RENEE A. BARLAU, Employee, v. PRUDENTIAL INS. CO. and TRAVELERS INS. CO., Employer-Insurer/Appellants, and MEDICA/HRI and MN DEP'T OF LABOR & INDUS./VRU, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 11, 1998

HEADNOTES

PRACTICE & PROCEDURE. Where the off-record proceedings of which the employer and insurer complained occurred prior to the swearing of the first witness, where there was no indication that the employer and insurer ever objected to them while those proceedings were being conducted, where the only complaint made on the record about the Aunusual schedule of the proceedings contained no mention of the substance of the off record proceedings and no allegation that the judge's conduct of them was improper, and where the employer and insurer's attorney essentially conceded that it had been his wish to take his witness's testimony at the time it was originally scheduled rather than to delay it until after the employee's testimony, there was no indication that the judge's conduct of the hearing was contrary to mutual agreement among the parties present at the hearing and no evidence that constituted an abuse of his discretion.

PRACTICE & PROCEDURE. Where the compensation judge did admit and view those portions of the employer and insurer's surveillance videotape that were taken by the witness personally and timely disclosed prior to hearing, where the judge expressly found that evidence unpersuasive either in impeaching the employee's credibility or in establishing restrictions different from those recommended by the employee's doctor, where the evidentiary value of excluded portions of videotape differed little from that of admitted portions, and where there was no evidence of a bona fide offer of proof at hearing regarding the excluded evidence, the compensation judge did not abuse his discretion in excluding those portions of the employer and insurer's videotape evidence that were not taken by appearing witnesses and that had not been disclosed in the employer and insurer's pretrial statement.

PRACTICE & PROCEDURE. Where the employer and insurer appealed from thirty-one of the compensation judge's eighty-one findings but expended only eleven lines of their six-page letter brief addressing their two factual issues on appeal, the employer and insurer's very brief arguments on substantial evidence did not constitute a substantive briefing such as to warrant address of factual issues by the court, particularly where there was no reason to presume that the compensation judge did not carefully examine and consider all evidence of record, nor did the employer and insurer's attachment of their trial brief sufficiently define issues on appeal or constitute an appellate briefing.

Affirmed.

Determined by Pederson, J., Wheeler, C. J. and Johnson, J.
Compensation Judge: David S. Barnett

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's finding of primary liability for benefits resulting from a July 1, 1991, work injury to the employee's neck, shoulders, and arms. We affirm.

BACKGROUND

In October of 1983, the employee began working for the Prudential Insurance Company [the employer] as a commissions calculator, a job that required her to spend about sixty to seventy percent of her time working at a computer keyboard. In about January of 1988, the employee was transferred by the employer to work as a computer programming analyst, a job that required her to spend nearly all of her time at her computer keyboard. The employee's medical history subsequent to that job change is complex and sometimes nebulous. In about August of 1990, the employee commenced treatment for chronic neck pain with Dr. Virginia Berglund, who diagnosed a cervical neck sprain and prescribed physical therapy. Dr. Berglund noted the following month that the employee's pain had markedly improved with cervical traction and that the employee had requested continuing with that therapy. The employee's provider would not cover the therapy at home, however, but the following month the employee was prescribed use of a soft collar by a different physician, under a diagnosis of neck spasm. On October 24, 1990, the employee was diagnosed with chronic cervical derangement and deconditioning syndrome by Dr. Joel Esmay, who took over treatment of the employee about that time.

