PETER L. OSTER, Employee/Appellant, v. J. L. SHIELY CO. and LIBERTY MUT. INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 26, 1999

No. [REDACTED SSN]

HEADNOTES

WITHDRAWAL FROM THE LABOR MARKET - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert opinion, vocational survey records, job logs and lay testimony supported the compensation judge's finding that the employee's remove from the Twin Cities metropolitan area to the Las Vegas, Nevada, labor market was a withdrawal from the active labor market, where there were very few job opportunities in the Las Vegas area in the specific occupational area to which the employee limited his job search.

Affirmed.

Determined by Wheeler, C.J., Johnson, J., and Pedersen, J.
Compensation Judge: Carol A. Eckersen

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's findings that he failed to make a reasonable and diligent job search for the period from July 19, 1996 through July 27, 1997, and that he withdrew from the labor market and failed to prove entitlement to temporary total disability compensation while living in Nevada between July 27, 1997 and April 8, 1998. We affirm.

BACKGROUND

The employee, Peter L. Oster, was born in September 1948 and is currently 50 years old. He sustained an admitted work-related injury to the neck and low back on May 7, 1979, while working as an equipment operator for J. L. Shiely Company, the employer. He returned to work with the employer in 1980 but was laid off effective November 11, 1987 after a sale of the company. The employee did not find other work, and was subsequently retrained as a quality control technician at Northeast Metro Technical College. He graduated from the retraining program in April 1996. (T. 24-26; Findings 1-3; Exh. B: 5/8/98 QRC report.)

Upon graduation from the retraining program the employee was provided with job development and placement services through a QRC, Debra A. Bourgeois. A job placement plan

and agreement was signed on April 9, 1996 and called for the employee to make a full-time job search focusing on finding work in the vocational area of quality assurance, inspection and control. Ms. Bourgeois provided the employee with a large number of job leads and the employee obtained several interviews over the next few months. However, in her July 5, 1996 report, Ms. Bourgeois noted that the employee had not yet obtained a position despite numerous leads and interviews, and suggested that it might be necessary for him to consider working in a temporary position to obtain some work experience in the quality control field as an approach to increasing his marketability. (Exh. B: 4/9/96 - 7/5/96.)

On August 2, 1996 the employee entered into a partial stipulation for settlement of his claims with the employer and insurer, and an Award on Stipulation was served and filed on the same date. The stipulation closed out the employee's claims for temporary total and temporary partial disability benefits from July 25, 1996 through July 24, 1997, in return for a lump sum payment. Under the terms of the stipulation, the employer and insurer also agreed to pay for vocational rehabilitation from July 25, 1996 until the employee obtained employment, but no later than January 24, 1997. Eligibility for further rehabilitation services was to be closed out thereafter until July 24, 1997. (Judgment Roll: 8/2/96 stipulation.)

The QRC had continued to provide job leads during July and August 1996. On August 28, 1996 the employee called to cancel a meeting with the QRC scheduled for the next day. The QRC left a message for the employee on August 29, 1996, requesting that he call and reschedule the meeting, but the employee did not return this call. On September 10, 1996 the QRC left another message asking whether the meeting should be rescheduled or whether the employee was no longer interested in continuing job placement services. The employee returned this call during the next week. According to the QRC's report, the employee told her that he had some "different irons in the fire," including considering employment out of Minnesota, and that she could "go ahead and close his rehabilitation file." The QRC spoke with the employee's attorney in October 1996, and "it was agreed that [the QRC] would close Mr. Oster's rehabilitation file since it appeared that the client was not interested in any further rehabilitation services." (Exh. B: 8/30/96 - 12/4/96.)

The employee testified that after he stopped working with his QRC he continued to search for work in the Twin Cities metropolitan area on his own over the next year. He testified that the level of his job search activity during this period was similar to that during the period of rehabilitation assistance from May through August 1996. However, the employee did not introduce any job search records or other documentary evidence regarding his job search activities for the period from about mid-August 1996 until July 28, 1997. He did not identify any specific employers from which he had sought employment during this period. (T. 38-48.)

