STEPHANIE ANDERSON, Employee v. BUREAU OF ENGRAVING and SELF-INSURED/ALEXSIS, INC., Employer-Insurer/Appellants.

WORKERS= COMPENSATION COURT OF APPEALS
SEPTEMBER 16, 1998

HEADNOTES

EVIDENCE--RES JUDICATA. Principles of res judicata were not applicable in litigation to determine the nature and extent of the employee's injury where earlier decision discussed the employee's diagnosis only in the context of determining whether an offered job was physically suitable.

CAUSATION. Substantial evidence supports the compensation judge's finding that the employee suffered from thoracic outlet syndrome and that it was causally related to her work injury.

PERMANENT PARTIAL DISABILITY. Where there was evidence that the employee may undergo further surgery, the compensation judge did not make a finding as to MMI, and the compensation judge did not determine the employee's minimum ascertainable permanent partial disability, the compensation judge prematurely rated the employee for permanent partial disability.

Affirmed in part and reversed in part.

Determined by Hefte, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Ronald E. Erickson

OPINION

RICHARD C. HEFTE, Judge

The self-insured employer appeals the compensation judge's findings that the employee sustained a work-related injury in the nature of thoracic outlet syndrome and that the employee was entitled to a 7% permanent partial disability rating. We affirm in part and reverse in part.

BACKGROUND

On October 28, 1991, Stephanie Anderson (employee) sustained an admitted work injury to her right shoulder in the nature of right shoulder impingement/mild bursitis while working in the screening department at the Bureau of Engraving (self-insured employer). The employer accepted liability for this injury and paid various benefits. Before the 1991 injury, the employee had developed bilateral carpal tunnel syndrome, which is not at issue in this case. The employee underwent an EMG on November 7, 1991, which was interpreted as a "[v]ery mildly abnormal

EMG suggestive of mild or early bilateral carpal tunnel syndrome." (Employer's Exh. 2.) In December 1991, the employee began treating with Dr. Richard Kyle, who diagnosed right shoulder impingement syndrome. The employee continued to treat with Dr. Kyle through 1993. A February 3, 1993, MRI showed moderate subacromial/subdeltoid bursitis, borderline acromiohumeral distance and intact rotator cuff. (Employer's Exh. 8.) In March 1993, Dr. Kyle referred the employee to Dr. David Blake to determine whether she had thoracic outlet syndrome. Dr. Blake diagnosed the employee with thoracic outlet syndrome. (Employer's Exh. 5.) On March 30, 1993, the employee underwent another EMG, which indicated a possibility of nerve root or plexus compression in the proximal upper extremity or neck that may correlate with the patient's symptoms of thoracic outlet syndrome. (Employer's Exh. 3.) Dr. Blake informed the employee of surgical options, but noted that the employee was against having surgery. (Employer's Exh. 5.)

On March 4, 1993, the employer offered the employee a job in the cleaning and finishing department at her pre-injury wage. The employee refused the offer, and the employee terminated the employee's employment for refusing a suitable job. The employee litigated this issue, and after a hearing on June 23, 1993, and July 19, 1993, the compensation judge found that the employee had refused a suitable job. (Findings & Order served and filed October 7, 1993.) The employee appealed, and this court affirmed. Anderson v. Bureau of Engraving, Inc., 50 W.C.D. 438 (W.C.C.A. 1994), aff'd (Minn. June 20, 1994).

On November 24, 1993, the employee was seen by Dr. Richard Johnson at the Noran Neurological Clinic for a second opinion. Dr. Johnson indicated that his examination showed parethesias down the right arm with pressure over the right brachial plexus and positive elevated arm stress, and opined that the employee had thoracic outlet syndrome. (Employee's Exh. B.) The employee returned to Dr. Johnson in May 1995 with continued symptoms and again in February 1997, when Dr. Johnson opined that the employee had ongoing thoracic outlet syndrome plus impingement syndrome. In October 1995, the employee was evaluated by Dr. Gregg W. Anderson, who also found evidence of thoracic outlet syndrome, and recommended physical therapy before considering surgical options. (Employee's Exh. C.)

The employee returned to Dr. Kyle in March 1996 with continued problems in her shoulders. Dr. Kyle referred the employee to Dr. Thomas Varecka for evaluation of her carpal tunnel and for consultation of the sequence of surgical events if she needed carpal tunnel surgery as well as shoulder decompression or other surgery for thoracic outlet syndrome. Dr. Varecka recommended that the employee first undergo shoulder decompression surgery before attempting injections or a first rib resection for her thoracic outlet syndromes. (Employer's Exh. 6.)

