

No. A07-1267

STATE OF MINNESOTA
IN SUPREME COURT

Kathy L. Maricle,
Relator,

vs.

Farmstead Foods/Self-Insured, and
Special Compensation Fund,
Respondents,
and

EMPI, Inc.,
Minnesota Department of Human Services,
Mayo Foundation,
Blue Cross/Blue Shield of Georgia,
Healthcare Recoveries, Inc.,
UCare Minnesota,

Intervenors.

**BRIEF AND APPENDIX OF RESPONDENT
SPECIAL COMPENSATION FUND**

ROBERT M. MAUS (#68950)
BAUDLER, BAUDLER, MAUS &
BLAHNIK, LLP

108 North Main Street
Austin, MN 55912
(507) 433-2393

ATTORNEYS FOR RELATOR

LORI SWANSON
Attorney General, State of Minnesota
RORY H. FOLEY (#0155056)
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 297-2972 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR RESPONDENT
SPECIAL COMPENSATION FUND

(Additional Counsel/Parties Listed on Following Page)

Don Hoffmann
EMPI
599 Cardigan Road
Shoreview, MN 55126

Jeffrey G. Carlson (#201480)
Attorney at Law
Brown & Carlson, P.A.
Suite 100, 5411 Circle Down Avenue
Minneapolis, MN 55416-1311
(763) 591-9950
ATTORNEY FOR FARMSTEAD FOODS/SELF-INSURED

Blue Cross/Blue Shield of Georgia
P.O. Box 9907
Columbus, GA 31908-6007

Michael Schoff
MN Department of Human Services
Benefit Recovery Section
P.O. Box 64994
St. Paul, MN 55164-0994

Charles S. Bierman
Mayo Foundation
200 1st Street SW
Rochester, MN 55905

Tamara E. Herrera
Healthcare Recoveries, Inc.
P.O. Box 36380
Louisville, KY 40233

Melissa Droher
UCare Minnesota
12125 Technology Drive
Eden Prairie, MN 55344

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LEGAL ISSUE

- I. Were the compensation judge's Findings of Fact and Order denying Relator's claim for medical treatment expenses supported by substantial evidence in the record as a whole?

The compensation judge determined that Relator had not demonstrated that her September 25, 1989 injury was a substantial contributing factor to claimed medical and rehabilitation expenses after December 1990, and were not reimbursable.

Apposite cases:

Gillette v. Harold Inc., 101 N.W.2d 200, 257 Minn. 313 (1960).

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

Nord v. City of Cook, 360 N.W.2d 337 (1985).

STATEMENT OF THE CASE

Relator, Kathy L. Maricle, alleged she sustained various arm, shoulder, and neck injuries beginning on September 25, 1989, while employed by Respondent Farmstead Foods. She filed a workers' compensation claim petition for wage loss benefits, medical treatment and rehabilitation assistance.

On March 28, 1990, Farmstead Foods filed Chapter 11 bankruptcy, at which time the Minnesota Commissioner of Commerce ordered that the Minnesota Self-Insurers Security Fund ("SISF") assume Farmstead Foods' workers' compensation benefit obligations.

In 1990, the SISF and the Special Compensation Fund ("Fund") disputed their respective liabilities for workers' compensation benefits due Farmstead Foods' employees. In December of 1990, the SISF and the Fund settled their dispute over liability for those benefits. The SISF assumed liability for employee benefit claims with dates of injury between July 1, 1986 and May 31, 1989. The Fund assumed liability for claims arising on June 1, 1989 and thereafter.

In July of 1991, Relator and the SISF entered into a Stipulation for Settlement which settled and closed out Relator's claims for any and all future wage loss benefits, leaving open only her claims for future reasonable and necessary medical expenses, exclusive of her neck injuries.

On April 21, 2005, the Workers' Compensation Court of Appeals ("WCCA") granted Relator's petition to vacate the prior Stipulation for Settlement and Award on Stipulation.

On June 13, 2005, Relator filed a Claim Petition for wage loss benefits, medical treatment, and rehabilitation expenses. On August 18, 2006, a hearing on Relator's Claim Petition was held before Compensation Judge Danny P. Kelly at the Office of Administrative Hearings. On November 24, 2006, Compensation Judge Kelly served and filed his Findings and Order that denied Relator's claim.

Relator appealed and on June 14, 2007, the WCCA affirmed the compensation judge's findings and order.¹

On June 29, 2007, Relator filed a Petition for Writ of Certiorari with this Court and the Clerk of Appellate Courts issued the Writ.

