

DONALD P. LEES, Employee/Appellant, v. G & S ROOFING, INC., and PRUDENTIAL NAT'L/BERKLEY RISK, Employer-Insurer, and MN DEP'T OF ECONOMIC SEC./RI, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 9, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Where a medical expert opined that there were no clinical findings to support any permanency, the compensation judge was supported by substantial evidence in finding no permanent partial disability under the disability schedule.

JOB SEARCH - SUBSTANTIAL EVIDENCE; TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the compensation judge found that employee did not engage in a reasonably diligent job search because he made relatively few job inquiries the compensation judge was supported by substantial evidence in denying temporary total disability benefits for the period of unemployment.

TEMPORARY PARTIAL DISABILITY. The compensation judge was in error when she denied temporary partial disability benefits because the employee had refused a physically suitable light duty job with the employer several months before the employee returned to work for another employer. The matter was remanded to the compensation judge for a proper loss of earning capacity analysis.

REHABILITATION - CONSULTATION. With the repeal of Minn. Stat. § 176.101, subd. 3c, a rehabilitation consultation can no longer be denied simply because the employee refused a suitable job.

SANCTIONS; STATUTES CONSTRUED - MINN. STAT. § 176.081, SUBD. 12. When a compensation judge is considering an award of sanctions for failure to appear at a hearing under Minn. Stat. § 176.081, subd. 12, the compensation judge must consider the matter in light of the justification and injustice standards in the statute.

Affirmed in part, reversed in part and remanded.

Determined by Wheeler, C.J., Johnson, J., and Hefte, J.
Compensation Judge: Joan G. Hallock

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's denial of temporary total disability benefits from October 25, 1996 through February 3, 1997, temporary partial disability benefits from February 4, 1997 through August 23, 1997, an award of permanent partial disability in the amount of 10% of the whole body, a rehabilitation consultation and from the award of sanctions.

BACKGROUND

The employee, Donald P. Lees, worked for the employer, G & S Roofing, as an apprentice roofer. On February 21, 1996, the employee slipped and sustained an admitted low back injury. At the time of the injury the employee was 33 years of age and had a weekly wage of \$449.56. As a result of his injury the employee was totally disabled from working from February 27 through May 14, when he returned to light-duty work until June 16. He was again unable to work until July 25, 1996. Thereafter, he returned to light duty work for the employer until October 22, 1996. He worked primarily indoors in the sheetmetal shop, bending metal. (T. 43, 88.) During most of this period the employee was paid either temporary total disability or temporary partial disability by the employer and insurer. (Judgment Roll: NOID filed 8/5/96; T.9, 83.)

The employee was initially treated by Dr. William Wilson at the Duluth Clinic in Hibbing, Minnesota. Dr. Wilson diagnosed "acute lumbar back strain" and prescribed Darvocet and Flexeril. X-rays indicated that there were "disc margin spurs at L3-4 and L4-5 levels. The disc space are intact." (Resp. Ex. 1.) The employee was next seen by James R. Boswell, D.O., M.P.H., at the Occupational Health Services of Allina Clinic on March 4, 1996. Dr. Boswell diagnosed "mechanical low back pain" and prescribed some medication and physical therapy. On March 19, 1996, an MRI of the employee's lumbar spine was taken, which was interpreted by radiologist Steven M. Fry, as indicating the following:

- 1) Disc space desiccation and disc bulge at L3-4 and L4-5.
- 2) Broad-based posterior disc protrusion and full-thickness annular tear at L5-S1 without MR evidence of S1 root compression or displacement.
- 3) Small Schmorl's nodes at the T-12 end plates.

(Resp. Ex. 3.) Dr. Boswell's report of a clinic visit on March 21, 1996 indicates that the "MRI shows an L5-S1 protruding disc and full-thickness annular tear." His diagnosis at that time was "herniated disc at L5-S1." As a result of this finding Dr. Boswell referred the employee to Dr. Walter L. Bailey, a neurologist, apparently also at Allina. On April 30, 1996, Dr. Bailey examined the employee and concluded that the employee "may very well have a herniated disc on the right at L5-S1, but I am much more impressed with his back tenderness and would like him to see one of our pain clinic doctors who specializes in sacroiliac joint problems and probably even more that then the facet syndrome is a possibility." Dr. Bailey scheduled the employee for an

EMG and referred him to Dr. Todd Hess at United Hospital's pain clinic. The employee's EMG of May 8, 1996 was within normal limits. Dr. Hess saw the employee on May 16, 1996, and on that occasion the employee complained of pain and tenderness along the paravertebral muscles in the lumbar region and the sacral area. He apparently localized his pain at approximately the L5-S1 region as being the most "exquisitely tender." Dr. Hess discussed with the employee the possibility of attempting facet joint injections for diagnostic and therapeutic purposes. At that point the employee chose to defer those injections until a later date. (Resp. Exs. 3, 4, 5.)

