LORI CARLSON, Employee/Appellant, v. BRIDGES MEDICAL SERVS. and AMERICAN COMPENSATION INS./RTW, INC., Employer-Insurer, and MN DEP'T OF HUMAN SERVS., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 14, 1998

No. *[redacted to remove social security number]*

HEADNOTES

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Where independent medical examiners for both the employer and insurer and the employee had concluded that the employee had attained MMI in September 1996 and April 1997 respectively, and where one of the employee's treating consultants had concluded that the employee was near MMI in February 1997, the compensation judge's conclusion that the employee had attained MMI in March 1997 without undergoing a chronic pain program was not clearly erroneous and unsupported by substantial evidence.

TEMPORARY BENEFITS - FULLY RECOVERED; PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Where it was supported by the expert medical testimony of a neurologist/psychopharmacologist, and where the chemically dependent employee had evidently been less than forthcoming with accurate information to her treating providers as to the history of her condition and her employment status, the compensation judge's conclusion as to the duration and extent of the employee's work injury, in reliance on the independent medical examiner, was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Hefte, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Harold W. Schultz, II

OPINION

RICHARD C. HEFTE, Judge

The employee appeals from the compensation judge's finding of maximum medical improvement and from the judge's denial of permanent partial disability benefits and of certain wage replacement, medical, and rehabilitation benefits. We affirm.[1]

[1] The employee appeals also from the judge's denial of reimbursement to the intervenor. However, because this issue is not addressed in the employee's brief, we will not address it. See 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).

BACKGROUND

On April 11, 1996, the employee sustained a work-related injury to her mid back while lifting a patient in the course of her employment as a registered nurse with Bridges Medical Services [the employer]. She was treated initially by Dr. Donald Gilsdorf, with whom she had been treating for at least two years previously for various problems, including back pain and chronic and often acute pancreatitis. X-rays on April 15, 1996, were read to reveal good position and alignment of the thoracic vertebral bodies, with no evidence of compression deformities or significant degenerative changes, although apparent pancreatic calcifications were noted. Dr. Gilsdorf recommended restrictions on lifting and several other back-related activities and prescribed medications and physical therapy. By May 30, 1996, the employee was complaining of more severe pain, complicated by stomach distress, and Dr. Gilsdorf referred the employee to an orthopedic surgeon under a diagnosis of [s]evere back sprain, possible ruptured disk or some unforeseen other type of illness affecting her back. The employer and insurer admitted liability for the injury and commenced payment of medical and intermittent wage loss benefits into the summer of 1996, as the employee continued to work for the employer at lighter duties with intermittent reductions in work hours.

On June 12, 1996, the employee saw orthopedic surgeon Dr. David Rathbone, who administered trigger point injections and ordered an MRI scan of the employee's thoracic spine. The scan, conducted July 11, 1996, was read to reveal small disc protrusions at T6-7 and T8-9, causing mild effacement of the dural sac but without evidence of cord compression, together with degenerative disc disease from T6 to T9. On those findings, Dr. Rathbone recommended that the employee continue working half days and continue with a home exercise program, and he referred the employee for a consultation with neurosurgeon Dr. Donald Koski. On July 26, 1996, prior to her appointment with Dr. Koski, the employee returned to Dr. Gilsdorf with complaints of more severe stomach distress in addition to her back pain, and Dr. Gilsdorf diagnosed gastritis secondary to pain medication and steroid. On August 7, 1996, the employee saw Dr. Donald Koski, who prescribed continued pain clinic modalities such as trigger point injections and biofeedback, concluding that the employee's disc protrusions were not in position to cause any rootlet pain. On August 16, 1996, the employee saw pain control specialist Dr. Jayant Damle, who prescribed medication and, over the course of the next several months, administered three epidural injections and an intercostal nerve block.

