

ROBERT D. YONKE, Employee, v. CONT'L MACHS., INC. and LIBERTY MUT. INS. CO.,  
Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS  
FEBRUARY 13, 2001

No. [REDACTED SSN]

HEADNOTES

REHABILITATION - RETRAINING. Given expert opinion and evidence as to the employee's earnings and earning capacity, the compensation judge did not err in approving the employee's request for retraining as a computer support specialist.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Pederson, J.  
Compensation Judge: James R. Otto.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's award of retraining. We affirm.

BACKGROUND

The employee sustained a work-related injury to his low back on May 3, 1985, while employed as a machinist for Continental Machines, Inc. [the employer]. He was earning \$11.41 per hour on the date of injury and received fringe benefits consisting of profit-sharing, paid health and dental insurance, holiday pay, and five weeks of paid vacation. In November of 1986, the parties entered into a stipulation for settlement, covering some chiropractic expenses and closing out claims for permanent partial disability to the extent of a 14% whole body impairment.

The employee continued working for the employer until 1989, when he began work as a machinist for MTS System Corporation [MTS]. In the MTS job, the employee was required to do work that became more and more difficult for him to perform, and he periodically missed work due to low back problems, including a three-month period in 1993-1994. By the time of his layoff from this employment on February 28, 1995, the employee was earning \$18.00 per hour and receiving fringe benefits comparable to those he had received in his job with the employer.

Subsequent to his layoff from MTS, the employee worked with QRC William Villa, who opined that the employee's restrictions reduced him to light to sedentary employment and that

the skills of machinist would not transfer to that type of work.<sup>1</sup> QRC Villa began a job search with the employee in the fall of 1995, and, on October 23, 1995, the employee began work as a security guard with SLP Security, a job lead he had obtained from QRC Villa. The employee's starting wage was \$7.00 per hour. He continued in security work thereafter, working for different employers, and, by the year 2000, he was earning \$10.50 per hour, with a week of paid vacation as his only fringe benefit.

In December of 1998, QRC Villa reopened his file, at the request of the employee and with the consent of the employer and its workers' compensation insurer, to explore the feasibility of retraining. The employee and QRC Villa completed a retraining plan in May of 1999, calling for the employee to be retrained as a computer support specialist, involving a two-year program of study. On October 7, 1999, the employee filed a claim petition seeking approval of the retraining plan, and the matter eventually proceeded to a hearing at the Office of Administrative Hearings. At trial, QRC Villa testified that retraining was the employee's only option to improve his economic status. Jan Lowe, a certified rehabilitation counselor testifying on behalf of the employer and insurer, indicated that some sort of selective placement should be attempted before retraining was explored. In a decision filed on July 21, 2000, the compensation judge found that the employee had become permanently precluded from engaging in work as a machinist due to the effects of his work injury and that without retraining he could not be expected to return to a job of the same or similar economic status as the job he held on the date of injury. The employer and insurer appeal.

## 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

Minn. Stat. §176. 102, subd. 1(b), provides that "[r]ehabilitation is intended to restore the injured employee so the employee may return to a job related to the employee's former

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<sup>1</sup> As of August 23, 1995, Dr. Mark Sigmond, the employee's treating doctor, had restricted him to lifting in a 25-pound range, with maximum lifting of 50 pounds, to be done rarely.

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**” (emphasis added).

The employer and insurer argue in part that the compensation judge erred in basing his retraining decision on the presumption that the employee would have earned \$23.00 per hour as a machinist in the year 2000 had his work injury not precluded him from that employment. Contending that Stadick v. United Parcel Serv., 47 W.C.D. 9 (W.C.C.A. 1992), is controlling, the employer and insurer assert that the employee’s date-of-injury average weekly wage of \$456.40 and his weekly earnings of \$420.00 at the time of trial were close enough to make retraining unnecessary. We note initially that the compensation judge made no specific finding basing the retraining award on any presumption that the employee could have been earning \$23.00 an hour, as a machinist, in the year 2000; the judge raised the point only in his memorandum. In any event, whatever the relevance of evidence concerning potential machinist wages in 2000, the record reasonably supports the judge’s conclusion that the employee’s job as a security guard did not produce an economic status as close as possible to that the employee would have enjoyed without his work-related disability.

