WILLIAM A. LAFLAMME, Employee/Appellant, v. FLOE INT'L and MINN. ASSIGNED RISK PLAN/BERKLEY ADM'RS, Employer-Insurer, and MN DEP'T OF HUMAN SERVS., Intervenor, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 23, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's determination that a finding of permanent total disability would be premature where limited rehabilitation assistance had been provided, and the employee's vocational expert recommended attempting sheltered or transitional employment options as a means of returning the employee to sustained gainful employment.

Affirmed as modified.

Determined by Johnson, J., Wilson, J. and Hefte, J.
Compensation Judge: Bradley J. Behr

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's finding that the employee failed to prove he was permanently and totally disabled from June 27, 1995, to the date of hearing. We affirm.

BACKGROUND

The employee, William A. LaFlamme, was 44 years old at the time of the hearing. He was divorced and had sole custody of his eleven year-old twins. His past work experience consisted primarily of welding and pipefitting, as well as some limited experience as a ticket agent, construction worker, plumber, and salesperson.

In June 1992, the employee began working as a welder for the employer, Floe International, in McGregor, Minnesota. The employer was insured by the Minnesota Assigned Risk Plan/Berkley Administrators. On August 6, 1992, the employee sustained an admitted, work-related injury to his head and neck when the upper deck of a pontoon boat came down, striking him on the top of the head. The employee was initially treated at the McGregor Clinic, and then by Dr. Steven Lebow. The employee was off work until November 1992, when, with

the assistance of a qualified rehabilitation counselor (QRC), he returned to work as a fabricator for the employer. He initially worked light-duty, then was released to return to work full-time on February 2, 1993.

On February 26, 1993, the employee sustained an admitted injury to his low back lifting a heavy metal beam at work. He was taken off work by his chiropractor, Tim Setterquist, D.C. The employee was released to return to work in September 1993 by Dr. Lebow, who recommended part-time work in a work-hardening program with no lifting over 30 to 40 pounds, or full-time, light-duty work with a work-conditioning program. The employee did not return to work with the employer, but could not recall the circumstances of his leaving.[1]

On December 8, 1993, the employee began working part-time as a press operator for Engineered Polymers Corporation (EPC) in Mora, Minnesota, working two 12-hour shifts on the weekends. On April 23, 1994, he was seen at Kanabec Hospital for an aggravation of his low back pain. He was then seen by Dr. Lebow on May 2, 1994, complaining of increased low back pain and pain in his left arm. Dr. Lebow noted the job at EPC was outside the employee's restrictions as it required frequent bending and lifting up to 60 to 70 pounds. He allowed the employee to return to work, but again restricted him to no lifting over 30 to 40 pounds. The employee continued to work for EPC.

On July 27, 1994, the employee was seen by Dr. Terry Johnson at the Mora Medical Center. He reported increasing pain in his left elbow during the past four months, stating he had been unable to work since July 9, 1994 due to severe elbow pain. Dr. Johnson noted the employee was terminated by EPC the following week. Dr. Johnson diagnosed epicondylitis of the left elbow due to repetitive use, and restricted the employee from any use of the left arm.[2] In October

---

[1] The employer and insurer initially denied liability for a low back injury. The employee filed a claim petition on May 21, 1993 seeking wage loss benefits. The parties entered into a to-date Stipulation for Settlement in June 1994 in which the employer and insurer admitted liability for the February 26, 1993 back injury, as well as the August 6, 1992 injury to the head and neck. The stipulation closed out temporary partial disability benefits for two years from April 14, 1994, and permanent partial disability for vascular headaches and cervical degenerative disease to 8.5% of the body as a whole. Rehabilitation services were closed out to-date, but remained open for the future. An Award on Stipulation was issued on June 30, 1994.

[2] On August 8, 1994, the employee filed a claim petition against both Floe International and EPC seeking temporary total disability benefits, payment of medical bills and rehabilitation assistance. The petition was later amended to include a claim for 7% permanent partial disability for the left arm. Both employers and their insurers denied liability. The parties entered into a Stipulation for Settlement in April 1995. The employee agreed he was at maximum medical improvement for all injuries as of January 4, 1995. The stipulation closed out temporary total disability to date and three months into the future, as well as permanency to the extent of 7% of the whole body. The settlement was full, final and complete as to all claims against EPC including medical, rehabilitation and retraining benefits. Claims against Floe International were settled to-

1994, the employee completed two weeks of physical therapy to the left arm. The November 1, 1994 discharge summary notes the employee was basically functioning without pain by his last visit.