On March 1, 1996, the employee filed a claim petition alleging a work injury in the nature of thoracic outlet syndrome and claiming 7% permanent partial disability and medical expenses. On September 12, 1996, the employee underwent an independent medical examination with Dr. David Boxall. Dr. Boxall found no evidence of thoracic outlet syndrome and opined that the employee was at maximum medical improvement with a 0% permanent partial disability rating. (Employer's Exh. 1.) A hearing was held on December 4, 1997. The compensation

judge found that the employee suffered from thoracic outlet syndrome, that this condition was causally related to her October 28, 1991, work injury, that the claimed medical expenses were reasonable and necessary, that a prior decision did not have res judicata effect in determining the nature and extent of the employee's October 28, 1991 work injury, and that the employee was entitled to a 7% permanent partial disability rating. The self-insured employer appeals.

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 (1996). 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

Res Judicata

The employer argues that the nature of the employee's injury was determined in the October 7, 1993, Findings and Order as being mild bursitis, which was affirmed by this court and the supreme court, and therefore that the employee is barred by principles of res judicata from claiming that the October 1991 work injury caused her thoracic outlet syndrome. The compensation judge's memorandum to the October 7, 1993, Findings and Order states:

> None of the medical information indicates that the employee has a significant disability with respect to her right arm. The great weight of the evidence is that she has a mild bursitis. This is not a sufficient disability to preclude her from most normal work activities.

(Findings and Order, served and filed October 7, 1993, memo at 6.) This statement is not a finding, however. The compensation judge did make a finding which mentioned that an MRI indicated bursitis, as follows:

> The employee underwent an MRI of the right shoulder on December 4, 1991, and this indicated some tendonitis or early degenerative changes in the mid-distal supraspinatus tendon. No rotator cuff tear was found. The MRI of left shoulder was negative. The employee underwent a repeat MRI on February 3, 1993, of the right shoulder, and this indicated moderate subacromial/subdeltoid bursitis. The supraspinatus muscle and tendon were normal in appearance without evidence of inflammation or tear.

(Id., Finding 5.) The compensation judge=s decision that the employee had refused a suitable job was affirmed by this court. This court noted:

> There is medical disagreement as to what the employee's diagnosis is. While Dr. Kyle believed that the employee had an impingement syndrome, his most recent office note indicates a referral to Dr. Dave Blake for evaluation of thoracic outlet syndrome, which Dr. Blake did diagnose. The compensation judge found that the weight of the evidence was that the employee had mild bursitis. This is consistent with the results of an MRI scan performed on February 3, 1993.

Anderson v. Bureau of Engraving, Inc., 50 W.C.D. 438, 443 n.2 (W.C.C.A. 1994) (citations omitted), aff'd (Minn. June 20, 1994).

Based on these references to the employee's diagnosis in the October 1993 decision and this court's affirmance, the employer argues that res judicata precludes the compensation judge from determining that the employee's work injury was anything other than bursitis. Generally, the doctrine of res judicata and related principles preclude relitigation of an issue distinctly put in issue, litigated, and determined in a prior adjudication. Principles of res judicata apply in workers' compensation proceedings. Alexander v. Kenneth R. LaLonde Enters., 288 N.W.2d 18, 20, 32 W.C.D. 312, 314 (Minn. 1980). The doctrine of res judicata does not bar litigation of issues not previously litigated. Westendorf v. Campbell Soup Co., 309 Minn. 550, 550-51, 243 N.W.2d 157, 158, 28 W.C.D. 460, 460 (1976) (per curiam); see also Fischer v. Saga Corp., 498 N.W.2d 449, 450, 48 W.C.D. 368, 369 (Minn. 1993) (citing 3 Arthur Larson, The Law of Workmen's Compensation ' 79.72(f) at 15-426.272(100) (1992) ("res judicata does not apply if the issue at stake was not specifically decided in the prior proceeding")). In this case, the nature of the employee's injury was not at issue at the 1993 hearing. The only issue in that hearing and on appeal to this court was the physical suitability of a job offered to the employee. The nature of the employee's injury, while discussed in the context of the physical suitability issue, was not specifically litigated or determined at that hearing. Therefore, principles of res judicata are not applicable in this case.

Causation

The employer argues that the compensation judge's finding that the employee suffers from thoracic outlet syndrome is not supported by substantial evidence. The employer relies on Dr. Boxall's opinion that the employee does not have thoracic outlet syndrome. (Employer's Exh. 1.) There is other medical evidence, however, which supports the compensation judge's finding. Dr. Blake diagnosed the employee with thoracic outlet syndrome. (Employer's Exh. 5.) The March 30, 1993, EMG indicated a possibility of nerve root or plexus compression in the upper extremity or neck that could correlate with the patient's symptoms of thoracic outlet syndrome. (Employer's Exh. 3.) Dr. Johnson indicated that his examination showed parethesias down the right arm with pressure over the right brachial plexus and positive elevated arm stress, and opined that the employee had thoracic outlet syndrome. (Employee's Exh. B.) In October 1995, Dr. Anderson found evidence of thoracic outlet syndrome, and recommended physical therapy before considering surgical options. (Employee's Exh. C.) It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). Substantial evidence supports the compensation judge's finding that the employee suffers from thoracic outlet syndrome. Accordingly, we affirm.

