7-28-2009

Creps v. Idaho Dep't of Labor Appellant's Brief Dckt. 36072

IN THE SUPREME COURT OF THE STATE OF IDAHO

RUTH A. CREPS, Claimant/Appellant, vs. IDAHO DEPARTMENT OF LABOR, Respondent.	)	NO. 36072-2009

APPELANT'S OPENING BREIF

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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Nature of the Case

The Appellant, Ruth A. Creps, appeals from the Decision and Order of the Industrial Commission of the State of Idaho reversing the decision of the Appeals Examiner granting Creps' request for training under the Federal Trade Adjustment Assistance ("TAA") program.

Statement of the Facts and Course of Proceedings

A. TAA Certification and Creps' Application for Training Assistance

In July 2007, Creps was separated from her employment as a Program Manager at Micron Technology, Inc. (R., p.32; Tr., p.21, Ls.16-17.) In eleven years at Micron, Creps spent approximately two years in technical management before being promoted to supervisory positions of progressively greater responsibility. (Tr., p.14, Ls.12-22.) In September 2007, Creps was certified by the United States Secretary of Labor as eligible for Federal Training Adjustment Assistance pursuant to the Trade Act of 1974, 19 U.S.C. §2101-2487, as amended (1988). (R.,p.32; Tr., p.8, Ls.18-22.)

On July 24, 2008, Creps applied to IDOL for TAA training seeking approval for Fall 2008 enrollment in the Executive Master of Business Administration ("EMBA") program offered by Boise State University. (R., p.32.)

On July 2008, IDOL's TAA Coordinator, Jennifer Hemly, issued a notice of determination letter denying Creps' request for TAA training, stating that "the EMBA cannot be approved due to the high cost" because BSU also offered a "traditional MBA program" for approximately $27,000.00 less to achieve the

same "end result." (R., p.34; Tr., p.5, L.21 – p.6, L.24.) The regulatory basis cited by Ms. Hemly in the notice of determination was:

> Per TAA Federal Regulations, CFR 617.22 (6) (iii) (b) Allowable amounts for training. In approving a worker's application for training, the conditions for approval in paragraph (a) of this section must be found satisfied, including the assurance that the training is suitable for the worker, is at the lowest reasonable cost, and will enable the worker to obtain employment within a reasonable period of time. An application for training shall be denied if it is for training in an occupational area which requires an extraordinarily high skill level and for which the total costs of the training are substantially higher than the costs of other training which is suitable for the worker.

(R., p.34, verbatim; see also, R., pp.36-38.)

Creps timely appealed the IDOL's determination to the IDOL Appeals Examiner. (R., p.35.)

B. Proceedings Before the Appeals Examiner

On September 25, 2008, a telephonic hearing was conducted before an IDOL Appeals Examiner to determine, "whether the Claimants request for training meets the criteria provided in the Trade Act regulations, 20 CFR §617.22 (a)(6)(iii)(B)." (Notice of Telephone Hearing, 9/16/08, p.1; Tr., pp.1-43.)

Ms. Hemly appeared representing IDOL and testified in support of her determination denying Creps' request for training. (Tr., p.4, L.15; p.5, L.5 – p.13, L.11.) Questioned about the reason Ms. Hemly denied Creps' training request, Ms. Hemly conceded it was based solely on cost:

> Q: When making your determination for the denial of the claimant's application, you indicated that it was based on suitability and eligibility and cost. It sounds to me like the determination is actually just cost; is that correct?

A: Yes. It is cost.

Q: All right. So, [Creps] met the requirements with respect to the suitability for the program, the executive MBA program?

A: Yes.

Q: It would be a suitable program for her?

A: If it met the six – all six requirements of the trade program.

Q: And the only requirement it does not meet, in your view, is cost?

A: Correct. And that is a requirement of trade.

(Tr., p.10, Ls.10-25.) Thereafter, the Appeals Examiner asked Ms. Hemly:

Q: Other than the fact, then, that there is a less expensive MBA program available to Ms. Creps, does the executive MBA program meet all the other criteria under the Code of Federal Regulations?