The employee was seen for an independent medical examination by Dr. Bruce Van Dyne on November 15, 1994. The doctor diagnosed a work-related cervical strain and muscle contraction headaches; a work-related musculoligamentous lumbar strain superimposed on a pre-existing spondylolisthesis at L5-S1; and left lateral epicondylitis, resolved. Dr. Van Dyne believed the employee could work with restrictions, including no repetitive lifting or bending and no lifting over 50 pounds.

The employee returned to Dr. Johnson on December 7, 1994. The doctor assigned permanent work restrictions including no lifting over 25 pounds, avoid repetitive movements of the left arm including grasping, manipulation and frequent flexion and extension, and no lifting over 10 pounds with just the left arm. The employee was then seen by Dr. Lebow on December 23, 1994. The doctor noted the employee continued to have neck pain, headaches and intermittent flare-ups of low back pain. The left elbow was mildly uncomfortable. Dr. Lebow released the employee to return to work with restrictions of no lifting over 30 pounds, no repetitive use of the left arm, and no prolonged standing or sitting in one position.

A new QRC and job placement vendor were assigned to the employee in the spring of 1995. After a brief job search, the employee obtained work as a commissioned sales person with Citation Cable Systems beginning on May 23, 1995. The employee worked for Citation through August 28, 1995, making only $200.00. (Ex. 4.)[3]

In early 1996, the employee was referred by the state's Division of Rehabilitation Services to Ray W. Griffen, a vocational evaluator with the Department of Economic Security, for testing and evaluation. Standardized vocational testing, completed on April 24-25, 1996, revealed apparent difficulties in cognitive functioning possibly related to the employee's head injury in 1992. Mr. Griffen referred the employee for neuropsychological testing which was completed by Maureen Winger, Ph.D., L.P., on August 8, 1996. The testing revealed cognitive deficits which Dr. Winger believed were consistent with a head injury. Dr. Winger opined that the employee would likely have a difficult time "thinking on his feet" and adjusting to changing demands in the workplace. She, therefore, recommended work that is routine and repetitive. She further recommended a quiet work environment with frequent breaks. Finally, Dr. Winger observed the

---

date. Floe International also specifically agreed to assign the QRC requested by the employee, Ed Ames of the Vocational Rehabilitation Unit, for a period of 90 days from the Award on Stipulation.

[3] Although some vocational records from 1992 through 1995 are included in the optically imaged department file and Judgment Roll in this case, these records were not submitted at the hearing.

employee has difficulty learning information presented verbally, and suggested that information be presented in multiple modalities, visually as well as verbally, and that the employee write down important information.

The employee was seen in follow-up by Dr. David Dorn on September 17, 1996.[4] The doctor noted the employee had ongoing neck pain, headaches and low back pain, had a history of elbow problems, and was having "memory" problems. Dr. Dorn completed a report of work ability restricting the employee to no lifting over 30 pounds, no repetitive use or lifting over 10 pounds with the left arm, and no prolonged standing, sitting or bending. Dr. Dorn further observed,

> Personally, taking into account his various injuries, problems and results of the psychometric testing, I would have some concerns about this gentleman's ability to find work. I think there is a strong chance that he is not going to be capable of finding substantial gainful employment. (Ex. C, 9/17/96 letter.)

Mr. Griffen completed his vocational report on October 9, 1996. He indicated that, physically, the employee was capable of sedentary to light-duty tasks. He observed, however, that the employee "had extreme difficulty with tasks requiring problem solving and following auditory instruction," and had "a great deal of difficulty working from diagrammatic instruction and assembling mechanical puzzles" during testing. He concluded,

> These problems do not point toward independent, competitive functioning, even at a lower level, repetitious job such as assembly or packaging. He would need support, both clinical and on the job site in the form of a job coach or trusted co-worker or employer to help him through difficulties in organizing his work. It is felt that at this time the employee is not capable of engaging in substantial gainful employment. (Ex. F, 10/9/96 report.)

