

NO. A06-1344

State of Minnesota
In Supreme Court

Connie C. Reider,

Employee-Respondent,

vs.

Anoka-Hennepin ISD #11,
Self-Insured,

Employer-Relator,

and

Blaine Chiropractic Center, P.A.,
Noran Neurological Clinic,

Intervenors,

and

Insurance Federation of Minnesota,

Amicus Curiae.

BRIEF AND APPENDIX OF EMPLOYEE-RESPONDENT

LAW OFFICE
OF THOMAS MOTTAZ
Thomas D. Mottaz (#129975)
David B. Kempston (#229738)
2150 Third Avenue North, Suite 220
Anoka, MN 55303
(763) 421-8226

Attorneys for Respondent

CRONAN PEARSON QUINLIVAN P.A.
Kirk C. Thompson (#162024)
1201 Marquette Avenue
Suite 110
Minneapolis, MN 55403
(612) 332-1300

Attorneys for Relator

LYNN, SCHARFENBERG & ASSOC.
Andrew W. Lynn (#65614)
P.O. Box 9470
Minneapolis, MN 55440
(952) 838-4451

Attorneys for Amicus Curiae
Insurance Federation of Minnesota

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii
Legal Issues	1
Statement of Case	2
Statement of Facts	7
Argument	16
I. The Compensation Judge did not commit reversible error by denying the relator's Motion for a neutral medical exam	16
II. This case should not be remanded	25
Conclusion	27
Certification of Brief Length	28
Appendix Index	29
Appendix	A-1

TABLE OF AUTHORITIES

<u>Statutes</u>	<u>Page</u>
Minn. Stat. Section 176.391, Subdivision 1 (2003) . . .	24, A-1
Minn. Stat. Section 176.391, Subdivision 2 (2003) . . .	22, A-1
Minn. Stat. Section 176.411, Subdivision 1 (2003) . . .	24
Minn. Stat. Section 176.471, Subdivision 1(2) (2003) . . .	17
Minn. Stat. Section 176.155, Subdivision 2 (2003)	1, 17, 18, 21, 22, 23, 26
Minn. Stat. Section 645.16 (2003)	23, 24
 <u>Cases</u>	
<u>Buck v. Cass County Social Servs., slip op.</u> (W.C.C.A. August 12, 1991)	18, 19, A-2
<u>Chillstrom v. Trojan Seed Co., 242 Minn. 471,</u> 65 N.W.2d 888 (1954)	24
<u>Hengemuhle v. Long Prairie Jaycees,</u> 358 N.W.2d 54 (Minn. 1984)	1, 26
<u>Hosking v. Metropolitan House Movers Corp.,</u> 272 Minn. 390, 138 N.W.2d 404 (Minn. 1965) . . .	1, 19, 24
<u>King v. Honeywell, Inc., 45 W.C.D. 308</u> (W.C.C.A. 1991)	20
<u>Krovchuk v. Koch Oil Refiner, 48 W.C.D. 607</u> (W.C.C.A. 1993)	17
<u>Morrisette v. Harrison Internat'l Corp.,</u> 486 N.W.2d 424 (Minn. 1992)	17
<u>Nord v. City of Cook, 360 N.W.2d 337 (Minn. 1985)</u>	20
<u>Olson v. Quality Pork, slip op.</u> (W.C.C.A. November 21, 1996)	17, 18, A-9
<u>Phelps v. Commonwealth Land Title Ins. Co.,</u> 537 N.W.2d 271 (Minn. 1995)	23
<u>Stotz v. Sabin Brothers, 257 N.W.2d 359 (Minn. 1977)</u> . .	1, 20

Legal Issues

I. Whether the Compensation Judge committed reversible error by denying the relator's motion for a neutral medical exam.

The lower court held: The Workers' Compensation Court of Appeals affirmed the Compensation Judge's denial of relator's motion for a neutral medical exam because it did not constitute an abuse of discretion in this case.

Minn. Stat. Sec. 176.155, Subd. 2 (2003).

Hosking v. Metropolitan House Movers Corp., 272 Minn. 390, 138 N.W.2d 404 (Minn. 1965).

Stotz v. Sabin Brothers, 257 N.W.2d 359 (Minn. 1977).

Olson v. Quality Pork, slip op. (W.C.C.A. November 21, 1996).

II. Whether this case should be remanded.

The lower court held: The Workers' Compensation Court of Appeals found no reason to remand the case. It affirmed the Compensation Judge's Findings and Order because it was supported by substantial evidence of record.

Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54 (Minn. 1984).

Statement of the Case

On February 24, 2003, Connie Reider sustained an injury arising out of and in the course and scope of her employment at Anoka-Hennepin School District #11). (RA.24)¹ On that date, relator was self-insured for worker's compensation liability. (Id.) The relator paid benefits initially, but later denied primary liability. (RA.3)

On or about July 22, 2004, Connie filed a Claim Petition seeking payment 10% whole body impairment relative to the cervical spine and 2.5% relative to the thoracic spine, along with payment of outstanding medical treatment expense claims. (RA.1-2) The Claim Petition alleged a Gillette injury to her spine. (RA.1)

On or about March 29, 2005, the relator filed a Motion for examination by a neutral physician. (RA.6-8) A Notice of Hearing was served on all parties on or about April 7, 2005, indicating the case was set for Hearing on August 5, 2005. (RA.11) No Pretrial Conference was ever scheduled. (Id.)

On June 30, 2005, Judge Cheryl LeClair-Sommer served and filed an Order denying the Motion for examination by a neutral physician. (RA.9) This Order noted no Pretrial Conference had been scheduled. The Judge also determined the Motion lacked

¹ Citations preceded by "RA" are to the pages of the appendix filed by the Employer-Relator.

necessary information and failed to provide appropriate documents. (Id.) Because a pre-hearing conference had not been scheduled, the Judge concluded the mandatory provisions of the neutral physician statute did not apply. Furthermore, according to the Judge the issues before her did "not warrant appointment of a neutral examiner." (Id.)

Connie's Claim Petition came on for a Hearing on August 5, 2005. (RA.9) The Judge served and filed her Findings and Order on September 29, 2005. (RA.23) The Judge found the opinions of Dr. Thomas Rice (chiropractor) and Dr. Ana Patricia Groeschel (neurologist) to be persuasive and consistent with the evidence. (Finding No. 2) (RA.24) The Judge accepted those opinions and concluded Connie sustained a Gillette injury on February 24, 2003. (Id.)

Judge LeClair-Sommer devoted much of her findings to a discussion of the medical care and treatment Connie received following her injury. (Findings Nos. 3-10) (RA.24-25) The Judge found Connie sustained a 10% whole body impairment of the cervical spine. (Finding No. 11) (RA.25) She also awarded 2.5% relative to the thoracic spine. (Finding No. 12) (Id.)

Judge LeClair-Sommer determined the work injury was a substantial contributing factor to the disputed medical treatment. (Finding No. 7) (RA.25) She also explained why she

found this treatment to be reasonable and necessary. (Finding Nos. 8-10) (Id.)

In addition to making thorough findings, Judge LeClair-Sommer authored a detailed Memorandum. (RA.26-28) The Memorandum outlined Connie's job duties as well as the causation opinions of the various physicians. (Id.) It also addressed the opinions of all three physicians who addressed causation; namely, Dr. Rice, Dr. Groeschel and Dr. Dahlquist. (RA.27) The memorandum outlined the deficiencies of the opinions of the independent medical examiner. (Id.)

The relator appealed the Compensation Judge's decision to the Workers' Compensation Court of Appeals ("W.C.C.A.") (RA.30) On appeal, the W.C.C.A. affirmed the Compensation Judge's decision. (RA.33) In doing so, the W.C.C.A. spent several pages reviewing the medical evidence ultimately concluding that substantial evidence of record supported the Judge's findings. (RA.34-39)

The W.C.C.A. also rejected the relator's argument that it had an absolute right to a neutral physician exam. (RA-40) In its discussion of the issue, the W.C.C.A. noted that no pre-hearing conference was scheduled. (RA.41) The W.C.C.A. then reviewed the statutory history of the neutral physician provision. (RA.41-42) In doing so, it noted the apparent conflict between Minn. Stat. Sec. 176.391, Subdivision 2

(discretionary appointment) and Minn. Stat. Sec. 176.155, Subdivision 2 (mandatory appointment). (RA.42)

