

WAYNE WILMES, Employee/Appellant, v. MYRON MILLER CONSTR., INC., and EMPS. INS. OF WAUSAU, Employer-Insurer, and BEHAV. MED. ASSOCS., INC./JOHN K. NASH, Ph.D., and DAVID C. FISHER, Ph.D., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 25, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE; PERMANENT PARTIAL DISABILITY - WEBER RATING. Substantial evidence supports the compensation judge's conclusion that the employee does not have any work-related "organic dysfunction" as is required for a permanent partial disability rating pursuant to Minn. R. 5223.0060, subp. 8D (1987)(brain injury), and the judge did not err in failing to award the employee benefits pursuant to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990) for a psychological condition, where the employee made no such claim to the judge.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: John E. Jansen.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's denial of his claim for permanent partial disability benefits related to his consequential psychological condition. We affirm.

BACKGROUND

On July 26, 1988, the employee sustained a work-related crush injury to his right shoulder while employed as a bridge construction laborer by Myron Miller Construction [the employer]. The employer and its insurer admitted liability for the injury and paid the employee various benefits, including benefits for a 10% whole body impairment. The employee was ultimately unable to return to work in bridge construction and had difficulty obtaining and keeping other employment. At some point he began receiving treatment for depression and other psychological symptoms.

In addition to his 1988 work-related injury, the employee sustained nonwork-

related injuries on November 30, 1990, when he was involved in a head-on collision in a parking lot. There is conflicting evidence as to the nature and extent of the employee's injuries from this accident, but some physicians have concluded that he sustained a traumatic brain injury.

The matter first came on for hearing before a compensation judge on June 30, 1994, at which time the employee was claiming that he had developed a consequential psychological condition as a result of his 1988 work injury. At issue was the compensability of psychotherapy the employee had been receiving from psychologist Mark Orth. The employer and insurer denied liability for the expenses, claiming that the employee's psychological condition was due to a preexisting personality disorder or, in the alternative, to the 1990 motor vehicle accident. The current record contains little testimony as to the circumstances of either the 1988 work incident or the 1990 nonwork-related automobile accident. However, in his August 23, 1994, decision, the compensation judge described the employee's 1988 industrial accident as follows:

The July 26, 1988 industrial accident was a terrifying experience for the employee. Over his objection, he was asked to change a flat tire on a crane being used to construct a bridge. While attempting to carry out this task, his body was pinned between the flatbed and the counterweight. He was able to get free, but only after his left shoulder was crushed. This left him in shock, bleeding, and hurt. His co-workers, including his supervisor, did not come promptly to his assistance, and then when they finally drove him to a nearby town for medical treatment, they left him alone at the facility in Pine River, over 150 miles from home.

With regard to the 1990 automobile accident, the judge wrote, in part, "On November 30, 1990 the employee was driving his Jeep Eagle in a parking lot at Treasure Island Casino when it was hit head on by another vehicle. He suffered injuries to his back, with headaches and a closed head injury." The compensation judge resolved the disputed medical expense claims in the employee's favor, concluding that the employee had developed post-traumatic stress disorder and clinical depression as a consequence of his work-related injury and that the treatment expenses in question were compensable. The employer and insurer did not appeal from this decision.

In June of 1997, the employee filed a claim petition alleging entitlement to permanent partial disability benefits for "at least 30 percent" impairment of the whole body under the applicable permanent partial disability schedules. About four months later, on October 13, 1997, the employer and insurer filed a petition for a determination that the employee was permanently and totally disabled. The parties subsequently stipulated that the employee had been permanently and totally disabled since January 22, 1996, and an award on stipulation to that effect was issued on February 23, 1998. In March of 1998, the employee amended his claim for permanency benefits to benefits for a 65% whole body impairment.

