JOSEPH W. SORCAN, Employee/Appellant, v. USX CORP., SELF-INSURED, Employer.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 4, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert medical opinion, supports the award of a 45 percent permanent partial disability to the left upper extremity and 30 percent to the right upper extremity pursuant to Minn. Stat. § 176.101, subd. 3 (1975).

MEDICAL TREATMENT & EXPENSE - NURSING SERVICES. Substantial evidence supports the compensation judge's award of additional hours for nursing services provided by the employee's spouse to the permanently and totally disabled employee, with the exception of certain LPN and home health care services, including housekeeping tasks, excluded by the compensation judge, which are hereby included.

Affirmed as modified.

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

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's determination on remand that the employee sustained a 45 percent permanent partial disability of his left upper extremity and a 30 percent permanent partial disability of the right upper extremity. The employee also appeals from the compensation judge's finding that the employee is entitled to compensation for 28.5 hours per week for nursing services provided by his spouse through June 4, 1998, and 25 hours per week thereafter. We affirm with respect to the award of permanent partial disability, and affirm, as modified, the award of additional compensation for nursing services provided by the employee's wife.

BACKGROUND

This matter is before the court on appeal of the employee from the compensation judge's findings and order following a remand for reconsideration and redetermination of the extent of the employee's permanent partial disability to the upper extremities, and compensation for nursing services provided to the permanently and totally disabled employee by his spouse.

The employee, Joseph W. Sorcan, is now 78 years old. He began working for the self-insured employer, USX Corporation (f/k/a United States Steel Corporation), in 1947. Testing in 1974 and 1975 revealed silicosis as a result of exposure to silica dust in the course of his work for the employer. The employee was also diagnosed with rheumatoid arthritis. The employee has not worked since October 8, 1975 as a result of these conditions. In October 1976, this court determined that the employee's disabling rheumatoid arthritis was causally related to his work-related silicosis. Sorcan v. U.S. Steel Corp., 29 W.C.D. 162 (W.C.C.A. 1976). In 1977, the employee was found to have a 30 percent permanent partial disability of the right arm, a 25 percent permanent partial disability of the left arm, a 30 percent permanent partial disability of the right leg, and a 20 percent permanent partial disability of the left leg.[1] (Findings & Order, Nov. 17, 1987: finding 4.)

In 1987, Compensation Judge Gregory Bonovetz determined the employee had been permanently and totally disabled since April 14, 1976. The judge awarded additional permanency resulting in a total 50 percent permanent partial disability to each leg. The compensation judge also awarded compensation of 24 1/2 hours per week for nursing services provided by the employee's wife, Marjorie Sorcan, from April 1976 and continuing, with annual adjustments. (Findings & Order, Nov. 17, 1987.)

On August 30, 1995, the employee filed a claim petition seeking increased compensation for nursing services from and after January 1, 1992, a 35 percent permanent partial disability of the back and additional permanency for the upper extremities. Prior to hearing, the self-insured employer voluntarily paid an additional five percent permanent partial disability of the left upper extremity (for a total of 30 percent) and a 30 percent permanent partial disability of the spine. The matter was heard by Compensation Judge Donald C. Erickson on April 15, 1997. In a findings and order, served and filed June 10, 1997, the compensation judge awarded an additional five percent permanency for the spine, but no other permanent partial disability, erroneously concluding the employee had already been paid a 45 percent permanent partial disability for the left upper extremity. The judge also awarded compensation for an additional six hours per week of nursing services, for a total of 30 1/2 hours per week, from and after January 1992. The employee appealed.

