COLLEEN LORAAS, Employee, v. GERIATRIC COMTY. CAREGIVERS, a/k/a TWIG HOUSE, and MICOA, Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 7, 2001

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - REMAND. Where the compensation judge has denied temporary partial disability on the basis that the employer and insurer had failed to rebut the presumption that the employee's actual post-injury earnings were equivalent to her earning capacity, the judge must make factual findings which support his conclusion. The matter was remanded for further findings.

TEMPORARY PARTIAL DISABILITY - PART-TIME WORK. In a case where the employee was essentially working full time at the time of the injury and is working less than full time after the injury, the compensation judge must determine whether the reduction in hours was reasonable under the particular facts and circumstances of the case. Relevant factors which should be considered include the number of hours the employee has been released to work by medical experts, the nature of the employee's disability, her age, education, skills and experience, and the number of hours available with her post-injury employer and other employers. The employee can be required to work up to the number of hours she worked in her pre-injury job(s).

Remanded.

Determined by Wheeler, C.J., Wilson, J., and Pederson, J.
Compensation Judge: Donald C. Erickson

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from that portion of the compensation judge's decision granting temporary partial disability benefits to the employee after August 9, 2000. We remand the matter to the compensation judge for further consideration consistent with this decision.

BACKGROUND

The employee, Colleen Loraas, sustained an admitted injury on May 3, 1997, while employed as a caregiver by Geriatric Community Caregivers, hereinafter the employer. At the time of her injury, she had a weekly wage from the employer of $191.30. In addition, the employee and her husband provided foster care services in their home to juvenile male sex offenders who needed constant supervision. They had been providing a foster home since 1987 or 1988. (T. 23-

24.) The employee testified that her hourly wage with the employer at that time was not "a whole lot more than $5.00 an hour," and was "five and a quarter or something like that." (T. 34.) The employee testified that "for the most part I worked full time." (T. 35.)

Shortly after the injury, the employee sought medical attention because of low back and radicular pain. Her initial treating physician, Dr. Bruce Knutsen, a family practitioner, ordered an MRI and released the employee from work. The MRI was noted as "stable and relatively unchanged from the scan done in December 1993." As a result, Dr. Knutsen referred the employee to Dr. Matthew J. Eckman, a physical medicine and rehabilitation specialist.[1] Dr. Eckman prescribed conservative care, including facet block injections in 1997. A functional capacity evaluation (FCE) was performed on October 23, 1997, at the Polinsky Medical Rehabilitation Center. The employee was found to have severe limitations on her ability to function and was unable to return to her former job with the employer. The FCE limited her to working four hours per day for five days per week. On December 10, 1997, Dr. Eckman released the employee to return to work within the restrictions of the functional capacity evaluation and the employee was given light-duty work by the employer.

On January 6, 1998, the employee contacted Dr. Eckman and advised him that she was having trouble working four hours per day, four days per week. She indicated that she was very tired and had increased achiness and pain, with daily headaches. Dr. Eckman restricted the employee to working no more than three hours per day, three days per week until she could be re-evaluated. (Unappealed Finding 19.) The employee testified that periodically she would experience exacerbations or flare-ups of her symptoms. In April 1998, she presented herself at the emergency room with a flare-up of her condition. She indicated that when she attempted to increase her hours of work she also experienced a flare-up.

On August 11, 1999, the employee experienced another flare-up of her condition. She obtained medical care at the St. Luke's Hospital emergency room. She was provided with pain and muscle relaxant medication. She returned to see Dr. Knutsen on August 27, 1999, complaining of low back pain and pain in her right and left leg. Dr. Knutsen noted a great deal of muscle spasm and severe restrictions on motion. Dr. Knutsen indicated that the employee was unable to work and refilled her prescriptions.

Dr. Eckman examined the employee on September 7, 1999, and indicated that her condition had deteriorated since he had last seen her in July 1999. A third MRI conducted on September 25, 1999, was read to show "over all appearance is similar to the prior examination." On October 27, 1999, the employee was examined by Dr. Scott Dulebohn, a neurosurgeon at the Duluth Clinic. On November 29, 1999, the employee was released to sedentary work by Dr. Dulebohn.

[1] The employee had sustained a nonwork-related injury to her low back on December 8, 1993. Following this injury, an MRI was taken which showed a "large L5-S1 herniated disc with extensive impingement on the lateral recess and edema of the nerve root." This condition was treated by surgery on December 21, 1993.

