

DIANE MOORE, Employee/Cross-Appellant, v. UNIV. OF MINN. HOSP., SELF-INSURED, Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS  
JUNE 14, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY - EARNING CAPACITY. The finding of earning capacity is supported by substantial evidence based on the employee's diminished earnings at Fairview subsequent to her returning to work following a work injury even though the employee had worked at a higher wage for one week for her original employer prior to commencing work at Fairview.

TEMPORARY PARTIAL DISABILITY - CALCULATION OF BENEFITS. A review of the entire evidence supports a reversal wherein the compensation judge denied a set off to the employee's temporary partial disability benefits. The employer and insurer is granted the right to a set off against the compensation judge's award of temporary partial disability benefits when a transition payment had been made by the employer to the employee to reimburse the employee for her diminished wages following a merger of two employers.

TEMPORARY TOTAL DISABILITY - MEDICALLY UNABLE TO CONTINUE. Substantial evidence supports the fact that the employee was not medically unable to continue to work after a flare-up of the employee's back problem and Minn. Stat. § 176.101, subd. 3j does not apply.

Affirmed in part and reversed in part.

Determined by: Hefte, J., Johnson, J., and Wheeler, C.J.  
Compensation Judge: Catherine Dallner

OPINION

RICHARD C. HEFTE, Judge

The self-insured employer appeals from the compensation judge's award of temporary partial disability benefits. The employee cross-appeals from the compensation judge's denial of temporary total disability benefits. We affirm in part and reverse in part.

BACKGROUND

Diane Moore, the employee, commenced employment for the University of Minnesota Hospital, the self-insured employer (hereinafter employer) in June of 1980. She

worked for the employer as a custodian on a full-time basis. Her duties mainly included vacuuming, mopping, dusting, cleaning bathrooms and picking up trash.

On October 7, 1991, the employee sustained an admitted work-related low back injury and as a result of this injury received various workers' compensation benefits, including benefits for a 7 percent permanent partial disability rating. After being off work a couple of months as a result of her work injury, the employee returned to work for the employer and was able to perform her same job on a full-time basis until August 10, 1994. On this date, while pulling trash from a barrel, the employee suffered a second work-related injury to her low back. Following this work injury, the employee was paid continuous temporary total disability benefits for approximately two years. The employee, in addition to other benefits, was paid, over and above the previously paid 7% disability payment, an additional permanent partial disability benefit for a 5 percent rating of the whole body as a result of her low back injury of 1994. The parties agreed that the employee attained maximum medical improvement on July 15, 1996.

On December 26, 1996, the employee, shortly after completing treatment at a pain clinic, returned to work for the employer at her custodian job. At that time she had significant restrictions and back pain as a result of her work injuries. She testified that she experienced flare-ups of her back problem every "month or two months." She worked one week for the employer in December 1996 when, on January 1, 1997, the employer, University of Minnesota Hospital, merged with Fairview (Hospital) Systems (hereinafter Fairview). The employee became a Fairview employee in January 1997 subsequent to this merger. The employee worked as a custodian for Fairview in a different building, and testified her duties were quite different than those she had while working for the employer. In order to be in line with the wages of similar Fairview employees, her rate of pay at Fairview was less than she had earned with the employer. Her wage for the employer was \$13.20 per hour and her wage at Fairview was \$11.19 per hour. The employee worked full-time at Fairview from January 1997 until January 1998. On January 27, 1998, the employee had a flare-up of her back problem which resulted in the employee taking off work. When the employee indicated she was ready to return to work full time in February 1998, Fairview determined it "could not accommodate the employee" returning to work and the employee was still off work on the date of the hearing, April 17, 1998. At the time of the merger, the employer and Fairview negotiated an arrangement to compensate former University of Minnesota employees for lost benefits and wages for their first 52 weeks of work after they began to work for Fairview. This compensation was paid to the employee and was termed a transitional payment. The employee was paid \$3,615.00 for her transitional payment in September 1997.

The employee filed a claim petition on October 14, 1997, which was later amended, claiming temporary partial disability benefits from January 26, 1997 through February 2, 1998 and temporary total disability benefits from February 3, 1998 to the date of the hearing, alleging that both benefits were the result of the employee's August 10, 1994 work injury. This matter came on for hearing on April 17, 1998, and the compensation judge found: (1) that the employee was entitled to temporary partial disability benefits as claimed; (2) that the lump sum transitional payment received by the employee was not includable in the employee's wages and was not to be

considered as an offset against temporary partial disability benefits; and (3) denied the employee's claim of temporary total disability benefits from February 3, 1998 to the date of the hearing, April 17, 1998. The employer appeals the award of temporary partial disability benefits and the denial of the lump sum transitional payment as an offset against temporary partial disability benefits. The employee appeals the denial of the temporary total disability benefits from and after February 3, 1998. We reverse in part and affirm in part.

