

LARRY D. GRUNZKE, Employee, v. SEABOARD FARMS and CRAWFORD & CO.,
Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 8, 2000

No. [REDACTED SSN]

HEADNOTES

REHABILITATION - RETRAINING. Substantial evidence, including the testimony of the employee's QRC, the employee's vocational testing results, and the employee's current employment and earnings, supported the compensation judge's approval of the proposed 30-week retraining program in the field of transport refrigeration technician.

PRACTICE & PROCEDURE - STATUTE OF LIMITATIONS; STATUTES CONSTRUED - MINN. STAT. § 176.102, SUBD. 11(c). The compensation judge properly determined that the statutory amendment in Minn. Stat. § 176.102, subd. 11(c) (1995), effective October 1, 1995, which requires an employee to file a claim for retraining prior to receipt of 104 weeks of any combination of temporary total or temporary partial compensation, did not preclude the employee from filing a claim for retraining, as he was injured on June 27, 1994 and August 28, 1995, prior to the effective date of the amended statute.

Affirmed.

Determined by: Rykken, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Danny P. Kelly

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal from the compensation judge's determination that the employee is eligible for rehabilitation services pursuant to Minn. Stat. § 176.102, that the employee is entitled to retraining as a transport refrigeration technician, and that the employee was not precluded from filing a claim for retraining under the statutory amendment, Minn. Stat. § 176.102, subd. 11(c), effective October 1, 1995. We affirm.

BACKGROUND

On June 27, 1994 and August 28, 1995, the employee, Larry D. Grunzke, was employed by Seaboard Farms of Minnesota, the employer, who was insured on that date for workers' compensation liability by Crawford & Company. On June 27, 1994 and August 28, 1995, the employee sustained admitted injuries to his right and left knees, respectively. Born on September 3, 1944, the employee was 49 years old when injured in 1994. On those injury dates, the employee earned an average weekly wage of \$636.19 and \$625.03, respectively.

The employee has worked for Seaboard Farms and its predecessor and successor companies, Wilson Foods, Farmstead Foods and Farmland Industries, for approximately 32 years. He worked in the stockyards for approximately 10 and a half years, moving hogs and cattle, operating a Bobcat loader and cleaning the pens. He then worked in the loading dock for nine and a half years, loading trucks and checking stock. For approximately seven years, the employee worked in the smoked meats department moving large pieces of meat through a conveyor system, operating equipment and cleaning. The employee worked in the smokehouse from 1987-1996, and was working there at the time of his knee injuries in 1994 and 1995.

Following the employee's right knee injury in 1994, the employee underwent two surgeries to his right knee. The first was a repair of internal derangement on August 5, 1994. Due to continuing swelling and pain, he consulted Dr. William T. Simonet, who diagnosed early medial compartment degenerative joint disease in both knees. At Dr. Simonet's recommendation, the employee underwent an additional right knee surgery on May 25, 1995, in the nature of an arthroscopic partial medial meniscectomy and joint debridement and a valgus-producing upper tibial osteotomy of the right knee. The employee eventually returned to work within restrictions, until he sustained a left knee injury on August 28, 1995. As a result of that injury the employee underwent surgery to his left knee on October 5, 1995, of the same type as performed in May 1995 to his right knee. Following that injury, the employer and insurer paid temporary total and temporary partial disability benefits from October 25, 1995 through September 1999.

Following those surgeries, Dr. Simonet assigned physical work restrictions, including (1) no repetitive lifting over 15 to 20 pounds; (2) no repetitive pushing over 23 pounds; (3) no repetitive pulling over 25 pounds; and (4) no repetitive carrying over 10 to 20 pounds. The employee's restrictions also included avoiding deep squatting and climbing ladders, and limiting his stair climbing. Dr. Simonet also limited the employee to working eight hours per day. At the recommendation of Dr. Simonet, the employee underwent a functional capacities evaluation (FCE) on May 29 and 30, 1996, for further assessment of his physical work restrictions. (Ee Ex. B2.) The employer's company nurse also evaluated one of the employee's main work tasks, by measuring the push/pull forces required to move trees (racks) of smoked hams in the smoked meats department. Based on review of those measurements, the physical therapist who conducted the employee's FCE concluded that the forces exceeded the employee's capabilities, that the employee's knees "would not hold up under the stress" and that the physical therapist and nurse recommended transfer to another area in the plant.

