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court that Gonzalez did not prove the prejudice prong of *Strickland*.[38] As a result, even if *Padilla* applies retroactively to her plea, she did not prove ineffective assistance of counsel and therefore did not prove the manifest injustice necessary to justify withdrawing her plea. The district court did not abuse its discretion in overruling Gonzalez' motion, and we find no merit to her assignment of error.

CONCLUSION

Although we conclude that the district court had jurisdiction to consider Gonzalez' motion to withdraw her plea, despite the fact that her conviction had become final, we find that she did not prove ineffective assistance of counsel. The district court did not abuse its discretion in overruling her motion. The district court's order is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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[38] See *Strickland, supra* note 21.

JULIE LOVELACE, APPELLEE, V.
CITY OF LINCOLN, APPELLANT.
809 N.W.2d 505

Filed January 13, 2012. No. S-10-1241.

1. **Workers' Compensation.** Under the odd-lot doctrine, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which a claimant can sell his or her services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his or her crippling handicaps.
2. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.

4. **Workers' Compensation: Time.** A worker cannot be considered permanently totally disabled for a period of time when he or she was working either part time or full time at the same job he or she had prior to his or her injury.

Appeal from the Workers' Compensation Court. Affirmed.

Rodney Confer, Lincoln City Attorney, and Margaret M. Blatchford for appellant.

Travis Allan Spier, of Atwood, Holsten, Brown & Deaver Law Firm, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

The City of Lincoln (City) appeals the decision of a three-judge panel of the Nebraska Workers' Compensation Court, which affirmed in part and in part reversed the original award which found Julie Lovelace to be temporarily and totally disabled for the periods "from and including June 22, 2006, through October 1, 2006, and again from December 19, 2007, through August 19, 2009, and thereafter became permanently and totally disabled." The City alleges that the original award of the Workers' Compensation Court is ambiguous and therefore does not comply with Workers' Comp. Ct. R. of Proc. 11 (2010) and that the three-judge panel did not correct the error. The City also alleges that as a matter of law, a worker "cannot be earning wages at a similar job with the same employer and at the same time have suffered a 100 percent loss of earning capacity." We affirm the decision of the three-judge panel.

BACKGROUND

The facts of this case are largely undisputed. On March 21, 2006, Lovelace was injured in the course and scope of her employment as an office specialist for the City. Lovelace was carrying a box when she tripped over a cart and fell to the floor, injuring her left knee and lower back. Lovelace continued to work after her injury up until June 22, the date of the surgery on her left knee. Lovelace returned to work on

October 2 and continued working for the City, with restrictions, until November 6, 2007, when she again slipped and fell, injuring her right leg. Lovelace had another surgery on her left knee on December 19. She did not return to work, and the City terminated her employment in June 2008.

[1] Lovelace filed suit with the compensation court to recover unpaid medical expenses, mileage, attorney fees, and ongoing medical care. Lovelace also sought payments for temporary total disability for the periods between June 22 and October 1, 2006, and December 19, 2007, and August 19, 2009, and payments for permanent disability from August 20, 2009, continuing indefinitely into the future. The compensation court found that Lovelace had been temporarily totally disabled for the periods "from and including June 22, 2006, through October 1, 2006, and again from December 19, 2007, through August 19, 2009, and thereafter became permanently and totally disabled." The compensation court also found that Lovelace was entitled to "benefits of $358.56 per week for 101 5/7 weeks for temporary total disability and thereafter and in addition thereto the sum of $368.09 per week for permanent total disability." The compensation court found that Lovelace was permanently and totally disabled, because she was an odd-lot worker.[1] Under the odd-lot doctrine,

> "'[t]otal disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.'"[2]

The City was given credit for $97,842.86 paid toward Lovelace's medical bills and was ordered to pay the remaining

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[1] See *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[2] *Id.* at 617, 748 N.W.2d at 63.

balances. The City was also ordered to pay $4,557.93 in mileage expenses, and $10,000 in attorney fees, because the City failed to pay medical bills in a timely fashion. The compensation court later issued an order nunc pro tunc, stating that the City should pay $2,445.17 in penalties together with interest as allowed by law for failing to "'catch up'" permanency benefits for the period of March 22 through June 22, 2006, pursuant to *Hobza v. Seedorff Masonry, Inc.*[3] The compensation court also revised the amount of certain compensable medical expenses incurred by Lovelace.

The City appealed the award to a three-judge panel of the compensation court. The three-judge panel affirmed the award in part, and in part reversed. The three-judge panel found that some of the medical expenses Lovelace had submitted were unrelated to her workplace injuries and remanded that portion of the award for further findings by the compensation court. The three-judge panel also found that *Hobza* was not applicable, because *Hobza* had been superseded by amendments to Neb. Rev. Stat. § 48-119 (Reissue 2008). Therefore, the three-judge panel found that no benefits were to be paid prior to June 22, 2006, because Lovelace worked full time between the first accident, which occurred on March 21, through June 22. The three-judge panel affirmed the categorization of Lovelace as an odd-lot worker and found no merit to the remainder of the City's or to Lovelace's assignments of error on cross-appeal regarding future surgeries. The City appealed.

