PATRICIA M. BORDSON, Employee, v. R & G RENTAL and FEDERATED MUT. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 18, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Where the judge's affirmed 1997 decision constituted evidence that the employee's ongoing symptoms in 1998 were related to her 1991 work injury, and where the judge's decision was reasonably supported by expert medical testimony, the compensation judge's conclusion that the employee's ongoing condition was causally related to her work-related injury was not clearly erroneous and unsupported by substantial evidence.

TEMPORARY TOTAL DISABILITY - MEDICALLY UNABLE TO CONTINUE. Where the judge did not fail to impose on the employee the ultimate burden of proving entitlement to the temporary benefits claimed, where the judge's decision was supported by expert medical opinion, and where the independent medical examiner's opinion was ultimately not excluded from evidence for postdating the Petition, the compensation judge's denial of the employer and insurer's Petition to Discontinue the employee's temporary benefits was not clearly erroneous and unsupported by substantial evidence.

REHABILITATION - COOPERATION. Where the judge did not arbitrarily exclude evidence preceding the formal execution of the Rehabilitation Plan and postdating the Petition to Discontinue benefits, and where it was not unreasonable to conclude that the employee's medical condition and medical advice justified her resistance to accepting certain job offers, the compensation judge's conclusion that the employee did not fail to cooperate with rehabilitation efforts was not clearly erroneous and unsupported by substantial evidence.

MEDICAL TREATMENT & EXPENSE - CHIROPRACTIC TREATMENT; MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS. Where there was evidence that the employee's chiropractic treatment satisfied factors referenced in Field-Seifert v. Goodhue Co. and Horst v. Perkins Restaurant and was within all treatment parameters except perhaps a notice requirement, the issue of the employee's entitlement to payment of certain chiropractic expenses was remanded to the compensation judge for reconsideration and additional findings as to the sufficiency of notice for departure from the parameters.

ATTORNEY FEES. Hourly-based attorney fees authorized under Minn. Stat. § 176.081, subd. 1, for work done at discontinuance conferences under Minn. Stat. § 176.239, are not normally assessable against an employer and insurer; where issues at hearing included the employer and insurer's Petition for Discontinuance and the employee's entitlement to payment of chiropractic expenses, and where the judge's award of hourly-based attorney fees was based in part on the

authorization in Minn. Stat. § 176.081, subd. 1, for hourly-based fees for work at discontinuance conferences, the compensation judge's assessment of hourly-based fees against the employer and insurer for both the attorney's defense against discontinuance and his work securing payment of chiropractic expenses was reversed and remanded for reconsideration based on the extent to which a contingent fee on the employee's ongoing flow of benefits is insufficient to constitute a reasonable fee under Minn. Stat. § 176.081, subd. 5.

Affirmed in part, and reversed and remanded in part.

Determined by Pederson, J., Johnson, J. and Hefte, J.
Compensation Judge: Donald C. Erickson

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's denial of discontinuance and award of ongoing temporary benefits, from the judge's award of payment of chiropractic expenses, and from the judge's award of hourly attorney fees and reasonable costs and disbursements. We reverse and remand the decisions on chiropractic expenses and attorney fees, and we affirm on all other issues.

BACKGROUND

The medical and litigational history in this matter is extensive, and we incorporate by reference the factual analyses contained in the Findings and Orders filed herein on October 12, 1994,[1] and March 5, 1997, together with this court's July 22, 1997, opinion affirming the latter decision. On November 7, 1991, Patricia Bordson sustained a work-related repetitive use injury to her right upper extremity while working as a service assistant at R & G Rental, evidently a satellite office of the insurer in this matter. At the time of her injury, Ms. Bordson was forty-one years old and was earning an average weekly wage of $250.00. Her symptoms eventually increased despite conservative treatment, and by February 6, 1992, she was reporting to her doctor substantial pain along the ulnar distribution of the right hand and forearm, "going up into the shoulder and into the neck." On April 30, 1992, she underwent carpal tunnel release surgery. Over the course of the two years following her return to work in June 1992, Ms. Bordson experienced a return of her pain with keyboarding and writing. On February 3, 1993, after initially refusing, R & G Rental and its workers' compensation insurer [collectively, R & G] agreed to pay medical expenses relating to Ms. Bordson's neck in addition to ones relating to her right forearm. On April 27, 1994, the forearm pain was diagnosed as being consistent with a pronator syndrome, and on May 2, 1994, Ms. Bordson went off work and requested benefits for temporary total disability. R & G contested liability on grounds that the employee was more than ninety

[1] As amended October 25, 1994.

days post maximum medical improvement [MMI]. By an Order on Discontinuance filed June 17, 1994, discontinuance was denied on grounds that Ms. Bordson was medically unable to continue working, and on June 27, 1994, Ms. Bordson underwent a pronator release and exploration of the median nerve in her problematic right forearm.

On August 17, 1994, R & G filed a Petition to Discontinue Ms. Bordson's temporary total disability benefits on grounds that her disability since May 2, 1994, was not causally related to her 1991 work injury and benefits had been paid under a mistake of fact. Ms. Bordson returned to work with restrictions a week later, and temporary partial disability benefits were commenced. Symptoms eventually increased again, however, and on October 10, 1994, occupational medicine specialist Dr. John Downs, who had been treating Ms. Bordson since the beginning of that year, restricted Ms. Bordson from working more than four hours a day and from doing more than one hour of typing a day. At hearing the following day on R & G's Petition to Discontinue, R & G retracted the causation and mistake grounds for their Petition, and Ms. Bordson was served with notice that, by stipulation of the parties, she had reached MMI from her median nerve decompression on September 27, 1994. By Findings and Order filed October 12, 1994, R & G were ordered to continue to pay temporary partial disability benefits so long as Ms. Bordson's condition warranted, consequent to Ms. Bordson's November 7, 1991, admitted work injury and an admitted aggravation or new injury on May 2, 1994.