In June 1996, the employee was transferred to the shop, where he continues to work as an "extra man." (T. 137) He works in a light-duty capacity in the maintenance department, earning \$9.90 per hour, 40 hours per week, with a resulting average weekly wage of \$396.00. (Finding No. 3.) Although the employee worked a significant number of overtime hours prior to his injuries, he now is limited to full-time, eight-hours per day work for the employer. The employer is aware of these limited-hour restrictions and has been very careful to limit the employee's work to no more than eight hours per day.

The employee has a significant medical history. He has sustained many work-related injuries during his employment with the employer, including seven knee injuries between 1992 and 1995, back injuries in 1984 and 1991, a shoulder injury in 1998 and a low back strain in January 1999. In addition to his 1994 and 1995 knee surgeries, he also underwent arthroscopic surgery to his left knee in 1993. The employee has received physical therapy for his back injury as recently as April 1999, and has received chiropractic care in the past for his shoulder and back problems.

On December 9, 1998, John E. Peterson, M.S., C.D.M.S., qualified rehabilitation consultant (QRC) conducted an initial rehabilitation consultation, to determine the employee's eligibility for rehabilitation services and recommendations for vocation rehabilitation. As a result of that consultation, the QRC determined that, in his opinion, the employee is eligible for statutory rehabilitation services since he continues to have restrictions associated with his injury, and since his restrictions prohibit him from working in excess of 40 hours per week. The QRC noted in his December 9, 1998 report that "[i]t is possible that rehabilitation services, such as selective placement or retraining, might restore Mr. Grunzke's earning capacity." The QRC therefore recommended a battery of vocational aptitude and interest tests, and submitted an R-2 form to the employer and insurer. (Ee Ex. D.)

The employer and insurer contested the employee's eligibility for rehabilitation assistance and did not approve the R-2 form which was submitted by the QRC. The QRC filed a rehabilitation request with the Minnesota Department of Labor and Industry on December 24, 1998, stating that:

Rehabilitation consultation found employee eligible for statutory rehabilitation services. Proposed R-2 recommends vocational testing to determine if employee can benefit from selective placement or retraining. Employee is currently working at a substantial wage loss. Insurer will not agree to proposed R-2.

To that rehabilitation request was attached an "Attending Physician's Return to Work Recommendations Record," completed by the employee's treating physician, William T. Simonet, dated December 26, 1995. That report outlined the employee's physical work restrictions, and indicated that the employee was limited to eight hours of sedentary work per day. In its rehabilitation response served and filed January 4, 1999, the employer and insurer objected to the provision of rehabilitation services.

Apparently over the employer's objection, the QRC conducted aptitude testing on July 1, 1999, in order to provide evidence regarding the employee's ability to benefit from retraining. (Ee Ex. D). Based upon that testing, the employee's career assessment inventory and a labor market survey, the QRC recommended that the employee complete a retraining program in the area of transport refrigeration technician at Riverland Community College in Albert Lea, Minnesota, and filed a retraining plan on September 2, 1999.

On September 8, 1999, the employee underwent a vocational assessment with Lynn Hjelmeland, M.A., C.R.C., C.C.M., qualified rehabilitation consultant, at the request of the employer and insurer. Ms. Hjelmeland interviewed the employee, reviewed medical and QRC records prepared by Mr. Peterson, reviewed the retraining plan, and also conducted various vocational tests on the employee. She also spoke to the director of the proposed retraining program course (T.157, 161.) and interviewed the two Albert Lea employers identified by the QRC as those who sought to hire transport refrigeration technicians. (T. 163.) Ms. Hjelmeland recommended against proceeding with the retraining program, concluding that the refrigeration technician position requires heavy lifting and working in awkward positions, that it is a brand new program without a proven track record, and that there are only two employers who hire program graduates in the Albert Lea area. She also considered that the employee is currently working in a job he is able to do, by varying his standing and walking and by avoiding working in awkward positions. Ms. Hjelmeland's report does also consider that the employee has good mechanical aptitude, average spatial ability, average reading skills and adequate math skills, as well as an interest in hands-on work, which would be reflected in the retraining program. (Er's Ex. 4.)

