DONALD S. DETMAR, Employee, v. KASCO CORP., SELF-INSURED/AIG CLAIM SERVS., Employer/Appellant, and LIFE INS. CO. OF N. AM., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 28, 2000

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - INSUBSTANTIAL INCOME. As a general rule, when determining whether an employee's post-injury earning capacity does not constitute a "substantial income," the compensation judge may not consider the fact that the employee had a higher preinjury wage and that his post-injury wage may be considered inconsequential or insignificant by comparison. The issue in a permanent total case is whether the post-injury earning capacity would provide the employee with an income, that is something other than sporadic employment resulting in insubstantial income.

Affirmed in part, reversed in part and remanded.

Determined by Wheeler, C.J., Rykken, J., and Pederson, J.
Compensation Judge: John E. Jansen

OPINION

STEVEN D. WHEELER, Judge

The self-insured employer appeals from the compensation judge's determination that the total knee replacement surgery conducted on November 22, 1996, was causally related to the employee's work activity or injury. In addition, the employer appeals from the compensation judge's award of temporary total disability benefits from November 22, 1996, through February 6, 1997, and from a finding that the employee was permanently and totally disabled from and after February 7, 1997. We affirm with respect to the finding of a causal relationship between the employee's work activities and his need for a total knee replacement and we affirm the award of temporary total disability benefits after November 22, 1996, until such time as the employee was released to return to work. With respect to the permanent total finding, however, we reverse the compensation judge's decision and remand the matter for further determination consistent with this decision.

BACKGROUND

The employee, Donald Detmar, was first hired by the employer, Kasco Corporation, in 1988 as a territory manager. His work duties were primarily that of a route salesperson. He sold and serviced butchering and meat processing equipment and sold meat seasonings in a territory covering the Twin Cities metropolitan area and the southern part of Minnesota. In this position, the employee was required to lift 60 to 90 pounds on a daily basis. His job required him

to mostly stand, but might require him to kneel or crawl while underneath equipment that he needed to service. The employee operated out of his own step van in which he kept his supplies. The entry point into the van required a vertical step of approximately three feet.

On August 7, 1995, while the employee was exiting his van at one of his sales stops, he stepped on a rock and twisted his right leg and knee. He immediately felt sharp pain in his right knee and contacted his employer. He sought treatment from his regular chiropractor, Dr. Gary Kiekhoefer, who suggested he see an orthopedic specialist. A podiatrist friend of the employee referred him to orthopedic surgeon, Dr. Larry S. Stern. On August 11, 1995, at his initial visit with Dr. Stern, x-rays were taken and the employee was given a cortisone injection. Dr. Stern's initial diagnosis was right knee medial compartment degenerative joint disease. He also suspected that the employee might have a torn medial meniscus. On examination, Dr. Stern noted that the employee's right leg was bowlegged, a condition which he concluded was the result of long-term degeneration and which would put additional pressure on the medial aspect of the employee's knee. (Pet. Ex. B, Deposition of Dr. Stern; Pet. Ex. E-2.)

At the time of the August 7, 1995 injury, the employee was 56 years of age. Prior to working for Kasco, the employee had been a delivery truck driver for United Hardware for approximately nine years, a delivery truck driver for John Morrell for approximately 17 years, and a route sales person for Pepsi for approximately one year. The employee graduated from high school in 1957 and served three years in the United States Navy as a radarman. Upon his honorable discharge from the service, he was briefly employed as a loan administrator in 1960, before joining Pepsi. At the time of his injury the employee was earning approximately $68,000 per year. The parties stipulated that his weekly wage at the time of the August 7, 1995 injury was $1,294.54. (Finding 1b.)

As the employee was continuing to complain of right knee pain, Dr. Stern scheduled him for an MRI on September 20, 1995, which showed a significant tear of the medial meniscus in his right knee. On October 20, 1995, Dr. Stern performed an arthroscopic partial medial meniscectomy, but advised the employee that because of the underlying degenerative osteoarthritic condition of his knee that he would likely need a total knee replacement sometime in the next one to three years.