The employee returned to see Dr. Eckman on February 1, 2000. His office notes contain a great deal of information concerning conversations he had with the employee concerning future employment, given her condition. His notes contain the following observations:

> We talked about things such as a motel clerk, telemarketing and that sort of thing. She has had some prior vocational evaluation testing apparently. It is always difficult to say absolutely how far is reasonable for her to commute. It really depends on how easy or how hard the job is when she gets there in part. She very much wants to stay where she lives. Her husband has a job and it is not crucial for family survival that she work. It is hard to know with employers as to how many absences they might be able to tolerate due to her flare up of back pain. She does dislike to miss work and sounds to be someone who gets there if she can. Rather than seeking a wage type typical occupation, unless she could find something easy enough such as a parking lot attendant or other position where she could move around as needed, it is more appropriate, I think, to look into further education to pick up some marketable skills. She only has an eighth grade education, but did get a GED later. She does like to read and is able to use a computer. She is wondering about such as a real estate agent and that sounds to me to be quite realistic as she seems articulate and would meet the public well and this would be more flexible with her hours, I presume. I did suggest that she would need something where she can change positions and move around as needed and obviously no heavy or frequent lifting and carrying and that sort of thing. She is pretty well aware of her restrictions.

Later in his recommendations, Dr. Eckman noted as follows:

> We talked things over quite a bit about vocational rehabilitation aspects and her back condition and what can be done. . . . I recommend that she could continue working in a sedentary position, though must be able to move and change position as she needs. I would recommend she look for part time, that is four hours a day to start, and this could be adjusted for suitable situations. If there were a great job close to home that was more hours than four, that would be certainly a thing to seriously look at. These prospects need to be individualized rather than arbitrarily decided. I strongly suggest she will continue to lack success in a job search for regular wage type jobs and that it would be better for her to go to school and learn a new skill that would be more marketable with a more independent schedule.

When the employee returned to see Dr. Eckman on March 6, 2000, she was experiencing some left knee pain, which was a new symptom. Based on this condition, which she

apparently attributed to walking while searching for work, Dr. Eckman removed her from all work until she was re-evaluated. The employee was again seen by Dr. Eckman on March 21, 2000. After this visit, he issued a report on work ability, indicating that the employee could return to work on March 27 to sedentary work, but that she "must be able to move, change positions as needs." He "recommended part-time work to start, at four hours per day, with adjustments if appropriate." On May 11, 2000, Dr. Eckman issued a letter to the employee's attorney in which he stated the following concerning the employee's ability to work:

> The restrictions which I have set for this patient which were to work for four hours per day are not permanent. Certainly if this patient can find a sedentary job which would allow her to get up and down and move around as needed and not be required to have prolonged sitting or standing in one place and/or to have a position which requires minimal bending, leaning, lifting, and carrying up to 10 lb. per day, she would probably be able to work up to an eight-hour day.

In addition, he stated that, "This patient may be able to drive beyond 30 miles per day. The restriction on 30 miles is somewhat arbitrary. If she were able to find an ideal job then she could possibly drive up to 40 or 45 miles per day." The employee returned to see Dr. Eckman on May 31. At that time he indicated that the employee could return to work at sedentary work but that she "must be able to move, change position as needs" and "a flexible schedule" would be helpful. The employee did not return to see Dr. Eckman until December 7, 2000. At that time, his office notes reflect the following with respect to the employee's ability to work:

> Vocationally she has gotten a job at a mortgage broker company in the Friendly West End of Duluth, now called Lincoln Park. She likes it there. She does clerical type tasks, processing, book work and computer tasks. She is at a desk, but is able to move around as she needs. She puts in about three days at the office and then can do about two days of work at home. The drive in from her home out of Canyon can be a challenge and bothers her. It is a small office and she is getting along well and finds it stimulating.

