GARY ASTI, Employee/Cross-Appellant, v. NORTHWEST AIRLINES and KEMPER GROUP, Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 10, 1998

HEADNOTES

APPORTIONMENT - PERMANENT PARTIAL DISABILITY. Where the compensation judge's use of statutory apportionment resulted in an award of benefits for permanent partial disability greater than might have resulted from the judge's assignment of a rating to the condition resulting from the employee's third injury alone, the court rejects the employee's claim that the judge's decision apportioning the employee's permanent partial disability should be reversed under the supreme court's holding in Fleener v. CBM Indus., 564 N.W.2d 215, 56 W.C.D. 495 (Minn. 1997).

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's testimony and his treating doctor's most recent medical records, supported the compensation judge's decision that the employee was not entitled to additional permanent partial disability ratings under Minn. R. 5223.0390, subp. 4E(1) and 4E(4) (1995).

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. Where substantial evidence supported the compensation judge's decision that a claimed health club membership was reasonable and necessary under case law principles but proper evaluation of the claim required analysis of the application of Hirsch v. Bartley-Lindsay Co., 537 N.W.2d 480, 53 W.C.D. 144 (Minn. 1995), to the permanent treatment parameters, an issue currently pending before the supreme court, further consideration and final resolution of the employee's claim would be stayed pending issuance of the supreme court's decision.

Affirmed in part, modified in part and stayed in part.

Determined by Wilson, J., Olsen, J., and Hefte, J.
Compensation Judge: Bernard Dinner.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's award of permanent partial disability benefits, contending that the judge erred in determining the amount of permanency attributable to the employee's 1995 work injury and in apportioning the employee's disability pursuant to Minn. Stat. § 176.101, subd. 4a. The employer and insurer appeal from the judge's award of expenses related to the employee's health club membership beginning January 1, 1997.

We affirm the judge's award of benefits for permanent partial disability, but we stay final resolution of the employee's entitlement to expenses related to his health club membership pending issuance of the supreme court's decision on the applicability of Hirsch v. Bartley-Lindsay Co., 537 N.W.2d 480, 53 W.C.D. 144 (Minn. 1995), to the permanent treatment parameters.

BACKGROUND

The employee has worked as a flight attendant since 1976, first for Hughes Airwest, then for Republic Airlines [Republic], and finally for Northwest Airlines [the employer]. Over the course of these years, the employee sustained at least three work-related injuries to his low back. The first injury at issue occurred on April 30, 1986,[1] while the employee was working for Republic, and as a result of this injury, he underwent a hemilaminectomy at L4-5 in June of 1987. Subsequently, in May of 1988, the employee and Republic settled certain claims regarding the injury, including claims for permanent partial disability to the extent of an 18% whole body impairment.

The employee sustained his second work-related low back injury on February 4, 1993, while employed by the employer. Conservative care again failed to alleviate his symptoms, and on October 14, 1993, the employee underwent additional surgery in the nature of decompressive lumbar laminectomy at L3-4 and L4-5 with bilateral intertransverse process fusion [of] L3 through L5. The employee was then off work for six or seven months but ultimately returned to his pre-injury position. Following this injury, the employer and its insurer paid the employee various benefits, including compensation for a 4.5% whole body impairment, bringing the total whole body impairment for which the employee received benefits to 22.5%.

The third work-related low back injury in question occurred on September 21, 1995, again during the employee's employment with the employer. Three months later, on December 21, 1995, the employee underwent a third surgical procedure, this time a decompressive laminectomy (reexploration) L2-3 and L3-4 with complete facetectomy L3-4 on the right, partial facetectomy L2-3 on the right, and bilateral intertransverse process fusion L2-L4. In a settlement reached in late June of 1996, the employer and insurer agreed in part to pay for a health club membership, which had been prescribed by the employee's treating neurologist, Dr. Bruce Idelkope, through the end of 1996. Shortly after the settlement, on about July 1, 1996, the employee again returned to work in his usual pre-injury job.

On June 25, 1997, the matter came on for hearing before a compensation judge for resolution of the employee's claim for additional benefits for permanent partial disability and for expenses associated with his health club membership after January 1, 1997. Underlying issues included the applicability of Minn. Stat. § 176.101, subd. 4a, concerning apportionment for preexisting permanent partial disability, and the applicability of the permanent treatment

[1] The compensation judge's decision erroneously designates the date of this injury as April 30, 1996. This is clearly a clerical error.

parameters to the employee's claim for payment of health club membership fees. Evidence included the employee's treatment records, the deposition testimony of Dr. Idelkope, and the reports of Dr. H. William Park, the employer and insurer's independent examiner.

