JANE WESTON, Employee/Cross-Appellant, v. UNIV. OF MINN./DULUTH, SELF-INSURED/SEDGWICK JAMES OF MINN., Employer-Insurer/Cross-Appellant, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 20, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - CONSEQUENTIAL INJURY; EVIDENCE - CREDIBILITY. The compensation judge's finding that the employee's December 10, 1996 cervical injury occurred as a consequence of the employee's prior left knee injuries was sufficiently supported by the employee's hearing testimony.

CREDITS & OFFSETS - GOVERNMENT DISABILITY BENEFITS; STATUTES CONSTRUED - MINN. STAT. § 176.021, SUBD. 7. An offset of MSRS disability benefits paid to the employee against permanent total disability compensation is controlled by Minn. Stat. § 176.021, subd. 7. Unlike the offset of Social Security disability benefits pursuant to Minn. Stat. § 176.101, subd. 4, the offset of MSRS benefits may be taken immediately rather than only after the payment of $25,000.00 in weekly benefits.

RESIDENTIAL REMODELING; STATUTES CONSTRUED - MINN. STAT. § 176.137. Primary jurisdiction over an award of residential remodeling is vested in the workers' compensation division of the Department of Labor and Industry and in this court pursuant to section 176.137, subd. 1. The compensation judge in this case had no original jurisdiction to consider the issue of residential remodeling, nor did the judge acquire subsequent jurisdictional authority to make factual findings on the issue where the issue merely arose by a claim petition and was not first raised to this court or to the worker's compensation division. The compensation judge's findings were also improper as no advisory opinion had been requested from the Council on Disability as required pursuant to Minn. Stat. § 176.137, subd. 4. The compensation judge's findings are accordingly vacated. An appropriate procedure for making a claim under Minn. Stat. § 176.137 is for the employee to request an administrative conference at DOLI pursuant to Minn. Stat. § 176.106. The department should advise the council on disability of the claim and the parties should submit the requisite architect's certification and proposal, together with other relevant evidence, to the council on disability. The advisory opinion of the council and any other information submitted by the parties should be reviewed by the commissioner's representative at the administrative hearing. Any party aggrieved by the commissioner's decision may request a formal evidentiary hearing on the record before a compensation judge pursuant to section 176.106, subd. 7, and the compensation judge thereby acquires jurisdiction over the issue. An appeal may be taken to this court from the compensation judge's decision in the usual manner.

Affirmed in part and vacated in part.

Determined by Johnson, J., Hefte, J., and Wheeler, C.J.
Compensation Judge: Gregory Bonovetz

OPINION

STEVEN D. WHEELER, Judge

The self-insured employer appeals from the compensation judge's finding that the employee sustained a consequential injury on December 10, 1996 rather than a new injury, and from the findings that the employee's residence does not adequately accommodate her disabilities butthat remodeling of her residence is impractical. The employee cross-appeals from the compensation judge's determination that Minn. Stat. § 176.021, subd. 7, rather than Minn. Stat. § 176.101, subd. 4, governs the timing of the self-insured employer's right to offset Minnesota State Retirement System [MSRS] disability benefits against permanent total disability compensation. We affirm the findings concerning the injury and the offset but vacate the findings regarding the employee's residence.

BACKGROUND

The employee, Jane Weston, was born in April 1947 and is currently 52 years old. She graduated from high school in 1966 and completed a year of vocational training as a baker in 1967. In 1980 she began working as a baker for the employer, the University of Minnesota at Duluth. (T. 39-40.)

On May 5, 1992 the employee sustained an admitted work injury when she slipped at work in the employer's cooler. She suffered a torn medial meniscus of the left knee. On June 3, 1992 the employee underwent arthroscopic surgery in the form of a partial medial meniscectomy to the left knee. The employee returned to work for the employer without restrictions but sustained another work-related injury working for the employer on January 13, 1993 when she slipped on a greasy floor and fell, landing on her knees. Both knees were injured and the employee underwent a valgus upper tibial osteotomy of the right knee on March 8, 1993 and of the left knee on August 17, 1993. (Judgment Roll: 10/9/97 F&O: Findings 18-29.)