The close-out of the employee's claim for temporary benefits, agreed to in the 1996 stipulation for settlement, ended on July 24, 1997. The employee introduced job logs to document his job search activities for the period beginning on July 28, 1997. He testified that he had become discouraged with the results of his job search efforts in the Twin Cities area by August 1997 and that he found himself repeatedly contacting the same employers to no avail. Around August 21,

1997, the employee moved to Las Vegas, Nevada, an area which he testified he had selected because he had read that it had a strong job market. His job logs indicate that he began searching for work in the Las Vegas area about August 27, 1997, but he continued to also mail applications or resumes to some employers in the Twin Cities until about mid-October 1997. Thereafter, the employee's job logs reflect a search focused entirely on employers in the vicinity of Las Vegas, Nevada. The employee did not find work in Nevada and returned to Minnesota in April 1998. (T. 49-63; Exh. C.)

On October 31, 1997, the employee filed a claim petition seeking temporary total disability benefits from July 28, 1997 and continuing. The employer and insurer answered alleging that the employee had failed to conduct a reasonably diligent job search and had withdrawn from the labor market. Shortly after the employee returned to Minnesota, the employer and insurer agreed to provide rehabilitation vocational placement services, and on June 15, 1998 the employee entered into a partial stipulation for settlement with the employer and insurer under the terms of which the employer and insurer agreed to pay for rehabilitation services and to pay the employee temporary total disability benefits for a period of 90 days commencing April 27, 1998, conditioned upon the employee cooperating with the rehabilitation efforts. After the 90 days, the employer and insurer agreed to continue rehabilitation services and benefits, but paid no further temporary total disability compensation. As of the date of hearing on September 15, 1998, the employee had not yet found permanent employment but, at the advice of his current QRC, had started a temporary, part-time work adjustment program performing production work at Owobopte Rehabilitation Center. (Exh. B; T. 67; Judgment Roll.)

The June 15, 1998 partial stipulation left open the employee's claim for temporary total disability compensation from July 28, 1997 through April 27, 1998, and the employer and insurer retained their defenses. The employee's claim for this period, together with his claim for temporary total disability benefits after the ninety days of benefits paid subsequent to April 27, 1998, came on for hearing before a compensation judge of the Office of Administrative Hearings on September 15, 1998. Following the hearing, the compensation judge found that the employee had withdrawn from the labor market and had failed to prove entitlement to temporary total disability benefits for the period from July 28, 1997 through April 27, 1998, but awarded temporary total disability benefits thereafter through the date of hearing, less the 90 days of temporary total disability already paid under the June 15, 1998 partial stipulation. The employee appeals from the denial of benefits from July 28, 1997 through April 27, 1998 and from a finding concerning the lack of a diligent job search before July 28, 1997.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one

inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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

Removal from the Labor Market

The compensation judge found that the employee had withdrawn from the active labor market from about the end of August 1997 until the employee returned to Minnesota from Las Vegas, Nevada, and recommenced participation in vocational rehabilitation with his new QRC in April 1998. The judge further found that the employee was capable of work within his physical restrictions during that period and that the employee had failed to prove that he was temporarily totally disabled during the period he elected to live in Nevada. (Findings 11, 12, 13.)

The employee asserts on appeal that the compensation judge applied an incorrect legal standard in reaching the conclusion that the employee had withdrawn from the active labor market. Pointing to language in the judge's memorandum, the employee argues that the judge's determination was based primarily upon a finding that the Las Vegas labor market was less favorable than the Twin Cities labor market, and upon the judge's finding that the employee had left "his geographical area for rehabilitation assistance." The employee contends that the judge should have focused solely upon "whether there was a reasonable expectation of earning a 'reasonable livelihood' in the town of destination." He argues that the judge failed to make an express finding to this effect, and that it was, further, improper for the judge to consider and, in effect, "punish" the employee for failing to avail himself of the four additional months of rehabilitation services which the employer and insurer had agreed to fund in the partial stipulation for settlement the employee signed on August 2, 1996. (See employee's brief at 9-13.)

