CHRISTOPHER J. EDMAN, Employee, v. ALLIANT FOOD SERV., INC. and TRAVELERS PROP. & CAS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 11, 2001

No. [REDACTED SSN]

HEADNOTES

REHABILITATION - RETRAINING. Where there was no evidence supporting an amendment to the employee's rehabilitation plan to add the provision of services to "explore" retraining, the compensation judge's award of such services is clearly erroneous.

REHABILITATION - JOB PLACEMENT. Where several rehabilitation experts opined that the employee's loss of economic status could be erased by additional job placement assistance, the compensation judge's award of such assistance is supported by substantial evidence and is affirmed.

Affirmed in part and reversed in part.

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

OPINION

STEVEN D. WHEELER, Judge

The employer and its insurer appeal from the compensation judge's decision that the employee's job placement services be continued and that the rehabilitation plan be amended to provide for "exploration of retraining." We reverse the award to explore retraining but affirm the award of additional job placement services.

BACKGROUND

On September 22, 1999, the employee, Christopher J. Edman, was employed by Alliant Food Service, Inc., hereinafter the employer, as a delivery driver.[1] He sustained an admitted injury to his left knee on that date. At the time of his injury, the employee was in a position covered by a collective bargaining agreement, at an hourly wage of $16.63 and a weekly

[1] The employee, who was 28 years old at the time of the injury, graduated from high school in 1989. He attended diesel truck driving school, receiving a certificate of completion in 1992. He held several truck driving jobs before he started with the employer, Alliant, in late 1997. While working for First Freight in 1993-1996, he worked first as a driver and then as a night dispatch supervisor, but returned to driving because he could earn more in fewer hours. (T. 19.)

wage of $832.34, which included approximately six hours of overtime in an average week. On this job, the employee was also entitled to healthcare and pension benefits called for under the union contract. (T. 119.)

Following extensive medical care and surgeries necessary to treat the employee's knee, he was able to return to light-duty work with the employer with substantial restrictions and at a pay loss.[2] The employee was paid temporary total disability while unemployed and temporary partial disability while on light-duty jobs. A qualified rehabilitation consultant, Neal Binsfeld, was assigned to assist the employee in March 2000 and a rehabilitation plan was created. Pursuant to this plan, the employee was to engage in a search for employment focused primarily on return to work with the employer. (T. 94-5.) A functional capacity evaluation was performed on July 18, 2000, which indicated that the employee's restrictions precluded him from returning to his pre-injury job as a delivery driver. (Pet. Ex. B.)

In August 2000, a job placement vendor, Alecia Lahti, was assigned to help the employee locate a better paying permanent job either at the employer or with another employer. Later, another vendor, Gary Novitsky, helped the employee with his job search. While looking for work, the employee was working in a light-duty job for the employer.[3]

On September 26, 2000, the employee filed a rehabilitation request, in which he requested that the "rehabilitation plan be reviewed to explore the possibility of retraining." In its response, the employer and insurer maintained that the employee's earning capacity had not been diminished, in spite of his restrictions, and that consideration of retraining was inappropriate. Shortly thereafter, at an administrative conference, the employer and insurer agreed to pay for partial exploration of retraining in the form of interest and aptitude testing. (T. 64.) This agreement was memorialized in a decision and order by a representative of the Commissioner of the Department of Labor and Industry on November 27, 2000. The testing, performed in December 2000, showed that the employee was a person of high aptitude and had skills which matched those needed for a number of higher paying occupations. Thereafter, the employee made a request for additional exploration of retraining. (Pet. Ex. C.) In a decision and order following an administrative conference, a representative of the Commissioner of the Department of Labor and Industry, on February 28, 2001, indicated that the rehabilitation plan should be amended "to include expanded direct job placement services and the exploration of retraining." In a memorandum, the mediator accepted the employee's argument that under Minn. R. 5220.0750, subp. 1, "equal consideration" should also be given to exploring retraining. The mediator

[2] At first, the employee was given a temporary light-duty job at $17.03 per hour with full union benefits. (T. 26.) Later, in January 2001, he was provided with a permanent clerk position paying $14.00 per hour, with medical coverage, which he declined because it cost $150.00 per month, and no union contract benefits. (T. 29, 121.)

[3] During the course of job placement activities, the employee had at least three interviews and was offered three jobs, two of which were turned down for reasons acceptable to the employer and insurer. (T. 26-29.) The third position was apparently refused at the request of the employer and insurer. (T. 28.)

commented that "if job placement services and/or skills enhancement are unlikely to lead to suitable gainful employment, a retraining plan may be proposed."

