

RICHARD GRIFFIN, Employee/Appellant, v. FABCON, INC., SELF-INSURED/ALEXSIS, INC., Employer.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 20, 1999

No. [REDACTED SSN]

HEADNOTES

TERMINATION OF EMPLOYMENT - MISCONDUCT; TEMPORARY TOTAL DISABILITY; TEMPORARY PARTIAL DISABILITY; STATUTES CONSTRUED - MINN. STAT. § 176.101, SUBD. 1(e)(1). The employee's termination "for cause" does not preclude the employee from recovering temporary total or temporary partial disability benefits. Minn. Stat. § 176.101, subd. 1(e)(1) (as amended in 1995) only applies to temporary total disability benefits, not to temporary partial disability benefits, and only when the employee has been terminated for misconduct. Further, Minn. Stat. § 176.101, subd. 1(e)(1) (1995), does not apply in this case since it is a recommencement provision and the employee had not yet received temporary total disability benefits.

Affirmed as modified in part, reversed and remanded in part.

Determined by: Rykken, J., Wilson, J., and Pederson, J.
Compensation Judge: Bonnie A. Peterson

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals from the compensation judge's conclusion that the employee's termination "for cause" by employer Fabcon, Inc., precludes the employee's entitlement to temporary total and temporary partial disability benefits. We modify in part, and reverse and remand the matter for further proceedings.

BACKGROUND

The employee began working as a laborer for Fabcon, Inc. (self-insured), [Fabcon] on September 19, 1994. He was employed in the labor department, where his duties included forming, edging, and smoothing concrete. The employee testified that he typically worked 10 to 12 hour days, and spent six or seven hours daily trimming and edging the concrete. To perform these tasks, he utilized hand tools, working with both hands. According to the employee's testimony, on a daily basis he also operated a jackhammer, shoveled concrete debris, and operated a fire hose to clean the concrete area. (T. 30-38.)

In May 1995, the employee's employment with Fabcon was terminated. The record does not indicate the reasons for that termination but does indicate that the employee's employment with Fabcon, Inc., was reinstated following a union grievance. (T. 87-88.)

The employee returned to work for Fabcon at his original position of laborer, on January 27, 1996. On Monday, January 29, 1996, he cut his left index finger while he was operating a concrete cutter saw. (T. 48.) He was treated with stitches at the emergency room at St. Francis Hospital in Shakopee. The employee was scheduled to be off work the next two days and returned to work on Thursday, February 1, 1996. He missed no time from work immediately as a result of the injury.

The employee received follow-up medical care from Dr. Bruce O. Rasmussen at Crossroads Medical Centers, on February 5, 1996. Dr. Rasmussen released the employee to return to work with restrictions including: "limited use of the left hand, avoiding gripping and grasping and keeping the dressings in place." By February 13, 1996, Dr. Rasmussen lifted all of the employee's physical work restrictions. (Resp. Fabcon Ex. 3.) The employee, however, noted ongoing symptoms in his left finger. Dr. Rasmussen recommended physical therapy. Thereafter, he referred the employee to Dr. Nathan Leigh at Edina Plastic Surgeons. On April 14, 1997, Dr. Leigh performed a nerve repair surgery on the employee's left index finger. (App. Ex. A.)

The employee continued working at Fabcon until June 1, 1996, when his employment was terminated for absenteeism and tardiness. The employee claimed that on two occasions his car was stuck, resulting in tardiness. (T. 53.) The employee also testified that he was unable to drive to work on at least two days due to the difficulties he experienced while driving his car which were caused by his injury. (T. 52.) Dr. Rasmussen originally determined that these absences were excused for medical reasons but later advised the employer that there was no medical basis for those particular absences. (Resp. Fabcon Ex. 3.) After his termination, the employee requested that the union file a grievance on his behalf, but the union declined to do so. The employee applied for reemployment insurance benefits but was denied. (T. 88-89.)

