

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 97

WCC No. 9407-7102

CITY OF GREAT FALLS/ALEXSIS RISK MANAGEMENT

Appellant

vs.

TARA DAMON

Respondent.

DECISION AND ORDER ON APPEAL

This is an appeal by the City of Great Falls from the Findings of Fact; Conclusions of Law; Order entered on July 22, 1994, by Stephen L. Wallace, hearing examiner for the Montana Department of Labor and Industry (DLI). The decision **reversed** the Initial Order of Determination issued by the Employment Relations Division on June 17, 1992, which had found that "option (c), return to a related occupation suited to the claimant's education and marketable skills, is appropriate for the claimant as outlined in the rehabilitation panel report."

Factual Background

Tara Damon (Damon) was injured in the course and scope of her employment on November 16, 1990, when a leaf vacuum machine ran over her and then backed over her again. She suffered significant abrasions to her right knee and thigh and abrasions and contusions to her low back. Dr. W.B. Ellis treated her in the emergency room and she was then under the care of Dr. Aimee Hachigian, an orthopedist. Her subsequent treatment included physical therapy and the development of a personalized program at a health club.

Dr. Hachigian referred Damon to physiatrist, Dr. Bill Tacke, who became her primary treating physician. On July 31, 1991, Dr. Tacke performed a psychiatric evaluation. His assessment of Damon's condition was: 1) traumatic strain injury, lower back and knees, 2) residual inflammation of lower back over sacroiliac joints secondary to original strain - possible mild myofascial pain syndrome, well controlled, and 3) impaired mobility and impaired physical labor activities. (Ex. 3 at 18.) At that time the doctor did not believe Damon had reached maximum medical improvement. He recommended "a good structured exercise program to build strength." (*Id.* at 26.) He further commented:

Vocationally I think that Tara will not be able to go back to her regular full labor position with Park and Rec. She needs to avoid heavy lifting as well as repetitive lifting, carrying, stooping, bending, reaching, pushing or pulling. She does need to modify any squatting activity to avoid stressing the right knee. She should avoid prolonged kneeling as well as standing and it is best that she also avoid prolonged sitting particularly if there is twisting involved such as operating equipment. . . .

Id.

On August 22, 1991, Alexis Risk Management, which adjusts claims for the City of Great Falls, designated Randy Kenyon (Kenyon) of Board Certified Rehabilitation Consultants (BCRC) as Damon's rehabilitation provider pursuant to the provisions of chapter 71, part 10 of Title 39, MCA, (1989). In October 1991, Kenyon submitted descriptions for several jobs, including the time-of-injury job (parks ground keeper), to Dr. Tacke for his review and approval. At a follow-up examination on November 6, 1991, Dr. Tacke and Damon reviewed the job descriptions. Dr. Tacke excluded a return to Damon's time-of-injury position. As to the other positions, Dr. Tacke wrote:

There were several other jobs reviewed. They are all in the area of light duty jobs and jobs she could do under the right circumstances. Several of them were assembly. That is primarily prolonged sitting. She presently would only be able to sit for 3 hours out of an 8 hour workday so an **assembly job wouldn't be practical unless it is combined with something else.** [Emphasis added.]

Id. at 18. Dr. Tacke did not return the job descriptions to Kenyon at that time.

On March 16, 1992, apparently at the prodding of Kenyon (see Exs. 1 at 9 and 3 at 16), Dr. Tacke completed a Physical Activities Checklist for Damon. (Ex. 1 at 30.) On the checklist, Dr. Tacke limited Damon to one hour of consecutive sitting and three hours total per day; one to two hours consecutive standing, up to a total of seven hours per day; and one to two hours consecutive walking, up to a total of five hours per day. Dr. Tacke further stated Damon should avoid repetitive lifting but could lift up to twenty pounds occasionally. He also restricted her pushing and pulling to ten minutes consecutively, up to one hour total per day. Dr. Tacke cautioned that Damon should **avoid** bending, squatting, kneeling, crawling and torso twisting. He stated: "She needs to be able to pace sitting/standing/walking on a regular basis per her schedule." (Ex. 1 at 12, emphasis in original.)

