

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 18

WCC No. 9306-6821

JOYCE RIDGEWAY SATHER

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

DECISION AND ORDER ON APPEAL

This is an appeal from a decision of the Montana Department of Labor and Industry (DLI), which is set forth in **Findings Of Fact; Conclusions Of Law; Order** entered by Gordon Bruce, a DLI hearing examiner. The DLI decision determined that appellant, Joyce Ridgeway Sather (Sather), is capable of returning to work as a motel clerk. Sather appeals.

Factual Background

Sather injured her back on October 30, 1990, while employed as a dry cleaner. (*Tr. at 6-7, Ex. No. 5.*) She underwent back surgery for a herniated lumbar disc in March of 1991. On September 13, 1991, Dr. Donald See performed an independent medical evaluation and concluded that Sather had reached maximum medical recovery. Sather's treating physician, Dr. J.V. Matthews, restricted her to occasional lifting and carrying up to a maximum of 20-25 pounds and more frequent lifting/carrying up to a maximum of 10-15 pounds. He also concluded that Sather could not safely return to her former job as a dry cleaner.

Sather was referred to a rehabilitation provider pursuant to the provisions of chapter 71, part 10 of Title 71, MCA (1989). The rehabilitation provider identified three jobs as suited to Sather's education and skills. Dr. Matthews approved all three jobs.

A rehabilitation panel was then empaneled pursuant to section 39-71-1015, 1016, MCA. The panel concluded that the first appropriate return to work option for Sather was option (c) of section 39-71-1012, MCA, which is "return to a related occupation suited to the claimant's education and marketable skills." The panel identified the position of motel clerk as suited to claimant's education and marketable skills. The position was medically approved by Dr. Matthews and the panel verified that it was typically available "within the

claimant's local and/or state wide job pool." (*Ex. No. 11.*) On May 21, 1992, the DLI issued a Final Order of Determination designating option (c) as the appropriate rehabilitation option. (*Ex. No. 13.*)

Sather then requested a hearing. The hearing was held on April 13, 1993. A decision affirming the panel report was issued on June 10, 1993. On June 25, 1993 Sather filed a notice of appeal with this Court, styled Claimant's Petition for Appeal to the Worker's [Sic] Compensation Judge.

Grounds For Appeal

Sather contends that she does not possess the requisite skills to work as a motel clerk and that she should be retrained.

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 judgement 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, 288, 829 P.2d 1 (1992).

Discussion

The DLI decision applied section 39-71-1012, which provides:

39-71-1012. Rehabilitation goals 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.

Sather is 42 years old. Her work history includes four years as a dry cleaner worker, seven years as a motel maid, three years as an apartment manager and six months as a motel clerk. Susan Kern, a rehabilitation counselor retained by the insurer, identified the position of motel clerk as an appropriate return to work alternative. The position was medically approved by Dr. Matthews.

Sather argues that she has tried to find employment in the Bozeman area as a motel clerk but has been unsuccessful. She also claims that she does not have the computer, typing, bookkeeping and telephone skills necessary for the position and is unable to sit for long periods of time. She contends that she needs additional training to be competitive in the motel job market in Bozeman. She argues that her prior experience as a motel worker is insufficient in today's job market and asserts that she needs to acquire additional skills to "separate her from the herd." Sather points out that a report prepared by Susan Kern, recommended that she participate in the Career Transitions Computer Literacy Course, and that there was discussion about her attending the Job Service Readiness Class. She contends that retraining was the most appropriate option for her.

Sather testified that she made numerous applications for jobs as a motel clerk but was unable to obtain a job. Failure to obtain an actual job, however, does not rebut an option (c) determination. By statutory definition a worker's job pool means:

those jobs typically available for which a worker is qualified, consistent with the worker's age, education, vocational experience and aptitude and compatible with the worker's physical capabilities and limitations as the result of the worker's injury. **Lack of immediate job openings is not a factor to be considered.**

Section 39-71-1011(7)(a), MCA (emphasis added). The statute further provides that a worker's job pool may be either local or statewide. Jobs need only exist, they need not be available. ***Allison v. State Compensation Insurance Fund***, WCC No. 9209-6588 (April 19, 1993). Ms. Kern testified that the job of motel clerk was typically available in both Bozeman and statewide.

In ***Dilling v. Buttrey Foods***, 251 Mont. 286, 290, 825 P.2d 1193 (1991), the Montana Supreme Court adopted this Court's definition of what constitutes jobs that are "typically available":

[T]here is labor market documentation of positions, not necessarily openings, for which an injured worker has marketable skills and access to within his or her job pool. The mere existence of the positions is not enough, however, if there are positions for which the claimant has the skills and physical capabilities to perform, those positions are typically available."

(Citing ***Roby v. A. Basil Canavan*** (1990), W.C.C. No. 785.) The Court further held that a claimant's physical ability to perform a job and ability to compete for the job must be considered in making a determination that a job is "typically available". ***Dilling*** at 291. In this case the panel report and the testimony of Ms. Kern supports a finding that Sather is able to perform and compete for motel clerk jobs and that those jobs are available both statewide and locally. Exhibit No. 10 indicates that there are currently approximately 800 motel clerk jobs statewide and that there are 23 motels in Bozeman. There is a high turnover of motel clerks.

Sather argues that she is not qualified for a position as a motel clerk because she has no computer skills, few typing skills and no experience with telephone systems. However, Susan Kern testified that Sather's lack of computer and typing skills would only preclude her employment by some of the larger motel chains. Sather testified that she could "henpeck" on the typewriter, using one or two fingers. Ms. Kern testified that the typing skills needed by motel clerks are "basic fill in the, the blank kind of typing or typing an invoice." (Tr. at 50.) Ms. Kern testified that Sather was qualified to work as a motel clerk.

Moreover, Sather's job search was self-defeating. She testified that when she applied for jobs she told prospective employers that they "would have to go through workman's [sic] compensation and through the Doctor" to get approval for her employment. (Tr. 24-5.) It is hardly surprising that the prospective employers did not call back. She also made only one round of applications and then quit looking.

Sather points out that she is unable to sit for long periods of time and is unable to do much lifting. However, Dr. Matthews approved all the physical demands of a motel clerk. At the DLI hearing Sather conceded that she could physically perform the duties of a motel clerk.

Sather contends that she needs retraining since she is not familiar with telephone systems and does not have the bookkeeping skills required of a motel clerk. However, Ms. Kern testified that no formal training in telephone systems is required of motel clerks and that employers provide on the job training on how to use their systems. Ms. Kern also testified that Sather had sufficient skills to perform the bookkeeping requirements. While working as an apartment manager, Sather took payments for rents and deposits and paid bills. Sather also worked as a motel clerk for a period of approximately six months.

Sather next argues that she needs additional training to be competitive and to "separate her from the herd." However, the return to work options do not require proof of a "competitive edge."

Finally, Sather notes that Ms. Kern recommended that she participate in the Career Transitions Computer Literacy course and suggested that she attend a Job Service Readiness class. Ms. Kern explained in her testimony that she recommended the courses as a means for Sather to enhance her skills. The courses are not a prerequisite to Sather's return to work.

There is substantial evidence supporting the decision below. The decision is therefore **affirmed**.

ORDER

IT IS HEREBY ORDERED that the June 10, 1993 decision of the Montana Department of Labor and Industry is **affirmed**.

DATED in Helena, Montana, this 14th day of March, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Marcelle C. Quist
Mr. Laurence A. Hubbard