On July 9, 1992, about four months after returning to work from a maternity leave, the employee saw Dr. Donald Johnson with complaints of discomfort in her hands and wrists and other parts of both upper extremities, particularly her right elbow and shoulder areas. Dr. Johnson diagnosed [m]echanical overuse discomfort of the upper extremities and prescribed medication and eventually physical therapy. Subsequently, on August 24, 1992, in a Workers' Compensation Injury report, Dr. Esmay diagnosed bilateral thoracic outlet syndrome, with a possible underlying component of carpal tunnel syndrome, which conditions he attributed to a work injury on July 1, 1991. He explained that the employee's symptoms of numbness, tingling, and other upper extremity discomfort had initially been noted about that time and had been attributed only to mild carpal tunnel syndrome. He indicated that the symptoms had initially subsided following the employee's delivery of a child but had subsequently reappeared upon her return to work. In a later report, dated September 21, 1992, Dr. Esmay developed his diagnosis to include a repetitive motion syndrome characterized by a combination of thoracic outlet syndrome bilat[erally] and an impingement syndrome in the r[igh]t shoulder. On September 30, 1992, in a response to a query from the insurer, Dr. Esmay clarified his opinion that, As stated in my notes . . . , the [employee] clearly has a work related injury.

On August 25, 1993, the employee was treated by Dr. Esmay for symptoms following a recent motor vehicle accident [MVA], which Dr. Esmay diagnosed as cervical and lumbosacral derangement secondary to MVA. Dr. Esmay's treatment notes for February 3, 1994, suggest that the employee continued to complain of both neck and low back pain on that date, which she apparently still attributed to her August 1993 MVA. Several months later, on July 1, 1994, the employee went off work from the employer on another maternity leave, apparently scheduled for nine months. In the months that followed, the employee was seen several times by orthopedist Dr. Philip Haley for continuing low back pain attributed to her MVA. Meanwhile, in January 1995, while she was still on maternity leave and still being monitored by Dr. Haley, the employee took a new computer programming job with a different employer, named AIC Company, for higher wages than she was earning at the employer. Within about two weeks, however, she was experiencing increasing symptoms of headache, neck pain, hand numbness, and continued low back pain.

On January 24, 1995, the employee commenced treatment with neurologist Dr. Steven Noran, primarily with regard to her upper extremity symptoms. Dr. Noran's history traces these symptoms to the employee's work in July 1991, noting that [t]hese problems have persisted and the [August 20, 1993, motor vehicle] accident really has not changed these symptoms. Dr. Noran ordered an EMG of both of the employee's arms and an MRI of her neck, and he restricted the employee's keyboard work to thirty-minute periods with fifteen-minute breaks between periods. The MRI proved normal, the EMG did not confirm any entrapment neuropathy, and on February 1, 1995, Dr. Noran diagnosed bilateral cumulative trauma syndrome to the arms, with findings suggestive of carpal tunnel syndrome clinically but not documented electrically, therefore, not likely as surgical candidate. While noting that thoracic outlet syndrome was still a strong consideration, Dr. Noran concluded that the employee was at maximum medical improvement [MMI] unless surgery was performed. Dr. Noran prescribed carpal tunnel splints for the employee's wrists, recommended assignment of a QRC, and ordered physical therapy. He also added a restriction against repetitive use of the arms and indicated that the employee's restrictions should now be considered permanent.

In February 1995, the employee commenced treatment also of her continuing low back pain, with Drs. David Kraker and Brian Nelson. She emphasized to Dr. Nelson on February 13, 1995, that her low back symptoms were not work related but stemmed instead from the August 1993 MVA, which coincidentally had occurred while she was on her way to chiropractic treatment for her neck pain. A few days later, on February 23, 1995, the employee's physical therapist reported that the employee had burning in the hands and all joints of the upper extremities and that [t]his started in 1991 while [the employee was] working as a computer programmer and has gotten worse since January 1995 when she returned to work after maternity leave. A month later, on March 31, 1995, Dr. Kraker concluded that [a]pparently [the employee's] low back injury is due to her MVA and the upper extremity and neck injury is a Work Comp injury.