On March 16, 1992, Dr. Tacke also approved the job analysis for the positions of computer casing assembly, computer assembly, electrical assembler and electronic subassembler (collectively referred to hereafter as "assembler jobs"). He approved the analysis for flagger, but restricted it to "selective settings." (Ex. 1 at 25-26.) For each of the assembler jobs, Dr. Tacke wrote in the restrictions he placed on Damon with regard to sitting for not

more than one hour consecutively and a maximum of three hours total each day. (*Id.* at 14, 17, 23, & 29.) For the positions of computer assembly and electrical assembler, he wrote that the work stations may need to be modified. Dr. Tacke's approval of each job, along with his written comments, appear on page two of a Job Analysis Narrative Description for each of the five approved positions. (*Id.* at 16 19, 25, 26 and 31.) The narrative contains only a summary description of the position and does not set forth details concerning the number of hours of standing, sitting, and walking, or details concerning other activities. However, each narrative was accompanied by a second document entitled On-site Job Analysis, which contains a detailed breakdown of the daily physical requirements of the job. The analysis for each of the assembler jobs sets forth a **sitting requirement which exceeds the stated three hour physical limitation placed on Damon by Dr. Tacke**. Further, as pointed out by the hearing examiner in his decision, the electronic subassembly position requires **kneeling and squatting** which Dr. Tacke cautioned Damon to avoid and the computer assembly positions require **frequent lifting and twisting**, thereby conflicting with Dr. Tacke's preclusion of repetitive lifting, **and may require lifting up to twenty-five (25) pounds**, which is beyond Damon's twenty (20) pound limit.

Following Dr. Tacke's review of the job descriptions, the matter was then referred to a Rehabilitation Panel. The Panel issued its report on June 8, 1992. Initially, the report was signed only by the Panel Chair. However, on March 31, 1993, the other two Panel members filed their written concurrence. (Rehabilitation Panel Report Addendum.)

The Rehabilitation Panel Report found that Damon "can continuously sit" and determined that "option (c), return to a related occupation suited to the claimant's education and marketable skills" is the first appropriate rehabilitation option for Damon. The flagger position "could not be verified as typically available." Thus, the Panel's approval of option (c) was based on the assembler jobs. One Panel member expressed doubt even as to those jobs, noting:

[A]ll the assembler positions were approved with modifications related to sitting. It would appear flexibility does exist for this activity but whether it is enough is questionable. . . .

In recommending option (c), the Panel stated: "[S]hould Ms. Damon attempt the Assembly positions and they do not provide flexibility with sitting requirements, further rehabilitation services would be warranted." (Rehabilitation Panel Report, 6-8-92.)

A hearing was held on January 21, 1994, before Stephen L. Wallace, hearing examiner. Damon testified in person, and the hearing examiner found her to be a credible witness "as to her limitations, abilities, and motivation." (Findings of Fact No. 21.) Kenyon testified by telephone. During his testimony he admitted that the physical requirements of the positions approved the Panel may exceed the lifting, sitting, twisting and other limitations imposed by Dr. Tacke. (Tr. at 21-28.)

The hearing examiner issued his Findings of Fact; Conclusions of Law; Order on July 22, 1994. Based on Dr. Tacke's restrictions, he concluded that Damon is unable to perform the positions approved by the Panel. He reversed the Panel's finding that option (c) is the first appropriate option, and remanded the matter to the Employment Relations Division for further evaluation.

This appeal by the City of Great Falls followed.

Grounds for Appeal

The City of Great Falls contends that the decision of the hearing examiner was clearly erroneous and also amounted to an abuse of discretion. Within those broad parameters, the City of Great Falls more specifically argues that the hearing examiner erroneously shifted the burden of proof to the City of Great Falls and that Damon failed to carry her burden of proof.

Standard of Review

Section 39-71-1018, MCA, provides for an appeal to the Workers' Compensation Court from the DLI's final order. Review of that order is governed by section 2-4-704(2), MCA, which provides in relevant part:

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) The administrative findings, inferences, conclusions, or decisions are:

...

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;

...

The hearing examiner's findings of fact must be overturned on judicial review where they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." ***State Compensation Mutual Insurance Fund v. Lee Rost Logging***, 252 Mont. 97, 102, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA.). The Court will not reweigh the evidence; the findings and conclusions of the fact-finder will be upheld if they are supported by substantial credible evidence in the record. ***Nelson v. EBI Orion Group***, 252 Mont. 286, 289, 829 P.2d 1 (1992).

