IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9501-7212

RONALD L. HULFORD

Appellant

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

ORDER ON APPEAL

This is an appeal by Ronald L. Hulford (claimant) from a Department of Labor and Industry determination that option (c) of section 39-71-1012, MCA (1987), is the first appropriate rehabilitation option. The final decision of the Department's hearing examiner overruled a Rehabilitation Panel determination that option (e) -- short term training -- is the first appropriate rehabilitation option for claimant.

Factual Background

Claimant suffered an industrial injury to his low back on March 29, 1988, while employed by Hanser Automotive Company in Billings, Montana. Hanser was insured by the State Compensation Insurance Fund, which accepted liability for the injury.

Following his injury, claimant initially returned to work. However, in 1990 he ceased working due to pain and has not worked since then.

He has chronic pain due to "three-level degenerative disc disease . . . the symptoms [of which] were brought to the forefront by the injury." (Lovitt Dep. at 6.) He is not a candidate for surgery and is being treated conservatively with a *Rainey jacket* for back support, medication and an exercise program. (*Id.*)

Claimant is presently 42 years old. He is of low-average intelligence. (Ex. C at 50.) While he is a high school graduate, his reading, language and math skills are substandard. In the autumn of 1990, the claimant took the General Aptitude Test Battery (GATB) and the Adult Basic Learning Examination (ABLE). His scores on the GATB ranged from the 2nd to the 15th percentile. On the ABLE he tested at the 6.1 grade level in math, the 6.6 level in language, the 6.3 level in reading comprehension, and the 10.9 level in vocabulary. (Ex. C at 59-65.)

Prior to his employment at Hanser, claimant held a variety of unskilled jobs. He worked as a sawmill worker, dairy farm worker, dump truck driver, salvage worker, construction laborer, pipeline worker, front end loader operator, and newspaper delivery driver.

In light of claimant's inability to return to his time-of-injury job, the State Fund invoked the rehabilitation procedures in effect at the time of the injury. In May 1990, it referred claimant to Certified Rehabilitation Consultants for evaluation. Andrea K. Meyer, a certified rehabilitation consultant, was assigned to his case.

Claimant underwent a functional capacities evaluation (FCE) on August 27, 1990. The evaluator reported claimant's physical ability for work as "light based on maximum lifting capacity of 38 lbs. from the floor position and his tolerance to activities on a frequent effort level." (Ex. B at 9.)

On October 1, 1990, Dr. Lovitt notified the State Fund that claimant had reached maximum medical healing and that he had rated claimant as having an 18% whole man impairment. He suggested that claimant would be "best served by getting him back to a tolerable form of activity so that he could earn a living . . . ." (Ex. A at 20.) In a separate letter to rehabilitation consultant Andrea Meyer the doctor ruled out claimant's return to his time-of-injury job. (*Id.* at 21.) He advised that claimant had "rather significant limitations" and that "he is only going to be able to be employed in a sedentary type job with minimal sitting." (*Id.)*

At the time it referred the case to Meyer, the State Fund requested that Meyer work with the claimant and the employer in an attempt to return claimant to work in a modified capacity as a wrecker driver. Hanser, however, was "unable to accommodate Mr. Hulford's combination of physical and functional limitations." (Ex. C at 56.) On May 29, 1991, Meyer reported that she was unable to identify any "'sedentary unskilled type jobs' suitable for this claimant" and "recommended that additional services be provided to develop feasible, medically approved training plan to return this individual to employment." (*Id.* at 57.)

Dr. Joseph McElhinny, a clinical psychologist, examined the claimant on August 28, 1991. He found that claimant

> . . . is a passive dependent individual who is socially isolated. He exhibits many features of a schizoid personality disorder. He most likely lacks many basic interpersonal skills and **will not do well in vocational settings where such skills are required.** [Emphasis Added.]

