

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 23

WCC No. 9304-6773

ROBERT KRAMLICH

Appellant

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

DECISION AND ORDER ON APPEAL

This is an appeal from the Findings of Fact, Conclusions of Law, and Order entered by the Montana Department of Labor and Industry (DLI) on April 19, 1993 following a contested case hearing. The Order provides:

The Employment Relations Division's July 6, 1992, Order of Determination identifying option (c), pursuant to § 39-71-1012, MCA, is hereby AFFIRMED.

The appellant, Robert F. Kramlich (claimant), also appeals from an earlier, November 9, 1992 Order on Motion for Continuation of Benefits.

Procedural Background

This case arises under the 1987 provisions regulating determinations of permanent disability and referral of disabled workers for vocational rehabilitation. Sections 39-71-1011 to 1019, MCA (1987). The provisions set forth in sections 39-71-1012 and 39-71-1015 through 39-71-1019 were repealed in 1991 but must be applied, as in this case, to injuries occurring between July 1, 1987 and June 30, 1989.⁽¹⁾

Appellant, Robert Kramlich, was working as a crusher/oiler for Konitz Contractor Inc. when he fell from a ladder injuring his right knee and ankle on April 25, 1989. The insurer, State Compensation Insurance Fund (State Fund), accepted liability and has paid various medical and compensation benefits. Claimant's last day of work was October 20, 1989.

After his treating physician disapproved of his returning to his time-of-injury job, Crawford Rehabilitation Services (Crawford) was designated to perform a vocational analysis, pursuant to section 39-71-1014, MCA. Crawford confirmed claimant's inability to return to his former job or to a modified position, but identified two related occupations which, in

the opinion of Crawford's vocational consultant, Tim Snyder, the claimant was capable of performing. Those jobs were:

1. Auto Self-Serve Service Station Attendant, and
2. Cashier II.

Section 39-71-1015, MCA (1987), provides for referral of an injured worker who has not returned to work to a rehabilitation panel. The three members of the rehabilitation panel in this case met by telephone on June 16, 1992. The Rehabilitation Panel's report, signed only by Panel Chair Karen Doig, was issued on July 1, 1992.⁽²⁾ The panel made the following recommendation:

The Rehabilitation Panel is recommending option (c), return to a related occupation suited to the claimant's education and marketable skills, as the first appropriate rehabilitation option with the position of Auto Self Serve Station Attendant. **The Panel also recommends placement assistance be offered to this claimant.** [Underlining in the original; bolded emphasis added.]

On July 6, 1992, the Employment Relations Division of the DLI issued an initial order of determination as provided by section 39-71-1018, MCA. The order adopted the Panel's recommendation.

Claimant filed a timely appeal, triggering a contested case proceeding. Section 39-71-1018(2), MCA. A hearing was held on December 30, 1992.

Meanwhile on August 28, 1992, the State Fund notified claimant that it was terminating his temporary total disability benefits retroactive to June 1, 1992. The notice acknowledged claimant's entitlement to wage supplement benefits at the weekly rate of \$149.50, but informed the claimant that he would be paid only \$1.00 biweekly (50 cents a week) until the State Fund recouped an overpayment of \$1,900.15. The overpayment was based on the temporary total benefits paid claimant between June 1, 1992 and August 28, 1992.

Claimant's Request for Order Requiring That Defendant Reinstate Benefits with supporting memorandum was served on September 30, 1992. On November 9, 1992, the hearing examiner determined:

1. Respondent is hereby ordered to reinstate total rehabilitation benefits from the date of termination (reduction) pending a decision following hearing before the department.
2. Respondent is entitled to reimbursement of any total rehabilitation benefits paid pursuant to this order in the event of Claimant's failure to prevail on the substantive issue now before the department.

On December 30, 1992, the administrative hearing was conducted with attorneys Andrew J. Utick and Laurence A. Hubbard and the claimant Robert F. Kramlich present. The testimony of Tim Snyder was taken telephonically. The depositions of Sandy Besel, Mary Mistal, P.T. and Stephen R. Davenport, M.D. were submitted. The hearing examiner issued his decision affirming the Order of Determination on April 19, 1993. The Notice of Appeal to the Workers' Compensation Court was filed on April 26, 1993. Briefs have been submitted and this matter is ready for decision.