On April 21, 1995, Dr. Downs reported that Ms. Bordson's right hand and wrist pain had returned and was worsening and was now beginning to radiate into her upper back and shoulder and neck, "secondary to posturing to protect her arm." By August 29, 1995, Dr. Downs had diagnosed a history of pronator syndrome and carpal tunnel syndrome, generalizing that Ms. Bordson's symptoms were "probably residual from a thoracic outlet type picture related to spasm of the scalene muscles." On October 23, 1995, Ms. Bordson filed a Claim Petition, alleging entitlement to additional medical and permanent partial disability benefits. R & G denied the claim, contending that the medical treatment and permanency at issue were related to the cervical spine and so were not compensable under the November 1991 work injury, which R & G contended was solely a carpal tunnel injury.

On November 26, 1996, Dr. Downs issued a report in which he stated as follows:

> The diagnosis for Ms. Bordson which is most responsible for her symptoms is median nerve dysfunction. This is a combination of pronator syndrome, for which she's had surgical exploration, and carpal tunnel syndrome for which she's had surgical exploration, but also additional sites of irritation/compression of the median nerve or the brachial plexus and nerve roots leading up to the median nerve which are occurring predominantly at the level of the neck in the scalene triangle, and at the level of the chest between the coracoid process, the pectoralis minor muscle, and the first and second ribs. In conjunction she has some degree of ulnar nerve irritation as evidenced by a positive elbow flexion test, borderline EMG

> findings, and positive Tinel's at the cubital tunnel and intermittent Guyon's canal at the wrist, although the last time she was seen the ulnar nerve component of her symptoms was not prominent and she did not have positive Tinel's at the wrist or elbow.

On December 9, 1996, Ms. Bordson was examined for R & G by Dr. Elmer Salovich. Dr. Salovich concluded that the employee's "right elbow, right wrist and fingers" symptoms were not causally related to her "carpal tunnel syndrome or pronator teres syndrome."

Hearing on the October 1995 Claim Petition was eventually held December 11, 1996. By a decision filed March 5, 1997, Compensation Judge Donald C. Erickson concluded that the right upper extremity symptoms for which Ms. Bordson had been treated since May of 1994 did not constitute a new injury, as contended by R & G, but were instead complications referable to her November 1991 work injury. In his memorandum, Judge Erickson explained that "[t]he [medical] records indicate that the employee has had a continuity of median nerve symptoms since 1991 that were temporarily relieved by a carpal tunnel surgery and a pronator teres surgery" but that "[t]he employee's symptoms were not limited to a carpal tunnel syndrome in 1991 or a pronator teres syndrome in 1994. Repeatedly throughout the medical records from 1991 to the present, the employee has complained of pain in her neck and shoulders, in addition to her wrist and elbow pain." On appeal, this court subsequently found "more than adequate" evidence on which to affirm Judge Erickson's determination that the employee did not sustain a new injury in May 1994, noting that "Dr. Downs is clearly of the opinion that the employee's pronator teres syndrome is part of a broader median nerve dysfunction problem."

On March 27, 1997, Ms. Bordson commenced chiropractic treatment with Dr. Christine Audette, to whom she complained of neck, upper back, and right arm and wrist pain, all of which she essentially traced back to her November 1991 work injury. Dr. Audette apparently diagnosed thoracic outlet syndrome together with cervical discogenic disease,[2] noting that a cervical MRI had revealed a slight herniated disc at C4 that was not the cause of Ms. Bordson's symptoms. Dr. Audette evidently continued to treat Ms. Bordson an average of about once a week for about another ten months.[3]

---

[2] This diagnosis is asserted by both parties in their briefs and corroborated by the compensation judge in his Findings and Order. We are unable, however, to locate such a diagnosis anywhere either in Exhibit 2, the records from the Audette Chiropractic Clinic, cited by both parties as the source of the diagnosis, or in Exhibit 5, Dr. Audette's November 24, 1997, response to the review of Dr. Palmquist.

[3] Chiropractic records in evidence run through January 5, 1998, but a March 26, 1998, report of Dr. Downs indicates that Ms. Bordson's last chiropractic visit was February 4, 1998. Spacing of the treatments was irregular--twice at the end of March 1997, twelve times in April, seven times in May, no times in June, twice in July, six times in August, three times in September, twice in October, once in November, six times in December, at least once in January 1998, and at

Ms. Bordson saw Dr. Downs again on April 1, 1997, for ongoing and increasing right arm pain. She informed Dr. Downs on that date "that after chiropractic treatment she had the least numbness she's had in her 5th finger in the past 4-5 years." Dr. Downs diagnosed "[c]hronic R[epetitive]S[tress]I[njury]/status post pronator release with increased symptoms secondary to irritation of the brachial plexus at the scalene triangles because of 1st rib dysfunction and associated middle and anterior scalene spasm." He concluded on that date that "chiropractic or physical therapy manipulation/mobilization respectively under the 12/12 Rule will continue to be appropriate." When he saw Ms. Bordson again on June 4, 1997, Dr. Downs noted again that Ms. Bordson's fifth finger numbness and forearm pain seemed to have decreased in the course of chiropractic treatment. On September 5, 1997, he noted that Ms. Bordson's primary symptoms were "from her elbows to her fingertips, but occasionally up to the shoulder." Dr. Downs restricted Ms. Bordson from continuing in her current employment, and he referred her to work with a hand therapist for nondominant hand retraining for up to six treatment sessions. On September 16, 1997, R & G filed a Notice of Intention to Discontinue [NOID] Ms. Bordson's temporary total disability benefits, on grounds that Ms. Bordson was now over ninety days post MMI with regard to her 1991 work injury. On that same date, without reexamining her, Dr. Downs released Ms. Bordson to work one hour a week until follow-up.

