

GERALD R. ARNEBECK, Employee, v. CITY OF MINNEAPOLIS, SELF-INSURED,
Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 9, 2000

No. [REDACTED SSN]

HEADNOTES

JOB OFFER - REFUSAL; STATUTES CONSTRUED - MINN. STAT. § 176.101, SUBD. 3e. Although a job offer under Minn. Stat. § 176.101, subd. 3e, may be made "at any time prior to the end of the 90-day [post-MMI] period," and although this language has been interpreted in case law to mean that such an offer may be made prior to MMI, a job offer under subdivision 3e cannot be made with regard to an injury not currently asserted, at issue, or evidently contemplated. Where the employer's job offer was issued a year and a half after ninety days post MMI with regard to the employee's low back injury and clearly prior to the employee's Second Amended Claim Petition alleging entitlement to benefits based on a consequential psychological injury, the employer's job offer was as a matter of law not a suitable job offer pursuant to Minn. Stat. § 176.101, subd. 3e, nor would that conclusion be altered by extension of the hearing below or remand to the compensation judge for further litigation and findings regarding the alleged psychological injury.

Affirmed.

Determined by Pederson, J., Johnson, J. and Rykken, J.
Compensation Judge: David S. Barnett

OPINION

WILLIAM R. PEDERSON, Judge

The self-insured employer appeals from the compensation judge's conclusion that the employee did not refuse or untimely respond to a suitable job offer under Minn. Stat. § 176.101, subd. 3e, and from the judge's denial of the employer's request that rehabilitation services be terminated. We affirm.

BACKGROUND

On January 27, 1994, Gerald Arnebeck sustained a work-related injury to his low back in the course of his employment as a heavy equipment operator with the City of Minneapolis. At the time of his injury, Mr. Arnebeck [the employee] was forty-five years old and was earning a weekly wage of \$646.40. The City of Minneapolis [the employer] accepted liability for the injury and commenced payment of various workers' compensation benefits. Subsequent to his injury, the employee received treatment from orthopedic surgeon Dr. Paul Crowe and was ultimately unable to return to his date-of-injury job. On a Functional Capacities Evaluation [FCE] dated

June 13, 1995, Dr. Crowe indicated that the employee was subject to various physical restrictions, including a restriction against sitting, standing, or walking for more than two or three hours each in any eight-hour work day.

Various issues pertaining to the employee's work injury came on for hearing in May, June, and July of 1996, and the record closed in that proceeding on July 24, 1996. On July 31, 1996, prior to issuance of any decision on the matters under litigation at the hearing, the employee filed an Amended Claim Petition, alleging entitlement to additional benefits based on a consequential injury in the nature of depression. At Finding 2 of his Findings and Order filed September 23, 1996, Compensation Judge Danny P. Kelly indicated that "[a]ll compensation benefit claims derivative of a psychological claim arising out of the January 27, 1994 personal injury are dismissed without prejudice, reserved for the filing of the appropriate pleading." At Finding 43 of that same decision, Judge Kelly indicated further that "[t]he employee attained Maximum Medical Improvement [MMI] per Dr. Crowe's April 16, 1996 report received by the employee on May 1, 1996," adding that "[t]his finding relates solely to the employee's degenerative disc disease and does not take into consideration the employee's alleged psychological condition."

On September 2, 1997, Dr. Crowe lifted his restrictions on the employee's standing and walking, but he indicated that all of the other restrictions he had issued on June 13, 1995, should be considered permanent, including the restriction on sitting more than two or three hours a day. On October 17, 1997, the employee's QRC at the time, Steven Walsh, resigned as the employee's QRC after stipulating with the employer for settlement of disputed costs for his services. By a Rehabilitation Request filed February 17, 1998, the employee requested appointment of QRC John Witzke as his QRC, and the employer contested the request, as it had an earlier request for assignment of a different QRC.

On March 19, 1998, by a letter to the employee from Human Resources employee Sarah Kraabel, the employer offered the employee a telephoning/keyboarding job as a Customer Service Representative I, describing the activities of the job in some detail. The employee was instructed to report to work at the job on April 6, 1998. Attached to the job offer was a report of an On Site Job Analysis [OSJA] conducted by case manager Jayne Sparks of the employer's managed care plan. Ms. Sparks's OSJA indicated that 67-100% of the job is normally done seated but that a worker would be free to get up and move around as needed as long as he or she met the standard of taking and documenting about thirty-five calls a day, averaging about 4.5 minutes each. Also attached to the job offer was a March 13, 1998, statement by Dr. Crowe, approving of the job for the employee, based on a review of Ms. Sparks's OSJA. Ms. Kraabel's cover letter included the following paragraph:

You have fourteen days after receipt of this letter to accept or reject the job offer, which we are making under the provisions of Minn. Stat. § 176.101 Subd. 3 (e) (1983). Refusal of the job offer is likely to affect your right to workers' compensation benefits. Your attorney can explain the statutory provisions to you. If you have any

physical problems performing this job, discuss them with me. The City will make reasonable accommodation for permanent physical disability.

