

GERALD C. LANIGAN, Employee, v. SUPERWOOD CORP./GEORGIA-PACIFIC CORP.,  
SELF-INSURED, Employer-Appellant.

WORKERS' COMPENSATION COURT OF APPEALS  
MAY 6, 1999

No. [REDACTED SSN]

HEADNOTES

**JURISDICTION - SUBJECT MATTER.** The compensation judge erred in finding that he lacked jurisdiction to determine the employee's current work restrictions in the absence of a claim for wage loss benefits or a request to modify a rehabilitation plan on the facts in this case.

**JOB OFFER - PHYSICAL SUITABILITY; REHABILITATION - WORK RESTRICTIONS.** Substantial evidence, including the opinion of the employee's treating doctor, supports the compensation judge's finding that the employee's restrictions had not changed since the previous determination by a compensation judge, and the employee remained restricted to 8 hours per day, five days a week.

**ATTORNEY FEES - HEATON FEES.** The compensation judge properly awarded hourly attorney fees to the employee's attorney pursuant to Minn. Stat. § 176.081, subd. 1(a)(1991), where the employee prevailed on the disputed rehabilitation issue.

Affirmed in part and reversed in part.

Determined by Johnson, J., Wheeler, C.J., and Pederson, J.  
Compensation Judge: Donald C. Erickson

OPINION

THOMAS L. JOHNSON, Judge

The self-insured employer appeals from the compensation judge's finding that the judge lacked jurisdiction to determine the employee's current work restrictions in the absence of a dispute over wage loss benefits or a rehabilitation plan. The self-insured employer also appeals from the compensation judge's decision, in the alternative, that the evidence does not support changing the employee's work restrictions from eight hours a day, five days a week, to twelve hours a day, four days a week, and from the compensation judge's award of hourly attorney's fees. We reverse in part and affirm in part.

BACKGROUND

This case has a long and litigious history. Briefly, the employee, Gerald C.

Lanigan, sustained an admitted injury to his mid- and low back on January 23, 1991, while working as a laborer for the self-insured employer, Superwood/Georgia-Pacific Corporation. At the time of the injury, the employee was working in humids and finishing on a rotating shift, twelve hours a day, four days on and four days off.

Following the injury, the employee was treated primarily by Dr. John E. (Jed) Downs at St. Luke's Occupational Health Service (OHS). Dr. Downs released the employee to return to work with restrictions between January 28 and March 25, 1991, including limitations on the number of hours the employee could work. On March 10, 1991, the employee was laid off as part of a general plant-wide lay-off. He was called back to work on May 18, 1991, but was suspended by the employer on May 28, 1991 and terminated on June 18, 1991. Following a union grievance and decision by an arbitrator, the employee was reinstated in April 1992. The employee bid for and obtained a less physically demanding job in the pallet shop. The employee remained in this job until about October 1992.

On January 27, 1993, the employee returned to St. Luke's OHS and was seen by Dr. Katherine L. Kostamo. The employee reported a gradual increase in low back pain following a change in job duties, and work restrictions were again imposed. On August 26, 1993, the employee returned to Dr. Downs, who was now at the Duluth Clinic. The employee reported an exacerbation of his low back pain while pushing a loaded cart that abruptly stopped. Dr. Downs issued various work restrictions following this aggravation. In September or October 1993, the self-insured employer assigned the employee light-duty banding and wrapping duties. The employee has remained in banding and wrapping since that time.

On February 16, 1994, the employee was examined by Dr. Richard F. Galbraith, a neurologist, at the request of the employer and insurer. Dr. Galbraith concluded the employee had reached maximum medical improvement (MMI) and could return to his usual employment without restrictions. On May 2, 1994, the self-insured employer filed a notice of intent to discontinue wage loss benefits (NOID), asserting that the employee had no permanency and was medically able to return to work without restrictions. The employee filed an objection to discontinuance on May 16, 1994, alleging entitlement to wage loss benefits from March 20, 1994 and continuing.

