

SUSAN M. THOMPSON, Employee/Appellant, v. ELECTRIC CORDS, INC., and AMERICAN COMP. INS. CO./RTW, INC., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
FEBRUARY 8, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY TOTAL DISABILITY - JOB SEARCH. Substantial evidence, including the limited number and nature of the employee's job contacts, supports the finding that the employee's job search was not reasonable or diligent and that the employee is not entitled to temporary total disability benefits.

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. The denial of temporary total disability benefits is reversed as the findings and order were clearly erroneous and manifestly contrary to the evidence in finding that the employee was able to return to work immediately following her surgery. The overwhelming weight of the evidence supports the fact that the employee had not been released to work as of the date of the hearing herein and is entitled to temporary total benefits for a certain period of time.

Affirmed in part and reversed in part.

Determined by Hefte, J., Wilson, J., and Wheeler, C.J.  
Compensation Judge: James R. Otto

OPINION

RICHARD C. HEFTE, Judge

The employee appeals from the compensation judge's denial of the employee's claims for temporary total disability benefits for the periods of time from May 22, 1996 to May 4, 1998, the day of the employee's carpal tunnel surgery; and from May 4, 1998 to the date of the hearing herein, June 3, 1998. We affirm in part and reverse in part.

BACKGROUND

Susan M. Thompson, employee, initially claimed a Gillette-type<sup>1</sup> work injury to her right arm in the nature of carpal tunnel syndrome, culminating on April 24, 1996, when she was working for Electric Cords, Inc., the employer.

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<sup>1</sup> Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

On May 10, 1996, the employee began treatment with Dr. J. Craig Paulson, an orthopedist. She was diagnosed as having symptoms and signs of mild carpal tunnel syndrome on the right. During May 1996 she continued to complain of pain in her right forearm and wrist and Dr. Paulson restricted the employee in the use of her right hand. Dr. Paulson watched a video of the employee mowing her lawn and although she was predominantly using her left hand, the doctor reported on June 7, 1996 that she was obligated to attempt to return to work, as the work was within her restrictions. The employer offered the employee various jobs which were refused by the employee. In September 1996 Dr. Paulson reported that the employee was a reasonable candidate for carpal tunnel release surgery, although he reported "the risks of surgery are increased, I believe, because of the attending emotional overlay." Dr. Chris Tountas saw the employee for the purpose of an independent medical examination (IME). Dr. Tountas, in his report of September 12, 1996, noted a lack of classical symptoms associated with carpal tunnel syndrome, and indicated the prognosis was guarded as he felt the employee's complaints were exaggerated. He did not recommend surgery and found no basis for any work restriction of the employee. (Er. Ex. 15.)

The employee filed a claim petition seeking temporary total disability benefits from May 22, 1996 and thereafter, approval of right carpal tunnel surgery, rehabilitation assistance, and payment of certain medical expenses incurred by the employee. By the date of the hearing, it had been stipulated that the employee sustained a work-related injury to her right upper extremity on April 24, 1996. The compensation judge issued his findings and order on September 15, 1997 determining that the employee was not entitled to temporary total disability benefits from May 22, 1996 to the date of the hearing because the employee was able to work and she unreasonably refused several offers of gainful employment by the employer. Also, the compensation judge found that the employee was entitled to a rehabilitation consultation, reimbursement of certain medical expenses, and was entitled to have carpal tunnel surgery as a result of her work injury. The employee appealed the denial of temporary total disability benefits and the employer and insurer cross-appealed the determination regarding the employee's surgery, reimbursement of certain medical bills and the award of a rehabilitation consultation.

This court entered its decision on March 12, 1998, affirming the finding that the employee was entitled to carpal tunnel surgery, reimbursement of certain medical bills and that the employee was entitled to a rehabilitation consultation. This court reversed the compensation judge's determination that the employee unreasonably refused the employer's offers of gainful employment. However, this reversal did not automatically entitle the employee to temporary total disability benefits as the employee had been released to work with restrictions during the period in question. This court indicated that the employee in this situation must show a diligent search for employment to be entitled to temporary total disability benefits; and, although evidence had been submitted on the job search issue, the compensation judge made no finding as to the reasonableness and diligence of the employee's job search. This matter was, therefore, remanded for redetermination of the temporary total disability benefits issue based on findings to be made as to the job search issue.

