

KEVIN FRY, Employee/Cross-Appellant, v. TWIN CITY CONCRETE PRODS. and ST. PAUL FIRE & MARINE INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 29, 2000

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - COMBINED RATINGS. Where the employee had a two-level cervical fusion with a poor result, including continuing pain and numbness in one arm, the compensation judge was not permitted to stack the ratings for a two-level fusion (Minn. R. 5223.0070, subp. 2D - 16.5%) and for two-level disc surgery with a poor result (Minn. R. 5223.0070, subp. 2B(2)(c) and 2B(5) - 18%). Since either rating was supported by medical evidence, the employee should have been awarded an 18% rating.

Reversed.

Determined by Wheeler, C.J., Rykken, J., and Pederson, J.
Compensation Judge: James R. Otto

OPINION

STEVEN D. WHEELER, Judge

The employer and its insurer appeal from the compensation judge's award of a permanent partial disability rating of 31.53% of the body as a whole as a result of cervical injuries sustained on July 14, 1988, and March 3, 1993. The employee cross appeals any implication in the compensation judge's decision that the employee is precluded from making a claim for permanent partial disability solely to his left thumb and left shoulder, and also appeals the application of the multiple-injury rule under Minn. Stat. § 176.105. We modify the compensation judge's decision to award the employee a total of 18% permanent partial disability of the whole body, we find that the compensation judge made no findings with respect to the employee's permanent partial disability to his left thumb and left shoulder, and we find it not necessary to rule on the issue of the application of Minn. Stat. § 176.105.

BACKGROUND

The employee sustained admitted injuries to his left thumb and shoulder and his neck on two separate occasions while working for the employer, Twin City Concrete Products. On July 14, 1988, the employee sustained a crushing and laceration injury to his left thumb and nerve injury as a result of disc injuries at spinal levels C5-6 and C6-7. (10/7/98 Findings and Order, Finding 1; 6/5/00 Stipulation for Settlement, ¶ II.) On March 3, 1993, the employee sustained a permanent aggravation of his C5-6 and C6-7 disc injury. (10/7/98 Findings and Order, Finding 2.) On October 8, 1997, the employee sustained a temporary aggravation of his cervical

injuries. At the time of the 1993 injury, the employee had a weekly wage of \$588.80 and was thirty-four years of age.

In the latter part of 1997, the employee was referred to Dr. Paul D. Hartleben, an orthopedic surgeon. In his examination of November 11, 1997, Dr. Hartleben noted that the employee was complaining of left neck pain and pain radiating into his left arm and left thumb. The employee gave a history of 1988 and 1993 injuries and continued complaints of similar symptoms since those dates. Dr. Hartleben noted that in 1993 the employee had an MRI which indicated he had degenerative disc disease at C5-6 and C6-7 which caused broad ridging central canal stenosis, as well as foraminal stenosis. He ordered a cervical myelogram and a post-myelogram CT scan of the cervical spine. These tests were performed on December 1, 1997, and confirmed that the employee had advanced cervical disc degeneration at C5-6 and C6-7, with neural impingement at both levels. In his report of December 11, 1997, Dr. Hartleben recommended that the employee undergo “anterior C5-6 and 6-7 discectomy and iliac grafting with anterior cervical plating” surgery.

The employer and insurer refused to approve the surgery and the employee filed a medical request on March 11, 1998. In a decision served and filed on October 7, 1998, the compensation judge determined that the employee’s current condition was causally related to the admitted work injuries and that the surgery proposed by Dr. Hartleben was reasonable and necessary. Two-level fusion surgery was performed on the employee by Dr. Hartelben on November 3, 1998. Thereafter the employee was paid temporary total disability benefits from November 3, 1998, through January 3, 1999, and paid permanent partial disability for a 16.5% whole body rating.

On March 8, 2000, Dr. Hartleben issued a healthcare provider report in which he indicated that the employee had a permanent partial disability rating for his cervical spine totaling 34.5%. This rating consisted of a 13% rating pursuant to Minn. R. 5223.0070, subp. 2B(2)(c), plus a 5% rating pursuant to Minn. R. 5223.0070, subp. 2B(5), an 11.5% rating for a one-level fusion pursuant to Minn. R. 5223.0070, subp. 2D, and a 5% rating for a fusion at an additional level under the same rule.

On April 5, 2000, the employee filed a claim petition alleging entitlement to a 34.5% permanent partial disability rating as a result of “C5-6 and C7 herniations with subsequent two-level fusion.” On April 12, 2000, the employer and insurer filed their answer indicating that the employee’s injury was only equivalent to a 16.5% PPD rating, which had previously been paid to the employee. On June 5, 2000, the issue of the amount of permanent partial disability which should be attributed to the employee’s cervical spine injuries was heard by a compensation judge at the Office of Administrative Hearings. In his decision issued June 16, 2000, the compensation judge determined that the employee had a 31.53% permanent partial disability of the body as a whole as a result of the application of Minn. Stat. § 176.105, multiple-injury rule, applied to the ratings cited by Dr. Hartleben. The employer and insurer appeal from the award of permanent partial disability in excess of 16.5% of the whole body related to the employee’s cervical spine injury. The employee appeals from the application of the multiple-injury formula and from any

implication that the compensation judge's findings terminate the employee's ability to make a separate claim for permanent partial disability related solely to the employee's left thumb and left shoulder injuries.

