JOHN A. PALCICH, Employee, v. USX CORP., SELF-INSURED, Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 20, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. The compensation judge's old law rating of permanent partial disability for the employee's 1978 work injury is supported by substantial evidence and is not clearly erroneous.

Affirmed.

Determined by Hefte, J., Wilson, J., and Pederson, J.
Compensation Judge: Donald C. Erickson

OPINION

RICHARD C. HEFTE, Judge

The self-insured employer appeals from the compensation judge's finding that the employee sustained a 75% permanent partial disability rating to his right upper extremity as a result of the employee's work injury which occurred in 1978. We affirm.

BACKGROUND

John A. Palcich, the employee, has been employed by USX Corporation, the self-insured employer, for some 27 years. On September 7, 1978, the employee suffered an admitted work-related right shoulder and arm injury. At the time of his injury the employee worked as a pit laborer in a warehouse of the employer doing repeated lifting, especially overhead work. The employee sustained a severe dislocation of his right shoulder as a result of his work injury.

On October 10, 1978 the employee underwent right shoulder reconstruction surgery. Following his recovery from surgery, the employee was assigned to work in the employer's electrical department. Dr. E. Harvey O'Phelan reported in 1991 that the employee "continued to work although it was necessary for him to perform lighter duties." The employee testified that after his work injury he could not return to his pre-injury job. The employee's post-injury job was "scaled down" so that the employee's main duties were the sorting of small packages and keeping logs of supplies on a computer. In this job he lifted smaller objects and was able to get help from his fellow workers with the lifting of larger items. The employee admits that the self-insured employer accommodated his work duties due to his injury after his surgery and that he was able to work full time. Based on the disability schedules in effect as of the date

of the employee's injury, the employee was initially paid workers' compensation benefits for a 15% permanent partial disability rating of the right arm. Later, based on a 1991 independent medical examination by Dr. Litman, the employee was paid benefits for an additional 20% rating, or a total of 35%, for his right arm and shoulder disability.

The employee testified he has pain in his shoulder and arm every day. He testified that his shoulder dislocates two or three times a year. This is accompanied by increased pain, as well as swelling and numbness down the employee's right arm. The employee is able to reduce these dislocations himself by laying on his back and making circular motions with his arm until he gets his shoulder back into the socket. The employee testified that he is unable to lift with his right arm. He is only able to use his right arm by positioning his left arm to help and steady the right arm. The employee claims he has a problem with his right arm in that his right elbow becomes so stiff that at times he cannot straighten his right arm from a 90 degree angle. The employee stated it takes days to gradually force his arm back to its previous position. The employee claims he has only five to 10% use of his right arm, hand and wrist because of his 1978 right shoulder injury. He states he can no longer drive a forklift which he did prior to his work injury. He is able to drive a car by using his left arm and hand. The employee testified that his shoulder injury and right arm problem has, for years, affected his ability to fully personally care of himself and eliminates his participation in most of his usual recreational and hobby activities.

In 1996, Dr. O'Phelan, based upon his treatment of the employee's right arm and shoulder condition, and after examining the employee and reviewing the disability schedules in effect in 1996, felt that the employee was entitled to an additional permanent partial disability rating as a result of his 1978 shoulder/arm injury. Dr. O'Phelan considered the disability schedule, Minn. R. 5223.0110, shoulder, range of motion, and reported he felt the rating should be considered to be somewhere between the 30% and 50% as set forth in Minn. R. 5223.0110, subp. 2, and opined that the employee had a 40 to 45% permanent partial disability rating of the whole body. Based on Dr. O'Phelan's opinion, the employee filed an amended claim petition on May 27, 1997, seeking payment of benefits for a 75% permanent partial disability rating under the 1978 disability schedules of the right arm (using a reverse calculation: the 45% whole body rating by Dr. O'Phelan divided by .6 reverse conversion factor from Table 1 of Rule 5223.0315 equals 75%). And the benefit claimed would be less the permanent partial disability already paid the employee by the self-insured employer.

On August 14, 1997, at the self-insured employer's request, the employee underwent an independent medical examination by Dr. Robert H.N. Fielden. Dr. Fielden, after examining the employee, evaluated the employee's permanent partial disability to be a 30% whole body rating based on the 1997 permanent disability schedules. Minn. R. 5223.0110, subp. 2.E. This converts, by using the .6 reverse conversion factor, to a 50% permanent partial disability rating of the employee's right arm under the 1978 disability schedules. The 15% rating, in addition to the 35% rating already paid, was then paid by the self-insured employer on or about August 28, 1997 based on the independent medical examination and opinion report of Dr. Fielden. After a hearing, the compensation judge found that the employee is entitled to a permanent partial disability benefit equivalent to 75% rating of the employee's right upper extremity. Therefore,

the judge ordered that the self-insured employer pay the employee an additional permanent partial disability benefit, over and above the 50% already paid, which would be an additional 25% rating of the employee's right upper extremity. The self-insured employer appeals.

