State of Wisconsin

Labor and Industry Review Commission

David Polkey Applicant **DMJ Services** Employer **Donegal Mutual Ins. Co.** Insurer Claim No. 2021-025270	**Worker's Compensation Decision**[1] **Dated and Mailed:** August 5, 2024 polkeyda_wsd.doc:185

Interlocutory Order

The commission **affirms** the decision of the administrative law judge (ALJ) issued in this matter on October 11, 2023. Within 30 days from this date, DMJ Services and Donegal Mutual Insurance Company (respondents) shall pay the disability compensation and reimbursements for medical expense detailed and ordered in the ALJ's Interlocutory Order of October 11, 2023.

Jurisdiction is reserved for such further findings and orders as may be necessary.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

[1] **Appeal Rights**: See the yellow enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: Labor and Industry Review Commission, and all other parties in the caption of this decision or order (the boxed section above). Appeal rights and answers to frequently asked questions about appealing a worker's compensation decision to circuit court are also available on the commission's website, http://lirc.wisconsin.gov.

Procedural Posture

The applicant submitted a timely hearing application alleging compensation due for a thoracic spine injury sustained in a work incident that occurred on August 12, 2021. Respondents conceded that a compensable work injury occurred, but disputed the nature and extent of disability, as well as the amount of compensable medical expense. On September 19, 2023, a hearing was held before an ALJ of the Department of Administration, Division of Hearings and Appeals, Office of Worker's Compensation Hearings. On October 11, 2023, the ALJ issued an Interlocutory Order that awarded the compensation and medical expense claimed by the applicant, including a finding of permanent total disability. Respondents submitted a timely petition for commission review alleging error in the ALJ's decision.

The commission has reviewed the evidence submitted at the hearing, and considered the arguments made by the parties in their briefs. Based upon its review and analysis, the commission agrees with the decision of the ALJ. The commission adopts the findings and conclusions made in that decision as its own.

Memorandum Opinion

In their arguments to the commission, respondents do not dispute acceptance of Dr. Brown's permanent physical limitations attributable to the conceded work injury, i.e., "...no lifting greater than 20 pounds on an occasional basis, no repetitive bending or twisting, no crawling or stooping, and no standing or walking greater than 30 minutes at a time." [2] Respondents differ with the ALJ's conclusions regarding the effect of Dr. Brown's restrictions on the applicant's ability to secure work. In particular, respondents disagree with the ALJ's interpretation of the restriction that provides, "...no standing or walking greater than 30 minutes." Respondents argue that their vocational expert, Keith Moglowsky, identified job categories with physical requirements that would accommodate this 30-minute restriction, as well as the other physical limitations set by Dr. Brown. They argue that the ALJ should have accepted Moglowsky's opinion, and that based upon such acceptance, the ALJ should have found that the applicant failed to establish a prima facie case for permanent total disability. [3]

The commission rejects these arguments, and it agrees with the ALJ that the applicant established a prima facie case for permanent total disability that was not credibly rebutted by the respondents' evidence.

Respondents argue that in the job categories identified by Moglowsky, there are jobs which would allow the applicant to stand for 30 minutes at a time, "sit for 2 minutes," and then get back on his feet and continue to work. [4] Assuming a 30-minute lunch break, this would require a minimum of fourteen, regularly-scheduled, two-minute

[2] See the last paragraph on page 12 of Dr. Brown's report (Applicant's Exhibit B).
[3] See *Beecher v. LIRC*, 2004 WI 88, ¶¶ 54-55, 273 Wis. 2d 136, 682 N.W.2d 29 (2004).
[4] Respondents' reply brief, page 3.

breaks in an eight-hour workday. Further assuming that a two-minute break would provide adequate time for the applicant to rest his back, and that employers would accommodate this proposed break schedule, respondents assert jobs are available for the applicant to work. However, the commission finds these assumptions to be unrealistic. While Dr. Brown did not specify how long the applicant would need to rest his back after 30 minutes of standing or walking, given the chronic and severe level of mid-back pain that the applicant credibly described, and that Dr. Brown recounted upon examination, it is not credible that the applicant could adhere to anything approaching the two-minute rest regimen suggested by respondents. Neither does the commission find it likely that the applicant would be successful in finding an employer willing or able to accommodate such frequent breaks. In short, the evidence respondents presented did not credibly undercut the applicant's prima facie case for permanent total disability.

After a prima facie case for permanent total disability is established, the employer/insurer may successfully rebut it by demonstrating that "...the injured employee is actually employable and that there are actual jobs available to him." [5] Moglowsky's listing of six potential job categories taken from the Department of Workforce Development's 2021 Occupational Employment Wage Statistics for the Milwaukee area failed to provide credible evidence that any job is actually available to the applicant. A job category is not an actual job. Had the record contained very substantial additional evidence demonstrating that the applicant's permanent restrictions were such that he could secure a job in the list of suggested categories, rebuttal of the prima facie case might have been successful. However, such evidence does not exist in the applicant's case.

Respondents take issue with the opinion given by the applicant's vocational expert, John Birder, that the applicant's work restrictions take him out of the light work category. Birder wrote in his report that light work typically involves extensive standing/walking activities including up to six or more hours per day.[6] He also testified that the jobs available in the categories listed by Moglowsky would require the applicant to be on his feet, "...for the majority of the workday."[7] Respondents argue that Birder's assessment of permanent total disability rests upon false assumptions because Dr. Brown did not specifically limit the number of hours the applicant could work in one day, or restrict him from being on his feet for the majority of the workday. This interpretation of Dr. Brown's restrictions fails to adequately account for the severity of the applicant's physical limitations, or to acknowledge the physical and work-duty requirements of the jobs that might be available in the categories listed by Moglowsky.

The applicant credibly testified that his mid-back pain is constant, that he experiences difficulty standing in one position or walking, that he uses a cane to walk any distance greater than 20 or 30 feet, that he is unable to bend or twist without

[5] *Beecher*, 2004 WI 88, ¶ 44.
[6] See page 6 of Birder's report (Applicant's Exhibit C).
[7] Transcript, page 62.

pain, that he also experiences pain while sitting, and that lifting aggravates his symptoms. The credible inference is that the applicant would need significant periods of rest throughout a workday, and that Dr. Brown's restriction of resting every 30 minutes should be interpreted with a view to the applicant's overall physical limitations and symptoms. The job categories listed by Moglowsky would require prolonged standing and/or walking, and nearly continuous attention to work duties that it is inferred would be incompatible with breaking away from work every 30 minutes. The category of shuttle driver would require lifting or other physical duties also incompatible with the applicant's restrictions.

The applicant is currently 58 years old, left high school after the 10th grade, has spent the majority of his working life removing and installing furnaces, has never used a computer in the work force, and must deal with the physical limitations outlined above. It is apparent that he is in the "odd lot" category, meaning that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable labor market for them does not exist.[8] Accordingly, the commission has affirmed the ALJ's finding of permanent total disability. As with all cases involving permanent total disability, the commission's order is left interlocutory to address the contingency that the applicant's physical condition or other relevant circumstances could change.

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[8] *Balczewski v. DILHR*, 76 Wis. 2d 487, 493, 251 N.W.2d 794 (1977). See also, *Smith v. Milwaukee Scrap Metal Co.*, WC Claim No. 1996012444 (LIRC Feb. 25, 1999).