CINDY BROWN, CONSERVATOR FOR THE ESTATE OF WILLIAM BROWN, EMPLOYEE/APPELLANT, v. PUERINGER DISTRIB./INT'L MULTIFOODS and LIBERTY MUT. INS. CO., Employer-Insurer/Cross-Appellants, and MN DEP'T OF HUMAN SERVS., MN DEP'T OF LABOR & INDUS./VRU, and MEDICARE, Intervenors, and SPECIAL COMPENSATION FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 1, 1998

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supported the compensation judge's conclusion that the employee's work-related permanent psychological impairment was best represented by a 30% rating under Minn. R. 5223.0060, subd. 8E(2), without additional separate ratings for communication disturbances under other provisions of the brain injury rule subpart.

Affirmed.

Determined by Wilson, J., Hefte, J., and Johnson, J.
Compensation Judge: Donald C. Erickson.

OPINION

DEBRA A. WILSON, Judge

Both parties appeal from the compensation judge's findings as to permanent partial disability.[1] We affirm.

BACKGROUND

The employee began working as an over-the-road truck driver for Pueringer Distributing [the employer] in March of 1987. About a year and a half later, on September 8, 1988, the employee was injured in the course and scope of his job when he was struck in the face by an insulated truck door that had been caught by the wind. Over the next several years, the employee developed a myriad of complaints, both physical and psychological, eventually including headaches, neck and back pain, leg and ankle pain, fatigue, insomnia, confusion, irritability, concentration problems, memory problems, and reading problems. As a result of the

[1] The employer and insurer also appealed from the compensation judge's award of treatment expenses. That dispute has, however, been settled.

employee's condition, his estate was eventually placed in a conservatorship,[2] and he was found incompetent to testify in the workers' compensation proceedings resulting from the September 1988 accident.[3]

The matter initially came on for hearing before a compensation judge in 1991 but was continued, for various reasons, until December of 1995. By this time, the employee was claiming entitlement to benefits for back, neck, psychological, and organic brain injuries; the employer and insurer were claiming, among other things, that the employee had no organic brain or consequential psychological injury and that he had fully recovered from the effects of any other injuries. Other issues included whether the employee had refused suitable employment and whether he had reached maximum medical improvement [MMI]. The evidence as to these issues included testimony by several lay witnesses and the records, reports, and/or deposition testimony of numerous treatment providers and expert examiners, including Drs. Gerald Church, J. P. McBride, Sheldon Segal, Miles Belgrade, Thomas Silvestrini, John Rauenhorst, Gary Cowan, and Brian Erickson. Most physicians agreed that the employee was totally disabled, but diagnoses and opinions as to causation varied.

In a detailed decision issued on March 8, 1996, the compensation judge concluded in part that the employee had not sustained a work-related organic brain injury; that the employee's psychological condition was causally related to the September 1988 accident; that the employee had not reached MMI with respect to his psychological condition; that the employee had refused suitable 3e employment;[4] that the employee was entitled to wage loss benefits for a short period prior to his refusal of suitable employment but not thereafter; and that some treatment expenses were compensable while others were not. Both parties appealed from the judge's decision, and in an opinion issued on October 16, 1996, a panel of this court affirmed in part, reversed in part, and remanded the matter to the compensation judge for further proceedings. Specifically, we affirmed the judge's denial of the employee's organic brain injury claim, affirmed the finding that the employee's psychological condition was causally related to the work injury, reversed the finding that the employee had refused suitable employment, and remanded the matter for reconsideration of the employee's claim for wage loss benefits and certain medical expenses. Brown v. Pueringer Distrib., 56 W.C.D. 176 (W.C.C.A. 1997). Our decision to this effect was summarily affirmed by the Minnesota Supreme Court.

When the hearing on remand was held on September 3, 1997, several additional issues were litigated, including whether the employee was entitled to permanent partial disability

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[2] The employee is not subject to a conservatorship of the person. The employee's wife, Cindy Brown, is the conservator of his estate and is technically the petitioner in these proceedings.