The QRC's rehabilitation request was addressed at hearing before a compensation judge on November 24, 1999. In Findings and Order dated December 22, 1999, the compensation judge determined that as a result of the employee's knee injuries in 1994 and 1995, the employee is unable to work at his pre-injury job and at his pre-injury wage; that his current job working light-duty in the maintenance department is physically suitable; and that his current employment is not economically suitable employment, based upon the discrepancy between the employee's current wage and his wage at the time of his injuries. The compensation judge determined that the employee is entitled to statutory rehabilitation services and retraining, finding that the employee has a low potential earning capacity without retraining and that the proposed retraining plan would produce an economic status as close as possible to that which the employee would have enjoyed without the disability sustained as a result of his June 27, 1994 and August 28, 1995 work-related injuries.

The compensation judge also determined that there is no statute of limitations preclusion for this employee's retraining claim, as the employee's injuries predate the statutory amendment which requires retraining claims to be filed with a commissioner before payment of 104 weeks of payment of temporary total or temporary partial disability benefits. The compensation judge determined that since the employee's injury dates precede the amended new law, that law is not applicable.

The employer and insurer appeal, alleging that the employee is not qualified to receive rehabilitation services, that the employee is not entitled to the claimed retraining benefits, and that the employee's claim for retraining was not timely filed, in view of the October 1, 1995, statutory amendment which precludes employees from retraining benefits if no such claim is filed prior to receipt of 104 weeks of weekly compensation. Minn. Stat. § 176.101, subd. 11(c).

STANDARD OF REVIEW

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, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Statute of Limitations Issue

The compensation judge determined that the employee was not precluded from filing a claim for retraining under the statutory amendment effective October 1, 1995. The compensation judge found that:

There is no statute of limitations deadline for dates of injury preceding the October 1, 1995 law which precludes employee from retraining benefits. The first law requiring that any requests for retraining must be filed with the Commissioner before 104 weeks of any combination of temporary total disability or temporary partial disability had been paid was the 1995 law made effective October 1, 1995. Since the employee's dates of injury precede the new law requiring the retraining filing before 104 weeks of wage loss benefits, that law does not apply.

(Finding No. 22.)

The employer and insurer argue that since the employee filed his claim for retraining benefits after receiving 155 weeks of temporary total and temporary partial disability benefits, he did not timely file his claim for retraining benefits. The employer relies upon the amendment to the section of the statute concerning claims for retraining benefits, effective October 1, 1995, which states that:

Any request for retraining shall be filed with the Commissioner before 104 weeks of any combination of temporary total or temporary partial compensation have been paid. Retraining shall not be available after 104 weeks of any combination of temporary total or temporary partial compensation benefits have been paid unless the request for the retraining has been filed with the Commissioner prior to the time the 104 weeks of compensation have been paid.

Minn. Stat. § 176.102, sub. 11(c).

In support of its argument that this statutory amendment has retroactive effect, the employer and insurer cite to Minn. Stat. § 176.102, subd. 11(a), which states that “[t]his section is applicable to all employees injured prior to or on and after October 1, 1979, except for those provisions which affect an employee’s monetary benefits.” The employer and insurer argue that since rehabilitation services are not “monetary benefits” within the meaning of Minn. Stat. § 176.102, subd. 11(a), “this section,” including the provisions regarding retraining benefits, is applicable to all employees, regardless of injury date.

