

SUSAN I. DETERS, Employee/Appellant, v. TRANSPORT CORP. OF AM. and ST. PAUL COS., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 12, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - TEMPORARY AGGRAVATION. Substantial evidence, including the opinion of the employee's treating physician, Dr. Hoversten, support the compensation judge's determination that the employee's June 5, 1998 work-related injury was a temporary aggravation of her pre-existing degenerative low back condition.

Affirmed.

Determined by: Johnson, J., Wilson, J., and Wheeler, C.J.

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's finding that the June 5, 1998 work injury was a temporary aggravation of a pre-existing low back condition. We affirm.

BACKGROUND

Susan I. Deters, the employee, has worked as a truck driver since 1976. (T. 13.) On June 5, 1998, the employee sustained an injury to her low back while working for Transport Corporation of America, the employer, insured by St. Paul Companies. The employer and insurer accepted liability for the employee's personal injury. (Finding 1d.)

The employee sustained a number of work-related injuries prior to June 5, 1998. In approximately 1979, the employee injured her shoulders and neck when her tractor/trailer tipped over. The employee testified she was off work one to two months. (T. 15.) In 1981, the employee injured her neck when her truck was rear-ended by another truck. Dr. Robert C. Suga, an orthopedic surgeon in Sioux Falls, South Dakota, examined the employee on October 15, 1981, and diagnosed a cervical injury with paresthesia of the left arm. (Pet. Ex. G.) A CT scan and cervical myelogram performed at McKennan Hospital in Sioux Falls, South Dakota, were normal. (Pet. Ex. F.) The employee was seen at the Mayo Clinic in June 1982. The doctor diagnosed post-traumatic head and neck pain with radiation to the left arm. An EMG of the left upper extremity was essentially normal. (Pet. Ex. I.) On April 5, 1982, the employee was seen at the University of Minnesota Hospital and was diagnosed with chronic neck and left arm pain. A pain

program was recommended. (Pet. Ex. J.) The employee attended a pain clinic at the Mayo Clinic. She was off work until sometime in 1984 when she returned to truck driving. (T. 17.) On October 25, 1990, the employee sustained a low back injury while working for the employer.¹ The employee saw Dr. David Hoversten, an orthopedic surgeon. X-rays of the lumbar spine showed considerable osteoarthritic changes and mild lipping. The doctor diagnosed acute low back strain with musculoligamentous problems. (Pet. Ex. C.) The employee was off work for approximately two months as a result of this injury (T. 18-19) and was apparently paid a 5 percent permanent partial disability under Wisconsin law. (Pet. Ex. Q.)² The employee returned to work for the employer with a prescription for a custom truck seat. (T. 20-21.)

On January 14, 1996, the employee suffered another low back injury while working for the employer. On a trip to Chicago, the fifth-wheel pin on her truck locked. When she attempted to release it, the employee testified it “just felt like something tore in my back.” (T. 26-27.) The employee saw a doctor in Janesville, Wisconsin, who took her off truck driving. On January 25, 1996, the employee returned to see Dr. Suga and gave a history of low back pain since her January 1996 injury, without radicular symptoms. Dr. Suga diagnosed an acute lumbar strain. (Pet. Ex. G.) A lumbar myelogram on March 27, 1996, was considered unremarkable. A CT scan on the same date showed early Grade I posterior spondylolisthesis at L4 and L5 without stenosis and diffuse disc bulging at L4 through S1. (Pet. Ex. F.) On March 28, 1996, Dr. Suga noted the CT scan showed a mild amount of retrololisthesis at L4-5 but no signs of compressive neuropathy. The doctor concluded the employee could return to work on April 15, 1996, with work “as tolerated.” (Pet. Ex. G.) Dr. Suga referred the employee to Dr. Mark Gregg, a neurologist, whom she saw on April 8, 1996. An EMG of the employee’s left leg was normal. On examination, Dr. Gregg found no evidence of radiculopathy or peripheral neuropathy and recommended continued conservative care. (Pet. Ex. E.)

The employee testified she was off work for several months following her January 1996 injury and was paid workers’ compensation benefits. Kathy Burns, a qualified rehabilitation consultant (QRC), worked with the employee and the employer to locate a custom seat for the employee’s truck, but the seat was never purchased. The employee returned to work for the employer. (T. 28-32.) The employee’s low back pain flared up in August 1997. She saw Dr. Nussbaum on August 10, 1997 complaining of increased low back pain. (Pet. Ex. D.) The employee testified she was off work for approximately one week and then returned to her regular job with the employer. (T. 34-36.)

On June 5, 1998, the employee was attempting to use a manual crank to lower a loaded trailer onto her tractor. The crank was stuck or difficult to turn and the employee sustained a sharp increase in her low back pain with pain into her hip and down her right leg. (T. 36-38.)

