ANITA R. STUTE, Employee/Appellant, v. TOM THUMB FOOD MKTS. and GENERAL CAS. INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 9, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - MATTERS AT ISSUE. Where there was no contradiction between the parties' stipulation to a surgically repaired full tear of the employee's right rotator cuff and the compensation judge's finding that that injury was small and not significantly disabling, and where there was no clear indication that the nature of the employee's injury, expressly introduced as an issue by the judge at the hearing, was ever withdrawn as an issue, the compensation judge did not exceed his jurisdiction or discretion in making the finding at issue. However, where the parties had stipulated at hearing that the employee had made a reasonable and diligent effort to find "work she could do," the compensation judge had no jurisdiction or discretion to find that the employee had not made a reasonable or diligent effort to secure "'management type' employment" or employment that was economically comparable to her pre-termination job or employment that allowed her to work as many hours as she had been working prior to her work injury.

TEMPORARY TOTAL DISABILITY; TERMINATION OF EMPLOYMENT - MISCONDUCT. The presumption that a reasonably diligent search for employment generally proves that a work-injury-restricted employee's post-injury wage loss is causally related to the work injury applies to the lifting of suspensions of benefits in Marsolek-type circumstances just as it does to the establishment of entitlement to benefits in non-Marsolek-type circumstances. Where, subsequent to her termination for misconduct, the employee was subject to work-injury-related restrictions and was, by stipulation of the parties, conducting a reasonable and diligent search for employment, and where there was no actual evidence that the employee's post-termination unemployment was due to causes other than her work injury, the compensation judge erred in denying the employee's claim to temporary total disability benefits.

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE; EARNING CAPACITY - SUBSTANTIAL EVIDENCE. Where, following her termination for misconduct, the employee was reemployed at fewer hours and a wage loss and still subject to restrictions related to her work injury, where the employer and insurer made no showing at all of "something more than a theoretical possibility of a [different] position or wage," and where the parties' stipulation at hearing to a reasonable and diligent post-termination job search was unlimited as to the duration of the search, the compensation judge erred in denying the employee's claim for temporary partial disability benefits.

Reversed.

Determined by Pederson, J., Johnson, J. and Wilson, J.
Compensation Judge: James R. Otto

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's denial of wage replacement benefits following the employee's termination for misconduct. We reverse.

BACKGROUND

On June 16, 1998, Anita Stute sustained an injury to her right shoulder in the course of her work as a store manager with Tom Thumb Food Markets. On the date of her injury, Ms. Stute [the employee] was thirty-five years old and was earning a weekly wage of $500.00. The employee sought treatment for her injury the following day with Dr. John Baudler, who diagnosed "[r]ight shoulder pain" and released her to work with restrictions against lifting over two pounds with her right arm or doing with that arm any reaching, overhead work, or repetitive lifting. On June 24, 1998, Dr. Baudler's partner Dr. Kristine Anderson continued the employee's restrictions and prescribed physical therapy. The following day, on June 25, 1998, the employee was terminated from her job with Tom Thumb Food Markets [the employer] for allegedly falsifying her time cards. The employee continues to contest the reasonableness of her termination.

Following her termination from the employer, the employee commenced a reasonably diligent search for another job within her restrictions. Those restrictions were gradually decreased beginning about July 1, 1998, but the employee's pain continued, and on July 21, 1998, the employee underwent an MRI scan of her right shoulder. The scan was read to reveal a "[s]mall, less than 5 mm focus of full-thickness tear" and "an additional 10 x 5 mm focus of deep surface partial-thickness tear" of a rotator cuff tendon. On July 31, 1998, the employee filed a Claim Petition, alleging entitlement to temporary total disability benefits continuing from June 26, 1998, consequent to her June 16, 1998, work-related shoulder injury. On September 8, 1998, having been unemployed since her June 25, 1998, termination by the employer, the employee began working at a part-time food service job with the local school district, at an hourly wage of $7.50. Two days later, on September 10, 1998, she began working part time also for D Rock Center/F.M. Trucking, taking orders at an hourly wage of $6.50.