In his recommendations, he indicated that the employee "will continue with her work restrictions that she must be able to change position as she needs." Dr. Eckman's records contain a note from January 4, 2001, that the employee had called. The note stated:

> [S]he has been working. She commutes each day to Duluth from her home in Canyon. She spends more time in her vehicle and then has the demands of work. As she does that and is doing more walking and things with her abnormal posture from her low back problems she tenses up in the mid and upper back and into her neck and gets some muscle tension headaches, from the sound of it. She was wondering about a trial of chiropractic. I suggested it would be helpful. She discussed a bit about some variabilities [sic] in different practitioners and what they may emphasize. I thought it

may be reasonable for her to give it try if she wishes to do so and hopes that it will be of help to give her some relief. /lm

The report of work ability prepared by Dr. Eckman on December 7, 2000, indicates that the employee was scheduled to return on April 4, 2001. The records from the Polinsky Clinic do not contain any notes from any visits after December 7, 2000. (Pet. Ex. IIIC, Polinsky Medical Rehabilitation records.)

On February 7, 2001, Dr. Eckman's deposition was taken. At that time, he testified that in May of 2000, consistent with his May 11, 2000 report, he felt that the employee was capable of working on a full-time basis. He stated that, "If it was an ideal job, that she could add more hours." (Depo. at p. 43, lines 1-2.) He further testified that as of December 2000, assuming the work was sedentary, he felt that she was capable of working on a full-time basis. Dr. Eckman further stated, "I don't know exactly the hours that she ended up putting in, but we didn't, you know, set a specific restriction on it as long as she was able to do it." (Depo. at p. 44, lines 17-20.) On cross-examination, Dr. Eckman agreed that "from a medical standpoint, based on your years of treating her, you have felt, at least since May of last year, that if she was able to avoid, you know, lifting and all these other things, sedentary work, able to change positions, from a medical standpoint, you -- she could work a full-time week?" (Depo. at pp. 44-45.)

In December 1999, the employee commenced a job search for alternative employment. This search eventually led to obtaining a position as an office manager for Millennium Mortgage in Duluth. She first started work for this employer on August 9, 2000. The employee testified that as a result of her understanding of the limits placed on her by Dr. Eckman she was only working 15 to 20 hours per week for the mortgage company. The employee testified that this position was physically suitable as she had the ability to frequently change positions. The job also gives her the option to do some of her work at home. The employee also testified that since her injury of May 3, 1997, she has continued to be a foster care provider in her home but has modified her activities and delegated tasks that she cannot perform to the foster children. She testified that she has been unable to engage in numerous nonwork activities which she had enjoyed prior to the May 3, 1997 injury.

On several occasions, the employee was examined by Dr. Larry Stern at the request of the employer and its insurer. Dr. Stern found that the employee suffered a temporary aggravation of her pre-existing condition. He stated that the effects of that injury were expected to last approximately six to eight weeks. In the latter part of 1999, Dr. Stern confirmed that the employee had limitations on her ability to work and should not return to her former job with the employer, but indicated that her ongoing problems were not related to the May 3, 1997 injury.

As a result of the opinion of Dr. Stern, the employer and insurer denied liability for periods of wage loss and medical expenses. The employee filed a claim petition seeking temporary total benefits from August 12, 1999 through August 8, 2000, temporary partial disability benefits after August 9, 2000, and medical expenses. The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on February 15, 2001. In his Findings and Order, issued April 16, 2001, the judge awarded the claimed temporary total and temporary partial disability benefits, payment of the employee's prescription expenses and

payment for medical and job search mileage. The employer and insurer appeal only from the award of temporary partial disability benefits from August 9, 2000 to the date of hearing.

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

On appeal, the employer and insurer contend that the compensation judge had no basis upon which to award temporary partial disability benefits to the employee from August 9, 2000 to the date of hearing. It is their principal contention that the employee had been released to work on an essentially full time basis but had limited her work to 15 to 20 hours per week. It is their position that the employee's doctor, on several reports and office notes, and in his deposition, indicated that the employee was capable of working on a full time basis or at least working additional hours toward full time employment. (See Ex. IIIC and deposition at 42-44.) In addition, the employer and insurer argue that additional hours of work, of a sedentary nature which met the employee's restrictions, were available to the employee from her employer, Millennium Mortgage. They point out that the employee testified that Millennium was busy and "there's always more time" available to her for work. (T. 81.) They also noted that the employee enjoyed the privilege of being able to work both at the office of Millennium Mortgage and in her home. The employee testified that she only needed to be in the office two days per month to do the payroll and she could do "quite a bit" of her work at home. (T. 68, 81.) At the employee's current pay rate of $5.60 per hour, she would equal her pre-injury wage after slightly more than 34 hours of work per week.