Factual Background

Claimant was born on August 9, 1950. He graduated from high school and has had no further formal education. Claimant's employment history consists of working for Cenex from 1972 to 1979. While employed at Cenex, his work experience consisted of all kinds of maintenance on automobiles, including changing tires, oil, mufflers and so forth. He drove a fuel truck and in the summer worked in the fertilizer plant, unloading and delivering fertilizer. Occasionally he worked in the full-service gasoline station run by Cenex, writing up tickets and making change from a cash box. The claimant testified he had no experience operating a cash register. Beginning in 1979, he was employed as an oiler/crusher for Konitz Contractor, Inc., a position which he held until October 20, 1989, when he quit his job as a result of the injury to his right knee and ankle.

Medical

Claimant's treating physician since November 29, 1989, has been Stephen Davenport, M.D., a board certified orthopedic surgeon. As a result of his injury, claimant has had two surgeries on his right knee and right ankle. Dr. Davenport indicated that the claimant would reach maximum medical improvement four months after his January 1991 surgery and sometime in May of 1991 he referred Mr. Kramlich for a functional capacities evaluation (FCE)⁽³⁾. Mary Mistal, PT conducted the functional capacities assessment over a two-day period, July 17 and 18, 1991.

The doctor was specific in stating that the claimant could not return to his time-of-injury work and on several occasions has recommended retraining. However, Dr. Davenport's review of the Estimated Functional Capacity form (EFC) and job analyses prepared by Tim Snyder resulted in his approval of two return-to-work options for claimant, one as an auto self-serve service station attendant and the other as a cashier II. Dr. Davenport discussed the EFC report with the claimant, but did not discuss working conditions and/or requirements for the gas attendant position with Ms. Mistal, Tim Snyder or any person familiar with that position prior to his approval. Mary Mistal also approved the job description for the auto self-serve service station attendant.

The Rehabilitation Panel relied in part on the information provided by the EFC and Dr. Davenport's approval of the job analysis for the auto self-serve service station attendant.

Upon appeal from DLI's Initial Order of Determination, and in preparation for a hearing, the depositions of Mistal, Davenport and Sandy Besel, an employer of persons working in a self-service gas station, were taken.

Dr. Davenport described the claimant's condition during his deposition by stating, "The simplest thing to say is that he's got osteoarthritis of his right knee and his right ankle." Discussing Kramlich's condition the doctor testified.

Q As I understand the condition of his knee, it's a condition called "chondromalacia." Is that correct?

A Right.

Q And it's a roughening of the back surface of the kneecap?

A Yes.

Q What's the prognosis for a condition like that over a long period of time?

A I suppose poor.

Q And what do you mean by that? Is he going to have recurrence of the condition or what?

A I mean, it's a condition that's never going to get better. It's going to deteriorate and get worse, and he's probably going to need further surgery at some point in time.

Davenport Dep. at 13-14.

In describing the restrictions which are placed on the claimant as a result of his injury the doctor stated, "he'd have problems going up and down stairs." He concurred with Mistal's restrictions which limited the claimant from lifting from below the knee level and performing any squat-type lift. Dr. Davenport approved of the claimant lifting 20 pounds at waist level.

When Dr. Davenport was told that Sandy Besel, the manager of a self-service station, had testified that a more accurate description of the lifting requirements would be 7 to 15 pounds and occasionally up to 20 pounds, and that the garbage cans which attendants are required to empty sat on the ground, the doctor testified that he would disapprove the job. (Davenport Dep. at 11.)

In responding to a question by Mr. Utick regarding whether it would be preferable for Mr. Kramlich to return to work at a job such as a cashier or to retrain for a sedentary type job, Dr. Davenport stated:

A I think it would be better to retrain him. I have some doubts as to -- I mean, we have to go by what these job descriptions are, but I have some doubts as to

the **validity of the job descriptions**; and I think he'd be better off being retrained.
[Emphasis added.]

Id. at 14-15.

Mr. Hubbard questioned the doctor regarding knee movement while lifting.

Q Okay. So the slightest movement of his knee is going to be the difference between being able to do this job --

A Comfortably, yes, I think, year in and year out. I mean, if you're talking about a temporary fix, I think he could probably do it for three or four months, and he'd only be right back here again. I just don't think that he's going to be able to do this for -- How old -- He's 40, isn't he? Let me see. (Looking.) He's 42. I don't think he's going to be able to successfully do this job for 20 years. That's what I'm saying. I'm saying he could probably go out there and do it for a week, probably do it for a couple weeks.

Q Eventually, he won't be walking, is your testimony?

A Yes, eventually. And this is not going to do it for him.

Id. at 26 (Emphasis Added.)