During this period, the employee continued to perform his regular duties as a territory manager, apparently without any significant interruption. The employee testified that his knee condition continued to deteriorate to the point that he sought treatment from Dr. Stern again on August 30, 1996. Dr. Stern diagnosed severe osteoarthritis of the right knee and recommended that the employee undergo a total knee replacement. X-rays indicated that the employee had a "complete loss of his medial compartment." (Pet. Ex. E-2.) Dr. Stern performed the total knee replacement surgery on November 22, 1996. The employee had continued working in his regular position until the day before the surgery. Following surgery, the employee first recuperated at home and undertook physical therapy treatments. Dr. Stern testified that when examined on December 18, 1996, the employee was making a very good recovery. The employee and Dr. Stern both contemplated that following his recuperation and rehabilitation he would return to his regular

sales position with the employer on April 1, 1997. Dr. Stern testified, in his deposition, that following such surgery he would expect that the employee would be able to stand and walk without restriction and would be able to lift and carry approximately 75 pounds. The employee would not, however, be able to squat and kneel frequently and should not engage in any crawling activity. Nevertheless, it was anticipated that the employee would return to his regular employment.

In January 1997, the employee went to Naples, Florida, to live in a condominium he and his wife had purchased in 1992 as a future retirement home. He stated that being in this location facilitated his rehabilitation program, particularly his walking, which was his primary exercise and his only weight control option. His wife testified that they had routinely vacationed in their unit for two to three weeks each January.

When the employer held its national sales meeting in February 1997, the employee, although not on active work status, was required to attend the conference in St. Louis. On February 7, 1997, while seated in a sales training session, with his right leg stretched out in front of him, a fellow employee fell on his leg. As a result of this incident, the employee's knee was hyperextended and the employee severely bit his lip. The employee testified that his knee was extremely painful and swollen. The employee returned to convalesce at his condominium in Florida and contacted Dr. Stern in St. Paul. The employee returned to the Twin Cities and was examined by Dr. Stern on March 12, 1997. At that time, Dr. Stern concluded that, as a result of his having hyperextended his knee on February 7, 1997, the employee now had a torn medial collateral ligament. (Pet. Ex. B, pp. 18-19.) He indicated that treatment of this condition was complicated by the fact that the employee had a total knee replacement. The employee's condition improved somewhat as a result of physical therapy treatment. Although his knee was still swollen and painful, Dr. Stern released the employee to return to work in late May or early June 1997 with severe restrictions, including not lifting more than ten pounds. (Pet. Ex. E-2, 5/18/97 office note.)

In the late spring or early summer of 1997, the employee, realizing that he would be unable to return to his regular route sales job, explored the possibility of returning to the employer as a field training manager. After some discussions, it became apparent that such a position, which was then being explored by the employer, would require that he move his residence to the St. Louis area. This was not satisfactory to the employee because of his longstanding ties with the Twin City area and his wife's long-term employment as a licensed practical nurse with a local hospital. As a result, the employee, whose short-term disability benefits from his employer were ending, applied for long-term disability benefits from CIGNA Insurance Company, which started apparently on June 20, 1997, but which were retroactive to mid May 1997. As a prerequisite to receiving these disability payments, the disability insurer required that the employee apply for social security disability benefits.[1] The employee apparently did not look for work in the summer or fall of 1997. No rehabilitation services were provided by the employer at any time.

[1] In a decision by the Social Security Administration dated November 16, 1997, the employee was determined to be disabled as of November 22, 1996, with benefits to commence in May 1997. (Pet. Ex. D.)

