GARY PIGEON, Employee, v. MARVIN WINDOWS, SELF-INSURED/COMPCOST, INC., Employer/Appellant, and DR. MICHAEL REMMICK, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 9, 1999

No. [REDACTED SSN]

HEADNOTES

REHABILITATION - CHANGE OF QRC. Substantial evidence supported the compensation judge's determination that the self-insured employer had not shown that a change of QRC was in the best interests of the parties where, although the rehabilitation consultation and rehabilitation plan had been subject to considerable delay, the evidence supported the conclusion that the delays were not the result of unreasonable or dilatory conduct on the part of the QRC.

Affirmed.

Determined by Wheeler, C.J., Johnson, J., and Rykken, J.
Compensation Judge: Harold W. Schultz

OPINION

STEVEN D. WHEELER, Judge

The self-insured employer appeals from the compensation judge's denial of its request to change the employee's qualified rehabilitation consultant (QRC). We affirm.[1]

BACKGROUND

The employee, Gary Pigeon, sustained a work-related injury to the lumbar spine on

[1] In its trial brief the self-insured employer argues that the compensation judge erred by not addressing the issue of whether the proposed rehabilitation plan was appropriate. We will not consider this issue on appeal for several reasons, including: (1) the issue was not raised in the notice of appeal, (2) the rehabilitation request is ambiguous at best concerning whether the self-insured employer sought to raise its objection to the plan as a separate request or simply as another basis for its primary request for a change of QRC, (3) the appropriateness of the rehabilitation plan was not addressed by DOLI in the order which prompted the employee's request for reconsideration by formal hearing before a compensation judge, (4) the parties did not address the appropriateness of the rehabilitation plan as an issue in their opening statements before the compensation judge, (5) no evidence was submitted at hearing concerning the appropriateness of the plan, and (6) the compensation judge did not treat the issue as having been raised.

August 27, 1990, and a work-related injury to the thoracic spine on November 14, 1991, both while working for the self-insured employer, Marvin Windows. At some time following the 1991 injury, on a date not disclosed by the record, the employee returned to work for the employer at a modified job with no wage loss. A functional capacities evaluation was performed in January 1993 resulting in permanent restrictions.[2] In 1994, the employee took a personal medical leave from the job with the employer as a result of nonwork-related heart difficulties which were ultimately diagnosed as low blood pressure. The employee's blood pressure condition was treated with medication and the employee was released to return to work. The employee did not return to work with Marvin Windows but found a job at Loral Industries in February 1995. This work, however, exceeded his back-related restrictions and increased his back problems, and the employee was forced to quit after a short time. (10/16/97 F & O: Findings 1-8.[3])

On March 2, 1995 the employee filed a claim petition seeking temporary total disability compensation from July 17, 1994 and continuing, and the provision of rehabilitation services. On April 3, 1995 the employee filed a request for rehabilitation services. On May 12, 1995 the employee filed an amended claim petition, retaining the rehabilitation issue but dropping the claim for temporary total disability compensation and instead seeking temporary partial disability compensation from March 6, 1995. The rehabilitation issue came before James E. O'Gorman, a settlement judge with the Department of Labor and Industry, and on April 28, 1995 the judge ordered that the employee be provided with a rehabilitation consultation with a QRC of his choice. (Judgment Roll.)

On July 6, 1995 the employee's attorney notified a QRC, Ken Moberg, to proceed with a rehabilitation consultation as ordered by Settlement Judge O'Gorman. Mr. Moberg testified that he received this letter with an authorization to proceed on July 11, 1995. Mr. Moberg determined that he would need the first report of injury, medical records, attendance records at Marvin Windows, job offers, job descriptions and pending job offers. On July 12, 1995, Mr. Moberg requested these records and reports from a representative of the employer's insurance administrator in order to perform the consultation. Mr. Moberg repeated the request on July 20, 1995, as no records had been furnished. On July 28, 1995, QRC Moberg contacted the employer directly for the records. When records had not been received as of August 14, 1995, Mr. Moberg decided to schedule the consultation without the benefit of records to review, and contacted the employee on August 14, 1995. (10/16/97 F & O: Findings 11-14; T. 23-25.)

