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JEFFREY BECERRA, APPELLEE, V. UNITED PARCEL SERVICE, APPELLANT.

822 N.W.2d 327

Filed September 28, 2012. No. S-11-1098.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation: Wages.** The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law.
3. **Workers' Compensation: Appeal and Error.** Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
6. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
7. **Workers' Compensation.** Workers' compensation cases are special proceedings.
8. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.
9. **Actions: Words and Phrases.** An "independent special proceeding" is one that is separate from the issues raised in any underlying dispute and is not a phase in a protracted special proceeding with interrelated phases.
10. **Final Orders: Appeal and Error.** When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of fewer than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
11. **Workers' Compensation: Wages.** For employees who are paid by the hour, the average weekly wage for workers' compensation purposes is determined pursuant to Neb. Rev. Stat. §§ 48-121 and 48-126 (Reissue 2010).

12. **Statutes: Appeal and Error.** An appellate court gives statutory language its plain and ordinary meaning.
13. **Workers' Compensation.** As a general rule, the Nebraska Workers' Compensation Act should be construed to accomplish its beneficent purposes.
14. ____. An injured employee is entitled to vocational rehabilitation services as may be reasonably necessary to restore him or her to suitable employment when the employee is unable to perform suitable work for which he or she has previous training or experience as a result of the injury.
15. **Workers' Compensation: Wages: Words and Phrases.** Accepting a job paying minimum wage does not automatically restore a claimant to suitable or gainful employment pursuant to Neb. Rev. Stat. § 48-162.01 (Reissue 2010), where the claimant's previous employment was at a significantly higher wage.
16. **Workers' Compensation.** The goal of any average income test is to produce an honest approximation of a workers' compensation claimant's probable future earning capacity.

Appeal from the Workers' Compensation Court. Affirmed.

Charles L. Kuper, of Larson, Kuper & Wenninghoff, P.C., L.L.O., for appellant.

M.H. Weinberg, of Weinberg & Weinberg, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

INTRODUCTION

An hourly employee who worked part time while attending college sustained a work-related injury. We must decide how to calculate his average weekly wage in order to determine the appropriate vocational rehabilitation priority—using his part-time wages, as the employer contends, or wages calculated using a 40-hour workweek, as the court below ruled. Under the circumstances of this case, a vocational rehabilitation plan seeking an average weekly wage based on a 40-hour week—the calculation used for purposes of permanent disability—best restores the employee to suitable employment. We affirm the award of the compensation court.

BACKGROUND

In July 2010, Jeffrey Becerra injured his lower back in an accident arising out of and in the course of his employment

with United Parcel Service (UPS). As a result, he suffered a 15-percent loss of earning capacity and is limited by permanent work restrictions. The compensability of Becerra's injury is not at issue, and there is no dispute that UPS paid all temporary total disability and permanent partial disability benefits owed.

At the time of the accident, Becerra earned $12.60 an hour and worked approximately 17 hours per week while attending college. The parties stipulated that Becerra had an average weekly wage of $217.86 for purposes of temporary disability and of $504 for purposes of permanent disability. Becerra testified that UPS had not offered him his former position or any alternative position. He desired formal retraining to lead him into a career other than loading or unloading parcels at UPS. Becerra testified that prior to the accident, he could have worked 40 hours per week on a regular basis if he had not been attending college. He stopped attending classes in the fall of 2010, but he wished to go back to school for an education in engineering. Becerra testified that there was nothing keeping him from working 40 hours per week at the time of trial.

The agreed-upon vocational rehabilitation counselor met with Becerra to develop a loss of earning capacity analysis and to discuss vocational rehabilitation options, but had not developed a vocational plan at the time of trial because he was unable to provide the compensation court with an agreed-upon or court-ordered average weekly wage. The counselor testified that the determination of the proper wage would affect the vocational priority that he would select: The vocational rehabilitation plan would more than likely be for retraining if the average weekly wage were determined to be $504 or be for job placement if the wage were determined to be $217.86 per week.

The compensation court framed the issue as whether a vocational rehabilitation plan should be aimed toward finding Becerra a job "at the $217.86 temporary total average weekly wage" or "at $504 per week for the permanent injury wage rate." The court found that Becerra was unable to obtain suitable employment at or near his preinjury wage rate and that a formal plan of retraining was the appropriate priority under

Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010). The court observed that Becerra's restrictions were permanent and reasoned that Becerra should not be limited to the average weekly wage for temporary disability. The court therefore determined that Becerra was entitled to a vocational rehabilitation plan of formal training and that the permanent wage rate calculation of $504 should be used to develop the formal plan.

UPS timely appealed, and we moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

UPS assigns two errors. First, UPS alleges that the compensation court erred as a matter of law in finding the appropriate average weekly wage to use in formulating a plan of vocational rehabilitation should be the permanent injury wage rate. Second, UPS contends that the court erred in finding Becerra was entitled to a vocational rehabilitation plan consisting of formal training.

