

BRENDA J. KURKOSKY, Employee, v. GATEWAY CMTY. SERVS. and AM. COMP. INS./RTW, INC., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 30, 2000

No. [REDACTED SSN]

HEADNOTES

EARNING CAPACITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's medical records and testimony as to her symptoms, supported the compensation judge's finding that the employee had a loss of earning capacity, causally related to her work injury, and that her actual earnings were representative of her earning capacity, despite the fact that the employee was not working full time and had few or no objective signs of ongoing disability.

Affirmed.

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

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's denial of their petition to discontinue temporary partial disability benefits. We affirm.

BACKGROUND

On April 8, 1998, the employee sustained a work-related injury to her neck and shoulders while employed by Gateway Community Services [the employer], a residential facility for the mentally retarded. The employee's job as a human services technician entailed bathing, feeding, and otherwise assisting residents in their daily activities. The employee initially sought treatment from Dr. Patrick O'Leary, D.C., but soon thereafter began seeing Dr. Richard Horecka, M.D., who became her primary treating physician in early May of 1998. Dr. Horecka prescribed medications and physical therapy and limited the employee to light work with restrictions on lifting, carrying, pushing and pulling, and overhead reaching.

In July of 1998, the employee filed a claim petition, alleging that the employer and insurer had underpaid wage loss benefits, apparently because of a dispute over the employee's weekly wage. About a month later, in late August of 1998, the employee left employment with the employer to start a job with Homestead Place, a residential facility for the elderly and disabled. The employee's job at Homestead paid the employee less on an hourly basis than her job with the employer - - \$6.81 versus \$8.50 - - but Homestead had more available hours of work, so the

employee's post-injury earnings increased when she changed jobs.¹ The employee testified that she worked approximately thirty-two hours a week when she began her job at Homestead and that she tried to work more hours when they were offered. Her hourly pay was eventually increased to \$7.24.

In an October 13, 1998, office note, Dr. Horecka wrote that the employee had changed jobs "but still has limitations based on lifting less than 50 pounds"; "[p]lease see attached Return to Work form for details." A form completed by Dr. Horecka on that same day indicated that the employee could "never" lift and carry more than 35 pounds or push/pull more than 50 pounds.

Also in October of 1998, an administrative conference was held to consider a Notice of Intention to Discontinue Benefits [NOID] filed by the employer and insurer on September 8, 1998. In his subsequent order, the compensation judge determined that the employer and insurer were entitled to discontinue temporary total disability benefits, based on the employee's return to work, but that he had no jurisdiction to determine the parties' continuing dispute over weekly wage. In late October 1998, the employee filed an objection to discontinuance, alleging entitlement to temporary partial disability benefits, which was later consolidated for hearing with the employee's July 1998 claim petition.

In January of 1999, the employee was examined, on the employer and insurer's behalf, by Dr. Richard Strand. Diagnosing "cervical strain, healed," Dr. Strand reported in part that the employee had no objective findings of ongoing injury, that the employee had reached maximum medical improvement [MMI], probably within two weeks of her injury, and that the employee had no need to observe any restrictions on her activities.

In March of 1999, the parties settled their dispute as to the employee's weekly wage and the employer and insurer's alleged underpayment of wage loss benefits. The stipulation for settlement, filed March 4, 1999, indicates that the parties had agreed that the employee's weekly wage on the date of injury was \$328.00 and that the employer and insurer would pay the employee \$2,750.00 in settlement of all wage loss, penalty, and rehabilitation claims that the employee might have through February 10, 1999. While continuing to maintain that the employee had recovered from her injury, as reported by Dr. Strand, the employer and insurer also agreed to pay for a cervical MRI scan and to pay "temporary partial disability benefits from February 10, 1999, so long as the Employee's condition shall warrant based on a compromised [weekly] wage of \$328.00." An award on stipulation was issued on March 5, 1999.

