DANIEL J. REYES, Employee, v. WAL MART and AM. INT'L GRP./CLAIMS MGMT., INC., Employer-Insurer/Appellants, and ST PAUL RADIOLOGY and PRIMARY BEHAV. HEALTH, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 13, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - PSYCHOLOGICAL INJURY; MENTAL INJURY. Where it was not unreasonable for the judge to infer that physical pain consequent to the employee's work injury substantially contributed to the condition diagnosed by the employee's treating psychologist as pain disorder, and because that diagnosis was not diminished by the judge's reasonable conclusion that that pain had become "associated with" "depressed features" in the employee, the judge's conclusion that the employee sustained an emotional injury consequent to his physical work injury was not clearly erroneous and unsupported by substantial evidence.

PERMANENT PARTIAL DISABILITY - WEBER INJURY; MENTAL INJURY. Where it was not legally inappropriate for the compensation judge to unilaterally select a category from the permanency schedules for guidance in making her Weber rating or to do so from a schedule technically inapplicable to the employee's date of injury, and where neither the judge's selection of a category nor her rating of the employee's whole-body impairment was unreasonable, the compensation judge's rating of the employee's consequential mental injury in less than full reliance on any expert medical opinion was not clearly erroneous and unsupported by substantial evidence.

Affirmed

Determined by Pederson, J., Wilson, J., and Johnson, J.
Compensation Judge: Jennifer Patterson

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's finding of a consequential mental injury and from the judge's rating of permanent partial disability under Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990). We affirm.

BACKGROUND

On June 5, 1998, Daniel Reyes sustained a work-related injury to his right ankle while employed as a night stock person with Sam's Club, a division of Wal Mart. The injury occurred in the course of a twisting fall, during which Mr. Reyes [the employee] looked down,

heard his bone break with a popping noise, and saw his ankle snap and his foot dislocate till it appeared to be hanging off to the side of his lower leg. The employee was twenty-six years old on the date of the injury and was earning a weekly wage of $403.82. Immediately subsequent to his injury, the employee underwent an open reduction with fixation of internal hardware, performed by orthopedic surgeon Dr. Peter Boyum. Wal Mart [the employer] and its insurer admitted liability for the injury and commenced payment of benefits.

After recovering from his surgery, the employee underwent about six weeks of physical therapy and then, in October 1998, returned to work at his preinjury job, restricted by Dr. Boyum to "a sit down job only," due primarily to dramatic continuing swelling in his injured ankle. On November 20, 1998, Dr. Boyum noted hypersensitivity over the employee's distal fibula with shooting pain into the employee's foot. The doctor's diagnoses on that date included residual soft tissue problems including nerve entrapment and possible mild reflex sympathetic dystrophy, pain from the internal hardware, post-traumatic fibroarthrosis with restricted range of motion, and post-traumatic venous insufficiency and swelling of the right lower extremity. The employee's sensitivity to the hardware in his ankle continued, and on March 11, 1999, the employee underwent a surgical procedure to remove it. By March 29, 1999, there remained no change in the employee's sensation, and there was still discoloration and swelling from the original injury. Severe swelling in the injured leg was continuing on June 11, 1999, when Dr. Boyum found the employee to have pitted edema almost up to his right knee, with the skin discolored and mottled. On June 21, 1999, the employee filed a Claim Petition, in which he alleged entitlement to certain temporary total, temporary partial, and permanent partial disability and medical benefits, in addition to continuing rehabilitation benefits, all consequent to the June 5, 1998, work injury.

On July 6 and 7, 1999, the employee underwent a functional capacities evaluation. Although the employee's tested physical capacities indicated a probable tolerance for light duty work, the examiner, in his report on July 8, 1999, recommended that the employee be restricted to sedentary work, due apparently to problems with balance and difficulties in walking and standing related to his continuing ankle disability. On July 20, 1999, in a report to the employee's attorney, Dr. Boyum reiterated diagnoses of posttraumatic arthrofibrosis of the right ankle with significant loss of motion, entrapment of a nerve at the right ankle, and posttraumatic circulatory changes with venous insufficiency and dependent edema fitting the medical definition of reflex sympathetic dystrophy. On that diagnosis Dr. Boyum expanded an earlier rating of the employee's permanent partial disability to include a 6.5% whole-body rating referable to the employee's right lower extremity causalgia condition, in addition to two earlier 4% ratings for fracture dislocation and loss of motion. Dr. Boyum concluded that the employee had reached maximum medical improvement as of July 1, 1999, and that he would not be able to return to his regular pre-injury type of employment. He concluded also that the employee's surgery and other treatment had been appropriate, including the repeat surgery for removal of the hardware, which the doctor noted had been performed "in an attempt to relieve some of the symptoms of pain."