The employee remained unemployed from June 1, 1996, until October 19, 1996, when he began working for Labor Ready as a temporary worker, working at various jobs for six weeks. By November 1996, the employee began working for Amcom, through Labor Ready. He worked at the Amcom plant through approximately July 14, 1997, as a Labor Ready employee. After July 14, 1997, the employee continued working at Amcom as a direct Amcom employee. (Finding Nos. 14 and 15.) During the time the employee worked at Amcom, as both a Labor Ready employee and an Amcom employee, he performed light assembly work. He testified that he was provided light-duty work due to his left index finger condition. (T. 55.) While at Amcom, the employee also worked both in quality control, inspecting merchandise, and in organizing, boxing, and shipping merchandise. On September 20, 1997, the employee's employment with Amcom was terminated when he used aggressive words and actions against his supervisor, including foul and abusive language, which made the supervisor feel threatened, and

when he left the Amcom premises without permission. (Resp. Amcom Ex. 3.)

In June 1997, the employee developed symptoms in his left wrist, during the period of time he was employed at Amcom as an employee of Labor Ready. (T. 70.) The employee admitted at hearing that he first noticed symptoms in his left wrist while swimming at a health club. While extending his hand to perform a swimming stroke, he noticed a grabbing sensation from his left hand extending through his shoulders and into his neck. (T. 71-72.) He reported these symptoms to his supervisor at Amcom prior to a medical appointment with Dr. Leigh. However, the employee never spoke with representatives from Labor Ready regarding his left wrist condition. (T. 74.) In July 1997, Dr. Leigh diagnosed left carpal tunnel syndrome, which was confirmed by electrodiagnostic studies on August 1, 1997. Dr. Leigh recommended that the employee undergo left carpal tunnel release surgery.

On May 5, 1997, the employee filed a claim petition against Fabcon alleging a laceration to his left index finger and claiming temporary total disability benefits from June 2, 1996, through September 30, 1996, and temporary partial disability benefits from October 1, 1996, through April 11, 1997. Fabcon admitted the left index finger injury but denied the employee's claim for temporary total and temporary partial disability benefits. On January 9, 1998, the employee filed another claim petition against Fabcon and Amcom, alleging a left hand and wrist injury in the nature of carpal tunnel syndrome culminating on September 19, 1997, and entitlement to various benefits commencing April 14, 1997, based on his finger and wrist injuries. Labor Ready and its insurer were joined by Order for Joinder served and filed July 10, 1998.

The employee's petitions for wage loss and medical expenses relating to both the finger and wrist injuries were heard on November 4, 1998. Issues at hearing included whether the employee's work activities for all employers represented substantial contributing causes to the employee's claimed carpal tunnel syndrome; whether the employee was entitled to temporary total disability and temporary partial disability benefits as a result of both injuries; whether the employee was terminated for cause from Fabcon and Amcom; if so, whether those terminations resulted in a bar from recovering temporary total disability benefits; and whether surgeries to the employee's left index finger and left wrist are reasonable and necessary to cure or relieve the effects of the employee's injuries.

All of the employers and insurers denied primary liability for the employee's alleged carpal tunnel syndrome, alleging lack of notice and lack of causal relationship between the employee's work activities and his left wrist symptoms. Employer Fabcon raised several defenses to the employee's claims, contending, among other things, that the employee's injury at Fabcon was confined to the left index finger; that the employee's work at Fabcon did not substantially contribute to his carpal tunnel syndrome; that the employee was not entitled to temporary total disability benefits pursuant to Minn. Stat. § 176.101, as he was terminated "for cause;" and that the employee's ongoing wage was not an accurate measure of his loss of earning capacity, and therefore did not provide a basis for temporary partial disability benefits.

