CORNELIA BOISJOLI, Employee, v. LYNDALE GARDEN CTR. and FLORISTS MUT. INS. CO./CRAWFORD & CO., Employer-Insurer/Appellants, and GEOFFREY R. FISHER, D.C., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 20, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. The compensation judge's rating was supported by the substantial evidence, including CT scan findings, medical records, the testimony of the employee, and the medical opinion of the employee's treating chiropractor, who described the persistent objective clinical findings which he had consistently observed during his treatment of the employee and explained how the recurrence of certain treatment modalities in his treatment notes meant that spasm had been observed on examination on the dates of such treatment.

MEDICAL EXPENSES - REASONABLE & NECESSARY; RULES CONSTRUED - MINN. R. 5221.6050, SUBP. 8.D. Minimally adequate evidence supported the compensation judge's finding that a departure from the duration guidelines on passive care was appropriate under Minn. R. 5221.6050, subp. 8.D.

APPORTIONMENT - PERMANENT PARTIAL DISABILITY. While there was no question that the employee here had sustained a prior non-work injury to the L5-S1 level of her back, substantial evidence, including the employee's unopposed testimony and the unrefuted medical records, demonstrated that the employee had resumed her full activities shortly after surgery for her prior injury and had continued to function without any restriction or impairment until she sustained a new work injury affecting two additional and different lumbar levels on September 7, 1995. The compensation judge could reasonably conclude that the new levels of injury were those associated with the employee's current disability and were those supporting the employee's 10 percent permanency rating. Since Minn. Stat. §176.101, subd. 4a allows apportionment of permanent partial disability only by "the proportion of the disability which is attributable only to the preexisting disability," the compensation judge reasonably held that the employer and insurer failed to prove that apportionment was appropriate.

Affirmed.

Determined by Wilson, J., Pedersen, J., and Wheeler, C.J.
Compensation Judge: Jeanne E. Knight

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's awards of reimbursement for disputed chiropractic treatment and of permanent partial disability compensation. We affirm.

BACKGROUND

The employee, Cornelia Boisjoli, was born in 1955 and is 43 years old. In March 1990, the employee underwent low back surgery in the form of a microdiscectomy at the L5-S1 level as the result of non work-related degenerative disc disease. Prior to this surgery, a CT scan of the lumbar spine was performed on December 19, 1989 and revealed a large disc herniation with nerve compression and a migrated disc fragment at L5-S1. Other than a slight leftward lateral disc bulge at L3-4, no other abnormalities were found from L3 to the sacrum. Two weeks after the surgery, the employee reported almost complete relief of her backache. She was back to full-time employment by June 1990 and there is no indication in the record of any continuing restrictions. The employee also resumed participation in active recreational activities including softball and broomball and skiing. (T. 12, 15-19; Exhs. 3, 4; Finding 3 [unappealed].)

In 1995 the employee began working for the employer, the Lyndale Garden Center. Her job there included occasional heavy lifting while unloading plants, setting trays of plants on display tables, carrying hose reels and watering cans and carrying out large plants for customers. On September 7, 1995 the employee sustained an admitted work injury to her back when she heard a "pop" in her back while moving a large display table and began to experience pain in her lumbar back and left shoulder. Over the next several days, she experienced gradually increasing pain in the lower back and right buttock, extending into her right thigh. (T. 19-25; Exh. A: 9/12/95 chart note; Finding 4 [unappealed].)

The employee began treating chiropractically with Dr. Geoffrey R. Fisher, D.C., on September 12, 1995. Dr. Fisher took the employee off work until October 6, 1995, when he released her to return to work four hours per day under restrictions. The work aggravated her symptoms and she was off work again from October 7, 1995 until November 10, 1995, when Dr. Fisher again released her to work with the prior restrictions. Subsequently, the employee progressed to six hours per day and on February 27, 1996, Dr. Fisher released her to return to full-time duties, although still under various physical restrictions. (Exh. A.)

Because the employee was beginning to experience isolated periods of loss of bowel and bladder control, a CT scan was performed on December 5, 1995. The scan showed postoperative changes at L5-S1, degeneration of the L5-S1 disc with marginal spurring but no recurrent herniation, and mild bulging of the discs at L4-5, L3-4, and L2-3. The employee was also referred to a neurologist, Dr. Michael D. Bromer, M.D., who saw the employee on March 22, 1996 for a neurologic evaluation. Dr. Bromer recommended a myelogram be performed for diagnostic purposes. The myelogram was performed on March 28, 1996 and was interpreted as showing no nerve compression or other neurological malfunction. (Exhs. B, D; Finding 13

[unappealed].)