Contrary to the employer and insurer’s argument, the present case is arguably distinguishable from Stadick, a case in which a panel of this court applied Jellum v. McGough Constr. Co., 479 N.W.2d 718, 46 W.C.D. 182 (Minn. 1992), to hold that “the average weekly wage on the date of injury controls and the wages the employee expected to earn in the future are speculative and cannot be used to determine the employee’s benefit rate” or the employee’s entitlement to retraining. Stadick, 47 W.C.D. at 11. Unlike Stadick, there is “concrete” evidence in the present case concerning the employee’s post-injury earning capacity in his preinjury occupation. That is, by the time of his layoff in 1995, the employee was earning \$18.00 an hour as a machinist, with substantial fringe benefits. This evidence is not speculative and clearly demonstrates the substantial economic disparity between machinist work and security work.

In addition, the later case of Siltman v. Partridge River, Inc., 523 N.W.2d 491, 51 W.C.D. 282, 293 (Minn. 1994), supports the compensation judge’s result. In Siltman, the employee sought rehabilitation services for purposes of exploring retraining. The employer and insurer took the position that, because the employee’s pre-injury and post-injury wages were nearly identical, he was not entitled to retraining because he had no impaired earning capacity. The Workers’ Compensation Court of Appeals affirmed the compensation judge, but, relying on Jellum, directed that the scope of any retraining evaluation be limited to developing a plan that would return the employee to his pre-injury wage. The supreme court, in an order opinion, held that the issue was whether the employee had an impaired earning capacity. Finding substantial evidence for the compensation judge’s determination that the employee had an impaired earning capacity and was entitled to evaluation for the purposes of developing a retraining plan, the supreme court went on to state that “[a]rguments based on Jellum, a case concerning the calculation of wage benefits, are inapposite here.” Siltman, 523 N.W.2d at 492, 51 W.C.D. at 294. As such, the continued validity of the earlier analysis in Stadick is uncertain. Furthermore, the disparity between the employee’s fringe benefits as a machinist and his fringe benefits as a security guard is extremely significant and might well by itself justify the judge’s conclusion as to the economic status comparison.

The employer and insurer also contend that the employee should do additional job search before retraining is considered, because the employee is employable at a higher wage either as a security guard or in selective machinist positions. However, QRC Villa testified that further job search would not increase the employee's economic status. While not specifically addressing the issue, the judge's decision as a whole reflects an adoption of the opinions of QRC Villa over those of Jan Lowe. A compensation judge's choice between expert opinions is generally upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

The employer and insurer also contend that retraining as a computer support technician would produce an economic status "that greatly exceeds the Employee's pre-injury economic status," contending that Ms. Lowe testified that the employee's earning capacity would be in the range of \$50,000 to \$70,000. In reality, Ms. Lowe testified that the employee could expect to start at \$30,000 to \$32,000 a year as a computer technician. It was only with years of experience that Ms. Lowe felt the employee could earn \$50,000, and only with years of experience and additional training in Web-page development that the employee could earn \$70,000.

The employer and insurer further contend that QRC Villa did not have adequate support for the proposed retraining plan through a labor market analysis. Normally, we would find the lack of a formal labor market survey problematic; however, in this case both employment experts testified to the employee's probable earnings as a computer support specialist,<sup>2</sup> and they agreed that the likelihood of employment after retraining was high. Under these circumstances, we will not overturn the judge's decision merely for lack of a labor market survey.

Finally, the employer and insurer contend that it is significant that the employee made his claim for retraining fifteen years after his injury. However, in Leahy v. St. Mary's Hosp., 339 N.W.2d 265, 36 W.C.D. 253 (Minn. 1983), the supreme court held that there was a substantial basis for a determination that the employee was entitled to retraining, twenty-five years after the injury, despite the fact that the employee "was receiving the minimum wage when injured in 1956 and was still at minimum wage in 1981, an increase perhaps in actual dollars but hardly in real income." Id., 339 N.W.2d at 268, 36 W.C.D. at 256.

For all of the above reasons, substantial evidence supports the judge's finding that retraining as a computer support specialist is necessary to restore the employee to an economic status as close as possible to what he would have enjoyed without the disability.

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<sup>2</sup> Mr. Villa testified to a median hourly wage in Minnesota in 1998 of \$17.25 per hour. This translates to \$35,880 per year. Ms. Lowe testified to a starting salary of \$30,000 to \$32,000 a year.