

JANINE P. NAUBER, Employee/Appellant, v. CARING HANDS HOME CARE, INC. and AM. COMP. INS. CO./RTW, INC., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 8, 2001

No. [REDACTED SSN]

HEADNOTES

DISCONTINUANCE - TEMPORARY PARTIAL. In the absence of any rebuttal evidence showing other or further work actually available to the employee in her disabled condition, employee was entitled to benefits based on her actual wages from her post-termination, full-time employment, and discontinuance was not appropriate.

Reversed.

Determined by Johnson, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: James R. Otto

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's determination that the employer is entitled to discontinuance of temporary partial disability benefits. We reverse.

BACKGROUND

The employee, Janine P. Nauber, resides in Park Rapids, Minnesota. As of June 11, 1997, the employee worked full time for the employer, Caring Hands Home Care, Inc., also located in Park Rapids, as a licensed practical nurse and home health aide. She was paid \$9.90 per hour for nursing work and \$7.90 per hour as an aide. Most of the work she performed for the employer was in this latter category. The employee also worked in a second job as a waitress and bartender at the Park Rapids Eagles' Club approximately 25 hours per week at a wage rate of \$5.50 per hour. The parties stipulated to a weekly wage of \$455.17 which was based upon the combination of the employee's work in all employments as of that date. Tip income received in the waitressing and bartending work was not considered in determining this wage figure. (Stipulation 1; T1. 6-8.)

The employee sustained an admitted personal injury while working for Caring Hands on June 11, 1997, in the nature of a musculoskeletal strain/sprain to the low back which evolved into a chronic low back strain/sprain condition. Following the injury, the employee was medically off work for about one week and then was released to light-duty work on a four hour per day basis. Her medical restrictions prevented her from returning to either her home health aide or LPN position. A functional capacities evaluation on September 12, 1997 set physical restrictions which included maximum lifting of 21 pounds above the shoulder, maximum lifting of

25.8 pounds from desk to chair, maximum lifting of 17 pounds from floor level, maximum 19.6 pounds carrying, maximum 31 pounds pushing and pulling, and sitting limited to 1-2 hours, standing to 3-4 hours, and walking 4-5 hours in a 6-7 hour workday, with bending and stooping limited to occasional. In the second half of 1997 and into the first months of 1998 she was treated with physical therapy and work hardening. On January 12, 1998 the physical restrictions were modified to permit sitting from 6-8 hours, lifting and carrying to 15 pounds, and occasional pushing and pulling to 65 pounds. The employer provided work as a receptionist for the employee within her restrictions during this period, but was unable to make this a permanent position and laid her off on February 13, 1998. (Exhs. B, D, E, H; T2. 25-27; Findings 1-3, 4; stipulation 1.)

The employee was referred for a rehabilitation consultation. She met with a qualified rehabilitation consultant ("QRC"), Douglas Sloan, on March 5, 1998. Mr. Sloan determined that the employee was eligible for statutory rehabilitation services. At the request of the employee, rehabilitation services were transferred to QRC Ken Moberg. A job placement and service plan agreement was prepared and was signed by the employee on April 22, 1998, calling for job search activities in the primary vocational areas of LPN, medical services and medical treatment advocacy, with secondary job search areas of customer service. The employer and insurer neither executed nor objected to the placement plan. (Exh. H.)

On April 22, 1998, the employee was hired temporarily for a job at seven hours per day, three days per week, selling pull tabs at the Eagles' Club in Park Rapids, filling in for an employee on vacation. She continued with job search activities during this employment. (Exh. H: 4/22 & 4/30/98.)

During May and June 1998 the employee continued job search efforts with QRC assistance looking for LPN and other medical field related service jobs but without success. The QRC focused much of his efforts on consideration of possible retraining for the employee, with particular emphasis on the field of respiratory therapy. On May 20, 1998 the employee's family physician, Dr. Spangler, noted that the employee was trying to work as a bartender at the Eagles' Club a couple of nights per week but that the job did not permit her to sit, and the doctor expressed uncertainty whether the employee would be able to do this job. The employee found a part time job as a cashier and stocker for \$5.25 per hour at a convenience store, Petro Pete's, on June 1, 1998. As of June 8, 1998 she was working part time in three separate jobs, with about 30 hours per week at Petro Pete's, about 18 hours per week tending bar at the Eagles' Club, and occasional work at the Eagles' Club selling pull tabs. A QRC's note of June 21, 1998 indicates that the employee was at that time doing "door work" rather than the bartending at the Eagles' Club for two to three nights per week, along with the work at Petro Pete's, but had been offered permanent work selling pull tabs at \$6.00 per hour. On June 22, 1998 the employee's family physician, Dr. Spangler, recorded that the employee's back pain had gotten much worse and she was tender all along the paravertebral musculature, particularly in the low back. When the employee told him that she had now been offered a job at the Eagles' Club selling pull tabs four days per week which would permit alternating sitting and standing, he recommended that she discontinue the job at Petro Pete's and take the job at the Eagles' Club. (Exh. D: 5/20/98, 6/22/98; Exh. H.)