The employee returned to work for the employer by December 1993. However, in compensating for her knee disabilities she developed a consequential injury to the low back in the nature of right sacral torsion with pelvic stabilizer weakness. Her treating physician continued her on various restrictions and limited her to four days work per week as of April 14, 1995. The employee sustained two temporary aggravations to the left knee at work later in 1995, the first after slipping in the cooler on July 26 and the second on October 24 when she partially hyperextended her left knee while lifting boxes of pudding. In October 1996 the employee was examined by Dr. John Dowdle, who opined that the employee could return to full-time hours in her job for the employer. The employee returned to full-time work at her pre-injury job by mid-November 1996. (Finding 9; Judgment Roll: 10/9/97 F&O: Findings 30-47.)

After returning to work on a five day per week basis the employee noted an increase in her left knee symptoms, with occasional buckling of the left knee from two to seven times per day. (T. 46-47, Finding 9 [unappealed].)

On December 10, 1996 the employee sustained a work-related injury to the cervical back when she fell in the employer's walk-in freezer. According to the employee's hearing testimony, she slid on ice after walking into the freezer but recovered her balance. She then picked up a box of bread sticks. The employee testified that while carrying the bread sticks her left knee buckled when she was near the door of the freezer, causing her to losing her balance. At the same time her right leg slipped on grease on the freezer floor, resulting in the incident in which she sustained the cervical injury. (T. 47-51.)

On December 10, 1996 the employee completed an employee incident report for the employer in which she described how the injury occurred: "I was bringing a large box out of freezer did not see large grease spill & slid in it." The employee completed another form, entitled "Accidental Injury Report," for the employer on December 12, 1996. In that form, the employee described the accident in these words: "Floor inside freezer had large grease spill - I was holding box & slid." (Exhs. 1, 2.)

The employee sought medical treatment from Dr. M. McCutcheon on December 12, 1996. The doctor recorded the following history describing the December 10, 1996 accident: "Two days ago she slipped on grease in a food locker, lurching to the right against a wall, catching herself before she fell but jerking her neck to the left." On December 18, 1996, the employee was seen in follow-up by one of her treating physicians for the knee condition, Dr. Edward E. Martinson. Dr. Martinson also recorded a history describing the December 10, 1996 accident: ". . . while attempting to carry out a box of bread sticks she slipped on the ice/grease. She states that she initially twisted to the right and her head and neck twisted to the left, although she did not fall to the ground." (Exh. G: 12/12/96; Exh. D: 12/18/96.)

The employee has been permanently totally disabled since December 12, 1996, when her physician first took her off work following the December 10, 1996 injury. On dates not disclosed in the record the employee was awarded Social Security disability benefits and disability benefits from the Minnesota State Retirement System. (Findings 25-27 [unappealed].)

The employee filed a claim petition on May 12, 1997 and an amended claim petition on November 6, 1997 seeking various workers' compensation benefits. The self-insured employer's answer raised various defenses including a denial of primary liability for the December 10, 1996 injury. On July 21, 1998 a hearing was held before a compensation judge of the Office of Administrative Hearings. At the hearing, the self-insured employer conceded that the employee had sustained a work-related cervical injury on December 10, 1996, but the parties disputed whether this was a new and distinct injury or one consequential to the employee's prior left knee injuries. The other issues presented included eligibility for permanent total or temporary total disability compensation, permanent partial disability, entitlement to benefits for residential remodeling, and the employer's right to and the timing of any offset of social security and MSRS

disability benefits against permanent total disability compensation. The self-insured employer appeals from the compensation judge's finding that the employee sustained a consequential injury to her cervical spine on December 10, 1996 rather than a new injury and from the findings that the employee's residence does not adequately accommodate her disabilities but that remodeling of her residence is impractical. The employee cross-appeals from the compensation judge's determination that Minn. Stat. § 176.021, subd. 7, rather than Minn. Stat. § 176.101, subd. 4, governs the timing of the self-insured employer's right to offset Minnesota State Retirement System disability benefits against permanent total disability compensation.