STATEMENT OF FACTS

Kathy L. Maricle ("Relator") is a 41 years old woman from Clarks Grove, Minnesota. Relator's Appendix ("RA") 28. Relator worked for Respondent Farmstead Foods at its Albert Lea, Minnesota plant in a variety of capacities between June 3, 1985 and March 3, 1990. RA28.

Relator sustained a right shoulder work-related injury on September 25, 1989. RA28. Farmstead Foods acknowledged that Relator had developed impingement

¹ The WCCA opinion on Westlaw and attached to Relator's brief omitted page 6. A complete copy of the WCCA opinion is contained in the Fund's Appendix at Resp. App. 1.

syndrome without rotator cuff tear and mild cervical strain/sprain. *Id.* In July 1991, Relator settled her claims with Farmstead Foods related to the impingement syndrome and mild cervical strain/sprain with a Stipulation for Settlement. Resp. App. 13.

On October 12, 2004, Relator filed a Petition to Set Aside the Award on Stipulation. RA29. On April 21, 2005, the WCCA granted Relator's Petition to Set Aside her prior Stipulation for Settlement and the Award on Stipulation. RA29.

On June 10, 2005, Relator filed a Claim Petition for Temporary Total Disability from January 1, 2001 to the present and continuing, and Temporary Partial Disability wage loss benefits for the time period January 1, 1990 to December 31, 2000, which had previously been resolved by the 1991 Stipulation for Settlement. RA1. Relator also sought permanent partial disability benefits, and reimbursement of medical treatment expenses she alleged were required as a result of the work-related injuries she claimed were related to the admitted September 25, 1989 injury. June 10, 2005 Claim Petition; RA1.

On October 26, 1989, Dr. Edward Shaman examined Relator for neck, shoulder, and hand pain. RA29. Dr. Shaman diagnosed Relator's condition as myalgias. *Id.*

On December 28, 1989, Dr. James R. Allen, a neurologist with the Albert Lea Clinic, examined Relator and noted that she had full range of motion in her cervical spine and that her neck muscles were supple. *Id.* Dr. Allen released Relator for a return to part-time work effective January 8, 1990. *Id.*

On January 29, 1990, Relator had a right shoulder exploratory surgery and debridement performed by an orthopedic surgeon, Dr. A. Douglas Lilly. RA29. Dr. Lilly diagnosed right shoulder impingement with chronic tenosynovitis.² RA29.

Relator continued to have pain complaints in her right upper extremity. RA29. On March 30, 1990, she had an examination of her right upper extremity that concluded that she had normal motor and sensory nerve conduction study. RA29.

On June 21, 1990, Dr. Lilly opined that Relator had reached maximum medical improvement effective June 15, 1990, and that her neck pain/strain complaints were not related to her work. Ex. 5; RA29. Dr. Lilly referred her to Dr. Zarling for an additional evaluation. RA29. Dr. Zarling noted the absence of objective neurological evidence and concluded that Relator's symptoms were subjective in nature. Ex. 3; FOF 10; RA29. Dr. Zarling concluded that Relator had reached maximum medical improvement related to her neck strain complaint. *Id.*

On September 20, 1990, Dr. Lilly opined that Relator had recovered from her shoulder injury and surgery. Ex. 5; RA29. He concluded that Relator had no further restrictions to the right shoulder, had reached maximum medical improvement, and had sustained a 3% permanent partial disability. Ex. 5; RA29. On November 6, 1990, Dr. Lilly opined that Relator's pain symptoms on the right side of her neck were unrelated to her employment at Farmstead Foods. Ex. 6; RA30.

² Tenosynovitis is an inflammation of a tendon sheath. Dorland's Medical Dictionary (28th Ed. 1994), p. 1668.

On November 15, 1990, a CT scan of Relator's cervical spine demonstrated minimal posterior disc bulging at the C5-6 disc level. Ex. 8; RA30. Dr. Farber concluded that Relator had primarily a soft tissue neck injury, and her follow-up November 29, 1990 EMG was normal. Ex. 11; RA30.

On November 29, 1990, Dr. Farber released Relator to return to work with restrictions on lifting, overhead working, limitations on frequent movements of her neck, and he advised her against working in one position for too long a time period. Ex. 11; RA30. On December 30, 1990, Dr. Farber concluded that Relator had reached maximum medical improvement. Ex. 12; RA30.