Thereafter the employee was referred to Dr. Charles E. Kelly, an internist at the Physician's Neck and Back Clinic. The employee first saw Dr. Kelly on July 22, 1996. Dr. Kelly diagnosed mechanical low back pain, deconditioning syndrome, and subjective rather than objective problems. He recommended that the employee participate in strength training physical exercises under the supervision of Michael J. Hogan, a physical therapist at the clinic. The employee participated in some of these, but on August 5, 1996 when he returned to see Dr. Kelly he indicated that he preferred more passive treatment in a swimming pool. Dr. Kelly refused to change the treatment and the employee withdrew from the program until September 10, 1996 when he returned, requesting a change of doctors. When Dr. Kelly refused to change doctors the employee agreed to continue in the more aggressive physical strengthening program. In his report of October 1, 1996, Dr. Kelly indicates that "Don has turned the corner and is making objective and subjective gains. He is very enthused about his improvement in the program." (Resp. Ex. 6.) During this period of time, the employee also was seen by Dr. Boswell on several occasions.

On October 21, 1996, the employee went to see Dr. Kelly for a follow-up visit. The employee indicated that on the prior Friday he had "strained himself at work but that he was improving." Dr. Kelly indicated that at that time he "opted to reduce his work restrictions today to lift less than 45 pounds and lifting less than 12 times per hour." (Resp. Ex. 6.)

The employee testified that on October 22, 1996, he was given a new job of sorting or washing rusty nails, outdoors in the rain. He stated that this work exacerbated his low back condition and he complained to his supervisor. He also indicated that he was unprepared to work outside, as he had anticipated working inside, and had not brought adequate clothing. (T. 50-2, 99.) He testified that after he complained he was advised that if he was unable to do the light-duty work which had been assigned that no further work was available for him given his restrictions. (T. 50-52.) As a result, the employee left work after less than one hour. (T. 99.)

The employee then went to see Dr. Kelly. The employee reported to Dr. Kelly that he had had difficulty at work that day and requested that Dr. Kelly change his restrictions. Dr. Kelly declined to change his restrictions because "they are based on his strength gains in the program and not how he feels." Dr. Kelly's office note from that date indicates that the employee was dissatisfied with Dr. Kelly's position and indicated that he was going to "seek medical care elsewhere." Dr. Kelly's note states that he "informed him that he had already spoken with Dr. Boswell about his case and we are both in agreement that this was the last approach that could offer him medical benefit and that most likely, he would be returned to work without restrictions." (Resp. Ex. 6.)

After leaving Dr. Kelly's office, the employee went to see Dr. Boswell, to whom he also complained of low back pain. Dr. Boswell indicated that his physical examination "showed very inconsistent findings." His diagnosis at that time was "lumbosacral strain and sprain." He stated, in his office notes, that the employee could return to work with the following restrictions: 20-pound weight restriction, 50-pound pushing and pulling, occasional bending to 20 degrees, twisting and turning frequently, and kneeling and squatting occasionally. "This is to be done during light hours times. He can go back to his regular duties for four hours and four hours of light duty." Dr. Kelly's plan notes indicate as follows:

We are considering getting him back to full duty at this time. The patient will be progressing along in accordance with what Dr. Kelly outlined. He is indicating that all of the studies are indicative that the patient truly has muscular problems and that his present complaints are not secondary to the disc that showed up on the MRI. His recommendation was that the patient be pushed to overcome his anxiety as well as the muscle spasms. We will proceed along that path at this time.

(Resp. Ex. 2.)

