

LARRY A. DAHL, Employee, v. HOMECREST INDUS., INC. and NORTHBROOK PROP. & CAS. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS  
SEPTEMBER 15, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including the opinion of the employee's treating physician, supports the compensation judge's award of a 3.5 percent permanent partial disability for the lumbar spine and 2.5 percent permanent partial disability for the thoracic spine.

APPORTIONMENT - PERMANENT PARTIAL DISABILITY. Substantial evidence supports the compensation judge's determination that the employer and insurer are not entitled to apportionment for a pre-existing disability under Minn. Stat. § 176.101, subd. 4a, against the permanency awarded to the employee for the lumbar spine.

PERMANENT PARTIAL DISABILITY - COMBINED RATINGS. The compensation judge properly applied the A + B (1 - A) formula in determining the employee was entitled to a total permanent partial disability of 7.7 percent. No order allowing a credit for previously paid permanent partial disability was necessary where the employee did not dispute that the employer and insurer were entitled to deduct a two percent permanency already paid from the total permanency due.

REHABILITATION - CONSULTATION. The compensation judge properly awarded a rehabilitation consultation upon the request of the employee where the employee had ongoing disability and work restrictions, and there was a question as to the physical suitability of the employee's post-injury job with the pre-injury employer.

Affirmed.

Determined by: Johnson, J., Wilson, J. and Wheeler, C.J.  
Compensation Judge: Danny P. Kelly

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal from the compensation judge's finding that the employee sustained a 7.7 percent permanent partial disability as a result of his June 14, 1996 personal injury, and his award of a rehabilitation consultation. We affirm.

## BACKGROUND

Larry A. Dahl, the employee, has worked for Homecrest Industries, Inc., the employer, since 1988. The employer is insured for workers compensation purposes by Northbrook Property & Casualty Insurance Company. On June 14, 1996, while performing his duties as an autophoretic paint line technician, the employee was sprayed across both knees with a potassium hydroxide cleaning solution. The employee sustained third degree chemical burns as a result of the accident. The burns required split thickness skin grafts which were performed by Dr. Thomas Van Bruggen on July 2, 1996.

Following surgery, Dr. Van Bruggen released the employee to return to his regular job, four hours a day, as of July 29, 1996. He released the employee to return to an eight hour work day on August 13, 1996, and authorized a return to work without restrictions on September 12, 1996. The employee continued to work for the employer, as an autophoretic paint line technician, through the hearing on January 26, 1999.

Shortly after the surgery, the employee began complaining of leg pain. Dr. Van Bruggen prescribed physical therapy and a TENS unit in the fall of 1996 to treat the employee's leg and occasional low back symptoms. On January 14, 1997, the employee was examined by Dr. Donald M. Larson, a neurologist, at the request of Dr. Van Bruggen. Dr. Larson concluded the employee's problems were probably not neurologic, and suggested trying various muscle relaxants to treat the employee's condition.

In February 1997, the insurer assigned a qualified rehabilitation consultant (QRC), Angela Peda, to provide rehabilitation services to the employee. Ms. Peda concluded the employee was eligible for statutory rehabilitation, and a rehabilitation plan was completed. The plan contemplated medical management to enable the employee to remain in the autophoretic paint line technician job with the employer.

In early March 1997, Ms. Peda referred the employee to Dr. Dennis G. Sollom, a physical medicine and rehabilitation specialist, for evaluation and treatment. Dr. Sollom eventually diagnosed fibromyalgia or myofascial pain syndrome involving the legs, lower back and upper back, secondary to the employee's chemical burns to the knees. Dr. Sollom also provided work restrictions including no overtime work, no more than occasional bending, twisting, climbing, squatting or kneeling, and assistance with heavy lifting (over 50 pounds) and pushing or pulling heavy loads (over 75 pounds). The employer was willing to accommodate these restrictions, and Ms. Peda closed her rehabilitation file in June 1997. The employee continued to treat with Dr. Sollom through the date of hearing.

On June 23, 1997, the employee filed a claim petition seeking permanent partial disability of 5.4 percent and payment of various medical bills. The employee later amended his claim, seeking a 7.8 percent permanent partial disability and a rehabilitation consultation. The case was heard on January 26, 1999 by a compensation judge at the Office of Administrative Hearings. In a Findings and Order served and filed April 7, 1999, the compensation judge found

the employee sustained a 7.7 percent permanent partial disability as a result of his June 14, 1996 personal injury, and ordered the employer and insurer to pay for a rehabilitation consultation. The employer and insurer appeal.

