STACY DVORAK, Employee v. LUTHERAN HOME and CHURCH MUT. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 9, 1998

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

HEADNOTES

REHABILITATION - ELIGIBILITY. Where the compensation judge offered no analysis of the employee's rehabilitation claim in the context of the treating physician's opinion that the employee could work no more than four hours a day and no more than two days consecutively, that she must lie down for five minutes each hour, and that she was restricted in bending, lifting, and static positioning, where it was undisputed that the employer had provided work within the employee's restrictions, had provided as many hours as the employee was medically capable of performing, and was prepared to accommodate the employee up to forty hours a week even with severe lifting restrictions, and where there was no evidence that the employee's continuing light duty work with the employer had aggravated her condition or that she had been asked to work beyond her restrictions, substantial evidence did not support the compensation judge's finding that the employee was a qualified employee for rehabilitation purposes, notwithstanding the fact that the employee had been only eighteen and working part time on the date of her work injury and had been found to be a qualified employee at her rehabilitation consultation.

Reversed.

Determined by Pederson, J., Wilson, J., and Hefte, J.
Compensation Judge: John E. Jansen

OPINION

The employer and insurer appeal from the compensation judge's determination that the employee was a qualified employee for rehabilitation services as defined by Minn. R. 5220.0100, subp. 22. We reverse.

BACKGROUND

On June 10, 1991, while still in high school, Stacy Dvorak [the employee] began working part time for Lutheran Home [the employer] as a certified nurses' assistant, continuing in this employment upon graduation from high school in 1992. The employee's primary duties as a nursing assistant were to assist the residents in their activities of daily living. These duties included assistance with eating, walking, toileting, and bedtime chores, as well as passing out ice water, distributing Attends products, and charting. The major physical activity in her job was the actual moving of residents in and out of bed with the assistance of a co-worker.

On December 22, 1992, the employee was assisting a co-worker in the transfer of a resident from a wheelchair into bed when she felt something pop in her back. Subsequent to her injury, the employee was treated and evaluated by several different physicians, physical therapists, and other treatment specialists.[1] Her main treating physician, Dr. George Adam, has described the employee's condition as a chronic cervical, thoracic, lumbar strain. Since at least July 14, 1997, and as of the date of trial in this matter, Dr. Adam has recommended to the employee a number of restrictions, including the following: work no more than four hours per day; work no more than two days in a row; change positions as indicated by fatigue; lie down five minutes each hour; avoid repetitive bending and lifting, static positions, and lifting overhead; and confine yourself to light work, never lifting more than 20 pounds. Subsequent to the injury, the employee has continued to work for the employer as a nursing assistant, about twelve hours per week as of the time of trial, but with the position modified to comply with Dr. Adam's restrictions. Pursuant to those restrictions, the employee has not been involved with patient transfer or with the care of some residents who need physical assistance. The employee has described her duties after her injury as being essentially the same as her duties before the injury, except that she no longer does any lifting.

Subsequent to the employee's injury, the employer's insurer, Church Mutual Insurance Company, accepted liability and paid benefits for varying periods of temporary total and temporary partial disability between January 17, 1993, and July 17, 1993. The employee has also been paid for a 7% permanent partial disability of the body as a whole and has received considerable medical treatment. At the time of her injury, the employee was still working only part time, earning $7.06 an hour and $137.70 a week.[2] It appears[3] that the employee was earning in excess of $9.00 per hour at the time of trial.

On July 22, 1997, the employee filed a Rehabilitation Request, seeking a rehabilitation consultation pursuant to Minn. Stat. § 176.102, subd. 4. The employer and insurer agreed to the consultation, and one was performed by QRC Thomas Saby on August 14, 1997. In a Rehabilitation Consultation Report dated August 20, 1997, QRC Saby indicated that it was

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[1] Medical records introduced at the hearing reflected evaluation and treatment with the Parkview Medical Clinic, Queen of Peace Hospital, Bruce I. Idelkope, M.D., The Pain Management Program at The Minneapolis Clinic of Neurology, Donald L. Foss, M.D., Institute for Low Back Care, Physical Therapy Orthopaedic Specialists, Inc., Courage Center, Samuel Yue, M.D., North Pain Institute, Erich S. Wisiol, M.D., Center for Diagnostic Imaging, Minnesota Diagnostic Center, Sports and Orthopedic Physical Therapy, Thomas H. McPartlin, M.D., and Lon J. Lutz, M.D. The employee's treating physician since January 15, 1997, and at the time of trial was Dr. George Adam of the Noran Neurological Clinic.

[2] See Petitioner's Exhibit A.

[3] See Respondent's Exhibit 4.

unknown whether the employee expected to return to the pre-injury employer or occupation. He concluded, however, that the employee could be expected to return to suitable gainful employment through statutory rehabilitation services and that the employee was eligible for such services. The employer and insurer filed a Rehabilitation Request on September 2, 1997, objecting to the proposed rehabilitation plan and the conclusion of the QRC that the employee is a qualified employee for rehabilitation services. The employee responded with a Rehabilitation Response filed on September 17, 1997, requesting approval of the rehabilitation plan.