(Ex. C at 52.) He recommended that claimant be evaluated for antidepressant medication therapy, attend assertiveness training in an effort to increase his social skills, and be considered for further vocational rehabilitative services. (*Id.* at 52-53.) Dr. McElhinny further commented that the claimant

> . . . has the capacity to learn new job skills. However, **a concrete approach is recommended in dealing with this individual.**
>
> The possibility of a financial settlement in this case may impair rehabilitative efforts. It would be in Mr. Hulford's best interest to clarify and settle this case as soon as possible. **It would also be in his best interest to be trained for appropriate employment opportunities.** [Emphasis added.]

(*Id.* at 52.)

In September 1991, claimant was tested by Thomas Dell of the Vocational Testing Service. Dell found that claimant may have trouble performing clerical-type work and should not be considered for jobs which "require specific sales ability . . . since this individual appears to be rather introverted." (*Id.* at 45.) He observed that "[s]hould short-term retraining be considered with this individual it would be recommended that he attend the Adult Education Center to upgrade his academic skills prior to attending a vocational-technical program" and recommended and that on-the-job training and a conditioning program be considered. (*Id.*)

Meyer submitted her final report in September 1991. In it she stated "that should a vocational rehabilitation plan be developed, that Mr. Hulford would need services for depression and physical reconditioning, and direct job placement assistance or development of an on-the-job training position in a hands-on occupation . . . ." (*Id.* at 38.)

Following Meyer's September 1991 report, the State Fund changed horses. On October 25, 1991, it referred claimant to Crawford & Company Health and Rehabilitation for another rehabilitation assessment to determine his employability. (*Id.* at 25.) Chuck Hooper, a certified vocational counselor, was assigned to the case. On December 5, 1991, he reported that claimant could return to work as an auto rental clerk, electronic assembler, self-service gas station attendant, and floor runner. (*Id.)* Job analyses for these positions were approved by Dr. Lovitt in November 1991. (Lovitt Dep. Exs. 8 through 12.) Hooper verified the existence, compatibility, and wage range for these occupations on a local and statewide basis. (Ex C. at 31.)

Review by a Rehabilitation Panel was then requested pursuant to section 39-71-1015(3), MCA. On July 1, 1992, the Panel chair notified the State Fund that it "could not recommend a first appropriate return to work option as outlined in Section 39-71-1012, MCA, with the information available for review." (Ex. A at 15.) The Panel found that claimant could not compete in the labor market for any of the positions identified by Hooper and approved by Dr. Lovitt, and noted that the jobs identified for claimant had no relationship to his past work experience or education and did not take into account psychological barriers. (Ex. A. at 15-16.) The Panel requested that the State Fund have the vocational consultant identify other option (c) alternative jobs or "develop a higher return to work option." (*Id.*)

The matter was referred back to Crawford, which then assigned the case to Patricia Murray, who is also a certified rehabilitation counselor. Initially, Murray did some counseling with the claimant to see if they could identify a job he might be able to perform. (Tr. at 56.) Later she considered jobs he could possibly do if he obtained some additional training. (*Id.*) Job analyses for the positions of computer assisted drafter and accounting clerk/bookkeeper were prepared and submitted to Dr. Lovitt, who approved them in June 1993. (Lovitt Dep. Ex. 5-6.) In November 1993, Dr. Lovitt approved an additional job description for a motel clerk. Murray verified the existence, compatibility and wages for the three positions.

On December 22, 1993, Murray submitted a RETRAINING PLAN. (Ex. C at 1.) In response to the previous instructions of the Panel, she wrote, "This vocational consultant was **unable to identify any further vocational alternatives** which would permit Mr. Hulford to return to direct employment based upon his transferable work skills." (*Id.* at 2, emphasis added.) She further opined:

> It is this vocational consultant's opinion that the best route to return Mr. Hulford to gainful employment will be for him to upgrade his academic skills through Adult Education. Once he has upgraded his academic skills to a competitive level, this consultant recommends that direct placement assistance be provided to assist Mr. Hulford in returning to employment in unskilled and semi-skilled occupations which have been medically approved.

