AMY BRICKER, Employee, v. MY PLACE CAFE and KEMPER NAT'L INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 30, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including the credible testimony of the employee and the opinions of her treating doctor, support the finding that the employee sustained a work-related permanent aggravation to her right ankle on October 3, 1995.

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including the opinions of the employee's chiropractor and her orthopedic surgeon, support the finding that the employee suffered a low back condition as a consequence of her work-related right ankle injury and subsequent surgeries.

PERMANENT PARTIAL DISABILITY - ANKLE. Substantial evidence supports the compensation judge's award of a presently ascertainable, minimum 10% permanent partial disability based on the employee's May 7, 1997 ankle fusion surgery, even though the employee has not yet reached maximum medical improvement for her right ankle injury.

MEDICAL TREATMENT & EXPENSE - SUBSTANTIAL EVIDENCE. The finding that the medical care provided by the employee's treating physician was reasonable and necessary and causally related to the October 3, 1995 work injury is adequately supported by the evidence.

Affirmed in part, and vacated in part.

Determined by Johnson, J., Hefte, J., and Wheeler, C.J.
Compensation Judge: John E. Jansen

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal from the compensation judge's finding that the employee's personal injury of October 3, 1995 was a permanent aggravation of a pre-existing condition. The employer and insurer also appeal the compensation judge's finding that the employee has a minimum 10 percent whole body disability secondary to her injury of October 3, 1995. We affirm.

FACTUAL BACKGROUND

The employee, Amy Bricker, sustained a non-work-related injury to her right ankle on April 17, 1995. (T. 101.) She was treated by Dr. Kurt Fuchs who then referred her to Dr. David A. Kittleson, an orthopedic surgeon. Dr. Kittleson first examined the employee on May 17, 1995. An x-ray showed a small fracture of the anterior lateral talar dome with a two millimeter fragment. A repeat x-ray on June 13, 1995 was unchanged. The employee was treated for a Grade II ankle sprain and referred to physical therapy. When seen on August 1, 1995, the employee complained of continued pain with walking and weight bearing. Dr. Kittleson noted substantial swelling over the anterior lateral ankle and tenderness over the lateral ankle joint and lateral ligaments. The doctor recommended an arthroscopic examination to assess the articular damage to the lateral talar dome. (Pet. Ex. B.)

In September 1995, the employee began working as a waitress for My Place Cafe, the employer, insured by Kemper National Insurance Company. The employee testified that on October 3, 1995, she slipped in a puddle of water and fell forward onto her left knee. She stated she landed with her right foot underneath her body and felt something snap in her right ankle. (T. 38-41.) Ms. Lori Yoch, a co-owner of the employer, was in her office doing book work at the time. Ms. Yoch did not see the employee fall, but assisted her to her feet. (T. 149-51.) The employee stated she did not complete her shift and went home after the fall. (T. 41-42.) Tammy Kreitz, a co-worker, testified that prior to October 3, 1995, the employee intermittently complained of right ankle problems and limped. She worked with the employee on October 4, 1995, and testified the employee did not limp or complain of ankle pain until after Ms. Yoch arrived at the restaurant. (Resp. Ex. 10 at 5-8.) The employee did not work on October 5 and was terminated on October 6, 1995. (T. 159.)

On October 10, 1995, the employee was seen by Dr. Kittleson's associate, Dr. Arnulf Svendsen. (T. 115-16.) She told the doctor she reinjured her right ankle a week ago when she slipped and fell at My Place Restaurant. X-rays showed "a little more fragmentation of the osteochondritic lesion in the superior lateral aspect of her talar dome." (Pet. Ex. F.) The employee returned to see Dr Kittleson on October 18, 1995. He compared the x-rays taken on October 10, 1995 with the x-rays taken on June 13, 1995, noting there had been a very dramatic change since that time. He concluded the employee reinjured her right ankle on October 3, 1995 with "a definite change of further fracturing and fragmentation of loose bodies within the joint." The doctor recommended arthroscopic surgery to remove the loose fragments and assess the integrity of the talar joint surface. (Pet. Ex. B, F.)

