SOUTH DAKOTA DEPARTMENT OF LABOR

DIVISION OF LABOR AND MANAGEMENT

DENA KELSHEIMER
Claimant,

v.

GATEWAY,
Employer, and

ST. PAUL COMPANIES,
Insurer.

HF 103, 2003/04

DECISION

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. Robert Tiefenthaler represents Claimant, Kelsheimer. Michael S. McKnight and Charles A. Larson, of Boyce, Greenfield, Pashby & Welk, L.L.P., represent Employer/Insurer.

Issue:

Whether Kelsheimer is entitled to either temporary total disability benefits or temporary partial benefits under the South Dakota Workers' Compensation Law.

Facts

This matter has been submitted by the parties pursuant to their written Stipulation of Facts. The parties agreed to the following:

Kelsheimer began work at Gateway on April 29, 1996. Kelsheimer was laid off on December 15, 2003, as part of a general layoff of workers at Gateway. The layoff at Gateway was part of an economically driven general reduction in force at Gateway. Kelsheimer could have continued working at Gateway but for the layoff. Kelsheimer was not laid off because of any disability. Kelsheimer was making $11.84 per hour and was working approximately 40 hours per week at the time her employment was terminated with Gateway.

The date of Kelsheimer's first injury at Gateway was April 2, 1998. Kelsheimer was holding a drill in her hand and felt pain up her arm. She missed one day of work. Dr. Martin did not place any work restrictions on Kelsheimer as a result of the April 2, 1998, injury.

The next date of injury to Kelsheimer at Gateway was April 17, 2003, when Kelsheimer hit her left elbow on a piece of metal. Dr. Martin sent Kelsheimer back to work with a temporary restriction of not using her left arm.

The next date of injury to Kelsheimer is identified as April 25, 2003, when Kelsheimer went in for a checkup on her left elbow and was re-diagnosed with bilateral wrist tendonitis. She was given work restrictions at that time. Kelsheimer saw Dr. Himmler who prescribed splints and

restricted her work activities temporarily to 30 hours per week with a prohibition against lifting anything over 5 pounds. Dr. Himmler did not assign any permanent work restrictions.

Kelsheimer missed work from October 21, 2003 until December 2, 2003, as a result of the April 17, 2003, injury, and the April 25, 2003, injury. On December 2, 2003, Kelsheimer was released to restricted duty of working thirty (30) hours per week with no repetitive work and no lifting over five (5) pounds. On December 8, 2003, she was increased to thirty-two (32) hours per week with the same restrictions. Kelsheimer was paid temporary total disability benefits during this time. Kelsheimer does not currently have any treatments scheduled with any doctor for her hands.

Kelsheimer was laid off on December 15, 2003, and is claiming temporary total disability benefits from that date until given an impairment rating by Dr. Mary Nelson-Himmler on February 24, 2004. This is a total of 9.6 weeks. Given Kelsheimer's weekly worker's compensation rate of $315.73, this results in Kelsheimer seeking a total of $3,031.01 in temporary total disability benefits. Kelsheimer was making $11.84 per hour and was working 40 hours week. Thus, Kelsheimer's gross average weekly wage was $473.60 per week. Kelsheimer's applicable weekly worker's compensation rate is $315.73.

Kelsheimer did not immediately seek other employment after her layoff from Gateway as she wanted to spend time with her kids. Kelsheimer became employed by Winnavegas Casino on June 1,2004.

Although Kelsheimer did not work at Gateway after December 15, 2003, she continued to be paid her regular wage for 60 days after December 15, 2003. In addition to receiving her regular pay for 60 days, Kelsheimer received a severance package from Gateway that included one week of salary for every year that she had been employed with Gateway as well as payment for her unused vacation time. Kelsheimer was employed at Gateway for over seven years so she received seven weeks of full pay and payment for her unused vacation as part of her severance package.

Analysis and Decision

Kelsheimer has "the burden of proving all facts essential to compensation[.]" King v. Johnson Bros. Constr. Co., 83 SD 69, 73, 155 NW2d 183, 185 (1967).

Kelsheimer contends she is entitled to temporary total disability benefits or temporary partial disability benefits from December 15, 2003, the date she was laid off, to February 24, 2004, the date she received a rating for permanent impairment.

Temporary Total Disability

SDCL 62-4-2 provides:

> No temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days. If the seven day waiting period is met, benefits shall be computed from the date of the injury.

The following facts, contained in the parties' stipulation of facts, are not disputed: Kelsheimer suffered work-related injuries on April 17 and 25, 2003. She missed work from October 21, 2003, until December 2, 2003, as a result of these injuries, and was paid temporary total disability benefits for this lost time.

Kelsheimer did not prove that she is entitled to temporary disability benefits under SDCL 62-4-2 at any time after December 15, 2003. The evidence is undisputed that she did suffer an injury that incapacitated her for a period of seven consecutive days. However, her doctor released her from temporary total disability on December 2. There is no evidence in the record that she has been totally incapacitated due to her injuries since that time.