Job search efforts continued to focus on a full-time return to work in the medical field. The employee was offered a position at North Star Orthodontics at \$5.50 per hour in

July 1998 but the employee and the QRC concluded that the employee should reject this offer in light of the medical problems she had when working the additional Petro Pete job, and in light of the low rate of pay and the likelihood that she would soon be provided with full time hours in the job selling pull tabs at \$6.00 per hour. As a full-time return to higher-paying work in the medical field was unsuccessful, the QRC focused on the development of a retraining plan. A plan was prepared on July 7, 1998 for retraining as a respiratory care practitioner. The employer and insurer did not agree with the proposed retraining. (Exhs. F, H.)

On August 12, 1998 Dr. Spangler noted that the employee had changed jobs and was now working entirely within her restrictions at the Eagles' Club selling pull tabs 3-4 days per week for 7 hours per day, as well as some additional work checking ID's at the club door. She now had stable pain consistent with the underlying diagnosis of chronic intractable pain from severe musculoskeletal strain/sprain. (Exh. D: 8/12/98.)

The employee filed a claim petition on September 23, 1998 requesting approval of retraining. The employer and insurer filed a rehabilitation request on September 28, 1998 objecting to retraining and requesting a change of QRC, and an answer to the claim petition on September 30, 1998 opposing the retraining. (Judgment Roll.)

The QRC's report on September 20, 1998 indicates that the employee had worked 191 hours selling pull tabs during the preceding month in addition to three nights at the door. The QRC reported that he did not believe that the employee could perform more job search activity than she had been doing in light of this work schedule. (Exh. H: 9/20/98.)

On November 3, 1998 the employer offered the employee a part-time, on-call position as a home health aide, with no guaranteed number of hours, expressly conditioned on the employee's meeting the physical restrictions of the position, which included an ability to carry 30 pounds, push and pull 60 pounds, lift 50 pounds, and squat, stoop and bend. The employer and insurer contemplated the employee continuing her current employment in addition to accepting this job. The QRC called to clarify the specific hours offered and was told that the job offered varied hours filling in on-call whenever other staff was sick, as well as some work on the third weekend of each month. The employee did not accept the job offer and the employer and insurer filed a notice of intent to discontinue temporary partial disability compensation ("NOID") on November 13, 1998. The NOID alleged as grounds for discontinuance that the employee's current level of earnings did not reflect her true earning capacity, in that "the employee has failed to adequately perform an adequate job search for employment in addition to her current employment at the Eagles' Club" and "has refused additional gainful employment that was offered by Caring Hands Home Care." (11/13/98 NOID; Exh. 1; Exh. H: 11/21/98.)

An administrative conference on the NOID at the Department of Labor and Industry apparently resulted in an order, served on or about December 17, 1998, denying the proposed discontinuance on the basis that the part-time, on-call job offered was outside the employee's restrictions and that the employee's job search was reasonably diligent in light of her full time work schedule at the Eagles' Club. The QRC wrote to the employer and insurer requesting clarification as to the direction of the employee's job search. The employer and insurer responded on January 27, 1999, stating that the employee should pursue additional part-time employment or

a new, full-time job equaling or surpassing her preinjury wage. The employer and insurer filed a petition to discontinue on February 9, 1999 incorporating the grounds in the NOID by reference and requesting that the matter be consolidated with their prior rehabilitation request and with the employee's claim petition. The QRC reported on February 27, 1999 that job search efforts were continuing and that the employee was at that time working two positions for a total of 60 hours per week. The QRC opined that the employee's "skill set deficit" also affected her ability to increase her economic status. (Judgment Roll: 2/9/99 petition to discontinue; Exh. H: 12/19/98 - 2-27-99; 2/27/99 letter.)

Job search efforts continued to focus on higher-paying full time work for the employee, but without success. On May 7, 1999 the QRC noted that the employee was still working both at pull tab sales and checking identification at the door at the Eagles' Club but mostly did the pull tab work and rarely performed the door work. On August 27, 1999, the QRC noted that the employee had received a raise to \$6.75 per hour and was getting in excess of 40 hours per week in the jobs doing pull tabs and door checking. (Exh. H.)

