

THORVALD W. HANSEN, Employee/Appellant, v. NEW MECH COS., INC., and N. H. INS. (AIAC), Employer-Insurer, and SPECIAL COMP. FUND and MN DEP'T OF EMP. SEC., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 4, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the judge's decision that the employee was not entirely unable to read and write was supported by expert vocational assessment and opinion, and where the judge's assessments of the vocational evidence and of the employee's job search and earning capacity were not erroneous or unreasonable in light of medical testimony, the compensation judge's denial of permanent total disability benefits was not clearly erroneous and unsupported by substantial evidence.

PERMANENT TOTAL DISABILITY - RETIREMENT; PERMANENT TOTAL DISABILITY - WITHDRAWAL FROM LABOR MARKET. Where the judge's decision was based primarily on the credibility of testifying witnesses, the compensation judge's conclusion that the employer had offered suitable work to the employee at the time of his retirement and that the employee had voluntarily withdrawn from the labor market at that time was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Wilson, J. and Rykken, J.
Compensation Judge: Jennifer Patterson

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's denial of permanent total disability benefits since June 14, 1993. We affirm.

BACKGROUND

On November 4, 1991, Thorvald Hansen sustained an injury to the thumb of his nondominant left hand while working as a sheet metal worker for New Mech Companies [the employer]. On the date of his injury, Mr. Hansen was fifty-eight years old and was earning about \$1000 a week,¹ having worked for the employer for about twenty-four years, except for a three-

¹ All issues as to the employee's specific weekly wage on the date of his injury have been

year interval in the late 1970s during which he worked in Alaska. Much of Mr. Hansen's work for the employer over the years, both before and after his injury, has entailed climbing on structural beams high off the ground, and much of it has been in a supervisory or coordinating capacity.

On March 5, 1992, Mr. Hansen [the employee] saw hand surgeon Dr. Chris Tountas regarding his injury. Dr. Tountas treated the employee with splints and steroid injections and restricted him from doing any firm grasping with his left hand or any more than limited ladder climbing. The employee's symptoms did not resolve, and on about December 4, 1992, Dr. Tountas performed a fusion with radial bone graft of the metacarpotrapezial (CMC) joint of the left thumb. The employee returned to work following his surgery, and on April 26, 1993, he reached maximum medical improvement [MMI]. Since that date, the employee has been subject to restrictions against lifting over ten pounds with his left hand, against firm grasping or pinching with his left hand, against working on ladders, and against using his left hand in the operation of power tools or vibrating tools.

On June 8, 1993, still in pain from his injury and concerned that he could no longer do his job safely, the employee applied to his sheetmetal workers' union for an early retirement pension. On June 14, 1993, the employee requested and was granted a layoff from the employer and subsequently began receiving unemployment compensation.² Effective July 1, 1993, he began to draw retirement benefits from his union in the amount of \$863.50 per month, and about two months later this monthly amount was increased to \$993.00.

On August 5, 1994, the employee retained an attorney to represent his interests in an action for workers' compensation benefits against the employer. On October 28, 1994, Eugene Hosch, Safety Director at the employer, wrote to the employee, expressing his understanding that the employee "would like to come out of retirement and return to the working world." Mr. Hosch offered to hold open for the employee until November 16, 1994, the "same [job] as what you did for 32 years with us" for even slightly higher pay. He indicated that the employee's supervisor at the employer, labor coordinator Ron Nadeau, was delighted to hear of the employee's availability and had "said he would make whatever accommodations are necessary" in that "a one-handed Thor Hansen is better than most two-handed workers."³ A little over a week later, however, by letter to the employee dated November 7, 1994, Mr. Hosch rescinded his offer, explaining that he had been "unaware, or had forgotten, that you had climbing restrictions."

reserved for later proceedings.

² The employee's separation notice cites "Reduction in Force" as the reason for the separation, but the parties apparently agree that the "layoff" status of the termination was at the employee's request and not economically compelled.