On March 14, 1996 the employer's workers' compensation insurer wrote to Dr. Fisher stating, among other things, that further passive treatment modalities were not indicated pursuant to the Minnesota workers' compensation treatment parameters. Dr. Fisher responded on March 15, 1996 with his reasons for continuing passive treatment:

> Regarding the assertion that no further passive therapy is necessary, this is incorrect. It should be noted that restrictions have been revised regarding Ms. Boisjoli's employment today. This plus the fact that she just recently returned to 8 hours per day work schedules plus the introduction to a conditioning program will necessarily predispose her to varying degrees of exacerbation. If exacerbations are allowed to accumulate without intervention with passive therapy, she could well return to the unstable condition in which she found herself when she first presented to this office.

Dr. Fisher continued to treat the employee with chiropractic modalities and the employer and insurer continued to pay for the treatment. (Exh. A: generally, and 3/15/95 letter.)

The employee continued working under restrictions for the employer until some time in July 1996, when she resigned because of a job reassignment by the employer. Between the date of injury on September 7, 1995 and July 5, 1996 the employer and insurer paid the employee intermittent temporary total and temporary partial disability benefits in the amount of $1,696.87. (Exh. A; Finding 2 [unappealed].)

The employee was seen by Dr. John A. Gerber, D.C., on September 17, 1996 for an independent chiropractic examination at the request of the employer and insurer. As of that date, the employee described herself as unemployed. He performed an examination which he characterized as showing "minimal objective evidence of continued lower spine instability." Dr. Gerber opined that the employee had sustained a sprain/strain injury to her left shoulder and lower lumbar region at work on September 7, 1995, but that she had since enjoyed a significant level of improvement and had reached maximum medical improvement. He opined that further chiropractic care was not warranted. In his view, the employee's permanent partial disability from the September 7, 1995 injury was properly rated at zero percent under Minn. R. 5223.0390., subp. 3, for lumbar pain syndrome with symptoms of pain or stiffness in the region of the lumbar spine not substantiated by persistent objective clinical findings. (Exh. 1.)

The employer and insurer denied payment of further chiropractic treatment after September 18, 1996. The employee continued to treat with Dr. Fisher through October 22, 1998, the date of hearing below. The employee testified that the treatment with Dr. Fisher during this period has continued to improve her condition and reduce her pain. Several exacerbations to the employee's condition are documented in Dr. Fisher's records, but the frequency of exacerbation decreased with the passage of time. There has been a continual reduction in the frequency of

treatment; as of the date of hearing, the employee was seeing Dr. Fisher once per month. For some time in the spring and summer of 1998, the dates of which are not fully disclosed in the record, the employee worked first full time and then part time for Linders Flower Mart. As of the date of hearing she was again unemployed, Linders Flower Mart having closed for the season as of June 30, 1998. (T. 8, 32-37, 39-40; Exh. A: 10/16/96-7/8/98; Findings 6, 10 [unappealed].)

The employee filed a claim petition on September 15, 1997 seeking payment for certain medical expenses including the continuing expenses of treatment with Dr. Fisher and alleging entitlement to permanent partial disability benefits. The matter came on for hearing before a compensation judge of the Office of Administrative Hearings on October 22, 1998. The employer and insurer defended the medical expense claim on the basis that the chiropractic treatment exceeded the allowable extent of passive treatment under the treatment parameters, and defended the permanency claim based both on the zero percentage rating offered by Dr. Gerber and on the basis that some or all of the employee's permanency was properly apportionable against her preexisting non work condition pursuant to Minn. Stat. § 176.101, subd. 4a. Following the hearing, the judge found that while the disputed chiropractic treatment had exceeded the treatment parameters, a departure from the parameters was appropriate, and that the treatment through the date of the hearing had been reasonable and necessary. The compensation judge further found that the employee had sustained a 10 percent whole-body permanent partial disability. Finally, the compensation judge held that none of the permanency was subject to apportionment pursuant to Minn. Stat. § 176.101, subd. 4a. 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

Chiropractic Treatment

The treatment at issue in this matter was rendered after the effective date of the permanent treatment parameters, Minn. R. 5221.6010, et. seq. As such, the employer's obligation

to pay for the disputed treatment is limited by the specific provisions of the parameters. Jacka v. Coca-Cola Bottling Co., 580 N.W.2d 27, 36, 58 W.C.D. 395, 408 (Minn. 1998). Pursuant to Minn. R. 5221.6200, subp. 3A, passive care, including chiropractic care, is generally not indicated beyond twelve calendar weeks after passive care is initiated. Minn. R. 5221.6200, subp. 3B(1) allows an additional 12 visits over the next twelve months under certain circumstances. It is not disputed in this case that all of the contested treatment rendered by Dr. Fisher after September 18, 1996 was in excess of the duration of passive care provided under Minn. R. 5221.6200.

