


IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBIN A. DREW,
Appellant
vs.
MANPOWER OF SOUTHERN NEVADA,
Respondent.

No. 45963

FILED

JUN 30 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

This is a proper person appeal from a district court order denying a petition for judicial review of an administrative decision that affirmed the suspension of vocational rehabilitation benefits in a workers' compensation case. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Appellant Robin A. Drew suffered an industrial injury to her right wrist in 2001, which resulted in a permanent partial disability. Consequently, Drew was entitled to vocational rehabilitation benefits as part of her ensuing workers' compensation claim. In the summer of 2004, vocational rehabilitation counselor Deborah Adler was assigned to provide Drew with vocational rehabilitation services.

Adler and Drew then signed a rehabilitation agreement, under which Drew and Adler agreed to work toward developing a rehabilitation plan that encompassed an appropriate vocational goal within Drew's physical limitations. Additionally, under the rehabilitation agreement, Drew agreed, among other things, to participate fully in the rehabilitation process and to cooperate fully with her counselor(s); the agreement warned Drew that her "[f]ailure to . . . cooperate with the counselor(s) may risk suspension and/or termination of rehabilitation benefits." The agreement also instructed Adler to immediately report any problems that

she was having with the program or with Drew to the insurance carrier. Further, if problems arose, Adler was to "provide conflict resolution to assist in continuing with the plan development." Any conflict resolution was to be reported in writing to the carrier without delay.

In a report summarizing the activities completed toward developing a plan for Drew, Adler noted several concerns, including that Drew exhibited ongoing extreme anger toward the insurance administrator and negative emotional energy, which could inhibit her rehabilitation progress, and that Drew was verbally abusive at times, which Adler usually ignored in an attempt to further rehabilitation efforts. From July 14 to 16, 2004, Drew met with Adler and Tom Bucher, an employment specialist who worked for the same firm as Adler, to further discuss plan development and to attend meetings that Drew had scheduled with several professionals to discuss the details and requirements of different vocational possibilities. Adler's report indicated that Drew made a point to inform those professionals "as to how she had been wronged by the insurance company" and how the insurer's administrator had attempted to deprive her of the rehabilitation benefits that she was owed. Adler's report also noted that Drew again "made comments that were abusive, degrading, and rude" to Adler and Bucher.

On the last day of the July appointments, July 16, Drew, Adler, Bucher, and Crystal Kamber, a vocational rehabilitation coordinator with the State of Nevada Department of Employment, Training, and Rehabilitation, met to discuss Drew's plan development options. Based on Adler's and Bucher's reports, as well as Adler's and, to some extent, Drew's testimony, Drew was not satisfied with the recommended plan of substitute teacher, but instead insisted that the vocational objective should be math teacher, only. According to Adler,

during that meeting, Drew was verbally abusive, in that she called Adler "a liar and stated that [Adler] had repeatedly lied to her and [made] various other degrading, rude, and offensive comments." Adler claimed that, when Drew repeated her accusations after being warned that she was "crossing the line," Adler left the room. Although, later, Kamber did not remember hearing Drew call Adler a liar and indicated that both Drew and Adler had "made comments . . . stating what they felt were facts, opinions," Bucher agreed with Adler's claims, asserting that Drew had accused Adler of lying and made inappropriate remarks regarding Adler's "moral and ethical behavior." In a letter noting Drew's alleged "unwillingness to work with [her] Vocational Counselor," the insurance administrator suspended all of Drew's vocational rehabilitation benefits that same day.

Drew administratively appealed the suspension letter. Ultimately, an appeals officer affirmed the suspension, determining that Adler had credibly testified as to Drew's rude and abusive comments and her uncooperative attitude. The appeals officer noted that, during the hearing, Drew was "evasive, vague, and unable to support her allegations." It was also pointed out that Drew had expressed an interest in being a math teacher, only, despite being presented with several other possible employment fields and indications that training to become a math teacher was substantially beyond the scope of Drew's benefits. Finally, the appeals officer pointed out Adler's testimony that it was Drew's antagonistic attitude toward the insurer that was preventing her from returning to the workforce, not her injuries or restrictions. Accordingly, the appeals officer determined that Drew's vocational rehabilitation benefits had been appropriately suspended in light of her "antagonistic behavior and uncooperativeness."

Drew petitioned for judicial review, which the district court denied. Drew now appeals to this court. As directed, respondent insurer Manpower of Southern Nevada has filed a response.

In an appeal from a district court order denying a petition for judicial review, this court, like the district court, examines the administrative decision for clear legal error or arbitrary abuse of discretion.¹ The determination whether an injured worker reasonably cooperated with rehabilitation efforts is generally a question of fact,² and thus entitled to deference. This court will not substitute its judgment for that of the appeals officer as to the weight of the evidence or on issues of credibility, and we must affirm an appeal officer's decision that is not "clearly erroneous in light of reliable, probative, and substantial evidence on the whole record,"³ or in violation of a party's constitutional rights.⁴ Substantial evidence is "that 'which a reasonable person might accept as adequate to support a conclusion.'"⁵ Our review of the administrative decision is limited to the record before the agency.⁶

¹Construction Indus. v. Chalue, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003); SIIS v. Engel, 114 Nev. 1372, 1374, 971 P.2d 793, 795 (1998).