[3] For a much fuller discussion of this very complex case, see Brown v. Pueringer Distributing, 56 W.C.D. 176 (W.C.C.A. 1997).

[4] See Minn. Stat. § 176.101, subd. 3e (repealed 1995).

benefits for impairment resulting from his psychological condition, either under the applicable schedules or pursuant to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990).[5] The parties supplemented the massive record from the prior hearing by submitting recent medical reports concerning permanent partial disability and additional deposition testimony from Drs. Erickson and Rauenhorst. The employee's wife also testified again concerning the employee's symptoms and behavior.

In a lengthy decision issued on January 6, 1998, the compensation judge concluded in part that the employee's psychological condition--depression with psychotic features--merited a 30% permanent partial disability rating under the applicable schedules.[6] 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, 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 permanent partial disability rating categories at issue in these proceedings provide as follows:

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[5] In Weber, the supreme court held that the commissioner had exceeded his authority by promulgating a rule denying compensation for permanent functional impairments not included in the permanent partial disability schedules.

[6] The judge also found that the employee had been permanently and totally disabled as a result of his 1988 work injury effective October 3, 1991; that the employee had reached MMI from his injury effective with service of an MMI report on September 21, 1995; and that the treatment expenses at issue on remand were compensable.

Subd. 8. Brain injury. Supporting objective evidence of structural injury, neurological deficit, or psychomotor findings is required to substantiate the permanent partial disability. Permanent partial disability of the brain is a disability of the whole body as follows:

A. Communications disturbances, expressive:

(1) mild disturbance of expressive language ability not significantly impairing ability to be understood, such as mild word-finding difficulties, mild degree of paraphasias, or mild dysarthria, 10 percent;

(2) severe impairment of expressive language ability, but still capable of functional communication with the use of additional methods such as gestures, facial expression, writing, word board, or alphabet board, 35 percent; or

* * *

B. Communication disturbances, receptive:

(1) mild impairment of comprehension of aural speech, but comprehension functional with the addition of visual cues such as gestures, facial expressions, or written material, 40 percent;

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D. Emotional disturbances and personality changes must be substantiated by medical observation and by organic dysfunction supported by psychometric testing. Permanent partial disability is a disability of the whole body as follows:

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(2) present at all times but not significantly impairing ability to relate to others, to live with others, or to perform self cares, 30 percent;

(3) present at all times in moderate to severe degree, minimal ability to live with others, some supervision required, 65 percent;

* * *

E. Psychotic disorders, as described in D.S.M. III, not caused by organic dysfunction and substantiated by medical observation:

* * *

(2) present at all times but not significantly impairing ability to relate to others, live with others, or perform self cares, 30 percent;

(3) present at all times in moderate to severe degree significantly affecting ability to live with others, and requiring some supervision, 65 percent;

Minn. R. 5223.0060, subp. 8 (1987). At hearing, the employee was claiming eligibility, under either the schedules or pursuant to Weber, for a 10% rating for expressive communication disturbances under subpart 8A(1), a 40% rating for receptive communication disturbances under subpart 8B(1), and a 65% rating for either emotional disturbances and personality changes under subpart 8D(3) or psychotic disorders under subpart 8E(3). The employer maintained that the employee's psychological condition did not warrant a rating under the schedules and that the most appropriate Weber rating would be a 30% rating for emotional disturbances and personality changes under subpart 8D(2). The compensation judge concluded that the employee's condition met the requirements for a 30% rating, under subpart 8E(2), for psychotic disorders, but that the employee was not entitled, under either Weber or the schedules, to any additional ratings for communication disturbances. On appeal, both parties have essentially reasserted the claims and arguments previously presented to the judge.