By a Rehabilitation Consultation Report dated September 25, 1997, QRC Helen Sauve concluded that Ms. Bordson was eligible for statutory rehabilitation benefits. On October 1, 1997, Dr. Downs took Ms. Bordson off work entirely again because of her inability to use her dominant hand, indicating that she was temporarily totally disabled for at least two years "but more probably permanently totally disabled." Ms. Bordson commenced rehabilitation efforts with the assistance of QRC Sauve, and on October 6, 1997, she evidently agreed to a Rehabilitation Plan (R2), the immediate goal of which was medical management of her condition.[4]

On October 9, 1997, chiropractor Timothy Palmquist performed a review of Ms. Bordson's treatment records for R & G. Dr. Palmquist concluded that there was "simply no justification for relating Ms. Bordson's thoracic outlet syndrome or cervical spine complaints to the 11/7/91 date of injury" and that "none of the chiropractic care rendered by Dr. Audette in this case can be considered justified as reasonable and necessary." He contended furthermore that, even if those conditions were held to be related to the 1991 work injury, Ms. Bordson's treatment with Dr. Audette in excess of twelve weeks of passive care was contrary to the workers' compensation treatment parameters. Moreover, he argued, departure from those parameters was inappropriate, not only in that Dr. Audette's care did not appear to have resulted in progressive improvement in or maintenance of the functional status achieved during the initial twelve weeks of passive care but also in that Dr. Audette had not documented a plan to encourage Ms. Bordson's independence and had not included active modalities in her treatment.

---

least once in February 1998.

[4] This is according to unappealed Finding 15. We are unable to locate an R-2 of this date in the record.

On October 24, 1997, after consultation with Ms. Bordson, QRC Sauve, and job placement specialist James Postance, Dr. Downs released Ms. Bordson to work four hours a day at a sedentary position requiring use of only her left hand, also recommending chiropractic treatment, trial of certain antidepressants, and an exercise program. Three days later, Ms. Bordson signed a Rehabilitation Plan Amendment and apparently commenced job search activities. On November 20, 1997, R & G's request to discontinue benefits, which had been heard on October 14, 1997, was denied on grounds that Ms. Bordson had been working up to her restrictions until she became medically unable to continue. On November 24, 1997, Dr. Downs limited Ms. Bordson's job search itself to four hours a day. On that same date, Dr. Audette contested Dr. Palmquist's report on the employee's chiropractic treatment. Without referencing any particular date or place in the records where the documentation occurs, Dr. Audette asserted that "[t]here is a treatment plan which describes the procedures and treatment used, as well as the frequency of care." Dr. Audette also alleged that Dr. Palmquist's findings appeared biased, particularly for failing to include evidence from the record "that after receiving chiropractic care [Ms. Bordson] on numerous visits reported significant improvement in her condition." On December 10, 1997, Ms. Bordson filed a Medical Request, seeking payment for her chiropractic treatment with Dr. Audette between March 27 and October 8, 1997. In a Response filed December 26, 1997, R & G denied the request.

In January 1998, Mr. Postance apparently provided Ms. Bordson with several job leads, including ones for a job at the FonDuluth Casino in Duluth and a job as a parking lot attendant, and Ms. Bordson signed a Job Placement Plan and Agreement [JPPA] that targeted jobs as an office manager, a surveillance system monitor, a casino worker, a teacher's aide, a paid reader for the blind, a clinic runner, or "any other employment agreeable to all parties." Ms. Bordson apparently declined to apply for either the FonDuluth job or the parking lot attendant job, however, on grounds that the casino atmosphere was too smokey and the parking lot work would be too cold.

Ms. Bordson's Medical Request for payment of her chiropractic expenses was heard on January 13, 1998, and on that same date R & G filed a Petition to Discontinue Workers' Compensation Benefits. Essential grounds for the Petition were (1) that Ms. Bordson was over ninety days post MMI without meeting the requirements of Minn. Stat. § 176.101, subd. 3j, to render her medically unable to continue working, (2) that she was exaggerating her symptoms in order to be issued restrictions, (3) that she had performed nonwork-related activities in excess of her purported abilities, and (4) that she had "failed to cooperate with attempts by the employer to return [her] to suitable employment." On January 29, 1998, Dr. Downs reiterated that Ms. Bordson was limited to a half-time job search four days a week, and he restricted her from doing any right hand work except on a rare basis. Ms. Bordson subsequently contested the Petition to Discontinue her benefits. Five days later, by a Decision and Order filed February 10, 1998, her request for payment of her chiropractic expenses was granted, and on March 5, 1998, R & G filed a Request for Formal Hearing on that issue.

On March 10, 1998, Dr. Salovich issued a report on an examination of Ms. Bordson

that he had conducted for R & G the previous month. Dr. Salovich indicated that Ms. Bordson had demonstrated "gross magnification of her subjective complaints" and that he had found "no objective physical findings to substantiate" those complaints, no organic basis for her continuing treatment, and no medical basis for her being off work since September 1997. He concluded also that Ms. Bordson's subjective complaints were unrelated to her 1991 work injury.

When Ms. Bordson saw Dr. Downs again, on March 26, 1998, Dr. Downs diagnosed in part "[c]hronic right upper extremity pain status post radial tunnel release with ongoing radial nerve neuritic symptoms" and recommended a chronic pain evaluation. Ms. Bordson underwent the evaluation on April 21, 1998, and was recommended for a chronic pain treatment program. The evaluation report expressly indicated that testing apparatus had revealed response validity and no suggestion of malingering or exaggeration. The chronic pain program for which Ms. Bordson was recommended was to run four days a week. Dr. Downs subsequently released Ms. Bordson to work four hours a day five days a week before commencement and after completion of that program and four hours on the one day each week that treatment was not scheduled during the program.

