QUINTANA V. CHRISTUS ST. VINCENT REGIONAL MED. CTR.

CHARMAINE QUINTANA,
Worker-Appellant,
v.
CHRISTUS ST. VINCENT REGIONAL MEDICAL CENTER and HOSPITAL SERVICES CORP.,
Employer/Insurer-Appellee.

No. 32,417

COURT OF APPEALS OF NEW MEXICO

December 4, 2013

APPEAL FROM WORKERS' COMPENSATION ADMINISTRATION, Gregory D. Griego, Workers' Compensation Judge

COUNSEL

Peter D. White, Santa Fe, NM, for Appellant

Camp & Elmore, LLC, Minerva Camp, Albuquerque, NM, for Appellee

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: LINDA M. VANZI, Judge, M. MONICA ZAMORA, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

{1} Charmaine Quintana (Worker) appeals the ruling of the Workers' Compensation Judge (the WCJ) that she is not entitled to statutory modifier-based benefits under the

Workers' Compensation Act (the Act), NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2013). Worker was denied modified benefits on the basis of the Separation Agreement and Release (the Agreement) made with her former employer, Christus St. Vincent (Employer). We remand for a finding of fact to determine the nature of Worker's alternatives to entering into the Agreement and for an application of the correct law to those facts.

BACKGROUND

{2} Worker was a compliance coordinator for Employer. In early 2009, Worker began having problems with her supervisor. In July 2009, Worker initiated a meeting with Barbara Roe, vice president of human resources for Employer. This was the first in a series of meetings between Worker and Roe during which they discussed the problems Worker was having with her supervisor and potential techniques to address those issues.

{3} On September 28, 2009, Worker suffered a back injury while at work and in the course of her duties. Worker reported the incident the same day and sought treatment. On October 5, 2009, Worker filed an accident report with the Workers' Compensation Administration.

{4} Worker's problems with her supervisor continued after returning to work from her injury on October 12, 2009. On or about October 19, 2009, Worker was asked to clean out her desk and leave the premises. In his memorandum opinion, the WCJ found that Worker's employment ceased on that date.

{5} Employer subsequently initiated a negotiation with Worker over the terms of her discharge. Worker was offered three options, the exact nature of which are disputed. Worker chose an option whereby she was paid $12,000 for a release of potential claims against Employer. On October 30, 2009, the Agreement was executed.

{6} As of November 8, 2010, Worker reached maximum medical improvement and was deemed permanently partially disabled with an impairment rating of six percent. On July 6, 2011, Worker filed a claim for temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits, and modified PPD benefits. After a June 27, 2012 trial, the WCJ issued a memorandum opinion and a compensation order. TheWCJ denied TTD benefits on the basis that Worker's claim was untimely filed, granted PPD benefits, and denied modified PPD benefits. The WCJ denied modified PPD benefits because the WCJ found that the Agreement constituted voluntary unemployment on the part of Worker. Worker appeals the denial of modified PPD benefits.

MODIFIED PPD BENEFITS

{7} Under Section 52-1-26(B) of the Act, PPD benefits are payable when a worker sustains an injury arising out of and in the course of employment, and therefrom suffers a permanent impairment. Pursuant to Sections 52-1-26(C) and 52-1-26.1 to -26.4, a

worker's PPD benefits are subject to increase by modification according to the worker's age, education, and physical capacity. However, a worker's PPD benefits are not subject to modification under certain circumstances, as set out in Section 52-1-26(D). Interpreting Section 52-1-26(D) in *Cordova v. KSL-Union*, this Court articulated a clear rule for the circumstances under which an employer is not liable for modified PPD benefits. 2012-NMCA-083, ¶ 20, 285 P.3d 686. An employer is not liable for modified PPD benefits only under two circumstances: (1) when the worker returns to work at or above his pre-injury wage or (2) when a worker both voluntarily and unreasonably removes herself or himself from the workforce. *Id.* The issue presented by this case is whether Worker voluntarily and unreasonably removed herself from the workforce by entering into the Agreement. This issue presents a question of application of law to the facts. We review such questions de novo. *Team Specialty Prods., Inc. v. N.M. Taxation and Revenue Dep't*, 2005-NMCA-020, ¶ 8, 137 N.M. 50, 107 P.3d 4.

{8} Worker argues that although she signed the Agreement voluntarily, she did not remove herself from the workforce voluntarily. Worker also argues that her decision to enter the Agreement was not unreasonable.

{9} The WCJ focused exclusively on whether Worker voluntarily removed herself from the workforce and failed to analyze whether Worker's removal was unreasonable. Because the *Cordova* test for denial of modified PPD benefits requires both voluntary and unreasonable removal from the workforce, we begin our analysis by examining whether Worker's entry into the Agreement was unreasonable. *See* 2012-NMCA-083, ¶ 20. For this purpose, we assume without deciding that the WCJ did not commit reversible error in finding that Worker voluntarily removed herself from the workforce by entering into the Agreement.

{10} In order to determine whether Worker's action was a reasonable removal from the workforce, we must know the nature of her options. Although both parties presented evidence on the options offered by Employer to Worker, and also submitted proposed findings of fact on the issue, the WCJ did not issue a finding of fact on Worker's options. On appeal, both parties make argument on this matter.

{11} Employer contends that Worker was offered three choices: (1) she could resign; (2) "Employer could consider corrective action because of performance issues that could lead to termination"; or (3) Worker and Employer could enter a negotiated severance agreement. Worker contends that the second choice presented was termination. Turning to the evidence, Barbara Roe testified at deposition that the second option was as maintained by Employer. However, the contemporaneous documentary evidence consistently supports Worker's position. Ms. Roe's handwritten notes taken in the course of her duties as Employer's vice president for human resources refer to "termination" as the second option. None of her contemporaneous notes in evidence are consistent with her deposition testimony. Importantly, Worker confirmed the options available to her in an e-mail exchange with Ms. Roe—in this exchange Ms. Roe acknowledges that the second option available to Worker was termination.

CONCLUSION

{12} Although there is significant evidence in the record, we do not determine questions of fact on appeal. *See Jontz v. Alderete*, 1958-NMSC-037, ¶ 20, 64 N.M. 163, 326 P.2d 95 (stating that the fact-finding function lies exclusively within the province of the trial court). We remand for a weighing of the evidence in order to determine the nature of Worker's alternatives to entry into the Agreement and for an application of the *Cordova* test to the facts.

{13} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

LINDA M. VANZI, Judge

M. MONICA ZAMORA, Judge