A: Yes.

(Tr., p.8, L.25 – p.9, L.4.)

Ms. Hemly testified that her decision to deny Creps' application for training was made by comparing the two programs provided by BSU: "traditional MBA" vs. the EMBA. (Tr., p.6, Ls.3-13.) The information Ms. Hemly used to compare these programs consisted of a conversation she had with EMBA program manager, Patrick Coyne, and her review of a BSU "brochure" or "flier" about the EMBA degree track. (Tr., p.7, Ls.1-15; p.11, Ls.10-14.) Ms. Hemly discovered that the traditional MBA program offered by BSU cost approximately $14,000.00 while its EMBA program cost $41,000.00. (Tr., p.6, Ls.14-18.) Ms. Hemly did not specifically inquire about the reason for the cost disparity between

the two programs. (Tr., p.11, Ls.6-10.) Questioned about admission requirements, course work, class size and composition, Ms. Hemley testified she either had inadequate information to compare the MBA programs or failed to do so. (Tr., p.11, L.16 – p.12, L.12.) In addition, Ms. Hemley was conceded she was not prepared to provide testimony about Creps' managerial qualifications; deferring to Ms. Creps to provide that information. (Tr., p.8, Ls.10-16.)

Ms. Hemly testified that both programs take two years to complete and both culminate in MBA degrees from the University. (Tr., p.6, Ls.19-25; p.12, Ls.12-15.) Ms. Hemly therefore concluded that the EMBA is merely "a different means to an end. The same end." (Tr., p.12, L.17.) However, Ms. Hemly, conceded that is "possible" that not all MBA degrees are equally valued by employers (Tr., p.12, Ls.18-22), but was "not familiar enough with the executive MBA" to compare its market value with a traditional MBA (Tr., p.12, L.23 – p.13, L.2).

Creps called the Director of Executive Education at Boise State University, Cheryl Maille as a witness. As Director of Executive Education, Ms. Maille, who has twenty years of experience with EMBA programs, is also the Director of the BSU EMBA program. (Tr., p.26, Ls.4-7; p.28, Ls.6-12.)

Ms. Maille testified that EMBA participants possess considerable work and management experience (the current class averages twelve or more years of relevant experience) not typically found in traditional MBA students who generally lack real-world experience. (Tr., p.26, L.8 - p.27, L.20.) As a result,

EMBA graduates benefit from a substantially different educational experience that has more value in the marketplace. (Tr., p.26, L.8 - p.27, L.20.) For example, in Ms. Mallie's experience, graduates of the traditional MBA program seek entry level jobs while 59% of the graduates of the most recent EMBA program received job promotions or significant job changes following graduation. (Tr., p.27, L.21 – p.29, L.20; p.35, L.11 – p.36, L.4.) According to Ms. Mallie a significant job and salary difference exists between graduates of traditional MBA programs, whose jobs pay between $40,000.00 and $50,000.00, and EMBA graduates who begin the program making $100,000.00 and increase their salaries to $150,000.00 to $175,000.00 after completing the executive degree program. (Tr., p.36, L.11 – p.37, L.6.) In addition, she testified that it is possible for EMBA graduates to experience significant promotions into the top echelons of their companies. (Tr., p.37, Ls.9-25.) Accordingly, Ms. Mallie testified that collectively these factors make an EMBA program more suitable for people, like Creps, with significant management experience. (Tr., p.34, Ls.9-19; p.35, 35, L.11 - p.36, L.4.)

Ms. Maille explained that the apparent cost disparity between the two programs is not as great as it initially appears when all of the costs of both programs are considered. (Tr., p.32, Ls.9-14.) For example, there are hidden costs inherent in the traditional MBA program including the fact that it takes longer than two years to complete the program and does not include books, materials and fees. (Tr., p.32, Ls.10-14.) In addition, the EMBA program offers unique value added qualities like: a faculty consisting of "our brightest and our

best" (Tr., p.29, L.21 – p.30, L.10); personal executive coaching (Tr., p.30, Ls.16-22; p.31, Ls.20-22); guest lecturers (Tr., p.30, L.24 – p.31, L.10; p.32, Ls.1-2); intensive off-site residency programs (Tr., p.32, Ls.2-9); small class size (eighteen in the current class) (Tr., p.34, Ls.6-8); and includes the cost of all books, materials and software (Tr., p.31, L.24 – p.32, L.1).

Ms. Maille testified that, in her opinion, the EMBA program is better suited to Creps' work history and experience than the traditional MBA degree path. (Tr., p.34, Ls.9-19.) Ms. Maille also opined that the training offered by the traditional MBA program is not substantially similar in quality, content, and result as the training offered by the EMBA program. (Tr., p.40, L.16 – p.41, L.15.)

Creps' testified that she was last employed as program manager at Micron Technology. (Tr., p.14, Ls.12-15.) Although her prior background was "kind of technical", Creps told the hearing examiner she was predominantly employed supervising employees working on technical programs and projects. (Tr., p.14, Ls.18-22.) The next step on her career path was executive management. (Tr., p.14, Ls.15-16.)

After comparing the all of the advantages and costs of BSU's traditional MBA program with the University's EMBA program, Creps chose to enroll in the EMBA program with money from her 401K plan. (Tr., p.14, L.23 – p.15, L.23; p.23, Ls.8-18.) Creps decided the EMBA program would enable her to return to suitable employment at the earliest date. (Tr., p.21, Ls.9-15.) Because the admission criteria used by the EMBA program recognized her existing management experience, Creps avoided waiting to complete pre-admission

testing required by the traditional MBA program. (Tr., p.14, L.23 – p.15, L.3; p.19, Ls.11-22.) She also avoided taking five core classes required by the traditional program. (Tr., p.19, Ls.11-17.) Creps found the demand for these courses made it probable she would not be able to complete the MBA within two years. (Tr., p.20, Ls.10-17.) In addition, Creps reasoned the EMBA program would yield better employment prospects by placing her directly in contact with people whose enterprises hire experienced managers. (Tr., p.15, Ls.3-13; p.20, L.24 – p.21, L.8; p.22, Ls.2-11.)

Delivering closing comments for IDOL, Ms. Hemly summarized the Department's case saying:

> ... [A]s a *Department of Labor representative*, I work with employers and I see job listings and requirements and I have never seen a job listing that required an executive MBA. We have no issue with approving an MBA for Ms. Creps. However, because it is the same outcome, her resume is still going to say MBA, and based on the regulation, we feel it is a similar content, quality and outcome and therefore, we go with the low cost provider.

(Tr., p.42, Ls.14-21.)

On September 29, 2008, the Appeals Examiner rendered a decision approving Creps' request for training in the Executive MBA program at BSU. (R., pp.1-9.) The examiner reasoned that the goal of Trade Act programs like TAA is to "help trade-affected workers return to suitable employment as quickly as possible." (R., p.7.) TAA provides training services to assist "certified workers who do not have the skills to secure suitable employment in the existing labor market" by targeting that training to a specific occupation to help affected

workers "secure employment **at a skill level similar to or higher** than their layoff employment, and sustain that employment at the best wage available." (R., p.7, emphasis original.)

The Decision then addressed the relevant regulatory conditions for approval of training applications imposed on IDOL by 20 CFR 617.22, including that the training be: "of the shortest duration necessary to return the individual to employment"; "suitable for the worker"; and "available at reasonable cost." (R., p.7.) The Decision acknowledged that the reasonable cost requirement precludes approval of training by one provider when "substantially similar training in **content, quality, and result,** can be obtained at a lower cost." (R., p.7, emphasis original.)

After considering the record and argument, the Appeals Examiner applied the applicable regulatory conditions for approval of training and concluded that the traditional MBA program and the EMBA program are not equal in content and quality. (R., p.7.) Specifically, the Appeals Examiner concluded that:

> [A]lthough the result in obtaining an MBA degree is the same, the MBA degrees are not "equal" in every way as the Department asserts. Further, in comparing the wages resulting from employment of each of the training programs to the claimant's previous earnings, the traditional MBA program will likely not meet the stated goal of the Trade Act of getting the claimant to a similar or higher level of employment. The goal of Trade Act programs, including TAA, is to make the claimant whole, again to help workers secure employment at a skill level similar to their layoff employment.

(Decision, p.7.)

IDOL appealed. (R., p.10.)

C. Proceedings Before the Idaho Industrial Accident Commission

On appeal to the Idaho Industrial Commission, the parties briefed the case for submission.[1] After conducting a de novo review of the record, the Commission rendered its Decision and Order on January 8, 2009, reversing the Decision of the Appeals Examiner and denying Creps' request for training approval and allowances for training in the EMBA program at Boise State University. (R., pp.118-126.)

The Commission's findings of fact are summarized as follows: Creps earned $89,602.33 during her base pay period; the total cost of the executive MBA program at Boise State University, including books, tuition and costs was approximately $41,000; IDOL denied Creps' application for TAA assistance "due to the inflated cost of the program and that Boise State University offered a traditional MBA program for approximately $14,000"; and both options are two year programs resulting in the same degree although the programs differ in admission requirements, class size, and courses. (R., p.120.)

Examining the six criteria for approval governing TAA training requests found in 20 C.F.R. §617.22, the Commission determined that the only criterion at issue was 20 C.F.R. §617.22(a)(6)(ii), "whether the training is suitable for the worker at a reasonable cost." (R., pp.121-122.) The Commission perceived its task as "determining whether the EMBA truly

[1] In addition to briefing, Creps requested a hearing before the commission and sought introduction of information to rebut IDOL's contention that its TAA funding was constrained. The Commission denied both requests. (R., pp.50-56.)

differs in quality, content and results for the traditional MBA." (R., p.122.) The Commission concluded there was "no solid evidence that the EMBA substantially differs substantially [sic] in the content, quality and result." (R., p.124.) Accordingly, the Commission denied Creps training approval and allowances "because it is not the lowest cost option for that training as required by 20 C.F.R. §617.22(a)(6)." (R., p.125.)

Creps timely appealed. (R., pp.127-130.)

ISSUE

Did the Idaho Industrial Commission err in its interpretation and application of the Federal statutory and regulatory requirements imposed on IDOL under the Trade Act of 1974 and Trade Adjustment Assistance for Workers regulations when it denied Creps' application for TAA training assistance on the basis of cost?

ARGUMENT

The Industrial Commission Erred By Denying Creps' Application For TAA Training In The Executive MBA Program At Boise State University

A. Introduction

Creps contends the Commission erred by disregarding the applicable law and regulations, misapplying the facts to the law, resulting in a decision contrary to the both the evidence and the law. Specifically, Creps contends the Commission erred by completely disregarding the clear and plain statutory and regulatory language requiring training to be suitable; by improperly reading 20 C.F.R. §617.22 to require comparison of two programs offered by the same training provider; and by disregarding unrebutted substantial and competent evidence supporting Creps' application for TAA training.

B. Standard of Review

The provisions of the TAA are liberally construed to effectuate Congress' remedial intent. *Former Employees of Merrill Corp. v. U.S.*, 387 F. Supp. 2d 1336, 1342 (Ct. International Trade, 2005).

The applicable federal regulation, 20 CFR §617.51(a), provides that determinations "shall be subject to review in the same manner and to the same extent as determinations and redeterminations under state law, and only in that manner and to that extent." *Id.*

On appeal from an Industrial Commission decision, this Court's review is limited to questions of law. Such questions are subject to free review.

Conversely, the Commission's factual findings will be upheld so long as they are not clearly erroneous. Factual findings will not be regarded as clearly erroneous if they are supported by substantial and competent evidence. "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." In determining whether substantial and competent evidence exists, we will "not re-weight the evidence or consider whether we would have reached a different conclusion from the evidence presented." Rather, it is up to the Commission to weigh the conflicting evidence and "determine the credit and the weight to be given the testimony admitted." Moreover, when reviewing one of the Commission's decisions, this Court "views all ... facts and inferences in the light most favorable to the party who prevailed before the Commission." *Henderson v. Eclipse Traffic Control and Fagging, Inc*, 2009 WL 1564538, at p.5, (June 5, 2009) (internal citations omitted).

