ALBERT PANITZKE, Employee, vs. HOMETTE CORP. (SKYLINE CORP.) and COM. UNION INS. CO., Employer-Insurer/Appellants and MN DEP'T OF ECON. SEC., Intervenor, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 9, 2001

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including adequately founded vocational testimony, supports the compensation judge's finding that the employee, at age 79, was permanently and totally disabled where the employee had continued to work past retirement age and, after termination from his latest employment, had conducted a limited search for work since a more extensive search would likely have been futile given the employee's age, education, experience, and physical restrictions.

Affirmed.

Determined by: Rykken, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Carol A. Eckersen

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal the compensation judge's award of permanent total disability benefits. We affirm.

BACKGROUND

On March 10, 1975, Albert Panitzke, the employee, was employed by Homette Corporation (Skyline Corporation), the employer. On that date, the employee sustained an admitted work-related injury to his right hip and pelvic bone. Born on July 15, 1921, the employee was 53 years old when injured. He earned a salary that entitled him to a base compensation rate of $100.00, which was subject to no annual statutory adjustments based on the statute in effect on the date of injury.[1]

The employee completed the eighth grade, and has not obtained a high school degree or GED, nor has he received any additional formal education. The employee was employed

[1] Minn. Stat. § 176.645, subd. 1, which provides adjustments to an employee's base compensation rate, applies to injuries occurring after October 1, 1975. At hearing, the parties stipulated that supplementary benefits will be paid, pursuant to Minn. Stat. § 176.132, if permanent total disability benefits are awarded. (Finding No. 1.)

as a farmer, operating on rented farmland, until 1969. Thereafter, he worked for Franklin Homes, a mobile home manufacturer, performing service and warranty repair work. In 1973, the employee began working for Skyline Homes, the employer, also performing service and warranty repairs. This job involved traveling throughout a five-state region, traveling approximately 35,000 to 40,000 miles per year.

On March 10, 1975, the employee fell four and a half feet to an assembly line track while handling a roll of linoleum flooring, and as a result broke his hip and crushed his pelvic bone. He was hospitalized for approximately five weeks, and was disabled from work for approximately 21 weeks, and returned to work for the employer thereafter. The employee developed a permanent limp as a result of this injury. On January 31, 1977, the employee consulted Dr. Donald C. Merideth, who advised him that eventually he may require a total hip replacement. Dr. Merideth advised the employee to avoid jumping and any twisting of his hip, recommended home traction and weight control, and assigned a permanent partial disability rating of 25 percent of the right leg. The employer and insurer paid permanency benefits to the employee based on that rating.

The employee continued to work for the employer until its New Ulm plant closed in 1979. The employee immediately began working as a service technician for Schult Homes in Redwood Falls, Minnesota, performing the same type of job duties and traveling approximately the same distances in the course of his service work. In 1991, when the employee reached the age of 70, he was no longer allowed to drive company vehicles due to the employer's insurance policy restrictions. As a result, the employee rode as a passenger while another co-worker drove.

The employee has received occasional chiropractic care between December 1982 and September 1999. The employee also consulted Dr. Merideth again in December 1982. X-rays at that time showed slight progression of the degenerative osteoarthritis in the right hip. Dr. Merideth advised the employee that he "did not feel he was ready for a total hip replacement on the right, but that his recent symptoms could be the beginning of progressive pain and discomfort to the extent that he might have to consider a total hip replacement in the near future." (Jt. Ex. A.) The employee wished to delay surgery as long as possible in order to avoid having a hip replacement performed twice. (T. 54.)

The employee also consulted Dr. Gudgel, for chiropractic treatment in 1994, who in turn referred the employee to Dr. Jeffrey Garske. On February 11, 1994, Dr. Garske diagnosed advanced osteoarthritic changes in the employee's right hip, "consistent with a post-traumatic arthritis of the hip secondary to his acetabular fracture." A physical exam revealed that the employee's right leg was 3/4 of an inch shorter than his left leg due to his pelvic injury. Dr. Garske recommended surgery, and performed that surgery on June 23, 1994, in the nature of a bipolar hip replacement and bone grafting of the acetabulum. By August 8, 1994, Dr. Garske released the employee to return to work to sedentary activities. Dr. Garske stated that the employee would "start increasing weight bearing with a walker and progress to a cane as tolerated." (Jt. Ex. A.)