Since returning to work following his work injury, the employee had been experiencing, in addition to the physical symptoms in his ankle, various symptoms apparently associated with emotional stress over not being able to work at the level of his pre-injury capacity. In February of 2000, he was seen four times at a hospital emergency room for continuing symptoms, which included difficulty swallowing, nausea, headache, sore throat, left-sided chest

discomfort, abdominal pain, second degree AVE block, anxiety, possible sleep apnea, fatigue, and dizziness. On February 14 and 15, 2000, he was apparently seen also in consultation by cardiologist Dr. Randall Johnson, by gastroenterologist Dr. David Hanson, and by pulmonary specialist Dr. Hal Sreden, none of whose findings were definitive of the source of the employee's symptoms. An MRI of his head on February 22, 2000, was also essentially unremarkable, and on March, 7, 2000, the employee commenced treatment for anxiety and depression with psychologist Dr. John Cronin, on referral from his family physician, Dr. Phillip Gonzales. Finally, on March 13, 2000, the employee decompensated at work, and his supervisor called Dr. Cronin, who took the employee off work. In a letter to the employee's QRC, Michael Stern, dated March 17, 2000, Dr. Cronin indicated that he had taken the employee off work because the employee's job did not appear suitable to the employee's "physical or emotional needs." Dr. Cronin offered also in that letter his opinion that the employee's "current status is directly and causally related to his work related injuries." On April 7, 2000, the employee filed an Amended Claim Petition, in part to allege a consequential psychological injury.

On July 25, 2000, Dr. Cronin issued a psychological evaluation of the employee, based on nine treatments of him and a substantial battery of psychological tests. In that evaluation, Dr. Cronin diagnosed in part, under D.S.M. IV[1] diagnosis 307.89, "Pain Disorder Associated with Both Psychological Factors and a General Medical Condition." Under D.S.M. IV diagnosis 296.33, Dr. Cronin also diagnosed "Major Depressive disorder, recurrent." In that same evaluation, Dr. Cronin also rendered an opinion that the employee's

> current pain and psychological/psychiatric problems are directly and causally related to his work related injury. Essentially, it is my opinion that Mr. Reyes was functioning without incident both physically and psychologically when he was injured June 5, 1998, and as a result has been unable to regain his physical and vocational status which has caused a significant depression and anxiety to take hold. This is a very common reaction, which results in the classic chronic pain syndrome.

Dr. Cronin concluded further that the employee was "capable of doing some types of work within certain physical and psychological parameters but" not, apparently, with his current employer. "The difficulty for him to continue in that position," the doctor noted, "is both from a physical and (obvious) from a psychological (not so obvious) perspective." It was also Dr. Cronin's opinion that the employee had "reached maximum medical improvement from the psychological perspective, although I would certainly hope that continued experimentation with the various medications would reduce some of his psychiatric symptoms and make it possible for him to function on a higher level." On those opinions, and concluding that the employee had a "moderate impairment of function," Dr. Cronin rated the employee's permanent partial disability at 60% of

[1] American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994)

the whole body under Minnesota Rule "5223.0360, Subsection C, . . . utilizing the Weber decision."[2]

On August 1, 2000, the employee was evaluated for the employer and insurer by psychiatrist Dr. John Rauenhorst. In his report on August 22, 2000, Dr. Rauenhorst diagnosed in part adjustment disorder with mixed anxiety and depressed mood. It was Dr. Rauenhorst's opinion, based on an interview of the employee and a review of his records, that the employee had not sustained any mental health injury or aggravation of a pre-existing mental health condition consequent to his work injury. Dr. Rauenhorst indicated that, in his opinion, the employee's mental and emotional symptoms were simply "a reaction to [the employee's] frustration in dealing with his financial problems, and his perception that he has been treated unfairly by [the employer]." Dr. Rauenhorst concluded that the employee's adjustment disorder was temporary and that it had not restricted the employee's activity since early February 2000 and would not restrict or limit him in the near future. He concluded that the employee was not subject to any ratable impairment for any mental health injury under the workers' compensation schedules. These opinions were essentially reiterated by Dr. Rauenhorst in deposition testimony on September 21, 2000.