¹ The employee testified that the employer cut her hours when she returned to light-duty work following her injury and that she changed jobs because she "could not live on a hundred-and-some dollars every two weeks." The employee also testified that the employer was not paying her temporary partial disability benefits at the time. The employee's appeal brief indicates that the parties disagreed, at least initially, as to whether the employee was working full time or part time on the date of her injury.

The employee underwent the cervical MRI scan on March 26, 1999. According to the radiologist's report, the "study [was] within normal limits."

In June of 1999, the employee began another round of physical therapy on referral by Dr. Horecka. The goal of this treatment, as delineated by the therapist, was to decrease the employee's cervical muscle spasm and pain, decrease her headache pain, and increase her pain-free range of cervical motion.

On August 16, 1999, the employer and insurer filed a petition to discontinue benefits, seeking to discontinue temporary partial disability benefits on grounds that the employee had no loss of earning capacity causally related to her work injury, as evidenced in part by Dr. Strand's report and the employee's normal cervical MRI scan. About a month later, on September 13, 1999, the employee underwent surgery on her tailbone, unrelated to her work injury, following which she was off work for several weeks.

The employee returned to see Dr. Horecka on November 29, 1999, complaining of continued pain in her neck that "kind of started when she increased her work hours from 64 to 72 per pay period." Dr. Horecka suggested that the employee try home exercises and return to a 64-hour per-pay-period schedule, with reevaluation in six to eight weeks, noting that the employee's problem was "a muscle and ligament type problem, not something of a skeleton or bone type problem." In a "Report of Work Ability Form" also dated November 29, 1999, Dr. Horecka reiterated that the employee's work hours should be reduced to 64 per pay period and advised that the employee should not lift or carry more than 40 pounds or push/pull more than 75 pounds. The employee's treatment notes from December of 1999 and January of 2000 reflect continued complaints of neck symptoms, for which Dr. Horecka reinstated physical therapy, and that the employee had again related her increased symptoms to increased hours of work. Dr. Horecka expressed uncertainty as to "what to do with [the employee]," noting that he had "not found very much objectively, her pain is primarily subjective."

The employer and insurer's petition to discontinue benefits came on for hearing before a compensation judge on February 8, 2000. At that time, the employer and insurer again alleged that the employee was not entitled to temporary partial disability benefits because there were no objective findings to support the need for any restrictions, as indicated by Dr. Strand, and because there was no medical opinion limiting the employee's work hours prior to the November 1999 office note from Dr. Horecka. In response, the employee asserted that she continued to have restrictions causally related to her work injury, entitling her to continued temporary partial disability benefits, and that the employer and insurer had in fact been underpaying benefits. Evidence included the employee's testimony and medical records, the report of Dr. Strand, and the testimony and report of L. David Russell, the employer and insurer's independent vocational expert.

In post-hearing correspondence to the judge, the parties agreed that, if the employee's actual earnings were representative of a reduced earning capacity causally related to the employee's work injury, the employer and insurer had underpaid benefits in the amount of

\$641.21 through January 14, 2000. Also in that correspondence, the employer and insurer suggested for the first time that the employee's post-injury weekly earning capacity should be computed by multiplying her hourly pay at Homestead by 40 (hours) until November 29, 1999, after which her hourly wage would be multiplied by 32, in accordance with Dr. Horecka's restriction on hours.

In a decision issued on March 13, 2000, the compensation judge concluded that the employee had been temporarily partially disabled after February 10, 1999, to the present and continuing, that she was entitled to benefits based on her actual earnings, and that the employer and insurer owed the employee the agreed-upon \$641.21 for underpaying benefits. The employer and insurer appeal.

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

As a rule, an employee is entitled to temporary partial disability benefits if the employee has a work-related physical disability, she is able to work subject to that disability, and she has an actual loss of earning capacity causally related to that disability. Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). Actual earnings create a rebuttable presumption of earning capacity. See, e.g., Roberts v. Motor Cargo, Inc., 258 Minn. 425, 104 N.W.2d 546, 21 W.C.D. 214 (1960).

