

THOMAS BEARD, Employee, v. AM. LINEN & APPAREL n/k/a AMERIPRIDE, and CNA INS./GAB ROBINS, INC., Employer-Insurer/Appellants, and TWIN CITIES BAKERY DRIVERS HEALTH and WELFARE FUND, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS  
APRIL 6, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert medical opinion, supports the compensation judge's determination that the employee continued to suffer from the effects of his December 8, 1997 work-related injury through the date of hearing, and that it was premature to determine whether the work injury was temporary or permanent.

EARNING CAPACITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee's current work restrictions and reduction of earning capacity are causally related to his December 8, 1997 work injury.

Affirmed.

Determined by Johnson, J., Wilson, J., and Pederson, J.  
Compensation Judge: Carol A. Eckersen

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal from the compensation judge's conclusion that the employee continued to suffer from the effects of his December 8, 1997 work-related injury through the date of hearing, and that it was premature to determine whether the work injury was temporary or permanent. The employer and insurer also appeal from the judge's determination that the employee sustained a reduction in earning capacity causally related to his December 8, 1997 work injury. We affirm.

BACKGROUND

The employee, Thomas Beard, began working as a driver for the employer, American Linen and Apparel, n/k/a AmeriPride, in 1980. He drove a regular route, that at the time of the injury included western Wisconsin customers from Sommerset, north to Frederick and east to Turtle Lake. The employee's job duties included delivering packages of clean tablecloths, napkins, towels, uniforms and the like, removing and replacing soiled rugs, and picking up bags of soiled linens. The bags weighed from 50 to 80 pounds each. The employee would carry the

bags out to the truck, lift them into the truck, and then stack them in the back to a height of about six feet.

On about November 19, 1991, the employee was involved in a non-work-related motor vehicle accident. He was seen at the Fairview Northeast Clinic and was initially treated for a left shoulder strain and left hip pain. He returned to the clinic on November 25, 1991, complaining of left-sided stiffness and soreness in his neck. The employee was treated conservatively for a neck and left shoulder strain through January 22, 1992. On that date, the employee reported he was feeling fine. The doctor noted slight soreness around the shoulder blade, but the back and neck were non-tender, and range of motion was full. The employee was released to return to work, without restrictions as of January 27, 1992. The employee did not seek medical attention for his neck thereafter until 1997, and continued to work in his regular job as a route driver.

On March 27, 1997, the employee returned to Fairview Northeast Clinic, reporting a lump in the back of his neck which would swell up, particularly while driving his route. On exam, the doctor noted a bony midline neck nodule in the cervical spine. X-rays showed a very prominent posterior spinous process at C2, which the doctor believed accounted for the lump. The x-ray also showed osteoarthritic and spondylitic changes in the mid- and lower cervical region with disc degeneration from C4 to C6, most marked at C5-6. The doctor recommended the employee move his neck more while driving and use anti-inflammatory medications as needed. The employee lost no time from work and continued to do his regular duties as a route driver.

On December 8, 1997, the employee was picking up soiled linens at the first customer on his route, Aveda Health Spa, in Osceola, Wisconsin. He had about 60 bags to take out to the truck, each weighing around 70 to 75 pounds. As the employee was lifting a bag into the truck, at about shoulder height, he felt something pop in the lower neck, and had immediate right-sided pain in the base of the neck and between the shoulder blades. He sat in the truck until an Aveda employee came out, who then called the employer. Another driver took over the route and the employee returned to the employer with the unit manager.

The employee then went to HealthWorks where he was examined by Dr. James Anderson. The doctor noted "a lot of spasm" in the right lower cervical and thoracic spine area, as well as limited cervical range of motion. (Pet. Ex. E.) X-rays showed degenerative changes at C5-6 and C6-7. Dr. Anderson diagnosed a cervical-thoracic strain, and prescribed Flexeril and Tylenol #3. The employee returned to Dr. Anderson on December 12, 1997. On examination, the doctor noted tight muscles in the mid-cervical spine, greater on the right, and limited range of motion. Dr. Anderson diagnosed a cervical strain, prescribed medication and physical therapy, and released the employee to return to light-duty work.

