CAROL M. METZGER, Employee, v. TURCK, INC., and ST. PAUL FIRE & MARINE INS. CO., Employer-Insurer/Appellants, and MN DEP'T OF HUM. SERVS., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 15, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - THRESHOLD; STATUTES CONSTRUED - MINN. STAT. § 176.101, SUBD. 5. Ratable nonwork-related permanent impairments are includable for purposes of the permanent partial disability thresholds for permanent total disability set forth in Minn. Stat. § 176.101, subd. 5, whether or not those impairments result in restrictions or otherwise affect the employee's employability.

Affirmed.

Determined en banc.
Compensation Judge: Danny P. Kelly.

MAJORITY OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's decision that the employee has sufficient permanent partial disability to satisfy the threshold for permanent total disability contained in Minn. Stat. § 176.101, subd. 5, arguing that the judge erred by including a nonwork-related permanent impairment that has no effect on the employee's ability to work.[1] We affirm.

BACKGROUND

On January 8, 1997, the employee sustained a work-related injury when she slipped and fell on ice in the parking lot of her employer, Turck, Inc. [the employer], following her shift. She sought treatment the next day for low back, leg, and arm pain, and was given medication and taken off work.

In the months after her fall, the employee was treated or evaluated by numerous

[1] In the event that we reverse the judge's award of permanent total disability benefits, the employer and insurer request review of three other issues. Our affirmance of the judge's permanent total disability decision means we need not reach those other issues.

physicians, including Thomas Oas, Kayvon Riggi, Kurt Anderson, Paul Biewen, David Holte, Elizabeth Albright, David Boxall, and Robert Wengler. Various diagnostic tests were performed, and scans revealed degenerative changes in the employee's cervical and lumbar spine. She also eventually developed knee pain.[2] Despite extensive conservative treatment, including anti-inflammatories, narcotic pain medication, antidepressants, physical therapy, epidural steroid injections, and chronic pain treatment, the employee's symptoms have not appreciably improved, and she is not considered a good candidate for surgery. According to Dr. Biewen, one of the employee's treating physicians, the employee is subject to permanent restrictions that include no squatting, crawling, reaching above shoulder level, crouching, kneeling, balancing, or pushing/pulling; an eight-pound lifting restriction; no sitting for more than fifteen minutes at a time, standing for more than ten minutes at a time, or walking for more than five minutes at a time; a thirty-mile driving limit; and a four-hour-a-day, three-day-a-week work schedule.[3] The employee had rehabilitation assistance for some period, but all vocational experts involved in the matter, including the employer and insurer's expert, agree that, if Dr. Biewen's restrictions are valid, the employee is incapable of earning anything more than insubstantial income.

On September 17 and 18, 1998, the matter came on for hearing before a compensation judge for resolution of the employee's claims for permanent total and permanent partial disability benefits as a result of her January 8, 1997, work injury. Numerous issues were disputed, and the record is extensive. The employer and insurer challenged the employee's permanent total disability claim on several grounds, asserting, among other things, that the employee did not have sufficient permanent partial disability to satisfy the threshold for permanent total disability contained in Minn. Stat. § 176.101, subd. 5. A sub-issue involved what impairments were includable for purposes of meeting the threshold. In addition to her work-related permanency claims, the employee alleged that she had a 20% whole body impairment due to a premenopausal hysterectomy and a 7% whole body impairment due to a 1985 out-of-state work injury.

In a decision issued on November 16, 1998, the compensation judge concluded that the employee had a 7% work-related whole body impairment due to her lumbar condition[4] and a

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[2] The employee claimed that her knee condition was work-related, but the compensation judge denied this claim, and the employee did not appeal.

[3] There is evidence to the contrary. Dr. Boxall, for one, concluded that the employee had no need for any restrictions as a result of her 1997 work-related fall. The compensation judge, however, accepted Dr. Biewen's opinion on this issue, and the employer and insurer did not designate this as an issue in their brief. Therefore, for purposes of this appeal, we view Dr. Biewen's restrictions as controlling.

[4] Pursuant to Minn. R. 5223.0390, subp. 4C(1).

3.5% work-related whole body impairment due to her cervical condition,[5] which, when combined under Minn. Stat. § 176.105, subd. 4, resulted in a 10.25% whole body rating. The judge also concluded that the employee had a 20% whole body impairment, due to her nonwork-related pre-menopausal hysterectomy,[6] and that this 20% rating was includable for purposes of Minn. Stat. § 176.101, subd. 5. Finding also that the employee had in fact been permanently and totally disabled since the date of her work injury, the judge awarded permanent total disability benefits. The employer and insurer appeal.

