**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

April 1, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-2320**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

---

**GANTNERS REPAIR, INC., AND GENERAL CASUALTY COMPANY OF WISCONSIN,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**LABOR AND INDUSTRY REVIEW COMMISSION AND JAMES HANSEN,**

**DEFENDANTS-RESPONDENTS.**

---

APPEAL from an order of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

BROWN, J. Gantners Repair Inc., and its insurer, General Casualty Company of Wisconsin, argue that the trial court erred when it affirmed the Labor and Industry Review Commission's (LIRC) order granting James Hansen vocational rehabilitation benefits following a work-related injury.

Gantners contends that Hansen is not entitled to vocational rehabilitation benefits because, given his supervisory skills, his injury neither warrants retraining nor impairs his ability to find employment. Gantners further argues that the Department of Vocational Rehabilitation (DVR) misused its discretion when it approved a retraining plan allowing Hansen to pursue a bachelor's degree in psychology.

Hansen's shoulder injury, however, impaired his ability to work as a diesel mechanic and significantly diminished his prospects of finding work in that field. LIRC's finding that he is a handicapped person under the vocational rehabilitation statutes, therefore, is not unreasonable. We also conclude that LIRC's decision to approve a retraining program for Hansen to pursue a degree in psychology was not so outside the reasonable scope of interpretation of the rehabilitation laws as to constitute a clear misuse of administrative discretion. We affirm.

Hansen, a diesel engine mechanic with many years of experience, worked for Gantners doing diesel engine overhauls and other mechanical work. Besides his duties as a diesel mechanic he also worked as Gantners' service manager, which gave him some additional administrative responsibilities, such as scheduling and supervising the other mechanics. In July 1991, Hansen injured his right shoulder while overhauling an engine for Gantners. Though he had surgery, Hansen never fully recovered from this injury and it continued to hamper his work. Eventually, in May 1992, a doctor placed permanent work restrictions on Hansen: he could not lift more than fifty pounds and was prohibited from doing any heavy torquing or using tools that would cause heavy torque in the arm. Although the restrictions allowed Hansen to perform his supervisory tasks, it curtailed the amount of work he could do as a diesel mechanic. Gantners,

therefore, significantly modified Hansen's job responsibilities to accommodate his restriction. Gantners later laid off Hansen in October 1992.

Hoping to eventually become a marriage counselor, Hansen then sought vocational rehabilitation benefits to complete a four-year degree in psychology.[1] The DVR approved the plan, but Gantners and its insurer denied benefits. An administrative law judge (ALJ) ordered Gantners to pay Hansen vocational rehabilitation benefits pursuant to §§ 102.43(5) and 102.61, STATS. LIRC affirmed, and the trial court upheld LIRC's decision. Additional facts will be set forth during our discussion of the issues.

Our standard of review—and the fact that we usually give a considerable amount of deference to LIRC's factual and legal findings—is firmly established and has been repeated often. LIRC's findings of fact will not be set aside as long as they are supported by "credible and substantial evidence." *See* § 102.23(6), STATS. Although the application of a statute to found facts is a question of law reviewable de novo, when LIRC has a history of expertise and familiarity with a particular field of law, we typically defer to a certain extent to its application of the statute. *See* ***Klusendorf Chevrolet-Buick, Inc. v. LIRC,*** 110 Wis.2d 328, 331, 328 N.W.2d 890, 892 (Ct. App. 1982). Thus, a reasonable legal

[1] Hansen initially sought retraining assistance from the DVR in November 1991, after he injured his arm but prior to the permanent physical restrictions. However, he was not pursuing vocational retraining benefits under the Worker's Compensation Act at that time; thus, the DVR had no reason to follow its standard protocol for processing and evaluating worker's compensation cases. The DVR then certified Hansen as eligible and developed an individualized written rehabilitation program (IWRP) in August 1992. Once Hansen had been laid off in October, however, and even though an IWRP had been completed, the DVR treated Hansen's case as a worker's compensation claim and initiated its standard protocol for processing worker's compensation cases. After performing the standard protocol steps, the DVR found no reason to modify Hansen's initial IWRP. Although Gantners previously, and unsuccessfully, raised an argument that the DVR misused its discretion because it approved a retraining program prior to Hansen losing his job, it has abandoned this argument on appeal.

conclusion will be sustained even if an alternative view may be equally reasonable. *See* ***Eaton Corp. v. LIRC,*** 122 Wis.2d 704, 708, 364 N.W.2d 172, 174 (Ct. App. 1985).