In a decision served and filed December 16, 1997, this court noted that, due to the erroneous belief that a higher level of compensation had been paid, the compensation judge failed to make specific findings regarding the claim for additional permanency. We, accordingly, remanded the matter for determination of the employee's current upper extremity permanent partial disability. The court affirmed the compensation judge's denial of the employee's claim for 24-hour per day nursing care, but concluded the compensation judge had misapplied the law and may have improperly excluded consideration of various personal services and household tasks

[1] All permanent partial disability ratings in this case have been "member" ratings, consistent with the permanency schedule in effect on the date of injury, October 8, 1975, rather than the "whole body" ratings used since 1984.

from his award of compensation. We, accordingly, remanded the matter for reconsideration of the employee's claim for nursing services under Minn. Stat. § 176.135, subd. 1(b).

The case was heard on remand by Compensation Judge Erickson on August 6, 1998. At the outset of the hearing, the parties agreed to expand the issues to include a claim for nursing services from the date of the previous hearing, April 15, 1997, through the date of the hearing on remand. In a findings and order, served and filed November 4, 1998, the compensation judge found the employee had sustained a 45 percent permanent partial disability of the left upper extremity and a 30 percent permanent partial disability of the right upper extremity. The judge further determined the employee was entitled to compensation for 28 1/2 hours per week of nursing services provided by his spouse through June 4, 1998, and 25 hours per week thereafter. The employee appeals.

STANDARD OF REVIEW

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 (1992). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

Upper Extremity Permanent Partial Disability

The employee contends that the compensation judge's award of permanent partial disability on remand is arbitrary, capricious and without substantial evidentiary support. He asserts the compensation judge accepted the ratings of Dr. Leff in his previous opinion. Since Dr. Leff's previous ratings were incomplete and did not include disability ratings for the hands, the employee argues it was "absurd" for the judge to award the same permanency ratings "found" at the previous hearing, that is, 45 percent for the left upper extremity and 30 percent for the right upper extremity.

In fact, this court remanded the matter because the compensation judge "made no findings regarding the actual level of PPD sustained" and had failed to "discuss, adopt or reject any of the medical opinions." Sorcan v. USX Corp., 58 W.C.D. 159, 163-64 (W.C.C.A. 1997). On remand, the employee re-submitted Dr. Duane Person's report rating a 70 percent disability to the left upper extremity and 65 percent to the right, along with a new report from Dr. Leff rating a 75 percent permanent partial disability bilaterally. The self-insured employer submitted a new

report by Dr. Litman, again providing a rating of 45 percent to the left arm and 30 percent to the right arm.[2]

For injuries occurring in 1975, permanent partial disability is payable based on a percentage of the total loss of the member. Minn. Stat. § 176.101, subd. 3 (1975). The statute prescribes no specific rule or method for determining the extent of permanent partial disability, leaving the ultimate determination to the judgment of the trier of fact. "[W]here there is a conflict in the testimony of medical experts the conflict must in the final analysis be resolved by the [compensation judge] as the trier of fact." Hosking v. Metropolitan House Movers Corp., 272 Minn. 390, 138 N.W.2d 404, 23 W.C.D. 673 (1965); see also Ananjew v. Delmark Co., 31 W.C.D. 564 (W.C.C.A. 1979).

On remand, the compensation judge observed the employee, read the various reports, and accepted Dr. Litman's rating of 45 percent to the left upper extremity and 30 percent of the right upper extremity, concluding this rating most accurately reflected the employee's functional loss. The compensation judge rejected the 75 percent rating of Dr. Leff, finding it inconsistent with Dr. Leff's previous ratings. The compensation judge was well within his discretion in so doing, and we must affirm.

Nursing Services

The employee argues the award of compensation for 28 1/2 hours of nursing services per week through June 4, 1998 and 25 hours a week thereafter is clearly erroneous on the facts. He further asserts the compensation judge again found household tasks non-compensable, contrary to this court's previous opinion, and seeks an increase in the number of hours per week for which nursing services are paid.

Pursuant to Minn. Stat. § 176.135, subd. 1(b), "[t]he employer shall pay for the reasonable value of nursing services provided by a member of the employee's family in cases of permanent total disability."[3] While recognizing that "nursing services," as used in subdivision

[2] The employer and insurer paid the employee an additional 15 percent permanency for the left upper extremity following the compensation judge's June 10, 1997 Findings and Order, bringing the total permanency paid to 45 percent for the left upper extremity and 30 percent for the right upper extremity.