The matter came on for hearing on October 4, 2000. Among the several issues presented for determination were whether the employee had sustained an emotional injury consequential to his admitted June 5, 1998, work injury, the nature and extent of the employee's permanent partial disability, if any, related to that emotional injury, and whether this was an appropriate case for a rating of unscheduled permanent partial disability pursuant to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990).[3] At the hearing, the employee testified in part that, upon returning to work four months after his injury, he "was always in pain, just constant pain," which remained at a level seven or eight on a ten-level scale. He testified that he took about four or five painkillers every shift--Percocet and Darvocet and Vicodin, "to try to, you know, keep up with everybody. I didn't want to seem like I wasn't pulling my weight."

By Findings and Order filed November 28, 2000, the compensation judge concluded in part that the employee had sustained a consequential emotional injury arising out of his June 5, 1998, work injury and that "[s]ince the employee's emotional diagnosis is not covered by the permanent partial disability rules, this is an appropriate case for a Weber rating." Rejecting the recommendations of both parties as to the extent of the disability, the judge then rated the

[2] There exists no Minnesota Rule 5223.0360, Subsection C. The referenced Weber decision is Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990), the essential rating principle of which has been codified at Minn. Stat. § 176.105, subd. 1.(c), to provide, "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."

[3] Among stipulations at hearing was an agreement to reserve for later proceedings issues of retraining claims, claims based on a consequential right knee injury, and attorney fees of more than $13,000.00.

employee's whole-body impairment at ten percent, pursuant to Minn. R. 5223.0060, subp. 8E(1). The employer and insurer appeal.[4]

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

1. Consequential Emotional Injury

At Finding 14, the compensation judge concluded in part, "As supported by the employee's testimony and the records and reports of the employee's treating doctors in evidence, [the employee] has had constant right leg pain and other symptoms since June 5, 1998." The judge concluded further in that finding that "[n]o doctor whose records or opinions are in evidence has expressed the opinion that the employee's complaints of right leg pain are out of proportion to his physical condition." At Finding 16, the compensation judge concluded further that,

> [a]s supported by the opinion of Dr. Cronin, the employee has developed a pain disorder associated with both psychological factors and a general medical condition with depressed features within the meaning of DSM IV diagnosis 307.89. As supported by the opinions of Dr. Gonzales and Dr. Cronin, the permanent leg symptoms including pain, swelling, perineal nerve symptoms, and thin shiny skin that is easily injured and slow to heal, were a

[4] In their notice of appeal, the employer and insurer also appealed from several other findings of the judge, most of which would be rendered moot if the judge's finding of a consequential injury were here to be reversed. Because the consequential injury issue is thus threshold to most of the other contentions of the employer and insurer, and because the employer and insurer do not address any secondary issues in their brief, we will not concern ourselves here with any but these two issues. Minn. R. 9800.0900, Subp. 1 ("Issues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by the court.").

> substantial contributing factor to the development of the pain disorder diagnosed by Dr. Cronin.

On that basis, the judge also concluded in that same finding that the employee had carried his burden of proving that he sustained an emotional injury consequent to his June 5, 1998, work injury. In her accompanying memorandum, the judge indicated expressly that she was unpersuaded by Dr. Rauenhorst's opinion that the employee was not emotionally disabled. The employer and insurer contend that Finding 16 is unsupported by substantial evidence. We are not persuaded.

Where a work-related physical injury causes, aggravates, accelerates, or precipitates a mental injury, that mental injury is compensable. See Hartman v. Cold Spring Granite Co., 243 Minn. 264, 271, 67 N.W.2d 656, 660, 18 W.C.D. 206, 212 (1954) ("traumatic neurosis is compensable if it is the proximate result of the employee's injuries and results in disability"), citing Welchlin v. Fairmont Ry. Motors, 180 Minn. 411, 230 N.W.897, and Rystedt v. Minneapolis-Moline Power Imp. Co., 186 Minn. 185, 242 N.W.623. In order for a mental injury to be compensable, it is not necessary that the work-related physical injury causing it is its sole cause; it is sufficient if the work-related physical injury is a substantial contributing factor. See Miels v. Northwestern Bell Tel. Co., 355 N.W.2d 710, 715, 37 W.C.D. 164, 170 (Minn. 1984). It does not necessarily follow, however, that the physical injury caused the mental distress just because the mental distress followed the physical injury; where healed injuries have not impaired an employee's ability to work and other possible causes of the emotional distress are present, some medical opinion causally relating the emotional distress to the physical injuries is required before the mental distress can be found compensable under the workers' compensation system. See Rindahl v. Brighton Wood Farms, Inc., 382 N.W.2d 855, 38 W.C.D. 473 (Minn. 1986).[5]

