DALE DAVIDSON, Employee, v. NORTHSHORE MFG. and STATE FUND MUT. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 22, 1999

No. [REDACTED SSN]

HEADNOTES

REHABILITIATION - RETRAINING; PRACTICE & PROCEDURE - RIPENESS. Where the employee had not yet actually sought approval of retraining, it was premature to determine whether the employee's filing of a rehabilitation request for retraining satisfied the requirements of Minn. Stat. § 176.102, subd. 11(c) (1996). The decisions below on this issue are therefore vacated and the appeal dismissed.

Vacated and appeal dismissed.

Determined *en banc*.
Compensation Judge: Donald C. Erickson.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's decision interpreting Minn. Stat. § 176.102, subd. 11(c). We vacate that decision and dismiss the appeal.

BACKGROUND

On May 15, 1996, the employee sustained a work-related low back injury while employed by Northshore Manufacturing, Inc. [the employer]. The employer and insurer admitted liability for the injury and paid various benefits. At some point the employee obtained other work with another employer, Vantage Point Manufacturing, where he allegedly sustained a second low back injury in December of 1997. Vantage Point and its insurer denied liability for that injury.

On September 25, 1998, the employee filed a rehabilitation request, stating "the employee requests retraining," and he supported the request with an attachment reading as follows:

> This retraining request is filed to comply with M.S. §176.102 that requires that any request for retraining be filed before 104 weeks of indemnity benefits have been paid. On January 8, 1998 employee underwent lumbar laminectomy/diskectomy surgery at L4-5/L5-S1. At this time, Dr. Dulebohn does not believe the

> employee has reached maximum medical improvement and he further believes that should the employee develop chronic back pain he would be an excellent candidate for an anterior fusion. Please see the enclosed Duluth Clinic, Ltd. medical record of May 13, 1998. Currently, the employee is working a light duty job, however, it is unknown whether this return to work will be successful or whether the employee will regain his pre-injury wage with an opportunity for advancement. As a result, the employee notifies the employer/insurer and the Commissioner of the Department of Labor & Industry of his request for retraining because of the potentiality that the employee's injury will severely and adversely impact his future employability.

Both the employer and insurer and Vantage Point filed objections.[1]

On November 25, 1998, a conference on the employee's rehabilitation request was held by a compensation judge of the Duluth Settlement Division of the Office of Administrative Hearings. In an order pursuant to Minn. Stat. § 176.106, issued on December 24, 1998, the compensation judge determined that the rehabilitation request was "not ripe for adjudication," noting that the employee had filed the request simply "to give the necessary notice . . . to toll any statute of limitations contained within Minn. Stat. § 176.102, subd. 11(c)." The judge also ruled, however, that, by filing the request, the employee had "indefinitely tolled any statute of limitations imposed by Minn. Stat. § 176.102, subd. 11(c)," and had "complied with the notice requirements of Minn. Stat. § 176.102 preserving for future determination employee's entitlement to retraining benefits."

On January 22, 1999, the employer and insurer filed a request for formal hearing, disputing the judge's conclusion as to the effect of the employee's filing of the rehabilitation request. The matter was then submitted to a compensation judge on May 27, 1999, on stipulated facts. As stated by the judge at hearing, the "only issue [was] whether and how a request for retraining tolls the statute found in Minnesota Statutes 176.102, [subd. 11(c)]." Both counsel[2] indicated that the employee was still working at a light-duty job and that the issue was whether his filing of the rehabilitation request, concerning retraining, satisfied Minn. Stat. § 176.102, subd. 11(c), so as to preserve a future claim for retraining should the employee choose to bring one.

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[1] Subsequently, in November of 1998, the employee and the employer and insurer entered into a to-date settlement concerning wage loss and permanent partial disability benefits. An award on stipulation was issued on November 13, 1998. Vantage Point was not a party to the settlement.

[2] Vantage Point and its insurer did not take part in this proceeding, apparently with the agreement of all parties.

In a decision issued on June 28, 1999, the compensation judge concluded that the employee's filing of the rehabilitation request "indefinitely preserved his right to request retraining." The employer and insurer appeal.

STANDARD OF REVIEW

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Minn. Stat. § 176.102, subd. 11(c), effective for injuries occurring on or after October 1, 1995, provides as follows:

> (c) Any request for retraining shall be filed with the commissioner before 104 weeks of any combination of temporary total or temporary partial compensation have been paid. Retraining shall not be available after 104 weeks of any combination of temporary total or temporary partial compensation benefits have been paid unless the request for the retraining has been filed with the commissioner prior to the time the 104 weeks of compensation have been paid.

The employer and insurer contend that the compensation judge erred in interpreting the statute as a notice provision rather than a limitations provision, arguing that the statute bars retraining claims unless the employee actually seeks approval of retraining prior to the employer and insurer's payment of 104 weeks of temporary benefits. After review of the file, we conclude that the issue was not properly before either compensation judge and is not properly before us on appeal.

It is undisputed that there is no present claim for retraining here; that is, the employee is not seeking approval of "a formal course of study in a school setting which is designed to train the employee to return to suitable gainful employment." Minn. Stat. § 176.011, subd. 23. Rather, the employee filed his rehabilitation request in order to preserve his rights should he decide to pursue retraining at some point in the future. That circumstance may well never come to pass, and, while it is understandable for the parties to want guidance as to how the requirements of Minn. Stat. § 176.102, subd. 11(c), may be satisfied, nothing in the workers' compensation act allows for either advisory opinions or declaratory judgments. The issue is not ripe; no benefits are yet at stake. Cf. Katzenmeyer v. M.T.S. Systems, Inc., slip op. (W.C.C.A. Apr. 4, 1995) (where no doctor had recommended surgery and the employee did not wish to pursue surgery at the time of hearing, the compensation judge properly concluded that the issue as to approval of surgery was not ripe for determination); see also Makitalo v. Sears, Roebuck & Co., slip op. (W.C.C.A. May 9, 1995) (the issue of whether a justifiable controversy exists may be

raised on the court's own motion). We therefore vacate the decisions of both compensation judges as premature, and we dismiss this appeal. The employee filed his rehabilitation request, notifying the employer and insurer of his request for retraining, and a decision as to whether that filing satisfies the statute may be made if and when the employee actually seeks approval of some specific retraining plan in the future.