By a letter dated fourteen calendar days later, April 2, 1998, the employee's attorney wrote to Ms. Kraabel, stating in part that the employee was "very interested in this job offer" but was "not in a position to accept or reject it at this time" because the employer's "Attorney/Workers' Compensation Department refuses to allow my client's chosen QRC the opportunity to do an on-site job analysis." The attorney explained that the matter was in the process of litigation and was expected to be resolved relatively soon. The attorney explained further that, while he was aware that a job analysis had been done by a representative of the employer's managed care plan, that representative was "not legally qualified to do such an analysis under Minn. Stat. § 176.102" and was "hardly a neutral party," whereas the QRC requested by the employee was under a "statutory obligation to be a neutral party."

On April 14, 1998, an administrative decision and order was issued and filed, appointing QRC Witzke as the employee's QRC. On April 21, the employer's attorney wrote to the employee's attorney, informing him that his office had just received a medical report restricting the employee permanently from all work, based apparently on a diagnosis of mechanical back pain with reactive depression. The employer's attorney invited notification "[i]f the City is not interpreting this information correctly and your client can work"; the employee's attorney apparently did not respond with such notification. On May 5, 1998, prior to expiration of the thirty-day period for requesting a formal hearing on the order appointing Mr. Witzke as QRC, the employer wrote to QRC Witzke, indicating to him that, while it had not yet decided whether or not to appeal from the order, the employer was willing to allow the QRC to evaluate the offered position the following day, May 6, 1998. The letter indicated that Mr. Witzke's OSJA was required by May 8, 1998, and that the job would be held open through May 12, 1998. The letter also indicated that the employer did not, by permitting the OSJA, waive any right it might have to assert that the employee's response to the employer's March 19, 1998, job offer was not timely and that, "[b]efore we confirm this appointment, we also need immediate clarification of whether or not [the employee] can work."

QRC Witzke performed the OSJA of the job on May 6, 1998, as requested, evidently accompanied by Ms. Kraabel, department supervisor Ray Morales, and Richard Van Wagner, a vocational expert selected by the employer. On May 8, 1998, QRC Witzke submitted his OSJA to the employer, cosigned by Mr. Morales. The OSJA listed various physical requirements of the job, indicating that it could be permanently modified as follows:

Ergonomically correct chairs can be made available, counter tops can be lowered or raised as needed, computer monitors can be lowered or raised as needed, head-set can be used for telephone answering, work station can be modified to suit employee's needs, work can be performed sitting or standing, custom fit keyboards can be utilized.

In his cover letter on that date, Mr. Witzke indicated that his OSJA “comes to the same conclusion as Ms. Sparks,” that the job “would be within [the employee’s] restrictions,” with the following reservation:

However, it should be noted that [the employee] has been restricted to sitting for no more than 2 to 3 hours at a time and I do believe that the work space will need to accommodate [his] being able to stand at times to perform the job. This may require a workstation that will accommodate a computer terminal for both a sitting and standing position.

Mr. Witzke’s cover letter was evidently carbon copied to both the employee and his attorney.

On May 22, 1998, QRC Witzke wrote to the employer, requesting approval of a Rehabilitation Plan Amendment approving his appointment as the employee’s QRC and contemplating a return to work with the employer. Mr. Witzke received from the employer no certification of the Rehabilitation Plan Amendment or other response to his request. By letter dated June 3, 1998, Ms. Kraabel wrote to QRC Witzke, recalling to him as follows her recollection of events of their consultation at his May 6, 1998, OSJA:

We discussed [the employee’s] need to alternate sitting and standing at that time. We also discussed providing a workstation that would enable use of a computer from both a standing and sitting position. We all agreed to job site modifications that you suggested. You told me you would recommend the job to your client because it was, in your opinion, a suitable job. You also told me you expected [the employee] to accept the job.