Employer Labor Ready and its insurer contended, among other things, that they did

not receive statutory notice of injury in the nature of carpal tunnel syndrome; that the employee's left index finger injury of January 29, 1996 prevented the employee from performing many of the work activities assigned at Labor Ready; and that the employee's duties while employed by Labor Ready were light-duty in nature and did not substantially contribute to the employee's carpal tunnel syndrome. Employer Amcom and its insurer also raised several defenses to the employee's claims, including lack of statutory notice, and lack of causal relationship between the employee's carpal tunnel syndrome symptoms and the employee's work activity at Amcom.

In a decision issued on January 29, 1999, the compensation judge concluded that the employee earned an average weekly wage of \$440.00 at the time of his January 29, 1996, injury at Fabcon, Inc.; that the employee was terminated for cause from Fabcon and Amcom; that the employee's later work for Labor Ready and Amcom was light-duty in nature and did not substantially contribute to the employee's carpal tunnel syndrome; that the employee failed to give the requisite statutory notice of an injury to Labor Ready; that the employee's left index finger injury on January 29, 1996, resulted in work restrictions and a medical condition which requires further surgical correction; that the recommended surgery to the left finger is reasonable and necessary to cure or relieve the effects of the injury of January 29, 1996¹; and that the employee failed to show by a preponderance of evidence that carpal tunnel release surgery is necessary at this time.

Further, the compensation judge determined that the employee is barred under Minn. Stat. § 176.101 from recovering temporary total disability and temporary partial disability benefits since he was terminated for cause from both Fabcon, Inc., and Amcom. The compensation judge awarded the employee's taxable costs and disbursements as well as Roraff fees, due to the medical issues addressed.

The employee appeals solely from the compensation judge's denial of payment of temporary total and temporary partial disability benefits. The employee also initially appealed the compensation judge's findings regarding the employee's weekly wage on January 29, 1996, the date of injury at Fabcon. In his brief, however, the employee withdrew his appeal regarding the weekly wage. The employee did not appeal from the denial of his claims against Labor Ready and Amcom, and those parties are not involved in this 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

¹ Finding 38 refers to approval of surgery to the right finger. The employee's injury was to the left index finger. Therefore, we modify Finding 38 to state that the "surgery recommended by Dr. Leigh for the left finger, is reasonable and necessary to cure or relieve the effects of the injury of January 29, 1996."

(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]act findings 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. A decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which the Workers' Compensation Court of Appeals may consider de novo. Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

The compensation judge found that the employee's employment was terminated "for cause" when he was discharged by Fabcon for attendance and tardiness problems (Findings 10, 12) and when he was terminated by Amcom for using aggressive words and actions, including foul and abusive language, and leaving the premises without permission (Finding 43). The compensation judge denied the employee's claim for temporary total disability benefits and temporary partial disability benefits based on her finding that the employee was "barred under Minn. Stat. § 176.101 from recovering temporary total disability and temporary partial disability since he was terminated for cause from both [employers]." (Finding 44.) The employee argues that the compensation judge misapplied the law and erroneously barred the employee's claim for temporary total disability benefits and temporary partial disability benefits under Minn. Stat. § 176.101, subd. 1(e)(1).

For injuries which occurred prior to October 1, 1995, a justifiable discharge for misconduct suspended an injured employee's right to wage loss benefits until the employee could show that the employee's work-related disability was the cause of the employee's inability to find or hold new employment. Marsolek v. George A. Hormel Co., 438 N.W.2d 922, 924, 41 W.C.D. 964, 966-67 (Minn. 1989). In 1995, Minn. Stat. § 176.101, subd. 1(e)(1) (effective for injuries occurring on or after October 1, 1995), was amended to provide that, where an employee's temporary total disability compensation has ceased because the employee had returned to work and the employee was later terminated for misconduct, the right to receive temporary total disability benefits following termination was forfeited.

The term "misconduct" is not defined in chapter 176 of the Minnesota Statutes. In Langworthy v. Signature Flight Support, slip op. (W.C.C.A. July 8, 1998), this court adopted a definition of misconduct set forth by the Minnesota Supreme Court in Tilseth v. Midwest Lumber Co., 295 Minn. 372, 204 N.W.2d 644 (1973), and held that, for purposes of Minn. Stat. § 176.101, subd. 1(e)(1), misconduct,

is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of [the] employer's interest or of the employee's duties and obligations to the employer.