A few days later, on October 25, 1996, while the employee was in Hibbing visiting his daughter, he apparently had a flare-up of his low back problems. He testified that he went to visit a family doctor in Hibbing, Dr. J. Greene. Dr. Greene's office notes indicate that the employee complained of severe pain in his low back which had come on when he was attempting to pick up a box and place it back on a shelf. He felt a sudden severe pain in his low to mid back. On examination the employee was tender in the mid to low back area and into both buttocks. Dr. Greene provided the employee with some pain and muscle relaxant medication. Dr. Greene again saw the employee on November 4, 1996. At that time the employee reported that his symptoms were improved and that he would like to return to light duty work. Dr. Greene gave him a return-to-work slip with the following restrictions: no climbing on ladders, working only indoors, no lifting over 10 pounds, and squatting, stooping or other activities that would irritate his low back problem. Apparently these restrictions were communicated to the employer on or about November 5, 1996.

On November 1, 1996, the employee filed a claim petition seeking temporary total disability from and after October 25, 1996, permanent partial disability in an unspecified amount, and rehabilitation assistance.

On November 19, 1996, the employee returned to see Dr. Boswell. On examination Dr. Boswell indicated that the employee was "diffusely tender everywhere." He also stated that he could not "find a specific location which would indicate that his pain is due to a herniated disc." His diagnosis at that time was (1) diffuse back pain, etiology unknown, and (2) L5-S1 disc herniation. He stated that the employee could return to work with limitations. He also indicated that he recommended an IME evaluation. (Resp. Ex. 2.)

By letter to the employee dated December 2, 1996, the employer stated:

On November 5, 1996, you called and told me that you had new restrictions from Dr. Greene and essentially wanted to know whether or not G & S Roofing had any work within those new restrictions.

From the perspective of G & S Roofing, the medical record to date are [sic] confusing. For example, on October 22, 1996, Dr. Boswell indicated that your physical examination showed very inconsistent findings and that your restrictions were 20 pounds lifting and 50 pounds pushing and pulling for eight hours per day, but that you could also do regular duties for four hours a day, with four hours of light duty. Then, on November 19, 1996, Dr. Boswell told Ms. Scott of Medica that there were no findings regarding your back that would keep you from regular duties.

This is in contrast to the note you supplied from Dr. Greene which took you completely off work, followed shortly by another report from Dr. Greene of November 4, 1996, which allowed you to return to work November 5, but with no outdoor work, no ladder work, or lifting over 10 pounds, nor bending or stooping until at least November 14, 1996.

It is my understanding that you are going to have an independent medical examination with Dr. Daniel Randa on February 10, 1997, at 1:00 p.m. as part of the workers' compensation claim.

Because of the confusion regarding your work status, I am going to wait until after Dr. Randa has issued his report to determine what type of work may be available for you at G & S Roofing.

We will consider you on a leave of absence at least until we have had a chance to review Dr. Randa's findings and compare those with work that may be available.

If you have any questions or concerns, please call. I anticipate contacting you within two weeks after Dr. Randa has issued his report.

The employee testified that he attempted to find employment as a maintenance or retail sales person from October 28, 1997 until February 4, 1997, when he went to work at his brother's construction company, which paid approximately \$5.00 per hour. (Pet. Ex. F; T.57.) He worked

for his brother until August 23, 1997, when he quit because the work activity had been aggravating his symptoms. (T. 57-9.) Apparently he returned to work for his brother at some later date and was still working there on the date of hearing. (T. 67.)

On February 10, 1997, the employee was examined by Dr. Daniel G. Randa, a neurologist, at the request of the employer and insurer. Dr. Randa indicated that the employee had sustained only a temporary muscular strain while at work on February 21, 1996, and that this condition was resolved within 12 weeks. He found that the employee had no permanent partial disability and was able to return to work as a roofer without restriction. The parties stipulated that the employee had reached maximum medical improvement on February 21, 1997. (Resp. Ex. 8.)

The matter was originally scheduled for hearing before a compensation judge at the Office of Administrative Hearings on February 10, 1998. The employee failed to appear for this hearing because of car trouble while en route to the hearing. On March 19, 1998, the employee filed a new claim petition requesting entitlement to temporary total disability from October 25, 1996 through February 3, 1997, temporary partial disability from February 4, 1997 through August 28, 1997, permanent partial disability, medical expenses for chiropractic treatment at the Hopkins Back and Neck Clinic, and rehabilitation assistance from a QRC. The employer and insurer's answer denied liability for the claimed benefits and requested sanctions in the form of reimbursement for attorney's fees and costs under Minn. Stat. § 176.081, subd. 12. The matter was subsequently rescheduled for May 21, 1998. The employee failed to attend the second hearing because he had been placed in jail after operating his motor vehicle without a valid driver's license. (T. 94.)

