

RONALD JOHNSON, Employee/Appellant, v. POTLATCH CORP., SELF-INSURED, Employer.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 16, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - MATTERS AT ISSUE; OCCUPATIONAL DISEASE - ASBESTOSIS. Where the issue before the compensation judge was whether the employee was entitled to permanent partial disability benefits for asbestosis, the judge did not err in failing to decide whether the employee had any other compensable loss of lung function.

Affirmed.

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

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's finding that the employee was not entitled to permanent partial disability benefits because he did not prove that he had contracted the occupational disease of asbestosis. We affirm.

BACKGROUND

The employee worked for Potlatch Corporation [the employer] from March of 1954 to May 31, 1994. From 1960 until his retirement in May of 1994, the employee worked as an electrician, and it is undisputed that he was exposed to asbestos during this employment.

The employee underwent lung x-rays in 1988, 1991, 1992, 1993, 1994, and 1997. The earlier x-rays reflected "bilateral pleural thickening," but the 1994 x-ray was read as showing that "[t]he lungs are free of infiltrates. No areas of pleural thickening or interstitial fibrosis are visible." The 1997 x-ray was interpreted as demonstrating "no significant change" from the 1994 x-ray. The employee also received pulmonary function testing in 1990, 1993, and 1995. His testing has improved over time, but the employee has consistently shown a loss of respiratory function.

The employee testified that at some time in the early 1990s he first noticed shortness of breath with exertion at work. The employee suffered from obesity and hypertension

and had previously been a cigarette smoker.

The self-insured employer had the employee examined by Dr. Michael Bozivich on September 18, 1995. Dr. Bozivich opined that the employee suffered from mild airway obstructive disease or chronic obstructive lung disease, which was “unrelated to his work activity.” It was Dr. Bozivich’s opinion that the employee did not suffer from asbestosis.

The employer also had Dr. James Finell conduct an independent review of the employee’s medical records. In a report dated August 20, 1996, Dr. Finell opined that the employee suffered, in part, from chronic obstructive lung disease, non-calcified, non-specific pleural thickening, hypertension, obesity, and diabetes. Dr. Finell opined that the medication the employee was taking for his hypertension “may be the cause of, or contributing to his pulmonary symptomatology,” and that the employee’s obesity “would also be a contributing factor to his shortness of breath (dyspnea).” It was Dr. Finell’s opinion that the employee did not meet the criteria for asbestosis and that his obstructive lung disease was not related to any work with asbestos.

The employee claimed entitlement to permanent partial disability benefits and medical expenses due to asbestosis and carpal tunnel syndrome,¹ and on June 23, 1998, the matter proceeded to hearing before a compensation judge of the Office of Administrative Hearings. In Findings and Order filed on September 11, 1998, the compensation judge concluded that the employee had sustained permanent partial disability as a result of respiratory loss of function but that “[t]he employee has failed to sustain his burden of proof that he has sustained the occupational disease of asbestosis. Accordingly, his claims relating thereto must be denied.” The employee appeals.

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

¹ The compensation judge ultimately denied the employee’s claim for benefits related to carpal tunnel syndrome. The employee did not appeal from those findings and, therefore, the carpal tunnel syndrome portion of the claim will not be discussed further.

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 employee does not contend that the compensation judge erred in determining that the employee does not suffer from asbestosis. Rather, the employee argues that where it is undisputed that the employee has mild obstructive pulmonary disease, that the employee was exposed to asbestos in the workplace, and that the employee has a respiratory loss of function, a diagnosis of asbestosis is not a prerequisite to an award of permanent partial disability benefits under Minn. R. 5223.0560, subp. 2B. We are not persuaded by the employee’s argument.

At hearing, the compensation judge began by listing the issues to be decided as “[w]hether the employee sustained an occupational injury in the form of asbestosis . . . and second, if he did, whether he is entitled to permanent partial disability benefits equivalent to 30% of the person.” (Emphasis added.) Later, in his opening statement, the employee’s attorney stated, “The only question before the Court today as I understand it . . . is whether my client has asbestosis as a consequence of that exposure, and if he does have asbestosis whether he has a permanent partial disability rating.” (Emphasis added.)

The employee never claimed at hearing that his mild obstructive pulmonary disease was work related or that it entitled him to permanent partial disability benefits. Therefore, the issue that the employee contends the compensation judge was obligated to address was never properly before the judge at this hearing.

The employee’s suggestion that Armstrong v. Potlatch Corporation, 40 W.C.D. 806 (W.C.C.A. 1987), is applicable in the instant case is incorrect. In Armstrong, this court affirmed the compensation judge’s award of permanent partial disability benefits for an employee who suffered from asthma even though the employee did not meet the requisite elements of the asthma section of the permanency schedule. In the instant case, there is no permanency section that specifically addresses asbestosis; asbestosis would appropriately fall under Minn. R. 5223.0180, Respiratory System, or Minn. R. 5223.0560, Respiratory. The compensation judge appropriately denied permanency benefits to the employee in this proceeding because the claim before the judge was for permanency benefits as a result of asbestosis, and the employee did not prove that he suffers from asbestosis. Whether the employee may have some other compensable, work-related impairment of lung function was not litigated or decided. We therefore affirm the judge’s decision in its entirety.