DALE L. MEWHORTER, Employee/Appellant, vs. CLEAN SOILS MINN. and MINN. ARP/BERKLEY ADMIN'RS, Employer-Insurer, and MINNEAPOLIS RADIOLOGY ASSOC., LTD., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 28, 2001

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - EVIDENCE. Where the medical evidence indicated that the employee's medical condition was unlikely to improve, given the employee's reluctance to pursue recommended medical treatment for his shoulder condition (manipulation under anesthesia), which this court deemed a reasonable refusal of treatment in an earlier decision, and where the vocational evidence indicated that a job search would be futile since the sole job possibility identified by the employer and insurer's vocational expert was a parking lot attendant which the employee could not reach due to his inability to drive because of his narcotic prescription medication, substantial evidence does not support the compensation judge's finding that the employee is not permanently and totally disabled, and must be reversed.

Reversed.

Determined by: Rykken, J., Johnson, J., Wheeler, C.J.
Compensation Judge: Joan G. Hallock

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals from the compensation judge's determination that the employee has not been permanently totally disabled from sustained gainful employment since September 25, 1998, as a substantial result of his injury on September 24, 1996. We reverse.

BACKGROUND

This case is before the court following an issuance of the compensation judge's Findings and Order on Remand. Following a hearing held on this matter on March 17, 1999, the compensation judge issued her original findings and order on May 24, 1999, in which she determined that the employee was not permanently totally disabled, as of the hearing date, as a result of his September 24, 1996 injury.[1] The compensation judge also determined that the

[1] A discrepancy exists as to the date of permanent total disability. In her initial Findings and Order, served and filed on May 24, 1999, the compensation judge found that the employee "is not permanently totally disabled as of the date of hearing." (Finding No. 27.) In Order No. 2, the compensation judge stated that "IT IS FURTHER ORDERED and determined that the employee

employee had failed to cooperate with recommended medical care, and that his diagnoses of hypertension and impotence were not causally related to his work injury of September 24, 1996. This court reversed the compensation judge's finding that the employee had failed to cooperate with recommended medical care, and vacated the compensation judge's determination that the employee was not permanently totally disabled as of the date of the hearing. This court remanded the issue of permanent total disability to the compensation judge, for reconsideration in light of our reversal of the finding that the employee had failed to cooperate with recommended medical care. This court also affirmed the compensation judge's determination that the employee's diagnoses of hypertension and impotence are not causally related to the employee's September 24, 1996 injury.

No additional testimony was taken on remand. The parties submitted supplemental briefs to the compensation judge. In a Findings and Order served and filed on July 27, 2000, the compensation judge again denied the employee's claim, and determined that the employee has not been permanently totally disabled after September 25, 1998.

Additional background information in this case is included in the court's original decision, served and filed March 10, 2000. Mewhorter v. Clean Soils Minnesota, No. [REDACTED SSN] (W.C.C.A. March 10, 2000). In summary, the employee sustained injuries to his head, neck and shoulders when he fell off a semi trailer truck while employed by Clean Soils Minnesota. At the time of his injury, the employee was 47 years old, and earned an average weekly wage of $480.00.

The employee was born in 1949, completed the seventh grade, and has received no further education nor formal job training. He has worked as a truck driver during his entire career, including ten years of self-employment. Since the employee cannot read or write and recognizes only a few written words, and is capable only of the most primitive arithmetic, he has relied on family members to assist him with bills, logs, job applications and other paperwork. (T. 23, 41, 58.)

The employee has undergone extensive medical treatment following his September 24, 1996 work-related injury. He initially reported neck and head pain. On September 28, 1996, he underwent surgery in the nature of an anterior cervical discectomy and fusion at the C3-C4 level, and an anterior foraminotomy at the C5-C6 level, with autologous bone grafts. Due to continued symptoms, the employee underwent further diagnostic testing and a second neck surgery on November 8, 1996, in the nature of an anterior cervical discectomy and fusion at the C5-6 level, with bone graft, cervical plate and screws. Post-operatively the employee continued to experience neck pain and headaches, and underwent a neurological consultation. The employee claims that this second surgery worsened his pain. (T. 105.)