Ms. Kraabel indicated further in her letter that, as of that date, she had not heard from the employee or his attorney and was considering recommending the employee’s termination from employment with the employer. By letter dated the following day, June 4, 1998, the employer’s attorney wrote to QRC Witzke, requesting that he close his rehabilitation file in this matter without further action. The letter indicated that the employee’s benefits were being suspended pursuant to Minn. Stat. § 176.101, subd. 3l, on grounds that the employee had not responded to the employee’s March 19, 1998, job offer within fourteen calendar days as required under Minn. Stat. § 176.101, subd. 3e. On June 5, 1998, the employer filed and served on the employee a Rehabilitation Request, requesting that rehabilitation services be terminated, attaching in support of that request its June 4, 1998, letter to QRC Witzke, together with the employer’s March 19, 1998, job offer and its attachments.

By letter dated three days later, June 8, 1998, the employee’s attorney wrote to counsel for the employer, explaining that the employee had not responded to the employer’s job offer yet

because you never responded to QRC Witzke's May 8, 1998 letter [inquiring into] whether [the employer] would be able to accommodate [the employee's] sitting restriction by designing the work station so he could operate a computer from both the sitting and standing position. . . .

Today, June 5 [sic], 1998, I received a copy of a letter Sarah Kraabel sent to Mr. Witzke indicating [the employer] would make the job site modifications requested. . . .

. . . . I spoke to [the employee] this afternoon, after reviewing the Rehabilitation Request and Ms. Kraabel's letter. I must advise you that [the employee] WILL accept the job offer [at issue] with the modifications agreed to on June 3, 1998.

On that same date, June 8, 1998, according to a Progress Report dated June 12, 1998, QRC Witzke talked with the employee and attempted to talk with Ms. Kraabel regarding the status of the employee's employment with the employer. Mr. Witzke evidently left a request for a return call from Ms. Kraabel, but, apparently having not yet received one three days later, he tried again on June 11, 1998. His Progress Report indicates that

Ms. Kraabel stated that she did recently receive a letter from Mr. Arnebeck's attorney indicating that Mr. Arnebeck was going to accept that position and they were going to be having a meeting very soon regarding modifying the workstation. We discussed what modifications would be helpful and I stated that a computer table which could be adjusted easily in either a sitting or a standing position would be helpful along with headphones. Ms. Kraabel stated that most of the employees there do use the headphones. She would be meeting with some other people to determine some time frames in having a workstation modified for Mr. Arnebeck and then let Mr. Arnebeck know when he could start work. Ms. Kraabel stated that she would contact me if she had any further questions.

In the summary of his June 12, 1998, report, and apparently based on his telephone conversations with the employee and Ms. Kraabel, Mr. Witzke indicated that it was his understanding that the employee had accepted the job offered by the employer. Three days later, however, by letter to the employer's attorney dated June 15, 1998, QRC Witzke indicated that his office had as of that date received the employer's June 5, 1998, Rehabilitation Request seeking termination of the employee's rehabilitation services.

On June 22, 1998, the employee's attorney filed a Rehabilitation Response, contesting the employer's June 5, 1998, request to discontinue rehabilitation services on grounds that the employee had "never refused a 'suitable' job offer." The attorney asserted that QRC Witzke had not received any commitment from the employer to proposed modifications until the employer's June 3, 1998, letter and that even then the employer had not been able to furnish a

timetable for completion of the modifications or a start date for the employee's return to work. He reiterated that "[t]he employee stands ready and willing to begin work once the job site modifications are made and he is given reasonable notice so he can relocate to the Twin Cities." Three weeks later, on July 15, 1998, QRC Witzke wrote to the employer's attorney, informing him that he, Mr. Witzke, had spoken with Ms. Kraabel the previous day and that "she informed me that she believes there is a group that is going to be starting in [the Customer Service Representative I] capacity in the next two to three weeks" and "that job modifications for this position can be easily made for [the employee]." In the summary to his Monthly Progress Report on that same date, Mr. Witzke indicated that he was still of the "understanding that there is a position open for Mr. Arnebeck and that he has accepted that position and is awaiting word from the employer as to when he can begin." By letter dated two days later, July 17, 1998, Ms. Kraabel wrote to the employee, "to clarify your employment status with [the employer]." Ms. Kraabel recounted a history of the employee's refusal to interview for an Account Clerk position offered him by the employer in January of 1998, indicating that the March 1998 Customer Service Representative job offer had been made to the employee "[d]espite your lack of cooperation in the hiring process." She indicated that she had spoken with Mr. Witzke on June 24, 1998, and that he had advised her at that time that he had recommended the job to the employee on May 8, 1998, and had on that date "told you that the City had advised him that the City would make the accommodation of providing you with a work station where you could work while sitting or standing." Ms. Kraabel indicated to the employee that, "[b]ecause of your delay and failure to communicate with me, I consider your failure to make a timely response a refusal of the City's job offer under Minn. Stat. § 176.101, subd. 3 e (e)." She informed the employee also that he was no longer considered a suitable candidate for the position and that his three-year lay-off status with the employer had now lapsed.

