

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

GERRIE MONK

Claimant,

v.

GATEWAY,

Employer, and

ST. PAUL COMPANIES,

Insurer.

HF 235, 2002/03

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, Monk. Michael S. McKnight and Charles A. Larson, of Boyce, Greenfield, Pashby & Welk, L.L.P., represent Employer/Insurer.

ISSUE:

Whether Monk 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:

Monk started working at Gateway on October 19, 1998.

On July 31, 2001, while working at Gateway, Monk complained that she had been having left elbow pain for the prior couple of weeks. She had a cortisone injection on August 24, 2001, and felt better for a time.

On January 3, 2002, Monk again complained of left elbow pain and numbness. She received a second cortisone shot on January 30, 2002. Monk began physical therapy around October of 2002, but the therapy did not seem to improve her condition. She received a third cortisone shot on December 12, 2002.

On February 27, 2003, Dr. Porter indicated Monk's carpal tunnel symptoms persisted and there was nothing further that could be done aside from surgical release of the lateral epicondyle.

Employer/Insurer admit Monk sustained an injury arising out of and in the course of employment as alleged by Monk. All of Monk's medical bills pertaining to her injury have been paid by workers' compensation coverage through Employer/Insurer.

Monk was laid off on March 17, 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. Monk was making \$13.25 per hour and was working approximately 40 hours per week at the time her employment was terminated with Gateway. Monk could have continued working at Gateway but for the layoff. Monk was not laid off because of any disability.

On March 25, 2003, Monk had surgery and was ordered off work by her doctor. She attended occupational therapy from April of 2003, to July 3, 2003. On July 3, 2003, Monk was at maximum medical improvement according to Dr. Porter and was able to return to work with no restrictions.

Monk received five weeks of workers' compensation benefits at the rate of \$353 per week for the time period from March 25, 2003, to July 3, 2003.

Monk testified that she is not now hindered in her performance of work activities or other activities by her previous injuries. She further testified that she is back to her normal pre-injury condition.

Although Monk did not work at Gateway after March 17, 2003, she continued to be paid her regular wage for 60 days after March 17, 2003. In addition to receiving her regular pay for 60 days, Monk received a severance package from Gateway that included one week of salary for every year that she had been employed with Gateway. Monk was employed at Gateway for four and a half years so she received four weeks of full pay as part of her severance package. Also in addition to receiving her regular pay for 60 days, Monk received payment for two weeks of full pay as compensation for her unused vacation time.

In addition to her workers' compensation benefits, Monk collected two and a half checks for unemployment benefits on July 6 and 13, 2003, after which Monk found employment. Monk began employment at Pech Optical on July 24, 2003, assembling glasses.

AUTHORITY AND ANALYSIS

Monk 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).

Monk contends she is entitled to temporary total disability benefits, pursuant to SDCL 62-4-3, from March 17 to 24, 2003, from the time she was laid off to the date of her surgery.

Monk also contends she is entitled to temporary total disability benefits from July 4 to July 23, 2003, from the date she was released to work after her surgery to the date she began her employment at Pech Optical.

Monk also contends she is entitled to temporary partial disability benefits, at the rate of \$91.75, pursuant to SDCL 62-4-5 from July 24, 2003 to the present, because she has not yet been rated for permanent impairment.

Temporary Total 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 62-4-2 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.

Monk did not prove that she is entitled to temporary disability benefits under SDCL 62-4-2 from March 17 to March 24, 2003, the time she was laid off to the date of her surgery. Monk missed no work as a result of her work injury until March 24, 2003, to July 3, 2003. The evidence is undisputed that she did not meet the seven day waiting period of SDCL 62-4-2 until after her March 24 surgery. Monk was then paid temporary total disability benefits from March 24 to July 3, 2003.

Monk is not entitled to temporary total disability benefits under SDCL 62-4-3 from July 4 to July 23, 2003, the date she was released to work after her surgery to the date she began her employment at Pech Optical. Although she did suffer an injury that incapacitated her for a period of seven consecutive days, her doctor released her from temporary total disability on July 23. There is no evidence in the record that she has been totally incapacitated due to her injuries since that time.

Temporary Partial Disability

SDCL 62-4-5 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.

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

After her recovery from surgery, Monk was released by her doctor from temporary total disability. There is no evidence she has been given a rating to which SDCL 62-4-6 would apply.

The parties agree that on July 3, 2003, Monk was at maximum medical improvement according to Dr. Porter and was able to return to work with no restrictions. The fact that Monk was at maximum medical improvement and returned to work with no restrictions does not establish that Monk has recovered from her work injury without a permanent impairment rating.

Monk testified that she is “not now hindered in her performance of work activities or other activities by her previous injuries” and that “she testified that she is back to her normal pre-injury condition.” However, it is not possible to determine from the record either when Monk testified to these facts, or whether her testimony is supported by any medical evidence.

In addition, the evidence in the record does not answer the third question: Whether Monk’s “present average earned income or that amount [she] is capable of earning at some suitable employment or business is less than what [her] average earned income was prior to [her] disability.” Monk argues she is entitled to benefits based on the difference between her average weekly pre-injury earnings and the amount she was actually earning at Pech Optical on her return to work after surgery. However, the facts she relies on in her brief, she cites exact wage figures, are not in the stipulated record.

SDCL 62-4-5 provides compensation for temporary, partial disability based in part upon “the average amount which [Monk] is earning or is able to earn in some suitable employment or business after the accident.”

Because SDCL 62-4-5 refers to the amount the employee is “capable of earning” Monk must, satisfy her burden under the statute by introducing evidence of what she is able to earn during the

period she seeks temporary partial disability. She must also establish that this reduction was the result of her injury.

To counter Monk's evidence, Employer/Insurer must show that higher earnings would be regularly and continuously available to Monk. This evidence is also not in the record.

Although Monk has proven a right to temporary partial disability benefits under SDCL 62-4-5 neither the duration nor the amount can not be determined from the parties' stipulated facts.

Whether Monk is entitled to benefits after an economic layoff

Employer/Insurer argue that because Monk 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 also 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 876.

Under the present facts, Monk was entitled to temporary partial disability benefits due to her work related medical condition. Monk's 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 Monk's benefits should be offset

Employer continued to pay Monk her regular wage for 60 days after March 17, 2003. Monk also received four weeks of wages under a severance package. Employer/Insurer argue they are entitled to offset these wages against Monk'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 Monk differently than employees who were laid off without disability or restrictions.

Furthermore, no agreement between Monk 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 March 17, 2003, or the four weeks of wages paid pursuant to the severance agreement against Monk's right to temporary partial disability benefits.

The Department will retain jurisdiction for any issues not resolved by this Decision.

Counsel for Monk 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 Monk'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 Monk shall submit such stipulation together with an Order consistent with this Decision.

Dated: August 1, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge