RAY AUSEN, Employee/Appellant, vs. AL'S DRYWALL and UNINSURED, Uninsured Employer, and F & L MANAGEMENT DEVELOPMENT and AUTO OWNERS INSURANCE CO., Employer & Insurer, and MINN. DEP'T OF HUMAN SERVICES, and FREMONT COUNTY, COLORADO, DEP'T OF SOCIAL SERVICES, CHILD SUPPORT ENFORCEMENT, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 10, 1998

HEADNOTES

EVIDENCE - WITNESSES. The compensation judge did not err in allowing employee's former girlfriend to testify. Her testimony was not inadmissible on the grounds of marital privilege where the employee failed to establish the facts necessary to invoke the privilege and much of the witness's testimony concerned nonassertive conduct by the employee that is not protected by the privilege.

EVIDENCE - WITNESSES. The compensation judge did not err in allowing two witnesses, allegedly undisclosed, to testify as rebuttal witnesses.

CAUSATION - PREEXISTING CONDITION; EVIDENCE - BURDEN OF PROOF; EVIDENCE - CREDIBILITY. Substantial evidence, including witness testimony, medical records, and varying descriptions of the mechanics of injury, support the compensation judge's determination that the employee lacked candor and failed to meet his burden of proving he sustained a compensable injury.

Affirmed.

Determined by: Johnson, J., Wheeler, C.J., and Wilson, J.
Compensation Judge: Cheryl LeClair-Sommer

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's denial of his claim for workers' compensation benefits as a result of an alleged injury on April 25, 1996. We affirm the Findings and Order of the compensation judge.

BACKGROUND

The employee, Ray Ausen, began working as a sheetrock hanger for the uninsured employer, Al's Drywall, in March 1996.[1] The employee filed a Claim Petition alleging he sustained a personal injury on April 25, 1996, arising out of and in the course of his employment, resulting in injury to his lumbar spine. The Special Compensation Fund (Fund) denied liability for the injury[2] and petitioned for joinder of F&L Management Development, Inc. (F&L) and its insurer, Auto Owners Insurance Company. The parties stipulated prior to hearing that, if an employment relationship was found between the employee and Al's Drywall, and if primary liability was found, F&L would accept liability as a general contractor for any workers' compensation benefits awarded. (Tr. 16; Finding 1.C.)[3] Two motions to intervene were also granted, one filed by the Minnesota Department of Human Services for medical expenses and General Assistance paid to the employee, the other filed by Fremont County, Colorado, to recover child support arrearages. (Judgment Roll, orders of 10/18/96 and 6/20/97.)

The employee testified at hearing that he was installing sheetrock in a closet on April 25, 1996, when he got hung up in the closet after I lifted the sheets up and collapsed after that. (Tr. 40.) He stated the sheet came down on me and he collapsed because of low back pain. (Tr. 41.) He later explained the sheet fell across the top of my legs and he fell to his knees, then fell backwards. (Tr. 71-72.) During a deposition taken approximately seven months prior to hearing, the employee gave a different account of the mechanics of injury, stating: I was twisting and lifting at the same time and put the sheet up to the upper position where it was at and had a very sharp pain in my back. (Ausen Workers' Compensation file, Depo. of 12/20/96 at 71.) He felt a burn in his low back and dropped the sheet. I was pinned in the closet. It was on my foot, my leg. (Depo. at 72.) He felt numbness and burning in his low back, but did not recall any symptoms in his legs. (Depo. at 73.) The employee apparently worked a few half days after the alleged injury, but has not worked at all since the beginning of May 1996. (Tr. 76.)

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[1] The nature of the employment relationship between Ray Ausen and Al's Drywall was litigated at hearing. The compensation judge determined Mr. Ausen was an employee of Al's Drywall. (Finding 3.) This finding is not appealed by any party.

[2] If an employee sustains a compensable injury while working for an uninsured employer, benefits shall be paid by the Special Compensation Fund unless another insurer or self-insurer is liable for the injury. Minn. Stat.§ 176.183.