Vocational Rehabilitation

Of the two job descriptions submitted and approved by Dr. Davenport and Mary Mistal, the Panel rejected the position of cashier II as not being available in the claimant's job pool. The job description for auto self-service station attendant was approved with the condition: "Client is limited in lifting from below knee level & is unsafe performing a squat-type lift." (Ex. No. 5.)

Sandy Besel testified that she did not sign the job descriptions which were used by the vocational counselor, Tim Snyder, in his evaluation. However at the time of her deposition she agreed that the descriptions of the job duties (Dep. Ex. Nos. 1 & 2), ". . . sound like what I could have told somebody." On direct and redirect examination she modified the job description by stating that the lifting requirement for emptying the garbage cans averaged from 7 to 15 pounds and was up to a maximum of 20 pounds. She said that the attendant would be expected to be able to lift that amount. This differs from the job description which was approved by Ms. Mistal and Dr. Davenport, which had indicated a maximum lift of 10 pounds.

Ms. Mistal expressed concern regarding the job requirement of retrieving oil from a lower shelf. In order to accomplish this task the claimant would have to modify his "body mechanics." Ms. Mistal described the modification as being, ". . . what we call a one knee up position, or down on one knee, which ever your preference is, ..." When this

suggested modification was described and demonstrated by Mr. Hubbard to Dr. Davenport, the following exchange took place:

Q -- that Mr. Kramlich could modify it if he could modify getting things by going to one knee (illustrating) --

A He can't kneel on that knee.

Q Okay. Well, how about the other knee?

A He can't bend that knee far enough to kneel on the other knee the way you just did.

Davenport Dep. at 16-17.

Mary Mistal, during her deposition, described what constitutes a "squat-type" lift and a "level lift."

There are certain weighted items or activities wherein the individual is to perform to determine how much weight they can lift at certain levels, [squat-type lift] . . . incorporating a full squat, lift the box back to the waist level. The level lift was designed to determine how much the individual could actually lift at waist level, moving it across four feet.

(Mistal Dep. at 7.) Regarding the claimant's limitations she stated, ". . . Mr. Kramlich is unsafe performing any type of activity wherein he would have to squat." When questioned further as to weight considerations she responded:

Q Would there be any limitation on the amount of weight he could lift from that type of squat-type lift, or should he just never do a squat-type lift regardless of the weight?

A It's my opinion that he never should do the activity.

...

Q And the amount of weight that would be lifted would be insignificant or would be of no significance, right?

A That's correct.

Id. at 17-18. Ms. Mistal and Dr. Davenport placed a limitation of 20 pounds as the maximum amount of the claimant's ability to perform a "level lift." Ms. Mistal explained, "Specifically and only for level lift and weight carry, meaning that only at waist level or when carrying a weight that would be his safe maximum [20 pounds] to be done on an occasional basis in an eight hour day." (Mistal Dep. at 20-21.)

At the hearing it was established that the garbage cans which attendants are required to empty were 27 inches in height, which would require a man of Mr. Kramlich's height, who is 6 feet 2 inches, (Tr. at 52) to bend his knees in order to grasp and lift.

DISCUSSION

The standards of review are set forth in section 2-4-704, MCA. Although the section, which is part of the Montana Administrative Procedures Act, generally applies to district court review of agency decisions, the standards set forth in the section have been utilized in judicial review cases under the jurisdiction of the Workers' Compensation Court. **E.g., *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 97, 102, 827 P.2d 85 (1992) (applying the "clearly erroneous" standard of 2-4-704 (2)(a)(v)).**

Section 2-4-704, MCA provides in pertinent 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:

...

(iv) affected by other error of law;

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

In ***State Compensation Mutual Insurance Fund v. Lee Rost Logging***, *supra*, the Supreme Court elaborated regarding the "clearly erroneous" standard:

"This Court recently explained the application of the "clearly erroneous" test in the context of reviewing the findings of a trial court sitting without a jury:

We adopt the following three-part test to determine if a finding is clearly erroneous. First, the Court will review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, we will determine if the trial court has misapprehended the effect of evidence. *Western Cottonoil v. Hodges* (C.A. 5th 1954), 218 F.2d 158; *Narragansett Improvement Company v. United States* ([1st Cir.] 1961, 290 F.2d 577. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court may still find that "[A] findings is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction

that a mistake has been committed.'" U[nited] S[tates] v. U.S. Gypsum Co. (1948), 68 S.Ct. 525, 333 U.S. 364, 92 L.Ed. 746.

