MICHAEL V. SHYKES, Employee, v. SHYKES SANITARY SERV. and MINN. ASSIGNED RISK PLAN/BERKLEY ADM'RS, Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 9, 2001

No. [REDACTED SSN]

HEADNOTES

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's findings that the employee worked only intermittently earning an insubstantial income from the fall of 1999 through March 2000, and was entitled to temporary total disability benefits for that period of time.

JOB SEARCH - SUBSTANTIAL EVIDENCE. Where the employee was provided rehabilitation assistance beginning in August 1999, and cooperated with his QRC and job placement vendors in conducting a job search, substantial evidence supports the compensation judge's determination that the employee performed a reasonably diligent search for employment from August 1999 through the date of hearing.

Affirmed.

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

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal from the compensation judge's findings that between the fall of 1999 and March 2000, the employee worked only intermittently earning an insubstantial income, and that the employee made a diligent search for employment from August 1999 through the date of hearing, and from the compensation judge's consequent award of temporary total disability benefits to the employee from August 1999 through the date of hearing and continuing. We affirm.

BACKGROUND

Michael V. Shykes, the employee, worked as a garbage hauler for the family garbage and refuse collection business, Shykes Sanitation Service, the employer. On May 22, 1991, the employee sustained an injury to his low back while attempting to lift an uncovered garbage can full of remodeling debris that had filled with rain water. The employee sustained a

severe lumbosacral strain with intermittent sciatica and substantially caused or aggravated degenerative joint disease in the lumbar spine with a grade I spondylolisthesis of L5 on S1. The employee was later diagnosed with chronic pain syndrome and depression secondary to the injury.

The employer and insurer accepted liability for the May 22, 1991 injury and paid the employee temporary total disability benefits from the date of injury through the end of December 1991. On January 1, 1992, the employee purchased Shykes Sanitation from his mother. He returned to work and continued to operate the business from January 1992 through July 1996. The employee had significant restrictions as a result of his injury, and was unable to continue working as a garbage hauler. He instead concentrated on the recently developed recycling side of the business, along with customer development and sales. The employer and insurer paid intermittent temporary partial benefits to the employee through March 1993, when benefits were discontinued. The employee was also paid a seven percent permanent partial disability as impairment compensation.

In July 1996, the employee sold the garbage and recycling business to United Waste. After selling the business, the employee engaged in several self-employment ventures. In March 1997, he bought some heavy equipment and attempted, without success, to develop an excavating business. The employee ceased operating the business in March 1998. The employee also built a motocross track which failed to produce any income, and purchased a rental property in late 1997 which he sold in the spring of 1999.

On April 17, 1998, the employee filed a claim petition seeking temporary total disability or, in the alternative, permanent total disability, from July 18, 1996 and continuing, and the assistance of a qualified rehabilitation counselor (QRC).[1] In August 1999, the employee was assigned a QRC, Kandise Garrison, and began a job search with the assistance of a placement vendor. The employee was unemployed as of the date of hearing.

The case was heard by a compensation judge on May 12, 2000.[2] In a Findings and Order, served and filed July 11, 2000, the compensation judge denied the employee's claim for permanent total disability. The judge further found the employee failed to make a diligent search for work between July 18, 1996 and August 1999, and denied temporary total disability benefits for that period of time. The judge also found the employee reached maximum medical improvement (MMI) effective May 5, 2000. The judge concluded, however, that work performed by the employee from the fall of 1999 through March 2000 was intermittent resulting in an insubstantial income, and that the employee made a reasonably diligent search for employment from August 1999 through the date of hearing. The compensation judge accordingly awarded temporary total

[1] The employee also sought temporary partial disability benefits from March 16, 1993 to July 18, 1996 and additional permanent partial disability benefits. The employee later withdrew these claims.

[2] A brief hearing was held on January 12, 2000, at which time the case was continued due to the employee's additional claim of a chronic pain syndrome and consequential depression.

disability benefits from August 2, 1999 through the date of hearing and continuing.[3] The employer and insurer appeal from the compensation judge's award of temporary total disability benefits for this period.

STANDARD OF REVIEW

On appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

1. Temporary Total Disability - Sporadic Employment Resulting in an Insubstantial Income

The employer and insurer contend the compensation judge's finding that the employee worked only intermittently earning an insubstantial income from the fall of 1999 through March 2000 is clearly erroneous, and the award of temporary total disability benefits must be reversed. Specifically, the appellants assert that, since the employee could not specifically recall all of the hours he worked or all of the money earned during the time at issue, the compensation judge was precluded, as a matter of law, from finding the employee's employment was sporadic and his earnings insubstantial. The appellants further contend the compensation judge ignored certain testimony and failed to consider work performed by the employee between October 1999 and March 2000. We are not persuaded.

