

CINDY (WOLFF) LARSON, Employee/Appellant, vs. ZERCOM, INC. and ST. PAUL FIRE & MARINE INS. CO., Employer-Insurer and ZERCOM, INC. and AETNA/ TRAVELERS PROP. CAS. INS., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
MARCH 27, 2001

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY; EARNING CAPACITY. The compensation judge erred in denying temporary partial disability benefits on the basis that the employee failed to prove a causal relationship between her lower post-injury wages and her work injury, where the employee established a loss of earnings during the relevant time period, continuing restrictions, inability to return to her pre-injury job, and testified she missed time from work due to her work injury, and the employer and insurer introduced no evidence to rebut the presumption of earning capacity.

ECONOMIC RECOVERY COMPENSATION - SUBD. 3t(b). The compensation judge erred in denying subd. 3t(b) benefits, where the judge found in previous unappealed findings that the employee had permanent restrictions due to the 1995 injury and was unable to return to the job she held on that date of injury, the employee was paid temporary total compensation following surgery related to the 1995 injury, and the employee was not entitled to benefits under the permanent partial disability schedule.

Reversed.

Determined by: Johnson, J., Rykken, J., and Wheeler, C.J.  
Compensation Judge: Carol A. Eckersen

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's denial of her claims for temporary partial disability benefits and 26 weeks of economic recovery compensation. We reverse.

BACKGROUND

This case has been tried on three occasions before the compensation judge and is now before this court for the second time. In a Findings and Order filed July 17, 1998, Judge Eckersen found the employee sustained an electrocution-type injury to her right hand on May 25, 1993, and a Gillette-type injury to her right hand and wrist, deQuervain's tendinitis, on July 25, 1995, while working for the employer, Zercom, Inc. The employee earned \$219.60 on May 25, 1993 and \$259.20 on July 25, 1995. St. Paul Fire & Marine Insurance Company, St. Paul, insured

the employer for the first injury and Aetna/Travelers Property Casualty Insurance, Aetna/Travelers, insured the employer at the time of the second injury.<sup>1</sup> The compensation judge further found the “employee is unable to return to work in the job she held on either date of injury. She cannot use vibrating tools or machines and has permanent restrictions from Dr. Schultz.” (Finding 11.) The compensation judge awarded temporary partial disability benefits from September 7, 1997 and continuing and apportioned liability for these benefits equally between the two insurers. In her memorandum, the compensation judge stated, “I also find Dr. Schultz’s opinion persuasive that the employee has a permanent injury as a result of the 1993 electrical shock the employee sustained. She has consistent and continuing complaints. Dr. Holm recommended permanent restrictions following this injury. I apportioned liability for temporary partial disability equally between these injuries as both have contributed to the employee’s continuing symptoms and restrictions on her work activities.”

Aetna/Travelers appealed the judge’s July 17, 1998 Findings and Order to the Workers’ Compensation Court of Appeals. In a decision filed February 2, 1999, this court affirmed the compensation judge’s finding that the employee sustained a Gillette injury on July 25, 1995 in the nature of deQuervain’s tendinitis. The court, however, remanded the case to the compensation judge for findings on whether the employee’s work activities during the 25-day period the employer was insured by Aetna/Travelers were a substantial and contributing cause of the July 25, 1995 Gillette injury. In a Findings and Order served and filed July 19, 1999, Judge Eckersen found the employee’s work activities from July 1 through July 25, 1995, were a substantial contributing cause of her Gillette injury. There was no appeal from the judge’s findings and order.

Thereafter, the employee filed a claim petition seeking payment of intermittent periods of temporary partial disability benefits from May 25, 1993 through July 24, 1995 and payment of economic recovery compensation pursuant to Minn. Stat. § 176.101, subd. 3t(b). In a findings and order filed August 8, 2000, Judge Eckersen denied the majority of the employee’s claim for temporary partial disability benefits and denied her claim for 3t(b) economic recovery compensation benefits. The employee appeals.

## STANDARD OF REVIEW

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, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

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<sup>1</sup> Aetna/Travelers’s insurance coverage commenced on July 1, 1995.