[3] If an employee sustains a compensable injury while working for an uninsured subcontractor, the general contractor is liable for payment of all compensation due. Minn. Stat. § 176.215, subd. 1. The Fund was dismissed from the action after F&L admitted it was a general contractor of Al's Drywall. (Judgment Roll,, Order of 4/14/97.)

The employee first sought treatment on April 30, 1996, when he saw Dr. J.B. Busch at the Sioux Valley Hospital, South Dakota, emergency room. He reported lifting a sheet of drywall when he had a sudden onset of severe low back pain that knocked him to his knees. The pain was located in the mid low back and left lower lumbar and sacroiliac areas. He also reported some numbness down the left leg, and intermittent pain into upper back, with left arm tingling if he slept with his arm down by his side. Dr. Busch also recorded the following history: [H]as had trouble with his back in the past and went through some sort of treatment where he said he got some shots and took some pills to try to dissolve the calcium spurs in his back.' . . . Since then he has seen chiropractors off and on because of his back problems. (Employee's Ex. I, ER note of 4/30/96.) The employee had tenderness on palpation, particularly over the L4-5 area and over the left SI joint, mild spasm of the paralumbar musculature and some loss of lordotic curve. Range of motion was very limited due to pain, but motor function, sensation and reflexes were intact. X-rays revealed mild disc narrowing at L4-5, straightening of the lordosis, and mild anterior spurring at L4-5. Dr. Busch diagnosed disc degeneration at L4-5. The employee was released with medications and instructions for home care. (Id.)

On May 2, 1996, the employee began to treat with Dr. William Kremer at Affiliated Community Medical Centers in Marshall, Minnesota.[4] Dr. Kremer diagnosed an acute low back strain and took the employee off of work. His chart notes state the employee jerked or hit his back. The accompanying work report states the employee was moving sheetrock and felt pain in low back and fell to knees. (Employee's Ex. J, note of 5/2/96.) An MRI revealed a small herniated disc at L4-5 (Employee's Ex. H, MRI report of 5/16/96), and Dr. Kremer referred the employee for an orthopedic evaluation with Dr. Robert Suga. Dr. Suga reported that a piece of sheetrock fell on the employee, pinning him against the wall. The employee did not report any past problems with his back. Dr. Suga diagnosed a probable acute lumbar strain and recommended continued conservative treatment. (Employee's Ex. G.) The employee was referred for physical therapy, but only attended one session. (Employee's Ex. K.)

The employee saw Dr. Tab McCluskey, D.O., on June 4, 1996. At that time he reported a piece of sheetrock he was lifting overbalanced him and he fell against the wall, becoming pinned to the floor and wall. He also reported that, since the alleged work injury, he experienced pain in the low back and numbness and tingling in the left arm when he lifted his neck. Dr. McCluskey diagnosed possible compression syndrome in the cervical area, placed the employee in a soft cervical collar, and referred him to a neurosurgeon, Dr. Jorge Johnson. (Employee's Ex. F.) Dr. Johnson stated the employee was lifting a piece of sheetrock when he slipped, fell, twisted and felt sudden, severe pain in his low back radiating into the anterior thigh

[4] The employee had first seen Dr. Kremer, who appears to be a general or family practitioner, on April 9, 1996, for an unrelated problem. During that visit, however, he mentioned his left arm became numb and tingly when his head was straight up or he looked back. Dr. Kremer recommended a cervical MRI, but there is no evidence that the scan was done. (Employee's Ex. J, note of 4/9/96.)

of the left leg down to the knee. (Employee's Ex. E, letter of 6/11/96.)[5] Dr. Johnson referred the employee for epidural steroid injections, but these do not appear to have produced any significant improvement. (Employee's Ex. D; Employee's Ex. J, note of 6/28/96.) A second lumbar MRI was obtained on July 11, 1996, and revealed a probable herniated disc at L3-4 filling the left neural foramen and effacing the left lateral recess. The problem at L3-4 was apparently present on the earlier scan, but had become more prominent. (Employee's Ex. H.)