On August 27, 1998, pursuant to an administrative conference three days earlier, a Decision and Order Pursuant to Minn. Stat. § 176.106 was issued, denying the employer's June 5, 1998, Rehabilitation Request to terminate rehabilitation services. The employer filed a Request for Formal Hearing on September 18, 1998, and the matter came on for hearing on December 16, 1998, and April 2, 1999. In addition to attorney fees, specific issues addressed at the hearing were as follows: "[w]hether the job offered March 19, 1998 by the employer was a suitable 3e job"; "[w]hether the employee unreasonably refused the March 19, 1998 job offer"; and "[w]hether the employee failed to reply within 14 days of May 8, 1998," the date on which QRC Witzke submitted his OSJA to the employer and apparently carbon copied it to the employee and his attorney.

On January 19, 1999, subsequent to the December 1998 portion of the hearing, the employee had filed a Second Amended Claim Petition, again alleging in part entitlement to benefits based on psychological injury consequential to his January 1994 low back injury. The employer moved to dismiss the petition and the employee requested that it be consolidated with the rehabilitation matters already under litigation. After a telephone conference with the compensation judge on March 24, 1999, attorneys for the parties agreed that the requested consolidation was not feasible, and the judge issued an Order to that effect on the same date. Late in the hearing on April 2, 1999, the subject of the employee's alleged consequential psychological injury claim came up again. When the employer's attorney suggested that the employee's

consequential depression was “an existing claim,” the judge interrupted to state, “For purposes of this hearing it is not an existing claim.”¹

By Findings and Order filed May 10, 1999, the compensation judge concluded in part the following: (a) that “[t]he job as offered March 19, 1998 was not within the employee’s permanent physical restrictions . . . and was not a suitable 3e job”; (b) that “[u]nder the circumstances, [the employer’s] position that the employee had failed to reply within 14 days of March 19, 1998 has no merit”; (c) that the employee never refused the job as reoffered on June 5, 1998, but instead “accepted the position, and . . . was waiting for notification that work station modifications were completed, and confirmation regarding when to report for training for this position”; and (d) that “[w]hat occurred on the date of May 8, 1998 did not constitute the offer of a suitable 3e job requiring response from the employee within 14 days.” Based on those findings, the compensation judge ordered in part “that the June 8, 1998 response of the employee through the letter of his attorney . . . was a timely response” and “that the self-insured employer’s request that rehabilitation services be terminated is denied.” As his whole Memorandum, the compensation judge stated, “The employee has a claim of consequential depression. The issues presently in dispute have been considered and decided without regard to that claim.” The employer appeals.

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

¹ Since the hearing, the parties have filed a Partial Stipulation for Settlement concerning the employee’s claim for permanent partial disability compensation, and an Award on that stipulation has been issued by this court. The stipulation expressly provides that “[t]he Employee’s Second Amended Claim Petition served and filed on or about January 15, 1999 and the issues pending at the Workers’ Compensation Court of Appeals are not affected by this Partial Stipulation for Settlement.”

At Finding 16 the compensation judge found that “[t]he job as offered March 19, 1998 was not within the employee’s permanent physical restrictions . . . and was not a suitable 3e job,” and at Finding 17 he found that “[u]nder the circumstances, the city’s position that the employee had failed to reply within 14 days of March 19, 1998 has no merit.” The employer contends that the job offered on March 19, 1998, was physically suitable, that it “provided all information to comply with Subd. 3e(e),” that the employee’s “failure to respond within 14 calendar days is deemed a refusal of the offer under the plain language of the statute,” and that the employee’s pending claim of a consequential depression injury requires a remand to determine if the employer’s job offer was timely. We do not agree.