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is not permanently and totally disabled from September 25, 1998 to the date of hearing." (Order No. 2.) However, this September 25, 1998, date is consistent with the pre-hearing recitation of issues (T. 6.) and is the date utilized by the compensation judge in her findings and order on remand.

The employee's physicians recommended that the employee undergo a myelogram, to review a defect in his cervical spine. The employee initially refused to undergo the myelogram, expressing his wishes to treat conservatively based on his fear of the effects of this invasive procedure. His physicians also recommended that he undergo manipulation to both shoulders under general anesthesia, to treat his "frozen shoulder," diagnosed as adhesive capsulitis. The employee initially agreed to undergo this procedure as well, but ultimately refused to go forward with the manipulation; he testified that Dr. Kempcke advised him that the procedure possibly could result in a broken arm, and that he "wasn't getting better, so . . . I didn't want it.. .The only reason was because I wanted to get out of some pain before they put me more in. Just can't handle it." (T. 124-125.)

The employee ultimately consented to undergo a myelogram, but that myelogram was not completed, apparently due to complications in his physician's scheduling, apparent miscommunications at Mayo Clinic and misunderstandings about procedures and techniques.

Post-injury, the employee has undergone treatment for hypertension, impotence, blurred vision, photophobia, headaches, chronic pain and sleep disturbance. He has undergone further extensive evaluations with chronic pain specialists, neurologists, orthopedists and internists. He received acupuncture treatments from Dr. MaryLynn Saande, D.C.[2] The employee testified that this treatment relieved symptoms in his left arm and shoulder, and that payment for those treatments were discontinued by the insurer. He also received pool therapy for a period of time in 1998, discontinued when he developed symptoms in his hip.[3] At the time of the hearing in March 1999, the employee used a TENS unit, prescribed by Dr. Bowar. (T. 110-112.)

The employee underwent a portion of a functional capacities evaluation at Regions Medical Center on March 8, 1999. While lifting during that evaluation, he noted a slipping sensation in his neck, accompanied by a sharp pain in his neck and arms. He was prescribed medication for pain and muscle spasm control; that evaluation was not completed due to his worsened symptoms. The employee testified that he is unable to lie down, and obtains little rest, with intermittent sleeping, usually only two hours at a time. He testified that "I sleep, you know, but it's short. I never do get a decent sleep. It don't matter whether it's day or night. I don't know what it is to sleep like a normal human being." (T. 114-115.) The employee has been prescribed pain medication, including narcotic medication, since his 1996 work-related injury; he testified that this medication affects his memory. (T. 47, 110, 140, 159).

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[2] The record does not indicate the number of treatments received; according to Dr. Saande's report dated September 22, 1998, those treatments were provided at least until September 1998, and were primarily intended to treat the employee's neck symptoms, headaches and bilateral upper extremity symptoms.

[3] The employee testified that Dr. Bowar discontinued that therapy, apparently as a result of his developing symptoms. The employee's qualified rehabilitation consultant (QRC), Steven M. Kurenitz, testified that he believed that the employee discontinued the pool therapy on his own because the employee thought it was aggravating his condition. (T. 88.)

The employee has not returned to work since his injury. The employer and insurer paid him temporary total disability benefits until September 21, 1998, for a total of 104 weeks, the statutory maximum allowed by Minn. Stat. § 176.101, subd. 1(k). Thereafter, the employer and insurer paid the employee periodic permanent partial disability benefits based upon a permanency rating of 17.5% whole body impairment. The employer and insurer also paid for medical expenses related to medical treatment for the employee's neck and shoulder, but denied primary liability for the employee's diagnoses of hypertension and impotence and therefore paid no expenses related to medical treatment for those conditions.