The employee sought a second opinion from Dr. Douglas Berg at North Suburban Family Physicians on December 16 or 17, 1997. The employee reported "[t]hings are slowly getting better," but was still taking Tylenol #3 periodically. Dr. Berg found minimal right-sided neck discomfort on palpation and "relatively full range of motion." He diagnosed a cervical neck

strain, and recommended continuing supportive treatment for the strain. The employee returned to North Suburban Family Physicians on December 22, 1997, and was seen by Dr. Julie Zimmerman. The employee related that “[t]he pain and difficulty ha[d] been on and off in the past two weeks.” He stated that Flexeril and Tylenol #3 helped, but he was taken off them or was out of them. The doctor noted muscle spasm in the mid-back on examination and diagnosed mid-back pain secondary to the injury at work. Dr. Zimmerman referred the employee for physical therapy, and imposed work restrictions of no sitting or driving for more than an hour without getting up and moving around, and no lifting over 25 pounds. On December 30, 1997, the employee was further restricted to 4 hours of work per week for two weeks.

The employee received physical therapy between December 30, 1997 and January 29, 1998. His work hours gradually increased, and the employee began helping loading trucks several hours a day, along with light-duty office work, with a 20 pound lifting restriction. On January 23 and 26, 1998, the employee reported tingling and numbness in the right hand with lifting and raising the right arm. The symptoms quickly subsided with cessation of the activity. On January 30, 1998, Dr. Zimmerman released the employee to return to 8 to 10 hour days, but continued a 20 pound lifting restriction.

In February 1998, the employee returned to his regular job as a route driver, but was provided a helper to do the heaving lifting. The employee returned to Dr. Zimmerman on February 13, 1998, reporting worsening neck pain and right arm numbness. Examination showed mild tenderness and spasm in the right cervical paraspinal muscles and restricted range of motion. X-rays showed loss of cervical lordosis and the previously noted osteoarthritic changes at C5 to C7. Dr. Zimmerman diagnosed a cervical strain with underlying disc disease, and referred the employee for a CT scan.

The CT scan, taken February 27, 1998, showed marked uncinat spurting at C5-6 with severe foraminal narrowing on the right and moderate foraminal narrowing on the left, as well as a small central disc protrusion. There were also mild degenerative changes at C3-4, and uncinat spurting with diffuse disc bulging at C6-7. The employee continued to experience neck pain with significantly limited range of motion and right arm symptoms, and on March 27, 1998, Dr. Zimmerman referred the employee for a neurosurgical consultation.

The employee was seen by Dr. Zarling, a neurosurgeon, on April 28, 1998. The employee gave a history of persistent pain in the base of the neck into the trapezius, and right arm numbness since the work injury on December 8, 1997. On examination, Dr. Zarling noted voluntarily limited range of motion and tenderness over the trapezius muscle in the midline neck. The doctor diagnosed chronic neck pain secondary to the work injury, and noted there was some suggestion of functional overlay. Dr. Zarling recommended an MRI scan to more accurately evaluate the neck problem, restricted the employee to light-duty work for two weeks, and advised continuing conservative treatment.

The employee was seen by Dr. Richard Edwards, an orthopedic surgeon, on May 8, 1998, for an independent medical examination. On examination, Dr. Edwards noted limited

cervical range of motion and some equivocal right arm weakness, with underlying degenerative disease evidenced by the prior CT scan and x-rays. He diagnosed pre-existing cervical arthrosis and degenerative disc disease. Dr. Edwards opined the employee had a temporary exacerbation of his pre-existing cervical condition on December 8, 1997, that resolved within three months of the work injury. Although he agreed an MRI scan would be appropriate, and the employee needed work restrictions related to the cervical spine, he opined that both were due solely to the employee's pre-existing degenerative spine condition.

In about June 1998, the employer stopped providing a helper and, on June 16, 1998, offered the employee a job in the production department. The job was within his lifting restrictions, but paid \$3.86 an hour less. The employee also lost the monthly bonus he received as driver based on team revenue. The employee remained in the production department job through the date of hearing.