Apparently about the beginning of April 1998, Ms. Bordson had received a verbal commitment for a job from a company named CustomerLink, to work as a telephone sales representative as soon as installation of certain voice-activated typing software was complete. Ms. Bordson apparently began expressing concern that the job might conflict with her anticipated enrollment in the chronic pain management program, and on May 13, 1998, Dr. Downs noted to QRC Sauve that he was "concerned that with a depressed mood and unresolved anger, Ms. Bordson's interpersonal skills may be compromised." QRC Sauve reported on that same date that employment with CustomerLink using voice-activated software would still be pursued, "with the understanding that chronic pain tr[eatmen]t is still pending." On May 15, 1998, QRC Sauve reported that she had been informed by the insurer that about five weeks of chronic pain treatment for Ms. Bordson would be approved, to commence near the end of June. On June 5, 1998, Dr. Downs examined Ms. Bordson again and took her back off work on grounds of severe depression.

On June 5, 1998, R & G's Petition to Discontinue Ms. Bordson's benefits and their Request for Formal Hearing on payment of her chiropractic expenses came on for hearing before Judge Erickson. Issues at hearing included (1) the causal relationship between Ms. Bordson's 1991 work injury and any ongoing physical disability since September 1997, (2) Ms. Bordson's physical ability or inability to continue working in September 1997, (3) the sufficiency of her cooperation with rehabilitation efforts under the statute, (4) the reasonableness, necessity, and work-injury-relatedness of her chiropractic care with Dr. Audette and the permissibility of that care under the treatment parameters, and (5) her attorney's entitlement to fees on an hourly basis, "either on a Heaton[5] basis or pursuant to the recent case regarding discontinuance of benefits."[6]

---

[5] See Heaton v. J.E. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983).

[6] Judge Erickson stated at hearing that he was assuming that Ms. Bordson's attorney was

By Findings and Order filed August 27, 1998, Judge Erickson denied R & G's Petition to Discontinue and awarded the benefits claimed, concluding in part that Ms. Bordson's physical disability in September 1997 was causally related to her 1991 work injury, that Ms. Bordson had become medically unable to continue working due to her work injury as of September 5, 1997, that she had cooperated with rehabilitation efforts, that her chiropractic treatment with Dr. Audette was reasonable, necessary, work-injury-related, and permissible under the treatment parameters, and that her attorney was entitled to payment of fees on an hourly basis as claimed. R & G appeal.[7]

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 (1996). 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

Causation

---

requesting hourly fees on either of these bases, and Ms. Bordson's attorney responded "Yes."

[7] By June 23, 1998, between the date of the hearing and the date of Judge Erickson's decision, CustomerLink had evidently withdrawn its job offer to Ms. Bordson, apparently due to delays in her availability for half time work and due to its perception that she was not very interested in the job. Ms. Bordson completed her chronic pain management program on July 23, 1998, evidently with some reduction in pain complaints and some increased ability "to identify stressors and how they relate to disability thinking." QRC Sauve's report on that date indicates that, upon discharge from the program, Ms. Bordson stated directly that she was no longer interested in pursuing employment with CustomerLink.

At Finding 22, Judge Erickson concluded that Ms. Bordson's 1991 work injury was a substantial contributing factor in her need for chiropractic treatment beginning in March 1997. The judge supported this conclusion by noting,

> This court has previously found, and the Workers' Compensation Court of Appeals has previously upheld a finding of[,] a causal connection between the employee's original injury and her ongoing symptoms. In addition, Dr. Down[s]'s deposition now makes clearer the connection between the original injury and the employee's current symptoms. As indicated, he is of the opinion that the employee's current symptoms were either due to postural changes made by the employee as a result of the original injury or the aggravation of the original by her work activities with the employer.

Judge Erickson's reference in the first sentence here is to his Findings and Order in this matter on March 5, 1997, affirmed by an opinion of this court filed July 22, 1997. R & G contend that, although some of Ms. Bordson's ongoing right-arm symptoms have been found to be compensable in those earlier decisions, "[i]t has not previously been adjudicated that the 1991 injury involved thoracic outlet syndrome or a cervical disc disease," as is Ms. Bordson's current diagnosis. They argue further that "Dr. Downs testified that he is unable to state within a reasonable degree of medical certainty that [Ms. Bordson's] thoracic outlet syndrome was caused by the 1991 injury." Moreover, they argue, any interpretation of Dr. Downs' opinion "would result in a new injury date, [and] this insurer may not be responsible for the condition depending upon the date of the new injury." This is a difficult issue, but we are not persuaded that Judge Erickson's decision was unreasonable.

At Finding 11, Judge Erickson concluded that Ms. Bordson became medically unable to work in September 1997 "due to the natural progression of her original injury and the employment activit[i]es that she was then engaged in with the employer." This implies a finding that "the natural progression of her original injury" was a substantial contributing factor, if not the only factor, in Ms. Bordson's inability to continue working in September 1997. It is true that Dr. Downs, while expressing reasonable certainty that Ms. Bordson's condition was work-related, did express something less than reasonable certainty that Ms. Bordson's thoracic outlet syndrome has resulted directly from her 1991 work injury. It remains true also, however, that this court has affirmed in its entirety, without further appeal, Judge Erickson's March 1997 decision, which documented at Finding 24 "the fact that the employer and insurer admitted primary liability . . . related to the employee's neck." This affirmed finding, although nonspecific as to Ms. Bordson's neck-related diagnosis at the time, constitutes evidence reasonably to be considered in determining whether or not Ms. Bordson's ongoing symptoms, to the extent they resemble her 1997 symptoms, are causally related to her 1991 work injury.

