

ROBERT S. MAKELA, Employee, v. SPANCRETE MIDWEST, SELF-INSURED/COMPCOST, INC., Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS  
MARCH 25, 1999

No. [REDACTED SSN]

HEADNOTES

REHABILITATION - RETRAINING. Substantial evidence supports the compensation judge's approval of a rehabilitation plan amendment to allow exploration of retraining options.

PRACTICE & PROCEDURE - MATTERS AT ISSUE. Where the employer had not admitted liability for an ankle injury and liability for that injury was not issue in the hearing below, a finding regarding such an injury must be vacated.

Affirmed in part and vacated in part.

Determined by Hefte, J., Pederson, J. and Wilson, J.  
Compensation Judge: William R. Johnson

OPINION

RICHARD C. HEFTE, Judge

The self-insured employer appeals the compensation judge's approval of an amendment to the employee's rehabilitation plan. The employer also appeals the compensation judge's reference to a right ankle injury. We affirm in part and vacate in part.

BACKGROUND

On September 3, 1992, Robert Makela (employee) sustained an admitted low back injury while working as a welder for Spancrete Midwest (employer), which was self-insured for workers' compensation. At the time of the injury, the employee's weekly wage was \$636.63. The employee did not return to work for the employer immediately after the injury. From January 1993 through December 1993, the employee worked with the Minnesota Department of Vocational Rehabilitation. The employee attempted to start his own business, then worked for a series of five car dealerships in sales. In February 1997, while still working at a car dealership, the employee began working with QRC Mike Stern. On February 7, 1997, QRC Stern completed a rehabilitation plan recommending job search with the goal of returning the employee to suitable employment. Job placement began on February 27, 1997. The employee was let go from his position at the car dealership.

On March 18, 1997, QRC Stern recommended a rehabilitation plan amendment to allow exploration of retraining as an option for the employee, as well as continued job search. On March 27, 1997, with QRC Stern's assistance, the employee obtained a full-time job as a customer service representative at Holiday Sports earning \$280 per week. The employer and insurer objected to the amendment, claiming that because the employee had not performed a diligent job search and was working full time, retraining was premature. The dispute was certified on May 28, 1997, and an administrative conference was held on June 19, 1997. After the conference, the insurer was ordered to authorize the QRC to conduct an analysis of the appropriateness of a retraining plan. The employer and insurer requested a formal hearing. In July 1997, the employer offered the employee a wire feeder welder position, which paid \$13.28 per hour. The employee's treating physician, Dr. Robert Hall indicated that the employee could return to work in that position with a 25 pound lifting restriction and suggested a gradual return to work. In August 1997, the employee attempted to return to work with the employer in this position.

In September 1997, the employee began treating with Dr. Seth Rosenbaum, reporting increased pain into his buttock and left leg. The employer had an on site job evaluation done of the employee's position, which recommended accommodations, but did not note any forward bending. By February 18, 1998, Dr. Rosenbaum had given the employee permanent restrictions of working three hours per day in the adapted welding position with frequent breaks. On March 6, 1998, the employer had another on site evaluation performed by Mark Netzinger, who opined that the position was within the employee's restrictions, except for the restrictions on bending and standing, but that those categories were modifiable. In April 1998, the employee's union went on strike. At that time, the employee was working three hours per day, nine hours per week. With his QRC's assistance, the employee found a job in customer service at a Home Depot within a week which paid \$10.00 per hour. The employee's hours were increased since this position was sedentary and did not increase his symptoms. When the strike was over, the employee returned to work for the employer.

The employee filed a rehabilitation request on March 20, 1998 to amend the rehabilitation plan to allow the employee's QRC to explore retraining options. The employee underwent an independent medical examination with Dr. Gary Wyard on March 19, 1998, who opined that the employee could work without restrictions. The employee also underwent an adverse rehabilitation consultation with QRC David Berdahl, who opined that on the job training and job placement should be pursued before exploring retraining and that exploration into retraining would be premature since the employee's job search had not been exhausted.

On April 29, 1998, the employee's rehabilitation request and the QRC's rehabilitation request were consolidated for hearing. A hearing was held on June 23, 1998. The compensation judge held that the proposed rehabilitation plan amendment to allow exploration of retraining as a vocational option was appropriate. The employer and insurer appeal.

