

BARBARA A. AUGUSTIN-STEWART, Employee, v. EVANS PRODUCTS-RIVIERA PRODUCTS and CNA INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS

APRIL 7, 1998

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including medical records, lay testimony, and expert medical opinion, supported the finding that the employee's 1978 work injury was a substantial contributing cause of her bilateral knee condition as of the date of the hearing below.

Affirmed, as modified.

Determined by Hefte, J., Wilson, J., and Johnson, J.  
Compensation Judge: Peggy A. Brenden

OPINION

RICHARD C. HEFTE, Judge

The employer and insurer appeal from the compensation judge's determination that the employee's work injury of November 8, 1978, was a substantial contributing cause of the employee's current bilateral knee condition. The employer and insurer further appeal from the compensation judge's failure to order the dismissal of the employee's claim for attorney fees pursuant to Roraff v. State, 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980). We affirm, as modified.

BACKGROUND

The employee, Barbara Augustin-Stewart, fell on her right knee some time in January 1975, while employed by the Red Wing-St. John's Hospital, sustaining a chip fracture of the posterior aspect of the patella. The employee treated for this problem with Dr. Nils Fauchald at the Interstate Medical Center. X-ray examination of the knee on January 27, 1975 also showed that the right patella was lying in a somewhat laterally eccentric position in relation to the left patella. On January 29, 1975, the employee underwent a lateral retinacular release and patellar shave on her right knee for a patellar malalignment syndrome with chondromalacia patella. Following this surgery, she was put on an exercise program and her right knee was essentially asymptomatic by April 3, 1975. She returned to her job at the hospital with no medical restrictions. (T. 19-22; Exh. A: Interstate Med. Ctr: 1/27/75 - 4/3/75 chart notes; 12/10/86 letter.)

In about August 1978, the employee began working for the employer, Evans Products. On November 8, 1978, the employee was working in the employer's spray or lacquer room, where her duties involved spraying and wiping kitchen cabinets as they proceeded along a

conveyor belt. On occasion, the employee was required to lift cabinets to reposition them if they had rolled too far down the belt. While lifting a cabinet, the employee fell, landing on a cement step with both knees. The employee returned to Dr. Fauchald that day, complaining of pain in the right knee. She was given a knee brace, exercises were prescribed, and she returned to work. On November 20, 1978, when next seen by Dr. Fauchald, the employee's right knee was found to be particularly tender along the lateral parapatellar area, and the left knee was also tender, although to a lesser degree, in the same area. By December 11, 1978, the date of her next appointment with Dr. Fauchald, pain in the left knee, rather than the right, had become the employee's primary complaint. Evaluation of the left knee revealed that the employee had patellar malalignment and associated chondromalacia patella on that side as well. The left knee was treated surgically with arthrotomy, lateral quadriceps release, and partial patellectomy on January 11, 1979. (T. 22-27; Exh. A: Interstate Med. Ctr: 11/8/78 - 1/11/79 chart notes; 12/10/86 letter.)

Following the left knee surgery, the employee was treated with physical therapy and a program of rehabilitative exercises. On April 2, 1979, Dr. Fauchald noted that the employee had progressed well with the therapy, and would be returning to work on April 9, 1979. He recommended that further treatment be on a per need basis. (Exh. A: Interstate Med. Ctr: 1/19/79 - 4/2/79.)

The employee bumped her left knee at work in October 1979 and saw Dr. Fauchald again for left knee pain on November 9, 1979. An arthrogram was ordered, but did not show any definite meniscal tear, and the employee was placed back on an exercise program. She progressed well by December 13, 1979, at which point her only symptoms were some aching in the back of the knee after periods of being on her feet for several hours. (Exh. A: Interstate Med. Ctr: 11/9/79 - 12/13/79.)

The employee did not return to the Interstate Medical Center for knee problems again until June 16, 1980, when she was seen there by Dr. D.L. Hubbard and reported recently developing a nonpainful effusion of the right knee associated with heavy activity but with no twisting or trauma. She was placed in a velcro knee immobilizer and quad setting isometric exercises were recommended. The employee was treated conservatively for this problem through July 31, 1980. (Exh. A: Interstate Med. Ctr: 6/16/80 - 7/31/80.)

The employee was next seen for knee problems, this time in the left knee, at the Interstate Medical Center by Dr. Fauchald on May 24, 1984. Her right knee symptoms had resolved. She reported an insidious onset of pain in the left leg about six months before, with some giving way of the knee. Despite conservative treatment for several months, the employee went on to undergo further surgery in May 1985 with arthroscopy of the knee and patellar tendon transfer. Despite the surgery, the employee continued to experience left knee difficulties, and a further surgery, in the form of excision of the lateral margin of the patella, was performed on February 14, 1986, for a hypertrophic spur on the lateral margin of the patella. In the opinion of Dr. Fauchald, expressed on December 10, 1986, the employee's 1978 work injury aggravated her pre-existing asymptomatic malalignment, causing the development of her knee symptoms. (Exh. A: Interstate Med. Ctr: 12/10/86 letter.)