A mediator/arbitrator at the Department of Labor and Industry issued a Decision and Order on December 1, 1997, approving the rehabilitation plan. The employer requested a formal hearing on December 22, 1997, and the case came on for hearing before Compensation Judge John Jansen on March 17, 1998. The record closed on April 7, 1998, with the filing of proposed findings by each party, and the judge issued his Findings and Order on May 8, 1998.[4] For that decision, the compensation judge adopted the proposed findings of the employee essentially verbatim, concluding essentially that the employee was qualified for rehabilitation services and that the rehabilitation plan proposed by the QRC was reasonable. He also awarded attorney fees and costs and disbursements to the employee's attorney. 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,

[4] While proposed findings or letter briefs at the conclusion of a hearing may be helpful to the finder of fact, they should not supplant the judge's obligation to evaluate the evidence. When submitting proposed findings, both sides obviously present a one-sided view of the evidence, presenting their best arguments and ignoring the weaknesses in their case. The pitfalls of wholesale adoption of proposed findings are displayed in this case. The treating physician's opinions as to the employee's work ability are not reviewed by the compensation judge in his Findings or Memorandum. We continue to discourage the practice of a compensation judge's cart blanche use of proposed findings and order as the judge's decision. See Hagg v. Olympic Steel, Inc., No. *[redacted to remove social security number]* (W.C.C.A. Sept. 1, 1998), and Goldman v. Bryn-Mawr Nursing Home, No. *[redacted to remove social security number]* (W.C.C.A. Nov. 23, 1998).

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 services, an injured employee must be deemed a qualified employee. The parties concur that the applicable rule governing this issue is 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.

In the present case, QRC Saby conducted a rehabilitation consultation on August 14, 1997, and concluded that [w]hile her work situation is appropriate, the QRC believes it is not suitable. He further opined that a return by the employee to regular duty as a nurses' assistant was unlikely and that her part-time schedule with the employer does not produce an economic status as close as possible to that the employee would have enjoyed without disability. He was also of the opinion that, if she were to work in other, lighter work, the employee would be more likely to work additional hours and to enhance her economic status. He concluded that the employee's economic status at the time of injury should include her aspiration to full-time employment. A full-time position in her current job would earn the employee gross wages of approximately $360.00 per week.

In his Findings and Order, the compensation judge determined 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 the job she held at the time of her injury, as specified in Minn. R. 5220.0100, subp. 1A. This conclusion is supported by substantial evidence, including the medical records, the report of QRC Saby, and the length of time that the employee has been working in a modified job. However, after review of the entire record, we cannot conclude that the second and third criteria of the rule have been satisfied.

The judge implicitly found that the employee's current job with the employer did not constitute suitable gainful employment and that the provision of rehabilitation services would be of benefit to the employee in returning to suitable gainful employment. The apparent basis for these conclusions is that the modified job provided by the employer does not return the employee to her pre-injury economic status. In his Memorandum, the judge explains that the employee was only eighteen years old when she was injured working at a part-time job and that in such a circumstance an employee's pre-injury economic status is not forever limited to part-time employment. He suggests that the employee has the right to receive rehabilitation services in her effort to return to her pre-injury economic status, which was not only her income at the time of her injury but also her potential for advancement and increase of earnings in the future. The judge concluded that the employee should be allowed to explore other options that will allow her to improve her economic status.

We think that full concurrence with the compensation judge's rationale regarding the employee's economic status would place the cart before the horse. The issue before us is not whether the employee might be able to improve her economic status through rehabilitation assistance but whether the modified position with the employer that she currently holds constitutes suitable gainful employment. Crucial to this determination is the employee's work ability. The compensation judge offers no analysis of the employee's claim in the context of the treating physician's opinion as to the employee's work ability. The restrictions placed on the employee by the treating physician are very limiting. The employee has been released to work only four hours per day and no more than two days consecutively. She must lie down for five minutes each hour. She has restrictions on bending, lifting and static positioning. There is no dispute that the employer has provided work within the employee's restrictions. The employer has provided as many hours as the employee is medically capable of performing. The employer's witness, Nancy Meyer, testified that the employer would be able to accommodate the employee up to forty hours a week, even if she couldn't lift more than five pounds. No evidence was offered to suggest that the employee's continuing light duty work with the employer has aggravated the employee's condition or impacted her restrictions or that she has been requested to work beyond her restrictions. The employee agreed that the employer has accommodated her medical restrictions in every respect. In fact, the employee essentially agreed that her current employment situation is ideal.

Part-time employment may not be considered suitable gainful employment for the employee indefinitely, but for now that is all that she is capable of performing. Considering the

treating physician's opinion as to the employee's work ability, we believe that the employee is currently engaged in suitable gainful employment with the date of injury employer and that therefore she is not eligible for rehabilitation services under these facts. See, e.g., Adams v. Marvin Windows, 533 N.W.2d 858, 52 W.C.D. 585 (Minn. 1995). If circumstances should change, the employee may of course submit another request for rehabilitation services. However, under the facts as they now exist, we believe that the compensation judge's conclusion that the employee is a qualified employee for rehabilitation purposes is clearly erroneous for being manifestly contrary to the weight of the evidence currently before the judge. See Northern States Power Co., 304 Minn. at 201, 229 N.W.2d at 524. While our substantial evidence standard is an admonition to the reviewing court not to treat the findings of the factfinder lightly, this court is still obligated to remain[] cognizant of its own responsibility to exercise good judgment in reviewing what the evidence will reasonably sustain. Hengemuhle, 358 N.W.2d at 60, 37 W.C.D. at 240.