

JUANITA GOULET, Employee, v. W. CTR. TURKEYS and INS. CO. OF THE STATE OF PA.,
Employer-Insurer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 27, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee was entitled to temporary partial disability benefits.

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Where a functional capacities evaluation and the employee's treating physician recommended a strengthening program to increase the employee's physical capacity for work, substantial evidence supports the compensation judge's finding that the employee had not reached maximum medical improvement.

PENALTIES; STATUTES CONSTRUED - MINN. STAT. § 176.225, SUBD. 1(f). Where the insurer failed to file a notice of intention to discontinue benefits prior to discontinuing benefits the requirements for an award of a penalty under Minn. Stat. § 176.225, subd. 1(f) are met, and the compensation judge's award of a penalty is affirmed.

Affirmed.

Determined by Hefte, J., Wilson, J., and Johnson, J.
Compensation Judge: Harold W. Schultz, II

OPINION

RICHARD C. HEFTE, Judge

The employer and insurer appeal the compensation judge's award of temporary partial disability benefits, the finding that the employee had not reached maximum medical improvement, and the award of penalties. We affirm.

BACKGROUND

On March 14, 1996, Juanita Goulet (employee) sustained an admitted work-related injury to her left upper extremity and back while working as a production line worker for West Central Turkeys (employer), which was insured for workers' compensation liability by Insurance Company of the State of Pennsylvania (insurer). At the time of the injury the employee was earning \$7.90 per hour. The employee's position involved removing bones from turkey thigh

pieces while working on a production line. The employee was initially treated with conservative medical treatment, including medication and physical therapy. The employee apparently continued working until May 1996 when she took a voluntary layoff, then returned to work in June in a light duty position using only her right arm. When her condition did not improve, the employee was referred to Dr. Philip Johnson, who recommended an MRI. A July 8, 1996, MRI indicated inflammation and bursitis with a questionable partial tear of the rotator cuff. Cortisone injections did not provide lasting relief. On September 26, 1996, the employee underwent left shoulder arthroscopic decompression surgery. The employee was paid temporary total disability benefits until she returned to work on November 6, 1996. The employee returned to work in the thigh rework position, which was not on the production line but involved removing bones from the turkey thighs, on a work hardening schedule. The employee was not able to work full time or to work mandatory overtime, and received temporary partial disability benefits.

In January 1997, Dr. Johnson recommended a functional capacities evaluation, which was not approved. In April 1997, Dr. Johnson opined that the employee had myofascial pain secondary to impingement syndrome, and recommended that the employee work as tolerated between four and eight hours per day with no overhead lifting, no lifting over 15 pounds, and reduce repetitive motions. In June 1997, Dr. Johnson opined that a functional capacities evaluation was mandatory and that the employee "may very well need to be retrained into a different job that takes her out of upper extremity work as this may be continuing to exacerbate her condition." In July 1997, Dr. Johnson recommended that the employee only work in the thigh rework position, 4 to 6.5 hours per day, lift 10 pounds up to 5 times per day, and no overhead work, and that these restrictions remain in place until a functional capacities evaluation was completed. On August 6, 1997, Dr. Johnson again recommended that the employee undergo a functional capacities evaluation. On September 27, 1997, the employee underwent an independent medical examination with Dr. William Lohman. Dr. Lohman opined that the employee had chronic myofascial pain syndrome of the left shoulder girdle region, and recommended no repetitive or sustained elevation of the shoulder, and also a work hardening schedule which would have had the employee working full time by November 1, 1997. The employee attempted the work hardening schedule recommended by Dr. Lohman, but was not able to increase her hours beyond seven hours per day. The employee returned to Dr. Johnson, who again limited the employee's hours from 4 to 6.5 hours per day and indicated that the employee should not continue in the work hardening program. On November 1, 1997, the employer and insurer discontinued the employee's temporary partial disability benefits without filing a notice of intention to discontinue benefits, based on Dr. Lohman's report.