The W.C.C.A. rejected the relator's argument that polarity of medical opinions required a neutral physician exam. (Id.) Per the W.C.C.A. the issues were "not complex or difficult issues but issues decided by compensation judges on a regular basis." (RA.42-43) As such, "there [was] simply no need for a neutral physician." (RA.43)

One component of the W.C.C.A.'s analysis was that a report from a neutral examiner would not necessarily dispose of the issues before the judge. (RA.43) Rather, that is the job of the Compensation Judge. (Id.) The W.C.C.A. acknowledged that there might be complicated cases where a Judge would want the assistance of a neutral examiner in making a decision. But in the case like the present, where the Judge did not think it was necessary then a mandatory neutral physician opinion was "very simply, a waste of time and resources." (RA.44)

Finally, the W.C.C.A. noted many practical concerns concerning the proposed mandatory appointment of the neutral physician. (RA.44) These included a lack of rules on how to utilize neutral physicians and the repeal of the requirement that the Commissioner of Labor and Industry develop a list of neutral physicians. (Id.) As a result of its analysis, the

W.C.C.A. concluded the designation of a neutral physician remained discretionary with the Compensation Judge. (RA.44-45)

There was a dissenting opinion. (RA.45) Although no pre-hearing conference was ever scheduled in this case, the dissenting Justice concluded that Minn. Stat. Section 176.155, Subdivision 2 was mandatory. (Id.) As such the dissenting Justice recommended a remand so the neutral decision evaluation could be performed. The Compensation Judge was then to issue a new Findings and Order. (Id.)

On July 19, 2006, the relator filed a Petition for Writ of Certiorari, seeking review by this Court. (RA.46) On appeal, the relator argues the neutral physician provision is mandatory. It also contends this case should be remanded to a different compensation judge for another full-blown hearing on the merits. An Amicus brief has also been filed by the Insurance Federation of Minnesota.

Statement of the Facts

Prior to going to work for the relator in 1992, Connie did not have any significant problems with the neck, upper back or shoulders. (T30) When hired she initially worked at Hoover Elementary. (T31) She was there for about four years. She then went to work at Coon Rapids Middle School. (Id.) A typical school day consists of seven 45-minute periods along with a 20-minute homeroom. (T31) During the day she does not follow a particular student, but instead attends various classes, dependent upon the needs of students. (T32)

Connie usually signs for seven periods a day. (T35) The amount of signing performed in a 45-minute class vary. (T36) Duties might include signing for a teacher or for an instructional video, or working with students in a small group. (Id.) Other times she works with students who are partnered with other students. (T37)

Connie's job duties require her to hold her arms in front of her body at about shoulder height. (T37) She usually signs with both arms. She uses her dominant hand (right hand) to do the finger spelling. The left hand is the supporting party in the sign. (T37-38).

Connie's symptoms came on gradually. (T38) She testified it was "a cumulative thing" that "just built up to the point

that something had to be done." (Id.) As a result of signing she began to have problems in her neck, her shoulders and her upper back down into her mid back. (T38-39) Connie believes her injury "was just a culmination" of her activities over the years. (T39) By February of 2003 she rated her symptoms at an 8 out of 10 on a pain scale. (T40) She described the pain as a deep ache that felt tight all the time with associated burning. (Id.)

Connie associated the onset of these symptoms with her work duties. (T40) She experienced these symptoms predominantly when working. They would subside when she was not working. Her symptoms were better in the summer. When work was really intense – such as the first week of school – her symptoms worsened. (T40-41)

Connie reported her condition to the relator as work related. (T40) She first treated with Dr. Thomas Rice in April 2003. (T41; Petitioner's Exhibit B) Treatment consisted of mild spinal and extremity manipulation and physiotherapy in the form of interferential stimulation. (Id.) She initially treated three times per week, then reduced to two times per week, then one time per week then about once every three weeks, ultimately moving to an as-needed treatment basis. (T43; Petitioner's Exhibit B)

The treatment with Dr. Rice decreased her symptoms. (T43) They never resolved entirely, however. (Id.) A couple of weeks after commencing treatment with Dr. Rice he recommended exercises. (T44) She was also instructed in the use of icepacks and how to watch her posture. (T43, 45) Connie has been very disciplined in performing her stretches and home exercises. (T45)

Connie sustained an aggravation in December of 2003. (T45) There was no specific injury at that time; rather, she experienced a worsening of her symptoms. (T45-47) Following this flare-up she initially treated three times per week, then two times per week, with a decreasing frequency thereafter. (T47) She was also icing at work. She missed two days from work with this flare-up. (T48)

Connie's treatment with Dr. Rice following this flare-up are discussed in his June 7, 2004, narrative report. (Petitioner's Exhibit B) As of late spring of 2004, she was placed on an as-needed basis. (T50; Petitioner's Exhibit B) Treatment was paid for through about June of 2004. (T50) There was no treatment between June 11 and September 15, 2004, because she was off of work and her symptoms were diminished. (T50-51) Although reduced, she still had some symptoms present in her neck, mid back and both shoulders throughout the summer of 2004. (T51-52)

With the advent of the school year in September of 2004 Connie experienced an increase of her symptoms. (T52) This prompted her to return to Dr. Rice on September 15, 2004. (T53; Petitioner's Exhibit B) She returned for treatment because she could not handle those symptoms with her home remedies. (T53)

Dr. Rice then wrote to the claims adjuster on or about September 17, 2004. (Petitioner's Exhibit B) He explained the treatment provided, his diagnosis and his recommendation for further treatment. (Id.) Connie treated approximately three times per week for about two and a half weeks, then reduced to two times per week, then a week later the frequency dropped to one time per week. (T54; Petitioner's Exhibit B) As of November 11, 2004, Dr. Rice again released her to treat on an as-needed basis. (Id.)

In February of 2005 Connie began to experience a different sort of symptom arising at the base of her neck that were sharp in nature. (T56) She was concerned. She told Dr. Rice. (Id.) He referred her to a neurologist. (Id.)

Connie then saw Dr. Ana Patricia Groeschel at Noran Clinic on March 4, 2005. (T56; Petitioner's Exhibit D) According to Dr. Groeschel's March 4, 2005, chart note, Connie had increased neck pain. (Petitioner's Exhibit D) Neck pain had been present intermittently for the last couple of years. Areas affected included the neck, shoulders and a burning sensation down the

arms. (Id.) More recently, however, the neck pain had been different. Dr. Groeschel documented a work-related injury in the nature of a cervical strain. Dr. Groeschel thought an MRI was appropriate to evaluate the new onset of pain. (Id.)

An MRI was performed on March 11, 2005. (Petitioner's Exhibit D) It was interpreted to show spondylitic and discogenic degenerative changes of the cervical spine, most severe at C4-5. (Id.) There were mild and degenerative changes throughout the remainder of the cervical spine. (Id.)

When seen on March 15, 2005, Connie had increased pain at the base of the left side of her neck and this spread across her neck and down into the medial scapular area. (Petitioner's Exhibit D) She also reported left arm weakness and tingling in the right first and second digits intermittently. Connie was taking ibuprofen, receiving occasional chiropractic treatment, and doing her exercises regularly. (Id.)

On exam, Dr. Groeschel noted trigger point and tenderness in the left trapezius muscles. (Petitioner's Exhibit D) Spasm was also present. Range of motion of the cervical spine showed a mild decrease. The impression remained work-related injury along with a cervical strain. Deep tissue massage was recommended. (Id.)

Connie then began to receive deep massage therapy from Karlene Comer. (T57) She first treated with Ms. Comer on April

6, 2005. (T57; Petitioner's Exhibit E) Treatment consisted of deep massage for three weeks in a row, very consistently. (Id.) Initially there was some improvement but after a while Connie did not feel the treatment was as effective. (T58) Thus, after about six weeks that treatment was discontinued. (Id.)

Connie returned to see Dr. Groeschel on May 16, 2005. (T58; Petitioner's Exhibit D) Dr. Groeschel's letter to Dr. Rice of that date indicates Connie's deep neck pain had improved, but she still needed a muscle relaxant. (Id.) There was a mild decrease of range of motion in the neck. (Id.) There was tenderness in the paracervical muscles. Spasm was still present. (Id.)

As of the Hearing, Connie rated her overall symptoms at about a 3 on a 10 scale. (T59) The symptoms were located in the same place as usual: her neck, her upper back, and her shoulders. (Id.) The symptoms were always present. (T60)

Connie testified to limitations because of her injury. (T60) When her symptoms flare up, she restricts herself at home. She also finds driving to be difficult when her symptoms flare up. (Id.) Specifically, she has a reduced range of motion when she turns her head over her shoulder to check traffic. (Id.) She never had problems like that before going to work for the school district. (T61).