Although Gantners raises several arguments, they are divided into two broad categories: First, that LIRC erred when it found that Hansen was eligible for retraining benefits; and second, that LIRC erred when it determined that the DVR's decision to approve the degree program in psychology was not so outside the reasonable scope of interpretation of the vocational rehabilitation statutes as to constitute a clear misuse of administrative discretion. We address the arguments in turn.

Under the vocational rehabilitation laws, to be eligible for vocational retraining, an applicant must be handicapped. *See* § 47.02(2), STATS. This is defined as a person having a physical or mental disability resulting in a substantial handicap to employment and who can reasonably be expected to benefit from vocational rehabilitation services. *See* § 47.01(3), STATS. Gantners' first argument is that Hansen's injury was not a substantial handicap. We disagree. Hansen was a diesel mechanic, and in this capacity, he was regularly required to do heavy torquing of up to 300 pounds and to lift objects weighing between 50 and 200 pounds. After Hansen injured his shoulder and the doctor placed permanent restrictions on his physical activities, he was no longer able to do many of the tasks required of a diesel mechanic without assistance. Finally, a DVR employee, Kathleen Gravelle, testified that given Hansen's permanent restrictions—no lifting of over 50 pounds and no heavy torquing—he could no longer perform the duties of a diesel mechanic.

Gantners argues, however, that Hansen's injury could not have been a substantial handicap to employment if he was able to continue working at his old job. But the facts belie Gantners' argument. Although Hansen continued to work as Gantners' service manager after his injury, Hansen's physical restrictions prevented him from working as a diesel mechanic without the assistance of another employee; therefore, Gantners had to arrange for other diesel mechanics to help him. Thus, Hansen was able to continue working after the injury only because Gantners significantly modified his job responsibilities in order to accommodate his physical restrictions. He did not, as Gantners would have us believe, simply return to his original job following his injury. Based on the foregoing analysis, LIRC's determination that Hansen's injury was a substantial handicap to employment was not an unreasonable application of the statute.

Gantners also contends that the DVR failed to give proper consideration to Hansen's employability and skills when it determined he needed retraining. Gantners raises two arguments to support this contention. First, Gantners contends that LIRC unreasonably interpreted the law when it determined Hansen had conducted a proper job search. We are not persuaded.

If after a reasonably diligent effort an applicant for vocational rehabilitation benefits is unable to find suitable employment, a rebuttable presumption arises that the applicant needs retraining. *See* WIS. ADM. CODE § DWD 80.49(10). Here, the DVR required Hansen to perform a job search and gave him a list of employers who might have job openings in a field related to his occupation. Using this list, Hansen applied to approximately seventy-five employers. He also contacted approximately eleven other employers which were not on this list. None of these places were hiring, however, and he was unable to

find suitable replacement employment. LIRC found that this was a reasonably diligent job search indicating Hansen was eligible for retraining.

Gantners, however, argues that because Hansen applied to businesses that were not hiring, his job search was neither reasonable nor diligent. This argument is subject to two interpretations, neither of which is very persuasive. First, Gantners' argument can be read to mean that to qualify as a job search the applicant must apply to those businesses which he or she knows are looking to hire someone. But a job search is not so narrowly defined. A job search entails what the name implies: a process in which an applicant makes inquiries at different places of employment to learn whether jobs are available. Although each inquiry might not result in an interview for a position (just as an interview might not result in a job), what is important is that the applicant is making inquiries, gathering information and developing a better idea of his or her employment opportunities. Here, it is undisputed that the DVR gave Hansen a list of potential employers, and from that list, Hansen checked with over seventy-five different businesses to inquire if they were hiring, but without success. Thus, he searched for a job and, given the number of inquiries, the search was reasonably diligent.