The matter was finally heard before a compensation judge at the Office of Administrative Hearings on July 23, 1998. In her Findings and Order served and filed September 10, 1998, the compensation judge determined that the employee had sustained no permanent partial disability and was not entitled to temporary total disability or temporary partial disability as claimed. In addition, the compensation judge determined that the chiropractic treatment at the Hopkins Back and Neck Clinic was not reasonable and necessary and payment was not approved. As well, the compensation judge concluded that the employee was not entitled to a rehabilitation consultation as requested. The compensation judge granted the employer and insurer's request for sanctions for the employee's failure to attend the hearings in February and May 1998.

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 (1992). 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 exact extent of the employee’s appeal is unclear. The employee is acting pro se on appeal and in his brief he lists several “issues.” We have interpreted the notice of appeal and the brief to raise issues concerning his claim for temporary total disability, temporary partial disability, permanent partial disability, need for rehabilitation assistance and the sanctions against him. There is no mention in his brief concerning denial of chiropractic expenses and that matter will not be considered. Minn. R. 9800.0900, subp. 2.

Permanent Partial Disability

The compensation judge found that the employee was not entitled to any permanent partial disability and denied the employee’s claim for a 10% whole body rating. In so doing, she adopted the opinion of Dr. Randa. (Finding 43.) The issue before this court on appeal is whether there is substantial evidence in the record to support the compensation judge’s decision.

The employee contends that a 10% rating is supported by the opinion of his treating chiropractor, Dr. Peter L. Kelzenberg of the Hopkins Back and Neck Clinic. On October 21, 1997, Dr. Kelzenberg opined that the employee had a 10% permanent partial disability rating pursuant to Minn. R. 5223.0390, subp. 3C(2). Dr. Kelzenberg’s opinion was based primarily on objective clinical findings of pain and stiffness in the lumbar spine with intermittent involuntary muscle tightness in the paralumbar muscles. He also noted decreased range of motion and stated that the March 1996 MRI results correlated with the employee’s symptoms. (Pet. Ex. A.)

Dr. Randa, the employer and insurer’s medical examiner, in his February 10, 1997 report indicated that the employee had sustained only a temporary “lumbosacral musculoligamentous strain injury which was superimposed upon pre-existing degenerative lumbar spondylosis.” Dr. Randa indicated that he thought the employee was magnifying his pain complaints and that the examination showed inconsistent findings. He released the employee to full-time work with no restrictions, stating that the strain injury the employee sustained should have resolved within 12 weeks of the date of injury. (Resp. Ex. 8.)

The question of whether an employee has sustained permanent partial disability is one of ultimate fact for the compensation judge. In this case, the compensation judge was faced with conflicting opinions by two medical providers. It is the compensation judge’s responsibility

to choose between those opinions. If the compensation judge finds that one of the opinions is more persuasive than the other, that choice will not be overturned by this court, unless the opinion selected is not based on adequate foundation. As there is no argument as to the foundation of Dr. Randa's report, the compensation judge's selection of Dr. Randa's opinion is affirmed. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

Temporary Total Disability

The compensation judge determined that the employee was not entitled to temporary total disability from October 25, 1996 through February 3, 1997, the period during which he was unemployed. The compensation judge indicated that the employee had been released to return to work with restrictions by his treating physician in late October 1996. She stated that the work restrictions provided by Dr. Greene were "problematic" and not shown to be related to the February 21, 1996 injury. In addition, she found that the employee's job search during the period of his claim was inadequate. She noted that, while the employee was not being assisted by a QRC, he made only a small number of contacts and submitted very few applications. She specifically found that his efforts did not represent a reasonable and diligent job search. (Finding 37.)

"A person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income." Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 83, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967). Where an employee has been released to return to work within his restrictions but has not engaged in a reasonably diligent search for work within those restrictions, he is not entitled to temporary total benefits. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988); Hanmer v. Wes Barrette Masonry, 403 N.W.2d 839, 39 W.C.D. 758 (Minn. 1987). Whether a job search is reasonably diligent is a question of fact for the compensation judge and should be viewed within the scope of assistance provided by the employer and insurer. Okia v. David Herman Health Care Ctr., 38 W.C.D. 261 (W.C.C.A. 1985).

