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CLARENCE JOHNSON, Employee/Appellant, v. QUALITY TEMP/T.E. DOHERTY CO., SELF-INSURED, Employer, and MN DEP'T OF ECON. SEC. and MN DEP'T OF HUMAN SERVS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 3, 1996

No. ###-##-####

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's determination that the preponderance of the credible evidence fails to establish that the employee sustained a work-related injury where the testimony of the employee was found to be not credible and the employee's testimony is the only evidence that a work-related injury occurred.

Affirmed.

Determined by Wheeler, C.J., Olsen, J., and Wilson, J.
Compensation Judge: Kathleen Nicol Behounek.

OPINION

STEVEN D. WHEELER, Judge

The employee Clarence Johnson, appeals from the compensation judge's determination that the preponderance of the credible evidence fails to establish that he sustained a work-related injury to his lower back on April 4, 1994, while employed by Quality Temp/T. E. Doherty Company, the employer. The employee's main argument is that the compensation judge based her decision on a faulty premise. The employee contends that the compensation judge concluded that he had not injured his low back on April 4, 1994 because she found that he had two months of low back treatment one year before the alleged work injury. The employee argues that this finding is an error of law based on the reasoning in Bender v. Dongo Tool Co., 509 N.W.2d 366, 49 W.C.D. 511 (Minn. 1993). The employee also contends that the findings of fact and order are unsupported by the substantial evidence in view of the entire record as submitted.

BACKGROUND

The employee, Clarence Johnson, started working for the employer, Quality Temp, in the winter of 1993. He planned to work for the employer from November to April, after which he intended to return to his seasonal employment painting houses for Sears. (T. 22.) The employee worked for the employer until April 4, 1994, at which time he claims he sustained an

injury to his low back during the course of his employment. (T. 31.) At that time the employer had placed the employee at OilDyne Company where his job was to "oil down gears and grind them." (T.16.) Approximately five or six times day, the employee would carry a bucket of gears weighing approximately 30 pounds from one department to another. He testified that while lifting gears on April 4, 1994 around 1:00 p.m., he noticed his lower back and left leg getting numb. (T. 31.)

The employee returned to work the next morning and attempted to work, but experienced pain in his lower back and left leg and went home after a brief period of time. Later that day, he sought chiropractic treatment with Dr. Ted Mazurek.. (T. 32.) The medical records from Dr. Mazurek's office indicate that the employee initiated treatment with Dr. Mazurek on April 5, 1994, complaining of neck, shoulder and low back pain caused by a work accident the day before. Dr. Mazurek opined that the low back portion of the work injury resulted in "considerable Myofashites of the peraspinal muscles with subluxations in the regions of his Lumbar and S\I joints with resulting paresthesia."(sic.) (Pet. Ex. C.) The employee testified that he had never experienced any problems with his low back prior to working at OilDyne. (T. 63.)

Prior to the April 4, 1994 injury, the employee was involved in two automobile accidents, one in 1983, in which the car he was riding in was broadsided, and one in 1990, in which the car he was driving was rear-ended while sitting at a red light. (T. 24-26.) The employee began chiropractic treatment with Dr. David Nowicki as a result of the 1990 automobile accident and treated with Dr. Nowicki from January 1990 to April 1993. (T. 27.) The employee testified that the injuries he suffered as a result of those prior automobile accidents were to his neck and both shoulders. He specifically testified that he had not had any problems with his low back as a result of the automobile accidents. (T. 35.) The majority of the medical records from Dr. Nowicki's office show care and treatment for neck and shoulder injuries. (Resp. Ex. 4.)

In addition to the 1983 and 1990 automobile accidents, in January 1993 the employee suffered frostbite to his hands and toes while working outside as a house painter for Perfect Touch Painting. (T. 28.) As a result of that injury, the employee treated with his family physician, Dr. Cassius Ellis. In February 1993 the employee was referred by Dr. Ellis to Dr. Crispin See for a neurologic evaluation of the numbness and tingling in his fingertips and toes. (Resp. Ex. 2.) The reason for the referral shown on the neurologic evaluation sheet from the employee's February 17, 1993 visit to Dr. See's office was "Numbness in the fingers and toes since frostbite in 1983. Also neck pain and low back pain. Rule out radiculopathy." (Resp. Ex. 5.) Dr. See's post-evaluation letter to Dr. Ellis reported the following health history:

> The patient has a history of neck pain and lower back pain related to a motor vehicle accident which occurred on December 30, 1990...He stated that he has been advised by his chiropractor not to return to work because of his neck and lower back pain. He also has a history of having been involved in a motor vehicle accident in 1983

> for which he had some neck pain and lower back pain, and he stated that the neck and back pains were worse after the accident of December 30, 1990. (Resp. Ex. 5)

Both the neurological evaluation and Dr. See's post-evaluation letter conclude that the employee demonstrated findings which were "suggestive of L5-S1 radicular involvement." Dr. See further noted that "with regard to his neck and lower back pain the patient is under the care of his chiropractor." (Resp. Ex. 5.) The employee denies reporting a history of low back pain to Dr. See. The employee testified that he told Dr. See that he had upper back pain and stated "I don't know how he [Dr. See] got that mixed up." (T. 61.)