Connie testified the chiropractic treatment with Dr. Rice was beneficial to her. (T62) She also felt the treatment with the neurologist was of value to her because of the workup she received for the sharp neck pain. (T62-63) Finally, she thought the massage therapy was temporarily beneficial and that it may have contributed to the decrease of her sharp neck pain. (Id.)

In an 18-page narrative report dated June 7, 2004, Dr. Thomas Rice provided a detailed description of Connie's onset of symptoms, the results of his various physical examinations, the results of x-rays he performed, as well as the course of treatment provided to Connie. (Petitioner's Exhibit B) He opined the treatment had been reasonable and necessary because it enabled her to continue working on a full-time basis as well as performing other activities "with a minimum flare-up of symptom complaints." (Id.)

In his June 7, 2004, report, Dr. Rice assigned Connie permanency ratings for her cervical and thoracic spine. (Petitioner's Exhibit B) Under Minn. Rule 5223.0370, Subpart 3C(2), he assigned her a 10% whole body impairment relative to the neck. Dr. Rice also assigned Connie a 2.5% relative to her thoracic spine per Minn. Rule 5223.0380, Subpart 3B. (Id.) His report explained why he assigned these ratings. (Id.) And Dr.

Rice specifically indicated that they came on as a result of her work-related condition. (Id.)

Dr. Rice issued a supplemental report dated January 10, 2005. (Petitioner's Exhibit B) Before doing so, Dr. Rice reviewed the report from Dr. Dahlquist. In his supplemental report, Dr. Rice documented Connie's ongoing findings from September 15, 2004, through December 15, 2004. (Id.)

Throughout this timeframe he documented reduced range of motion on a number of visits. (Id.)

Dr. Rice then issued a third report dated July 20, 2005. (Petitioner's Exhibit B) Before doing so he had reviewed various medical records, Connie's deposition transcript and the supplemental IME report from Dr. Dahlquist dated July 8, 2005. This report discussed Connie's job duties. Dr. Rice also provided a clear explanation on the mechanism of injury. (Id.)

Dr. Ana Groeschel also issued a report dated August 2, 2005. (Petitioner's Exhibit D) There, she opined that Connie's work activities contributed to her cervical and thoracic strain. In arriving at that conclusion, Dr. Groeschel reviewed the records of Drs. Rice and Dahlquist. She went on to state that Connie's work "has caused her to have a cumulative trauma to her neck and upper back." (Id.) She concluded that Connie's work as a sign language interpreter caused her to have increased problems with strain in her neck and upper back consistent with

repetitive use. She diagnosed a myoligamentous strain due to repetitive use of the muscles in those area. (Id.)

Dr. Groeschel also assigned a 10% whole body impairment relative to the cervical spine per Minn. Rule 5223.0370, Subpart 3C(2). (Petitioner's Exhibit D) She also assigned a 2.5% relative to Connie's thoracic spine pursuant to Minn. Rule 5223.0380, Subpart 3B. (Id.) Dr. Groeschel further opined as to reasonableness and necessity of the treatment provided through the Noran Clinic. She thought Connie needed medications to diminish the spasms in the neck. (Id.) That is why she prescribed a muscle relaxant. (Id.)

Argument

In this case, the mandatory requirements for a neutral physician evaluation were not satisfied. That is undisputed. Specifically, no pre-hearing conference was ever scheduled or conducted. Nonetheless, the relator wants this case to be remanded so a repeat hearing can be conducted by a different compensation judge "who has not already made up his or her mind[.]" (Relator Brief - 17)

In its attempt to get a second bite of the apple, the relator has broadly framed the issue. The Amicus has done the same thing. And while the W.C.C.A. did conclude the appointment of a neutral physician is discretionary, this Court need not to address that issue to decide this case.

Simply put, the mandatory provisions do not apply. As such, there was no abuse of discretion by the Compensation Judge. The relevant inquiry on appeal is whether the Findings and Order are supported by substantial evidence of record. They are. They should be affirmed on appeal. That was the correct conclusion of the W.C.C.A.