On February 12, 1987, the employee was seen by Dr. Fauchald, and reported that she had been getting along well with her left knee, but that her right knee had continued to give her problems which seemed to be gradually worsening. Examination revealed marked tenderness over the medial joint line and some pain on external rotation of the tibia on the femur. Dr. Fauchald thought that there was considerable likelihood of an internal derangement. On March 16, 1987, the employee was again treated surgically by arthroscopy and removal of a loose body, patellar tendon transfer with vastus medialis advancement and lateral retinacular release, and partial excision of the lateral portion of the patella. The employee continued treating with Dr. Fauchald through May 11, 1987, after which she sought no further treatment for her knees for several years. (Exh. A: Interstate Med. Ctr: 2/12/87 - 5/11/87; 4/9/87 letter.)

Following May 1987, the employee continued to experience some symptoms in her knee, principally pain when walking. She self-treated for these symptoms by using cold packs and elevating the knees. (T. 34-35.)

In February 1994, the employee returned to Dr. Fauchald for a recheck of her knees after developing a transient effusion of the right knee, having hyperflexed the knee while reaching across her car to open the opposite door. Dr. Fauchald noted that the employee's effusion had subsided and that the employee had full range of motion of the knees and no evidence of internal derangement, though she had palpable crepitation of the left knee and minimal crepitation on the right. He instructed her to continue regular isometric exercises, and restricted her from squatting, kneeling and ladder climbing, limited her to occasional bending and stair climbing, limited lifting and carrying, and further limited her to semi-sedentary work. In a letter dated February 16, 1995, Dr. Fauchald opined that the employee's 1978 work injury remained a significant contributing cause of her ongoing knee problems. (Exh. A: Interstate Med. Ctr: 2/8/94; 2/16/94 letter.)

The employee underwent an independent medical examination by Dr. Richard C. Strand on June 5, 1995. Dr. Strand opined that the employee's knee problems were wholly the result of her pre-existing patellar malalignment, and that the 1978 work injury did not significantly contribute to her symptoms as of the date of his examination. (Exh. 3.)

In January 1997, the employee was evaluated by Dr. Jack M. Bert. Dr. Bert noted severe patellofemoral crepitus bilaterally. His diagnosis was of a severe bilateral chondromalacia with Grade III merchant views on the right. He recommended a Maquet procedure on the left and opined that a similar procedure would eventually be necessary on the right. In his opinion, the 1978 work injury was a permanent aggravation of her pre-existing condition and continued to be a substantial contributing cause of the employee's symptoms and need for the recommended treatment. (Exh. A: Dr. Bert.)

The employee filed a medical request seeking approval of the proposed Maquet procedure on January 31, 1997. On February 7, 1997, the employer and insurer filed their response refusing payment for the proposed procedure on the basis that the employee's current knee problems were unrelated to her 1978 work injury. (Judgment Roll.)

The employee underwent a second independent medical evaluation by Dr. Strand on May 27, 1997. Dr. Strand again expressed the opinion that the employee's current knee

symptoms were unrelated to the 1978 work injury. In addition, he opined that the Maquet procedure recommended by Dr. Bert was inappropriate for the employee's knee problems. (Exh. 2; see also Exh. 1.)

Following a hearing on August 7, 1997, before a compensation judge of the Office of Administrative Hearings, the judge found that the employee's 1978 work injury was a substantial contributing cause of her bilateral knee condition as of the date of hearing, but that the proposed Maquet procedure was not a reasonable and necessary form of treatment. The employer and insurer appeal from the finding of a causal relationship between the 1978 work injury and the employee's bilateral knee condition. (Judgment Roll.)

## STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1996). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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

### Causation

The compensation judge found that the employee's 1978 work injury was a substantial contributing cause of her ongoing bilateral knee symptoms as of the date of the hearing. The employer and insurer appeal from this determination.

The appellants first point out that, in order to prevail on her medical request for authorization of the Maquet procedure, the employee was required to show not only that the treatment was reasonable and necessary, but also that the need for such treatment was causally connected to the work injury. They argue that, since the compensation judge found that the requested Maquet surgical procedure was not reasonable or necessary, a determination on the issue of causation was unnecessary to defeat the employee's request. Characterizing the finding of a causal relationship as therefore gratuitous, they argue that this court should vacate that finding.