A few weeks earlier, on March 2, 1995, Dr. Noran had diagnosed bilateral thoracic outlet syndrome, bilateral accumulative trauma syndrome with findings suggestive of carpal tunnel

syndrome, and cervicogenic headaches, and he had referred the employee for a second opinion and surgical consultation. The employee saw Dr. Gregg Anderson for the second opinion on March 6, 1995. Dr. Anderson concluded that the employee does have some signs and symptoms of thoracic outlet syndrome although she lacks the usual history of trauma. On that conclusion, Dr. Anderson recommended that the employee should seriously consider changing her occupation, adding, I think we can potentially help her with surgical intervention but that [h]opefully this will not be necessary. On March 15, 1995, pursuant to recommendations of Dr. Noran, the employee terminated her employment at AIC. On April 5, 1995, Dr. Noran released the employee to look for work that would involve no repetitive use of the arms and no static positioning and no frequent lifting. The Report of Work Ability completed by Dr. Noran's assistant on that date indicates that the employee was permanently restricted from doing any carrying, from lifting over one pound, and from pushing or pulling over five pounds unwheeled weight or twenty pounds wheeled weight. Effective the following day, the employee apparently resigned from her job with the employer.

On April 7, 1995, the day after resigning from the employer, the employee was examined for the employer and insurer by Dr. Daniel Ahlberg, who was unable to specifically diagnose her symptoms, or to arrive at a specific diagnosis for her chronic symptomatology. Dr. Ahlberg did believe, however, that the employee's upper extremity symptoms, most likely carpal tunnel syndrome[,] related to her pregnancies and likely resolved after her deliveries. Dr. Ahlberg recommended more regular exercise, no work restrictions, and no surgical treatment for the time being.

On May 23, 1995, the employee returned to Dr. Noran with complaints of continuing neck and upper extremity pain, and Dr. Noran referred her for evaluation for chronic pain syndrome and depression. In his report dated June 6, 1995, psychologist Dr. Larry Krupp reported findings consistent with those conditions, concluding that there was no evidence of malingering or conversion disorder. About a week later, on June 12, 1995, the employee filed a Claim Petition, alleging entitlement to certain medical, rehabilitation, and wage replacement benefits pursuant to injuries to her neck, shoulders, arms, wrists, and hands on July 1, 1991. On June 14, 1995, the employee was evidently served with a medical report of Dr. Noran indicating that the employee had reached MMI as of March 2, 1995. Several months later, on October 11, 1995, following a chronic pain evaluation by Dr. Matthew Monsein, Dr. Noran expressed an opinion that the employee was suffering from chronic cumulative trauma syndrome to her arms as a direct result of her July 1, 1991, injuries under the Minnesota Workers' Compensation Guidelines. On November 14, 1995, Dr. Noran adopted restrictions recommended by Dr. Monsein on an R-33 Functional Capacities Evaluation,[1] and on February 5, 1996, he rendered an opinion that the employee was subject to a 3.5% whole body permanent impairment under Minn. R. 5223.0070, subp. 2A(2). Two weeks later Dr. Noran referred the employee for a rheumatology evaluation. The employee saw rheumatologist Dr. David Zoschke on February 27,

[1] These restrictions generally permitted back-active activities only very occasionally, and at his eventual deposition on October 22, 1997, Dr. Noran proposed modifications that rendered them in some ways even more limiting.

1996, who diagnosed chronic fibromyalgia syndrome with fairly classic symptoms and positive physical findings on exam. Subsequently, on March 5, 1996, the employee's Claim Petition was amended to allege entitlement to benefits for the 3.5% impairment under Minn. R. 5223.0070, subp. 2A(2), pursuant to interpretation under Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990).

On April 5, 1996, Dr. Ahlberg examined the employee for the employer and insurer a second time. Dr. Ahlberg indicated at that time that he was unable to establish a specific diagnosis or [to] conclude that [the employee's] work activities at either [the employer] or AIC Company have resulted in any work injury. Nor could he diagnose any need for additional evaluation or treatment. Several months later, on September 25, 1996, Dr. Noran reported in clinic notes his conclusion that the employee's work injuries are a significant contributing factor [in] her ongoing fibromyalgia and chronic pain syndrome and that the employee also has ongoing depression related to this and that this would be an area where additional disability rating should be considered. On October 31, 1996, the employee was examined for the employer and insurer by Dr. Frank Wei. Dr. Wei diagnosed thoracic outlet syndrome, cumulative stress disorder of the forearms bilaterally, probable ulnar nerve irritation, deconditioning, depression, sleep dysfunction, and rotator cuff impingement. Dr. Wei concluded that the employee had some paresthesias and dysesthesias that is certainly attributable to a cumulative or repetitive stress disorder to her forearms, but he expressed no opinion as to whether or not the employee's other conditions were work-related, noting only and expressly that the employee's depressive features are not the cause of her problem. On January 29, 1997, Dr. Noran reiterated his 3.5% whole body permanency rating, indicating that he had spent an extraordinary amount of time reviewing [the employee's] records.