In a decision issued on August 12, 1997, the compensation judge concluded in part that the employee's 1995 work injury was attributable in part to his preexisting condition; that the employee had a 28% impairment of the whole body; that statutory apportionment under subdivision 4a was appropriate; that the employee was entitled to benefits for permanent partial disability based on the difference between his current 28% rating and the 22.5% rating for which benefits had previously been paid; that the permanent treatment parameters applied to the employee's health club claim; and that the claimed health club fees were compensable under both case law criteria and a rule governing Departures from Parameters in the permanent treatment parameters. The compensation judge therefore ordered the employer and insurer to pay the employee impairment compensation for a 5.5% whole body impairment and to reimburse the employee for his [health club membership] . . . beginning with the dues paid for January 1997 [and continuing] until such time as the employee is able to continue working as a flight attendant without such treatment. Both parties appeal.

STANDARD OF REVIEW

In reviewing cases 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). Substantial evidence supports the findings if, in the context of the entire record, Athey are supported by evidence that a reasonable mind might accept as adequate. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, [f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). 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. Id.

DECISION

Permanent Partial Disability

Minn. R. 5223.0390, subps. 4E and 5 (1997), read as follows:

Subp. 4. Radicular syndromes.

* * *

E. Radicular pain or radicular paresthesia, with or without lumbar pain syndrome, and with objective radicular findings, that is, reflex changes or EMG abnormality or nerve root specific muscle weakness in the lower extremity, on examination and myelographic, CT scan or MRI scan evidence of spinal stenosis, as defined in part 5223.0310, subpart 47, that impinges on a lumbar nerve root, and the medical imaging findings correlate with the findings on neurological examination, ten percent with the addition of as many of subitems (1) to (4) as apply, but each may be used only once:

(1) if chronic radicular pain or radicular paresthesia persist, despite treatment, add three percent;

(2) if a surgery other than a fusion performed as part of the treatment, add five percent, if surgery included a fusion, the rating is as provided in subpart 5;

(3) for additional surgery, other than a fusion, regardless of the number of additional surgeries, add three percent, if additional surgery included a fusion, the rating is as provided in subpart 5;

(4) additional concurrent lesion on contralateral side at the same level or on either side at other level, which meets all of the criteria of this item or item D, add nine percent.

Subp. 5. Fusion.

A. Fusion, as defined in part 5223.0310, subpart 29, at one level performed as part or all of the surgical treatment of a lumbar pain or radicular pain syndrome, add five percent to the otherwise appropriate category in subpart 3 or 4.

B. Fusion at multiple levels performed as part or all of the surgical treatment of a lumbar pain or radicular pain syndrome, add ten percent to the otherwise appropriate category in subpart 3 or 4.

Relying in part on the opinion of Dr. Idelkope as well as the employee's medical records and testimony, the compensation judge concluded that the employee's low back condition warranted a 10% rating under subpart 4E, a 3% rating under subpart 4E(3), a 5% rating under subpart 5A, and a 10% rating under subpart 5B, for a total rating of 28%. Concluding also that the employee's 1995 injury was attributable in part to his preexisting condition, the judge ruled that the employee's permanent partial disability was subject to apportionment under Minn. Stat. § 176.101, subd. 4a, and that the employee was therefore entitled to benefits for the difference between his current impairment, rated at 28%, and the 22.5% impairment for which he had previously received benefits. On appeal, the employee contends that the compensation judge's apportionment of permanent partial disability under subdivision 4a is inconsistent with the Minnesota Supreme Court's decision in Fleener v. CBM Industries, 564 N.W.2d 215, 56 W.C.D. 495 (Minn. 1997).

In Fleener, the employee sustained a work-related low back injury in 1989 that resulted in disc herniations at L3-4 and L4-5, and in 1990 he settled all nonmedical claims

regarding the injury on a full, final, and complete basis. Subsequently, in 1993, while employed by a different employer, the employee sustained another work-related injury to his low back, this time a disc herniation at a previously uninjured level, L5-S1. Following a hearing, a compensation judge determined that the employee had a 7% whole body impairment, pursuant to Minn. R. 5223.0390, subp. 4C(1) (1993), as a result of the 1993 injury alone, and he declined to apply Minn. Stat. § 176.101, subd. 4a, to reduce the second employer and insurer's liability for permanent partial disability benefits. On appeal, a divided panel of this court affirmed the judge's decision. The employer and insurer then appealed the matter to the supreme court. After discussing the underlying differences between the permanent partial disability schedules applicable to the 1989 injury and those applicable to the 1993 injury, the court, with one justice dissenting, noted that it would be Asomewhat presumptuous . . . to meld apparently incompatible methods of measuring disability without further guidance, particularly where the preexisting disability was closed out to a stipulated rating years before the adoption of the new schedules.[2] Id., at 217, 56 W.C.D. at 498-99. The court then went on to explain as follows:

