

IN THE UTAH COURT OF APPEALS

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Enrique Martinez,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner,)	
)	Case No. 20040590-CA
v.)	
)	
Labor Commission and Media-)	F I L E D
Paymaster Plus (self-insured,)	(December 28, 2007)
The Church of Jesus Christ of)	
Latter-day Saints),)	2007 UT App 410
)	
Respondents.)	

Original Proceeding in this Court

Attorneys: Richard R. Burke, Sandy, for Petitioner
Merrill F. Nelson, Stuart F. Weed, Christian S.
Collins, and Alan L. Hennebold, Salt Lake City, for
Respondents

Before Judges Greenwood, Billings, and Thorne.

GREENWOOD, Associate Presiding Judge:

This case returns to this court on remand from the Utah Supreme Court. See Martinez v. Media-Paymaster Plus, 2007 UT 42 ¶ 55, 164 P.3d 384 (Martinez II). The supreme court granted a petition for certiorari from the decision of this court wherein we reversed the Utah Labor Commission's (the Commission) decision denying Enrique Martinez permanent total disability compensation. See Martinez v. Media-Paymaster Plus, 2005 UT App 308, ¶¶ 16-17, 117 P.3d 1074 (Martinez I). The supreme court determined that we had applied an incorrect standard of review and remanded for application of the appropriate standard of review, which is substantial evidence. See Martinez II, 2007 UT 42, ¶ 55.¹

¹The supreme court also addressed the burden of proof, determining that the employee bore the burden of proof in establishing eligibility for permanent total disability benefits. See Martinez II, 2007 UT 42, ¶ 50, 164 P.3d 384. Burden of proof is not, however, an issue on remand, and we have no need to address it.

After suffering an industrial accident, Martinez applied to the Commission for permanent total disability compensation. In order to find that an employee is permanently totally disabled, the Commission must conclude, among other matters not disputed in this case, that:

(iii) the industrial or occupationally caused impairment . . . prevent[s] the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident . . . ; and

(iv) the employee cannot perform other work reasonably available, taking into consideration the employee's:

- (A) age;
- (B) education;
- (C) past work experience;
- (D) medical capacity; and
- (E) residual functional capacity.

Utah Code Ann. § 34A-2-413(1)(c)(iii)-(iv) (2005) (amended 2006).

After the Commission denied him benefits, Martinez appealed, claiming that the Commission's findings of fact were inadequate as a matter of law and that the Commission's order was arbitrary and capricious. This court addressed "the Commission's conclusions that Martinez could perform the 'essential functions' of a fast food worker and that other work was 'reasonably available' for him" under an abuse of discretion standard of review. Martinez I, 2005 UT App 308, ¶ 10.

In its review, the supreme court first determined whether the "essential functions" and "reasonably available" issues present factual, legal, or mixed issues. See Martinez II, 2007 UT 42, ¶ 25. The court determined that both concepts presented factual issues, to be reviewed under a substantial evidence standard of review. See id. ¶¶ 30-32.

The court described the standard as follows: Substantial evidence exists when the factual findings support "more than a mere scintilla of evidence . . . though something less than the weight of the evidence." An administrative law decision meets the substantial evidence test when "a reasonable mind might accept as adequate" the evidence supporting the decision. Id. ¶ 35 (quoting Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah Ct. App. 1989)).

The court further stated that to determine if there is substantial evidence, we should "consider the whole record before the lower court. . . . To aid the appellate court in conducting a whole record review, the party challenging the factual findings must marshal all of the evidence and demonstrate that, despite the facts supporting the decision, the 'findings are not supported by substantial evidence.'" Id. ¶ 36 (quoting Grace Drilling, 776 P.2d at 68).

Martinez II also addressed the nature of the marshaling requirement, concluding that it "is not a limitation on the power of the appellate courts. Rather, it is a tool . . . not, itself, a rule of substantive law." Id. ¶ 19. Consequently, appellate courts "retain[] discretion to consider independently the whole record and determine if the decision below has adequate factual support." Id. ¶ 20.

Martinez's original brief in this matter, which we consider again on remand, fails to marshal the evidence supporting the Commission's findings of fact. Essentially conceding that failure, Martinez requested at oral argument an opportunity to properly marshal the evidence in further briefing. We deny this request as untimely. However, we have exercised our discretion to review the record in this matter ourselves, avoiding any reweighing of the evidence by this court. See id. ¶ 10. Our review is for the sole purpose of determining if substantial evidence supports the Commission's findings. We determine that it does.

Martinez presented evidence that he had poor manual dexterity and limited ability to use his hands as a result of the industrial accident, and that he therefore could not perform the type of work he had done previously at McDonald's. He also presented evidence that he had limited standing capability. Martinez contended that as a result, there were no jobs available that he could perform.

The employer presented contrasting evidence, specifically that there were jobs available because employers could and would accommodate Martinez. The employer's witnesses testified that Martinez could perform cashier duties with one hand and because he is bilingual, employers in the fast-food industry would be particularly willing to employ him. Specifically, the record includes the testimony of Dr. McGlothlin, an orthopedic specialist, who said Martinez was capable of light work. In addition, Cory Davis, a physical therapist, testified that Martinez could perform light work and reported that there was "substantial symptom magnification" by Martinez. Furthermore, Kit Bertsh, the employer's expert, testified that Martinez was employable as a fast-food clerk and that there were jobs available with employers who could accommodate his limitations.

The medical panel also reported that Martinez could stand and walk. The foregoing constitutes substantial evidence supporting the Commission's findings that Martinez could perform the essential functions of employment at a job similar to his employment at McDonald's, taking into account the factors of Martinez's age, physical abilities, education, language skills, and previous experience. See Utah Code Ann. § 34A-2-413(1)(c)(iv) (2005) (amended 2006). As the Commission stated in its Findings of Fact, "the Commission accepts the evaluations of Dr. McGlothlin and Mr. Davis to be the most accurate descriptions of Mr. Martinez's true abilities." The Commission was entitled to make determinations of credibility as the fact finder.

Based on these findings, "[t]he Commission's conclusion that available fast-food positions could be modified to accommodate Martinez's limitations is a logical finding based on the presented evidence." Martinez II, 2007 UT 42, ¶ 15, 164 P.3d 384. The Commission "carefully consider[ed] Martinez's weight limitations on lifting and pushing, evidence of symptom magnification, and the fast-food industry's practice of assigning tasks according to the respective abilities of each individual employee." Id. After comparing "Martinez's abilities with the essential functions of fast-food work [the Commission] concluded that 'Mr. Martinez's work-related impairments do not prevent him from performing such functions.'" Id.

We affirm the Commission's order denying Martinez permanent total disability compensation because the Commission's findings are supported by substantial evidence and logically lead to the conclusion that Martinez could obtain employment.

Pamela T. Greenwood,
Associate Presiding Judge

WE CONCUR:

Judith M. Billings, Judge

William A. Thorne Jr., Judge