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.

Question of law. The issues on appeal in this matter also involve the interpretation and application of case law to undisputed facts. While this court may not disturb a compensation judge's findings of fact unless clearly erroneous and unsupported by substantial evidence in the record as a whole, Minn Stat. § 176.421, subd. 1(3) (1992), a decision which rests upon the application of the law to undisputed facts involves a question of law which this court may consider *de novo*.

DECISION

Consequential Injury or New Injury

The self-insured employer agreed at hearing that the employee had sustained a work-related cervical injury on December 10, 1996, but the parties disagreed over whether the injury was consequential to the employee's prior left knee injuries sustained working for the employer or instead constituted a wholly independent new injury.[1]

[1] The significance of this distinction is that if a period of disability is precipitated by a consequential injury, as opposed to a new, separate injury, the original injury continues to be the controlling event, and the employee's rights are governed by the Workers' Compensation Act in

The compensation judge found that the December 10, 1996 injury occurred as a consequence of the employee's prior left knee injuries, specifically finding that the injury was precipitated by the employee's left knee having given way or "buckled." This finding was consistent with and supported by the employee's hearing testimony.

The self-insured employer argues that the employee's testimony was not credible as neither the incident reports or medical notes made contemporaneous with the injury nor two subsequent statements taken in January 1997 mention any buckling or giving way of the left knee, and merely reflect that the employee slipped on ice or grease. The employer argues that under these circumstances the employee's hearing testimony should have been given little if any weight and that the compensation judge was clearly erroneous in accepting the employee's hearing testimony.

While different inferences could have reasonably been drawn from the evidence in this case, determination of the relative weight of the evidence and the credibility of witness testimony were factual matters within the province of the compensation judge, and this court may not reverse unless the compensation judge's determination is clearly erroneous. See, e.g., Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989). Here, the employee explained the mechanics of her injury and clarified any apparent discrepancies between her hearing testimony and prior statements and records. The compensation judge found the employee to be a credible witness. There was no direct contradiction between the employee's testimony and the other evidence, and we cannot say that the compensation judge committed clear error in accepting the employee's account of the role of the buckling of her left knee in the chain of events leading to her cervical spine injury. We therefore affirm.

Offset for Minnesota State Retirement System Disability Benefits

In unappealed findings, the compensation judge determined that the employee had been permanently and totally disabled since at least December 12, 1996. On subsequent dates, undisclosed in the record, the employee began receiving disability benefits under both federal Social Security and MSRS. Minn. Stat. §176.021, subd. 7, provides in pertinent part that "[i]f an employee covered by the Minnesota state retirement system receives total and permanent disability benefits pursuant to section 352.113 or disability benefits pursuant to sections 352.95 and 352B.10, the amount of disability benefits shall be deducted from workers' compensation benefits otherwise payable." Minn. Stat. § 176.101, subd. 4, generally governing permanent total disability benefits, provides in pertinent part that ". . . after a total of $25,000 of weekly compensation has been paid, the amount of the weekly compensation benefits being paid by the employer shall be reduced by

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effect on the date of the original injury, whereas if, on the other hand, the employee suffers a new, separate injury, that new injury supersedes the earlier injury as the controlling event, and the law in effect on the date of the new injury supersedes the law in effect at the time of the earlier injury. Joyce v. Lewis Bolt & Nut Co., 412 N.W.2d 304, 40 W.C.D. 209 (Minn. 1987).

the amount of any disability benefits being paid by any government disability program if the disability benefits are occasioned by the same injury or injuries which give rise to payments under this subdivision."

