RICHARD A. ANDERSON, Employee, v. METRO. MECH. CONTRACTORS, INC., and CNA/TRANSCONTIN. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 19, 1999

No. [REDACTED SSN]

HEADNOTES

REHABILITATION - RETRAINING. Substantial evidence, including the testimony of the employee's QRC, supported the compensation judge's approval of a proposed retraining plan in construction management.

Affirmed.

Determined by Pederson, J., Rykken, J., and Johnson, J.
Compensation Judge: Danny P. Kelly.

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's approval of retraining. We affirm.

BACKGROUND

The employee was born in 1951 and earned a bachelor's degree in elective studies prior to entering the pipefitting trade in 1975 or 1976. After a four-year apprenticeship, the employee became a journeyman pipefitter and eventually obtained master licenses in a number of areas in the trade, including refrigeration, gas, oil, low pressure steam, and "CFC universal," which concerns refrigerant handling and reclamation. As a union member with significant experience and licensure, the employee earned more than $50,000 a year in 1993, 1994, and 1995, together with substantial fringe benefits.

On December 6, 1995, the employee fractured both heels in a twenty-foot fall while working as a pipefitter for Metropolitan Mechanical [the employer]. He was hospitalized immediately after the accident and underwent surgery to both feet, in the nature of open reduction and internal fixation, on December 13, 1995. The employee wore casts for several months and then underwent physical therapy that had been prescribed by his treating physician, Dr. Paul Crowe.

In January of 1997, the employee returned to work for the employer in a part-time

pipefitter job that was consistent with the restrictions recommended by Dr. Crowe, which included a forty-pound lifting limit, a four-hour work day, and a one-hour limit on time spent by the employee on his feet without sitting to rest. The employee later attempted but was unable to increase his work day to five hours, and Dr. Crowe eventually indicated that the employee would always have significant limitations as to the time he could spend on his feet. Working part-time for the employer, the employee earned about $29,000 a year. Although he continued to receive fringe benefits, those benefits were adversely affected by his part-time status.

The employee's QRC, Thomas Saby, ascertained that the employer had no appropriate full-time work for the employee, and, after discussing the matter with the employer's insurer, QRC Saby began investigating the possibility of retraining. The QRC later testified that he and the insurer's claims representative had agreed early on that a job search was unlikely to produce economically suitable employment given the employee's high pre-injury wage.

In July of 1998, after completion of vocational testing and a labor market survey, QRC Saby prepared a formal retraining plan, calling for the employee to enroll in a four-year program for a bachelor's degree in construction management. Rehabilitation records indicate that the construction management program, which is relatively new, was developed by the University of Minnesota at the request of about two dozen local construction firms. As described in the retraining plan, "[c]onstruction managers oversee construction supervisors and workers and are responsible for controlling specific aspects of the design and construction processes over the lifetime of a project." The work involves planning, budgeting, scheduling, determining construction methods, procuring necessary construction permits and licenses, reading engineering and architectural drawings, and conferring with design professionals, owners, contractors, and project managers in order to monitor and coordinate all phases of a construction project. Under the plan, the employee was to complete two years of coursework at North Hennepin Community College and then two years of coursework at the University. The estimated total retraining cost, excluding wage loss benefits, was about $21,000; the length of the program was 128 weeks. According to the labor market survey, in which the QRC contacted eleven construction companies, the average starting salary in the field was about $31,000, with an average salary of about $52,000 expected after five years of work.

In the fall of 1998, the employee enrolled in several courses required for the construction management program, having been informed by QRC Saby that the insurer had approved the retraining proposal. However, the insurer subsequently changed its position, alleging in part that the plan was too expensive. An administrative conference was held on October 8, 1998, to consider the employee's request for retraining, and, on November 2, 1998, a representative of the commissioner issued a decision pursuant to Minn. Stat. § 176.106, determining that "the proposed retraining plan [was] not reasonable and necessary at this time." In her memorandum, the commissioner's representative explained that "an analysis of the results of job search and . . . of the value of taking isolated courses would be helpful before embarking on such a relatively costly program," especially given that the program was new and untested and given that it was expected to take five years or more, after completion of the program, for the employee to return to his pre-injury wage level. The decision of the commissioner's

representative was based in part on the opinion of vocational expert L. David Russell, who evaluated the proposed retraining program on behalf of the employer and insurer. In his September 28, 1998, report, Mr. Russell had indicated in part that the employee was marketable for several jobs, including construction management, in his current state; that it was important, given his age, that the employee remain in the labor market; and that the employee could likely benefit from taking isolated courses in conjunction with a job search and continued part-time employment.