The employer also argues that the compensation judge's finding that the employee's thoracic outlet syndrome was causally related to the employee's work injury is not supported by substantial evidence. In November 1993, Dr. Johnson opined that:

> I think [the employee] probably does have thoracic outlet syndrome. When she developed the sudden parethesias and numbness of the arm in October of 1991 at the time she developed her shoulder problem, I think she most likely had a brachial plexus stretch compression. She is having ongoing symptoms using her arms up high which would correlate with thoracic outlet syndrome.

(Employee's Exh. B.) The employer argues that Dr. Johnson's opinion is not valid because the employee's 1991 EMG did not reveal any evidence of a brachial plexus stretch compression. Dr. Johnson was aware of the results indicated in the 1991 EMG but still opined that the employee's thoracic outlet syndrome was casually related to the employee's work injury. Dr. Johnson's opinion has adequate foundation. Dr. Johnson admitted that "it is very difficult to separate things out clinically in terms of how much is coming from carpal tunnel and how much from the thoracic outlet." (Id.) But he also stated that: "Certainly, when the whole arm goes numb, this most likely is coming from thoracic outlet. Some of the symptoms in the fingers could be coming from the thoracic outlet or the carpal tunnel syndrome. I think her symptoms in the arms are certainly related to her work activities over the 16 years. The thoracic outlet stretch which occurred on October 31[1] and the carpal tunnel syndrome and perhaps some element of the

[1] This date is apparently an error. The employee's date of injury is October 28, 1991.

thoracic outlet syndrome are due to ongoing repetitive work with the arms." (Id., footnote added.) Substantial evidence supports the compensation judge's finding that the employee's thoracic outlet syndrome is causally related to the employee's work injury.

The employer also appealed the compensation judge's award of medical expenses for treatment by Dr. Johnson at the Noran Neurological Clinic. The employer's only argument on appeal regarding these expenses is based on the assertions that the employee did not suffer from thoracic outlet syndrome and/or that her condition was not causally related to her work injury. Since we have affirmed the compensation judge's findings that the employee suffers from thoracic outlet syndrome and that it is causally related to her work injury, we also affirm the compensation judge's finding that the employee's treatment for this condition at the Noran Clinic was reasonable and necessary.

Permanent Partial Disability

The compensation judge awarded the employee 7% permanent partial disability for her thoracic outlet syndrome. The employer argues that the compensation judge erroneously rated the employee=s permanency without determining that the employee had reached MMI. The compensation judge did not make a finding on whether the employee had reached MMI for thoracic outlet syndrome. A minimum ascertainable permanent partial disability rating is allowed prior to MMI under Minn. Stat. § 176.021, subd. 3. Goodwin v. TEK Mechanical, 49 W.C.D. 350, 361 (W.C.C.A. 1993). It is apparent, however, that the compensation judge did not determine the Aminimum ascertainable permanent partial disability.

The employee testified that she was considering surgery. (T. 69.) Dr. Johnson recommended conservative treatment including exercises, but noted that surgical options were available, either a scalenotomy or a first rib resection. (Employee's Exh. B.) Dr. Anderson recommended physical therapy before considering surgical options. (Employee's Exh. C.) Dr. Blake noted that a rib resection surgery was an option for the employee. (Employer's Exh. 5.) In a July 15, 1993, deposition, Dr. Kyle indicated that the employee has reached MMI "for right now," but that her condition "could get worse or it could get better." (Employee's Exh. D, p. 33.) In April 1996, however, Dr. Kyle recommended that the employee undergo shoulder decompression surgery. (Employer's Exh. 6.) Dr. Kyle referred the employee to Dr. Varecka for evaluation of surgical options. Dr. Varecka's recommendation:

> Given this situation, she was advised that if Dr. Kyle felt that she would be benefited from shoulder decompression, that this would be the first step in her treatment. Further, she was advised that response to thoracic outlet decompression can be quite variable, and that prior to proceeding with a first rib resection for her thoracic outlet syndromes, it might be most beneficial to proceed with bilateral carpal tunnel injections to assess the impact on her pain picture from addressing this situation.

(Employer's Exh. 6.) Because the employee may undergo further treatment and surgery for her thoracic outlet syndrome which may change the employee's permanency rating, we conclude that the compensation judge prematurely rated the employee's permanency. Therefore, we reverse the compensation judge's finding that the employee had sustained a 7% permanent partial disability rating. The employee may bring another claim petition after the additional treatment or surgeries, or if further treatment is ruled out.