STANDARD OF REVIEW

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Minn. Stat. § 176.101, subd. 5, as amended effective October 1, 1995, provides in part as follows:

> **Subd. 5. Definition**. For purposes of subdivision 4,[7] "permanent total disability" means only:
>
> (1) the total and permanent loss of the sight of both eyes, the loss of both arms at the shoulder, the loss of both legs so close to the hips that no effective artificial members can be used, complete and permanent paralysis, total and permanent loss of mental faculties; or
>
> (2) any other injury which totally and permanently incapacitates the employee from working at an occupation which brings the employee an income, provided that the employee must also meet the criteria of one of the following clauses:
>
> (a) the employee has at least a 17 percent permanent partial disability rating of the whole body;

[5] Pursuant to Minn. R. 5223.0370, subp. 3B.

[6] Apparently due to a clerical error, the compensation judge cited Minn. R. 5223.0610, subp. 10C(3), as the basis for this rating. It is evident that the judge intended to cite Minn. R. 5223.0600, subp. 10C(3). The hysterectomy was performed in 1972, after the employee was diagnosed with cancer.

[7] Subdivision 4 establishes the rate for permanent total disability benefits, the so-called social security offset, and the retirement presumption. Subdivision 4 is not directly at issue in this proceeding.

> (b) the employee has a permanent partial disability rating of the whole body of at least 15 percent and the employee is at least 50 years old at the time of injury; or
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> (c) the employee has a permanent partial disability rating of the whole body of at least 13 percent and the employee is at least 55 years old at the time of the injury, and has not completed grade 12 or obtained a GED certificate.

In Frankhauser v. Fabcon, Inc., 57 W.C.D. 239 (W.C.C.A. 1997), one of the first cases to construe subdivision 5, the issue was whether nonwork-related permanent partial disability may be counted toward the threshold permanency ratings. After discussing the statutory language and longstanding case law principles, we held that

> an employee who has sufficient ratable permanent partial disability from any cause may establish entitlement to benefits for permanent total disability if he or she meets the remaining eligibility requirements - - that is, if "the employee's physical disability . . . causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income," id.; see also Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 153 N.W.2d 130, 24 W.C.D. 290 (1967) - - as long as the employee's work-related injury is a substantial contributing cause of that disability.

Id. at 252 (emphasis in original).

The employee in the present case was 49 years old on the date of her work injury,[8] meaning that, under subdivision 5(2)(a), a 17% whole body rating is a prerequisite to an award for permanent total disability. For purposes of this appeal, it is undisputed that the employee has a 3.5% whole body impairment for her cervical condition and a 7% whole body impairment for her lumbar condition, both attributable to her 1997 work injury.[9] It is also undisputed that the employee's 1972 nonwork-related hysterectomy surgery would warrant a 20% rating under the applicable permanent partial disability schedules. These three impairments, either simply added or combined using the statutory formula, yield a total whole body rating well exceeding 17%.

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[8] More precisely, the employee was ten days short of her fiftieth birthday.

[9] As previously indicated, the compensation judge combined the two ratings using the formula contained in Minn. Stat. § 176.105, subd. 4(c), for purposes of determining the employer and insurer's liability for permanent partial disability benefits. It has yet to be determined whether the formula is applicable for purposes of determining whether the permanency thresholds in Minn. Stat. § 176.101, subd. 5, have been met, and we need not reach that issue here.

The employer and insurer acknowledge that, under Frankhauser, nonwork-related permanent partial disability is includable for purposes of establishing the ratings required by subdivision 5. The employer and insurer ask, however, that we refine our prior holding in Frankhauser to indicate that nonwork-related permanency may not be included for purposes of the statutory threshold unless that permanency "results in functional impairment which affects the Employee's ability to work." In support of this argument, the employer and insurer cite Unger v. Balkan Mining Co., 248 Minn. 510, 80 N.W.2d 846, 19 W.C.D. 107 (1957), a case where the supreme court indicated that, "if the loss or partial loss of a member should result in an employee's not being able to engage in remunerative work, he may be eligible for total permanent disability." Id. at 515, 80 N.W.2d at 849, 19 W.C.D. at 112. Noting that there is no evidence in the record indicating that the employee's 1972 hysterectomy has any effect on her employability, the employer and insurer contend that the 20% rating applicable to that condition does not count toward the requisite 17% rating under subdivision 5(2)(a). In response, the employee maintains that the employer and insurer's proposed construction of the statute is speculative and unsupported by any evidence as to legislative intent. In the alternative, the employee contends that she has an additional 7% whole body impairment, due to her 1985 Colorado work-related lumbar injury, that, when combined with the permanency resulting from her 1997 work injury, satisfies the 17% permanent partial disability rating requirement.[10]