On May 2, 1991, Dr. Mark Engasser performed an independent medical examination. Resp. App. 20; RA30, RA40. Dr. Engasser opined that Relator had full range of motion of the right shoulder and full range of motion of the cervical spine. *Id.* He further opined that the employee had suffered an injury to the right shoulder as a result of her repetitive work activity at Farmstead Foods and a myoligamentous strain of the cervical spine as a result of her work activity. *Id.* He assigned Relator a 3% permanent partial disability rating for the right shoulder. *Id.*

In July of 1991, Relator and the SISF entered into a Stipulation for Settlement that resolved and closed out her claims for any and all future wage loss benefits, leaving open only claims for future reasonable and necessary medical expenses, exclusive of her neck injury. RA41. An Award on Stipulation was served and filed on July 31, 1991. RA31.

Relator did not treat for her neck and shoulder conditions from December 1990 through October 1992, when she again saw Dr. Farber. Ex. 13; RA41. Thereafter, Relator did not treat again until December 1996, when she sought chiropractic care from Dr. Christian. Ex. 46. On December 23, 1996, at Dr. Christian's suggestion, Relator followed up with her treating physician, Dr. Waldron, at the Albert Lea Clinic. *Id.* She continued to treat sporadically, thereafter, with Dr. Christian between 1997 and 2001. RA46.

On January 25, 2002, Relator sought treatment for neck and shoulder pain at Naeve Hospital in Albert Lea, MN. RA41. On February 1, 2002, a follow-up MRI examination revealed impingement and a partial rotator cuff supraspinatus tendon. *Id.*; RA32, RA41. The March 29, 2002, EMG results of her right upper extremity were normal. *Id.*; RA32. On March 29, 2002, she had a cervical MRI performed that indicated degenerative disc disease and disc herniations at multiple cervical disc levels. *Id.*

In February 2004, Relator treated at the Mayo Clinic's Spine Center. The Center recommended that she have another MRI performed. RA32-33. On March 2, 2004, Relator had the supplemental MRI performed. It indicated a continued worsening of her spondylosis,³ moderate central stenosis, and moderate left-sided foraminal stenosis at multiple cervical disc levels. *Id.* On June 14, 2004, Relator consulted with Dr. David

³ "Spondylosis" is defined as: 1. Ankylosis of a vertebral joint. 2. A general term for degenerative changes due to osteoarthritis. *Dorland's Medical Dictionary* 1564 (28th Ed. 1994).

Beck, an orthopedic surgeon for neck and arm pain. RA33. On June 18, 2004, Dr. Beck performed an anterior discectomy and fusion in Relator's cervical spine. *Id.* The surgery resolved Relator's neck pain, though she still complained of upper extremity pain. RA33.

Relator sought treatment for mid-thoracic through mid-lumbar pain at the Mayo Clinic with Dr. Keith Bengtson. Ex. 28; RA32-33. Relator then treated with Dr. Matthew J. Kirsch in Austin, Minnesota, who diagnosed Relator with bilateral rotator cuff tendonitis and prescribed injections and physical therapy. RA33. A follow-up MRI demonstrated that Relator's left shoulder was normal but her right shoulder demonstrated mild impingement of the supraspinatus tendon and mild tendonosis of the supraspinatus with no evidence of a tear. *Id.*

On October 12, 2004, Relator filed a Petition to Vacate the 1991 Stipulation for Settlement and Award on Stipulation due to unforeseen substantial changes in her medical condition. RA34. On April 21, 2005, the WCCA vacated the prior Stipulation for Settlement and Award on Stipulation. RA34.

On November 12, 2004, Dr. Kirsch performed a right shoulder arthroscopic subacromial decompression. Ex. 44; RA33. On February 15, 2005, Relator again saw Dr. Kirsch and reported that her shoulder was better after surgery but that she still had pain, although she had full range of motion in her right upper extremity. *Id.* Dr. Kirsch diagnosed Relator with fibromyalgia. *Id.*; RA42.

Relator then treated with Dr. Larson for fibromyalgia. Exs. 16 and 17; RA42. Dr. Larson opined that Relator's right shoulder bursa and tendon disorder were caused or

aggravated by her work on September 25, 1989. *Id.* On June 10, 2005, Relator filed a new claim petition. RA1.

