

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 3, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0305

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ELIZABETH JOHNSON,

PLAINTIFF-APPELLANT,

v.

**REXNORD PLASTICS CORP., CIGNA INSURANCE
COMPANY, AND LABOR AND INDUSTRY REVIEW
COMMISSION,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Ozaukee County:
JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM Elizabeth Johnson appeals from an order affirming the determination of the Labor and Industry Review Commission (LIRC) that she is not entitled to vocational retraining benefits following her inability to return to

work at Rexnord Plastics Corporation. She argues that LIRC should have deferred to the determination of the Division of Vocational Rehabilitation (DVR) that she was eligible for vocational rehabilitation services. We conclude that LIRC's determination that the DVR failed to follow its own rules in providing Johnson retraining benefits is supported by the record and we affirm the order appealed from.

¶2 Johnson performed a box operation at Rexnord's factory that involved many repetitive hand movements. She developed an occupational injury due to overuse. Johnson received temporary total disability benefits starting July 11, 1995. She returned to Rexnord with alternative duties within the restrictions mandated by her treating physician. Johnson's employment was terminated on February 27, 1996, because Rexnord was unable to provide Johnson with employment within permanent restrictions assigned to her.

¶3 Johnson sought DVR services to find employment. DVR required Johnson to conduct a ninety-day job search. When this was unsuccessful, DVR found Johnson eligible for retraining. Johnson was to complete an associate degree program that she had previously started in Environmental and Pollution Control Technology. The associate degree program fit Johnson because she held a Bachelor of Science degree in Natural Resources from the University of Wisconsin-Madison. Johnson had never been able to find employment in the natural resource field despite her continuous search efforts since graduating from the university in December 1991. Johnson sought an award of vocational retraining benefits beginning August 26, 1996, through completion of the associate degree program.

¶4 The administrative law judge found that the DVR failed to follow its policies and procedures in certifying Johnson for retraining because Johnson's ninety-day job search did not encompass all suitable factory work. The ALJ found that the job search was not reasonable and adequate in light of Johnson's pre-injury wage and the great availability of light factory work in the Milwaukee area. There was also a finding that the DVR counselor was not informed when considering Johnson's eligibility of one doctor's opinion that Johnson was able to return to work without any restrictions. Retraining benefits were denied. LIRC affirmed the ALJ's decision.

¶5 Two standards of review are controlling here. The first regards LIRC's review of DVR's determination that Johnson was eligible for retraining benefits. Johnson correctly points out that LIRC must defer to DVR's determination. See *Dane County Hospital & Home v. LIRC*, 125 Wis.2d 308, 319, 371 N.W.2d 815, 822 (Ct. App. 1985). However, such deference is not absolute. DVR's determination may be reversed if "highly material facts were misrepresented to or withheld from [DVR] or ... [DVR] applied an interpretation of the rehabilitation laws which is entirely outside the reasonable scope of interpretation and hence a clear abuse of administrative power." *Massachusetts Bonding & Ins. Co. v. Industrial Comm'n*, 275 Wis. 505, 512, 82 N.W.2d 191, 194-95 (1957).

¶6 LIRC found that DVR had applied an interpretation of the rehabilitation laws which was unreasonable. Our review of that determination is whether it is supported by the record. See *West Bend Co. v. LIRC*, 149 Wis.2d 110, 117-18, 438 N.W.2d 823, 827 (1989).

¶7 The purpose of retraining benefits is to restore an injured worker as nearly as possible to his or her preinjury earning capacity and potential. *See* WIS. ADM. CODE § DWD 80.49(1). Retraining benefits are available if the injured worker is unable to find suitable employment. “[S]uitable employment’ means a job within the employe’s permanent work restrictions for which the employe has the necessary physical capacity, knowledge, transferable skills and ability and which pays at least 85 percent of the employe’s preinjury average weekly wage.” DWD 80.49(4)(d). A reasonably diligent effort must be made to obtain suitable employment. *See* DWD 80.49(10)(a)2.

¶8 Johnson’s preinjury employment was in a factory. Johnson’s rehabilitation plan listed machine operator as a potential area of employment. The DVR counselor acknowledged that there were numerous light factory jobs available in the Milwaukee area. However, except for the one inquiry of whether Rexnord had a position for Johnson, there was no attempt to secure Johnson employment in a factory setting. Rather, Johnson’s job search, which included over 200 employment contacts, targeted environmentally associated fields. Not only had Johnson not been able to find employment in the environmental field for the years preceding her injury, those positions would have paid Johnson a wage greater than her preinjury earnings. The DVR sought to enhance Johnson’s employment situation. Such advancement goes beyond the purpose of restoring Johnson to her preinjury employment situation. The DVR did not follow its own rules about searching for suitable employment and therefore, there was a clear abuse of administrative power.

¶9 We affirm LIRC’s determination. We need not address whether or not a material fact was withheld from the DVR in determining Johnson’s eligibility for retraining.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