Discussion

The hearing examiner for the DLI reversed the Panel's conclusions based on his analysis of the medical evidence, the testimony of Damon, and the testimony of Kenyon. Relying on Dr. Tacke's restrictions, he found that Damon lacked the **physical capacity** to perform repetitive lifting, torso twisting, posture holding, sitting, bending, squatting or kneeling which was required by each position to varying degrees. Further, he found the Panel's conclusion that Damon was capable of "continuous sitting" to be clearly erroneous.

Initially, the City of Great Falls attacks the hearing examiner's finding that Dr. Tacke did not review the On-site Job Analysis for each position he approved. The City of Great Falls points to Kenyon's testimony that he provided Dr. Tacke with both the narrative **and** the analysis for each job, and asserts that Dr. Tacke therefore approved all the physical requirements set forth in each analysis. It argues that by failing to call Dr. Tacke, Damon thereby concluded his testimony would have been adverse to her. Finally, it argues that in light of Dr. Tacke's failure to testify, the hearing examiner's findings impermissibly shifted the burden of proof to the City of Great Falls.

In Conclusion of Law No. 5, the hearing examiner expressly indicates that the burden of proof was on Damon's shoulders, but that she satisfied that burden. Based on the documents executed by Dr. Tacke, it was a fair and reasonable inference that Dr. Tacke did not read the analysis for the jobs he approved. It is an even more compelling inference that by inserting handwritten restrictions on the Physical Activities Checklist (Ex. 1 at 12) and in the "comments" section following each of his approvals, he intended that his handwritten restrictions prevail over his general approval.

The City of Great Falls' argument that Damon could and should have called Dr. Tacke goes to the weight of the evidence. Contrary to the City of Great Falls' position, medical testimony in this case was not essential. **Warburton v. State Compensation Insurance Fund**, WCC No. 9401-6985 (August 26, 1994), is distinguishable. In that case there was a credibility issue which could not be resolved by telephone testimony. Also, the physician who opined that Warburton could work did not clearly address Warburton's ability to perform the specific job approved by the Panel. In this case Damon testified in person and was found to be credible. Further, there is nothing ambiguous or unclear in Dr. Tacke's restrictions on Damon's physical activities.

The hearing examiner was entitled to draw reasonable inferences from the evidence presented. **Search v. Union Pacific R. Co.**, 649 P.2d 48, 50 (Utah 1982). In this case, it appears that he did.

The City of Great Falls must identify jobs which Damon can physically perform. **Dilling v. Buttrey Foods**, 251 Mont. 286, 290, 825 P.2d 1193 (1991). A comparison of Dr. Tacke's restrictions with the more detailed job descriptions set forth in the On-site Job Analysis

shows that the hearing examiner correctly concluded that the restrictions conflicted with the detailed job descriptions.

The City of Great Falls argues, however, that Damon's physical activities since she was last seen by Dr. Tacke demonstrates that she is now physically able to perform the jobs approved by the Panel. The hearing examiner considered testimony concerning Damon's college attendance and her physical fitness program. He found that despite improvement of her physical condition, she still did not have the physical capacity to perform the assembler jobs:

While the Claimant is by now able to now sustain herself at somewhat more arduous and steady work demands than what Dr. Tacke suggested in his assessment/restrictions written more than two years ago, **on balance, the Claimant is considered credible** as to her own stated restrictions for an inability to sit continuously at a work bench, and the difficulty she would have with repetitive lifting, twisting, posture holding, bending, and any kneeling which would necessarily be encountered in the types of jobs identified. . . .

(Finding of Fact No. 21 C, bold in original.) The hearing examiner noted that in attending college Damon had flexibility in alternating sitting and standing, and that the physical demands at college "cannot be fairly equated with the competitive demands of bench assembly work the Claimant has encountered." (Finding of Fact No. 21 A.) He also noted that "Claimant's back tended to flare up after multiple-class days" and that her "subjective complaints are not inconsistent with the limitations imposed by Dr. Tacke." (*Id.*) Those findings are supported by Damon's testimony.

As noted in **Nelson**, 252 Mont. at 286, the function of the Court is not to reweigh the evidence; the findings and conclusions of the hearing examiner will be upheld "if they are supported by substantial credible evidence in the record." The decision in this case is not clearly erroneous nor an abuse of discretion. It is supported by substantial credible evidence.

ORDER

The July 22, 1994 decision of the hearing examiner is **affirmed**.

DATED in Helena, Montana, this 26th day of October, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Leo S. Ward
Mr. Tom L. Lewis