## 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 employee claims temporary partial disability benefits based on a loss of earning capacity which she sustained while working for Fairview between January 26, 1997 and February 2, 1998. After being off work and receiving temporary total benefits for approximately two years as a result of her work-related injury of August 10, 1994, the employee returned to work for the employer in late December 1996 for one week. After the merger between the employer and Fairview Systems, the employee began to work in January 1997 as a custodian for Fairview in a different hospital at a wage rate lower than she received at the time she was injured while working for the employer. The employer claims that the employee's earning capacity when she returned to work some two years after her work injury should be based on the employee's wage she earned when she returned to work for the employer for one week in December 1996. There is no dispute that the employee worked for Fairview Systems at a lower wage than she had earned while working for the employer at the time of her work injury, and this situation continued until February 2, 1998. Using her wages and earning capacity while working for the employer for one week in 1996, the employer maintains the employee would not be entitled to temporary partial disability benefits because her wage would not be less than her wage at the time of her work injury. The compensation judge found that the employee's earning capacity was to be based on the

employee's wage or earnings while she was working for Fairview and awarded temporary partial disability benefits from January 26, 1997 through February 2, 1998.

A diminished earning capacity justifying temporary partial disability may be established by demonstrating actual decreased earnings, thus creating a presumption of the diminished earning capacity. See French v. Minnesota Cash Register, 341 N.W.2d 290, 36 W.C.D. 385 (Minn. 1983). The presumption of earning capacity may be rebutted by evidence of the employee's ability to earn an amount different from the wage earned post injury. Noll v. Ceco Corp., 42 W.C.D. 553, 557 (W.C.C.A. 1989). In order for an employee to be entitled to temporary partial disability benefits, there must be a physical disability, the employee must be able to work subject to the disability, and there must be an actual loss of earning capacity causally related to the disability. Dorn v. A.J. Chromy Constr. Co., 310 Minn. 46-47, 245 N.W.2d 451, 454, 29 W.C.D. 86, 91(1976). In all cases of temporary partial disability the compensation shall be two-thirds of the difference between the weekly wage of the employee at the time of the injury and the wage the employee is able to earn in the employee's partially disabled condition. Minn. Stat. § 176.101, subd. 2.

The compensation judge concluded that the employee's return to work for the employer for one week in December 1996 was temporary only and not dispositive of the employee's earning capacity issue under the circumstances of this case. The employee's job for the employer in December 1996 lasted only five days after the employee had been off work for two years. The employee had recently completed treatment at a pain clinic. The employee's duties when she worked for Fairview continuously for a year were not as demanding as when she worked for the employer. When the employee returned to work in December 1996, she had many restrictions and problems with her back. One week at work for the employer would not really determine the effect of the employee's "flare-ups" which occurred almost monthly. The compensation judge was reasonable in concluding that the employee's one week of work for the employer was temporary and not a reasonable basis to determine the employee's earning capacity for temporary partial disability. Therefore, the employee's post injury earnings at Fairview are presumptive of the injured employee's earning capacity for the determination of temporary partial disability. There is a lack of evidence to rebut this presumption. The evidence did not identify any higher paying and physically appropriate job or jobs available for the employee when the employee was working at Fairview. Substantial evidence supports a finding that the employee's wages earned at her job at Fairview from January 1997 to February 1998 establishes the employee's earning capacity for the claim of temporary partial disability benefits.

The employer maintains that the employee's wage loss was due only to the economic condition at the time the employee returned to work in December 1996, arguing that the reason that the employee earned less wages at Fairview was simply because of the employer's merger with Fairview on January 1, 1997. However, when returning to work in December 1996, the employee had significant work-related restrictions. The compensation judge reasonably found:

As a result of her work-related low back injuries, including the

injury of August 10, 1994, the employee has restrictions on her work activities, as imposed by her treating physicians (from July of 1996 through the date of hearing on April 17, 1998), including: no lifting, carrying, pushing or pulling over 10 pounds; no standing for more than two to three hours and no standing in one place for more than one hour; walking limited to no more than two to three hours per eight hour period; position changes between sitting, standing and walking every 20 to 30 minutes; no repetitive or sustained bending or twisting at the waist; no squatting; no stair or ladder climbing; and no activities that require sustained reaching above shoulder height or away from the body. The employee's earnings at Fairview during the period from January 26, 1997 through February 2, 1998 were less than her earnings at the time of her injury on August 10, 1994 at the University of Minnesota Hospital. The employee suffered a loss of earning capacity that is causally related to her personal injuries during the period from January 26, 1997 through February 2, 1998. (Finding 4.)