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[2] Among other things, the functional capacities evaluation restricted the employee from bending, stooping or crouching, limited crawling, kneeling and balancing to occasionally, limited the durations of continuous sitting and standing, and limited lifting to under 25 pounds. (Exh. 6.)

[3] Factual findings regarding some of the events relevant to the issue in this case are contained in the prior Findings and Order served and filed on October 16, 1997. These findings were made following a hearing on the issue of the employee's eligibility for rehabilitation services. The factual findings were unappealed and are applicable to the dispute in the present matter under the principles of collateral estoppel.

At about the same time, the employee decided to attempt work in Devils Lake, North Dakota, as a heavy equipment mechanic/technician with employer Devils Lake Equipment. Because the employee had moved to North Dakota, an in-person consultation with the employee could not be scheduled in Minnesota. On September 2, 1995 the employee completed job analysis materials provided to him by the QRC concerning his former position at Loral and the new job at Devils Lake Equipment. He indicated that the latter job required frequent twisting, stooping, bending, squatting, kneeling and crawling, as well as lifting in excess of 50 pounds. (10/16/97 F & O: Findings 9, 10; T. 25.)

On December 7, 1995 a settlement conference on the rehabilitation request was held before Settlement Judge O'Gorman. As of that date, the employee had not returned to Minnesota and the QRC had not been able to meet with the employee in person to perform the rehabilitation consultation. The judge issued an order, served and filed on December 8, 1995, that QRC Moberg would not be required to meet with the employee in person to perform the rehabilitation consultation unless an in-person meeting could be held in Minnesota. He further ordered the QRC to complete and file the rehabilitation consultation report within thirty days. (Judgment Roll.)

Following receipt of the Judge O'Gorman's order, the QRC conducted a telephone interview with the employee and also contacted the new employer, Devils Lake Equipment, by telephone for further information about requirements of the employee's job. As the records he had requested in July from the employer still had not been furnished, the QRC again contacted the employer, but was advised to obtain records from the employee's attorney. The QRC then obtained various records from the office of the employee's attorney and on December 18, 1995 submitted a consultation report which concluded that the employee was qualified for rehabilitation services, as the only work he had been able to find exceeded his restrictions. (T. 27; Judgment Roll: 12/18/95 rehabilitation consultation report.)

Mr. Moberg next contacted the employer's insurance administrator by telephone on January 3, 1996, and followed up with a letter on January 4, to request authorization to proceed with developing a rehabilitation plan. Mr. Moberg received a letter from the employer's insurance administrator on January 11, 1996 stating that the employer would not authorize rehabilitation services and disagreeing with the QRC's finding that the employee was qualified for rehabilitation assistance. Based on the dispute over the employee's eligibility for rehabilitation services, Mr. Moberg placed the development of a rehabilitation plan on hold. (T. 28-30.)

The employee filed a rehabilitation request on January 16, 1996 seeking rehabilitation services. On January 23, 1996 the employer filed a rehabilitation response disagreeing with the request for rehabilitation services. Another rehabilitation response was filed by the employer on February 16, 1995, again disagreeing with the request for rehabilitation services and alleging that the employee was currently employed in a job which was both physically and economically suitable. (Judgment Roll.)

On February 6, 1996, Judge O'Gorman ordered that the employee's claim petition, amended claim petition and the various rehabilitation requests be consolidated for hearing. The issue of the employee's entitlement to rehabilitation services eventually came on for hearing before Compensation Judge Danny P. Kelly at the Office of Administrative Hearings on September 18, 1997. Judge Kelly found that the employee qualified for rehabilitation services. The self-insured employer did not appeal this determination. (Judgment Roll; 10/16/97 F & O.)

The QRC received a copy of Judge Kelly's decision on November 19, 1997. He met with the employee on December 6, 1997 in Elbow Lake, Minnesota. He then developed a rehabilitation plan, which was submitted to the employer on December 11, 1997. The employer disagreed with the rehabilitation plan and it was accordingly not signed by the parties or filed with the Department of Labor and Industry. (T. 33, 37-38.)