³ Mr. Nadeau testified that he had previously worked for some eight years as a journeyman under the employee's supervision prior to 1978, when he assumed his current position, apparently while the employee was working in Alaska.

From November 15, 1994, through November 29, 1994, the employee conducted a documented job search, and on December 5, 1994, he commenced work with West Industries, distributing tools from a “tool crib.” On January 31, 1995, he commenced rehabilitation activities with QRC Nicky Stubbe. In her report of February 6, 1995, QRC Stubbe stated that the employee had indicated to her that he had “felt forced to leave his employer given the fact that he was continually operating outside of his restrictions and feared for the safety of himself and others” and “that he resigned in June of 1993 in order to survive.” She noted that the “employer was left with the impression that the [employee] wanted to retire for reasons other than problems with his work or work restrictions” but that, “[a]fter learning about [the employee’s] reasons for leaving[,] the employer is now motivated to offer the [employee] a job within his physical restrictions.” According to a February 17, 1995, letter from the employee’s attorney to counsel for the employer and insurer, however, the employer subsequently became reluctant to rehire the employee because the employee was no longer on active status with his union and to rehire him immediately would jeopardize the employer’s relationship with the union by preempting candidates on the union’s availability list. QRC Stubbe had evidently suggested that the union would allow the employer to rehire the employee “if it were clear that this was a workers’ compensation case and not one of voluntary retirement,” and the employee’s attorney promised cooperation in returning the employee to work with New Mech on that basis.

Near the end of April 1995, the employee quit his job with West Industries and about the same time was awarded Social Security disability benefits retroactive to the date of his retirement from the employer.⁴ On May 8, 1995, QRC Stubbe and Mr. Nadeau conducted an on-site analysis of all jobs potentially available to the employee at the employer, and no job within the employee’s restrictions was found to be available. By subsequent vocational testing three months later, QRC Stubbe concluded that the employee was no longer a candidate for vocational placement services “based on the wages that are available to him” and not a candidate for retraining “based on his vocational testing scores.” Subsequently, at the request of the employer and insurer, the employee underwent a vocational evaluation by rehabilitation consultant David Berdahl and a follow-up orthopedic examination on September 27, 1995, by Dr. William Call. It was Dr. Call’s opinion in part that the employee was capable of sustained gainful employment subject to his existing restrictions, which Dr. Call found reasonable “from the point of view of comfort” and the employee’s “reported safety concerns” but “not from the point of view of materially exacerbating the [employee’s] condition.”⁵

On February 18, 1997, and again on July 14, 1997, the employee amended a Claim

⁴ The employee has been receiving Social Security benefits continuously ever since. When he turned 65 years old in June of 1998, his benefits were reclassified from disability benefits to retirement benefits, without any change in amount.

⁵ No report from Mr. Berdahl contemporaneous with his evaluation is in evidence. An eventual report of Mr. Berdahl dated February 23, 1998, is addressed subsequently.

Petition filed earlier against the employer, which had alleged entitlement to benefits based on an asbestosis condition. The Amended Claim Petition alleged entitlement to various benefits stemming also from the employee's November 1991 injury to his left hand, thumb, and wrist. At pretrial of the matter over a year later, on August 31, 1998, all issues relating to the employee's asbestosis claim were severed and struck from litigation in the current proceeding.

By deposition on October 1, 1998, QRC Stubbe testified in part that in her opinion the employee's job at West Industries was not a physically suitable one, in that the employee had sometimes to lift up to eighty pounds, well over his ten pound restriction, and in that he often had to use his left hand for more than mere assistance, again beyond his restrictions. She testified also that the record-keeping required by the job was apparently problematic for the employee. It was her opinion that the employee is permanently totally disabled, assuming as a definition that "a person is totally disabled if his physical condition in combination with his age, training and experience causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income."⁶ QRC Stubbe acknowledged that, in her firm's August 1995 vocational testing of the employee, normal mechanical testing was deemed unnecessary, "because we knew based on history and based on our information with the employer that he had a high mechanical aptitude. But what we wanted to get at . . . was, you know, where is he at in terms of his ability to read, write, spell and math." Notwithstanding this purpose, however, QRC Stubbe also acknowledged that the employee was presumed unable to read, based on the employee's own assertions, already prior to his taking the Wide Range Achievement Test that fixed his reading and spelling skills at a second grade level. She indicated that the employee was therefore administered an oral, "non-reading" version of the test.

