

DONNA M. NYREEN, Employee, v. INDUSTRIAL CUSTOM PRODS. and ST. PAUL FIRE & MARINE INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 23, 1999

No. [REDACTED SSN]

HEADNOTES

APPORTIONMENT - EQUITABLE; CALCULATION OF BENEFITS - CONCURRENT BENEFITS. Kirchner I and II are inapplicable and do not require the employer and insurer to continue payment of temporary partial disability benefits when the employee's second and totally disabling injury is a work-related injury subject to another state's law and is not compensable under the Minnesota Workers' Compensation Act.

PRACTICE & PROCEDURE - EXPEDITED HEARING. The compensation judge erred by considering the employee's earning capacity at an expedited discontinuance hearing where that issue was not raised by the NOID and there was no agreement, as required by Minn. Stat. § 176.238, subd. 6, to expand the issues.

Reversed in part and vacated in part.

Determined by Wilson, J., Pederson, J., and Hefte, J.
Compensation Judge: William R. Johnson.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's decision that the employee is entitled to continuing temporary partial disability benefits following the employee's totally disabling Wisconsin work injury and from the judge's decision as to the employee's earning capacity following her return to work after the Wisconsin injury. We reverse in part and vacate in part.

BACKGROUND

On October 30, 1991, the employee sustained a work-related low back injury in the course and scope of her employment at Industrial Custom Products [the employer]. Her weekly wage at the time was \$418.00. The employee subsequently underwent several surgical procedures to her low back, and the employer and insurer paid various Minnesota workers' compensation benefits, including medical benefits, temporary total disability benefits, and

permanent partial disability benefits.¹ Notice of maximum medical improvement [MMI] with regard to the 1991 injury was served and filed in August of 1997, and there is apparently no dispute that the employee reached MMI at that time.

On October 27, 1997, the employee began a valet parking attendant job, at a wage loss, at the St. Croix Casino in Wisconsin, and the employer and insurer commenced payment of temporary partial disability benefits based on reported casino earnings of \$222.40 a week. Subsequently, on May 27, 1998, the employee sustained an injury to her knee while performing her duties at the casino. Her physician took her off work “due to knee ligament strain,” and St. Croix Casino and its workers’ compensation insurer began paying temporary total disability benefits, under Wisconsin law, based on a weekly wage of \$222.40. On July 4, 1998, the employee returned to modified sedentary work at the casino, earning less than she had before because of slow business. The employer and insurer apparently continued paying temporary partial disability benefits but on July 15, 1998, filed a Notice of Intention to Discontinue Benefits [NOID], requesting discontinuance of temporary partial disability benefits effective May 27, 1998, on the following grounds:

The employee is no longer working due to a superseding, intervening cause of disability. She is not entitled to payment of temporary partial disability benefits when she is not working, generating an income and generating an income at a wage loss in relation to our date of injury.

The employee filed an objection to discontinuance the following day, and the matter was set for expedited hearing pursuant to Minn. Stat. § 176.238, subd. 6.

The discontinuance hearing was held before a compensation judge of the Office of Administrative Hearings on September 15, 1998. At that time, the employer and insurer reiterated their position that the Wisconsin injury was an intervening, superseding cause of the employee’s disability and claimed that no temporary partial disability benefits were payable until the employee had been released to work at her usual valet parking attendant job without restrictions associated with her knee injury. The employee claimed entitlement to continuing temporary partial disability benefits from and after her May 27, 1998, knee injury, based on the reasoning of Kirchner I and II. Kirchner v. County of Anoka, 339 N.W.2d 908, 36 W.C.D. 335 (Minn. 1983) [Kirchner I], and Kirchner v. County of Anoka, 440 N.W.2d 825, 40 W.C.D. 197 (Minn. 1987) [Kirchner II]. During the course of the hearing, testimony was elicited from the employee concerning her earnings at the casino, among other subjects.

The compensation judge issued his decision on October 15, 1998, listing the issues as follows:

¹ A 1998 stipulation for settlement closed out claims for permanent partial disability to the extent of a 21% whole body impairment.

1. The Compensation Judge must determine whether the decision in Kirchner v. County of Anoka, 36 W.C.D. 335, 339 N.W.2d 908 (1983) is applicable where the employee's second injury is in another state.

2. If the Compensation Judge finds that the employee is entitled to temporary partial disability benefit then the Compensation Judge must determine if the fact that the employee is 90 days post MMI terminates her right to claim TPD benefits pursuant to Kirchner, *supra*.

As to those issues, the compensation judge concluded that, pursuant to Kirchner, the employer and insurer were liable for continuing temporary partial disability benefits during the employee's total disability following the Wisconsin work injury. The judge also concluded that the employee's earning capacity after her return to work on July 4, 1998, was \$257.40, and he ordered the employer and insurer to pay temporary partial disability benefits accordingly. The employer and insurer appeal.

STANDARD OF REVIEW

"[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

Temporary Partial Disability Benefits Under Kirchner

It is undisputed that the employee was totally disabled from May 27, 1998, to July 4, 1998, due to the effects of her work-related Wisconsin knee injury; the employee in fact admitted that she was off work due to her knee injury alone. The central issue in this case is whether the employee's entitlement to temporary partial disability benefits from the employer and insurer during this period is governed by Kirchner I and II or by Patrin v. Progressive Rehab Options, 497 N.W.2d 246, 48 W.C.D. 273 (Minn. 1993).

