

ROGER D. CLAUSEN, Employee/Appellant, v. THE DOTSON CO. and AM. MUT. LIAB. INS. CO./MIGA, Employer-Insurer, and CONT'L MACH., INC., and RELIANCE INS. CO., Employer-Insurer, and D.C. HEY CO. and LIBERTY MUT. INS. CO., Employer-Insurer, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 26, 2000

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Where it was clear that the judge credited the employee's testimony and considered the employee's physical condition, in combination with his age, training, and experience, in determining that the employee, although only forty years old at the time of hearing, was unable to secure anything more than sporadic employment resulting in an insubstantial income, the compensation judge's award of permanent total disability benefits was not clearly erroneous and unsupported by substantial evidence, to the extent that it appeared possibly contested by the pro se employee.

PERMANENT PARTIAL DISABILITY - BACK. Where the judge had a vast array of medical testimony and medical records upon which to rely in making his determination, where the judge's determination was not unreasonable, and absent a specific basis for the employee's appeal, the compensation judge's rating of the pro se employee's permanent partial disability was not clearly erroneous and unsupported by substantial evidence.

APPEALS - SCOPE OF REVIEW. Where issues before the compensation judge did not include the pro se employee's entitlement to an additional award of penalties, his entitlement to damages pursuant to Minn. Stat. § 176.82, his claim that the insurer's license should be revoked, and his contention that his benefits should not be affected by his receipt of Social Security disability benefits or by his counsel's claim for attorney fees, the Workers' Compensation Court of Appeals could not consider the issues on appeal.

Affirmed.

Determined by Pederson, J., Rykken, J., and Johnson, J.
Compensation Judge: Gary P. Mesna

OPINION

WILLIAM R. PEDERSON, Judge

The pro se employee appeals generally from the compensation judge's decision regarding the employee's entitlement to various workers' compensation benefits. We affirm.

BACKGROUND

The essential facts in this case are not in dispute. Roger D. Clausen [the employee] sustained three work-related injuries. On December 17, 1981, he injured his back while employed by The Dotson Company [Dotson]. On that date, the employee was earning a weekly wage of \$298.00, and his employer was insured for workers' compensation liability by American Mutual Liability Insurance Company/Minnesota Insurance Guaranty Association [MIGA]. On November 14, 1991, the employee again injured his back. On that date, he was employed by Continental Machines, Inc. [Continental Machines], and was earning a weekly wage of \$494.85. Continental Machines was insured by Reliance Insurance Company [Reliance].¹ On May 9, 1996, the employee sustained multiple injuries when he was involved in a work-related motor vehicle accident while working for D. C. Hey Company [D. C. Hey]. The employee's weekly wage on May 9, 1996, was \$265.00, and D. C. Hey was insured by Liberty Mutual Insurance Company [Liberty].

At the time of the employee's injuries of May 9, 1996, Continental Machines and Reliance were paying temporary partial disability benefits related to the employee's 1981 and 1991 injuries. In November 1996, Continental Machines and Reliance filed a Notice of Intention to Discontinue [NOID] the employee's temporary partial disability benefits, asserting that the employee had been unemployed since May 9, 1996, and was not entitled to temporary partial disability benefits. On December 19, 1997, this court affirmed a compensation judge's decision that the employee was entitled to a concurrent award of temporary partial disability and temporary total disability benefits pursuant to the Kirchner principles.² On a separate track, Liberty discontinued the employee's temporary total disability benefits on November 17, 1997, based on its claim that the employee had reached maximum medical improvement [MMI] from his 1996 injuries. On July 27, 1998, Continental Machines and Reliance filed another NOID, asserting that the employee was no longer entitled to temporary partial disability benefits in light of the fact that he was unemployed without earnings and had not received wage loss payments since November 18, 1997. Reliance paid temporary partial disability benefits through July 23, 1998. On September 4, 1998, a compensation judge agreed with Reliance that the "Kirchner" doctrine

