CHARLES CLEVEN, Employee, v. MARVIN WINDOWS, SELF-INSURED/COMPCOST, INC., Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 27, 2000

No. [REDACATED SSN]

HEADNOTES

REHABILITATION - CONSULTATION; STATUTES CONSTRUED - MINN. STAT. § 176.102, SUBD. 4(h). A request for a waiver of a rehabilitation consultation may not be made more than 180 days after the date of injury, even if the employee has lost no time from work, under Minn. R. 5220.0120, subps. 1 and 2.

REHABILITATION - ELIGIBILITY. A rehabilitation consultation cannot be denied on the basis that the employee is not a qualified employee.

EVIDENCE - ADMISSION. Where the employee failed to disclose that he was asserting a claim that his weekly wage and right to rehabilitation services was predicated on his inability to work a second job he had at the time of injury until the day before trial, the compensation judge's ruling that the evidence concerning the second job was inadmissible as to the weekly wage issue but not as to the rehabilitation issue was inappropriate. If the evidence was tainted, it should not have been considered for any reason. The petitioner had the option to withdraw all his claims or proceed, at his jeopardy, without the evidence.

Affirmed in part, reversed in part and remanded.

Determined by Wheeler, C.J., Rykken, J., and Pederson, J.
Compensation Judge: Gary P. Mesna

OPINION

STEVEN D. WHEELER, Judge

The self-insured employer appeals from the compensation judge's findings that its request for a waiver of rehabilitation services was untimely, that the employee was entitled to a rehabilitation consultation and that he was a "qualified employee" entitled to rehabilitation services. We affirm the finding with respect to the untimely nature of the self-insured employer's request for a waiver of rehabilitation services and we affirm the award of a rehabilitation consultation. We reverse the compensation judge's finding that the employee was a qualified employee.

BACKGROUND

The employee, Charles Cleven, was first employed by Marvin Windows, the employer, in 1963. On November 17, 1997, while employed as a pallet maker, the employee sustained an admitted injury to his low back, neck and shoulder. At the time of his injury, the employee was 62 years of age. The employee was seen by several chiropractors and an osteopath following his injury, but continued to work a 40-hour week for the employer from the date of injury until the date of hearing below, on March 4, 1999. The employee's treating physicians indicated at various times that he was not limited in any way from returning to work (Dr. Erickson, D.C., 3/30/98) or was limited to working either a 40-hour work week or an 8-hour day (Dr. Nesmoe, D.C., Pet. Ex. C, and Dr. Clark, D.O., Resp. Exs. 1, 5, Pet. Ex. F). The employee was subject to different physical restrictions over time, all of which the employee was able to have accommodated by working with his supervisor.

On the date of injury, the employee's hourly wage was $10.68. On the date of hearing the employee's hourly wage had increased to $11.02. (Resp. Ex. 3.) During the year prior to the injury the employee apparently worked 68 hours of overtime. Shortly after the injury, he worked 16 hours of overtime, but worked no overtime after December 1997. (Resp. Ex. 3.)

On April 30, 1998, a request for certification of dispute was filed by the employee's attorney. The nature of the dispute was indicated to be "Rehab Consult with Ken Moberg," a qualified rehabilitation consultant in Alexandria, Minnesota. On May 18, 1998, the employee filed a rehabilitation request, requesting that a "rehabilitation consultation be provided by Ken Moberg, QRC, of Ken Moberg Career & Vocational Services." On May 22, 1998, the self-insured employer filed a disability status report in which it requested a waiver of the rehabilitation consultation sought by the employee on the basis that the employee was currently working for the employer in suitable gainful employment. On June 15, 1998, the self-insured employer filed a rehabilitation response, essentially reiterating its position in the disability status report. Attached to both the disability status report and the rehabilitation response was a copy of the March 30, 1998 medical authorization report from Dr. Lew Erickson, D.C., and a copy of an R-31 job description form, describing the requirements of the employee's pallet making position. Dr. Erickson's report indicated that the employee was released to return to work without any restrictions and that he had sustained a cervical and sacroiliac strain, subluxation and myofascitis injury. (Resp. Ex. 6.)