On October 18, 2005, Relator had an independent medical examination with Dr. Mark D. Friedland. Resp. App. 24; RA30-31, RA42-43. Dr. Friedland's report noted, *inter alia*, Relator's exaggerated pain behaviors, diffuse non-physiologic tenderness of the spine, positive distraction testing, discrepancies between sitting and supine straight leg raising. *Id.* He diagnosed Relator with marked functional overlay and/or malingering. RA31, RA42. Dr. Friedland concluded that Relator had sustained a right shoulder impingement syndrome without rotator cuff tear and mild cervical strain/sprain. *Id.* He further concluded that she had reached maximum medical improvement from these conditions by December 30, 1990. *Id.* Finally, Dr. Friedland concluded that Relator's September 25, 1989 injury was not responsible for any medical care and treatment received after December 30, 1990. *Id.*; RA43. Dr. Friedland instead attributed Relator's conditions to the normal aging process. *Id.*

On January 19, 2006, Dr. Kirsch performed a surgical release of the first dorsal extensor compartment. RA33. Relator continued to have right hand pain and, on March 2, 2006, Dr. Kirsch performed a right carpal tunnel release. Ex. 42. Following the procedure, Relator had no numbness or tingling in her fingers or hand. *Id.*

On March 22, 2006, Dr. Beck issued a report wherein he concurred with Dr. Friedlund's opinion that Relator's cervical disc herniations were the result of normal aging and not related to Relator's 1989 work injury. Ex. 35; Resp. App. 34; RA33. On March 30, 2006, Dr. Beck issued another report which concluded that Relator's 1989

work injury did substantially contribute to the cervical disc herniations. Ex. 36; Resp. App. 35.

On April 5, 2006, Dr. Friedland performed a second independent medical examination. Resp. Ex. 5; Resp. App. 36. Dr. Friedland's report opined that Relator's thoracic, lumbar, and right hand and wrist symptoms were not related to her regular work activities nor her specific 1989 work injury. Resp. App. 41. Dr. Friedland opined that the right hand surgeries were not reasonable and necessary in the absence of any positive EMG findings. *Id.*

On April 7, 2006, Dr. Bengston examined Relator and noted that she had continued mechanical neck and lower thoracic pain. Resp. Ex. 11. Dr. Bengston opined that her symptoms and need for surgery were directly related to Relator's 1989 work injury. *Id.*

On July 5, 2006, Dr. Friedland issued a supplemental report wherein he reaffirmed and restated his earlier diagnosis and opinions. Ex. 13; Resp. App. 45. He disagreed with Dr. Beck that Relator's work injury made her more susceptible to degenerative arthritis and cervical disc herniations. *Id.* Dr. Friedland also disputed that Relator's right carpal tunnel and de Quervains tenosynovitis⁴ were related to her work-related injuries. *Id.*

⁴ de Quervains tenosynovitis is defined as "painful tenosynovitis due to relative narrowness of the common tendon sheath of the abductor pollicis longus and the extensor pollicis brevis." Dorland's Medical Dictionary 481 (28th Ed. 1994).

On May 11, 2006, Dr. Kirsch issued a report wherein he noted that he had based his de Quervains tenosynovitis diagnosis for Relator upon her subjective complaints and his objective clinical findings. Ex. 43.

On August 18, 2006, a hearing on Relator's new claim petition was held. RA26. On November 14, 2006, Compensation Judge Danny P. Kelly issued his decision that found Relator's September 25, 1989 injury resulted in a right shoulder injury and cervical strain/sprain; that the cervical injury resolved no later than January 30, 1990; that the Relator had failed to prove that her right shoulder injury remained a substantial contributing factor to either her wage loss or her medical expenses after December 30, 1990; and that Relator had failed to establish a causal connection between her 1990 injury and her subsequent medical conditions. RA26.

On December 4, 2006, Relator filed an appeal with the WCCA from the compensation judge's decision. RA37. On June 14, 2007, the WCCA affirmed the compensation judge on all issues. RA37.

On July 5, 2007, Relator filed a Petition for Writ of Certiorari to this Court. RA47.

ARGUMENT

I. STANDARD OF REVIEW.

The Minnesota Supreme Court has original jurisdiction for review of decisions from the Workers' Compensation Court of Appeals ("WCCA") as set forth in Minn. Stat. § 176.471, subd. 1 (2006). Review of questions of fact are subject to the substantial evidence test as set forth in Minn. Stat. § 176.421, subd. 1(3) (2006). *See*

Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d. 54 (Minn. 1984). Substantial evidence is evidence that a reasonable mind would find adequate. *Hengemuhle*, 358 N.W.2d at 60. “Fact-findings 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.*, 229 N.W.2d 521, 524, 304 Minn. 196, 201 (1975). On appeal, fact-findings should not be disregarded “unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported the evidence as a whole.” *Id.* at 524.