On August 29, 1996, the employee was examined for the employer and insurer by neurologist and psychopharmacologist Dr. Donald Starzinski. In the course of his evaluation, Dr. Starzinski reviewed in some detail the employee's pre-injury medical history, which he noted included treatment for thoracic pain in 1993, 1994, and 1995. Dr. Starzinski notes in his report that the 1993 pain was thought related to possible disc disease, that the 1994 pain was related to the employee's lifting of her dog, and that the 1995 pain was described as musculoskeletal rib pain. Dr. Starzinski concluded that the employee was completely normal neurologically, that the employee's April 1996 work injury had been only a temporary exacerbation of a chronic musculoskeletal condition, and that the employee had reached maximum medical improvement [MMI] from the effects of that injury. While suggesting that the employee's small physical size

would obviously preclude her from lifting very heavy objects, Dr. Starzinski concluded that the employee was physically unrestricted from performing her duties as a registered nurse, with the exception of emergency room duties and assistance in the work of licensed practical nurses. Dr. Starzinski concluded further that, while chronic pain treatment might be a reasonable approach, the employee's ongoing symptoms were only in a very small part attributable to the April 1996 work-related injury. Dr. Starzinski reiterated his conclusions on September 12, 1996, after review of the employee's radiographic studies, and on September 18, 1996, his opinion that MMI had been reached was served on the employee.

By September 16, 1996, the employee was working the same number of hours a week for the employer that she had been working on the date of her injury, attempting to avoid heavy lifting and extended sitting, and the employer formally offered her the job back, with the caveat that she will need to use good judg[]ment on lifting. The employee accepted the job, and by the end of the month she was apparently attempting to perform the same duties that she had performed prior to her injury.

On October 6, 1996, the employee was observed on the job looking sweaty and shaky, with a blank facial expression and slurred, thick-tongued speech. She was suspended from employment and was ultimately put on administrative leave, after an examination at Glenmore Recovery Center on October 9, 1996, resulted in a recommendation that she enter a chemical treatment center or a pain clinic on an inpatient basis, to have an evaluation of her pain medication assessed. The employee did not undergo the recommended assessment. On October 23, 1996, the employer wrote to the employee indicating that the with-pay status of her leave would terminate on October 28, 1996, unless she consented to undergo a five-day inpatient evaluation at the Glenmore facility.

On October 22, 1996, the employee returned for a recheck with Dr. Koski, who reported that the employee had had to quit work on October 7, 1996, because she was having some back pain. On that information, Dr. Koski released the employee to return to work on a trial basis, discouraging her from use of certain habit-forming drugs and indicating that she could follow up with the pain clinic. On October 25, 1996, the employee's attorney wrote to the insurer, indicating that the employee had been encouraged to enter an in-patient pain treatment program and requesting that the insurer pay temporary total disability benefits upon the employee's entry into such a program. On November 6, 1996, Dr. Damle wrote to the Workers' Compensation Division, requesting preauthorization to perform a full evaluation of the employee for chronic back pain.

On November 7, 1996, the employee underwent a rehabilitation consultation with QRC Elmer T. Nelson, as a result of which the employee was found to be a qualified employee for rehabilitation, without expectation of return to her preinjury employer expressly because the employer currently does not have any light duty work available. Following that consultation, on that same date, the QRC met with the employer and informed the employer that the employee's doctor had referred her to a chronic pain program to help her deal [with] and perhaps decrease the

amount of medication prescribed.[2] On November 8, 1996, the insurer wrote to the employee's attorney denying payment for chronic pain treatment or for any wage replacement benefits during such treatment. On December 10, 1996, the employee filed a claim petition, alleging entitlement to temporary total disability benefits continuing from October 7, 1996, permanent partial disability benefits of at least 2.5%, and continuing rehabilitation benefits including retraining, together with interest and penalties.

On December 11, 1996, Dr. Starzinski wrote to the insurer, having reviewed previously unseen medication records dating to before the employee's April 1996 work injury. These records revealed that medication prescribed for the employee by Dr. Gilsdorf and other physicians, in the months following her work injury and for various other problems for about two years preceding it, had included often intensive use of a long list of drugs, many of them highly addictive.[3] In his letter to the insurer, Dr. Starzinski indicated his opinion that the employee was chemically dependent and that, while her work injury certainly is an event which can be considered an exacerbation of [the employee's] chronic musculoskeletal condition, her ongoing use of addictive medications was quite inappropriate with regard to . . . a chronic pain syndrome.

On December 24, 1996, the employer and insurer filed a rehabilitation request objecting to the employee's request for rehabilitation services, based on the opinions of Dr. Starzinski. Nevertheless, the employee's QRC continued to provide support to the employee in a self-directed job search, mainly by telephone. On January 3, 1997, the employer and insurer denied the remainder of the employee's claims, and a month later they filed a medical response contending that the employee's request for chronic pain therapy should be denied on grounds that the employee's chemical dependency is the condition which requires immediate attention and treatment, not chronic pain.[4]

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[2] According to the QRC's eventual report, dated November 25, 1996.