On November 17, 1997, the employer and insurer offered the employee full-time work including overtime in thigh rework and bone/fat cut, which was a production line position. The employee accepted the thigh rework portion of the offer, claiming that the other portion of the job was not consistent with Dr. Johnson's restrictions. On December 19, 1997, the employer terminated the employee's employment for attendance problems. The employee was provided rehabilitation assistance in March 1998. The employee's QRC, Ione Tollefson, was informed that the employer did not plan to offer the employee a job since she was terminated from her employment. A functional capacities evaluation was completed on April 20, 1998, which

recommended that the employee undergo a strengthening program to increase her physical capacity for work. Dr. Johnson reviewed the results of the evaluation and added permanent restrictions of no overhead work, no production line work, no repetitive pushing or pulling, no overhead work, and no static work. Dr. Johnson did not add an hourly restriction as before, but indicated that the employee could work 4 to 10 hours per day as tolerated. Dr. Johnson agreed that a strengthening program would improve the employee's physical functioning. In April 1998, the employee began providing daycare services in her home. The employee had previously run a daycare business from 1982 through 1987. Dr. Johnson and the QRC indicated that the employee could perform this type of work. The employee started with one child and working twenty hours per week, charging \$1.75 per hour per child. By July 15, the employee was providing care for four children and working between thirty-five and thirty-nine hours per week. The employee earned \$189.46 from her daycare business in April 1998, \$253.63 in May 1998, and \$472.05 in June 1998. On June 9, 1998, the employer and insurer offered the employee a thigh rework and bone/fat cut position or alternatively a position cleaning bathrooms. The employee declined both offers as outside of her restrictions.

On January 13, 1998, the employee filed an objection to discontinuance claiming temporary partial benefits and temporary total disability benefits from December 19, 1997. The employer and insurer paid the claimed benefits including temporary total disability benefits through January 16, 1998. On January 16, 1998, the employer and insurer filed a notice of intention to discontinue based on the employee's failure to accept full-time employment with the employer, her termination of employment, and service of maximum medical improvement. A hearing was held on July 15, 1998. The compensation judge found that the employee had not reached maximum medical improvement, that the employee was entitled to temporary partial disability benefits from and after April 6, 1998, and awarded \$500.00 in penalties for employer's and insurer's failure to file a notice of intention to discontinue benefits at the time that benefits were discontinued. The employer and insurer appeal.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1998). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id.

DECISION

Temporary Partial Disability

The employer and insurer challenge the compensation judge's award of temporary partial disability benefits, arguing that the employee's self-employment as a daycare provider generated insufficient income to award temporary partial disability benefits and that the employee had refused suitable employment with the employer. In order to be eligible for temporary partial disability benefits, the employee must establish a reduction in earning capacity which is causally related to the work injury. Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 864, 41 W.C.D. 42, 48 (Minn. 1988). An employee's entitlement to temporary partial disability benefits is based on the difference between the employee's wage on the date of injury and the wage the employee is able to earn in his or her partially disabled condition. Minn. Stat. § 176.101, subd. 2. The employee's post-injury wage is presumed to be representative of the employee's reduced earning capacity. However, in appropriate circumstances, this presumption can be rebutted with evidence indicating the employee's ability to earn is different from the post-injury wage. Schwan v. Fabcon, 45 W.C.D. 209, 211 (W.C.C.A. 1991). Rebuttal of this presumption takes a showing by the employer and insurer of "something more than a theoretical possibility" of a different position or wage. Patterson v. Denny's Restaurant, 42 W.C.D. 868, 875 (W.C.C.A. 1989). A determination of earning capacity is a factual decision for the compensation judge. Noll v. Ceco Corp., 42 W.C.D. 553, 557 (W.C.C.A. 1989).

In cases involving injuries sustained on or after January 1, 1984, proof of earning capacity alone is generally inadequate to establish entitlement to temporary partial disability benefits. See Parson v. Holman Erection Co., 428 N.W.2d 72, 41 W.C.D. 129 (Minn. 1988). "The employee must also be working, and implicit in this requirement is the additional requirement that the employee must be paid a wage or have some earnings as a result of his labor. If the employee has no earnings - - whether or not he or she is performing 'real work' - - it may fairly be said that the employee has withdrawn from the labor market." Hansford v. Berger Transfer, 46 W.C.D. 303, 314 (W.C.C.A. 1991). In this case, the employee started providing daycare in April 1998 with one child and working twenty hours per week. By July 15, 1998, the employee was providing care for four children and working between thirty-five and thirty-nine hours per week. The employee earned \$189.46 from her daycare business in April 1998, \$253.63 in May 1998, and \$472.05 in June 1998. While the employee's earnings are minimal, the compensation judge found that the evidence supports the conclusion that the employee's business would grow and be successful. Under these circumstances, although the issue is close, we cannot conclude that the employee's earnings were so low as to justify reversal of the compensation judge's award of temporary partial disability benefits. Compare Trafton v. Marriott Corp., 52 W.C.D. 572 (W.C.C.A. 1995) (employee had operated a business at a loss for five months, therefore had not established that she had any earnings upon which to base a temporary partial disability award), summarily aff'd (Minn. May 22, 1995).