On October 1, 1998, a workers' compensation specialist in the rehabilitation and medical affairs section of the Minnesota Department of Labor and Industry issued a letter stating that the self-insured employer's request for a waiver of the need for a rehabilitation consultation was not granted on the basis that the "rules do not provide for a waiver of rehabilitation services after 180 days after the date of injury." (Pet. Ex. J.) In response, on October 14, 1998, the self-insured employer filed a rehabilitation request objecting to the denial of the waiver, requesting an administrative conference on the issue of the employee's eligibility for rehabilitation services, including a rehabilitation consultation, and attaching the March 30, 1998 release to return to work without restriction form issued by Dr. Erickson. On November 6, 1998, employee's counsel responded by indicating that the "information of the employee's attorney is that Mr. Cleven is restricted from working over-time because of his injury. He used to work a lot of over-time. Thus, Mr. Cleven does have a wage loss as a result of his work injury and he is entitled to rehabilitation

benefits." On November 30, 1998, an order directing that a rehabilitation consultation take place was issued by a representative of the commissioner of the Department of Labor and Industry. (Pet. Ex. H.)

Thereafter, QRC Moberg requested that the claims administrator for the self-insured employer approve initiating the rehabilitation consultation. This request was rejected and the self-insured employer filed a request for a formal hearing on the issue of the employee's entitlement to rehabilitation assistance of any kind, including a rehabilitation consultation. The request for formal hearing was filed on December 21, 1998. The position of the self-insured employer was that the employee had not lost any time from work, nor had he lost any wages as a consequence of his work injury and that he continued to work full time with regular wages and earnings with the date-of-injury employer. It contended that the waiver of rehabilitation services should have been granted pursuant to Minn. Stat. § 176.102, subd. 4(h), and this court's ruling in Cortez v. Heartland Foods, 53 W.C.D. 310 (W.C.C.A. 1995).

On December 14, 1998, the employee met with an associate of QRC Moberg, QRC Elmer T. Nelson, and a rehabilitation consultation took place. On December 15, 1998, QRC Nelson issued his rehabilitation consultation report in which he concluded that the employee was a qualified employee and was eligible for rehabilitation services because it was unknown whether the employee was expected to return to his pre-injury occupation or employer and because it was expected that the employee would return to suitable gainful employment as the result of receiving rehabilitation services. (Pet. Ex. H.) In his narrative report, dated December 19, 1998, the QRC summarized the information received from the employee and his recommendations for additional rehabilitation services. The QRC's opinion was based primarily on his conclusion that the employee was limited to working 40 hours per week, which would preclude him from earning overtime wages and working as a freelance carpenter, activities which the QRC was told by the employee that he had engaged in prior to his injury. The QRC's report indicates that, "Prior to his injury, the client averaged 44 hours per week over the calendar year, as well as his work as a freelance carpenter . . . ." (Pet. Ex. H.) The proposed plan of services had a vocational goal of returning the employee to his pre-injury level of work with the same employer and to return him "to his duties as a freelance carpenter." (Pet. Ex. H.)

On December 24, 1998, QRC Nelson issued a Form R-2, Rehabilitation Plan, in which he outlined recommended various vocational services, including medical management, vocational counseling, return-to-work coordination, on-site job analysis and administrative services, at a total cost of $2,350.00. (Pet. Ex. H.) The QRC observed that the employee's

> final restrictions are not known at this time. The clt. is currently receiving intensive physical therapy. . . It is not known whether R.T.W. long term is possible with the pre-injury employer. An effort will be made to coordinate R.T.W. with the pre-injury employer. If this is not possible an R3 will be filed reflecting the change of goal to R.T.W. different employer/different job. All categories will remain open including retraining.

(Id.). On December 30, 1998, the employer filed a rehabilitation request disputing that the employee was a qualified employee entitled to rehabilitation services.

All of the employee's claims, including a claim for temporary partial disability and payment of certain medical expenses, came on for hearing before a compensation judge at the Office of Administrative Hearings on March 4, 1999. At the outset of the hearing, it was decided that the claim for temporary partial disability and the need to determine a pre-injury weekly wage would not be considered by the compensation judge. On May 5, 1999, the compensation judge issued his findings and order in which he determined that the employer's request for a waiver of rehabilitation services was untimely, that the employee was entitled to a rehabilitation consultation and that the employee was a "qualified employee" entitled to rehabilitation services. The self-insured employer appeals from each of these findings.