On March 19, 2001, the employer and insurer filed a request for formal hearing on the basis that the employee's rehabilitation plan should not be amended to include further consideration of retraining. The employer and insurer contended that the employee's "existing transferrable skills" qualified him for suitable gainful employment. On April 10, 2001, the employee was interviewed by Jan Lowe, a vocational expert retained by the employer and insurer. Her report, dated May 9, 2001, stated that the proper rehabilitation plan was to do more job placement as there were a number of jobs the employee could do without retraining which would erase his wage loss. (Ex. E.) On May 17, 2001, the employee resigned his position with the employer and, on May 21, 2000, he started work as a dispatcher with Eagle Global Logistics. (Ex. 10.) This position paid $17.00 per hour and provided healthcare benefits and a 401(k) savings plan. (T. 31.) The lead for this job had been first found by job placement vendor Lahti in the fall of 2000. (T. 30, 41-43.) The employee testified that he took the job in order to "get out of Alliant" and that being a dispatcher was not one of his career goals. (T. 127.)

The matter came before a compensation judge at the Office of Administrative Hearings on May 30, 2001. In her Findings and Order, issued June 26, 2001, the compensation judge ordered that the employee's rehabilitation plan be amended to include an exploration of retraining "while employee continues to work and should continue to look for suitable gainful employment that does not require retraining, as well." The employer and insurer appeal from the award of additional "exploration of retraining" and job placement services, contending that the employee is not in need of any further rehabilitation services.

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

The issue raised by the employer and insurer on appeal is whether the decision of the compensation judge to award exploration of retraining and job placement services was

supported by substantial evidence and was not clearly erroneous. The employer and insurer's position is based on the contention that the goals of the rehabilitation provisions of the Minnesota Workers' Compensation Act have been satisfied by the employee's acceptance of the dispatcher position at Eagle Global Logistics ten days before the hearing.

The Workers' Compensation Act provides the basic principles concerning the need for rehabilitation. The act provides as follows:

> 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). Retraining may be an appropriate form of rehabilitation where it is supported by competent evidence. See Norby v. Arctic Enter., Inc., 232 N.W.2d 773, 28 W.C.D. 48 (Minn. 1975).

> The 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.

Minn. R. 5220.0750, subp. 1. Suitable gainful employment is defined in Minn. R. 5220.0100, subp. 34, as:

> "Suitable gainful employment" means employment which is reasonably attainable and which offers an opportunity to restore the injured employee as soon as possible and as nearly as possible to employment which produces an economic status as close as possible to that which the employee would have enjoyed without disability. Consideration shall be given to the employee's former employment and the employee's qualifications, including, but not limited to, the employee's age, education, previous work history, interests, and skills.

In this case, there is no evidence that the exploration of retraining was a reasonable option for the employee. To the contrary, all the evidence introduced was that the employee was not a candidate for retraining because the rehabilitation goals in Minn. Stat. § 176.102 could be met by additional job placement efforts. The employer and insurer's expert, Ms. Lowe, stated that the employee was not a candidate for retraining because the results of the aptitude and vocational testing showed that the employee could work in several areas with no retraining at compensation and benefit levels which were equal to or exceeded his pre-injury economic status. She recommended additional job placement until the employee had returned to his pre-injury economic status. (Pet. Ex. E.) As well, Theresa Hippert, the vocational evaluator at the Minnesota Resource

Center, where the employee was tested in December 2000, indicated that retraining should only be considered as an option after "a thorough search of possible immediate employment options had been completed and exhausted." (Pet. Ex. C.) The employee's QRC, Mr. Binsfeld, stated that the employee did not need to be retrained. (T. 50.) The QRC specifically testified that additional formal "schooling" was not necessary for the employee to find employment that would equal his pre-injury earnings. (T. 86.) He indicated that the employee's rehabilitation plan did not need to be amended to indicate the need for an exploration of retraining. (T. 52.) He stated that the only rehabilitation assistance needed was additional job placement services. (T. 48-51.) The evidence in this record establishes that the employee has the skills and talents which will eventually result in attaining suitable gainful employment without further exploration of retraining. The award of additional "exploration" of retraining is reversed.

The compensation judge's award of additional job placement services was supported by the testimony of the employer and insurer's expert, the QRC and the vocational testing expert that such efforts were appropriate until he had been returned to a position which erased his loss of economic status. The award of additional job search was also supported by evidence of the ongoing disparity between the employee's weekly wage and his current earnings. The award of additional job placement services is affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).