JAMES HASWELL, Employee/Appellant, v. INDELCO PLASTICS and FEDERATED MUT. GROUP, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 17, 2001

No. [REDACTED SSN]

HEADNOTES

WAGES. The compensation judge did not err in failing to impute a weekly wage, based on earnings of coworkers, where the record indicated that coworkers' earnings would not be reasonably representative of the employee's earning capacity. However, the judge's wage determination was modified to reflect inclusion of a commission earned prior to the work injury.

STATUTES CONSTRUED - MINN. STAT. § 176.101, SUBD. 1(i); TEMPORARY TOTAL DISABILITY. As a rule, voluntary termination does not constitute refusal of employment for purposes of applying Minn. Stat. § 176.101, subd. 1(i). Because the compensation judge erred in denying temporary total disability benefits pursuant to Minn. Stat. § 176.101, subd. 1(i), and the entire matter was tried on that basis, the matter was remanded to the judge for relitigation of the employee's temporary total disability claim.

Affirmed in part, as modified, vacated in part, and remanded.

Determined by: Wilson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Harold W. Schultz II

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's decision as to weekly wage and the judge's finding that the employee is barred from receiving temporary total disability benefits because he voluntarily terminated his employment with the employer. We affirm the judge's finding as to weekly wage, as modified, vacate the denial of temporary total disability benefits, and remand for rehearing on the issue of the employee's entitlement to temporary total disability benefits.

BACKGROUND

The employee was hired by Indelco Plastics [the employer] on July 1, 1998, to work as a salesman and technical back-up person for a base salary of $2,700.00 per month, plus a 2% commission on all sales. The employee had worked only nine weeks when he was involved in a serious work-related auto accident on September 3, 1998. The accident rendered the employee unconscious, and he was taken to Regions Hospital for treatment. That same day, the employee

underwent surgery on both arms. On September 4, 1998, a CT scan of the brain revealed "scattered trace subarachnoid hemorrhage and now diffuse cerebral swelling." The September 9, 1998, discharge summary indicates that arrangements were made "for supervision for a short period of time regarding his safety and gait and to insure that he will not get into any accidents regarding his home care."

The employee returned to Regions Hospital on September 24, 1998, and was seen in the orthopedic clinic for complaints of left shoulder pain. He was diagnosed with a midshaft clavicle fracture, which doctors related to the September 3, 1998, accident. The employee was treated conservatively for this condition.

The employee was next seen at the physical medicine and rehabilitation clinic of Regions Hospital on October 19, 1998. At that time, the employee gave a history of resolved double vision, decreased balance, significant decreased energy, sleeplessness, and decreased appetite. Dr. Patrick Stewart released the employee to return to work half days "as tolerated."

The employee returned to work for the employer on October 20, 1998, doing primarily inside sales. At some point, he overheard a conversation between his supervisor, Mark Madison, and the general manager, Trent Dore, in which they discussed frustration with the employee working half days and not making outside sales calls. On November 23, 1998, the employee submitted a resignation letter, stating, "[w]hile many factors were involved in this decision, I do not feel that I can achieve my personal goals here in a reasonable time frame."

The employer filed a notice of intention to discontinue workers' compensation benefits on November 25, 1998, indicating that the employee's temporary partial disability benefits were being terminated because "you terminated your employment with Indelco Plastics on 11-23-98." On December 3, 1998, the employer and insurer filed a Rehabilitation Request, seeking to terminate the employee's rehabilitation plan because "rehabilitation services are no longer needed as you had returned to work prior to voluntarily terminating your employment with Indelco Plastics on 11-23-98." On December 10, 1998, the employee filed a Rehabilitation Response, disagreeing that the rehabilitation plan should be terminated, stating in part that a rehabilitation plan had never existed and that a number of factors were involved in his decision to leave his job, including incomplete recovery from his work injury.

The employee did not work again until April of 1999, when he worked a two-week temporary job. After that job ended, the employee did not work again until October 2, 1999, but he has worked consistently since that time.

On October 14, 1999, the employee filed a claim petition, seeking temporary total, temporary partial, and permanent partial disability benefits as a result of the September 3, 1998, injury. The employer and insurer filed an answer denying liability for benefits, alleging "suitable employment was provided by the employer which the employee terminated for reasons unrelated to his injury on November 23, 1998."

