

EDWARD TOSSEY, Employee/Appellant, v. CITY OF ST. PAUL, SELF-INSURED, Employer.

WORKERS' COMPENSATION COURT OF APPEALS  
DECEMBER 6, 1999

No. [REDACTED SSN]

HEADNOTES

**JOB OFFER - REFUSAL; EARNING CAPACITY.** Where the job offered by the employer to the employee in 1993 was no longer available during the period for which benefits were at issue, and where unrebutted vocational testimony indicated the employee's actual earnings were representative of his earning capacity, the compensation judge erred in denying the employee's claim for temporary partial disability benefits on grounds that the employee did not contact the employer to accept the 1993 job offer and did not search for other work.

Reversed.

Determined by: Wilson, J., Johnson, J., and Pederson, J.  
Compensation Judge: Bradley J. Behr.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's denial of temporary partial disability benefits continuing from January 7, 1997. We reverse.

BACKGROUND

The employee sustained work-related injuries on August 10, 1984, while employed as a firefighter for the City of St. Paul [the employer]. On September 30, 1992, while working as a fire investigator for the employer, the employee sustained another work-related injury. The injuries were to his cervical, thoracic, and lumbar spine, and he subsequently developed chronic pain syndrome and depression as a consequence of these injuries. He was taken off work by his treating doctor on September 30, 1992, and he is subject to physical restrictions that prevent him from returning to work as a firefighter, dispatcher, or fire investigator. The employer voluntarily paid the employee impairment compensation for a 25.76% whole body impairment; following a hearing, a compensation judge determined that the employee had a total whole body impairment rating of 33.17%.

In April of 1993, the employer offered the employee a job as administrative assistant to the fire chief, which the parties agreed was physically and economically suitable

employment. The employee conditionally accepted the job, subject to approval by his psychologist, but the psychologist did not approve the job, and the employee never attempted it. The employee subsequently moved from Minnesota and worked at miscellaneous jobs, including self-employment as a taxidermist in Wisconsin and various jobs in Alaska, before returning to Minnesota in March of 1995 and beginning work at Bill's Rental Center. This job was part time for the period at issue in this proceeding, and the employee apparently earned \$9.00 per hour.<sup>1</sup> Each of the jobs that the employee held subsequent to leaving the employer paid substantially less than the administrative assistant job offered to the employee by the employer in April of 1993.

The employee claimed entitlement to temporary partial disability benefits from November 1, 1993, and the matter proceeded to hearing on January 2 and 6, 1997. In findings filed on March 20, 1997, the compensation judge determined that the job offered by the employer to the employee in 1993 was suitable pursuant to Minn. Stat. §176.101, subd. 3e (repealed 1995), and that the employee's conditional acceptance constituted an unreasonable refusal of that offer. The judge therefore denied the employee's claim for temporary partial disability benefits, citing Minn. Stat. § 176.101, subds. 3e and 3n. The employee appealed that decision, and on October 6, 1997, this court affirmed the compensation judge. Tossey v. City of St. Paul, 58 W.C.D. 104 (W.C.C.A. 1997). In November of 1997, the employee left his employment with Bill's Rental and began work for K-Mart. The employee testified that he worked "pretty much a forty hour week" in that employment and that his pay was approximately \$10.00 per hour. The employee then appealed his case to the Minnesota Supreme Court, which, in a memorandum opinion filed March 10, 1998, held that the offered administrative assistant job was not a 3e job, but that it was an offer of suitable employment, which the employee had unreasonably refused. Citing Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 41 W.C.D. 42 (Minn. 1988), the court affirmed the denial of temporary partial disability benefits through the date of the hearing. Tossey, 58 W.C.D. at 115-18.

On March 19, 1998, the employee wrote to the employer, accepting the administrative assistant job that had been offered to him in 1993. The attorney for the employer responded that, due to the employee's five-year delay in accepting the job, circumstances had changed, meaning that funding and civil service rules would have to be investigated before a return to work could be arranged. On April 23, 1998, the attorney for the employer wrote to the employee and his attorney "re-offering the job because there are some slight changes to the proposal . . ." The new offered job paid less than the original offer and, due to civil service regulations, the employee would have to be classified as a provisional employee, without seniority and without the ability to gain seniority. The employee began the 1998 offered job on May 23, 1998, and the employer paid him temporary partial disability benefits after that date.

Shortly before beginning his new job with the employer, the employee filed a claim petition, alleging entitlement to temporary partial disability benefits continuing from January 7, 1997, the day after the previous hearing before the compensation judge. The claim petition was

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<sup>1</sup> See Petitioner's Exhibit D.

heard on April 6, 1999, and, in a decision filed on June 2, 1999, the compensation judge found, in part, that the employee had failed to make a reasonable and diligent job search from January 7, 1997, to March 18, 1998, and that he had failed to demonstrate that his reduction in earning capacity, during that period, was causally related to his work injuries.<sup>2</sup> 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.