[3] Prior to 1992, this sentence was included within Minn. Stat. § 176.135, subd. **1(a)**. Effective October 1, 1992, the sentence was removed from subdivision 1(a) and a new subdivision **1(b)** was created containing solely the provision for nursing services provided by a family member in cases of permanent total disability. Laws of Minn. 1992, ch. 510, art. 4, § 9. The supreme court's decision in Ross v. Northern States Power Co., 442 N.W.2d 296, 42 W.C.D. 7 (Minn. 1989) was issued prior to this change, as was this court's decision in Greenwald v. City of Robbinsdale, 47 W.C.D. 155 (W.C.C.A. 1992). Thus, references to subdivision 1(a) in these cases includes *both* permanent total and non-permanent total nursing claims.

1(b) "are broader and go beyond those services reimbursable" in other circumstances, see Ross v. Northern States Power Co., 442 N.W.2d 296, 299, 42 W.C.D. 7, 13 (Minn. 1989), the compensation judge, nevertheless, imposed a standard for nursing services similar to that allowed in non-permanent total disability cases, that is, medically-related nursing care to cure or relieve from the effects of the employee's work injury. Ross, at 298-99, 42 W.C.D. 11, 13 (claim for nursing services provided by a family member in a non-permanent total disability case under what is now subdivision 1(a).)[4] (Mem. at 10-11.)

To establish compensability of nursing services provided by a family member in a permanent total disability case, the employee must show (1) the services for which compensation is sought fall within the "broader type of general nursing care" reimbursable under subdivision 1(b); (2) the services are reasonable and necessary in the context of the employee's needs and limitations and the time and circumstances in which the services are provided; and (3) the reasonable value of the compensable services. See Lundeen v. Horizon Fabricators, Inc., 56 W.C.D. 336 (W.C.C.A. 1997); Greenwald v. City of Robbinsdale, 47 W.C.D. 155 (W.C.C.A. 1992).

The employee in this case was 78 years old at the time of the hearing on remand. His wife, Marjorie Sorcan, was 68 years old. The employee has been permanently and totally disabled since April 1976. He was found to have increased permanency in 1987 and in 1997, and now has a 45 percent permanent partial disability of his left upper extremity, a 30 percent permanent partial disability of his right upper extremity, a 35 percent permanency of the spine, and a 50 percent permanency to both legs.[5] In November 1987, the employee was awarded compensation for 24 1/2 hours a week of nursing services provided by his wife from and after April 1976. On August 30, 1995, the employee filed a claim petition seeking increased compensation for nursing services, alleging he has required additional assistance since at least January 1, 1992.

The medical records clearly document deterioration of the employee's condition between November 1987 and August 6, 1998, the date of the hearing on remand. On July 20,

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[4] The compensation judge concluded that the clearest statement of the law was that expressed in Meyer v. The Travel Co., 49 W.C.D. 583 (W.C.C.A. 1993). The employee's claim in Meyer, however, did not involve a claim under Minn. Stat. § 176.135, subd. 1(b), but was brought instead under subdivision 1(a), as it existed post-October 1, 1992. Although the employee in Meyer was permanently and totally disabled, there was no claim for services provided by a *family member*. Instead, the employee sought reimbursement for housekeeping and yard work services prescribed by her doctor and for which she paid a housekeeper and high school student who did the work.

[5] The employee underwent a cervical spine fusion on May 19, 1998. Potential additional permanency for the cervical spine had not been assessed at the time of the hearing on remand.

1992, Dr. Dougan, one of the employee's treating rheumatologists,[6] noted the employee "seems to be losing ground this year." Both Dr. Dougan and Dr. Counihan noted the employee was having significant difficulty walking, and a motorized scooter was authorized. (Ex. E, 7/20/92, 7/21/92.)