I. The Compensation Judge did not commit reversible error by denying the relator's Motion for a neutral medical exam.

A. Standard of Review

A decision which rests upon the application of a rule of essentially undisputed facts involves a question of law which

this Court may consider *de novo*. See Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993). In reviewing questions of law, this Court is free to exercise its independent judgment. See Morrissette v. Harrison Internat'l Corp., 486 N.W.2d 424, 426 (Minn. 1992); see also Minn. Stat. § 176.471, Subd. 1(2) (2003) (review by this Court appropriate to determine whether the Compensation Judge "committed an error of law").

B. The mandatory provision does not apply in this case

The relator's Brief is devoted to the argument that a legal error occurred because the Compensation Judge refused the request for a neutral examination. This argument is misplaced. The mandatory provision does **not** apply to the case at bar. Rather, the Judge's decision to deny the motion was well within her discretion. Since there was no abuse of discretion, there was no error of law.

Minn. Stat. Section 176.155, Subdivision 2 (2003), defines the contours of a neutral physician examination. **If** a pretrial conference is scheduled, **then** the Statute says the Compensation Judge shall designate a neutral physician if request is made 30 days before the scheduled pre-hearing conference. If the request is made later than 30 days prior to a scheduled pretrial conference, then the decision to appoint a neutral physician is at the Compensation Judge's discretion. See Olson v. Quality

Pork, slip op. (W.C.C.A. November 21, 1996).² (A.9) See also Buck v. Cass Co. Social Servs., slip op. (W.C.C.A. August 12, 1991). (A.2)

The relator would have this Court adopt a strict construction of a little-used statutory provision where the express requirement of the statute was **not** satisfied. That is not appropriate. It is undisputed that **no** pretrial conference was ever scheduled or conducted in this matter. As such, the mandatory provision does not apply. The issue on appeal thus becomes whether the Judge abused her discretion in denying the motion for a neutral physician.

A review of the Judge's Order concerning the reasons she denied the request for a neutral physician dispels any suggestion of an abuse of discretion. (RA.9) The June 30, 2005, Order outlined the deficiencies the Judge found in the motion requesting a neutral physician. (Id.) The Judge was very detailed as to the failings of the motion. (Id.) Based upon the contents of the motion itself, Judge LeClair-Sommer determined it was "deficient in necessary information in order to trigger the provisions" of Minn. Stat. Section 176.155, Subdivision 2. (Id.) This decision was clearly within her discretion. Moreover, once these deficiencies were pointed out,

² Citations preceded by "A" are to the pages of the Appendix filed by Employee-Respondent.

the relator made **no** attempt to cure them by filing an amended motion with the requested information.

More to the point, however, is Judge LeClair-Sommer's determination in the June 30, 2005, Order that the issue before her; namely, "a 12.5% permanent partial disability rating for disability of the cervical and thoracic spine, does not warrant appointment of a neutral examiner." (RA.9) Stated otherwise, the issues were not unique or complex. As noted by the W.C.C.A. this was a standard, run-of-the-mill worker's compensation case involving a disputed injury, some permanent partial disability, and some unpaid medical bills. (RA.42-43)

Not only does the Judge's conclusion comport with common sense, it also complies with what little case law there is on the subject. Where the mandatory provision requirements are not satisfied - there is no requirement a neutral exam be granted. See Hosking v. Metropolitan House Movers Corp., 272 Minn. 390, 138 N.W.2d 404, 408 (Minn. 1965) ("[T]he mere fact that medical experts expressed divergent opinions as to the cause of disability . . . does not obligate [the compensation judge] to . . . appoint a neutral physician."). See also Buck v. Cass Co. Social Servs., *slip op.* (W.C.C.A. August 12, 1991) ("This court is reluctant to appoint a neutral physician simply because there has been a dispute between medical experts as to the extent of

the employee's permanent partial disability."). (A.2) Accord, King v. Honeywell, Inc., 45 W.C.D. 308 (W.C.C.A. 1991).

