

SCOTT CHENEY, Employee, v. SUBURBAN SANITATION SERV. and EMPLOYERS MUT. INS. CO., Employer-Insurer/Appellants, and CTR. FOR DIAGNOSTIC IMAGING, NW. ANESTHESIA, P.A., INST. FOR LOW BACK AND NECK, MN DEP'T OF HUM. SERVS., MEDICA CHOICE FOR HRI, and CONSULTING RADIOLOGISTS, LTD., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 21, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION; EVIDENCE - EXPERT MEDICAL OPINION; PRACTICE & PROCEDURE - REMAND. Where the compensation judge erroneously rejected one physician's causation opinion based solely on a perceived lack of foundation, the matter would be remanded for reconsideration.

Vacated and remanded.

Determined by Wilson, J., Wheeler, C.J., and Johnson, J.
Compensation Judge: Donald C. Erickson

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's finding that the employee injured his thoracic spine at the time of the admitted work injury on March 11, 1993. We vacate and remand.

BACKGROUND

On March 11, 1993, the employee was working for Suburban Sanitation Service [the employer] as a laborer when he sustained an admitted work-related injury to his low back while lifting a heavy container. The employee's medical care after May 3, 1994, was coordinated by Dr. Matthew Eckman. When he first saw Dr. Eckman, the employee was complaining of low back pain and pain, numbness, and tingling of the lower extremities. Noting that the employee was 5 feet 8 inches tall and weighed 339 pounds, Dr. Eckman suggested weight loss.

An MRI performed in July of 1994 was interpreted as showing a small central to right-sided disc herniation at L5, with some displacement of the S1 root, and mild degenerative disc changes at other levels, with no significant impingement on the neural structures. A neurosurgeon who evaluated the employee did not consider him a candidate for surgery, and the employee continued to treat with Dr. Eckman for low back pain and bilateral leg pain.

On December 9, 1994, Dr. Eckman received a phone call from the employee's QRC, who reported that the employee was having trouble controlling his bowel movements. After speaking with the employee on December 12, 1994, Dr. Eckman noted, "what it amounts to is that when his back pain gets especially bad he has trouble holding his rectal sphincter well and in combination with the loose watery stools that he gets from his weight reduction mostly liquid diet he does have trouble holding it." The employee also reported that this had "been an intermittent problem for quite some time and is not a major change except that it occurs periodically then when his back pain flares up mainly." The doctor's records reflect that the employee had no bladder control problems at that time, and Dr. Eckman concluded that "it is by far most likely that the acute low back pain just makes it hard to maintain good sphincter tone in face of liquid stools" Dr. Eckman's office notes from December 4, 1995, reflect that the employee was complaining of constipation problems and that he had no bladder control problems.

When the employee's low back pain and lower extremity numbness continued, Dr. Eckman ordered an MRI of the lumbar spine, which was performed on January 29, 1996, and revealed disc degeneration mainly at L4-5 and L5-S1. Dr. Eckman opined that the employee was not a surgical candidate. In July of 1996, after having treated the employee with medications, physical therapy, and facet blocks, Dr. Eckman referred the employee to the Low Back Institute, where he saw Dr. Sunny Kim. Dr. Kim opined that the employee's chronic back symptoms were "due to the central herniation at 4-5 and 5-S1" with slight degeneration of the L3-4 disc, and he recommended gravity lumbar traction therapy.

On September 16, 1996, Dr. Eckman indicated for the first time that "[the employee] gets some pain into the upper back where as he tries to compensate presumably." Three months later, on December 2, 1996, Dr. Eckman again noted that the employee was complaining of constipation.

In a telephone conversation with Dr. Eckman on March 18, 1997, the employee complained of an acute flare up of back pain. Dr. Eckman's notes also reflect that "[o]ccasionally he has noted a little post void wetness, but this does not sound obviously significant and most likely is related to some inhibition from the pain."

In a follow-up exam on June 3, 1997, when the employee complained again of low back and right lower extremity pain, Dr. Eckman noted that "[o]ne area of added concern is his bladder. Following a void, often about ten minutes later, he has some further spontaneous voiding that he has not been able to consciously be aware of or inhibit. It is bad enough so he has to change his pants." This was noted to occur once or twice a day. Dr. Eckman also noted that the employee's bowel control was good "with an occasional laxative needed for constipation."

A repeat MRI performed on June 17, 1997, revealed some bulging at L4-5 with a more prominent herniation at L5-S1 but no definite nerve root impingement. Dr. Eckman noted that the employee continued to have a lot of right leg pain "in characteristic sciatica pattern down into the right calf"

A CT scan of the thoracic spine was taken on July 21, 1997, and revealed a broad-based, right-sided T7-8 disc herniation that mildly flattened the ventral and right side of the thoracic spinal cord. Office notes dated September 3, 1997, reflect that Dr. Eckman discussed the thoracic findings with the employee, who “noted thoracic spine region and rib area pain, particularly since he participated in work hardening.” Dr. Eckman also noted that “it is well described in my notes, that [the employee] has had bladder incontinence and problems for over a year.”

The employee eventually underwent thoracic discography, which reproduced pain at T7-8. Dr. Kim then recommended surgery and on April 23, 1998, performed a partial decompression and fusion at the T6-8 levels. Postoperatively it was noted that the T8 screw was in the disc space, and additional surgery was therefore performed on April 25, 1998. At that time, the fusion was extended from T6 through T9. Dr. Kim opined that the thoracic disc problems had been going on for five years and had caused the employee “chronic thoracic pain and low back pain with bilateral leg weakness, numbness, tingling and pain as well as bowel and bladder incontinence.” The employee initially had complete relief of those symptoms; however, approximately four months after the surgery, his leg and back pain recurred. On January 25, 1999, Dr. Kim opined that the back and leg pain could be due to the central disc herniations at L4-5 and L5-S1.

