

RICHARD DUBORD, Employee, v. OGDEN-MARTIN PROJECTS, INC. and SELF-INSURED/ALEXIS, INC., Employer-Insurer/Appellants, and GROUP HEALTH PLAN, INC., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 7, 1998

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

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including lay testimony, medical records, and expert medical opinion, supported the compensation judge's finding that the employee's work-related injury was a substantial contributing cause of his right shoulder disability and need for medical treatment.

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Despite the absence of formal medical restrictions, minimal but sufficient evidence supported the compensation judge's award of temporary partial disability for the period at issue.

Affirmed.

Determined by Johnson, J., Hefte, J., and Wheeler, C.J.
Compensation Judge: Bradley J. Behr

OPINION

THOMAS L. JOHNSON, Judge

The self-insured employer appeals from the compensation judge's finding that the employee's work injury on January 1, 1996 was a substantial contributing cause of his subsequent disability and medical treatment, and from the award of temporarily partial disability compensation for the period between April 25, 1996 and August 8, 1997. We affirm.

BACKGROUND

The employee, Richard Dubord, began working for the employer, Ogden-Martin Projects, Inc. ("Ogden-Martin"), on May 5, 1989. Ogden-Martin operates a garbage burning facility for Hennepin County, Minnesota. In 1995, the employee's regular job assignment for the employer was as a utility operator, which principally involved driving a front-end loader, and also involved responsibility for dealing with problems and complaints in the scale house where garbage trucks were weighed entering and leaving the facility. (T. 30-31.)

The employee sustained a nonwork injury in July 1995 when a motorbike he was riding in a park on a day off from work bogged down in a sand track and fishtailed, causing him

to fall on his right shoulder. He experienced some dull pain in his shoulder, but did not seek medical attention. He returned to his job with the employer as a utility operator as usual on his next scheduled workday. T. 31-34.)

The employee continued to experience some soreness in his shoulder but thought it was improving. He had no difficulty performing his duties as a utility operator. In October 1995, the employee started a temporary work assignment for the employer as an auxiliary operator, which provided a significantly higher hourly rate of pay. This job was performed on a rotational basis, repeating a pattern involving several 12-hour days in succession working the day shift, several days off work, and then several 12-hour days on the night shift, again followed by several days off. The employee averaged about 42 hours per week in this position. The auxiliary operator job involved more physically demanding duties, including raking the grizzly, or prying chunks of metal and slag from metal teeth located at the end of a conveyor system, opening and closing large valves, knocking slag off the inside of a boiler chute by striking it repeatedly with the end of a 25-foot steel pipe inserted into a small access door, shoveling out large accumulations of ash, and pounding against a strike plate with a sledgehammer to loosen ash plugs in a discharge chute. (T. 32-60.)

After the employee began working at the auxiliary operator job, his shoulder pain, which had almost resolved, began to worsen, becoming more of an aching, gnawing pain. The increases in pain were associated with the more strenuous duties of the job. (T. 45, 50, 54, 56, 59.)

On October 24, 1995, the employee saw Dr. Daniel Riley at Group Health about some congestion coughing. Although the employee did not seek treatment for his right shoulder, Dr. Riley noted that the employee was reporting an aching in his right shoulder which had started when he tipped over his son's dirt bike. The doctor did not prescribe any treatment for the employee's shoulder complaints. (T. 62-63; Exh. A.3: 10/24/95.)

The employee returned to Group Health on December 20, 1995 complaining of his shoulder pain. Dr. Terrence Dunklee, who examined the employee, noted a history of a shoulder injury in July 1995 following a fall from a motorcycle, which at first seemed to be getting better but without fully having resolved, but then had worsened over the past few months at work when opening large valves, climbing ladders and lifting. On examination, the employee exhibited tenderness over the inferior and lower pole of the deltoid and a tender muscle mass was found knotted within that muscle along the shaft of the humerus. The employee complained of pain with abduction at 80 degrees and popping was present at that point. Dr. Dunklee suspected a possible rotator cuff tear, placed the employee on restrictions of 30 pounds lifting and limited pushing and pulling, and scheduled an MRI scan. (T. 64-65; Exh. A.3: 12/20/95.)