An employee is totally disabled within the meaning of the workers' compensation act if the employee is "unable to secure anything more than sporadic employment resulting in an insubstantial income." Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 83, 153 N.W.2d 130, 134, 24 W.C.D. 290, 295 (1967). Whether employment was sporadic and insubstantial is a question of fact for the compensation judge on the record before him. Given the findings made and the judge's comments in his memorandum, we are satisfied the compensation judge fully considered the employee's testimony and did not overlook evidence regarding work performed by the employee between August 1999 and March 2000.

The employee testified that, in about June 1999, he began helping out a friend, Jay Mercel, doing maintenance and repair jobs on rental properties owned by Jay's brother. He also did very occasional odd jobs for friends and acquaintances. At the request of his QRC, the

[3] Ninety days post-MMI would have expired on about August 3, 2000, at which point entitlement to temporary total disability benefits would normally cease.

employee included in his job logs the maintenance and repair work he did for Jay between August 1999 and March 2000. (T. 206-08.) The employee was taken off work by his doctor on April 4, 2000, and did not perform any work after that time.

The evidence indicates the employee worked irregularly, when Jay or other acquaintances had work for him. The job logs submitted at the hearing show one day of work in September, five days of work in October, seven in November, ten in December, two in January and one in February, and nine days of work in March. Although the employee did not consistently note the hours he worked or the amount earned, the logs and the employee's testimony indicate he worked less than eight hours in a work day, most often working about three to five hours. The employee's QRC was aware the employee was working with Jay Mercel, and testified that to her knowledge, the work was sporadic "as-needed work," with no regular schedule. (T. 245-46.)

The employee testified he was paid on a daily basis, usually by the job, but sometimes by the hour. The compensation judge accepted the employee's testimony that, when paid by the hour, he received $10.00 an hour or possibly more for difficult work. In his job logs, the employee recorded earnings of $1,800.00 for the seven month period, or an average of about $60.00 a week. Between 1996 and 1999, the employee also occasionally worked on friends' vehicles, usually in exchange for their help with work on his property. The evidence reflects the employee worked on Jay's truck or van on about November 17, 1999, but the employee testified at the May 12, 2000 hearing that he had done no work on cars in the past six months or so. (T. 110, 155-57, 177-79.)

The compensation judge's finding that the employee worked only intermittently between August 1999 and March 2000 is amply supported by the evidence. While acknowledging the record of the employee's earnings was "sparse," the judge found, based on the available evidence, that the employee earned an insubstantial income between the fall of 1999 and March 2000. While a different conclusion could be reached on this record, the compensation judge's determination is not unreasonable or clearly erroneous. We must, therefore, affirm. See Hengemuhle, 358 N.W.2d 54, 37 W.C.D. 235.

2. Job Search

The employer and insurer also contend the compensation judge's finding that the employee made a diligent search for work between August 1999 and the date of hearing is unsupported by the evidence and clearly erroneous. We disagree.

The employee first met with his QRC, Kandise Garrison, in August 1999. The QRC referred the employee to a job placement vendor on about September 6, 1999. During September, a resume was produced and job seeking skills training was provided. Active job search, with the assistance of the job placement vendor, was initiated on about September 27, 1999. The employee's search resulted in an apparent job offer in November 1999. The job fell through and the employee, although discouraged, continued to search for work. In March 2000, the employee obtained a job with Better Brands on his own. He worked for one week but was physically unable to continue. The employee continued to search for work through the date of hearing.

The QRC was aware the employee was working with Jay Mercel, and testified that,

> [W]e never discouraged the employee from working because he was working, and we wanted him to continue the level of activity -- both work activity and physical activity he was able to tolerate -- so we had an understanding that we would work around his . . . work schedule and so that he would not be required to do full-time job-seeking activities. (T. 239.)

We have repeatedly stated that when an employee has rehabilitation assistance, it is not so much the employee's job search but rather the employee's cooperation with rehabilitation efforts that is important in evaluating entitlement to temporary total disability benefits. See, e.g., Schreiner v. Alexander Constr. Co., 48 W.C.D. 469 (W.C.C.A. 1993); Grieco v. Minnesota Natural Foods, 48 W.C.D. 174 (W.C.C.A. 1992); Bauer v. Winco/Energex, 42 W.C.D. 762 (W.C.C.A. 1989). While the employee's search for employment was less than "perfect," there is no indication the employee did not cooperate with rehabilitation. (See Finding 28; T. 241-42, 252.) Rather, his QRC testified that in her opinion, the employee "wants to work, and he's always expressed that. He has never expressed to me in . . . the year that he did not want to work." (T. 249, 254.)

Substantial evidence supports the compensation judge's finding that, since August 1999, the employee had made a reasonably diligent search for employment. We, accordingly, affirm the award of temporary total disability benefits to the employee from August 1999 through the date of hearing and continuing as warranted.