C. The Commission Improperly Applied the Comparative Low Cost Analysis Required When Two Different Training Providers Are Available for The Same or Similar Training

As a threshold question, Creps asks this Court to determine that the Commission erred by applying the comparative cost rules found in 20 CFR §617.22(a)(6)(ii) and 20 CFR §617.22(a)(6)(iii)(B). The clear and unequivocal language of the regulation requires the state administrator to compare program costs between two programs only when they are available from separate competing providers. 20 CFR §617.22(a)(6)(ii) provides in relevant part:

> Available at a reasonable cost means that training may not be approved at **one provider** when, all costs being considered, training substantially similar in quality, content and results can be obtained from **another provider** at a lower total cost within a

> similar time frame. It also means that training may not be approved when the costs of the training are unreasonable high in comparison with the average costs of training other workers in similar occupations at **other providers**. This criterion also requires taking into consideration the funding of training costs from sources other than TAA funds, and the least cost to TAA funding of providing **suitable training opportunities to the worker**. Greater emphasis will need to be given to these elements in determining the reasonable costs of training, particularly in view of the requirements in §617.11 (a)(2) and (3) that TRA claimants be enrolled in and participate in training. Id. (emphasis added).

20 CFR §617.22(a)(6)(iii)(B) provides in relevant part:

> In determining whether the costs of a particular training program are reasonable, first consideration must be given to the lowest cost training which is available within the commuting area. When training, substantially similar in quality, content and results, is **offered at more than one training provider** the lowest cost training shall be approved. Id. (emphasis added).

The regulations comport with logical market principles; no consumer, particularly sophisticated and experiences business executives, would pay more for an EMBA program if the same result could truly be obtained in the traditional MBA program at the same institution for half the price. The fact that the EMBA program is populated with experienced business executives is a compelling prima facia rejection of the Commission's conclusion that the two programs are substantially similar in quality, content and results.

In Creps' case, there is only one training provider; Boise State University. Thus, the regulation relied on by IDOL and the Commission to deny her application for TAA training assistance is, on its face, inapplicable to the facts and cannot serve as the basis for denying her benefits. The comparative analysis rule should not have been applied at all in Creps case to compare two programs from a single provider.

D. Relevant Federal Statutory And Regulatory Provisions Pertaining To Training Costs Under The TAA

The Trade Act of 1974 provides federal training adjustment assistance to workers adversely affected by the import of foreign goods. 19 U.S.C. §2296 (1988). These benefits cover the tuition and book cost for retraining workers. Under the Act, an eligible worker's request for benefits will be approved where:

> (A) there is no suitable employment * * * available for an adversely affected worker;
>
> (B) the worker would benefit from appropriate training;
>
> (C) there is a reasonable expectation of employment following the completion of such training;
>
> (D) training * * * is reasonably available * * *;
>
> (E) the worker is qualified to undertake and complete such training; and
>
> (F) such training is suitable for the worker and available at a reasonable cost.

19 U.S.C. § 2296(a)(1)

The Department of Labor has promulgated regulations setting forth further criteria for approval of training under this section. *See* 20 C.F.R. §617.22 (1991). The regulations define "suitable employment" as follows:

> Work of a substantially equal or higher skill level than the individual's past adversely affected employment, and wages for such work at not less than 80 percent of the individual's average weekly wage. 20 C.F.R. § 617.22(a)(1).

An eligible worker's request for retraining benefits "shall be approved" if six determinations are made, 19 U.S.C. §2296(a)(1)(A)-(F), the only determination at issue here is subsection (F): "such training is suitable for the worker and available at a reasonable cost."