The matter was heard by Compensation Judge Gregory A. Bonovetz on February 22 and April 4, 1995.<sup>1</sup> In a Findings and Order, served and filed June 6, 1995, Judge Bonovetz found that since at least August 1993, a "myriad of varying work restrictions" had been issued by Dr. Downs and other physicians, "resulting in bedlam with regard to attempting to schedule the employee for work." (6/6/95 F&O, finding 28.) The judge further found that certain restrictions issued by Dr. Downs were provided in an effort "to manage the case more politically than

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<sup>1</sup> The NOID and Objection to Discontinuance were consolidated for hearing with a Claim Petition filed by the employee on March 14, 1994, seeking intermittent wage loss benefits from and after January 23, 1991, payment of medical expenses and approval for fusion surgery.

medically.” He concluded that Dr. Downs was not a credible witness and little if any weight could be given to his opinions. (6/6/95 F&O, findings 29, 30). Judge Bonovetz, nonetheless, found that,

[T]he preponderance of the evidence clearly establishes that from January of 1993 forward the employee has in fact suffered low back pain and discomfort as a result of the work injury. . . . [T]he court has reviewed all of the lay and medical evidence presented and finds that . . . since January 27, 1993, the employee’s reasonable medical restrictions limit the employee to 40 hours of work per week with no work in excess of eight hours per day. The reasonable medical restrictions applying to this period of time subsequent to January 27, 1993, would require that no more than five days be worked consecutively. Further the employee is to avoid repetitive lifting, bending and twisting. (6/6/95 F&O, finding 45; 9/25/98 F&O, finding 3).

Although both parties appealed Judge Bonovetz’s decision, neither party disputed his findings regarding the employee’s work restrictions.<sup>2</sup>

Following the hearing, the employee did not return to Dr. Downs, choosing instead to treat with his family physician, Dr. Jean E. Hoyer, at the Duluth Clinic.<sup>3</sup> On June 14, 1995, the employee was seen for an evaluation of his back condition and to obtain written work restrictions. The employee reported nearly continual low back pain with occasional pain radiating to the thoracic region. On examination, Dr. Hoyer found mild to moderate spasm and tenderness in the lumbosacral paraspinal musculature, with limited flexion, extension and rotation. Dr. Hoyer diagnosed mechanical low back pain, prescribed nonsteroidal and muscle relaxant medications, and advised the employee to “keep same work restrictions in place.” (Pet. Ex. 3, 6/14/95.)

In September 1995, Dr. Frank W. Budd, an orthopedist, completed an on-site visit at the request of the self-insured employer. In his report, dated September 11, 1995, Dr. Budd reviewed a list of six jobs proposed by the employer, stating the employee could do four and perhaps five of the jobs listed, with certain modifications, but not the sixth. Dr. Budd further opined that the employee could work twelve hour days, four days in a row. (Resp. Ex. B.)

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<sup>2</sup> Judge Bonovetz’s June 6, 1995, Findings and Order was affirmed by both this court and the supreme court. Lanigan v. Superwood Corp. slip op. (W.C.C.A. Jan. 10, 1996); Lanigan v. Superwood Corp., No. CC-96-298 (Minn. May 28, 1996) *aff’d w/out opinion*.

<sup>3</sup> Dr. Hoyer is a family practice physician. She has been the employee’s primary care doctor since October 1993. The employee’s wife is a nurse at the Duluth Clinic, Superior East, and works for Dr. Hoyer.

The employee returned to Dr. Hoyer on September 14, 1995, reporting an exacerbation of his low back pain after vacuuming a car. On examination, the doctor found moderate to marked spasm in the thoracic, lumbar and sacral paraspinal muscles with significantly reduced lumbar range of motion. She continued the employee's medications, referred him to physical therapy, and took the employee off work for the next two weeks.

On September 22, 1995, Dr. Budd completed an independent medical examination (IME) report. The doctor examined the employee and reviewed his medical treatment records. Dr. Budd diagnosed mild degenerative disc disease at L4-5 and L5-S1, and opined that the employee was capable of doing the jobs outlined in the September 11, 1995 on-site evaluation.

Dr. Hoyer saw the employee in follow-up on September 28, 1995. The doctor noted decreased spasm but only slightly improved range of motion. Physical therapy was continued and a TENS unit was prescribed. Dr. Hoyer released the employee to return to work on October 2, 1995 with his previous restrictions of "eight hour days five days a week with no bending, twisting, or prolonged sitting or standing." (9/25/98 F&O, finding 16; Pet. Ex. 3.)