We conclude initially that the record as a whole easily supports the compensation judge's denial of the employee's claim for a 65% rating under either subparts 8D(3) or 8E(3), both of which describe a disturbance or disorder present at all times in moderate to severe degree significantly affecting [the employee's] ability to live with others, and requiring some supervision. Minn. R. 5223.0060, subps. 8D(3) and 8E(3) (emphasis added). The compensation judge noted that the employee did apparently at times require some supervision. However, the judge concluded that the other requirement of the schedule had not been met, explaining as follows:

> The employee currently lives at home with his wife at his home in Silver Bay. His daughter is in college and his son is in high school. When questioned at the Mayo Clinic, the employee was able to relate to the examining physician the activities of his children. The employee remains independent in caring for himself. He is able to pick out his clothes and dress himself. He is able to perform personal care activities and toilet functions. He is able to stay at home alone during the day for 8 to 9 hours when his wife is working outside the home. He is able to stay at home alone when the children are in school and his wife is working. He is able to take medications which his wife places in a pill box. He is able to prepare his own sandwiches for lunch, when home alone. He recognizes members of his extended family as his mother, father and sister and long time neighbors. He is able to watch TV and to use the remote control. He prefers watching old war movies or news or documentary-type shows. He is able to relate the content of television shows or news that he watches. He still has significant problems in communication in a group setting, such as relatives during a holiday. He voted in the last presidential election. He occasionally will paint portraits, using photographs as his subjects. He remains capable of mowing the lawn, using a snow blower and vacuuming. He answers the telephone, but may forget to write down messages or who called if he does not write down the message.

> He is able to appear in public places, such as a shopping mall, without becoming disruptive. The employee discontinued driving at some point after 1991. When the employee becomes suicidal, his wife will tell him that he has to go back to Polinsky Center if he keeps talking in that fashion. The employee is able to comprehend and stops talking about suicide.

The judge's underlying factual determinations are consistent with the evidence, and they reasonably support the conclusion that the employee's condition does not significantly affect or impair his ability to live with others. We note also that Dr. Rauenhorst testified in his 1997 deposition that a 30% or 35% rating, over all, would best reflect the extent of the employee's impairment. 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 we cannot conclude on this record that the compensation judge erred in denying the employee's 65% rating claim.[7]

In their appeal on this issue, the employer and insurer contend initially that the compensation judge erred in concluding that the employee's condition warranted a rating under subpart 8E, concerning psychotic disorders, in that the employee does not have an organic brain injury as required by that rule. We have already implicitly rejected the argument that a rating under subpart 8E is contingent on the presence of organic brain injury, Goodwin v. Tek Mechanical, 49 W.C.D. 350 (W.C.C.A. 1993), and we decline to reconsider the issue here.

The employer and insurer's primary argument is that the compensation judge should have assigned the employee a 30% rating, under Weber, with reference to subpart 8D(2), for emotional and personality disturbances, rather than a 30% rating under subpart 8E(2), for psychotic disorders, in that there is no evidence that the employee has the requisite psychotic disorder[], as described in D.S.M. III. From a purely factual perspective, the employer and insurer's argument may have some merit. Dr. Rauenhorst, who diagnosed the employee's condition as major depression with psychotic features, explained in some detail in his 1997 deposition why the employee's condition does not qualify as a psychotic disorder under D.S.M.

[7] The employee also argues that, even if a 65% rating is too high, a 30% rating is too low, and he contends that the judge should have chosen a numerical rating falling between the two categories. In support of this contention, the employee points out that Dr. Rauenhorst would have assigned the employee a 35% rating if the scheduled ratings were not controlling. The compensation judge could perhaps have concluded that some other rating, under Weber, was appropriate, but we are not persuaded that the judge's failure to assign some intermediate rating was error or grounds for reversal.

III,[8] and both Dr. Cowan and Dr. Erickson, treating physicians,[9] testified that the employee has no psychotic disorder.[10] In fact, all three physicians rated the employee's condition under the category applicable to emotional and personality disorders, as proposed by the employer and insurer. However, we fail to understand the employer and insurer's purpose in appealing from the judge's decision on this issue,[11] in that they do not dispute their own expert's diagnosis of major depression with psychotic features, and they do not contest the numerical 30% rating assigned by the judge. More importantly, the specific disabilities at issue, dealing with social functioning, are identical under both rating categories. Finally, whether or not the employee's condition satisfies all the requirements for a rating under the category applicable to psychotic disorders, the compensation judge could easily have used that category to assign a Weber rating, rather than using the category proposed by the employer and insurer. We see no need, under these circumstances, to address the matter further.

