PATRICK CELLETTE, Employee, v. FLEMING FOODS and CIGNA INS. CO., Employer-Insurer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 26, 1999

No. [REDACTED SSN]

HEADNOTES

REHABILITATION - RETRAINING. Substantial evidence supports the compensation judge's approval of a two-year retraining program. The compensation judge adequately considered the alternative programs suggested by the employer and insurer.

TEMPORARY PARTIAL DISABILITY - EARNING CAPACITY. Substantial evidence supports the compensation judge's finding regarding the employee's earning capacity.

Affirmed.

Determined by: Rykken, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Jeanne E. Knight

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal the compensation judge's approval of a retraining plan and the finding that the employee had an earning capacity of $8.50 per hour as of March 8, 1998. We affirm.

BACKGROUND

On September 17, 1997, Patrick Cellette (employee) sustained an admitted low back injury while working in the warehouse of Fleming Foods (employer), which was insured for workers' compensation liability by Cigna Insurance Company (insurer). The parties stipulated that the employee's weekly wage at the time of this injury was $814.11. At the time of the hearing, the employee was 34 years old. The employee had worked for the employer from 1985 through November 1997, and had previously sustained injuries to his back during his course of employment in 1989, 1990, 1991, 1993 and 1996. Following a work-related injury on November 18, 1996, the employee eventually returned to work but was restricted to no lifting over 50 pounds and limited bending and twisting.

The employee had returned to full-time work as a forklift operator by the time of his final injury on September 17, 1997. Following this injury, the employee was assigned

additional work restrictions of no lifting over 50 pounds, limited bending and twisting, and no more than four hours per day operating a forklift or pallet jack. On November 17, 1997, these restrictions became permanent, which precluded the employee from returning to his pre-injury job with the employer.

The employee was then assigned QRC Susan Schmidt to assist him with placement services. On December 23, 1997, the QRC conducted an Initial Rehabilitation Consultation and related vocational testing of the employee. (Ee. Ex. D.) Prior to the rehabilitation consultation, on December 5, 1997, the employer offered the employee a full-time non-union customer service representative position at $8.50 per hour. (Ee. Ex. E.) The employee refused this offer, allegedly on the advice of his QRC, on the grounds that the pay was insufficient. (Finding No. 6; Ee. Ex. D; T. 50-51.) In January 1998, the employee requested a change of QRC to Michael Anderson, who also recommended placement services. The insurer agreed to the change in QRC but denied provision of placement services.

On March 8, 1998, the employee found a job on his own at E & O Tools & Plastics paying $8.00 per hour. Also in March 1998, the employee filed a rehabilitation request for job placement services and exploration of retraining and filed a claim petition for temporary partial disability benefits. The employer agreed to provision of placement services in May 1998 and the employee began a formal job search while continuing to work full time. In June 1998, the employer and insurer sought discontinuance of the employee's temporary partial disability benefits, arguing that the employee had not conducted a diligent job search and that the employee's post-injury earnings at E&O Tools and Plastics were not representative of his earning capacity. On July 6, 1998, the employee underwent an independent vocational assessment with Richard VanWagner. Mr. VanWagner concluded that the employee was not conducting a diligent job search, and that the employee had an earning capacity of $9.00 to $12.00 per hour. (Er. Ex. 1; T. 236-237.)

On July 27, 1998, the employee was hired by Carbide Tool as a manual machinist at $9.25 per hour. The employee worked approximately 44 hours per week and continued to perform a job search in order to obtain employment at a wage closer to his pre-injury weekly wage of $814.11, based on $18.40 per hour, plus overtime.

The employee's QRC and job vendor concluded that the employee would need vocational training in order to find a job paying a wage closer to his date of injury wage. In November 1998, a labor market survey was conducted by Janene Haugen, to investigate entry level employment for the position of CNC machinist. (Ee. Ex. A.) This was a field in which the employee expressed interest, and for which the QRC believed the employee possessed an aptitude and ability to learn the necessary skills. (T. 156.) The survey indicated that the CNC machinist position was physically suitable, within the employee's restrictions, and that an entry level position would pay $9.00 to $14.00 per hour and after five years, the hourly wage would range from $15.00 to $25.00. All ten of the employers contacted for the survey indicated that they preferred to hire individuals with at least 2 years' training or experience with the skills needed for that type of work.