> In any event, this case is not, as the compensation judge and WCCA majority concluded, about the allocation of responsibility for disability between a preexisting condition and a subsequent work injury. Instead, this case is more about attributing a specific permanency rating to each of two discrete work-related injuries, in which case the allocation of responsibility for those injuries to the preexisting condition and the work injury does not implicate statutory apportionment. *Cf. Kulp v. Sheraton Ritz Hotel*, 450 N.W.2d 296, 299 (Minn. 1990), citing *Marose v. Maislin Transp.*, 413 N.W.2d 507, 513 (Minn. 1987). The employee settled his claim for permanent partial disability benefits resulting from the 1989 injury. [The second employer is] liable for the permanent disability which resulted from the 1993 injury. *Fleener v. CBM Industries*, [56 W.C.D. 487, 491] (WCCA 1996). The WCCA properly affirmed the compensation judge's award.

Id.

It may be true, as the employee in the present matter maintains, that the employee's 1995 injury [a]ffected a disc space (L2-3) which had not been symptomatic prior to that injury and led to an extensive surgery which included a fusion . . . . However, contrary to the employee's

[2] In so concluding, the court observed that Athe new schedules do not indicate how 1984-1992 rated or ratable disabilities are to be treated for [purposes of apportionment]. Id. at 217, 56 W.C.D. at 498. However, Minn. R. 5223.0315B (1993) describes how apportionment calculations are to be performed if the preexisting Arating represents a percentage of disability to the whole body. Presumably this item is applicable if the preexisting impairment has been rated under schedules covering injuries sustained between 1984 and 1993.

contention, it is not necessarily true that Athe 1995 injury in this case is as discrete with reference to the injury in 1993 as was the 1993 injury in Fleener discrete with reference to the prior injury in that case. Unlike the judge in Fleener, the compensation judge in the present case specifically found that the employee's 1995 injury was itself attributable in part to the employee's preexisting low back injuries.[3] Moreover, again contrary to the employee's suggestion, the compensation judge in this matter did not conclude that the employee was entitled to a 5% rating under subpart 5A and an additional 10% rating under subpart 4E as a result of the 1995 injury; rather, the judge concluded only that those rating categories were applicable to the employee's overall low back condition as it existed after the employee's 1995 injury and third surgery.

Determining the appropriate compensation due for the employee's permanent partial disability in this matter is complicated both by the complexity of the employee's medical condition itself and by the change in the applicable permanent partial disability schedules prior to the employee's final work injury. It may be that the compensation judge could have simply rated the impairment resulting from the employee's 1995 injury alone, without resorting to apportionment under Minn. Stat. § 176.101, subd. 4a. Had he done so, however, it is apparent that the judge would have awarded benefits for a 5% whole body impairment under Minn. R. 5223.0390, subp. 5A, for the one-level extension of the employee's fusion to L2, and that decision would have been affirmable.[4] As it stands, the judge instead added together all of the ratings he found applicable to the employee's post 1995 condition, under the current schedules, and then subtracted back out the ratings for which the employee had previously been compensated under the previous schedules. This resulted in an award of benefits for an additional 5.5% impairment, a rating greater than that arguably attributable to the employee's 1995 injury alone.[5] Therefore, whether or not the judge should have analyzed the employee's claim some other way,

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[3] The judge's conclusion on this point is clearly supported by the testimony of the employee's own treating physician, Dr. Idelkope, who responded absolutely when asked whether there was a relationship between the employee's three work injuries.

[4] This is in fact the way Dr. Idelkope originally rated the employee's 1995 injury. He later changed the rating to 10%, pursuant to subpart 5B, based on his conclusion that the 1995 surgery in reality involved a two-level fusion, not merely a one-level fusion. However, both Dr. Idelkope and Dr. Park indicated that the 1995 surgery extended the employee's previous fusion by one level to L2, and, as the compensation judge noted, the employee had already been compensated for the fusion involving the L3 level. As such, the judge reasonably concluded that a 5% rating under subpart 5A was the appropriate rating applicable to the employee's third surgery. As for the potential argument that subpart 5A by its terms requires the assignment of an additional rating under subpart 3 or 4, the record reasonably supports the conclusion that the 1995 injury did not cause any condition that would warrant an additional rating under those provisions.

[5] We also note here that the employee expressly agreed at hearing that, if statutory apportionment was in fact applicable, the employee's permanent partial disability rating should be reduced by the 22.5% rating for which the employee had previously received benefits.

we cannot conclude that the judge's use of statutory apportionment unfairly under-compensated the employee for the disability caused by his 1995 injury.