On September 22, 1998, the employee underwent a surgical evaluation by Dr. Daniel Buss, who recommended repair of her torn right rotator cuff. On October 8, 1998, the employee was examined for the employer and insurer by Dr. Chris P. Tountas. Dr. Tountas concluded that there were no objective clinical findings to support a diagnosis of the employee's right shoulder complaints, but he acknowledged that the employee's MRI had revealed a partial and a full-thickness rotator cuff tear. He concluded, however, that "[t]hese tears are quite small and clinically there is no significant functional deficit of the right shoulder." Therefore, he

concluded, surgery on the shoulder was not reasonable and necessary. It was also Dr. Tountas's opinion that "the employee was not temporarily and totally disabled from June 26, 1998 through September 10, 1998," but he did concede that she had been temporarily partially disabled since the latter date, capable of working with restrictions, "primarily to limit forceful use of the right arm at or above shoulder level." Notwithstanding Dr. Tountas's opinion, on October 23, 1998, Dr. Buss performed the surgical repair that he had recommended. Three days later Dr. Buss restricted the employee for four weeks from using her right arm at all and thereafter from lifting over a pound with or making any repetitive use of it. The employer and insurer admitted liability for the employee's shoulder repair and the underlying injury and paid medical benefits, rehabilitation benefits, and temporary total disability benefits from October 23, 1998, through November 30, 1998. On December 1, 1998, the employee found a job working as a cashier at a convenience store other than the employer, where she works from thirty-two to forty hours a week and earns $8.00 an hour. On December 22, 1998, Dr. Buss's nurse, on behalf of Dr. Buss, restricted the employee from lifting over fifteen pounds and from doing any repetitive outstretched reaching with the right arm, continuing also restrictions on above-shoulder lifting and above-shoulder repetitive activity.

The matter came on for hearing on February 9, 1999. Early in the hearing, the compensation judge identified two issues for litigation. The first of those was "the nature of [the employee's] personal injury of June 16, 1998," and the second was "whether [the employee] is disqualified from receiving benefits for temporary total disability from June 26, '98 to September 8, '98, and/or temporary partial disability benefits from September 9, 1998 to October 22, 1998, and from December 1, '98 to date because her wage loss during this period of time was not due to the effects of her personal injury but was rather due to her termination from employment for cause."[1] In response to the judge's inquiry as to whether there were any "additions or corrections" to these issues as stated, the employee's attorney responded, "I don't believe so, your Honor," and the employer and insurer's attorney responded, "Your Honor, I think per counsel's approval, we would go ahead and stipulate that there was a rotator cuff tear." This tear was subsequently agreed to be a full tear, surgically corrected. The parties also stipulated at hearing, in the words of the compensation judge, "[t]hat [the employee] made a reasonable . . . and diligent effort to find work she could do after her termination on June 25, 1998."

Subsequent to the hearing, by Findings and Order filed February 11, 1999, the compensation judge denied all of the employee's claims on grounds that the employee had not proven that her wage loss during the periods at issue was due to the effects of her work injury. The judge's decision was apparently based materially on his conclusion in Finding 5 that the employee's "rotator cuff tear which presumably, was surgically repaired on October 23, 1998 appears most probably to have been quite small and (according to Dr. Tountas), produced no significant functional deficit and presumptively no significant functional inability to work in her

[1] The parties stipulated at hearing that the employee was entitled to receive temporary total disability benefits from October 22, 1998, to December 1, 1998, subsequent to her surgery on October 23, 1998.

employment." The judge's decision was apparently also based in part on his conclusion in Finding 4, that

> the evidence does not support a finding of fact that [the employee] made a reasonable or diligent effort to secure 'management type' employment, or employment that would reasonably return [her to] a job of the same or similar economic status as she had prior to her termination for reasonable cause, or that provided her the same number of hours of employment as she worked as an employee for [the employer] prior to June 16, 1998.

