

DEANNA G. HENNES, Employee, v. DECATHLON ATHLETIC CLUB and AM. CAS./CNA INS. CO., Employer-Insurer/Appellants, and DECATHLON ATHLETIC CLUB and AM. COMP. INS./RTW., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 3, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - TEMPORARY AGGRAVATION. Substantial evidence supports the compensation judge's findings that the employee's 1995 injury was a temporary aggravation of her pre-existing lumbar spine condition and that the employee's 1997 injury caused her permanent lumbar spine injury.

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's medical records and expert medical opinion, supports the compensation judge's finding that the employee sustained a seven percent permanent partial disability under Minn. R. 5223.0390, subp. 3C(1).

Affirmed.

Determined by: Rykken, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Danny P. Kelly

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer, American Casualty/CNA Insurance Company, appeal from the compensation judge's award of permanent partial disability benefits and payment of medical expenses. We affirm.

BACKGROUND

This claim arises from two work-related injuries Deanna Hennes, the employee sustained while employed by Decathlon Athletic Club. The employee injured her cervical and lumbar spine on May 22, 1995. On that date, she was working as the dining room manager, and was assisting with cleaning the kitchen. She reached up to remove a large plastic container from an overhead shelf. The bin, which she assumed contained cloth napkins, was filled with silverware rolled inside napkins, and weighed an estimated eighty pounds. As she lifted the container, it fell forward, hitting her in her neck and shoulder and throwing her against the wall. The weight of the container also caused the employee to twist at her waist area. After this

incident, the employee experienced stiffness in her neck and left shoulder, and also noticed symptoms in her low back area. American Compensation Insurance/RTW, insurer on this date, admitted primary liability solely for a cervical spine injury. The employee received initial medical treatment from Dr. David Zanick, who prescribed physical therapy. (Joint Ex. 1.) The employee received physical therapy for both her neck and back symptoms while treating at Nova Care and Physicians Neck and Back Clinic. (Joint Exs. 2 and 4.)

Dr. Zanick referred the employee to Dr. Richard Strand, for an orthopedic consultation. As of her examination with Dr. Strand on August 29, 1995, her symptoms in her neck and low back persisted. Dr. Strand noted decreased range of motion in her neck and muscle spasms in her trapezius and paracervical muscles. Lumbar x-rays on that date were normal. Cervical spine x-rays detected a degenerative disc at C5-6 and multiple level spondylosis. (Joint Ex. 5.) At Dr. Strand's recommendation, the employee underwent an MRI of her cervical spine on September 1, 1995, which indicated severe degenerative disc disease at the C5-6 level. The MRI also indicated marked disc space narrowing, bulging of the disc annulus, and osteophitic spurring which resulted in spinal stenosis. (Joint Ex. 3.)

The employee also underwent an orthopedic consultation with Dr. John Sherman on October 2, 1995, at the request of Dr. Strand. Dr. Sherman determined that as a result of her May 22, 1995 injury, the employee most likely aggravated some underlying degenerative changes to her cervical spine, and recommended exercises for improving range of motion. (Joint Ex. 5.) The employee's neck symptoms persisted and at the time of a neurological examination by Dr. Hurr on April 9, 1996, the employee continued to note headaches, neck pain, sleep disturbance due to neck pain, aching in her left arm and aching in her low back. (Joint Ex. 6.)

The employee sustained an additional injury on July 22, 1997. On that date, she was pushing a food cart for a room service delivery. She walked in a hall where remodeling work was being done, and stumbled on loose carpeting. She struck her face on the edge of the cart and landed on both knees. At an examination with Dr. Zanick on July 23, 1997, the employee reported symptoms in her knee, left low back and the side of her jaw. Dr. Zanick diagnosed left knee strain and contusion and left sacroiliac joint strain. American Casualty/CNA Insurance Company, insurer at the time of this injury, admitted primary liability for a left knee and low back injury. Dr. Zanick referred the employee to Nova Care for additional physical therapy. (Joint Ex. 1.) The employee was again referred to Dr. Richard Strand, who examined her on August 21, 1997. He diagnosed a knee strain and low back strain, and recommended cortisone injections for both her low back and left knee; the employee underwent those injections on August 26, 1997. The employee's symptoms in her left knee persisted. She was re-examined by Dr. Strand on April 2, 1998, and received an additional cortisone injection in her left knee. (Joint Ex. 5.)

X-rays of the lumbar spine taken on February 19, 1998, indicated degenerative disc disease at the L5-S1 level. An MRI scan of the left knee, taken on February 20, 1998, revealed osteoarthritis, chondromalacia and partial tearing of the medial meniscus. (Joint Ex. 5.)

