RICKY F. ASCHER, Employee/Appellant, v. BILL DENTIGNER, INC. and AM. STATES INS./SAFECO INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 23, 2001

No. [REDACTED SSN]

HEADNOTES

REHABILITATION - RETRAINING. Substantial evidence, including the opinion and testimony of the employer and insurer's vocational expert, supports the compensation judge's denial of the employee's request for a two year course in applied electronics technology.

Affirmed as modified.

Determined by: Johnson, J., Rykken, J., and Wheeler, C.J.
Compensation Judge: Joan G. Hallock

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's denial of his request for retraining in a course of applied electronics technology. We affirm.

BACKGROUND

Ricky F. Ascher, the employee, sustained an injury to his right knee on October 21, 1991, while working as a mason tender for Bill Dentinger, Inc., the employer. The employee was then 26 years old. The employer and its insurer accepted liability for the employee's personal injury and commenced payment of workers' compensation benefits. The employee was unable to return to work for the employer.

The employee underwent arthroscopic surgery of his right knee on January 10, 1992, for a suspected anterior cruciate ligament (ACL) injury. During surgery, Dr. Schaffhausen determined the ACL was intact but noted damage to the posterior cruciate ligament (PCL), for which he recommended conservative treatment. The employee then received physical therapy and participated in work hardening. Medium duty restrictions were imposed, including no lifting over 50 pounds, lifting from 25 to 35 pounds frequently, no kneeling on the right knee, no full squatting, and limited repetitive squatting and bending.

The employee was provided rehabilitation assistance with job placement beginning in July 1992. He obtained a sales position with Sears at minimum wage plus commissions in November 1992, but was terminated after about six weeks. He next worked for County Seat in a sales position earning $4.25 an hour, for about a month. He then tried bartending at Red Lobster

in August 1993, making $5.50 an hour, but quit when his hours were reduced in September 1993. In December 1993, the employee began working at Majestic Oaks Golf Course as a banquet setup person and server, starting at $5.50 an hour. In March 1996, the employee began working a second job as banquet captain at a Holiday Inn.

In April 1996, the employee obtained employment as an assistant manager at the Holiday Station Store in Minnetonka. Initially, the employee earned $6.50 an hour. In approximately March 2000, the employee was demoted to a sales associate as a result of a corporate reorganization, but was given a raise to $11.25 an hour. The parties stipulated that as of August 30, 2000, the employee earned $469.00 a week at his job with Holiday. (T. 7.)

In June 1997, the employee filed a request for a rehabilitation consultation and rehabilitation assistance from Frank J. Lamp, a qualified rehabilitation consultant (QRC), as he did not believe his employment was economically suitable. The employer and insurer agreed to a rehabilitation consultation, but only if it was done by a QRC of their choosing. In August 1997, the employee additionally filed a claim petition, alleging underpayment of wage loss benefits.

On January 16, 1998, the employer and insurer served a Notice of Intent to Discontinue Benefits (NOID), asserting the employee had no restrictions and was not entitled to continuing wage loss benefits. In a Findings and Order filed June 3, 1998, Compensation Judge David S. Barnett found the employee sustained a ruptured PCL as a result of his work injury. The judge concluded the work injury resulted in significant instability of the right knee joint with significant limitations of the right knee rendering the employee incapable of returning to the mason tender job he held on October 21, 1991, and incapable of safely working at heights. (6/3/98 Findings & Order, finding 43.) The compensation judge, accordingly, denied the employer and insurer's petition to discontinue.

A second hearing was held before Compensation Judge Barnett on October 14, 1998, to determine the employee's weekly wage on the date of injury, October 21, 1991. In a Findings and Order filed December 14, 1998, the compensation judge found the employee was paid an hourly wage of $16.50. The judge further found the employee's daily wage was irregular. The judge, accordingly, computed the employee's wage pursuant to Minn. Stat. § 176.011, subd. 3, resulting in a daily wage of $120.69 and an average weekly wage from the employer of $603.45. (Findings 13, 14, 16.) The parties stipulated that "[a]s of the date of injury, the employee had simultaneous employment as an apartment caretaker which paid him $56.54 per week, in addition to his regular employment with the employer herein." (12/14/98 Findings & Order, Finding 1.B.) Neither party appealed this findings and order.

QRC Lamp began working with the employee in October 1998. At that time, the employee was working 40 hours a week at the Holiday Store earning $9.00 per hour, and continued his caretaking activities. Mr. Lamp opined the employee was qualified for rehabilitation services and recommended vocational testing and a transferrable skills analysis. (Resp. Ex. 9.) Thereafter, on December 14, 1998, a Rehabilitation Plan (R-2) was completed with a goal of a return to suitable employment. The plan included a part-time job search as well as vocational exploration for possible retraining. A Job Placement Plan and Agreement (JPPA) similarly provided for a

part-time job search, including vocational exploration activities, with placement assistance, to secure a higher paying job. (Resp. Ex. 8.)