With regard to R & G's argument that any disability to which Ms. Bordson is currently subject is attributable to a new injury rather than to her 1991 work injury, we note

Dr. Downs' testimony, to a reasonable degree of medical certainty, that "subsequent postural changes due to the pain caused by that work injury w[ere] a substantial contributing cause or substantial contributing factor in causing the mechanical dysfunction in the thoracic cervical spine." Postural changes to accommodate arm pain that is consequent to a work injury are themselves consequences of that work injury. Natural consequences flowing from a work injury are compensable under that injury. See Andeen v. Emmaus Nursing Home, 256 N.W.2d 290, 292, 30 W.C.D. 269, 271 (Minn. 1977), citing Rohr v. Knutson Const. Co., 305 Minn. 26, 232 N.W.2d 233, 28 W.C.D. 23 (1975). We acknowledge that there are occasional ambiguities in both Dr. Downs' testimony and Judge Erickson's characterization of that testimony that might permit a conclusion that at least some of Ms. Bordson's symptoms may have arisen without a causal link to her work injury. However, Dr. Downs' testimony was lengthy and detailed, and it was not unreasonable for Judge Erickson either to understand it as substantially supportive of causation in this case or, having done so, to credit it over the testimony of independent examiners Drs. Salovich and Palmquist, as in his memorandum he expressly acknowledged doing. A trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence. See Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985). Here, the expert relied on had been familiar with the employee's physical condition and employment circumstances for several years when he rendered the testimony at issue, and there is no evidence that his opinion was based on any false premises. Moreover, given that Judge Erickson clearly acknowledged the opinions of Drs. Salovich and Palmquist, the relative uncertainty of Dr. Downs' opinion in comparison with those opinions is not dispositive. See Tuomela v. Reserve Mining Co., 299 Minn. 203, 204, 216 N.W.2d 638, 639, 27 W.C.D. 312, 313 (1974) (although, under Flansburg v. Giza, 284 Minn. 199, 201-02, 169 N.W.2d 744, 746, 25 W.C.D. 3, 6 (1969), unopposed expert medical testimony cannot be disregarded, such testimony is not necessarily conclusive upon the trier of fact). For these reasons, and given the evident continuity of Ms. Bordson's symptoms if not exactly her diagnoses from the date of her 1991 work injury through March 5, 1997, and on up to the date of hearing herein, we affirm as not unreasonable the judge's finding of a causal relationship between the work injury and Ms. Bordson's current disability. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Medically Unable to Continue Working, under Subdivision 3j

At Finding 11, Judge Erickson found that Ms. Bordson became medically unable to continue working on or about September 5, 1997, "due to the natural progression of her original injury and the employment activit[i]es that she was then engaged in with the employer." On that basis, the judge denied discontinuance of the employee's benefits and affirmatively awarded temporary total disability benefits recommencing September 7, 1997. R & G contend that Judge Erickson erred by placing the burden of proof on R & G to show that Ms. Bordson did not become medically unable to continue working after September 7, 1997, due to her 1991 work injury, instead of requiring Ms. Bordson to show affirmatively that she did become medically unable to work at that time due to that injury. They argue that Ms. Bordson was not subject to an actual total disability after that date and that even Dr. Downs was at least initially uncertain as to such disability. They argue further that the judge erred in concluding that Dr. Salovich's opinion might

not be admissible support for their Petition to Discontinue, in that it post-dated that Petition. We affirm.

Burden of Proof as to Causation and Actual Disability

Reiterating their argument that Ms. Bordson's current thoracic/cervical dysfunction is not causally related to her 1991 work injury, R & G contend that, although an employer and insurer have the initial burden in a discontinuance proceeding, in this case, once R & G had established entitlement to discontinue benefits based upon MMI, the burden of proof should have been shifted to Ms. Bordson, to show that the symptoms precipitating her going off work after September 5, 1997, were not only the result of her 1991 work injury but also sufficient to constitute a medical disability from working. In support of that position, they argue again that Dr. Downs himself was unable to state within a reasonable degree of medical certainty that Ms. Bordson's ongoing disability was causally related to the 1991 injury. In further support, they note Dr. Downs' vacillation between September and October 1997 as to whether or not the employee was able to work half time or was permanently unable to work at all. They contend that, when he first took Ms. Bordson off work on September 5, 1997, Dr. Downs did not state a basis for doing so, did not identify any significant change in the employee's medical condition that would warrant a significant modification of restrictions, did not state his understanding of her job duties, and did not therefore have adequate foundation for his action. They note further that Dr. Downs subsequently released Ms. Bordson to work again on September 16, 1997, without having examined her or even reviewed her records, then restricted her entirely from working again on October 1, 1997, conjecturing that she was permanently and totally disabled, and then released her yet again three weeks later, to work four hours a day.

We have already addressed the causation issue above and have found substantial support for Ms. Bordson's position in evidence affirmatively offered by her. R & G's argument with regard to Ms. Bordson's actual disability in the fall of 1997 is not without merit. However, having affirmed the judge's conclusion that Ms. Bordson's physical condition in the fall of 1997 was causally related to her 1991 work injury, and given Dr. Downs' testimony that he was in the end compelled to remove the employee from work in September and October because of her physical condition, we will not reverse Judge Erickson's conclusion on this issue on grounds that it is unsupported by substantial medical evidence affirmatively offered.