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

Request for Waiver of Rehabilitation Consultation

In making his determination that the employee's request for a waiver of a rehabilitation consultation, made in his disability status report of May 22, 1998, was untimely, the compensation judge relied on Minn. R. 5220.0120, subp. 2. In his memorandum, the compensation judge stated:

> The self-insured employer did not file a timely request for a rehabilitation waiver. Under Minn. Rule 5220.0120, Subp. 2, a waiver is not effective more than 180 days after the injury, unless a renewal of the waiver is granted. A renewal cannot be granted if

> there was never an initial waiver. In this case, the Employer first requested a rehabilitation waiver on May 26, 1998, more than 180 days after the injury of November 17, 1997. Since a waiver, if granted, does not remain effective for more than 180 days after the injury, it obviously follows that a waiver may not be requested more than 180 days after the injury. If a waiver was granted in such circumstances, it would become ineffective the moment it was issued.

The rule cited by the compensation judge states as follows:

> **Criteria**. A rehabilitation waiver is granted when the employer documents that the otherwise qualified employee will return to suitable gainful employment with the date-of-injury employer within 180 days after the injury. The waiver shall not be effective more than 180 days following the injury unless a renewal is granted under subpart 4.

Subpart 4 provides as follows:

> **Renewal of a waiver**. If a waiver is in effect but the employee does not return to work within 180 days after the injury, the insurer may request a renewal of the waiver by filing another disability status report . . . The renewal of a waiver will be granted only upon additional documentation that convinces the commissioner that a consultation is not necessary because the otherwise qualified employee's return to suitable gainful employment with the date-of-injury employer is imminent.

On appeal, the self-insured employer argues that this regulation is inapplicable primarily because the employee had never left work. In addition, it points out that the statutory basis for a waiver, Minn. Stat. § 176.102, subd. 4(h), does not place a time limit on when a waiver may be granted. This statute provides:

> The commissioner or compensation judge may waive rehabilitation services under this section if the commissioner or compensation judge is satisfied that the employee will return to work in the near future or that rehabilitation services will not be useful in returning an employee to work.

We agree with the compensation judge's interpretation of the regulation. The intent of the regulations in implementing Minn. Stat. § 176.102, subd. 4(h), seems clear. Except when a prior waiver had been granted, it is not contemplated by the regulations that a waiver of a rehabilitation consultation may be granted after 180 days after an injury. The self-insured

employer's reliance on our decision in Cortez is not appropriate. That case is distinguishable on its facts. In that case, the employer's request for a waiver was made within 180 days of the employee's injury. In this case, the compensation judge properly denied the self-insured employer's request for a waiver of rehabilitation.

Entitlement to a Rehabilitation Consultation

It appears, from the self-insured employer's brief, that its primary argument against the granting of a rehabilitation consultation is that it had filed an effective request for waiver of rehabilitation services. In its brief, the self-insured employer, in the alternative, argued that even if its request for a waiver were untimely that since "no waiver was required" the request for a rehabilitation consultation should have been denied. The section of the self-insured employer's brief dealing with this subject, however, seems to emphasize its position with respect to the timeliness and the appropriateness of the filing of the request for waiver and does not clearly explain its alternative position. The best that we can determine from the brief is that the alternative position is based on the self-insured employer's position that the "employee has not lost any time from work." (ER brief at p. 12.) Essentially, its theory is that the regulations concerning the need for a waiver, and therefore the right to rehabilitation services, is predicated upon the employee being off work and needing to return to work. The self-insured employer's brief emphasizes that the "Employee has returned to work. The Employee was never off work. The Employee continues to work in his date-of-injury job." In addition, the self-insured employer relies on this court's decision in Cortez v. Heartland Foods, 53 W.C.D. 310 (W.C.C.A. 1995). It argues that, like in Cortez, the employee did not lose any time from work as a result of his injury, because the employer accommodated all of his limitations by light duty work. It points out that in Cortez, this court affirmed the compensation judge's statement that the employer was entitled to a waiver because the employee had returned to work. We are not persuaded by these arguments