The matter came on for hearing on October 6, 1998. Issues at hearing included the employee's entitlement to at least \$92,000.00 in permanent total disability benefits continuing from June 14, 1993, or, in the alternative, temporary total disability benefits between that date and December 4, 1994, and about \$12,000.00 in temporary partial disability benefits from December 5, 1994, to April 28, 1995. By Findings and Order filed December 14, 1998, the compensation judge awarded the temporary partial disability benefits claimed but denied the total disability claims. The employee appeals from the denial of benefits for permanent total disability since June 14, 1993.⁷

STANDARD OF REVIEW

⁶ See Schulte v. C. H. Peterson Constr., 278 Minn. 79, 83, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967).

⁷ The employee's Notice of Appeal implies an appeal also from the judge's denial of temporary total disability benefits. The employee has briefed only the permanent total issue, however, and accordingly we address only that issue. See Minn. R. 9800.0900 (issues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by the court); see also Anderson v. Stremel Bros., 47 W.C.D. 99 (W.C.C.A. 1992).

In reviewing cases 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 (1996). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). 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." Id.

DECISION

"[A] person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income." Schulte v. C. H. Peterson Constr., 278 Minn. 79, 83, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967). In Finding 17, the compensation judge concluded in part that "[t]he employee was not permanently and totally disabled at any point between June 13, 1993 and the date of hearing because he was likely to have been able to find sustained gainful employment paying between \$180.00 and \$300.00 per week if [he] had looked for it." In appealing from this conclusion and related findings,⁸ the employee contends that the judge (1) disregarded uncontroverted evidence that the employee is functionally illiterate, (2) erred in her findings concerning the testimony of vocational experts, (3) applied an incorrect legal standard and made unsupported findings regarding the employee's job search and earning capacity, and (4) erred in concluding that the employer had physically suitable work available in June 1993 and that the employee voluntarily withdrew from the labor market at that time. We are not persuaded that the judge's decision was either legally erroneous or factually unreasonable.

Literacy

In Finding 6, the compensation judge concluded that, by administering only unwritten vocational tests to the employee, QRC Stubbe's firm simply presumed, on the employee's own say-so, that the employee was functionally illiterate and so "did not have him complete a reading test to verify his level of reading skills." On this conclusion, the judge held

⁸ Finding 17 was not listed on the Notice of Appeal among findings specifically appealed from, but its general conclusion is embraced by details contained in the ten other findings from which the employee did expressly appeal.

that “[a]s between the results of one set of vocational tests and a person’s actual life attainments, the life attainments carry more weight.” The employee suggests that this conclusion of the judge constitutes a refusal to accept “uncontroverted” results of vocational testing indicating that the employee is functionally illiterate. He argues that, in so finding, the judge “ignores the futility of administering a written test to a person who cannot read.” We do not agree.