On December 24, 1997 the self-insured employer filed a rehabilitation request seeking to change the employee's QRC from Mr. Moberg to Wendy Morrel, because "the QRC who performed the rehabilitation consultation has continually been delinquent in completing tasks and preparing and filing reports." In an addendum to the request, the employer set forth the dates of the various orders, the rehabilitation consultation report and the rehabilitation plan, and alleged that the QRC had failed to conduct in-person meetings with the employee or to prepare and file the rehabilitation consultation report in a timely manner. The employer further alleged that "no rehabilitation plan has ever been prepared or filed by Mr. Moberg" and that "it was not until December 15, 1997 that Mr. Moberg submitted a rehabilitation plan." Finally, the addendum also noted that "the self-insured employer objects to the Rehabilitation Plan. The plan sets out activities, the final cost of which is in excess of $6,000.00." The employer did not, however, check off the box provided on the form to indicate a request for a change to the employee's rehabilitation plan. The employee filed a rehabilitation response checking off the box marked for disagreement with request for a change of QRC and noting further that the employee did not agree with the employer's objection to the rehabilitation plan. (Judgment Roll.)

On February 17, 1998, the Department of Labor and Industry notified the parties of its intent to render a non-conference decision on the record. A representative of the Commissioner of Labor and Industry approved the employer's request for a change of QRC on March 3, 1998, noting that the provision of rehabilitation services had been delayed for three years and concluding that QRC Moberg had failed to conduct a timely rehabilitation consultation or to file a rehabilitation plan. (Judgment Roll.)

The employee filed a request for a formal hearing on March 16, 1998, resulting in the hearing below before a compensation judge of the Office of Administrative Hearings on December 18, 1998. Following the hearing, on January 29, 1999, the judge served and filed his opinion denying the employer's request for a change of QRC. The self-insured employer appeals.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings

and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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 Best Interests of the Parties"

The issue presented in this case is whether the compensation judge erred in denying the employer's request to change the employee's QRC. Pursuant to Minn. Stat. § 176.102, subd. 4d, the question of a change of QRC may be made by a compensation judge and the determination is to be based on "the best interests of the parties." Since the issue before the compensation judge was one of fact our scope of review is whether the finding that a change was not in the best interests of the parties was supported by substantial evidence in the record. Hengemuhle.

There is no doubt that a protracted delay in the provision of rehabilitation services is not in the best interests of the parties. Here, the employer alleged that the lengthy delays in the rehabilitation process in this case were the result of unreasonable conduct by the QRC. Specifically, the employer points to the time delay between the order allowing a rehabilitation consultation and the dates of the initial "meeting" with the employee and the completion of the rehabilitation consultation report. The employer also points to the delay between the issuance of the rehabilitation consultation report and the preparation of a rehabilitation plan.

The compensation judge found that, upon being authorized to perform the rehabilitation consultation, the QRC immediately began the process of gathering the necessary reports, records and other information needed, but that he experienced difficulty in obtaining the documentation. (Findings 3, 4.) Pursuant to Minn. R. 5220.0130, subp. 3A, "[a] copy of the first report of injury, the disability status report, and the accompanying current treating physician's work ability report shall be sent by the insurer to the assigned rehabilitation consultant prior to the rehabilitation consultation." In unrebutted testimony, the QRC testified that he made several telephone calls to the self-insured employer's insurance administrator and then directly to the employer and these materials were not timely provided to him. In fact, the employer never provided the QRC with these documents, and the QRC eventually had to obtain them from the employee's attorney. By the time it was clear that the QRC would need to attempt to conduct the consultation without the benefit of advance receipt of the documents, the employee had moved to

Devils Lake, North Dakota, to accept employment there, which, as the compensation judge found, made it difficult to set up any in-person meeting with the employee. (T. 23-25; Finding 5.)

While the rules are not explicit that the first meeting with the employee must be in person, Minn. R. 5220.0410, subp. B, does refer to the QRC's disclosure requirements "[d]uring the first *in-person* meeting with the employee." (Emphasis added.) We note, further, that pursuant to Minn. R. 5220.0130, subp. 2, "[t]he rehabilitation consultation shall be held at a location not more than 50 miles from the employee's residence."

