

ROBERT L. FINN, Employee/Appellant, vs. HOMECREST INDUS., INC. and STATE FUND MUT. INS. CO., Employer-Insurer and TEAMSTERS LOCAL 346 HEALTH AND WELFARE FUND and TRI CNTY. HOSPS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS  
AUGUST 16, 2001

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY SCHEDULE - Where the employee's hernia condition was specifically rated by the schedules, the judge erred in awarded the employee benefits for an additional 15% rating pursuant to Weber v. Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990).

PERMANENT TOTAL DISABILITY - The compensation judge properly concluded that the employee had completed grade 12 within the meaning of Minn. Stat. § 176.101, subd. 5(2)(c), despite the employee's testimony that he is in fact functionally illiterate.

Reversed in part and vacated in part.

Determined by: Johnson, J., Wilson, J., and Wheeler, C.J.  
Compensation Judge: Harold W. Schultz, II

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal from the compensation judge's award of benefits for a 15 % whole body disability under Minn. Stat. § 176.101, subd. 1(c),<sup>1</sup> resulting from three surgical procedures for an abdominal hernia. The employee cross-appeals from the compensation judge's finding that the employee completed grade 12 within the meaning of Minn. Stat. § 176.101, subd. 5(c). We reverse the 15 % permanent partial disability award and affirm the threshold finding under Minn. Stat. § 176.101, subd. 5(c). The employee also contends the compensation judge erred by failing to make findings regarding his nonwork-related permanent partial disability. The employee's nonwork-related permanency claims may be reasserted in a future proceeding.

BACKGROUND

Robert L. Finn, the employee, sustained a personal injury on March 3, 1999, while working for Homecrest Industries, Inc., the employer, insured by State Fund Mutual Insurance

---

<sup>1</sup>A rating under this statute is commonly referred to as a Weber rating. See Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990).

Companies. The employee went to the Wadena Medical Center on March 4, 1999, and saw Dr. Thomas Van Bruggen. The doctor recorded that the employee had been “lifting a large pallet jack and noticed some abdominal pain and a mass in the periumbilical region.” Dr. Van Bruggen diagnosed an upper abdominal wall ventral incisional hernia, which he repaired on March 10, 1999. The employee did not improve and was again hospitalized on March 17, 1999. Dr. Van Bruggen performed a second surgery for a “ventral incisional hernia repairs with post-operative ileus.”<sup>2</sup>

Dr. Gary Paulson at the Alexandria Clinic examined the employee on June 28, 1999. The doctor diagnosed abdominal pain and recurrent ventral hernias, which he did not feel were related, and prescribed Prilosec for the abdominal pain. The employee returned on July 7, 1999, with continued complaints of abdominal pain with bulging. The doctor’s diagnosis remained ventral hernia, recurrent. On August 24, 1999, Dr. Paulson noted the ventral hernia was getting bigger but the employee’s fascial defect was unchanged. The doctor stated the employee was having quite a bit of difficulty and again recommended a hernia repair. On September 8, 1999, Dr. Paulson performed a mesh onlay ventral herniorrhaphy for what the doctor described as a “fairly large ventral hernia.” On September 15, 1999, Dr. Paulson noted the employee was doing well with no evidence of recurrence. Thereafter, the doctor stated the repair was perfectly intact and felt stout. Dr. Paulson released the employee to return to work on October 18, 1999, subject to restrictions.

The employee had a functional capacities evaluation performed in January 2000. At that time, the occupational therapist recorded significant deficits in twisting, reaching, weight handling, bending, standing, kneeling and squatting. The therapist felt that the employee was capable of employment of three to four hours a day at the sedentary work level and recommended a conditioning program to increase his activity tolerance and general strength.