The employer’s arguments with regard to the job offer and acceptance here at issue are all made in reference to Minn. Stat. § 176.101, subds. 3e and 3n, and the compensation judge’s findings appear for the most part to be similarly oriented. Minn. Stat. § 176.101, subd. 3e(a), provides that an employee’s temporary total disability benefits cease either ninety days after the employee has reached MMI from his work injury and has been served with a medical report to that effect or ninety days after the end of an approved retraining program, whichever is later. Subdivision 3e(b) provides in part that an employer may obtain the economic benefit of paying permanency benefits as impairment compensation rather than as economic recovery compensation if, prior to expiration of that same ninety-day period, it furnishes the employee, or the employee otherwise obtains, an economically suitable job “that the employee can do in the employee’s physical condition.” Subdivision 3e(e) establishes certain requirements as to the form and content of job offers made by employers under subdivision 3e and provides that an employee’s failure to respond to such an offer within fourteen calendar days should be deemed a refusal of the offer. Subdivision 3n of the section further provides that rehabilitation assistance shall cease permanently upon an employee’s refusal of a job offered under subdivision 3e.²

The question of whether post-injury employment meets the criteria of Minn. Stat. § 176.101, subd. 3e, is normally a fact issue to be resolved by the compensation judge. See Schneider v. Arrow Tank & Tng'g, 509 N.W.2d 359, 360, 49 W.C.D. 435 437 (Minn. 1993). However, with regard to the June 5, 1998, Rehabilitation Request at issue at hearing and in the Findings and Order, the job offer here at issue was as a matter of law, based on facts conceded in

² In addition, subdivision 3e(c) provides that “[a] job offer may be made before the employee reaches [MMI],” and subdivision 3e(d) provides that “[t]he job which is offered or procured by the employer or accepted by the employee under clause (b) does not necessarily have to commence immediately but shall commence within a reasonable period after the end of the 90-day period.” Requirements of the offer established in subdivision 3e(e) include that the offer must be in writing and that the written description “shall state the nature of the job, the rate of pay, the physical requirements of the job, and any other information necessary to fully and completely inform the employee of the job duties and responsibilities.” Subdivision 3e(e) also provides that “[t]he written description and the written offer need not be contained in the same document.” Subdivision 3l of the section provides that temporary total disability benefits shall also cease upon an employee’s refusal of a job offered under subdivision 3e. Subdivision 3n provides further that, in addition to rehabilitation benefits, temporary partial disability benefits shall also cease upon an employee’s refusal of a subdivision 3e job offer.

the employer's own request for remand, never even arguably suitable under Minn. Stat. § 176.101, subd. 3e. This is true in that the offer was made fully a year and a half after ninety days post MMI with regard to the employee's low back injury and yet clearly prior to not just the establishment but even the formal assertion of any other injury, including the consequential psychological injury alleged by the employee in his Second Amended Claim Petition. Nor would extension of the hearing below or remand to the compensation judge for further litigation and findings alter those factual circumstances.

We acknowledge that a job offer under subdivision 3e may be made “at any time prior to the end of the 90-day [post-MMI] period,” Minn. Stat. § 176.101, subd. 3e(b) (emphasis added), and that this language has been interpreted to mean that such an offer may be made prior to MMI, see Collier v. Septran, Inc., 42 W.C.D. 32 (W.C.C.A. 1989); Minn. Stat. § 176.101, subd. 3e(c). Nevertheless, an offer of employment under subdivision 3e cannot reasonably presume to accommodate an injury that is not currently at issue, regardless of the date on which the employee might eventually assert or obtain MMI with regard to such an injury. Determinations regarding the suitability of a job offer are to be made with reference to “the circumstances existing at the time of the offer.” Nelson v. Dahlen Transport, Inc., 43 W.C.D. 479, 485 (W.C.C.A. 1990), citing Collier, 42 W.C.D. 32, 42. In this case, the offer was made subsequent to dismissal of an earlier claim of consequential psychological disability, prior to formal reallegation of such a disability, and apparently without any medical or other contemplation of the offered job's suitability for a worker who might be psychologically disabled. Thus, even if evidence had been presented to the compensation judge, or were to be presented to him on remand, demonstrating the existence of a psychological condition from which the employee was not yet beyond ninety days post MMI at the time of the offer, the March 1998 job offer here at issue was never one legally contemplating such a condition “at the time of the offer.” Id.

On the bases indicated above, we affirm as a matter of law the judge's conclusion in Finding 16 that “[t]he job as offered March 19, 1998 . . . was not a suitable 3e job,” his conclusion in Finding 17 that “[u]nder the circumstances, [the employer's] position that the employee had failed to reply within 14 days of March 19, 1998 has no merit,” and his conclusion in Finding 29 that “[w]hat occurred on the date of May 8, 1998 did not constitute the offer of a suitable 3e job requiring response from the employee within 14 days.” In that no consequential psychological injury was at issue or apparently even contemplated at the time of the job offer here at issue, any eventual claim based on such an injury had, and continues to have, no bearing on the suitability of the job offer here under consideration.