The issue before this court on appeal is whether there is substantial evidence in the record to support the compensation judge's finding that the employee did not engage in a reasonably diligent job search. The employee argues that he did attempt to find work, as evidenced by the entries in his job log. He further argues that he was ultimately successful in finding work with his brother's construction company in February 1997. The employer and insurer argue that even without the assistance of a QRC the employee was required to make a greater effort than that demonstrated by the logs.

As indicated above, the question of whether an employee has engaged in a reasonably diligent job search is an ultimate question of fact for the compensation judge. Unless clearly erroneous, such determination will not be overturned by this court. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984). In the case at hand, the employee's job logs indicate that he made relatively few job inquiries between October 25 and January 8,

1997. The logs indicate that he made no job search effort after January 8, 1997.

Based on the small number of job contacts evidenced by the employee's testimony and his job logs there is substantial evidence in the record to support the compensation judge's determination that the employee did not engage in a reasonably diligent job search during the period of claimed temporary total disability. As a result, her denial of those benefits is affirmed. Hengemuhle, 358 N.W.2d 54, 37 W.C.D. 235.

Temporary Partial Disability

The compensation judge determined that the employee was not entitled to temporary partial disability between February 4, 1997 and August 23, 1997, while he was employed by his brother's construction company at approximately \$5.00 per hour. The judge found that the employee's medical condition would not prevent him from continuing to work in the light-duty job he was offered on October 22, 1996. She determined that the employee was not entitled to temporary partial disability because he had refused this offer of employment "by walking off the job." The compensation judge indicated that the offer of work on October 22, 1996 was an "offer of gainful employment, the refusal of which made the employer not liable for any future temporary partial disability benefits thereafter." (Findings 38, 39.) In addition, in her memorandum the compensation judge indicated that, "The employee's failure to accept the employment offered by the employer in late October 1996 precludes him from eligibility for benefits." She further stated that, "The work offered the employee was within his restrictions."

In order for an employee to be entitled to temporary partial disability benefits, four factors are necessary: (1) there must be a physical disability; (2) the disability must be temporary in nature; (3) the employee must be able to work subject to the disability; and (4) there must be an actual loss of earning capacity that is causally related to the disability. Dorn v. A.J. Chromy Constr. Co., 245 N.W.2d 451, 454, 29 W.C.D. 86, 91 (1976). "Where the employee is found medically able to return to work without restrictions, having suffered no residual disability from his work injury," there is no basis for payment of temporary wage loss benefits or rehabilitation services after that date. Kautz v. Setterlin Co., 410 N.W.2d 843, 845, 40 W.C.D. 206, 208 (Minn. 1987). Temporary partial disability benefits are generally based on the post-injury wage of the employee, which is presumed to be representative of an employee's reduced earning capacity. However, in appropriate circumstances, this presumption can be rebutted with evidence indicating the employee's ability to earn is different from the post-injury wage. Schwan v. FabCon, 45 W.C.D. 209 (W.C.C.A. 1991).

In the case at hand, it is unclear exactly what analysis the compensation judge made with respect to temporary partial disability benefits. The employee's refusal of the light-duty job offered in October 1996 would have no bearing on his entitlement to temporary partial disability during the period that he worked for Lees Construction from February through August 1997. It would be important to know if the employer had reoffered physically appropriate work to the employee during this period. We note that in its letter of December 2, 1996, the employer indicated that it would be contacting the employee within two weeks after Dr. Randa's February 10, 1997 report concerning the availability of work which met his restrictions. (Pet. Ex.

L.) The employee testified that the employer never recontacted him.

The matter is remanded to the compensation judge for a redetermination of entitlement to temporary partial disability, using the principles set forth above. It is unclear whether the compensation judge found that the employee was subject to restrictions related to the February 21, 1996 injury. Her use of the reasonable diligent job search standard suggests that she found that the employee had ongoing restrictions but she does not make a clear statement to that effect. If this is true, it appears that the Kautz decision does not apply in this case and that the presumption that the employee's earnings at Lees Construction would represent his earning capacity would be available to the employee. With respect to the issue of temporary partial disability, the compensation judge may resolve the matter on the present record or, at her sole discretion, permit the parties to introduce additional evidence with respect to the question of restrictions and/or the loss of earning capacity.

