MARY A. KEAVENY, Employee, v. HENNEPIN CNTY., SELF-INSURED, Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 1, 2000

No. [REDACTED SSN]

HEADNOTES

REHABILITATION - ELIGIBILITY. Where the judge's decision was supported by the testimony of the employee and the opinion of a QRC, the compensation judge's conclusion that the employee was a "qualified employee" for rehabilitation services was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that it was for the purpose of managing the employee's return to her date-of-injury job that the rehabilitation assistance was required.

JURISDICTION - SUBJECT MATTER; PRACTICE & PROCEDURE - DISMISSAL. Where the self-insured employer's appeal was from certain findings in, and procedural aspects of, a judge's order denying the employee's attorney's request for attorney fees only pending that attorney's submission of further support for his claim, the WCCA, under Minn. Stat. § 176.421, subd. 1, lacked subject matter jurisdiction to review the contested findings and procedures because no order affecting the merits of the case had yet been issued.

Affirmed.
Appeal from Order Denying Request for Attorney Fees dismissed.

Determined by Pederson, J., Rykken, J., and Wilson, J.
Compensation Judge: Bonnie A. Peterson

OPINION

WILLIAM R. PEDERSON, Judge

The self-insured employer appeals from the determination of the compensation judge that the employee is a "qualified employee" as defined in Minn. R. 5220.0100, subp. 22, to receive rehabilitation services, and from a separate order denying a request for hourly attorney fees pursuant to Minn. Stat. § 176.135. We affirm the employee's entitlement to rehabilitation services and dismiss without prejudice the appeal relative to attorney fees as premature.

BACKGROUND

Mary Keaveny sustained an admitted injury to her neck on June 30, 1994, while employed as a "Fraud Prevention Specialist" with the Hennepin County Department of Economic Assistance. On that date, Ms. Keaveny [the employee] was forty-five years old and earning a weekly wage of $625.17. Hennepin County [the employer], self-insured against workers' compensation liability, paid various workers' compensation benefits to and on behalf of the

employee, including impairment compensation for 10% permanent partial disability of the whole body attributable to a chronic cervical strain.

Following her injury, the employee continued working for the employer as a Fraud Prevention Specialist, but at reduced hours. On November 13, 1994, she was taken off work entirely, and the employer assigned case manager Judy Brooke to provide disability case management services to assist the employee in returning to work for the employer. About eight weeks later, the employee returned to her position as a Fraud Prevention Specialist, but again at reduced hours. Thereafter, Ms. Brooke continued to provide case management services. In late 1995, the employee completed a chronic pain management program at the Pilling Pain Clinic, and she returned to full-time employment as a Fraud Prevention Specialist in January 1996.

The employee continued working full time in her job until the end of 1997, when the class of Fraud Prevention Specialist was eliminated in a reclassification of duties within the employer's Department of Economic Assistance. The employee, and four other co-workers who had been Fraud Prevention Specialists were offered positions either as Principal Financial Workers, to be paid at the same rate as Fraud Prevention Specialists, or as Senior Child Support Officers, to be paid wages frozen at the Fraud Prevention Specialist level until the wage of the new classification caught up. The employee chose the position of Principal Financial Worker, and the employer again assigned Ms. Brooke to facilitate the employee's job change. Ms. Brooke performed an ergonomic assessment and made recommendations relative to the employee's work station. The employee worked at this position, which was determined to be a temporary position, until January 1999.

In January 1999, the employer again assigned Ms. Brooke to provide case management services to assist in placing the employee in a different position with the employer. On January 15, 1999, the employee filed a Rehabilitation Request with the Department of Labor and Industry, seeking a rehabilitation consultation pursuant to Minn. R. 5220.0130. On February 1, 1999, the employee began a new position as Senior Child Support Officer at a frozen weekly wage of $744.24. On February 3, 1999, the employer filed a Rehabilitation Response, disagreeing with the requested consultation on the grounds that the employer had provided, and would continue to provide, both work within the employee's restrictions and a disability case manager "to address all ergonomic issues to make certain the worksite is ergonomically correct." The employer subsequently authorized the employee's requested rehabilitation consultation with QRC Don Ostenson.

On February 25, 1999, QRC Ostenson met with the employee, and on March 4, 1999, he issued his report, concluding that the employee was eligible for statutory rehabilitation services. On March 18, 1999, the employer filed a Rehabilitation Request, objecting to QRC Ostenson's finding that the employee was qualified for rehabilitation services. The employer argued that the employee is not a qualified employee for rehabilitation services "as she not only is expected to return to work for Employer, but she has done so and continues to work full time for Employer."