STANDARD OF REVIEW

[1] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[2]

[2,3] The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law.[3] Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.[4]

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[1] See Neb. Rev. Stat. § 24-1106 (Reissue 2008).

[2] *Sellers v. Reefer Systems*, 283 Neb. 760, 811 N.W.2d 293 (2012).

[3] *Mueller v. Lincoln Public Schools*, 282 Neb. 25, 803 N.W.2d 408 (2011).

[4] *Id.*

ANALYSIS

Jurisdiction.

[4,5] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[5] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.[6]

[6-8] The compensation court's award was a final order. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.[7] Workers' compensation cases are special proceedings.[8] A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.[9] The award of vocational rehabilitation in the form of formal training eliminated UPS' claim that Becerra was not entitled to vocational rehabilitation. Thus, the order falls under the second category of final orders listed in § 25-1902 because it was made in a special proceeding and affected a substantial right.

[9] Becerra asserts that we lack jurisdiction because the compensation court decided some, but not all, of the issues before it. Specifically, he identifies the undecided issues as the type and the length of the retraining program. Becerra cites

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[5] *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[6] *Id.*

[7] *Id.*

[8] See *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011), *modified on denial of rehearing* 281 Neb. 978, 802 N.W.2d 420.

[9] *Big John's Billiards v. State, supra* note 5.

Big John's Billiards v. State,[10] where we iterated that an order resolving all the issues raised in an independent special proceeding is a final, appealable order. An "independent special proceeding" is one that is separate from the issues raised in any underlying dispute and is not a phase in a protracted special proceeding with interrelated phases.[11] While the proceeding in the instant case was a special proceeding, it was not an independent special proceeding.

[10] A more apt rule is that when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of fewer than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.[12] Here, the petition identified "rehabilitation" as an issue in dispute and the court determined that Becerra was entitled to vocational rehabilitation in the form of formal training. The court did not expressly reserve anything for later determination. Further, we find no authority—and Becerra points us to none—requiring that an award of vocational rehabilitation specify the length and type of retraining program.

Average Weekly Wage.

The compensation court found that the appropriate average weekly wage to use in formulating a plan of vocational rehabilitation should be the permanent injury wage rate under Neb. Rev. Stat. § 48-121 (Reissue 2010). UPS argues that § 48-121(4) is a schedule of compensation and is not applicable to the determination of what is suitable and gainful employment under § 48-162.01. UPS asserts that § 48-121 applies only to the payment of benefits and not to the calculation of wages. We disagree.

[11,12] For employees who are paid by the hour, the average weekly wage is determined pursuant to § 48-121 and Neb. Rev.

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[10] *Id.*

[11] See *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

[12] See *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008).

Stat. § 48-126 (Reissue 2010).[13] If an employee's rate of wages is fixed by the hour,

> his or her weekly wages shall be taken to be his or her average weekly income for the period of time ordinarily constituting his or her week's work, and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer, *except as provided in sections 48-121 and 48-122*.[14]

Consequently, an employee's weekly wages must be computed by averaging his or her earnings over the 6 months preceding the injury unless § 48-121 or Neb. Rev. Stat. § 48-122 (Reissue 2010) provides differently. Both § 48-121(4), regarding disability resulting from permanent disability, and § 48-122(2), concerning injuries resulting in death, provide that the weekly wages shall be computed upon the basis of a workweek of a minimum of 40 hours if the rate of wages was fixed by the hour. We give statutory language its plain and ordinary meaning.[15] Thus, when an employee paid by the hour suffers a work-related injury that results in permanent disability or death, the employee's average weekly wage is calculated by multiplying the rate of wages by a 40-hour workweek rather than by averaging that employee's actual wages over the 6 months before the accident. As this court explained:

> As to hourly employees, § 48-121(4) alters the computation of the average weekly wage under § 48-126 only to the extent that it requires that a minimum of 40 hours per week be utilized in making the computation, which would result in part-time hourly employees with permanent disabilities being treated as though they had worked a 40-hour workweek.[16]

Because Becerra was an hourly employee who suffered a permanent disability, his average weekly wage must be

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[13] *Mueller v. Lincoln Public Schools, supra* note 3.

[14] § 48-126 (emphasis supplied).

[15] *Rosberg v. Vap*, 284 Neb. 104, 815 N.W.2d 867 (2012).

[16] *Ramsey v. State*, 259 Neb. 176, 182, 609 N.W.2d 18, 22 (2000).

calculated based upon a 40-hour workweek under § 48-121(4). We conclude that the compensation court correctly calculated Becerra's average weekly wage based on a 40-hour workweek, or $504 for 40 hours at $12.60 per hour.

Vocational Rehabilitation.