The employee was examined by Dr. William Akins, at the request of the employer and insurer, on February 17, 1997. Dr. Akins diagnosed the employee as suffering from herniated discs at L4-5 and L5-S1 and degenerative disc disease at L3-4. He opined that the employee was at maximum medical improvement [MMI] from the work injury and rated the employee as having a 19% whole body impairment. Dr. Akins’ report was served on the employee on March 17, 1997. On December 1, 1997, the employer and insurer filed a notice of intention to discontinue benefits. The matter apparently went to administrative conference where the employer and insurer were allowed to discontinue benefits. The employee then filed an objection to discontinuance.

On February 23, 1998, the employee filed a medical request, requesting payment for a pending discogram and possible additional surgery, if the discogram warranted it. The matters were consolidated for purposes of hearing.

The hearing was originally held on May 26, 1998. Issues at that time included whether the employee was entitled to medical expenses for the discogram and surgery, whether he had reached MMI on or before March 17, 1997, and whether he was entitled to temporary total disability benefits. The record was left open for the submission of an addendum report by Dr. Akins. In that report, dated June 14, 1998, Dr. Akins opined that if the employee’s low back and leg pain were alleviated by the surgery, then the thoracic disc herniation was a result of the 1993 work injury, and the discography, surgery, and time loss from work would all be causally related; however, if the back and leg symptoms returned after the thoracic surgery, then the herniated thoracic disc was not causally related to the work injury. Of importance to Dr. Akins was the absence of complaints of mid back pain or bladder or bowel incontinence until 1997.

In findings filed on August 3, 1998, the compensation judge determined, based on the opinions of both treating doctors and the independent examiner, that it was premature to determine causation until at least six months had passed after the employee's surgery. The judge therefore set the matter on for further hearing, which took place on February 26, 1999. In supplemental findings filed on April 27, 1999, the compensation judge found that the employee's thoracic problem was causally related to the work injury, and he awarded the employee's claims for medical expenses and wage loss benefits. The employer and insurer appeal.

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 (1992). 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

The employer and insurer contend that the compensation judge erroneously rejected the opinion of Dr. Akins in favor of the opinion of Dr. Kim. Generally, a judge's choice between expert opinions is affirmed, unless the facts assumed by the expert in rendering his opinion are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). However, in the instant case, the compensation judge erroneously rejected Dr. Akins opinions outright because of a perceived "faulty foundation."

The compensation judge made a finding that, "as early as December 1, 1994, the records of Dr. Eckman document complaints by the employee of bowel and bladder symptoms that were present intermittently for some time and were aggravated by the employee's low back symptoms." The compensation judge explained in his memorandum that Dr. Akins opinions were lacking in foundation because Dr. Akins incorrectly noted that the employee did not complain of mid back or bowel and bladder problems until 1997. The judge's conclusion in this regard is erroneous.

Dr. Eckman's office note of December 12, 1994, does reflect that the employee was having difficulty controlling his bowels, but that same note indicates that the employee was on a

“mostly liquid diet,” which would explain the problem. Also, in notes from the years that followed, there are repeated references to the employee complaining of constipation. There is no suggestion in any of the doctors’ records that constipation is a symptom related to a herniated thoracic disc, and there is no mention of additional bowel control problems until 1998. In his office notes of March 16, 1998, Dr. Eckman recorded a history indicating that the employee had been experiencing bowel incontinence “that ha[s] been going on for a few months now,” and the doctor noted that those symptoms “appear more recent in origin.” In his March 17, 1998, letter to Dr. Kim, Dr. Eckman noted his concern about “the addition of bowel incontinence along with his continuing bladder incontinence,” which would also suggest that bowel incontinence was a new symptom.

There are no entries in Dr. Eckman’s office notes, or any other medical record, of any complaints by the employee of bladder control problems until March 18, 1997, when Dr. Eckman wrote, “occasionally [the employee] has noted a little post void wetness” The December 1994, office note referenced in the judge’s finding and memorandum does not establish that the employee was complaining of bladder control problems at that time; rather, it specifically states that the employee “has no bladder control problems at this time.”¹

The judge found that “[t]he greater weight of the evidence supports the opinions of Dr. Kim and Dr. Eckman’s that the employee injured his thoracic spine in the initial injury of March 11, 1993, as well as, his lumbar spine.” Dr. Eckman, however, did not give an opinion regarding causation, and the judge’s memorandum indicates that he did not find Dr. Kim’s opinions more persuasive than Dr. Akins, only that he rejected Dr. Akins’ opinions because of a perceived lack of foundation. Because the judge’s conclusion as to Dr. Akins’ foundation is erroneous, we must vacate the findings regarding causation and remand the case for reconsideration, of the record as it now exists, as to whether the employee sustained an injury to his thoracic spine at the time of his 1993 work injury. On remand, depending on his decision as to causation, the judge should also reevaluate the issues of MMI, the employee’s entitlement to temporary total disability benefits, and the compensability of medical expenses. Consideration of the employer’s argument as to the compensability of the employee’s second thoracic surgery is unnecessary at this time given our remand on the issue of causation.

¹ The compensation judge also erroneously noted in his memorandum that the employee testified that he had complained of thoracic pain to his doctors in early 1994. The employee actually testified that he first recalled experiencing thoracic pain while in a program at the Polinsky Institute. Records from the Polinsky Institute indicate that the employee was involved in a work hardening program there from June 22, 1995 through August 4, 1995.