This court specifically declined to adopt a “just cause” standard, noting that the legislature had not precluded commencement of temporary total disability benefits in cases where an employee had been terminated for “just cause” but for misconduct only. The compensation judge’s finding that the employee was barred from recovering temporary total disability benefits or temporary partial disability benefits because he had been terminated for “cause” is, therefore, clearly erroneous.

The employee also argues that, since he had not received temporary total disability benefits prior to his discharge from employment with Fabcon in June 1996, Minn. Stat. § 176.101, subd. 1(e)(1), does not apply because it is a recommencement provision. Minn. Stat. § 176.101, subd. 1(e)(1), provides that,

if temporary total disability compensation ceased because the employee returned to work, it may be recommenced if the employee is laid off or terminated for reasons other than misconduct within one year after returning to work if the layoff or termination occurs prior to 90 days after the employee has reached maximum medical improvement.

The employee points out that temporary total disability benefits have not “ceased” under the statute because he did not receive any temporary total disability benefits before his discharge. In this case, the employee was injured on Monday, January 29, 1996. The employee was scheduled to be off work the next two days and returned to work on Thursday, February 1, 1996. He missed no time from work as a result of the injury immediately following this injury. The employee was terminated from Fabcon on June 1, 1996, for reasons of absenteeism and tardiness. The employee returned to work for a different employer in October 1996 and claims temporary total disability benefits from June 2, 1996, through September 30, 1996.

Had the employee received temporary total disability benefits after his January 29, 1996, work injury, Minn. Stat. § 176.101, subd. 1(e)(1), would apply to preclude recommencement of temporary total disability benefits, assuming that the employee was terminated for misconduct. However, we agree that the plain language of Minn. Stat. § 176.101, subd. 1(e)(1), does not preclude commencement of temporary total disability benefits where an employee has been terminated for misconduct but only precludes recommencement of benefits after an employee has returned to work and was subsequently terminated for misconduct. Therefore, we conclude that

Minn. Stat. § 176.101, subd. 1, does not apply to this case. Rather, as with temporary partial disability benefits, the employee's entitlement to temporary total disability benefits must be determined pursuant to Marsolek.

Finally, Minn. Stat. § 176.101, subd. 1(e)(1), does not apply to temporary partial disability benefits. Subdivision 1 of Minn. Stat. § 176.101 refers only to temporary total disability benefits. When Minn. Stat. § 176.101, subd. 1(e)(1), was amended in 1995 to preclude recommencement of temporary total disability benefits, there was no corresponding amendment to Minn. Stat. § 176.101, subd. 2, regarding temporary partial disability benefits. See Johnson v. Fingerhut Corp., slip op. at 5, n.2 (W.C.C.A. Jan. 25, 1999) (noting that the 1995 amendments do not apply to temporary partial disability benefits). Therefore, termination for misconduct does not bar a claim for temporary partial disability benefits. As a result, under Marsolek, a justifiable discharge for misconduct only suspends an injured employee's right to temporary partial disability benefits until the employee can show that his work-related disability is the cause of his inability to find or hold new employment.

We, accordingly, reverse the compensation judge's finding that the employee is barred from recovering temporary total disability benefits and temporary partial disability benefits because of his termination for cause and remand for reconsideration of the employee's claim. On remand, the compensation judge should determine whether the reasons for the employee's terminations from Fabcon, Inc. and Amcom constituted misconduct under Marsolek, whether the employee's wage loss and loss of earning capacity were causally related to the employee's work injury, and whether the presumption that the employee's actual wages are representative of the employee's earning capacity was rebutted. The judge may in her discretion require submissions by the parties to aid in her resolution of the issues on remand.