In the meantime, on July 25, 1997, the employee filed a claim petition seeking temporary total disability benefits from November 22, 1996, medical expenses and rehabilitation services. The claim petition indicated the employee's date of injury was in August 1994. This claim petition was subsequently amended on September 17, 1997, by changing the date of injury to August 7, 1995. A third amendment to the claim petition was filed, in the form of a letter dated December 4, 1997, in which the claim was expanded to request permanent partial disability in the amount of 15% of the whole body. At the time of the hearing, the employee's claim was further amended to request that the employee be considered permanently and totally disabled following the November 22, 1996 knee replacement surgery.

The employee apparently was last seen by Dr. Stern on September 22, 1997. At that time, the employee's condition continued to improve. Dr. Stern indicated that the employee's treatment consisted of home exercises and that the employee would possibly continue to improve until approximately February 1998. He stated, however, that he felt the employee would not fully recover from the effects of the February 7, 1997 injury. (Pet. Ex. B, pp. 21-22.) During his deposition testimony, Dr. Stern placed permanent restrictions on the employee of no lifting and carrying of more than 25 pounds, no squatting or crawling on his knees and that he should be allowed to change positions as needed. (Id., p. 30.) Dr. Stern opined that the employee's August 7, 1995 injury was a substantial contributing cause of the need for the employee's total knee replacement and that he had a 21% whole body permanent partial disability rating. (Pet. Ex. B.)

The employee was examined by Dr. Mark C. Engasser, an orthopedic surgeon, at the request of the self-insured employer on October 7, 1997. Dr. Engasser indicated that the employee had suffered from preexisting problems with his right knee, based on complaints of pain detailed in the records of Dr. Kiekhoefer, the employee's chiropractor. At the time of his examination, the employee told Dr. Engasser that he had been improving since his injury of February 7 as a result of physical therapy and home exercises. He stated that he was able to walk two miles and could engage in golfing, if he used a riding cart. He reported no significant instability in his knee. On examination, Dr. Engasser found that the employee was six foot one and a half, weighed 278 pounds and labeled him as "slightly obese." The employee walked without a limp but did have some swelling and discomfort of the right knee. Dr. Engasser found some laxity in the medial collateral ligament, mild thigh atrophy, restricted range of motion and that the employee had specific pain symptoms while standing in certain positions. As a result of the history and examination, Dr. Engasser indicated that the employee had sustained a tear of his right medial meniscus, had an osteoarthritic condition of his right knee and had a strained medial collateral ligament of his right knee. Dr. Engasser made the following statement with respect to these conditions:

> After reviewing all medical records and examining Mr. Detmar, the following opinions are expressed with reasonable medical certainty. In my opinion this patient did have a significant pre-existing condition of osteoarthritis of the right knee which predated the work injury of August 7, 1995. I do, however, feel that the injury of August 7, 1995 does represent a substantial contributing factor to

> his current disability. I agree with Dr. Stern's assessment that this patient did have a significant injury to his right knee on February 7, 1997. He injured the medial collateral ligament of the knee. I feel the patient has reached maximum medical improvement. I feel that following his right total knee arthroplasty, the patient would have had very little physical restrictions. He would have had no limitations with regard to sitting, standing and walking. I feel that the patient, given his size, could have lifted up to 80 pounds, although he could not perform any kneeling or crawling. Currently I feel the patient would have no limitation with regard to sitting. I feel that he could walk and stand six hours in an eight-hour day with frequent changes of position. He would have a 25 pound weight lifting and carrying restriction with no kneeling or crawling. He would not be able to climb or descend stairs more than occasionally. I feel that the patient does have these additional restrictions due to the work injury in February 1997. Overall Mr. Detmar does exhibit a 15 percent impairment of the body as a whole due to his right total knee arthroplasty as found in section 5223.0510, subp. 3(c).

Just before New Year's Day of 1997, the employee again went to Florida and lived in his condominium until February 12, 1998. During that time, the employee continued to do his home exercises, which included walking and playing golf. In his deposition Dr. Stern stated that golfing would be an approved activity for the employee. In addition, at some point during his stay in Florida, the employee was able to obtain a part-time position as a motorized golf ranger at a golf course in the Naples, Florida area. He worked approximately 12 to 20 hours per week at $5.15 per hour. In addition, as a consequence of his employment, the employee was permitted to play golf on several local public golf courses in the late afternoon. The record does not indicate how many rounds of golf he played while in Florida.

