

WILLIAM MARTIN, Employee/Appellant, v. C.F. ANDERSON CO., INC., and AETNA LIFE & CASUALTY, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 5, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - BRAIN; PERMANENT PARTIAL DISABILITY - SCHEDULE. Where the employee apparently fainted and fell and bumped his head as a result of thrombophlebitis and pulmonary embolism consequent to his work-related abdominal hernia, but where a CT scan and EEG testing were normal and psychometric testing failed to confirm an organic dysfunction of the employee's brain, the compensation judge's denial of benefits for a permanent impairment to 30% of the body as a whole under direct application of Minn. R. 5223.0060, subp. 8.D.(2), on grounds that there was no objective evidence of organic brain dysfunction supported by psychometric testing, was neither erroneous as a matter of law nor unsupported by substantial evidence.

PERMANENT PARTIAL DISABILITY - WEBER RATING; PERMANENT PARTIAL DISABILITY - BRAIN. Where the judge reasonably concluded that symptoms of the employee's depression and other emotional problems were treatable and were growing less severe, and where the judge's decision was based in part on expert medical opinion, the compensation judge's conclusion that the employee was not entitled to benefits for a permanent impairment of 30% of the body as a whole under Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990), by analogy to a brain injury under Minn. R. 5223.0060, subp. 8.D.(2), was not clearly erroneous and unsupported by substantial evidence, although there was evidence that the employee fainted and fell and bumped his head as a consequence of thrombophlebitis and pulmonary embolism consequent to his work-related abdominal hernia.

COSTS & DISBURSEMENTS; MEDICAL TREATMENT & EXPENSE. Where there was no report to demonstrate that any diagnostic or otherwise medically related treatment occurred during a .3 hr. "legal consult" billed by a treating psychologist, and where three other disbursements to treating experts evidently pertained only to the employee's failed claim to permanent partial disability benefits and/or to Xerox copying and not to any actual diagnosis or treatment of the employee's condition, the compensation judge's denial of reimbursement for four disbursements on grounds that they were costs of litigation and not treatment expenses was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Johnson, J. and Wheeler, C.J.
Compensation Judge: Cheryl LeClair-Sommer

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's denial of permanent partial disability benefits and consequent attorney fees and from her denial of reimbursement for certain disbursements. We affirm.

BACKGROUND

On about March 26, 1992, William Martin sustained an abdominal hernia in the course and scope of his work as a warehouseman for the C. D. Anderson Company [the employer]. At the time of his injury, Mr. Martin [the employee] was forty-seven years old and was earning a weekly wage of \$416.00. The hernia was repaired April 8, 1992. About eight months later, the employee's hernia required further repair, and that was accomplished on December 21, 1992. On December 30, 1992, about a week after his surgery, the employee was seen on an emergency basis for pain in his legs, and his surgeon, Dr. Leonard Schultz, diagnosed possible early phlebitis, apparently related to the employee's surgery. About a week later, on January 6, 1993, the employee sustained a bump on his head when he apparently fainted and fell while walking in his home. He was seen immediately thereafter by Dr. David Lang, who diagnosed pulmonary embolism, also apparently consequent to the employee's surgery. The employee was hospitalized for six days for treatment with anticoagulants, and subsequently he was released with a prescription for continued daily use of oral blood thinners. On March 3, 1993, Dr. Schultz completed a Physician's Report, indicating that the employee had achieved maximum medical improvement [MMI] from his March 26, 1992, work injury on March 1, 1993, subject to a 0% permanent impairment of the body as a whole.

On May 20, 1993, the employee was seen by neurologist Dr. Thomas McPartlin, on referral from Dr. Lang, "for difficulty with memory and difficulty concentrating." Dr. McPartlin made an initial diagnosis of "[d]ifficulty with memory secondary to a postconcussive syndrome and head injury" and referred the employee for psychometric testing, a CT scan, and an EEG examination. The employee underwent the CT and EEG exams on June 2 and June 10, 1993, respectively. Both studies were read as normal. When he saw him again on June 17, 1993, Dr. McPartlin noted that the employee was reporting a worsening in his memory problems. Noting that he had not yet received a report on the employee's psychometric tests, Dr. McPartlin concluded that the employee "still has some post-concussive syndrome."