The compensation judge held that the self-insured employer was entitled to offset Social Security disability benefits received by the employee against permanent total disability compensation after payment of $25,000.00 in weekly benefits, pursuant to Minn. Stat. § 176.101, subd. 4. The judge held further that the self-insured employer was entitled to offset any MSRS disability benefits paid to the employee against permanent total disability compensation pursuant to Minn. Stat. § 176.021, subd. 7. The employee appeals from the immediate offset of MSRS disability benefits, arguing that offset of such benefits is controlled by Minn. Stat. § 176.101, subd. 4, rather than Minn. Stat. § 176.021, subd. 7, so that no offset may be taken until after the payment of $25,000.00 in weekly benefits.

Specifically, the employee asserts that her MSRS disability benefits, being paid by a state government, must be construed as "disability benefits being paid by any government disability program" and must thus be considered to fall within the scope of section 176.101, subd. 4. The compensation judge, however, reasoned that the term "government disability benefits" referred not to benefits paid by the State of Minnesota in its incidental function as an employer, but rather to disability benefits paid by a governmental entity in its public capacity through a disability program available generally to any qualified citizen.

We do not address whether this distinction is generally appropriate to the interpretation of the scope of Minn. Stat. § 176.101, subd. 4, as we conclude that it is clear by application of the principles of statutory construction that the question of the timing of an offset for MSRS disability benefits would in any event be controlled by Minn. Stat. § 176.021, subd. 7, rather than section 176.101, subd. 4. Even if we were to conclude that the MSRS benefits could fall generally within the definition of "disability benefits being paid by any government disability program" under section 176.101, subd. 4, the specific language of section 176.021, subd. 7, directly addresses MSRS disability benefits. Pursuant to statutory and case law principles of statutory construction, where two statutes contain general and special provisions which seemingly are in conflict, the special provision will prevail as an exception to the general, and the general provision will affect only those situations within its general language which are not within the language of the special provision. Minn. Stat. § 645.26, subd. 1; see also, e.g., Ehlert v. Graue, 195 N.W2d. 823 (Minn. 1972).

The employee next argues that if Minn. Stat. § 176.021, subd. 7, controls in this case, that statute is unconstitutional on grounds of equal protection. This court lacks jurisdiction to determine constitutional issues. Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990). The employee's constitutional objections to the statute are preserved for further appeal to the Minnesota Supreme Court.

Residential Remodeling/New Residence

The employee's amended claim petition, filed November 6, 1997, claimed entitlement to residential remodeling benefits. At the hearing before the compensation judge, the employee relied upon her own testimony, a videotape and photographs showing the exterior and interior of her home, and the testimony of a licensed architect, John Ivey Thomas, as well as a letter from Mr. Thomas to employee's counsel dated March 30, 1998.

The employee testified that her home was an older two-story house with two bedrooms and a bathroom on the second floor, a half-bath and a room converted to a bedroom for her elderly mother on the first floor, and basement laundry facilities. She testified that her knee injuries had made it difficult for her to negotiate the stairs in her home because of the frequent giving way or buckling of her left knee, which sometimes caused her to fall. (T. 66-70, 103-105.)

In Mr. Thomas' letter and in his testimony, he offered the opinion that it would be physically possible to modify the employee's residence to provide entry ramps to the house and two new bedrooms, a handicapped bathroom and laundry facilities on the first floor for about $54,000.00, but that it would "make more economic sense" to combine proceeds from selling the current residence with residential remodeling benefits to purchase a new home which was more suitable for the employee's disability in its original design. Mr. Thomas testified that he had no medical information as to the employee's disability and that he had based his recommendations only on what the employee had told him. He also acknowledged that he had not prepared a specific remodeling proposal detailing any dimensions or materials in making his cost estimate and that his estimate had included costs of adding two first floor bedrooms so as also to accommodate the employee's mother. (T. 116-129; Exh. L.)

Neither the parties, the workers' compensation division of the Department of Labor and Industry, nor the compensation judge submitted the employee's claim for residential remodeling benefits to the Minnesota Council on Disability for an advisory opinion, and no advice from the Council was in evidence or considered by the compensation judge.