In about November 1996, the employee moved to Blaine, Minnesota. He continued to treat with Dr. Dorn. The doctor continued to impose the same work restrictions, at times, however, restricting the right arm, for which the employee was currently being treated, rather than the left arm. On February 24, 1997, Dr. Dorn diagnosed a closed head injury; post-traumatic headaches; cervical strain/sprain syndrome; lumbosacral strain/sprain syndrome with spondylolisthesis; and left and right lateral epicondylitis. Dr. Dorn concluded that the employee

[4] Both Dr. Dorn and Dr. Lebow are physicians with the Noran Neurological Clinic. Due to transportation difficulties the employee requested his care be transferred to the Mora Medical Center where he was seen by Dr. Dorn.

had reached maximum medical improvement (MMI) for all injuries.[5]

On June 24, 1997, the employee was seen by Thomas Beniak, a neuropsychologist, at the request of the employer and insurer. In his report, dated July 30, 1997, Dr. Beniak stated that the test results showed a "pattern of impaired attentional deployment, sustained vigilance and learning [that was] quite apparent." He believed his results were consistent with those of Dr. Winger. He similarly recommended the employee be assigned routine and repetitive tasks, that mnemonic aids such as a diary/calendar be used, and additionally suggested therapy or counseling and/or cognitive remediation or training to compensate for the employee's psychological and cognitive problems. Mr. Beniak believed, however, that the employee,

> [C]ould and should return to gainful employment in a capacity he is capable of managing. Even a minimally-structured work environment would greatly heighten his chance of success. (Ex. I, 7/30/97 report.)

At the request of the employee, QRC Steven Hollander completed an employability assessment report on September 26, 1997. Mr. Hollander observed that from a cognitive and emotional point of view, the employee would do better in a repetitive work situation. However, his physical restrictions generally prohibit most repetitive work. Thus, in Mr. Hollander's opinion, the employee was not competitively employable at that time. He suggested, however, transitional or sheltered employment as a "first step in the return to work process." (Ex. J, 9/26/97 report.)

A vocational assessment report, dated November 19, 1997, was prepared by Lynn Hjelmeland, a rehabilitation consultant, at the request of the employer and insurer. Ms. Hjelmeland concluded that the employee's physical and cognitive problems would not preclude him from work, and opined the employee was capable of obtaining substantial gainful employment. She recommended a job search with the assistance of a QRC or job placement vendor with a good knowledge of the employee's capabilities and his geographic area.

In late March 1998, the employer and insurer agreed to rehabilitation assistance, for 60 to 90 days, with the job placement vendor of their choice. With the assistance of QRC Hollander and placement vendor Dan Fowler, the employee obtained work as a security guard with Twin City Security beginning on May 27, 1998. He was initially assigned two 12-hour days on

[5] On March 10, 1997, the employee filed a claim petition alleging an injury to the head, neck and back on August 6, 1992, and seeking permanent partial disability of 35% for his head injury. The employer and insurer denied liability. In November 1997, the parties entered into a Partial Stipulation for Settlement in which the employer and insurer admitted liability for a closed-head injury, and closed out the employee's permanency claims to the extent of a 35% whole body impairment. An award on stipulation was issued on December 2, 1997, as amended on December 19, 1997.

the weekend shift, watching and reporting activity at a railroad yard. Shortly after he started, Twin City Security began assigning the employee to other sites on an irregular schedule. The constant change in work sites and locations was problematic for the employee, and an assignment to a single location with a regular routine was requested by the QRC. The employee was then assigned a full-time position on the night shift at Northrup King in downtown Minneapolis beginning June 21, 1998. That weekend, while doing his rounds, the employee discovered two individuals who appeared to be stealing office equipment. Although he had been instructed not to confront intruders, the employee yelled at the thieves who ran from the building. The employee refused to return to the job out of fear for his physical safety and was terminated as of June 29, 1998. QRC Hollander requested that rehabilitation services be reinstituted, but the insurer refused additional job placement assistance.

