MICHAEL DADDARIO, Employee, v. ZIEM'S FLOOR COVERING and ST. PAUL COS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 12, 1998

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

HEADNOTES

CAUSATION - SUPERSEDING INTERVENING CAUSE. Where a work injury remains a substantial contributing cause of the employee's disability or need for treatment, allegedly reckless or negligent conduct by an employee while performing his subsequent work activities, resulting in a subsequent *work-related* reinjury or aggravation, does not render the workplace reinjury or aggravation a superseding intervening cause. To permit an employer to defend against its continuing liability on that basis would improperly introduce a contributory negligence standard into the determination of entitlement to or liability for benefits.

STIPULATION FOR SETTLEMENT - INTERPRETATION. The terms of an approved stipulated agreement for settlement supersede the employee's statutory entitlement to benefits where the stipulation's language differs from the statutory entitlement. Where the clear language of the stipulation between the parties conditions a resumption of temporary total disability payment upon the employee's hospitalization for an invasive surgical procedure, it was clear error for the compensation judge to award temporary total benefits for a period prior to the date the employee entered the hospital, even though the employee was temporarily totally disabled during that period.

Affirmed in part and reversed in part.

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

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the award of the expenses of the employee's proposed low back fusion surgery and of temporary total disability compensation from August 12, 1997 through the date of hearing. We affirm the award of the medical expenses but reverse the award of temporary total disability for the period at issue.

BACKGROUND

The employee, Michael Daddario, sustained an admitted low back injury on July 16, 1979 in the course and scope of his employment as a carpet layer for the employer, Ziem's Floor Covering. The employee was paid various benefits, including compensation for a 25 percent permanent partial disability to the spine. He was released to return to light duty work

with the employer as of December 17, 1979, but no work meeting his restrictions was apparently available at the employer. His treating physician, Dr. Jack M. Bert, recommended that the employee consider seeking other employment, and told the employee that I do not think that you will be able to do carpet laying in the future without persistent complaints of low back pain . . . if you do not think that you can do carpet laying work in the future . . . you should seek light duty type employment. The employer and insurer agreed to a two-year retraining program to qualify the employee for work in the field of lithography. The employee complete this training in about 1983. (Findings 2, 3, 7 [unappealed]; Exh. 7: Dr. Bert, 1/28/80 correspondence.)

On March 3, 1983, the employee underwent a chymopapain injection for his low back condition, but did not significantly improve. On October 28, 1983, Dr. Bert noted that the employee would have difficulty performing any repetitive bending or stooping activity in the future, and recommended that the employee avoid lifting, pushing or pulling more than 25 pounds. The employee's chiropractor, Dr. Arvin C. Holtz, recommended an even more stringent 10-pound lifting restriction. (Findings 5, 6 [unappealed]; Exh. 7: Dr. Bert, 3/24/83 - 10/28/83.)

In November 1986, the employee entered into a stipulation for settlement with the employer and insurer. The stipulation closed out future claims on a full, final and complete basis, with the exception of future medical expenses causally related to the 1979 injury, and temporary total disability benefits payable only during any subsequent hospitalization for reasonable and necessary invasive surgery and for a reasonable healing period thereafter. (Exh. H; Findings 3, 4 [unappealed].)

The employee continued to work in the graphic arts field for about six or seven years after retraining. His job duties in this field were very light, but he continued to have back problems and treated with Dr. Bert and his chiropractor, Dr. Holtz. On May 17, 1989 the employee had a significant increase in his low back symptoms when he lifted a five to eight pound stripper flat at work, and was released from work for a short period of time. According to the employee's testimony, his back symptoms continued to slowly worsen over time. Sometime in 1989 or 1990, the employee lost his job in the printing business when his employer went out of business. He sought work in this field but was unable to find a job. (T. 35-42; Findings 8, 12, 13 [unappealed]; Exh. 4: Dr. Holtz, 6/12/89.)

After failing to find further work in the graphic arts field, the employee returned to carpet laying work in late 1991 or in 1992, initially accepting jobs through his union. The employee exceeded his medical restrictions each time he worked as a carpet layer. After returning to carpet-laying work, he missed one to two days of work per month because of back problems. By 1996 the employee was performing more non-union carpet-laying jobs because he had difficulty keeping up with the work pace required in union jobs. Some time in 1996, the employee began obtaining non-union carpet laying assignments through Dan Wamsley, a salesman for Cheney Floor Company, for which he was paid in cash. (T. 57-71; Findings 10, 15, 16 [unappealed].)