This court has previously summarized Kirchner I and II as follows:

The employee in Kirchner sustained a work-related injury in 1977, which reduced his earning capacity and gave rise to eligibility for temporary partial benefits from Iowa National Insurance Company. A second work injury in 1979, for which Home Insurance Company was liable, further reduced Kirchner's earning

capacity and made him totally incapable of working. The Minnesota Supreme Court held that Iowa National was responsible for continuing temporary partial benefits at the 1977 wage rate and that Home was to pay, concurrently, temporary total disability benefits based on Kirchner's 1979 part-time wage rate. Kirchner I, 399 N.W.2d 908, 913, 36 W.C.D. 335, 342 (Minn. 1983). In Kirchner II, the court clarified that the combined amount of temporary partial and temporary total benefits may not exceed the statutory maximum for temporary total benefits in effect for the injury that caused the employee's total disability - - in that case, the 1979 injury - - and that, "when temporary partial and temporary total disability benefits are reduced because of a statutory maximum, the obligation of the earlier insurer is calculated first and the later insurer pays the remainder." Kirchner II, 410 N.W.2d 825, 829, 40 W.C.D. 197, 202 (Minn. 1987).

Horstmann v. American Can Co., 49 W.C.D. 26, 30-31 (W.C.C.A. 1993).

The temporary partial disability issue in Patrin was resolved differently. In Patrin, the employee sustained a compensable cervical injury and her employer, Progressive Rehab Options, subsequently paid temporary partial disability benefits when the employee found employment at a wage loss. About three years after her work injury, on September 9, 1991, the employee was involved in a nonwork-related automobile accident, after which she was unable to return to work. The employer and its insurer petitioned to discontinue temporary partial disability benefits. Based on Kirchner, the compensation judge concluded that, because no-fault benefits compensated the employee for wage loss from the post-injury job alone, the employer and insurer were responsible for continuing temporary partial disability benefits. On appeal, the Workers' Compensation Court of Appeals reversed, concluding that Kirchner applies only when the subsequent and totally disabling injury is compensable under the workers' compensation act. The Minnesota Supreme Court agreed, noting that the employee's "inability to work is not in any way related to any injury arising out of and in the course of her employment" and therefore finding "no basis for requiring [the employee's] former employer, Progressive Rehab Options, to continue to pay TPD benefits based on a wage [the employee] no longer earns." Patrin, 497 N.W.2d at 248, 48 W.C.D. at 275.

The underlying question in the present matter, then, is whether this employee's Wisconsin work injury is more like Kirchner's Minnesota work injury or like Patrin's nonwork-related automobile accident. Both alternatives have some merit. As the compensation judge noted, requiring continued payment of temporary partial disability benefits during the employee's total disability would subject the employer and insurer to no greater liability than they would have borne had the employee's second injury been compensable under the Minnesota Workers' Compensation Act. However, this fact was equally true, but not dispositive, in Patrin. On the other hand, the court in Patrin indicated that Patrin was entitled to no-fault benefits for both her lost wages and the temporary partial disability benefits lost because of her inability to work,

meaning that she was nearly fully compensated for her entire wage loss. Patrin, 497 N.W.2d at 248-49, 48 W.C.D. at 276. Unlike Patrin, no other mechanism or benefit exists to address the employee's total loss of earnings, vis-a-vis her wage on the date of her first work injury, if the employer and insurer on the present case are relieved of liability for temporary partial disability benefits. However, after weighing the relevant considerations, we conclude that Patrin should be applied in these circumstances.

We note initially that application of Kirchner to post-1983 injuries arguably represents an exception to the general rule, under the 1983 amendments, that temporary partial disability benefits are only payable to employees who are working. See, e.g., Minn. Stat. § 176.101, subd. 2 (1984); Morrissey v. Country Club Markets, Inc., 430 N.W.2d 169, 41 W.C.D. 402 (Minn. 1988); Tews v. Geo. A. Hormel & Co., 430 N.W.2d 178, 41 W.C.D. 410 (Minn. 1988); Parson v. Holman Erection Co., 428 N.W.2d 72, 41 W.C.D. 129 (Minn. 1988). In fact, in Patrin, the supreme court discussed the 1983 limitations on temporary partial disability benefits and then indicated that the Workers' Compensation Court of Appeals' application of Kirchner to post-1983 injuries "represented an equitable solution to a unique and troublesome problem with respect to the calculation of benefits."² Patrin, 497 N.W.2d at 247, 48 W.C.D. at 275. Similarly, this court has noted on several occasions that Kirchner does "not create an independent right to temporary partial disability benefits" but rather "simply specifies how to calculate the respective responsibilities of the various employers." Clausen v. Dotson Co., 58 W.C.D. 153, 157 (W.C.C.A. 1997); see also Horstmann, 49 W.C.D. at 30, 31 ("Kirchner I and II therefore clearly specify not only what wage loss benefits are payable to the employee but also how to calculate the respective liability of the insurers"). When the second injury is not covered by the Minnesota Workers' Compensation Act, the goals of Kirchner may not be satisfied, because the insurer, if any, responsible for that second injury has no obligations under the act, and the benefits, if any, payable for that second injury are completely beyond the Minnesota system's control.