The employee continued to look for work on his own, obtaining job leads through the paper and job service. In August 1998, he obtained "very part-time" work as an on-call driver for Sacred Heart Transportation, using his own vehicle to transport disabled persons. The employee was paid by the mile and had minimal earnings. (Ex. J, 8/7 and 8/12/98.)

The employee filed an amended claim petition on September 26, 1997, seeking permanent total disability benefits from January 15, 1995 to the present and continuing. The case was heard by a compensation judge at the Office of Administrative Hearings on September 18, 1998. In a findings and order, served and filed October 28, 1998, the compensation judge found the employee was capable of working, subject to restrictions, and concluded the employee had failed to prove that he was permanently and totally disabled through the date of hearing. The employee appeals.

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

The employee argues that his physical and cognitive restrictions have caused him to be unable to maintain substantial gainful employment since June 27, 1995, and that substantial evidence does not support the compensation judge's finding that the employee is not permanently and totally disabled. We disagree.

The compensation judge found the employee was capable of working, accepting the restrictions provided by Dr. Dorn and Dr. Winger, that is, no lifting over 30 pounds, no repetitive use or lifting over 10 pounds with the left arm, and no prolonged standing, sitting or bending. The employee requires a quiet work environment, repetitive or routine tasks, frequent breaks and the option of using written notes. (Finding 2; Ex. C, 9/17/96 to 10/29/97; Ex. G.) The judge found that "[n]o physician has opined the employee is physically, mentally or psychologically unable to work," pointing out that neither Dr. Dorn or Dr. Winger had opined the employee was "incapable" of working. (Finding 2; mem. at 6.)

The concept of "total disability" depends primarily on an employee's ability to find and hold a job, and not solely on his or her physical condition. McClish v. Pan-O-Gold Baking Co., 336 N.W.2d 538, 542, 36 W.C.D. 133, 139 (Minn. 1983; Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967). "The significance of Schulte is that total disability is not solely based on an inability to perform work, but may also be based on an inability to find work an injured employee is capable of performing." Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 732-33, 40 W.C.D. 948, 953-54 (Minn. 1988).

An injured employee is not obliged to affirmatively seek and be denied employment as a prerequisite to permanent total disability. However, failure to conduct a reasonably diligent job search goes to the evidentiary weight of the assertion that the employee is permanently and totally disabled. Redgate, id.; Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 30 W.C.D. 426 (Minn. 1978). Thus, as a general rule, if an employee is not obviously incapable of working, "total disability" is established by a diligent job search to no avail. Redgate, id. Here, the compensation judge found little evidence of a reasonably diligent job search from May 1995 through April 1998 (noting the finding goes only to whether the employee has established permanent total disability). The judge further concluded that although QRC Hollander testified that the employee was not presently capable of sustained gainful employment, he recommended placement of the employee in a "sheltered workshop" environment as a means of making the transition to competitive employment. The compensation judge concluded, therefore, that it would be premature to make a finding of permanent total disability until "there has been a more concerted effort in this direction." (Findings 3, 5; mem. at 10.)

It appears the employee has had very limited, and often restricted, rehabilitation assistance through the workers' compensation system since leaving his employment with the employer, Floe International, in 1993. The employee has not worked full-time since then, nor has he worked on a sustained basis since his termination from EPC in approximately mid-July 1994, over four years ago. QRC Holland, while concluding that the employee was not presently capable of maintaining competitive employment, recommended trying some sort of sheltered or transitional employment or further training as a means of eventually securing sustained gainful employment. (Ex. B at 25-27, 41-42.) Mr. Griffen suggested support in the form of a job coach or trusted co-worker or employer to assist the employee at work. (Ex. F.) Dr. Beniak similarly observed that "[e]ven a minimally-structured work environment would greatly heighten his chance of success." (Ex. I.)

The employee was only 44 years old at the time of the hearing. He has repeatedly expressed his desire to return to work. Under these circumstances, the compensation judge reasonably concluded that it would be premature to find the employee permanently and totally disabled until more concerted rehabilitation efforts have been made, including exploration of sheltered, transitional or structured work-environment options. The compensation judge's decision is, however, modified, to the extent it could be read to limit rehabilitation efforts solely to placement in a "sheltered workshop." We, accordingly, affirm as modified.