

VERNON A. JOHNSON, Employee/Appellant, v. OLSON CARRIERS, INC., and ST. PAUL COS., Employer-Insurer, and BLUE CROSS/BLUE SHIELD OF MINN. and TOWN CTR. CHIROPRACTIC, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS  
DECEMBER 6, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - BRAIN. Substantial evidence supports the compensation judge's findings that the employee had not fully met the criteria for additional permanent partial disability for a brain injury under Minn. R. 5223.0360, subp. 7.

Affirmed.

Determined by: Rykken, J., Pederson, J., and Wheeler, C.J.  
Compensation Judge: Joan G. Hallock

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals the compensation judge's finding that the employee was not entitled to any additional permanent partial disability for his work-related brain injury beyond the 10 percent permanent partial disability rating already paid. We affirm.

BACKGROUND

On November 21, 1996, Vernon Johnson (employee) sustained admitted injuries when he was involved in a motor vehicle accident while working as a truck driver for Olson Carriers, Inc. (employer), which was insured for workers' compensation liability by St. Paul Companies (insurer). The employee sustained a collapsed lung and a brain injury, and was hospitalized from November 21 through December 10, 1996. The employee suffered multiple head injuries, including bilateral subdural hematomas, subarachnoid hemorrhage, blood in the left sylvian fissure and right frontal area, and a large left occipitoparietal laceration. Following his injury, the employee exhibited persistent cognitive defects, especially with his memory, and showed other signs of brain injury, including flat affect, disorientation, difficulty concentrating, and difficulty finding the right words.

In February 1997, the employee underwent a neuropsychological evaluation with George Montgomery, Ph.D., Director, Brain Injury Clinic, Abbott Northwestern Hospital. Dr. Montgomery noted that the employee had a history of taking prescribed Valium for anxiety

and tension for many years until 1987, then later taking prescribed Propranolol through the date of the February 1997 examination. Observations during the evaluation included mild loss of verbal and moderate loss of nonverbal cognitive skills, slowed processing and perceptual motor speed, impaired attentional management, and impaired conceptual thinking and flexibility in problem solving. Tests indicated impaired complex attentional management and severely impaired work retrieval efficiency. The employee was treated at the Regions Hospital Department of Physical Medicine and Rehabilitation through outpatient treatment until April 1997. When he was discharged from speech therapy, the employee still had mild difficulty with abstract reasoning tasks and in learning complex new information.

In April 1997, the employee returned to work part time with the employer, and by the fall of 1997 was able to increase his hours to eight hours per day. In October 1997, the employee was taken off work and hospitalized for pneumonia. The employee returned to work in January 1998, and was able to increase his hours until he was working nine hours a day, which still was not considered full time work with the employer. Before the accident, the employee had worked 12 hour days. The employee testified that at work, he must perform required paperwork immediately while he remembers, he performs his vehicle inspection by steps to avoid forgetting what was already done, and it takes him longer to find delivery locations than before the accident. He also testified that he is more irritable and that it is harder for him to communicate, to understand directions or information, or to stay focused. In addition, he reads less, has difficulty finding the right words, and has experienced interrupted sleep, loss of balance, headaches, and tiredness after nine hours of work. The biggest problem for the employee is trouble with his memory. The employee's wife also testified as to the employee's difficulties since the accident, explained that he was defensive, upset, and combative, and emphasized that the employee was easily frustrated.

On January 18, 1999, the employee was re-evaluated by Dr. Montgomery, who noted that the employee had difficulty expressing his thoughts clearly and comprehending and following instructions. According to Dr. Montgomery, the employee exhibited a language disorder that encompassed auditory comprehension, work finding abilities and expressive clarity, and was mild to moderately impaired in multiple function areas. The employee also demonstrated deficits in nonverbal reasoning and problem solving, impaired processing and perceptual motor speed, impaired attentional management and concentration, impaired abstract thinking and reasoning, and mild impaired memory. Since February 1997, he had improved verbal memory and nonverbal reasoning. In his report of March 4, 1999, Dr. Montgomery opined that the employee had a 10% permanent partial disability of the body as a whole under Minn. R. 5223.0360, subp. 7A(1), for a mild disturbance in expressive language, 35% permanent partial disability under Minn. R. 5223.0360, subd. 7B(1), for a mild disturbance in receptive language, affecting oral and written communication, 10% permanent partial disability under Minn. R. 5223.0360, subp. 7C(1), for mild impairment of higher cognitive functions and memory, and 20% permanent partial disability under 5223.0360, subd. 7D(2), for mild emotional disturbance. (Employee's Exh. J.)

On February 2, 1999, the employee underwent an independent neurological examination with Bruce Van Dyne, M.D., who opined that the employee was entitled to a 10% permanent partial disability rating related to his brain injury, for mild impairment of complex

integrated cerebral function under Minn. R. 5223.0360, subp. 7C(1). (Employer and insurer's Exh. 4.) The employee was paid benefits based on this rating. The employee filed a claim petition for chiropractic treatment expenses, medical treatment for pneumonia, wage loss benefits while he was off work due to the pneumonia, and additional permanent partial disability for his brain injury pursuant to Minn. R. 5223.0360, subps. 7A(1), 7B(1), and 7D(2). A hearing was held on March 5, 1999. The compensation judge denied the employee's entire claim. The employee appeals only the denial of additional permanent partial disability for his brain injury.

## 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 (1998). 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

A compensation judge's finding regarding the rating of permanent partial disability 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). 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). The employer and insurer paid benefits based on a 10% permanent partial disability under Minn. R. 5223.0360, subp. 7C(1). The employee claims additional permanent partial disability under Minn. R. 5223.0360, subps. 7A(1), 7B(1), and 7D(2).

