

DANA VAN MILLIGAN, Employee, v. NW. AIRLINES CORP. and LIBERTY MUT. INS. COS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 11, 2001

No. [REDACTED SSN]

HEADNOTES

TEMPORARY TOTAL DISABILITY - WITHDRAWAL FROM THE LABOR MARKET. Temporary disability benefits are not payable during a period of retraining absent certification or approval of retraining or a demonstrated inability to find other employment. As the compensation judge awarded temporary total disability benefits based on her determination that the employee made reasonable and diligent efforts to vocationally rehabilitate herself in part by enrolling in college and participating in unapproved retraining, but failed to make a specific finding regarding the reasonableness and diligence of the employee's job search, the matter is vacated and remanded for redetermination.

Vacated and remanded.

Determined by Johnson, J. Wilson, J. and Rykken, J.
Compensation Judge: Jennifer Patterson

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal from the compensation judge's award of temporary total disability benefits to the employee from August 21, 2000 to the date of hearing. We vacate and remand this matter for reconsideration in accordance with this decision.

BACKGROUND

Dana Van Milligan, the employee, sustained a personal injury to her low back on September 10, 1999, while working as a flight attendant for the employer, Northwest Airlines Corporation. The employer and insurer admitted liability, and paid temporary total disability benefits to the employee from the date of injury through August 21, 2000.

From September through December 1999, the employee received treatment for her back from various medical providers in Minnesota, California and Nevada. During most, but not all, of this time the employee was released to return to work with light-duty restrictions. The employee began treating with Dr. Peter Saltzman in Farmington, New Mexico, on July 25, 2000. Dr. Saltzman also released the employee to work with light-duty restrictions. The employee claimed she was placed off-duty, in on-the-job injury (OJI) status with the employer, and was not able to return to work as a flight attendant due to her restrictions.

At the time of the injury, the employee lived in Pebble Beach, California, commuting to her home base with the employer in Minneapolis, Minnesota. In early January 2000, the employee moved to Farmington, New Mexico. The employee enrolled as a student at San Juan College in Farmington and began taking general college courses in mid-January 2000. The employee began looking for employment while attending school. In about April 2000, the employee sought job search assistance from the Farmington office of the New Mexico Department of Labor. In the spring of 2000, the employee also contacted the New Mexico Department of Vocational Rehabilitation (DVR) for tuition assistance at the recommendation of the San Juan College financial aid office. The employee began working with Stephen Nordhus, a counselor at the New Mexico DVR, on June 8, 2000. An employment plan was developed which called for completion of a one-year pilot training program at San Juan College, along with a job search. The employee began the pilot training program in mid-August 2000. As of the date of hearing on January 17, 2001, the employee had not returned to work.

On August 23, 2000, the employer and insurer served a Notice of Intent to Discontinue Benefits (NOID) on the grounds that the employee was a student at San Juan College, had withdrawn from the labor market and had failed to conduct a reasonable and diligent job search. Following an administrative conference, a compensation judge at the Settlement Division issued an Order on Discontinuance on September 21, 2000, permitting the employer and insurer to discontinue payment of temporary total disability benefits to the employee.

On September 25, 2000, the employee filed a Rehabilitation Request seeking a rehabilitation consultation and statutory rehabilitation services. The employer and insurer agreed the employee was entitled to a rehabilitation consultation, but denied any entitlement to rehabilitation services. As of the date of hearing, the employee had received no statutory rehabilitation assistance, nor had the employee made a request for approval of a retraining plan.

On October 27, 2000, the employee filed an Objection to Discontinuance of her temporary total disability benefits. An expedited hearing was scheduled on January 17, 2001. At the hearing, the issues were limited to those raised by the Objection to Discontinuance as the employer and insurer stated they were not ready to proceed with the employee's rehabilitation request.

In a Findings and Order, served and filed February 27, 2001, the compensation judge found the employee had made "diligent efforts to rehabilitate herself" and had not withdrawn from the labor market. The judge, accordingly, ordered the employer and insurer to pay to the employee temporary total disability benefits from August 21, 2000 through the date of hearing. The employer and insurer appeal.

DECISION

1. Retraining - Reasonable and Diligent Job Search

The employer and insurer assert the compensation judge applied an incorrect legal standard and the judge's finding that the employee did not withdraw from the labor market to

attend school is erroneous. A decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which the Workers' Compensation Court of Appeals may consider de novo. Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993). We vacate and remand for reconsideration.

The compensation judge awarded ongoing temporary total disability benefits from and after August 21, 2000, based on her finding that,

[T]he employee's actions in taking courses, working on flight training and searching for work have been reasonable and show that she has been "proactive, attempting to move on with her life." (See Exhibit H.) The opinion of QRC Busse and the employee's testimony support the conclusion that the employee has been making diligent efforts to rehabilitate herself since August 21, 2000 and that both her classroom and her job search objective have been to return to work at no wage loss as quickly as possible. (Finding 26.)