The compensation judge found that the employee's present home does not permit the employee to move freely into and throughout the residence and does not adequately accommodate her disabilities. He further found that remodeling the residence is impractical. The judge noted that since no evidence had been introduced identifying and describing any specific new home, he could not determine whether any specific new or different residence would better accommodate the employee's disabilities, and declined to determine the amount or necessity for an award of residential remodeling benefits. (Findings 35, 36, 38.) The self-insured employer appeals from the compensation judge's finding that the employee's home does not accommodate her disability as well as from the finding that remodeling is impractical.

The employer makes three arguments on appeal: (1) that the compensation judge's findings were not supported by substantial evidence, (2) that no award under section 176.137 can be made without an architect's certification that remodeling or purchase of a new residence is reasonably required, and that the testimony and letter of architect John Ivey Thomas in this case did not constitute the requisite certification, and (3) that section 176.137 requires that the advice

of the Minnesota Council on Disability be obtained and considered as a prerequisite to the making of any findings as to the necessity and extent of residential alteration or purchase to accommodate an employee's disability, so that the compensation judge erred in making the appealed findings in this case.

The eligibility of a disabled employee for certain costs for residential remodeling or the purchase of a new residence to accommodate the employee's disability under the workers' compensation act is governed by Minn. Stat. § 176.137. As the issues raised in this case involve the interpretation of the procedural requirements of that statute, we have set forth the subdivision in its entirety (emphasis in italics is ours):

> **176.137 Remodeling of residence; handicapped employees.**
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> **Subdivision 1. Requirement; determination**. The employer shall furnish to an employee who is permanently disabled because of a personal injury suffered in the course of employment with that employer such alteration or remodeling of the employee's principal residence as is reasonably required to enable the employee to move freely into and throughout the residence and to otherwise adequately accommodate the disability. Any remodeling or alteration shall be furnished *only when the division or workers' compensation court of appeals determines* that the injury is to such a degree that the employee is substantially prevented from functioning within the principal residence.
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> **Subd. 2. Cost**. The pecuniary liability of an employer for remodeling or alteration required by this section is limited to prevailing costs in the community for remodeling or alteration of that type.
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> **Subd. 3. New residence**. Where the alteration or remodeling of the employee's residence is not practicable, the award may be to purchase or lease a new or different residence if the new or different residence would better accommodate the disability.
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> **Subd. 4. Certification**. *No award may be made except upon the certification of a licensed architect to the division or workers' compensation court of appeals* that the proposed alteration or remodeling of an existing residence or the building or purchase of a new or different residence is reasonably required for the purposes specified in subdivision 1. *The council on disability shall advise the division or workers' compensation court of appeals* as provided in section 256.482, subdivision 5, clause (7). The alteration or remodeling of an existing residence, or the building or purchase of a new home must be done under the supervision of a

licensed architect relative to the specific needs to accommodate the handicap.

Subd. 5. Limitation. An employee is limited to $60,000 under this section for each personal injury.

While this court has previously been called upon to review factual determinations made with respect to issues presented under this statute, this case, as far as we are aware, is the first to present us with the question of the interpretation of this statute in terms of its procedural and jurisdictional requirements. The statute is not a model of clarity and contains some unusual features. In order to properly consider the procedural questions raised by the self-insured employer's appeal, we believe it is necessary to address the statute's jurisdictional requirements.[2]

We note, first, that primary jurisdiction over an award of residential remodeling appears to be vested in the workers' compensation division of the Department of Labor and Industry and in this court pursuant to section 176.137, subd. 1. That statute provides that ". . . remodeling or alteration shall be furnished *only when the division or workers' compensation court of appeals determines* that the injury is to such a degree that the employee is substantially prevented from functioning within the principal residence." No parallel language is included providing primary jurisdiction for the award to be made upon the determination of a compensation judge. It thus appears that the legislature intended that such claims be treated differently from those made by claim petition pursuant to Minn. Stat. § 176.305, which are first presented at a settlement conference presided over by a representative of the commissioner, next may proceed to formal hearing before a compensation judge and then may be appealed to this court.