Gantners' argument can also be read to mean that because Hansen applied to places which were not hiring, his job search was a sham. But Gantners provides no factual basis for this allegation; there is no evidence that Hansen intentionally confined his job search to those places he knew were not hiring. Without the necessary factual support to show that Hansen knew beforehand who

was hiring and who was not, Gantners' argument collapses upon itself and we dismiss it.[2]

Second, Gantners argues that the DVR misused its discretion when it certified Hansen as eligible for vocational retraining. We disagree. Gravelle testified that Hansen's shoulder injury and resulting physical restrictions took him out of the scope of employment as a diesel mechanic, his primary occupation. Also, the DVR contacted Gantners to inquire if it would rehire Hansen and had Hansen perform a reasonably diligent job search, without success. A failed job search creates a rebuttable presumption that retraining is necessary. *See* WIS. ADM. CODE § DWD 80.49(10).

Gantners attempts to rebut this presumption by arguing that Hansen had significant supervisory skills which would enable him to find employment without retraining. However, the evidence overwhelmingly supports LIRC's finding that retraining was necessary. Hansen could no longer work as a diesel mechanic, his primary occupation. Although a vocational assessment identified several different occupations Hansen could possibly enter with little or no training, most of these occupations were considered a poor match. A report by Dr. Ross Lynch, prepared after Hansen's individualized written rehabilitation program (IWRP) was completed, stated that the remaining occupations, although supervisory in nature and thus compatible with Hansen's transferable job skills, were inappropriate because most supervisors in the mechanical field function in a dual capacity and must be capable of performing the heavy work of a mechanic.

[2] By analogy, if a graduating law student applies to seventy-five law firms, none of which he or she knows is hiring, it cannot be said that the job search is a sham even if it is determined that none of the law firms were hiring.

Also, these supervisory positions often could only be accessed by working up the ranks from a diesel mechanic and offered little chance of approximating Hansen's preinjury earning capacity. Finally, Gravelle testified that even if she had Ross's report and the report of Gantners' expert, Leanne Panizich, prior to making her decision, it would not have altered her final determination to recommend retraining.

Gantners also argues that Hansen is ineligible for retraining because he lost his job for economic reasons and not because of his injury. However, Hansen was injured while working for Gantners, and his injury substantially impeded his ability to find a job after he was laid off. Thus, Hansen was eligible for retraining because but for the industrial injury, he would not need vocational retraining. We therefore affirm LIRC's finding that the DVR did not misuse its discretion by certifying Hansen as eligible for vocational retraining.

Having disposed of Gantners' argument that Hansen was ineligible for retraining benefits, we now turn to its argument that the DVR's decision to approve a degree program in psychology was an unreasonable application of the vocational rehabilitation statutes. Gantners claims that the DVR's retraining decision was a misuse of its discretion because it was based solely on Hansen's desire to become a marriage counselor and because the DVR failed to perform a wage analysis comparing Hansen's postinjury earning capacity with and without retraining. We reject these arguments.

Gantners first argues that the retraining decisions of the DVR cannot be based on the desires of the worker. We find no legal support for this argument. Gantners does not point to any law or regulation prohibiting the DVR from considering the desires of the worker when it formulates a retraining plan, and we

can find none. Indeed, we would be surprised if the agency was prohibited from considering the applicant's vocational interests when it developed his or her retraining program. As Gravelle testified, it makes sense for the DVR to give considerable weight to the applicant's vocational interests because the applicant has a better chance of successfully completing a retraining program if he or she is motivated to complete it.

However, Gantners also contends that in this case, the DVR's approval of a four-year degree in psychology was improper because it was based solely on Hansen's desire to become a marriage counselor. Essentially, Gantners argues that the program was chosen only because it was something Hansen wanted to do. Gantners is wrong.

Although the DVR considered Hansen's desires to be of great importance when it developed a retraining plan, it also considered numerous other factors. The DVR considered Hansen's physical restrictions and that he was both highly motivated and academically qualified to pursue a degree program in psychology. Although an assessment identified some compatible jobs Hansen could perform without retraining, most of these were considered a poor match, and the remaining positions were only accessible in conjunction with employment as a mechanic. Finally, although the DVR did not complete a detailed wage analysis, Gravelle testified that consideration was given to Hansen's earning capacity with retraining versus without, and she concluded that it was not feasible for Hansen to match his preinjury earning capacity without retraining. Thus, it is evident that the DVR gave consideration to many factors, including Hansen's postinjury earning capacity with retraining versus without, when it developed an IWRP for Hansen. We affirm LIRC's finding that the DVR's approval of a degree program in

psychology was not an unreasonable application of the vocational rehabilitation statutes.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.