As the employee himself notes in his brief, the compensation judge expressly ruled at hearing that a demonstration by the employee of his professed inability to read was pointless. Given that it is the employee’s own position that he cannot read, the reasons for the ruling are obvious. Nor, we would add, was it entirely unreasonable for QRC Stubbe’s firm, for similar reasons, to administer the unwritten version of the tests at issue. However, notwithstanding these conclusions, the fact remains that the version of the very tests that purported to establish the employee’s reading ability apparently did essentially presume, on little more than the employee’s own assertion, that that ability was essentially at no greater than a second grade level. It was the observation of vocational consultant Berdahl, in his report to the employer and insurer on February 23, 1998, that, “while [the employee] obviously has limited capabilities in terms of reading and writing,” the employee “was obviously able to make some successful adaptations to the point where he functioned as a supervisor” for several years. There is little contention by either Mr. Berdahl or the compensation judge that the employee’s ability to read may not be quite limited. Based on the employee’s “demonstrated capabilities, as found via his actual work history,” Mr. Berdahl rated the employee’s language skills “Low Average” and his clerical perception “Below Average,” and the compensation judge found only, in Finding 6, that “the trade of sheet metal worker requires an individual to be able to read” and that the employee “reads well enough to interpret specifications, manuals, blueprints and technical diagrams used in the trade of sheet metal work.” As the judge stated in her Memorandum, “Reading may have been difficult for the employee, but when he had to do it, he was able to.” The judge did find the employee less than credible in his claim that he managed his job only by bringing his multi-page blueprints and specification books home to be read to him by his wife and then memorized for application the next day, but this finding does not constitute a conclusion that the employee did not have a substantial reading deficit. Moreover, to the extent that it might be seen to constitute a finding contrary to functional illiteracy, that credibility conclusion was clearly within the judge’s discretion. See Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (assessment of a witness's credibility is the unique function of the trier of fact).

We conclude that it was not unreasonable for the compensation judge to find as she did, pursuant to arguments of Mr. Berdahl, that the employee’s “actual life attainments” were better evidence of the employee’s employment potential than were “one set of vocational tests,” at least with regard to potential employments arbitrarily excluded by those tests’ literacy scores. A trier of fact’s choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985). Mr. Berdahl’s opinion does not appear to be based on any false premise that the employee did not have important reading deficits, and the compensation judge’s apparent reliance on that opinion was not unreasonable. Therefore we will not reverse the judge’s decision on grounds that it ignored “uncontroverted”

evidence of illiteracy. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Vocational Testimony

The employee contends that the compensation judge erred in finding that “the employee’s vocational testing showed that he had a current earning capacity of . . . between \$180.00 and \$310.00 per week.” He argues that his vocational experts found him incapable of performing any job and that the employer and insurer’s expert, David Berdahl, performed no vocational testing of his own and was unable to locate a single job opening which would have been suitable for the employee. Finally, he argues that the compensation judge also failed to take into consideration the employee’s age, sixty-two, when he left employment with the employer. We are not persuaded.

The employee’s vocational testing was conducted on August 2, 1995, under the direction of QRC Stubbe’s associate vocational consultant Kathleen Anderson. As indicated earlier, the tests were administered in an oral format, upon the employee’s assertion that he could not read. In her August 8, 1995, report, prior to recounting the specific results of her testing, Ms. Anderson stated as follows in a paragraph headed “Financial/Salary Requirements”:

A the time of injury, Mr. Hansen was earning approximately \$24.00 per hour. His hourly wage including benefits was \$29.00 per hour. The McCroskey Transferable Skills Report shows that his current entry level earning capacity is \$4.49 to \$7.76 per hour. This post-injury earning capacity translates to between \$180.00 and \$310.00 per week compared to the employee’s date of injury wage reported at \$1000.00 per week. In my opinion, these wages do not qualify as gainful employment.