Following issuance of the administrative decision, the employee filed a request for formal hearing, and the matter came on for hearing before a compensation judge on February 12, 1999. Evidence included the employee's testimony; the testimony and records of QRC Saby, including an updated labor market survey performed after issuance of the administrative decision; some medical records from Dr. Crowe; and the deposition of Mr. Russell, taken post-hearing. In a decision issued on March 18, 1999, the compensation judge approved the proposed retraining plan in construction management. 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

Retraining an injured worker in another occupation may be appropriate if the retraining "will materially assist the employee in restoring his impaired capacity to earn a livelihood." Norby v. Arctic Enters., Inc. 305 Minn. 519, 521, 232 N.W.2d 773, 775, 28 W.C.D. 48, 50 (1975). As noted in Poole v. Farmstead Foods, 42 W.C.D. 970, 978 (W.C.C.A. 1989),

> Areas of concern in evaluating an employee's entitlement to retraining . . . include: (1) the reasonableness of retraining as compared to returning to work with employer or other job placement activities, (2) the likelihood that employee has the ability and

> interest to succeed in a formal course of study in a school, (3) whether retraining is likely to result in reasonably attainable employment, and (4) whether retraining is likely to produce an economic status as close as possible to that which the employee would have enjoyed without disability.

In the present case, the issue is not so much whether the employee would benefit from some retraining as it is whether the specific retraining proposal is appropriate. In their brief, the employer and insurer concede that the employee will not be returning to full-time work with the employer and that he is capable of completing a formal course of study. They argue, however, that substantial evidence does not support the conclusion that retraining will result in reasonably attainable employment or that it will produce an economic status as close as possible to that which the employee would have enjoyed without his disability. More specifically, the employer and insurer contend that the labor market survey, upon which QRC Saby based his opinion, is deficient because the survey "fails to address a number of key issues such as the Employee's age and the availability of employment at the time the Employee completes the construction management program." The employer and insurer also contend that the construction management retraining plan is an unreasonable option because the proposed program has no proven track record and because the QRC did not do any comparison between the total dollars the employee would receive in his current part-time position, considering anticipated salary increases and supplementation by workers' compensation benefits,[1] and his anticipated earnings in construction management. After review of the record as a whole, we are unpersuaded by the employer and insurer's arguments.

QRC Saby testified in some detail as to the basis for his recommendation of the proposed retraining plan. While he acknowledged that few of the employers contacted actually required a construction management degree, he noted that most of them indicated that the degree would be helpful to candidates seeking that position. He also testified that the employee's experience as a pipefitter would make the employee a more attractive candidate and should balance out any concerns that employers might have about the employee's age, which would be 51 or 52 by the time of his anticipated completion of the program. Moreover, while it may be true that the degree program is new, with an "unproven track record," the fact that numerous local construction firms requested development of the program provides at least some evidence that graduates of the program will have reasonable employment opportunities in the field. In fact, according to the labor market survey, "[e]mployment of construction managers is expected to increase much faster than the average for all occupations through the year 2005 as the number and complexity of construction projects continues to grow."

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[1] We note, however, that the employee is apparently eligible for temporary partial disability benefits for only about 150 more weeks. For this and other reasons, the employee's receipt of workers' compensation benefits is not a relevant consideration in evaluating the retraining plan.

The employee was a high wage earner at the time of his injury and has no reasonable expectation of returning to full-time work in his pre-injury occupation or to other appropriate full-time work with the employer. He was only 47 years old at the time of hearing and testified that he had no definite plans as to retirement. The record as a whole reasonably indicates that the employee is capable of completing the proposed retraining plan and of obtaining employment in the field following graduation. QRC Saby testified that the addition of a second part-time job to supplement the employee's current income from the employer would not result in an economic status as close as possible to that the employee would have enjoyed without his disability, and he further explained that piecemeal supplemental coursework, as opposed to completion of a degree program, would be riskier for the employee in terms of his ability to obtain economically suitable work. While Mr. Larson, the employer and insurer's expert, disputed many of QRC Saby's conclusions and raised concerns about the validity of the labor market surveys, those concerns were for the compensation judge to weigh and provide no justification for reversal. The propriety of a proposed retraining plan is a fact issue for the compensation judge. It is clear to us that the judge considered the evidence in light of established case law factors, and he was entitled to accept the opinion of QRC Saby over the opinion of Mr. Russell. See, e.g., Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Finding substantial evidence in the record to support the judge's decision, we affirm.