Claimant submits that the DLI decision must be reversed for the following reasons:

The first appropriate rehabilitation option for this claimant is not option (c) when it is considered that, if the claimant attempts the self-service station job, in a short time he will no longer be able to walk.

Option (c) is inappropriate because there is no unconditional medical release to work at any job in the claimant's job pool, as is required under the law.

Option (c) is not appropriate in this matter because conditions were placed on the panel recommendations, which is prohibited under the law.

The decision of the department is erroneous because there is a total lack of proof in the record that the self-service station attendant job is typically available to the claimant, given his physical restrictions.

The decision of the department must be reversed for failure of the department to follow its own rules in that the rehabilitation panel report was not signed by all members of the panel as is required by law.

Since option (c) is not an appropriate rehabilitation option for the claimant, the department should have proceeded to address the other options set forth in section 39-71-1012, MCA, which it failed to do, so the claimant must be awarded permanent total disability benefits.

In the event that this court should determine that the department decision was correct with respect to the first appropriate rehabilitation option, the department erred in determining that the defendant was entitled to be reimbursed for total rehabilitation benefits paid under the department's order of November 9, 1992, because total disability benefits must be paid up to the time of the final order, not the initial order of determination.

Claimant's Brief on Appeal (all caps in original).

Dispositive of the merits of this appeal is this Court's finding that the hearing examiner's determination that the claimant is physically able to perform the duties of an auto self-service gas station attendant is not supported by substantial evidence and is clearly erroneous in light of the deposition testimony of Dr. Davenport and Mary Mistal. This Court is in as good a position as the hearing examiner to assess that deposition testimony. See ***Jones v. St. Regis Paper Co.***, 196 Mont. 138, 639 P.2d 1140 (1981).

Sandy Besel revealed that the weight limit was not 10 pounds as set forth on the job description, but more accurately 7 to 15 pounds and up to a maximum of 20 pounds.

Further, she clarified that an attendant would be required to bend or squat to retrieve oil from a low shelf. Ms. Mistal, while not having the testimony of Ms. Besel, did respond to hypothetical questions which set forth these exceptions. She expressed concern over claimant's ability to perform these tasks. Dr. Davenport was more definite in his rejection of the position when the changes in the job description were given. When asked about claimant's ability to perform the job, Dr. Davenport emphatically stated that the claimant would be able to work in this position for "a week or two," or perhaps up to three or four months, but that ultimately he would be unable to continue working. In light of this medical testimony, the hearing examiner's finding at page 11 of his decision that:

A review of the transcripts reveals, not that there was a revocation of physician approval, but rather that Dr. Davenport has reservations with regard to the long-term effect of physical activity on the knee condition, which he predicts will deteriorate regardless of the amount of activity. . . . Dr. Davenport clearly feels that the claimant would be capable of performing those duties, essentially encompassing the full spectrum of physical duties described both in the written job description and in the testimony of Ms. Besel. As such, it is concluded the medical approval of the identified position remains in effect.

was not supported by substantial evidence and was clearly erroneous. While the Court recognizes that Dr. Davenport testified that claimant could perform the duties for a short period of time, such short term ability to work does not satisfy the statutes. Sections 39-71-1012 and 1017 state:

39-71-1012. Rehabilitation goal and options. (1)The goal of rehabilitation services is to return a disabled worker to work, with a minimum of retraining, as soon as possible after an injury occurs.

(2) The **first appropriate option** among the following must be chosen for the worker:

- (a) return to the same position;
- (b) return to a modified position;
- (c) return to a related occupation suited to the claimant's education and marketable skills;
- (d) on-the-job training;
- (e) short-term retraining program (less than 24 months);
- (f) long-term retraining program (48 months maximum); or
- (g) self-employment.

(3) Whenever possible, employment in a worker's local job pool must be considered and selected prior to consideration of employment in a worker's statewide job pool.

39-71-1017. Rehabilitation panel report. (1) the rehabilitation panel shall:

- (a) review all records, statements, and other pertinent information; and

- (b) prepare a report to the department, with copies to the insurer and worker.
- (2) The report must:
 - (a) identify the **first appropriate** rehabilitation option by following the priorities set forth in 39-71-1012;

Use of the word "appropriate" in two places indicates that the legislature intended the word to have meaning. "Appropriate" means "suitable" or "compatible." Webster's New Collegiate Dictionary (1979). The goal of rehabilitation is to return a person to a job which will sustain him and his family, not to a situation which will worsen his condition. In this case the medical testimony shows that the job approved by the Rehabilitation Panel, and thereafter by the DLI's hearing examiner, was neither suitable nor compatible with claimant's condition.

