

SAMMY J. DIFFERDING, Employee/Appellant, v. M.E. INT'L and SENTRY INS. CO.,  
Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
JULY 28, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - PREMATURE FINDINGS; ECONOMIC RECOVERY COMPENSATION - SUITABLE JOB. On the facts peculiar to this case, where the job offered to the employee was the subject of a pending union grievance, it was premature to determine whether the job was suitable, within the meaning of Minn. Stat. § 176.101, subd. 3e, and a determination of whether permanency is payable as economic recovery compensation (ERC) or impairment compensation (IC) is similarly premature.

Vacated.

Determined by: Johnson, J., Wheeler, C.J., and Pederson, J.  
Compensation Judge: Gregory A. Bonovetz

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's finding that the employer's job offer of October 6, 1997 was a suitable job within the meaning of Minn. Stat. § 176.101, subd. 3e. We vacate the finding that the job was suitable.

BACKGROUND

On August 6, 1992, Sammy J. Differding, the employee, sustained an injury to his left hand while employed at M.E. International, the employer, insured by Sentry Insurance Company. The employer and insurer accepted liability for the employee's personal injury. The employee was assigned restrictions because of his personal injury, including no repetitive motion of the hand and limitations on lifting and the use of vibrating tools. Due to these restrictions, the employee was unable to return to his pre-injury job as a metal specialist. The employer then offered the employee a series of temporary, light-duty jobs within the company. (T. 51-52.)

The employees at M.E. International are represented by a union and a collective bargaining agreement was in effect between the company and the union. Jobs within the plant were classified as temporary or permanent. A temporary position was typically available because the job holder was ill or on leave but expected to return to the job. An injured employee with

restrictions might be given a temporary job if no other job was available. (T. 54-55.) The collective bargaining agreement required that permanent job openings within the plant be posted unless the union and the company mutually agreed to waive the posting procedure. When a job is posted, any employee in the plant is eligible to sign up requesting consideration for the position. The union contract requires the position be awarded to the bidder with the most seniority. (T. 56-57.) Mr. Differding is 98 out of 158 employees in terms of seniority. (T. 59.)

On January 17, 1997, the job of “maintenance specialist (formerly maintenance clerk)” was posted and specifically stated to be a “temporary vacancy.” (Pet. Ex. E.) The employee was already working in that job on a temporary basis. (T. 53.) The employee and four employees bid up for the position. The employee remained in the job although he had the least seniority of the applicants. (Pet. Ex. E.) The position paid more than the employee’s pre-injury job and the parties agree the duties were within the employee’s physical restrictions. (T. 39, 63-66.)

The employer’s policy was to wait for an injured employee to reach maximum medical improvement (MMI) before offering a permanent position. (T. 17.) The employee was served with MMI notice of on July 10, 1997.<sup>1</sup> Wendy Morrell had been retained by the employer and insurer to work with the employee as a disability case manager. In September 1997, Ms. Morrell advised the employer she had identified two positions which could be offered to the employee on a permanent basis. One was a “melt shop” position and the second was the maintenance specialist or warehouse position in which the employee was already working. (Pet. Ex. A.) Ms. Morrell concluded the warehouse position fit the employee’s physical restrictions. (T. 38-39.) Ms. Morrell performed an on-site job analysis of the maintenance specialist position on September 5, 1997 and noted the employee was working in the job “on a temporary basis to date.” (Pet. Ex. A.)

On October 6, 1997, the employer provided the employee a written job offer which offered the maintenance specialist job to the employee on a permanent basis. The written offer stated, in part: “I would like to discuss with you some of the labor agreement issues that surround this particular offer by virtue of the company’s decision not to post this position.” (Pet. Ex. H.) The union did not agree to waive the posting requirement for the maintenance specialist position. This was explained to the employee but he accepted the job knowing the union had not waived the posting requirement. (T. 55-58; Pet. Ex. H.) A co-employee with more seniority than Mr. Differding complained about the failure of the employer to post the maintenance specialist position. (T. 75-76.) The union then filed a grievance under the union contract. A grievance is resolved by arbitration which, the employee testified, had not taken place by the date of the hearing. (T. 76-79.)

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<sup>1</sup> The compensation judge made no finding on maximum medical improvement. Implicit in the judge’s decision, however, is the conclusion the employee reached MMI. The parties apparently agree the employee reached MMI on July 10, 1997. (T. 4-7.) For purposes of this decision, the court will assume the employee reached MMI effective July 10, 1997.

On April 22, 1998, the maintenance specialist position was again posted. (Pet. Ex. F.) The April 1998 posting was to fill the position only while the employee was off for wrist surgery which occurred on May 20, 1998. (T. 82.) The employee returned to the job on July 17, 1998, after he recovered from surgery. (T. 75.) The employee testified he intends to remain in the job. (T. 77.) He cannot be removed from the job by the union nor can the union force the employer to post the job except through arbitration. (T. 78.) The employee was continually employed as a warehouse clerk through the date of hearing before the compensation judge on January 7, 1999.

