

DEBBIE L. KOMIS, Employee, v. WATKINS, INC., and EMPLOYERS INS. OF WAUSAU, Employer-Insurer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 10, 1999

No. [REDACTED SSN]

HEADNOTES

REHABILITATION - ELIGIBILITY. Substantial evidence supports the compensation judge's finding that the employee is qualified for rehabilitation services.

Affirmed.

Determined by: Rykken, J., Pederson, J., and Johnson, J.
Compensation Judge: Cheryl LeClair-Sommer

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal the compensation judge's award of rehabilitation services. We affirm.

BACKGROUND

On December 19, 1997, Debbie Komis (employee) sustained an admitted left shoulder injury while working as a packer for Watkins, Inc. (employer), which was insured for workers' compensation liability by Employers Insurance of Wausau (insurer). In her position as a packer, which commenced on July 30, 1997, the employee sat on a bench next to a conveyor belt, which carried merchandise to her work station. She unloaded merchandise from plastic tote bins, packed merchandise in boxes, taped the boxes shut, and placed labels on them. The employee then pushed the boxes onto the roller or conveyor belt, to move them out of her work station. Once packed, these boxes weighed up to 50 pounds.

On December 19, 1997, the employee injured her left shoulder by pulling a laundry detergent box out of a small tote bin on the conveyor belt. The box was wedged in the bin, and so the employee pulled to dislodge the box, after which she experienced pain up her left arm and into her shoulder and spine. The next day, the employee treated with a chiropractor, Dr. Scott Meisel, for symptoms in her spine and in her left shoulder. The employee was off work for a couple of weeks at the recommendation of Dr. Meisel. By mid-January 1998, the employee returned to work with work restrictions of no lifting over five pounds, no repetitive movement with her left arm, and working only two hours per day. Due to these restrictions, the employer

placed the employee in a light-duty position stuffing sheets of paper into envelopes. The employee reported to her supervisor that this type of work aggravated her left arm symptoms.

The employee continued to receive occasional chiropractic treatments from Dr. Meisel. In March 1998, Dr. Meisel referred the employee to Dr. Thomas Retzinger, the employee's family doctor, since her symptoms were worsening. Dr. Retzinger prescribed pain medications and ordered an MRI of the cervical spine, which indicated congenital segmentation anomalies and degenerative changes. (Pet. Ex. E.) Dr. Retzinger referred the employee to Dr. Liu, a neurosurgeon at Gunderson Clinic, who recommended continued conservative treatment. Dr. Liu also referred the employee to Dr. Evan Nelson in the Gunderson Clinic's physical medicine and rehabilitation department. Dr. Nelson recommended a regimen of physical therapy, which did not reduce the employee's symptoms. The employee underwent an EMG of her left upper extremity on April 29, 1998, and an MMPI on May 5, 1998, both of which had normal results. Dr. Nelson referred the employee to Dr. Edward Riley, an orthopaedic surgeon. On May 27, 1998, at the recommendation of Dr. Riley, the employee underwent an MRI of the left shoulder which indicated a small under surface tear of the supraspinatus tendon of the rotator cuff. Dr. Riley provided subacromial injections to the employee's shoulder on June 10 and July 29, 1998, and recommended continued physical therapy, none of which improved the employee's condition. Dr. Riley recommended an additional attempt at physical therapy and home exercises. He also determined that shoulder surgery might be necessary in the future, contingent upon the results obtained through continued conservative treatment. (Pet. Ex. B.)

The employer had earlier assigned a disability case manager to the employee, DorisAnn Nelson, who accompanied the employee to medical appointments and maintained contact with the employee and the employer. The employee continued to work at the envelope-stuffing position, two hours per day, from January until July, 1998. The employee reported to Ms. Nelson that she was experiencing difficulties with these envelope-stuffing tasks, but the employer made no revisions to that job assignment.

On May 15, 1998, the employee filed a rehabilitation request for statutory rehabilitation services and a rehabilitation consultation. At hearing, she testified that she requested this rehabilitation consultation because she "wanted somebody to help [her] find a job." (T. 41.) The employer and insurer denied the request, contending that the employer was already providing the employee work within her restrictions and therefore the employee was not qualified for statutory rehabilitation services. An administrative conference was held, after which a commissioner's representative concluded that the employee was eligible for rehabilitation services, pursuant to Minn. Stat. § 176.102. On July 23, 1998, the employee underwent a rehabilitation consultation with QRC Frank Samlaska, who concluded that the employee was a "qualified employee" for rehabilitation services. On July 29, 1998, the employee returned to Dr. Riley, who took the employee off work completely, noting that the employer had not been following the employee's assigned work restrictions. On August 21, 1998, Dr. Riley indicated that the employee was further restricted to no overhead reaching with the left arm, no repetitive use of the left arm, and no lifting over five pounds. (Pet. Ex. B.) Under these restrictions, the employee was not able to return to her pre-injury job as a packer, so she remained off work.

On September 4, 1998, the employer and insurer filed a request for formal hearing on the rehabilitation request. On September 18, 1998, at the request of the employer and insurer, the employee underwent an independent medical examination with Dr. Paul Wicklund, who diagnosed a work-related partial left rotator cuff tear and recommended work restrictions of no lifting with the left arm and no overhead work with the left shoulder. Dr. Wicklund also recommended left rotator cuff surgery. Dr. Wicklund opined that the employee would need permanent work restrictions for her left shoulder after the surgery. (Pet. Ex. D.)

