

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

KEVIN LIVINGSTON,

HF No. 36, 2005/06

Claimant,

v.

DECISION

**DUNHAM'S ATHLEISURE
CORPORATION,**

Employer,

and

**FIREMAN'S FUND INSURANCE
COMPANY,**

Insurer.

This is a Workers' Compensation case brought before the South Dakota Department of Labor, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The Department conducted a hearing on May 10, 2007, and rendered a Decision on three legal issues on September 27, 2007. On appeal, the circuit court upheld the Department's Decision. The parties have now agreed to submit one remaining issue to the Department based on the record established during those prior proceedings. This Decision deals with that sole remaining issue.

Issue:

Whether Claimant is entitled to temporary total disability benefits after Employer terminated Claimant's employment for cause?

Facts:

Based upon the hearing transcript, exhibits and record, the following facts are found by a preponderance of the evidence:

1. On November 21, 2003, Kevin Livingston (Claimant) suffered a work-related injury while employed by Dunham's Athleisure Corporation (Employer).
2. Claimant worked for Employer as a department coordinator. In this position, Claimant helped customers with hunting and fishing equipment and some apparel.

3. On November 21, 2003, Employer was insured by Fireman's Fund Insurance Company (Insurer) for workers' compensation purposes.
4. Employer and Insurer accepted responsibility for Claimant's November 21, 2003, injury.
5. Following his November 2003 injury, Claimant experienced back pain and pain radiating into both legs.
6. On April 1, 2004, Dr. Mitchell Johnson performed lower back surgery on Claimant at the L3-4 and L5-S1 levels.
7. After receiving his April 2004 surgery, Claimant received physical therapy and was placed on lifting restrictions.
8. Claimant's recovery progressed after surgery and Dr. Johnson released him from care on July 1, 2004.
9. Claimant saw Dr. Johnson on February 1, 2005, for an impairment rating. Dr. Johnson noted Claimant was continuing to have problems with right leg pain and some lower back pain.
10. Claimant was working for Employer in February 2005, when he helped load a gun safe for a customer. The gun safe weighted about 400 pounds.
11. Claimant's leg and back pain continued to worsen after February 2005.
12. Employer fired Claimant on March 3, 2005, for reasons unrelated to his work injury.
13. Claimant returned to Dr. Johnson in April 2005 complaining of right leg pain and some lower back pain.
14. Dr. Johnson took Claimant off work on April 4, 2005, pending an MRI.
15. After reviewing the MRI results, Dr. Johnson kept Claimant off work on April 15, 2005, and ordered an epidural injection.
16. When the epidural injection did not provide any relief, Dr. Johnson kept Claimant off work on May 6, 2005, and recommended surgery.
17. Insurer paid benefits to Claimant until May 16, 2005. At that time, Insurer discontinued paying Claimant temporary total disability (TTD) benefits and did not authorize the surgery.

18. After Insurer ceased paying TTD, Claimant tried working at a restaurant called the Waterfront for about one week. This job required Claimant to climb stairs and was not a sedentary job. Claimant was unable to perform his job duties due to leg pain and numbness.
19. On August 24, 2005, Dr. Johnson released Claimant to sedentary work.
20. Other than the job at the Waterfront, Claimant has not sought any employment since he was fired by Employer.
21. On September 27, 2007, the Department of Labor found that Claimant's back and leg problems and treatment after February 2005 were compensable.

Analysis

In this case Claimant seeks temporary total disability benefits. Claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Brothers Construction Co., 155 N.W.2d 193, 195 (S.D. 1967).

Claimant argues that Wellman v. Schad Excavation LLC, 2009 SD 46, 768 NW2d 149 is controlling in this case and that he is entitled to TTD benefits following his termination from employment. Employer and Insurer argue that the Wellman case is distinguishable from this case and that Claimant has not demonstrated that he is unable to work. Consequently, an examination of the Wellman case is required.

Wellman suffered a work-related injury. After a period of convalescence, he was released to return to work by his physician. Subsequently, Wellman was fired from his job for reasons unrelated to his injury. Wellman then brought a claim for temporary partial disability (TPD) benefits. The South Dakota Supreme Court held that, "termination for cause does not automatically preclude a claimant from receiving TPD benefits he would otherwise be awarded. However, in order to receive such an award, the claimant bears the burden of proving loss of income or ability to earn an income attributable to the work-related disability." Id. at ¶ 17, 154-155.

First, it must be noted that Wellman is distinguishable from this case. Wellman sought TPD benefits while Claimant seeks TTD benefits. This point is significant because termination for reasons unrelated to the work injury indicates that the employee was capable of working at some level at the time of the termination. It was possible for Wellman to be partially disabled and capable of working. However, Claimant could not have been totally disabled at the time of the termination.

Despite this distinction, the Wellman decision is still instructive for this analysis. Wellman teaches us that the focus of our analysis should be on the loss of employment caused by Claimant's injury rather than his termination. Consequently, Claimant must

show that he was totally unable to work due to his injury and the time period during which he was so disabled.

The best evidence of Claimant's physical ability to work comes from Dr. Johnson. . Dr. Johnson took Claimant off work on April 4, 2005. Dr. Johnson then released Claimant to sedentary work on August 24, 2005. Therefore, Claimant is entitled to TTD benefits from April 4, 2005, through August 24, 2005. Claimant's benefits were discontinued by the Insurer on May 16, 2005. Therefore, Claimant is entitled to an award of TTD benefits from May 16, 2005, through August 24, 2005.

Conclusion

Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant's Proposed Findings of Fact and Conclusions of Law to submit objections or Employer and Insurer may submit Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer and Insurer shall submit such stipulation together with an Order.

Dated this 26th day of October, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge