JOHN C. DILLEMUTH, Employee/Appellant, v. OWATONNA TOOL CO. and RELIANCE GROUP/CRAWFORD & CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 5, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's award of a two percent permanent partial disability for the employee's skin disorder, rather than the 10 percent permanency claimed by the employee.

WITHDRAWAL FROM THE LABOR MARKET - RETIREMENT. The compensation judge's award of permanent partial disability payable as impairment compensation (IC) pursuant to Minn. Stat. § 176.101, subd. 3e(b) based on the employee's voluntary acceptance of an early retirement package from his pre-injury employer is contrary to both the law and the evidence where the employee returned to gainful employment within one week after leaving the employer and remained employed through the date of hearing approximately two years later.

ECONOMIC RECOVERY COMPENSATION. An employee who voluntarily leaves suitable work prior to MMI is entitled to payment of permanent partial disability where the employee does not obtain a suitable, subd. 3e job within the 90 days post-MMI. Hackler v. Plastech Research, 54 W.C.D. 70 (1996). The employee is entitled to payment of his two percent permanency as ERC rather than IC where the employee was employed in a job with considerably lower earnings which the employer and insurer's expert opined was not economically suitable during the 90 day period post-MMI.

Affirmed in part and reversed in part.

Determined by Johnson, J., Wilson, J., and Rykken, J.
Compensation Judge: Kathleen Nicol Behounek

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's finding that the employee sustained a two percent, rather than a ten percent permanent partial disability, and the determination that the permanent partial disability awarded is payable as impairment compensation rather than economic recovery compensation. We affirm in part and reverse in part.

BACKGROUND

The employee, John C. Dillemuth, graduated from high school and began working as a laborer for the employer, Owatonna Tool Company (OTC), in June 1955. In 1973, the employee was offered the position of a manufacturing engineer with the employer. He remained in that position for the balance of his employment with OTC.

In July 1993, the employee began experiencing redness, peeling, and a burning or itching sensation in both hands. He was treated by Dr. Charles H. Dicken and Dr. Arnold L. Schroeter at the Mayo Clinic who diagnosed severe contact dermatitis related to his exposure to oils, coolants and solvents at work. The employer accepted liability for a personal injury occurring on July 19, 1993, and paid various workers' compensation benefits.

The employee was taken off work and attempted to return to work in the employer's plant four or five times between November and June 1994, without success. In June 1994, Dr. Schroeter advised the employee's disability case manager, Sharon Yocum, that the employee could not return to work at the employer's manufacturing plant due to the repeated exacerbation of his severe contact dermatitis upon return to the employer's facilities.

On November 26, 1994, the employee was seen by Dr. O.J. Rustad at the request of the employer and insurer. The doctor agreed the employee had work-related allergic or irritant contact dermatitis as the result of exposure to chemicals at work. Dr. Rustad stated a number of treatment options were available that had not been attempted, and did not believe the employee had reached maximum medical improvement (MMI). Dr. Schroeter later recommended ultraviolet radiation treatment, which began in mid-February 1995. The employee continued to receive treatment for his contact dermatitis through November 1996.

In early 1995, the employee approached his supervisor about working at home using a computer, modem and phone connection. On May 11, 1995, the employer offered the employee a modified, full-time job as manufacturing engineer, at his pre-injury salary and benefits, performing special projects and some of his previous job duties at home using a computer.[1] The employee accepted the job offer and began working in the modified position on June 5, 1995. The parties agreed, and the compensation judge found, that the modified job was physically and economically suitable.

In mid-December 1995, the employer offered the employee, and approximately 32 other employees, a voluntary special early retirement package. Eligible employees included participants in the company pension plan, who were at least 55 years old, had at least five years of

[1] The employee filed a rehabilitation request on May 10, 1995 seeking a rehabilitation consultation. The employer opposed the request stating a formal job offer had been made and rehabilitation services were not necessary. On July 11, 1995, an Order on Agreement was filed in which the parties agreed to indefinitely suspend the obligation to provide a rehabilitation consultation pending the employee's return to work with the employer, and further agreeing that if the return to work was unsuccessful, the insurer would then provide a rehabilitation consultation.

vesting under the plan by December 1996, and were "designated by SPX [the parent company] as affected by future organizational requirements." (Ex. A-3: Letter and Notice to Employees.) The package included payment of the employee's pension at the age 65 level, or $1,109.50 a month, a "Social Security Enhancement" of $400.00 a month for 24 months, a one-time "Retirement Bonus Payment" of $9,139.20, and company paid health and life insurance benefits for 24 months. The employee accepted the offer in January 1996 and reaffirmed his acceptance of the package in February 1996. The employee elected to retire from the company on the latest possible date set by the company, December 31, 1996, and continued to work in his modified position until then. The employee had worked for the employer 41½ years and was 61 years old at the time he left his employment with OTC.

Prior to leaving his position with OTC, the employee put a notice in the local Knights of Columbus newsletter, of which he was the editor, stating he was retiring from OTC and that "I was looking for a job, and if anybody had any ideas to let me know." (T. 18.) Bill Reagan, the owner of the Owatonna Bus Company, responded to the notice and offered the employee a full-time job helping to set up the bus system and driving one of the buses. The employee accepted and began working for the Owatonna Bus Company on January 6, 1997. The employee was paid about $8.50 an hour and worked 40 to 50 hours a week.

The employee resigned from the Owatonna Bus Company effective December 20, 1997. He then began working as a part-time salesperson for Coast to Coast hardware in Owatonna on December 26, 1997. He was initially paid $6.25 with a later increase to $6.50 an hour, and worked anywhere from 30 to 78 hours during a semi-monthly pay period. The employee did not seek full-time work with Coast to Coast because he believed it would require evening and weekend work which the employee did not want to do. The employee remained in this position through the date of hearing.

The employee filed a claim petition on February 26, 1998, seeking temporary partial disability from and after January 6, 1997, payment of a 10 percent permanent disability, the assistance of a qualified rehabilitation consultant (QRC) and retraining benefits. The employer and insurer denied liability asserting the employee had voluntarily retired from the employer. The case was heard on December 17, 1998, by a compensation judge at the Office of Administrative Hearings. The compensation judge found the employee had voluntarily retired from his employment with the employer and had not made a diligent search for work "compatible with his employment experience or wages he earned at the time he retired from the employer." (Findings 9, 11.) The judge further determined the employee had sustained a two percent permanent partial disability, rather than the 10 percent claimed by the employee, and held the permanent partial disability awarded was payable as IC, rather then ERC, pursuant to Minn. Stat. § 176.101, subd. 3e(b), providing that permanency is payable as IC if the employee retires at any time prior to the end of the 90 day period following MMI. The employee appeals.[2]

[2] The compensation judge also denied temporary partial disability benefits. The employee listed findings arguably related to the issue of temporary partial disability in his notice of appeal, but neither asserted entitlement to temporary partial disability benefits or argued the

STANDARD OF REVIEW

On appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

Permanent Partial Disability

The employee contends that the compensation judge erred in awarding a two percent permanent partial disability rather than the ten percent permanency claimed. The employee argues he established on-going "life-style modifications" as a result of his work injury, asserting his hands remain very sensitive, affecting his ability to do manual labor and grasp tools firmly. The employer and insurer contend the employee failed to prove persistent limitation in his activities of daily living. They argue substantial evidence supports the compensation judge's decision so it must be affirmed.

Minn. R. 5223.0640, subp. 2, provides in pertinent part:

> **Subp. 2. Skin disorders * * ***
>
> B. Class 1, two percent. Signs or symptoms of skin disorder are present and supported by objective skin findings, and there is no persistent limitation in the performance of the activities of daily living, as defined in part 5223.0310, subp. 5,[3] although exposure to certain

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issue in his brief. The issue is, therefore, waived. Minn. R. 9800.0900, subp. 1.

[3] **Subp. 5. Activities of daily living.** "Activities of daily living" means the ability to perform all of the following:

> A. self cares: urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, and eating;
> B. communication: writing, seeing, hearing, and speaking;
> C. normal living postures: sitting, lying down, and standing;
> D. ambulation: walking and climbing stairs;
> E. travel: driving and riding;

> physical or chemical agents may temporarily result in a limitation of activity.
>
> C. Class 2, ten percent. Signs or symptoms of skin disorder are present, and intermittent treatment is required, and there is limitation in the performance of some of the activities of daily living.

Two medical opinions were offered. The employee's treating physician, Dr. Schroeter, rated the employee as class 1 or class 2 under Minn. R. 5223.0640, subp. 2, skin disorders. The doctor noted symptoms of the disorder were present and the employee was limited in some of the activities of daily living. He concluded the employee "probably fits best" in class 2 for a 10 percent permanent partial disability. (Ex. A-1: 2/5/98.) Dr. Rusted, the medical examiner selected by the employer and insurer, opined the employee's condition was well controlled, required no medical treatment and did not cause any limitation in the performance of daily activities. The doctor concluded the employee had a class 1 skin disorder entitling him to a two percent permanent partial disability. (Ex. 1: 4/3/97.) Both doctors agreed the employee might have occasional temporary exacerbations due to exposure to irritants.

A compensation judge's finding regarding the rating of permanent partial disability is one of ultimate fact and must be affirmed if it is supported by substantial evidence. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987). The compensation judge concluded subp. 2.B., class 1, most closely represented the employee's condition, pointing out that although the employee continued to have signs and symptoms of contact dermatitis, he had required no medical treatment since November 1996. Further, the compensation judge concluded the employee had failed to prove any significant or persistent limitations on the employee's activities of daily living. (Mem. at 6-7); see Minn. R. 5223.0300, subp. 3.C. Substantial evidence supports the compensation judge's award of a two percent permanent partial disability and we, therefore, affirm.

ERC vs. IC

The employee next contends that the compensation judge erred in awarding permanent partial disability benefits payable as impairment compensation (IC) rather than economic recovery compensation (ERC). The employee argues the relevant time frame is the 90 days following attainment of MMI and that the job he held with Coast to Coast during that time was not suitable within the meaning of Minn. Stat. § 176.101, subd. 3e. The employer and insurer

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> F. nonspecialized hand functions: grasping and tactile discrimination;
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> G. sexual function: participating in usual sexual activity;
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> H. sleep: ability to have restful sleep pattern; and
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> I. social and recreational activities: ability to participate in group activities.

argue that the employee retired from a suitable job with the employer in December 1996, "prior to the end of the 90 day period" following MMI, and the compensation judge properly awarded payment of permanency as IC rather than ERC pursuant to Minn. Stat. § 176.101, subd. 3e(b).[4]

Minn. Stat. § 176.101, subd. 3e(b) (1993), provides in relevant part:

> (b) If at any time prior to the end of the 90-day period [following MMI] the employee retires . . . temporary total compensation shall cease and the employee shall, if appropriate, receive impairment compensation . . . .

The compensation judge found the employee "voluntarily retired from his employment with the employer" in December 1996 (Finding 9), and thus apparently concluded that IC was payable pursuant to subdivision 3e(b). We believe this conclusion is unsupported by the evidence.

While it is true that an employee may obtain a suitable job or retire "at any time prior to the 90 day period" post-service of MMI,[5] "retirement" is specifically defined in the workers' compensation act. Minn. Stat. § 176.101, subd. 8 (1993), provides:

> "Retirement" means that a preponderance of the evidence supports a conclusion that the employee has retired. The subjective statement of an employee that the employee is not retired is not sufficient in itself to rebut objective evidence of retirement but may be considered along with other evidence.
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> For injuries occurring after January 1, 1984, an employee who receives social security old age and survivors insurance retirement benefits is presumed *retired from the labor market*. This presumption is rebuttable by a preponderance of the evidence. (Emphasis added.)

Under the act, "retirement" means a more or less permanent withdrawal from the general labor market at the end of a working life. Pfeifle v. Peterson-Biddick, 56 W.C.D. 459 (W.C.C.A. 1997); Hansford v. Berger Transfer, 46 W.C.D. 303 (W.C.C.A.1991). The fact that

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[4] In 1995, the legislature repealed the two-tier system requiring payment of permanent partial disability as either IC or ERC, replacing it with a uniform schedule for all permanent partial disability benefits, applicable to injuries occurring after October 1, 1995. Act of May 25, 1995, ch. 231, art. 1, §§ 19-21.