The employer and insurer retained R & D Agency, Inc. [R & D], an investigation agency, to conduct videotape surveillance of the employee's everyday activities. In a report to the insurer on September 12, 1997, agent Don Dunn reported observing the employee in the process of various activities related to her marketing of sweatshirts that she had designed. Although he observed the employee using her hands and arms in various way without impediment, agent Dunn indicated that he did not observed her ever lifting anything over her restriction. He also indicated that, although he observed the employee loading four to six shirts at a time into baskets at a craft show, the baskets themselves were subsequently loaded into a van by another person.

The matter came on for hearing on November 12, 1997. It was stipulated at the beginning of the hearing that the employee sustained a work related carpal tunnel syndrome injury on July 1, 1991. Issues litigated included whether or not the employer and insurer were also liable for various benefits consequent to injuries to the employee's neck, shoulders, and arms on that same date. Among those testifying at hearing was Thomas Goodpaster, an investigator and supervisor of Mr. Dunn and other investigators at R& D. In the course of the hearing, the compensation judge admitted into evidence certain surveillance videotape taken by Mr. Goodpaster but sustained objections to admission of videotape taken by Mr. Goodpaster's subordinates because they were not present to testify personally about the tape's making. The

judge also excluded some of the tape evidence taken by Mr. Goodpaster himself, for being undisclosed in the employer and insurer's pre-trial statement. Hearing was not concluded in one day and was continued to December 30, 1997, with the record closing on January 29, 1998. By a sixteen-page decision filed March 30, 1998, which entailed eighty-one findings and eleven orders, the compensation judge awarded most of the benefits claimed by the employee, with the exception of permanent partial disability compensation, which was denied as said disability, if any, is not yet determinable. The employer and insurer appeal.

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

The employer and insurer have submitted a letter brief in lieu of a formal appellant's brief, and the bases of their appeal are somewhat ambiguous. They appear to contest the judge's award of benefits in this case primarily on grounds that the compensation judge abused his discretion in his conduct of the hearing and in his admission of evidence. They suggest that the judge inexplicably delayed the beginning of testimony by excessive pre-trial questioning of the attorneys and that this delay compelled presentation of testimony and related evidence in an illogical order. They argue that this illogical order ultimately prejudiced their case by rendering their testimonial evidence ineffective in compelling admission of certain surveillance video tape evidence over objections. They contend further that the exclusion of that evidence was itself a further abuse of discretion for being contrary to supreme court's favoring of liberal inclusion of evidence in workers' compensation matters. In addition to these abuse of discretion arguments, the employer and insurer contend broadly that the judge's decision is unsupported by substantial evidence, particularly with regard to medical evidence and diagnosis. On these bases the employer and insurer seek either reversal of the judge's decision after inclusion of the excluded surveillance tape or, in the alternative, remand to the compensation judge for reconsideration after inclusion of that evidence.

Abuse of Discretion

The employer and insurer suggest on appeal that the compensation judge abused his discretion by spending all of the morning hours of the first day of hearing, prior to taking any testimony, questioning the attorneys off the record as to their respective positions and as to the evidence that they would be introducing. This inquiry, they argue, resulted in the court's taking investigator Goodpaster's testimony prior to the testimony of the employee, who had originally been scheduled to testify first. The employer and insurer argue that, by virtue of this sequence, at the time he heard Mr. Goodpaster's testimony the Compensation Judge had no way of being familiar with the employer and insurer's detailed analysis of the medical chronology, or the cross-examination of Dr. Noran, for that matter.[2] They suggest that the judge's familiarity with these two bodies of evidence was essential to a fair ruling as to the admissibility of those portions of the surveillance tape that were challenged on foundational grounds because taken by investigators subordinate to Mr. Goodpaster who were not at hearing to testify personally. Furthermore, they contend that the illogical conduct of the hearing also precluded them from properly introducing as impeachment evidence that portion of tape taken solely by Mr. Goodpaster but undisclosed prior to hearing, since the employee had not yet offered the testimony that they were prepared to impeach. We are not persuaded that the judge abused his discretion in his conduct of the hearing.