## 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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

## DECISION

### Permanent Partial Disability

The employer and insurer contend the compensation judge's determination that the employee sustained a 3.5 percent permanent partial disability for the lumbar spine and a 2.5 percent permanent partial disability for the thoracic spine is not supported by substantial evidence and is clearly erroneous. They essentially argue that the compensation judge should have adopted the opinion of the independent medical examiner, Dr. Michael Kosiak, rather than the opinion of Dr. Sollom.

It is the responsibility of the compensation judge, as the trier of fact, to determine the degree of permanent partial disability taking into account all relevant evidence, including medical expert opinion. Where medical opinion conflicts, resolution of that conflict is the province of the compensation judge. The judge's choice between medical experts must be upheld so long as there is adequate foundation for the expert's opinion. See Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987); Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

Dr. Sollom diagnosed fibromyalgia or a myofascial pain syndrome as a consequence of the chemical burns suffered by the employee on June 14, 1996. Dr. McAvoy, a neurologist, concurred with Dr. Sollom's diagnosis. (Finding 6; Ex. D, 8/11/97 letter report.) Based on his treatment of the employee, Dr. Sollom provided a 3.5 percent permanent partial disability rating for the lumbar spine pursuant to Minn. R. 5223.0390, subp. 3.B., for "[s]ymptoms of pain or stiffness . . . substantiated by persistent objective clinical findings" including "decreased range of motion in the lumbar spine." He additionally rated a 2.5 percent permanency for the thoracic spine under Minn. R. 5223.0380, subp. 3.B. for "[s]ymptoms of pain

or stiffness . . . substantiated by persistent objective clinical findings, that is, involuntary muscle tightness in the paraspinal muscles.” Dr. Sollom’s treatment records reflect persistent findings on examination of restricted range of motion in the thoracolumbar spine with tenderness and spasm in the muscles of the lower and upper back.

Dr. Kosiak disagreed with Dr. Sollom’s diagnosis. Although he found some minimal restriction of motion in the lumbar spine, he found no muscle splinting or spasm in the low back or upper back. He concluded there was no evidence of fibromyalgia or a fibromyalgia-type syndrome. In Dr. Kosiak’s opinion, the employee’s back problems were in no way related to his chemical burn injuries, but were, instead, related to pre-existing degenerative disc disease in the lumbar spine. He, accordingly, gave no rating for permanency in the lumbar or thoracic spine.

The compensation judge specifically adopted Dr. Sollom’s opinions regarding the employee’s diagnosis, causation, treatment and permanent partial disability. (Findings 5, 9, and 10.) The employer and insurer do not argue that Dr. Sollom’s opinion lacks adequate foundation. Rather, they argue only that the weight of the medical evidence requires that the opinion of Dr. Sollom be discounted. It is not the role of this court to reassess the credibility or probative value to be given expert testimony. There is substantial evidence in the record to support the compensation judge’s decision, and we must, therefore, affirm.

#### Apportionment of Permanent Partial Disability

The employer and insurer further contend that the compensation judge erroneously denied apportionment of permanent partial disability for the lumbar spine under Minn. Stat. § 176.101, subd. 4a. Subdivision 4a permits reduction of permanent partial disability benefits due an employee by an amount “attributable to a pre-existing disability” that is “clearly evidenced in a medical report or record made prior to the current personal injury.” Minn. Stat. § 176.101, subd. 4a. The employer and insurer argue that an x-ray report dated February 16, 1993, establishes the existence of pre-existing degenerative disc disease in the lumbar spine requiring apportionment, as a matter of law, under subdivision 4a. We disagree.