¹ This matter was previously heard by Compensation Judge Paul V. Rieke on October 18, 1994. In an unappealed Findings and Order issued November 3, 1994, Judge Rieke resolved the issue of the employee's weekly wage at Continental Machines; determined entitlement to temporary total disability benefits between January 9, 1992, and October 2, 1994; awarded benefits for a 13% whole body permanent partial disability relative to the employee's back (3.5% to the injury of December 17, 1981, and 9.5% to the injury of November 14, 1991); ordered payment of the employee's medical expenses, including expenses related to an L4-5 partial hemilaminectomy performed by Dr. Harry Rogers on January 28, 1994; and apportioned liability 25% to MIGA and 75% to Reliance. It is noted that the employee had also injured his back while working for Dotson on September 20, 1979. At Finding 9, Judge Rieke determined that the 1979 injury was temporary in nature and did not contribute to the temporary total disability being claimed or to the employee's permanent partial disability.

² Clausen v. Dotson Co., 58 W.C.D. 153 (W.C.C.A. 1997), *summarily aff'd* (Minn. Apr. 1, 1998), citing Kirchner v. County of Anoka, 339 N.W.2d 908, 36 W.C.D. 335 (Minn. 1983), appeal after remand, 410 N.W.2d 825, 40 W.C.D. 197 (Minn. 1987).

was no longer applicable in light of Liberty's discontinuance of temporary total disability benefits on November 17, 1997.

On October 2, 1998, the employee filed an Objection to the Order of September 4, 1998, and on October 23, 1998, he filed a Claim Petition alleging entitlement to temporary total or permanent total disability benefits continuing from November 17, 1997, as well as to compensation pursuant to various permanent partial disability ratings related to his injuries of May 9, 1996. The issues were subsequently consolidated by order dated January 26, 1999.

The employee's claims came on for hearing before a compensation judge on September 21 and 22, 1999. Evidence introduced at the hearing included live testimony from the employee, his parents, and rehabilitation counselors Albert McCaffrey and Jan Lowe, deposition testimony from psychologist Dr. J. Patrick Cronin, psychiatrist Dr. John M. Rauenhorst, neuropsychologist Dr. Steven Morgan, and orthopedists Dr. Michael Davis and Dr. Arnulf Svendsen, as well as the employee's voluminous medical records. At the hearing, the parties agreed that the issues to be resolved by the compensation judge were as follows: (1) whether the employee was entitled to permanent total disability benefits; (2) alternatively, whether the employee was entitled to temporary total disability benefits; (3) the nature and extent of the claimed permanent partial disability; (4) whether the insurers were entitled to discontinue benefits; (5) whether the disability and benefits claimed by the employee were causally related to one or more of the work injuries; (6) apportionment of liability amongst the employers and insurers; (7) whether the employee had achieved MMI; (8) whether the employee had made a diligent search for employment or had withdrawn from the labor market; and (9) whether the 1996 injury was controlling for purposes of supplementary benefits.

In his Findings and Order served December 6, 1999, the compensation judge found in favor of the employee and awarded the claimed permanent total disability benefits continuing from November 17, 1997, the date on which total disability benefits had been discontinued by Liberty. The judge also determined that the employee was entitled to compensation for a 28.83% permanent partial disability to the body as a whole as a result of the injuries he sustained on May 9, 1996.³ The judge apportioned liability for the permanent total disability benefits as follows: 5% to Dotson/MIGA; 15% to Continental Machines/Reliance; and 80% to D. C. Hey/Liberty. The employee has appealed.

