

HARLAN OAKGROVE, Employee/Appellant, v. MCTO, SELF-INSURED, Employer.

WORKERS' COMPENSATION COURT OF APPEALS

MARCH 9, 2001

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - WEBER RATING. Where the disability schedule, Minn. R. 5223.0390, limited the circumstances under which an additional rating could be given for nerve root damage to situations where there was a total and complete loss of the nerve, as defined in Minn. R. 5223.0420, and the employee's condition was very close to but did not meet the total loss criteria, the compensation judge was not erroneous in denying an additional permanent partial disability rating under Weber and its codification, Minn. Stat. § 176.105, subd. 1(c).

Affirmed.

Determined by Wheeler, C.J., Rykken, J., and Johnson, J.  
Compensation Judge: Danny P. Kelly

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's denial of his request for an additional 15 percent whole body impairment for an injury to the employee's L5 nerve root.

BACKGROUND

The employee, Harlan Oakgrove, sustained an admitted injury to his lumbar spine, in the nature of a Gillette injury culminating on or about January 14, 1997. At the time of his injury the employee worked as a bus driver for the Metropolitan Transit Company and was 51 years of age and had a weekly wage of approximately \$669.00. The employee was first hired by the bus company in May 1979. He worked continuously, except for time off for a number of injuries, until he became permanently and totally disabled on January 24, 1997.<sup>1</sup> As a result of the employee's injuries, he underwent a three-level fusion surgery in May 1997. Because the fusion surgery apparently failed at spinal level L5-S1 a repeat surgery to repair the fusion at that level was performed. Following surgery the employee experienced bilateral foot drop, caused by a weakness of the tibialis anterior muscles. After physical therapy the employee showed improvement in strength of those muscles, more on the right than the left. The employee's orthopedic surgeon, Dr. Francis Denis, M.D., testified in his June 1, 2000 deposition that on

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<sup>1</sup> A detailed history of the employee's work injuries while employed by the bus company is contained in the compensation judge's findings and order issued January 24, 1997.

June 14, 2000, the employee's tibialis anterior muscle strength was four out of five on the right and between two and three out of five on the left. (Pet. Ex. A, at 26.)

In January 1999, the employee filed a claim petition seeking payment for permanent partial disability benefits, payment of permanent total disability benefits from January 24, 1997 to the present and continuing and the cost of a wheelchair. At some point prior to the hearing before the compensation judge below, which was held on July 12, 2000, the employer and insurer admitted that the employee had a permanent partial disability rating of 21 percent of the whole body pursuant to Minn. R. 5223.0390, subp. 4D. and subp. 5, as a result of three-level lumbar fusion surgery. In addition, the parties stipulated that the employee was permanently and totally disabled as of January 24, 1997 and was entitled to a wheelchair. The only remaining issue which came on for hearing was whether the employee was also entitled to an additional permanent partial disability rating of 15 percent of the whole body as a result of nerve damage to the L5 nerve. The compensation judge, in his findings and order of July 21, 2000, found that the employee was not entitled to an additional permanency as a Weber-type rating, Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990), or under the provisions of its statutory codification, Minn. Stat. § 176.105, subd. 1(c) (1993).

#### 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). 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, 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

The sole issue in this matter is whether the compensation judge erred in finding that the damage to the employee's L5 nerve did not qualify for a permanent partial disability rating pursuant to Minn. Stat. § 176.105, subd. 1(c) (1993), and the supreme court's decision in Weber. The compensation judge found that an employee could receive a permanent partial disability rating for nerve loss in addition to a rating for a three-level fusion, noting that such rating could only be made if the nerve loss was total or complete. He found that because the employee's nerve loss was incomplete according to the definitions in the schedule, no additional permanency could be awarded. He determined that the employee's condition was not outside the conditions described in the schedules. In his memorandum, the compensation judge expressed sympathy for the employee's predicament and stated as follows:

