

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-878

TOUFAYAN BAKERY,
INC./MEMIC,

Appellants,

v.

HAROLD DARIUS,

Appellee.

On appeal from an order of the Office of the Judges of
Compensation Claims.

Thomas W. Sculco, Judge.

Date of Accident: March 23, 2020.

November 16, 2022

PER CURIAM.

This workers' compensation case involves an award of temporary partial disability benefits to bakery employee Harold Darius. Because the judge of compensation claims (JCC) erred in awarding these benefits for the period that Darius refused to return to work following his compensable work injury, we set aside that portion of the final compensation order. We affirm the rest of the order.

Toufayan Bakery, Inc., has employed Darius in various positions since 2005. In March 2020, Darius was injured in an accident at work, while standing atop a “shaker table.” The table—which does indeed shake—is a three-foot high stand that positions employees so that they may reach a lane where bread comes down for packaging.

Two days after the accident, a doctor evaluated Darius and placed him on work restrictions that included no lifting above certain weight amounts and no climbing. The doctor did not place Darius at maximum medical improvement but did start a treatment plan that included medication and physical therapy.

Although he was cleared to return to work with certain restrictions, for about six weeks, Darius did not do so. During this time, he received a call from the bakery’s human resource office that confirmed he would be assigned work within his restrictions. But Darius returned to work only after receiving a letter from the bakery that said if he did not return to the workplace, he would be let go.

Following his return to work, Darius was assigned to sweep and clean floors, which was within his restrictions. But after several days, because of short staffing, a supervisor returned Darius to working on the “shaker table.” This did not accord with Darius’s “no climbing” restriction. Darius began to leave work early or call in sick.

Darius filed a petition seeking temporary partial disability benefits from the date of the accident through the date of the final hearing. The JCC granted the petition in part and ordered the bakery and its carrier to pay Darius the benefits for the period commencing with the date of the accident and ending June 12, 2020 (the date the “no climbing” work restriction was lifted). The JCC reasoned that the bakery had failed to offer Darius suitable employment during that period, so his refusal to return to work was justified. The JCC denied the remaining period of temporary partial disability benefits.

On appeal, the bakery and its carrier challenge the award of benefits asserting that any wage loss that occurred stemmed from

Darius's refusal to return to work and his frequent absence from work following his return to the workplace, not from the bakery's refusal to offer him suitable work within his medical restrictions. Because this is partially correct, we set aside part of the JCC's order.

As to indemnity benefits, like the temporary partial disability benefits here, Florida's Workers' Compensation Act provides:

If an injured employee refuses employment suitable to the capacity thereof, offered to or procured therefor, such employee shall not be entitled to any compensation at any time during the continuance of such refusal unless at any time in the opinion of the judge of compensation claims such refusal is justifiable.

§ 440.15(6), Fla. Stat. (2020).

Under this provision, the JCC determined that Darius's refusal to work was justified because the bakery failed to offer him employment suitable to his work restrictions. Because a supervisor assigned Darius to the "shaker table" in contravention of his work restrictions, the voluntary wage loss that stemmed from Darius's absence from the workplace (for six weeks after the accident) and his calling in sick or leaving early for the rest of the period (until June 12, 2020) was justified.

We find this analysis flawed as to the six weeks post-accident that Darius refused to return to work. A supervisor's actions following Darius's eventual return to work are separate from what preceded the return to work. Darius's own testimony revealed that his failure to return to work was not because the bakery failed to offer him suitable work within his restrictions. Indeed, Darius testified that the bakery's human resource office called him during that period and confirmed that he would be assigned suitable work within his medical restrictions. Rather, Darius testified that he did not return to work because he was experiencing too much pain in his back and shoulder.

Given the circumstances, Darius's subjective belief that he could not work due to pain cannot support the award of benefits

for the period he refused to return to work. We thus set aside that portion of the final compensation order. The rest of the order is affirmed, as competent substantial evidence supports the JCC's findings that the work offered to Darius upon his return was not suitable to his restrictions.

SET ASIDE in part and AFFIRMED in part.

B.L. THOMAS, NORDBY, and TANENBAUM, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Kimberly J. Fernandes, of Kelly Kronenberg, Tallahassee, for Appellants.

Nicholas A. Shannin and Carol B. Shannin, of Shannin Law Firm, P.A., Orlando, for Appellee.