Relevance of Dr. Salovich's Opinion

At Finding 9 of his decision, Judge Erickson found that "[i]n contrast to Dr. Downs[']careful and detailed examinations, the employee underwent a cursory adverse medical examination on February 2, 1998 with Dr. Elmer Salovich." In a footnote to this conclusion, Footnote 2, Judge Erickson states, "A good argument can be made that Dr. Salovich's examination, being made after the Petition to Discontinue Benefits, cannot be considered in the first instance on the issue of whether the employer had an evidentiary basis for the proposed discontinuance" (emphasis added). After developing his original, principal finding for six more sentences, Judge Erickson concluded, "In light of his failure to perform Phalen's and Tinel's tests,

which admittedly would produce positive objective findings, and his failure to explain why the grip strength readings should be considered to be *'voluntary'* the opinions of Dr. Salovich carry little weight." Referencing Footnote 2, R & G contend that Judge Erickson "erred in determining that the evidentiary basis for the petition [to discontinue benefits] had to be in existence at the time that the petition was filed." They argue that there is no such requirement in the statute or rules and that "[t]he courts have found that on a petition to discontinue benefits a compensation judge may make the determination as to whether ongoing benefits can be discontinued on the date of hearing."

Whatever might or might not be its legal viability, we are not persuaded that the legal option identified by Judge Erickson in Footnote 2 was in any way dispositive with regard to the judge's denial of R & G's Petition to Discontinue benefits. It is apparent from the whole of Finding 9 proper that the judge did, after all, carefully consider Dr. Salovich's opinion, and there is no clear evidence that he dismissed that opinion out of hand any more with regard to the period of benefits prior to the Petition to Discontinue than with regard to the period subsequent to that Petition. Indeed, in Finding 5 Judge Erickson expressly concluded that "[R & G] provided an evidentiary basis to support three of their four grounds alleged to discontinue wage loss benefits" and failed to provide such a basis only with regard to their "claim that the employee performed activities in her non-work environment that were beyond her work restrictions," a claim nowhere supported or even addressed in Dr. Salovich's opinion. Moreover, in his memorandum, Judge Erickson expressly indicates that he did consider Dr. Salovich's opinion in evaluating whether the employee had sustained her "overall" burden of proving entitlement. Thus, even were there evidence that the judge might have disregarded Dr. Salovich's opinion as initial support for R & G's Petition to Discontinue, the issue is ultimately moot, since the judge has expressly concluded that the employee prevails on the issue of entitlement even in the face of that opinion, after the "overall" burden of proving entitlement has shifted onto her.

Because Judge Erickson did not clearly disregard Dr. Salovich's opinion in reaching his conclusion, and because in reaching his decision it was not unreasonable for the judge to rely instead on the opinion of Dr. Downs, see Nord, 360 N.W.2d at 342-43, 37 W.C.D. at 372-73, we affirm Judge Erickson's conclusion that the employee was unable to continue working in September 1997 due to her 1991 work injury. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Cooperation with Rehabilitation

In Finding 1a(4), Judge Erickson suggested that any issue as to R & G's entitlement to discontinue benefits based on a failure by Ms. Bordson to cooperate with rehabilitation efforts was directly related to Ms. Bordson's "good faith effort to participate in a rehabilitation plan" "prior to January 13, 1998," the date of R & G's Petition to Discontinue Benefits. R & G contend that this casting of the issue rendered their burden of proof "very difficult," as a formal rehabilitation plan was not actually signed until October 27, 1997. They argue that their Petition had cited, as a basis for discontinuance, Ms. Bordson's failure to cooperate with R & G's "efforts to return the employee to work," not just Ms. Bordson's failure to cooperate with a formal

rehabilitation plan. They contend that Judge Erickson should have considered "all of the evidence introduced regarding the employee's failure to cooperate with the employer's efforts to return the employee to work," including evidence preexisting the October 1997 signing of the formal rehabilitation plan and evidence post-dating the January 1998 filing of the Petition to Discontinue. They suggest that this more inclusive evidence demonstrates that Ms. Bordson unreasonably refused suitable work with R & G Rental as a marketing assistant in September 1997 and with Customer Link using a voice-activated data entry system in March 1998. We are not persuaded that Judge Erickson's decision was unreasonable.

There does initially appear, at Finding 18 and in Footnote 4, a footnote to Finding 19, evidence that Judge Erickson was not intending to consider the employee's activities subsequent to the January 1998 filing of R & G's Petition to Discontinue in determining R & G's entitlement to discontinue benefits pursuant to that Petition. However, in a manner similar to that in which he ultimately did consider Dr. Salovich's opinion, the judge indicated in his memorandum that he did consider rehabilitation records subsequent to January 13, 1998, with regard to Ms. Bordson's ultimate "overall" burden of proving entitlement to benefits, once R & G's initial burden of production had been met. Moreover, although the judge's decision contains little analysis of Ms. Bordson's efforts to cooperate with rehabilitation efforts prior to the October 1997 execution of her formal rehabilitation plan, we find sufficient justification in the medical records of Dr. Downs for Ms. Bordson's relative reluctance to attempt the work purportedly proffered by the R & G Rental during the pre-plan period.

Judge Erickson found that Ms. Bordson had returned to her pre-injury job following her work injury and had worked at that job until she became medically unable to continue working on or about September 5, 1997. The judge found also that Ms. Bordson's refusals to work as a casino employee because of the smoke, as a parking lot attendant because of the cold, and as a security guard because of personal safety issues were not unreasonable refusals. This conclusion, in Finding 18, was not an unreasonable conclusion. Nor was it unreasonable, in light of the medical and rehabilitation records in evidence, for the judge to conclude in Finding 19 that the placement vendor apparently did not screen many of the openings to ensure that they were appropriate for the employee or to conclude, again in Finding 18, that Ms. Bordson had followed up on all job leads that were for appropriate for her and within restrictions defined by Dr. Downs. Moreover, these conclusions, together with the conclusion in Finding 20 as to the employee's essential though conditional readiness to work for CustomerLine, also appear to manifest consideration of evidence to some extent both preceding Ms. Bordson's formal rehabilitation plan and postdating the Petition to Discontinue, as sought by R & G. For these reasons we affirm Judge Erickson's refusal to grant discontinuance on grounds that Ms. Bordson failed to cooperate with rehabilitation efforts. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Chiropractic Treatment