By October 10, 1994, the employee reported to Dr. Garske that his pre-operative complaints were almost totally eliminated. However, Dr. Garske recommended that the employee continue using a cane, and advised the employee that he could sit, stand or walk, but that he needed

to decrease the amount of time he spent on his feet, and advised that he should avoid repetitive climbing, squatting, kneeling, and excessive lifting. Dr. Garske advised that the employee was capable of some sedentary work, especially if he did not have to be on his feet a great deal of the time. On October 10, 1994, Dr. Garske completed a Report of Work Ability form, stating that the employee could return to work within those restrictions and with a lifting limit of 20-25 pounds. On October 16, 1995, Dr. Garske completed a Report of Work Ability form that stated the employee could return to work at his present job with no restrictions. Dr. Garske's October 16, 1995, chart note includes the following recommendation: "Activity as tolerated with the exception of no running or jumping activities."

On October 2, 1994, Dr. Steven Barron examined the employee at the request of the employer and insurer. Dr. Barron diagnosed a healed central fracture and dislocation of the employee's right acetabulum. Dr. Barron rated a permanent partial disability of 20 percent of the right leg. On March 31, 2000, Dr. Barron re-examined the employee, and assigned the same permanency rating. Dr. Barron determined that the employee could work full-time, with physical work restrictions of no lifting over 25 to 30 pounds and no repetitive ladder climbing.

The employee returned to work to his same position on October 25, 1994, and worked on a two-person crew as he had done before his surgery. He traveled to homeowners' sites with the same frequency and distance after his surgery, in order to perform service work and warranty repairs, splitting his time evenly between traveling and working. Post-surgery, the employee did not perform roofing work because of his difficulty climbing over the edge of the roof with a ladder.

By report dated December 29, 1995, Dr. Garske assigned a permanency rating of 24 percent of the right leg. He also stated that:

> Mr. Panitzke does have certain limitations requisite of a hip arthroplasty and this means that basically his time on his feet has to be reduced to a certain extent, although he can walk, sit, and stand. His walking and standing probably should be limited to 2-4 hours per day. He should not be involved in any squatting or kneeling activities and should not be climbing, as a rule. In addition, he should not be doing any activities which require significant impact such as running or jumping.

(Jt. Ex. A.)

The employee's medical records describe an incident of transient global amnesia the employee experienced on July 7, 1997. He checked into the Redwood Falls Hospital on that date, reporting that he did not remember anything he had done from noon to 5:00 p.m. that day, even though he had traveled 30 miles to perform service work and had returned to work. The employee was hospitalized overnight, remained off work for one week on a FMLA basis[2] and then

[2] The employee applied for and received a Family and Medical Leave of Absence from Schult Homes for the week he was off work.

returned to work for Schult Homes. He received follow-up medical care from his family physician, Dr. R. O. Schroeppel. There are no other references in the employee's medical records concerning other instances of amnesia. However, the employee's supervisor testified that co-workers had reported two other episodes of the employee's confusion in 1997; the employee testified that those reported events were not comparable to the July 7, 1997 incident.

On July 10, 1997, the employer sent a letter to Dr. Schroeppel, advising that due to the employee recent's illness [hospitalization and examination for memory lapse], the employee was required to submit a "fitness for duty"form before returning to work. Twenty-six job duties were listed on that form. On July 13, 1997, Dr. Schroeppel completed the form, marking "yes" to the question whether the employee could perform each of those duties.