We note initially that, contrary to the employer and insurer's suggestion, a condition that meets the requirements for a permanent partial disability rating under the current rating schedules by definition constitutes a functional impairment. Fleener v. CBM Indus., 564 N.W.2d 215, 217, 56 W.C.D. 495, 498 (Minn. 1997) ("In 1993, the disability schedules based on diagnostic criteria were replaced by a new scheme based on '[l]oss of function'"). Moreover, the Unger case cited by the employer and insurer, connecting permanent partial disability to an employee's loss of earning capacity or ability to work, was based on a different version of the statute. Well after Unger, in 1974, the legislature amended the statute to distinguish permanent partial disability benefits from those benefits payable for wage loss, changing the language of Minn. Stat. § 176.021, subd. 3. See Act of Apr. 12, 1974, ch. 486, § 1, 1974 Minn. Laws at 1230-31, currently codified at Minn. Stat. § 176.021, subd. 3 (1998) ("Permanent partial compensation is payable for functional loss of use or impairment of function, permanent in nature, and payment therefore shall be separate, distinct, and in addition to payment for any other compensation . . . .).[11]

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[10] The 7% rating for the employee's 1985 Colorado lumbar injury was suggested by both Dr. Anderson and Dr. Boxall, and Dr. Boxall indicated that the employee should observe a 50-pound lifting limit due to that injury. The compensation judge made a finding as to CT scan results obtained shortly after that injury--showing a herniation at L4-5--but he made no finding as to a rating or whether that impairment was includable toward the 17% threshold, despite the employee's arguments to that effect.

[11] The 1974 amendments effectively overruled Boquist v. Dayton-Hudson Corp., 297 Minn. 14, 209 N.W.2d 783, 27 W.C.D. 16 (1973), and Pramschiefer v. Windom Hosp., 297 Minn. 212, 211 N.W.2d 365, 27 W.C.D. 33 (1973), cases in which the supreme court had indicated the permanent partial disability benefits were not payable concurrently with temporary total disability

Therefore, for injuries occurring after the 1974 amendments, "impairment of function is compensable for its own sake in the form of damages separate and distinct from wage loss [benefits]." Tracy v. Streater/Litton Indus., 283 N.W.2d 909, 914, 32 W.C.D. 142, 148 (Minn. 1979). The 1995 legislature may have amended Minn. Stat. § 176.101, subd. 5, to add permanent partial disability requirements, but it did not make any changes to Minn. Stat. § 176.021, subd. 3, that would indicate any modification in the underlying basis for permanent partial disability benefits. Accordingly, Unger and related cases have little relevance to the issue before us now.

We also note that the 1995 amendment to Minn. Stat. § 176.101, subd. 5, itself appears to illustrate continued legislative recognition that permanent partial disability has no necessary connection to an injured employee's restrictions or wage loss. The final paragraph of Minn. Stat. § 176.101, subd. 5, reads as follows:

> For purposes of this clause, "totally and permanently incapacitated" means that the employee's physical disability in combination with any one of clause (a), (b), or (c) causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. Other factors not specified in clause (a), (b), or (c), including the employee's age, education, training and experience, may only be considered in determining whether an employee is totally and permanently incapacitated after the employee meets the threshold criteria of clause (a), (b), or (c). The employee's age, level of physical disability, or education may not be considered to the extent the factor is inconsistent with the disability, age, and education factors specified in clause (a), (b), or (c).