(*Id.* at 3.) She went on to say:

> **The first appropriate return-to-work option for Mr. Hulford has been identified as Option E, Short Term Retraining.** This consultant has recommended that Mr. Hulford attend Adult Basic Education for the purpose of upgrading his academic skills. Upon his successful **completion of coursework** [sic] through Adult Basic Education, this consultant recommends direct job placement assistance for Mr. Hulford in unskilled and semi-skilled occupations which have been medically approved. [Emphasis added.]

(Id. at 5-6.) Murray then outlined a specific plan which called for claimant to attend and complete adult basic education courses, followed by eight weeks of direct job placement assistance. (*Id.* at 6.) She determined that claimant should attend a minimum of four months of courses, at the end of which Mike Joyce would determine what additional courses were necessary for claimant to upgrade his academic skills to a competitive level. (*Id.*) She indicated that the job placement assistance would involve placing claimant "in unskilled and semi-skilled occupations which have been medically approved." (*Id.* at 3.)

The Rehabilitation Panel met on February 25, 1994, to consider the first appropriate option for claimant. (Ex. 1.) On March 3, 1994, it issued a report concluding that option (e) was the

first appropriate option. The Panel reaffirmed its determination of June 12, 1992, regarding the positions identified as alternative occupations under option (c).

> Under option (c), the vocational consultant attempted to identify alternative occupations suited to the claimant's education and marketable skills. These positions were reviewed by the Panel on June 12, 1992, and considered inappropriate for the claimant. The vocational [consultant - Patricia Murray] could not identify any on-the-job training positions under option (d). The consultant **did identify a short-term retraining plan under option (e)**, however. [Emphasis added.]

(*Id*.) Comments by the Panel members indicated their belief that adult education courses are necessary for claimant to compete in the job market. Motel clerk was identified as a specific job which claimant could perform provided he upgraded his academic skills. (*Id*.)

On April 12, 1994, Joan Joyce, rehabilitation counselor with the Department of Social and Rehabilitation Services, met with claimant to discuss vocational retraining. Based on claimant's statements concerning his physical limitations, she determined that his physical condition was not consistent with a vocational plan and recommended against pursuing a plan at that time. (Ex. A at 3.) Nonetheless, claimant entered the Adult Education Program in July 1994. (Tr. at 18.) He enrolled in mathematics, language arts and a keyboarding class.

Meanwhile, both claimant and the State Fund appealed the Panel determination. A hearing was held before a Department hearing examiner on October 27, 1994, in Billings, Montana.

Mike Joyce, a rehabilitation counselor who works for the Adult Education Program which claimant is attending, testified by telephone. Joyce's job is to "[d]eal with students on personal and educational issues that may be barriers to their education, try to resolve those issues with the students so that they can leave the program and become self-sufficient in their education and training." (Tr. at 6.) He has had daily contact with the claimant at school. He testified that the school has made various accommodations to enable claimant to attend classes. For example, the claimant is free to get up and move around at will. Joyce further testified that the claimant initially attended class four days a week, but due to his physical condition has cut back his attendance to three days a week. (*Id*. at 8-9.)

When questioned about his observations of the claimant Joyce testified:

> My observations are that there is a very pure effort beginning [sic] put forth by an individual who is giving 100% to his educational program. What I am observing very often that Mr. Hulford is preoccupied with almost, very obvious pain. And this is also being conveyed to me by his classroom instructors. He is on task probably 70% of

> the time, the last time I tasked [sic], ah [sic] checked, but not on task 30% of the time because of almost overwhelming pain.

(Id. at 9.) When asked if the claimant could sit for extended periods, Joyce stated:

> My observation of Mr. Hulford is that he is not able to sit for an extended period of time. He has to get up and move around and stand up move around in his chair and have accommodations to do that.

(Id. at 15.) Regarding Hulford's career goals, Joyce testified:

> And that reality is that there are many barriers to placement in any kind of employment situation or even training situation at the present time, given the very obvious limitations that exist and are observed almost daily.