## DECISION

The compensation judge apparently based his denial of temporary partial disability benefits on the employee's failure to attempt to accept the 1993 offered job between January 7, 1997, and March 18, 1998, or to make a reasonable and diligent search for other work. After review of the record, we are unable to conclude that the judge's decision is supported by substantial evidence or applicable case law.

In order to be eligible for temporary partial disability benefits, an employee must establish that he has a work-related injury resulting in disability, that he is able to work subject to that disability, and that he has an actual loss of earning capacity causally related to the disability. Dorn v. A.J. Chromy Constr., 310 Minn. 42, 254 N.W.2d 451, 29 W.C.D. 86 (1976). An employee's post injury wage is presumed to be representative of the employee's reduced ability to earn. French v. Minn. Cash Register, 341 N.W.2d 290, 36 W.C.D. 385 (Minn. 1985). However, in appropriate circumstances, this presumption may be rebutted with evidence indicating the employee's ability to earn is different than the post-injury wage. Schwan v. Fabcon, 45 W.C.D.

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<sup>2</sup> The compensation judge found that temporary partial disability benefits were payable commencing on March 19, 1998, the date that the employee wrote the employer indicating his acceptance of the 1993 job offer. Neither party appealed from that finding, so benefits after March 18, 1998, are not at issue on appeal.

209 (W.C.C.A. 1991).

At the 1997 hearing, the employer was able to establish that the employee's ability to earn was different than the post-injury wage by demonstrating the existence of a suitable job, available with the employer, that paid more than the employee was earning in his post-injury employment. At the most recent hearing, however, there was no evidence of any job available with the employer, or with any other employer, as of January 7, 1997, which would have paid more than the employee was earning at Bill's Rental and subsequently with K-Mart. In fact, at oral argument, counsel for the employer conceded that the job offered to the employee in 1993 was not available in 1997. The judge's apparent assumption that the employer would have provided suitable work paying more than the employee was earning, had the employee inquired about work between January of 1997 and March 18, 1998, has no basis in the record. Moreover, the employer offered no vocational testimony or other evidence to indicate that the employee's actual pay was not representative of his earning capacity or that his reduced wages were unrelated to his work injury.

The record may support the judge's conclusion that the employee did not make a diligent search for alternate employment. However, a lack of a reasonable and diligent search for work, in this case, does not overcome the presumption that the employee's actual earnings at Bill's Rental and K-Mart were representative of his earning capacity. Where an employee is released to work full time but works only part time, a reasonable and diligent job search is not a legal prerequisite to an award of temporary partial disability benefits but is merely a factor for the judge to consider in determining whether an employee's wage loss is causally related to the work injuries. Nolan v. Sidal Realty Co., 53 W.C.D. 388 (W.C.C.A. 1995). Here, rehabilitation consultant Patricia Herbulock testified, unrebutted, that the employee was "earning the best that he could be earning" in his job at Bill's Rental. Given this testimony and the other circumstances of this case, including the lack of rehabilitation assistance, the employee's job search efforts are not determinative. As to the K-Mart job, the employee testified that that work was full time, and, generally, an employee does not lose eligibility for temporary partial disability benefits by failing to search for higher-paying work when he is already employed at a full-time job. Peters v. Egan and Sons, 54 W.C.D. 262 (W.C.C.A. 1996).

We are not unsympathetic to the employer, who made a suitable job offer to the employee in 1993, assuming it had met all of its obligations. However, the employee has already paid a substantial price for his refusal of that job, losing wage loss benefits through the date of the first hearing. See also Mahoney v. Southern Minn. Sugar Beet Coop., 54 W.C.D. 370 (W.C.C.A. 1996) (the extension granted by Manderfeld v. J.C. Penney, 526 N.W.2d 52, 52 W.C.D. 152 (Minn. 1995), for acceptance of a job offer, does not preclude discontinuance of wage loss benefits upon an initial determination by a judge that the job the employee failed to accept was physically and economically suitable). More importantly, it is undisputed that the job offered to the employee in 1993 was not available as of January 7, 1997, the commencement date of the employee's claim, and a job that is not available to the employee has little or no value for purposes of evaluating entitlement to temporary partial disability benefits. See, e.g., Tottenham v. Eaton Char-Lynn Corp., 43 W.C.D. 71 (W.C.C.A. 1990); Agan v. Prospect Foundry, slip op. (W.C.C.A. Apr. 11,

1995).

The employee has in excess of a 30% whole body impairment, he is restricted to sedentary work, which prevents him from working in his previous jobs as a firefighter, dispatcher, or fire investigator, and even the employee's current job with the employer pays less than he was earning on the date of injury. The real issue in this case is not so much whether the employee has an injury-related loss of earning capacity as it is how to measure that loss. Given the record as a whole, including the vocational evidence and the evidence relating to the 1993 job offer, and given the presumption of earning capacity created by actual earnings, the compensation judge had no legally sufficient basis to deny the employee's claim for temporary partial disability benefits, based on actual earnings, from and after January 7, 1997. We therefore reverse his decision on this issue.