On September 23, 1993, psychologist Dr. Jon Boller reported to the insurer on his assessment and treatment of the employee, which had commenced on May 26, 1993, on referral from Dr. McPartlin, for the purpose of helping the employee to "deal with ongoing pain, particularly in his L leg, and to overcome a chronic depression - - relatively low level - - that he has developed as a result of all he's been through medically since the original injury." Dr. Boller concluded that there was "nothing that really suggests brain injury at this point," noting that the employee's "[m]emory function is adequate, as is concentration and attention span." He

recommended psychotherapy and biofeedback treatment to address the employee's depression, "anticipat[ing] that he will require approximately six months of continuing psychological therapy to help alleviate the . . . symptoms/problems." The employee evidently last saw Dr. Boller on November 16, 1993.

On September 8, 1995, the employee's regular treating physician, Dr. Kenneth Pallas, wrote to the employee's attorney, in response to the attorney's "request concerning follow-up of [the employee's] work comp injuries and subsequent problems." Dr. Pallas indicated that the employee's memory problems were continuing and now included reversal of numbers, forgetting of familiar tasks, episodes of disorientation, occasional vertigo, problems with reading retention, and some sexual dysfunction. Dr. Pallas reported that the employee seemed "very frustrated with seeing physicians and has felt like the neurology care did not help significantly," that the employee had last seen Dr. McPartlin about a week earlier, that he had been off all medication since the beginning of the year, and that he "has been isolating himself from everyone since last fall" and "certainly has [a] significant amount of depression." Dr. Pallas indicated that he had recommended psychotherapy but that the employee had refused. In an addendum on that same date, Dr. Pallas reported that the employee was also having problems with bleeding in the whites of his eyes as a result of the blood thinner that he was taking for prevention of further phlebitis or pulmonary emboli. The doctor indicated, however, that "other than the nuisance," there were no permanent problems associated with this bleeding.

On about March 2, 1996, on referral from a Ron Berk, M.Ed., who had evidently administered an MMPI to the employee, the employee underwent various modes of psychological evaluation and testing by psychologist Dr. David Fisher, "to assess level of functioning related to a possible organic brain injury." In his report two days later, Dr. Fisher indicated that he had included neuropsychological testing in his evaluation "to help quantify any possible cognitive impairment," which had been "hypothesized to have resulted from an injury suffered in a fall in 1993." Dr. Fisher found test results, however, to be "most consistent with a major depressive episode, secondary to [the employee's] concerns about his physical status." Dr. Fisher found these concerns in turn to be "related to [the employee's] multiple hernia repair surgeries and to his pulmonary embolism." Dr. Fisher found that the employee's memory problems "might mimic a brain injury in many respects, even to the point of causing significant occupational impairment," noting that "a mild degree of cognitive impairment cannot be absolutely ruled out by this evaluation. His symptom of reversing numbers in fact, is not commonly associated with depression." On March 13, 1996, the employee was billed \$1,487.90 for various diagnostic and testing services rendered by Dr. Fisher on March 3, 1996. On March 21, 1996, the employee was billed an additional \$52.50, for a .3 hr. "legal consult" rendered by Dr. Fisher on March 19, 1996.

On April 11, 1996, Dr. McPartlin saw the employee in follow-up for headaches and memory loss, which "[the employee] relates . . . to a work-related injury in April 1992 resulting in post-concussive syndrome and a total of 7 hernias with 5 hernia repairs." Dr. McPartlin's impression of the employee's condition, apparently based in important part on the report of Dr. Fisher, was as follows:

Neuropsychometric testing revealed that the [employee's]

subjective memory problems may be at least primarily secondary to depression and most likely stemming from his concerns about his physical status resulting from embolism. The fact that he is awakening fearful and sweating is most descriptive of elements of a post-traumatic stress disorder. A mild degree of cognitive impairment would not absolutely be ruled out by this neuropsychometric evaluation. I feel that the [employee] would benefit from a trial of tricyclic antidepressant medication with an assessment following to determine the medication's effectiveness. Another option would be to continue psychiatric counseling.