## DECISION

### Temporary Partial Disability Benefits

The employee sought payment of intermittent temporary partial disability benefits from May 25, 1993 through July 24, 1995. The compensation judge found that, with the exception of one two-week period, the employee failed to prove she missed time from work for reasons related to her work injury. Accordingly, the compensation judge concluded the employee failed to prove her wage loss during the relevant period was caused by her work injury. The employee contends this conclusion is legally erroneous. We agree.

To demonstrate entitlement to temporary partial disability, an employee must prove a work-related physical disability and an actual loss of earning capacity that is causally related to the disability. Krotzer v. Browning-Ferris, 459 N.W.2d 509, 43 W.C.D. 254 (Minn. 1990); Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). Post-injury wages create a presumption of earning capacity. French v. Minn. Cash Register, 341 N.W.2d 290, 36 W.C.D. 385 (Minn. 1985). This presumption may be rebutted by evidence that the employee's ability to earn is different than the post-injury wage. Wesley v. City of Detroit Lakes, 344 N.W.2d 614, 36 W.C.D. 518 (Minn. 1984).

In her 1998 Findings and Order, the compensation judge found the employee had restrictions on gripping, grasping, pinching, lifting and use of power tools secondary to her 1993 injury. (Finding 3.) As previously noted, the compensation judge also found the employee was unable to return to her pre-injury job as a result of the May 1993 injury. The employee testified that following that injury her job duties were modified. She also testified she missed time from work following her 1993 injury due to pain and fatigue in her right hand and to obtain medical care. (T. 46-47.) Further, the employee testified that because of her restrictions, on occasion her employer sent her home early because they had no work available for her. (T. 58.)

There is no dispute the employee has physical restrictions on her ability to work and was unable to return to her pre-injury job as a result of her May 1993 injury. The employee testified she lost time from work due to the effects of her injury. The employee's claim summary and wage records, Petitioner's Exhibits E and F, document a loss of earnings during certain weeks within the relevant period. The employee is entitled to the presumption that her actual earnings are an accurate measure of her earning capacity. The employer and insurer introduced no evidence to rebut the presumption. Accordingly, the employee is entitled to temporary partial disability benefits for the period May 25, 1993 through July 24, 1995. The employer and St. Paul Fire & Marine are directed to pay same to the employee and withhold appropriate attorney fees.<sup>2</sup>

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<sup>2</sup> At oral argument, counsel for St. Paul agreed that if this court decided temporary partial disability benefits should be awarded, the parties could resolve the benefits due based on the trial exhibits.

Minn. Stat. § 176.101, subd. 3t(b)

Minn. Stat. § 176.101, subd. 3t(b) states, “Where an employee has suffered a personal injury for which temporary total compensation is payable but which produces no permanent partial disability and the employee is unable to return to former employment for medical reasons attributable to the injury, the employee shall receive 26 weeks of economic recovery compensation.” The employee argues each statutory element has been established, thus the compensation judge’s denial of economic recovery benefits is erroneous. We agree.

The employee had surgery for deQuervain’s disease on August 12, 1998, to release the right first dorsal compartment. The parties agree the employee received temporary total disability benefits for a two-week period following the surgery. The parties further agree the employee is not eligible for benefits under the permanent partial disability schedule for her 1995 injury. The remaining statutory requirement for payment of 26 weeks of economic recovery compensation is that the employee must be unable to return to former employment for medical reasons attributable to the 1995 injury. In her August 8, 2000 memorandum, the compensation judge observed “the employee’s restrictions have been modified and refined but she continued to perform job duties similar to those she did on the date of injury.” Apparently, on that basis, the compensation judge denied the employee’s claim.

In the July 17, 1998 Findings and Order, the compensation judge specifically found the employee was unable to return to work in the job she held on either date of injury, and found the employee had permanent restrictions resulting from the 1995 injury. This finding was unappealed and is the law of the case. The compensation judge cannot now reach a contrary conclusion. Accordingly, the employee has proven entitlement to 26 weeks of economic recovery compensation and the employer and Aetna/Travelers are ordered to pay same to the employee and withhold appropriate attorney fees.