

CESAR F. CORNEJO, Employee, v. RELEASE COATINGS OF MPLS. and MINN. WC ASSIGNED RISK PLAN/OCCUPATIONAL HEALTHCARE MANAGEMENT SERVS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 15, 1998

No. *[redacted to remove social security number]*

HEADNOTES

REHABILITATION - ELIGIBILITY. The compensation judge's decision that the employee was a qualified employee for purposes of rehabilitation assistance was vacated as premature where the employee had undergone surgery expected to improve his function just six weeks prior to hearing, where no permanent restrictions had been set or even projected, where there was no medical opinion concerning the employee's probable ability to work, and where the employer had demonstrated a willingness to modify the employee's job in the past.

Vacated.

Determined by Wilson, J., Hefte, J., and Johnson, J.
Compensation Judge: Catherine A. Dallner.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's award of rehabilitation services. We vacate the award as premature.

BACKGROUND

The employee is a Mexican citizen whose employment experience in Mexico included several years of police work. In 1995, after coming to the United States, the employee obtained a job as a general laborer with Release Coatings of Minneapolis [the employer], a company that straightens, cleans, and recoats baking pans for commercial baking companies. The employee's specific job assignments varied, depending on the employer's need at the time, and might involve work on a press machine, a glazer machine, or a washer.

On September 30, 1996, the employee sustained a crush injury to the fingers on his right hand when the hand was caught in a press at work. The injury and subsequent surgical repair resulted in amputation of the employee's index and little finger at the first joint, and amputation of the employee's ring and middle finger midway between the first and second joint. The employer and insurer accepted liability for the injury and paid various benefits.

The employee eventually came under the care of Dr. Phillip Haber, who released him to return to work with restrictions in January of 1997, and the employee returned to modified work for the employer on about January 20, 1997. In February of 1997, following a rehabilitation consultation, QRC Norman Mastbaum reported that the employee was a qualified employee for purposes of entitlement to rehabilitation services. About a week later, the employer's insurer responded that it would not voluntarily pay for services beyond the initial consultation. QRC Mastbaum nevertheless continued to provide limited rehabilitation services, for example, accompanying the employee to some medical appointments.

Medical records indicate that the employee complained of increased symptoms with various activities at work, and in mid or late March, after an on-site job evaluation by a physical therapist, Dr. Haber recommended additional restrictions, advising, among other things, that the employee avoid stacking pans for the press, removing pans from the washer, and performing duties associated with glazer operations. Ted Holly, the employer's plant manager, testified that the employer accommodated all recommended restrictions and essentially gave the employee a free hand to choose his job duties. The employee testified, however, that he was sometimes required to work outside of his restrictions and that he continued to experience additional symptoms as a result. Nevertheless, the employee continued to work for the employer, with little or no wage loss, into the summer of 1997.¹

The employee evidently filed a rehabilitation request in April of 1997, requesting that QRC Mastbaum be authorized to provide rehabilitation assistance.² After a conference, the issue was evidently decided in the employee's favor, and the employer and insurer subsequently filed a request for formal hearing. A few weeks later, in late July of 1997, the employee was evaluated by Dr. Mark Holm, a surgeon,³ for a second opinion regarding additional treatment options. Dr. Holm recommended surgical revision of the employee's fingertips to shorten the digital nerves and remove neuromas that had developed after the first operation. In his report, Dr. Holm advised that the recommended procedure should improve the function of [the employee's] right hand and indicated that the employee could continue to work within his restrictions pending surgery.

¹ On the date of his injury, the employee had been earning \$7.50 an hour and had been working an average of 27 hours a week. After the injury, the employee eventually worked back up to his usual hours and at some point received a raise to \$9.00 an hour.

² Several pertinent documents are missing from the file, but there is evidently no dispute as to the nature and results of the initial proceedings in this case.

³ Dr. Haber had declined to provide further treatment in early June of 1997 after the employee indicated that he no longer considered himself Dr. Haber's patient. The employer's managed care plan allowed the change in physicians.

Dr. Holm performed the recommended surgical revision on August 19, 1997. Ten days later, on August 29, 1997, Dr. Holm reported that, because the employer had no appropriate light or one-handed jobs available, the employee would remain off work until a recheck in four weeks. After that recheck on September 29, 1997, Dr. Holm indicated that the employee could return to work on October 1, 1997, on a work-hardening schedule, that the first two weeks of work hardening should take place in a therapy setting, and that the employee should observe restrictions on grasping and lifting. Another follow-up examination was scheduled to take place in two weeks.