Dr. D.M. Van Nostrand examined the employee on April 19, 2000, at the request of his attorney. One of his diagnoses was a recurrent ventral hernia. The doctor noted the employee had a scar from essentially his xiphoid to his pubis as a result of his last hernia repair. The doctor also observed that, when the employee flexed his abdomen, there was a bulge present above the present mesh, which presented itself as a hernial defect along the top border of the mesh. Dr. Van Nostrand concluded:

Mr. Finn’s his [sic] activities of daily living are significantly affected by his abdominal musculoskeletal pathology. Under the Dept of Labor and Industry Guidelines from the state of MN, 5223.0440, subpart 3B(4) abdominal hernia recurrent after 2 or more repairs, 1%. In my opinion, Mr. Finn is troubled a great deal more than the 1% allowed by the Dept of Labor. This would be apparent by his activities of daily living discussion. He is extremely impaired by this condition. Therefore, I would refer to the AMA Guides to the Evaluation of Permanent Impairment 4<sup>th</sup> Edition. On

---

<sup>2</sup> Ileus is an intestinal obstruction.

Table 7, page 247, a Class III impairment of the whole person, as he does have a palpable defect and it is persistent, irreducible, and has limitation in his normal activity on an ongoing basis, would be equivalent to 25% of the whole person.

In addition to a recurrent ventral hernia, Dr. Van Nostrand also diagnosed cervical pain syndrome with radiculopathy and weakened grip, lumbar pain syndrome, right shoulder impingement syndrome, severe osteoarthritis of both knees, hypertensive cardiovascular disease with angina, and depression. The doctor rated a 7% whole body disability for the cervical pain syndrome, a 3.5% permanent disability for the lumbar pain syndrome, a 12% whole body disability secondary to the right shoulder condition, 0% permanency for the osteoarthritis of the knees, and 20% permanency for depression.

Dr. H.L. Saylor examined the employee on May 22, 2000, on behalf of the employer and insurer. The doctor diagnosed chronic abdominal wall pain following a history of multiple abdominal operations. He concluded the employee did suffer a permanent impairment to his whole person to the point that he was only able to lift 10 pounds or less in work or recreational activities. The doctor rated a 0% permanent partial disability under Minn. R. 5223.0440, subp. 3.A.(1).<sup>3</sup>

The employee graduated from Bertha Hewitt High School in 1961 and received a diploma. The employee testified, however, he is unable to read or write but is able to do basic mathematics. He further stated he graduated from school only because the superintendent of the school district had asked him to remain in school so that the school could receive state aid. In return, the employee stated, the superintendent promised him a passing grade. The employee conceded, however, it was important for him to obtain a diploma. He was 55 years of age on March 3, 1999, the date of his personal injury.

The employee filed a claim petition seeking payment of temporary total and/or permanent total disability benefits together with permanent partial disability benefits for a recurrent abdominal hernia. In addition, the employee sought a determination of the extent of his whole body impairment prior to the March 3, 1999, personal injury. In a Findings and Order filed January 22, 2001, the compensation judge found the employee was not permanently and totally disabled and the employee had a 1% whole body disability due to the recurrent ventral hernia.<sup>4</sup> These findings are unappealed. The compensation judge further found there was no specific rule that covered the employee's whole body impairment due to the numerous abdominal surgeries and the failure of the abdominal mesh to stay in place. The judge awarded the employee benefits for a 15% whole body impairment for the disability to his abdomen "based on his ability to walk only short distances and the difficulty that he has in getting up from a seated position, and lifting and in

---

<sup>3</sup> Strain or sprain of abdominal muscle, zero percent.

<sup>4</sup> See Minn. R. 5223.0440, subp. 3.B.(4), which states "abdominal hernia recurrent after two or more herniorrhaphies, one percent."

bending over.”<sup>5</sup> The employer and insurer appeal from these findings and from the award benefits for a 15% whole body disability. The compensation judge further found the employee had completed grade 12 within the meaning of Minn. Stat. § 176.101, subd. 5(2)(c). The employee appeals from this finding.

## DECISION

### Permanent Partial Disability

The employer and insurer appeal from the compensation judge’s award benefits for a 15% whole body disability for functional impairment secondary to the recurrent ventral hernia. They argue the employee’s condition is specifically rated under Minn. R. 5223.0440, subp. 3.B.(4), and an additional rating under Weber is legally erroneous. We agree.

In Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn 1990), the Minnesota Supreme Court recognized that the permanency schedules could not cover every possible rateable disability. Accordingly, the court held that non-scheduled injuries resulting in functional impairment may not be excluded from coverage. Subsequently, in 1992, the legislature enacted Minn. Stat. § 176.105, subd. 1(c), which provides, “If an injury for which there is objective medical evidence is not rated by the permanent partial disability schedule, the unrated injury must be assigned and compensated for at the rating for the most similar condition that is rated.” The statute allows a Weber rating for an unscheduled injury. However, the injury in this case is an abdominal hernia, which is specifically rated by the permanent partial disability schedule at Minn. R. 5223.0440, subp. 3.B. Accordingly, an additional rating under Minn. Stat. § 176.105, subd. 1(c), is not appropriate.

The employee argues that an award for only 1% whole body disability under the rule fails to compensate him for the extent of the functional impairment resulting from his personal injury, pointing out he has undergone three surgical procedures and sustained significant restrictions on his ability to work, as documented by the functional capacity evaluation. The compensation judge did find that the employee’s ability to walk, rise from a seated position, lift, and bend over were limited as a result of his abdominal hernia, and the purpose of the permanency schedules, the employee contends, is to compensate for functional loss of use or impairment of function. The employee therefore argues the compensation judge’s additional 15% rating is legally appropriate and supported by substantial evidence.

Minn. R. 5223.0440, subp. 3.B., sets forth ratings for the specific injury of an abdominal hernia. The repair of an abdominal hernia is rated at 0%, and a recurrent abdominal hernia, after two or more herniorrhaphies, is rated at 1%. It makes no difference under these rules whether the employee had a good or poor result from the hernia surgeries; in either case, the rating

---

<sup>5</sup> The compensation judge based the 15% permanency award on Minn. R. 5223.0060, subp. 7.A.(1), which covers impairments in the use of the lower extremities secondary to an injury to the spinal cord (can rise to a standing position and can walk, but has difficulty walking onto elevations, grades, steps and distances, 15 percent).

is the same.<sup>6</sup> The rule does not distinguish between individuals who have greater or lesser amounts of functional impairment or loss of use resulting from an abdominal hernia. While the employee here may have a significant functional loss following the multiple abdominal hernia surgeries, the rule rates permanency for the employee's injury, and no further rating is permitted. "No permanent partial compensation shall be payable except in accordance with the disability ratings established under this subdivision. . . ." Minn. Stat. § 176.105, subd. 1(b). Accordingly, the judge's award of benefits for a 15% whole body rating is reversed.

### Permanent Total Disability Threshold

The legislature revised Minn. Stat. § 176.101, subd. 5, in 1995. The five conditions constituting statutory permanent total disability (PTD) were not changed by this legislation.<sup>7</sup> However, the test for determining whether an employee falls into a sixth PTD category was substantially rewritten. Prior to the 1995 amendments, an employee could be found permanently and totally disabled if the employee suffered from an injury "which totally and permanently incapacitates the employee from working at an occupation which brings the employee an income."<sup>8</sup> The meaning of "totally and permanently incapacitated" was first defined in cases such as Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 153 N.W.2d 130, 24 W.C.D. 290 (1967), and later codified in a statute requiring an employee to establish that his or her physical condition, in combination with his or her age, training, experience, and the work available in the community, caused the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income.<sup>9</sup> This test was retained in the 1995 legislation, but new threshold showings are now required before the Schulte test may be applied.

The employee claimed that he was permanently and totally disabled as defined at Minn. Stat. § 176.101, subd. 5(2).<sup>10</sup> To qualify for PTD benefits under this definition, the employee must first meet one of the threshold criteria established at subdivision 5. Clause (c) requires that "the employee has a permanent partial disability rating of the whole body of at least

---

<sup>6</sup> Compare Minn. R. 5223.0390, subp. 2.B.(2) and (4), which deals with lumbar fractures requiring surgery.