Minn. R. 5223.0360, subp. 7, provides in relevant part:

**Subp. 7. Brain dysfunction.** Signs or symptoms of organic brain dysfunction due to illness or injury must be present and persistent with anatomic loss or alteration, or objectively measurable neurologic deficit. A rating under this part is the combination as described in part 5223.0300, subpart 3, item E, of the ratings assigned by items A to I.

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 paraphasia, ten percent;

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B. Communication disturbances, receptive:  
(1) unable to comprehend oral speech without the addition of visual cues such as gestures, facial expressions, or written material, 35 percent;

\* \* \*

C. Disturbances of consciousness or complex integrated cerebral function disturbances must be determined by medical observation, and in the case of complex integrated cerebral function, supported by psychometric testing. Functional overlay or primary psychiatric cerebral function include defects in orientation, ability to abstract or understand concepts, memory, judgment, ability to initiate and perform planned activity, and acceptable social behavior. Disturbances of consciousness include lethargy, clouding of consciousness, delirium, stupor, and coma:

(1) mild impairment of complex integrated cerebral function is demonstrated by psychometric testing but able to live independently; ten percent;

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D. Emotional disturbances and personality changes must be substantiated by medical observation and supported by psychometric testing. These disturbances may include irritability, outbursts of rage or aggression, absence of normal emotional response, inappropriate euphoria, depression, abnormal emotional interaction with others, involuntary laughing and crying, akinetic mutism, and uncontrollable fluctuation of emotional state. Primary psychiatric disturbances, including functional overlay, shall not be rated under this part:

\* \* \*

(2) mild emotional disturbance is present at all times but can live independently and relate to others, 20 percent; . . .

The employee claimed 10% permanent partial disability under Minn. R. 5223.0360, subp. 7A(1), for expressive communication disturbances, based upon a rating assigned by Dr. Montgomery. The compensation judge denied this claim. While the employee and his wife testified that the employee had difficulty finding words at times, and Dr. Montgomery concluded

that the employee had difficulty expressing his thoughts clearly and struggled to activate needed words when precise responses were requested, the compensation judge had ample opportunity to observe the employee's ability to speak at the hearing. Dr. Van Dyne opined that the employee did not have any expressive language difficulties since he had essentially normal fluent speech. In addition, Dr. Rebecca Koerner, the employee's primary treating physician at Regions Hospital, did not assign any permanency rating based upon communication disturbance. It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). The compensation judge relied upon Dr. Van Dyne's opinion, and found that the employee had essentially fluid speech which would not give rise to any rating under this section of the permanency schedule. Substantial evidence supports the compensation judge's finding that the employee is not entitled to a rating under Minn. R. 5223.0360, subp. 7A(1).

The employee also claimed 35% permanent partial disability under Minn. R. 5223.0360, subp. 7B(1), for receptive communication disturbances. Dr. Montgomery assigned this rating to the employee. He apparently found that this category most closely described the employee's condition, even though the employee did not need visual cues, since the employee had difficulty comprehending and following instructions and since there is no lower permanent partial disability rating available for receptive communication disturbances in this subpart. The employee and his wife testified that the employee had difficulty comprehending information. By contrast, Dr. Van Dyne opined that the employee did not have any receptive language difficulty. The compensation judge found that the employee was able to comprehend oral speech without the aid of visual cues, which was evident at the hearing since the employee responded appropriately to questioning. Also, the employee's wife testified that she did not use visual cues when she talked to the employee. Substantial evidence supports the compensation judge's finding that the employee is not entitled to a rating under Minn. R. 5223.0360, subp. 7B(1).

Finally, the employee claims a 20% permanent partial disability under Minn. R. 5223.0360, subp. 7D(2), for a mild emotional disturbance. The employee relies on the opinions of Dr. Montgomery and Dr. Rebecca Koerner as support for this portion of the claim. Dr. Montgomery noted that the employee's behavior had changed from his condition of tension and nervousness that existed before the accident, including reduced tolerance for stress, increased level of frustration, and increased likelihood of anger and irritability. Dr. Koerner believed this rating was substantiated by the employee's neuropsychometric testing and his multiple clinical visits with his rehabilitation physician and psychologist.<sup>1</sup> The employee and his wife testified

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<sup>1</sup> Dr. Koerner's report of November 11, 1998, provides a rating of 30% whole body impairment pursuant to Minn. R. 5223.0060, subp. 8D(2). This rating refers to the pre-1993 disability schedules. However, Dr. Koerner's description of the impairment matches the language in the corresponding section of the current schedule, Minn. R. 5223.0360, subp. 7D(2), which assigns a 20% rating for this impairment. Although Dr. Koerner concluded this rating would be 30%, the employee notes in his brief that the correct rating under the appropriate schedule would be 20% whole body impairment.

that he was more irritable, defensive, and upset after the accident.

Dr. Van Dyne noted that the employee had a past history of chronic personality disorder manifested by periods of anxiety and irritability for which he was on long term medications. The compensation judge also noted this pre-existing condition, and that the employee continued to live independently with his wife and currently was able to perform a responsible job driving a tractor-trailer. The judge also found that while the employee has some irritability and anxiety, these conditions were present before the accident, and the employee was not given to unusual laughing, crying, or outbursts referred to in the disability schedule. Substantial evidence supports the compensation judge's finding that the employee was not entitled to a 20% permanent partial disability rating under Minn. R. 5223.0360, subp. 7D(2).

Therefore, substantial evidence supports the compensation judge's determination that the employee did not fully meet the criteria for any additional permanent partial disability claimed beyond the ten percent permanent partial disability already paid under Minn. R. 5223.0360, subd. 7C(1). Accordingly, we affirm.