The employee returned to Dr. Zimmerman on June 18, 1998. The doctor noted tenderness along the right side of the neck and into the trapezius and substantially reduced cervical range of motion. She diagnosed a neck and trapezius strain secondary to the December 8, 1997 work injury. She referred the employee for additional physical therapy and encouraged him to continue his home exercises. The employee returned to Dr. Zarling on July 14, 1998 following an MRI scan on June 26, 1998. The scan confirmed uncinat spurting at C5-6 with foraminal stenosis, greater on the right than the left, with impingement of the right C6 nerve root, and with osteophytic spurting and disc bulging at C3-4 and C6-7. Dr. Zarling also recommended additional physical therapy including cervical traction. Surgery was also raised as a possibility if the neck did not improve.

On May 8, 1998, the employer and insurer served a notice of intention to discontinue benefits (NOID), seeking to discontinue wage loss benefits, asserting they had no restrictions from the employee's doctor indicating the employee could not return to his pre-injury hours. The employee filed an Objection to Discontinuance on June 22, 1998, alleging entitlement to temporary partial or temporary total disability benefits from May 9, 1998 and continuing. The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on September 9, 1998. In her Findings and Order, served and filed October 21, 1998, the compensation judge found the employee had sustained an aggravation of a pre-existing cervical spondylosis on December 8, 1997, but it was premature to determine whether the aggravation was temporary or permanent. The judge further found the employee had restrictions as a result of the December 8, 1997 injury, and suffered a reduction in earning capacity causally related to the work injury. Finally, the compensation judge found the employee's medical care was causally related to the December 8, 1997 work injury and was reasonable and necessary. The judge, accordingly, awarded temporary partial disability benefits from and after June 16, 1998 through the date of hearing, and payment of the employee's outstanding medical bills. The employer and insurer appeal.

## STANDARD OF REVIEW

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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

## DECISION

### Nature of the Injury

This case involves a dispute with respect to the nature and extent of the employee's admitted December 8, 1997 work injury. Resolution of the dispute is dependent, to a large extent, on conflicting medical expert opinion. Dr. Zimmerman began treating the employee for his neck and mid-back problems within two weeks after the work injury and continued to treat the employee through the date of hearing. She agreed the employee had pre-existing degenerative changes in the cervical spine, but opined the employee's current neck, trapezius and mid-back pain and strain were a result of the December 8, 1997 injury. She believed the employee continued to need treatment for the aggravation caused by the work injury, but could not state, as of August 6, 1998, whether the aggravation would be temporary or permanent.

Dr. Zarling also agreed that the employee had pre-existing cervical spondylosis, and similarly opined that the December 8, 1997 injury substantially contributed to the employee's ongoing symptoms. In his view, the lifting injury aggravated the employee's degenerative spine condition, making the underlying spondylosis symptomatic. He also concluded that it was too early to determine whether the injury was a temporary or permanent aggravation, stating "I don't think the end of that story is over yet." (Pet. Ex. A at 11-12, 21.)

Dr. Edwards, on the other hand, believed the employee had sustained a temporary aggravation as a result of the December 8, 1997 incident lasting no more than three months, and perhaps only a few weeks. He agreed the employee continued to have neck and mid-back symptoms but attributed the employee's current symptoms solely to his pre-existing cervical spondylosis.

The compensation judge accepted the opinions of Dr. Zarling and Dr. Zimmerman. The employer and insurer contend, however, that the opinions of Dr. Zarling and Dr. Zimmerman lack adequate foundation, and urge this court to adopt, instead, the opinions of Dr. Edwards as the only properly founded medical opinion. The appellants assert that Dr. Zarling had not reviewed the employee's medical records and was not aware of the employee's prior history of treatment for the cervical spine at the time he wrote his initial report on April 28, 1998. They argue that the

April 28, 1998 report was based on an inaccurate and faulty history and must be disregarded.