Ms. Anderson indicated subsequently that her testing had included the Wide Range Achievement Test [WRAT], Level III, which had revealed that the employee’s reading and spelling skills were at the second grade level and his arithmetic skills were at a ninth grade level. She indicated also that her testing had also included the Career Ability Placement Survey [CAPS], which had revealed the following levels of ability: mechanical reasoning, 68%; spatial relations, 32%; verbal reasoning, 8%; numerical ability, 32%; language usage, 2%; work knowledge, 1%; perceptual speed and accuracy, 8%; and manual speed and dexterity, “right hand evaluated only,” 92%. Ms. Anderson indicated that she did not use the CAPS scores to generate a vocational profile “because they do not take into consideration physical limitations” but that she did use them to obtain aptitude levels for the McCroskey Transferable Skills analysis, referenced earlier. The McCroskey analysis, which was administered by another of QRC Stubbe’s associates, had revealed that the employee was capable of performing only 9 out of 2,476 potential jobs listed in the Ramsey County Job Bank: bicycle assembler, container liner inserter, tobacco bin filler, bagger, garment folder, copper wire cutter, rag sorter and cutter, fruit cutter, and cleaner/housekeeper. Notwithstanding her earlier statement that the McCroskey results had revealed the employee’s post-injury earning capacity to be between \$180 and \$310 a week,

Ms. Anderson concluded her report by asserting that the employee was medically precluded by his left hand disability from performing any of these nine jobs and so was not a candidate for vocational placement services “based on the wages that are available to him.”

The day after Ms. Anderson’s evaluation, August 3, 1995, the employee underwent his vocational evaluation for the employer and insurer by Mr. Berdahl. In October 1997, the employer and insurer provided Mr. Berdahl with additional file information pertinent to an assessment of the employee’s vocational prospects, and on February 23, 1998, Mr. Berdahl made his report. In that report, Mr. Berdahl observed that, when viewed in light of occupational requirements listed in the US Department of Labor’s Dictionary of Occupational Titles, Ms. Anderson’s findings would suggest that the employee would never have been able to perform as a sheet metal worker at all, even without any physical restrictions - - “and yet he has [had] an entire[ly] successful career as a sheetmetal worker.” Mr. Berdahl noted further that Ms. Anderson’s assessment would similarly suggest that the employee could never have performed his job at West Industries, although he apparently performed that job also quite adequately for nearly five months.⁹ In light of these facts, Mr. Berdahl concluded that Ms. Anderson’s assessment “does not present a realistic and valid portrayal of [the employee’s] capabilities and/or employment potential.” Supporting the opinion with a summary of individual employer contacts, Mr. Berdahl concluded that the employee “does have employment options available to him within the Twin Cities labor market” and “would have a starting level earning capacity ranging anywhere from a low of \$6.00 per hour, up to between \$8.00 to \$10.00 per hour,” - - a range of from \$240 to \$400 a week.

We conclude that the judge’s assessment of the vocational evidence was not unreasonable. We acknowledge that the nine potential jobs that the Stubbe firm’s tests indicated might produce for the employee a weekly wage of up to \$310 were disqualified by Ms. Anderson on grounds of the employee’s left hand physical disability. However, there is credible evidence, both in the opinion of Dr. Call and in the employee’s own demonstrated ability to perform competently for nearly five months a job arguably outside his restrictions, on which the judge could have concluded that that physical disability was not by itself sufficiently severe to constitute a basis for disqualification from the nine simple jobs identified. This is not even to mention the fact that the pool of jobs potentially available to the employee would no doubt be substantially broadened from that nine by application of the judge’s conclusion, here affirmed, that the employee had at least some ability to read.

⁹ A performance evaluation of the employee’s work at West Industries was completed on February 15, 1995, on which the employee’s two highest ratings were in the areas of attendance and dependability/reliability and his two lowest ratings were in the areas of knowledge of the job and work performance. The reviewer had indicated that the low rating in work performance, which was defined in terms of both quality and quantity of work, might be due simply to a poor hearing condition, a condition corroborated by a reference by the employee’s own attorney at hearing. On March 5, 1995, upon completion of his probationary period, the employee was retained by West Industries and received a raise in pay.