Temporary Partial Disability

SDCL 62-1-1(7) defines the time periods covered by temporary partial and total disabilities as "the time beginning on the date of injury, subject to the limitations set forth in 62-4-2, and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first."

SDCL 62-4-5 provides

> If, after an injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing the employee's usual and customary line of employment, or if the employee has been released by the employee's physician from temporary total disability and has not been given a rating to which § 62-4-6 would apply, the employee shall receive compensation, subject to the limitations as to maximum amounts fixed in § 62-4-3, equal to one-half of the difference between the average amount which the employee earned before the accident, and the average amount which the employee is earning or is able to earn in some suitable employment or business after the accident. If the employee has not received a bona fide job offer that the employee is physically capable of performing, compensation shall be at the rate provided by § 62-4-3. However, in no event may the total calculation be less than the amount the claimant was receiving for temporary total disability, unless the claimant refuses suitable employment.

Hendrix v. Graham Tire Co., 94 SD 654, 520 NW2d 876 provided a test for entitlement to temporary partial disability benefits under SDCL 62-4-5:

> Under this statute, to receive temporary partial benefits, an employee must establish:
>
> 1. That he is partially incapacitated from pursuing his usual and customary line of employment due to his work related injury; or
> 2. That he has been released by his physician from temporary total disability and has not yet been given a permanent partial disability; and

3. That his present average earned income or that amount he is capable of earning at some suitable employment or business is less than what his average earned income was prior to his disability.

If the employee makes his requisite showing, then he will receive the difference between his pre- and post-injury average earning amounts, subject to the limitations set forth in SDCL 62-4-3.

Kelsheimer made a prima facie showing that she is entitled to temporary partial disability benefits under SDCL 62-4-5.

First, Kelsheimer proved that she was "partially incapacitated from pursuing [her] usual and customary line of employment due to [her] work related injury." After her return to work on December 2, 2003, Kelsheimer was restricted to working only thirty (30) hours of her normal forty (40) hour week with no repetitive work and no lifting over five (5) pounds. On December 8, 2003, she was increased to only thirty-two (32) hours per week with the same restrictions. At the time she was laid off, she was still working under these restrictions.

In addition, the parties agree that after Kelsheimer was released by her doctor from temporary total disability she was not given a rating to which SDCL 62-4-6 would apply until February 24, 2004. During this time period, Kelsheimer had been "released by [her] physician from temporary total disability and ha[d] not yet been given a permanent partial disability." The parties agree that the time period from December 15, 2003 to February 24, 2004, represents 9.6 weeks.

Kelsheimer has proven a right to temporary partial disability benefits under SDCL 62-4-5 for a period of 9.6 weeks.

Economic Layoff

Employer/Insurer argue that because Kelsheimer was laid off for economic reasons unrelated to her disability, she is not be entitled to benefits.

Employer/Insurer's reliance on Whitney v. AGSCO Dakota, 453 N.W.2d 847, 851 (SD 1990) and Beckman v. John Morrell & Co. 462 N.W.2d 505, 509 (SD 1990) is misplaced. In Whitney the claimant admitted he had not experienced the requisite change in his physical condition to reopen his claim for benefits under SDCL 62-7-33. The court held a mere economic change was insufficient. In Beckman, the claimant's participation in a strike, rather than any medical problem, kept him off work.

These two cases cited by Employer/Insurer place the emphasis where it properly belongs, on the claimant's physical or medical condition. The claimants in Whitney and Beckman could not establish physical or medical entitlement to benefits, the better analogy to the present facts is presented by Jackson v. Lee's Travelers' Lodge, Inc., 1997 SD 63, 563 NW2d 858.

Jackson was held to be entitled to total disability benefits even while incarcerated:

> Whether a totally disabled employee may collect workers' compensation benefits while incarcerated is a question of first impression for this Court. The South Dakota Department of Labor addressed this question involving temporary total disability benefits in Miller v. River City Builders, HF No. 365, 1990/91 (October 21, 1991). In Miller, the Department held that "[i]ncarceration, in itself, does not require a suspension of temporary total disability payments." The Department noted this holding was in line with the rule of the majority of jurisdictions having addressed this issue "that incarceration is not an independent intervening cause; it is loss of earning capacity, not loss of wages per se, that is compensable in workers' compensation cases, and a claimant's earning capacity does not change by virtue of incarceration alone." (citations omitted). The Department further noted its analysis was similar to that used by this Court in Beckman v. John Morrell & Co., 462 NW2d 505 (SD 1990). In Beckman, we determined the claimant's participation in a strike, rather than a medical problem, precluded him from being offered light duty or favored work, thereby terminating benefits. Id. at 509. The Department stated in Miller, "[a] strike, like incarceration, 'removes a worker from the labor market,' but appears to play no role in a claimant's benefit eligibility unless the claimant is medically capable of performing work." In the present case, Jackson was found not medically capable of performing work and it is this reason, rather than his incarceration, which has removed him from the labor market.