Dr. Sheila Coxe conducted an independent neuropsychological evaluation of the employee on March 31, 2000. In her report of that same date, Dr. Coxe opined that the employee had some residual difficulty in learning and memory of verbal and visual material. She rated him as having a 10% whole body impairment under Minn. R. 5223.0360, subp. 7.C.(1), for brain dysfunction, "mild impairment of complex integrated cerebral function demonstrated by psychometric testing but able to live independently." It was Dr. Coxe's opinion that the employee had no employment restrictions associated with cognitive or memory impairment. The employer and insurer voluntarily paid benefits for the 10% rating.

The matter proceeded to hearing on December 13, 2001, at which time the employee was asserting that his weekly wage on the date of injury was $1,017.19, imputed from what other salesmen of the employer earned, and claiming underpayment of temporary total and temporary partial disability benefits and entitlement to periods of temporary total and temporary partial disability benefits, plus additional permanent partial disability benefits for loss of smell. The employer and insurer took the position that the employee's average weekly wage was $623.08, that Minn. Stat. § 176.101, subd. 1(i), barred temporary total or temporary partial disability benefits after the employee voluntarily terminated his employment with the employer, that there were no actual work restrictions as a result of the work injury that would support a claim for temporary total or temporary partial disability benefits, and that the employee had no additional permanent partial disability.

In a decision filed on February 13, 2001, the compensation judge found that the employee's weekly wage was $623.08, that the employee did not have a permanent loss of taste or smell, and that the 1998 work injury "currently affects the employee's ability to engage in sustained gainful employment and has affected him since the date of that injury." The judge awarded temporary partial disability benefits but denied the employee's claim for temporary total disability benefits. 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

Weekly Wage

The employee was paid a base salary of $2,700 per month and was to receive a commission on sales he generated. The employee contends that he had anticipated earning $12,000 to $22,000 in commissions in his first year and that, because he was injured after only nine weeks of work, his earnings in those nine weeks were not representative of his earning capacity. The employee introduced evidence as to what other salesmen working for the employer had earned in 1998, as evidence of the employee's imputed weekly wage. The compensation judge relied on the employee's "actual wage," rather than including anticipated commissions, in finding a weekly wage of $623.08.

The employee contends that the judge's finding of a weekly wage of $623.08 is "simply inappropriate." It is the employee's position that the compensation judge should have utilized the average earnings of other salesmen working for the employer and imputed a weekly wage of $1,017.19. We are not persuaded.

The employee cites Bradley v. Vic's Welding, 405 N.W.2d 243, 39 W.C.D. 921 (Minn. 1987), for the proposition that, where a twenty-six week wage history with the date of injury employer is not available, "resort should be made to other evidence of wages." In the Bradley case, the Minnesota Supreme Court did reinstate the compensation judge's wage decision in which the judge had apparently relied on evidence of hours worked by other employees in the employer's employ. However, the court did not direct that other evidence of wages must be used where a twenty-six week wage history is not available. Rather, as stated in Berry v. Walker Roofing, 473 N.W.2d 312, 45 W.C.D. 125 (Minn. 1991), the supreme court has indicated that a compensation judge may rely on evidence of wages paid to employees doing similar work to determine the weekly wage of an employee who has been employed for only a very short period of time. We note, however, that, in Berry, the employee had worked for the employer for only a few hours before his work injury. The court in Berry held,

> the wage calculation based on the average weekly wage of three co-employee's was more reliable than a speculative extrapolation of Berry's earning capacity based on a few hours of work about which there was conflicting testimony . . . . In short, the method of calculation used in this case was the most reliable under the circumstances.

473 N.W.2d at 316, 45 W.C.D. at 130.

The object of wage determination is to "arrive at a fair approximation of [the employee's] probable future earning power which has been impaired or destroyed because of the injury." Knotz v. Viking Carpet, 361 N.W.2d 872, 874, 37 W.C.D. 452, 455 (Minn. 1985) (quoting Sawczuk v. Special Sch. Dist. No. 1, 312 N.W.2d 435, 437-38, 34 W.C.D. 282, 287 (Minn. 1981)). In the instant case, substantial evidence supports the compensation judge's decision not to base

the employee's weekly wage on the earnings of the employee's coworkers. Specifically, the record establishes that the employee was not as knowledgeable about the products as the other salesmen and that the accounts he was given had generated only $6,000.00 in sales in the six months before he began work for the employer. In addition, Mr. Madison testified that, prior to the work injury, he had been dissatisfied with the employee's performance and that he would rate the employee as below average compared with the other sales people that he employed. Accordingly, the compensation judge did not err in basing the employee's weekly wage on his actual earnings during the nine weeks he worked prior to the injury, rather than on an average of wages earned by other salesmen at the employer. We note, however, that the judge's finding of a weekly wage of $623.08 does not include any commissions paid prior to the date of injury.[1] At oral argument, counsel for the employer admitted that the employee had earned and been paid a commission of $22.30 prior to the date of injury. Accordingly, we modify the judge's finding of weekly wage to $625.56, to reflect this commission.[2]

Temporary Total Disability

> Minn. Stat. § 176.101, subd. 1(i), provides:
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> > temporary total disability compensation shall cease if the employee refuses an offer of work that is consistent with a plan of rehabilitation . . . or if no plan has been filed, the employee refuses an offer of gainful employment that the employee can do in the employee's physical condition. Once temporary total disability compensation has ceased under this paragraph, it may not be recommenced.