The employer and insurer argue initially that "Dr. Cronin did not have the foundational basis for the diagnosis of a pain disorder under ref. 307.89." With regard to that contention, they quote the D.S.M. IV to the effect that "[t]he essential feature of Pain Disorder is **pain** that is the predominant focus of the clinical presentation" (emphasis in the employer and insurer's brief), arguing that pain, as opposed to mental stress, must be the cause of the "significant distress or impairment in social, occupational, or other important areas of functioning." They argue that Dr. Cronin's report of July 25, 2000, "makes it very clear that [the employee's] claimed mental condition is not a consequence of 'pain' from the ankle injury" (emphasis in the brief). They note that the employee returned to work after his June 1998 work injury, continued to function in his job until February 2000 despite his pain, and has provided no evidence that his level of pain changed before his decompensation in February 2000. They assert, moreover, that a

[5] Moreover, mental injuries caused solely by work-related mental stress are not compensable; the mere presence of physical symptoms does not convert a mental injury caused by mental stress into a mental injury caused by physical injury. See Johnson v. Paul's Auto and Truck Sales, 409 N.W.2d 506, 40 W.C.D. 137 (Minn. 1987). "The fact that a physical injury occurred does not automatically convert a noncompensable mental/mental case to a compensable physical/mental injury case." Ben-Ami v. University of Minnesota, slip op. (June 8, 1994); see also Casler v. RCI Brokerage, Inc., slip op. (W.C.C.A. June 5, 1995).

diagnosis of Pain Disorder under the D.S.M. IV "is not to be diagnosed if the pain is better accounted for by a mood, anxiety or psychotic disorder."[6]

We conclude that there was sufficient foundation for Dr. Cronin to conclude that pain from the employee's physical work injury had been the predominant focus of the employee's post-injury clinical presentation and so a substantially contributing factor in the psychological disability at issue, such that the compensation judge could rely on that conclusion by Dr. Cronin in making her decision. Prior to commencing treatment with Dr. Cronin, the employee had a long history of post-injury pain duly reported in the medical records of Dr. Boyum. Moreover, contrary to the argument of the employer and insurer, Dr. Cronin's July 25, 2000, report does not make it "very clear that [the employee's] mental condition is not a consequence of 'pain' from the ankle injury" (emphasis in brief). In his report, Dr. Cronin diagnosed a Pain Disorder "Associated with Both Psychological Factors and a General Medical Condition" (emphases added). In that same report, Dr. Cronin just as clearly indicated that the employee's "current pain and psychological/psychiatric problems are directly and causally related to his work related injury" (emphasis added). "As a result" of that injury, the doctor opined, the employee "has been unable to regain his physical and vocational status," which the doctor indicated had in turn resulted in "the classic chronic pain syndrome" (emphases added). Moreover, in his letter to QRC Stern about a week earlier, Dr. Cronin had indicated that he had taken the employee off work because that work did not appear suitable to the employee's "physical or emotional needs" (emphasis added).

In light of Dr. Cronin's repeated reference not only to general physical problems in addition to emotional ones but also to physical pain problems in particular, and especially in view of the employee's broader post-injury history of pain as even more conspicuously reported in the records of Dr. Boyum, we conclude that Dr. Cronin's diagnosis of a pain disorder was not unfounded. Therefore, particularly in light also of the employee's clear testimony of continuing physical pain, it was not unreasonable for the compensation judge to rely on that diagnosis. See Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985) (a trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence).