On the employee's return to Minnesota, he apparently obtained a position as a golf ranger, also on a part-time basis, for which he was paid approximately $100.00 per week, at the Hudson Golf Club in Hudson, Wisconsin. The employee was a member of this golf club and did not receive any special playing privileges. He stated that during the full calendar year of 1998 he played approximately 45 rounds of golf. The employee testified that in the winter of 1998-1999 he returned to Florida just after Christmas and stayed until early in March 1999. He stated that he was able to again work as a part-time golf ranger while in Florida.

Based on a letter dated March 11, 1999, which the employee apparently first saw on the date of the hearing, March 16, 1999, the employee was presented with a job offer from the employer to be the company's field training manager. The position offered a salary of $60,400, with bonuses, stock options, moving expenses and other benefits. This job, however, would have required that the employee relocate to the St. Louis area, as a good deal of the training would be done at the employer's corporate offices. The employee testified that he was fully capable of performing the work of this position and that it was within his restrictions. He stated, however,

that he could not consider the job because of the need to move to St. Louis. He indicated that he would take the job if he could continue to live in St. Paul. He and his wife both testified that she was employed as a licensed practical nurse at a local hospital and was within approximately six years of retirement. Their medical insurance was provided by her employer and she was concerned about changing coverage because she had previously had cancer. In addition, they indicated that their families and friends all lived in the Twin City area and did not want to relocate until they planned to retire to their condominium in Florida.

The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on March 16, 1999. In his Findings and Order, issued June 9, 1999, the compensation judge determined that the need for the employee's medical treatment, including the arthroscopic surgery in October 1995 and the total knee replacement in November of 1996, were substantially contributed to or caused by the employee's initial injury of August 7, 1995. (Unappealed Finding 16.) As a result of this finding, the compensation judge awarded temporary total disability benefits from November 22, 1996, through February 6, 1997. The judge found that the February 7, 1997 incident involved an increase in the injury to the employee's right knee and that thereafter the employee was permanently and totally disabled. (Finding 12.) The compensation judge determined that the employee had a preinjury weekly wage on February 7, 1997 of $1,201.31.[2] The self-insured employer appeals from the finding that the knee surgery was caused by the August 7, 1995 injury and that the employee is entitled to temporary total and permanent total disability benefits.

STANDARD OF REVIEW

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 (1992). 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

[2] The employer's notice of appeal indicates that this finding was appealed, but since the issue of the level of the employee's weekly wage was not briefed on appeal any claims contesting the weekly wage finding are waived. Minn. R. 9800.0900, subp. 2.

Total Knee Replacement

The self-insured employer appeals from the compensation judge's determination that the need for the employee's total knee replacement of November 22, 1996 was substantially contributed to by the admitted August 7, 1995 injury. The primary basis for its appeal is that the compensation judge's determination with respect to this issue is based on the opinion of Dr. Stern, which the employer contends lacked adequate foundation. The employer argues that Dr. Stern was not aware of or did not take into consideration the fact that the employee had a preexisting osteoarthritic condition and degenerative process in his right knee. It also argues that the employee's medical records indicate that the employee had experienced right knee pain in the 1960s and had been treated by his chiropractor, Dr. Kiekhoefer, in the early 1990s for right knee problems. The employer contends that the employee was less than candid when he testified that he had not experienced any significant right knee problems prior to August 7, 1995. As a result, it argues that only Dr. Engasser's opinion was adequately founded. It states that Dr. Engasser did not opine that the August 7, 1995 injury was a significant contributing factor to the employee's need for his total knee replacement. As a result, its position on appeal is that the compensation judge's decision was not based on an adequately founded medical opinion and as a result was not supported by substantial evidence in the record and was clearly erroneous.

