STEVE SENICH, Employee/Appellant, v. HIBBING REHAB. and MINN. ASSIGNED RISK PLAN, adm'd by BERKLEY ADMR'S, Employer-Insurer, and MESABA CLINIC and WAUSAU INS. CO., Employer-Insurer, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 21, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's determination that the employee's job with Avis and STS pre-paid telephone card business resulted in insubstantial income, and the employee failed to prove entitlement to temporary partial disability benefits.

PERMANENT TOTAL DISABILITY; PRACTICE & PROCEDURE - REMAND. Where the evidence was conflicting and the extent of the employee's physical disability and restrictions was disputed by the parties, the compensation judge's failure to make specific findings regarding the employee's work restrictions and limitations requires a remand for additional findings and redetermination of the issue of permanent total disability.

Affirmed in part and vacated and remanded in part.

Determined by: Johnson, J. Wilson, J., and Wheeler, C.J.
Compensation Judge: Gregory A. Bonovetz

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's findings that the employee's earnings between February and July 1996 and from July 1996 to April 1997 were insubstantial and insufficient to establish entitlement to temporary partial disability benefits. The employee also appeals the compensation judge's determination that the employee is not permanently and totally disabled. We affirm, in part, and vacate and remand, in part, for redetermination in accordance with this opinion.

BACKGROUND

Steve Senich, the employee, was born on September 29, 1929, and is now 69 years old. He obtained a bachelor's degree in physical therapy from the University of Minnesota in 1956, and obtained a job as a physical therapist at the Iron Range Rehabilitation Center. He began

working as a physical therapist for Mesaba Clinic in the fall of 1957. He eventually became the director of physical therapy at the clinic.

On April 14, 1966, the employee sustained an admitted personal injury to his low back and right leg while employed by Mesaba Clinic, then insured by Wausau Insurance Company. The employee underwent low back surgery for a herniated disc at L4-5 on October 4, 1966. He underwent a second low back surgery in 1975. Following the surgeries, the employee continued to suffer chronic low back pain, right hip pain, and sciatic pain in the right leg with atrophy of the right calf muscles. The employee was paid a 20 percent permanency for the spine and a 15 percent permanency for the right lower extremity.

In February 1967, the employee began working as the director of physical therapy for Hibbing Rehabilitation (then known as Leisure Hills Nursing Home). The employee's job included direct patient care, supervision of physical therapy staff, and management of the physical therapy program. On November 16, 1992, the employee sustained an admitted personal injury to his neck, back and right shoulder, and an alleged injury to the left knee. Hibbing Rehabilitation was then insured by the Minnesota Assigned Risk Plan administered by Berkley Administrators.

Following the November 16, 1992 injury, the employee was treated by his family physician, Dr. Ben Owens, at the Mesaba Clinic. When the employee did not improve with conservative treatment, Dr. Owens referred the employee to Dr. Robert F. Donley and Dr. Thomas G. Patnoe at the Duluth Clinic for further evaluation and treatment. The employee continued to complain of neck pain, headaches, right shoulder and arm pain, low back and left hip pain, and left knee pain.

The employee continued to work at Hibbing Rehabilitation until June 1993 when he was terminated by the employer. Shortly thereafter, the insurer assigned a qualified rehabilitation consultant (QRC), Stewart Hunter of Intracorp, to coordinate a return to work.[1] In mid-April 1994, Dr. Donley released the employee to return to work with restrictions including part-time work, one to four hours per day as tolerated, no lifting over 20 pounds occasionally, and occasional bending, stooping, squatting, climbing, twisting and reaching. In May 1994, Hibbing Rehabilitation/Berkley became frustrated with the employee's lack of medical and vocational progress and filed a Medical Request, asserting a lack of a medical treatment plan. In June 1994, Hibbing Rehabilitation/Berkley filed a notice of intent to discontinue benefits (NOID), alleging there was no evidence the employee was unable to return to work. Following an administrative

[1] Documents in the Department of Labor and Industry file indicate that a Rehabilitation Consultation Report was completed in August 1993. A rehabilitation plan (R-2) was completed and signed by all parties in August and September 1993. The vocational goal was to return to work with a different employer, similar job. The employee's treating physician was listed as Dr. Donley. The employee had not yet been released to return to work. A rehabilitation plan amendment (R-3) was filed on February 2, 1994, extending the time to complete the plan and providing for coordination of a return to work in a light-duty, part-time position.

conference on August 1, 1994, a settlement judge at the Department of Labor and Industry concluded there was an adequate treatment plan in place and denied the request to discontinue benefits.