The employee's claim for permanent partial disability benefits related to his psychological condition came on for hearing, before the same compensation judge that had heard

the matter previously, on June 17, 1998.¹ Evidence submitted in connection with the employee's psychological injury included records, reports, and/or test results from numerous health care providers, including Mr. Orth, Linda Marshall, Ronald Berk, Kenneth Perkins, David Fisher, Susan Storti, and John Nash, licensed psychologists; Lawrence Schut, a neurologist; A. V. Anderson, director of the Pain Assessment & Rehabilitation Center Ltd.; Robert Clift, clinical director of the Pilling Pain Clinic; and Andrew Leemhuis, a neurologist and the employer and insurer's independent examiner. These records and reports contain conflicting evidence on a number of underlying issues, including whether, and if so, when, the employee sustained a traumatic brain injury, and whether certain psychometric test results were valid.

In a decision issued on September 10, 1998, the compensation judge concluded in part that the employee was not entitled to additional benefits for permanent partial disability. The employee 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 (1992). 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 Under Minn. R. 5223.0060, Subp. 8D

The permanent partial disability rules at issue in this proceeding read in relevant part as follows:

Subp. 8. Brain injury. Supporting objective evidence of structural injury, neurological deficit, or psychomotor findings is

¹ The employee was also claiming certain medical expenses, which were ultimately awarded and which are not in dispute in this appeal.

required to substantiate the permanent partial disability. Permanent partial disability of the brain is a disability of the whole body as follows:

* * *

D. Emotional disturbances and personality changes must be substantiated by medical observation and by organic dysfunction supported by psychometric testing. Permanent partial disability is a disability of the whole body as follows:

(1) only present under stressful situation such as losing one's job, getting a divorce, or a death in the family, 10 percent;

(2) present at all times but not significantly impairing ability to relate to others, to live with others, or to perform self cares, 30 percent;

(3) present at all times in moderate to severe degree, minimal ability to live with others, some supervision required, 65 percent; or

(4) severe degree of emotional disturbance which, because of danger to self and others, requires continuous supervision, 95 percent.

Minn. R. 5223.0060, subp. 8D (1987). Relying on the opinions of psychologists Marshall and Berk, as well as other records relating to his psychological condition, the employee claimed entitlement to a 65% whole body rating pursuant to subpart 8D(3). The compensation judge denied this claim, finding as follows:

3. The employee's post-traumatic stress disorder and clinical depression are causally related to his work injury (see Findings and Order served and filed August 23, 1994). However, the employee has failed to prove by a preponderance of evidence that he suffered a brain injury concurrent with his admitted work injury on or about July 26, 1988, or that any other emotional or psychological symptoms are causally related to that injury. As a result, the employee is not entitled to any additional permanent partial disability compensation.

In his memorandum, the judge apparently accepted evidence, including opinions by psychologists Nash, Fisher, and Marshall, indicating that the employee exhibits some psychomotor slowing. However, the judge rejected the employee's claim that he had sustained a brain injury in the 1988 work accident, explaining in part as follows:

The Compensation Judge recognizes the possibility that a ratable brain injury could occur in the absence of head trauma. Nevertheless, the employee has failed to prove by a preponderance

of the evidence that his alleged brain injury was causally related to his work injury. According to Dr. Nash, the employee's symptoms are "well beyond what would be expected from a mild reactive depression or as a reaction to pain from an accident"; instead, they are "consistent with mild traumatic brain injury" of the type caused in motor vehicle accidents. . . . Although Dr. Nash opined that the employee may have sustained a brain injury concurrent with his work injury, he admitted that the employee was "unclear regarding what exactly happened to his head" during that injury. . . . It seems much more likely that the employee's alleged brain injury was related to his motor vehicle accident. In any event, the employee has failed to adduce affirmative proof that he suffered a ratable brain injury in the course or scope of his employment.

On appeal, the employee does not contend that the compensation judge erred in concluding that the employee had not sustained a brain injury as a result of his 1988 work-related accident. Rather, the employee claims that a rating under Minn. R. 5223.0060, subp. 8D, is not contingent on the occurrence of brain trauma or injury and that the employee's psychomotor findings satisfy the requirements for a 65% rating under subpart 8D(3). We are not persuaded that the judge erred in denying the employee's claim.