¹ The employer was then insured by Home Insurance Company. (Pet. Ex. Q.)

² Dr. Frederick Entwistle rated a 3.5 percent permanent disability of the lumbar spine under Minn. R. 5223.0070A.(2). (Pet. Ex. H.)

The employee sought treatment at a clinic in Kansas City, Missouri. (T. 39.) Upon her return to her home in South Dakota she saw Dr. Nussbaum who diagnosed low back pain. The doctor removed the employee from work and prescribed physical therapy. By July 1, 1998, Dr. Nussbaum noted the employee was only minimally improved. (Pet. Ex. D.) On July 8, 1998, the employee saw Dr. Hoversten who recorded a history of recurrent back pain over the past seven to eight years with a flare-up while lifting at work. The doctor reviewed x-rays which he stated showed severe degenerative disc disease at L4-5 with retrolisthesis of 4 to 5 mm., and significant foraminal stenosis at L4-5 on the right due to spurring and disc change. Dr. Hoversten stated, "The major cause in this instance is a degenerative process over many years and her age. Certainly, smoking plays a part, her weight plays a part and her work plays a part." (Pet. Ex. C.)³ A lumbar myelogram with a post-myelogram CT was done on July 15, 1998, and compared with the previous myelogram dated March 27, 1996. The myelogram showed a mild ventral extradural defect at L4-5 and L1-2, unchanged from the earlier myelogram. The CT scan showed a mild bulging disc at L4-5 with mild central canal stenosis which had progressed slightly since the prior examination. (Pet. Ex. F.)

The employee returned to see Dr. Hoversten after the myelogram and CT scan. The doctor stated the myelogram and CT scan showed mild degenerative arthritis with mild stenosis at multiple levels. He concluded the tests showed no acute change with no rupture or fracture. The doctor opined the employee's condition was "clearly a degenerative process" with multiple-level disc disease at L2 through L5. Dr. Hoverstan stated the employee could return to light-duty work, with no lifting or carrying over 30 pounds but was permanently precluded from truck driving. (Pet. Ex. C.)

By letter dated July 14, 1998, Ms. Janis Graupman, claims specialist with the insurer, wrote to Hoversten and asked: "Do you concur that Ms. Deters suffered a flare-up of her pre-existing condition in relation to the incident of June 5, 1998, such that this injury was a temporary aggravation of her pre-existing degenerative disc disease?" Dr. Hoversten answered yes to this question and dated his response July 20, 1998. (Resp. Ex. 1.) By letter dated August 26, 1998, Dr. Hoversten again responded to a series of questions from Ms. Graupman as follows:

1. id Ms. Deters suffer an aggravation of preexisting degenerative disk disease as a result of the June 5, 1998, incident?
 - A. The answer is yes.
2. as Ms. Deters reached maximal medical improvement in relation to the temporary aggravation?

³ The employee was approximately 6'1" tall, weighed around 228 pounds and was 49 years of age at the date of hearing. She had a history of cigarette smoking since at least 1982. (Pet. Ex. J.)

- A. The answer is yes.
3. Is any further treatment needed, and would it be a result of Ms. Deters' preexisting condition?
- A. Again, the answer would be yes. It is all due to the preexisting condition.
4. Is Ms. Deters released to return to work with permanent restrictions of no lifting or carrying of over 30 pounds and no truck driving?
- A. The answer to that is yes.
5. Are Ms. Deters' above permanent restrictions a direct result of her preexisting degenerative process?
- A. The answer to that is yes.

(Resp. Ex. 1.)

By letter dated December 3, 1998, Dr. Hoversten responded to the following questions posed by the employee's attorney:

1. Did the activities associated with truck driving over these many years contribute to Mrs. Deters' June 5, 1998, spinal injury or aggravation?
- A. Certainly, years of driving a truck and years of work will contribute to wearing out and deterioration of the back, and in that manner her work and her involvement in trucking contributed to the wearing out of her back.
2. Did these occupational activities or requirements cause, exacerbate, or accelerate any spinal degenerative processes affecting Mrs. Deters' spine?
- A. Of course, they did. The question is how much, was it significant or not significant. It is likely these deteriorating factors would have occurred with her ordinary, everyday activities anyhow, but it is certainly probable that her work activities contributed to the deterioration of her spine.
3. In your opinion is Mrs. Deters capable of returning to over-the-road truck driving employment?
- A. She could, but she is at high risk for recurrent injury, and I would not recommend it. She is too old, her back is too worn out, and she is too out of shape and too heavy to resume work.
4. If so, what restrictions, limitations, or job modifications

would Mrs. Deters require?

