

RAYMOND J. OSWALD, ESTATE OF, BY ROBIN D. SIMPSON, Employee, v. BOISE CASCADE CORP., SELF-INSURED, Employer/Appellant, and HEALTHCARE FIN. ADMIN. (MEDICARE), Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 20, 2001

No. [REDACTED SSN]

HEADNOTES

ELECTION OF COVERAGE. Where the decedent had not filed claims for workers' compensation benefits in two jurisdictions, where there was no statutory provision requiring even an offset of benefits much less a preclusion of benefits due to receipt of veterans' disability benefits, where the judge's award under a 95% whole-body impairment rating did not exceed the statutory limit of 100%, and where statutory circumstances for apportionment did not exist, there was no statutory basis for concluding that the decedent's receipt of veterans' disability benefits constituted an election of remedies so as to preclude payment of permanent partial disability benefits to the decedent's estate or to entitle the employer to an offset or credit for VA benefits paid.

PERMANENT PARTIAL DISABILITY. Vesting of entitlement to permanent partial disability benefits occurs if the permanent partial disability can be ascertained and the employee lives for at least thirty days beyond the date of injury. Where there was no statutory or case law support for the contention of the employer that the decedent's application for and receipt of VA disability benefits constituted an "election of remedies," where there was no statutory basis for a "credit" to the employer equal to the amount of veterans' disability benefits paid to the decedent before his death, and where the decedent satisfied the conditions for compensation established in Minn. Stat. § 176.021, subd. 3, and Owens v. Water Gremlin Co., 605 N.W.2d 733, 60 W.C.D. 36 (Minn. 2000), the judge's award of vested but unpaid permanent partial disability benefits to the decedent's estate was not improper.

Affirmed.

Determined by Pederson, J., Wilson, J., and Johnson, J.
Compensation Judge: Donald C. Erickson

OPINION

WILLIAM R. PEDERSON, Judge

The self-insured employer appeals from the compensation judge's award of permanent partial disability benefits to the estate of the deceased employee and from the judge's determination that the employee's receipt of veterans' disability benefits did not bar additional claims for permanent partial disability or entitle the self-insured employer to a credit for veterans' benefits paid to the employee before his death. We affirm.

BACKGROUND

The facts in this matter are essentially undisputed. On or about December 5, 1997, Raymond Oswald was diagnosed with malignant pleural mesothelioma, a cancer caused by exposure to asbestos. Mr. Oswald was exposed to asbestos while in the United States Navy from 1943 to 1946 and from January 1948 through March 1955. He was also exposed while working for the Boise Cascade Corporation [the employer] between 1969 and February 1, 1991, the date of his retirement.

On May 22, 1998, Mr. Oswald filed a claim petition, seeking to establish the employer's primary liability for his mesothelioma and claiming entitlement to medical expenses and compensation for a minimum 50% permanent partial disability of the body as a whole consequent to that condition. Two weeks later, on June 5, 1998, he underwent a medical examination by Dr. Ronald Vessey at the request of the employer. In his report of July 27, 1998, Dr. Vessey confirmed the presence of malignant pleural mesothelioma, and, based on pulmonary function studies obtained at that time, rated Mr. Oswald's permanent partial disability of the body as a whole at 50%, due to loss of lung function. Dr. Vessey concluded, however, that Mr. Oswald's permanency rating was due primarily to his two-pack-a-day, forty-seven-year smoking history.

On July 8, 1998, Mr. Oswald filed an application with the Department of Veterans' Affairs for disability benefits based on his exposure to asbestos in the United States Navy. Meanwhile, while Mr. Oswald's application with the Department of Veterans' Affairs was pending, the employer agreed to accept liability for Mr. Oswald's malignant pleural mesothelioma under the Minnesota workers' compensation laws and began paying permanent partial disability benefits on a weekly basis retroactive to February 1, 1998, at the compensation rate of \$459.00 per week. The employer continued to pay a total of \$52,326.00 in permanent partial disability benefits through April 9, 2000, from which \$6,471.90 has been withheld for attorney fees. The payments by the employer represented slightly more than required under the 50% rating.

On January 21, 1999, the Department of Veterans' Affairs issued a rating decision indicating that "[s]ervice-connection for mesothelioma with chronic obstructive pulmonary disease is granted with an evaluation of 100 percent effective July 14, 1998." Mr. Oswald received an initial monthly award of \$1,964.00, effective August 1, 1998, and an increase to \$1,989.00 per month effective December 1, 1998. The employer did not learn of Mr. Oswald's application for or receipt of veterans' benefits until March of 1999.