On September 29, 1998, the employee underwent an independent medical

examination with Dr. Paul Wicklund. He diagnosed degenerative disc disease in both the employee's cervical and lumbar spine. In Dr. Wicklund's opinion, the May 22, 1995 injury represented a permanent aggravation of the employee's underlying multilevel degenerative disc disease in her cervical spine. He determined that the injury of July 22, 1997 further aggravated the employee's neck and arm symptoms, and that the 1997 injury also caused the employee's left medial meniscus tear in her left knee. Dr. Wicklund did not assign any permanent disability as a result of the employee's low back condition, and in fact indicated that the low back symptoms were temporary in nature. (Joint Ex. 7.)

On December 10, 1998, the employee underwent an independent medical examination with Dr. Peter Daly. He determined that the employee's neck and left arm symptoms were caused entirely by her May 22, 1995 injury, and assigned seven percent permanent partial disability to the body as a whole, relative to the cervical spine condition. Dr. Daly also determined that the employee's July 22, 1997 injury represented merely a temporary aggravation of the employee's low back condition. He diagnosed lumbar degenerative disc disease but related that to the employee's pre-existing condition and not to her work-related injuries. (Joint Ex. 8.) Both Dr. Wicklund and Dr. Daly assigned physical work restrictions for the employee, relative to her neck and low back conditions. As to the employee's left knee injury, Dr. Daly determined that the July 22, 1997 injury temporarily aggravated the left knee osteoarthritis condition.

Dr. Wicklund determined that the employee had sustained seven percent permanent partial disability to the body as a whole, relative to her cervical spine condition. He apportioned liability for that permanency between the May 1995 and July 1997 incidents, assigning 60 percent liability to the 1995 injury and 40 percent to the July 1997 injury. Dr. Wicklund determined that the employee had sustained no permanent partial disability as a result of her low back condition. (Joint Ex. 7.)

The employee filed a claim petition on April 21, 1998, alleging entitlement to payment for medical expenses related to the employee's July 1997 injury. The employee later amended her claim petition to include the injury of May 22, 1995, and to include claims for seven percent permanent partial disability of the whole body based upon the employee's cervical injury, and seven percent permanent partial disability of the whole body based upon the employee's lumbar spine injury.

At the time of the hearing held on March 23, 1999, the employee was still noting symptoms in her neck and left arm, as well as in her low back and left knee. The employee testified that her neck and arm symptoms have persisted since May 1995. Her low back symptoms subsided following her May 1995 injury, but have persisted since her July 1997 injury.

Following the hearing on March 23, 1999, the compensation judge determined that the employee sustained a cervical spine injury on May 22, 1995, which resulted in seven percent permanent partial disability of the whole body, and that this injury also resulted in a temporary aggravation of the employee's pre-existing lumbar spine condition. The judge also determined that as a result of the employee's injury on July 22, 1997, the employee sustained seven percent

permanent partial disability of the whole body relative to the employee's lumbar spine, that she sustained a left knee injury on July 22, 1997, but that she sustained no cervical spine injury on that date. Accordingly, the compensation judge awarded portions of the employee's medical expense claim related to her 1997 injury, and denied portions as not being causally related to that injury.

The employer and its insurer at the time of the 1997 injury, American Casualty/CNA Insurance Company, have appealed from the compensation judge's award of permanency benefits relative to the lumbar spine, and have appealed from the award for payment of low back treatment the employee underwent at Park Nicollet Clinic and Twin Cities Orthopaedics. The employer and insurers have not appealed from the judge's award of permanency benefits relative to the employee's cervical spine, nor have they appealed from the judge's award for payment of medical treatment to the employee's left knee.

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 (1998). 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

Nature of Employee's Injuries

On appeal is the compensation judge's determination that the employee's May 22, 1995 injury resulted in a temporary aggravation of her pre-existing lumbar spine condition (Finding 10), and that the employee's July 22, 1997 injury resulted in a permanent injury to her lumbar spine (Findings 17 and 19). The compensation judge based his determination of the temporary nature of the 1995 injury on the medical reports of Dr. Hurr and Dr. Strand. As of the employee's August 29, 1995 orthopedic examination by Dr. Strand, the employee had normal range of motion in her lumbar spine, negative results on a straight leg raising test, and a normal neurological examination. At her April 9, 1996 neurological examination with Dr. Hurr, the employee reported that "the achiness in the low back area comes and goes, but [the employee] has no lower extremity symptoms at this time." (Joint Ex. 6.)

As to the employee's July 1997 injury, the employee testified that her low back symptoms had persisted since her July 1997 injury, and that is verified in the history she provided to various medical providers following her injury, including Dr. Zanick, Dr. Strand, and Nova Care Physical Therapy.