A. I do not think truck driving is in her best interest. I think she should follow a sedentary to light-duty work capacity which does not involve truck driving.

5. What, if any, additional care or treatment would you recommend at this time?

A. In my opinion, drastic weight loss of 100 pounds with elimination of nicotine and a regular exercise program would improve her back as much as one could accomplish. The exercise should involve swimming, walking, or bicycling. Symptomatic management with pain medication and muscle relaxants will also be necessary.

6. If Mrs. Deters is disabled or significantly limited relative to over-the-road truck driving, is she capable of working in other careers and occupations?

A. Certainly, and I have answered that above.

The employer and insurer paid temporary total disability benefits to the employee commencing June 6, 1998. On September 8, 1998, the employer and insurer filed a Notice of Intention to Discontinue Benefits contending the June 1998 injury was a temporary aggravation of a pre-existing condition which resolved and the employee was not entitled to further benefits. In an Order on Discontinuance Under Minn. Stat. § 176.239, a compensation judge permitted the employer and insurer to discontinue temporary total disability benefits effective September 29, 1998. The employee filed an Objection to Discontinuance and the case came on for a *de novo* hearing before a compensation judge at the Office of Administrative Hearings pursuant to Minn. Stat. § 176.238. In Findings and Order served and filed March 23, 1999, the compensation judge found the employee's personal injury of June 5, 1998 was a temporary aggravation of a pre-existing low back condition from which the employee reached maximum medical improvement on August 26, 1998. Accordingly, the compensation judge denied the employee's claim for temporary total disability benefits from September 29, 1998 through the date of hearing. The employee appeals.

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." Min421, 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 employee appeals the compensation judge’s denial of temporary total disability benefits after September 28, 1998, and contends the compensation judge’s Findings and Order are legally erroneous in three respects. First, the employee contends the compensation judge’s factual findings are inherently inconsistent. The compensation judge found the June 5, 1998 injury was a temporary aggravation of a pre-existing low back condition. (Finding 5.) In her Memorandum, the compensation judge referred to the June 1998 injury as a “significant aggravation.” (Memo. at p. 4.) Further, the employee contends the compensation judge found the employee was permanently precluded from truck driving. (Finding 4.) A significant aggravation and a permanent restriction or preclusion from truck driving are, the employee asserts, inconsistent with the finding of a temporary aggravation. Thus, the employee argues, the aggravation must be permanent rather than temporary. We disagree.

First, the issue is not the severity of the aggravation but its permanence. An aggravation can be both significant and temporary. The fact that the June 1998 aggravation was “significant” is not legally inconsistent with the finding that the aggravation was temporary. Further, the compensation judge did not find the employee was permanently precluded from returning to work as a truck driver. Rather, the compensation judge found “Dr. Hoversten recommended that the employee should not return to work as an over [the] road truck driver.” (Finding 4.) The compensation judge made no findings regarding the employee’s restrictions as of the date of hearing. Even assuming the employee was unable to return to truck driving after the June 1998 injury, such fact would not mandate a conclusion that the injury caused the restriction. The employee’s restrictions following the June 1998 injury are but one factor which the compensation judge may consider in deciding whether the injury is temporary or permanent. See Wold v. Olinger Trucking, Inc., slip op. (W.C.C.A. Aug. 29, 1994). The compensation judge’s finding that the June 1998 injury was a temporary aggravation of a pre-existing condition is not inconsistent or legally erroneous.

The compensation judge adopted Dr. Hoversten’s medical opinion that the June 1998 injury was a temporary aggravation of the employee’s pre-existing low back condition, and that the June 1998 injury had resolved by August 26, 1998. The employee acknowledges it is the compensation judge’s function as factfinder to choose between conflicting medical opinion. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Dr. Hoversten’s testimony was, the employee asserts, uncontroverted and the judge may not disregard unopposed expert medical testimony. Flansburg v. Giza Plumbing & Heating, 169 N.W.2d 744, 746, 25 W.C.D. 3, 6 (Minn. 1969). Two reports of Dr. Hoversten, the employee contends, establish the June 1998 injury was a permanent aggravation. In his July 8, 1998 report, the doctor commented:

I think the major cause in this instance is a degenerative process over many years and her age. Certainly smoking plays a part, her weight plays a part, and her work plays a part. She has had multiple injuries over several years coming from work; and even though this is largely a degenerative process, due to the frequency of work injuries and the nature of trucking, one could make a strong point that through cumulative injury, workmen's compensation should be responsible for this, even though it is by and large a degenerative process.

(Pet. Ex. C.) In his December 3, 1998 report, Dr. Hoversten stated:

Years of driving a truck and years of work will contribute to wearing out and deterioration of the back, and in that manner her work and her involvement in trucking contributed to the wearing out of her back . . . The question is how much, was it significant or not significant. It is likely these deteriorating factors would have occurred with her ordinary, everyday activities anyhow, but it is certainly probable that her work activities contributed to the deterioration of her spine.