In the present case, the employer and insurer contend initially that the compensation judge erred in concluding that the employee was entitled to temporary partial disability benefits following her tailbone surgery, which was not causally connected to her work-related condition. However, the employer and insurer have the burden of proving that there is an intervening cause of an employee's disability, see, e.g., Drews v. Kohl's, 55 W.C.D. 33, 40 (W.C.C.A. 1996), and we see no evidence that the employer and insurer ever even raised this issue to the compensation

judge, either at hearing or in their post-hearing submission. See also Malinoski v. North American Cable Sys., slip op. (W.C.C.A. Dec. 14, 1989) (issues raised for the first time on appeal are not properly before this court and will not be addressed). We also note that the employee's claim summary indicates that the employee was not claiming temporary partial disability benefits for the period during which she was off work due to the surgery. Under these circumstances, the employer and insurer's arguments on this issue have no merit.

The employer and insurer's primary contention is that the judge erred in awarding the employee temporary partial disability benefits, based on actual earnings, from February 10, 1999, to November 29, 1999, because there is no medical evidence that the employee was unable to work full time during this period. Therefore, the employer and insurer contend, her wage loss in part-time employment during this period was not causally related to her work injury. Again, we are unpersuaded.

The employee's claim summary and check stubs indicate that, with certain exceptions, she worked about 32 to 36 hours a week at Homestead prior to November 29, 1999. The employee testified that she accepted all of the hours that were offered to her but that her neck symptoms would increase when she tried to increase her hours. The compensation judge expressly found the employee's testimony credible, and he was entitled to rely on her assertion that she worked as much as her symptoms would allow. Cf. Brenning v. Roto Press, Inc., 237 N.W.2d 383, 28 W.C.D. 225 (Minn. 1979) (a determination as to whether an employee is physically able to perform offered work may in some cases rest on the judge's assessment of the employee's credibility on the issue). The fact that Dr. Horecka did not formally limit the employee's hours until November 29, 1999, is not necessarily determinative of either the employee's ability to work full time or her entitlement to benefits prior to that date.

Finally, the employer and insurer argue that "the opinion of Dr. Horecka was without foundation to be reliable," because "Dr. Horecka was under the mistaken impression that the Employee was working no less than 64 hours every pay period."² There is, however, no evidence whatsoever to support the employer and insurer's assertion as to Dr. Horecka's alleged "mistaken impression" and, even if true, we fail to see the relevance of the alleged mistake.

The employee sustained an admitted work-related injury for which she received intermittent treatment and for which her treating physician has recommended continuing

² In this same vein, the employer and insurer assert that the employee's only restriction through November 29, 1999, was a 50-pound lifting restriction imposed by Dr. Horecka on October 13, 1998. However, the form completed by Dr. Horecka on October 13, 1998, contains other restrictions that were to continue "indefinitely." In addition, the employer and insurer's assertion that the employee received no medical care between October of 1998 and late August of 1999 is simply untrue, in that the employee underwent physical therapy in June and throughout August of 1999.

restrictions that preclude her from performing her pre-injury job.³ She left her job with the employer to take work at Homestead that offered her substantially more hours and therefore higher pay. While she seldom worked forty hours a week in this new job, she testified, un rebutted, that she worked all the hours that she was offered. The employer and insurer's vocational expert testified that the employee's hourly pay at Homestead was within the range she could expect to receive given her education and experience and that, if she was in fact limited to part-time work due to her injury, her earnings from Homestead were an accurate reflection of her earning capacity. The record also indicates that the employee has little formal education beyond high school, that she lives in a small town, that she does not own a car, and that she has had no rehabilitation assistance. It may be true that the record contains little objective evidence of ongoing injury, and the compensation judge could certainly have accepted the opinion of Dr. Strand, who indicated that the employee had no residual disability. However, that the evidence might have supported a different result is essentially irrelevant to our review on appeal. Because substantial evidence supports the compensation judge's conclusion that the employee's actual earnings are representative of a loss of earning capacity that is causally related to her work injury, we affirm his decision in its entirety.

³ According to a "Human Service Technician" job description, employees are required "to pass a physical and back screen test of lifting 70 pounds." At no point has Dr. Horecka released the employee to lift that much.