Review of questions of law is *de novo* and the Court must determine whether the WCCA’s order conforms with Minn. Stat. ch. 176 (2006) or whether the WCCA committed an error of law. *See Krovchuk v. Koch Oil Refinery*, 48 W.C.D. 607 (WCCA, 1993), *aff’d* without opinion, 502 N.W.2d. 216 (Minn. June 3, 1993).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE COMPENSATION JUDGE’S FINDINGS THAT RELATOR DID NOT ESTABLISH THAT HER SEPTEMBER 25, 1989 INJURY CONTINUED TO BE A SUBSTANTIAL CONTRIBUTING FACTOR IN HER CLAIMED DISABILITY.

Relator challenges the compensation judge’s findings and the WCCA’s decision denying her claim for wage loss and medical benefits. The compensation judge evaluated the voluminous medical evidence in the record and, in painstakingly detailed findings, found that Relator had not met her burden of proof that the September 25, 1989 injury caused her alleged wage loss and her current need for medical treatment. RA26.

Relator contends that the compensation judge and the WCCA erred in rejecting her *Gillette*⁵ injury claim and erred in accepting the opinion of Dr. Friedland over the opinions of several of her treating physicians. Relator asks this Court to substitute its judgment for the compensation judge's resolution of the opposing medical opinions that the causation for her current claims are not related to her admitted September 25, 1989 injury at Farmstead Foods. The premise for this argument is directly contrary to rule of law established in *Nord v. City of Cook*, 360 N.W.2d 337, 342-343 (Minn. 1985) (holding that a compensation judge's resolution of conflicting medical opinion will be upheld unless it is not based upon substantial evidence).

At the outset, the Court is directed to the counsel of Professor Larson who stated:

When we turn from these cases of medical causal relation to the broad question of miscellaneous consequences having some causal connection with the original injury, we enter an area of compensation law where the difficulty of expressing a body of coherent principles is at the maximum.

1 Arthur Larson, *Larson's Workers' Compensation Law*, § 10.04 (2003).

The Fund introduced two independent medical evaluation reports from two board certified orthopedic surgeons, Dr. Mark Engasser and Dr. Mark Friedland, who had evaluated Relator. Exs. 5-9; Resp. App. 20, 24, 36. The compensation judge reasonably relied upon the medical opinions of Drs. Engasser and Friedland in concluding that Relator's September 25, 1989 injury did not substantially contribute to her need for continued medical treatment, that Relator had not established that her cervical spine injury and her right shoulder injury had contributed to her wage loss and required

⁵ *Gillette v. Harold Inc.*, 101 N.W.2d 200, 257 Minn. 313 (1960).

medical treatment compensable under the Workers' Compensation Act, Minn. Stat. ch. 176, and that her 1990 injury did not contribute to her fibromyalgia condition. The compensation judge reasonably relied upon these opinions in denying Relator's claim.

First, Relator argues that the compensation judge's causation findings, in reliance upon Dr. Friedland's independent medical reports, are clearly erroneous because they ignored Dr. Beck's August 23, 2004 report that her September 25, 1989 work injury at Farmstead Foods substantially contributed to the disc herniations in her neck. Rel. Br. at 13-14. She further argues that the compensation judge ignored Dr. Bengtson's April 7, 2006 report that her 1989 work injury led to her neck fusion. *Id.*

The compensation judge set forth detailed findings as the basis for his adoption of Dr. Engasser's and Friedland's opinions. RA30-32. In Finding of Fact No. 18, the compensation judge noted that Dr. Engasser had performed an independent medical examination of the Relator on May 2, 1991. RA30. The compensation judge found that Dr. Engasser took a complete medical history at that time, had reviewed her medical records, and performed a physical examination. RA30. At that examination, Dr. Engasser noted that Relator "had full range of motion of the right shoulder and full range of the cervical spine." Resp. App 51. He further noted that she had sustained an injury to her right shoulder as a result of repetitive strain and a myoligamentous strain to her cervical spine. Resp. App. 51; RA30. Dr. Engasser concluded that Relator was at maximum medical improvement from her September 25, 1989 work injury, and he assessed her with 3% permanent partial disability. Resp. App 51; RA30.