The employer and CNA Insurance Company correctly point out that the employee sustained previous injuries to her low back, as early as January 1984. (Resp. CNA Exs. 2 and 3.) The employee testified that she continued to notice some low back symptoms "over the years" (T. 63), but that she noted an onset of low back pain after her May 1995 injury (T. 66). She also testified that her low back problems continued periodically between her May 1995 and July 1997 injuries, and that her low back symptoms were located in the same area before and after her 1997 injury (T. 81). We recognize that the employee's low back symptoms persisted, at least periodically, following her 1995 injury, and that discrepancies exist in the employee's testimony *vis-a-vis* her post-injury symptoms. Her medical records, however, indicate that her medical treatment for her low back discontinued prior to her 1997 injury, and then resumed after her 1997 injury.

Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). In this case, it was not unreasonable for the compensation judge to determine that the employee's 1995 injury represented a temporary aggravation of her pre-existing condition, and that the employee sustained a permanent injury to her lumbar spine as a result of her July 22, 1997 injury, and we affirm these findings.

Permanent Partial Disability

On appeal is the compensation judge's award of seven percent permanent partial disability of the body as a whole, relative to the employee's lumbar spine. The judge determined that as a result of the employee's July 22, 1997 work-related injury, she sustained a permanent injury of her lumbar spine (Findings 17 and 19), resulting in a permanency rating of 7 percent permanent partial disability of the body as a whole. The compensation judge relied upon the opinion of the employee's treating physician, Dr. Zanick, outlined in his report of May 13, 1998. In that report, Dr. Zanick stated as follows:

With reference to the low back, Ms. Hennes has plain x-ray evidence for L5-S1 degenerative disc disease and objective findings including paralumbar muscle spasm and restricted lumbar flexibility. According to the Permanent Partial Disability Schedule 5223.0390, subp. 3.C(1) this constitutes a seven percent impairment.

The portion of the permanency schedule assigned by Dr. Zanick reads as follows:

Subpart 3. Lumbar Pain Syndrome.

C. Symptoms of pain or stiffness in the region of the lumbar spine, substantiated by persistent objective clinical findings, that is, involuntary muscle tightness in the paralumbar muscles or decreased range of motion in the lumbar spine, and with any radiographic, myelographic, CT scan or MRI scan abnormality not specifically addressed elsewhere in this part:

(1) Single vertebral level, 7 percent.

Minn. R. 5223.0390, subp. 3C(1).

A compensation judge is responsible to determine under which rating category an employee's disability falls, based on all relevant evidence, including objective medical findings. Jensen v. Best Temporaries, 46 W.C.D. 498, 500-01 (W.C.C.A. 1992). Although permanency ratings offered by physicians may assist the compensation judge in making this determination, these opinions are not binding. Erickson by Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 43, 35 W.C.D. 523, 528 (Minn. 1983). In order to receive a permanent partial disability rating, the employee must prove each element of the scheduled disability. Knudson v. Twin City Hide, Inc., 40 W.C.D. 336, 338 (W.C.C.A. 1987) (citing Davies v. Marriott-Host Int'l, 39 W.C.D. 631, 633 (W.C.C.A. 1987)).

The employee's medical records provide evidence of the requisite factors in Minn. R. 5223.0390, subp. 3C(1). The employee's low back symptoms and objective findings are well documented in her medical records. Following her 1997 injury, the employee reported her low back symptoms to Dr. Zanick. Dr. Zanick's chart note of July 23, 1997, written the day after the injury, reflects the employee's history of tenderness over the left sacroiliac joint with restricted lumbar flexibility, some spasm in the paralumbar musculature and tenderness at the L5-S1 interspace. Dr. Zanick diagnosed a left sacroiliac joint strain on that date. According to the physical therapist's chart note of July 28, 1997 from Nova Care, the employee continued to experience symptoms in her left lower back with radicular pain into her left leg. Her symptoms were aggravated with sitting, transitional movements from sitting to standing, bending forward, twisting, pushing and sleeping. Those symptoms persisted throughout the eight sessions of physical therapy the employee received from July through August 1997. In fact, according to the discharge summary from Nova Care dated September 8, 1997, the employee reported no significant changes or improvement in her low back symptoms by that date.

Dr. Strand's report of August 21, 1997, reflects that the employee's left low back pain persisted, with radicular symptoms extending into her left leg. Dr. Strand diagnosed a low back strain and eventually provided the employee with cortisone injections to try to relieve her low back symptoms.

We find that substantial evidence of record exists to support the compensation judge's award of permanency benefits relative to the employee's lumbar spine; accordingly we affirm.

Payment of Medical Expenses

The compensation judge determined that certain medical bills incurred by the employee, for treatment for her lumbar spine, were reasonable and necessary to cure or relieve the effects of the employee's July 22, 1997 injury. The employer and American Casualty/CNA Insurance Company originally appealed from these findings and related orders (Findings 23 and 27; Orders 6 and 7), but did not specifically address the issue of liability for medical payments in their brief. Pursuant to Minn. R. 9800.0900, subp. 1, "issues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by this court." Therefore, no further decision on this issue will be made by this court.