The employer and insurer paid the employee for a 5.35 percent whole body disability, payable as impairment compensation (IC). In October 1997, the employee filed a claim petition seeking payment of the permanent partial disability benefits as economic recovery compensation (ERC). The case came on for hearing before a compensation judge at the Office of Administrative Hearings on January 7, 1999. In a Findings and Order served and filed January 27, 1999, the compensation judge found the employer's job offer as a maintenance specialist on October 6, 1997 was not a temporary position, but was a suitable job within the meaning of Minn. Stat. § 176.101, subd. 3e, and denied the employee's request for ERC. The employee appeals.

#### 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

The employee acknowledges the maintenance specialist job was physically suitable and economically suitable based on his wages. However, the employee asserts the job was not suitable within the meaning of Minn. Stat. § 176.101, subd. 3e, because the job was temporary. The employer and insurer contend substantial evidence supports the compensation judge's finding that the maintenance specialist job was suitable and this court must, therefore, affirm the judge's factual finding. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). We disagree with the employer and insurer's argument. This case involves the interpretation of Minn. Stat. § 176.101, subd. 3e, based upon essentially undisputed facts. Accordingly, the issue before the court is a legal issue. Krovchuk, *id.*

In Cassem v. Crenlo, Inc., 470 N.W.2d 102, 44 W.C.D. 484 (Minn. 1991), the supreme court held a temporary job does not qualify as a suitable job within the meaning of Minn. Stat. § 176.101, subd. 3e. The court stated:

We think a temporary job, as that term is used in the labor market, is characterized by an inherent impermanence. Generally

speaking, a temporary position has no future; the job is not expected to last long, tends to be episodic or transient, and is unlikely to carry with it expectations of any job enhancement, such as wage increases or seniority. Here, although the [job in question] survived for 15 months, it was designated in the plan of rehabilitation as temporary and from the beginning was understood to be temporary, so that impermanence was inherent in the employment.

Id. at 107, 44 W.C.D. at 494.

The maintenance specialist job was classified as temporary when the employer posted the position in January 1997. Ms. Morrell continued to describe the job as temporary until October 6, 1997. (Pet. Ex. A.) Although the employer called the job permanent in the October 6, 1997 written job offer, the employer acknowledged the union did not agree to waive the posting requirement. The employee accepted the job with the knowledge that the union could object to the job offer by filing a grievance, which it did. If the grievance is resolved against the employer, it is uncertain whether the employee will have sufficient seniority to retain the job.

We acknowledge that as of the date of the hearing, the employee had held the maintenance specialist position for at least two years. We do not find this fact determinative, however. In the Cassem case, the court held a job was temporary although it survived for 15 months. The duration of a job is only one factor in deciding whether the job is temporary. Another factor is how the parties viewed the job from the beginning. Here, both the employer and the employee recognized the employee could be bumped from the job if the employer was required to post the position. Resolution of this issue is, however, in the hands of neither the employee or the employer. As of oral argument before this court, no arbitration of the union grievance had been scheduled. (See Finding 12.) Based on the facts as they exist at this time, we conclude a determination of whether the maintenance specialist job was suitable, within the meaning of Minn. Stat. § 176.101, subd. 3e, is premature. We adopt the employee's alternative argument<sup>2</sup> that the IC versus ERC decision should be postponed until it can be determined whether the maintenance specialist job was permanent or temporary.

In Bruns v. City of St. Paul, 555 N.W.2d 522, 55 W.C.D. 384 (Minn. 1996), the city offered and the employee accepted a job in vehicle maintenance within the 90-day period following service of MMI. Ultimately, the employee terminated his employment with the city because he believed the vehicle maintenance position was physically inappropriate. The employee filed a claim petition seeking payment of his permanent partial disability as ERC. A compensation judge found the vehicle maintenance position was not suitable and awarded ERC.

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<sup>2</sup> In his brief, the employee argued he was not offered a suitable 3e job within 90 days of MMI so the permanent partial disability benefits are payable as ERC rather than IC. At oral argument, the employee argued, in the alternative, the IC versus ERC decision should be postponed pending a determination whether the maintenance specialist job was permanent or temporary.

The W.C.C.A. affirmed. On appeal, the city argued that an award of ERC was inappropriate because the city had no opportunity to further modify the vehicle maintenance position to accommodate the employee's restrictions before the employee terminated his employment. The supreme court agreed, and held an award of economic recovery compensation was premature. The court noted that substantial due process considerations applied to the city in the case,<sup>3</sup> and stated the city should not be penalized because the actual work activities did not conform to the party's original expectations. The court therefore vacated the award of ERC and gave the city an additional 90 days to develop and offer the employee a job meeting the criteria of Minn. Stat. § 176.101, subd. 3e.

In the present case, due process considerations apply to both the employee and the employer. The parties agree the maintenance specialist job is physically suitable and economically suitable based on the employee's wages. That the job may be temporary is due to the collective bargaining agreement and is not an impediment which can be corrected by either the employee or the employer. An award of IC or ERC at this time might penalize either the employee or the employer. Accordingly, we conclude a determination of whether permanent partial disability is payable as ERC or IC is premature. We therefore vacate Finding No. 13. At such time as the union issues are resolved, the employee may file another claim petition seeking payment of economic recovery compensation, if appropriate.

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<sup>3</sup> The court concluded the Bruns case was analogous to Manderfeld v. J.C. Penney, 526 N.W.2d 52, 52 W.C.D. 152 (Minn. 1995).