On September 13, 1999 the employer offered the employee a return to work as a home health aide at approximately 20 hours per week, although the number of hours was not guaranteed. The rate offered was \$7.90 per hour. The offer required the employee to carry 30 pounds, push and pull 60 pounds, lift 50 pounds, and squat, stoop and bend. (Exh. I.)

On October 1, 1999 Dr. Spangler recorded that the employee was working 70-80 hours per week selling pull tabs without increased back pain. On October 13, 1999 the employee was seen by her low back physician at the Dakota Clinic, Dr. Bonnie Z. Dean, M.D., at the request of Dr. Spangler to review questions about the employer's most recent job offer. Dr. Dean opined that the restrictions set by the prior functional capacities evaluation remained valid, and that the employee was not capable of returning to work in the job with the employer. (Exh. D: 10/1/99; Exh. C: 10/13/99.)

The QRC placed the employee's rehabilitation efforts in a "file monitoring" status on October 24, 1999 pending the resolution of the disputed issues between the employer and insurer and the employee. In this status, the QRC's efforts were directed at reviewing want ads, making random telephone contacts with employers likely to have higher paying employment possibilities, and review with the Workforce Center, with follow up by the employee on any leads for a physically appropriate position. This status continued through the date of hearing. (Exh. H.)

On February 16, 2000, Dr. Spangler noted that the employee was working about 42 hours per week at the Eagles' Club. (Exh. D: 2/16/2000.)

A hearing was held on March 28 and 29, 2000 before a compensation judge of the Office of Administrative Hearings. Following the hearing, the judge determined that the proposed course of retraining was inappropriate for the employee, and that the jobs offered by the employer were not within the employee's physical restrictions. (Findings 8-12; 14). The judge granted discontinuance, however, on the basis that the employee theoretically could attain a weekly wage comparable to that she had on the date of injury were she to be working 65 hours per week and

that she was under-employed through limiting her hours of work. The employee appeals from the discontinuance of temporary partial disability benefits.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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 reasoned that, as the employee's pre-injury weekly wage was based on the combination of three jobs, two with the employer and one at the Eagles' Club as a bartender and waitress, totaling about 65 hours per week, that the employee's average hourly wage in all employments on the date of injury was approximately \$7.00 (stipulated weekly wage of 455.17 divided by 65 hours). The judge considered the employee's current hourly wage at the Eagles' Club of \$6.75 per hour to be the equivalent of the pre-injury hourly wage in light of her testimony that she also received tips. Based on this presumed equivalence of the hourly wage, the judge reasoned that the employee would sustain no loss of earning capacity if she worked at this rate, with tips, for 65 hours per week, the number of hours she averaged in her various jobs on the date of injury. The judge further concluded that the evidence in the case suggested that the employee was physically capable of working more than five days per week and he apparently reasoned that if she worked 9-10 hour days each of the seven days of the week she would attain the same earning capacity she held on the date of injury. Noting that the rehabilitation efforts and related job search activities had not focused on additional part-time work to bring the employee to 65 hours, the judge concluded that the employee was effectively "under-employed by limiting her hours of work." See Findings 5-7, 13, 16-18 and Mem. at 6-7.

The employee on appeal asserts that the compensation judge erred in failing to adhere to the proper legal standards relating to the determination of post-injury earning capacity and further raises several additional specific objections on appeal, including the assertion that the medical question of whether the employee was capable of working more than five days per week was not properly raised by the NOID or the petition to discontinue and that as a result the employee

did not have an effective opportunity to introduce evidence on that issue¹; that the employee's tip income subsequent to her injury should not be included in calculations as the parties' stipulated weekly wage at the time of injury had not included tip income also being received as of that date; and that the compensation judge erred in relying on what the employee asserts is erroneous information recorded by Dr. Spangler to the effect that she was working 70-80 hours per week in October 1998.

We do not reach all of the specific objections raised by the employee as we conclude that the compensation judge did indeed err as a matter of law in his determination of the issues of post-injury earning capacity and discontinuance.

A specific basis for the discontinuance alleged in this case was that the employee was underemployed, i.e., that the employee's post-injury earning capacity was greater than that demonstrated by her post-injury employment. We therefore conclude that the compensation judge did not exceed the scope of the issue presented in reaching the question of earning capacity. We further conclude that there was an adequate factual basis for the judge's implicit finding that the employee may be physically capable of working as much as 65 hours per week, so long as the work otherwise meets her post-injury medical restrictions. However, the compensation judge erred in his application of these facts to the issue of earning capacity presented.