We are not persuaded by the self-insured employer's argument for three reasons: (1) the self-insured employer failed to appeal Finding 16, in which the compensation judge found a causal relationship between the August 7, 1995 injury and the need for the November 22, 1996 surgery; (2) Dr. Stern was aware of the employee's preexisting degenerative condition; and (3) Dr. Engasser's opinion could be interpreted to support the conclusion that the August 7, 1995 injury was an aggravation of the preexisting condition and was therefore a substantial contributing cause of the need for the total knee replacement surgery.

While the self-insured employer did appeal Finding 4, in which the compensation judge merely recites that Dr. Stern's opinion that the employee's total knee replacement was substantially contributed to by the injury of August 7, 1995, it failed to appeal Finding 16, in which the compensation judge stated his determination that he found the opinion of Dr. Stern more persuasive than that of Dr. Engasser. Normally we would hold that the failure to appeal this finding would be dispositive of this issue. Because the self-insured employer may have been confused by what Finding 4 represented, however, we will consider its argument on the merits.

Even if the self-insured employer had appealed Finding 16, however, we do not find that its arguments with respect to whether the compensation judge was clearly erroneous to be persuasive. In this particular case, we find that Dr. Stern's opinion was adequately founded. Dr. Stern's deposition testimony and his office notes clearly reflect his awareness of the employee's preexisting condition. (Pet. Ex. E-2 and Ex. B, p. 24.) In addition, Dr. Engasser's report, an excerpt of which was cited above, could have been interpreted to suggest that his opinion was that the August 7, 1995 injury was a substantial contributing factor in the employee's need for total knee replacement surgery. Dr. Engasser specifically stated that he found that the August 7, 1995 injury was a substantial contributing cause of the employee's current disability. Since the

employee's current disability was directly related to his knee replacement, the compensation judge could have concluded that Dr. Engasser's opinion was not contrary to that of Dr. Stern. In any event, we find that the compensation judge's resolution of any possible conflict between the opinions of Dr. Stern and Dr. Engasser were resolved by the acceptance of Dr. Stern's well-founded opinion. We will not disturb that factual finding. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

As a result of the affirmance of the compensation judge's determination that the employee's November 22, 1996 total knee replacement was substantially caused or contributed to by the August 7, 1995 injury, we affirm the award of temporary total disability for the period from the date of the surgery until the date of the second injury on February 7, 1997. As there is no question that the February 7, 1997 injury substantially increased the disability of the employee, based on the opinions of both Dr. Stern and Dr. Engasser, there can be no dispute that the employee was entitled to temporary total disability, at a minimum, for the period following February 7, 1997, until he was released to return to work in late May or early June 1997. The exact date of his release was not well developed at the hearing and should be further explored on remand. The payment of those benefits is affirmed, whether the period after February 7, 1997 is considered to be payable as temporary total disability or permanent total disability. The issue of whether the employee is entitled to any disability benefits after his release to return to work is the subject of the next section of this decision.

Permanent Total Disability

The compensation judge determined that the employee was entitled to permanent total disability status after February 7, 1997. In making his determination, the judge issued three specific findings: (1) It was unreasonable for the employer to expect the employee to relocate to St. Louis and that the employee's "overall job search efforts have been adequate" (Finding 10). (2) The employee's earnings as a golf course ranger were limited to $100.00 per week and together with his receipt of some free golfing benefit did not provide benefits which caused his total earnings to rise to the level of consequential income "when compared to his preinjury wage at the time of his work-related injury" (Finding 11, emphasis added). (3) In the context of reciting the earning capacity opinions of the vocational experts, the compensation judge stated, "In light of the employee's 'well above average' preinjury earnings, considered in the context of his training, experience, and age (59 at the time of hearing), there has been no evidence submitted by either party that would suggest the employee is able to earn anything but relatively insignificant income compared to his preinjury earnings. The employee has been permanently and totally disabled from and after February 7, 1997" (Finding 12, emphasis added).