In Finding of Fact No. 19, the compensation judge noted that at the October 30, 2005 independent medical examination, "Dr. Friedland took a history from the employee, reviewed medical records and performed a physical examination." RA30. Dr. Friedland can be presumed then to have been aware of Dr. Beck's August 23, 2004 report in the complete set of medical records he reviewed. Dr. Friedland also examined Relator on two separate occasions, October 18, 2005 and April 5, 2006. Fund Exs. 5 and 6; Resp. App. 51. Dr. Friedland concluded in his first report that Relator sustained a mild cervical strain from the September 29, 1989 incident and that she had reached maximum medical improvement from that injury by at least December 30, 1990. Fund Ex. 5; Resp. App. 52. In his April 5, 2006 report, Dr. Friedland noted:

The conclusions contained in my report of 10/18/05 have not changed as a consequence of repeat examination of Ms. Maricle or review of the additional medical records since last being seen. It remains my opinion that the only injuries sustained as a result of the alleged work-related injury of 09/29/89 while employed at Farmstead Foods was that of a right shoulder impingement syndrome and mild cervical strain/sprain. The patient's thoracic, lumbar, and right hand and wrist symptomatology was not a substantial result of her work activities and/or alleged injury of 09/29/89. As previously outlined in my report of 10/18/05, it is my opinion that the cervical strain/sprain had resolved as of 12/30/90 when the patient had been placed at maximum medical improvement by Dr. Farber. Any ongoing care or treatment with respect to the cervical condition including the anterior cervical discectomy and fusions eventually performed were not a substantial result of Ms. Maricle's alleged work injury of 09/29/89. This would be consistent with Workers' Compensation Disability Schedule 5223.0070 subpart 2A(1). As I previously noted in my report of 10/18/05, the 16% permanent partial disability relative to the cervical spine subsequent to her surgical intervention at C5-6 and C6-7 levels would not be a causal result of the alleged injury of 09/29/89 in that she developed C5-6 and C6-7 disc herniations long after full recovery from

her injury on 12/30/90. It is my opinion that the cervical injury of 09/29/89 was temporary in nature...⁶

Ex. 5; Resp. App. 41.

Dr. Friedland referenced Dr. Farber's December 30, 1990 maximum medical improvement opinion as support for his own opinion that Relator's cervical strain/sprain had resolved. *Id.* Dr. Farber opined in his December 30, 1990 report that Relator did

⁶ In Finding of Fact No. 19, the compensation judge indicated:

Dr. Friedland diagnosed S/P C5-6 and C6-7 anterior cervical discectomy and fusions with solid arthrodesis radiographically and subjective symptomatology far in excess of objective findings on physical examination and radiographic studies, S/P right shoulder subacromial decompression on two occasions with subjective symptomatology far in excess of objective findings on physical examination or radiographic studies, mild age appropriate multi-level thoracic degenerative disc disease and marked functional overlay and/or malingering. Dr. Friedland opined that on or about September 29, 1989, the employee sustained an injury of the right shoulder in the form of an impingement syndrome without rotator cuff tear and a mild cervical strain/sprain while employed for Farmstead Foods. Dr. Friedland opined that the employee reached maximum medical improvement with respect to both the right shoulder and cervical strain/sprain as of at least December 30, 1990. Dr. Friedland opined that there was no objective evidence to substantiate the need for any physical restrictions with respect to her cervical complaints at the time of maximum medical improvement in December 1990. Dr. Friedland opined that the employee was capable of working on a full-time basis within right shoulder physical restrictions since having reached maximum medical improvement in December 1990. Dr. Friedland opined that there is no evidence to substantiate that the injury alleged on September 29, 1989 was in any way a substantial contributing cause to any alleged temporary total disability from and after December 30, 1990. Dr. Friedland has adequate foundation for his opinions. The opinions of Dr. Friedland are adopted by the undersigned compensation judge.

RA30-31.

not require surgery for her bulging cervical disc and had reached maximum medical improvement from her September 25, 1989 injury. Rel. Ex. 12.

The compensation judge accurately summarized Dr. Friedland's opinions as further set forth in his independent medical report. Resp. Ex. 6; Resp. App 51-54. Because Dr. Friedland's opinions are based upon his review of Relator's medical records, his physical examination of Relator, and his experience as an orthopedic surgeon, it is supported by sufficient foundation and the compensation judge could accept Dr. Friedland's opinion as his own. *See Nord*, 360 N.W.2d at 342-343.