[3] The overall list includes Acetaminophen (Tylenol) #3 & #4 (w/Codeine), Actidose-Aqua, Amitriptyline (Mylan), Ativan (Lorazepam), Axid, Buprenex, Butalbital, Cephalexin, Compazine, Cyclobenzaprine, Demerol (Meperidine), Depo-Medrol, Diazepam, Esgic-plus, Estrix, Flexeril, Idoxycycline, Lonox, Loracet (Hydrocodone), Methocarbamol, Methylprednisolone, Pancrease, Phenergan, Promethazine (Phenergan), Prozac (Fluoxetine), Robaxin, Rocephin, Roxicet, Solaquin, Soma (Carisoprodol), Stadol, Trisoralen, Valium, Vicodin, Viokase, Vistaril (Hydroxyzine HCL), and Zithromax. In 1984, Dr. Gilsdorf's license to practice medicine in Minnesota had been restricted for about four years for overprescription of numerous drugs.

[4] The employee has subsequently acknowledged that she had previously undergone inpatient treatment for chemical dependency in 1992 and had been arrested in August of 1996 for driving while intoxicated, after urine tests revealed traces of morphine and the active drug in marijuana in her system, to which charge the employee had pleaded guilty and lost her driver's license as a result

On February 21, 1997, on referral from Dr. Damle, the employee was examined by rehabilitation specialist Dr. Paul Lindquist, who diagnosed [t]horacic strain, April 11, 1996, with thoracic disc abnormality producing mild radiculitis but without evidence of thoracic radiculopathy or myelopathy, concluding that the employee was probably reaching maximum medical improvement. Dr. Lindquist prescribed use of a TENS unit on a long term basis, potentially in the context of a chronic pain management program, and he suggested that the employee might need to look into a vocation that did not require bending and lifting. Dr. Lindquist rated the employee's permanent partial disability at 5%, pursuant to a subpart of the schedules that rates disability for thoracic radicular syndromes including pain and paresthesias with MRI abnormalities not including radiculopathy.

On February 25, 1997, all pending issues were consolidated for hearing. The following month the employee began to complain more of migrainous headaches, and by the end of the month she had been diagnosed with insulin-dependent diabetes, a condition of which she had been previously unaware. On April 15, 1997, after a follow-up visit with the employee for medication review, Dr. Damle reported that, since starting on insulin, the employee was feeling better and was trying to address herself to her exercise program and that that was beginning to make a gradual change in her pain status.

On April 28, 1997, the employee was examined at her attorney's request by orthopedic surgeon Dr. Duane Person. X-rays of the employee's thoracic spine on that date were negative, but their views of the upper abdomen revealed very extensive pancreatic calcification indicative of a chronic pancreatitis. Dr. Person diagnosed (1) chronic musculoligamentous strain with intervertebral disc herniations at T6-7 and T8-9 and multilevel degenerative disc disease of the thoracic spine, (2) chronic pancreatitis, (3) diabetes, (4) chemical dependency, and (5) depression. Having reviewed the employee's MRI and other medical records, Dr. Person concluded that the employee's symptoms of shakiness, disorientation, sweatiness, slurred speech, and unsteady gait on the day she was suspended by the employer were symptoms not of drug abuse but of hypoglycemia due to her pancreatitis--a condition he compared to what the employee now recognizes as an insulin reaction, for which she self medicates herself with glucose. Dr. Person concluded that the employee had reached MMI from the effects of her work injury but was still subject to work restrictions and to an 8% whole body permanent impairment as a result.

On May 19, 1997, Dr. Starzinski testified in reiteration of his existing opinions, emphasizing that the employee was subject to polysubstance abuse or chemical dependency, for which the doctor strongly recommended chemical dependency treatment. Two days later, on May 21, 1997, Dr. Gilsdorf wrote to the employee's attorney, opining in part that the employee's symptoms were consistent with those of a thoracic disc injury, that the employee should be restricted from lifting over fifteen pounds and from repetitive bending or twisting, and that her injury was permanent and rateable at 5% of the whole body under workers' compensation rules.