With regard to the sufficiency of Mr. Berdahl's testing and survey of the job market, we conclude that, given especially the evident fractures in the employee's own vocational evidence, the judge's acceptance of Mr. Berdahl's opinions was not unreasonable. Although based more on what the employee's actual work history shows him capable of doing, rather than on what skills he might currently demonstrate in a testing situation, Mr. Berdahl's vocational assessments are detailed and thorough and supported by computerized analyses. Although Mr. Berdahl's January 1998 survey of potential employers in the Twin Cities area did not identify any jobs currently open to applicants with the employee's abilities and restrictions, the survey did identify ten potential employers who had just filled and/or were about to fill openings with such applicants. Moreover, it was Mr. Berdahl's opinion that the employee's age would not be a barrier in obtaining an entry level job such as Mr. Berdahl was recommending. In fact, he emphasized, "[i]n some respects some employers would prefer older workers simply due to the perception that older workers have [a] better work ethic and are more reliable." We conclude that it would not have been unreasonable for the compensation judge to accept and rely on these opinions, and therefore we will not reverse the judge's decision on grounds that her relevant findings were unsupported by substantial evidence. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Job Search/Earning Capacity

At hearing, the employee testified generally that he searched for work during the year and a half between his retirement from the employer in June 1993 and his employment by West Industries in December 1994. He offered into evidence, however, job search logs for only about the last two weeks of that period, documenting only eighteen contacts with potential employers. The compensation judge concluded in Finding 10 that the employee offered insufficient evidence of a diligent job search between June 1993 and November 1994 to entitle him to total disability benefits during that period. The employee asserts that a job search is not, as a matter of law, necessary to establish entitlement to total disability benefits, and he contends that the compensation judge erred by requiring a diligent job search in this case. Moreover, he suggests that the compensation judge "does not adequately consider the effects of the employee's functional illiteracy on his ability to perform and document a job search." He contends also that, in concluding that the employee has an earning capacity of from \$6.00 to \$7.00 an hour, the compensation judge appears to have erroneously relied on the fact that the employee voluntarily resigned from his job with West Industries, which the judge herself concluded was outside the employee's restrictions. He argues, finally, that the compensation judge erred in concluding that it was the employee's position that the most important factor in determining what constitutes sustained gainful employment is whether the after-injury earning capacity is a small or large fraction of the date-of-injury wage. We are not persuaded.

It is well established that a diligent job search is not a legal prerequisite to being found totally disabled in a workers' compensation proceeding. See Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 188, 30 W.C.D. 426, 432 (Minn. 1978); see also Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 733, 40 W.C.D. 948, 954 (Minn. 1988) ("employees who are capable of work must make a diligent job search to establish total disability" (emphasis added)). However, evidence of a post-injury job search, or the lack thereof, may still go to the evidentiary weight of

the employee's claim that he is totally disabled. See Scott, 267 N.W.2d at 188-189, 30 W.C.D. at 432. In this case, particularly given the employee's relatively successful post-injury work at a job that was arguably even beyond his restrictions, it was not unreasonable for the judge to consider the diligence of the employee's job search in reaching her decision as to the totality of the employee's disability. With regard to the judge's consideration of the impact of the employee's reading and writing ability on the conduct and documentation of his job search, we reiterate our affirmance of the judge's conclusion that the employee has apparently at least some ability to read and write, however minimal it might be. Certainly individuals of no more literacy and far less experience and responsibility in the employment world have successfully sought work, and certainly the employee, in his long history of work at various levels in the sheet metal industry, has been responsible for more complicated record keeping than mere job search logs. Indeed, it is noteworthy that, fully a year after his work injury and over three months after retaining an attorney in this matter, the employee did manage to successfully document a reasonably diligent job search for about two weeks and that that same brief search did, in fact, result in employment.

With regard to her determination of the employee's earning capacity, we conclude that the compensation judge did not rely in any material way on the employee's work for or resignation from West Industries. Vocational consultant Anderson set the employee's hourly earning capacity without consideration for his left hand disability at from \$4.49 to \$7.76, and rehabilitation consultant Berdahl set that earning capacity at from \$6.00 to \$8.00 and upward to \$10.00. The judge's fixing of that hourly earning capacity at from \$6.00 to \$7.00 is clearly within the brackets proposed by both vocational experts. The judge does note in her Memorandum that "[t]he theoretical projections of earning capacity made by both employment experts are supported by the fact that [the employee] made \$6.75 per hour" at West Industries, but we conclude that this observation does not rise to material reliance on the West Industries job as an index of the employee's earning capacity.