Rehabilitation

The compensation judge determined that the employee was not entitled to a rehabilitation consultation. She stated that "with his refusal of suitable employment, he constructively waives his right to a consultation." (Finding 42.) In her memorandum she explains that,

Generally an employee is entitled to a rehabilitation consultation, as a matter of right, unless the employer and insurer have filed a timely request for waiver. Wagner v. Bethesda Hosp., [cite omitted] (W.C.C.A. Jan. 4, 1995). There are exceptions. In Judnick v. Sholom Home, [cite omitted] (W.C.C.A. Aug. 4, 1995), the Workers' Compensation Court of Appeals held that the employers and insurers may assert threshold liability issues, such as complete recovery from injury, lack of notice, the expiration of the statute of limitations, refusal of suitable employment, and a denial of primary liability in response to an employee's request for rehabilitation consultation. In this case, the employee refused suitable employment. Therefore a rehabilitation consultation is denied.

The compensation judge's reliance on Judnick under the circumstances of this case is misplaced. The "refusal of suitable employment" as set forth in Judnick was the refusal of suitable employment under Minn. Stat. § 176.101, subd. 3e. That section was no longer in the statute at the time of the employee's injury in February 1996. As a result, the refusal of a suitable 3e job is irrelevant with respect to the entitlement of the employee to a rehabilitation consultation. It does appear, based on the facts of this case, that the compensation judge has found that none of the other defenses available to the employer and insurer had been established and as a result the employee is entitled to a rehabilitation consultation. However, because the issue of whether the employee is subject to restrictions is unsettled and would be relevant to the rehabilitation question, we remand the issue of the rehabilitation consultation. If the compensation judge finds that the

employee has ongoing restrictions then the consultation should be awarded.

Sanctions

The compensation judge determined that the employer and insurer were entitled to reimbursement of attorney fees and costs under Minn. Stat. § 176.081, subd. 12, as a result of the employee's failure to appear at the February and May 1998 hearings. She specifically found that the employee's failure to appear was not justified.

Minn. Stat. § 176.081, subd. 12, provides as follows:

Sanctions; failure to prepare, appear, or participate. If a party or party's attorney fails to appear at any conference or hearing scheduled under this chapter, is substantially unprepared to participate in the conference or hearing, or fails to participate in good faith, the commissioner or compensation judge, upon motion or upon its own initiative, shall require the party or the party's attorney or both to pay the reasonable expenses including attorney fees, incurred by the other party due to the failure to appear, prepare, or participate. Attorney fees or other expenses may not be awarded if the commissioner or compensation judge finds that the noncompliance was substantially justified or that other circumstances would make the sanction unjust. The department of labor and industry, and the office of administrative hearings may be rule establish additional sanctions for failure of a party or the party's attorney to appear, prepare for, or participate in a conference or hearing.

(Emphasis added.) In her memorandum to the Findings and Order, the compensation judge indicated that the reasons given by the employee for failing to appear at the two conferences were "simply not good enough." She found that the employee had a responsibility to appear at the hearings and that his car breakdown and incarceration were "not good enough reasons to deny the employer and insurer's request for reasonable expenses and fees." (Memo at p. 7.)

The employee testified that on the date of the first hearing he attempted to attend by driving his aged and decrepit truck to the hearing. He stated that his vehicle broke down several times en route. Following one of the breakdowns he indicated that he contacted his girlfriend at his residence and asked that she notify his attorney that he was having car problems. He stated that he did finally arrive at the hearing sometime after it was scheduled to start and met his lawyer in the hall after the hearing had been canceled and the parties dispersed. With respect to the second hearing in May, the employee testified that he was in the Carlton County jail as a result of having been arrested for driving a motor vehicle without a valid driver's license. His testimony was not clear with respect to whether this event occurred while he was en route to the hearing or not. His testimony was also vague with respect to when and if he had contacted anyone

to have them notify the court that he would be unavailable. (T. 72, 93-95.)

The determination of whether the “noncompliance was substantially justified or that other circumstances would make the sanction unjust” is a question of fact for the compensation judge. However, in making the factual determination, the compensation judge is required to define the question being answered in a way which is consistent with the statute. In this case the statutory standard is whether the failure to attend was “substantially justified” or whether other circumstances would make the sanction “unjust.” The compensation judge’s conclusion that the employee’s reasons were “simply not good enough” does not address the deeper analysis required by the statute. We are troubled by the compensation judge’s conclusion because we can conceive of circumstances where it would be unjust to apply sanctions on a party or an attorney who was unable to attend because his car broke down or he was placed in jail. We vacate the compensation judge’s findings concerning sanctions and remand the issue for further consideration consistent with the statutory language. The compensation judge, at her sole discretion, may take additional evidence before completing her analysis.