Workers' compensation laws vary considerably from state to state, which may give rise to practical problems as to both entitlement and calculation issues. Suppose, for example, that this employee's Wisconsin injury would be considered compensable under Wisconsin law but not under Minnesota law,³ or vice versa. Which state's compensability standard should govern? Differing compensation rates may also come into play. It is entirely possible that benefits payable for an injury in another state might exceed those payable had the injury occurred in Minnesota, which could, in theory, result in combined compensation payments exceeding the employee's total loss of earning capacity. Moreover, under Kirchner II, combined benefits are not to exceed the statutory maximum rate for the second, totally disabling injury, and it makes little sense to apply the Minnesota statutory maximum to an injury occurring in another state. Also, it is the insurer

² Citing Floen v. Red Wing Publishing Co., 41 W.C.D. 1126 (W.C.C.A. 1989; Nybeck v. H.S. Kaplan Scrap Iron, 42 W.C.D. 1169 (W.C.C.A. 1990).

³ This might happen, for example, with an "arising out of" dispute or in the case of a specific defense recognized by one state but not the other.

on the risk for the second injury that is entitled to any reduction in payments resulting from application of the statutory maximum, and it is unlikely that an insurer subject to another state's workers' compensation scheme would be able, under that scheme, to take advantage of the reduction allowed by application of Minnesota law. This would again raise the possibility that the employee would be overcompensated for his or her total disability. As the supreme court noted in Patrin,

Kirchner and its post-1983 progeny carry forward the workers' compensation policy of addressing the total diminution of earning capacity caused by the combination of two or more work-related injuries by awarding concurrent temporary benefits which are, in aggregate, appropriate for the total diminution in earning capacity attributable to those injuries.

497 N.W.2d at 248, 48 W.C.D. at 275. The kind of benefit coordination envisioned by Kirchner is assured only if both injuries are subject to Minnesota jurisdiction; the fact that there is evidently no over- or undercompensation dilemma in the present matter is mere happenstance.

The employee's second injury in the present case is not compensable under the Minnesota Workers' Compensation Act and was in effect a superseding, intervening cause of the employee's disability from May 27, 1998, to July 4, 1998. For the reasons stated above, we conclude that Kirchner I and II are not applicable under these circumstances. We therefore reverse the judge's decision that the employee was entitled to continuing temporary partial disability benefits from the employer and insurer during the period of her total disability, from May 27, 1998, to July 4, 1998, resulting from her Wisconsin knee injury.

Temporary Partial Disability Benefits Beginning July 4, 1998

On July 4, 1998, the employee returned to modified, sedentary work, subject to restrictions due to her knee injury. At that point, the employee again became eligible for temporary partial disability benefits from the employer and insurer because she was employed and continued to have a loss of earning capacity causally related to her 1991 work-related low back injury. See Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). The fact that the employee may also have restrictions related to her knee injury is not dispositive. The employer and insurer are therefore liable for resumption of temporary partial disability benefits as of that date, despite the employee's Wisconsin knee injury.

When addressing the employee's entitlement to benefits for the period following her return to work, the compensation judge concluded that the employee's weekly earning capacity was \$254.40, rather than the \$222.40 wage upon which the employer and insurer had been basing the temporary partial disability payments. The judge reached this conclusion based on the employee's testimony regarding her previous underreporting of tip income⁴ and on her testimony

⁴ The employee testified that the \$222.40 wage included tip income of \$1.00 a day,

that her hours had occasionally been reduced for reasons unrelated to her injuries. On appeal, the employer and insurer argue that the compensation judge impermissibly expanded the issues by considering the employee's earning capacity following her return to work on July 4, 1998.

The employer and insurer's reason for appealing this issue is not apparent, as they stand to benefit from the judge's ruling. However, they did appeal, and they are correct. This was an expedited discontinuance hearing, and, under Minn. Stat. § 176.238, subd. 6, "[t]he hearing shall be limited to the issues raised by the [NOID] unless all parties agree to expanding the issues." There was no such agreement, and the fact that testimony as to the employee's earnings was taken is not enough, in our view, to substitute for an agreement. The employer and insurer did not raise earnings or earning capacity in the NOID and lacked reasonable notice sufficient to gather and submit evidence on the issue. See Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 869 (Minn. 1988). The dispute at hearing was entitlement, not calculation. We therefore vacate the judge's decision as to the employee's earning capacity from and after July 4, 1998, and hold that the employer and insurer are obligated to pay temporary partial disability benefits after that date based on the employee's actual earnings as reported to the insurer by the employee. The parties may of course litigate the question of the employee's earning capacity after July 4, 1998, in a future proceeding, in which case the employee would be able to recoup any underpayment and the employer and insurer could claim a credit for any overpayment.

whereas she had actually been earning \$8.00 a day in tips--from the beginning of her employment at the casino.