EDWARD D. BECKMAN, Employee v. BRAXTON HANCOCK & SONS and LIBERTY MUT. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 18, 1998

HEADNOTES

PERMANENT PARTIAL DISABILITY--SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee had met the requirements of Minn. R. 5223.0390, subp. 4.D(4).

PERMANENT PARTIAL DISABILITY; RULE CONSTRUED--MINN. R. 5223.0390, SUBP. 4. Where the employee underwent a two level surgery and had already been rated for one level using Minn. R. 5223.0390, subp. 4.D and 4.D(2), the employee is not entitled to an additional 2% permanent partial disability under Minn. R. 5223.0390, subp. 4.D(2) or subp. 4.D(3) since subitem 2 had already been used and could only be used once, and subitem 3 did not apply because both levels were operated on during the same surgery.

Affirmed as modified.

Determined by Hefte, J., Wilson, J., and Johnson, J.
Compensation Judge: Bonnie A. Peterson

OPINION

RICHARD C. HEFTE, Judge

The employer and insurer appeal the compensation judge's finding that the employee's low back condition warranted a 22% permanent partial disability rating. We affirm as modified.

BACKGROUND

On May 20, 1995, Edward Beckman (employee) sustained an admitted work-related injury to his low back while working as a journeyman carpenter for Braxton Hancock & Sons (employer), which was insured for workers' compensation liability by Liberty Mutual Insurance Company (insurer). Ultimately, the employee's condition required surgery. Dr. Daniel B. Ahlberg, the employee's surgeon, anticipated that the operation would involve only one disc level. On November 28, 1995, the employee underwent a right L5-S1 lumbar foraminotomy/facetectomy, right L5-S1 lumbar laminectomy and diskectomy, left L4-5 lumbar foraminotomy/facetectomy, left L4-5 lumbar laminectomy/diskectomy, and lumbar spine microdissection. (Employee's Exh. A4.) The operative report indicated that only one disc level was involved in the operation. Dr. Ahlberg testified by deposition that the operation actually

involved two disc levels and that the operative report was erroneous. (Employee's Exh. B, deposition of Dr. Daniel B. Ahlberg dated November 7, 1997, pp. 12-14.)

After the operation, the employee treated with Dr. Ahlberg and with Dr. Frank Y. Wei. In June 1996, Dr. Wei rated the employee at 11% permanent partial disability. (Employee's Exh. A5.) In November 1996, Dr. Ahlberg rated the employee at 20% permanent partial disability. While completing the employee's maximum medical improvement report a few days later, Dr. Ahlberg revised his opinion, indicating that the employee had a 22% permanent partial disability under Minn. R. 5223.0390, subp. 4.D, subitems 2 and 4. (Employee's Exh. A4.) Dr. Ahlberg testified his first opinion was given without checking the schedule and that he revised his opinion after checking the schedules while preparing the employee's maximum medical improvement report. In April 1997, Dr. Wei indicated that the employee's condition warranted a 22% permanent partial disability rating based upon Minn. R. 5223.0390, subp. 4.D and subitems 2, 3, and 4 (Employee's Exh. A5.) In September 1997, Dr. Jack Drogt performed a medical record review regarding the employee at the request of the employer and insurer. Dr. Drogt opined that the employee had only undergone surgery on one level, and therefore rated the employee as having an 11% permanent partial disability. (Employer and insurer's Exh. 2.)

The employer and insurer paid the employee 11% permanent partial disability in October 1996. In January 1997, the employee filed a claim petition for 22% permanent partial disability, rehabilitation benefits, and Heaton fees. Before the hearing, the rehabilitation issue had resolved, the employee had returned to work, and he was receiving temporary partial disability benefits. A hearing was held on November 13, 1997. The compensation judge found that the employee had undergone surgery on two disc levels and held that the employee was entitled to an additional 11% permanent partial disability, for a total rating of 22% permanent partial disability. This appeal followed.

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 (1996). Substantial evidence supports the findings if, in the context of the entire record, "they 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

The main issue at the hearing below was whether the employee had undergone surgery on one disc level or on two disc levels. The employer and insurer did not appeal the compensation judge's finding that the employee's surgery involved two disc levels. The employer and insurer dispute the permanency rating assigned to the employee's condition. The compensation judge awarded the employee a 22% permanent partial disability rating. A compensation judge is responsible to determine under which rating category an employee's disability falls, based on all relevant evidence, including objective medical findings. Jensen v. Best Temporaries, 46 W.C.D. 498, 500-01 (W.C.C.A. 1992). Although permanency ratings offered by physicians may assist the compensation judge in making this determination, these opinions are not binding. Id.; see also Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 43, 35 W.C.D. 523, 528 (Minn. 1983). In order to receive a permanent partial disability rating, the employee must prove each element of the scheduled disability. Knudson v. Twin City Hide, Inc., 40 W.C.D. 336, 338 (W.C.C.A. 1987).