Finally, we conclude that the judge did not err in suggesting in her Memorandum that it was the employee's "position that the most important factor [in determining what constitutes sustained gainful employment] is whether the after-injury earning capacity is a small or a large fraction of the date-of-injury wage." This statement by the judge in her Memorandum does not, first of all, constitute a factual finding. Moreover, there is basis in the record on which the judge might reasonably have inferred that the referenced degree of wage disparity was, in fact, a factor in the employee's assessment of earning capacity, whether or not it was "the most important" factor. Prior to disqualifying such a capacity on grounds of the employee's physical disability, vocational consultant Anderson found a "post-injury earning capacity [that] translates to between \$180.00 and \$310.00 per week compared to the employee's date of injury wage reported at \$1000.00 per week" (emphasis added), adding immediately, "In my opinion, these wages do not qualify as gainful employment." Implicit in these statements is a clear suggestion that Ms. Anderson understands the disparity between an employee's pre-injury and post-injury wages to be a factor in determining his entitlement to permanent total disability benefits. Ms. Anderson makes no reference to the availability of only "sporadic employment resulting in an insubstantial income" as the more appropriate correlative standard. See Schulte, 278 Minn. at 83, 153 N.W.2d at 134, 24 W.C.D. at 295 (emphasis added). Nor do we find any reference to that standard

anywhere else in the employee's rehabilitation records until it is posed to QRC Stubbe at her deposition. We conclude that the compensation judge did not err in focusing on the apparent misconception to the extent that she did in her Memorandum. Because they were also not unreasonable, we will not reverse the compensation judge's findings as to the employee's job search and earning capacity. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Suitable Work with the Employer/Withdrawal from the Labor Market

In Finding 9, the compensation judge found that, several months before the employee's retirement from the employer in June 1993, "Mr. Nadeau offered to assign the employee to work that he would perform one handed or to assign him to the kind of major projects where he would have performed only supervisor duties which would not have involved carrying tools and duct work on scaffolds, ladders, beams and tresses." The judge found that "the employee chose to take early retirement in June 1993 rather than accept one handed or supervisory-only job assignments." The employee contends that the compensation judge erred in finding that the employer had physically suitable work available for the employee in June 1993 and that the employee's retirement at that time was a voluntary withdrawal from the labor market. We are not persuaded that the judge's conclusion was unreasonable.

The employee testified at hearing that there was no talk of his doing a light duty job for the employer after his surgery and that there was never any mention of his working in the office or doing any similar work. He testified that working in a supervisory capacity without participating in the physical work that was outside his restrictions would not even have been possible,

because in the building where I was it was all open steel beams, the floors removed, the grates removed. In order to get in to where [other workers] were I had to walk out onto the beams to get to them—or climb in there. And even to supervise and tell them what I wanted done with the project I would have to go out there to tell them to do it.

The employee testified that, to explain his reasons for leaving the employer, "I told them I could not work for them anymore, my hand hurt too much, and there was no physical work I could do, and they offered me no work to do." When asked on direct examination whether he had told the employer that he was retiring, he responded, "I told them if that's what I had to do to make a living, that's what I would do, but I went right down to the union hall and tried to get a job right away." When he was informed by the union that no work was available, he testified, "in order to survive, I had to file for retirement." Subsequently, he testified, he went out and looked only for smaller jobs unrelated to sheet metal work, as permitted by pension rules. He testified that he had intended to work to at least age sixty-five and decided to retire at age sixty only because he "couldn't physically do anything anymore." He testified that his annual income dropped from \$50,000 to \$20,000 when he went from working for the employer to being dependent on his pension and Social Security, and he indicated that, had he been able to wait just six more months

to retire, his monthly income would have jumped about two hundred dollars.