The employee moved to Phoenix, Arizona, in August 1994 due, in part, to the ongoing effects of his work injuries. On December 16, 1994, Hibbing Rehabilitation/Berkley filed another NOID seeking discontinuance of workers' compensation benefits asserting the employee had been released to return to work with restrictions, had abandoned treatment, had relocated to Arizona and was not looking for work. An amended NOID was filed January 4, 1995, asserting as an additional basis for discontinuance that the employee had reached maximum medical improvement (MMI). Following an administrative conference, a settlement judge found the employee had reached MMI, and permitted discontinuance of temporary total disability benefits 90 days from January 3, 1995. (2/6/95 Order on Discontinuance.) The employee filed a claim petition and objection to discontinuance on April 7, 1995, claiming temporary total disability benefits from April 3, 1995 and continuing.[2]

In the meantime, the employee's rehabilitation file was transferred to a rehabilitation specialist in Phoenix, Arizona, Paula O'Neill, also with Intracorp. Ms. O'Neill was supervised from the Minnesota Intracorp office. The employee reported ongoing problems, including low back and hip pain, left knee pain, headaches, and numbness in his right hand. He requested a neurological consultation through Ms. O'Neill. The employee was seen by Dr. Ronald M. Lampert on January 31, 1995, who noted that he was authorized to care only for the employee's neck and right shoulder problems. Dr. Lampert diagnosed degenerative arthritis of the cervical spine with cervical radiculitis, and impingement syndrome of the right shoulder. He recommended an EMG and prescribed a kit for strengthening exercises to the shoulder. On April 17, 1995, Dr. Lampert completed a physical capacity evaluation form stating the employee could stand or drive without restriction, could sit 8 hours per day but needed to stand and stretch for 30 seconds to a minute twice an hour, could bend, squat, kneel, climb, reach, twist, rotate or crawl, but could do no repetitive work or lifting over 10 pounds over shoulder level.

On May 2, 1995, Dr. Owens completed a Report of Work Ability at the request of the employee. Dr. Owens limited the employee to zero to two hours per day of work, occasional lifting up to 10 pounds, no use of the right arm/hand for pushing/pulling or fine manipulation, occasional bending, squatting, kneeling, climbing, reaching, twisting, rotating, and no crawling.

On June 1, 1995, the employee was examined by Dr. Robert A. Johnson at the request of Hibbing Rehabilitation/Berkley. Dr. Johnson diagnosed arthritis of the cervical and lumbar spines; residuals from a herniated disc at L4-5 with chronic nerve root irritation extending

[2] The employee applied for Social Security retirement benefits in April 1995 and was awarded benefits retroactive to January 1995. The employee was receiving $1,227.00 a month in Social Security retirement benefits at the time of the hearing. The compensation judge found, however, that the employee had not retired from the labor market. (Findings 22, 23.)

into the lower extremitites; calcification of the left hip capsule; calcification of the left knee cartilage; pre-existing arthritis of both wrists; and no right shoulder pathology. Dr. Johnson stated the employee could resume work as a physical therapist, particularly in a directive, supervisory capacity but, due to his arthritis, should refrain from lifting patients. He restricted the employee to light-duty activities, including avoiding heavy lifting, bending, stooping, running, jumping, climbing or working around dangerous equipment.

In late May 1995, the employee, with the assistance of rehabilitation specialist O'Neill, began searching for part-time work as a physical therapy consultant. The employee sent out approximately 70 letters over a two month period, with follow-up calls, without success. On June 23, 1995, alternate occupations were identified for job search, including golf course manager, inventory taker, alarm monitor and courier/delivery driver. Ms. O'Neill provided a number of leads, including a position as a car delivery driver for Avis Rent-A-Car. The employee was offered a part-time job by Avis in August 1995, but was unable to begin work at that time.[3] In October 1995, Ms. O'Neill advised the insurer, MARP/Berkley, that the employee planned to take the delivery driver job with Avis. On November 17, 1995, the claims adjuster advised Ms. O'Neill that the job at Avis was not acceptable and asserted the employee should be conducting a full-time job search for a full-time job.

On September 18, 1995, the employee was examined by Dr. David A. Rand at the request of Mesaba Clinic/Wausau. The employee reported neck pain with occasional headaches, right shoulder pain and loss of motion, low back, right hip and right leg pain, left knee pain, and some numbness in the hands, particularly the right. Dr. Rand diagnosed degenerative arthritis in the cervical and lumbar spines, calcification in the left knee, a torn medial meniscus in the left knee by history, and a frozen right shoulder. Dr. Rand provided no opinion regarding work restrictions.