In a letter to QRC Ostenson dated March 25, 1999, the employee's treating physician, Dr. Richard Olson, prescribed a three-week medical leave of absence due to a flare-up of the employee's symptoms. The doctor prescribed a physical therapy program and recommended a modified work schedule upon the employee's return to work. The employee returned to work in April of 1999, with work hours reduced to twenty hours a week. In June 1999, Dr. Olson released the employee to work twenty-seven hours in four days each week in the Senior Child Support Officer position.[1] The employee continued to work twenty-seven hours a week through the date of hearing in this matter, October 14, 1999.

On April 12, 1999, the employee filed a Rehabilitation Request, contending that rehabilitation services are necessary because the employee's job is not compatible with her medical restrictions and the "employer has been only marginally cooperative in making accommodations." On May 20, 1999, a conference on the employer's rehabilitation request was held at the Department of Labor and Industry. In a decision served and filed on May 21, 1999, the commissioner's representative concluded that the employee was eligible for rehabilitation services. On June 17, 1999, the employer filed a Request for Formal Hearing pursuant to Minn. Stat. § 176.106.

Following the employee's job change and the new work restrictions from Dr. Olson, the employer, by letter dated May 20, 1999, requested that the employee attend an IME with Dr. Mark Engasser on June 7, 1999. The employee's attorney evidently advised the employer's counsel that the employee would not attend an IME without a court order. The appointment with Dr. Engasser was therefore canceled, and on May 24, 1999, the employer filed a Motion to Compel the employee's attendance at "the next available appointment with Dr. Mark Engasser or Dr. Bruce Idelkope." A Special Term Hearing before a compensation judge at the Settlement Division of the Office of Administrative Hearings was held on June 16, 1999. By order served and filed June 23, 1999, the judge granted the employer's motion and ordered the employee to attend the scheduled exam with Dr. Bruce Idelkope on July 14, 1999.

The employee reported for her examination with Dr. Bruce Idelkope on July 14, 1999. Dr. Idelkope had previously examined the employee on September 1, 1995. In a report dated July 14, 1999, but not received by the employer until September 3, 1999, Dr. Idelkope suggested that the employee would be better served by having her physical activities at the work station varied. The doctor recommended that, although the employee is capable of doing computer work, the position of Senior Child Support Collection Officer would require modification for the employee to perform it, given her restriction against sitting in a fixed or static position for protracted periods of time.

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[1] In addition to providing for reduced hours in a modified work schedule, the employee's restrictions, set forth in Dr. Olson's letter of September 4, 1997, limited the employee to fifteen pounds of lifting occasionally and to ten pounds of carrying with the left arm. The employee was also instructed to change positions frequently throughout the work day, avoiding rapid repetitive left arm motions and tasks requiring prolonged sitting in one position.

On October 14, 1999, the employer's Request for Formal Hearing came on for hearing before Compensation Judge Bonnie A. Peterson. The issue presented to the compensation judge was whether the employee is a qualified employee for rehabilitation services pursuant to Minn. R. 5220.0130, subp. 1, and Minn. R. 5220.0100, subp. 22. Upon close of the hearing, the record was left open pending the judge's receipt of post-hearing briefs. On October 20, 1999, prior to close of the record on the rehabilitation matter, the employee's attorney filed a Statement of Attorney Fees with the Department of Labor and Industry, seeking an award of hourly fees pursuant to Minn. Stat. § 176.135, for attending the Special Term Hearing on the employer's June 16, 1999, Motion to Compel. The employer filed an objection to the claim for fees on November 1, 1999, and both the Statement and the Objection were referred to Judge Peterson at the Office of Administrative Hearings. In a Findings and Order on the rehabilitation matter issued November 8, 1999, the judge concluded that the employee is a "qualified employee" under the rules and is therefore entitled to statutory rehabilitation services. Ten days later, on November 18, 1999, the judge also issued an Order Denying Request for Attorneys Fees, noting that the employee's attorney did not submit hourly figures substantiating his claim for fees. In her Order, the judge indicated that she had jurisdiction to consider the issue but would withhold her determination until the employee's attorney submitted further support for his claim. The employer appeals from the award of rehabilitation services and also from certain findings in, and procedural aspects of, the order denying attorney fees.

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.

"[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

Rehabilitation Services

"Rehabilitation is intended to restore the injured employee so the employee may return to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without disability." Minn. Stat. § 176.102, subd. 1(b). In order to be eligible for rehabilitation services, an injured employee must be deemed a "qualified employee." See Minn. R. 5220.0130, subp. 1. "Qualified employee" is defined in Minn. R. 5220.0100, subp. 22, as follows:

> **Subp. 22. 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;
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> B. cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer; and
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> 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.

The primary argument of the employer on appeal is that the compensation judge failed to properly apply criteria B of subpart 22, the requirement that the employee "cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer." The employer argues that the employee was provided with suitable gainful employment by the date-of-injury employer for over five years following her injury, that she has worked for that employer for over nineteen years and desires to stay so employed, and that she has now been offered full-time work and the services of a disability case manager to assist in making reasonable and necessary modifications to her job. We are unpersuaded, nevertheless, that the judge's award of rehabilitation services was unreasonable under the facts in this case.