The effects of the work injury upon the employee have been devastating. The employee's activities of daily living are severely restricted. The employee uses an extension to pick things up off the floor because he cannot bend over, the employee can't sit in a tub because of difficulty getting in and out, the employee can't carry or lift anything heavier than a 12 pack of soft drinks, the employee can perform no yard work, the employee can only stand 10-15 minutes at a time, the employee needs a wheelchair to get around, the employee uses canes or a walker to ambulate, the employee uses furniture and walls to assist walking in his own home without the use of canes or walker, the employee wears a back support at all times, the employee drives an automobile infrequently, the employee sometimes doesn't know when his foot is on the accelerator and to completely understand the employee's situation is to understand his opinion that he has lost everything. It has been the experience of the undersigned Compensation Judge that not all 21% permanent partial disability of the whole body cases are equal. Some claimants receive a windfall while others, like the employee in this case, do not receive adequate compensation for their functional loss.

While the permanent partial disability schedules are intended to promote consistency and objectivity in the rating of PPD, the statute and the case law recognize that the schedules do not cover every possible ratable disability. In regard to those disabilities not discussed in the schedules, Minn. Stat. § 176.105, subd. (1)(c) (1993) states, "if an injury for which there is objective 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." This statute is a codification of the Minnesota Supreme Court's decision in Weber and is intended to apply in cases where disabilities supported by objective evidence are not addressed by the schedules. The statute and the Weber decision, however, are not intended to be used in cases where the injuries to a particular part of the body are "rated" in the schedules but the employee's objective findings do not satisfy the requirements of the schedules and where the employee's claim for an increased rating is based on significant subjective complaints of pain with no objective findings. Warner v. Luther Haven Nursing Home, slip op., (W.C.C.A. October 14, 1993).

We believe that the compensation judge has construed the decision in Weber and the statute correctly. In analyzing whether Weber or the statute is applicable, it is helpful to consider: "(1) whether the employee has sustained a significant and objectively measurable functional impairment as a result of the work injury; (2) whether the kind of impairment and/or level of impairment sustained is included in the category in the permanency schedule; and (3) if the impairment or level of impairment does not fall within or meet the requirements of any of the rating categories in the schedules, what rating category, or method of rating, included in the schedules most closely approximates the level of the employee's functional impairment." Jarvi v. City of Grand Rapids, 51 W.C.D. 36 (W.C.C.A. June 30, 1994).

The finding of permanent partial disability is one of “ultimate fact” for the compensation judge. The interpretation of medical evidence and the determination of the level of permanent disability is for the compensation judge. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 39 W.C.D. 771 (Minn. 1987). The assignment of a permanent total disability rating to a particular disability is not an arbitrary decision in each case, however. The Minnesota statutes and case law require that a compensation judge base an award of permanent partial disability benefits on objective medical evidence which meet the requirements of the disability schedules found in the Minnesota rule. See Minn. Stat. § 176.021(3); Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 41 W.C.D. 42 (Minn. 1988); Minn. R. 5223.01 et seq.

In the case at hand, the parties stipulated that the employee was entitled to a 21 percent permanent partial disability rating pursuant to Minn. R. 5223.0390, subp. 4D, and subp. 5, as a result of the three-level fusion surgeries. Subpart 1B of Minn. R. 5223.0390 states as follows:

Permanent partial impairment due to injury of the nerve roots is as provided in parts 5223.0420 and 5223.0430 and may be combined with ratings under this part if the nerve root injury results in complete loss as defined in part 5223.0420, subpart 1, item A, or 5223.0430, subpart 1, item A. If the loss is less than complete, the ratings under this part are inclusive of any injury to the nerve root.

(Emphasis added.) Section 5223.0420 of the disability schedule referred to in 5223.0390, subp. 1B, concerning nerve root damage contains the following language:

**Subpart 1. Total loss.** For permanent partial impairment to the peripheral nerves, plexuses, and nerve roots of the lower extremity resulting from nerve injury or disease, and if there is loss of motor function for those particular portions of the body served by the peripheral nerve, plexus, or nerve root, disability to the whole body is as provided in subparts 2 to 6.