The employer and insurer filed a Rehabilitation Request objecting to the rehabilitation plan. By decision filed March 26, 2000, the Commissioner of the Department of Labor and Industry approved the rehabilitation plan submitted by QRC Lamp. On May 4, 1999, the employee began a job search with the assistance of Kari Terwey, an employment specialist with Employee Development Corporation. (Resp. Ex. 7, 9.) Areas of job search initially included property management, building inspector, building maintenance, estimating in the brick and concrete field, and entry level computer assembly, service or repair.

In July 1999, the employee and his family moved from their apartment to a home they purchased in Albertville, in Wright County, Minnesota. The employee then discontinued his job as a caretaker. (T. 24.) He continued to work for Holiday, full time, on the second shift from 2:00 to 10:00 p.m. In the mornings, the employee cared for his two children while his wife worked. (T. 41.) Job search activities continued with Ms. Terwey and QRC Lamp through the date of hearing. (See Resp. Exs. 7, 9.)

On February 21, 2000, QRC Lamp submitted a Retraining Plan proposing a 72 week course at Dunwoody Institute to obtain a certificate in Applied Electronics Technology, commencing in the fall of 2000 and ending in June 2002. The estimated cost was $15,900.00 (not including day care costs, if necessary, and wage loss benefits). A labor market survey indicated the average starting wage for electronic technicians with a two-year degree program was $26,000.00 per year. With five or more years of experience, the average wage was $42,000.00 a year. Dunwoody reported a 100 percent placement rate for 1998.

On March 15, 2000, the employer and insurer filed a Rehabilitation Request, objecting to the proposed plan, asserting retraining was not reasonable or necessary. In a Decision and Order on May 18, 2000, a Commissioner's representative at the Department of Labor and Industry approved the plan. The employee and insurer then filed a Request for Formal Hearing. The case was heard by Compensation Judge Joan G. Hallock on August 30, 2000. In a Findings and Order, served and filed September 25, 2000, the judge found the employee failed to conduct a reasonable and diligent job search from March 1999 through the date of hearing. The judge further found the proposed retraining plan was not reasonable or necessary, concluding that if the employee made a reasonable effort to find work in fields in which he has experience and transferable skills, he could earn a higher wage, comparable to that for an electronic technician, without retraining. The employee appeals.

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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). 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).

DECISION

The sole issue in this case is whether substantial evidence supports the compensation judge's denial of the employee's request for approval of the proposed retraining plan. Vocational rehabilitation, including retraining, is designed to return the employee to suitable gainful employment. "Suitable gainful employment" is employment which is reasonably attainable and which offers an opportunity to restore the injured employee as soon as possible to employment which produces an economic status as close as possible to that which the employee would have enjoyed without the disability. Minn. Stat. §§ 176.011, subd. 23, 176.102, subd. 1(b); Minn. R. 5220.0100, subp. 34.

In evaluating whether retraining is appropriate in a given case, this court has identified four areas of concern: (1) the reasonableness of retraining compared to other job placement activities; (2) the likelihood that the employee has the ability to succeed in a formal course of study in school; (3) whether retraining is likely to result in reasonably attainable employment; and (4) whether retraining is likely to produce an economic status as close as possible to that which the employee would have enjoyed without disability. Poole v. Farmstead Foods, 42 W.C.D. 970, 978 (W.C.C.A. 1989). Whether proposed retraining is necessary or appropriate is a question of fact for the compensation judge. Thus, where the compensation judge's findings are supported by substantial evidence we must affirm the decision reached below. Norby v. Arctic Enters., Inc., 305 Minn. 519, 232 N.W.2d 773, 775-76, 28 W.C.D. 48 (1975).

The employee asserts that substantial evidence does not support the compensation judge's finding that the employee failed to conduct a reasonable and diligent job search. This court has repeatedly stated that a diligent job search is not necessarily a prerequisite for retraining. Rather, each case must be analyzed on its own facts with a view to determining the approach or plan that will most realistically result in a return to suitable gainful employment. Anderson v. Ford Motor Co., 46 W.C.D. 24, 30 (W.C.C.A. 1991); Stone v. General Office Prods., No, [REDACTED SSN] (W.C.C.A., Aug. 13, 1998); McCann v. Sysco/Continental, slip op. (W.C.C.A., Dec. 2, 1993); Kostreba v. Stay Clean Janitorial, slip op. (W.C.C.A., July 31, 1990). We are concerned by the compensation judge's emphasis on a reasonable and diligent job search, and, to the extent that disapproval of the proposed retraining plan was based on the assumption that a reasonable and diligent job search is a prerequisite for consideration of retraining, it is hereby modified.