DECISION

When an appeal is taken from a compensation judge's factual findings, this court's review on appeal is limited to a determination of whether the compensation judge's findings and

³ Payments made by Liberty for the May 9, 1996, injuries are also subject to a Third-Party Order filed March 31, 1997. According to a third-party worksheet attached to the Order, proceeds from the employee's third-party claim provided a recovery to the employee and employer and allowed a future credit to the employer. The judge determined that D. C. Hey and Liberty were entitled to reduce their liability for permanent total disability benefits and permanent partial disability benefits by any remaining third-party credit determined in the Third-Party Order.

order are “clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 176.421, subd. 1(3) (1992). If the judge’s factual determinations are adequately supported by substantial evidence and are not clearly erroneous, we must affirm. This court is not a finder of fact, and on appeal we do not “retry” factual issues that were before the lower court; thus it is irrelevant whether conclusions different from those reached by the compensation judge could be reached based on the same evidence. Substantial evidence supports the judge’s findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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.

We have carefully reviewed the record in the context of the issues presented to the compensation judge. The most significant issue presented to the judge was whether the employee was entitled to permanent total disability benefits. At the hearing, the employers and insurers argued that the employee was not permanently and totally disabled. The court determined otherwise. It is clear that the judge credited the employee’s testimony and considered the employee’s physical condition, in combination with his age, training, and experience, in determining that the employee, although only forty years old at the time of hearing, was unable to secure anything more than sporadic employment resulting in an insubstantial income, and so was entitled to permanent total disability compensation. The judge outlined his findings with respect to the employee’s numerous injuries, noting in his memorandum that the employee had considerably more problems with chronic pain following the 1996 injury, “which is understandable considering the numerous significant injuries and residuals that he has had to deal with since the 1996 work injury.” To the extent that it may be here at issue,⁴ the judge’s determination that the employee is permanently and totally disabled is supported by substantial evidence and therefore is affirmed.

The other benefit issue presented to the compensation judge was the nature and extent of the employee’s permanent partial disability. In his Notice of Appeal, the employee does not specify a particular order, finding of fact, or conclusion of law that he contends is unsupported by substantial evidence. See Minn. Stat. § 176.421, subd. 3. We cannot determine the basis for any challenge to the judge’s permanent partial disability determinations. As trier of fact, the compensation judge was responsible for determining the degree of disability after considering all evidence and relevant legal factors in the case. See Erickson by Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 43, 35 W.C.D. 523, 528 (Minn. 1983). A compensation judge’s finding regarding a rating of permanent partial disability is one of ultimate fact and must be affirmed if it is supported by substantial evidence. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987). In this case, the compensation judge had a vast array of medical

⁴ The employee’s appeal in this regard is ambiguous.

testimony and medical records upon which to rely in rating the employee's permanent partial disability. It is not the role of the reviewing court to make its own evaluation of the credibility or probative value of conflicting testimony or to choose among possible inferences different from those drawn by the compensation judge. Krotzer v. Browning-Ferris/Woodlake Sanitation, 451 N.W.2d 509, 43 W.C.D. 254 (Minn. 1990). "The point is not whether [the reviewing court] might have viewed the evidence differently, but whether the findings of the compensation judge are supported by evidence that a reasonable mind might accept as adequate." Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988). Absent a specific basis for the employee's appeal from the judge's permanent partial disability determinations, we are simply left to analyze whether the judge's findings are "clearly erroneous" and "unsupported by substantial evidence." Because the conclusions of the compensation judge are not unreasonable, we affirm the judge's determination as to permanent partial disability. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).

Although the issues were not presented for determination by the trial judge, the employee contends on appeal that he is entitled to an additional award of penalties, that he is entitled to damages pursuant to Minn. Stat. § 176.82, and that the insurer's license should be revoked. He also contends that his benefits should not be affected by his receipt of social security disability benefits or by his counsel's claim for attorney fees. On appeal, this court may not consider matters not contained within the record before the compensation judge. Minn. Stat. § 176.421, subd. 6; Gollop v. Gollop, 389 N.W.2d 202, 203, 38 W.C.D. 757, 758 (Minn. 1986). As these latter issues now raised on appeal by the employee were not presented to the compensation judge for consideration, they may not be addressed by this court. Id.

We conclude that the Findings and Order of the compensation judge are supported by substantial evidence, and therefore we affirm them in all respects.