We are not persuaded. The decision relied upon by the employer and insurer, Sherman v. Whirlpool Corp., 386 N.W.2d 221 (Minn. 1986) is distinguishable from the facts in this case. In that case, the employee was awarded rehabilitation benefits, even though no such benefits existed in the statute at the time of his 1969 injury. In Sherman, the Minnesota Supreme Court found that rehabilitation services were not monetary benefits within the definition of the statute, and therefore found that the employee was eligible for rehabilitation services, through retroactive application of the rehabilitation statute. The Sherman court distinguished rehabilitation services from “monetary benefits,” as the employee did not have any discretionary use or control over the rehabilitation benefits, as he would with monetary benefits. The court further stated that subdivision 11(a) prohibits employers from cutting back the rate of concurrent temporary disability and retraining benefits for employees whose rights had vested prior to 1979.

As stated in Sherman, “Minn. Stat. § 176.102 (1984) was passed in 1979 and amended in 1983 in order to improve the comprehensive workers’ compensation program by significantly expanding the scope and availability of rehabilitation services for injured employees,” 386 N.W.2d at 223, citing Rippentrop v. Imperial Chemical Co., 316 N.W.2d 514, 515-16 (Minn. 1982). Here, the employer and insurer seek to constrict the employee’s benefits by expanding the scope of the retroactive provision in subdivision 11(c).

The employee argues that the employer and insurer are asserting a principle which would impose a bar on injured workers seeking retraining which theoretically could have expired even before the law was enacted. The employee argues that the provisions of Minn. Stat. § 176.1321 control the effective date of the 104 week rule. That statute states as follows:

176.1321. Effective date of benefit changes.

Unless otherwise specified in the *act making the change*, any workers' compensation benefit change shall be effective on the October 1 next following its final enactment.

Minn. Stat. § 176.1321 (1979) (emphasis added).

The employee also relies upon Granberg v. PCL Constr., 434 N.W.2d 467 (Minn. 1989). In Granberg, the court ruled that retraining benefits were “monetary benefits,” and therefore the amount payable was subject to law in effect on the date of injury and not the law in effect on the date that the employee’s liability for retraining benefits was established. The employee seeks a 30-week, full-time retraining program which will provide 30 weeks of temporary total disability, tuition, books and supplies, all of which, the employee argues, are monetary benefits. The employer and insurer argue that the retraining program itself is separable from monetary benefits the employee would receive if the retraining program is approved. The employer and insurer’s argument, in this case, theoretically would allow payment for the employee’s retraining program itself, but no payment for the weekly retraining benefits, books and supplies.

The Minnesota Supreme Court has long ruled that a retroactive change in the vested obligation of an employer and insurer to pay monetary benefits is unconstitutional. As stated in Yaeger v. Delano Granite Works, 250 Minn. 303, 308, 84 N.W.2d 363, 366 (1957), “[s]ince a workman’s compensation act is contractual in nature, any statute which purports to alter a substantial term of the contract which was in effect at the time the controlling event occurred . . . impairs the obligation of such contract and is therefore unconstitutional.”

The 1984 law included the provision relied upon by the employer and insurer, Minn. Stat. §176.102, subd. 11(a), to make certain that injured workers with a date of injury before 1979 had access to retraining benefits. In this case, the 1995 statute of limitation provision at Minn. Stat. § 176.102, subd. 11(c) contained no provision concerning retroactivity. As a result, the general rule applies which makes the effective date for that amendment to be October 1, 1995. In addition, the determination of the applicable law for this case does not rest on whether the claimed retraining benefits are “monetary benefits.” The determination rests upon the law in effect on the date of injury. Yaeger, 250 Minn. at 308, 84 N.W.2d at 366. We therefore affirm the compensation judge’s determination that there is no statute of limitations defense to the employee’s claim for retraining, relying on the long-held rule that the substantive rights of the employer and employee are contractual, and are fixed by law in effect on the date of injury.