The evidence did not indicate that the employee had any work restrictions when she performed her job duties for the employer prior to her August 10, 1994 work injury. And, the employee had no problem in performing these duties. Her duties for the employer over the years prior to her work injury in 1994 appear to have been more extensive and difficult than her duties at Fairview. The employee worked at Fairview as a custodian and described her work at Fairview as “[s]ame job, it’s just less [duties] . . . Well all I did there at Fairview is paper towels and clean the counter, dusted and a small amount of vacuuming.” (T. 51.) The employee testified when she began work for Fairview in January 1997 as a custodian, the job had fewer and different duties than she had while working for the employer. The employee indicated that while working at Fairview she “could handle the job,” even though she had extensive work-related restrictions. While working for the employer prior to her work injury, the evidence revealed that the employee performed additional duties including mopping, cleaning bathrooms, and picking up trash. (*Id.*) With her restrictions in December 1996 from her 1994 injury, as well as flare-ups of her back every month or two, it is reasonable to infer that the employee may not have been able to perform the required duties for the employer on a continuing basis for longer than one week she worked for the employer in 1996. While the merger of Fairview with the University did result in the employee’s wage at Fairview being less than her wage for the employer, there is substantial evidence, under the facts and circumstances in this case, that her work-related injury, resultant disability, and restrictions were contributing factors to her diminished earning capacity while working at Fairview. We affirm the compensation judge’s award of temporary partial disability benefits.

### Lump Sum Payment

The compensation judge held that the lump sum transition payment received by the employee from the employer in September 1997 was not includable in the employee’s wages at Fairview and could not be taken as an offset against an award to the employee of temporary partial

disability benefits. The employer claims the compensation judge erred as the evidence clearly establishes that a portion of the lump sum transition payment made to the employee was compensation for her earning a lower wage to cover a one year period when she worked for Fairview after the University-Fairview merger. We agree with the employer and reverse.

The compensation judge's explanation for her finding on this issue is that she felt there was insufficient evidence to establish what portion of the employee's transition payment could be considered to be payment for the wage differential between the employee's wage with the employer and the lower wage at Fairview. The compensation judge stated that the employer did not produce adequate records at the hearing to explain the calculation or breakdown of the lump sum payment and did not satisfactorily explain what portion of the employee's transition payment was for lost wages. The employee acknowledged she received a check in September 1997 for \$3,615.00 from the University of Minnesota and that she knew it applied to the wages from when she worked for Fairview. Mr. Terry Teachout, director of workers' compensation for the employer, University of Minnesota, testified that the transition payment following the merger with Fairview Systems was for one year starting in January 1997 and that \$2,932.00 of the \$3,615.00 total payment constituted payment for the wage differential between wages the employee earned at the University and the lesser wages earned at Fairview Systems. The difference between the amount of the total check of \$3,615.00 and \$2,932.00 was \$683.00, which was testified to as representing reimbursement for accrued sick leave and vacation time that the employee lost due to the merger. There is no contradicting or impeaching evidence as to these facts and figures. There is no evidence that the payment of \$2,932.00 applied to anything else except for the payment of the employee's wage loss because of the differential between the employee's pre-injury wage for the employer and the wage earned while she was working for Fairview.

A memorandum to all former employees of the employer, including the employee, dated February 4, 1997, indicated, by the paycheck code ZR on the employee's pay stub, that the employee would receive a check for a lump sum payment for the difference between the Fairview and the employer's base salary rates calculated for a 12 month period. It is evident that the transition payment of \$2,932.00 applied to the amount of temporary partial disability that the employee is now claiming.<sup>1</sup> The testimony adequately explained and substantiated that a portion of the transitional payment, \$2,932.00, made by the employer to the employee was for the wage loss differential between her wage rate for the employer and her lower wage rate at Fairview for a

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<sup>1</sup> In a review of the evidence, it appears that the \$2,932.00 amount can be substantiated by applying the evidence of the employee's hourly wages and time worked. The hourly difference between what the employee earned while working for the employer and what the employee earned for Fairview was \$1.41 per hour. (\$13.20 per hour less \$11.79 equals \$1.41). Then taking 40 hours a week times 52 weeks for the year (total 2080 hours) and multiplying the difference of \$1.41 times 2080 hours equals \$2932.80, which is basically the amount paid the employee for her transitional payment of lost wages.