The Trade Act mandated the United States Department of Labor to prescribe regulations to set forth criteria to be used in making determinations on each of the six determinations required for approval of training. 19 U.S.C. §2296(a)(9). The regulatory subsection in question here, 20 C.F.R. 617.22(a)(6) and its various subparts, requires approval of TAA training upon IDOL's determination that the training is "suitable for the worker and available at a reasonable cost." Suitable training for the worker is that training which the worker is qualified to undertake and complete given the worker's capabilities, background and experience. 20 C.F.R. §617.22(a)(5)-(6)(i). Available at a reasonable cost means that when two training providers offer training "substantially similar in quality, content and results" within a similar time frame, only the lowest cost provider can be approved. 20 C.F.R. §617.22(a)(6)(ii). In addition, subpart (6)(ii) also requires disapproval of training costs that are "unreasonably high in comparison with the average costs of training other workers in similar occupations at other providers." *Id.*

E. Other Jurisdictions Interpretation of Reasonable Cost Criteria Applied to Benefit Determinations Under The TAA

This is a case of first impression in Idaho and, as the Commission observed, "we can locate no published decisions addressing a conflict between two available training programs." (R., p.5.)

Cases are found in other jurisdictions affirming or remanding determinations denying TAA requests for professional training due to cost considerations. Although instructive, the cases are not controlling because they

are from other jurisdictions; fail to address the comparison of costs between different training providers; do not consider cost differences between programs offered by a single provider; and contrary to the interpretation placed on them by the Commission, when properly read and applied to the facts in this case, they support the Decision of the Appeals Examiner approving Creps' application for TAA training.

The Commission cited the cases of *Wilder v. Employment Security Commission of North Carolina*, 618 S.E.2d 863 (2005) and *Nevarre v. Unemployment Compensation Board of Review*, 675 A.2d 361 (1996), for the general proposition that state agencies administering the TAA program on behalf of the Department of Labor "are under a mandate to allocate training dollars in a manner that the greatest number of workers will derive the greatest benefit for the lowest cost." (R., p.122.) The Commission concluded with the moralistic injunction, "the needs of the many will often outweigh the needs of the few." (R., p.122.) Although this may be true in some instances, there is no evidence in this record that such a Hobson's choice was presented in this case or was considered by IDOL as grounds for denying Creps' application for TAA training assistance. In fact, the regulations require IDOL to make individualized application determinations of suitability for training. (*Eg.* 19 USC 2269 (factors to be considered in making a determination of eligibility are all based on evaluation of the individual; 20 CFR 617.22(a)(1) – (6) (same); Nevarre, 675 A.2d at 363. Accordingly, to the extent the Commission attempted to ground it decision on this principle it committed err in both law and fact.

More instructive are the cases of *Marshall v. Commissioner,* 496 N.W. 2d 841 (Minn. Ct. App. 1993); and *Wilder v. Employment Security Commission of North Carolina*, 618 S.E.2d 863 (2005). Marshall held a B.A., M.B.A., had eight years of experience as an accountant, treasurer/comptroller/chief financial officer, and financial analyst when he applied for under the TAA to attend law school. *Marshall,* 496 N.W.2d at 842. Statistical evidence was submitted by the department showing employment opportunities were available and expected to increase for individuals with Marshall's pre-existing qualifications. In addition, Marshall had been qualified to apply for several "suitable" jobs and other suitable job opportunities were listed in the Department's job bank. *Marshall,* 496 N.W.2d at 843-44.

Citing the department's decision that approval of benefits was not justified given the evidence that Marshall was currently employable and the significant cost of law school ($27,000.00), Minnesota Court wrote that it could not say the basis for the Department's decision to deny benefits was "arbitrary or capricious." *Marshall,* 496 N.W.2d at 843.

Unlike Marshall, Creps does not have multiple degrees and has not had opportunities to interview for suitable employment. The evidence presented before the appeals examiner established that Creps sought training assistance, not to collect another degree as an enhancement, but rather to obtain suitable employment through networking and advanced education reasonably calculated to result in "suitable employment." Unlike Marshall, IDOL offered no statistical or other evidence to rebut testimony provided by Creps and Ms. Maille

concerning the superior ability of the EMBA program to provide Creps the best opportunity to return to suitable employment at the earliest date. The only evidence in the record relevant to the proper statutory and regulatory analysis for deciding Creps' application is uncontroverted; only the EMBA program presents any opportunity for Creps to return to suitable employment (80% of her previous annual income of $89,602.23). (Tr., p.26, L.8 – p.29, L.20; p.35, L.11 – p.36, L.11 – p.37, L.6; p.37, Ls.9-25.)