The employee returned to Dr. Owens who completed a report on September 25, 1995. Dr. Owens noted continuing neck, right shoulder, left knee, low back and right leg problems, along with headaches the employee related to his neck, and numbness and tingling in both hands. The employee reported he could not walk more than three blocks due to low back and leg pain, could not lift or carry more than five to ten pounds and for only a short periods of time, and could do only light yard or house work. Dr. Owens commented, "Agreement seems to be that this man could work only in a supervised capacity where he would do no physical work of any kind except instructing other therapists and workers health providers . . . . Unfort. he has been unable to find such employment in a strictly supervised capacity so therefore he is really unemployable." Dr. Owens agreed the employee had reached MMI.

[3] The employee was unable to job search from late August through October 1995 while undergoing radiation therapy. In December 1995, the employee reported ongoing side effects from the radiation treatments and an infection on his hands and arms.

In December 1995, the parties entered into a Stipulation for Settlement. The parties agreed the employee sustained a personal injury to the low back and right leg on April 14, 1966 and a personal injury to his neck, back and shoulders on November 16, 1992. Hibbing Rehabilitation/ Berkley maintained a primary liability defense with respect to the left knee. The employee receive a lump sum payment of $26,500.00 in return for a to-date settlement of all claims relating to the admitted injuries, with a full, final and complete closeout of temporary total disability benefits. Permanent partial disability to the cervical spine was closed out to the extent of 10.5 percent. Hibbing Rehabilitation/Berkley was given the exclusive right to select a new QRC or job placement vendor. An Award on Stipulation was served and filed on December 21, 1995.

The employee began working for Avis on February 26, 1996 at a wage of $4.75 per hour. The employee worked 21.75 hours during the first two week pay period, but worked less than ten hours most weeks thereafter. In about May 1996, the employee, on his own, began selling pre-paid telephone cards for Strategic Telecom Systems (STS) on a commission basis. On about July 12, 1996, the employee terminated his employment with Avis, reporting increased leg and hip pain due to the amount of walking required. Ms. O'Neill continued to forward part-time and full-time job leads to the employee.

On May 3, 1996, the employee filed a claim petition seeking temporary partial disability benefits from and after March 4, 1996. Hibbing Rehabilitation/Berkley maintained that the employee was earning "insubstantial income" and was capable of obtaining full-time employment. In March and April 1997, Dorothy Kret, a rehabilitation specialist, completed a Labor Market Report and employment evaluation for Hibbing Rehabilitation/Berkley. The report focused on job opportunities for physical therapists in the Phoenix, Arizona area. Ms. Kret concluded that the demand for physical therapists was high, and that, based on the employee's self-described restrictions,[4] there were various physical therapy jobs that would be appropriate and that he could do. She did not believe the employee's age would be a significant liability, but might even be an asset given the substantial number of retirees in the area. Ms. Kret further opined the employee had effectively retired from the competitive job market with respect to his physical therapy career.

In April 1997, the STS job "fell apart" and the employee ceased working. He has not looked for employment since. Ms. O'Neill continued to furnish the employee with job leads until early November 1997, when Hibbing Rehabilitation/Berkley requested that rehabilitation services be placed on hold as the employee did not feel he was capable of working or participating in job search.

[4] The employee reported various limitations on his physical abilities and activities to Dr. Owens (Ex. F), rehabilitation specialist O'Neill (Ex. Q), vocational expert Don Loscheider (Ex. P), and Ms. Kret (Ex. S, Ex. ARP 3).

In January 1997, the employee began to complain of increasing back pain, right and left leg numbness, right shoulder pain, and numbness in his hands. On May 14, 1997, the employee's primary care physician, Dr. David Harclerode, provided a referral to Dr. Candyce Williams, a neurologist. Dr. Williams ordered various diagnostic tests including MRI scans of the cervical and lumbar spines, and an MRI scan of the right shoulder.[5] The spinal scans showed significant degenerative disc and joint disease. The right shoulder MRI scan revealed a rotator cuff tear, tendinitis, hypertrophic changes in the AC joint with impingement and edema, fluid in the bursa, and an old fracture. The employee was seen by a specialist, Dr. E. Michael Lucero, on July 22, 1998, who recommended surgery consisting of an open right shoulder subacromial decompression and rotator cuff repair.

