WANDA KUMP, Employee, v. HILLCREST HEALTH CARE CTR., SELF-INSURED/BERKLEY ADM'RS, Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 9, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - REFLEX SYMPATHETIC DYSTROPHY. Under Minn. R. 5223.0410 an award of permanent partial disability for reflex sympathetic dystrophy (RSD)/causalgia cannot be made unless at least five of the eight symptoms are present as required by the rule. By substituting "typical findings of RSD on autonomic reflex tests" for "typical findings of RSD on bone scan," the compensation judge committed error. The autonomic reflex test results are not acceptable under the clear language of the rule and the compensation judge does not have the discretion to make the substitution. As a result, the employee has not established the existence of five conditions and the permanent partial disability rating under this rule should be denied, even though the employee's physician and others believe she has RSD.

Reversed.

Determined by Wheeler, C.J., Rykken, J., and Pederson, J.
Compensation Judge: William R. Johnson.

OPINION

STEVEN D. WHEELER, Chief Judge

The self-insured employer appeals from the compensation judge's finding that the employee sustained a 30% permanent partial disability rating as a result of sustaining an injury in the nature of reflex sympathetic dystrophy [RSD] or causalgia under Minn. R. 5223.0410, subp. 7B, and Minn. R. 5223.0540, subp. 1B. We reverse.

BACKGROUND

The employee initially sustained an admitted work injury to her right elbow on December 9, 1994 while employed by Hillcrest Health Care Center in Mankato, Minnesota. At the time of the injury the employee had a weekly wage of $226.20. The employee continued to work for the employer and experienced pain in her right arm, elbow and shoulder. In a claim petition filed April 18, 1996, she alleged that she was entitled to wage loss benefits from and after April 11, 1996, and medical and rehabilitation benefits as a result of the December 10, 1994 right elbow injury. Subsequently, this claim petition was amended on June 21, 1996, to claim that the employee had sustained a right elbow injury and had a reflex sympathetic dystrophy condition of

the right arm and hand which entitled her to wage loss and medical benefits. While admitting the December 1994 injury, the employer denied that there was any causal relationship between any additional problems the employee was having and her work activity.

The issue of whether the employee's condition arose out of and in the course of her employment was the subject of a hearing before Compensation Judge William R. Johnson at the Office of Administrative Hearings on April 4, 1997. At that hearing the employee alleged that she sustained a Gillette-type injury[1] to her right arm, elbow and shoulder in the form of causalgia. The employer admitted the 1994 right elbow injury but denied any other injury. The compensation judge, in Findings and Order issued May 9, 1997, determined "the employee has proven by a preponderance of the credible evidence that her claimed Gillette type injury culminating on or about February 14, 1996 arose out of and in the course of her employment." In making his finding, the compensation judge specifically adopted the opinions of Dr. Keith Bengtson, a consultant in the Department of Physical Medicine and Rehabilitation at the Mayo Clinic, and Dr. Wilbert Pino, an orthopedic surgeon at the Mankato Clinic. The compensation judge specifically rejected the opinions of Dr. William Call, an orthopedic surgeon specializing in hand and upper extremity surgery, who had examined the employee at the request of the self-insured employer. (Findings and Order of 5/9/97: Finding 7.)

The compensation judge awarded various wage loss and medical benefits to the employee but did not make any findings with respect to permanent partial disability. Other than the indication in Finding 7 that the employee had established that her "claimed Gillette type injury" had been caused by her work activity, the compensation judge did not make a specific finding concerning the nature of the employee's Gillette injury. The May 9, 1997 Findings and Order were not appealed.

The employee filed a claim petition on January 29, 1998, claiming entitlement to temporary partial disability from June 8, 1997, and permanent partial disability of 35% of the whole body as a result of "reflex sympathetic dystrophy of right elbow" arising out of the December 1994 and February 1996 injuries. The matter came on for hearing before Compensation Judge William R. Johnson at the Office of Administrative Hearings on March 11, 1999. In his Findings and Order of April 29, 1999, the compensation judge determined that the employee had sustained a 30% whole body permanent partial disability rating pursuant Minn. R. 5223.0410, subp. 7B, and Minn. R. 5223.0540, subp. 1B. In addition, the compensation judge made determinations with respect to the employee's claim for temporary partial disability and penalties. The self-insured employer appeals only the permanent partial disability rating.