The employee appeals.

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 (1992). 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. Moreover, "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 Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

The employee contends on appeal that the compensation judge's findings as to the nature of the employee's work injury and the adequacy of her post-injury job search were contrary to stipulations of the parties on issues uncontested at the hearing and that therefore, in making those findings, the compensation judge "exceeded his jurisdiction and abused the discretion afforded him as fact finder." See Minn. Stat. § 176.371 (the compensation judge's decision shall include a determination of "all contested issues of fact and law"); see also Minn. R. 1415.3000, subp. 2.E., Deryke v. Pet Food Warehouse, slip op. (W.C.C.A. Sep. 18, 1997), and Carroll v. Honeywell, Inc., slip op. (W.C.C.A. Mar. 31, 1992) (the judge may make a determination "of each contested issue of fact or law, but may not resolve matters not at issue" (emphasis in original)).

The employee contends also that the compensation judge erred in his application of case law flowing from principles established in Marsolek v. George Hormel & Co., 438 N.W.2d 922, 41 W.C.D. 964 (Minn. 1989). We agree that the judge erred in his denial of the benefits at issue.

Contested Findings

Finding 5

At the hearing, the parties stipulated that the work injury at issue was an eventually repaired full tear of the rotator cuff in the employee's right shoulder. Following the hearing, the compensation judge concluded, in Finding 5, that that full tear "appears most probably to have been quite small and (according to Dr. Tountas), produced no significant functional deficit and presumptively no significant functional inability to work in her employment." The employee contends that the parties stipulated at hearing to "the exact nature" of the employee's work injury, that the judge therefore exceeded his jurisdiction in making Finding 5, and that that finding should therefore be reversed or vacated. We find no contradiction between the parties' stipulation to a surgically repaired full tear of the rotator cuff and the compensation judge's finding that that injury was small and not significantly disabling. Nor do we find any clear indication that the nature of the employee's injury, expressly introduced as an issue by the judge at the hearing, was ever clearly withdrawn as an issue. Therefore we decline to reverse the judge's finding on grounds that it exceeded the judge's jurisdiction or constituted an abuse of discretion.[2]

Finding 4

The parties' stipulation at hearing as to the employee's job search, as stated there by the compensation judge, was that the employee had made a reasonable and diligent effort to find "work she could do" after her termination on June 25, 1998. In his Findings and Order following the hearing, the judge stated that the parties had stipulated that the employee had made a reasonable and diligent effort to find "work that she could *physically* do" (emphasis added) following her termination. Then, in Finding 4, the judge concluded that the evidence did not show that the employee had made a reasonable or diligent effort to secure "'management type' employment" or employment that was economically comparable to her pre-termination job or employment that allowed her to work as many hours as she had been working prior to her work injury. We conclude that the parties' stipulation at hearing as to the employee's job search implied that that search was appropriate for the employee in all respects. Contrary to what might have been the case with the stipulation regarding the nature of the employee's injury, which appears to us to have permitted litigation as to that injury's functional effects, the stipulation at hearing that the employee's post-termination job search was reasonable and diligent resolved on its face the sufficiency of the employee's search for any work within her physical restrictions. See Bauer v. Winco/Energex, 42 W.C.D. 762, 768 (W.C.C.A. 1989) (a diligent job search "is a

[2] Our conclusion here, that the judge did not exceed his discretion or jurisdiction in making the finding, does not constitute an affirmance of the finding on a factual basis.

search that is reasonable under all the facts and circumstances," quoting with added emphasis Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 956 (Minn. 1988)). Concluding that it was not within the judge's jurisdiction to make a finding contrary to that stipulation by resurrecting a "management-type" subdivision of the issue, we reverse Finding 4.