When the employee returned to work, he gave the restrictions to his supervisor, but no changes were made in his work duties. On January 1, 1996, while opening a stuck discharge valve, the employee experienced the onset of a searing pain in his right shoulder. He filled out an accident report that day and was seen the next day at the occupational medicine clinic at Park Nicollet Medical Center by Dr. J. Dunne. Dr. Dunne associated the employee's shoulder

condition with the 1995 motorbike accident but thought that the employee had sustained a temporary aggravation at work. He increased the employee's restrictions and recommended that the employee follow up with his family physician. The employee telephoned Group Health on January 3, 1996 and spoke to Dr. Dunklee. Dr. Dunklee recommended that, since an MRI had already been scheduled for January 5, the employee should wait to follow up with him until after the MRI. (T. 65-67; Exh. A.1: 2/96; Exh. A.3: 1/3/96 phone message note.)

The MRI scan revealed internal degeneration and intra substance tearing in the distal supraspinatus and subscapularis tendons, but no evidence for full thickness rotator cuff tear. The employee's anterolateral acromial anatomy was noted to be impingement-compatible. Dr. Dunklee referred the employee to Dr. Randy S. Twito at Capitol Orthopedics for further evaluation and suggestions for treatment on January 9, 1996. Dr. Twito examined the employee on January 15, 1996. The employee elected to undergo arthroscopic surgery suggested by Dr. Twito. The surgery, consisting of a right shoulder partial acromionectomy, subacromial bursectomy and repair of a partial rotator cuff tear, was performed on January 25, 1996. The parties have stipulated that the employee has a residual two percent whole body disability. (Exh. A.2. 1/15/96; Exh. A.3. 1/5/96 MRI report, 1/9/96 referral; Exh. A.4. 1/30/96 discharge summary; Stipulation 4.)

The employee returned to work for the employer with light duty restrictions on March 22, 1996, returning to the lower-paid but less strenuous utility operator job. On April 25, 1996, Dr. Twito fully lifted the employee's work restrictions. (T. 68-69; Exh. A.2: 3/18/96 & 4/25/97 restriction notes.)

The employee worked primarily in the utility operator position through the date of his separation from employment with the employer as of August 8, 1997. He did, however, work as an auxiliary operator for the employer on October 12, 1996, April 12 and 13, 1997, and from May 27 through July 1, 1997. He testified that he worked these periods in this assignment because the employer asked him to help out on a fill-in basis while another employee had either quit or was off work. He testified he also agreed to work in this job for these periods because the pay was so good, and because he wanted to see if he could do the work. However, he testified that the duties of this position caused his shoulder to ache, that he had gotten help doing the heavier parts of the job, and that he did not believe that he could continue to do this work on a sustained basis. For this reason, he did not apply for permanent reassignment to an auxiliary operator position, although such positions were posted on several occasions and the employee would likely have been accepted for the reassignment due to his seniority level. (T. 9, 70-72, 90-96, 104-105; Exhs. 10-13.)

The employee filed a claim petition on July 12, 1996, seeking temporary total disability compensation from January 25, 1996 to March 22, 1996, and temporary partial disability benefits for periods of reduced earnings thereafter. The employer and insurer denied liability on the basis that the employee's condition was nonwork-related. They further took the position that the employee's wage loss subsequent to April 25, 1996 was unrelated to any injury or disability, contending that the employee could have posted for reassignment in the auxiliary operator position. The employee limited his current claim for temporary partial benefits to the period ending August 8, 1997. (T. 19, 25-27; Judgment Roll; Issue 3.)

The case was heard by a compensation judge of the Office of Administrative Hearings on October 29, 1997. The compensation judge found that the employee's work injury on January 1, 1996 was a substantial contributing cause of the employee's subsequent disability and need for surgery. The judge further found that the employee was temporarily partially disabled from March 22, 1996 to August 8, 1997. 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.

