MATT NIEMI, Employee/Appellant, v. M.A. MORTENSON CO. and ST. PAUL FIRE & MARINE INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 19, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - REFLEX SYMPATHETIC DYSTROPHY; RULES CONSTRUED - MINN. R. 5223.0420, SUBP. 6. Minn. R. 5223.0420, subp. 6B, applies when "the individual can ambulate *only* with assistive devices or special shoes" (emphasis added). Since the employee here is able to ambulate without his orthopedic shoe indoors at home, the compensation judge did not err in failing to apply subpart 6B where the employee was capable of ambulation without an assistive device or special shoe on a repetitive and regular basis for a significant portion of each day. In the absence of specific medical evidence justifying such an interpretation, there was similarly no basis in this case to classify the employee's thermal stockings as an "assistive device" within the meaning of this rule.

Affirmed.

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

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's award of a 6.5 percent whole-body permanent partial disability rating for a diagnosis of mild reflex sympathetic dystrophy (RSD) pursuant to Minn. R. 5223.0420, subp. 6A. The employee contends that he was entitled to a higher percentage whole body rating under subparts 6B or 6C of the rule for either moderate or severe RSD.

DECISION

The employee, Matt Niemi, sustained an admitted work-related injury to his left foot and ankle on May 21, 1996 while employed as a millwright by M. A. Mortenson Company, the employer. The employee was treated surgically for a fracture of the proximal phalanx of the left great toe by open reduction with internal fixation on May 30, 1996. Subsequent to the surgery, the employee developed symptoms of reflex sympathetic dystrophy in the left lower extremity. (Findings 2, 4 [unappealed]; Exh. L: 5/30/96 operative report.)

The employee's treating physician, Dr. T. G. Patnoe, rated the employee with a 19.5 percent whole-body permanent partial disability pursuant to Minn. R. 5223.0420, subp. 6C. Dr. Jack Drogt, who examined the employee for the employer and insurer on February 18, 1997, also rated the employee's permanency under that rule. Dr. William H. Lohmann, a specialist in occupational medicine, examined the employee for the employer and insurer on December 10, 1997, and rated the employee's permanent partial disability at 13 percent of the whole body, relying in part on Minn. R. 5223.0420, subp. 6B. Surveillance of the employee's activities was conducted by a private investigation firm on various dates in 1997, and the employee was videotaped and photographed. Upon review of these videotapes and photographs, Dr. Lohman revised his opinion of the appropriate permanency rating, and rated the employee with a 6.5 percent whole-body permanent partial disability under Minn. R. 5223.0420, subp. 6A. (Exhs. A, F, 6, 8, 9.)

The employee filed a claim petition on May 15, 1997, seeking permanent partial disability compensation for a 19.5 percent whole-body disability. A hearing before a compensation judge of the Office of Administrative Hearings was held on March 24, 1998. Prior to the hearing on the matter, the employer and insurer paid permanent partial disability compensation for a 6.5 percent whole-body disability. The compensation judge found that the employee had not established entitlement to a permanent partial disability rating greater than the 6.5 percent of the whole body that had been paid by the employer and insurer under Minn. R. 5223.0420, subp. 6A. (Finding 7.)

This appeal comes before the court on the limited question whether the compensation judge erred in concluding that the appropriate permanency rating for the employee's causalgia condition was no more than 6.5 percent of the whole body as provided by subpart 6A of Minn. R. 5223.0420, rather than either 13 percent or 19.5 percent of the whole body as provided under subparts 6B or 6C of that rule, respectively. Minn. R. 5223.0420 provides ratings applicable to motor loss in the peripheral nervous system of a lower extremity. Subpart 6 addresses reflex sympathetic dystrophy, causalgia and cognate conditions, and where present as defined generally in the subpart, three ratings are provided:

> A. mild: meets the requirements of this subpart, 25 percent of the rating for the appropriate category in part 5223.0550;
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> B. moderate: meets the requirements of this subpart and the individual can ambulate only with assistive devices or special shoes, 50 percent of the rating for the appropriate category in part 5223.0550;
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> C. severe: meets the requirements of this subpart and the individual is unable to weight-bear to effectively perform most of the activities of daily living, 75 percent of the rating for the appropriate category in part 5233.0550.

In the present case, there is no dispute that the general requirements of subpart 6 are met, nor is there any dispute that ratings under the application of these subparts would result in a rating of either 6.5 percent, 13 percent, or 19.5 percent of the whole body, respectively.

Both parties agree that the employee has difficulty in ambulation. The employee generally uses an orthopedic shoe recommended by his physician. The employee testified, however, that while he uses this shoe at all times in order to walk outside his home, he does not wear the orthopedic shoe to walk in his home. (T. 35- 40.)

The compensation judge noted that a rating under subpart 6B requires that "the individual can ambulate *only* with assistive devices or special shoes" (emphasis added). Since the employee is able to ambulate without his orthopedic shoe at home, the compensation judge concluded that the 6.5 percent permanency under subpart 6A, rather than the 13 percent under subpart 6B, appropriately rated the employee's condition. On appeal, the employee argues that since his ability to ambulate without his orthopedic shoe is limited, this court should conclude that the compensation judge erred, and reverse and substitute a 13 percent rating. We disagree. The language of subpart 6B is explicit and restrictive. The compensation judge did not err in failing to apply subpart 6B where the employee was capable of ambulation without an assistive device or special shoe on a repetitive and regular basis for a significant portion of each day.

The employee next argues that although he can ambulate without his orthopedic shoe at home, he always ambulates while wearing a thermal stocking, which is softer than a regular stocking and better retains body heat around his left foot. (T. 35.) He argues that this stocking should constitute an "assistive device" within the meaning of subpart 6B. Under the facts of this case, we do not accept this argument. The employee did not specifically testify that he could not ambulate without the use of these thermal stockings. We see no basis in this case to conclude that the compensation judge erred in failing classify the employee's thermal stockings as an "assistive device" within the meaning of this rule.

Finally, the employee argues that this court "could find" that the employee is entitled to a 19.5 percent rating under subpart 6C, on the basis that he is unable to engage in the activities of daily living, pointing to his testimony about difficulties he experiences with normal activities including sitting, lifting, driving and walking. (T. 38-44.) The compensation judge, however, found that the employee's condition "does not prevent him from performing his activities of daily living." (Finding 6.) In reviewing this factual finding, our review is not *de novo* but is limited to determining whether the finding was supported by substantial evidence and not clearly erroneous. Minn. Stat. § 176.421, subd. 1(3) (1992). We have examined the record fully and conclude that this finding, and the compensation judge's 6.5 percent whole-body permanency rating, are supported by substantial evidence. We therefore affirm. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985); Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).