In order to be eligible for temporary partial disability benefits, an employee must establish a work-related injury resulting in disability, an ability to work subject to that disability, and 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). There is no dispute in this case that the employee sustained a disabling injury resulting in permanent physical restrictions. With respect to the employee's earning capacity, an employee's post-injury wage if more than nominal and less than the weekly wage on the date of injury creates a presumption of a reduced earning capacity. *See, e.g., French v. Minn. Cash Register*, 341 N.W.2d 290, 36 W.C.D. 385 (Minn. 1985). This presumption may be rebutted by evidence indicating that the employee's ability to earn is different than the post-injury wage. Schwan v. Fabcon, 45 W.C.D. 209, 211 (W.C.C.A. 1991, *summarily aff'd* Minn. Sept. 4, 1991.) However, it has long been held that rebuttal of this presumption requires a showing by the employer of "something more than a theoretical possibility of a different position or wage." Patterson v. Denny's Restaurant, 42 W.C.D. 868, 875 (W.C.C.A. 1989).

In the present case, the employer and insurer relied only upon the part-time, on-call job the employer offered to the employee in November 1998 to demonstrate that specific work was actually available which could have afforded the employee greater post-injury earnings. The compensation judge, however, found that the job offered by the employer was not physically suitable. It was, therefore, not work which was available to the employee in her disabled condition. Thus, as the judge properly recognized, the employer's job offer failed to demonstrate a greater

¹ In connection with this argument, the employee has attached additional evidence to her brief which she contends should be considered as bearing on this issue. As our consideration of an appeal is limited to review of the record below, and we have neither reviewed nor considered this material in arriving at our decision.

post-injury earning capacity or that by refusing the job the employee was thereby unreasonably limiting her post-injury income.

Other than the job offer by the employer, the record is devoid of any evidence that there were other jobs available to the employee within her restrictions which either would have paid her more than her job with the Eagles' Club or by which she could have augmented her income by working in such job or jobs in addition to her job with the Eagles' Club. Nor was there any evidence that additional hours were actually available to the employee in her job with the Eagles' Club and that she was limiting her hours by declining further available work there. Certainly the evidence indicates that the employee's hours at that employment have varied, and there was evidence, noted by the compensation judge, which could have suggested that at some time during 1998 the employee was afforded more than 65 hours a week in the job with the Eagles' Club. This does not constitute evidence that such hours were or are regularly available. Nor would occasional periods of earnings in excess of the pre-injury weekly wage provide a basis for discontinuance of benefits in the weeks when there was an absence of such evidence. Cf., e.g., Oswskey v. Wholesale Club, slip op., (W.C.C.A. Aug. 10, 1994) (temporary partial disability is calculated on weekly earnings and not on yearly averages and where there are variable post-injury earnings the employee is entitled to benefits during weeks of diminished earnings).

Similarly, while the evidence supports the finding that the job search efforts were not specifically directed at seeking to increase her hours of work to 65 hours per week, and instead were focused on finding higher-paying full time work, we note that this was the direction of job search specifically set by the employee's rehabilitation plan, and the uncontroverted evidence was to the effect that she fully complied and cooperated with the rehabilitation efforts directed by her QRC. As we have often stated in previous cases, where an employee is under a rehabilitation plan, the employee's eligibility for temporary benefits depends "not so much on the employee's job search efforts as on the employee's cooperation with rehabilitation." Jones v. North County Health Servs., No. [REDACTED SSN], slip op. at 6 (W.C.C.A. Mar. 16, 1994). See, e.g., Shreiner v. Alexander Constr. Co., 48 W.C.D. 469 (W.C.C.A. 1993); Grieco v. Minnesota Natural Foods, 48 W.C.D. 174 (W.C.C.A. 1992); Bauer v. Winco/Energex, 42 W.C.D. 762 (W.C.C.A. 1989); Sherry v. Ford Motor Co., No. [REDACTED SSN] (W.C.C.A. Apr. 24, 1991). We do not think that an employee's cooperation with the objectives and direction of a bona fide rehabilitation plan can form the basis for a determination of voluntary underemployment.

The employer and insurer have provided no evidence of any employment actually available to the employee which would demonstrate a greater earning capacity. The presumption of actual earnings constituting earning capacity is "a rule of law dictating decision on unopposed facts." Jerabek v. Teleprompter Corp., 255 N.W.2d 377, 29 W.C.D. 621 (Minn. 1977) (citation omitted; emphasis added). In the absence of any rebuttal evidence showing other or further work actually available to the employee in her disabled condition, the employee was entitled to benefits based on her actual wages from her post-termination, full-time employment, and discontinuance was not appropriate. DeNardo v. Divine Redeemer Memorial Hospital, 450 N.W.2d 290, 42 W.C.D. 626 (Minn. 1990); see Noll v. Ceco Corp., 42 W.C.D. 553 (W.C.C.A. 1989). The order discontinuing temporary partial disability compensation is reversed.