Minn. R. 5221.6050, subp. 8, however, lists circumstances in which "[a] departure from a parameter that limits the duration or type of treatment . . . may be appropriate." The compensation judge here found that the evidence established that the results obtained from Dr. Fisher's treatment after September 1996 met the requirements for a departure from the parameters as set forth in Minn. R. 5221.6050, subp. 8D. Accordingly, the judge ordered the employer to pay the costs of the contested treatment with Dr. Fisher. On appeal, the employer argues that substantial evidence does not support the compensation judge's award.

Pursuant to Minn. R. 5221.6050, subp. 8D, departure from the durational limits for treatment prescribed elsewhere in the treatment parameters may be appropriate where the treatment has continued to meet two of the following three criteria:

> (1) the employee's subjective complaints of pain are progressively improving as evidenced by documentation in the medical record of decreased distribution, frequency, or intensity of symptoms;
>
> (2) the employee's objective clinical findings are progressively improving, as evidenced by documentation in the medical record of resolution or objectively measured improvement in signs of physical injury; and
>
> (3) the employee's functional status, especially vocational activity, is objectively improving as evidenced by documentation in the medical record, or successive reports of work ability, of less restrictive limitations on activity.

In a letter opinion dated July 10, 1998, and citing his medical records, Dr. Fisher explained how his treatment had provided "gradual but definite improvement in stability with diminished symptoms and decreasing episodes of significant exacerbation," particularly noting that "[w]hen significant exacerbations occurred after approximately August of 1997, they always resulted from specific causative factors whereas previous to that time significant exacerbations frequently occurred for no identifiable reason [and] . . . frequently involved radiation of pain into the right leg, but this symptom became far less frequent as time proceeded after 1996, indicating that the severity of problems related to the lumbosacral discs was diminishing." Dr. Fisher further noted that intervals of significant relief in the fall of 1996 invariably lasted no more than a week, whereas by the summer of 1997, significant relief lasted for considerably greater periods of time,

correlating with a reduction in the frequency of the employee's treatment during the same period. (Exh. A: 7/10/98 letter.)

The treatment records and the employee's testimony are consistent with Dr. Fisher's opinion and further document decreased distribution, frequency, and intensity of symptoms and a progressive improvement in objective clinical findings. Although Dr. Gerber expressed the opinion in 1996 that further chiropractic treatment was not warranted, the compensation judge was not required to adopt this opinion in light of the evidence of subsequent improvement. The choice between opposing expert medical opinion is for the compensation judge, and we will reverse only where the opinion relied upon was without adequate foundation or the compensation judge's reliance on the opinion was clearly erroneous. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

Here, although the chiropractic records are not so detailed as we might have wished, particularly in respect to setting out the objective findings observed by Dr. Fisher on examination, there was minimally adequate evidence to support the compensation judge's finding that a departure from the duration guidelines on passive care was appropriate under Minn. R. 5221.6050, subp. 8D.[1] The compensation judge was not clearly erroneous in finding the chiropractic treatment through the date of hearing had been reasonable and necessary. We, therefore, affirm.

Permanent Partial Disability

The compensation judge rated the employee's permanent partial disability under Minn. R. 5223.0390, subp. 3(C)(2), which provides a 10 percent PPD rating for lumbar pain syndrome at multiple vertebral levels, where there are "symptoms of pain or stiffness in the region of the lumbar spine, substantiated by persistent objective clinical findings, that is, involuntary muscle tightness in the paralumbar muscles or decreased range of motion in the lumbar spine, and with any radiographic, myelographic, CT scan, or MRI scan abnormality."