The employer and insurer also argue that the employee has refused suitable employment by declining their job offer. The jobs involved full time positions plus overtime in

the thigh rework position and the bone/fat cut position. According to the job description, the bone/fat cut position was a production line position, outside of Dr. Johnson's restriction of no production line work. The same evaluators who conducted the employee's functional capacities evaluation also conducted a work site analysis of the thigh rework position and concluded that this position was appropriate for the employee. QRC Tollefson testified that the thigh rework portion of this offer was inappropriate for the employee since it involved production work and static positioning outside of Dr. Johnson's restrictions. The employer and insurer argued that this position was not a production position because it was not on the production line so the employee would not have to keep pace with the line. The compensation judge accepted the QRC's opinion. Also, in July 1997, Dr. Johnson stated that the employee "may very well need to be retrained into a different job that takes her out of upper extremity work as this may be continuing to exacerbate her condition." On August 6, 1997, Dr. Johnson stated ". . . I think that she's not going to be able to return to this type of work and that she's going to need to be retrained down the line to alleviate her overuse in myofascial pain within her left shoulder area." Further, Dr. Johnson indicated that the employee could work 4-10 hours as tolerated. There was no indication in the job offer that there was any flexibility in the hours required. The compensation judge could reasonably conclude that the job offered to the employee was not suitable for the employee. Accordingly, we affirm the compensation judge's award of temporary partial disability benefits.

Maximum Medical Improvement

The employer and insurer argue that there is a lack of substantial evidence in the record to support the compensation judge's finding that the employee had not yet reached maximum medical improvement. Maximum medical improvement is defined as "the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon reasonable medical probability." Minn. Stat. § 176.011, subd. 25. Maximum medical improvement "occurs upon medical proof that the employee's condition has stabilized and will likely show little further improvement." Polski v. Consolidated Freightways, Inc., 39 W.C.D. 740, 742 (W.C.C.A. 1987). Maximum medical improvement is an issue of ultimate fact to be determined by the compensation judge after considering medical records, medical opinions, and other relevant evidence. Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 528-29, 41 W.C.D. 634, 639 (Minn. 1989). After the employee's functional capacities evaluation, a strengthening program was recommended to increase the employee's physical capacity for work. Dr. Johnson agreed that a strengthening program would improve the employee's physical functioning. While Dr. Johnson had indicated that the employee was probably at maximum medical improvement in March 1998, that was before the employee's functional capacities evaluation was completed on April 20, 1998. The compensation judge could reasonably conclude that a strengthening program in this case would improve the employee's condition. Substantial evidence supports the compensation judge's finding that the employee has not reached maximum medical improvement in this case. Therefore, we affirm.

Penalty

The compensation judge awarded the employee \$500 as a penalty under Minn. Stat. § 176.225 for the employer and insurer's failure to file a notice of intention to discontinue benefits. An employee may be awarded penalties if there has been an unreasonable or vexatious delay of payment, neglect or a refusal to pay benefits, or unreasonably or vexatiously discontinued compensation in violation of sections 176.238 and 176.239. Minn. Stat. § 176.225, subds. 1(b), (c), and (f). The determination of whether conditions exist to justify an award of penalties is generally a factual determination for the compensation judge.

The employee's temporary partial disability benefits were discontinued on November 1, 1997, without the filing of a notice of intention to discontinue benefits by the employer and insurer as required by Minn. Stat. § 176.238. The employee filed an objection to discontinuance asserting entitlement to temporary partial disability benefits between November 1, 1997, and December 19, 1997, and temporary total disability benefits from December 20, 1997, and continuing. The employer and insurer responded by paying all claimed wage loss benefits through January 16, 1998, and asserting various grounds for discontinuance after that date. The employer and insurer allege that they were relying upon an independent medical examination report which indicated the employee was capable of working eight hours per day, however, the employer and insurer do not give any reason for their failure to file a notice of intention to discontinue benefits as required by the statute. Failure to file a notice of intention to discontinue benefits prior to discontinuing benefits is a basis for awarding penalties. Frankhauser v. Fabcon, Inc., 57 W.C.D. 239 (W.C.C.A. 1997). Under the circumstances, the compensation judge's awarding of a \$500 penalty is hereby affirmed.