On December 14, 1995, the employee was examined by Dr. Mark Thomas at the request of the employer and insurer. Dr. Thomas obtained a history of the employee's injuries on April 17, 1995 and October 3, 1995, reviewed the pertinent medical records and took additional x-rays. The doctor diagnosed an osteochondral fracture of the right ankle talar dome which he categorized as a stage III lesion. Dr. Thomas concluded the x-ray changes in October 1995 resulted from continued weight bearing on the ankle after the April 1995 injury. He recommended arthroscopic removal of bone fragments in the right ankle, but opined the need for

arthroscopic surgery was due entirely to the employee's April 17, 1995 injury.[1]

On January 30, 1996, arthroscopic surgery was performed by Dr. Kittleson, including removal of multiple loose bodies and an abrasion chondroplasty to regenerate fibrocartilage on the joint surface. (Pet. Ex. B, F.) The employee returned to see Dr. Kittleson periodically with persistent right ankle complaints. On December 17, 1996, Dr. Kittleson noted the employee's ankle was swollen over the anterior lateral aspect with limited range of motion. The employee requested a second opinion from the Mayo Clinic to which Dr. Kittleson agreed.

The employee was seen by Dr. Harold Kitaoka at the Mayo Clinic in January 1997. Dr. Kitaoka stated the employee had "a difficult problem with right ankle and hindfoot arthritis, valgus malalignment, and bony deficiency of the talus. She would benefit from ankle realignment and arthrodesis." (Pet. Ex. C.) The employee returned to see Dr. Kittleson on February 18, 1997. Treatment options were discussed, and the employee elected to proceed with an arthrodesis of the right ankle. (Pet. Ex. F.)

At some point after leaving the employer, the employee returned to work as a waitress. She obtained a job at the Main Event, but testified she quit the job because her right ankle was too painful. (T. 68, 116.) The employee then obtained a job at Tequilaberry's. She had two interviews, but did not mention the October 3, 1995 ankle injury. (T. 69, 116-17.) On December 22, 1995, the employee had another slip and fall while waitressing at Tequilaberry's. She was seen by Michael T. Hample, D.C., on February 23, 1996 complaining of neck and low back pain which she attributed to the December 22, 1995 fall. The employee denied any low back pain prior to her fall. (Resp. Ex. 3.) Dr. Hample concluded the cast on the employee's right ankle and her limp caused a gait disturbance resulting in left-sided low back pain. (Pet. Ex. H.) Dr. Hample treated the employee twice. He did not see the employee again until January 23, 1997, when the employee complained primarily of head and neck pain, giving a history of falling at the Colonial Liquor Store on November 21, 1996. Dr. Hample noted persistent gait disturbance, and opined the employee's low back problems were causally related to the employee's right ankle injury. (Pet. Ex. H.)

On May 7, 1997, Dr. Kittleson performed a right ankle fusion with internal compression fixation. By December 16, 1997, Dr. Kittleson noted the employee's ankle joint was clinically fused although he suspected some posterior tibialis dysfunction. The doctor discussed with the employee further treatment options including a subtalar arthrodesis to correct a heel disformity. (Pet. Ex. F.)

In reports dated September 10, 1997 and April 23, 1998, Dr. Kittleson opined the employee's April 1995 non-work injury caused a minimally displaced fracture of the lateral talar

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[1] In the discussion section of his report, Dr. Thomas refers to a right ankle injury on May 17, 1995. Presumably, the this is a typographical error and the doctor is referring to the April 17, 1995 injury.

dome. He believed the October 3, 1995 work injury caused extensive fragmentation of at least one-half of the ankle joint with multiple loose fragments. In Dr. Kittleson's opinion, the October 3, 1995 injury was a substantial contributing cause of the need for arthroscopic surgery on January 30, 1996 and the arthrodesis on May 7, 1997. Dr. Kittleson provided a 17 percent whole body permanency rating for the right ankle secondary to the work injury. He further opined the employee's low back pain was causally related to her October 3, 1995 right ankle injury, concluding casting and bracing of the right ankle had caused abnormal mechanics affecting the employee's lower back. (Pet. Ex. F.)

Dr. Thomas performed a second independent medical examination on April 30, 1998, He reviewed the current medical records and examined the employee. Dr. Thomas noted moderate swelling of the right foot and ankle with tenderness, significant heel valgus and lateral subluxation of the foot under the tibia. The employee's ankle was essentially fused and her subtalar joint range of motion was quite limited. Dr. Thomas diagnosed an osteochondral fracture of the right ankle talar dome, degenerative arthritis of the right ankle, subtalar joint degenerative arthritis and valgus hindfoot deformity. In Dr. Thomas's opinion, the employee's right ankle problems resulted solely from the employee's non-work-related April 17, 1995 injury. He opined the employee's injury of October 3, 1995 was a temporary aggravation of her pre-existing condition, from which she reached maximum medical improvement as of December 14, 1995. (Resp. Ex. 2.)