On December 1, 1998, the employee filed a formal retraining plan in a two-year CNC machinist program at Anoka Hennepin Technical College. The employer and insurer objected, arguing that the employee could take night school classes while continuing to work at Carbide Tools, or could complete a shorter-term program.

A hearing was held on January 6, 1999. The compensation judge found that the employee was not temporarily totally disabled from January 28, 1998 through March 2, 1998 and had not conducted a job search during this time, and that the employer and insurer therefore were entitled to a credit for temporary total disability payments paid during this time. The compensation judge determined that the employee had an earning capacity of $8.50 per hour as of March 8, 1998 based upon the customer service job offered by the employer in December 1997, and concluded that the employee was entitled to the two-year retraining plan. The employer and insurer appeal the approval of the retraining plan and the earning capacity determination.

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 (1998). 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

The compensation judge approved the two-year retraining plan in CNC machining. The employer and insurer argue that the compensation judge did not properly analyze the plan or appropriate alternatives in arriving at her decision. Factors relevant in evaluating the propriety of a proposal for retraining include (1) the reasonableness of retraining as compared to job placement activities or the employee's return to work with the employer; (2) the likelihood that the employee has the abilities and interest to succeed in the proposed formal course of study; (3) the likelihood that retraining will result in reasonably obtainable employment; and (4) the likelihood that retraining will produce an economic status as close as possible to that which the employee would have enjoyed without the disability. See, e.g., Poole v. Farmstead Foods, 42 W.C.D. 970

(W.C.C.A. 1989); Minn. Stat. § 176.102, subd. 1.

The Poole factors were addressed through vocational testimony and rehabilitation reports included in the hearing record. In regard to the first Poole factor, the employee's QRC compared retraining to continued job search, and concluded that additional job search would not be successful in locating a higher paying job for the employee. Many of the employers contacted for the labor market survey indicated that the employee would need additional training in order to be eligible for the higher paying positions. The employer and insurer concede that the employee was likely to successfully complete the program, the second factor addressed in Poole. The employer and insurer argue, however, that the employee's two-year removal from the labor market would hurt his chances of obtaining employment after the program, contrary to the third Poole factor which addresses the likelihood that retraining will result in reasonably obtainable employment. The labor market survey, by contrast, indicated that the employee needed vocational training to be hired for higher-paying jobs. There was no indication in the labor market survey that being unemployed while completing the program would be considered negatively by employers.

The employer and insurer argue that the employee initially would earn less after the CNC retraining program than he would if he continued working at Carbide Tools. However, according to the vocational opinions presented at hearing, retraining would result in reasonably obtainable employment, see, Poole, and the employee's earning capacity in the future would be significantly higher with retraining than if he stayed at Carbide Tools. The employee's earning capacity at his current position with Carbide Tools was $11.00 to $13.00 after two to four years, and approximately $13.00 to $14.00 after five years. The employee's QRC opined that after retraining, the employee would earn a starting wage of $12.00 or $13.00 per hour but would earn an increase up to $20.00 per hour after five years. Based on this information, the compensation judge could reasonably conclude that the retraining program was reasonable and would produce an economic status as close as possible to that the employee would have enjoyed without the disability. The compensation judge appropriately considered these and all other Poole factors in approving the two-year plan.

The employer and insurer also argue that the compensation judge did not adequately consider the alternate evening programs which would allow the employee to continue working at Carbide Tools, citing Kunferman v. Ford Motor Co., 55 W.C.D. 564 (W.C.C.A. 1996), which stated that in addition to consideration of the Poole factors,

> the compensation judge must do a comparative analysis of any alternative retraining plans proposed by the employer and insurer. The compensation judge must apply the four factors to both the proposed retraining plan and the alternative retraining plan and then make a comparison between the two plans. Inherent in this comparison would be a review of how long the various programs would take, how soon the employee would be returned to an economic status as close as possible to that which they would have

enjoyed without the disability, and a comparison of the total costs associated with providing the retraining.

