

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

DENICE JOY

Claimant,

v.

GATEWAY,

Employer, and

ST. PAUL COMPANIES,

Insurer.

HF 88, 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, Joy. Michael S. McKnight and Charles A. Larson, of Boyce, Greenfield, Pashby & Welk, L.L.P., represent Employer/Insurer.

ISSUE:

Whether Joy 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. Pursuant to said Stipulation of Facts, the parties agreed to the following:

Joy began work at Gateway on January 20, 1997. Joy worked in the production department at Gateway building computers from 1997 to 1999 and then installed software on computers from 1999 until 2003.

Joy 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. Joy could have continued working at Gateway but for the layoff. Joy was not laid off because of any disability. Joy was making \$13.49 per hour and was working approximately 40 hours per week at the time her employment was terminated.

Joy's first injury at Gateway occurred on September 17, 1999, when Joy was lifting a computer tower and felt a pull in her lower right arm between the wrist and elbow. Joy did not miss any time off of work with regard to this injury.

Joy also sustained an injury on November 5, 2002, with regard to her left arm which she attributed to over usage and over compensation for the injury to her right arm. Joy did not miss any work following the November 5, 2002, injury. She was put on light duty after this incident, however. Joy continued to work on a light duty basis intermittently from September of 1999,

until November 2002.

Dr. Greendyke made a diagnosis of carpal tunnel syndrome in Joy's right arm and Dr. Genoff made a diagnosis of tendonitis in her left arm. Joy received an impairment rating from Dr. Genoff in September of 2003, which was the last time she saw any medical doctor for either arm since that time.

Dr. Kipp released Joy to regular work with no restrictions on January 25, 2003. At the time of her layoff, Joy had returned to her regular job of installing software on computers. Joy is not presently under any physical restrictions from any doctor.

Employer and Insurer have admitted that Joy sustained the injuries incurred on September 17, 1999, and November 5, 2002, described above, and that they arose out of and in the course of employment. All of Joy's medical bills pertaining to her injury have been paid by workers compensation coverage through Employer/Insurer.

Joy was given a 5% whole person impairment on October 15, 2003. Joy seeks entitlement to 15.6 weeks of permanent partial disability benefits which equates to a total of \$5611.78.

Joy also seeks temporary total benefits from the date that she was laid off on March 17, 2003, until she was given an impairment rating on October 15, 2003. Joy is seeking 29.8 weeks of temporary total disability benefits. Joy's workers' compensation rate would be \$359.73 per week. Therefore, Joy is claiming \$10,719.95 in temporary total disability benefits.

Although Joy 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, Joy 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. Joy was employed at Gateway for over six years so she received six weeks of full pay and payment for her unused vacation as part of her severance package. In addition to her workers' compensation benefits, Joy has collected unemployment benefits of \$250 per week since approximately June 6, 2003.

Analysis and Decision

Joy 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).

Joy contends she is entitled to temporary total disability benefits or temporary partial disability benefits from March 17, 2003, the date she was laid off, to October 15, 2003, the date she received a rating for permanent impairment.

Temporary Total Disability

SDCL 62-4-2 provides, in relevant part: "No temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days."

The following facts are not disputed: Joy suffered two work related injuries while working for Employer: one on September 17, 1999, and one on November 5, 2002. She did not miss any work due to either injury. Following the second injury, and after a period of time when Joy was on light-duty work, her doctor released her to regular work with no restrictions on January 25, 2003. After nearly two months back on the job, full time, Joy was laid off on March 17, 2003. Joy admits she was not at that time under any physical restrictions from any doctor and that she could have continued working at Employer but for the layoff. It is undisputed Joy was not laid off because of any disability.

Joy did not prove that she is entitled to temporary disability benefits under SDCL 62-4-2. The evidence is undisputed that she did not suffer an injury that incapacitated her for a period of seven consecutive days. She missed no work due to either work-related injury. The only work Joy has missed since the time of her injuries has been due to Employer's economically driven reduction in force.

Temporary Partial Disability Benefits

The waiting period set out in SDCL 62-4-2 does not distinguish between temporary partial and 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." Because there is no evidence in the record that Joy was incapacitated, partially or otherwise, for more than seven consecutive days, she is not entitled to any temporary disability benefits, including temporary partial disability benefits.

Joy relies on SDCL 62-4-5, which 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.

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.

Hendrix v. Graham Tire Co., 94 SD 654, 520 NW2d 876 (citations omitted).

There is no evidence in the record that Joy sustained an injury which resulted in her becoming “partially incapacitated from pursuing [her] usual and customary line of employment due to [her] work related injury.” Joy missed no work due to either injury, worked full time up to the date of her layoff. She was released from any restrictions and returned to full duty two months before her layoff. She admitted she could have continued working for Employer but for the layoff. She admitted she was not laid off due to any disability.

There is no evidence in the record that Joy’s doctor at any time took her off work, or thereafter released her from temporary total disability.

Finally, there is no evidence in the records that Joy’s “present average earned income or that amount [s]he is capable of earning at some suitable employment or business is less than what [her] average earned income was prior to [her work injury.]”

Joy is not entitled to temporary partial disability benefits under SDCL 62-4-5.

Counsel for Employer/Insurer 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 Joy shall have an additional 10 days from the date of receipt of Employer/Insurer’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 Employer/Insurer 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