PROCEDURAL BACKGROUND

The employee contended she sustained a work-related injury to her right ankle on October 3, 1995. The employer and insurer filed a Notice of Denial of Liability on October 19, 1995. On January 25, 1996, the employee and a representative of the insurer participated in a mediation session conducted by a staff member at the Department of Labor and Industry. A Mediation Resolution/Award was served and filed that day. (Resp. Ex. 1.) That document provided for a full, final and complete settlement of all past, present and future claims by the employee for workers' compensation benefits as a result of the October 3, 1995 injury in return for a lump-sum payment of $5,000.00 and payment of medical expenses from the date of injury through December 31, 1995. The Mediation Resolution/Award stated the "intent of this agreement is to resolve a temporary aggravation of a pre-existing condition to the right ankle of the named employee." (Resp. Ex. 1.)

On October 2, 1997, the employee petitioned the Workers' Compensation Court of Appeals to set aside the mediation award. In a decision served and filed February 6, 1998, this court referred the matter to the Office of Administrative Hearings (OAH) for a hearing before a compensation judge. We instructed the compensation judge to make findings regarding the nature and extent of the employee's injury, the employer and insurer's liability for any injuries sustained by the employee, and whether there existed a causal relationship between any injury sustained and the medical care received by the employee. The employee filed a claim petition on March 2, 1998 claiming right ankle and back injuries and seeking payment for a 17 percent permanent partial disability secondary to the right ankle injury. This court's order of referral was consolidated with

the employee's claim petition.

The consolidated cases came on for hearing before a compensation judge at OAH on June 9, 1998. In a Findings and Order on Remand, served and filed September 8, 1998, the compensation judge found the employee's injury of October 3, 1995 was a permanent aggravation of a pre-existing right ankle condition. The compensation judge further found the medical care received by the employee through the date of hearing was reasonable, necessary and causally related to the personal injury of October 3, 1995, and found the employee sustained a 10 percent whole body disability secondary to her personal injury. Finally, the compensation judge found the employee sustained a consequential injury to her back secondary to her personal injury of October 3, 1995.[2] The employer and insurer appeal each of these findings.

STANDARD OF REVIEW

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 are to 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

Right Ankle Injury

The compensation judge found the employee sustained a specific injury to her right ankle on October 3, 1995 in the nature of a permanent aggravation of a pre-existing condition. The employer and insurer contend this finding is manifestly contrary to the evidence. Essentially, the appellants assert the employee was not credible, and contend her testimony was legally insufficient to sustain an award of benefits. In support of their argument, the appellants cite the following examples: Ms. Yoch testified the employee complained only of her knee, not her right ankle, after the October 3, 1995 fall (T. 182); on October 4, 1995, the employee did not tell Ms. Kreitz of her injury the day before, and Ms. Kreitz testified she did not observe the employee limping until after Ms. Yoch entered the restaurant; the employee testified she was in severe pain after her fall but did not seek medical attention until October 10, 1995; the employee submitted

[2] The compensation judge did not make ultimate findings regarding the employer and insurer's liability or enter an order determining the Claim Petition, concluding that such a determination would exceed his jurisdiction under this court's order of referral. (Finding 11.)

resumes to at least two employers stating she had an M.B.A. degree which was false (T. 96-97); and the employee testified she dropped her claim for unemployment benefits against the employer when, in fact, her claim was denied by the Minnesota Department of Economic Security. (T. 115; Resp. Ex. 11). These and other inconsistencies in the employee's testimony, the appellants contend, require this court to reverse the compensation judge's finding. We disagree.

The compensation judge acknowledged the employee has "demonstrated some lack of candor, selective or convenient memory, and a tendency towards embellishment." However, the judge further concluded he found the testimony of the employee to be credible "with respect to the disputed facts essential to establish her claims." (Memo. at 7.) "Assessment of witness credibility is the unique function of the factfinder." Tews v. Geo. A. Hormel & Co., 430 N.W.2d 178, 180, 41 W.C.D. 410, 412 (Minn. 1988). It is not the role of this court to re-evaluate the credibility and probative value of a witness's testimony. Krotzer v. Browning-Ferris/Woodlake Sanitation Serv., 459 N.W.2d 509, 513, 43 W.C.D. 254, 260-61 (Minn. 1990). Thus, a finding based on the credibility of a witness will not be disturbed on appeal unless there is clear evidence to the contrary. See Even v. Kraft, Inc., 445 N.W.2d 831, 835, 42 W.C.D. 220, 225-26 (Minn. 1989).