Id. (emphasis added). By using the language emphasized above, the legislature clearly intended to differentiate between an employee's "physical disability" and the permanent partial disability ratings delineated in clauses (a), (b), and (c). While the precise meaning of the language may be less obvious, one logical construction is that "physical disability," as contained in subdivision 5, was intended to refer to restrictions or loss of earning capacity, while permanent partial disability continues to be as distinct from wage loss as it has been for the past twenty-five years. The issue then becomes the intent of the language "in combination with." A reasonable argument may be made that the first sentence of the paragraph should be interpreted to mean that the permanent partial disability ratings specified in clauses (a), (b), and (c) must be a "cause" of the employee's permanent total disability. The language is, however, susceptible to differing interpretations, and, given the clear distinction between permanent partial disability and wage loss benefits elsewhere in the workers' compensation act, we see insufficient reason to conclude that the legislature intended to confuse functional disability and earning capacity concepts in this one isolated

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benefits because both were payable for wage loss. See Rozales v. Peerless Welder, Inc., 311 Minn. 6, 10, 246 N.W.2d 851, 853, 29 W.C.D. 176, 182 (1976).

instance. The legislature may well have added the permanent partial disability thresholds in order to make permanent total disability status dependent on at least some objective evidence of some substantial physical impairment. However, any substantial ratable permanent partial disability will satisfy that goal, whether or not that permanent partial disability is a factor in the employee's wage loss or inability to work.

Finally, we reject the employer and insurer's argument that construing the statute contrary to their position would "drain economic resources rightfully reserved for those most severely injured . . . and burden the Minnesota Workers' Compensation System with . . . claims which, frankly, do not warrant an award of permanent total disability benefits." Regardless of the statutory permanent partial disability requirements, an employee is not eligible for permanent total disability benefits unless that employee is, as a substantial result of a work injury, "unable to secure anything more than sporadic employment resulting in insubstantial income." Minn. Stat. § 176.101, subd. 5; Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 153 N.W.2d 130, 24 W.C.D. 290 (1967). Simply put, an employee may not receive permanent total disability benefits unless that employee proves that he or she is in fact permanently and totally disabled from employment. Once this criterion is met, and given the basic purpose of the benefits in question, it is hard to see why one permanently totally disabled worker should be considered more deserving of benefits than another. Some already argue that the 1995 amendments arbitrarily deny permanent total disability benefits to workers who are unemployable as the result of work-related injuries. To adopt the employer and insurer's construction of the statute would give even more force to that argument and would also encourage otherwise unnecessary litigation on the issue of causation. We doubt that the legislature intended either result.

In Frankhauser, we observed that, "[p]rior to the 1995 amendments, permanent partial disability, which is based on functional loss of use of a body part, had no necessary relationship to permanent total disability, which was always dependent more on the employee's vocational potential than on the employee's physical condition." 57 W.C.D. at 252. We then acknowledged that "it appears that that relationship has now changed," id., and we reiterate that acknowledgment here - - that is, under the 1995 amendments, eligibility for permanent total disability benefits is for the first time dependent on some specified level of permanent partial disability. We must and will enforce the new thresholds. However, the employer and insurer have advanced no compelling reasons to imply additional requirements for permanent total disability not clearly mandated by the language of the statute. We therefore hold that ratable nonwork-related impairments are includable for purposes of the permanent partial disability requirements of Minn. Stat. § 176.101, subd. 5, whether or not those nonwork-related impairments result in restrictions or otherwise contribute to the employee's unemployability. With the 20% rating for her nonwork-related hysterectomy, the employee in the present matter has more than enough permanent partial disability to satisfy subdivision 5(2)(a), with or without the 7% rating arguably applicable to her 1985 Colorado work injury, and we therefore affirm the judge's decision in its entirety.

CONCURRING OPINION

THOMAS L. JOHNSON, Judge

I concur with and join in the decision of the majority. I further conclude the 1995 amendment to the definition of permanent and total incapacity by the inclusion of a specified level of permanent partial disability establishes an arbitrary and meaningless requirement.

The dissent suggests that in amending the statute, the legislature assumed that injured workers with higher permanent partial disability ratings are more likely to be permanently and totally disabled than injured workers with lower permanency ratings. I find no legal or rational basis for such an assumption. As the majority correctly states, permanent partial disability is payable for functional loss of use or impairment of function and has no relationship to ability to work.[12] An injured employee's ability to work is dependent not on the employee's level of permanent partial disability, but on the employee's "physical condition, in combination with his age, training, and experience, and the type of work available in the community." Schulte v. C.H. Peterson Constr. Co., 279 Minn. 79, 153 N.W. 130, 24 W.C.D. 290 (1967).