²See Stone v. Industrial Com'n, 675 N.E.2d 280, 283 (Ill. App. Ct. 1997).

³Chalue, 119 Nev. at 352, 74 P.3d at 597 (quoting United Exposition Service Co. v. SIIS, 109 Nev. 421, 425, 851 P.2d 423, 425 (1993)); see also Engel, 114 Nev. at 1374, 971 P.2d at 795.

⁴See NRS 233B.135(3)(a).

⁵Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491-92 (2003) (quoting SIIS v. Montoya, 109 Nev. 1029, 1032, 862 P.2d 1197, 1199 (1993)).

⁶Id. at 235, 71 P.3d at 491.

Eligible injured employees are statutorily entitled to vocational rehabilitation benefits.⁷ As other courts have recognized, an injured worker's cooperation is "[a]n obvious requirement of a plan of vocational rehabilitation."⁸ Accordingly, NAC 616C.601(1)(c) provides that an injured employee's vocational rehabilitation benefits may be suspended if the injured employee refuses to cooperate in the development of a vocational rehabilitation plan.⁹

Here, substantial evidence supports the appeals officer's decision affirming the suspension of Drew's benefits. First, Adler, whom the appeals officer specifically found credible, testified as to Drew's rudeness and verbal abuses, and both Adler and Bucher provided written reports of the same. Although, according to Drew, she merely expressed her opinion as to the truth of what she thought had been communicated to her, the appeals officer determined that Drew's explanation was evasive and vague, and that she was unable to justify her comments. Accordingly,

⁷NRS 616C.590.

⁸Warburton v. M & D Const. Co., 498 N.W.2d 611, 614 (Neb. Ct. App. 1993); see also Scurlock v. Durham County General Hosp., 523 S.E.2d 439, 441 (N.C. Ct. App. 1999); NRS 616C.590(7) (providing that non-accident compensation benefits may not be paid to an injured worker who refuses counseling, training or other vocational rehabilitation services offered by the insurer).

⁹See also NAC 616C.577(2)(a) (providing that vocational rehabilitation maintenance payments must be paid until the injured employee fails to cooperate with the insurer or participate in a rehabilitation program). We disagree with Drew's argument that the suspension of her benefits violates NRS 616C.530, which lists priorities for returning an injured employee to work. That statute does not prohibit the suspension of benefits when the injured employee does not cooperate with efforts to return her to the workforce.

while there was some conflicting evidence in the record as to whether Drew's behavior was abusive, substantial evidence supports the appeals officer's determination that Drew was verbally abusive and uncooperative.

Second, while no decisive conclusion had been made that becoming a math teacher was completely impossible under the vocational rehabilitation terms, the appeals officer found that Drew was unwilling to consider other possible vocational choices, despite strong indications that specific training to become a math teacher, only, was outside the scope of benefits to which she is entitled. We find no abuse of discretion in labeling as uncooperative Drew's lack of willingness to consider other vocational choices, including the recommended substitute teacher training, during the planning stages of rehabilitation.¹⁰

Third, while the agreement between Adler and Drew provided that Adler was to implement conflict resolution procedures, that agreement did not waive the insurance administrator's regulatory right to suspend benefits for a failure to cooperate. In fact, the agreement expressly warned that, by failing to cooperate, an injured employee risks suspension of rehabilitation benefits.

As noted above, however, an injured employee whose benefits may be deprived as a result of uncooperativeness has a strong interest in being made aware of the behavior believed to be uncooperative, so that she may take advantage of any opportunity to explain her behavior and/or to correct that behavior. Even though the record contains substantial evidence to support the appeals officer's findings of uncooperativeness,

¹⁰See, e.g., Merriam Webster's Collegiate Dictionary 255 (10th ed. 1997) (defining "cooperative" as, among other things, "marked by a willingness and ability to work with others").

neither the insurer's suspension letter nor the appeals officer's determination informed Drew how, or whether, the suspension could be lifted. As a result, the letter and decision effectively indefinitely suspended her benefits. In light of Drew's strong interests in retaining an opportunity to correct any behavior or actions that led to her suspension so that the rehabilitation process can go forward as contemplated under NRS Chapter 616C, we conclude that the appeals officer's decision affirming the indeterminate suspension improperly infringed on Drew's statutory entitlement to vocational rehabilitation benefits.¹¹

Accordingly, we affirm the portion of the district court's order denying Drew's petition for judicial review that relates to the propriety of suspending her benefits, and we reverse that portion of the district court's order that relates to the indefinite suspension. We remand this matter so that the district court may then remand to the appeals officer for modification of the order affirming the suspension of Drew's benefits in accordance with this order.

It is so ORDERED.¹²

Becker, J.
Becker

Parraguirre, J.
Parraguirre

Shearing, Sr. J.
Shearing

¹¹See NRS 616C.590; cf. Laird, 147 Cal. App. 3d 198.

¹²The Honorable Miriam Shearing, Senior Justice, participated in the decision of this matter under a general order of assignment entered January 6, 2006.

cc: Hon. Kenneth C. Cory, District Judge
Robin A. Drew
Moran & Associates
Clark County Clerk