At Finding 23, Judge Erickson concluded in part that Ms. Bordson's chiropractic care had been reasonable and necessary and that "the records of Dr. Audette contain documentation of both a treatment plan and the details of treatment." At Finding 24, the judge also concluded

that the first twelve weeks of Ms. Bordson's care, through June 19, 1997, were within the treatment parameters, pursuant to Minn. R. 5221.6300, subps. 11-16. At that same finding, the judge concluded also that Ms. Bordson was entitled to a departure from the parameters for subsequent treatment pursuant to Minn. R. 5221.6050, subps. 8A and 8E,[8] "as her condition . . . is a documented medical complication and . . . [she] had an incapacitating exacerbation of her condition on or about September 5, 1997 that entitled her to additional treatment." R & G contend in part that Judge Erickson's decision was unsupported by substantial evidence, in that the care at issue was being provided in conjunction with physical therapy and medication and that such a "shotgun approach" is "not reasonable" because it prevents accurate identification of the source of any improvement. They contend also that the award was clearly erroneous in light of applicable treatment parameters, on essentially three grounds: (1) Ms. Bordson had been diagnosed with a chronic pain syndrome of apparently long standing at the time she was undergoing the treatment, and "[u]nder 5221.6300, passive care is inappropriate while an employee has a chronic pain syndrome"; (2) Judge Erickson's permission of a departure from the treatment parameters was "based upon the fact that there was a medical complication" that "consisted of thoracic outlet syndrome and cervical discogenic spondylosis," and these conditions were "not a complication but rather the purpose for the treatment"[9]; and (3) any departure from the schedules may be made only with prior notification of the departure at least seven working days before initiation of the treatment, pursuant to Minn. R. 5221.6050, subp. 9, and Minn. R. 5221.6300, subp. 3B(2),[10] and no evidence was introduced that such prior notice was ever given. We find only the argument as to notice of departure from the parameters compelling.

Reasonableness and Necessity

R & G cite no authority for their contention that "[m]ultiple passive forms of treatment are not reasonable," and we know of none. Indeed, the use of medication and even physical therapy concurrently with chiropractic treatment seems to us reasonably advantageous in some circumstances, to the extent that it is prescribed and monitored carefully. In Field-Seifert v. Goodhue Co., slip op. (W.C.C.A. Mar. 5, 1990), this court identified the following factors to be considered in assessing whether or not chiropractic treatment has been reasonable and necessary: (1) the evidence of a reasonable treatment plan; (2) documentation of the details of the treatment; (3) the degree and duration of relief resulting from the treatment; (4) whether the frequency of treatment was warranted; (5) the relationship of the treatment to the goal of returning

[8] The judge's citation of subpart 8F is obviously a typographical error.

[9] Judge Erickson found that the employee's "condition (thoracic outlet syndrome exacerbated by scalene tone and recurrent rib dysfunctions) is a documented medical complication" under the rules. R & G do not contest that conclusion on grounds that that diagnosis of the employee's condition does not appear in the records of Dr. Audette herself that were offered into evidence at the hearing below.

[10] R & G cite "subp. B(2)"; we presume they intended subp. 3B(2).

the employee to suitable employment; (6) potential aggravation of underlying conditions by additional chiropractic treatment; (7) duration of the treatment; and (8) the cost of the treatment in light of relief provided. In Horst v. Perkins Restaurant, 45 W.C.D. 9 (1991), this court essentially reiterated this list and supplemented it with some factors including the employee's testimony about the relief obtained and the employee's psychological dependency on the treatment. While they are less than copiously detailed, it is clear from Dr. Audette's records in evidence and from the records of Dr. Downs that the chiropractic treatment at issue was effective in relieving the employee's work-related pain and was administered on an essentially as-needed basis, under the advice and consent of a medical doctor. Nor does the treatment appear to have been unreasonably expensive, given its effectiveness in relieving the employee's symptoms. Nor is there evidence, given the very irregularity of the treatment, that the employee was in any way psychologically dependent on the treatment. Notwithstanding some sparseness of plan and detail in the treatment records in evidence, we will not reverse the judge's award of payment for the chiropractic expenses at issue on grounds that they were not reasonable and necessary. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Treatment Parameters

Ms. Bordson was first recommended for a chronic pain evaluation in late March 1998, well subsequent to any chiropractic treatment of record. R & G have suggested that, "[b]ased upon the pain clinic evaluation, the employee has had a chronic pain syndrome for quite some time." They contend on that basis that Ms. Bordson's passive chiropractic care was inappropriate because concurrent with a chronic pain syndrome. We conclude that R & G's argument is insufficient to compel reversal of the judge's award of payment for treatment prior to Ms. Bordson's formal chronic pain diagnosis, on either a factual or a legal basis. Therefore, having found the care at issue otherwise reasonable and necessary, we affirm Judge Erickson's award of payment for Ms. Bordson's chiropractic expenses through at least June 19, 1997, as being both reasonable and necessary and within the regular treatment parameters.

Judge Erickson also permitted a departure from the treatment parameters, to allow further chiropractic care after June 19, 1997, on grounds that Ms. Bordson's condition is a "documented medical complication" warranting departure under Minn. R. 5221.6050, subp. 8A, and on grounds that, when she went off work in September 1997, she sustained an "incapacitating exacerbation" of that condition warranting departure under Minn. R. 5221.6050, subp. 8E. R & G's argument that the employee's ongoing problems are not a "medical complication" or "incapacitating exacerbation" of her work injury, but are instead a new and separate problem that is the "purpose" of the treatment at issue, is essentially a reworking of their argument on the causal relatedness of the employee's ongoing condition. Having already addressed and denied reversal on other issues on this basis, we decline to reverse on this basis the judge's permission of a departure from the parameters.