The compensation judge also considered Dr. Friedland's opinion that Relator exhibited "marked functional overlay" as well as his opinion that she had "dramatic and exaggerated pain behaviors." *Id.*

The compensation judge's findings support his conclusions. In Finding of Fact No. 20, the compensation judge set forth the detailed history and results from Dr. Friedland's April 5, 2006 IME. He again noted that Dr. Friedland took another medical history from Relator at this subsequent IME, and that Dr. Friedland had reviewed medical records, as well as performing another physical examination. RA31.

The compensation judge relied upon Dr. Friedland's opinion over the contrary opinions of Relator's physicians. A compensation judge may choose one expert's opinion over another expert's opinion. It is well-settled in Minnesota that a compensation judge's choice of expert opinion is to be upheld unless that opinion is without adequate foundation. *Nord*, 360 N.W.2d at 342-343. The compensation judge's adoption of Dr. Friedland's opinion is reasonable because it was based upon adequate

foundation. Therefore, the compensation judge's findings were based upon substantial evidence in the record as a whole. *Hengemuhle*, 358 N.W.2d. at 60.

The court found that the compensation judge did not err in selecting the opinions of Drs. Engasser and Friedland. RA46; *Nord*, 360 N.W.2d at 342-343. The WCCA further correctly noted that the issue presented in this case was not whether the Relator had sustained a *Gillette* injury, but rather "whether or not that injury continued to be a substantial contributing factor in the employee's claimed disability."⁷ RA45. Having found that Drs. Engasser's and Friedland's opinions were based upon sufficient foundation, it was reasonable for the compensation judge to adopt their opinions as his

⁷ The term "substantial contributing factor" is not defined in the Workers' Compensation Act, Minn. Stat. ch. 176. The nearly identical term "substantial contributing cause," while also undefined by the Act, has been construed by the WCCA as follows:

The term essentially contains its own definition- that is, a 'substantial contributing cause' is a cause that is both 'substantial' and 'contributing' to the ultimate disability. Stated another way, the cause must be 'appreciable.' *Roman v. Minneapolis Street Ry.*, 268 Minn. 367, 380, 129 N.W.2d 550, 558, 23 W.C.D. 573, 592 (1964). As this court stated in a different context, "[w]hen a line is drawn, there are always cases very close to each side of the line. No absolute rule can be derived, since there are too many factual variables that could affect the result'. *Bohlin v. St. Louis County/Nopeming Nursing Home*, 61 W.C.D. 69, 81 (W.C.C.A. 2000). It is because of the many factual variable peculiar to each case that the issue of whether a work injury is a substantial contributing factor in a claimed disability is a factual question for the compensation judge. The term essentially defies precise definition, and the issue on appeal in this case is whether substantial evidence supports the judge's decision.

Hamm v. Marvin Windows & Doors, 64 W.C.D. 270, 2004 WL 1044810 (April 21, 2004).

own. RA31-32. Moreover, since these opinions were reasonable, they constitute substantial evidence. *Hengemuhle; Id.* at 60.

Finally, the WCCA properly rejected Relator's claim that the compensation judge erred in adopting Dr. Friedland's opinion, as that opinion was based upon inadequate foundation because he did not address Relator's "trigger points" in Relator's shoulder as identified by Dr. Larson and Dr. Christian. The court analyzed this argument and noted that Dr. Friedland's report detailed elsewhere the basis for his opinion and therefore concluded that the compensation judge could properly rely upon Dr. Friedland's opinion. RA46.

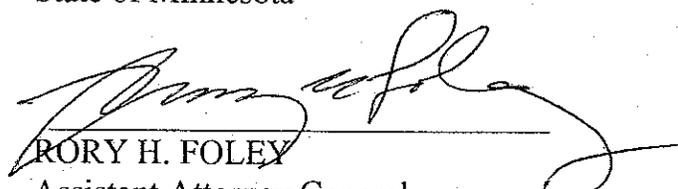
CONCLUSION

For the foregoing reasons, the decision of the compensation judge, as affirmed by the WCCA, should be affirmed.

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Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota



RORY H. FOLEY
Assistant Attorney General
Atty. Reg. No. 0155056
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 297-2972 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR RESPONDENT
SPECIAL COMPENSATION FUND