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

In stating the issue to be resolved at the June 5, 2000 hearing, the compensation judge indicated that it was as follows: "The extent of permanent partial disability sustained by Mr. Fry as a result of his personal injuries of July 14, 1988 and March 3, 1993." In resolving that issue, the compensation judge makes the following specific findings:

7. The employer and insurer voluntarily paid impairment [c]ompensation benefits to Mr. Fry based solely upon Minnesota Rule 5223.0070, subp. 2D, a rule that did not take into consideration Mr. Fry's functional loss of use of, or impairment to, his left arm and his left thumb.
8. The payment of permanent partial disability based solely on Minnesota Rule 5223.0070, subd. 2D, does not adequately or fairly represent Mr. Fry's total disability that causes functional loss of use or impairments of his left arm and left thumb in addition to his functional loss of use, or impairment of, his cervical back.
9. A rating based solely upon Mr. Fry's two-level fusion reflects the correct rating of permanent partial disability

based on Mr. Fry's functional loss of use of his cervical back **only**.¹

10. In addition to the permanent partial disability impairment benefits paid to Mr. Fry pursuant to Minnesota Rule 5223.007 [sic], subp. 2D, Mr. Fry is entitled to receive additional benefits based upon Minnesota Rule 5223.0070, subp. 2B, 2C, and Minn. Rule 5223.0070, subp. 2B(2)(5), subject to the A + B (1-A) formula required by Minn. Stat. § 176.105.
11. Mr. Fry is entitled to receive total impairment benefits for permanent partial disability equal to 31.53 percent of the body as a whole, less benefits heretofore paid, and less attorney fees as provided for below; and the payment of impairment benefits for 31.53 percent of the body as a whole fairly and adequately compensates him for the functional loss of use or impairment of his cervical back, his left arm, and his left thumb.

In his memorandum, the compensation judge made the following comments explaining his decision:

Mr. Kevin Fry's testimony has been received as highly credible. He has experienced a poor result from the fusion discectomy and two-level fusion surgery that he underwent on or about November 3, 1998. He has functional loss of use of his left arm including his left thumb in addition to functional loss of use of his cervical back. Mr. Fry's treating doctors decided that the most appropriate rating for evaluating Mr. Fry's total permanency requires the use of two schedules - - Schedule 5223.6070, Subp. 2D and Schedule 5223.0070, subp. 2B(2)(c) and (5) which reflects his functional loss of use for surgery with poor surgical results such as persistent or increased symptoms with neck motions or lifting and major restrictions on daily living and work activities because of neck and arm pain with an additional 5 percent added pursuant to subp. (5).

Minn. Rule 5223.0070, subp. 2D, that refers to a fusion with or without laminectomy presumes a good result. The rating is solely for loss of functional use of the cervical neck and body movement. This schedule alone does not reflect the total functional loss that

¹ This finding was not cited as appealed by either party in the notice of appeal or cross-appeal.

Mr. Fry has experienced due to significant and substantial pain in his left arm and left thumb. To fairly compensate Mr. Fry for his personal injuries of July 14, 1988 and March 3, 1993, it appears most appropriate to rate his disability under the combined schedules used above. In this connection, see James B. Dixon v. Twin City Commercial Flooring, decided by the Workers' Compensation Court of Appeals on February 15, 1995, Minnesota Workers' Compensation Decision Vol. 52, pg. 432. Also see Robert D. Weber v. City of Inver Grove Heights, Supreme Court, November 9, 1990, 43 W.C.D. 474.

On appeal, the employer and its insurer contend that what the compensation judge has done in this case is to improperly "stack" two separate ratings under the disability schedule for cervical spine injuries found in Minn. R. 5223.0070. They further argue that only one rating, that found in Minn. R. 5223.0070, subp. 2D, applies to the employee's condition and entitles him to a 16.5% whole body rating for a two-level fusion. They point out that in unappealed Finding 9, the compensation judge specifically found the two-level fusion rating reflects "the correct rating of permanent partial disability" for "functional loss of use of his cervical back **only**." Since the parties agree that the only issue before the compensation judge was the extent of the employee's cervical injuries, the employer and insurer contend that unappealed Finding 9 resolves the issue completely. They argue that, based on the preamble to Minn. R. 5223.0070, subp. 2, the employee's continued complaints of left arm and left thumb pain and numbness are covered by the phrase "the spine ratings are inclusive of arm symptoms." They also contend that a rating pursuant to the Weber decision would be inappropriate because this is not a case which involves a condition that is not specifically covered by the disability schedule. In the alternative, they argue that even if the rating in Minn. R. 5223.0070, subp. 2D, is insufficient to cover the employee's condition, it is clearly erroneous to add two additional ratings to the 2D rating to take into consideration the manifestations of the employee's cervical injuries in his left arm and thumb.