It would have been reasonable for the judge to conclude, based on the evidence in the record, that the delays in conducting the rehabilitation consultation were due in significant part to the employer's conduct in this matter, rather than to any dilatory conduct by the QRC. In any event, there is ample support in the record to conclude that the QRC did not unreasonably delay the consultation but instead attempted to follow the strictures of the statutes and rules concerning the conduct of the consultation. We assume that the requirements of the statutes and rules for the rehabilitation consultation are those which are to be deemed "in the best interests of the parties."

Following the completion of the consultation report, the employer refused to authorize rehabilitation services and, as was its right, sought a hearing on the question of whether the employee was qualified for rehabilitation services. The compensation judge apparently concluded that it was not unreasonable for the QRC to put the development of a rehabilitation plan on hold during the pendency of this dispute. We think this conclusion was reasonable. After the employee's right to rehabilitation services had been determined by Judge Kelly, the QRC acted with reasonable expedition to prepare a rehabilitation plan. The employer disagreed with the plan, and refused to sign it, as was its right. However, it could have seemed unreasonable to the compensation judge for the employer to refuse to sign the plan and then assert that the QRC acted improperly in failing to file the contested plan pending the outcome of the employer's objections.

Despite numerous delays largely engendered by the employer's conduct and challenges to the employee's attempts to obtain rehabilitation services, the present QRC has become familiar with the employee's rehabilitation needs and did complete both a rehabilitation consultation and plan. Rehabilitation services have been significantly delayed, but it was not unreasonable for the compensation judge to conclude that the QRC was not dilatory. The compensation judge may further have considered that a new QRC would need to familiarize him or herself with the employee's situation and which would merely add further delay. We, accordingly, affirm the compensation judge's conclusion that the employer failed to prove that a change of QRC is in the best interests of the parties.

Res Judicata

The self-insured employer also contends that "the Compensation Judge concluded that the issue regarding the QRC's actions between 1995 and 1997 could have been raised at the 1997 hearing, and therefore determined that he would not give any consideration to the events in 1995-1997 when making his decision." The appellant further argues that the compensation judge

committed an error of law by applying *res judicata* principles in this case.

We do not reach the question of whether an application of res judicata principles would have been appropriate in this case, as it appears clear to us that the compensation judge fully considered all of the employer's contentions and all of the evidence offered. The employee made a motion at the beginning of the hearing requesting that the compensation judge render a decision without a hearing on the basis that the issues presented were precluded by the res judicata effects of the prior findings and order of Judge Kelly. The compensation judge denied the motion, held the hearing and accepted written exhibits. (T. 9-20.) The compensation judge made specific findings with respect to the QRC's activities preceding the date of the hearing before Judge Kelly. (Findings 2-9.) The compensation judge also made the specific finding that the issue of a change of QRC was not presented to Judge Kelly. (Finding 10.) The judge's rulings and findings thus reflect that he considered all of the evidence, including that involving the QRC's activities prior to the hearing before Judge Kelly, in determining the factual question of whether a change of QRC was in "the best interests of the parties."

It is true, as the employer points out, that the compensation judge in his memorandum states that "[i]t is *not strictly necessary* for the compensation judge to determine if the QRC's work in 1995 was unsatisfactory." (Mem. at 4, emphasis added.) It is also true that the compensation judge's memorandum reflects his conclusion that the employer's claims regarding the rehabilitation activities in 1995 properly should have been raised before Judge Kelly in conjunction with the litigation over the employer's contention that the employee was not entitled to rehabilitation services. We conclude, however, that the compensation judge's reasoning on the issue of *res judicata* at most constitutes a statement of an alternate basis for the decision to deny the employer's request to change the employee's QRC. As we have affirmed the compensation judge's factual determination that the employer has failed to show that a change of QRC is in the best interests of the parties, we need not consider whether the decision would also have been appropriate if based solely on the basis of *res judicata*.