JAMES E. DONOVAN, Employee/Appellant, v. GREEN VIEW, INC. and NATIONAL FARMERS UNION PROP/CASUALTY CO., Employer-Insurer, and CNA INS. CO., ST. CLOUD ORTHOPEDIC ASSOC., LTD., and MEDICARE, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 6, 1998

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

HEADNOTES

WAGES; CAUSATION - SUBSTANTIAL CONTRIBUTING CAUSE. Substantial evidence, including expert medical opinion and documentary evidence, supported the compensation judge's decisions as to primary liability and the hours that the employee worked.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Hefte, J.
Compensation Judge: Janice M. Culnane.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the judge's determination that the employee worked thirty-six hours per week and/or that he did not sustain a work-related injury while working for the employer. We affirm.

BACKGROUND

The employee sustained a work-related injury to his lumbar spine in 1989 while working for R. L. Polk as a salesperson. In the spring of 1993, while still employed by R.L. Polk, the employee had a recurrence of back pain, and he was temporarily totally disabled from April 5, 1993, through April 25, 1993, and again from May 10, 1993, through August 15, 1993. The employee's treating chiropractor, Dr. Jeffrey Varner, ordered a CT scan of the lumbar spine, which revealed mild to moderate central spinal stenosis and bilateral subarticular recess stenosis at L4-5 and mild central stenosis at L3-4. The employee received benefits for a 14% whole body disability.

In July of 1993, the employee entered into a settlement with R. L. Polk and its workers' compensation insurer, wherein the employee received $64,500 (less attorney fees) in full, final, and complete settlement of all claims arising out of the 1989 injury, except for medical expense claims. The insurer also agreed to pay for ten chiropractic visits per calendar year. An

award on stipulation was filed on August 10, 1993. The employee did not return to work with R. L. Polk after May of 1993 and received retirement benefits from that company.

The employee lived on a family farm. After he left R. L. Polk, he helped with renovation on several farm buildings. The employee treated with Dr. H. R. Schubert, D.C., on July 26, 1993, and records from that date reflect that the employee had been busy fixing up the farm. The employee also treated with Dr. Schubert on August 23, 1993, September 17, 21, 24 and 28, 1993, and October 15, 1993, each time complaining of low back pain and sometimes right buttock pain.

In October of 1993, the employee applied for a job with Green View, Inc. [the employer], a nonprofit company that hires low income elderly people to do certain jobs at highway rest areas and state parks. The application for employment, completed by the employee, asked whether the employee had any physical impairments, to which the employee responded, I do not have any physical problems other than what a person of my age may have. The application also asked whether the employee had been under a doctor's care in the last five years, to which the employee responded, No.

The employee treated with Dr. Schubert again on February 21, 1994. Records for that date reflect pt. has been pretty good feels a little stiff in the. The remainder of the entry was not photocopied.

The employee was hired by the employer and went through orientation on May 3, 1994.[1] A Statement of Weekly Earnings prepared by the employer reflects that the employee worked thirty-six hours in the week ending May 17, 1994, thirty-six hours in the week ending May 24, 1994, and twenty-seven hours in the week ending May 31, 1994. However, at hearing, the employee testified that he worked fifty-four hours the first week. He was paid $5.00 per hour.

The employee returned to Dr. Schubert on May 16, 1994. Portions of Dr. Schubert's records did not photocopy, but the incomplete entry for that day reads, mostly in left leg. Still is stiff in the mornings. When the employee was seen again by Dr. Schubert on May 31, 1994, Dr. Schubert recorded, in relevant part, pain in LB [down] L. leg musc. pull. Pt has not felt this bad since 15 mos. ago.

The employee claimed that he sustained a work-related injury to his low back on or about May 28, 1994, while working for the employer, and he filed a claim petition seeking payment of medical and chiropractic expenses. An amended claim petition was filed on April 17, 1997, adding claims for temporary total disability benefits and permanent partial disability benefits. The matter proceeded to hearing on September 16, 1997, at the Office of Administrative Hearings.

[1] At oral argument, the employee contended that orientation took place on May 13, 1994. There are no written records to support this contention.