A. Total or complete motor loss means that motor function is less than muscle strength grade 2/5.

**Subp. 4. Nerve root.** There is total or complete motor loss of the nerve root, and signs or symptoms of organic disease or injury are present, and there is anatomic loss or alteration:

C. L5 nerve root, 15 percent;

**Subp. 5. Incomplete loss.** Incomplete loss means that motor function is less than normal but at least antigravity. Motor function is measured in the specific muscles innervated by the injured nerve, plexus, or nerve root, and muscle strength is graded as follows:

- A. 5/5: majority of the tested muscles able to sustain contraction against expected resistance;
- B. 4/5: majority of the tested muscles unable to sustain contraction against expected resistance but able to sustain contraction against some applied resistance;
- C. 3/5: majority of the tested muscles unable to sustain contraction against any applied resistance but able to move part through full range of motion against gravity;
- D. 2/5: majority of the tested muscles able to move part through full range of motion with gravity eliminated.

The rating for incomplete loss is made on the muscle strength grade of the majority of the affected muscles:

- (1) muscle strength grade 5/5, zero percent;
- (2) muscle strength grade 4/5, 25 percent of rating assigned in subpart 2, 3, or 4;
- (3) muscle strength grade 3/5, 50 percent of rating assigned in subpart 2, 3, or 4;
- (4) muscle strength grade 2/5 or less, 100 percent of rating assigned in subpart 2, 3, or 4.

(Emphasis added.)

The employee's appeal contends that the employee is entitled to a Weber rating because he has a functional level of impairment which goes beyond the functional impairment usually associated with a three-level fusion, according to the opinion of his treating physician, Dr. Denis. He also points out that the compensation judge felt that the scheduled rating did not provide the employee with "adequate compensation." The employee argues that his strength rating is only slightly better than a 2/5 rating and the employee has extreme difficulty in standing or walking. It is his position that under the circumstances of this case, given the objective findings of loss of function of the left tibialis anterior muscle that the employee is entitled to a Weber rating of 15 percent because the condition described at Minn. R. 5223.0420, subp. 4C, most closely approximates his functional impairment.

While the compensation judge was obviously sympathetic to the level of impairment that the employee sustained, he felt constrained by the terms of the schedule to only award the 21 percent rating that the parties had stipulated was applicable pursuant to Minn. R. 5223.0390. We believe that the compensation judge's factual analysis of the case is appropriate. While we also recognize that the employee has sustained substantial functional impairment, his condition is specifically covered and described, i.e., "rated," by Minn. R. 5223.0390, subp. 1B. This part of the disability schedule permits additional permanency to be added to the rating for a musculoskeletal injury to the lumbar spine under certain circumstances. The rule, however, specifically states that additional permanency may only be added to the rating under 5223.0390 if the injury to the nerve root is a "complete loss" as defined in Minn. R. 5223.0420, subp. 1A. The rule also states that if the nerve root loss is less than complete that the ratings under rule 5223.0390

are inclusive of any injury to the nerve root. Since the employee concedes that his strength rating pursuant to Minn. R. 5223.0420, subp. 5, is an incomplete loss, the result reached by the compensation judge is appropriate. This is not a case where a Weber rating would be available. The condition the employee suffers from is rated by the schedule at 21 percent and he simply does not meet the requirements of the schedule for an additional rating.

The employee argues in the alternative that the denial of additional permanent partial disability is a violation of the United States and Minnesota Constitutions. He also argues that the Commissioner of the Department of Labor and Industry exceeded the scope of her authority to produce the disability schedule when she failed to provide a rating of additional permanent partial disability to compensate for the loss of function experienced by the employee as a result of the damage to his L5 nerve root. This court does not have jurisdiction to resolve these arguments and they are preserved for appeal to the Minnesota Supreme Court. We affirm the compensation judge's decision.