In *Wilder v. Employment Security Commission of North Carolina*, 618 S.E.2d 863 (2005), the court recognized the regulatory requirement that a determination of suitable employment, which the court observed may include technical and professional employment, means "work of a substantially or higher skill level than the worker's past adversely affected employment, and wages at not less than 80 percent of the worker's average weekly wage." Id. at 865. The court found that in the absence of evidence that jobs were available at a salary equaling eighty percent of Wilder's prior wage, the employment commission's finding that suitable employment was available to Wilder was not supported by the record. Id. at 865.

The ground on which the court ultimately rejected Wilder's TAA application is readily distinguishable from Creps' case. Evidence adduced in Wilder's case established that Wilder already possessed a marketable professional degree and supported the conclusion that another degree would not significantly enhance his ability to secure suitable employment given his capabilities, background and experience. The uncontroverted evidence in Creps

case is that the EMBA will enhance her ability to return to suitable employment as soon as practicable.

The Commission, therefore, improperly applied the reasonable cost rule of 20 C.F.R. §617.22(a)(6)(i)) by completely disregarding the regulatory definition of 'suitable employment" when considering the availability of training substantially similar in quality, content and results at a lower cost than the EMBA program.

F. The Commission's Conclusion of Law Is Contrary To The Evidentiary Record

The Commission's determinations that 'there is no solid evidence that the quality [of the EMBA program] is deemed so much higher as to be sought after in the workforce and "there is not [sic] solid evidence that the EMBA substantially differs substantially [sic] in content quality and result," (R., pp.123-124), are so against the great weight of the evidence that they should be set aside as arbitrary, capricious, an abuse of discretion, and contrary to law.

The only evidence adduced at the hearing concerning the comparison between the traditional MBA program and the EMBA program was that they are not substantially similar in quality, content and result despite the fact that both programs culminate in a MBA degree. The Commission attempts to sidestep the unrebutted testimony of Creps and Ms. Maille claiming it was "not solid" is conclusory and without reason.

It is also abundantly clear that the Trade Act, the TAA, and the regulations contemplate maximum flexibility to meet the goal of finding suitable employment for the unique experience and work history of every individual

worker seeking assistance *(e.g. Navarre,* 675 A,2d at 363-364 (state agencies administering the TAA program are vested with discretion in approving or denying requests for training provided they adhere to regulatory criteria).

The Commission also failed to consider that, due to the academic admission requirements Creps would have to meet and competition for core classes in the traditional MBA program, the EMBA achieves the regulatory goal of obtaining "suitable employment" for Creps at the earliest possible date. The record supports the conclusion that the MBA program could well exceed the 104 week period allowed for completion of training under the TAA. 20 C.F.R. §617.15. Only the EMBA program can secure the training objective within the allowable time.

The only evidence adduced at the Creps' hearing regarding market comparisons between the type of jobs and salaries available to EMBA graduates and traditional MBA graduates made it clear that the EMBA program is the only training option that provides Creps with the opportunity to meet the statutory goal of securing "suitable employment" at the soonest date. The evidence that Creps' participation in the EMBA program would likely to enable her to secure "suitable employment" while the traditional MBA program would not yield the same result compels reversal of the Commission's Decision and Order.

CONCLUSION

Appellant/Claimant, Ruth A. Creps, respectfully requests the Court to reverse the Decision and Order of the Industrial Commission of the State of

Idaho and direct IDOL to approve her application for TAA training in the EMBA program at Boise State University.

Dated this 28th day of July 2009.

THOMAS THARP

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 28th day of July 2009, I filed and served true and correct copies of the foregoing APPELLANT'S OPENING BRIEF by HAND DELIVERY AND/OR U.S. MAIL, on the following:

Ms. Katherine Takasugi
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THOMAS THARP