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

[1] Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 32 W.C.D. 105 (1960).

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 compensation judge accepted Dr. Bengtson's opinion that the employee had either reflex sympathetic dystrophy or causalgia as described in the disability schedule, Minn. R. 5223.0410, subp. 7B, and rejected the contrary opinion of the self-insured employer's expert, Dr. William Call. The two rules under which the compensation judge awarded the employee's permanent partial disability rating are set forth as follows:

> **5223.0410 Peripheral Nervous System; Upper Extremity - Sensory Loss.**
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> Subp. 7. **Reflex sympathetic dystrophy, causalgia, and cognate conditions**. For purposes of rating under this part, reflex sympathetic dystrophy, causalgia, and cognate conditions are deemed to occur in a member if at least five of the following conditions persist concurrently in that member: edema, local skin color changes of red or purple, osteoporosis in underlying bony structures demonstrated by radiograph, local dyshidrosis, local abnormality of skin temperature regulation, reduced passive range of motion in contiguous or contained joints, local alternation of skin texture of smooth or shiny, or typical findings of reflex sympathetic dystrophy on bone scan.
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> If reflex sympathetic dystrophy is present and persistent despite treatment, the permanent partial disability, rating from the most proximal joint of the involved member, is:
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> A. mild; meets the requirements of this subpart, 25 percent of the rating for the appropriate category in part 5223.0540;
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> B. moderate: meets the requirements of this subpart and the involved member is limited to a helping role in bilateral upper extremity activities, 50 percent of the rating for the appropriate category in part 5223.0540;

C. severe: meets the requirements of this subpart and the involved member cannot be used for most of the activities of daily living, 75 percent of the rating for the appropriate category in part 5223.0540.

In addition, Minn. R. 5223.0540, in relevant part, reads as follows:

> **5223.0540 Musuloskeletal Schedule; Amputations of Upper Extremity.**
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> Subpart 1. **Amputations.** Permanent partial impairment due to amputation of upper extremities is a disability of the whole body as follows:
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> A. amputation of the upper extremity at the shoulder, including removal of the ipsilateral scapula, clavicle, and muscles of the upper extremity attaching to the chest, 70 percent;
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> B. disarticulation, as defined in part 5223.0310, subpart 21, at shoulder joint, 60 percent;
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> C. amputation of arm above deltoid insertion, 60 percent;
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> D. amputation of arm between deltoid insertion and elbow joint, 57 percent;
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> E. disarticulation at elbow joint, 57 percent;
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> * * *

The compensation judge determined that the employee had met five of the listed conditions under subpart 7. He found that "the employee has: (1) changes of skin color; (2) dyshidrosis; (3) local abnormality of skin temperature regulation; (4) local alteration of skin texture in the area of her second and fourth fingers; and (5) typical findings of reflex dystrophy on bone scan." (Memorandum at pp. 6-7.) In addition, the compensation judge found that a sixth factor was present in the nature of "local skin color change of red or purple." (Memorandum at p. 7.) The compensation judge recognized that the employee did not have positive findings on a bone scan, but nevertheless found that this specific finding had been satisfied because of Dr. Bengtson's testimony that "typical findings of reflex sympathetic dystrophy" had been found as a result of autonomic reflex tests. Dr. Bengtson testified these tests were a more reliable method of establishing typical findings of RSD. He accepted Dr. Bengtson's testimony that the Mayo Clinic used the autonomic reflex tests instead of bone scans in a majority of cases since bone scans frequently returned a false positive and the autonomic tests were much more accurate. (Memorandum at p. 7.)

As to the degree of permanency attributable to the employee's RSD/causalgia, the compensation judge, however, did not accept Dr. Bengtson's conclusion that the level of the employee's permanent partial disability should be 50% of the 70% category found in Minn. R. 5223.0540, subp. 1A. Instead, he determined that the rating should be under subpart 1B and

should therefore be 50% of the 60% rating contained in that paragraph.[2]