The employer and insurer argue also that "depressed features" as referenced by the compensation judge in Finding 16 are not within the meaning of D.S.M. IV diagnosis 307.89, the diagnosis of Dr. Cronin relied upon by the judge. They note that the judge did not expressly find Dr. Cronin's other diagnosis, of Major Depressive Disorder, to be a condition resulting from the employee's June 5, 1998, work injury, arguing that the judge has therefore "applied such a feature in an incorrect diagnosis." We conclude, however, that the absence of "depressed features" from the elements of D.S.M. IV 307.89 does not render that diagnosis inaccurate so far as it goes. It would not have been unreasonable for the compensation judge to find certain depressed features present in addition to the pain disorder diagnosed by Dr. Cronin, on which diagnosis the judge principally relied.

[6] The assertion is an accurate representation of a criterion referenced on both page 458 and page 461 in the D.S.M. IV.

Because it was not unreasonable for the judge to infer that physical work-injury-related pain substantially contributed to the condition diagnosed by Dr. Cronin as pain disorder, and because that diagnosis was not diminished by the judge's reasonable conclusion that that pain had become "associated with" "depressed features" in the employee, we conclude that substantial evidence supports the compensation judge's conclusion that the employee sustained an emotional injury consequent to his June 5, 1998, physical work injury. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

2. Permanency Rating under Weber

At Finding 17, the compensation judge characterized the employee's consequential emotional injury as a permanent one, "[a]s supported by the employee's ongoing need for medications, as well as the opinion of Dr. Cronin." At Finding 18, the judge concluded further that, "[s]ince the employee's emotional diagnosis is not covered by the permanent partial disability rules, this is an appropriate case for a Weber rating." Dr. Cronin had rated the employee's whole-body impairment at 60% under the Weber decision, referencing Minnesota Rule "5223.0360, Subsection C," which does not exist. At Finding 18, the compensation judge rated the employee's permanent impairment instead at 10%, using as her guideline Minnesota Rule 5223.0060, subpart 8.E.(1), which provides for such a rating for "[p]sychotic disorders . . . not caused by organic dysfunction and substantiated by medical observation," where symptoms are "only present under stressful situation[s], such as losing one's job, getting divorced, a death in the family." The judge indicated also that her award was issued "for both physical and emotional reasons." The employer and insurer contend in their brief that the judge's rating of the employee's disability under the Weber decision was inappropriate for the following reasons: (a) the judge "apparently assigned the arbitrary rating only in response to the request of the Employee's attorney at closing arguments"; (b) the judge used disability schedules which apply for injuries that occurred on or before July 1, 1993, which, they argue, are not applicable to the employee's date of injury; and (c) the scheduled disability under which the judge assigned a rating applies to "psychotic disorders," not to either a pain disorder or even a major depressive disorder such as was diagnosed by Dr. Cronin. Although they appeared to suggest in their brief that "[a so] called 'Weber' rating in this matter is not appropriate" at all, the employer and insurer subsequently conceded at oral argument that some rating under Weber is "absolutely" appropriate. The permanency issues before this court are therefore only the category selected by the judge and the extent of permanency found.

2(a). The judge's authority to select a category. At the hearing before the compensation judge, the employee essentially conceded that the scheduled authority for Dr. Cronin's rating could not be determined. His attorney argued, however, that the judge could accept Dr. Cronin's finding of permanency without accepting the doctor's specific rating, either in its scheduled authority or in its amount. He proposed instead a 10% rating, without proposing also an alternative rating category. We conclude that the judge had authority to select an unproposed rating category. See Johnson v. L. S. Black Constr. Co., slip op. (W.C.C.A. Aug. 18, 1994) (a compensation judge is free to accept a portion of an expert's opinion, yet reject other portions of that expert's opinion), citing City of Minnetonka v. Carlson, 298 N.W.2d 763, 767 (Minn. 1980) (a factfinder generally "may accept all or only part of any witness' testimony"); Hill v. MacKay Envelope, No. [REDACTED SSN] (W.C.C.A. July 10, 1998) ("a finding of permanent partial disability is one of ultimate fact, and a compensation judge is generally not bound by expert

opinion in deciding the issue"), citing Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 39 W.C.D. 771 (Minn. 1987). Therefore we will not reverse the judge's decision on grounds that she exercised the option proposed by the employee at the end of the hearing and selected a rating category unilaterally.