On July 22, 1996, the employee saw Dr. Charles Burton at the Institute for Low Back Care in Minneapolis. He reported hitting his back on a wall while lifting a sheet of drywall. (Employee's Ex. A, questionnaire of 7/19/96.) The employee did not report any history of back or leg problems. Dr. Burton diagnosed a herniated disc at L3-4 producing entrapment of the left L3 nerve root. (Employee's Ex. A, note of 7/22/96.) On July 24, 1996, Dr. Burton performed an L3-4 left intracapsular decompression with superior laminotomy and medial facetectomy and release of lateral entrapment at L3-4 left compressing the exiting L3 and traversing L4 nerves. (Employee's Ex. C, operative report of 7/24/96.) The employee was released to light duty work on August 19, 1996. Dr. Burton stated the employee reached maximum medical improvement (MMI) on October 30, 1996, and sustained a 9% permanent partial disability. He opined the herniated disc at L3-4 and the subsequent medical treatment and permanent disability were causally related to a work injury on April 25, 1996. (Employee's Ex. A, report of 11/27/96.)[6]

Dr. Paul Cederburg, an orthopedic surgeon, examined the employee on behalf of F&L in January 1997. The employee reported pain in the low back while lifting a piece of drywall in April 1996, and stated that was the first time he ever had trouble with his back and left leg. Dr. Cederburg noted that although emergency room records refer to past back problems and

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[5] Employee's Ex. E consists of only one page of what appears to be a multi-page letter.

[6] The employee returned to see Dr. Burton in December 1996, complaining he had recently developed numbness in his upper extremities. MRI scans revealed multilevel degenerative disc disease in the cervical spine, with posterior annular tears and mild to moderate posterior bulting from C3-4 through C6-7. There was lateral and/or central stenosis of varying levels of severity from C2-3 through C6-7, and a broad-based herniated disc at C6-7. Two further herniated discs at C5-6 and C2-3 produced impingement or compression of the right C6 nerve root and right C3 nerve root, respectively. (Employee's Ex. A, cervical MRI report of 12/20/96.) Dr. Burton has performed two surgeries to alleviate the employee's upper extremity pain, and at his deposition in July 1997 stated the employee was then post surgical for cervical as opposed to lumbar problems. (Employee's Ex. P at 19.) A repeat MRI of the lumbar spine showed juvenile discogenic disease with mild to moderate degeneration and dehydration at L3-4 and L4-5 and Schmorl's nodes from T12 through L4. There was a bulging disc at L4-5 without evidence of nerve compression or impingement, and moderate left-sided foraminal bulging of the L3-4 disc producing mild to moderate impingement of the left L3 nerve root. (Employee's Ex. A, lumbar MRI report of 12/20/96.)

treatment, the employee denied such problems. He diagnosed multilevel degenerative disc disease of the cervical spine, and two-level degenerative disc disease of the lumbar spine. Dr. Cederburg opined the employee sustained a work-related injury on April 26, 1996, noting that although he had a pre-existing low back disability, he had not had surgery prior to the alleged work injury. He stated the employee had reached MMI and had an 11% permanent partial disability, with 7% attributable to a preexisting disability. (F&L Ex. 1.)

The employee filed a claim petition and amended claim petitions seeking compensation for wage loss, permanent partial disability, medical and rehabilitation benefits.[7] The Fund and F&L denied liability and the matter came on for hearing before a compensation judge of the Office of Administrative Hearings on July 15, 1997. At hearing, the employee testified he had no lower back or upper back problems prior to April 25, 1996 (Tr. 88-89, 92-93, 96-97), and denied using a back support at any time prior to the alleged injury except when working for a previous employer, St. Aubin Drywall, where use of a back support was required. (Tr. 77-78.)

F&L called three witnesses, all of whom testified that the employee had back problems before the alleged work injury in April 1996. Roxane Nickerson lived with the employee in Colorado for approximately six years, and they have a son born in 1989.[8] Ms. Nickerson testified the employee had back problems at the time they began living together in 1987, with symptoms primarily in the neck, shoulder and upper back. He later developed low back symptoms following a motor vehicle accident. (Tr. 139-40.) She testified further that the employee's back condition affected his posture and ability to work, that he made accommodations for his condition at work, and that he self-treated with alcohol and over-the-counter medications to control pain. (Tr. 141-43, 146-47.) Finally, she testified the employee did not have any medical insurance, and talked about arranging an injury at work, such as falling off a ladder or having something fall on him, so he could obtain treatment for his back. (Tr. 143-45.)