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

The self-insured employer seeks a reversal and remand of the compensation judge's findings and order on the grounds that the compensation judge erred in awarding the employee an additional permanent partial disability benefit over and above what had been previously paid by the employer to the employee. We affirm the compensation judge.

The parties agree that the sole issue is whether the employee is entitled to an additional permanent partial disability rating and an additional benefit as a result of the employee's 1978 work injury. The self-insured employer points out that the compensation law in effect in 1978 bases an employee's permanent disability rating as being payable "for functional loss of use or impairment of function, permanent in nature." Minn. Stat. § 176.021, subd. 3.[1] The self-

[1] In 1978, Minnesota Statute Section 176.021, subdivision 3 read, in part, as follows:

> Liability on the part of an employer or his insurer for disability of a temporary total, temporary partial, and permanent total nature shall be considered as a continuing product and part of the employee's inability to earn or reduction in earning capacity due to injury or occupational disease and shall be payable accordingly. Permanent partial disability 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.

insured employer notes that Finding 15 states, "[t]he preponderance of the evidence indicates that Dr. O'Phelan's opinion on the extent of disability is more consistent with the employee's loss of function and loss of earning ability." The self-insured employer contends that the compensation judge's reference to a loss of earning ability results in his use of an incorrect standard. However, an overall review of the whole record and the judge's findings reveals that the finding of the employee's increase in permanent partial disability is reasonable based on the employee's loss of function.

The employee was found, in unappealed Finding 9, to suffer on a daily basis from pain and stiffness from his shoulder to his waist and has difficulty bending his elbow. With his arms he can only lift "less than ten pounds" and to accomplish this the employee uses his right hand and arm as a guide only, lifting packages by pinching them between his leg and left arm. The employee's right shoulder is profoundly limited in its motion and the compensation judge accepted Dr. O'Phelan's opinion that the employee's shoulder is nonfunctional and is a major source of the employee's disability. (Finding 12.) The employee's right arm muscle strength is markedly wasted on the right and he has a very limited range of motion of the arm. He has a continual problem with his right elbow becoming stiff and his right shoulder dislocating. The determination of permanent partial disability is one of ultimate fact for the compensation judge. Jacobwitch v. Bell & Howell, 404 N.W.2d 270, 271, (Minn. 1987). Under the law in 1978, subjective complaints of pain and limitations of activity may be considered by a compensation judge in rating permanent partial disability. Heim v. Yellow Freight System, Inc., slip op. (W.C.C.A. Dec. 15, 1997). There is substantial evidence to support the compensation judge's statement, also a part of Finding 15, that "[b]ased on the evidence of record, the employee is functionally disabled in performing at least 75% of the functions that he would be expected to perform with his right upper extremity," and that the employee is reasonably entitled the additional rating of permanent disability based on his current functional loss of use of his right arm as a result of his 1978 injury.

The self-insured employer also contends that the compensation judge improperly found the employee had a 75% permanent partial disability rating based upon the 1996 permanent disability schedule which was not in effect on the date of the injury. The compensation judge accepted the opinion of Dr. O'Phelan, the employee's treating doctor, as to permanent partial disability. While Dr. O'Phelan, in his 1996 report, did refer to the current disability schedules, he states in his report that this rating is based on his past "experience with a vast number of shoulder injuries that [he] ha[s] cared for and examined in the past" as well as based on his treatment of the employee. (Ex. A.) Dr. O'Phelan, after examining the present disability schedules considered the whole body disability rating should be somewhere between 30% and 50% and then concluded the employee had a 40 to 45% disability rating of the whole body because of his 1978 shoulder injury. See Minn. R. 5223.0110, subp. 2. The record reasonably reveals that the compensation judge's determination was based upon his consideration of the evidence as a whole. He reasonably concluded the employee's disability rating for the whole body was 45%, and then the conversion factor was applied by a "reverse" calculation (.6) to arrive at a 75% rating of the right upper extremity. The compensation judge, as the ultimate finder of fact as to the employee's permanent partial disability rating, is not bound by the ratings advanced by medical experts. The

self-insured employer contends because of the use of this reverse calculation the permanent partial disability rating was improper and the judge's award should be reversed and remanded for further consideration. However, in Heim v. Yellow Freight Systems, Inc., slip op. (W.C.C.A. Dec. 15, 1997) this court stated that conversion factors [Minn. R. 5223.0250 currently Minn. R. 5223.0315] may be used in determining permanency by converting body member ratings to whole body ratings. Heim goes on to conclude that "consistency requires that the use of the conversion factors for the reverse calculation may also be appropriate . . .." The compensation judge was not clearly erroneous in converting permanency ratings given under the current disability law to "old" law ratings.[2] Substantial evidence supports the compensation judge's findings and order in this case and we affirm.

[2] The self-insured employer's own physician, Dr. Fielden, also, in 1997, rated the employee's permanent partial disability under the "new law" whole body disability rules at 30% disability, and the self-insured employer, apparently applying the reverse conversion of disability ratings, determined the employee to have a 50% rating, which the self-insured employer then paid.