Pursuant to Minnesota Statutes section 176.411, [e]xcept as otherwise provided by [the statute], when a compensation judge makes an investigation or conducts a hearing, the compensation judge is bound neither by the common law or statutory rules of evidence nor by technical or formal rules of pleading or procedure. Minn. Stat. § 176.411, subd. 1; see also Minn. R. 1415.2900, subp. 6. ([e]xcept as provided by the [A]ct and [the Rules,] the compensation judge is not bound by . . . technical or formal rules of pleading or procedure). The Rules do provide, however, that, [a]fter the first witness is sworn[,] all of the proceedings must be on the record, including motions, objections, offers of proof, rulings of the judge, arguments of the parties, or other comments of the parties, their representative, or the judge and that a compensation judge [shall not] turn off an audio-magnetic recording device being used to record the proceedings, other than for reasonable breaks, without the consent of the parties present. Minn. R. 1415.2900, subp. 9.A. The off-record proceedings of which the employer and insurer complain, however, properly occurred prior to, not after, the swearing of the first witness. Moreover, while the substance of the judge's off-record questions as they have been characterized in the employer and insurer's letter brief do appear to have been rather tedious, there is no indication, either on the record or in the employee's letter brief on appeal, that the employer and insurer ever objected to them while those proceedings were being conducted. Only once in the course of the subsequent recorded proceeding did the employer and insurer's attorney complain in any way about the unusual schedule of the proceedings, and that complaint made no mention of the substance of the off record questionings and no allegation that the judge's conduct of them was improper. Indeed, the employer and insurer's attorney essentially conceded that it had been his wish to take

[2] This evidence was to have been introduced and analyzed in the context of the employee's testimony.

Mr. Goodpaster's testimony at the time it was originally scheduled, rather than to delay it until after the employee's testimony. While providing, as indicated above, that proceedings should generally be on the record, Minnesota Rule 1415.2900 also provides that [t]he judge shall be in complete charge of the hearing, id., and there is no indication that the judge's conduct of the hearing was contrary to mutual agreement at the time among the parties present.

In the context of the testimony of investigator Goodpaster, the employer and insurer offered for admission into evidence certain surveillance video tape taken by Mr. Goodpaster and several of his subordinates. While admitting some of those portions of the tape taken by Mr. Goodpaster personally, the compensation judge sustained a motion to exclude those portions of the tape taken by the subordinates, because the subordinates were not present to testify personally regarding them. The judge also excluded certain portions of even that tape taken solely by Mr. Goodpaster, because it had been undisclosed prior to hearing. The employer and insurer suggest that this exclusion of evidence was itself a further abuse of discretion, in light of the supreme court's position favoring inclusion of evidence in workers' compensation matters. See, e.g., Scalf v. Lasalle Convalescent Home/Beverly Enters, 481 N.W.2d 364, 366, 46 W.C.D. 283, 286 (Minn. 1992) (the purpose of [a workers' compensation] proceeding is disclosure of the true facts, a purpose better served by acceptance of all competent, relevant, and material evidence than by exclusion of evidence). They suggest that the excluded surveillance tape was essential to their defense, that most of it had been duly disclosed prior to trial in preparation to being offered into evidence, that it was objected to for the first time at hearing, and that even those undisclosed portions of tape taken by Mr. Goodpaster should have been admitted, either for impeachment purposes or because they did not exist early enough for timely disclosure. Again we are not persuaded that the judge abused his discretion.

