09/08/92 CAROL L. MCGINNIS v. ORIENTAL TRADING CO.

1 NCA 1442 (1992) | Cited 0 times | Nebraska Court of Appeals | September 8, 1992

IRWIN, Judge.

Oriental Trading Co., Inc., appeals from an award to Carol L. McGinnis on rehearing in the Nebraska Workers' Compensation Court. In the award entered April 16, 1991, the court found that McGinnis had reached maximum recovery on October 30, 1989, and that she suffered a 5-percent permanent partial disability to the body as a whole. In the award on rehearing entered on September 9, 1991, the three-Judge panel concluded that McGinnis had reached maximum medical improvement on June 1, 1990 and that she suffered a 15-percent permanent loss of earning power.

Oriental Trading alleges that the Workers' Compensation Court erred in finding that (1) the record supported McGinnis' assertion that her temporary total disability continued beyond October 30, 1989, and (2) there was reliable, probative, and substantial evidence that McGinnis suffered a 15-percent impairment of earnings.

STANDARD OF REVIEW

The findings of fact made by the Workers' Compensation Court have the same force and effect as a jury verdict. Factual determinations by the Workers' Compensation Court will not be set aside unless clearly erroneous. Hernandez v. Hawkins Constr. Co., 240 Neb. 129, 480 N.W.2d 424 (1992). In testing the sufficiency of the evidence to support findings of fact made by the compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party. Id.

FACTS

On January 6, 1989, McGinnis was pushing a stack of about 25 grocery carts while working for Oriental Trading. Her foot slipped, and she injured her back.

At the time of her injury, McGinnis was a quality control print inspector, earning $6 per hour. She was required to lift tubs, weighing up to 50 pounds each, from carts. She also lifted, pulled, and corrected orders to be shipped.

On January 9, 1989, McGinnis went to Midwest Minor Medical. She saw a Dr. Hanson, an orthopedic surgeon, on January 27. McGinnis saw her own doctor, a Dr. Kershaw, on February 7. Dr. Kershaw's records indicate that he last saw McGinnis on June 25, 1990. In his office notes of that date, he indicates as a diagnosis ''chronic low back pain,'' and he prescribes ''continue same meds.''

McGinnis was first seen by a Dr. Woodward, an orthopedic surgeon, on February 8, 1989, while she was at Immanuel Medical Center under Dr. Kershaw's supervision. McGinnis' last visit to Dr. Woodward was on January 5, 1990. Dr. Woodward advised Dr. Kershaw that he could not make a definite diagnosis relating to McGinnis' pain. Dr. Woodward stated that the nature of her problems stayed constant throughout all of her visits to him.

McGinnis saw another orthopedic surgeon, a Dr. Bowman, on September 19, October 3, and October 30, 1989. On November 27, Dr. Bowman issued a physician consultation report setting the date of maximum healing for McGinnis as October 30, 1989, with a permanent partial impairment of 3-percent and permanent work and nonwork restrictions as set forth in a functional capacity assessment conducted on November 2, 1989. McGinnis testified that she did not feel she had been released to work at this point.

McGinnis testified that in November 1989, she could stand for 15 to 20 minutes and had pain all the time, including cramping and pain down the left leg. She talked to the rehabilitation agent about the fact that no rehabilitation or retraining was being set up. She felt that she could not perform her former work. She worked with the rehabilitation expert from February to June 1990 in her job search. McGinnis obtained retraining on her own in the summer of 1990 through Advantage, Inc. When she informed the insurance rehabilitation representative that she was in this program, her compensation checks stopped.

On November 12, 1990, she took a job with First Data Resources doing sedentary work at $6.02 an hour. She had previously worked at First Data in the printshop. She testified regarding two jobs that had recently opened at First Data which paid over $7 an hour. She was ineligible for the jobs because of the standing and lifting required. She also testified that jobs she used to be capable of performing, which jobs involved other types of work such as printing jobs at First Data, paid over $8 an hour.

On April 16, 1991, the Workers' Compensation Court determined that McGinnis was temporarily totally disabled from and including January 8, 1989, to and including October 30, 1989, and that she thereafter sustained a 5-percent permanent partial disability to her body as a whole.

REHEARING

Dr. Kershaw testified at the rehearing that he thought McGinnis had reached maximum medical healing in March 1991, but he acknowledged that McGinnis' pain had been constant and continuing and was "aggravated by sustained sitting or sustained posture of any kind" and by lifting, pulling, or stooping. He said he felt from his Discussions with Dr. Bowman that there was an uncertainty in Dr. Bowman's opinion that McGinnis had reached maximum healing on October 30, 1989.

Dr. Woodward testified that McGinnis' problems had stayed constant through all the visits she made to him for her back problem. Dr. Kershaw stated that there was no substantial change in McGinnis' condition.

Dr. Bowman issued a second release for McGinnis to return to work dated June 1, 1990, and effective that date, with the following restrictions: "Can't stand for more than 1/2 hour," "can't walk more than 3 blocks," "can't sit without movement," and "can't lift more than 20 lbs."

