

WILLIAM ALLEN, Employee, v. HENNEPIN CNTY. MED. CTR., SELF-INSURED,
Employer/Appellant, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 13, 2001

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee is permanently totally disabled where there was both vocational and medical expert testimony that the employee's work-related physical injuries in combination with his consequential psychiatric disorder and lack of education and skills made it highly unlikely the employee would be able to return to work in the foreseeable future.

Affirmed.

Determined by: Johnson, J., Rykken, J., and Wheeler, C.J.
Compensation Judge: Bradley J. Behr

OPINION

THOMAS L. JOHNSON, Judge

The self-insured employer appeals from the compensation judge's finding that the employee is permanently and totally disabled. We affirm.

BACKGROUND

William Allen, the employee, was employed by the Hennepin County Medical Center, the self-insured employer, as a custodian in the housekeeping department. (T. 16.) On August 24, 1994, he sustained an injury to his right shoulder. On August 9, 1995, the employee sustained an injury to his left shoulder. The employer admitted liability for the employee's 1994 and 1995 shoulder injuries but denied liability for any cervical injury on those dates. On May 31, 1996, the employee sustained another personal injury to his left shoulder and his cervical spine. The employee's weekly wage on May 31, 1996 was \$394.00. The employee returned to work for the employer, with restrictions, following the 1996 injury. On approximately August 27, 1996, the employee resigned his employment. The employer then sought to discontinue the employee's benefits.

On July 24 and August 19, 1997, the employer's request to discontinue benefits was heard by Compensation Judge Behr. In a Findings and Order filed October 10, 1997, the judge found the employee injured his cervical spine on May 31, 1996. The compensation judge further found the employee was not physically able to perform many of the tasks to which he was assigned from May 31 to August 22, 1996 without experiencing an increase in his left arm and

shoulder pain. The judge determined the job was not within the employee's physical capabilities, concluded the employee did not refuse gainful employment under Minn. Stat. § 176.101, subd. 1(i), and found the employee's resignation was reasonable. Finally, the judge found the employee was totally disabled from March 27, 1997 to the date of the hearing pursuant to the opinion of his treating neurosurgeon, Dr. Gaylan L. Rockswold.

The employee returned to see Dr. Rockswold in October 1997. The doctor ordered a cervical MRI scan which reflected cervical spondylosis and a herniated disc at C5-6 on the left and spondylosis with bilateral foraminal narrowing at C6-7. (Pet. Ex. B.) On October 28, 1997, Dr. Rockswold performed a cervical microdiscectomy at C5-6 on the left. Thereafter, the employee had physical therapy at the Sister Kenny Institute. Dr. Rockswold released the employee to light-duty work effective February 18, 1998. (Pet. Ex. A.)

The employee underwent a functional capacity evaluation at Saunders Therapy Centers resulting in a functional abilities form outlining the employee's work abilities and restrictions. (Pet. Ex. E.) On October 26, 1998, the employee was rehired by the employer in a modified custodial position. (Resp. Ex. 5.) By December 1998, the employee had increased his hours to full-time and his wage loss benefits were discontinued. (Resp. Ex. 8.)

The employee was hospitalized on January 28, 1999, at the Fairview University Hospital. The principal diagnosis was adjustment disorder with mixed features with secondary diagnoses of major depression, neck pain and shoulder pain. Dr. Sushila N. Mohan prescribed Zoloft for depression and Trazodone for sleep. The employee was discharged on February 1, 1999. (Pet. Ex. J.) The employee has not worked since then.

Following his hospitalization, the employee was treated for his depression by Dr. John Benninghoff and Stanley Johnson, a psychologist, at HealthPartners. In March 1999, the employee was again hospitalized for treatment of a recurrent major depressive disorder. On April 13, 1999, Dr. Benninghoff opined the employee should not return to the workplace because of the potential of the employee harming coworkers and because the workplace was psychologically depressing for the employee. On April 20, 1999, Mr. Johnson concurred that the employee should not return to work for the employer. In May 1999, Mr. Johnson diagnosed depression and chronic pain. The employee was last seen on September 21, 1999, with a continuing diagnosis of depression and chronic pain. (Pet. Ex. K.)

Between January and October 1999, the employee also treated with Dr. Barbara Gibson at HealthPartners for neck pain. The doctor's assessment was chronic neck pain after a herniated cervical disc and surgery. A cervical MRI scan on July 1, 1999, showed mild disc space narrowing at C5-6 with bilateral spur formation resulting in partial bilateral C5-6 neural foraminal stenosis, moderate on the right and moderate to marked on the left. (Pet. Exs. H, I.) By report dated October 21, 1999, Dr. Gibson opined the employee's work-related injuries to his neck caused a chronic pain condition which led to depression. The doctor stated that the employee was totally disabled due to his depression and his physical injuries. (Pet. Ex. O.)

The employee was evaluated by David S. Alter, Ph.D., of the Fairview Hospital Pain Management Center in April 1999. Dr. Alter diagnosed chronic pain syndrome with both

physical and psychological factors, including a major depressive reaction. In July 1999, Dr. Alter recommended the employee be admitted to the pain management program. The employee completed a four-week pain management program, under the direction of Dr. Miles Belgrade, and followed up with Dr. Belgrade thereafter. A Functional Capacity Evaluation (R-33) was done on September 8, 1999. The doctor last saw the employee on January 27, 2000, at which time the doctor noted the employee was having an extreme degree of agitation and required psychiatric management. The doctor opined the employee was not then in a position to return to work. Dr. Belgrade further opined the combination of work-related muscular dysfunction, underlying cervical degenerative changes, left upper extremity dysfunction and the underlying psychiatric factors made it highly unlikely the employee would return to work in the foreseeable future. (Pet. Ex. L.)