The employee's appeal from the compensation judge's denial of permanency ratings for communication disturbances raises more difficult issues. Whether or not ratings under Minn. R. 5223.0060, subps. A and B, are inappropriate in the absence of organic brain injury, as the employer and insurer maintain, there is still the question of whether the employee should receive some rating for communication disturbances under the rationale of Weber. Virtually all of the evidence, including even Dr. Rauenhorst's testimony, indicates that the employee's psychological condition has impaired his ability to understand and to verbally communicate with others. And, while it may be true that the employee does not require visual cues to comprehend aural speech, as would be required for a 40% rating for receptive disturbances under subpart 8B(1), the evidence is very strong that the employee has at least mild word-finding difficulties, which would arguably justify a 10% rating for expressive disturbances under subpart 8A(1).

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[8] We note, however, that earlier, in 1995, Dr. Rauenhorst testified that the employee's condition would fall under the category applicable to psychotic disorders and that most psychiatrists would call this a psychotic disorder. The employer and insurer did not elicit any explanation as to why Dr. Rauenhorst, their expert examiner, apparently changed his opinion between 1995 and 1997.

[9] Dr. Cowan, who testified by deposition in 1995, apparently died prior to the hearing on remand. Dr. Erickson took over the employee's care after Dr. Cowan's death.

[10] All three doctors indicated that the employee does not experience delusions or hallucinations, which are typically part of a psychotic disorder as defined by D.S.M. III. Dr. Erickson did indicate, however, that, while he has never diagnosed the employee as having a psychotic disorder and believes the employee is suffering from an organic brain injury, he would attribute the employee's symptoms to a psychosis if organic brain injury were ruled out.

[11] In their initial appeal in this case in 1996, the employer and insurer raised several issues that had no practical effect, then or in the future. As we said then, this court generally avoids ruling on purely academic disputes.

We are not necessarily convinced by some of the compensation judge's stated reasons for rejecting the employee's claim. For example, the fact that the employee's communication deficits result from the employee's psychological condition does not automatically preclude a separate rating for those deficits. See, e.g., Lerich v. Thermo Sys., Inc., 292 N.W.2d 741, 32 W.C.D. 476 (Minn. 1980). At the same time, however, we find no reversible error in the compensation judge's apparent conclusion that the employee's communication deficits are merely one symptom of a condition for which the employee has already been adequately compensated by the 30% whole body impairment rating already assigned by the judge. As the compensation judge noted, the employee objectively [has] the ability to communicate [and] to produce discernible and appropriate language, and his comprehension difficulty appears to be related more to the inability to process more complex information than to any difficulty understanding spoken words or language.

The Minnesota Supreme Court has noted that the brain injury schedules pose a particular risk of exaggerating the extent of an employee's permanent impairment, because there are no clear lines of demarcation between rating categories. Deschampe v. Arrowhead Tree Serv., 428 N.W.2d 795, 800, 41 W.C.D. 200, 207 (Minn. 1988). As the employer and insurer point out, the risk of double compensation may be especially great when ratings are assigned under the rationale of Weber, where the schedules are not, strictly speaking, even applicable in the first place While it is true that the employee in the present matter has a substantial impairment, it is equally true that 30% is a substantial impairment rating. Given the huge volume of complex and conflicting medical evidence, we cannot conclude that the compensation judge erred in finding that a 30% rating best represents the employee's permanent impairment and that additional ratings for communications disturbances would unfairly over estimate the extent of the employee's disability. See also Minn. R. 5223.0010, subp. 2 (if more than one category may apply to a condition, the category most closely representing the condition shall be selected, and categories shall be selected to avoid double compensation for any part of a condition). We therefore affirm the judge's decision in its entirety.