The employee points out that Dr. Eckman's opinion with respect to her ability to work full time is not unequivocal. His opinion was conditioned on meeting certain conditions. The employee argues that she was unable to work more than 15 to 20 hours per week because she felt that was what she had been limited to by Dr. Eckman. (T. 67.) In addition, the employee contends that she has to commute 40 miles from her home to her place of employment, which places a strain on her. She also stated that when she worked at the office she liked to return home by 1:00 p.m. so she could rest before the foster children returned from school. (T. 68.)

The compensation judge simply stated that "[t]he employer has failed to rebut the presumption that the employee's earnings reflect her current earning capacity" (Finding 30), and that "[t]he employee is entitled to temporary partial disability benefits from August 9, 2000 to the date of the hearing" (Finding 35). In his memorandum, the judge stated that, "[w]ith reference to the temporary partial disability claimed, the preponderance of the evidence indicates that her earnings presumptively reflect her earning capacity and the employer and insurer did not rebut this injury [sic]." The compensation judge made no other findings or comments concerning his award of temporary partial disability benefits.

To establish entitlement to temporary partial disability benefits, the employee must show (1) a physical disability; (2) an ability to work subject to the disability; and (3) an actual loss of earning capacity that is causally related to the disability. Morehouse v. Geo. A. Hormel & Co., 313 N.W.2d 8, 34 W.C.D. 314 (Minn. 1981); Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). The employee has the burden of establishing a diminution in earning capacity that is causally related to the disability. Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 864, 41 W.C.D. 42, 48-49 (Minn. 1988). However, when a disabled employee who is released to return to full-time work finds a full-time job, the earnings from such employment create a presumption of earning capacity. Roberts v. Motor Cargo, Inc., 258 Minn. 425, 104 N.W.2d 546, 21 W.C.D. 314 (1960); Einberger v. 3M Co., 41 W.C.D. 727 (W.C.C.A. 1989).

In appropriate circumstances, this presumption can be rebutted with evidence indicating that the employee's ability to earn is different than the post-injury wage. Patterson v. Denny's Restaurant, 42 W.C.D. 868, 874 (W.C.C.A. 1989); Einberger v. 3M Co., 41 W.C.D. 727 (W.C.C.A. 1989). In order to establish an earning capacity different from actual earnings, there must, however, be more presented than evidence of a hypothetical job paying a theoretical wage, Saad v. A.J. Spanjers Co., 42 W.C.D. 1184, 1194 (W.C.C.A. 1990); Patterson v. Denny's Restaurant, 42 W.C.D. 868, 875 (W.C.C.A. 1989).

In analyzing a case in which the employee was essentially working full time at the time of the injury and is working less than full time after the injury, certain factual analyses must be made by the compensation judge. These considerations are outlined in this court's decision in Nolan v. Sidal Realty Co., 53 W.C.D. 388 (W.C.C.A. 1995). We held that where an employee returns to less than full time work, the earning capacity presumption may be rebutted by a showing by the employer and insurer that the employee has not worked a reasonable number of hours in her post-injury job, up to the number of hours she worked at the time of the injury. The compensation judge must determine whether the reduction of hours is reasonable under the particular facts and circumstances of the case. As we pointed out in Nolan, "whether the wage loss during part time employment is a result of a personal injury is generally a question of fact." Relevant factors which the compensation judge should consider include the employee's reason for working fewer hours, the number of hours the employee has been released to work by medical experts, the nature of the employee's disability and her age, education, skills and experience. Also important are the number of hours available with her post-injury employer or other potential employers, the wage rate and the size of the wage loss.

Under the circumstances of this case, it is important for the compensation judge to make certain factual findings in order to determine if the employer and insurer have rebutted the

presumption that the employee's actual part-time earnings were equivalent to her earning capacity. The compensation judge failed to make any findings concerning this issue. Based on the lack of factual findings, it is not possible to review the compensation judge's decision that the employer and insurer had failed to rebut the earning capacity presumption. On remand, the compensation judge is to address the question of the exact nature of the employee's physical restrictions, any limitations on the number of hours she is able to work, the availability of work with the post-injury employer, and whether such work is available at the employee's home or at the office, the effects of the commute to the work, whether the employee should be increasing her hours of work in connection with a work-hardening program, and any other factors deemed relevant to the question of whether it was reasonable for her, under the unique circumstances of the case, to limit her hours of work. In making these determinations, the compensation judge should review the current record but may accept additional argument based on the record.