On remand, a hearing was held on June 3, 1998. Additional evidence consisting of the employee's testimony regarding her job search and her job logs were submitted. Evidence at this hearing indicated that the employee underwent carpal tunnel surgery on May 4, 1998. In his Findings and Order on Remand, dated June 18, 1998, the compensation judge found that the employee did not prove that her job search from May 22, 1996 to May 4, 1998 was reasonable or diligent and that therefore the employee is not entitled to receive temporary total disability benefits during this period of time. The compensation judge also found that the employee was not entitled to receive temporary total disability benefits from May 4, 1998, the day of her surgery, to the day of the hearing on remand herein, June 3, 1998, due to a lack of showing that the employee was medically unable to work following her corrective surgery and, following her surgery, that she did not conduct any job search. 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 (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 Total Disability - May 22, 1996 to May 4, 1998

The employee claims that during the period from May 22, 1996 to May 4, 1998, the date of the employee's carpal tunnel syndrome surgery, and under all the circumstances in this case, substantial evidence supports the fact that her job search was reasonably diligent. Therefore the employee maintains that the compensation judge's findings should be reversed and the employee should be awarded temporary total disability benefits (TTD). The compensation judge denied the employee's claim for temporary total disability benefits. We affirm the compensation judge on this issue.

As to her claim that she conducted a reasonable and diligent job search, the employee mainly points to the fact that she had no high school diploma or GED; that a job search was difficult as she stuttered and was a nervous person; that she submitted job search logs for over

200 job contacts over almost a two-year period; that she felt her restrictions included the fact that she could only work with her left nondominant hand; and that she did not have rehabilitation assistance in her job search.

The burden of proving an adequate job search is on the employee. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988). The determination of whether or not an employee's job search is diligent is a question of fact for the compensation judge to resolve. Bauer v. Winco/Energex, 42 W.C.D. 762, 768 (W.C.C.A. 1989). Moreover, "it is clear that the issue of whether or not an employee has sought work with reasonable diligence must be viewed within the context of the scope of rehabilitation assistance which has been provided by the employer and insurer." Hunter v. Crawford Door Sales, slip op. at 3 (W.C.C.A. August 4, 1993). However, it has been held that a lack of rehabilitation assistance does not make a virtual lack of any job search sufficient. See Evink v. Roger E. Duncan, slip op. (W.C.C.A. May 17, 1991). While the employee's job search efforts should be weighed in the context of a lack of rehabilitation assistance, it does not relieve the employee of her obligation to diligently seek employment. Stephens-Hahn v. Lakeland Envelope Co., slip op. (W.C.C.A. July 30, 1992).

The employee submitted job logs to identify employers she contacted for employment. Of some 200 listed contacts, the employee never completed any job applications and never had a job interview. The evidence indicated that the employee conducted her job search almost exclusively over the telephone. The employee admitted she did not actually make any in-person contact with potential employers. The employee indicated when she called potential employers she would initially ask whether they had work for a one-handed person. She admitted she called employers whom she was aware were not hiring as well as many employers who only did assembly-type work which would require working with two hands. The compensation judge commented on what he felt the employee's restrictions were in 1996, 1997 and 1998 by referencing the employee's own testimony. The employee testified that the first and third fingers of her right hand were numb all the time, that sometimes she would get shocks in three of her right fingers, and that on occasion she had experienced swelling on the right side of her right wrist. The evidence did not indicate the employee was restricted to the use of one hand. In unappealed Finding 12 in the Findings and Order on Remand, the compensation judge found that, "The evidence is insufficient to determine Ms. Thompson's restrictions up to May 4, 1998 or following May 3, 1998 as no medical evidence up to May 4, 1998 [or] following May 3, 1998 was placed in evidence." The compensation judge apparently considered the employee to be able to use her right hand and wrist with some restriction. The judge noted that during the holiday seasons of 1996 and 1997, the employee failed to look for retail clerking positions which were shown to be reasonably available. The compensation judge explained in his memorandum, at page 5, further reasons of his finding of an inadequate job search:

Her pattern on her job search records indicate two phone calls a week. Two phone calls a week, even without assistance, does not represent a reasonable effort to find work especially with employers who were not hiring or employers who were only offering assembly type work. (Compensation judge's added emphasis.)

The employee argues, that, in light of the absence of rehabilitation services, there is substantial evidence in the record, mainly because of her job logs, to support a finding that the employee made a reasonable or diligent job search. However, the compensation judge found the job logs were less than adequate. The issue on appeal is not whether a result contrary to that reached by the compensation judge might also be supported by the evidence, but rather whether substantial evidence supports the result actually reached by the compensation judge. We conclude that the compensation judge's finding that the employee failed to make a reasonable or diligent job search is supported by substantial evidence and we affirm the compensation judge's denial of temporary total disability benefits for the period of May 22, 1996 to May 4, 1998.