The employee's testimony was countered by the testimony of the employee's supervisor at the employer, Ron Nadeau. Mr. Nadeau testified that he believed that, "a couple months prior to [the employee's] retiring," the employee came to him "and said that he could not perform his work due to his injury and that he was honestly thinking of retiring." Mr. Nadeau testified that he believed he responded by inviting the employee to "work here with one hand or just supervise" but that the employee told him that "you know me. If I can't do it, then I don't want to be here at all." Mr. Nadeau testified further, "I really believe that [the employee] wanted to retire." The employee evidently declined a retirement party but consented to a luncheon with Mr. Nadeau, to which the employer's owners were also ultimately invited. Mr. Nadeau testified that his "recollection is [that] all we talked about was retirement" at that luncheon. On cross examination, Mr. Nadeau reiterated, "I believe I told Thor he could stay as long as he wants as a working - - nonworking supervisor." On redirect, Mr. Nadeau reiterated that, if "Thor wanted to stay on, I would've said - - yeah, I'd be happy to have him."

Also testifying at hearing was the employer's president, Ron Pearson. Mr. Pearson testified that, prior to the employee's going off work in June 1993, the employee and Mr. Nadeau came into his office to discuss retirement. Mr. Pearson testified that he had suggested to the employee, "[G]ee, you're too young," but that the employee had indicated that he could no longer do a lot of the heavy sheet metal work that he had done in the past and that now "he wanted to do things; he wanted to go to Alaska; he wanted to do hunting and fishing." When asked if he would have provided the employee with a nonphysical supervisory position had the employee been interested in one, Mr. Pearson responded, "Thor Hansen is someone that everybody knows in the company, and for me not to give him a non[physical] supervis[ory] role would be ludicrous." On cross examination, the employee's attorney asked Mr. Pearson if he was aware that, subsequent to the employee's retirement, she had written several letters to the employer and insurer's attorney indicating that the employee would like to return to work. Mr. Pearson responded, "I wasn't aware of that."¹⁰

In concluding that the employer had physically suitable work available for the employee in June 1993 and that the employee therefore voluntarily retired from the labor market when he went off work at that time, the compensation judge accepted and relied on the testimony of Mr. Nadeau and Mr. Pearson rather than that of the employee. Assessment of the credibility of witnesses is the unique function of the trier of fact. See Brennan, 425 N.W.2d at 839-40, 41 W.C.D. at 82. Nor was the judge's credibility conclusion on this issue unreasonable. Evidence presented by both sides in the record as a whole generally supports the conclusion that it would not have been atypical for the employee to require of himself all of the skills and abilities that he might be expected to require of subordinates, and so to decline a position as a "nonworking" supervisor. Moreover, even acceptance of the employee's argument that the particular project on

¹⁰ We note that the letters to which the employee's attorney apparently refers referenced the employer's Safety Director as the informational contact with the employer at the time.

which he was working just prior to his retirement would not have permitted him to serve as such a “nonworking” supervisor does not preclude the possibility that such a position might be available on other projects. Further, the judge had already reasonably found the employee to be of questionable credibility on another issue - - i.e., the degree to which he depended on his wife to read for him at night, for his memorization, the plans and specifications that he was responsible for applying each day at work. Because credibility issues are the unique province of the trier of fact, Brennan, and because the judge’s conclusion on this issue was not otherwise unreasonable, we will not reverse the judge’s denial of benefits on grounds that substantial evidence does not support her findings that the employer had physically suitable work available for the employee in June 1993 and that the employee voluntarily retired from the labor market when he quit working for the employer at that time. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

The compensation judge’s denial of Mr. Hansen’s claim for permanent total disability benefits since June 14, 1993, is affirmed.