On August 21, 1996, the employee filed a Claim Petition, alleging entitlement to payment of certain medical expenses and to compensation for a permanent impairment of an unspecified percentage of his body as a whole, consequent to a work-related injury on March 26, 1992, in the nature of "multiple hernias and complications relating thereto, including but not limited to, pulmonary embolism, phlebitis, psychological and neurological problems."

Several months later, on January 15, 1997, Dr. Fisher responded to the employee's attorney's request for a medical opinion, noting at the start that, because he had not seen the employee in about ten months, his conclusions "may be somewhat out of date if Mr. Martin has shown significant clinical change." With that caveat, Dr. Fisher rated the employee's permanent whole-body impairment at 30%, by analogy with provisions in Minn. R. 5223.0060, subp. 8.D.(2). Dr. Fisher conceded that "this section requires a brain injury documented by psychological testing" and that his own "testing did not strongly suggest an actual brain injury." However, asserting that he did "not see a specific category in the [schedules] for depression and complaints of cognitive symptoms not clearly related to a brain injury," Dr. Fisher indicated that he had made his rating pursuant to authority for ratings by analogy provided in Minn. R. 5223.0300, subp. 3.A. This rule, effective July 1, 1993, essentially codifies the supreme court's decision in Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990).

On February 24, 1997, the employee underwent a neuropsychological evaluation by psychologist Dr. Gary Krupp at the request of the employer and its insurer. Dr. Krupp's report indicates that the employee had been uncertain as to whether or not he actually lost consciousness at the time he fainted and fell in his home in January 1993. Dr. Krupp concluded in part that neuropsychological test results were "not suggestive of residual organic brain impairment," that there was "no evidence of residual neuropsychological deficits," and that "[n]either is there any evidence of specific impairment in concentration, memory, or reasoning to suggest that he suffered an organic brain injury when he fell and struck his head in January, 1993." It was Dr. Krupp's further conclusion that the employee was not in need of any work restrictions from a psychological perspective. Dr. Krupp essentially reiterated his conclusions in subsequent deposition testimony,¹ when he also opined that it was virtually, though not entirely, inconceivable that brain damage

¹ On June 4, 1998.

could result from a bump on the head that did not result in more than a few minutes' unconsciousness.

Also on February 24, 1997, the employee was examined for the employer and insurer by neurologist Dr. Steven Lebow. Dr. Lebow concluded in part that "there is no evidence of on-going problems from an organic brain injury, and there is certainly no reason to quantitate any permanent partial disability referable to any organic brain injury." He concluded also that "[t]here is absolutely no neurologic basis for any impairment, disability, or on-going restrictions," noting that the employee had told him that he was working in a warehouse position of some responsibility.

On June 30, 1997, Dr. Pallas wrote to the employee's attorney, rendering an opinion that the employee was subject to a 10% whole-body permanent impairment consequent to his incompletely controlled phlebitis, deferring to the employee's surgeon, Dr. Leonard Schultz, for a rating as to the employee's hernia symptoms. Dr. Pallas concluded further that the employee's complaints of sexual dysfunction would resolve with adjustment in his medication but that both his pulmonary emboli and his apparent loss of consciousness in January 1993 were causally related to his work-related hernia and subsequent surgeries and complications. Dr. Pallas deferred to Dr. McPartlin with regard to permanency related to any brain injury.

