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YASIEL ISAAC HERNANDEZ, APPELLEE AND CROSS-APPELLANT, V. JBS USA, L.L.C., APPELLANT AND CROSS-APPELLEE.

828 N.W.2d 765

Filed March 26, 2013. No. A-12-435.

1. **Workers' Compensation.** The Workers' Compensation Court may not award vocational rehabilitation benefits until the applicant is at maximum medical improvement and the court makes a finding of permanent impairment.
2. **Workers' Compensation: Appeal and Error.** The findings of fact made by a workers' compensation judge on original hearing are reviewed for clear error.
3. **Workers' Compensation.** Employees who are entitled to workers' compensation benefits remain entitled to workers' compensation benefits if their employment is subsequently terminated.
4. **Employment Security: Workers' Compensation.** Neb. Rev. Stat. §§ 48-130, 48-147, and 48-628 (Reissue 2010) advise that unemployment benefits should not be deducted from a workers' compensation award.
5. **Workers' Compensation: Liability.** Benefits secured by an injured employee from collateral sources are not to be considered in fixing compensation under the Nebraska Workers' Compensation Act, nor are they to affect liability for compensation to the injured employee.
6. **Employment Security: Workers' Compensation.** Neb. Rev. Stat. § 48-628(5)(b) (Reissue 2010) of the Employment Security Law disqualifies a person from receiving unemployment benefits while receiving compensation for temporary disability under the Nebraska Workers' Compensation Act, unless the amount of workers' compensation benefits is less than the amount recoverable for unemployment.
7. ____: ____. The ability to offset the amount of unemployment benefits by the amount of workers' compensation benefits paid to an injured employee does not permit the converse.
8. ____: ____. When read together, Neb. Rev. Stat. §§ 48-130 and 48-628 (Reissue 2010) suggest that if an individual qualifies for both workers' compensation benefits and unemployment benefits, workers' compensation benefits should be paid and unemployment benefits should cease.
9. **Workers' Compensation: Liability.** The Nebraska Workers' Compensation Act holds an employer liable for an employee's job-related injury and requires the employer to compensate the employee so long as the employee is not willfully negligent.
10. **Workers' Compensation.** The Nebraska Workers' Compensation Act is remedial in nature, and its purpose is to do justice to workers.
11. **Employment Security: Workers' Compensation.** Neb. Rev. Stat. § 48-628 (Reissue 2010) disqualifies individuals from receiving unemployment compensation from the Unemployment Compensation Fund if they are receiving workers' compensation temporary disability benefits.
12. **Workers' Compensation.** The Nebraska Workers' Compensation Act prohibits an employer from considering benefits derived from any other source than those

paid or caused to be paid by the employer when determining the amount of workers' compensation benefits to be paid.

Appeal from the Workers' Compensation Court: J. MICHAEL FITZGERALD, Judge. Affirmed in part, and in part reversed and remanded.

Abigail A. Wenninghoff, of Larson, Kuper & Wenninghoff, P.C., L.L.O., for appellant.

Lee S. Loudon and Ami M. Huff, of Law Office of Lee S. Loudon, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and SIEVERS and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

JBS USA, L.L.C. (JBS), appeals the Workers' Compensation Court's award of temporary partial disability benefits and a vocational rehabilitation evaluation to Yasiel Isaac Hernandez. Hernandez cross-appeals.

On appeal, JBS argues that (1) the trial court should not have awarded a vocational rehabilitation evaluation because Hernandez is not at maximum medical improvement (MMI) and (2) Hernandez is not entitled to workers' compensation benefits because he voluntarily abandoned his job. Hernandez concedes that the court erred in awarding a vocational rehabilitation evaluation, and we agree. Therefore, we reverse that portion of the award. We affirm, however, the award of other benefits, because we find that the court did not err in finding that JBS terminated Hernandez' employment.

Hernandez argues on cross-appeal that the court erred in reducing the amount of his workers' compensation benefits by the amount he was receiving in unemployment benefits. We agree and reverse the reduction of benefits.

BACKGROUND

Hernandez began working for JBS in January 2009. He sustained injuries in the course of his duties on three different occasions. In June 2009 and January 2010, Hernandez injured his back when large pieces of meat, which were hanging from

a chain and swinging back and forth, struck him from behind. In November 2010, he aggravated his back injury while pushing a cow carcass. Both parties agree that Hernandez sustained these injuries in the course of his duties at JBS.

Hernandez' Job Duties and Injuries.

Hernandez filed his first report of an alleged occupational injury or illness with the Workers' Compensation Court in January 2010. That month, a 3-foot-wide piece of meat struck him in the back while he was working. He reported the incident to JBS, and JBS sent him to see Dr. Douglas Herbek. Dr. Herbek assigned restrictions prohibiting Hernandez from bending over or twisting and referred him to Dr. Steven Volin. Dr. Volin restricted repetitive bending, lifting, twisting, and stooping.

In June 2010, Hernandez underwent an MRI examination that showed several mild degenerative abnormalities including stenosis, hypertrophy, bulging, disk disease, and a small tear. A handwritten note on the back of his medical file says: "NO Bending or Lifting at all," and "NO Twisting of Back." The note also says that orders were given to "Kim" at JBS.

In October 2010, JBS reduced Hernandez' duties to a light-duty job "stamping carcasses." This job required Hernandez to put a stamp on each carcass as it passed by his position on the line.

In November 2010, Hernandez reported another injury after experiencing pain in his back and leg when a carcass hanging from a chain "jammed" while he was pushing it. That same month, Hernandez underwent a functional capacity evaluation (FCE). His FCE showed he could perform activities within the medium physical demand level so long as he restricted "[f]orward bending through end range of motion . . . to an occasional basis," 1 to 33 percent of the day, and "forward bending through mid range of motion on a frequent basis," 34 to 66 percent of the day. The FCE also limited squatting to a frequent basis, 34 to 66 percent of the day. In its response to Hernandez' request for admissions, JBS admitted that Hernandez should minimize repetitive bending maneuvers and that it should follow the FCE findings. In JBS'

"Employee Restricted/Modified Duty Form," JBS adopted the FCE's restrictions, including the restrictions on bending, as Hernandez' official restrictions.

In February 2011, JBS added "tail tucking" to Hernandez' duties. This change required him to "stamp the cow and then . . . grab the tail and squat down and hide the tail." At trial, Hernandez testified he tucked around 3,500 tails each day, requiring him to bend over repetitively. Maxamed Xasan, JBS' human resources manager, disagreed with Hernandez' calculations, testifying that Hernandez had to tuck only 2,300 to 2,500 tails per day. Hernandez testified that the job was outside his work restrictions because he had to squat down and bend over constantly.

Hernandez' Termination From JBS.

Shortly after assigning Hernandez the extra duty, JBS terminated his employment. The parties dispute the events surrounding the termination. Hernandez testified that he told his supervisor that the "tail tucking" job was outside his restrictions and was hurting his back. Hernandez said that JBS terminated his employment for complaining and that he has not worked since. He testified that he talked with Xasan, the human resources manager, 3 days after his employment was terminated and that Xasan told him that the supervisors did not want him at JBS any longer. Hernandez denied that Xasan offered to help him find another position or offered to evaluate the job to see if it was within his restrictions.

Xasan testified that JBS initially suspended Hernandez for 2 to 3 days because he refused to tuck tails after he was told to do so. When Hernandez returned to work after the suspension, Xasan explained to Hernandez, in the presence of JBS' superintendent, why he was suspended. Xasan testified that Hernandez told him he believed his job was outside of his restrictions. According to Xasan, the superintendent believed the job was within Hernandez' restrictions.

Xasan testified that he told Hernandez to "go down to the floor [and] start working" and someone would evaluate the job to see if it was within Hernandez' restrictions. Xasan testified that Hernandez refused to go back to work. Xasan said he

explained to Hernandez that he would likely be terminated if he continued to refuse.

Xasan testified by deposition that he did not have a chance to talk to Hernandez' supervisor about the issue because after Hernandez refused to return to the floor, it "was the end of that whole deal because he was refusing to work." He also stated in his deposition that he had no knowledge of Hernandez' restrictions. He stated that if Hernandez had returned to work, he would have met with the safety monitor to "follow the process, but [he] never had a chance to do anything like that." JBS' "Employment Termination Checklist" sheet states the reason for Hernandez' termination was "Refus[al] to do work." On the checklist, there is a checkmark in the box next to the word "In-voluntary."

JBS' ergonomics manager testified that part of her job involved tracking individuals, including Hernandez, who are placed on light-duty work to determine whether their duties needed to be modified. She stated that she observed Hernandez daily and frequently checked in with him. She testified that she told him he could report any concerns he had about his restrictions to her and that he never complained about his duties.

Posttermination Medical Care.

At the request of JBS, Dr. David Benavides examined Hernandez in February 2011. Dr. Benavides diagnosed Hernandez with a "[l]umbar strain superimposed on an early degenerative disk phenomenon." He suggested that Hernandez lose weight and begin a stretching program as well as minimize repetitive bending maneuvers. Dr. Benavides wrote that Hernandez "would do better in a position of working between the waist and shoulders." JBS agreed with Dr. Benavides' diagnosis and recommendations.

Hernandez saw Dr. Timothy Burd in March 2011. Dr. Burd noted that all conservative treatment options had been exhausted and recommended an "anterior lumbar muscle sparing interbody fusion at L5-S1." As of the date of trial, Hernandez had not undergone surgery and had not yet reached MMI.

In March 2011, Hernandez filed his workers' compensation action seeking past and future medical expenses and temporary disability benefits. At trial, Hernandez testified that he was receiving $268 per week in unemployment compensation.

The Workers' Compensation Court awarded Hernandez past and future medical expenses, a vocational rehabilitation evaluation, intermittent temporary total disability benefits, and temporary partial disability benefits beginning on March 1, 2011. The court determined that Hernandez was entitled to temporary total disability benefits from March 1, but that the amount should be reduced by the amount of unemployment benefits Hernandez was receiving, resulting in temporary partial benefits instead of temporary total benefits. This timely appeal and cross-appeal followed.

ASSIGNMENTS OF ERROR

On appeal, JBS argues that the trial court erred in awarding (1) a vocational rehabilitation evaluation and (2) temporary disability benefits. Hernandez argues on cross-appeal that the trial court erred in reducing his disability benefits by the amount of unemployment benefits he was receiving.

ANALYSIS

Awarding Vocational Rehabilitation Before MMI.

The parties agree that the trial court erred as a matter of law in awarding a vocational rehabilitation evaluation because Hernandez was not at MMI. We agree.

[1] A trial court may not award vocational rehabilitation benefits until the applicant is at MMI and the court makes a finding of permanent impairment. See *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). Because the trial court determined that Hernandez was not at MMI, the trial court erred as a matter of law in awarding a vocational rehabilitation evaluation; therefore, we reverse this portion of the award.

Voluntary Abandonment.

[2] JBS argues that the trial court did not make a finding as to whether Hernandez abandoned his job and erred as a matter

of law in awarding temporary disability benefits after March 1, 2011, because Hernandez voluntarily abandoned his job. We find that the trial court did make a supportable finding that Hernandez did not voluntarily abandon his job. The findings of fact made by a workers' compensation judge on original hearing are reviewed for clear error. See *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996).

[3] We note that employees who are entitled to workers' compensation benefits remain entitled to workers' compensation benefits if their employment is subsequently terminated. See, *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000); *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985). Thus, if JBS terminated Hernandez from his position, Hernandez remained eligible for disability benefits.

The trial court found that Hernandez stamped carcasses until

> early February of 2011 when he was required to not only stamp carcasses, but also to tuck tails. When [Hernandez] tucked tails, he had to bend. [Hernandez] claimed the bending hurt and that he was unable to do the job of tucking tails because of back pain. [JBS] argues that the job was within the restrictions of the [FCE]. The finding is that bending was limited by the physicians. [Hernandez] testified that he was unable to do the job without bending. [Hernandez] is entitled to temporary partial benefits beginning March 1, 2011.

Although JBS is correct that the trial court did not explicitly make a finding as to whether or not Hernandez voluntarily abandoned his job, the trial court did make specific findings that the job requirements were outside of Hernandez' restrictions. The evidence supports this finding.

Hernandez testified that the job required him to squat or bend over repetitively. Hernandez' bending was restricted by the FCE and all the physicians, including Dr. Benavides, whose findings JBS conceded should be followed.

JBS argues that it does not matter whether or not the job violated Hernandez' work restrictions, because Xasan, the human resources manager, offered to accommodate him. Hernandez denied that JBS made this offer. The trial court had discretion

to believe Hernandez' testimony and reject that of Xasan. See *Estate of Coe v. Willmes Trucking*, 268 Neb. 880, 689 N.W.2d 318 (2004). Therefore, the trial court was not clearly wrong in finding Hernandez' employment was terminated.

Finally, JBS itself did not consider Hernandez to be leaving voluntarily. Instead, JBS checked the box for an involuntary termination on its "Employment Termination Checklist" sheet. Hernandez did not voluntarily abandon his job; he was terminated from it. Because Hernandez was terminated from his position, the trial court did not err in awarding temporary disability benefits.

Cross-Appeal.

Hernandez argues on cross-appeal that the Workers' Compensation Court erred as a matter of law in reducing Hernandez' temporary total disability benefits due to his receipt of contemporaneous unemployment benefits. We agree.

Nebraska's Employment Security Law and the Nebraska Workers' Compensation Act are different forms of wage-loss legislation designed to restore a worker to a portion of his lost wages. See 9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 157.01 (2007). Both pieces of legislation are designed to satisfy the goal of restoring a portion of a worker's wage, but they do not provide specifically for coordination of benefits. See, Neb. Rev. Stat. § 48-101 et seq. (Reissue 2010 & Cum. Supp. 2012); Neb. Rev. Stat. § 48-601 et seq. (Reissue 2010 & Cum. Supp. 2012); 9 Larson & Larson, *supra*, § 157.02.

Professor Larson's treatise notes that the majority of unemployment statutes deny benefits to someone receiving workers' compensation, but that workers' compensation laws generally do not contain a specific provision denying workers' compensation benefits to those receiving unemployment benefits. 9 Larson & Larson, *supra*. When an employee receiving unemployment benefits petitions the court for workers' compensation, the court faces an "awkward problem: The obvious legislative intention is to prevent dual benefits, but the specific act before the court—the workers' compensation act—contains no authorization for reduction of benefits on this ground." *Id*. at

157-4. The optimal solution is to have the Legislature coordinate the benefits.

[4] In Nebraska, the Legislature has addressed the coordination of unemployment benefits and workers' compensation benefits in §§ 48-130, 48-147, and 48-628. These statutes advise that unemployment benefits should not be deducted from a workers' compensation award. Section 48-130 states:

> No savings or insurance of the injured employee or any contribution made by him or her to any benefit fund or protective association independent of the Nebraska Workers' Compensation Act shall be taken into consideration in determining the compensation to be paid thereunder; nor shall benefits derived from any other source than those paid or caused to be paid by the employer as herein provided be considered in fixing compensation under such act.

Section 48-147 likewise provides:

> [L]iability for compensation under [the Nebraska Workers' Compensation Act] shall not be reduced or affected by any insurance of the injured employee, or any contribution or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer . . . .

[5] The Nebraska Supreme Court has interpreted these statutes to mean that "benefits secured by an injured employee from collateral sources are not to be considered in fixing compensation under the Workmen's Compensation Act, nor are they to affect liability for compensation to the injured employee." *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 634, 371 N.W.2d 294, 300 (1985).

The amounts Hernandez received in unemployment benefits were paid from a collateral source, the Unemployment Compensation Fund, pursuant to the Employment Security Law. See § 48-601 et seq.

[6] Section 48-628(5)(b) of the Employment Security Law disqualifies a person from receiving unemployment benefits while receiving compensation for temporary disability under

the Nebraska Workers' Compensation Act, unless the amount of workers' compensation benefits is less than the amount recoverable for unemployment. In that situation, the employee is entitled to receive the difference.

[7,8] The ability to offset the amount of unemployment benefits by the amount of workers' compensation benefits, however, does not permit the converse. We find no provision in the Nebraska Workers' Compensation Act that limits an employee's ability to receive workers' compensation benefits because he or she is simultaneously receiving unemployment benefits. Rather, when read together, §§ 48-130 and 48-628 suggest that if an individual qualifies for both workers' compensation benefits and unemployment benefits, workers' compensation benefits should be paid and unemployment benefits should cease.

The Michigan appellate courts, interpreting statutes similar to §§ 48-130, 48-147, and 48-628, reached the same conclusion. See *Maner v Ford Motor Co*, 196 Mich. App. 470, 493 N.W.2d 909 (1992), *affirmed* 442 Mich. 620, 502 N.W.2d 197 (1993). In *Maner*, the Michigan Court of Appeals reviewed various prior decisions involving the setoff of workers' compensation benefits. It concluded that the operative language for determining whether an employer could set off workers' compensation benefits was whether the collateral benefits were "'caused to be paid by the employer *as provided in the act*.'" 196 Mich. App. at 482, 493 N.W.2d at 917.

Section 48-130 contains a similar requirement that only payments made by the employer as provided in the act may be considered in determining the amount of workers' compensation benefits due. It states, in part, "nor shall benefits derived from any other source than those paid or caused to be paid by the employer as herein provided be considered in fixing compensation under such act." *Id*.

Other jurisdictions interpreting statutory schemes containing a provision similar to § 48-628 but silent as to the setoff of workers' compensation for unemployment benefits have also concluded that workers' compensation benefits cannot be reduced. See, *Crow's Hybrid Corn Co. v. Indus. Com.*, 72 Ill. 2d 168, 380 N.E.2d 777, 20 Ill. Dec. 568 (1978); *Williams*

v. Molded Electronics, Inc., 305 Minn. 562, 233 N.W.2d 895 (1975); *Edwards v. Metro Tile Company*, 133 So. 2d 411 (Fla. 1961); *Wells v. Jones*, 662 S.W.2d 849 (Ky. App. 1983); *Florence Enameling Co., Inc. v. Jones*, 361 So. 2d 564 (Ala. Civ. App. 1978); *Utica Mutual Ins. Co. v. Pioda*, 90 Ga. App. 593, 83 S.E.2d 627 (1954).

In reaching the conclusion that a setoff from unemployment benefits for workers' compensation benefits does not allow the converse, we also consider the distinct characteristics of the Nebraska Workers' Compensation Act and Nebraska's Employment Security Law.

[9,10] The Nebraska Workers' Compensation Act holds an employer liable for an employee's job-related injury and requires the employer to compensate the employee so long as the employee is not willfully negligent. See § 48-101. "The Workmen's Compensation Act is remedial in nature and its purpose is to do justice to workmen . . . ." *Gill v. Hrupek*, 184 Neb. 436, 439, 168 N.W.2d 377, 379 (1969).

[11] Section 48-617, on the other hand, creates the Unemployment Compensation Fund. The fund holds money in trust to pay unemployment benefits to qualifying individuals in the event that they become unemployed. See, also, §§ 48-623 and 48-627. Section 48-628 disqualifies individuals from receiving unemployment compensation from the fund if they are receiving workers' compensation temporary disability benefits.

The Michigan Supreme Court detailed the "distinct character and objectives" of the two different institutions in Michigan in *Paschke v Retool Industries*, 445 Mich. 502, 512, 519 N.W.2d 441, 445 (1994). The court explained that the Michigan Legislature "'set up two independent organizations for the administration of two kinds of compensation, payable from different funds or sources,'" and explained that permitting a "'set-off by the department of labor and industry would in effect extend relief to the employer beyond the express terms of the workmen's compensation act.'" *Id.* (emphasis omitted) (quoting *Bartels v. Ford Motor Co.*, 292 Mich. 40, 289 N.W. 322 (1939)).

Like the Michigan statutes, Nebraska statutes establish two distinct institutions that provide compensation payable from different funds or sources. A court cannot apply the statutes determining an individual's eligibility for unemployment benefits as affecting his eligibility for workers' compensation benefits unless the Legislature expressly provides the authority to do so.

[12] The Nebraska Workers' Compensation Act prohibits an employer from considering "benefits derived from any other source than those paid or caused to be paid by the employer as herein provided" when determining the amount of workers' compensation benefits to be paid. § 48-130. Although the act does not specifically reference unemployment benefits, such benefits are derived from a collateral source. Furthermore, the Employment Security Law allows a setoff of unemployment benefits when a person is receiving temporary disability benefits under the Nebraska Workers' Compensation Act, thereby preventing a double recovery.

Accordingly, the trial court erred as a matter of law in reducing Hernandez' workers' compensation benefits by the amount he was receiving from the unemployment insurance fund. The trial court reduced Hernandez' benefits from temporary total disability benefits to temporary partial disability benefits when it reduced his benefits by the amount he was receiving in unemployment compensation. Because the trial court erred in reducing the amount of Hernandez' benefits, it erred also in awarding temporary partial disability benefits instead of temporary total disability benefits from March 1, 2011.

CONCLUSION

We find that the trial court properly awarded disability benefits, but that it erred in awarding a vocational rehabilitation evaluation and in reducing Hernandez' disability benefits award as of March 1, 2011. Accordingly, we affirm in part, and in part reverse and remand.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.