Jackson ¶ 27.

Similar cases from other jurisdictions are persuasive:

Wills v. Kratz Farm, 509 N.W.2d 162 (Minn. 1993). After the claimant had been laid off he began experiencing back pain and underwent spinal fusion surgery which left him medically unable to work. The court held that injured employees who happen to be on layoff from suitable employment when their compensable injuries worsen are just as deserving and just as in need of compensation as workers who are employed when the worsening of their work-related injury causes them to stop working. The claimant was awarded temporary total disability benefits.

Danley v. General Motors Corp., 173 Mich. App. 271, 433 N.W.2d 329 (1988). The claimant was awarded workers' compensation benefits up to the claimant's last day of work prior to a layoff. The board found that the claimant would no longer have a continuing disability because the work that he performed, which caused his back condition to be symptomatic, would no longer be required of him. The court determined that this finding could be interpreted to mean that the claimant's entitlement to benefits was terminated due to his layoff and held it was error to find that the claimant's layoff from employment terminated his workers' compensation benefits. What is compensable is the loss of wage-earning capacity rather than actual loss of wages. The claimant's layoff did not affect his wage-earning capacity. The court rationalized that if that were the case, any employer would be able to terminate a claimant's entitlement to benefits by merely laying off the employee. The court remanded the case to determine if the claimant remained disabled on the date of layoff, regardless of the fact that the claimant was being laid off after that date.

State ex rel. Andersons v. Industrial Comm'n, 64 Ohio St. 3d 539, 597 N.E.2d 143 (1992). The claimant was in seasonal agricultural employment. He suffered a work injury and recovered temporary total disability following his seasonal layoff. The employer argued that compensation was barred because the claimant's departure from work was voluntary, since he chose seasonal labor in the first instance. The court rejected this argument and held that the claimant's layoff and the temporary nature of his work did not bar or reduce his wage loss compensation.
Workers' compensation benefits for are meant to compensate for lost earning capacity rather than lost wages. See Hendrix, 520 NW2d at 876.

Under the present facts, Kelsheimer was entitled to temporary partial disability benefits due to her work related medical condition. Her earning capacity did not change because of her layoff, but was the result of her work-related injury. Her layoff did not operate as an intervening superseding cause, and does not require a suspension of those benefits.

Whether Kelsheimer's benefits should be offset

Employer continued to pay Kelsheimer her regular wage for 60 days after December 15, 2003. Kelsheimer also received seven weeks of wages under a severance package. Employer/Insurer argue they are entitled to offset these wages against Kelsheimer's right to temporary partial disability benefits.

SDCL 62-3-18 provides:

> No contract or agreement, express or implied, no rule, regulation, or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this title except as herein provided.

SDCL 62-7-5 requires Department approval of any agreement between employer and employee in regard to workers' compensation:

> If the employer and employee reach an agreement in regard to the compensation under this title, a memorandum of the agreement shall be filed with the department by the employer or employee. Unless the department within twenty days notifies the employer and employee of its disapproval of the agreement by letter sent to their addresses as given in the memorandum filed, the agreement shall stand as approved and is enforceable for all purposes under the provisions of this title.

In Middleton v. City of Watertown, 70 SD 158, 16 NW2d. 39 (1944), the employer claimed that any workers' compensation award made to the claimant "should be reduced by the amount of wages paid by the city to the employee during disability." The court held:

> There is no evidence to show that the wages paid to the employee during disability were paid under any agreement that the employer was to receive credit therefor on any future award. Therefore the amount of the wages paid by the city in excess of the award amounted to a gratuity. Such gratuity could not be used by the city as a setoff against its statutory liability to the employee under the Workmen's Compensation Act, and

consequently such payments did not affect the liability of the insurance company to the employee.

In the present case, Employer, in connection with its mass layoff, put a severance package in place for its employees. There is no evidence that the wages or other amounts paid under this severance agreement were to be credited toward any future workers' compensation award. To do so would be to treat Kelsheimer differently than employees who were laid off without disability or restrictions.

Furthermore, no agreement between Kelsheimer and Employer/Insurer was at any time submitted to the Department for approval.

Employer/Insurer are not entitled to offset either the sixty days of wages paid after December 15, 2003, or the seven weeks of wages paid pursuant to the severance agreement against Kelsheimer's right to temporary partial disability benefits.

Counsel for Kelsheimer shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Counsel for Employer/Insurer shall have an additional 10 days from the date of receipt of Kelsheimer's proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Kelsheimer shall submit such stipulation together with an Order consistent with this Decision.

Dated: August 1, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR
Division of Labor and Management

Randy S. Bingner
Administrative Law Judge