The employee also argues, in the alternative, that the compensation judge erred by failing to include all of the permanent partial disability rating categories applicable to his condition, alleging that he is entitled to an additional 3% rating under Minn. R. 5223.0390, subp. 4E(1), and an additional 9% rating under subpart 4E(4). We are not persuaded. The compensation judge expressly and reasonably rejected the employee's claim for the additional 3% rating on grounds that both the employee's testimony and Dr. Idelkope's most recent medical reports indicate that the employee does not have persistent chronic radicular pain or radicular paresthesia as required for a rating under subpart 4E(1). Similarly, the compensation judge reasonably declined to include a 9% rating under subpart 4E(4), in that Dr. Idelkope testified that he would not rate the employee's condition under that rule.[6] Because a finding of permanent partial disability is one of ultimate fact, Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 39 W.C.D. 771 (Minn. 1987), and because substantial evidence supports the judge's choice of ratings, we affirm the judge's award of benefits for permanent partial disability in its entirety.[7]

Health Club Membership Fees

On the advice of Dr. Idelkope, the employee has engaged in an exercise program at a local health club on a regular basis since 1987, beginning not long after his initial low back injury and surgery. The employer and insurer ultimately paid the fees associated with the employee's membership through the end of 1996. At the hearing before the compensation judge, the employer and insurer denied liability for the employee's claim for reimbursement of fees beginning in January of 1997, contending that the health club membership was not reasonable and necessary and that the membership was not consistent with the permanent treatment parameters, Minn. R. 5221.6010, et. seq. The compensation judge disagreed, concluding that the membership was reasonable and necessary pursuant to the factors listed in Field-Seifert v. Goodhue County, No. *[redacted to remove SSN]* (W.C.C.A. Mar. 5, 1990), and that the claim was compensable under Minn. R. 5221.6050, subp. 8, which describes grounds for departures from the parameters. The compensation judge therefore ordered the employer and insurer to reimburse the employee for membership fees through the date of hearing and continuing Auntil such time as the employee is able to continue working as a flight attendant without such treatment.

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[6] More specifically, while Dr. Idelkope at one point included a 9% rating under this category in assessing the employee's condition, he testified at his deposition that he would now eliminate that rating.

[7] The employer and insurer note that they paid the employee some additional benefits for permanent partial disability after the hearing but before the compensation judge issued his decision. As this is verified by a notice of benefit payment contained in the file, the employer and insurer are entitled to a credit for this payment against the benefits awarded by the compensation judge.

Substantial evidence clearly supports the compensation judge's conclusion that the employee's health club membership is a compensable expense under the factors delineated in Field-Seifert and related cases, e.g., Horst v. Perkins Restaurant, 45 W.C.D. 9 (W.C.C.A. 1991). Dr. Idelkope explained that the employee has a substantial restriction in range of motion due not only to the fusion but to muscular tightness and spasm, and he indicated that the exercise program gives the employee as much flexibility and muscle tone as possible. Dr. Idelkope has also indicated on several occasions that the employee might well be unable to continue working, at least at his pre-injury job, if the health club exercise program were to be discontinued. Given this evidence, and also considering the relatively minimal cost of the membership,[8] we affirm the judge's conclusion that the health club membership is reasonable and necessary under case law principles.

We agree, however, with the employer and insurer's contention that the judge erred in ordering them to pay for the membership fees Auntil such time as the employee is able to continue working as a flight attendant without such treatment. Among other problems, the order as written unfairly deprives the employer and insurer of potential defenses to future reimbursement claims that might otherwise be available. As the employee's claim at hearing appeared to be for a one-year membership, based on the prescription of Dr. Idelkope, the compensation judge should have restricted any award accordingly. The judge's decision is therefore modified to the extent that it imposes continuing liability on the employer and insurer beyond the employee's claim.

Finally, the employer and insurer contend that the compensation judge erred in concluding that the claimed health club membership was compensable under Minn. R. 5221.6050, subp. 8C. This argument may have some merit, in that the departure rule in question is applicable where the treatment at issue Ais necessary to assist the employee in the initial return to work (emphasis added), and by the time of hearing the employee had been working with no specific restrictions on his work activities for nearly a year. We note, however, that the majority of the employee's responsive argument on this issue concerns the applicability of Hirsch v. Bartley-Lindsay Co., 537 N.W.2d 480, 53 W.C.D. 144 (Minn. 1995), to the permanent treatment parameters, and this same issue is currently pending before the supreme court in the certified, consolidated cases of Jacka v. Coca Cola Bottling Co., No. 468-08-3864, and Kelley v. Viking Auto Salvage, No. *[redacted to remove SSN]*.[9] Therefore, for reasons of judicial economy, we stay final resolution of the compensability of the employee's health club membership under the permanent treatment parameters pending issuance of the supreme court's decision in Jacka and Kelley. See Elmquist v. Green Acres Country Care Ctr., No. *[redacted to remove SSN]* (W.C.C.A. Nov. 6, 1997).

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[8] Currently less than $600.00 a year.

[9] Kelley and Jacka are scheduled for oral argument before the supreme court on March 5, 1998.