Application of Case Law

Temporary Total Disability

In basic support for his denial of benefits in this case, the compensation judge cited this court's decision in Hesby v. Swift Indep. Packing Co., 39 W.C.D. 544 (W.C.C.A. 1986), to the effect that "an employee cannot purposefully disregard or intentionally violate reasonable employment responsibilities and obligations to such an extent that he is reasonably terminated and then expect to receive ongoing disability benefits under the Workers' Compensation Law." Hesby, 39 W.C.D. at 547, quoting from Pream v. Public Housing Agency of St. Paul, 36 W.C.D. 535 (1983). Subsequent to our decision in Hesby, however, the supreme court has held that

> a justifiable discharge for misconduct suspends an injured employee's right to wage loss benefits; but the suspension of entitlement to wage loss benefits will be lifted once it has become demonstrable that the employee's work-related disability is the cause of the employee's inability to find or hold new employment. Such a determination should be made upon consideration of the totality of the circumstances including the usual work search "requirements."

Marsolek v. Geo. A. Hormel & Co., 438 N.W.2d 922, 924, 41 W.C.D. 964, 968 (Minn. 1989). As we have affirmed, the parties stipulated at hearing to the fact that the employee performed a reasonable and diligent job search following her termination from the employer on June 25, 1998. The employee contends that therefore, whether or not her termination for misconduct was reasonable, any suspension of benefits warranted by her termination should have been lifted immediately, since her post-termination job search began immediately to prove the required causal connection between her work injury and her loss of wages.[3] The employer and insurer argue in response that, under the Marsolek decision, the determination as to when the suspension of benefits after a termination for cause should be lifted "should be made upon consideration of the totality of

[3] Minn. Stat. § 176.101, subd. 1(e) (1) (1995), provides that an employee's temporary total disability benefits may be "recommenced" following the employee's return to work and subsequent layoff or termination, only in situations where the employee has been laid off or terminated "for reasons other than misconduct." As the employee asserts in her brief, that provision does not apply here, since this case deals only with the employee's initial entitlement to benefits and not to a recommencement of those benefits. The employer and insurer do not contend otherwise.

the circumstances including the usual work search 'requirements.'" Marsolek, 438 N.W.2d at 924, 41 W.C.D. at 968 (emphasis added). The employee's job search is therefore, they argue, "merely a factor to be weighed" in making a determination as to the employee's entitlement to temporary total disability benefits. We agree with the employee that, under principles articulated in Marsolek, the compensation judge erred in denying the temporary total disability benefits at issue.

In order to demonstrate entitlement to temporary total disability benefits, work-injured employees who are capable of working must make a reasonably diligent search for employment. See Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 733, 40 W.C.D. 948, 954 (Minn. 1988). Such a post-injury search for employment normally entitles the employee to benefits, provided the employee continues to be subject to physical restrictions related to her work injury. See Kautz v. Setterlin Co., 410 N.W.2d 843, 844, 40 W.C.D. 206, 207 (Minn. 1987) (an employee is not entitled to temporary total disability benefits unless she is disabled). This principle applies to the lifting of suspensions of benefits in Marsolek-type circumstances just as it does to the establishing of entitlement to benefits in circumstances where voluntary termination or termination for cause is not a factor. We grant that the court's language in Marsolek apparently permits a judge to consider factors in addition to job search in making the causal relationship determination here at issue. However, we find in this case no substantial evidence to support the judge's decision.

Notwithstanding the compensation judge's conclusion in Finding 5, that the employee had no significant disability from working "in her employment," it is evident from the medical records that the employee was subject to physical restrictions related to her work injury at all times during the period of her claim. Nor do the employer and insurer argue that she was not. The compensation judge suggests in his Memorandum that his denial of benefits was based to some extent on evidence that the employee may have actually elected not to work during the period of her temporary total disability claim in order to spend more time with her children.[4] However, this conclusion is in direct contradiction of the clear meaning of the parties' stipulation at hearing as to the reasonableness and diligence of the employee's post-termination job search.[5] Because, by stipulation of the parties, the employee was diligently searching for work during the period of her claim, because there is no substantial evidence that the employee was unrestricted by her work injury during that period, and because there is only the argument and no actual evidence that the employee's continued unemployment during the period at issue was due to factors other than her work injury, we reverse the compensation judge's denial of temporary total disability benefits.