On appeal, the self-insured employer contends that the compensation judge's determination is clearly erroneous because there was no evidence in the record to support the existence of certain specific clinical findings which were required in order for the employee to qualify for the rating under the disability schedule found applicable by the compensation judge. The self-insured employer indicates that, at best, only three of the required clinical findings were present in the employee's case - - changes in skin color, dyshidrosis[3] and abnormality of skin temperature - - but none of these were present on a persistent and concurrent basis as required by the rating schedule. It contends that the compensation judge was not correct in finding that the requirement for "typical findings of reflex sympathetic dystrophy on bone scan" had been met by the results of autonomic reflex testing. It contests the finding that the latter was an appropriate substitute for the particular test required by the rule. The self-insured employer also points out that the compensation judge double counted "change of skin color" in enumerating the employee's symptoms which satisfied the requirements of the rule. In addition, the self-insured employer argues that the compensation judge placed inappropriate significance on the abnormal autonomic reflex test results since that test only showed an abnormality on the employee's left upper extremity and not on the extremity which was involved in the claim. The self-insured employer argues that the compensation judge should have adopted the opinion of Dr. Call that there was insufficient evidence of reflex sympathetic dystrophy or causalgia. It also points out that Dr. Bengtson's clinical examination notes and testimony indicate that the employee's limited symptoms did not occur on each occasion when Dr. Bengtson examined the employee. The self-insured employer argues that the employee's own testimony only supports a conclusion that her symptoms came and went on an intermittent basis and therefore could not be considered to be persistent and concurrent, as required by the rule.

The question before this court is whether there is substantial evidence in the record to support the compensation judge's determination and that it is not clearly erroneous. In this case, the compensation judge relied on the opinion of Dr. Bengtson that either through direct observation, as a result of history provided by the employee to Dr. Bengtson, or as a result of tests which were a equivalent or substitute for the requirements of the schedule, at least five of the eight conditions necessary for a diagnosis of RSD or causalgia had been met in the employee's case. Dr. Bengtson testified in his deposition with respect to each of these five factors. At the hearing, the employee testified, as well, that on occasions between examination that each of the four factors

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[2] It does not appear that the self-insured employer contests the level of permanency found by the compensation judge, but only appeals that portion of the decision which finds that the employee has satisfied the requirement of having five of the eight conditions required by subpart 7 of Minn. R. 5223.0410. The self-insured employer did not brief the issue of the level of PPD– only whether the employee met the schedule for a finding of RSD/causalgia.

[3] Dyshidrosis is "an abnormality of sweat production." Webster's Medical Desk Dictionary.

that could be observed were observed by her on a regular and consistent basis.[4]

With respect to the fifth factor, that being "typical findings of RSD on bone scan," we find that the compensation judge was inappropriate in accepting Dr. Bengtson's testimony that the autonomic reflex tests have become a standard substitute for the bone scan tests in determining "typical findings of RSD." We recognize that Dr. Bengtson testified that while some doctors still use the bone scan test, in his experience at the Mayo Clinic the primary diagnostic tools for RSD are autonomic reflex tests, as they are 95 to 97% specific and sensitive. He testified that the bone scan tests are "perhaps 50 to 75% specific and may be 72 to 80% sensitive." (Pet. Ex. A, p. 11.) By accepting the substitute test, the compensation judge has redrafted the permanency schedule. Only a positive finding of typical RSD symptoms on a bone scan are acceptable by the rule. If the rule is to be changed, such change can only be made by following the appropriate rule-making procedures. This is not a matter of a simple interpretation of an ambiguous rule. The rule is clear. It requires a bone scan. In fact, in this case a bone scan was conducted and found to be negative for RSD/causalgia. We note that the only findings substantiating RSD, found as a result of the autonomic testing, were asymmetric temperature and sweat output. (Pet. Ex. E, 4/2/97 Depo. of Dr. Bengtson at p. 7.) We also note that both these symptoms were apparently also found on direct clinical examination. We must assume that the drafters of the rule required findings on a bone scan rather than autonomic reflex tests for a specific reason, perhaps because the latter only confirms symptoms which are also observable, while a bone scan may not. In any event, for whatever reason, the bone scan test is the only one acceptable under Minn. R. 5223.0410, subp. 7B. As a result, the employee has not established the existence of five of the eight conditions required.[5] The award of a 30% permanent partial disability rating is reversed.

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[4] We agree with the self-insured employer's observation that the compensation judge's "sixth" condition was the same as the first condition that he found existed. "Changes of skin color" is the same condition as "local skin color changes of red or purple."

[5] As a result of this determination we find no need to address the self-insured employer's arguments that the employee did not have any findings of "alteration of skin texture of smooth or shiny" or that her symptoms did not "persist concurrently."