In October 1997, the employer assigned the employee to an office position. The employee's supervisor and divisional service manager, Mr. Joel Buller, testified that the employee was reassigned to an office position for two reasons: (1) Even though he was very experienced and was a good coach for the other service technicians, "some of the service technicians had expressed concern about having [the employee] go out with them [due to memory lapses] and them feeling responsible if something did happen on the road, and that "he was getting slower and slower, and it was hard for him to keep up a lot of times." (2) There was a high backlog of work orders in the service department and the employer believed that in view of the employee's knowledge and experience, he could assist with reducing that backlog by writing parts orders and planning itineraries for service technicians. (T. 152, 158.)

On January 26, 1998, Schult Homes laid off the employee, retaining his name on a recall list for six months. The employee testified that he contacted Schult Homes three to four times weekly, asking that he be recalled to work; Mr. Buller testified that the employee contacted the employer approximately once weekly. By letter dated August 24, 1998, Schult Homes advised the employee that he was terminated from employment, but that he could reapply by obtaining a job application at their offices. The employee did submit a job application for re-employment but was not rehired by Schult Homes. The record shows that Schult Homes listed openings for two service technicians in May 1998, and that Schult Homes hired a new service technician in August 1998, during that period of time the employee was regularly asking to be recalled to work.[3]

After his termination from Schult Homes, the employee was re-employed with Gordy's Mobile Home Transport in 1998, and continued that part-time employment at the time of the hearing. He drives an escort truck, accompanying trucks hauling mobile homes. The employee

[3] The record and testimony indicates that the employee had the most seniority of the service technicians, and that no other service technicians were laid off in January 1998, although one service technician's employment was terminated and approximately 50 production employees were laid off in early 1998. (T. 160-162, 173.) The employee filed an age discrimination complaint with the EEOC and Minnesota Department of Human Rights, and also filed a suit against Schult Homes in state district court, alleging that his job had been terminated on the basis of age discrimination. That matter was settled and as a result of a confidentiality agreement, the record contains no information on the terms of the agreement reached between the employee and Schult Homes.

is paid on the basis of mileage, and utilizes his own vehicle, personally funding his own vehicle-related costs. In 1998, the employee earned $851.25; in 1999, he reported a profit of $698.00.

The employee consulted Dr. Robert Wengler on November 30, 1999. Dr. Wengler assigned post-traumatic degenerative arthritis in the employee's right hip with a satisfactory post-operative course following the bipolar total hip replacement. Dr. Wengler concluded that the employee should not work in the type of job he had been doing, and concluded that the employee was permanently totally disabled as of January 1998, when his employment was terminated by Schult Homes. Dr. Wengler assigned a permanency rating of 40 percent permanent partial disability of the right leg.

On August 20, 1999, the employee filed a claim petition, alleging entitlement to permanent total or temporary total disability benefits from January 26, 1998 to the present and continuing. The employer and insurer denied that the employee was entitled to temporary total or permanent total disability benefits. The employee later amended his claim petition to claim entitlement to 40 percent permanent partial disability of the right leg, minus the permanency benefits the employer had already paid. The employer and insurer earlier had paid the employee benefits based on a 25 percent permanent partial disability of the right leg, and denied that any additional permanency benefits were payable.

The Minnesota Department of Economic Security intervened, claiming reimbursement for unemployment benefits paid to the employee during the period of the week ending January 24, 1998 through January 16, 1999, in the amount of $5,188.00.

Hearing was held on this matter on September 13, 2000. By Findings and Order served and filed November 29, 2000, the compensation judge found that the employee was permanently and totally disabled from January 26, 1998 through the date of hearing, September 13, 2000 and continuing. The compensation judge concluded that the employee had not presumptively retired in 1991, when he began receiving social security old age benefits. The compensation judge also concluded that the employee was laid off by Schult Homes for economic reasons, and that he had diligently sought work until August 24, 1998, but had not diligently sought work following that date. The compensation judge also concluded that the employee is not released to return to work without restrictions and that the employee's work injury is a substantial contributing cause of the employee's disability and loss of earning capacity.

In conjunction with her award of permanent total disability benefits, the compensation judge awarded the intervenor's claim for reimbursement of unemployment benefits paid to the employee. The compensation judge also found that the employee had sustained a 25 percent permanent partial disability of the right lower extremity, and therefore denied the employee's claim for any additional permanency benefits beyond those already paid by the employee.