On August 22, 1994, Dr. Dougan commented "[t]he extent of his disability is quite obvious even to the untrained observer in watching his difficult and painful ambulatory movements and the way he uses his arms and hands." (Ex. B.) On November 6, 1995, the doctor noted more rheumatic discomfort, despite the fact that the employee's synovitis was generally less. Dr. Dougan observed it had been ten months since he had seen the employee, "long enough to be able to appreciate the occurrence of the further deterioration in his overall functional capacity. The deformities of the hands have increased (the thumbs are virtually useless); he needs help to get out of a solid chair from a decent height; he ambulates with considerable deliberation and obvious difficulty." (Ex. 7.)

Although the employee's active synovitis presently appears to be fairly well controlled with the use of Imuran, aspirin and prednisone, the treatment records reflect periodic flareups with considerable pain and discomfort. On April 28, 1997, Dr. Dougan observed the employee seemed to have embarked on a smoother and less symptomatic course of arthritis control with medication changes made the previous month. He noted the joints were showing trace synovitis or less, with the exception of the left knee and ankles. "The digital deformities, however, have increased." (Ex. E; Ex. 15.)

In April 1998, the employee was seen by Dr. Konasiweicz, an orthopedic surgeon, as he had lost significant neck range of motion, and had extreme difficulty holding his head up. The employee was admitted to St. Luke's Hospital on May 19, 1998 and a cervical fusion was performed. The employee remained in the hospital through June 12, 1998, in part due to a wound infection following the surgery. While in the hospital, the employee received physical therapy and occupational therapy to return the employee to his previous functional level before returning home.

On remand, the compensation judge found "it is reasonable for Mrs. Sorcan to spend an average of 28.5 hours per week providing the employee with services that could be provided by an L.P.N. or home health aide." (Finding 22.) In so doing, the compensation judge apparently accepted, in large part, the testimony of the self-insured employer's home health care expert, Wende Morrell, along with the deposition testimony of the independent medical examiner, Dr. Litman.

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[6] The employee was treated by Dr. Dougan, Arthritis and Rheumatology Consults, in Minneapolis, Minnesota, and Dr. Counihan at the Duluth Clinic from 1992 through 1994. Dr. Counihan died, and in 1995, the employee began treating with Dr. Leff at the Duluth Clinic as well as continuing care with Dr. Dougan.

LPN Care

The compensation judge determined that two tasks performed by Mrs. Sorcan, administration of medication and colostomy irrigation, constitutes "medical treatment under Minn. Stat. § 176.135, subd. 1(a)."[7] The judge further found only 1/2 hour per week reasonable and necessary for medication administration, since "the employee retains the ability to administer his own medications." (Finding 13.) We do not agree. Since April 1976, the employee's wife has been compensated, at an LPN rate, for administering medications, in accordance with Judge Bonovetz's 1987 decision finding such assistance reasonable and necessary. (See Findings & Order, Nov. 17, 1987.) The employee now has additional medications and requires daily eye drops. The self-insured employer's expert opined that 20 minutes to 1/2 hour per day was reasonable and necessary for set up and administration of the employee's medications. (Tr. Apr. 15, 1997 at 191; Tr. Aug. 6, 1998 at 112.)

The employee's wife takes the pills from the containers and places them next to the employee's plate at meal times. The employee then takes the pills by himself, although sometimes he drops them. (Dep. July 10, 1996 at 28.) The self-insured employer's expert, Dr. Litman, stated the employee can take his water and pills by himself, which he does, but suggested that Mrs. Sorcan could "place in front of the employee or on his night table" the pills for the day or for the week "if she wants." (Dep. Aug. 4, 1998 at 18-19.) There is nothing unreasonable, however, in Mrs. Sorcan setting up the pills for the employee to take at each meal, especially in view of the fact that she has been doing so, and has been compensated for it, since 1976. We, therefore, modify the compensation judge's decision to include an additional 3 hours a week, at the LPN rate, for medication set up and administration.