On September 11, 1997, Dr. Schultz rendered an opinion that the employee was subject to a 5% whole-body permanent impairment related to a recurrent abdominal hernia, and he concurred in Dr. Pallas's opinion that the employee was subject to a 10% whole-body permanent impairment related to his phlebitis. On October 31, 1997, Dr. McPartlin issued a report indicating that the employee had, in addition to disabilities related to his hernia and phlebitis, a 30% permanent partial whole-body impairment related to "an organic brain dysfunction." Dr. McPartlin's rating appears to be based either on Minn. R. 5223.0060, subp. 8.D.(2), by application of Weber, or on that same rule in combination with Minn. R. 5223.0300, subp. 3.A., which essentially codified Weber effective July 1, 1993:

I have rated the [employee] . . . in the situation where it is most concordant to brain injury with cognitive symptoms 5223.0300, Subpart 3a and also Category 5223.0060, Subpart D2. You have sent me a Weber decision that states that if an employee's permanent impairment is not listed in the permanent partial disability schedules the nonscheduled injury may be assigned "to its closest compensable category in the schedule".² This would be 5223.0060 Subpart 8d2, a 30% permanent partial disability.

Dr. McPartlin's opinion contains no reference to any positive psychometric testing.

² See Weber, 461 N.W.2d at 922, 43 W.C.D. at 478.

On February 5, 1998, the employee was examined for the employer and insurer by Dr. Jack Shrouts. Dr. Shrouts concluded that the employee's abdominal wall herniations and their surgical repair were due not to any specific work activities but instead to an underlying predisposition to herniation and "normal life activities which included work." Dr. Shrouts concluded that the employee was capable of working full time with restrictions, subject to a 10% whole-body permanent impairment related to his chronic venous insufficiency, pursuant to Minn. R. 5223.0200.

The matter came on for hearing on June 9, 1998. The parties stipulated at hearing that the employer and insurer would pay the employee benefits for a 5% whole-body impairment related to his hernias and for a 10% whole body impairment related to his thrombophlebitis, together with certain related medical expenses. Issues for litigation at hearing included the employee's entitlement to benefits for a permanent impairment of 30% of his body as a whole, either under Minn. R. 5223.0060, subp. 8.D.(2), or under Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990), and his entitlement to reimbursement for certain disbursements to Drs. Fisher, McPartlin, and Boller, depending on whether those disbursements were costs of litigation or treatment expenses.³ At the hearing, the employee testified in some detail as to the manner in which his emotional condition has been affected by physical consequences of his work injury. He emphasized, for instance, that he suffers from depression that is triggered not only by his hernia-related physical incapacity but also by embarrassment that he feels as a result of bleeding in the whites of his eyes and the necessity to use prescribed support hose, both consequences of his injury-related vascular problems. The employee's wife also testified at the hearing, in part that, although previous medications that the employee had taken for his depression had been less effective, the medication that the employee had been taking for the past six to nine months, Effexor,

seems to be doing the trick. All the various other ones that were tried, they didn't always do it, plus they would have the side effects, like a little nausea or, you know, just not feeling well. They just didn't take care of the problem. This one seems to be doing it.

By Findings and Order filed July 31, 1998, the compensation judge denied the employee's claim for permanent partial disability benefits and consequent attorney fees under either the schedules or Weber. By that same decision, the judge also denied the employee's entitlement to reimbursement of four disbursements to treatment providers that the judge determined to have been costs of litigation rather than treatment expenses. The employee appeals.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must

³ At least some of these disbursements had apparently already been reimbursed, and at actual issue with regard to those was the employer and insurer's entitlement to a credit therefor.

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 (1996). 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

Permanency Benefits under Minn. R. 5223.0060, subp. 8.D.(2)