To apportion permanency, the employer and insurer must establish a pre-existing “disability,” that is, a permanent loss of use or function prior to the personal injury, rateable under the permanency schedules. Compare Zidich v. National Cash Register Corp., 54 W.C.D. 348 (W.C.C.A. 1996), *rev’d in part*, 549 N.W.2d 629 (Minn. 1996); Beck v. Dick & John’s Price Rebel, 40 W.C.D. 254 (W.C.C.A. 1987). Here, the employee was seen in the emergency room at Tri-County Hospital on February 14, 1993 for low back pain after shoveling snow. A thoracolumbar strain was diagnosed and a muscle relaxant was prescribed. The employee testified he made a complete recovery following the initial visit and returned to his regular job, with no restrictions, within a matter of days. (T. 33-37.) There is no evidence of any low back problems or treatment for the back after the February 14, 1993 snow shoveling incident until after the employee’s June 14, 1996 personal injury.

Moreover, the 3.5 percent rating for the lumbar spine is not dependent upon and

does not include any “radiographic abnormality.” See Minn. R. 5223.0390, subp. 3.B; compare Minn. R. 5223.0390, subp. 3.C. In his deposition, Dr. Sollom explained that, in his opinion, the employee’s work-related condition is a soft-tissue problem, and is not attributable to the degenerative changes in the employee’s lumbar spine. (Ex. 3 at 16-18, 28.)

On these facts, the compensation judge reasonably concluded that the employer and insurer failed to establish entitlement to apportionment under Minn. Stat. § 176.101, subd. 4a, and we, therefore, affirm.

#### Application of the A + B (1 - A) Formula

The employer and insurer also assert that the compensation judge failed to properly apply the A + B (1 - A) formula required under Minn. Stat. § 176.105, subd. 4(c).<sup>1</sup> In addition to the 3.5 percent permanent partial disability for the lumbar spine and 2.5 percent for the thoracic spine, the compensation judge awarded an undisputed one percent permanent partial disability for each leg. He then applied the A + B (1 - A) formula, and determined the employee was entitled to a 7.7 percent permanent partial disability, payable as impairment compensation. (Finding 13; mem. at 6.) We have reviewed the compensation judge’s calculations and are satisfied that he correctly applied the formula in determining the amount payable.

The employer and insurer assert, however, that the compensation judge failed to order a credit for permanent partial disability of two percent voluntarily paid by the employer and insurer based on Dr. Kosiak’s permanency ratings. Counsel for the employee agreed, at the beginning of the hearing, that the employer and insurer had paid a two percent permanent partial disability and “they would obviously be entitled to a credit against the 7.[7] percent for what they’ve already paid.” (T. 10-11, 13.) Under these circumstances, there was no need for a specific order allowing a credit. The employer and insurer may simply deduct the undisputed amount already paid from the total permanency due the employee.

#### Rehabilitation Consultation

Finally, the employer and insurer contend the compensation judge committed an error of law in awarding a rehabilitation consultation. They argue the employee returned to work in his pre-injury job with the employer, and does not meet the criteria for a “qualified employee” under Minn. R. 5220.0100, subp. 22.

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<sup>1</sup> Minn. Stat. § 176.105, subd. 4(c) provides that “[i]f an employee suffers a permanent functional disability of more than one body part due to a personal injury incurred in a single occurrence, the percent of the whole body which is permanently partially disabled shall be determined by the following formula so as to ensure that the percentage for all functional disability combined does not exceed the total for the whole body:  $A + B(1 - A)$  . . . .” The employee does not dispute the applicability of the formula in this case.

An injured employee is entitled to a rehabilitation consultation upon the request of the employee as a matter of law. Minn. Stat. § 176.102, subd. 4(a). The purpose of the rehabilitation consultation is to determine whether the employee is a “qualified employee.” Thus, the employee’s eligibility for statutory rehabilitation services is not at issue in determining entitlement to a rehabilitation consultation, but is to be made in the course of the consultation by the assigned QRC. See Goodwin v. Byerly’s Inc., 52 W.C.D. 90 (W.C.C.A. 1994); Wagner v. Bethesda Hosp., slip op. (W.C.C.A. Jan. 5, 1995).

Although the employee returned to work with the employer in his pre-injury job, as modified, he has ongoing permanent disability and his treating physician, Dr. Sollom, has imposed work restrictions. There is evidence in the file, including the employee’s testimony, Dr. Sollom’s treatment records, and the report of Douglas W. Brown, a vocational consultant (Ex. B), that raise questions about the current physical suitability of the job. Rehabilitation services may be appropriate in such circumstances, even though the employee has returned to work with the pre-injury employer. The compensation judge properly awarded a rehabilitation consultation and we, accordingly, affirm.