The employer and insurer initially provided rehabilitation assistance to the employee. Mr. Kurenitz conducted an initial rehabilitation consultation on December 26, 1996, and continued to work with the employee, primarily providing medical management. His rehabilitation records refer to the employee's reported frustration with his ongoing medical treatment and the lack of a definitive diagnosis; in his report of May 23, 1997, Mr. Kurenitz reported that the employee did not wish to go through with any manipulations of his frozen shoulder adhesions until his headaches were addressed. After monitoring the employee's medical treatment, Mr. Kurenitz issued a report on May 14, 1998, and provided his opinion concerning the employee's prospects for future employment:

> At this time, per all the medical information on Mr. Mewhorter from the multiple physicians who have treated him for his frozen shoulders, headaches, hip and leg problems, high blood pressure, chronic pain concerns, along with Mr. Mewhorter having a seventh grade education (with reading and writing deficiencies) and his entire work history as a laborer/truck driver, he would have a very questionable prognosis in job search. His lack of transferable skills, along with the above noted variables, would strongly suggest that he is not employable or placeable in a competitive work environment.

(Pet. Ex. H, QRC report of 5/14/98.)

On July 7, 1998, the employee filed a claim petition asserting entitlement to permanent total disability benefits commencing May 14, 1998. On July 28, 1998, the employee filed a medical request for payment of outstanding medical expenses related to treatment for hypertension. Following an administrative conference at the Office of Administrative Hearings, a compensation judge issued a Decision and Order pursuant to Minn. Stat. § 176.06, determining that the employee's hypertension was causally related to the employee's injury, and ordering payment for hypertension medication. The employer and insurer appealed that decision, and requested a formal hearing.

The employee's claim petition and the employer and insurer's request for formal hearing were consolidated and both were heard by a compensation judge at the Office of Administrative Hearings on March 17, 1999. One additional issue addressed at hearing was the employee's claim for medical treatment for his impotence, which he contended was related to the medication required for hypertension. The compensation judge found that the employee failed to cooperate with recommended medical care and that the employee was not permanently totally

disabled as of the date of the hearing. The compensation judge also determined that the employee's hypertension and impotence are not causally related to his work injury of September 24, 1996, and therefore denied payment for medical expenses related to treatment for those conditions. The employee appealed from that decision.

This court addressed that appeal in its initial decision, Mewhorter v. Clean Soils Minnesota, No. [REDACTED SSN] (W.C.C.A. March 10, 2000), and remanded, in part, to the compensation judge. Following remand, the compensation judge issued a Findings and Order on July 27, 2000, addressing the issue of whether the employee has been permanently totally disabled from and after September 25, 1998. The compensation judge determined the following:

> Based upon a preponderance of the evidence, the employee is not permanently totally disabled. The employee has not met his burden of proving that his physical disability in combination with the required level of permanent partial disability (to which the parties stipulate), causes him to be unable to find anything more than sporadic employment with insubstantial income. (Finding No. 9.)

The compensation judge also found that there "is no opinion placing the employee at maximum medical improvement. Additional medical treatments are available to the employee and may improve his condition." (Finding No. 7.) The judge also found that the "employee has not engaged in a job search, participated in a vocational plan, or completed a functional capacity evaluation. The employee's physical restrictions are unknown." (Finding No. 8.) The employee again 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). 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, 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

As outlined in Minn. Stat. § 176.101, subd. 5, "totally and permanently incapacitated" means that the employee has sustained a requisite level of permanent partial disability, and the employee's "physical disability in combination with [the required level of permanent partial disability of the body as whole] causes the employee to be unable to secure

anything more than sporadic employment resulting in an insubstantial income."[4] A person is totally disabled if his physical condition, in combination with his age, training, experience and the type of work available in his community causes him to be unable to secure employment. Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967).

Employee's Physical Status

The compensation judge initially addressed the employee's physical status in her second findings and order. She first referred to Dr. Mark Engasser's opinion that the employee had "obvious underlying anatomic abnormality now that he is status post two cervical surgeries which should also significantly contribute to his inability to function," (Resp. Ex. 9; Finding No. 2.) and to Dr. Ireland's opinion that the employee would be unable to return to work without a significant change in his chronic pain. She also referred to Dr. Bowar's contrasting opinion that the employee could do left-handed sedentary work, and that lack of employment activity would be self-destructive. In her memorandum, the compensation judge again stated that the employee has not reached maximum medical improvement (MMI), as his position is not stable. She also stated that "[i]t is difficult to know the employee's capability until medical stability has been reached." She found that "[a]dditional medical treatments are available to the employee and may improve his condition." (Finding No. 7). In her memorandum, she stated that:

> Further, there appears to be no opinion that indicates that the employee is not capable of working on a permanent basis. Dr. Ireland stated, "I do not see Mr. Mewhorter being able to return to work without a significant change in his health status." Petitioner's Exhibit A. This statement, relied upon by the employee as a permanent total disability opinion, is simply too vague. It seems to indicate that there may be room for improvement in the employee's health status that could lead to a return to work. Dr. Ireland did not say that the employee would never improve.