The compensation judge also found 3 1/2 hours a week reasonable and necessary for colostomy irrigation at the LPN rate, through June 4, 1998. Both Mrs. Sorcan and Wende Morrell testified that the colostomy irrigation procedure took about one hour of Mrs. Sorcan's time daily. However, only 1/2 hour involved LPN-type care, thus the award of 3 1/2 hours of LPN care per week. The remaining 3 1/2 hours a week are "home health aide" services. (Tr. Apr. 15, 1997 at 61, 191, 206-07.) While in the hospital, on about June 4, 1998, the employee changed to a different colostomy system, requiring periodic changing of colostomy bags rather than irrigation. Again, both Mrs. Sorcan and Wende Morell testified the new method required about one hour per day. However, the entire procedure now falls under home health aide-type care. (Tr. Aug. 6, 1998 at 48, 106, 112-115.) The compensation judge included changing colostomy bags in the "type of services that may be provided by home health aides," and properly reduced the LPN services by 3 1/2 hours per week. He failed, however, to include the 3 1/2 hours a week now falling within home health aide-type care after June 4, 1998. We accordingly modify the award of "home health aide" services by an additional 3 1/2 hours a week from and after June 4, 1998.

[7] As the employee's claim for "nursing services" was brought pursuant to subdivision 1(b), no separate analysis is required under subdivision 1(a). However, at least in this case, such services would clearly fall within the broader definition of nursing care under subdivision 1(b).

Home Health Aide Care

On remand, the compensation judge included in his findings a comprehensive list of the non-LPN nursing and personal care provided by the employee's spouse, finding the "tasks performed . . . generally constitute the type of services that may be provided by home health aides." (Finding 14.) The list includes virtually all of the "hands on" care claimed by Mrs. Sorcan. The judge concluded, however, that "[n]ot all of the services listed in the preceding paragraph are medically necessary." (Finding 15.)

The compensation judge found the employee and his wife had "decided to follow their own routine" rather than one that is "medically indicated," and "refuse to use adaptive techniques and equipment . . . [or] engage in physical therapy activities and exercises that would increase the employee's ability to function more independently." The judge concluded, therefore, that it was "not medically necessary, or in some cases medically indicated, that Mrs. Sorcan perform all of the activities she performs for the employee." (Finding 15.) The judge failed, however, to make findings stating which tasks, among the many listed, he deemed noncompensable.

We note first that the judge's reliance on Dr. Litman's testimony and the St. Luke's Hospital records to conclude the employee retains the ability to independently cook and prepare meals, do range of motion exercises, and get up and walk around his house and yard, strains credulity. Similarly, there was no evidence of any specific adaptive techniques or equipment - - not already in use by the employee and his spouse - - that would demonstrably increase the employee's independence. Such a conclusion is speculative, at best, on the record. Secondly, the judge concluded that time sheets kept by Mrs. Sorcan for an eight-day period did not represent a typical week because the employee "required more care from Mrs. Sorcan than normally would be necessary." (Finding 20.) Although it is true that the employee had been home from the hospital only a week at that point, the judge's conclusion that the employee required "more care" during this eight-day period is contrary to all evidence submitted. Rather, both Mrs. Sorcan and Wende Morrell testified that Mrs. Sorcan did less than usual, and there were a number of tasks and activities, normally performed by Mrs. Sorcan, that were not included in the time sheets.

At the August 6, 1998 hearing, the self-insured employer's expert, Wende Morrell, testified, based on calculations using Mrs. Sorcan's eight-day time sheets, that the employee's wife provided 24 1/2 hours per week of "nursing services" including both LPN and home health aide activities. She acknowledged, however, that certain services, previously included, were not included in the current calculation solely because Mrs. Sorcan had not performed the activity during the eight days. These included tasks such as complete range of motion exercises, scooter-related activities, clipping nails, full baths or showers, skin treatment and foot care. At the previous hearing on April 15, 1997, Ms. Morrell had opined that the employee's wife provided 3 1/2 hours daily, or 24 1/2 hours per week, of home health aide services. The compensation judge, despite his earlier findings, apparently accepted Ms. Morrell's opinion, concluding Mrs. Sorcan provided the type of services that could be performed by a home health aide a total of 24 1/2 hours

a week. There is substantial support for this conclusion, and we therefore affirm, as modified above.

