

HEATHER CRAIN, Employee/Appellant, v. RIVERVIEW HEALTHCARE ASS'N, SELF-INSURED/SEDGWICK JAMES OF MINN., Employer-Insurer, and NORTHERN PLAINS HEALTH PLAN and MAYO FOUND., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS  
NOVEMBER 9, 1998

No. *[redacted to remove social security number]*

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's assignment of a 5 percent permanent partial disability pursuant to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990) for functional impairment of the legs due to chronic pain syndrome, comparing the impairments described in Minn. R. 5223.0500, subp. 2.B.(2)-(3) and Minn. R. 5223.0510, subp. 2.H.(2)-(3) (1993).

Affirmed.

Determined by Johnson, J., Hefte, J., and Wheeler, C.J.  
Compensation Judge: Peggy A. Brenden

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's findings assigning a five percent permanent partial disability pursuant to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990) for functional impairment of the employee's legs due to a chronic pain syndrome. We affirm.

BACKGROUND

The employee, Heather Crain, sustained an injury to her right foot and ankle on October 25, 1991, while working for the employer, Riverview Healthcare Association, self-insured. Liability was admitted and workers' compensation benefits were paid to the employee, including a 10 percent permanent partial disability for the right foot. The employee continued to experience considerable right foot and leg pain following the injury, eventually undergoing three surgical procedures in an attempt to reduce the pain. In about January 1996, the employee began experiencing similar pain in her left foot and leg.

A number of the physicians who treated and examined the employee referred to or diagnosed reflex sympathetic dystrophy (RSD). In May 1996, the employee was seen for an

evaluation at the Mayo Clinic. Dr. Willner, a neurologist at the clinic, concluded that there was no significant evidence suggesting any variant of RSD and diagnosed a chronic pain syndrome. (Ex. C-10: 5/24/ 96, 6/3/96, 7/25/96.) The independent medical examiner, Dr. Jacques, also diagnosed chronic pain syndrome, similarly noting that he did not see sufficient evidence of RSD to make that diagnosis. (Ex. 1: 12/9/96).

On March 27, 1997, the employee filed an amended claim petition seeking an additional 26 percent permanent partial disability for RSD, alleging that she had developed RSD as a consequence of the October 25, 1991 work injury. Following a hearing, a compensation judge found that the employee failed to establish that she suffers from RSD, relying on the opinion of Dr. Willner. The judge further concluded that the employee sustained a five percent permanent partial disability as a result of chronic pain syndrome. (7/10/97 Findings & Order: findings 8, 9.) On appeal, this court affirmed the finding that the employee failed to prove she suffers from RSD. Concluding, however, that the basis for the compensation judge's five percent permanency rating could not be determined, the issue of the extent of the permanent partial disability sustained by the employee was remanded to the compensation judge for additional findings. (1/6/98 WCCA Decision.)

On remand, the compensation judge additionally found that the employee had sustained permanent functional loss in her legs as a result of chronic pain syndrome, limiting her ability to walk, lift, carry, kneel and stoop. The judge again awarded a five percent permanent partial disability, pursuant to Weber, concluding that the employee's disability fell between the impairments described in Minn. R. 5223.0500, subp. 2.B.(2) and (3) and Minn. R. 5223.0510, subp. 2.H.(2) and (3) (1993). The employee appeals.

## STANDARD OF REVIEW

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

It is the province of the compensation judge to assign a rating for permanent partial disability based on all relevant evidence. The judge's permanency rating is one of ultimate fact and must be affirmed if it is supported by substantial evidence. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987); Jensen v. Best Temporaries, 46 W.C.D. 498, 500-01 (W.C.C.A. 1992). Here, the compensation judge awarded a 5 percent permanent partial disability pursuant to Weber, comparing the extent of the employee's functional loss to that reflected in Minn. R. 5223.0500, subp. 2.B.(2)- (3) and 5223.0510, subp. 2.H.(2)-(3)(1993). She explained that although the underlying pathology is different, these categories reasonably describe the nature of the employee's impairment, that is, pain and paresthesia in the lower extremities.<sup>1</sup> (Mem at 3.)

The employee contends, however, that the compensation judge improperly assigned a rating somewhere between two categories in the rating schedule, and committed reversible error by failing to apply the post-July 1, 1993 permanency schedule for reflex sympathetic dystrophy,<sup>2</sup> contending that this category is the closest compensable category in the schedule. We are not persuaded.