A hearing was held on November 12, 1998. The compensation judge awarded rehabilitation services. This appeal followed.

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

The compensation judge awarded rehabilitation services, finding that the employee was likely to be precluded from engaging in her pre-injury job as a packer, that the employer has been unable to comply in the past with physical restrictions, that permanent restrictions were expected post-surgery, and that rehabilitation services would assist in the employee's return to work at suitable gainful employment. (Finding 5.)

The compensation judge also determined that rehabilitation services would assist to restore the employee in returning to work in a job related to her former employment or a job in another work area which would produce an economic status as close as possible to that which the employee would have enjoyed without her disability. (Finding 6.) The compensation judge based her determinations on the employee's physical work restrictions as assigned by both the treating physician, Dr. Riley, and by the independent medical examiner, Dr. Wicklund. Of critical significance to the judge were those physical work restrictions, assigned post-injury and also

anticipated as continuing even post-surgery.

The judge also relied upon the opinion of the vocational expert, Frank Samlaska, that “[g]iven the prior unsuccessful attempts to accommodate the restrictions, without rehabilitation services, a successful return to work will be reduced.” (Pet. Ex. C.) Prior to the hearing, the employer had originally provided light-duty work which Dr. Riley later opined was outside the employee’s restrictions. The employee discontinued that light-duty work by July 1998, at the recommendation of her physicians. No other modified work had been offered by the employer from July 1998 through the hearing date of November 12, 1998.

“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 assistance, an injured employee must satisfy the requirements of 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.

The employer and insurer argue that the compensation judge erred in finding that the employee met the definition of a “qualified employee” pursuant to Minn. R. 5220.0100, subp. 22. First, the employer and insurer argue that the employee cannot be eligible for rehabilitation services because her permanent restrictions have not been determined, those restrictions might change after the employee has undergone surgery, and therefore it is uncertain whether she will be able to return to her pre-injury position. The supreme court has recognized that the determination of whether rehabilitation services would be useful generally cannot be made until the nature and extent of the employee’s permanent disability is known. Langa v. Fleischmann-Kurth Malting Co., 481 N.W.2d 35, 37, 46 W.C.D. 156, 160-161 (Minn. 1992). However, rehabilitation services, including medical monitoring, may be needed to assist an employee prior to a final determination of the employee’s permanent restrictions. Keiser v. Merit HVAC, slip op. (W.C.C.A. Feb. 1, 1995). This employee indeed has been assigned physical work restrictions

which prevent her from returning to her pre-injury position as a packer. Dr. Wicklund, the independent medical examiner, opined that the employee was likely to have permanent restrictions after her surgery. Based on this medical evidence, the compensation judge found that the employee's condition was sufficiently stable to determine the employee's physical restrictions and to anticipate that the employee would require permanent restrictions after the surgery. The compensation judge reasonably concluded, based on the evidence of record, that the employee was likely to be precluded from returning to the job she held at the time of the injury.

The employer and insurer also argue that substantial evidence does not support the compensation judge's finding that the employee cannot reasonably be expected to return to work with the employer, citing Cornejo v. Release Coatings of Minneapolis, 58 W.C.D. 348 (W.C.C.A. Apr. 15, 1998), aff'd 582 N.W.2d 549 (Minn. 1998). In the Cornejo case, an award of rehabilitation services was reversed where the employee had worked with restrictions until surgery, the surgery was expected to improve the function of the employee's hand, and the employee was off work at the time of the hearing pending commencement of a work hardening program. In that case there was no indication what the employee's permanent restrictions would be after the surgery nor any doctor's opinions as to the employee's ability to perform various job assignments available with the employer.

In this case, there was evidence that the employee would have permanent restrictions following surgery. Dr. Wicklund, the independent medical examiner, opined that the employee was likely to have permanent restrictions after her surgery. There was also evidence that the employee would not be able to return to work with the employer given that the employer had not been able to accommodate the employee's restrictions in the past. The employee's vocational expert indicated that there were problems with the employee's original return to work in that the employee had been placed in a position beyond her physical restrictions, and that rehabilitation services would assist with defining employment positions available within the employee's work restrictions. He also testified that with his assistance he thought the employee would be able to return to work with the employer, but that given the history of the employee's case, the chances of a successful return to work were reduced without a QRC's assistance. (T. 58.)

In addition, the employee also has a preexisting medical condition in her right arm and right leg related to cerebral palsy, which has caused weakness and lack of fine motor skills in her right side. The compensation judge noted that these problems further reduced the probability that the employer would have an appropriate position available for the employee. Substantial evidence, including the likelihood of permanent restrictions, the employee's preexisting condition, and the employer's past inability to accommodate the employee's restrictions, supports the compensation judge's findings that the employee is permanently precluded from engaging in the job she held at the time of injury, that the employee cannot reasonably be expected to return to work with the date-of-injury employer, and therefore that the employee is a qualified employee under the requirements of Minn. R. 5220.0100, subp. 22. We therefore affirm the compensation judge's award of rehabilitation services.