[5] See, e.g., Collier v. Septran, Inc., 42 W.C.D. 32 (W.C.C.A.1989); Mattson v. State, Dept. of Public Safety, 494 N.W.2d 884, 48 W.C.D. 84 (Minn.1993); Bruns v. City of St. Paul, 555 N.W.2d 522, 525 n.2, 55 W.C.D. 384, 388 n.2 (Minn. 1996).

the employee "retired" from employment with his date-of-injury employer is not dispositive of the question of whether the employee has permanently retired from the labor market. See, e.g., Shaw v. Metz Baking Co./Tastee Div., slip op. (W.C.C.A. Aug. 15, 1994); Brown v. Metropolitan Transit Comm'n, slip op. (W.C.C.A. Sept. 7, 1993, at 4 n.3); Marsh v. Moore Data Management, slip op. (W.C.C.A. Sept. 1, 1993); Woelfle v. Bermo, Inc., slip op. (W.C.C.A. Nov. 15, 1989). Whether an employee has retired from the labor market is dependent upon the facts peculiar to each case. Various factors have been considered including: the employee's expressed intent to retire or continue working (see Minn. Stat. § 176.101, subd. 8; Grunst v. Immanuel-St. Joseph Hospital, 424 N.W.2d 66, 40 W.C.D. 1130 (Minn.1988); Nibbe v. City of St. Paul, 320 N.W.2d 92, 34 W.C.D. 690 (Minn. 1982)); application for social security retirement benefits (see Minn. Stat. § 176.101, subd. 8; Grunst, id; Nibbe, id; Pfeifle, id.); evidence of a financial need for employment income, including the adequacy of a pension or other retirement income (see Grunst, id.; Nibbe, id); whether the employee or the employer initiated the discussion of retirement (see Bright v. Duininck Bros., 51 W.C.D. 227 (W.C.C.A.1994)); whether the employee sought rehabilitation assistance (see Eisenzimmer v. Knutson Cos., slip op. (W.C.C.A. Aug. 25, 1986)); and whether the employee actively sought alternative employment or was in fact, working (see Hansford, id., Woelfle, id.).

Here, the employee was doing well in the modified job and evidenced no desire to leave his employment with OTC prior to the offer of early retirement. It was the employer who initiated the special early retirement offer. After accepting the offer in January 1996, the employee continued to work for OTC as long as he was able, through December 31, 1996. Prior to leaving OTC, the employee put an ad in a local paper seeking work. The employee returned to full-time work, on January 6, 1997, as a driver with the Owatonna Bus Company. The employee resigned from his employment with the bus company on December 20, 1997, and began working as a part-time salesperson for Coast to Coast hardware on December 26, 1997. He remained employed in this job through the hearing on December 18, 1998. There is no evidence that either job was a sham or was not gainful employment. In addition, the employee testified he had other paid, part-time jobs, including working as a special deputy sheriff for Steele County at dance halls and places of entertainment two or three times a month; doing maintenance and repairs as needed at the local Hallmark store his wife managed; occasionally driving hearse and helping the local mortician with funerals; and occasionally picking up cars out of town and driving them back to Owatonna for a local auto dealer. (T. 53-54.)

The employee testified that he "was planning on working to age 65, if my health is good." (T. 26.) He stated he had not applied for Social Security retirement or disability insurance, and did not intend to apply for Social Security benefits until age 65. Thus the retirement presumption of Minn. Stat. § 176.101, subd. 8, does not apply. He further testified that he had to work because he needed the money. He noted that starting in January 1999, he would be paying $456.00 a month for health insurance for himself, his wife and a college-age daughter. (T. 26-27, 51.) The employee had filled out applications for two jobs he became aware of in 1998, and testified he would take the job if it provided more money.[6]

[6] Although the employee has, on several occasions, requested the assistance of a QRC, no

The only "objective evidence of retirement" offered by the employer and insurer is the employee's acceptance of the special early retirement package. This is insufficient to establish retirement from the labor force in the face of the employee's expressed intent to remain actively employed and the fact that he has been employed continuously since leaving his job with the employer. The compensation judge found only that the employee voluntarily retired from his employment with the employer. She did not find, nor does the evidence of record support a finding, that the employee withdrew or retired from the work force. We, therefore, reverse the compensation judge's finding that the employee was entitled to IC rather than ERC based on "retirement" prior to 90 days post-MMI under Minn. Stat. § 176.101, subd. 3e(b).