---

[4] The judge references a statement that he attributes to Dr. Anderson, which was actually made by Dr. Anderson's colleague Dr. Orrin Mann, to the effect that the employee "was taking care of three children, ages 13, 10 and 6 on July 16, 1998, and her employment on September 8, 1998, was contemporaneous with her children being back in school."

[5] Nor is this conclusion diminished by the employee's testimony that she had once in the past given up managerial work for a period of time in order to spend more time with her family.

Temporary Partial Disability

Once the employee had found post-injury employment following her termination from the employer, the employee's actual earnings became presumptively representative of her post-injury earning capacity, absent 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), citing Einberger v. 3M Co., 41 W.C.D. 727, n.14 (W.C.C.A. 1989); Serra v. Hanna Mining Co., slip op. (W.C.C.A. Feb. 2, 1989). Quoting Borchert v. American Spirits Graphics, 582 N.W.2d 214, 215, 58 W.C.D. 316, 318 (Minn. 1998), the employer and insurer argue that "this presumption may be rebutted by evidence establishing that the reduction in the employee's earning capacity is unrelated to the employee's disability." Even were Borchert applicable in this case, however, and we conclude that it is not,[6] the employer and insurer have offered no actual evidence to support their argument. Even pursuant to Borchert, a compensation judge's conclusion as to whether an employee's reduced earning capacity is attributable to the disability or to some other factor must be supported by "sufficient evidence in the record." Id. The employer and insurer have made no showing of the availability of a higher wage or of more work hours, through the testimony of vocational experts or any other means. It is true that, while a reasonably diligent job search is not a prerequisite to an award of temporary partial disability benefits, the employer and insurer might have argued the absence of a reasonable and diligent job search to support their position regarding such benefits in this case, given that the employee had been released to work full time but was working less than that during the period of her temporary partial disability claim. See Nolan v. Sidal Realty Co., 53 W.C.D. 388 (W.C.C.A. 1995). The parties in this case, however, stipulated at hearing that the employee had made a reasonable and diligent search for work following her termination from the employer, specifying no limits on the duration of that search. The employer and insurer did present evidence that the employee could still be working for the employer at her date-of-termination wage and hours had she not precipitated her own termination by misconduct. However, because the employee's pre-termination job with the employer is apparently no longer an actual "possibility" for her, it is not evidence useful in rebuttal of the actual wage earning capacity presumption articulated in Patterson. See Sellner v. Bituminous Materials, slip op. (W.C.C.A. Nov. 19, 1991). The judge suggested in his Memorandum that his denial of benefits was to some extent based on a conclusion that economically less suitable employment was "the expected outcome of being fired from a management position for cause." The judge cites no evidence, however, that the employee was ever denied higher paying work or more hours because of her history of termination for cause, nor

[6] The issue in Borchert concerned the employer and insurer's obligation to pay benefits based on specific overtime wages that were no longer available to the employee due specifically to particular economic reasons. At the hearing in the present case, overtime wages were not at issue; the attorney for the employer and insurer expressly stipulated that the employee's pre-injury job was a salaried position, and in response to the judge's query "does it matter whether it was based upon a 35-hour workweek?" he answered "I don't believe so." Nor did the judge' himself cite Borchert as any basis for his denial of benefits.

is there any evidence that any actual or prospective employer aside from the employer herein even knew of that history. Because the employer and insurer have offered no evidence sufficient to rebut the earning capacity presumption referenced in Patterson, we reverse also the compensation judge's denial of the employee's claim for temporary partial disability benefits.

SEPARATE CONCURRING OPINION

DEBRA A. WILSON, Judge

I concur in the result reached by the majority.