On April 11, 2000, two days after the employer ceased making payment of permanent partial disability benefits to Mr. Oswald for his 50% impairment, Mr. Oswald underwent additional pulmonary function testing at St. Mary's Medical Center in Duluth. Mr. Oswald's "forced vital capacity" on inhalation [FVC] was measured at 29% of normal, and his "forced expiratory volume in one second" [FEV1] was measured at 21% of normal. According to the pulmonary function test report, Mr. Oswald was unable to perform a third test--a "diffusion capacity maneuver"--because of his severe shortness of breath. These test results established that Mr. Oswald qualified for a 95% disability category under Minn. R. 5223.0560, subp. 2F. On April 17, 2000, Mr. Oswald's attorney faxed a letter to the attorney for the employer, advising the

employer that Mr. Oswald was now claiming entitlement to compensation for a 95% whole body impairment, in accordance with the recent pulmonary function test results.

On April 19, 2000, the parties attended a settlement conference, at which the employee again requested payment of the 95% permanency, less the 50% already paid by the employer. A second settlement conference was held on May 23, 2000. The parties were unable to resolve the issue of the remaining permanent partial disability, and the case was certified for formal hearing.

Mr. Oswald died on June 27, 2000, as a result of his malignant pleural mesothelioma. The employee was a widower at the time of his death but was survived by three adult children.

On December 14, 2000, a claim petition for benefits was filed on behalf of Mr. Oswald's estate [the petitioner], seeking payment of the difference between the permanent partial disability benefits already paid (\$52,326.00) and the amount payable under the 95% rating (\$342,000.00). The petitioner apparently acknowledged that the permanency benefits would be payable on a weekly basis, but it sought payment retroactive to April 9, 2000, the date on which the employer ceased paying permanency benefits to Mr. Oswald.

The petitioner's claim for additional permanent partial disability benefits came on for hearing before a compensation judge on January 18, 2001. At hearing, the employer contended that Mr. Oswald's assertion of his claim for disability benefits against the Veterans' Administration in effect constituted an election of remedies which barred Mr. Oswald from further recovery of Minnesota workers' compensation benefits.¹ It also contended that the balance of benefits claimed was not properly payable to Mr. Oswald's heirs under the supreme court's holding in Owens v. Water Gremlin Co., 605 N.W.2d 733, 60 W.C.D. 36 (Minn. 2000). Finally, it contended that, if Mr. Oswald is entitled to additional permanent partial disability benefits, the employer should be entitled to a credit for the veterans' disability benefits paid to Mr. Oswald before his death. In a Findings and Order issued on April 18, 2001, the compensation judge determined that Mr. Oswald sustained a 95% whole body impairment due to his malignant pleural mesothelioma and that his exposure to asbestos while working for the employer was a substantial contributing factor in causing that impairment. He further concluded that the balance of the compensation due was properly payable to Mr. Oswald's estate and that Mr. Oswald's receipt of veterans' disability benefits did not constitute an election of remedies so as to preclude recovery or entitle the employer to a credit for the benefits paid. The employer 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

¹ The employer, having previously admitted liability for Mr. Oswald's malignant pleural mesothelioma, did not claim that the 50% permanent partial disability already paid had been paid under a mistake of fact or law.

(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.

“[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers’ Compensation Court of Appeals] may consider de novo.” Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Election of Remedies/Offset

The employer’s first argument on appeal is that, given his receipt of disability benefits from the Department of Veterans’ Affairs, Mr. Oswald, under a theory of “election of remedies,” is barred from receiving additional permanent partial disability benefits under the Minnesota Workers’ Compensation Act. Citing Minn. Stat. § 176.041, subd. 4, and Pauli v. Pneumatic Systems, Inc., 328 N.W.2d 743, 35 W.C.D. 551 (Minn. 1983), the employer contends that the Workers’ Compensation Act does not allow duplicate payments for the same condition. Under the facts here presented, we cannot conclude there has been an impermissible duplication of payment.

Minn. Stat. § 176.041, subd. 4, is a jurisdictional statute that provides in pertinent part as follows:

If an employee who regularly performs the primary duties of employment outside of this state or is hired to perform the primary duties of employment outside of this state, receives an injury within this state in the employ of the same employer, such injury shall be covered within the provisions of this chapter if the employee chooses to forego any workers’ compensation claim resulting from the injury that the employee may have a right to pursue in some other state . . .