The dispute in this case centers on the appropriate calculation of an employee's average weekly wage for the purpose of determining the lowest vocational rehabilitation priority that will result in gainful employment. Becerra testified that UPS had not offered him any position, and counsel for UPS offered to stipulate that UPS had not offered Becerra a job. Thus, as the parties acknowledge, the only possible priorities for a vocational rehabilitation plan are "[a] job with a new employer" or "[a] period of formal training which is designed to lead to employment in another career field."[17] The vocational rehabilitation counselor testified that his recommendation as to the vocational rehabilitation priority depended upon a determination of the average weekly wage. If the wage was determined to be $504 a week, the plan would be for formal training, but if the average weekly wage was determined to be $217.86, the plan would be for job placement with a new employer.

UPS asserts that the average weekly wage of $217.86 under § 48-126 should be used because it is based on the average hours Becerra worked as a part-time employee. On the other hand, Becerra contends that the vocational rehabilitation plan should use the permanent disability rate of $504, which is based on a minimum of a 40-hour workweek under § 48-121(4).

[13,14] As a general rule, the Nebraska Workers' Compensation Act should be construed to accomplish its beneficent purposes.[18] A primary purpose of the act is "restoration of the injured employee to gainful employment."[19] An injured employee is entitled to vocational rehabilitation services "as

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[17] § 48-162.01(3).

[18] See *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011).

[19] § 48-162.01(1).

may be reasonably necessary to restore him or her to suitable employment" when the employee "is unable to perform suitable work for which he or she has previous training or experience" as a result of the injury.[20]

Section 48-162.01(3) contains priorities for use in developing a vocational rehabilitation plan, and no higher priority may be selected unless all lower priorities have been determined to be unlikely to result in suitable employment for the injured employee. Because the stipulation eliminated three lower statutory priorities, only two priorities remained: a job with a new employer—the lower of the two priorities—or a period of formal training designed to lead to employment in another career field. In this case, we are concerned with determining which average weekly wage will best restore Becerra to gainful employment.

[15] This court previously considered what was meant by the terms "restore," "suitable employment," and "gainful employment" as used in § 48-162.01(1) and (3). In *Yager v. Bellco Midwest*,[21] an employee earned $220 per week and his hourly wage had increased to $5.85 at the time of injury. At the time of rehearing, the employee worked elsewhere, earning $3.35 per hour and working 31 hours per week. The employer argued that because the employee had obtained a minimum-wage job with a different employer, the employee was not entitled to vocational rehabilitation. We disagreed, stating:

> It is inappropriate to hold, from the mere fact that the injured worker has accepted a job resulting in a $104 weekly wage, that, by that act alone, he has foreclosed himself from some training that would enable him to return to the approximate level of the salary he was earning when he was injured.[22]

We accordingly held that "accepting a job paying minimum wage does not automatically 'restore' a claimant to 'suitable' or 'gainful' employment pursuant to § 48-162.01, where the claimant's previous employment was at a significantly higher

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[20] § 48-162.01(3).

[21] *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991).

[22] *Id.* at 897, 464 N.W.2d at 341.

wage."[23] We observed that the statutory goal is to return the worker to comparable employment.[24]

[16] In certain situations, an employee's actual earnings may not be a predictable measure of future earning capacity. We are mindful that Becerra was working only part time at UPS and that part-time employment with a different employer which paid an average weekly wage of $217.86 would arguably restore him to comparable employment. But the goal of any average income test is to produce an honest approximation of the claimant's probable future earning capacity.[25] As a treatise explains:

> [W]hen a high school or college student works on a full-time job during summer vacation, since he or she presumably expects to be a full-time worker eventually it is logical to calculate the earnings on a full-time basis. By the same token, for temporary benefits there is no reason to go beyond the part-time earnings, since they more accurately reflect actual loss during the period covered by the temporary disability.[26]

Here, Becerra was working part time while attending school, but there was no barrier to his working 40 hours per week at the time of trial and there is no indication that he wished to remain a part-time employee in the future.

Returning Becerra to employment paying an average weekly wage of $217.86 would not restore him to comparable employment. Becerra is not prevented from working 40 hours per week, but a 40-hour workweek yielding an average weekly wage of $217.86 would mean that Becerra would need to be placed in a job paying only $5.45 an hour—less than minimum wage and far less than the $12.60 hourly wage he was earning at UPS. As in *Yager v. Bellco Midwest*,[27] we determine that such employment would not restore an injured worker to

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[23] *Id.* at 896, 464 N.W.2d at 340.

[24] See *id.*

[25] *Mueller v. Lincoln Public Schools, supra* note 3.

[26] 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 93.02[2][d] at 93-38 (2011).

[27] *Yager v. Bellco Midwest, supra* note 21.

suitable employment. We conclude that the compensation court did not err in finding Becerra was entitled to a vocational rehabilitation plan consisting of formal training.

CONCLUSION

Because Becerra was a part-time hourly employee who suffered a permanent impairment, the compensation court properly calculated his average weekly wage for vocational rehabilitation purposes under § 48-121(4). We agree with the compensation court that seeking to place Becerra in employment where he would earn wages similar to those based upon the calculation used for permanent disability purposes would best achieve the goal of restoring him to suitable employment. Accordingly, we affirm the court's award of vocational rehabilitation consisting of formal training.

AFFIRMED.