#### Temporary Total Disability - May 4, 1998 to June 3, 1998

The employee had carpal tunnel surgery on May 4, 1998. The compensation judge held that there is insufficient evidence to prove that the employee is entitled to temporary total disability benefits commencing after May 4, 1998, the day of her surgery to the date of the hearing, June 3, 1998. No report by Dr. Paulson, the surgeon, concerning the course or outcome of the employee's carpal tunnel surgery or any report of the doctor subsequent to the surgery was introduced into evidence. The compensation judge indicated in his memorandum that, although noting it is a harsh result, he found that there is no basis to reinstate benefits for temporary total disability on May 4, 1998. The employer and insurer argue that the employee submitted no evidence that she was totally disabled after her surgery, and then, being medically able to work, she did not conduct a reasonable and diligent job search. The employee claims that the compensation judge's findings and order on this issue is clearly erroneous and not reasonably supported by the evidence as a whole. We agree with the employee and reverse.

The employer and insurer initially argued at the hearing, and in its brief following the hearing on remand, that the employee had withdrawn from the labor market and was not entitled to TTD benefits following her surgery. See Minn. Stat. § 176.101, subd. 1(f). In his findings and order on remand, Finding 14, the compensation judge found that, "the evidence of record does not support a finding of fact that Ms. Thompson withdrew from the labor market at any time prior to Mary [sic] 4, 1998." This finding was not appealed. On appeal, the employer and insurer now argue that the employee, immediately after her carpal tunnel surgery, was able to work and then did not conduct a job search from and after May 4, 1998. The employer and insurer ask this court to accept the fact that "carpal tunnel surgery is performed on an outpatient basis and the recuperation period is fairly limited," but offer no medical report to support this conclusion. (Employer & Insurer brief p. 14.) Even if this factual premise would be accepted, it does not automatically follow that the employee was not temporarily totally disabled immediately following her surgery and therefore had an obligation to conduct a job search.

The employee argues that the parties agreed that, as of the date of the hearing, the employee had not been released to return to work. Although Dr. Paulson, who performed the employee's surgery, did not submit any medical evidence or reports evidencing the employee's surgery and its effect on the employee's ability to work, the parties, in the record on remand, agreed as follows:

Compensation Judge: Have I correctly identified the issues to be determined?

MR. HEINS: Yes.

MR. CHRISTIANSON: Yes, Judge.

THE COURT: Thank you. May the record further show that the parties have stipulated and agreed that Ms. Thompson had a carpal tunnel surgery on her right wrist on May 4, 1998 and has not been released to return to work as of the date of hearing, so be?

MR. CHRISTIAN [sic]: Correct.

MR. HEINS: Correct.

(T. on Remand, p. 6.)

This agreement, made on the record at the hearing on June 3, 1998 effectively shows that the employee had surgery and implies that medically the employee was still not released to work as the date of the hearing. In the initial findings and order of September 15, 1997, it was found, and not contested, that the employee had not reached MMI; and in the present matter, there is no evidence that MMI of the employee had been reached as of the date of the hearing on remand, June 3, 1998.

The employee's testimony on the record supports the parties' agreement and the fact that medically the employee was not released to return to work by June 3, 1998. The employee testified that she had the surgery in May 1998. On cross-examination the employee was asked, "Now, you have on the right side the rigid splint there. How long do you have to keep that [splint] on for?" (T., Hearing on Remand, p. 15.) The employee answered that "I'm going to therapy now and they said put it [splint] on when it [hand] hurts and I'm not supposed to use it yet." (*Id.*) (Emphasis added.) She went on to testify that Dr. Paulson has not been able to "assess whether or not the surgery was successful." (*Id.*, p. 16.) The employee was then asked, "But Dr. Paulson, has he indicated you shouldn't do work of any kind at this point?" The employee answered, "They haven't - - when - - I saw his assistant to get the stitches out and then he said I'm supposed to make an appointment with Dr. Paulson and I did." (*Id.*) This appointment was scheduled for June 24. It is reasonable to conclude from this evidence that the employee was temporarily totally disabled from her surgery and Dr. Paulson had not released the employee to work prior to June 3, 1998. This being the case, the employee was not required to conduct a job search. No evidence, medical or otherwise, was submitted by the employer and insurer concerning whether the employee was able to return to work or as to any specific date the employee should have been able to return to work after her surgery.

On the issue being considered, the findings and order on remand are clearly erroneous and are manifestly contrary to the weight of the evidence. The employee is entitled to receive TTD benefits commencing May 4, 1998 through June 3, 1998, the date of the hearing on remand. We reverse Finding 11 and Order 1 in the Findings and Order on Remand and find and

order that the employee is entitled to temporary total disability benefits for the time period of May 4, 1998 through June 3, 1998.