Eligibility for Retraining Benefits

The compensation judge approved the 30-week retraining plan for retraining as a transport refrigeration technician. The employer and insurer argue that the employee is not eligible for any rehabilitation services, as he is not a qualified employee within the meaning of Minn. R. 5220.0100, subp. 22. The employer and insurer also argue that the employee is not entitled to retraining as a transport refrigeration technician, since other rehabilitation services were not

offered, the job market in this field is limited, and the employee would not regain his lost earning capacity for approximately five years post-retraining.

As outlined in Minn. R. 5220.0750, subp. 1, “[t]he purpose of retraining is to return the employee to suitable gainful employment through a formal course of study. Retraining is to be given equal consideration with other rehabilitation services, and proposed for approval if other considered services are not likely to lead to suitable gainful employment.” The employer and insurer argue that the employer made accommodations to the employee in the past, therefore the employee’s QRC should have explored both direct job placement with the current employer and on-the-job training. The employer and insurer also argue that the QRC made no effort to assist the employee with any job search for work with other employers in the area and therefore neither the employee nor QRC has demonstrated that other services, including direct job placement or on-the-job training, would not lead to suitable, gainful employment. The employer and insurer assert that the employee currently works full-time at suitable, gainful employment with the employer and that, by choice, he avoids working overtime hours, which limits his earnings. Further, they argue that the employee’s current wages are comparable to that which he would earn post-retraining, which proves that no retraining is necessary.

Factors to be considered in making a determination as to whether retraining is appropriate include:

1. the reasonableness of retraining versus return to work through alternate rehabilitation methods;
2. the likelihood of success in the retraining program;
3. the likelihood that the retraining will result in employment; and
4. the likelihood that the job returned to will produce an economic status as close as possible to that which the employee would have enjoyed without the disability.

Poole v. Farmstead Foods, 42 W.C.D. 970 (W.C.C.A.1989); see Minn. Stat. § 176.102, subd. 1.

The Poole factors were addressed through vocational testimony and rehabilitation reports included in the hearing record. In regard to the first Poole factor, the employee’s QRC compared retraining to job search or continued employment with the employer, and concluded that a job search would not be successful in locating a higher paying job for the employee, in view of the employee’s physical work restrictions, his limitation to eight hours of work per day, and his lack of transferable skills. This first factor was adequately addressed in the record.

To address the second Poole factor, the QRC also testified as to the probability of the employee’s success in the retraining program based in part on the vocational testing he conducted on the employee. The employee scored significantly above average on tests which measured his ability to perceive and understand the relationship of physical forces and mechanical elements in practical situations. (T. 48-49.) In addition, the employee scored in the high, mid-average range on a test which measured his capacity to visualize and manipulate objects in space,

important tasks in mechanical work. (T. 49-50.) Testing conducted by the QRC demonstrated that the employee has strong interests in mechanical work. (T. 50; Ex. D.)

The employer and insurer's vocational expert testified that the testing she conducted on the employee produced results consistent with the QRC's testing. She also agreed that the employee's mechanical aptitudes were good for the recommended retraining program. (T. 165.) The employee's QRC also testified that the employee's reliability, likeability and longevity with the employer were good predictors of success in completing the retraining program as well as success in the newly retrained field. (T. 84-85.)

The employer and insurer assert that the employee would not be successful in the retraining program since it has been many years since he has been enrolled in a formal education setting, he has never attended any secondary education courses, and no record exists of any vocational studies which could "prove" that the employee can pass the vocational classes he seeks to attend. The employer and insurer cite no support in the record, however, which demonstrates the employee's lack of capability to successfully complete the retraining program.

The compensation judge found that the employee has the intellectual capacity, academic ability, and interest to succeed in the recommended retraining plan. (Finding No. 15.) The compensation judge reasonably reached those conclusions, based upon the evidence of record and on testimony from both the employee's QRC and the employer and insurer's vocational expert, and satisfactorily addressed the second Poole factor.