Minn. Stat. § 176.102, subd. 4(a), provides, "A rehabilitation consultation must be provided by the employer to an injured employee upon request of the employee, the employer or the commissioner." An insurer may not challenge an employee's right to a rehabilitation consultation on the basis that the employee is not qualified for rehabilitation services. Rather, the purpose of the rehabilitation consultation is "to determine whether the employee is a qualified employee . . . to receive rehabilitation services . . . ." (Minn. R. 5220.0100, subp. 26.) See Goodwin v. Byerly's, Inc., 52 W.C.D. 90 (W.C.C.A. 1994). An employer and insurer are not, however, always indefinitely responsible for providing a rehabilitation consultation at the request of the employee merely because the employee sustained a personal injury. In response to an employee's request for a rehabilitation consultation, an employer and insurer may make certain defenses and raise threshold liability issues such as, but not limited to, allegations of complete recovery from the injury, lack of causal relationship, lack of notice and expiration of the statute of limitations. Lewis v. Honeywell, Inc., 53 W.C.D. 364 (W.C.C.A. 1995); Judnick v. Sholom Home, slip op. (W.C.C.A. Aug. 4, 1995); Fraser v. R.N.W. Assocs., slip op. (W.C.C.A. Sept. 30, 1999).

Since the self-insured employer has admitted liability for the injury of November 17, 1997, and it does not appear that it is asserting any of the defenses recognized by

the decisions cited above, it has no basis upon which to object to the employee's right to a rehabilitation consultation under Minn. Stat. § 176.102, subd. 4(a).[1] As we have affirmed the compensation judge's denial of the self-insured employer's request for a waiver of rehabilitation services, there is no basis upon which to deny the employee's right to a rehabilitation consultation. As a result, we affirm the award of the rehabilitation consultation and the self-insured employer would be required to pay for the limited time taken by the QRC to gather information and prepare the rehabilitation report on December 15, 1998.

Qualified Employee

The compensation judge determined that the employee was a "qualified employee," who was entitled to rehabilitation services under Minn. R. 5220.0100, subp. 22. This rule defined a qualified employee as follows:

> **Qualified employee**. "Qualified employee" means an employee who, because of the effects of a work-related injury or disease, whether or not combined with the effects of a prior injury or disability:
> A. is permanently precluded or is likely to be permanently precluded from engaging in the employee's usual and customary occupation or from engaging in the job the employee held at the time of injury;
> B. cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer; and
> C. can reasonably be expected to return to suitable gainful employment through the provision of rehabilitation services, considering the treating physician's opinion of the employee's work ability.

In his memorandum, the compensation judge stated the following:

> The crux of the issue in this case is whether an employee who had two jobs at the time of the injury is entitled to rehabilitation services to assist him in returning to both jobs or whether return to one of the two jobs is sufficient to preclude rehabilitation services. Neither the statute nor the rules cover this type of situation. But since the purpose of rehabilitation is to return the employee to a job that produces an economic status as close as possible to what the employee would have enjoyed without disability, that purpose would not be met if both jobs were not considered. Both jobs

[1] If the self-insured employer is arguing that the employee has made a complete recovery from the injury, it did not assert that theory clearly. Such a theory, however, was rejected by the compensation judge whose memorandum indicates that the compensation judge accepted the employee's testimony that he has been performing his modified job with difficulty. It is also clear from the medical records that the employee continues to have restrictions on his ability to work.

> contributed to his economic status before the injury and he has a right to have his economic status restored as much as possible from what it was before he was injured.

(Memo. at 4.) The compensation judge went on to further state that,

> The employee is likely to be permanently precluded from engaging in his usual and customary occupation or from engaging in the job the employee held at the time of the injury. The employee is restricted to light medium work and not more than 40 hours per week. Based on the employee's testimony of his ongoing complaints while working for the employer, his age, the length and severity of his complaints, the length of time the restrictions have been in place, and the medical records, it is unlikely that he will ever be able to return to his second job doing carpentry work.

(Id.) In addition, the compensation judge also indicated that,

> While the employee has returned to work at Marvin Windows and is able (with some difficulty) to perform most of the duties that he had at the time of the injury, he is not able to work overtime and is not able to return to his second job doing carpentry work.

(Memo. at p. 5.)