Compensation for emotional disturbances and personality changes under Minn. R. 5223.0060, subp. 8.D.(2), requires (1) “objective evidence of structural injury, neurological deficit, or psychomotor findings,” with the emotional disturbances and personality changes both (2) “substantiated by medical observation and by organic dysfunction supported by psychometric testing” and (3) “present at all times.” The compensation judge denied permanency benefits under the rule on grounds that “[t]he evidence fails to establish organic brain dysfunction supported by psychometric testing” and “fails to establish that the condition is present at [all] times.” In her memorandum, the judge noted that even treating psychologists Dr. Boller and Dr. Fisher had indicated that there was insufficient evidence in psychometric tests to document an organic brain injury. Moreover, the judge indicated, the employee’s CT scan and EEG tests were normal, and no physician had described any basis for a neuropsychological deficit. “[I]n the absence of objective evidence of organic brain injury, neurological deficit or positive psychometric testing,” the judge concluded, permanency benefits were not payable under the rule at issue. Citing Grabinski v. Maury’s TV and Appliance, slip op. (W.C.C.A. May 14, 1996), the employee argues that “[a] normal scan of an employee’s brain does not preclude a compensation judge from finding that an employee sustained a PPD due to brain injury pursuant to Minn. R. 5223.0060, subp. 8.” Moreover, he contends, “[t]here is objective evidence to support this rating,” and the judge “should have adopted the opinion of Dr. McPartlin” and “should have relied on the testimony of the employee” as to the development of his mental problems in the wake of his hernia surgeries. We are not persuaded.

As the holding in Grabinski demonstrates, a normal radiological scan may not necessarily preclude a finding of permanent injury under Minn. R. 5223.0060, subp. 8, provided there is other objective evidence of physical injury. However, subpart 8.D. of that rule still requires that the emotional disturbances and personality changes there at issue be substantiated not only by “medical observation” but also by “organic dysfunction” that is “supported by

psychometric testing.” While the compensation judge in this case did note in her memorandum the normalcy of the employee’s CT and EEG testings, the judge also clearly emphasized there that “[t]his rule requires objective evidence of organic brain dysfunction supported by psychometric testing.” In light of that requirement, the judge proceeded to note that even treating psychologists Drs. Boller and Fisher had found little evidence on which to document an organic brain injury, that psychometric testing had failed to reveal evidence of organic brain deficits, and that no physician had described any neurological basis for a finding of impairment.

Specifically citing the doctor’s letter of October 31, 1997, the employee has argued that Dr. McPartlin’s rating of the employee’s condition under Minn. R. 5223.0060, subp. 8.D.(2), was supported by psychometric testing and should have been credited and adopted. We would note at the outset that Dr. McPartlin’s October 31, 1997, rating of the employee’s condition directly under the schedules appears to have been based on Minn. R. 5223.0060, subp. 8.D.(2), only in combination with Minn. R. 5223.0300, subp. 3.A. To the extent that it depends on the latter rule, Dr. McPartlin’s rating directly under the schedules appears to be unsupportive of the employee’s position, in that the effective date of the latter rule postdates the employee’s work injury. To the extent that Dr. McPartlin’s rating directly under the schedules might not depend on the latter rule, the compensation judge’s dismissal of the rating for lack of supporting psychometric testing was not unreasonable. The employee has asserted that the doctor’s opinion was supported by psychometric testing of Ron Berk, M.Ed., L.P., and Dr. Fisher. However, Dr. McPartlin himself makes no reference in his opinion to any psychometric testing, we do not find any psychometric testing reports of Mr. Berk in evidence, and we are unpersuaded that Dr. Fisher’s testing results are sufficiently, if at all, demonstrative of an organic brain dysfunction to warrant reversal of the judge’s factual conclusion. Dr. Fisher himself found that his testing only “might mimic a brain injury” (emphasis added) and “did not strongly suggest an actual brain injury,” and he himself, after all, ultimately opted to rate the employee’s condition under Weber rather than directly under the rule as scheduled.

Dr. McPartlin’s October 31, 1997, rating was implicitly based on his earlier diagnosis of post-concussive syndrome. There is other expert medical opinion, in the testimony of Dr. Krupp, that it was almost inconceivable that actual brain damage could result from a bump on the head that did not result in more than the very brief unconsciousness that the employee asserted. It is apparent from the judge’s memorandum that the judge credited Dr. Krupp’s opinions, together with the opinion of Dr. Boller, who found “nothing that really suggests brain injury at this point,” over the opinions of Dr. McPartlin. This was the judge’s prerogative, and it warrants our deference given that the opinions of Drs. Krupp and Boller were not evidently based on any false premises. See Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985) (a trier of fact’s choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence). Moreover, there is further expert medical support for the judge’s decision in the opinion of Dr. Lebow, that “there is no evidence of on-going problems from an organic brain injury,” “certainly no reason to quantitate any permanent partial disability referable to any organic brain injury,” and “absolutely no neurologic basis for any impairment, disability, or on-going restrictions.” Dr. Lebow’s opinion as to neurologically based restrictions is complemented by