Recognizing the permanency schedules cannot cover every possible ratable disability, the supreme court held in Weber that non-scheduled injuries resulting in functional

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<sup>1</sup> Minn. R. 5223.0500, subp. 2.B. provides:

B. Nerve entrapment syndrome . . . at the pelvis, hip or upper leg:

(2) pain and paresthesia recurring or persisting despite treatment, but not substantiated by persistent findings on electrodiagnostic testing, zero percent;

(3) pain and paresthesia persisting despite treatment, or recurring and persisting despite treatment and substantiated by persistent findings of electrodiagnostic testing, two percent; . . . .

Minn. R. 5223.0510, subp. 2.H. similarly provides:

H. Nerve entrapment syndrome . . . at the knee or in the lower leg:

(2) pain and paresthesia recurring or persisting despite treatment, but not substantiated by persistent findings on electrodiagnostic testing, zero percent;

(3) pain and paresthesia persisting despite treatment, or recurring and persisting despite treatment and substantiated by persistent findings of electrodiagnostic testing, two percent; . . . .

<sup>2</sup> Minn. R. 5223.0420, subp. 6.B. (1993).

impairment may not be excluded from coverage.<sup>3</sup> The court directed compensation judges to exercise their discretion in assigning a rating, and suggested that the legislative objectives of [c]onsistency and objectivity might be achieved by . . . assign[ing] the nonscheduled injury to its closest compensable category in the schedule. Weber at 922, 43 W.C.D. at 477-78.

The employee contends that the law requires assignment of one category, that is, the rating for the most similar condition,<sup>4</sup> regardless of whether or not the rating reasonably approximates the impairment involved. We disagree. The supreme court emphasized in Weber that the fundamental purpose of permanent partial disability is to compensate for functional impairment. Id. The purpose of a Weber rating is to approximate the functional loss suffered by the employee by comparing the disability to similar losses included in the schedule. Since a non-scheduled injury, by definition, falls outside the schedule, there is no requirement that any particular category in the schedule be applied, or that the injury meet the specific requirements of any given category. Rather, the permanency schedule provides a point of reference, for the purpose of comparison, to ensure some objectivity and consistency in the permanency ratings made. Compare, for example, Kenow v. The King Co., 52 W.C.D. 264 (W.C.C.A. 1994); Wackerfuss v. Muska Elec. Co., 47 W.C.D. 71 (W.C.C.A. 1992); Hough v. Independent Sch. Dist. #115 (W.C.C.A. Feb. 4, 1998).

The employee further contends that the closest compensable category is Minn. R. 5223.0420, subp. 6.B. (1993) which provides a rating for reflex sympathetic dystrophy, causalgia, and cognate conditions. She contends that the evidence establishes that she has at least five of the conditions defined in the schedule (Minn. R. 5223.0400, subp. 6), and argues that the compensation judge was required to use this category as the basis for the Weber rating. This court addressed the same argument in the previous decision in this case, holding that since the date of injury in this matter is October 25, 1991, and the permanency schedule relied on by the employee was not effective until July 1, 1993, application of this rule could not be legally mandated. Moreover, the compensation judge's rejection of the employee's claim that she suffers from RSD was affirmed by this court in that same opinion. (1/6/98 WCCA Decision.)

The compensation judge was directed on remand to identify a category in the permanency schedule that reasonably approximates the employee's functional loss due to her chronic pain syndrome. The compensation judge concluded that Minn. R. 5223.0500, subp. 2.B.

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<sup>3</sup> On appeal, the employer and insurer do not dispute that the employee sustained additional permanent partial disability, nor do they dispute that the employee's condition is not included in the permanent partial disability schedule in effect on the date of injury.

<sup>4</sup> The employee repeatedly cites Minn. Stat. § 176.105, subd. 1(c) which states that [i]f an injury . . . is not rated by the permanent partial disability schedule, the unrated injury must be assigned and compensated for at the rating for the most similar condition that is rated. This statute was effective April 29, 1992, and its application is not, therefore, legally mandated in this case. Minn. Laws 1992, c. 510, art. 2, 4.

and 5223.0510, subp. 2.H., rating disability due to pain and paresthesia in the lower extremities, most accurately described the employee's condition. This is consistent with the record which reflects repeated complaints of pain and hypersensitivity in the legs. (See, e.g., Ex. C:10, Ex. 1; T. 30, 35, 70.) The judge believed that the employee's impairment was not adequately addressed solely by comparison to these rules, explaining that the employee's functional impairment, as evidenced in the records and the employee's testimony, fell somewhere between zero percent under subps. 2.B.(2) and 2.H.(2). and the condition for which a two percent rating is provided in 2.B.(3) and 2.H.(3). The compensation judge has adequately explained the basis for her permanency rating, and her findings are supported by substantial evidence in the record as a whole. We must, therefore, affirm.