Layton Ausen, the employee's father, testified concerning a letter he wrote to Ms. Nickerson in August 1995. The letter states the employee was wearing his back support all the time during a visit to Minnesota in June 1995 and his father tried to get him to stay and see if he could get it fixed. (F&L Ex. 2.) The back support was worn back around his stomach. (Tr. 169.) A third witness, Debra Cox, testified she lived down the street from the employee in Colorado between 1985 and the early 1990's. (Tr. 176-77.) She stated she was aware the

[7] Although the employee's claim petition alleges only an injury to the low back, he stated at hearing he was also claiming an injury to his cervical spine or neck as a result of the April 25, 1996, incident. (Tr. 84-85.) However, no medical records regarding the two surgeries for upper extremity pain was offered into evidence, and no medical provider expressed a causation opinion related to the employee's cervical condition.

[8] The employee grew up in Minnesota and returned to the state in the late summer of 1995, after living in Colorado for several years.

employee had back problems, that he walked with a stooped posture and looked like his back hurt, and on a couple of occasions she observed him lying on the couch because his back hurt. (Tr. 177-78.)

In Findings and Order served and filed August 28, 1997, the compensation judge found the employee failed to establish he sustained a compensable personal injury on April 25, 1996, and denied the employee's claims. The employee 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 (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

Witness Testimony

The employee contends first that the compensation judge erred in overruling his objection to the testimony of his spouse, Ms. Nickerson. He argues that the marital privilege statute prohibits Ms. Nickerson from testifying about communications between the parties during their relationship. We conclude the compensation judge properly allowed Ms. Nickerson to testify.

The marital privilege statute provides:

> A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage.

Minn. Stat. § 595.02, subd. 1(a) (1996). The party claiming the privilege has the burden of establishing both his right to assert the claim **and** the fact that the communication falls within the scope of the privilege. State v. Lender, 266 Minn. 561, 124 N.W.2d 355 (1963).

The majority of Ms. Nickerson's testimony concerned her own observations of the employee's behavior, such as his posture or his use of pain medications. The word communication as used in the marital privilege statute has been narrowly construed to apply only to assertive conduct, including written or spoken words, actions or gestures intended by one spouse to convey a meaning or message to the other. State v. Hannuksela, 452 N.W.2d 668 (Minn. 1990). Nonassertive actions such as those at issue here, observed by the testifying spouse, are not protected communications within the meaning of the statute.[9]

Ms. Nickerson's most significant testimony - that the employee discussed faking an accident at work in order to obtain treatment for his back condition - regards specific statements made by the employee. This assertive conduct would clearly be covered by the marital privilege if it were applicable. We conclude, however, that the compensation judge could reasonably find the employee had failed to establish the facts necessary to invoke the privilege. See State v. Martin, 293 Minn. 116, 197 N.W.2d 219 (1972) (party asserting the privilege has the burden to establish the facts necessary to invoke it). Ms. Nickerson stated she was never married to the employee. (Tr. 129-30. See also Tr. 1149-51.) Although the employee stated during his deposition that they were married (Depo. at 12, 18), he submitted no evidence - no marriage license, marriage certificate or divorce decree - in support of his assertion.[10] The compensation judge did not err in allowing Ms. Nickerson to testify.

The employee also argues the compensation judge erred in allowing Layton Ausen and Debra Cox to testify, asserting they were undisclosed, surprise witnesses whose names were not disclosed prior to hearing despite numerous requests. (Tr. 156-58, 169-70.) These objections were overruled at hearing and the witnesses allowed to testify to rebut the employee's testimony that he did not have back problems before the alleged work injury. (Tr. 158-59, 174.)

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[9] See Hannuksela, 452 N.W.2d 668 (marital privilege not violated when spouse testified she observed defendant husband conceal a shotgun in his jacket, unload murder victim's possessions from victim's truck, and saw victim's property in possession of spouse).