Dr. Krupp's opinion that the employee was not in need of any work restrictions psychologically. With regard to the employee's argument that the judge should have placed more weight on the employee's own testimony as to the deterioration of his psychological condition, we would emphasize subpart D's requirement that the emotional disturbances and personality changes at issue be substantiated not only by psychometric testing but also by "medical observation" (emphasis added). On all of these bases, we affirm the compensation judge's denial of benefits under Minn. R. 5223.0060, subp. 8.D.(2). See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Permanency Benefits under Weber v. City of Inver Grove Heights

The compensation judge also denied permanency benefits on grounds that the evidence "fails to establish permanent loss of use or impairment of function sufficient for a permanent partial disability rating pursuant to Weber." The employee contends that his mental conditions are at least "very comparable to conditions that are described under Minn. R. 5223.0060, Subp. 8. D. (2)" and that he should therefore have been awarded that category's permanency rating under principles established in Weber if not under the rule directly. In support of that position, he notes Dr. McPartlin's recognition of post-traumatic stress disorder in the employee's condition and cites case law to the effect that that disorder, when it is consequent to a physical work injury, may qualify an injured employee for a permanent partial disability rating. See Anderson v. Cloquet Transit Co., 40 W.C.D. 101 (W.C.C.A. 1987), citing Charlsen v. Stillwater Fire Dept., slip op. (W.C.C.A. June 30, 1986). We are not persuaded.

The compensation judge, in her memorandum, expressly indicated that her denial of permanency under Weber was based in important part on Dr. Krupp's opinions that testing had revealed no evidence of objective memory problems or organic brain injury, that most depression is very treatable, and that the employee's depression falls into that category, given its relationship to medical problems and given the employee's age at onset. As indicated earlier, the judge's reliance on Dr. Krupp's opinions was not unreasonable. See Nord, 360 N.W.2d at 342-43, 37 W.C.D. at 372-73. The judge further supported her decision by noting that "[c]urrent medications have [relieved the employee's] irritability and moodiness," that "Dr. Pallas, in the report dated June 30, 1997, opined that the sexual dysfunction would resolve with the right medication," and that "[s]ubsequent to treatment for the depression, the employee has continued working and, in addition, was promoted to a manager at Meredith Cable." On this evidence, the judge found that the employee had failed to prove that he is permanently impaired functionally as a result of his depression, "particularly to the extent of 30%, as claimed." This conclusion was not unreasonable. A finding as to permanent partial impairment is one of ultimate fact to be made by a compensation judge. See Hill v. MacKay Envelope, slip op. (W.C.C.A. July 10, 1998), citing Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 39 W.C.D. 771 (Minn. 1987). Because the judge's conclusions on this issue were based in part on expert medical opinion and were not otherwise unreasonable, we affirm the judge's denial of permanent partial disability benefits under Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990). See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Attorney Fees and Disbursements

In Order 2, the compensation judge awarded attorney fees on benefits paid or payable to the employee pursuant to certain stipulations of the employer and insurer at hearing. These benefits did not include the permanent partial disability benefits here at issue. Because we have here affirmed the judge's denial of those benefits, we deny also the employee's appeal from the judge's failure to award attorney fees on the denied benefits.