One of the primary disputes at the hearing was whether the employee injured her right ankle when she fell on October 3, 1995. The employee testified she did and gave that history to Dr. Svendsen and Dr. Kittleson. The compensation judge accepted the employee's testimony regarding her fall as credible. While there is certainly evidence from which a different inference might be drawn, we cannot conclude the compensation judge's decision was clearly erroneous. We, accordingly, affirm the finding that the employee injured her right ankle on October 3, 1995, arising out of and in the course of her employment.

The compensation judge further found the October 3, 1995 right ankle injury was a permanent aggravation of a pre-existing condition. This finding is clearly supported by the medical opinion of Dr. Kittleson. The compensation judge accepted the opinions of Dr. Kittleson over those of Dr. Thomas, the adverse examiner. It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. See Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). We affirm the compensation judge's finding of a permanent aggravation on October 3, 1995.

Low Back Injury

In her claim petition, filed March 2, 1998, the employee claimed a consequential low back injury. The compensation judge found the October 3, 1995 ankle injury was a substantial contributing cause to the employee's low back symptoms and her need for treatment with Dr. Hample. (Finding 5.) The employer and insurer contend this finding lacks evidentiary support, arguing the employee admitted she had no low back symptoms until her December 22, 1995 fall at Tequilaberry's. (See Resp. Ex. 3.) The employer and insurer ask this court to reverse the compensation judge's finding. We decline to do so.

Dr. Hample stated that when he saw the employee on February 22, 1996 "she was experiencing low back pain from the limping due to the right ankle fracture." Dr. Hample went on to opine the employee's subsequent low back pain was causally related to her right ankle injury. (Pet. Ex. H.) Dr. Kittleson similarly opined the employee's low back pain was causally related to her October 3, 1995 right ankle injury, concluding the employee's uneven stance from the casting and bracing of her right ankle had caused abnormal mechanics affecting the employee's lower back. (Pet. Ex. F: 9/10/97.) The opinions of Dr. Hample and Dr. Kittleson provide ample support for the compensation judge's finding. We, therefore, affirm.

Permanent Partial Disability

The compensation judge concluded that since the employee was scheduled for additional surgery on October 5, 1998, she had not reached maximum medical improvement from the effects of her right ankle injury. The compensation judge further found the employee sustained a minimum 10 percent whole body disability secondary to her right ankle injury. The employer and insurer contend these findings are inconsistent. They argue it is premature to rate permanent partial disability since the employee might yet improve. We disagree.

The rating assigned by the compensation judge is based on loss of plantar flexion and dorsiflexion.[3] This loss of motion was a result of the May 7, 1997 fusion surgery for which Dr. Kittleson rated a minimum 10 percent permanent disability. (Pet. Ex. F: 9/10/97.) This loss is presently rateable and is unlikely to change. Substantial evidence supports the compensation judge's finding of a minimum 10 percent permanent partial disability of the right ankle, and we affirm.

Medical Expenses

The compensation judge found the care and treatment provided by Dr. Kittleson was reasonable, necessary and causally related to the work injury of October 3, 1995. The employer and insurer appeal this finding contending the compensation judge failed to make findings sufficient to explain the reasonableness and necessity of each treatment provided by Dr. Kittleson, citing Buda v. Pillsbury Co., 38 W.C.D. 516 (W.C.C.A. 1986). We find little merit in this argument. The compensation judge had the opportunity to review all of Dr. Kittleson's records. (See Pet. Exs. B, F and I.) It does not appear the employer and insurer ever seriously contended Dr. Kittleson's treatment was not reasonable or necessary. Rather, the primary issue was causal relationship to a work injury on October 3, 1995. We conclude the finding that the medical care provided by Dr. Kittleson was reasonable, necessary and causally related is adequately supported by the record, and affirm.

Petition to Vacate

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[3] See Minn. R. 5223.0520, subp. 4.A.(4).

The compensation judge found the mediation agreement constituted a mutual mistake of fact (Finding 9a) and found the need for fusion surgery on May 7, 1997 constituted a substantial change in medical condition. (Finding 9b.) The resolution of the employee's petition to vacate is the exclusive province of the Workers' Compensation Court of Appeals. Minn. Stat. § 176.521. We accordingly vacate Findings 9a and 9b. The employee's petition to vacate, filed October 2, 1997, will be considered and determined by this court thirty days after the issuance of this decision or a decision by the Supreme Court on appeal from this decision.