Housekeeping Tasks

Finally, the compensation judge again refused to consider homemaking tasks, such as bed making, meal preparation, mowing the lawn, shoveling snow, paying bills, doing normal laundry and ironing, and shopping and running errands as compensable activities, concluding they "would not normally be provided by a home health aide." The judge further concluded that such services were not rendered necessary by the employee's disability. (Finding 17.) In our decision remanding this case, the court observed "[i]t is insufficient to merely conclude that certain services are not 'nursing services'." Rather, "[w]here a permanently and totally disabled employee is receiving services and assistance from a family member, the compensation judge must carefully consider whether . . . household tasks may, at some point, become compensable when performed - and performed more frequently - out of necessity." Sorcan at 171-72.

This court has previously observed that "nursing services" under subdivision 1(b) include not only medically-related and personal care services, but also housekeeping and home maintenance services if rendered necessary by the employee's disability. The compensation judge, however, limited compensable services to "medically indicated" care that could be performed by an LPN or home health care aide. We believe this is too narrow a view. In our opinion, the entire gamut of "home health care services" may be considered, including medically-related care, personal care services, homemaking services and chore services.

Here, there is ample evidence of housework performed by the employee's spouse that was "performed or performed more frequently" as a result of the employee's disability. This includes extra laundry, such as the employee's bibs, soiled clothes from accidents and spills, and additional bedding; extra cleaning as a result of accidents and spills, including scrubbing the bathroom and vacuuming; a fourth late-night meal made necessary by the employee's medications; and picking up prescriptions. The self-insured employer's expert, Ms. Morrell, based on her experience as a nursing services consultant, estimated that 30 to 33 hours per week would be appropriate in this case, "if you take the big picture into account." (Tr. Aug. 6, 1998 at 146-49.) We, accordingly, modify the award of compensable nursing services to include an additional 5 1/2 hours a week of home care services. This results in a total of 37 hours a week (just over 5 hours per day), including 7 hours at the LPN rate and 30 hours at the home health care rate through June 4, 1998, and 3 1/2 hours at the LPN and 33 1/2 hours at the home health care rate thereafter.

Reasonable Value of Nursing Services

Finally, the compensation judge, although awarding benefits, found there was "a substantial question presented whether the employee has . . . sustained his burden of proving what activities performed by his wife are medical services rendered necessary by his disability and his burden of proving the amount of time that is reasonable for Mrs. Sorcan to spend on the activities." (Finding 22.) The compensation judge commented that the evidence consisted of "estimates,

guesstimates, and speculation by Mrs. Sorcan," noting the employee submitted time sheet evidence for only one week that was not a typical week.

> In our opinion remanding this case, the court stated,
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> > [W]e do not believe it is realistic to expect the employee or his wife to keep time sheets accounting for every minute of the day. . . . Ms. Morrell could have been asked to provide estimates based on her own education and experience providing and evaluating the need for home health services.

Sorcan at 170. Similarly, in Greenwald, this court noted that "[t]he test is the reasonable value of the services," and affirmed the judge's award of nursing services based on the testimony of the employee's daughters regarding the number of hours worked. "While these hours were not logged or otherwise documented, there is no such requirement in § 176.135, other than that the cost be reasonable." Greenwald at 162. Here, both parties provided the expert opinions of nursing consultants regarding the need for the services and the value of the services, expressed as the number of hours reasonably provided at a rate for a given level of care, along with extensive testimony from the employee and his spouse. This evidence adequately meets the proof required in such cases. We, therefore, affirm, as modified, the award of compensation for increased nursing services provided by the employee's wife to the permanently and totally disabled employee.