DECISION

Causation

The employer and insurer concede that there was substantial evidence to support the determination that the employee sustained a work-related right shoulder injury on January 1, 1996. However, they argue on appeal that this injury caused only a temporary aggravation of the employee's preexisting nonwork injury and that substantial evidence fails to support a finding that the January 1, 1996 work injury was a substantial contributing cause to the employee's need for surgery and subsequent disability. The employer and insurer rely upon the opinion of Dr. Chris P. Tountas, who examined the employee at their request on October 17, 1996. Dr. Tountas expressed the opinion that the January 1, 1996 injury was a temporary aggravation to the employee's preexisting condition and that the effects of the aggravation would have lasted no more than a few weeks. (Exh. A.5.)

There is no medical dispute that the employee sustained a nonwork right shoulder injury in July 1995 which was a substantial contributing cause of the disability and need for treatment in this case. However, it is well-settled that injuries are compensable if the employment is a substantial aggravating factor not only to the cause of the condition but also to the aggravation or acceleration of an existing condition. Wallace v. Hanson Silo Co., 305 Minn. 395, 235 N.W.2d 363, 28 W.C.D. 79 (1975). An employee need not prove that the employment was the sole cause,

only a substantial contributing cause of the disability for which benefits are sought. Swanson v. Medtronics, Inc., 443 N.W.2d 534, 42 W.C.D. 91 (Minn. 1989).

The employee's treating orthopedic surgeon, Dr. Twito, expressed the view on February 21, 1996 that the history of a sudden searing pain in his shoulder when opening a valve contributed to his symptoms and need for evaluation and treatment. Dr. Dunklee also opined that the employee's need for surgery and treatment and his subsequent disability were the result of work related stresses on top of the prior injury which were Aa substantial contributing factor to his present disability. (Exh. A.3: 3/28/96 letter; Exh. A.2: 2/21/96.)

Where there is a conflict in expert opinion, the choice between experts by the trier of fact must be upheld on appeal if the expert's opinion has adequate foundation. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). This is true even where this Court could draw opposite inferences from those made by the Compensation Judge. Redgate v. Sroga's Standard Service, 421 N.W.2d 729, 40 W.C.D. 933 (Minn. 1988). We, accordingly, affirm the compensation judge's findings relating causation for the employee's right shoulder-related disability and treatment to the injury of January 1, 1995.

Temporary Partial Disability

On appeal, the employer and insurer reiterate their contention that the employee's wage loss subsequent to April 25, 1996 was unrelated to the effects of his injury or disability. Specifically, they point out that the employee was released without restrictions on that date. Accordingly, the appellants argue that the employee failed to prove that he was unable to perform the auxiliary operator position on a sustained basis.

Written medical restrictions are not an absolute prerequisite to proof of temporary partial disability. See, e.g., Flaten v. Kohl's, slip op. (W.C.C.A. Mar. 19, 1998)(interpreting Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987)). Rather, an employee is eligible for temporary partial disability where a work injury contributes to residual disability, which in turn results in a diminution of earning capacity. It is a principle of long standing that an employee's own testimony as to the effects of the injury on the employee's ability to work is competent evidence which a compensation judge may consider in evaluating the existence and effect of such residual disability. Id.; see also, e.g., Roberts v. Motor Cargo, Inc., 258 Minn. 425, 104 N.W.2d 546, 21 W.C.D. 214 (1960).

Here, the parties agree that the employee has a residual permanent partial disability, and the employee testified that, although he had attempted to perform the duties of an auxiliary operator on several brief occasions subsequent to his injury and surgery, that work caused increased shoulder symptoms and he did not believe he would be able to perform it on a sustained basis. We conclude that minimal but sufficient evidence supports the compensation judge's determination as to the employee's temporary partial disability for the period at issue in this case. We, therefore, affirm. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).