## 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

### Rehabilitation Plan Amendment

The employer claims that the compensation judge erred by approving the rehabilitation plan amendment to allow exploration of retraining as a vocational option for the employee, arguing that rehabilitation should focus only on returning the employee to suitable full time employment with the pre-injury employer and that development of a retraining plan is premature. The purpose of rehabilitation is 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. § 176.101, subd. 1(b). Retraining is "a formal course of study in a school setting which is designed to train an employee to return to suitable gainful employment." Minn. Stat. § 176.011, subd. 23. "Suitable gainful employment" is employment which is reasonably attainable and which offers an opportunity to restore the employee to an economic status as close as possible to that which the employee would have enjoyed without the disability. Minn. R. 5220.0100, subp. 13. Minn. R. 5220.0750, subp. 1 provides: "Retraining is to be given equal consideration with other rehabilitation services, and proposed for approval if other considered services are not likely to lead to substantial gainful employment."

First, the employer argues that the compensation judge erroneously applied the standard for retraining eligibility rather than the standard for amendment of a rehabilitation plan. Minn. Stat. § 176.102, subd. 8, governs situations in which rehabilitation plans are modified:

**Plan modification.** Upon request to the commissioner or compensation judge by the employer, the insurer, or employee, or upon the commissioner's own request, the plan may be suspended, terminated, or altered upon a showing of good cause, including:

(a) a physical impairment that does not allow the employee to pursue the rehabilitation plan;

- (b) the employee's performance level indicates the plan will not be successfully completed;
- (c) an employee does not cooperate with a plan;
- (d) that the plan or its administration is substantially inadequate to achieve the rehabilitation plan objectives;
- (e) that the employee is not likely to benefit from further rehabilitation services.

The compensation judge did not make an explicit finding of good cause under this statute, but found that exploration of retraining was appropriate considering the employee's attempts at returning to work and his inability to restore his lost earning capacity in the six years since the work injury. The issue is whether substantial evidence supports the compensation judge's conclusion that amendment of the rehabilitation plan was appropriate. See Rovinsky v. Paulson's Super Valu, slip op. (W.C.C.A. July 23, 1992). The employee's QRC testified that the employee's job with the employer was not progressing and that the employee should continue to job search but also explore retraining since it was six years past the date of injury and the employee was not anywhere close to an economic status as close as possible to that the employee would have enjoyed without disability. The compensation judge adopted Dr. Rosenbaum's opinion that,

This return to work has not been successful for [the employee]. He continues to experience increased signs and symptoms in the legs due to his disc herniation, which he has not experienced prior to that return to work. Various job modifications have not been successful thus far. In view of this situation the patient is placed on permanent restriction of three hours per day at this job, unless further ergonomic change can be achieved.

(Memo. at 16.) The employer argues that the on site evaluators were in better positions to evaluate the employee's ability to perform the job as modified than Dr. Rosenbaum. There is no evidence that Dr. Rosenbaum's opinion lacked foundation. It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. See Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). While the employer apparently has made commendable efforts to accommodate the employee, the compensation judge could reasonably conclude from the evidence that these efforts have not been successful. The compensation judge could reasonably conclude that good cause to amend the rehabilitation plan had been established in this case. Accordingly, the compensation judge's finding that the rehabilitation plan should be amended to permit exploration of retraining as a vocational option is supported by substantial evidence and is therefore affirmed.

The employer also argues that the compensation judge erred by concluding that the employee had conducted an adequate job search. The employee cites other cases where the compensation judges found that retraining should not be considered until additional job search had been performed. See Burks v. Ault, Inc., slip op. (W.C.C.A. 1990)(limiting job search to management jobs in that case was not reasonable because employee had a wide variety of skills

and interest areas); see also Seglem v. Northland Foods, 53 W.C.D. 46 (W.C.C.A. 1995) (investigation of retraining premature where the employee had a number of transferable skills and the employee's pre-injury weekly wage was \$350). The employer's argument fails to recognize the importance of the fact that the decisions in Burks and Seglem were affirmances of compensation judge's decisions. Given this court's standard of review, an affirmance of a compensation judge's decision on a factual issue has little or no value as precedent. See, e.g., Carlson v. Nabisco Brands, slip op. (W.C.C.A. May 2, 1994). In this case, the employee was earning a high weekly wage at the time of his injury, and he has not been able to return to that earning capacity in the six years since the injury. He has no transferable skills other than welding. Furthermore, "[r]etraining is to be given equal consideration with other rehabilitation services, and proposed for approval if other considered services are not likely to lead to substantial gainful employment." The compensation judge could reasonably conclude that the employee's job search was sufficient under the circumstances.

### Ankle Injury

The compensation judge found that the employee had sustained a personal injury "to his right ankle and low back arising out of and in the course of his employment." (Finding 1.) The employer had admitted liability for the low back injury prior to the hearing, but not for the ankle injury. Primary liability for the ankle injury was not at issue at the hearing before the compensation judge. The only issue was approval of the rehabilitation plan amendment. The employee does not dispute the employer's argument that the compensation judge's finding regarding the ankle injury should be vacated. Therefore, we vacate that portion of Finding 1 which refers to a personal injury to the employee's right ankle.