It is true, as the employee points out, that this court has previously held that brain injury is not a condition precedent to a permanent partial disability rating under Minn. R. 5223.0060, subp. 3E, which is applicable to psychotic disorders. See, e.g., Goodwin v. TEK Mechanical, 49 W.C.D. 350 (W.C.C.A. 1993); Brown v. Pueringer Distrib., slip op. (W.C.C.A. July 1, 1998). However, subpart 8E by its terms applies to "psychotic disorders . . . not caused by organic dysfunction." Minn. R. 5223.0060, subp. 8E (emphasis added). In contrast, subpart 8D, the rating category at issue here, expressly requires that the employee have emotional disturbances and personality changes "substantiated by . . . organic dysfunction supported by psychometric testing." Minn. R. 5223.0060, subp. 8D (emphasis added).²

The record contains evidence that may support the conclusion that the employee has psychomotor slowing, but it was not unreasonable for the compensation judge to conclude that such slowing was due to depression, rather than the organic dysfunction specified by the rule.³ Moreover, both Ms. Marshall and Mr. Berk, who indicated that the employee has a ratable impairment under subpart 3D, assumed, in part, that the employee had in fact sustained a traumatic

² The most recent permanency rule covering emotional disturbances and personality changes is expressly inapplicable to "primary psychiatric disturbances." Minn. R. 5223.0360, subp. 7D (1997).

³ And we find no definitive expert opinion in this record indicating that the employee's depression has caused "organic dysfunction."

brain injury in the 1988 work accident.⁴ The compensation judge reasonably rejected this premise, and the employee does not argue otherwise on appeal. Finally, the record also easily supports the compensation judge's apparent conclusion that, if the employee does have the organic dysfunction required by the rule, that dysfunction is causally related to the 1990 motor vehicle accident rather than the 1988 work accident. Mr. Orth indicated that, while he had been treating the employee primarily for psychological symptoms related to the employee's work injury, the employee's post-1990 drop in IQ was due to a "concussion injury" in the car accident "as there is no other explanation." Similarly, Dr. Schut's impression after his January 31, 1992, examination of the employee was "possible closed head injury with post-concussional syndrome" due to the November 1990 accident, and Dr. Anderson indicated that the employee had a 15% impairment due to "closed-head injury suffered in the motor vehicle accident," with neuropsychometric test results consistent with a closed-head injury secondary to trauma and "not the pre-existing post-traumatic stress disorder or learning disability."⁵ Dr. Sorti, too, indicated that the employee was exhibiting "specific neuropsychological symptomatology secondary to the traumatic brain injury" sustained in the motor vehicle accident.

The medical evidence in the case is complex and conflicting. However, whether or not a traumatic brain injury, per se, is always a necessary element for an impairment rating under Minn. R. 5223.0060, subp. 8D, substantial evidence supports the conclusion that the employee does not have the requisite organic dysfunction causally related to his 1988 work injury and that he is therefore not entitled to a permanent partial disability rating under that rule. We therefore affirm the judge's decision to that effect.

Weber Rating

The employee argues, in the alternative, that the compensation judge should have awarded him permanency benefits, for his work-related psychological condition, pursuant to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990). We disagree. That issue was not pled, argued, or otherwise presented to the judge for decision. Therefore, we express no opinion as to the merits of any such claim should the employee choose to assert it in a future proceeding.

⁴ In her February 24, 1998, report, Ms. Marshall indicated that the employee reported losing consciousness in the 1988 accident (which is not borne out by contemporaneous medical records), and she also indicated that the employee was suffering, in part, from dementia due to head trauma. In his May 23, 1997, report, Mr. Berk expressly concluded that some brain injury was attributable to the employee's work accident.

⁵ Several experts indicated that the employee most likely had a learning disorder that preexisted both the work injury and the automobile accident.