The compensation judge, however, specifically found Dr. Zarling had “an accurate history” and “adequate foundation for the opinions expressed in his deposition testimony” and clearly did not rely solely, or even primarily, on Dr. Zarling’s brief written report. (Finding 12.) Dr. Zarling testified that he had reviewed the employee’s medical records prior to the deposition. Additionally, at the deposition, Dr. Zarling was provided with a hypothetical question including the 1991 non-work-related motor vehicle accident and the March 27, 1997 visit for a lump in the neck. (Pet. Ex. A at 7-10.) The hypothetical was consistent with the facts as found by the compensation judge. Based on the hypothetical question, Dr. Zarling again concluded that the employee’s December 8, 1997 injury was a substantial contributing cause of his current complaints. When cross-examined about the March 27, 1997 visit, he stated that it “does not change my impression of the disease process, [or] the fact that the injury of December 1997 produced the symptoms for which I saw the employee.” (Pet. Ex. A at 11-12, 17, 21.)

The employer and insurer similarly argue that Dr. Zimmerman’s opinion lacks foundation, asserting she was not aware of the employee’s occasional neck pain after the 1991 accident (although she was clearly aware of the accident itself) or the March 27, 1997 visit. The employee testified that his symptoms resolved following the 1991 accident, he had no further medical treatment until 1997, and he was able to return to his regular job duties. He acknowledged he occasionally had “average aches and pains that go with the job,” but stated it did not affect his ability to do the job. (T. 37, 40-42, 60-62.) The compensation judge acknowledged that it did not appear that Dr. Zimmerman was aware of the March 27, 1997 visit, but nonetheless found Dr. Zimmerman’s opinion, in combination with the opinion of Dr. Zarling, convincing. Based on our review of the record in this case, we do not believe the compensation judge’s weighing of the evidence was unreasonable. It is the province of the compensation judge to determine the weight and credibility to be given to expert testimony. A trier of fact’s choice between medical experts whose testimony conflicts must be upheld unless the facts assumed by the expert in rendering his or her opinion are not supported by the evidence. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). The facts known to or assumed by Dr. Zarling and Dr. Zimmerman are consistent with the facts found by the compensation judge. We must, therefore, affirm.

#### Earning Capacity/Work Restrictions

The employer and insurer also contend that the compensation judge’s finding of a causal relationship between the employee’s work restrictions and the December 8, 1997 work injury is unsupported by the evidence and clearly erroneous. It is undisputed that the employee has restrictions, including a 25 pound lifting restriction. The sole issue is whether the restrictions resulted from the employee’s work injury, or are solely the result of his pre-existing degenerative cervical spine condition. The employer and insurer again urge this court to adopt Dr. Edwards’ opinion that the employee’s December 8, 1997 injury was a temporary aggravation and has resolved. We decline to do so. The employer and insurer further argue that if the compensation judge is correct, and it is too early to determine whether the employee suffered a temporary or

permanent aggravation, then it is too early to determine that the employee's need for restrictions is due to the December 8, 1997 work injury or the pre-existing condition. We disagree.

It goes without saying that temporary restrictions may be imposed while an employee is recovering from a work injury. The fact that it cannot be determined, as of yet, whether these restrictions, or the injury itself, are temporary or permanent does not prevent or prohibit a finding that the restrictions currently imposed are causally related to the work injury. The issue of an employee's earning capacity is neither static nor amenable to a final determination valid for all future periods. Thus, the findings of the compensation judge have res judicata effect only through the date of hearing, and are not binding upon a future period associated with a different set of facts. See, e.g. Saenger v. Liberty Carton Co., 316 N.W.2d 737, 34 W.C.D. 499 (Minn. 1982); Tottenham v. Eaton Char-Lynn Corp., 43 W.C.D. 71, 78 (W.C.C.A. 1990). The compensation judge's determination that the employee has work restrictions and suffered a loss of earning capacity from May 8, 1998 through the date of hearing as a result of his December 8, 1997 injury is supported by substantial evidence of record and is not clearly erroneous. We, accordingly, affirm.