The employer and insurer argue that this rating was unsupported by substantial evidence, asserting that the employee had neither persistent objective clinical findings nor any radiographic, myelographic, CT scan or MRI scan abnormality. They argue that the employee's permanent partial disability should have been rated pursuant to Minn. R. 5223.0390, subp. 3A, which provides a zero percent rating for lumbar pain syndrome with "[s]ymptoms of pain or stiffness in the region of the lumbar spine not substantiated by persistent objective clinical findings, regardless of radiographic findings." This was the rating offered by Dr. Gerber, who failed to find muscle tightness or spasm or decreased range of motion in his examination of the employee

[1] The compensation judge also relied upon Minn. R. 5221.6050, subp. 8C, which allows departure from the durational limits for treatment "[w]here the treatment is necessary to assist the employee in the initial return to work where the employee's work activities place stress on the part of the body affected by the work injury." However, as we have affirmed the compensation judge's departure pursuant to subpart 8D of the rule, we have not reached the issue presented under subpart 8C.

on September 17, 1996. Dr. Gerber also assumed as a matter of "reasonable clinical judgment" that the circumferential bulging of the L2-3 and L3-4 disc annuli as noted in the December 5, 1995 CT scan were of incidental preexisting status prior to the September 7, 1995 work injury. (Exh. 1.)

The compensation judge's rating was supported by the opinion of the employee's treating chiropractor, Dr. Fisher, who rated the employee's permanent partial disability as 10 percent under the rule applied by the compensation judge.[2] (Exh. A: 9/5/97 letter.) In his letter report of July 10, 1998, Dr. Fisher further described the persistent objective clinical findings which he had consistently observed during his treatment of the employee, including deficits in thoracolumbar range of motion and the presence of hypertonicity and spasm, and explained how the recurrence of certain treatment modalities in his treatment notes meant that spasm had been observed on examination on the dates of such treatment. (Exh. A: 7/10/98 letter.) Finally, the compensation judge reasonably concluded that the degenerative changes at the L2-3 and L3-4 level, which had not been observed in radiographic studies prior to the 1995 work injury, together with the absence of symptoms between recovery from the 1990 low back surgery and the 1995 work injury, supported the conclusion that these CT scan abnormalities were referable to the 1995 work injury.

The compensation judge's permanency rating has substantial support in the record, and we must affirm. Nord, supra, 360 N.W.2d 337, 37 W.C.D. 364; Minn. Stat. § 176.421, subd. 1(3) (1992).

Apportionment of Permanency

The employer argues that the compensation judge erred by not apportioning any of the disability to the employee's pre-existing condition. Pursuant to Minn. Stat. § 176.101, subd. 4a,

> If a personal injury results in a disability which is attributable in part to a preexisting disability that arises from a congenital condition or is the result of a traumatic injury or incident, whether or not compensable under this chapter, the compensation payable for the permanent partial disability pursuant to this section shall be reduced by the proportion of the disability which is attributable only to the preexisting disability.

[2] Dr. Fisher also offered an alternate permanency rating of 12 percent under Minn. R. 5223.0390, subp. 4D(1), if the disc protrusions at the L3-4, L4-5 and L5-S1 levels were found to slightly compromise the intervertebral foramina and associated lumbar nerves. In unappealed findings, the compensation judge found that there were no objective radicular findings, and rejected this proposed rating. (Finding 15.)

An apportionment decision is a question for the finder of fact and is not solely determined by medical opinion. Apportionment is available when the pre-existing condition causes loss of use or impairment of function prior to the current injury. Beck v. Dick & John's Price Rebel, 40 W.C.D. 254, 257 (W.C.C.A. 1987). While there was no question that the employee here had sustained a prior non-work injury to the L5-S1 level of her back, the compensation judge, reasonably relying on the employee's unopposed testimony and the unrefuted medical records, found that the employee had resumed her full activities shortly after surgery for her prior injury, and had continued to function without any restriction or impairment until she sustained a new work injury on September 7, 1995, now affecting two additional and different lumbar levels. These determinations have substantial support in the evidence. Thus, the compensation judge could reasonably conclude that the new levels of injury were those associated with the employee's current disability and were those supporting the employee's 10 percent permanency rating. Under subdivision 4a, permanent partial disability may be reduced in apportionment only by "the proportion of the disability which is attributable only to the preexisting disability."

The employer and insurer here failed to introduce medical or other evidence which would adequately support their proposed apportionment. The compensation judge reasonably found that the employer and insurer failed to prove by a preponderance of the evidence that an apportionment of permanent partial disability was appropriate pursuant to Minn. Stat. § 176.101, subd. 4a was appropriate. We affirm.