(Emphasis added.) In the present case, Mr. Oswald has not filed claims for workers’ compensation benefits in two jurisdictions. In Pauli, the supreme court determined that Minnesota did not have jurisdiction over a claim filed by a non-resident employee injured in Minnesota, on the ground that the employee did not forego benefits in the foreign state--Oregon. Pauli filed an appeal from the

Oregon Board's denial of benefits and specifically requested that his rights be preserved. Neither the statute nor Pauli are applicable to the facts of this case.

The employer also contends that, if Mr. Oswald's receipt of veteran's disability benefits does not bar recovery of additional permanent partial disability benefits, it is clear that the payments made to Mr. Oswald by the Veterans' Administration [VA] before his death should be coordinated with payments made under the Workers' Compensation Act for the same condition. In support of its position, the employer cites Minn. Stat. § 176.101, subd. 4, and Minn. Stat. § 176.111, subd. 21, as evidence of a legislative intent to provide a credit to payors where benefits are being received simultaneously from a workers' compensation payor and a governmental entity. In this case, the employer contends that it is entitled to a credit equal to the \$45,647.00 paid by the Veteran's Administration. We disagree.

Jurisdiction of the Workers' Compensation Court of Appeals is restricted by statute to construction and application of the Workers' Compensation Act. Minn. Stat. § 175A.01, subd. 5; see also Hagen v. Venem, 366 N.W.2d 280, 37 W.C.D. 674 (Minn. 1985). Under Minnesota workers' compensation law, governmental disability benefit programs are coordinated, in certain respects, with workers' compensation benefits. Minn. Stat. § 176.101, subd. 4, with respect to permanent total disability, provides that, once \$25,000.00 in permanent total disability benefits have been paid, "the amount of the weekly compensation benefits being paid by the employer shall be reduced by the amount of any disability benefits being paid by any government disability program if the disability benefits are occasioned by the same injury or injuries which give rise to payments under this subdivision." Coordination is also provided for under Minn. Stat. § 176.111, subd. 21, with respect to payment of dependency benefits. In the present case, however, Mr. Oswald's claim is for permanent partial disability benefits, and, even if this court could construe the disability payments of the Veterans' Administration as being duplicative, there is simply no provision in Chapter 176 of Minnesota Statutes which offsets, much less precludes, payment of permanent partial disability benefits due to receipt of veterans' disability benefits.

The employer argues also that Minn. Stat. § 176.105, subd. 4, paragraph 7, provides that a disability rating cannot be more than 100% of the body as a whole. It argues that the judge's award of workers' compensation for a 95% whole body impairment in addition to an award of VA benefits for a 100% disability is clearly contrary to the law. We disagree.

Under Minn. Stat. § 176.101, subd. 2a(a), an employee may not receive compensation for more than a 100% disability of the whole body, even if the employee sustains disability to two or more body parts. The judge's award of a 95% impairment in this case does not exceed the statutory limitation. There is simply no basis for consideration of the VA payments under Chapter 176 of Minnesota Statutes. While apportionment of a permanent partial disability may be appropriate under circumstances provided for under Minn. Stat. § 176.101, subd. 4a, circumstances for apportionment do not exist in this case. We find no basis in the statute to conclude that receipt of veterans' disability benefits constitutes an election of remedies or entitles the employer to an offset or credit for such benefits.

Survivability of Permanent Partial Disability

Minn. Stat. § 176.021, subd. 3, provides in pertinent part as follows:

The right to receive permanent partial compensation vests in an injured employee at the time the disability can be ascertained provided that the employee lives for at least 30 days beyond the date of injury. Upon the death of an employee who is receiving economic recovery compensation or impairment compensation, further compensation is payable pursuant to section 176.101. Impairment compensation is payable if vesting has occurred, the employee dies prior to reaching maximum medical improvement, and the requirements and conditions under section 176.101, subdivision 3e, are not met.