In October 1995, the self-insured employer assigned a qualified rehabilitation consultant (QRC), Karen Strewler. Ms. Strewler met with representatives of the employer, completed an on-site tour, and "obtained direct feedback" from Dr. Budd. In a report dated November 1, 1995, QRC Strewler noted the employee wished to choose his own QRC, and observed that "[b]ased on review of records, as well as information obtained from Dr. Budd, it is medically recommended Mr. Lanigan work at the [proposed] jobs within the Finishing/Shipping Department." (Resp. Ex. E.) Sometime thereafter, the employer agreed to the QRC selected by the employee, Joel Rhyner. On January 5, 1996, the employee and QRC Rhyner met with Dr. Hoyer to discuss restrictions. Dr. Hoyer indicated the employee's eight hour day, five days a week restrictions were permanent.

The employee returned to Dr. Hoyer on February 23, 1996, reporting an exacerbation of his back condition after slipping and wrenching his back while lifting garbage out of a trash can. Dr. Hoyer found moderate to marked paraspinal spasm through the entire length of the back. She prescribed pain and muscle relaxant medications and continued the same work restrictions.

On February 27, 1996, Dr. Hoyer was deposed by counsel for the self-insured employer.<sup>4</sup> Dr. Hoyer indicated that she did not normally make disability evaluations, and had incorporated the restrictions placed on the employee by Dr. Downs. Dr. Hoyer acknowledged that if Dr. Downs' restrictions were not valid, it would be reasonable to accept Dr. Budd's assessment. She further stated, however, that "I would disagree" the employee could do the jobs identified by Dr. Budd based "[o]n the times that I've seen him in the clinic, when he's been

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<sup>4</sup> Counsel for the employee objected to the deposition, and was not present at the deposition.

complaining of a large amount of back pain and of muscle spasm.” “That’s why I kept him on light duty.” (Resp. Ex. C at 20, 24-25; see also Ex. C at 26, 29-30, 51.)

The parties were unable to resolve their dispute regarding the employee’s restrictions, and on April 10, 1996, QRC Rhyner filed a final report, closing the rehabilitation file.<sup>5</sup> In the report, Mr. Rhyner commented,

The employer [inquired] whether it would be reasonable to approach Mr. Lanigan to ask him to work within the restrictions outlined by Dr. Budd and apparently agreed to by Dr. Hoyer. I indicated that based upon the information I had available to me this would be a reasonable approach although I noted Mr. Lanigan and his attorney may not be agreeable to this plan of action. \* \* \* It appears Georgia Pacific/ Superwood will go forth with asking Mr. Lanigan to work within the guidelines outlined by Dr. Budd. I anticipate there may be some obstacles and road blocks to this being a successful endeavor. (Resp. Ex. F, p. 2.)

In mid-April 1996, the self-insured employer attempted to return the employee to twelve hour shifts, four days a week, in accordance with Dr. Budd’s September 11, 1995 on-site work report. The employee refused, asserting the work was outside his restrictions, and was terminated. The employee filed a grievance and was reinstated following the decision of an arbitrator approximately six months later.

The employee returned to Dr. Hoyer in November 1996, complaining of worsening low back pain. The doctor found mild to moderate spasm and tenderness in the thoracic and lumbar spines, and noted probable depression. The previous restrictions were continued. The employee continued to treat with Dr. Hoyer through the summer of 1998 for periodic exacerbations with increased spasm, tightness and pain in the mid- and low back.

In April 1998, the employee was prescribed a trial of Baclofen, a muscle relaxant. The employee responded well to the medication, and by June 5, 1998, Dr. Hoyer noted “very little paraspinal muscle tenderness or spasm present, indeed, he has no palpable muscle tenderness today on exam.” Dr. Hoyer continued the employee’s permanent restrictions, and referred him to Dr. Edward Martinson, a physical medicine and rehabilitation specialist at the Duluth Clinic, for

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<sup>5</sup> On March 5, 1996, QRC Rhyner filed a Rehabilitation Request, indicating “[i]t became clear very quickly that I could not obtain agreement by the parties regarding the restrictions for Mr. Lannigan.” The employee was upset and the employee’s attorney requested rehabilitation be placed on hold. Shortly thereafter, both parties agreed to close rehabilitation services and the Rehabilitation Request was withdrawn. (3/5/96 Rehabilitation Request; Resp. Ex. F.)

consideration of an implantable Baclofen pump. (Pet. Ex. 3.) Dr. Martinson saw the employee on July 20, 1998. He noted myofascial and soft tissue tightness and tenderness in the back with limited range of motion on examination. The doctor recommended an upper back stretching program, but did not believe a pump was warranted. Dr. Martinson released the employee to work “with current restrictions on permanent basis.” (Pet. Ex. 3.)