The third Poole factor was addressed by the compensation judge as well; he found that completion of the proposed retraining plan will result in reasonably attainable employment. (Finding No. 16.) The employer and insurer argue to the contrary. The employer and insurer assert that the program at issue is in its first year of operation, so it has no track record for placement of students, and that only two employers in the employee's geographical area hire transport refrigeration technicians, so that all graduates will saturate that market upon completion of the program. However, the employee testified that he is willing to relocate in order to secure employment.

Furthermore, the employee's QRC testified that the demand for technicians is high, as demonstrated by the course at Riverland Community College being developed in response to employer requests for the program. The QRC testified that two employers in the Albert Lea area, Thermo King and Crossroads Trucking, were instrumental in developing this program, and that one other area employer indicated a high demand for these technicians. The QRC based this testimony on his interviews with these three potential employers and with 22 other trucking companies in the southeastern/south central Minnesota area, and also on his interview with the program manager at Riverland Community College. In addition, the vocational expert who testified on behalf of the employer and insurer admitted that the transport refrigeration technician program could increase the employee's transferrable skills (T. 166) and assist him in earning a higher income with other employers. The compensation judge's finding that the retraining program would result in reasonably attainable employment is supported by the record.

As to the fourth Poole factor, the compensation judge found that the proposed retraining program will produce an economic status as close as possible to that which the employee would have enjoyed without the disability sustained August 28, 1995 and June 27, 1994. (Finding No. 19.) The employer and insurer argue that there is no guarantee that the retraining will attain that economic status. They also argue that the initial wages the employee could earn post retraining closely approximate that which he currently earns for the employer. However, the employee's QRC testified as to the future advancement potential inherent in the retraining program, and testified that the employee's future earning potential is strong. (T. 63, 67.) The employee's QRC testified that initially the employee's wage would approximate \$10.00 to \$11.00 per hour, increasing to \$17.00 to \$18.00 per hour after three to five years working in the field. "Economic status is to be measured not only by opportunity for immediate income but also by opportunity for future income." Minn. Stat. § 176.102, subd. 1(b). Based on this information, the compensation judge could reasonably conclude that the retraining program would produce an economic status as close as possible to that the employee would have enjoyed without his disability.

The employer and insurer also argue that as part of the fourth Poole factor, consideration must be given to the employee's ability to perform the employment he seeks after retraining, and that the job of a refrigeration technician is outside the restrictions and abilities of the employee in this case. The employer and insurer also cite to the employee's future knee replacement surgeries and required post-surgery rehabilitation and also to the issue of whether the job of refrigeration technician will require overtime work. The employer and insurer rely on Bauman v. Trevilla of Golden Valley, 45 W.C.D. 89 (W.C.C.A. 1991) and argue that substantial evidence does not exist to show that the retraining program is within the employee's physical capabilities.

The QRC addressed these concerns by conducting an on-site job analysis of the technician position, reviewing work performed on a refrigeration unit, and discussing the job's requirements with an owner of a potential employer, Thermo King. The QRC testified that this company expects employees to lift no more than fifty pounds, that other workers are available to assist with heavier objects and that equipment is available to move large items. The QRC testified that he concluded that the work is physically appropriate for the employee. (T. 59.) Based upon this information, the compensation judge could reasonably conclude that the proposed retraining plan is within the employee's physical restrictions. (Finding No. 17.)

Based upon the rehabilitation reports in the record, the results from vocational testing completed on two occasions by the employee, and the testimony provided by both the employee's QRC and the employer and insurer's vocational expert, substantial evidence exists to support the compensation judge's determination that the employee is eligible for the claimed retraining benefits. The propriety of a proposed retraining plan is a fact issue for the compensation judge. See Anderson v. Metropolitan Mechanical Contractors, slip op. (W.C.C.A. Oct. 19, 1999). It is clear that the judge considered the evidence in light of established case law factors, and he was entitled to accept the opinion of QRC Peterson over the opinion of the employer and insurer's vocational expert, Ms. Hjelemeland. See, e.g., Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D.

364 (Minn. 1985). In view of substantial evidence in the record to support the compensation judge's decision, we affirm.