On appeal, the self-insured employer raises numerous arguments attacking the compensation judge's factual findings as clearly erroneous in several ways: (1) the employee's refusal of the March 11, 1999 job offer was unreasonable, and (2) the employee was not so disabled that he was not capable of earning a substantial income. In addition, it contends that the compensation judge applied an improper legal standard in determining whether the employee was permanently and totally disabled.

Refusal of a Job Offer

The self-insured employer contends that the employee's refusal of its March 11, 1999 job offer as a field training manager should preclude the employee's recovery from permanent total disability benefits under Minn. Stat. § 176.101, subd. 1(i). This subdivision provides as follows:

> Temporary total disability compensation shall cease if the employee refuses an offer of work that is consistent with a plan of rehabilitation filed with the commissioner which meets the requirements of section 176.102, subdivision 4, or, if no plan has been filed, the employee refuses an offer of gainful employment that the employee can do in the employee's physical condition. Once temporary total disability compensation has ceased under this paragraph, it may not be recommenced.

It argues that this statute does not indicate that an employee may consider an otherwise suitable job to be unsuitable simply because it requires him to relocate. It further contends, arguendo, that the employee's argument that he should not be required to relocate is belied by his repeated relocations to Florida during the winter months and by his admission that the job is physically suitable for him.

We agree with the employee and the compensation judge that the provisions of Minn. Stat. § 176.101, subd. 1(i), do not prevent a compensation judge from finding that a job offer is not suitable if it requires an employee to relocate. The issue on appeal is whether the compensation judge's decision was clearly erroneous. The compensation judge's factual determination that to require the employee to relocate to St. Louis was unreasonable is supported by substantial evidence in the record. First, the general rule in wage loss cases is that an employee may not be forced to relocate in order to accept a job offer. Rovinsky v. Paulson's Super Valu, slip op. (W.C.C.A. Oct. 20, 1993); Van Overbeke v. Bud Meyer Trucking, 41 W.C.D. 572 (W.C.C.A. 1988). Second, the employee and his wife had significant ties to the St. Paul area which the compensation judge could rely on to find relocation to be unreasonable. Hengemuhle, 358 N.W.2d 54, 37 W.C.D. 235.

Permanent Total Disability

The self-insured employer argues that the compensation judge used an inappropriate standard in determining whether the employee was permanently and totally disabled. The employer points out that when the compensation judge found the employee's actual ($100.00 per week) or potential ($320.00 to $575.00 per week) earnings to be "inconsequential" or "insignificant" as compared to his preinjury earnings, he created a new standard for determining whether a worker was permanently and totally disabled, which considered whether the employee

had a high or a low preinjury wage. It argues that there can be only one standard which applies to all injured workers. As a result, it appealed both on a statutory and constitutional basis.[3]

An employee is entitled to permanent total disability benefits if he sustains an injury which totally "incapacitates the employee from working at an occupation which brings the employee an income." Minn. Stat. § 176.101, subd. 5 (2) (1995) (emphasis added). The statute further states that "totally and permanently incapacitated" means that the employee's physical disability in combination with any one of clause (a), (b) or (c) causes the employee to be unable to secure anything more than sporadic employment resulting in insubstantial income." Id., subd. 5 (2) (c) (1995) (emphasis added). "Permanent total disability is primarily dependent on an employee's vocational potential rather than his physical condition." Thompson v. Layne of Minn., 50 W.C.D. 84, 100 (W.C.C.A. 1993). "A person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in the community, causes him to be unable to secure anything more than sporadic employment resulting in insubstantial income." Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 83, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967) (emphasis added).