The compensation judge appears to be referring, at least in part, to the additional medical treatment earlier recommended to the employee, which he refused to undergo. In our earlier decision, we determined that in view of the record as a whole, the employee's refusal to undergo a shoulder manipulation and the corresponding general anesthesia was reasonable, and also remanded this matter to the compensation judge for determination as to whether the record, absent the employee's refusal to undergo a shoulder manipulation, supported the determination that the employee was not permanently totally disabled. Consistent with that earlier opinion, we are not inclined to put any emphasis on the compensation judge's determination now that there are additional medical treatments available to the employee which may improve his condition. Instead, we again must view the other factors addressed by the compensation judge in arriving at her determination that the employee is not permanently totally disabled.

[4] The parties have stipulated that the employee meets the threshold criteria of "at least a 17% permanent partial disability rating of the whole body," as set forth in Minn. Stat. § 176.101, subd. 5(2)(a). (T. 11.)

As we stated in our first decision, we again note that "there is minimal evidence of record indicating that the employee's functional capabilities would substantially improve even if he followed through with the recommended medical treatment." Mewhorter v. Clean Soils Minnesota, [REDACTED SSN] (W.C.C.A. March 10, 2000). Dr. Engasser stated that "[i]n terms of this patient's past medical history, the likelihood of improvement of Mr. Mewhorter's medical or vocational condition relative to the recommended treatment [myelogram, shoulder manipulation and physical therapy] is only fair." (Resp. Ex. 9; Memo at p. 3.) QRC Kurenitz testified that from a vocational standpoint, the "most physically disabling problem" the employee has is his "frozen shoulders or the capsulitis." (T. 75.) The employer and insurer also argue that the instability of the employee's medical condition, and the fact that the employee has not yet reached MMI, are significant factors since they signify that the employee's doctors believe that there is still medical treatment available for the employee which would likely improve his condition. The employer and insurer argue that since all reasonable treatment which will likely improve the employee's condition has not been explored, a permanent total disability finding would be premature. They also argue that Dr. Ireland's opinion which states "I do not see Mr. Mewhorter being able to return to work without a significant change in his health status," does not support a conclusion that the employee is permanently and totally disabled (PTD).

The employee argues that Dr. Ireland's opinion concerning the employee's PTD status must be considered in its entirety. Dr. Ireland concluded her report of February 2, 1999, by stating:

> Although I usually do not make this decision on my own without a complete functional evaluation by our Occupational Medicine Department. I would refer to both Mayo Clinic's information that they believe the patient has a marked disability secondary [sic] his chronic pain. The need for the patient to be on narcotics to control his pain would severely limit his ability to function in any occupation. I do not see Mr. Mewhorter being able to return to work without a significant change in his health status.

(Ee. Ex. A.)

As argued by the employee, an individual claiming that he is permanently totally disabled is not required to show that he "would never improve." A disability is permanent, for worker's compensation purposes, if it is likely to exist for an indefinite period of time. Harrision v. Cleaning Concepts, Inc., 526 N.W.2d 46, 48, 51 W.C.D. 545, 548 (Minn. 1994). It appears that given the employee's reluctance to pursue recommended medical treatment for his shoulder (manipulation under anesthesia), which this court determined was a reasonable refusal of treatment, the employee's medical condition is unlikely to change. The record compels the conclusion that while there may be a remote chance of improvement in the future, at this point in time the employee is unable to return to work.