52 week period.<sup>2</sup> Upon review of the entire evidence herein, we believe a mistake has been made, and the compensation judge's findings on this issue are clearly erroneous. The lump sum transitional payment of \$2,932.00 to the employee herein shall be an offset against the temporary partial disability benefits awarded the employee for the period commencing January 26, 1997 and for 52 weeks thereafter. To the extent that the employee worked more than 52 weeks at Fairview at a wage loss, temporary partial disability benefits would be payable. We reverse the compensation judge's findings.

### Temporary Total Disability

The employee cross-appeals the compensation judge's finding that the employee is not entitled to temporary total disability benefits claimed from February 3, 1998 to the date of the hearing, April 17, 1998. The employee argues that Minn. Stat. § 176.101, subd. 3j<sup>3</sup> applies to the employee's situation. The employee reached maximum medical improvement on July 15, 1996. The employee claims that she sustained a "flare-up" of her back in January 1998 resulting in her not being able to work, and therefore argues she was medically unable to continue at her job. However, no doctor stated the employee was unable to work or stated that her restrictions had changed, and there is a lack of evidence that the employee's back worsened at this time. In February 1998, after being off work for a short time because of the claimed flare-up of her back, the employee presented herself to Fairview indicating she was able to return to her same job.

The compensation judge reasonably concluded that 3j does not apply in the present case, stating in her memorandum:

Minn. Stat. § 176.101, subd. 3j does not apply in this case. Ms. Moore was not medically unable to continue working due to the effects of her work related low back injuries as of February 3, 1998 or from February 3, 1998 through April 17, 1998. On the contrary, the employee was physically able and very willing to work. All the

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<sup>2</sup> With the transition payment to the employee of \$2,932.80 and the award of temporary partial disability by the compensation judge, it would appear that the employee would then be paid double for the temporary partial disability portion of her wages for a 52 week period.

<sup>3</sup> Minn. Stat. § 176.101, subd. 3j (repealed 1995) states that if the employee has started the job offered under subdivision 3e and is medically unable to continue at that job because of injury, that employee shall receive temporary total compensation pursuant to clause (b). Clause (b) provides, "That temporary total compensation shall be paid for up to 90 days after the employee has reached maximum medical improvement." *Id.* at subd. 3j(b). The Minnesota Supreme Court has extended subdivision 3j benefits to employees who are medically unable to continue non 3e jobs and to those who became medically unable to work during an economic layoff. *O'Mara v. State, Univ. of Minn.*, 501 N.W.2d 603, 48 W.C.D. 483 (Minn. 1993); *Wills v. Kratz Farm*, 509 N.W.2d 162, 49 W.C.D. 417 (Minn. 1993).

employee's treating physicians opined that she was physically capable of working with her restrictions. None of the employee's treating or examining physicians had disabled her from work due to her personal injuries. The employee acknowledged this in her testimony at trial. . . . The employee acknowledged that the reason that she was not working was not due to any change in her physical condition but was due to Fairview's not providing her with her job. . . . QRC Bourgeois testified that Ms. Moore is medically able to perform the job but Fairview, for whatever reason, is not allowing Ms. Moore to perform the job. The employee and QRC Bourgeois, as well as the employee's treating physicians, agree that the employee is medically able to work and is medically able to continue performing the custodian job that she has performed for more than a year as of February 1998.

Substantial evidence supports the compensation judge's denial of temporary total disability in this matter.

#### SEPARATE OPINION

DEBRA A. WILSON, Judge

I concur with the majority's decision that transition pay is includable as wages, however, I respectfully disagree with the majority's decision regarding temporary total disability benefits. Contrary to the compensation judge's analysis, I think that Trojanowski v. Primnet Data Systems, 461 N.W.2d 916, 56 W.C.D. 271 (Minn. 1997), is applicable. If the employee's work injuries substantially contributed to her medical inability to continue working in late January of 1998, then the employee is not precluded from receiving temporary total disability benefits thereafter, because no second notice of MMI was served. Therefore, I would remand the case to the compensation judge for a determination of whether the work injuries were a substantial contributing cause of the employee's inability to continue working on January 27, 1998, and, if so, whether the employee is entitled to renewed temporary total disability benefits thereafter under all the facts and circumstances of this case, including the fact that the employee met with the employer in mid-April of 1998, the fact that the employee had rehabilitation assistance, the fact that the employee was apparently never actually terminated by the employer, and the fact that less than three months of benefit eligibility are at issue.