The employer and insurer appeal from the award of 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

Permanent Total Disability

The compensation judge found that the employee has been permanently totally disabled from January 26, 1998 through September 13, 2000 and continuing. 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). "[A] person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income." Schulte v. C.H. Peterson Constr., 278 Minn. 79, 83, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967). Minn. Stat. § 176.101, subd. 5(b).

The employer and insurer contend that the employee's 1975 work-related injury does not represent a substantial contributing factor to the employee's current inability to find work. The employer and insurer agree that it is undisputed that the employee has physical work restrictions related to his right hip injury. However, they argue that there is no showing that the employee was unable to continue working at Schult Homes as a result of his right hip restrictions. Instead, they contend that the employee's employment was terminated as a result of the employee's inability to drive a company vehicle due to insurance policy, three instances of amnesia which the employee experienced while working for Schult Homes, and the employee's "general slowing down." The employer and insurer argue that absent a labor market survey or job search showing that the employee was turned down employment as a result of his hip and leg restrictions, there is insufficient foundation to support a finding that the 1975 injury substantially contributed to the employee's inability to engage in substantial gainful employment. Further, the employer and insurer argue that the employee effectively retired after his position with Schult Homes was terminated.

The employee contends that the employee's hip condition remains a substantial contributing cause to the employee's physical condition leading to permanent total disability. The employee argues that his work injury need not be considered the sole cause of his disability, but merely a substantial contributing cause. See Salmon v. Wheelbrator Frye, 409 N.W.2d 495, 40 W.C.D. 117 (Minn. 1987).

The compensation judge found that the employee's 1975 work injury is a substantial contributing cause to the employee's disability, and that he continues to be subject to physical work restrictions. The compensation judge concluded that the employee sustained a loss of earning capacity as a result of his March 10, 1975 injury. In her memorandum, the compensation judge referred to work restrictions assigned by three physicians. She concluded that although Dr. Garske released the employee to return to work on October 10, 1997, she believed Dr. Garske released the employee without restrictions on the assumption that he would return to the job he formerly performed at Schult Homes.[4] The compensation judge also referred to the restrictions assigned by Dr. Barron and to Dr. Wengler's opinion that the employee was unable to continue the job he had been performing. Based on those medical opinions, the compensation judge determined that the employee continues to have restrictions on his ability to lift, climb and crawl as a result of his 1975 injury. Based upon the medical records in evidence, the judge could reasonably conclude that the employee has met his burden of proving that his reduction in earning capacity is causally related to his work-related injury and disability.

The compensation judge concluded that the employee's employment at the time of the hearing, with Gordy's Mobile Home Transport, was sporadic and is not substantial gainful employment. His earnings are minimal, as he works on call with eight other employees and works only occasionally. As the employee was self-employed, paying operating expenses, his earnings consisted of the net amount remaining after expenses, with no employee benefits. Based on these factors, the compensation judge concluded that the position with Gordy's was not substantial gainful employment that would preclude a finding of permanent total disability benefits.

The employer and insurer argue that the vocational expert opinion rendered by Lynn Hjelmeland, on which the employee relies in support of his claim, lacks sufficient foundation. They argue, therefore, that the compensation judge erred in relying upon that vocational opinion in determining that the employee is permanently totally disabled. Permanent total determinations are a combination of both medical and vocational factors. McClish v. Pan-O-Gold Baking Co., 335 N.W.2d 538, 36 W.C.D. 133 (Minn. 1983). Citing Olson v. Midwest Printing Co., 35 W.C.D. 716, 720-721 (W.C.C.A. 1983), the employer and insurer argue that an expert opinion which lacks sufficient foundation, such as the opinion offered by Ms. Hjelmeland, cannot form the basis for the decision of the compensation judge.