On or about March 28, 1997, the employee was installing a carpet base on a wall as part of an installation job he had been sent to by Mr. Wamsley. He heard a pop in his back and felt excruciating pain in the low back, buttocks and right leg. He returned to Dr. Bert for treatment within a few days. Eventually, Dr. Bert referred the employee to Dr. John A. Dowdle, an orthopedic surgeon, for consideration of possible surgery. Based on the results of a repeat MRI, discography, examination finding and the employee's medical history, Dr. Dowdle and Dr. Bert recommended that the employee undergo low back fusion surgery. Both physicians attributed the employee's low back condition and need for surgery to the 1979 injury. Dr. Dowdle opined that the employee had not sustained a repetitive use injury in his subsequent employment activities. Dr. Nolan Segal, who examined the employee for the employer and insurer on August 20, 1997, agreed that fusion surgery would be considered reasonable and necessary, but with some reservations about whether the employee was an ideal surgical candidate. He attributed 25 percent of the need for the surgery directly to the 1979 work injury, 30 percent to non-work aggravations and activities of daily living, 20 percent to the activities of the employee's work in the printing business, and 25 percent to his post-injury carpet-laying work activities. (Findings 17-24 [unappealed]; Exh. 7: Dr. Dowdle, 5/23/97 - 5/30/97, Dr. Bert, 5/12/97; Exh. 9: Dr. Segal dep. at 17-21, 8/20/97 report.)

On June 19, 1997, the employee filed a medical request seeking authorization and payment for the fusion surgery recommended by his physicians. On June 19, 1997, the employee filed a claim petition seeking temporary total disability compensation from the employer and insurer from April 3, 1997 and continuing. The issues were considered by a compensation judge of the Office of Administrative Hearings following a hearing on October 8, 1997. The judge awarded temporary total disability benefits from and after August 12, 1997, and ordered the employer and insurer to pay for the medical expenses related to the proposed surgery. The employer and insurer appeal.

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) (1992). 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.

The issue on appeal in this matter also involves the interpretation and application of case law to undisputed facts. While this court may not disturb a compensation judge's findings of fact unless clearly erroneous and unsupported by substantial evidence in the record as a whole, Minn. Stat. § 176.421, subd. 1(3) (1992), a decision which rests upon the application of the law to undisputed facts involves a question of law which this court may consider *de novo*. Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607 (W.C.C.A. 1993).

DECISION

Reasonableness and Necessity of Proposed Surgery

Based on MRI studies and the results of discography, the employee's treating physicians, Dr. John A. Dowdle and Dr. Jack M. Bert, recommended that the employee undergo fusion surgery for his low back condition. (Exh. 7.) The employer and insurer's medical expert, Dr. Nolan M. Segal, who examined the employee on August 20, 1997, agreed that the two-level fusion surgery would be considered reasonable and necessary, but had some reservations over factors that he believed did not make the employee an ideal surgical candidate. Specifically, Dr. Segal noted that the employee is a diabetic, and that there was some evidence of a degree of functional overlay. In his deposition testimony, Dr. Segal recommended a thorough psychologic profile prior to determining whether to perform the surgery. (Exh. 9: dep. at 17-21, 8/20/97 report.)

The compensation judge found that the proposed surgery was reasonable and necessary. (Finding 27.) The employer and insurer argue that this court should vacate this finding on the basis that such a finding is premature as the employee had not undergone the kind of psychological testing recommended by Dr. Segal.

We note, however, that the employee's treating physicians apparently did not deem such a profile necessary prior to making the recommendation for surgery. In addition, on cross-examination Dr. Segal acknowledged that despite his reservations about whether the employee would be an ideal surgical candidate, he did not believe that the proposed surgery was contraindicated. (Exh. 9: dep. at 20.) We conclude that the compensation judge's determination was supported by substantial evidence, and affirm. Minn. Stat. § 176.421, subd. 1(3) (1992); Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

Superseding, Intervening Cause

The employer and insurer next argue that their liability for the employee's back condition and proposed surgery should have been found to have been terminated by an application of the doctrine of superseding intervening cause, and that the compensation judge erred in ordering that they pay for the surgery.