(Id. at 19.) Based on his personal observations, Joyce felt it unrealistic to think in terms of full-time employment for the claimant. (*Id.* at 22.)

At the time of the hearing the claimant was doing well in school and achieving good grades for his level. Claimant presently functions at a fifth and sixth grade level in language and math, respectively. (Ex. F.) He types approximately 15 words per minute. (*Id.*)

Claimant testified that he enjoys school, but finds attendance difficult because of his pain. (Tr. at 32.) He wears his back brace while attending school. He takes Ibuprofen - 800 milligrams -- and Flexeril daily. (*Id.* at 47.) He testified that he would find it hard to put in an eight-hour day "[b]ecause my back won't let me do eight hours." (*Id.* at 44.) The hearing examiner made no specific finding concerning claimant's credibility and there is no indication in his findings that he found the claimant to be incredible.

Murray testified at the hearing. The opinions she expressed were at odds with the Panel report and with her own December 1993 report. She supported option (c), testifying that without adult education the claimant is employable in the jobs previously approved by Dr. Lovitt, with the possible exception of the computer generated drafter and the accounting position. (Tr. at 67.) She referred to adult education courses as merely enhancing claimant's employability. (*Id.*) She provided no explanation or justification for her repudiation of her prior recommendation of adult education and job placement. Nonetheless, the hearing examiner adopted her testimony in concluding that option (c) was the first appropriate rehabilitation option for claimant.

STANDARD OF REVIEW

The claimant argues that the findings of the hearing examiner are clearly erroneous. The applicable standard of review is set forth in section 2-4-704(2), MCA, which 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 the administrative findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

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, 88 (1992) (quoting section 2-4-704(2)(a)(v), MCA). However, 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. Semitool, Inc., 252 Mont. 286, 289*, 829 P.2d 1, 2 (1992).

DISCUSSION

The hearing examiner found that the claimant is able, in all respects, to perform the jobs identified by vocational consultant Murray. He overruled the determination of the Rehabilitation Panel and found that option (c) is the first appropriate option for the claimant.

In reaching his decision the hearing examiner relied on the testimony of Murray, giving it the greatest weight. He concluded:

> The professional opinion of Ms. Murray carries the greatest weight as to the claimant's current marketability. Her testimony was lucid and credible. **She feels the goal of upgrading the claimant's academic skills has been met.** There is nothing to suggest a full two year program, or, for that matter, even a one year program, was necessary to accomplish the desired end. The Rehabilitation Panel's recommendation did not require such a scenario either. The insurer has adequately established the claimant is physically able to return to work in an occupation suited to his education and marketable skills. [Emphasis added.]

(Findings of Fact, Conclusion of Law, and Order at 14-15.)

In stating that Murray testified that claimant had met the **"the goal of upgrading the claimant's academic skills"**, the hearing examiner misapprehended Murray's testimony. She did not testify that claimant's additional education met the goal set forth in her original recommendation. Rather, she said:

> Mr. Hulford has, **before he went to adult ed**, has the aptitudes and abilities to perform these jobs based on the information provided by the employers, that they don't require special education beyond high school, they don't require previous experience, they're willing to teach the worker through demonstration what needs to be done on the job. The fact that he's gone to adult education and upgraded his skills is a credit to him, and he's learned computer skills that he didn't have before. To an employer, the fact that he has knowledge of a computer makes him more employable than he -- **it just enhances and makes him a better likely candidate to be employed than it did before, but it doesn't mean that he wouldn't have been employed before.** [Emphasis added.]

(Tr. at 67.)

Her testimony is clear: She testified that claimant is employable **without** adult education. Thus, to her, **any** amount of adult education is merely frosting on the cake.

Murray's testimony at hearing represented an about-face. She repudiated her original recommendation in its entirety. I repeat what she stated and recommended in her report:

> This vocational consultant was **unable to identify any further vocational alternatives** which would permit Mr. Hulford to return to direct employment based upon his transferable work skills.