The employer's request for formal hearing on the rehabilitation dispute came on for hearing before a compensation judge on September 30, 1997, just prior to the scheduled commencement of work hardening. Evidence included the employee's medical and rehabilitation records and the testimony of the employee, QRC Mastbaum, and plant manager Holly. In a decision issued on October 30, 1997, the compensation judge concluded that the employee had been a qualified employee for purposes of rehabilitation services since February of 1997. The employer and insurer appeal.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted. Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, they are supported by evidence that a reasonable mind might accept as adequate. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, [f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole. Id.

DECISION

Rehabilitation is intended to restore the injured employee so the employee may return to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without disability. Minn. Stat. § 176.102, subd. 1(b). In order to be eligible for rehabilitation assistance, an injured employee must satisfy the requirements of Minn. R. 5220.0100, subp. 22, which provides as follows:

Subp. 22. **Qualified employee.** Qualified employee means an employee who, because of the effects of a work-related injury or disease, whether or not combined with the effects of a prior injury or disability:

A. is permanently precluded or is likely to be permanently precluded from engaging in the employee's usual and customary occupation or from engaging in the job the employee held at the time of injury;

B. cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer; and

C. can reasonably be expected to return to suitable gainful employment through the provision of rehabilitation services, considering the treating physician's opinion of the employee's work ability.

Id. In the present case, QRC Mastbaum concluded after the initial rehabilitation consultation in February of 1997 that the employee was a qualified employee, citing as barriers to sustain[ed] employment the employee's lack of English skills, the employee's development of additional symptoms after his return to work, and the employee's trust issues regarding the workers' compensation system. Later, at hearing, QRC Mastbaum reiterated his conclusion that the employee was entitled to statutory rehabilitation services, testifying that the employee was precluded from performing his customary occupation as a policeman, that continuing work at the employer was contraindicated, and that the employee could reasonably be expected to return to suitable gainful employment through provision of services.

The compensation judge was persuaded that the employee was a qualified employee for purposes of rehabilitation eligibility. In reaching this conclusion, the judge determined in part that the employee was likely to be permanently precluded from performing his date-of-injury job, as specified in Minn. R. 5220.0100, subp. 1A. This conclusion is minimally supported by the evidence, including the medical records and the testimony of QRC Mastbaum; in fact, the nature of the injury alone would appear to make it very unlikely that the employee could ever be reasonably expected to perform all of his pre-injury job duties without modification. However, after review of the entire record, we cannot conclude that the second and third criteria of the rule have been satisfied.

We note initially that the judge characterized the possibility of the employee's return to suitable employment with the employer as uncertain and questionable. While the judge's assessment is probably accurate in view of the seriousness of the employee's injury and the essential nature of the employer's business, the rehabilitation eligibility rule would appear to require something more than mere uncertainty as to the employee's prospects for suitable work with the date-of-injury employer. Moreover, while the judge apparently accepted that the employee was at times required to work beyond his restrictions when he returned to the employer in late January of 1997, the judge also acknowledged that the employer had made efforts to accommodate the employee's disability and offer job assignments that the employee could

reasonably be expected to perform. Perhaps most importantly, the August 1997 surgery was expected to improve function in the employee's hand, and, on the date of hearing, only six weeks post-surgery, the employee had not yet had an opportunity to even begin the work hardening schedule recommended by Dr. Holm. The record in this matter contains neither any indication as to what the employee's permanent restrictions are likely to be nor any physician's opinion as to the employee's probable post-surgery ability to perform the various job assignments available in the employer's plant. See Minn. R. 5220.0100, subps. 1B and C.

The assignment of permanent restrictions may not be an absolute prerequisite to eligibility for rehabilitation assistance. See, e.g., Keiser v. Merit HVAC, No. [redacted to remove social security number] (W.C.C.A. Feb. 1, 1995); but see Jones v. Cambridge Health Care Ctr., No. [redacted to remove social security number] (W.C.C.A. Sept. 25, 1996). At the same time, however, the supreme court has recognized that

the determination that rehabilitation would significantly reduce or eliminate any decrease in employability and any decision about the kind of rehabilitation services which would be useful in achieving that end cannot be made until the employee's condition stabilizes sufficiently that the nature and extent of permanent disability and its effect on the employee's employability are known.

Langa v. Fleischmann-Kirth Malting Co., 481 N.W.2d 35, 37, 46 W.C.D. 156, 160-61 (Minn. 1992). Because the award of rehabilitation assistance was premature under all the facts and circumstances of this case, we vacate the judge's decision.