Resolution of this case depends on the application of and interpretation of Minn. R. 5223.0390, subp. 4.D, which provides for the following permanency ratings for lumbar radicular syndromes:

> Radicular pain or radicular paresthesia, with or without lumbar pain syndrome, and with objective radicular findings, that is, hyporeflexia or EMG abnormality or nerve root specific muscle weakness in the lower extremity, on examination and myelographic, CT scan, or MRI scan evidence of intervertebral disc bulging, protrusion, or herniation that impinges on a lumbar nerve root, and the medical imaging findings correlate anatomically with the findings on neurologic examination, nine 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 two 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 two percent, if the 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 E, add nine percent.

The compensation judge found that the "employee was paid 11% whole body permanency for permanency as outlined under Minn. R. 5223.0390, subp. 4D, which results in 9% permanent

partial disability with the addition of subp. 2, 2% for surgery other than fusion." (Finding 2.) The compensation judge also found that the employee had another 11% permanent partial disability as a "result of the second level of surgery." (Finding 9.)

The employer and insurer contend that the compensation judge erroneously applied Minn. R. 5223.0390, subp. 4.D. The employer and insurer have paid 11% permanent partial disability, determined as 9% for the employee's herniated disc on the right at L5-S1 under Minn. R. 5223.0390, subp. 4.D plus 2% for the surgery under Minn. R. 5223.0390, subp. 4.D(2). The employer and insurer argue that the employee did not produce evidence of objective radicular findings associated with a left L4-5 injury on neurological examination, and therefore that the employee did not prove all of the elements necessary to rate that condition in addition to the rating already paid for the L5-S1 condition. Dr. Ahlberg testified that he found an objective finding in that the employee had restricted range of motion in his back. (Employee's Exh. B, p. 53.) He also testified that the employee had radicular pain into the left leg. (Employee's Exh. B, p. 10.) Dr. Ahlberg noted that he found impingement and nerve root compression on both sides during the operation, and specifically testified that the employee's L4-5 nerve root was compressed on the left side, which had been the cause of his left-sided radicular symptoms. (Id. at 13.) The compensation judge could reasonably conclude that the employee had radicular findings associated with the L4-5 disc level which warranted a permanent partial disability rating. Therefore, the employee is entitled to an additional 9% under Minn. R. 5223.0390, subp. 4.D(4) for his L4-5 condition for "an 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," for a total rating of 20% permanent partial disability.

The employee argues that he is entitled to the additional 2% because he had surgery on more than one level. Minn. R. 5223.0390, subp. 4.D, however, allows the use of each listed subitem in the rule only once to determine a total rating. Subitem 2, providing for an additional 2% for surgery, was already used in determining the employee's initial 11% permanency rating for his L5-S1 injury. Dr. Ahlberg opined that the employee should be compensated for surgery at both levels and that a 22% permanent partial disability rating as a Weber rating most closely represents the employee's condition. We disagree. A permanency rating pursuant to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990) is inappropriate in this case since the schedules specifically rate the employee's condition. A Weber rating is not permitted where specific ratings are provided in the schedules and a departure from the schedules would be based on subjective criteria. Warner v. Luther Haven Nursing Home, File No. *[redacted to remove the social security number]* (W.C.C.A. Oct. 14, 1993).

The employee notes that subitem 3 allows an additional 2% for "additional surgery" and argues that surgery on more than one disc level constitutes additional surgery. We disagree. The rule does not provide for an additional 2% because the same surgery involved two levels. We interpret subitem 3 to apply to surgeries performed at a later date. The employee has not undergone "additional surgery" under subitem 3 since the procedures for both levels were done at the same time. The employee also argues that once an employee qualifies for the additional 9% under subitem 4, each of subitems 1, 2, and 3 may be used more than once, otherwise the additional

level could be underrated. The rule, however, does not indicate that subitems 1, 2, and 3 may be used again once the requirements of subitem 4 are met. The rule specifically states that each of the subitems may be used only once.

Therefore, subitems 2, 3 or 4 may not be used to add an additional 2% to the employee's rating. Pursuant to Minn. R. 5223.0390, subp. 4.D, the employee is entitled to a 20% permanent partial disability rating. Accordingly, we modify the compensation judge's award of permanent partial disability benefits corresponding to a 20% permanent partial disability rating instead of a 22% permanent partial disability rating.