The compensation judge, in making these statements in his memorandum, appears to be relying primarily on the evidence presented by the employee that he was engaged in a second job as a carpenter. The compensation judge specifically relied on the opinion of QRC Nelson that the employee was a "qualified employee." The QRC, however, also predicated his opinion on his belief that the employee had a second career as a freelance carpenter. The employee testified that he had been engaged in carpentry work and produced several checks representing payments received in 1997 for such work. (T. 41-42; Pet. Ex. T.) At the outset of the hearing, the self-insured employer objected to the introduction of any evidence concerning work or income as a carpenter on the basis that this allegation/claim had only been asserted on the afternoon before the hearing. (T. 15.) The compensation judge agreed that the late notice was improper and indicated that he would not consider this evidence in connection with the employee's claim for temporary partial disability. As a result, the compensation judge ruled that he would not make a weekly wage determination. (T. 16-19.) The compensation judge did, however, state that he would permit the introduction of evidence concerning the second job as a freelance carpenter in connection with the employee's claims for rehabilitation services. (T. 19.) The compensation judge then relied on the testimony of the employee and his son and the evidence of payment, in Exhibit T, to conclude that the employee had been engaged in a second career at the time of his injury.

On appeal, the self-insured employer objects to the compensation judge's consideration of the evidence of the employee's alleged second job as a carpenter, as a result of its inability to defend against the allegation because it was precluded from engaging in any discovery concerning the matter. The self-insured employer points out that at no time prior to the day before hearing had the employee's attorney asserted that the employee had a second career. The records support the self-insured employer's position and indicate that the employee's theory of recovery was based only on his claim of having lost "a lot of over-time" as a result of his injury.[2] (Pet. Ex. H, 11/6/98.)

We note that, although the compensation judge emphasizes the loss of carpentry work and mentions the inability to work overtime in his memorandum, he did not make any findings with respect to whether the carpentry work should have been included in the employee's pre-injury weekly wage, the amount of overtime that the employee had worked and whether such overtime should have been included in his weekly wage. The statements made by the compensation judge in his memorandum cannot be considered to be findings of fact. Such determinations must be made in the findings section of the decision to be effective.

We find that the compensation judge's reliance on the evidence concerning the second job, his failure to make any determinations with respect to what effect the alleged carpentry work and the alleged overtime had on the employee's economic status, and his reliance on the QRC's opinion, which was based primarily on the same facts, was inappropriate. When the compensation judge found that the evidence regarding a second job was so tainted that it would not be considered in relation to the temporary partial disability and weekly wage issues, he should have made a similar ruling as it related to the rehabilitation issues. If the evidence was tainted, it should not have been considered at all.[3] As a result, we vacate all the compensation judge's

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[2] We note that the QRC's December 19, 1998 report indicates that the employee claimed he had been precluded from his freelance carpentry work by the effects of his injury. The employee's attorney, however, did not assert a claim related to a second job until the day before hearing and agreed that he did not grant the self-insured employer's request for a deposition of his client, made a month before the hearing.

[3] We understand the compensation judge's dilemma at trial. He and the self-insured employer's attorney had traveled to Bemidji for the hearing, a number of witnesses were present, only to be confronted by petitioner's last-minute claim. He was faced with continuing or dismissing most of the issues raised by the petitioner or trying to salvage as much as possible. The compensation judge tried to construct a practical solution to the problem created by petitioner's counsel's lack of preparation. Under these circumstances, we believe that the compensation judge would have been within his rights to have advised the employee's attorney that if the employee wished to proceed with a trial that all issues raised, including weekly wage, temporary partial disability and rehabilitation, would be decided without consideration of the employee's evidence concerning a second career. If the employee's attorney chose to withdraw any claims, the compensation judge would have been permitted to place sanctions on the employee's attorney for his lack of preparation. Because the compensation judge, however, did not reject the evidence and proceeded to resolve the rehabilitation issue, and did not advise the employee's attorney that he

comments in his memorandum concerning the employee's alleged carpentry work. Without that evidence and without findings concerning the importance of the overtime worked by the employee, the entire basis for the compensation judge's finding that the employee was a qualified employee entitled to rehabilitation services is discredited and must be reversed. The matter is remanded to the compensation judge. He should consolidate the question of the employee's economic status with any claims for wage loss benefits or other benefits that are currently pending, so that the matter can be fully and completely resolved and not bifurcated.

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could withdraw his claim and return when his evidence was available, we do not believe it would be appropriate to rule that all evidence concerning the alleged second career should forever be excluded from consideration.