The employee contends that the employer and insurer did not raise Minn. Stat. § 176.101, subd. 1(i), as a defense prior to hearing and that the employee was severely prejudiced by his lack of adequate notice as to the employer's position. The compensation judge did not make any findings on this argument but apparently determined that the defense was timely raised, in that he ultimately denied temporary total disability benefits in his order, noting in his memorandum that his denial was "based on the clear language contained in Minn. Stat. § 176.101, subd. 1(i)." The issue of timely notice of the employer's defense is, however, largely irrelevant, as the employee resigned from his job with the employer, and, as a general rule, a voluntary quit does

[1] There is no evidence as to when commissions were *earned*, which is the determinative factor in whether the commissions should be included in calculating the employee's weekly wage.

[2] The employee was also paid a commission of $79.95 for the pay period ending September 15, 1998. The employee was temporarily totally disabled after September 3, 1998; however, Mr. Madison testified that any orders placed on the employee's accounts, whether he was there or not, were credited to the employee and resulted in a commission. Therefore, it is possible that the employee had earned a commission while he was temporarily totally disabled. Because we cannot ascertain when the commission was earned, we have not included it in the weekly wage calculation.

not constitute a constructive refusal of suitable post-injury employment.[3] Wagner v. Marvin Windows, slip op. (W.C.C.A. Apr. 30, 1996). See, e.g., Martin v. John Roberts Co., 47 W.C.D. 479 (W.C.C.A. 1992); Schewe v. Tom Thumb Food, 46 W.C.D. 693 (W.C.C.A. 1992).[4]

An employee's voluntary termination of employment may provide grounds for suspension of workers' compensation benefits, which may be reinstated upon proof that the wage loss is attributable to the work-related disability. Fielding v. Geo. A. Hormel & Co., 439 N.W.2d 12, 41 W.C.D. 942 (Minn. 1989); Johnson v. State, Dep't of Veterans Affairs, 400 N.W.2d 729, 39 W.C.D. 367 (Minn. 1987). Eligibility for benefits is normally established by showing permanent partial disability and/or work restrictions and a diligent search for work or cooperation with rehabilitation efforts. See, e.g., Marsolek v. Geo. A. Hormel Co., 438 N.W.2d 922, 41 W.C.D. 964 (Minn. 1989).

The compensation judge made a finding that the work injury "currently affects the employee's ability to engage in sustained gainful employment and has affected him since the date of injury." However, the judge made no findings as to diligent search for work or cooperation with rehabilitation. Rather, the judge denied temporary total disability benefits based on Minn. Stat. § 176.101, subd. 1(i). Contrary to the employee's counsel's contention at oral argument, this case arose out of a claim petition, and it was the employee's obligation to establish his claim. At the same time, however, the issue of the employee's entitlement to benefits was framed and decided only in the context of whether the employee had work restrictions and whether his voluntary quit forever barred him from receiving temporary total disability benefits pursuant to Minn. Stat. § 176.101, subd. 1(i). As such, the issues of diligent job search and/or cooperation with rehabilitation were never litigated. Accordingly, we vacate the judge's denial of temporary total disability benefits after November 23, 1998, and remand the matter to the compensation judge for relitigation.

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[3] That said, we note that the employer and insurer raised the employee's termination of employment as a bar to temporary partial disability benefits in their NOID and to all benefits in their answer to the employee's claim petition.

[4] The cases cited involved the application of Minn. Stat. § 176.101, subds. 3(l) and 3(n) (repealed 1995), which provided that if an employee refused an offer of a 3e job, temporary total disability benefits would cease and no further temporary total disability benefits would be payable for that injury, nor would that employee be entitled to temporary partial disability benefits if he subsequently returned to work at a wage loss. We see nothing in Minn. Stat. § 176.101, subd. 1(i), that would make the rationale of these cases inapplicable to it, and there is nothing in this record that would support construing this case as one in which the employee's voluntary quit should be held to constitute a constructive refusal of employment.