In making her determination that the employee is a "qualified employee" for rehabilitation, it is evident that the compensation judge credited the employee's testimony and Mr. Ostenson's supporting opinions. In testimony offered before the compensation judge, QRC Ostenson pointed out that the employee has chronic pain in her neck, right shoulder, and upper back, as well as headaches stemming from her injury of June 30, 1994. Considering the treating physician's opinion of the employee's work ability, Mr. Ostenson opined that the position of senior child support officer, which required working at computers more than 50% of the time, exceeded the employee's restrictions. He concluded that her work station needed modifications

in order to bring the job within her physical limitations. The employee testified before the compensation judge, and advised Mr. Ostenson, that she was continuously stressed about the process and uncertainty of continuing to work at a full-time job with the County. She indicated that she did not trust the employer or the people who were assigned to work with her, including her case manager, and that the stress of that distrust seemed to be contributing to her chronic pain. Mr. Ostenson believed that rehabilitation services in the form of medical management were necessary to coordinate the employee's work efforts with the treating physician's restrictions. He also believed that the employee could benefit from occasional counseling, to explain the process and to make recommendations to her, and that a functional capacities evaluation or a transferrable skills analysis might be appropriate in this case.

In her award of services, the compensation judge expressly determined that the employee cannot reasonably expect to return to suitable gainful employment with the date-of-injury employer "without the assistance of a rehabilitation expert." The employer argues that the judge's addition of the phrase "without the assistance of a rehabilitation expert" changes the entire criteria set forth in subpart 22. We do not agree. The fact that it is the express desire of the parties and the goal of the rehabilitation plan to return the employee to employment with her date-of-injury employer does not automatically render the employee ineligible for statutory rehabilitation services. At the time of trial, the employee's restrictions had only recently been changed by the treating physician, and her hours had been limited to twenty-seven per week. At this point, more than five years following the date of injury, the employee was not working at a suitable job with the date-of-injury employer. It was not unreasonable for the compensation judge to conclude that, notwithstanding the good intentions of the employer, the provision of rehabilitation services in this case would be in the best interest of both parties. The judge noted that "[t]he communication problems the county is having with the employee and the employee is having with the county could possibly be resolved with the assignment of the QRC." Under the facts of this case, we agree with the compensation judge that, even though the employee is returning to work for the employer, the provision of rehabilitation services is both reasonable and appropriate. Accordingly, we affirm the determination of the compensation judge that the employee is a "qualified employee" for rehabilitation services. Hengemuhle, 358 N.W.2d 54, 37 W.C.D. 235.

Order on Attorney Fees

The employer filed a separate appeal from the compensation judge's Order Denying Request for Attorneys Fees dated November 18, 1999. In its Notice of Appeal, the employer indicated that it was appealing from "[t]he findings of fact in the Memorandum that Employee won the motion and obtained a change in IME examiners. Further objection is made that the motion for fees was not referred back to the judge who presided at the motion hearing."

The jurisdiction of the Workers' Compensation Court of Appeals is governed by statute. Pursuant to Minn. Stat. § 176.421, subd. 1,

> [w]hen a petition has been heard before a compensation judge, within 30 days after a party in interest has been served with notice

> of an award or disallowance of compensation, or other order affecting the merits of the case, the party may appeal to the Workers' Compensation Court of Appeals.

(Emphasis added.) Orders which do not affect the merits of the case or prevent a later determination on the merits are not appealable to this court. Mierau v. Alcon Indus., Inc., 386 N.W.2d 741, 38 W.C.D. 652 (Minn. 1986). As a general rule, an order is appealable only if it "finally determines the rights of the parties and concludes the action." Hagen v. Hoffman Aseptic Packaging, slip op. (W.C.C.A. May 8, 1997), citing Zizak v. Despatch Indus., Inc., 427 N.W.2d 755, 756 (Minn. Ct. App. 1988). The rule is intended in part to avoid piecemeal appeals.

The issues of whether the employee was a prevailing party at the Motion to Compel and the reasonableness of the claimed attorney fees have not been finally determined by the compensation judge's Order of November 18, 1999. The judge has yet to render a determination on these issues. Given the objections of the employer, we suggest that the compensation judge issue specific findings as to whether the employee was the prevailing party at the Motion and, if so, the reasonableness of the requested fee in light of the factors set forth by the supreme court in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 142, 59 W.C.D. 319, 336 (Minn. 1999). For the present, however, we make no determination on the merits of the employer's appeal and conclude that the present appeal is premature and that this court lacks jurisdiction to consider it.