The matter was heard on May 22, 1997, when issues included the date of MMI, intervenor Minnesota Department of Human Services' entitlement to certain reimbursement, and the employee's entitlement to permanency benefits, to rehabilitation services, to $10,924.32 in

continuing wage replacement benefits, and to medical benefits including chronic pain treatment and payment of over $3,864 in outstanding medical bills. In testimony at hearing, the employee acknowledged that she was chemically dependent and indicated that she was prepared to undergo treatment for that dependency through a pain clinic but that she had been denied permission from the employer and insurer to do so. She also testified that she continued to experience symptoms of knife-like mid back pain on the right, which followed the ribs to the sternum. She explained that she preferred to undergo her treatment through a pain clinic rather than through a chemical dependency treatment center, because the latter was demeaning and would not take into account her physical pain. It remained the employer and insurer's position that the employee's problems were no longer ones of chronic pain but ones of purely chemical dependency. Following the hearing, the compensation judge concluded in part that the employee had reached MMI from the effects of her work injury in early 1997, that her medical and rehabilitation services were reasonable and necessary consequences of her work injury through March 1, 1997, but that the employee's injury had been only temporary and she was entitled to wage replacement and other benefits only through March 1, 1997. 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 (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 employee's appeal is from the compensation judge's conclusions that the employee has attained MMI from the effects of her work injury and that the work injury was only temporary and was fully resolved as of March 1, 1997.

MMI

At the time of hearing, the employer and insurer's position was that the employee reached MMI from the effects of her work injury by August 28, 1996, the date of Dr. Starzinski's examination, and the parties stipulated that the employee was served with Dr. Starzinski's report

of MMI on September 18, 1996. Dr. Lindquist concluded on February 21, 1997, that the employee was probably reaching maximum medical improvement as of that date. Dr. Person placed MMI at April 28, 1997. In Finding 33, the compensation judge concluded generally that MMI had occurred in early 1997, expressly referencing in his memorandum Dr. Lindquist's opinion and noting immediate thereafter his conclusion that the employee had no restrictions on her physical activities [due] to the effects of the personal injury by March 1, 1997, thus effectively locating MMI no later than that date. Even while indicating in her brief that she would have no objection to an MMI date on or after April 11, 1997, which is one year after the date of injury, the employee contends on appeal that the date of maximum medical improvement should be delayed until [an] inpatient chronic pain program is completed. We are not persuaded.

Independent medical examiners for both the employer and insurer and the employee have concluded that the employee has attained MMI from the effects of her work injury, Dr. Starzinski locating it in September 1996 and Dr. Person locating it in April 1997. A third physician, one of the employee's own treating consultants, Dr. Lindquist, concluded that the employee was on the verge of MMI in February 1997. In that the employee's physical symptoms and condition in February 1997 were little different from what they were two months later in April 1997, when her own independent examiner found her to be at MMI, it was not at all unreasonable for the compensation judge to conclude in effect, from these three expert opinions, that the employee had obtained MMI by March 1997. MMI is not a purely medical conclusion but a finding of ultimate fact. See Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 528-29, 41 W.C.D. 634, 639 (Minn. 1989). Because the judge's decision was not unreasonable in light of three expert medical opinions, we conclude that it is not unsupported by substantial evidence, and therefore we affirm it. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239; Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985) (a trier of fact's reliance on expert medical opinion is usually upheld).

Duration and Extent of the Work Injury

Having concluded that the employee had reached MMI from the effects of her work injury in early 1997, the compensation judge went on to conclude also that the employee had in fact completely recovered from her work injury by March 1, 1997, and so was no longer entitled to any benefits after that date. See Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987). In deciding the MMI issue, the compensation judge had apparently relied importantly on the opinions of Drs. Lindquist and Person, both of which post-dated the service of Dr. Starzinski's opinion. Both Dr. Lindquist and Dr. Person had also concluded, however, contrary to the opinion of Dr. Starzinski, that the employee was still subject to work restrictions and that her work injury had resulted in permanent impairment. Thus, as the employee has implied, the judge's decision as to the extent of the employee's injury relies more solely on the opinion of Dr. Starzinski. The employee contends that this reliance was error, arguing not only that Dr. Starzinski's opinion is contrary to all other expert opinion but also that it is without adequate foundation. Although this is a somewhat more difficult issue, we conclude that the judge's decision was not unreasonable.