In the Kunferman case, however, the compensation judge specifically refused to consider the "significant amounts of evidence" concerning the alternative programs proposed by the employer and insurer. In this case, the compensation judge did consider the alternatives. The alternatives offered by the employer and insurer were not presented by written documentation but were instead outlined in Mr. VanWagner's testimony. He testified that an evening program was available in CNC training which would allow the employee to continue working at Carbide Tools and stay in contact with the labor market. He also referred to a one-year CNC training course which could serve as an option to the employee's proposed two-year course, on-the-job training opportunities potentially available from some employers and continuing education courses available at Dunwoody Institute. (Er. Ex. 2; T. 242-46.)

By contrast, the employee's QRC opined that the two year full time program would be more appropriate since enrolling in evening classes would take much longer for completion of the entire program (T. 214-15), although the record does not indicate how long it would take the employee to complete the program by taking evening classes. The QRC determined that by completing the course in two years, the employee would recover his lost earning capacity more quickly. The compensation judge considered the employer and insurer's argument that retraining combined with experience gained through continued employment would be a better plan and would minimize the employee's reduction in earning capacity. After considering the evidence and these alternatives, the compensation judge concluded that the employee had proven that the requested two-year retraining program was necessary to restore the employee's lost earning capacity. Substantial evidence supports this finding. The compensation judge did not err by failing to consider the employer and insurer's alternative programs.

Earning Capacity

The employer and insurer claim that the compensation judge erred in determining the employee's earning capacity from and after March 8, 1998. The determination of the employee's earning capacity is a finding of fact for the compensation judge. Noll v. Ceco Corp., 42 W.C.D. 553, 557 (W.C.C.A. 1989). An employee's post-injury wage is presumed to be representative of his reduced earning capacity. However, in appropriate circumstances, this presumption can be rebutted with evidence indicating the employee's ability to earn is different than the post-injury wage. Schwan v. Fabcon, 45 W.C.D. 209 (W.C.C.A. 1991) (citing Einberger v. 3M Co., 41 W.C.D. 727, 739 (W.C.C.A. 1989) (citations omitted)). In order to rebut the presumption and establish an earning capacity different from actual earnings, as is argued by this employer and insurer, there must be more presented than evidence of a hypothetical job paying a theoretical wage. Saad v. A.J. Spanjers Co., 42 W.C.D. 1184, 1194 (W.C.C.A. 1990); Patterson v. Denny's Restaurant, 42 W.C.D. 868, 875 (W.C.C.A. 1989).

On March 8, 1998, the employee began working for E & O Tools at a wage of $8.00 per hour. The employee previously had refused the employer's job offer as a customer service

representative which was presented to him in December 1997 and which paid $8.50 per hour. (Ee. Ex. E.) The compensation judge found that the employee's earning capacity as of March 8, 1998 was $8.50 per hour based upon that prior job offer. The employer and insurer appeal, arguing that the employee's earning capacity was $9.00 to $12.00 per hour based upon jobs identified by the job placement specialist, the employee's ability to find a job in July 1998 at Carbide Tools paying $9.25 per hour, and the opinions of the employer's vocational expert witness, Mr. VanWagner.

Whereas it is true that once the employee was provided job placement services, the employee was able to find a job which paid $9.25 per hour, before that time the employee performed a job search on his own and found a job which initially paid $8.00 per hour. While the employee's QRC testified that the employee's earning capacity might range between $9.00 to $12.00 per hour (T. 145), the employee eventually earned only $9.25 per hour after more than seven months of job search, and $9.70 by October 1998 due to a pay increase. It was not until late July 1998 that the employee had been offered a job which paid any more than the $8.50 hourly wage previously offered by the employer. The judge based her determination of the employee's March 8, 1998 earning capacity on an actual job offered to the employee. That level of earning capacity extended from March 8, 1998 until July 27, 1998 when the employee began earning $9.25 per hour at Carbide Tools. Substantial evidence supports the compensation judge's finding regarding the employee's earning capacity. Accordingly, we affirm.