In Owens v. Water Gremlin Co., 605 N.W.2d 733, 60 W.C.D. 36 (Minn. 2000), the supreme court reviewed Minn. Stat. § 176.021, subd. 3 (1995), in the context of a claim by an employee's heirs or dependents for the balance of vested but unpaid permanent partial disability benefits. At pages 736-737, 60 W.C.D. at 41-42, the court stated:

Minnesota Statutes §176.021, subd. 3 imposes three conditions before further compensation is payable. The preconditions include the ascertainment of the disability, the determination that the injured employee lived at least 30 days beyond the date of the injury, and the establishment of the fact that the employee was receiving economic recovery or impairment compensation benefits at the time of his death Because the employee had met all of the preconditions, we next interpret the phrase '*further compensation is payable* pursuant to section 176.101.' Therefore, in order to give meaning to the word 'further' within Minn. Stat. §176.021, subd. 3 and the legislative directive that payments are 'in addition to payment for any other compensation, subject to section 176.101', we hold that the benefits payable after death under this section must refer to the total vested but unpaid PPD benefits, not simply accrued but unpaid PPD benefits.

On appeal, the employer contends that the judge's award of unpaid permanent partial disability benefits to Mr. Oswald's heirs is contrary to case law and unsupported by the evidence. Mr. Oswald was not receiving permanent partial disability at the time of his death, it argues, nor was Mr. Oswald's disability even ascertained, much less payable.

As to ascertainment, the employer notes that the pulmonary function tests, which formed the basis for the 95% rating, were done on April 11, 2000, only two and one-half months before the employee died on June 27, 2000. The employer argues that, because the tests reflect the employee's condition when he was dying, they are not an accurate reflection of a permanent impairment. We do not agree.

The pulmonary function study administered on April 11, 2000, clearly qualified Mr. Oswald for a 95% permanent partial disability rating, under Class 6 of Minn. R. 5223.0560, subp. 2F. This rating and its relationship to the employment were confirmed by Mr. Oswald's medical expert, Dr. Samuel Hammar, in his report of December 26, 2000. The rating was also confirmed by the employer's medical expert, Dr. Ronald Vessey, in his report of January 10, 2001. The employer did not offer any evidence that the employee had other than a 95% permanent partial disability rating. The compensation judge's determination that the employee sustained a permanent partial disability of 95% of the whole person due to his lung condition is supported by substantial evidence. The employee's pulmonary function study was an accurate reflection of the employee's impairment on April 11, 2000, and the disability was clearly "ascertained" within the meaning of Minn. Stat. § 176.021, subd. 3 (1995).

The employer contends also that, having discontinued payment of permanent partial disability on April 9, 2000, prior to the April 11, 2000, pulmonary function test, the employee was not receiving permanent partial disability benefits at the time of his death and therefore does not meet the requirements of the statute or Owens. Again, we do not agree.

The employer accepted primary liability for the employee's condition and paid permanent partial disability benefits between February 1, 1998, and April 9, 2000, in the total sum of \$52,326.00. Payment was allegedly stopped because the employer had compensated the employee for more than the 50% permanent partial disability conceded in 1998.² The employer was advised by Mr. Oswald's attorney of the claim for benefits under a 95% permanent partial disability rating by April 17, 2000.

The statutory language at issue in this case reads "[u]pon the death of an employee who is receiving economic recovery compensation or impairment compensation, further compensation is payable pursuant to section 176.101." Minn. Stat. § 176.021, subd. 3 (emphasis added). We conclude that the only reasonable way to construe "who is receiving" is to construe it to mean "who is receiving *or entitled to receive*" economic recovery compensation or impairment compensation. Clearly, an employer should not be able to avoid liability for significant permanent partial disability benefits by simply placing itself in a position where benefits are not being paid at the time an employee dies. The issue is whether entitlement to the permanent partial disability benefits had vested in the injured employee. Vesting occurs if the permanent partial disability can be ascertained and the employee lives for at least thirty days beyond the date of injury. Mr. Oswald's permanency had vested in this case.

Because there is simply no statutory or case law support for the contention of the employer that Mr. Oswald's application for, and receipt of, disability benefits from the Department of Veterans' Affairs constituted an "election of remedies" that extinguishes the employer's liability for permanent partial disability benefits under the Minnesota Workers' Compensation Act, because there exists no statutory basis for a "credit" to the employer equal to the amount of veterans' disability benefits paid to Mr. Oswald before his death, and because Mr. Oswald satisfied

² In this case, a 50% permanent partial disability entitled Mr. Oswald to a total payment of \$50,000.00.

the conditions for compensation established in Minn. Stat. § 176.021, subd. 3, and the Owens case, we affirm the judge's award of vested but unpaid permanent partial disability benefits to Mr. Oswald's estate.