The acceptance of a suitable job under Minn. Stat. § 176.101, subd. 3e, prior to MMI is not determinative of whether permanent partial disability is payable as IC or ERC. It is service of the notice of MMI that sets in motion the process that ultimately results in a determination of the nature of the benefits to which the employee is entitled. Gibbons v. Weyerhaeuser, 482 N.W.2d 480, 46 W.C.D. 392 (Minn.1992). Under Minn. Stat. § 176.101, subd. 3p, an employee is entitled to ERC if a suitable job is not offered or obtained" within 90 days after reaching MMI" (emphasis added). Thus, the crucial period for determination of ERC or IC is the 90 day post-MMI period. "[If] an employee loses his subdivision 3e job prior to MMI and is not offered or does not otherwise obtain suitable employment within the 90 day post-MMI period, that employee is entitled to economic recovery compensation." Hankermeyer v. Kloster-Madsen, Inc., 43 W.C.D. 21 (Minn.1990); see also Gibbons, id; Miller v. North Central Cable, 47 W.C.D. 297 (W.C.C.A. 1992); Brown v. Metropolitan Transit Comm'n, slip op. (W.C.C.A. Sept. 7, 1993). This court has held that an employee who voluntarily leaves suitable employment prior to MMI is *not* precluded from eligibility for ERC. Hackler v. Plastech Research, 54 W.C.D. 70 (W.C.C.A. 1996).

The employee accepted the employer's early retirement package and left his employment with OTC on December 31, 1996.[7] He did not, however, retire from the labor market. The employee reached MMI effective with service of an MMI report on February 25, 1998, more than a year after the employee resigned from his job with the employer. The 90-day period expired on or about May 25, 1998. The employee was then working as a part-time salesperson for Coast to Coast hardware. While that job was apparently physically suitable, the employee's earnings were considerably less than his pre-injury weekly wage. The only

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job search assistance has been provided to the employee.

[7] As a general rule, a voluntary resignation from a suitable post-injury job does not constitute a "constructive refusal" of suitable work. See Martin v. John Roberts Co., 47 W.C.D. 516 (W.C.C.A. 1992); Schewe v. Tom Thumb Food Stores, 46 W.C.D. 693 (W.C.C.A. 1992). In the present case, there is no basis for concluding the employee "refused" suitable work. The employee initiated consideration by the employer of a modified job working at home from a computer, and worked for the employer in this job for a year and a half, from June 1995 through December 31, 1996.

vocational evidence offered was the testimony of the employer and insurer's vocational expert who opined that the Coast to Coast job was not economically suitable. (T. 74-75, 109.)

While the employee was arguably underemployed in the Coast to Coast job, "[t]he primary obligation to procure subdivision 3e employment lies with the employer." Miller at 303 (citing Jerde v. Adolphson & Peterson, 484 N.W.2d 793, 46 W.C.D. 620 (Minn. 1992)). There is nothing that prevents the employer from providing rehabilitation assistance or re-offering suitable work, if the employer wishes to avoid liability for payment of ERC. See also, Hackler, id.; Brown, id.[8] As the employee did not receive a job offer or obtain a suitable subd. 3e job during the 90 days post-MMI, the employee is entitled to payment of his two percent permanent partial disability as ERC rather than IC. The compensation judge's finding is, accordingly, reversed and payment of ERC is ordered in accordance with this decision.

[8] It is well established that a job search is not required to establish eligibility for ERC. Gibbons id.; Berry v. McLeod County, 46 W.C.D. 329 (W.C.C.A.1991); Hankermeyer, id.