The above conclusion is dispositive of the main issue in this matter, but the Court will briefly address other arguments made by counsel.

The claimant argues that the failure of all Panel members to sign the Rehabilitation Panel Report must result in reversal and cites the case of ***Young v. State Compensation Insurance Fund***, WCC No. 9012-6632 (March 2, 1993). In this case only the Panel chair signed the report. However, claimant did not raise the issue below and the Court will not consider an issue raised for the first time on appeal.

The claimant also argues that the Panel recommendation is void because it contains a "qualifier" to the Panel Report. Since the decision below is reversed, this issue is moot.⁽⁴⁾

Finally, claimant challenges part of the Order entered on November 9, 1992. That Order directed the State Fund to reinstate total rehabilitation benefits but also provided that "[r]espondent is entitled to reimbursement of any total rehabilitation benefits paid pursuant to this order in the event of Claimant's failure to prevail on the substantive issues . . ." Claimant challenges the latter provision both as to its correctness and as to the DLI's jurisdiction to make it. However, claimant's challenges are conditioned upon the Court affirming option (c). Since that option has not been affirmed it is unnecessary to further consider claimant's arguments in this regard.

REMEDY

Claimant argues that since no evidence was presented regarding other options, the only alternative is to declare him permanently totally disabled. He cites *George v. Transamerica Company*, WCC No. 9106-6170 (May 27, 1992) and ***State Compensation Mutual Insurance Fund v. Russell***, WCC No. 9206-6469 (October 6, 1992) as precedent. In ***George*** this Court concluded that the Rehabilitation Panel did not have statutory authority to refer a case back to the insurer for additional rehabilitation services. In ***Russell*** the Court held that the DLI's hearing examiner similarly lacked the authority to refer a case back to the rehabilitation provider. Those decisions effectively preclude the

Panel and the DLI from developing additional information as to lower options where the rehabilitation provider concludes that a particular option is appropriate and does not go on to evaluate the lower options. Thus, according to claimant, where option (c) recommendation is rejected the Court, the DLI and the Rehabilitation Panel are powerless to develop the further information needed to determine whether options (d), (e), (f) or (g) are appropriate. The Court disagrees.

Section 39-71-1017(2)(a) requires the Rehabilitation Panel to "identify the first appropriate option." (Emphasis added.) To do so, it must consider each of the options, serially, until it arrives at an appropriate one. If option (c) is not appropriate, then the statutes mandate that it consider option (d), and so on. By implication, the Panel and the DLI, and ultimately this Court, must have the power to assure compliance with that mandate. Since the DLI and the Rehabilitation Panel never reached option (d) and below, and information relating to those options was never developed, they must now do so. Upon remand the DLI shall enter such orders as necessary to develop the information needed for the Panel to fulfill its duty to consider option (d) and below. Insofar as **George** and **Russell** are inconsistent with this decision, they are overruled.

ORDER

The Decision below is reversed. The finding that option (c) is the first appropriate rehabilitation option under section 39-71-1012 and 1017, MCA, was clearly erroneous and contrary to the medical evidence. The matter is remanded to the DLI.

IT IS HEREBY ORDERED that upon remand the DLI and the Rehabilitation Panel shall enter such orders and take such steps as are necessary to develop information needed to determine whether option (d), (e), (f) or (g) or none of them, is the first appropriate option, and shall designate the first appropriate option.

DATED in Helena, Montana, this 10th day of March, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Andrew J. Utick
Mr. Laurence A. Hubbard
Ms. Melanie A. Symons

1. 1987 Montana Laws, ch. 464, sec. 73 provided an effective date of July 1, 1987 for the 1987 provisions. The July 1, 1991 effective date of the repealer was specified in 1991 Montana Laws, ch. 574, sec. 16.

2. The other members of the Panel, Joe Taylor and Jim Dobbins submitted a Rehabilitation panel report addendum which was received by the hearing examiner on March 31, 1993, after the hearing. This document states that they concur in the option recommended in the Panel report. The Addendum was not properly admitted into evidence and it should not have been included in the record. However, it has no bearing on the outcome of this case.

3. Functional Capacities Evaluation and Functional Capacities Assessment are used interchangeably in this file. The report created as a result of the tests is referred to as an Estimated Functional Capacity form (EFC).

4. In any event, a reading of the language to which claimant objects shows that it is merely a recommendation rather than a qualifier. The Panel Report reads in relevant part, "[t]he panel recommends placement assistance be offered this claimant." (Emphasis added.)