HENSLER V. CLARKE OIL WELL SERV., 1988-NMSC-104, 108 N.M. 51, 766 P.2d 311 (S. Ct. 1988)

MARK HENSLER Petitioner,
vs.
CLARKE OIL WELL SERVICE and HOME INSURANCE COMPANY, Respondents

No. 17981

SUPREME COURT OF NEW MEXICO

1988-NMSC-104, 108 N.M. 51, 766 P.2d 311

December 28, 1988

Original proceeding on Certiorari, Administrative Appeal

COUNSEL

Warren F. Reynolds, Hobbs, NM, for Petitioner

Samuel M. Laughlin, Jr., Hobbs, NM, for Respondents

AUTHOR: SOSA

OPINION

*{*52}* SOSA, Senior Justice.

{1} In its memorandum opinion (No. 10,640, August 23, 1988), the court of appeals affirmed the dispositional order of the workers' compensation administration finding petitioner 10% permanently disabled. On petition for writ of certiorari to the court of appeals, we granted the petition, and now reverse the court of appeals for the reasons stated herein and remand the case to the workers' compensation administration hearing officer.

{2} In its opinion, the court of appeals accurately states the following: "[Petitioner] argues that if he was unable to return to his former job, he would be totally disabled. **See Medina v. Zia Co.,** 88 N.M. 615, 544 P.2d 1180 (Ct. App.1975). However, if there is some work for which he is fitted, he cannot be totally disabled. **Id."**

{3} The court then goes on to state, "It appears from the record that claimant was released to return to work on October 30, 1986. At that time, he was given a few medical restrictions * * * * These restrictions did not pose a problem with claimant's

employer. There was work available to satisfy those restrictions. However, claimant never returned to work."

{4} The issue of petitioner's capacity to return to work, his employer's willingness to permit him to return to work, and his acceptance or rejection of any such work is pivotal to the court of appeals' decision. Yet, as we read the record, the evidence is ambiguous on this issue. More crucial, the hearing officer entered neither findings of fact nor conclusions of law which conclusively disposed of this issue. Consequently, we reverse the court of appeals and remand the case to the hearing officer with instructions to enter findings of fact and conclusions of law which dispose of the following questions:

(1) Was there work available for petitioner to perform for which he was qualified by age, training, education and previous experience, and which would yet satisfy the restrictions on his physical activity as specified by his doctor?

(2) Did petitioner make an effort to engage in such work, if it was available?

{5} The answer to these questions is dispositive, because, as the court of appeals correctly stated in its opinion, "If a claimant is capable of performing some work for which he is fitted, but does not return to work, he does not satisfy the test for total disability." If the hearing officer enters findings of fact and conclusions of law which answer question one in the affirmative and question two in the negative, thereby finding the facts as the court of appeals has interpreted the record, then judgment shall be entered in favor of respondents. If, however, question one is answered in the negative, then the hearing officer's dispositional order should be reversed, and petitioner shall be adjudged totally disabled.

{6} If petitioner "can no longer do the work he was doing when injured, and cannot do the only work for which he is qualified, he is 'legally' totally disabled." **Quintana v. Trotz Constr. Co.,** 79 N.M. 109, 112, 440 P.2d 301, 304 (1968). This is so in spite of the fact that medical testimony places petitioner's disability at 10% insofar as his capacity to perform his previous job is concerned. From the restrictions placed on the petitioner by his doctor, it is evident that the medical testimony could be interpreted to mean 10% **impairment.** Impairment and disability are not equivalent concepts, but even so, our law is clear that the test of total disability is not a percentage *{*53}* assessment of disability from medical testimony but the test quoted above from **Quintana v. Trotz Construction Company, id.**

{7} The hearing officer, by answering the two questions set forth above, will determine, first, whether work was available for which petitioner was qualified and which would permit him to meet the restrictions on physical exertion set by his doctor, and second, whether petitioner accepted any such work. In arriving at his conclusion, the hearing officer will be guided by our holding in **Brown v. Safeway Stores, Inc.,** 82 N.M. 424, 427, 483 P.2d 305, 308 (1970), to the effect that "proof of the disability is on the [petitioner], but after [petitioner] has introduced evidence as to his age, education, training, and general physical and mental capacity, the burden of coming forward," i.e.,

the burden of proving that petitioner is employable to do some work for which he is qualified, is on respondents.

{8} Reversed and remanded for proceedings consistent with this opinion.

{9} IT IS SO ORDERED.

SCARBOROUGH, C.J., and WALTERS and RANSOM, JJ., concur.

STOWERS, J., dissents.

DISSENT

STOWERS, Justice, dissenting.