The February 17, 1993 treatment notes from Dr. Nowicki, with whom the employee had been consistently treating since 1991, state that the employee "also complains of radicular pain down left leg . . . observed palpable lumbar back muscle spasms (left S1 joint subluxed)." That entry is the first notation of low back complaints in Dr. Nowicki's records. Subsequently, from February 26, 1993 through April 9, 1993, Dr. Nowicki's treatment notes consistently show that the employee complained of cervical, thoracic and lumbar back pain, and the doctor observed the same areas to have muscle spasm. (Resp. Ex. 4.)

Following the filing of the first report of injury the employer filed Notices of Denial of Liability on April 22 and May 20, 1994. The employee filed a claim petition on September 28, 1994, alleging an injury to his back, legs and neck, and claiming entitlement to medical expenses and Temporary Total Disability benefits from April 4, 1994. The employer filed a Notice of Denial of Liability on January 10, 1995. A hearing was held before Compensation Judge Kathleen Nicol Behounek on January 24, 1996. The compensation judge determined that the preponderance of the credible evidence failed to establish that the employee sustained a work-related injury on April 4, 1994. The employee appeals from that decision.

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

The compensation judge determined that the employee had failed to prove by a preponderance of the credible evidence that he sustained a personal injury on April 4, 1994. The employee argues that the compensation judge found that he had an earlier injury to his low back for which he received treatment, and as a result of that he had not injured his back on April 4, 1994. The employee contends this finding is an error of law, citing Bender v. Dongo Tool Co., 509 N.W.2d 366, 49 W.C.D. 511 (Minn. 1993). In that case the supreme court held that the fact "that an employee has a long history of back trouble does not disqualify a claim if the employment aggravated, accelerated or combined with the infirmity to produce the disability for which compensation is sought."

We do not share the employee's interpretation of the compensation judge's decision. We do not believe that she found that the employee could not have a work injury in 1994 simply because he had a similar problem in 1993. Instead, we interpret the compensation judge's findings to hold that she did not believe that the employee sustained an injury of any kind at work on April 4, 1994. We believe she determined that the employee had failed to prove that his 1994 "employment aggravated, accelerated, or combined" with whatever preexisting infirmity he may have had to produce a disability. The basis for her decision was not the fact that the employee had a preexisting condition, but was her unwillingness to believe the employee's testimony, which was the only evidence that the employee's work activities contributed to his disability. The compensation judge, in the memorandum attached to her Findings of Fact and Order, clearly states that "[t]he employee's claimed injury was unwitnessed. Therefore, the credibility of employee's testimony as to how the injury occurred is at issue. Based on all the evidence submitted in this case, the court determines that the employee's testimony was not credible and does not support his claim of a work injury on April 4, 1994." The compensation judge further stated that the basis for her finding that the employee's testimony was not credible was the conflict between the testimony given by the employee about his prior history of lower back pain, and the history reflected in the records of Dr. See and Dr. Nowicki. Thus, the decision of the compensation judge hinged not on whether or not the claimed low back injury was an aggravation of a previous condition, but on whether the injury actually occurred. The compensation judge's decision was based on her finding that the employee's testimony was not credible.

"A finding based on credibility of a witness will not be disturbed on appeal unless there is clear evidence to the contrary." See Even v. Kraft, Inc., 445 N.W.2d 831, 835, 42 W.C.D. 220, 225-26 (Minn. 1989). Here, the compensation judge reviewed all of the evidence submitted in the case, including the employee's testimony and all of the medical records, and made a finding

on the credibility of the employee's testimony. We find that there is sufficient evidence to support the compensation judge's finding. At the hearing before the compensation judge on January 24, 1996, the employee testified that he had never experienced any problems with his low back prior to the unwitnessed injury of April 4, 1994. The reports from both Dr. See and Dr. Nowicki indicate that the employee complained about lumbar back pain and radicular pain down the left leg as early as February of 1993 and consistently complained after that date of back and leg pain. Dr. See found objective evidence of L5-S1 radicular involvement during a neurological examination on February 17, 1993 and Dr. Nowicki consistently found muscle spasm in the lumbar back area upon examination from February 26, 1993 until the last time he treated the employee in April of 1993. These contradictions in the evidence provide a basis for the conclusion that the employee's testimony "was not credible." From this finding the compensation judge was free to question all of the employee's testimony, including his claim that he was injured at work. It is not the role of this court to evaluate the credibility and probative value of witness testimony and to choose different inferences from the evidence than did the compensation judge. Krotzer v. Browning-Ferris/Woodlake Sanitation Serv., 459 N.W.2d 509, 43 W.C.D. 254 (Minn. 1990).

In addition, we believe the compensation judge's decision is consistent with the supreme court's holding in Bender. The supreme court in the Bender case stated "whether the employment [aggravated the preexisting condition] is a question of fact, not law, and a finding of fact on this point...will not be disturbed on appeal." The compensation judge made a finding that the preponderance of the credible evidence does not support the employee's claim that any injury occurred on April 4, 1994, much less that the employee's work aggravated the preexisting condition. For this reason and all the reasons given above we affirm the findings of the compensation judge.