2(b). The applicability of the schedule from which the category was selected. As the employer and insurer have argued, Minnesota Rule 5223.0060, subpart 8.E.(1), under which the judge rated the employee's permanent partial disability, is expressly applicable to injuries predating the employee's. As we have indicated previously, however, a judge's Weber rating may be affirmed even when the scheduled category selected for guidance is not technically applicable to the employee's date of injury. See Carlson v. Montgomery Ward, 55 W.C.D. 1 (W.C.C.A. 1996), citing Olson v. Control Data Corp., slip op. (W.C.C.A. Mar. 6, 1991). The statutory codification of Weber's operative holding, Minn. Stat. § 176.105, subd. 1.(c), provides that, "[i]f 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 does not limit conditions available for guidance to only those described under the schedules technically applicable to the employee's date of injury.[7] All categories under consideration at hearing appeared to be ones under Minnesota Rule 5223.0360, subpart 7, which describes only "[s]igns or symptoms of organic brain dysfunction," and the judge expressly found, without contest on appeal, the employee's condition to be a non-organic one. The category selected by the judge as a guideline–Minnesota Rule 5223.0060, subpart 8(E), is one of very few in relevant schedules that describe conditions "not caused by organic dysfunction."

2.(c). The reasonableness of the category selected. The employer and insurer have noted that the subpart from which the judge selected her guiding category is one describing "[p]sychotic disorders," arguing, based on the D.S.M. IV, that term is restricted at least to "a loss of ego boundaries or a gross impairment in reality testing" and may even embrace symptoms of schizophrenia, delusions or prominent hallucinations. Such symptoms, they argue, do not describe the emotional condition of the employee, who has demonstrated ability to live and to care for himself and his family effectively off the job. At oral argument, they contended, as they had at the hearing and in their brief, that the employee's work-injury-related mental impairment was not severe enough for a rating beyond 0%, arguing that, even if it were, a more appropriate category for use as guidance would be Minnesota Rule 5223.0060, subpart 5.B.(1).[8] The employee stutters under stress, and this subpart provides for compensation for a mechanical disturbance of articulation due to disability of a glossopharyngeal, vagus, or spinal accessory nerve resulting in

[7] This court has, in fact, without correction by the supreme court, affirmed even Weber ratings based essentially on the AMA Guides to the Evaluation of Permanent Impairment rather than on the Minnesota Rules. See Finn v. Homecrest Indus., Inc., slip op. (W.C.C.A. Aug. 16, 2001); Wackerfuss v. Muska Elec. Co., 486 N.W.2d 768, 47 W.C.D. 93 (Minn. 1992); Hansford v. Berger Transfer, 46 W.C.D. 303 (W.C.C.A. 1991).

[8] We note that this category, recommended by the employer and insurer, is also a category in the schedule that the employer and insurer objected to for not being technically applicable to the employee's injury date.

distorted speech, where ninety-five percent or more of the employee's words are still understood by persons not among the employee's immediate family.[9]

We conclude that the judge's choice of Minnesota Rule 5223.0060, subpart 8(E), for guidance was not unreasonable. Although the employee was never diagnosed as psychotic, his treating psychologist did diagnose him with major depression, arguably a more generally debilitating condition functionally and occupationally than stuttering. This diagnosis was issued after a substantial battery of psychological inventories, including a Pain Report and Recover Index, a Hopkins Symptom Checklist, an Individual History Form, a Personal Pain History, a Pain Index, a Shipley-Hartford Test, an MMPI-2, a Beck Depression Inventory, a Cornell Index, and a Career Assessment Inventory. Upon these inventories and this diagnosis, Dr. Cronin concluded that the employee was subject to a substantial permanent, though apparently controllable, impairment. Given this reasonable conclusion by the employee's treating doctor with apparently very good foundation, and given the substantial discretion normally granted compensation judges to choose among expert opinions, see Nord, 360 N.W.2d at 342-43, 37 W.C.D. at 372-73, it does not seem to us unreasonable for the judge to have selected the rating category that she did. Her selection seems to us particularly reasonable for the category's uniqueness in expressly describing disability "not caused by organic dysfunction," "substantiated by medical observation," and manifested expressly in situations "such as losing one's job," trauma over the loss of occupational prospects being, along with chronic pain, apparently integral to the employee's consequential psychological injury. Therefore we affirm the compensation judge's Weber rating of the employee's permanent partial disability. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

[9] This alternative category was not proposed by the employer and insurer either at the hearing or in their brief on appeal.