On the statutory question raised by the employer, we agree that it appears that for this case the compensation judge has applied an inappropriate standard with respect to determining permanent total disability. The compensation judge stated that the employee's actual earnings as a ranger were "inconsequential income when compared to his preinjury wage." (Finding 11; emphasis added.) In addition, he apparently found that the testimony of the vocational experts that the employee had an earning capacity in his disabled condition of $320.00 to $575.00 per week was not evidence "that would suggest the employee is able to earn anything but relatively insignificant income compared to his preinjury earnings." (Finding 12, emphasis added.) On this basis, he found that the employee was permanently totally disabled. We agree that, as a general rule, a compensation judge's use of comparison and relativity with respect to the employee's post-injury earnings or earning capacity when considering the question of whether the employee is permanently and totally disabled is inappropriate. There may be fact-specific cases in which making such a comparison may be an appropriate factor to consider. The facts in this case, however, are not sufficiently compelling to create an exception to the general rule.

In the context of this case, it appears, from the testimony of both of the vocational experts, Dr. Phillip Haber and QRC Lynn Hjelmeland, that at a minimum, the employee would be able to earn $320.00 to $400.00 per week in a salaried position. These rates of salary would provide the employee with approximately $16,000 to $20,000 in income per year. If the opinion of Lynn Hjelmeland, the employer's expert witness, were accepted the employee would be able to earn $30,000 per year or $575.00 per week. While both of these amounts are significantly less than the $67,000 to $68,000 earned per year by the employee in his preinjury job, in this case the relative difference between his preinjury wage and his post-injury earning capacity is not an important consideration. The issue in a permanent total dispute is whether the employee can actually earn more than "insubstantial income." In resolving this case, the compensation judge

[3] This court is not provided with jurisdiction to make determinations with respect to constitutional issues, and those are preserved for further appeal if necessary.

should not have placed emphasis on how the employee's post-injury earnings or earning capacity compares to his preinjury wage. In this case, whether the employee's post-injury wages or earning capacity is the best that he can do may have relevancy in determining the need for rehabilitation services, including the efficacy of initiating a retraining plan, but is not important in determining if the employee is permanently and totally disabled.

We understand that for a high wage earner having to work at a job which pays a significantly lower wage may be personally difficult as it may result in a loss of prestige and involve less interesting and challenging work. Nevertheless, if the post-injury wage that could be earned was "substantial" the employee would not be entitled to permanent total benefits. In general, so long as the post-injury work under consideration is not unsafe and is fitting, given the employee's age, experience, interests, training and physical abilities, an employee would be obligated to engage in such work. The standard of what is "substantial" or "insubstantial" income would not change simply because the employee had earned a high preinjury wage. The employee in such a situation, however, would generally be entitled to temporary partial benefits and/or rehabilitation, including retraining so that he would have his economic status returned as close as possible to the economic status he would have enjoyed had he not been injured.[4] (Minn. Stat. § 176.102.)

As the compensation judge applied the incorrect standard in this case, the matter is remanded for a redetermination of the employee's entitlement to wage loss benefits based on the appropriate legal standard. For the period following the employee's release to return to work, the compensation judge is to determine whether, given the employee's level of physical disability, education, interests, training and experience, and potential for retraining, the employee is capable of securing anything more than sporadic employment resulting in insubstantial income. Minn. Stat. § 176.101, subd. 5(2). He will have to determine the employee's earning capacity. In so doing, he has many possible options. These include, but are not limited to finding that the employee's current ranger work to be the best he can do and that the vocational expert opinions are merely hypothetical or unpersuasive or he may find one of the experts persuasive. Once he has determined the employee's earning capacity he will be required to determine what type of wage loss protection the employee is entitled to, if any. In making these comments, we do not suggest how the compensation judge should resolve the matter. Whatever factual determination he may make would be subject to appeal to this court.

The compensation judge's order that the intervenor be reimbursed for long-term disability payments made after May 18, 1997 is vacated, subject to the compensation judge's future findings and order of wage loss benefits after the employee was released to return to work in late May or early June 1997.

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[4] We note that the self-insured employer did not provide rehabilitation assistance to the employee, nor did they attempt to consider a retraining program. Based on the employee's proven abilities it is unfortunate that so much time has passed without any rehabilitation assistance having been provided.