

7002-053

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1 IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

2 LAWRENCE JARAMILLO,

3 Worker-Appellee,

FEB 08 2016

4 v.

NO. 34,528

[Signature]

5 STATE OF NEW MEXICO DEPARTMENT
6 OF CORRECTIONS, and RISK MANAGEMENT
7 DIVISION,

8 Employer/Insurer-Appellants.

9 APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION
10 David L. Skinner, District Judge

11 Donald D. Vigil
12 Albuquerque, NM

13 for Appellee

14 Paul L. Civerolo L.L.P.
15 Paul L. Civerolo
16 Albuquerque, NM

17 for Appellants

18 MEMORANDUM OPINION

19 ZAMORA, Judge.

20 (1) Employer appeals from the compensation order entered by the workers'
21 compensation judge (WCJ). We issued a calendar notice proposing to affirm.
22 Employer has filed a memorandum in opposition. Worker has filed a memorandum
23 in support. We affirm.

1 {2} Employer contends that the WCJ erred in concluding that Worker was entitled
2 to modifier benefits because he did not voluntarily remove himself from the
3 workforce when he was terminated from the Corrections Department based on
4 allegations of sexual harassment. [DS 14] We conclude that the WCJ's ruling was
5 correct based on *Hawkins v. McDonald's*, 2014-NMCA-048, 323 P.3d 932.

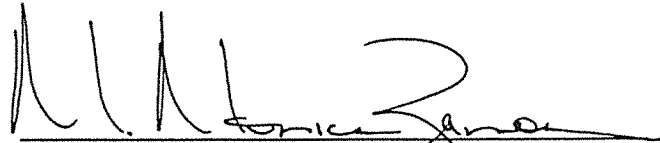
6 {3} In *Hawkins*, this Court held that termination of post-injury employment,
7 whether or not for misconduct, does not render the worker ineligible for modified
8 permanent partial disability benefits: “[W]e do not agree . . . that the level of
9 employee misconduct plays any role in the calculation of benefits[.]” *Id.* ¶ 23. While
10 benefits may still be denied if a worker, “through voluntary conduct unconnected with
11 his injury, takes himself out of the labor market[.]” *see id.* ¶ 24 (internal quotation
12 marks and citation omitted), a worker's misconduct at work and subsequent
13 termination no longer constitutes voluntarily removing one's self from the labor
14 market after *Hawkins*. As such, contrary to Employer's contention, it was not
15 improper for the WCJ to avoid a consideration of the merits of the sexual harassment
16 claim, while at the same time determining that Worker had not voluntarily removed
17 himself from the labor market. Employer's attempt to distinguish *Hawkins* based on
18 minor factual differences is unpersuasive in light of the straightforward legal holding
19 that misconduct is irrelevant to the modifier analysis. *See id.* ¶ 21.

1 {4} In addition, like the worker in *Hawkins*, *see id.* ¶ 25, the WCJ found that
2 Worker’s employment history was in a specific job category, and his injury prevented
3 him from meeting the requirements necessary to qualify for work in this field. [RP
4 365, ¶¶ 20-23] As such, the WCJ determined that Worker did not voluntarily remove
5 himself from the workforce. [RP 365, ¶ 21] We construe the WCJ’s findings to rely
6 on evidence in the record [RP 256] that Worker had, in fact, made numerous attempts
7 to find employment, but was unsuccessful. *See Toynebee v. Mimbres Mem’l Nursing*
8 *Home*, 1992-NMCA-057, ¶ 16, 114 N.M. 23, 833 P.2d 1204 (“On appeal, a reviewing
9 court liberally construes findings of fact adopted by the fact[-]finder in support of a
10 judgment, and such findings are sufficient if a fair consideration of all of them taken
11 together supports the judgment entered below.”).

12 {5} As observed in *Hawkins*, modified benefits may be denied if “worker either
13 (1) accepts employment at or above his pre-injury wage, or (2) unreasonably refuses
14 offered employment at or above his pre-injury wage.” *Id.* ¶ 24. Because the first
15 ground was not at issue, and because the evidence as a whole supports a rejection of
16 the second ground, we conclude that the WCJ did not err in awarding modifier
17 benefits. *See Leonard v. Payday Prof'l*, 2007-NMCA-128, ¶ 10, 142 N.M. 605, 168
18 P.3d 177 (noting whole record review in workers’ compensation cases).

19 {6} For the reasons set forth above, we affirm.

1 {7} IT IS SO ORDERED.


M. MONICA ZAMORA, Judge

4 WE CONCUR:

5 
6 MICHAEL E. VICIL, Chief Judge

7 
8 TIMOTHY L. GARCIA, Judge