A vocational rehabilitation nurse, Cecilia Blakovich, rendered the opinion that McGinnis could obtain a job making the same salary that she was earning when she left Oriental Trading. Blakovich also thought that vocational retraining for McGinnis was not necessary because of her numerous job skills and because there were many jobs available within her locale and within her vocational and physical abilities.

On April 16, 1991, the compensation court found that McGinnis had reached maximum recovery on October 30, 1989, and that she suffered a 5-percent permanent partial disability.

On rehearing, the compensation court modified the April 16, 1991, award by finding that McGinnis was temporarily totally disabled from and including January 8, 1989, to and including May 31, 1990, and that thereafter she sustained a 15-percent permanent loss of earning power. The court explained:

The plaintiff was finally released to return to work by Dr. Bowman on June 1, 1990 and this circumstance, together with the fact that plaintiff has been working with a vocational counselor engaged by the defendant to place plaintiff in employment, causes us to conclude that plaintiff reached maximum medical improvement on June 1, 1990. . . .

Plaintiff's condition has been described as low back pain with possible facet joint syndrome and possible spinal nerve irritation secondary to disc disruption by Dr. Woodward. Dr. Bowman described his impression as spondylosis, lumbar spine, and chronic lumbar strain and rated the plaintiff's permanent impairment at 3 percent. Dr. Kershaw estimated plaintiff's impairment at 5 percent. Dr. Bowman, in his return to work note dated June 1, 1990, listed restrictions on plaintiff's standing, walking, sitting and also limited lifting to 20 pounds. From all of this we conclude that the plaintiff has suffered a 15 percent permanent loss of earning power.

ANALYSIS

Period of Temporary Total Disability

Oriental Trading argues that once a claimant has a permanent disability rating, all temporary total disability benefits must cease. Oriental Trading points to Dr. Bowman's report dated November 27, 1989, in which he gave McGinnis a date of maximum healing of October 30, 1989, and a release to return to work under the provisions of the functional capacity assessment conducted November 1, 1989.

While it is true that when a worker has reached maximum recovery, the remaining disability is permanent and the worker is no longer entitled to compensation for temporary disability, the question as to whether an injured employee has reached maximum medical improvement is a question for the trier of fact. Carter v. Weyerhaeuser Co., 234 Neb. 558, 452 N.W.2d 32 (1990).

Regarding facts determined and findings made after rehearing in the Nebraska Workers' Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1988) precludes the [appellate court's] substitution of its view of facts for that of the compensation court if the record contains evidence to substantiate the factual Conclusions reached by the compensation court. As the trier of fact, the Nebraska Workers' Compensation Court is the sole Judge of the credibility of witnesses and the weight to be given their testimony.

234 Neb. at 562, 452 N.W.2d at 36.

Dr. Bowman, Oriental Trading's orthopedic surgeon, issued three different releases for McGinnis to work. They were effective, respectively, October 30, 1989, June 1, 1990, and July 31, 1990. Dr. Kershaw, McGinnis' physician, indicated in a report dated July 31, 1990, that McGinnis continued to report back pain and that she had been released to work on that date by Dr. Bowman. Dr. Kershaw testified that he felt there was some uncertainty as to the October 1989 date on the part of Dr. Bowman. There was evidence of improvement in McGinnis' physical skills between October 1989 and June 1990.

In addition, McGinnis worked with the rehabilitation expert in searching for a job until at least June 1990. The time during which an injured employee is undergoing vocational rehabilitation, which includes a plan of direct job placement, is included in the period of time when temporary total disability benefits should be awarded. Carter. v. Weyerhaeuser Co., supra.

Viewing the facts as we must, in the light most favorable to McGinnis, the finding of the Workers' Compensation Court that the period of McGinnis' total temporary disability extended to June 1, 1990, is supported by the evidence and is not clearly erroneous.

Impairment of Earnings

Oriental Trading argues that there was not sufficient competent proof that McGinnis suffered a 15-percent loss of employability and earning capacity. Oriental Trading contends that where the uncontradicted evidence shows an ability to obtain and hold a job at the same earnings as before the accident, the finding that McGinnis suffered an earnings impairment is in error. McGinnis maintains that a 15-percent loss of earning capacity is a conservative conversion of the 3- and 5-percent impairments of the body as a whole stated by the physicians.

A finding of the Workers' Compensation Court that an employee has suffered a permanent partial loss of earning power is a finding of fact. Guerra v. Iowa Beef Processors, Inc., 211 Neb. 433, 318 N.W.2d 887 (1982).

"'Earning power,' as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted."

211 Neb. at 436, 318 N.W.2d at 889 (quoting Akins v. Happy Hour, Inc., 209 Neb. 236, 306 N.W.2d 914 (1981)).

There is evidence on the record of McGinnis' past employment being almost exclusively in physically demanding positions. There is evidence of the hourly wage currently being paid for such jobs, including jobs similar to the one she used to hold at First Data, which paid considerably more than the job she is now able to hold at First Data.

The finding of the Workers' Compensation Court that McGinnis suffered a permanent loss of earning power is supported by the evidence and is not clearly erroneous. The judgment of the Nebraska Workers' Compensation Court is affirmed.

AFFIRMED.