In a decision filed on October 28, 1997, the compensation judge found that the employee failed to sustain his burden in proving a work-related injury at the employer. 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

In his Notice of Appeal, the employee (pro se) described the issue as follows: No of Hrs worked pr WK Report From Hanson Dordell Summit Orthopedics P.A. In his letter brief of April 29, 1998, the employee asked the court to consider, in part,

> I. The number of hours Green View asked me to work as opposed to the number of hours I was told I would have to work when I was hired.
> II. Even though, through the first two weeks I had worked 95 hrs, Green View's Bob McChaken (my foreman) was on the phone the evening of 6/1 requesting me to report to work the next morning. Again I was only supposed to work 27 hrs a week.

At oral argument, the employee indicated that the judge was mistaken as to the hours he worked and his physical condition at the time he began working for the employer.

The judge made no specific findings as to the number of hours worked by the employee. However, she noted in her memorandum that

> Payroll records introduced at the hearing showed the employee worked one day from the payroll period May 1-3, for a three (3) hour period. This reflects his orientation. He worked from May 11, 1994, through May 31, 1994. Throughout this three week period,

> the employee worked 108 hours. The records show that for three one-week pay periods, the employee worked four (4) days and 36 hours each week.

Later, in that same memorandum, the judge noted, The employee worked for three weeks from May 11, 1994 through May 31, 1994. Payroll records show the employee worked four days per week, for a total of 36 hours weekly.

In a letter submitted to this court dated April 1, 1998, the employee indicated that he worked 45 hours in the first week and 54 hours in the second. He went on to contend that [t]hese additional hours are the reason for my injury. After thoroughly reviewing the record in its entirety, we can find no evidence to support the employee's claim. He testified at hearing that he worked 54 hours in the first week, but gave no testimony as to the hours worked in the second or third weeks. Further, at hearing the employee was represented by an attorney, who indicated that the employee was claiming an average weekly wage of $200.00 per week, which would figure out to a forty-hour work week. The only documentary evidence that the compensation judge had before her as to the hours worked was the Statement of Weekly Earnings, which reflects that the employee worked four days per week, nine hours per day in the first two weeks and nine hours per day for three days in the third week.

The compensation judge specifically noted in her memorandum that she accepted the payroll records of the employer over the testimony of the employee as to hours worked. Assessment of a witness's credibility is the unique function of the trier of fact. Even v. Kraft, Inc. 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989). Because the compensation judge had written documentation as to actual hours worked, it was not unreasonable for her to conclude that the employee was working thirty-six hours per week.[2]

However, even if substantial evidence did not support a conclusion that the employee was working only thirty-six hours per week, the judge's finding that the employee did not meet his burden of proving a work injury in May of 1994 is controlling as to the employee's entitlement to benefits. The employee did not appeal from that finding, and the judge in her memorandum explained that her finding had nothing to do with how many hours the employee did or did not work but was instead based on the fact that the employee's history of his injury was inconsistent and did not support his own conclusion concerning causation. Each example of inconsistency noted by the judge is fully supported by evidence in the record.[3] Also, the

[2] We acknowledge that, as the employee claims, the employee actually worked more hours than he was hired to work. Nancy Beimert, the office manager for the employer, testified that the employee was hired to work alternating two-week pay periods of seven nine-hour days in one and six nine-hour days in the other.

[3] We note also that for the first time at oral argument the employee suggested that his work injury was as much the result of harassment from his supervisor as it was the carrying of the water.

compensation judge accepted the opinion of independent medical examiner Dr. Lloyd Leider over the opinions of Dr. Debra Peven, Dr. Schubert, and Dr. Dwight Jaeger. Dr. Leider opined that there are no objective factors present which would suggest that the patient's work activities in the last two weeks of May 1994 are a contributing factor to any of the patient's current symptoms. A judge's choice between expert witnesses is generally upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). It is questionable whether the employee raised the issue of lack of foundation in his notice of appeal, and, in any event, the employee did not brief that issue. An issue not briefed is deemed waived. Minn. R. 9800.0900, subp. 1.[4]

Because substantial evidence supports the compensation judge's findings, we affirm the judge's decision in its entirety.

[4] In his letter brief the employee also requested a court order to determine where Bob McChaken was on the weekend in question, and he requested that the court determine whether carrying water on the job caused a lesion on his leg. Where Bob McChaken was on the weekend in question is irrelevant to the issues before this court. Further, the employee did not make a claim for a leg injury at the hearing below, and issues not litigated at the hearing below cannot be litigated before this court. Finally, these issues were not raised in the notice of appeal and are not properly before this court.