On December 24, 1997, the self-insured employer had filed a Rehabilitation Request “[t]o address the employee’s capability to perform the jobs and duties outlined in Dr. Budd’s report,” asserting “[t]he employee should be required to perform the jobs listed on Dr. Budd’s report on 12 hour shifts four days per week.” The employee objected, and an administrative conference was held before Settlement Judge Jerome G. Arnold on February 24, 1998. In a decision and order, served and filed March 6, 1996, Judge Arnold concluded the restrictions established by Dr. Budd were appropriate, and the jobs offered by the self-insured employer were within those restrictions. The judge directed the employee return to twelve hour shifts, four days a week, subject to a work-hardening schedule.

The employee filed a Request for Formal Hearing on March 16, 1998, appealing Judge Arnold’s decision, asserting the employee’s restrictions were not as found by the judge. The case was heard by Compensation Judge Donald C. Erickson at the Office of Administrative Hearings on August 12, 1998. In his Findings and Order, served and filed September 25, 1998, the compensation judge concluded he did “not have jurisdiction to render an advisory opinion on whether the employee’s restrictions should be changed to those recommended by the adverse medical examiner,” and declined to rule on the self-insured employer’s request to change the employee’s restrictions. (9/25/98 F&O, finding 38, order 1.) The judge further held, in the alternative, that the preponderance of the evidence did not support changing the employee’s restrictions from those previously determined by Judge Bonovetz to those recommended by Dr. Budd. The self-insured employer appeals.

## STANDARD OF REVIEW

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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, 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.” Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

## DECISION

### Jurisdiction to Determine Disputed Work Restrictions

The self-insured employer initiated this proceeding by filing a rehabilitation request seeking modification of the employee's work restrictions. The employee contended, and the compensation judge agreed, that the judge did not have jurisdiction to decide the parties' dispute in the absence of a claim for wage loss benefits or a request to initiate or modify a rehabilitation plan.<sup>6</sup> The self-insured employer asserts that the compensation judge erred in determining that he did not have jurisdiction to determine the dispute. We agree.

Where a dispute exists about entitlement to rehabilitation services, the appropriateness of a plan, or "any other dispute about rehabilitation," any party may file a rehabilitation request to resolve the issue. Minn. R. 5220.0950, subp. 1. The statute specifically provides that "a compensation judge shall . . . make determinations regarding rehabilitation issues not necessarily part of a [rehabilitation] plan." Minn. Stat. § 176.102, subd. 6(a). Here, there is no question that a genuine dispute exists between the parties. There is an existing Findings and Order establishing the employee's restrictions that is binding on the parties unless or until the parties mutually agree to modify them, or the commissioner or compensation judge finds the employee's restrictions have changed. The employee asserts his restrictions have remained the same. The self-insured employer contends that, since September 1995, the employee has been able to work twelve hour shifts, four days a week, in the positions approved by Dr. Budd and offered to the employee by the employer.

The employee's ability to work is an issue which is regularly decided by compensation judges. As a general rule, an employer cannot require an employee to return to work beyond his restrictions, nor may an employee refuse a job that is within his restrictions. Unlike Makitalo v. Sears, Roebuck & Co., slip op. (W.C.C.A. May 9, 1995), cited by the compensation judge, there is clearly a dispute which the court can resolve, and relief for the court to grant or deny.<sup>7</sup> Nor does this matter involve an attempt to compel the self-insured employer to provide voluntary, non-statutory disability case management as was the case in Gibbs v. Duluth Clinic, Inc., 58 W.C.D. 23 (W.C.C.A. 1998), also cited by the judge. In other words, there is a justiciable controversy which is ripe for legal determination. We, accordingly, reverse the compensation judge's finding that he lacked jurisdiction to determine the parties' dispute.

### Current Work Restrictions

The self-insured employer further contends that the compensation judge's finding that the employee's current work restrictions remain eight hours a day, five days a week, is clearly erroneous and supported by no credible evidence in the record. In particular, the employer argues

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<sup>6</sup> The employee returned to work with the employer and his present earnings exceed his pre-injury wage, thus, no wage loss benefits are claimed.