It is a well established principle of workers' compensation proceedings that evidentiary rulings are within the sound discretion of the compensation judge. See Ziehl v. Vreeman Constr., No. *[redacted to remove social security number]* (W.C.C.A. Oct 15, 1991). The compensation judge in this case did admit and view, in the course of the hearing itself, those portions of the employer and insurer's surveillance tape that were taken by Mr. Goodpaster and timely disclosed prior to hearing. In his memorandum, the judge expressly found the employer and insurer's surveillance evidence unpersuasive in establishing either a lack of credibility on the part of the employee sufficient to discredit her claim or restrictions different from those indicated by Dr. Noran. Moreover, we have carefully reviewed both the admitted and the excluded portions of tape present in the file, and, finding their evidentiary value very little different, we conclude that the excluded portions contain no evidence sufficient to compel either reversal or remand. While, had we been the judge, we may well have admitted into evidence all of the tape that was offered, we cannot find reversible error in the fact that the judge admitted only those portions that he did. Surveillance evidence is unique in that it provides the finder of fact with images of the employee at moments when the employee is functioning most candidly. Given especially the extensive medical record in this case, we are not persuaded that additional surveillance evidence might have proved dispositive. Nor is there evidence in the record that there was a bona fide offer of proof made at hearing that the challenged evidence was substantially and materially different

from that admitted and for that reason potentially dispositive. For these reasons we conclude that the compensation judge did not commit reversible error in excluding the evidence at issue.

Substantiality of Supporting Medical Evidence

Having appealed from thirty-one of the compensation judge's eighty-one findings and all eleven of the judge's orders, the employer and insurer spent over six and a half pages of their seven-page letter brief addressing the two alleged abuses of discretion addressed above. Only in the final half page of their letter do they address their final basis for appeal, which they suggest relates more to the Hengemuhle/substantial evidence standard of review on appeal, specifically with regard to medical evidence and diagnosis. In the two very brief paragraphs that follow, they argue for five lines that the medical records define only what the employee's disorder is not, illustrating their point by a mock paraphrase of those records, and then for six lines that Dr. Wei is not the employer and insurer's doctor but is instead only a regular practitioner in the employer's long-term disability plan. These very brief arguments do not, in our opinion, constitute substantive address of any particular factual issues on appeal. Therefore, although we have carefully reviewed the entire file, we will not address in any detail the substantial evidentiary bases for the judge's decision. Minn. R. 9800.0900 (Issues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by the court.); see also Anderson v. Stremel Bros., 47 W.C.D. 99 (W.C.C.A. 1992).[3]

Along with the surveillance video tapes offered for admission into evidence, the employer and insurer identified the chronology of the employee's medical treatment and the cross-examination testimony of Dr. Noran as essential evidence in their attempt to impeach the employee's credibility and so to undermine her position in general. We have concluded that the compensation judge ultimately reviewed as much of the surveillance evidence as he was required to review within limits of his discretion. Moreover, particularly given the factual detail of the judge's Findings and Order, there is no reason to presume that he did not carefully examine and consider both Dr. Noran's testimony and the employee's treatment chronology in drawing his conclusion as to the medical diagnosis and causation of the employee's upper extremity condition. Indeed, there is every indication in the transcript of the hearing that the judge was very attentive to testimony and attendant evidence, even at times to the point of intrusiveness. We have made a thorough review of the evidence in this case notwithstanding the employer and insurer's failure to brief the factual bases for their appeal. Acknowledging that elements of that evidence might also have supported a contrary decision, we find the judge's award of benefits in this case neither clearly erroneous for abuse of discretion nor patently unreasonable in light of the facts. Therefore we affirm it. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239; see also Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (assessment of a

[3] Even granting that it may have adequately defined their defenses at hearing (and we're not sure that it did), the employer and insurer's trial memorandum does not define issues on appeal, and its attachment to their letter brief on appeal does not constitute an appellate briefing.

witness's credibility is the unique function of the trier of fact), citing Spillman v. Morey Fish Co., 270 N.W.2d 781, 31 W.C.D. 187 (Minn. 1978).