In the case before us, the employee has a total of 10.25% permanent partial disability secondary to her work injury. The compensation judge found the employee is permanently and totally disabled and the appellants do not contest this finding on appeal. Thus, this court is faced with an admittedly totally disabled employee whose entitlement to wage loss benefits depends solely on her level of permanent partial disability. I find such a requirement to be totally arbitrary and without any rational basis.

DISSENTING OPINION

WILLIAM R. PEDERSON, Judge

I respectfully dissent. I would reverse the compensation judge's determination that the employee has satisfied the 17% permanent partial disability threshold based in part on her pre-menopausal hysterectomy, and I would remand the matter to the compensation judge for a determination as to whether a previous 7% rating due to a 1985 Colorado work injury is a contributing cause of Ms. Metzger's disability.

I concur with this court's holding in Frankhauser that the ratable permanent partial disability necessary to establish entitlement to permanent total disability need not be work related. However, I disagree with the majority opinion in the instant case that that ratable permanency need not be a cause of the employee's permanent total disability. To so hold essentially renders entirely arbitrary the permanent partial disability thresholds under Minn. Stat. § 176.101, subd. 5(2).

[12] For example, I find no basis to assume that all workers with a 20% permanent partial disability for a class 3 skin disorder under Minn. R. 5223.0640, subp. 2.D. are less able to work than workers with a 10% permanent disability for multiple level lumbar pain syndrome under Minn. R. 5223.0390, subp. 3.C.(2).

Prior to the 1995 amendments, Minn. Stat. § 176.101, subd. 5(b), provided as follows:

> (b) For purposes of paragraph (a), clause (2), "totally and permanently incapacitated" means that the employee's physical disability, in combination with the employee's age, education, training, and experience, causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income.

"The causes" of an employee's permanent total disability were viewed as a combination of the employee's physical disability and other vocational obstacles. Effective October 1, 1995, this definitional portion of the statute was amended to read as follows:

> For purposes of this clause, "totally and permanently incapacitated" means that the employee's physical disability in combination with any one of clause (a), (b), or (c) causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. Other factors not specified in clause (a), (b), or (c), including the employee's age, education, training and experience, may only be considered in determining whether an employee is totally and permanently incapacitated after the employee meets the threshold criteria of clause (a), (b), or (c).

Eligibility for permanent total disability benefits is now, therefore, dependent on the employee's "physical disability," her other vocational obstacles, and a specified level of permanent partial disability. The majority interprets the statutory changes as really no change at all except that now, prior to applying the Schulte standard, an employee must establish a 17% permanent partial disability rating of the whole body, regardless of its contribution to the employee's permanent total disability status. Thus, according to the majority, the outcome of Ms. Metzger's claim is determined by the fortuitous existence of a nonwork-related functional impairment that has no bearing on her ability to work. Under the facts of this case, Ms. Metzger's actual disability from working would be no different from what it is now had she not undergone her premenopausal hysterectomy. Yet, under the majority's opinion, although "totally and permanently incapacitated" under the Schulte standard, she would somehow be less deserving of benefits without that surgery. I believe a fairer interpretation of the permanency threshold, and what the legislature intended, is that the required permanency contribute to the employee's permanent total disability status.

I cannot agree that the introduction of a permanent partial disability requirement into the definition of permanent total disability necessarily confuses the well established distinction between functional disability and earning capacity concepts. That distinction was made primarily to facilitate payment of permanent partial disability and not as a pronouncement

that the degree of permanency has no impact on an employee's restrictions or wage loss. In fact, it is not unreasonable to assume, and I believe it was the intent of the legislature, that injured workers with a higher permanent partial disability rating are more likely to be permanently and totally disabled than injured workers with lower permanent partial disability ratings. The fact is that permanent partial disability, although separate and distinct for purposes of payment, does often, though not always, contribute to an employee's restrictions and ability to work.

While the statutory language may not be a model of clarity, it cannot be disputed that the purpose behind the threshold criteria was to supplement the established Schulte standard with additional objective criteria. It makes no practical sense to establish a permanent partial disability threshold for eligibility for permanent total disability if the permanency need have no relationship to an employee's ability to work. I would construe the statute in this way because doing so embraces the only reasonable rationale under which the legislature might have chosen to apply the apparatus of permanency benefits to a workers' entitlement to wage replacement, the two forms of benefits having long been held to be entirely unrelated; to hold otherwise would be to concede that the 1995 amendment of subdivision 5 was entirely arbitrary.