In February 2000, the employee began treating with Dr. Fatemi, a psychiatrist at the University of Minnesota Hospital. The doctor diagnosed major depression with psychotic features. The doctor last saw the employee on November 10, 2000, at which time the doctor noted the employee “seems to be doing much better now.” The diagnosis was major depression, improving. (Pet. Ex. M.)

The parties entered into a partial stipulation for settlement under which the employer paid to the employee permanent partial disability benefits in excess of 17 percent of the whole body. This payment was sufficient to satisfy the permanent total disability threshold contained in Minn. Stat. § 176.101, subd. 5(2)(a). The parties also agreed the employer had paid the employee at least \$25,000.00 in total disability benefits, entitling the employer to the Social Security offset contained at Minn. Stat. § 176.101, subd. 4. An award on stipulation was filed in June 2000.

On October 25, 2000, David Berdahl, a rehabilitation consultant, conducted a vocational evaluation of the employee. Mr. Berdahl prepared a report (Resp. Ex. 3), and testified at the hearing. The employee was given vocational tests which reflected very low or marginal reading levels and low academic skill levels. The employee’s math skills tested at the 4.5 grade level. Mr. Berdahl noted the employee’s work history was consistent with the vocational tests in that the employee performed very entry level, unskilled work such as the custodial work he did for the employer. He concluded the employee had the ability to work at entry level positions involving routine and repetitive tasks. (T. 69-70.) Mr. Berdahl performed a labor market survey in which he identified seven employers who reported they could work with and make accommodations for persons with physical and psychological restrictions such as the employee. He opined given the physical restrictions from the 1998 functional capacity evaluation, the employee was currently employable in the labor market in custodial jobs, entry level assembly positions and machine operating. (T. 72-79.)

Michael R. Flynn, a qualified rehabilitation consultant (QRC), provided rehabilitation services to the employee after his surgery in 1997. The QRC stated vocational tests of the employee reflected a reading vocabulary at the 1.5 grade level, reading comprehension at 1.8 grade level, mathematics at 4.5 grade level. Mr. Flynn testified based on the restrictions developed in the 1999 R-33, the employee would not be able to perform custodial or light assembly work because those jobs would require activities in excess of the employee’s restrictions. He

opined the employee does not have the ability to engage in substantial gainful activity with the degree of consistency which would make him employable in the labor market. (T. 124-132.)

Dr. John Rauenhorst performed a psychiatric evaluation of the employee on February 1, 2000. The doctor diagnosed depressive disorder NOS (not otherwise specified) with a past history of alcohol, cocaine and cannabis dependence. The doctor stated the employee's diagnosis was not major depressive disorder because he did not meet the criteria for that diagnosis. (Resp. Ex. 1, p. 10-13.) The doctor further opined the employee's work injuries with the employer were not a direct or substantial cause of his depressive disorder. The doctor also opined the employee was not at maximum medical improvement for his depressive condition and felt there was "at least some chance he will improve." (T. 22-25.) Finally, the doctor opined the employee was capable of working from a psychological standpoint, and stated work would probably help the employee's depression. (T. 25.)

The employee's claim for permanent total disability benefits was heard on November 16, 2000. In a Findings and Order filed January 23, 2001, the compensation judge found the August 9, 1995 and May 31, 1996 injuries each substantially contributed to the employee's development of chronic pain syndrome and a major depressive disorder. The judge found the employee was permanently and totally disabled from January 28, 1999, to the date of the hearing and ordered the self-insured employer to pay permanent total disability benefits. The self-insured employer appeals the finding of permanent total disability.

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

The self-insured employer asserts the compensation judge erred in finding the employee was permanently and totally disabled. The appellant argues the employee has not yet reached maximum medical improvement from his depressive condition, and the records of Dr. Fatemi and the testimony of Dr. Rauenhorst demonstrate some improvement in the employee's condition. Citing Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 153 N.W.2d 130, 24 W.C.D.

290 (1967), the appellant contends an individual cannot be permanently and totally disabled unless “there is no substantial chance that [an injury] will improve in the future.” Id. at 135. Since the employee’s condition is improving, the appellant argues that although the employee may be temporarily and totally disabled he is not permanently and totally disabled under the Schulte definition. Accordingly, the self-insured employer asks this court to reverse the compensation judge’s award of benefits.

Permanent total disability means an injury which “totally and permanently incapacitates the employee from working at an occupation which brings the employee an income.” Minn. Stat. § 176.101, subd. 5(2). “Totally and permanently incapacitated” means that 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). The definition of total and permanent incapacity is essentially a codification of the Schulte definition of total disability.

The supreme court held, in Harrison v. Cleaning Concepts, Inc., 526 N.W.2d 46, 51 W.C.D. 545 (Minn. 1994), that total disability is permanent if it is likely to exist for an indefinite period of time. See also Behrens v. City of Fairmont, 553 N.W.2d 854, 53 W.C.D. 41 (Minn. 1995) (permanent total disability benefits are payable when an injured worker’s disability is likely to exist for an indefinite period of time).

Mr. Flynn testified the employee is unable to engage in substantial gainful activity with any degree of consistency because of the effects of his work injuries. He testified the employee’s abilities are so limited in quality, quantity and dependability that no market for them exists. Dr. Belgrade stated the employee’s physical injuries together with the underlying psychiatric factors made it highly unlikely the employee would be able to return to work in the foreseeable future. The employee has sustained three injuries resulting in significant restrictions and at least a 17 percent whole body disability together with chronic pain and a depressive disorder. The employee has no high school diploma or GED and limited skills in reading and math. Based on this evidence, the compensation judge reasonably concluded the employee’s disability is likely to exist for an indefinite period of time, and the employee is permanently and totally disabled. The compensation judge’s decision is affirmed.