The employee argues the compensation judge failed to consider these opinions and the judge's decision, therefore, must be reversed. We are not persuaded.

In the July 14 and August 26, 1998 letters to Ms. Graupman, Dr. Hoversten clearly opined the June 5, 1998 injury was a temporary aggravation from which the employee reached maximum medical improvement by August 26, 1998. The portions of Dr. Hoversten's written reports cited by appellant are not necessarily inconsistent with this conclusion. In his July 8 report, the doctor opined the employee's condition was "by and large a degenerative process." (Pet. Ex. C.) The doctor's December 3 report expresses a similar opinion. Dr. Hoversten acknowledged the employee's work as a truck driver over the years may well have contributed to her spinal deterioration. While this opinion might support a claim for a Gillette-type injury or liability based on one or more of her prior injuries, it is not necessarily inconsistent with a temporary aggravation due to the specific work injury on June 5, 1988. In any event, a compensation judge is not obligated to adopt a medical expert's opinion *in toto*. Rather, the compensation judge may adopt and rely on a portion of a doctor's opinion and reject other portions so long as the opinion relied upon has adequate foundation. Klasen v. American Linen Co., 52 W.C.D. 284, 192 (W.C.C.A. 1994). Dr. Hoversten's opinion that the June 1988 injury was a temporary aggravation was adequately founded and the compensation judge properly relied upon it. Nord, 360 N.W.2d 337, 37 W.C.D. 364.

Finally, the employee asserts Dr. Hoversten's opinion cites the employee's age, weight, smoking history and other personal habits as the principal causes of the degenerative

process in her spine. The employee argues the employer must accept the employee with all her pre-existing infirmities and apportionment of disability to a non-work related pre-existing impairment is not allowed, citing Welton v. Fireside Foster Inn, 41 W.C.D. 101, 102 (W.C.C.A. 1988) and Wallace v. Hanson Silo Co. 235 N.W.2d 363, 28 W.C.D. 79 (Minn. 1975). In this case, the employee argues, the compensation judge erroneously allocated the disability resulting from truck driving to pre-existing factors of age, weight and smoking. Such allocation, the employee asserts, contravenes the Welton and Wallace cases and mandate reversal. We reject this argument.

Where an employee's ordinary and usual employment tasks substantially aggravate, accelerate or combine with a pre-existing disease or latent condition to produce a disability, the entire disability is compensable. Vanda v. Minn. Mining & Mfg. Co., 218 N.W.2d 458, 27 W.C.D. 379 (Minn. 1974).⁴ The issue in this case was whether the work injury was a substantial contributing cause of any ensuing disability. The compensation judge concluded the July 1998 injury was a temporary aggravation of the employee's pre-existing condition. If substantial evidence of record supports this finding, it must be affirmed. Hengemuhle, *id.*

On October 25, 1990, Dr. Hoversten stated that x-rays of the employee's lumbar spine showed considerable osteoarthritic changes with mild lipping. (Pet. Ex. C.) A CT scan in March 1996 showed a mild amount of retrolisthesis at L4-5. (Pet. Ex. G.) A post myelogram CT scan in March 1996 showed early grade I posterior spondylolisthesis at L4-5, without stenosis. (Pet. Ex. F.) When the employee saw Dr. Hoversten on July 8, 1998, she reported a history of recurrent low back pain over the past seven to eight years with a flare-up while lifting at work. The doctor reviewed x-rays which showed severe degenerative disc disease at L4-5 with retrolisthesis of 4-5 mm. and significant foraminal stenosis at L4-5 due to spurring and disc change. A second CT scan in 1998 showed a mild bulging disc at L4-5 with mild central canal stenosis which had progressed slightly since the prior examination. (Pet. Ex. F.) The medical records clearly document pre-existing degenerative disc disease. Dr. Hoversten acknowledged the employee's work was a contributing factor to her low back problems. Dr. Hoversten concluded, however, the major cause of the employee's inability to work was a degenerative process over the years and her age. Accordingly, the doctor opined the July 1998 injury was a temporary aggravation only. (Pet. Ex. C.) Whether an aggravation is a permanent or temporary condition is primarily a question of fact. Wold v. Olinger Trucking, Inc., *id.* Substantial evidence of record supports the compensation judge's conclusion that the July 1998 injury was a temporary aggravation. The decision of the compensation judge is affirmed.

⁴ The Vanda principle has been statutorily changed in cases involving apportionment of permanent partial disability. See Minn. Stat. § 176.101, subd. 4a (1992).