On December 17, 1997, the employee filed an amended claim petition seeking, in the alternative, permanent total disability from and after April 3, 1995, and payment of medical expenses. On August 28, 1998, Don Loscheider, a medical and rehabilitation consultant, completed an employment evaluation on behalf of the employee. Mr. Loscheider noted the employee's previous experience had been in adult and geriatric physical therapy, and opined that his restrictions would significantly limit him from performing the essential duties of most physical therapy positions. He further observed that new restrictive coverage of physical therapy treatment by government programs and third-party payors had created an extremely competitive job market in the physical therapy area. Mr. Loscheider believed that it was highly unlikely the employee would be able to procure a position in physical therapy, and opined that the employee was permanently and totally disabled.

A hearing was held before a compensation judge on December 7, 1998. Additional testimony was taken at the hearing from Dorothy Kret who agreed that the job market was not as favorable for physical therapists as it had been at the time of her March and April 1997 reports. Ms. Kret continued to believe, however, that jobs, in which the employee's restrictions could be accommodated, were available in physical therapy and related medical fields such as utilization review, supervision of home health care aides or discharge planning. She also testified that there were many jobs in telemarketing and customer service telecommunications in the Phoenix area that would be appropriate for the employee. Karen Stewler, a rehabilitation specialist, testified for the employee. She opined that the Avis and STS jobs were the best the employee could do. She further testified that based on Dr. Owens and Dr. Donley's restrictions, the employee was not competitively employable. In a Findings and Order, served and filed December 7, 1998, the compensation judge found, among other things, that the employee cooperated with the employer-selected QRC in Arizona; the employee's earnings with Avis and STS were insubstantial and insufficient to establish entitlement to temporary partial disability benefits; the employee is "markedly restricted" in certain of his physical activities; the September 25, 1995 restrictions of Dr. Owens "mirrors" the employee's self-perceived restrictions as related to Dorothy Kret; and based on the "burgeoning labor market" in the Phoenix, Arizona

[5] Dr. Williams also ordered Doppler testing of the lower extremities which revealed peripheral vascular disease. Bypass surgery was recommended for this condition.

area, the "rapidly increasing market" for one with the employee's training and experience, and the employee's transferable skills, the employee was and is not permanently and totally disabled. 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

Temporary Partial Disability

The employee argues he established entitlement to temporary partial disability benefits by showing he was earning less than his pre-injury wage. He asserts that he is entitled to the presumption of earning capacity, and that the employers and insurers failed to rebut that presumption. We disagree. As this court has noted previously, loss of earnings *alone* is not sufficient to establish entitlement to temporary partial disability benefits. See Parson v. Holman Erection Co., Inc., 428 N.W.2d 72, 41 W.C.D.129 (Minn. 1988). To be entitled to temporary partial disability benefits, an employee must be gainfully employed, that is, the employee must show something more than "sporadic employment resulting in an insubstantial income." See Schulte v. C.H. Peterson Constr. Co, 278 Minn. 79, 153 N.W.2d 130, 134, 24 W.C.D. 290, 295 (1967); Hubbell v. Northwoods Panelboard, 45 W.C.D. 515 (W.C.C.A. 1991); compare Minn. Stat. § 176.101, subd. 5(b); Hansford v. Berger Transfer, 46 W.C.D. 303 (W.C.C.A. 1991).

Here, the employee worked as a "very part-time" delivery driver for Avis for about four and a half months. The employee worked less than ten hours a week during most of this time, earning gross wages between $28.50 and $52.25 a week. (See unappealed finding 12; finding 14; Pet. Ex. T.) The compensation judge reasonably concluded the employee's job with Avis resulted in insubstantial income, and we must, therefore, affirm his determination that the employee failed to prove entitlement to temporary partial disability benefits during that time.

With respect to the claim for temporary partial disability benefits based on his STS telephone card sales, the employee simply failed to prove his earnings, if any, from that employment. In support of his claim, the employee testified he worked for STS from July 1996 through April 1997 and received total gross payments of $1,557.00. (T. 62-64, 76.)

Documentary evidence submitted consisted of copies of "commission escrow account" checks issued by STS of $200.00 on May 28, 1996, $400.00 on June 17, 1996, and $600.00 on August 13, 1996. (Pet. Ex. T.) The employee further testified that he ceased doing STS sales because it started costing him more money, agreed that he was not able to make a profit, and agreed that, taking into account the expense of trips around Arizona and to Minnesota in connection with the business, he lost money on the STS job. (T. 77, 107.)