(Ex. C at 2.)

> It is this vocational consultant's opinion that the best route to return Mr. Hulford to gainful employment will be for him to upgrade his academic skills through Adult Education. Once he has updated his academic skills to a competitive level, this consultant recommends that direct placement assistance be provided to assist Mr. Hulford in returning to employment in unskilled and semi-skilled occupations which have been medically approved.

(Ex. C at 3.)

> **The first appropriate return-to-work option for Mr. Hulford has been identified as Option E, Short Term Retraining**. This consultant has recommended that Mr. Hulford attend Adult Basic Education for the purpose of upgrading his academic skills. Upon his successful **completion of course work** through Adult Basic Education, this consultant recommends direct job placement assistance for Mr. Hulford in unskilled and semi-skilled occupations which have been medically approved. [Emphasis added.]

*(*Ex. C at 5-6.) With regard to the duration of adult education courses necessary, Murray said:

> Mr. Hulford will be expected to attend classes at Adult Education for a minimum of two to four hours a day, five days per week, for a continuous period of four months.
>
> . . .
>
> Once Mr. Hulford has upgraded his academic skills to a competitive level **as determined by Mr. Mike Joyce,** he will participate in eight weeks of direct job placement services . . . . [Emphasis added.]

(*Id.* at 6.) Earlier in her report, Murray had indicated that only **after** four months would Joyce be able to "assess how long it will take for Mr. Hulford to upgrade his basic language and math skills and complete courses in computer literacy to successfully compete for employment in the job market . . . ." (*Id.* at 3.)

Murray provided no explanation for her about-face. While the hearing examiner was in the best position to judge credibility, in this case he misinterpreted Murray's testimony and failed to consider the fact that she was repudiating her prior opinions. He gave no consideration to her prior recommendation or to the recommendations of Dr. McElhinny, Andrea Meyer, Thomas Dell and the Rehabilitation Panel. Other than the recommendation in Murray's report that claimant **complete** four months minimum of adult education course work (*Id.* at 5-6), and the statement that Mike Joyce would then determine how much additional course work would be required for claimant to upgrade his academic skills to a competitive level (*Id.* at 3), the hearing examiner had no evidence indicating the amount of adult education necessary to make claimant employable. Reviewing the evidence as a whole, I find that in light of the reliable, probative, and substantial evidence, the decision of the hearing examiner was clearly erroneous.

The hearing examiner cited this Court's decision in *Sather v. State Fund,* WCC No. 9306-6821 (March 4, 1994), for the proposition that "return to work options do not require proof of a 'competitive edge.'" While it is true that a competitive **edge** is not required, the claimant must at least have a fair opportunity of employment in the approved jobs. In this case, overwhelming evidence was presented showing that despite graduating from high school the claimant's academic performance level in many areas is at a fifth and sixth grade level and that he does not have the basic academic or personal skills necessary to obtain employment at jobs approved by Dr. Lovitt and Murray.

Claimant argues that this Court should find that claimant is permanently totally disabled. It cannot do so. Under the statutes in effect at the time of the claimant's injury, the Department must determine the first appropriate option. If none of the statutory options are appropriate, then the claimant must certainly be deemed permanently totally disabled. However, should the hearing examiner so find on remand in this case, there is ample evidence to support a finding that the first appropriate option for claimant is option (e). Dr. Lovitt medically approved specific jobs for claimant. Despite some difficulties, claimant is

continuing to attend his courses. The hearing examiner is in the best position to judge the credibility of claimant's pain complaints and whether they preclude him from working despite Dr. Lovitt's approval.

ORDER

The January 6, 1995 decision of the hearing examiner is **reversed** and this matter is **remanded** for further proceedings consistent with the foregoing discussion.

Dated in Helena, Montana, this 7th day of September, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Cynthia K. Thornton
Mr. Charles G. Adams
Ms. Melanie A. Symons