SOUTH DAKOTA DEPARTMENT OF LABOR

DIVISION OF LABOR AND MANAGEMENT

CONSTANCE FABER
Claimant,

v.

GATEWAY,
Employer, and

ST. PAUL COMPANIES,
Insurer.

HF 237, 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, Faber. Michael S. McKnight and Charles A. Larson, of Boyce, Greenfield, Pashby & Welk, L.L.P., represent Employer/Insurer.

ISSUE:

Whether Faber 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 such stipulation of facts, the parties agreed to the following:

Faber worked at Gateway from December 12, 1994, until she 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. Faber was making $13.35 per hour and was working approximately 40 hours per week at the time her employment was terminated with Gateway. Faber could have continued working at Gateway but for the layoff. Faber was not laid off because of any disability.

Faber's first injury at Gateway was on June 12, 1995. This was an injury to the middle part of her back. Faber contends this injury was different than a previous injury that she sustained while working at Metz Baking because the later injury at Gateway occurred more to the upper part of her back to the neck area. The injury sustained at Metz Baking was more toward the middle and lower part of her back. She had no additional restrictions after this particular injury at Gateway.

On June 8, 1996, Faber was moving a full tub of parts off of a rack and felt a sharp pain in her lower back and hip area. Faber did not miss any work at Gateway because of this Injury.

Faber's next work injury occurred on August 14, 1999. Faber was putting keyboards in a box and when she pushed on the box, she felt a pop in her neck. Faber did not miss any work at Gateway because of this incident. She was released to return to work with no restrictions within two weeks of this incident.

On August 8, 2000, Faber hit her head on a conveyer table at work at Gateway. She did not miss any work from this particular incident.

On February 9, 2001, Faber injured her lower back pulling carts with parts in them at Gateway. She did not miss any work because of this incident. Sometime after this incident, Faber was moved to a different area of the plant because they needed more help in this new area. She continued to work in this new area up until the time of her layoff, and was able to do all of the duties of that particular job.

Dr. Martin found that Faber was at maximum medical improvement on May 12, 2003. Dr. Martin concluded on June 12, 2003, that no ratable impairment could be ascertained.

Employer and insurer have admitted that Faber sustained the above-mentioned injuries arising out of and in the course of employment of Faber. All of Faber's medical bills pertaining to her injury have been paid by workers compensation coverage through Employer/Insurer.

Although Faber 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, Faber 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. Faber was employed at Gateway for over eight and a half years so she received eight weeks of full pay as part of her severance package in addition to full payment for her unused vacation time.

After her severance payments from Gateway ran out on June 21, 2003, Faber collected unemployment benefits from that date until September 3, 2003, when she began new employment. Faber started her new employment at American Popcorn on September 3, 2003.

ANALYSIS AND DECISION

Faber 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).

Faber contends she is entitled to temporary total disability from March 17, 2003, the date she was laid off, to June 12, 2003, the date she received a rating for permanent impairment.

Temporary Total Disability Benefits

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 parties agree Faber missed no work after the February 9, 2001, incident. Faber was laid off on March 17, 2003, as part of an economically driven general reduction in force at Gateway. Faber admits she was not laid off because of any disability and that she could have continued doing her job at Gateway but for the layoff.

Faber 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. The only work Faber has missed since the time of this injury 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 Faber 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.

In support of her argument that she is entitled to temporary disability benefits, Faber 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.

It will be assumed that Faber intended to make an argument that she is entitled 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.

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

Faber did not make a prima facie showing of entitlement to temporary partial disability. She met none of the three tests set out in Hendrix and SDCL 62-4-5.

Faber did not show that she was partially incapacitated from pursuing her usual and customary line of employment due to her work related injury.

As for the second requirement, there is no evidence in the record that Faber was ever taken off work by her doctor, or that she was subsequently "released by [her] physician from temporary total disability and has not yet been given a permanent partial disability."

Finally, there is no evidence in the records that Faber'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] disability."

It should be noted that, in her brief, Faber argues facts that are not in the record. She argues: "She was placed in a separate light duty job after [the February 2001] incident to avoid aggravating injuries to her back and neck. On February 26, 2003, she was given restrictions of no more than 10 pounds lifting and she should avoid cervical flexion postures." These facts are not in the stipulated record. Furthermore, these facts are contrary to the parties' Stipulation of Facts, which states that some time after the February 9, 2001, incident, Faber was moved to a new position for reasons not related to this incident: "Faber was moved to a different area of the plant because they needed more help in this new area. She continued to work in this new area up until she was laid off on March 17, 2003. She was able to do all of the duties of that particular job."

Faber is not entitled to temporary total or temporary partial disability benefits.

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 Faber 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
Division of Labor and Management

Randy S. Bingner
Administrative Law Judge