We disagree, and decline to vacate the finding on the issue of causation. The employer and insurer specifically raised the issue of causation as a defense to the employee's medical request, and in so doing, directly invited a finding on that issue. In fact, the pleadings

reveal that the causation issue was the employer and insurer's primary defense to the medical request. (See T. 10-11; Judgment Roll: Medical Response filed 2/7/97.) Pursuant to Minn. Stat. § 176.371, [t]he compensation judge's decision shall include a determination of all contested issues of fact and law. . . Unlike various cases, cited by the appellants, in which this court vacated findings on issues not properly before a compensation judge<sup>1</sup>, the question of causation was here an integral part of the larger issue before the compensation judge and was placed at issue by the appellants themselves. We cannot conclude that the compensation judge erred in rendering a determination on the issue of causation in this case. Because we do not accept the appellants' characterization of the causation finding here as gratuitous, we also do not accept their argument that, as such, it must be deemed without any collateral estoppel effect in future determinations. However, we note that the collateral estoppel effect of this finding is limited, since the determination addresses only causation relative to the employee's bilateral knee condition as of the date of hearing.

The employer and insurer next argue that the compensation judge's finding of a causal relationship was unsupported by substantial evidence. Specifically, they argue that Dr. Fauchald's opinion on causation was not current, having been rendered regarding the employee's symptoms in 1986, and thus of insufficient evidentiary value to support a finding that the employee's bilateral knee condition in 1997 remained causally related to the 1978 work injury. In addition, they argue that the evidence might equally support the view that the employee's 1997 bilateral knee symptoms were solely the result of her underlying pre-existing patellar malalignment deformities; as such, they contend, this court must conclude that the employee failed to sustain her burden of proof.

We disagree, and affirm. There was current medical expert opinion, that of Dr. Bert, which causally linked the employee's current condition and the 1978 work injury. The compensation judge could reasonably rely on this opinion, and this court will not reverse a compensation judge's determination where based upon a choice between divergent expert opinion unless the opinion relied upon was without adequate foundation. No foundational defect is apparent in Dr. Bert's opinion, and we must affirm. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989).

With respect to the burden of proof, we note, first, that this court must review a compensation judge's factual findings using a substantial evidence and clearly erroneous standard, rather than a preponderance of the evidence standard. Minn. Stat. § 176.421, subd. 1(3) (1996). Here, the medical records, the employee's testimony, and medical expert opinion provide

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<sup>1</sup> In Berry v. McLeod County, slip op. (W.C.C.A. Dec. 3, 1991), this court vacated a finding denying loss of earning capacity for a period with respect to which no claim for temporary total, temporary partial, or permanent total disability compensation had been brought. In Robinson v. University of Minn., slip op. (W.C.C.A. Apr. 4, 1997), we vacated a finding that the employee's work injury was a permanent, rather than a temporary aggravation to the employee's underlying condition, where this finding was not relevant to the determination of the issue before the judge, which was whether a causal relationship existed between the injury and certain medical treatment. Neither of these cases support the proposition that, where determination of an issue hinges on proof of more than one element, the failure of the party bearing the burden of proof to prevail on any one element renders any findings on the remaining elements gratuitous.

substantial evidence supporting the compensation judge's determination on causation. Because a compensation judge determines the relative weight to be given to conflicting evidence, including expert medical opinion, we cannot say, accepting the relative weight apparently accorded the medical opinions by the compensation judge, that the employee failed to meet her burden of proof by a preponderance of the evidence below.

We, therefore, affirm the finding that the 1978 work injury was a substantial contributing cause of the employee's bilateral knee condition as of the date of the hearing below.

#### Roraff Fees

Subsequent to the hearing below, but before the compensation judge issued her Findings and Order, the employee's attorney, on September 16, 1997, filed a Statement of Attorney's Fees seeking hourly fees pursuant to Roraff v. State of Minnesota, 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980), for assisting in the resolution of a medical dispute. The compensation judge's Findings and Order, served and filed on September 30, 1997, noted but did not determine this attorney fee request. The employer and insurer appeal from the absence of an order dismissing the fee request. Roraff fees may be available in certain circumstances where an employee's attorney has *successfully* assisted in the resolution of a medical issue. See, e.g., Worasi v. Hyatt Regency Hotel, 41 W.C.D. 371 (W.C.C.A. 1988). Where, as here, the employee failed to prevail on her medical request, such fees are not payable. It is not clear that a formal dismissal of the fee request is necessary under the circumstances here presented. The employee, in her brief, acknowledges that no Roraff fees are currently at issue. Nonetheless, we modify the compensation judge's order to dismiss the fee request in this case.