The burden is on the employee to establish the amount of his post-injury earnings. Here, the evidence with respect to the amount of commissions earned is confusing and incomplete, and there is no evidence from which the employee's profit or "earnings" after expenses could be deduced. Compare McQuillan v. Syscom, Inc., 57 W.C.D. 210, 214, 214 n.1 (W.C.C.A. 1997); Trafton v. Marriott Corp., 52 W.C.D. 572 (W.C.C.A. 1995); Gilles v. S.B. Foot Tanning Co., 48 W.C.D. 183, 189-90 (W.C.C.A. 1992). At best, it could be concluded, as did the compensation judge, that the employee had failed to establish anything more than insubstantial income from the STS business. We, therefore, affirm the denial of temporary partial disability benefits based on the employee's STS pre-paid telephone card business.[6]

Permanent Total Disability

The employee contends he is permanently and totally disabled as he has been unable to secure anything more than sporadic employment resulting in an insubstantial income.[7] He asserts that he has been released to work only a few hours per day based on the restrictions provided by his treating physicians, Dr. Owens and Dr. Donley, and that the work he obtained with Avis and STS was the best he could do given his physical disabilities. The employers and insurers assert that the employee is clearly capable of working more than "one or two" hours a day, and was, in fact released by Dr. Lampert and Dr. Johnson to return to full time work. They argue the compensation judge's determination that the employee is not permanently and totally disabled is supported by substantial evidence in the record as a whole.

---

[6] The employee also contends that since there is no dispute that he cooperated with rehabilitation, he is entitled to temporary partial disability benefits. Even if the employee has made a good faith effort to cooperate with rehabilitation efforts and has conducted a diligent job search, there can be no entitlement to temporary partial disability benefits if the employee does not obtain a job resulting in gainful employment with something more than sporadic and insubstantial earnings.

[7] The compensation judge's findings that the employee was temporarily totally disabled between February 1996 and April 1997 are unnecessary to the determination that the employee failed to establish entitlement to temporary partial disability benefits during this period, and may be inconsistent with findings regarding permanently and totally disability during this same period of time, since both depend on the same definition of "total disability." We, accordingly, vacate those portions of findings 15 and 18 finding the employee temporarily totally disabled.

An employee is totally and permanently incapacitated if "the employee's physical disability, in combination with the employee's age, education, training, and experience, causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income." Minn. Stat. § 176.101, subd. 5(b)(1992); Schulte, at 134, 24 W.C.D. at 295. While "the concept of total disability is not a mere reflection of an employee's physical condition," Schulte, id., the employee's physical disabilities **must** be taken into account. The issue is whether the employee's "physical disabilities, in combination with" the listed vocational factors have caused the employee to be permanently and totally disabled.

The compensation judge concluded the employee is "markedly restricted in certain of his physical activities" (finding 20) but failed to make any findings regarding specific restrictions or limitations. The extent of the employee's physical disability is a primary focus of the dispute between the parties. The restrictions imposed by Dr. Owens in his May 2, 1995 work ability report are vastly different from those imposed by Dr. Lampert on April 17, 1995, or those provided by Dr. Donley in April 1994 or Dr. Johnson on June 1, 1995.

The compensation judge found the testimony of vocational expert Dorothy Kret "most credible" (mem. at 8), and concluded "the restrictions and limitations of Dr. Ben Owens of September 25, 1995 mirrors the employee's self-perceived restrictions which he related to Dorothy Kret as included within ARP Exhibit No. 3." (Finding 20.) It is not apparent, however, what those restrictions are, and it is not clear what functional capacities or restrictions either Ms. Kret or the compensation judge assumed. While the testimony of an experienced rehabilitation expert may be sufficient to support a finding of permanent total disability or the lack thereof, McClish v. Pan-O-Gold Baking Co., 336 N.W.2d 538, 36 W.C.D. 133 (Minn. 1983), the facts upon which the expert relies in rendering the opinion must be consistent with the facts found by the compensation judge. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

The compensation judge further found that "[s]ince no FCE has been performed concrete, specific restrictions have not been readily available." (Finding 20.) While we agree that a functional capacities assessment would have been helpful in this case, such testing is not required in order to determine an employee's restrictions and/or physical disabilities.

Both parties ask this court to assume on the evidence submitted that specific findings regarding the employee's restrictions or disabilities were made or could have been made. We reluctantly conclude we are unable to do so. It is impossible for this court to determine whether substantial evidence supports the compensation judge's findings regarding permanent total disability in the absence of a finding determining the employee's physical restrictions and limitations, and consideration of the testimony and opinions of the vocational experts taking into account the employee's "physical disabilities" as found by the compensation judge, "in combination with" the employee's age, education and experience, and the work available in the employee's community. We, accordingly, vacate findings 20, 21 and 22, and remand for reconsideration, on the existing record, in accordance with this opinion.