In Finding 6, the compensation judge concluded that \$1,487.90 of Dr. Fisher's total bill of \$1,540.40 on March 21, 1996, was incurred in medical treatment of the employee's March 1992 work injury. The judge concluded also in that finding that the remaining \$52.50 of that bill, which had been itemized as payment for a "legal consult" on March 19, 1996, was a "cost of litigation" and not a cost of medical treatment. In Finding 7, the compensation judge concluded also that Dr. McPartlin's bill of \$525.00 and Dr. Fisher's bill of \$130.00 for certain medical reports were "costs of litigation relating to the psychological/brain permanent partial disability and not incurred for the purpose of medical treatment." Also in Finding 7, the judge concluded that a bill of Dr. Boller's for \$29.00 for copying certain medical records was also a cost of litigation relating to permanent partial disability and not a cost incurred for medical treatment. The employee's Notice of Appeal does not specify an appeal from either Finding 6 or Finding 7, but it does specify an appeal from Orders 3 and 4, which expressly deny the employee's claim for reimbursement of the four costs here identified. Reimbursement of the \$52.50 paid to Dr. Fisher for a legal consultation was denied on grounds that it was "a cost relating to the claim for permanent partial disability to the brain and/or for depression." The employee's claims for reimbursement of the three amounts paid to Drs. McPartlin, Fisher, and Boller for their medical reports were denied as claims "for reimbursement of costs of litigation," without further explanation. The employee contends that the judge erred in denying reimbursement for the legal consultation, in part because "the compensation judge found in Finding Number 2 that the employer and insurer admitted liability for depression," and the employee prevailed on that issue. The employee contends also that the judge erred in denying reimbursement for the three identified medical reports, in part because "[a]ll of these care providers provided reasonable and necessary care and treatment for the employee's conditions related to the employee's depression." We are not persuaded.

With regard to reimbursement for Dr. Fisher's "legal consult" on March 19, 1996, we find no report in the record of any meeting between the employee and Dr. Fisher on that date. We acknowledge that the judge's denial was in part because the expense was "a cost relating to the claim for permanent partial disability to the brain and/or for depression" (emphasis added), and we acknowledge that the employee did ultimately prevail on his claim for depression, as reflected in Finding 2. Nevertheless, without evidence that Dr. Fisher's separate and otherwise unreported consultation on March 19, 1996, involved any diagnostic or otherwise medically related assessment or treatment of the employee's condition, the judge's denial of reimbursement was not unreasonable.

As to reimbursement for the three identified reports from Drs. McPartlin, Fisher, and Boller, there is similarly no evidence that the costs at issue were incurred for actual diagnosis or treatment of the employee's condition. The \$29.00 disbursed to Dr. Boller was a separate prepayment made to Dr. Boller on August 5, 1993, not to pay for treatment but "to cover the cost

of copying your medical records maintained for Mr. Martin while he was treated by you.” The record reasonably suggests that Dr. McPartlin’s referral of the employee to Dr. Boller had been primarily for the purpose of psychometric examination to investigate the possibility of permanent brain injury. The \$130.00 disbursed to Dr. Fisher was separately billed by Dr. Fisher on January 15, 1997, for a “[r]ecords review, review of MCAR statutes, report preparation, brief telephone calls.” This billing was apparently for work done by Dr. Fisher on his report to the employee’s attorney on that same date. As of that date, Dr. Fisher had not seen the employee in nearly a year, and his report on that date, which includes no new diagnostic content and or treatment recommendation, appears clearly intended solely to support a claim for workers’ compensation permanency benefits. The \$525.00 disbursed to Dr. McPartlin was a separate payment made to Dr. McPartlin on October 1, 1997, “as prepayment for a report and record review,” requested to be received “by October 15, 1997,” because “[a] settlement conference has been scheduled for November 16, 1997.” There is no evidence that Dr. McPartlin saw the employee subsequent to this prepayment, and the only report from Dr. McPartlin subsequent to the date of the prepayment is the brief one issued by the doctor on October 31, 1997, which was clearly intended not to further diagnose the employee’s condition but, again, only to document its potential permanency for litigation purposes. It was not unreasonable for the judge to conclude that none of these three disbursements was in payment for actual medical diagnosis or treatment of the employee’s work injury. Because the judge’s conclusion was not unreasonable, we affirm the judge’s denial of reimbursement for these expenses on grounds that they were costs of failed legal action and not medical expenses. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.