We conclude that the compensation judge had no original jurisdiction to consider the issue of residential remodeling, nor did the judge acquire subsequent jurisdictional authority to make factual findings on the issue where the issue merely arose by a claim petition and was not first raised to this court or to the worker's compensation division. The mere occurrence of a settlement conference was not an exercise of the commissioner's primary jurisdiction over the issue such that the compensation judge exercised jurisdiction over the issue when the claim petition was heard. Accordingly, we vacate Findings 32-38 and Order 11 as made without subject matter jurisdiction.

After considering both the language and the apparent legislative intent of Minn. Stat. § 176.137, subd. 4, we conclude that the compensation judge's findings were also improper as no advisory opinion had been requested from the Council on Disability. The language of the statute is directive, rather than permissive: "the council on disability *shall* advise the division or

[2] We think that the issue of jurisdiction is implicitly raised by the employer's arguments on appeal, but, in any event, the issue of subject matter jurisdiction may be raised at any time, and an appellate court may raise and determine jurisdiction on its own motion, even where none of the parties has raised the issue. See, e.g., Davidner v. Davidner, 304 Minn. 491, 493, 232 N.W.2d 5, 7 (1975).

workers' compensation court of appeals as provided in section 256.482, subdivision 5, clause (7)." Although it could be argued that this language simply requires the council on disability to provide such advice where requested, making the solicitation of the advice optional, this interpretation does not hold up when considered in light of the statute referenced, Minn. Stat. § 256.482, subd. 5(7). That statute provides that it is a duty of the council on disability to advise the workers' compensation division and this court "as to the necessity and extent of *any* alteration or remodeling of an existing residence or the purchase of a new or different residence which is proposed by a licensed architect under section 176.137." (Emphasis added.)

It is clear from the remainder of subdivision 256.482 that the council on disability was created to provide specialized expertise and insight about both the specific needs of the disabled and the assistive policies, methods and technologies available to meet those needs, in order to advise and assist not only the governor, legislature and state agencies, but also the disabled and the general public at large. The council on disability was also given the power to initiate or seek intervention in administrative or judicial proceedings which concern programs or services directly affecting the legal rights of persons with a disability. We believe that the language of section 176.137, subd. 4, as it pertains to the council on disability reflects the legislative intent that the extensive and specialized expertise of the council on disability should be available to assist the finder of fact in determining both the threshold issue of whether a disabled employee's home fails to accommodate the disability and the issue of the necessary extent of any alterations or of a new residence.

To effectuate the statutory language and intent, one appropriate procedure for making a claim under Minn. Stat. § 176.137 is for the employee to request an administrative conference at DOLI pursuant to Minn. Stat. § 176.106. The department should advise the council on disability of the claim and the parties should submit the requisite architect's certification and proposal, together with other relevant evidence, to the council on disability. Cooperation with the council on disability at this stage may greatly assist the parties in narrowing the issues, and in resolving differences. The advisory opinion of the council and any other information submitted by the parties should be reviewed by the commissioner's representative at the administrative hearing. Any party aggrieved by the commissioner's decision may request a formal evidentiary hearing on the record before a compensation judge pursuant to section 176.106, subd. 7, and the compensation judge thereby acquires jurisdiction over the issue. An appeal may be taken to this court from the compensation judge's decision in the usual manner.

While it appears that the issue of residential remodeling benefits may also be raised directly to this court by petition of a party, parties should be cognizant of the policy of this court to refer all factual issues to the Office of Administrative Hearings for a formal evidentiary hearing on the record by a compensation judge pursuant to Minn. Stat. §176.381, subd. 1. Also, parties should be aware that this court may decline to grant such a petition unless exceptional circumstances are present, as we believe that such issues normally should be raised by a petition for an administrative hearing.

Having concluded that the compensation judge's findings on the residential remodeling issues must be vacated in this case because the compensation judge had not acquired jurisdiction over those issues, we do not reach the questions of whether the findings were supported by substantial evidence in the record, or whether the compensation judge erred in finding that the testimony and letter of the architect in this case met the requirements for an architect's certification within the meaning of Minn. Stat. § 176.137, subd. 4.