We agree with the employee's contention that this case is controlled by the supreme court's decision in Paine v. Beek's Pizza, 325 N.W.2d 812, 35 W.C.D. 199 (Minn. 1982). In Paine, the employee, after a personal injury, moved from the Twin Cities metropolitan area to an area where there were few employment opportunities. The employee was unable to find work in his new community and sought temporary total disability benefits. The supreme court stated that the record was "clear that where he chose to live the employee could obtain nothing other than sporadic, short-term employment resulting in grossly insubstantial income." Id. at 814, 35 W.C.D. at 203. The court noted that an employee has the right to chose where he or she will live. But it does not follow that if an employee chooses to live in an area where "employment opportunities for him are virtually nonexistent, an employer-insurer must subsidize him by continued payment of total disability benefits." Id. at 815, 35 W.C.D. at 205. The court held that Paine voluntarily withdrew from the labor market, and had not, therefore, made a "reasonably

diligent effort" to procure employment. See also Fredenburg v. Control Data Corp., 311 N.W.2d 860, 34 W.C.D. 260 (Minn. 1981).

In the instant case, the employer and insurer offered a vocational opinion based on survey evidence which indicated that virtually no job opportunities existed in the Las Vegas area for quality assurance and control technicians. Among the findings reported in the survey were that a representative of the Las Vegas job service had not seen any job openings in that employment area listed in about five years; that jobs available in the Las Vegas area were primarily in the service area and not in manufacturing; and that only a handful of companies on a list of the Las Vegas area manufacturers obtained from the State of Nevada had quality assurance or control positions and there were only very rarely any vacancies in this occupational area. By contrast, the survey revealed that dozens of job vacancies in this occupational area are advertised in Twin Cities newspapers almost every week. (Exh. 1.)

The employee's testimony and job logs revealed that his job search had been oriented almost entirely toward finding a job in this single limited occupational area during the entire period he lived in Nevada. In addition, the compensation judge could reasonably conclude, based on the employee's job logs and other evidence, that only a perfunctory search was undertaken. The employer introduced two reports from Ed Spitler of ES Consulting Services, whom the employer had hired to monitor and audit the employee's job logs for the period between July 28, 1997 and April 3, 1998 (Exhs. 2, 3.) Mr. Spitler was able to contact about 67 of the companies mentioned in the employee's job logs related to the job search in Nevada. Of these, sixteen companies denied having received either an application or a resume from the employee, several denied having the type of position for which the employee claimed to be applying, and several others refuted some part of the information provided by the employee in his job logs.

"Whether an employee has removed himself from the labor market is a question of fact, the resolution of which will not be disturbed on appeal unless manifestly contrary to the evidence." Schroeder v. Highway Services, 403 N.W.2d 237, 238, 39 W.C.D. 723, 725 (Minn. 1987). Whether the employee might have successfully found work in Las Vegas in some other occupational area is, under the facts of this case, not significant. Taking into account the evidence of the limited scope and extent of the employee's job search together with the evidence that the specific type of employment on which the employee was concentrating his job search was almost nonexistent in the Las Vegas labor market, we conclude that substantial evidence supports the finding of a withdrawal from the labor market. As a result, we affirm that finding and the denial of temporary total disability benefits. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).

Job Search Finding

The employee objects to the compensation judge's finding that he had failed to make a reasonable and diligent search for employment from July 19, 1996 thorough July 27, 1997. He argues that this finding was unsupported by substantial evidence and that it was irrelevant to the issues before the judge and must be vacated.

A review of the transcript reveals that the compensation judge apparently made this finding in response to the one of the employee's arguments seeking to justify entitlement to benefits for the period after July 27, 1997. The employee testified at length about the nature of his job search activities before July 28, 1997. The compensation judge interrupted the questioning and asked, "Well, I just was wondering, you know, what the relevancy would be because we're talking about a [claim for benefits for the] period July 28, 1997, to September 7, '98." The employee's attorney responded that the purpose of the evidence was "to show that he very thoroughly canvassed this labor market, and he exhausted nearly every possibility that existed in this labor market before he decided to move away from this labor market." (T. 38.) Opening argument at the hearing also reveals that the employee argued that his move to Nevada was not a withdrawal from the labor market in part because the employee had already "thoroughly and completely . . . exhausted his possibilities here, went out to Las Vegas, gave it a try out there in a different labor market." (T. 10-11.)

In this case, the compensation judge's finding probably was irrelevant to the real issue in the case, which was whether there was a reasonable expectation that the employee would be able to find work in the quality control field in the Las Vegas area. However, we cannot fault the compensation judge for responding to the employee's factual allegations. The employee's claim for wage-loss benefits for the period covered by the disputed finding was closed out in a stipulation for settlement. As the employee is, accordingly, not prejudiced by the finding, we decline to direct that it be vacated.