In Le v. State, University of Minnesota, 34 W.C.D. 547 (W.C.C.A. 1982), this court affirmed an award of temporary disability benefits to an employee during a period of unapproved retraining,¹ noting "the employee is a highly motivated individual with respect to his wanting to obtain suitable employment and we believe that his efforts to receive training can clearly be considered as reasonable and diligent." Id. at 547. The supreme court reversed, stating that neither this court nor the supreme court had ever held that an award of temporary disability benefits could be based on an employee's reasonable and diligent efforts to acquire additional education or training in the absence of certification or approval of a retraining plan. The court, accordingly, held that temporary disability benefits are *not* payable to an injured employee during a period of retraining absent certification or approval for retraining or a demonstrated inability to find other employment. Le v. State, University of Minnesota, 330 N.W.2d 453, 35 W.C.D. 665 (Minn. 1983).

In Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988), the employee, who was released to return to light-duty work, enrolled in a two-year electronics course which was not part of an approved retraining plan. Evidence of a job search was sharply disputed, although the employee testified he continued to make job inquiries after enrolling in school. The compensation judge found the employee failed to make a reasonable and diligent job search and denied temporary total disability benefits. The supreme court upheld the denial of benefits, holding that an employee seeking total disability benefits must prove total disability by showing unavailability of other employment after a diligent search for suitable work.

The injured employee proves total disability by showing that work the employee is capable of doing is unavailable, and unavailability is shown by a diligent job search to no avail.

¹ "Retraining" means a formal course of study in a school setting designed to return an employee to suitable gainful employment. Minn. Stat. § 176.011, subd. 23.

Id. at 733, 40 W.C.D. at 954. A diligent job search is one that is reasonable under all the facts and circumstances peculiar to the case. Id. at 734, 40 W.C.D. at 956. The determination of whether or not an employee has performed a diligent job search is a question of fact for determination by the compensation judge. Kunferman v. Ford Motor Co., 56 W.C.D. 163 (W.C.C.A. 1996).

In this case, the compensation judge, although acknowledging that approval for retraining had not been sought, concluded the employee had not withdrawn from the labor market by attending school, explaining:

[The employee's] efforts to upgrade her employability by finishing her college degree and working part time while going to school shows strong motivation to rehabilitate herself and get on with her life. * * * Given the fact that the employee did not have available to her the services of a Minnesota QRC at any point through the date of hearing, her decisions . . . to increase her employability by finishing the few courses left in her college degree; to seek out a counselor at the New Mexico Department of Vocational Rehabilitation; and to follow the advice of a counselor she was assigned to work with were reasonable and support the conclusion that she was making diligent efforts to rehabilitate herself vocationally through the date of hearing.

(Mem. at 9.) While the employee's efforts to obtain additional schooling and improve her employability may be commendable, the question is not whether the employee made reasonable efforts to vocationally rehabilitate herself, but (in the absence of an approved retraining plan) whether the employee "demonstrated [an] inability . . . to find other employment." Compare, e.g., Fischer v. Elmers Distrib. Co., 57 W.C.D. 165 (W.C.C.A. 1997); Kunferman, 56 W.C.D. at 166; Wheeler v. Gould, Inc., 38 W.C.D. 435 (W.C.C.A. 1985); Welter v. CDL Commissary, Inc., slip op. (W.C.C.A. May 5, 1994); Hansen v. Beaver Indus., slip op. (W.C.C.A. Apr. 30, 1992); Marquardt v. Jennie-O Foods, Inc., slip op. (W.C.C.A. Aug. 7, 1991); Burks v. Ault, Inc., slip op. (W.C.C.A. Dec. 14, 1990).

The compensation judge made no specific finding determining whether the employee did or did not make a reasonably diligent search for other employment under the circumstances. We, therefore, vacate the findings of the compensation judge, and remand the case for redetermination.²

2. Expedited Hearing - Findings Relating to Rehabilitation

The employer and insurer also appeal on the basis that the majority of the compensation judge's findings exceeded her jurisdiction under the expedited hearing procedures

² With the exception of our decision regarding the legal standard for entitlement to temporary total benefits under Le, no opinion on the merits of any claim or defense raised by the employee or the employer and insurer is intended by this decision.

provided for in Minn. Stat. § 176.238, subd. 6.³ In particular, the employer and insurer object to the compensation judge's findings relative to the employee's cooperation with rehabilitation services and the employee's participation in retraining.

The employer and insurer seek to discontinue payment of temporary total disability benefits based on the employee's enrollment in school and in the pilot training program and the employee's alleged failure to conduct a reasonable and diligent job search. Evidence of rehabilitation services provided or obtained (or the lack thereof), the employee's enrollment in school and/or participation in a retraining program, the employee's restrictions and ability to return to work in her pre-injury job or other employment, any reasonable expectations regarding a return to work with the employer, and other similar issues are clearly relevant and appropriately addressed by the compensation judge in determining whether the employer and insurer have established a basis for discontinuance on the stated grounds.

Moreover, it appears to us that the employer and insurer's request to discontinue temporary total disability benefits and the employee's request for rehabilitation assistance raise many of the same issues and, if tried separately, could result in inconsistent or conflicting results. We, accordingly, order the matters be consolidated for hearing on remand.

³ Minn. Stat. § 176.238, subd. 6(d), states, in pertinent part: "The hearing shall be limited to the issues raised by the notice or petition unless all parties agree to expanding the issues."