<sup>7</sup> In Makitalo, the parties executed a stipulation, after the compensation judge issued his findings and order, settling the claims presented in the case. The dispute was rendered moot on appeal by the settlement as there was no claim pending and no relief that could be granted.

that the compensation judge erred in relying on the restrictions imposed by Dr. Hoyer, since Dr. Hoyer relied upon the “discredited” restrictions of Dr. Downs. The self-insured employer, instead, urges this court to adopt the opinions of Dr. Galbraith and Dr. Budd.

The employee came to Dr. Hoyer with judicially imposed restrictions. Although Judge Bonovetz concluded the restrictions provided by Dr. Downs from August 26, 1993 to April 4, 1995 could be given “little if any weight,” he nonetheless rejected Dr. Galbraith’s opinion that the employee could work in his usual job without restrictions, finding instead that the employee was restricted to eight hours of work a day, no more than five days a week, and was to avoid repetitive lifting, bending and twisting. (6/6/95 F&O, findings 30, 45.)

The compensation judge reviewed, in detail, Dr. Hoyer’s treatment records, noting exacerbations with ongoing spasm and loss of range of motion on examination. (See 9/25/98 F&O, findings 13, 14, 16, 18, 19, 21, 24, 25, 26, 27.) Dr. Hoyer testified that the employee came to her with restrictions, and that nothing she had seen on examination or in the course of treatment of the employee would lead her to believe that the restrictions should be changed. Dr. Hoyer observed that any time the employee has tried to increase his activity level, at home or at work, it has lead to flare-ups of his back problems, and she did not believe the employee was capable of working twelve hour shifts four days a week. (Pet. Ex. 1 at 7-8, 13-15, 22, 29, 32, 36.)

The self-insured employer additionally asserts that the employee’s examination in June 1998 was essentially “normal,” and there is no present basis for restrictions. However, the employee testified he takes Baclofen and Motrin daily to control his back spasms, and continues to be restricted in his activities. (T. 30-31, 34-36.) Dr. Hoyer testified that while the employee was doing better with Baclofen, he continued to have the same underlying problems and she would not change his restrictions at this point. In his July 20, 1998 examination, Dr. Martinson, a physical medicine and rehabilitation specialist, noted tenderness, myofascial and soft tissue tightness and limited range of motion. He also recommended that the employee’s restrictions be continued on a permanent basis.

The compensation judge found the opinions of Dr. Hoyer more persuasive than the report of Dr. Budd of September 1995. Where there is a conflict in medical expert opinion, resolution of that conflict is the function of the compensation judge and may not be reversed by this court unless the facts assumed by the expert in rendering the opinion are not supported by the evidence. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). That is not the case here. We, therefore, affirm the compensation judge’s finding that the employee remains restricted to 40 hours a week, eight hours a day, five days a week.

#### Award of Attorney’s Fees

The compensation judge awarded attorney fees on an hourly basis to the employee’s attorney for his successful representation of the employee. (F&O 9/25/98, finding 40, order 2.) The employer and insurer argue that if the compensation judge had no jurisdiction to decide the case, he had no jurisdiction to award attorney fees. As we have reversed the

compensation judge's finding that he lacked jurisdiction, the argument is moot.

The employer and insurer also contend that since the compensation judge awarded no wage loss benefits or rehabilitation services there is no basis for contingency or hourly Heaton fees.<sup>8</sup> The applicable attorney fees statute provides for an award of hourly fees "for representation on rehabilitation . . . issues." Minn. Stat. § 176.081, subd. 1(a)(1991).<sup>9</sup> There is nothing in the statute or case law that limits attorneys fees to cases in which payment of wage loss benefits or rehabilitation expenses is ordered. The employee prevailed in the dispute and his attorney is entitled to attorney fees for his successful representation of the employee. Affirmed.

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<sup>8</sup> Heaton v. J.E. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983).

<sup>9</sup> The 1995 amendment to Minn. Stat. § 176.081 changing the fee available for representing employees in rehabilitation disputes applies only in cases where the employee's injury occurred on or after the October 1, 1995, effective date of the amendment. Deef v. University of Minn., slip op. (W.C.C.A. Jan. 24, 1997.)