<sup>7</sup> See Minn. Stat. § 176.101, subd. 5(a)(1) (1994) (establishing an irrebuttable statutory presumption of permanent total disability where an employee sustains: (1) permanent and total loss of sight in both eyes; (2) loss of both arms at the shoulder; (3) loss of both legs so that no prosthetic devices may be used; (4) complete and permanent paralysis; or (5) total and permanent loss of mental faculties).

<sup>8</sup> Minn. Stat. § 176.101, subd. 5(a)(2) (1994).

<sup>9</sup> See Minn. Stat. § 176.101, subd. 5(b) (1992).

<sup>10</sup> Minn. Stat. § 176.101, subd. 5(2), defines permanent total disability as "any other injury which totally and permanently incapacitates the employee from working at an occupation which brings the employee an income . . . ."

12 percent and the employee is at least 55 years old at the time of the injury, and has not completed grade 12 or obtained a GED certificate.” The compensation judge found that the employee had completed grade 12. Accordingly, the employee would not meet the threshold set forth at Minn. Stat. § 176.101, subd. 5(2)(c). The employee appeals from this finding, contending that it is clearly erroneous and unsupported by substantial evidence.

The employee asserts that, in the amendments to Minn. Stat. § 176.101, subd. 5, the legislature purposely created a lower threshold for PTD benefits where an injured worker lacks a high school education. Inherent in this classification system, the employee contends, is the underlying assumption that the injured employee’s level of education affects employability. The employee argues that he is functionally illiterate and does not, in fact, possess the equivalent of a high school education. Accordingly, the employee maintains that the spirit and intent of the statute have been satisfied and that the compensation judge’s finding that the employee completed grade 12 is unsupported by substantial evidence and must be reversed.

Inherent in the employee’s argument is the contention that a high school diploma or GED certificate is an arbitrary classification.<sup>11</sup> That is, the employee argues that a high school diploma or GED certificate is not necessarily an accurate measure of the level of an employee’s education, training, or skills. While there may be merit to this argument, the statute is clear and unambiguous. The employee has completed grade 12 and does not, therefore, qualify under the threshold contained at Minn. Stat. § 176.101, subd. 5(2)(c). The compensation judge’s decision on this issue is affirmed.

#### Non-Occupational Permanent Partial Disability

The compensation judge awarded the employee benefits for a 1% whole body disability for a recurrent abdominal hernia. The compensation judge also found the employee has a 3% whole body disability due to his right shoulder condition. On appeal, the employee contends the compensation judge failed to make findings of fact to resolve the employee’s other claims for non-occupational permanent partial disability. Specifically, the employee contends that the judge failed to make findings regarding the employee’s claims for permanent disability of the cervical spine, the lumbar spine, and depression, as rated by Dr. Van Nostrand. The employee asks this court to remand the case to the compensation judge to make appropriate findings.

Minn. Stat. § 176.101, subd. 5(2), establishes thresholds based on age and level of permanent partial disability as a prerequisite to entitlement to permanent total disability benefits. In Frankhauser v. Fabcon, Inc., 57 W.C.D. 239 (W.C.C.A.1997), this court held that nonwork-related permanent partial disability may be included for purposes of meeting the thresholds specified at Minn. Stat. § 176.101, subd. 5(2). The employee here sought a determination of the amount of his that nonwork-related permanent partial disability to meet the PTD thresholds. In his brief, the employee states there is another claim petition pending seeking permanent total disability benefits. Accordingly, we need not reach the merits of the employee’s appeal on this

---

<sup>11</sup> The employee does not assert the thresholds contained at Minn. Stat. § 176.101, subd. 5 violate the due process or equal protection clauses of the United States or Minnesota Constitutions.

issue. The employee's claims for nonwork-related permanent partial disability may be litigated in conjunction with the employee's pending permanent total disability claim.