The employee suggested in testimony that her back pain following her work injury was different in kind from any pain that she had experienced prior to that injury and that the post-injury pain persisted on the day of the hearing. It is evident from the judge's findings that he understood the employee's post-injury pain to have been essentially only a temporary recurrence of similar pre-injury pain, in keeping with the opinion of Dr. Starzinski. This conclusion, together with the judge's conclusion as to the resolution of the work injury by March 1997, imply that the compensation judge found the employee's testimony as to the history of her back pain less than credible. Assessment of the credibility of witnesses is the unique function of the trier of fact. Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988), citing Spillman v. Morey Fish Co., 270 N.W.2d 781, 31 W.C.D. 187 (Minn. 1978). Furthermore, there were several indications in the medical records that the employee was not always entirely forthcoming with her treating providers regarding both her medical history and her current employment status. For example, QRC Nelson testified that he was uninformed until the date of hearing that the employee, as a consequence of an arrest for driving while intoxicated in August of 1996, had been without a license to drive all the while that the QRC had been providing her with job search assistance following her October 1996 suspension by the employer. The employee's inability to drive was certainly information relevant to the effectiveness of the QRC's decisions and advice as he attempted to assist the employee in finding work. For another example, very shortly after the employee's suspension from work in October 1996, clearly for displaying symptoms and behaviors typical of drug intoxication, Dr. Koski reported, after his October 22, 1996, consultation with the employee, that the employee had had to quit her job due to her back pain. In light of such evidence that the employee may have been providing far less than accurate information to her treating providers, we cannot conclude that it was at all beyond the judge's discretion to credit the opinion of Dr. Starzinski, a neurologist and specialist in psychopharmacology, over the contrary opinions of the treating providers, who reasonably might have less insight into the problems and behavioral tendencies of individuals with the employee's chemical history. See Nord, 360 N.W.2d at 342-43, 37 W.C.D. at 372-73 ("[a] trier of fact's choice between experts whose testimony conflicts is usually upheld [unless] the facts assumed by the expert in rendering his opinion are not supported by the evidence").[5]

The employee has argued also that Dr. Starzinski's opinion itself was unreliable, both because it was based on an examination too long preceding the judge's decision and because

[5] It would also not have been unreasonable for the judge to question Dr. Person's opinion based on Dr. Person's equation of the employee's symptoms of disorientation on October 6, 1996, with symptoms that the employee now experiences in an insulin reaction and medicates by taking additional sugars to counteract the presence of too much insulin in the system. It would not have been unreasonable for the compensation judge to conclude that in October 1996, prior to the employee's diabetes diagnosis and to her adoption of an insulin regimen, the employee's own defective pancreas was producing too little insulin. Moreover, even the employee, in her informal brief, acknowledges that [i]t is not clear whether the diabetes problem diagnosed in March 1997 . . . is responsible for her 10/6/96 behavior or whether use of chemicals is the culprit.

it was not based on a detailed factual hypothetical and was otherwise lacking in foundation. Again we are not persuaded.

Although the employee's symptoms may have fluctuated somewhat between the time of Dr. Starzinski's physical examination of the employee in September 1996 and his reiteration of his findings and opinion in May 1997, there is no evidence that the employee's basic condition had materially changed or deteriorated over that time. Because Dr. Starzinski's opinion in September of 1996 was based on the employee's own sufficiently detailed version of her injury and symptoms, and because that version remains essentially unchanged, Dr. Starzinski's opinion in May of 1997 remains adequately founded for purposes of addressing the employee's issues with regard to that injury, even without a detailed factual hypothetical. Furthermore, and importantly, prior to Dr. Starzinski's testimony in May 1997, the foundation for the doctor's opinion had been substantially supplemented by his review of a detailed and objective list of medications that the employee had purchased over the course of the preceding three years, in addition to records of the employee's treatment since her examination by the doctor in September 1996.

Dr. Damle reported in April 1997 that, since starting on insulin, the employee was feeling better, was addressing herself to an exercise program, and was as a consequence finding her pain subsiding. In light of this history, and having concluded that the opinion of Dr. Starzinski was of adequate foundation to be credited and that it would not have been unreasonable for the judge to weigh that opinion more heavily than contrary expert opinion, we conclude that the compensation judge's denial of benefits after March 1, 1997, was not clearly erroneous and unsupported by substantial evidence, and so we affirm it. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239; Nord, 360 N.W.2d at 342-43, 37 W.C.D. at 372-73.