The provisions of the Minnesota permanent partial disability schedule being cited by the parties in this matter are set forth as follows:

5223.0070 MUSCULOSKELETAL SCHEDULE; BACK

* * *

Subp. 2. **Cervical spine.** The spine rating is inclusive of arm symptoms except for gross motor weakness; sensory loss; and bladder, bowel, or sexual dysfunction. Bladder, bowel, or sexual dysfunction must be rated as provided in part 5223.0060, subpart 7. Permanent partial disability of the cervical spine is a disability of the whole body as follows:

* * *

B. Herniated intervertebral disc, single vertebral level:

* * *

(2) Condition treated by surgery:

(a) Surgery with excellent results such as mild neck pain, no arm pain, and no neurologic deficit, 9 percent.

(b) Surgery with average results such as mild increase in symptoms with neck motion or lifting, and mild to moderate restrictions of activities related to neck and arm pain, 11 percent.

(c) Surgery with poor surgical results such as persistent or increased symptoms with neck motion or lifting, and major restriction of activities because of neck and arm pain, 13 percent.

* * *

(5) Second herniated disc at adjacent level treated concurrently, add five percent to subitem (1) or (2).

* * *

D. Fusion of a single vertebral level with or without a laminectomy, 11.5 percent. Add five percent for each additional vertebral level.

The compensation judge's decision is less than clear. In Finding 9, he states that the employee's permanent cervical injury is limited to a rating for a two-level fusion under Minn. R. 5223.070, subp. 2D. In Finding 8, however, he states this rating does not "adequately or fairly represent" the employee's "total disability that causes functional loss of use or impairments of his left arm and left thumb" This latter finding suggested to the parties that the compensation judge was making a permanent partial disability finding related to permanent injury to the employee's left arm and thumb, an issue both parties agree was not presented to him.

We think a better interpretation of the compensation judge's decision is that he felt the employee had a two-level cervical fusion but had a poor result which caused him functional loss not only in the cervical spine structures but also functional loss in his left arm and thumb, in the nature of pain and numbness emanating from the cervical injury. For the cervical spine structural loss (the two-level fusion), he awarded 16.5% under subpart 2D. For the left arm and thumb pain and numbness, caused by the disc degeneration and nerve impingement in the cervical spine, he awarded an additional 18% permanency under Minn. R. 5223.0070, subp. 2B(2)(c) (13%), and 2B(5) (5%). We agree with the employer and insurer that this constitutes an improper stacking of two ratings to cover a single condition.

We would not have criticized the compensation judge if he had awarded a permanent partial disability rating of 18% under 2B(2)(c) and 2B(5) since there is evidence to support a finding that the employee had herniated discs treated by surgery at multiple levels with a poor result. That surgery also could have been rated under 2D, but the employee is not entitled to both ratings for the single surgery. This is especially true because the preamble to Rule 5223.0070, subp. 2, specifically states that the ratings in the section are inclusive of arm symptoms. Therefore, it would be improper to add additional permanency simply because the employee had symptoms of left arm pain and numbness after the fusion surgery.

We recognize that the compensation judge felt that the employee was entitled to a rating of more permanent partial disability than provided by the two-level fusion rating. Because

he also found the employee entitled to 18% under Minn. R. 5223.0070, subp. 2B(2)(c), and 2B(5), we vacate the lesser of these two ratings and affirm the rating of 18%. The employer and insurer shall pay an additional 1.5% permanent partial disability benefit to the employee, less contingency fees which shall be paid to the employee's attorney.²

Thumb and Left Arm

The parties agree that the compensation judge was not presented with an issue concerning a permanent partial disability rating for a separate injury to the employee's left arm and thumb, not associated with any effects on these body parts caused by the employee's cervical injuries. We do not interpret the compensation judge's decision to make any findings concerning an injury to the employee's left arm and thumb. The ratings used by the compensation judge were limited to Minn. R. 5223.0070, subp. 2, for cervical injuries. The employee is free to bring a claim for injuries to his left thumb and arm that are not related to his cervical injuries. Any symptoms the employee may have in his arm and thumb which are caused by his cervical injuries, however, are included in the ratings found by the compensation judge and affirmed above.

Multiple Injury Formula

The employee's arguments against the application of the multiple injury formula in Minn. Stat. § 176.105 were made in the context of the compensation judge's award of multiple ratings under Minn. R. 5223.0070, subp. 2B(2)(c), 2B(5) and 2D. Since we have found that the employee's ratings should be under 2B(2)(c) and 2B(5), and that the formula does not apply, we need not address the employee's arguments.

² We agree that a Weber rating is not appropriate and that the Dixon decision is distinguishable because in Dixon each condition resulted in distinct functional loss, whereas in this case the functional loss found by the compensation judge involved arm symptoms which were specifically covered by the surgery ratings.