ASSIGNMENTS OF ERROR

The City assigns that the compensation court erred when it (1) failed to comply with rule 11 (discussed below), by not specifying in the award and order the weeks owed and credited in disability benefits, and (2) determined that a worker could be earning wages at a similar job with the same employer and, at the same time, have suffered a 100-percent loss of earning capacity.

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[3] *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000).

STANDARD OF REVIEW

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.[4]

[3] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.[5]

ANALYSIS

Compensation Court's Award Did Not Violate Rule 11.

We address the City's assignments of error together, because both are based on the argument that the compensation court failed to adequately address benefits owed for the period of time between October 2, 2006, and December 18, 2007. In essence, the City claims the compensation court failed "to set out in specificity in the Award and Order the weeks and amounts owed in benefits and credited in benefits. The Court's lack of specificity results in ambiguity as to how much is owed in permanent total disability benefits."[6] Rule 11 provided at the time of the compensation court's award that "[d]ecisions of the court on original hearing shall provide the basis for a meaningful appellate review. The judge shall specify the evidence upon which the judge relies."

Although the parties' briefs do not make this entirely clear, the confusion appears to center on the period of time between October 2, 2006, and December 18, 2007, when Lovelace was working either part time or full time with restrictions. Prior to trial, the compensation court ordered both parties to submit, among other things, a pretrial statement addressing Lovelace's weekly wages, periods of indemnity, and medical expenses incurred and paid. In her pretrial statement, Lovelace made

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[4] *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 793 N.W.2d 319 (2011).

[5] *Id.*

[6] Brief for appellant at 14.

no claims regarding her disability between October 2, 2006, and December 18, 2007, whether partial or total, temporary or permanent. In its pretrial statement, however, the City claimed to have voluntarily paid partial temporary disability during this time, a claim that Lovelace did not dispute. The City appears to be concerned that it will be penalized if it does not pay permanent total disability benefits for that period of time (between October 2, 2006, and December 18, 2007).

First, we note that the compensation court made no findings for the period of time between October 2, 2006, and December 18, 2007, probably because Lovelace did not claim in her pretrial statement that she was owed benefits for that period of time. In paragraph I of the award, the compensation court found that Lovelace was "temporary [sic] totally disabled from and including June 22, 2006, through October 1, 2006, and again from December 19, 2007, through August 19, 2009, and thereafter became permanently and totally disabled." In paragraph III, the compensation court ordered the City to pay Lovelace "$358.56 per week for 101 5/7 weeks for temporary total disability," and "$368.09 per week for permanent total disability." The periods of temporary total disability are precisely those claimed by Lovelace in her pretrial statement. And while the City argues that there is no clear start date to the permanent disability benefits, the award sets forth the periods of time that Lovelace was temporarily totally disabled and states "and *thereafter* became permanently and totally disabled." (Emphasis supplied.)

[4] To the extent that there is any confusion over the payment of permanent total disability for the period of time between October 2, 2006, and December 18, 2007, we find that Lovelace is not entitled to permanent total disability benefits for that same period while she was working either part time or full time and receiving temporary partial disability payments.[7] Our prior case law dictates that a worker cannot be considered permanently totally disabled for a period of time when he or

[7] See *Kam v. IBP, inc.*, 12 Neb. App. 855, 686 N.W.2d 631 (2004), *affirmed* 269 Neb. 622, 694 N.W.2d 658 (2005).

she was working part time or full time at the same job he or she had prior to his or her injury.[8]

Application of Hobza.

Although both the City and Lovelace argue strenuously about the application of *Hobza v. Seedorff Masonry, Inc.* to this case, *Hobza* is inapposite.[9] Citing *Hobza*, the compensation court ordered the City to pay penalties and interest for failing to "'catch up'" permanency benefits for the period of time between March 22 and June 22, 2006, or between her first injury and the subsequent knee surgery. In *Hobza*, this court held that under § 48-119 (Reissue 1998), benefits were to be paid from the date of injury. However, since *Hobza* was decided, the Legislature changed the statute to specifically provide that compensation begins from the date of disability. The three-judge panel recognized this fact and reversed the decision as it related to *Hobza*, finding the City was not required to pay Lovelace benefits for that period of time when she had been working full time. We agree with the finding of the three-judge panel.

CONCLUSION

We find that Lovelace is not entitled to permanent total disability benefits for the period of time after she was injured and while she was working between October 2, 2006, and December 18, 2007. Lovelace is, however, entitled to permanent total disability payments from December 19, 2007, onward. We affirm the decision of the three-judge panel.

AFFIRMED.

WRIGHT, J., not participating in the decision.

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[8] *Id.*

[9] *Hobza, supra* note 3.