Lynn Hjelmeland, QRC, conducted a vocational evaluation of the employee on October 30, 2000. She concluded that the employee has limited transferrable skills from his years of employment, that he resides in a small community where there are limited employment opportunities, and that the employee is permanently and totally disabled from sustained gainful

[4] Although the October 190, 1997, Report of Work Ability lists a release to return to work with no restrictions, Dr. Garske also specified that the release was "for normal job." (Jt. Ex. A.)

employment. She based her conclusion on the history obtained directly from the employee, her review of the employee's medical records, the employee's deposition testimony, his wage records from Gordy's Mobile Home Transport and the employee's tax records. Ms. Hjelmeland testified that she also investigated employment options for the employee, including self-employment and the local casino, that she called several mobile home companies, and contacted the job service office of the Minnesota Department of Jobs and Training. (T. 120-121, 124, 127.) Based upon Ms. Hjelmeland's review of this information, she noted that the employee has significant work restrictions that limit the type of work he is able to do, that he has no experience performing sedentary work or office work, and that she did not think it reasonable to expect someone at age 79 to develop those types of skills. The QRC also concluded that the employee's job search had been reasonable under the circumstances, and that the employee had not removed himself from the labor market by retiring. (T. 129-132.)

Ms. Hjelmeland concluded that the employee was permanently totally disabled, based upon his age, his limited education, his work experience limited to farming and the specialized field of mobile home repair, and his limited transferrable skills. She also based her opinion on the employee's geographic locale and his physical work restrictions. There was no testimony or vocational opinion presented by the employer and insurer to rebut this testimony, and no labor market survey indicating specific jobs available to the employee within the restrictions. Although the employer and insurer argue that Ms. Hjelmeland conducted no labor market survey, she testified that she conducted an informal market survey, which demonstrated that work was not available to the employee.

Based upon our review of the evidence, the vocational opinion by Ms. Hjelmeland had sufficient foundation and provided a sufficient basis for the compensation judge's conclusions. The judge did not err by relying upon that vocational opinion in concluding that the employee is permanently totally disabled from employment.

The employer and insurer also argue that the employee did not conduct a diligent job search for re-employment after his position with Schult Homes was terminated. The compensation judge concluded that the employee's job search was reasonable under the circumstances. Mr. Panitzke testified that he regularly contacted Schult Homes, three to four times weekly, asking that he be recalled to work after his layoff. The employee testified that his supervisor, Mr. Buller, advised him to "[j]ust hang on and if the business turns around we'll get in contact." (T. 70.)[5] The employee contacted Schult Homes with this same frequency until seven months post-layoff when he was formally notified that he was terminated. The compensation judge concluded that it was reasonable for the employee to continue to contact the employer with whom he expected to return to work.

The employee also testified that after he received notice of his termination, he worked occasionally with Gordy's on an on-call basis, that he continued to look in the newspaper

[5] Mr. Buller testified that he did could not recall specifically what he had advised the employee in response to his requests to be recalled from layoff status but that he had not used the expression, as quoted by the employee, that he should "hang in there." However, Mr. Buller also testified that he considered the employee to be an honest individual. (T. 176, 178.)

and to ask friends in his community about potential jobs. Ms. Hjelmeland concluded that these job contacts were a reasonable attempt under these circumstances, including the fact that the employee was receiving no rehabilitation assistance, and that he accepted a job with Gordy's Transport that was somewhat related to what he had done in the past. The compensation judge concluded that "given the employee's age, education, experience and physical restrictions, a more extensive search would likely be futile."

It is well established that a diligent job search is not a legal prerequisite to being found totally disabled in a workers' compensation proceeding. See Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 188, 30 W.C.D. 426, 432 (Minn. 1978); see also Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 733, 40 W.C.D. 948, 954 (Minn. 1988) ("employees who are capable of work must make a diligent job search to establish total disability"). However, evidence of a post-injury job search, or the lack thereof, may still go to the evidentiary weight of the employee's claim that he is totally disabled. See Scott, 267 N.W.2d at 188-189, 30 W.C.D. at 432. In this case, considering the employee's regular contact for seven months with Schult Homes after his termination, and his attempts at a job search thereafter, the judge could reasonably conclude that the employee's job search was sufficient. We therefore affirm.