When she received the relator's motion for a neutral physician exam, the Judge correctly determined it was not necessary. (RA.9) This conclusion is reinforced by the fact there was no objection to the foundation of the opinions of Dr. Rice or Dr. Groeschel at the hearing. It was the Judge's job then to carefully evaluate the expert's opinion and compare them to the facts. The Judge did that. She then accepted the opinions of the treating physicians. (RA.24)

A neutral physician exam would have made no difference in this case. That opinion either would have agreed with the opinions of Drs. Rice and Groeschel or it would have lined up with the opinion of Dr. Dahlquist. The Judge correctly determined the former opinions matched the evidence whereas the latter opinion did not. An additional opinion one way or the other would have made no difference. See Stotz v. Sabin Brothers, 257 N.W.2d 359, 360 (Minn. 1977) (The report of a neutral examiner is "not necessarily and invariably decisive of an issue where other competent evidence will permit a different finding."). The W.C.C.A. observed this and correctly determined it is the job of the Compensation Judge to resolve conflicts of fact. (RA.43) See Nord v. City of Cook, 360 N.W.2d 337, 342 (Minn. 1985).

The Compensation Judge in this case weighed the request for a neutral exam. (RA.9) She then denied the motion. (Id.) Her Order was clear as to the grounds for denial of the motion. (Id.) The judge denied the motion because she found it deficient and unnecessary. (Id.) These were proper determinations. They were within the ambit of her job. As such, there has been no abuse of discretion.

There is no need to remand this matter for another hearing after a wasteful neutral physician examination with yet another physician. Rather, this Court should affirm the well-founded fact findings as of Judge Cheryl LeClair-Sommer.

C. Appointment of a neutral physician is always discretionary

In its decision, the W.C.C.A. properly concluded that appointment of a neutral physician is always discretionary. The relator and the Amicus both attack this conclusion on appeal. The tenor of their briefs suggests that the W.C.C.A. cavalierly ignored black letter law. That is not true. Rather, the W.C.C.A. carefully construed an inconsistent statute in accordance with accepted principals of statutory construction. (RA.42)

In a well-crafted decision, the W.C.C.A. outlined the history of the neutral physician statute. (RA.41-42) In doing so, it noted that before 1979, the statute unequivocally

provided that a neutral exam was discretionary. (RA.41) Minn. Stat. Section 176.155, Subdivision 2, was amended in 1979 at which point mandatory language was inserted, as long as certain conditions were satisfied. (Id.)

As drafted, however, the statute also contained internal inconsistencies. Upon review of Minn. Stat. Section 176.155, Subdivision 2, the W.C.C.A. noted that the statute's mandatory language conflicts with the statute's discretionary language. (RA.42) Specifically, the statute provides that the compensation judge conducting the hearing, "may with or without the request of any interested party designate a neutral physician" and "may request a neutral physician to answer any particular question with reference to the medical phase of the case." Minn. Stat. § 176.155, Subd. 2 (2003). The W.C.C.A. correctly observed that "[t]hese provisions clearly leave whether to seek the assistance of a neutral physician to the discretion of the compensation judge and appear to conflict with the apparent mandatory language." (RA.42)

Not only is Minn. Stat. Section 176.155, Subdivision 2 (2003), internally inconsistent -- it also conflicts with another provision of the Workers' Compensation Act. Specifically, Minn. Stat. Section 176.391, Subdivision 2 (2003) provides that a compensation judge "may appoint one or more neutral physicians or surgeons to examine the injury of the

employee and report thereon[.]” This provision is clearly discretionary.

Based upon analysis of these inconsistencies, the W.C.C.A. correctly concluded that if the purpose of the 1979 Amendment was to make appointment of a neutral physician mandatory, then the legislature probably would have revised the other portions of the statute that indicated otherwise. (RA.42) Because it determined Minn. Stat. Section 176.155, Subdivision 2 was ambiguous, the W.C.C.A. correctly turned to the principles of statutory construction. See Phelps v. Commonwealth Land Title Ins. Co., 537 N.W.2d 271 (Minn. 1995) (A statute is ambiguous if it is susceptible to more than one reasonable interpretation).

According to Minn. Stat. Sec. 645.16 (2003), when the words of the law are not explicit, the intention of the legislature may be ascertained by considering the following:

1. the occasion and necessity of the law;
2. the circumstances under which it was enacted;
3. the mischief to be remedied;
4. the object to be obtained;
5. the former law, if any, including other laws upon the same or similar subjects;
6. the consequences of a particular interpretation;
7. the contemporaneous legislative history; and

8. legislative and administrative interpretations of the statute.