[10] Ms. Nickerson stated she divorced the employee in 1993, to prevent him from removing their child from Colorado. (Tr. 130, 133-35.) However, the court orders to which she referred are simply orders regarding custody, child support and visitation. (Judgment Roll, Motion to Intervene filed 6/5/97 and attached Exhibits.) Neither Colorado order is a divorce decree, and neither contains evidence of marriage, such as the date and place of marriage, date of separation, date of divorce or other relevant information commonly found in marriage dissolution pleadings. The fact that the documents are captioned In re the Marriage of the parties, we believe, is not sufficient to prove the existence of a marriage.

Again, we find no error in the admission of the testimony of these witnesses. Dr. Busch recorded a history of back problems and treatment, and Dr. Burton and Dr. Cederburg both opined the employee had prior back problems. (Employee's Ex. P at 19; F&L Ex. 1.) The employee, however, testified repeatedly that he did not have back problems prior to the alleged work injury. (Tr. 77-78, 88-89, 92-93, 96-97; Depo. at 17, 21, 28, 30, 42, 63.) He either failed to report or expressly denied a history of back problems to all medical providers except Dr. Busch, and subsequently denied having reported such a history to him. (Tr. 89.) It is well-established that witnesses can be called to rebut such testimony, and that rebuttal witnesses need not be disclosed prior to hearing. See, e.g., Buss v. H & S Distributing, Inc., 52 W.C.D. 697, 707 (W.C.C.A. 1995), summarily aff'd (Minn. June 30, 1995); Elling v. Cub Foods, (W.C.C.A. February 24, 1994). See also Minn. R. 1415.1900, subp. 7.

Causation

The employee argues there is no reliable evidence to support the compensation judge's finding that he failed to establish he sustained a compensable injury on April 25, 1996. He points out that both Dr. Burton and the adverse examiner, Dr. Cederburg, opined the employee sustained an injury on that date, and argues that, even if he had a pre-existing low back condition, the alleged injury nonetheless constitutes a substantial contributing cause of his need for treatment and disability after April 25, 1996. The compensation judge acknowledged Ait is entirely possible that an injury was sustained on April 25, 1996" (Findings and Order, Memorandum at 7), but concluded the employee failed to meet his burden of proof. In support of her conclusion she cited the testimony of the three defense witnesses, the insufficient history provided to Dr. Burton, the varying description of the mechanics of injury given to medical providers, and the lack of candor of the employee. (Id.; see also Finding 5.) We affirm the findings of the compensation judge.

First, all three defense witnesses testified the employee had low back problems prior to the alleged work injury. This testimony is consistent with the history provided to Dr. Busch. Second, both Dr. Burton and Dr. Cederburg were aware that the employee had a pre-existing back condition in spite of his failure to report it or, in Dr. Cederburg's case, in spite of his denial of the history contained in Dr. Busch's notes. Both doctors, however, appear to have accepted the employee's statement that he was never disabled from work due to back problems before April 1996. Neither doctor, in rendering his opinion, was aware of the considerable evidence to the contrary. Third, there are significant variations in the employee's description of the mechanics of the injury. All these factors support the compensation judge's conclusion.

As the employee points out, the presence of a preexisting condition does not preclude compensation for a work injury if the injury is a substantial contributing cause of disability. See, e.g., Swanson v. Medtronics, Inc., 443 N.W.2d 534, 536, 42 W.C.D. 91, 94-95 (Minn. 1989). The key finding in this case, however, concerns the credibility of the employee. The compensation judge twice refers to the employee's lack of candor in support of her conclusion that the employee failed to meet his burden of proof. The evidence cited above, together with the fact that the alleged injury was unwitnessed and Ms. Nickerson's testimony that the employee discussed faking an injury so as to obtain treatment for his back condition, adequately supports a

conclusion that the employee's testimony was not credible.[11] 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 the compensation judge. Krotzer v. Browning-Ferris/Woodlake Sanitation Serv., 459 N.W.2d 509, 513, 43 W.C.D. 254, 260-61 (Minn. 1990). 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).

[11] This conclusion is also supported by inconsistencies in the employee's testimony. For example, he acknowledged at hearing that he had been in a motor vehicle accident in Colorado (Tr. 90, 95), but admitted he denied such an accident during his deposition. He also gave conflicting testimony regarding the onset of cervical and upper extremity symptoms.