With regard to the issue as to prior notice, Minn. R. 5221.6050, subp. 9A(4), provides that "[t]he health care provider must notify the insurer within two business days after initiation of treatment if the departure from a parameter is for an incapacitating exacerbation."

Ms. Bordson had nearly exhausted the twelve weeks plus twelve additional visits permitted her under Minn. R. 5221.6300, subps. 3A and 3B(1), when, in September 1997, she went off work due to an incapacitating exacerbation of her condition. As indicated above, this exacerbation entitled her to a departure from the parameters. However, her twelve weeks plus twelve visits expired with the first of her two visits in October 1997, arguably rendering her final ten visits permissible only with prior notification. Ms. Bordson argues that the policy behind the prior notice provision in the rules is "to give the Employer an opportunity to determine whether to contest additional care" and that that policy would not be advanced in this case by requiring prior notice of the departure, since R & G had already contested and denied all chiropractic care. We essentially agree with this argument, noting that de facto notice of ongoing treatment may thereby have already been in place, but we remand the issue to the compensation judge for reconsideration and additional findings as to the appropriateness of departure from the treatment parameters for all of the treatment at issue, in light of notice requirements.

Attorney Fees

The work injury here at issue occurred in November 1991. Minn. Stat. § 176.081, subd. 1(a) (1990), effective at that time, provided that "[f]ees for administrative conferences under section 176.239 shall be determined on an hourly basis, according to the criteria in subdivision 5," which essentially address matters of reasonableness. Minn. Stat. § 176.081, subd. 1 (1990), also defines the statutory contingent fee payable expressly from the employee's award and includes no provision for the hourly-based fee for .239 conference work to be paid from any source other than employee benefits. Citing Roraff v. State of Minnesota, 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980), and Gruber v. Independent School Dist. #625, 57 W.C.D. 284 (W.C.C.A. 1997), Judge Erickson awarded to Ms. Bordson's attorney, payable by R & G, attorney fees "on an hourly basis for his successful representation of the employee on the medical and discontinuance issues herein."

In her responsive brief, Ms. Bordson contends that the judge's award of hourly-based fees was appropriate on three grounds: (1) R & G are liable for hourly-based Heaton fees for work done on rehabilitation-related issues; (2) an "Employer and Insurer must withhold from benefits paid" an amount necessary to compensate the employee's attorney on an hourly basis for successfully defending at an administrative conference under Minn. Stat. § 176.239, pursuant to Minn. Stat. § 176.081, subd. 1(a), and "[this] obligation should not differ merely because the employer sought to discontinue benefits using a petition to discontinue rather than a notice of intent to discontinue benefits and an administrative conference under section 176.239"; and (3) R & G are liable for hourly-based fees for work done in connection with the dispute over the chiropractic bills of Dr. Audette, pursuant to Roraff and Minn. Stat. § 176.135, subd. 1(d) (1987). R & G concede that a Roraff fee may be appropriate if Ms. Bordson prevails on the medical issues, as she has, but they contend that "additional attorney's fees on the issue of the Petition to Discontinue [are] not appropriate." They argue that the Gruber case is inapplicable in this case, in that the employee's attorney in Gruber had no alternative basis for being paid, whereas in the present case benefits have been paid from which fees are being withheld, and fees will also be withheld from ongoing benefits in the event Ms. Bordson prevails on the Petition to Discontinue. We agree.

Although Judge Erickson acknowledged at hearing that a request was in place for hourly fees based in part on Heaton, the judge's award of hourly fees was based only on fee provisions under Roraff and, apparently, the provision in Minn. Stat. §176.081, subd. 1(a), for hourly fees for representation at discontinuance conferences under Section 176.239. This exclusion of a Heaton basis for fees was not unreasonable, since the primary benefits at issue in the case were wage replacement and medical benefits, not rehabilitation benefits, and since even those issues were ostensibly based more on causation than on Ms. Bordson's cooperation with rehabilitation efforts. With regard to his assessment of hourly fees against R & G in part on apparently the mere fact that discontinuance was at issue, we conclude that Judge Erickson erred. As the employee herself apparently acknowledges, and as this court stated in Gruber, cited by the judge himself, "Unlike fees for recovery of medical or rehabilitation benefits or services, the statute does not include administrative conference hourly fees among those that may be assessed against an employer and insurer." Gruber, 57 W.C.D. at 289.[11] Judge Erickson also based his award of hourly-based fees on the work that Ms. Bordson's attorney had done on securing payment for her chiropractic expenses. Such fees are awardable against an employer and insurer, but "only in the most unusual circumstances wherein payment of the medical expenses is of primary importance and where the employee's attorney would obtain a most unreasonable fee for services rendered if only Minn. Stat. § 176.081 [contingency] fees were granted." Kopish v. Sivertson Fisheries, 39 W.C.D. 627, 630 (W.C.C.A. 1987). We reverse Judge Erickson's award of any hourly fees assessed against R & G merely because the work was done on discontinuance issues, and we remand for reconsideration of the issue of Ms. Bordson's attorney's entitlement to hourly fees under Roraff alone.

[11] We note that the Gruber panel was applying the 1993 version of the statute, which had been held to be essentially a codification of then current case law regarding Roraff fees, without mention of other hourly-based fees. See Peterson v. Everything Clean, Inc., 55 W.C.D. 126, 129-30 and 132 (W.C.C.A. 1996), citing Mehrkens v. Chafoulias Management Co., No. [REDACTED SSN] (W.C.C.A. July 14, 1995).