Employee's Vocational Status

The employer and insurer also argue that since the employee has not participated in a vocational rehabilitation plan or engaged in a job search, it is premature to determine the

employee's vocational ability and permanent total disability status. However, according the QRC Kurenitz, when he contacted the insurer to consult concerning the appropriate rehabilitation plan for the employee, the insurer never suggested that the employee be involved in job search or job placement. (T. 71.) He also testified that the employee has not yet reached the point of "medical stability," with "assigned restrictions" which would allow him, as QRC, to turn his focus to vocational rehabilitation. (T. 85.) This court has determined, and the employer and insurer acknowledged, that a job search is not required to establish permanent total disability where the evidence demonstrates that a job search would be futile. Atkinson v. Goodhue County Co-op Electric Assoc., 55 W.C.D. 150, 160 (W.C.C.A. 1996) summarily aff'd, (Minn. Sept. 20, 1996); see also McClish v. Pan-O-Gold Baking Co., 336 N.W.2d 538, 542, 36 W.C.D. 133, 139 (Minn. 1983). The evidence of record herein, including both the medical and vocational records and opinions, demonstrate that a job search by the employee most likely would be futile.

The information in the record overwhelming indicates that the employee would have great difficulty securing anything more than "sporadic employment resulting in insubstantial income." Minn. Stat. § 176.101, subd. 5. The employee has a seventh grade education and 20 years of work experience as a truck driver, of which approximately half was in self-employment. Only one job, that of a parking lot attendant, has been identified as something the employee could perform; that one job was identified by John Hjelmeland, who examined the employee on behalf of the employer and insurer. The employer and insurer argue that a parking lot attendant position is not necessarily the only position available to the employee, and refer to Mr. Hjelmeland's testimony concerning the employee's vocational opportunities. That testimony was as follows:

> I would anticipate that further medical services as described by the doctors and, as they have indicated, it offers him the potential for improvement, would also have a significant impact on his vocational choices which would expand beyond the current one of parking lot attendant. (T. 222.)

The employee has significant vocational barriers to re-employment at a job which would be considered sustained gainful employment. The QRC, Steve Kurenitz, testified that the factors that render the employee unemployable include the employee's seventh grade education, difficulties with reading, writing, spelling and math, his background as a laborer and driver, his lack of a driver's license, and at least one felony conviction. Mr. Kurenitz also testified that the employee's narcotic prescription medication "could" present a barrier to employment. (T. 75.) Dr. Ireland specifically referred to the employee's medication, stating that the "need for the patient to be on narcotics to control his pain would severely limit his ability to function in any occupation." (Ee. Ex. A, Report of Feb. 2, 1999.) This medication affects not only the employee's functional ability but also restricts his ability to drive. As a result, it is apparent that even if the employee were able to locate a position as a parking lot attendant, which is the sole job possibility identified by the employer and insurer's vocational expert, transportation assistance would be necessary as the employee lives in rural Hastings, Minnesota, three to four miles from the nearest bus line, and is unable to drive due to his narcotic prescription medications. The totality of these factors compels the conclusion that the employee would have difficulty securing employment.

As we stated in our initial decision:

> We are well aware that a finding on the issue of permanent total disability is one of fact, and as such, the compensation judge's determination must be affirmed if it is supported by substantial evidence and is not clearly erroneous. Hengemuhle, 358 N.W.2d 54, 60; Minn. Stat. § 176.421, subd. 1(3). Based upon this court's standard of review, we are extremely reluctant to overturn a compensation judge's factual findings; however, that standard of review also requires the court to "remain cognizant of its own responsibility to exercise good judgment in reviewing what the evidence will reasonably sustain." Harvala v. Noeske Lumber, 44 W.C.D. 118, 123 (W.C.C.A. 1990) (citing Hengemuhle, 358 N.W.2d at 60, 37 W.C.D. at 240), summarily aff'd, (Minn. Jan. 30, 1991).

Mewhorter v. Clean Soils Minnesota, No. [REDACTED SSN] (W.C.C.A. March 10, 2000). We conclude that the compensation judge's decision concerning the employee's permanent total disability status is unsupported by substantial evidence in the record and is clearly erroneous. In view of the overwhelming medical and vocational evidence that the employee is permanently totally disabled, we reverse and order that permanent total disability benefits be paid dating from the expiration of the employee's temporary total disability benefits on September 21, 1998.