WAYNE TUPA, Employee/Appellant, vs. FARMERS CO-OP ELEVATOR and SELF-INSURED/ASU RISK MGMT. SERV., LTD., Employer-Insurer and CONSULTING RADIOLOGISTS, LTD., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 12, 2001

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - WEBER RATING. Substantial evidence supports the compensation judge's finding that the employee's work-related hearing loss, which was not rated in the permanent partial disability schedules, should be assigned a 2 percent permanent partial disability of the whole body rating pursuant to Weber.

Affirmed.

Determined by: Rykken, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Bradley J. Behr

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals the compensation judge's finding that the employee is entitled to a 2 percent permanent partial disability Weber rating for a work-related hearing loss. We affirm.

BACKGROUND

On August 20, 1998, Wayne Tupa, the employee, was injured in a grain elevator explosion while working for Farmers Co-op Elevator, the self-insured employer. The employee sustained a severely lacerated right ear, and injured his left leg and both knees in the explosion. The employee was also diagnosed with post concussive syndrome and experienced headaches. He later noted hearing loss out of his right ear. The employer accepted liability for the employee's injuries and paid various wage loss benefits. On July 1, 1999, the employee's hearing was tested by Dr. Jon Beithon, which indicated a hearing loss of 75 decibels in the right ear at a frequency level of 6000Hz and of 40 decibels in the left ear at a frequency level of 6000 Hz. This level of hearing loss is not rated in the permanent partial disability schedules for hearing loss, Minn. R. 5223.0340. The employee has no hearing loss at lower frequencies, only at the higher frequencies, and does not use a hearing aid. Dr. Beithon concluded that the employee had lost one-third to one-half of his hearing ability and apparently compared this to a 40 to 45 percent binaural hearing loss, which would entitle the employee to a 15 to 16 percent permanent partial disability rating under the scheduled ratings. Dr. Beithon estimated this loss, and did not perform any calculations similar to those in the rule. (Ee's Ex. B.)

On June 22, 2000, the employee's hearing was tested by Dr. Phillip Rapport, at the employer's request. Dr. Rapport stated that the employee's diagnosis was "sensorineural hearing loss, which is, at least in part, due to exposure to the explosion." Dr. Rapport concluded that the employee's permanent partial disability rating is zero percent of the body as a whole since the permanency schedule does not use hearing test results at 4000 Hz and above. (Er's Ex. 2.) The employer argued that the employee's hearing loss was not compensable under the permanent partial disability schedule since this level of hearing loss was not rated under the schedule.

The matter was submitted on stipulated facts, exhibits, and briefs for a determination of the amount of the employee's permanent partial disability for hearing loss sustained in the explosion. The employee argued that he is entitled to a 15 percent or 16 percent rating based upon Dr. Beithon's opinion. The compensation judge awarded 2 percent permanent partial disability of the whole body, using calculations similar to those found in Minn. 5223.0340, to determine a Weber rating. The employee appeals.

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. 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

In Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990), the Supreme Court emphasized that the fundamental purpose of permanent partial disability benefits is to compensate the employee for functional impairment. 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. Finn v. Homecrest Indus., slip op. (W.C.C.A. Aug. 16, 2001). A Weber rating is not intended for use in cases where the injury to a particular part of the body is provided for in detail in the schedule. Bilotta v. Pizza Hut, slip op., (W.C.C.A. Dec. 17, 1998). The schedule may provide that minor impairments receive a zero rating. Minn. Stat. § 176.105, subd. 1(c).

"The purpose of a Weber rating is to approximate the functional loss suffered by the employee by comparing the disability to similar losses included in the schedule. Since a non-scheduled injury, by definition, falls outside the schedule, there is no requirement that any

particular category in the schedule be applied, or that the injury meet the specific requirements of any given category. Rather, the permanency schedule provides a point of reference, for the purpose of comparison, to ensure some objectivity and consistency in the permanency ratings made." Crain v. Riverview Heathcare Ass'n, slip op. (W.C.C.A. Nov. 9, 1998). 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. 1994).

The permanent partial disability ratings for hearing loss are determined by application of Minn. R. 5223.0340. This rule only covers hearing loss for the 3000 Hertz frequency level. The employee's hearing loss is measurable only at higher frequencies, past 3000 Hertz. The rule is silent regarding hearing loss measurable at higher frequencies. On appeal, the employer and insurer agree that a rating under Weber would be appropriate in this case, but should be limited to two percent permanent partial disability of the body as a whole. Dr. Beithon concluded that the employee had lost one-third to one-half of his hearing, but did not use the formula in Minn. R. 5223.0340 to reach this conclusion. The compensation judge analyzed Minn. R. 5223.0340, subps. 4-6, and used the employee's audiometric tests results combined with the formula contained in Minn. R. 5223.0340, subp. 5, to determine an appropriate Weber rating.

Under Minn. R. 5223.0340, the hearing threshold levels at four frequencies, 500, 1000, 2000, and 3000 Hertz, are tested and averaged through the formula. The compensation judge used the same formula but added the hearing threshold level for higher frequencies, 4000, 6000, and 8000 Hertz, to the calculations. This type of analysis is consistent with the analysis used for hearing loss at lower frequencies. The compensation judge also noted that the employee continues to function without the use of hearing aids. Further, 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). Substantial evidence supports the compensation judge's finding that the permanent partial disability rating most closely describing the employee's hearing loss is 2 percent permanent partial disability of the whole body, and we affirm.