Although the compensation judge did not mention the Poole factors, the primary dispute in this case was the reasonableness and necessity of retraining compared to other job placement activities. The employee contends that substantial evidence does not support the finding that, with a diligent effort to find work in fields in which he has experience and/or transferable skills, the employee could obtain a wage comparable to that offered by the proposed retraining plan. In determining this issue, the scope and effectiveness of the employee's job search efforts is relevant.

The employee began a job search with the assistance of Kari Terwey, a placement specialist, on May 4, 1999. Areas of job search included entry-level computer or electronic repair, computer assembly, property management, building inspector, building maintenance, estimating in the brick and concrete field, prefabricated home sales, gyms or fitness center manager, landscape or siding estimating, computer system installation, retail store management, electronics or computer sales, electronic technician, electronic manufacturing, biomedical equipment technician, convenience store manager, customer service, and office equipment sales or repair. (Resp. Ex. 7, 9.) From May 1999 through August 2000, 45 suitable job leads were developed by Ms. Terwey. The employee followed up on only 18 or so, most of which were either computer-related or assistant manager positions. (Resp. Ex. 12.) The employee had only four job interviews as a result of these leads: three for service or repair technician trainee positions and one for a computer sales position. (Resp. Ex. 7.)

The employee expressed an interest, from the beginning, in obtaining retraining in computer or electronic repair and maintenance. QRC Lamp concluded the employee's earning capacity, without retraining, was between $8.00 to $13.00 per hour, and the employee was working at a job in the mid-range of what he would expect the employee to earn. The QRC indicated, as of December 1999, that neither the placement vendor or the employee had located jobs, for which he was qualified, paying more than he was making at the time ($10.50 per hour). Mr. Lamp opined the employee had limited transferable skills for jobs paying an entry level wage higher than his current employment, and would be better able to return to the earnings potential he would have enjoyed without the disability through retraining as opposed to direct job placement. (T. 102-103; Resp. Ex. 9: 10/29/99, 11/2/99, 12/9/99, 12/30/99.)

L. David Russell, a QRC, conducted a vocational evaluation of the employee at the request of the employer and insurer. Mr. Russell obtained a medical and employment history from the employee, reviewed the employee's job logs and the vocational reports and records of QRC Lamp and Ms. Terwey, and administered achievement and aptitude tests. (T. 159; Pet. Ex. B.) Mr. Russell concluded the employee's current earning capacity ranged between $6.00 to $23.00 an hour, and that the employee's current earnings of $11.25 per hour fell in line with his expected earnings at this point. QRC Russell noted that although job placement assistance had been provided, the employee had not actively sought potentially higher paying employment, such as construction or production-related work. He further opined, based on his review of the job search records, that job search to date reflected only cursory involvement by the employee himself, with few applications, in person contacts or interviews, as well as a delayed response and lack of follow-up with job leads. (T. 160; Pet. Ex. B.)

QRC Russell concluded the employee's medium duty work restrictions would include about 90 percent of the jobs in the national economy. Mr. Russell opined that, given the employee's age, education, work history and multiple transferable skills, the employee was employable in a broad range of occupations including assistant manager retail, part sales, route sales driver, truck driver (light), equipment operator, carpenter, electrician or painter helper, or

assembler.[1] QRC Russell disagreed the employee was at his "peak" for wages, and testified the employee could "absolutely" do better in terms of earnings. Mr. Russell provided examples of available jobs including assistant manager, manager trainee, forklift operator, assembler and electronic assembler, and route sales driver with starting wages ranging from $7.00 to $16.83 per hour, with most ranging from $10.00 to $15.00 per hour. QRC Russell noted that the starting wage anticipated after two years of retraining in electronic technology was $26,000.00 a year or $12.50 an hour. Accordingly, Mr. Russell concluded that direct entry into the job market would produce equivalent earnings to those expected upon completion of the proposed two year retraining plan, and the proposed retraining was neither necessary nor particularly helpful as a means of significantly improving the employee's earnings. (T. 159-62, 164, 167-68, 174; Pet. Ex. B.)

Although the employee's desire to obtain additional education is understandable and commendable, the employer and insurer are not obliged to pay for retraining unless the employee establishes that retraining is reasonably necessary. While different inferences could be drawn from the evidence, the compensation judge accepted the opinions of vocational expert Russell over those of QRC Lamp. As a general rule, unless the opinion of the expert lacks foundation, the compensation judge's choice between experts must be upheld. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 64 (Minn. l985); Yonke v. Continental Machines, Inc., slip op. (W.C.C.A. Feb. 13, 2001). Although we might have reached a different result, the evidence is minimally adequate to support the compensation judge's determination and we must, therefore, affirm.

[1] QRC Russell also included real estate sales agent in the list of potential occupations. However, the employee registered with two different real estate companies but sold only one house and was unable to build up a clientele. (Pet. Ex. A.)