Generally, . . . the employer is liable for all natural consequences flowing from an admitted personal injury unless such consequences are the result of an independent intervening cause, and it is only necessary for the employee to show that the personal injury was a substantial contributing cause of the disability, even though it was not the sole cause. Buford v. Ford Motor Co., 52 W.C.D. 723 (W.C.C.A. 1995), summarily aff'd (Minn. June 30, 1995) (citing Rohr v. Knutson Constr. Co., 305 Minn. 26, 232 N.W.2d 233, 28 W.C.D. 23 (1975), and Roman v. Minneapolis Street Ry., 268 Minn. 367, 129 N.W.2d 550, 23 W.C.D. 573 (1964)).

In Minnesota workers' compensation cases, there are two distinct concepts under which an employer's liability for benefits is interrupted following a subsequent injury or aggravation on the basis of a superseding intervening cause. First, an employer's liability for benefits for disability or medical treatment is severed or suspended where periods of temporary disability, increased degree of permanent partial disability or need for specific medical treatment are occasioned by some wholly unrelated trauma or disease. See, e.g., Patrin v. Progressive Rehab Options, 497 N.W.2d 246, 48 W.C.D. 273 (Minn. 1993) (non-work related car accident). Second, an employer's liability has been severed despite a causal relationship between the initial work injury and a non-work related aggravation or reinjury, where the employee's subsequent disability or need for additional medical care was the result of unreasonable, negligent, dangerous or abnormal activity on the part of the employee. Eide v. Whirlpool Seeger Corp., 260 Minn. 98, 102, 109 N.W.2d 47, 49, 21 W.C.D. 437, 441 (Minn. 1961).[1]

Appellants here do not dispute that the employee's 1979 back injury remains a substantial contributing cause of the employee's low back disability and current need for surgical treatment, consistent with all of the medical opinion in the case. Nor do they contend that the aggravation to the employee's low back condition sustained after his return to carpet-laying work was an entirely new injury sustained as a result of an occurrence which had no causal relation to the original injury. Instead, they argue that by returning to carpet-laying employment, which the employee admitted involved duties beyond the restrictions suggested by his physicians after the 1979 injury, the employee engaged in unreasonable and dangerous activity of a type which justifies severing their liability for subsequent aggravation to his low back condition.

As the employer and insurer point out, the compensation judge did not determine whether the employee sustained either a discrete personal injury or repetitive trauma injury during the period in which he returned to carpet-laying work, nor did the judge make any findings as to whether the employee's return to carpet-laying work was unreasonable and dangerous activity consistent with the employer and insurer's legal theory. On appeal, the employer and insurer's position is that this court should reverse or remand the finding of liability for the surgical expenses, either determining, as a matter of law, that the employee's return to carpet-laying was an unreasonable activity severing the causal link between the 1979 injury and the need for the

[1] For additional citations to cases reflecting these two disparate principles, see Buford v. Ford Motor Co., 52 W.C.D. 723 (W.C.C.A. 1995) at Ftn. 3.

proposed surgery, or instructing the compensation judge to make findings on that issue as a question of fact.

We are aware of no Minnesota case in which an employee's *work activities* subsequent to an initial work injury have been considered unreasonable, negligent, dangerous or abnormal activity such that a resulting *work-related* reinjury or aggravation was considered to be an intervening, superseding cause of disability. Thus, it appears that the question presented is one of first impression.

In considering the applicability of this defense in the context of successive work injuries, we begin by examining the basic principles of the workers' compensation act. As our supreme court has long noted, underlying the entire system of workers' compensation legislation in Minnesota is the central premise that an employee's entitlement to benefits is not based upon fault. Minn. Stat. § 176.021, subd. 1, provides that all employers subject to the workers' compensation act are . . . liable to pay compensation in every case of personal injury or death . . . arising out of and in the course of employment without regard to the question of negligence, unless the injury or death was intentionally self-inflicted or when the intoxication of the employee is the proximate cause of the injury. As the supreme court observed in one of its earliest workers' compensation decisions, [i]n controversies under the Workmen's Compensation Act the contributory negligence of an injured employee is not a bar to his right to compensation. State ex rel. Green v. District Court, 145 Minn. 96, 98, 176 N.W. 155, 156 (1920). This principle has remained central to the act throughout its history to the present.

As a second consideration, we note that it has long been the rule in our system that where successive work injuries contribute to disability, liability for wage-loss and medical benefits is subject to principles of equitable apportionment, such that the employer on the risk for each contributory injury is liable for that portion of the disability attributable to the injury sustained in that employer's service. See, e.g., Goetz v. Bulk Commodity Carriers, 303 Minn. 197, 226 N.W.2d 888 (1975); Joyce v. Lewis Bolt & Nut Co., 412 N.W.2d 304, 40 W.C.D. 209 (Minn. 1987).