In its decision, the W.C.C.A. observed that the purpose of the neutral physician statute is to provide authority to the fact finder to appoint a neutral physician where it would be "needful or desirable in arriving at a decision." Hosking at 408. (RA.42) The W.C.C.A. expressly noted the statute was not enacted to give a party the right to an additional medical expert; rather, the purpose of the provision is to assist the judge, if needed. (Id.) Accepting the arguments of the relator and Amicus in this case would require construing the statute inconsistently with its purpose.

In its decision, the W.C.C.A. never lost sight of the broad discretionary power given a compensation judge to "make an independent investigation of the facts alleged in the petition or answer." Minn. Stat. § 176.391, Subd. 1 (2003). Specifically, the compensation judge is "bound neither by the common law or statutory rules of evidence." Minn. Stat. § 176.411, Subd. 1 (2003). The only constraint is that the hearing "be conducted in a manner to ascertain the substantial rights of the parties." Id. The obvious legislative intent here is that process remain "flexible." Chillstrom v. Trojan Seed Co., 242 Minn. 471, 65 N.W.2d 888, 895 (1954). Flexibility and

discretion are the hallmarks of a Compensation Judge's decision-making function.

In reaching the conclusion that the appointment of a neutral physician is discretionary, the W.C.C.A. properly kept the function of the compensation judge in mind. The W.C.C.A. did not ignore the plain language of the statute; rather, given the ambiguity present, it correctly construed the statute in light of its purpose and function.

Not only does the decision of the W.C.C.A. comport with the purpose and policy of the law, it also complies with common sense. As expressed before, this was not an unusual case. True, the treating doctors opinions disagreed with those of the independent medical examiner. But, significant polarity of medical opinions exists in almost every disputed workers' compensation case. That is why we have workers' compensation judges. They resolve disputed fact questions. If a judge feels a neutral exam is necessary, a judge can order one or grant a request for one. If a judge does not feel it is necessary, then, as the W.C.C.A. aptly noted "another mandatory expert opinion is, very simply, a waste of time and resources".

(RA.44)

II. This case should not be remanded.

Substantial evidence of record supports Judge LeClair-Sommer's decision. It rests squarely on the testimony of Connie

and the opinions of her treating physicians. It is not clearly erroneous. Thus, the decision should be affirmed on appeal. See Hengemuhle v. Long Prairie Jaycees, 358 N.W. 2d 54 (Minn. 1984).

Even if this Court concludes that Minn. Stat. Section 176.155, Subdivision 2 (2003), grants a party the absolute right to a neutral physician in certain circumstances, those circumstances did not exist here. The Compensation Judge properly exercised her discretion in denying the request for a neutral exam. She explained the basis for her denial. There was no abuse of discretion.

There is no need to remand this matter for another hearing after a neutral physician examination. Furthermore, there is no need to refer this matter to a different judge for a new hearing. Rather, this Court should follow the decision of the W.C.C.A. and affirm the well-founded fact-findings of Judge Cheryl LeClair-Sommer.

Conclusion

For the foregoing reasons, the employee-respondent respectfully requests the Minnesota Supreme Court to affirm the September 29, 2005 Findings and Order of Compensation Judge Cheryl LeClair-Sommer in all respects.

Dated: 9/7/06

LAW OFFICE OF THOMAS D. MOTTAZ



Thomas D. Mottaz, #129975
David B. Kempston, #229738
Attorneys for Employee
2150 Third Avenue North, #220
Anoka, MN 55303
763-421-8226
Fax: 763-421-8362

No. A06-1344
STATE OF MINNESOTA
IN SUPREME COURT

Connie C. Reider,
Employee-Respondent,

vs.

Anoka-Hennepin ISD #11,
Self-Insured,
Employer-Relator,

and

Blaine Chiropractic Center, P.A.,
Noran Neurological Clinic,
Intervenors.

CERTIFICATION OF BRIEF LENGTH

I HEREBY CERTIFY THAT THIS Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 663 lines and 5,324 words. This brief was prepared using Microsoft Word Office 2000.

Dated: 9/7/06

LAW OFFICE OF THOMAS D. MOTTAZ



Thomas D. Mottaz, #129975
David B. Kempston, #229738
Attorneys for Employee
2150 Third Avenue North, #220
Anoka, MN 55303
763-421-8226
Fax: 763-421-8362

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).