In light of these principles, we conclude that to permit an employer to defend against its continuing liability for its apportioned share of benefits after a subsequent *work-related* reinjury or aggravation, on the basis of allegedly reckless or negligent conduct by an employee while performing his subsequent work activities, would improperly introduce a contributory negligence standard into the determination of entitlement to or liability for benefits. Specifically, were such a defense permissible, there are two possible outcomes regarding the portion of the benefit liability foreclosed by that defense: (1) the apportioned share of liability attributable to the first injury would be borne by the employee through non-receipt of a part of the benefits otherwise payable, thereby directly introducing a standard of contributory negligence, or (2) the employer on the risk for the earlier injury would shift its share of liability onto the subsequent injury

employer, again introducing a notion of employee contributory negligence by conditioning apportionment between employers on the absence of this factor.[2]

As we conclude that the appellants' legal theory does not constitute a viable defense to liability in this case, we further conclude that the compensation judge did not err by failing to make findings relevant to that proposed defense. Since it is undisputed that the 1979 work injury remains a substantial contributing factor to the employee's need for the proposed low back surgery, we affirm the award of the employee's related medical expenses. The employer and insurer remain free to seek contribution by apportionment against any other employers in whose service the employee may have sustained a reinjury or aggravation which also contributed to the need for the surgery. Similarly, the employee remains free to file a claim petition for any other benefits to which he may be entitled as a result of any such other injury or injuries.

Temporary Total Disability Benefits

The employee's entitlement to temporary total disability benefits from the employer and insurer in this case is controlled by the language of the November 4, 1986 Stipulation for Settlement between the parties. The language of that stipulation closed out temporary total disability compensation on a full and final basis with one limited exception, which provides in part as follows:

> . . . [I]f the Employee upon the advice of his treating physician undergoes an invasive surgical procedure to cure or relieve the residual effects of the incident and injury described herein the Employee will be entitled to a limited period of temporary total disability benefits during his period of hospitalization and for a reasonable healing period hereafter.

(Exh. 4 at & X.)

The compensation judge found that the employee was temporarily totally disabled as of August 12, 1997, when his treating clinic took him off work pending possible surgery. The compensation judge further found that the employee was, as of that date, ready, willing and able to undergo the proposed surgery. (Findings 21, 29.) The compensation judge then concluded that the employer and insurer should pay temporary total disability benefits from and after August 12, 1997. (Finding 29 & Order 1.)

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[2] Even were we to conclude that questions of apportionment did not fall under the act's proscription of fault-based considerations, it would be patently inequitable to require the subsequent injury employer to pay *more* where an employee's own negligence contributed to the work injury for which that employer was on the risk than in cases where contributory negligence by the employee was absent.

The employer and insurer argue that the compensation judge's order is not consistent with the language of the stipulation for settlement, and that the employee's entitlement to temporary total disability benefits, if any, would begin only upon the inception of hospitalization for the surgery. In response, the employee argues only that substantial evidence supported the compensation judge's determination regarding the date on which the employee was totally disabled. Were this issue a question of entitlement to statutory benefits, we might agree with the employee. Here, however, the contractual language of the stipulation, rather than principles pertaining to statutory benefits, is controlling. The compensation judge did not, apparently, construe or apply the language of the stipulation in determining the award of temporary total benefits.

We reverse the award of temporary total benefits from August 12, 1997 through the date of hearing, as it is a period prior to any hospitalization for the proposed surgery. The language of the stipulation is clear on its face. Temporary total benefits under the stipulation begin upon the inception of hospitalization for an invasive surgical procedure causally related to the 1979 back injury, not during periods prior to such hospitalization. While the dispute in this case may have resulted in a delay in the date on which that hospitalization commences, the stipulation does not provide for additional temporary total benefits where the date of surgery is delayed after the employee is taken off work by his physicians. The parties could have agreed that temporary benefits would be paid under such circumstances, but did not do so, and it is not for this court to redraft the parties' contractual agreement. We reverse the order for payment of temporary total disability benefits for the period from August 12, 1997 through the date of the hearing below. The employer and insurer are liable for payment of temporary total benefits beginning only upon the employee's hospitalization for the surgery.