TIMOTHY HOFFMAN, Employee, v. BUS. ESSENTIALS and STATE FUND MUT. INS. CO., Employer-Insurer/Appellants, and EMPI, INC., and NW. ANESTHESIA, P.A., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 10, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - PERMANENT AGGRAVATION. Substantial evidence, including medical records, the employee's testimony, and expert medical opinion, support the compensation judge's finding that the employee's May 1994 injury was a permanent aggravation of the employee's underlying condition.

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including medical evidence, supports the compensation judge's 5% permanent partial disability rating.

APPORTIONMENT - PERMANENT PARTIAL DISABILITY. Substantial evidence supports the compensation judge's finding that the employee had a preexisting condition, clearly evidenced in medical records, apportioned at 2.5% permanent partial disability rate.

Affirmed in part and vacated in part.

Determined by: Rykken, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Gary P. Mesna

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal from the compensation judge's determination that the employee sustained a permanent injury on May 11, 1994, and from the compensation judge's award of permanent partial disability benefits and payment of medical expenses. We affirm in part and vacate in part.

BACKGROUND

On January 18, 1993, Timothy Hoffman (employee) was employed by Business Essentials (employer), which was insured on that date by Sentry Insurance Company. On Monday, January 18, 1993, while at work, the employee leaned over to pick up a pen from the floor and noted an onset of low back pain. He reported this incident to his employer, and also advised his employer that he had performed snow shoveling during the past weekend. The

employee testified that during the weekend of January 16-17, 1993, he had used a snow rake to pull snow off a house roof, shoveled snow and used a snowblower. (T. 29-30.) His arms were sore, but he did not notice any low back pain until January 18, 1993, after bending over to pick up a pen off the floor. (T. 31, 64.)

The employee sought medical treatment on January 18, from Dr. Duane Orn, Northport Medical Center. He described to Dr. Orn the heavy snow shoveling he had done at home during the past two days. He also advised Dr. Orn that the onset of pain occurred at work on the morning of January 18. (Resp. Ex. 6, T. 64.)

The employer and Sentry Insurance Company denied primary liability for any work-related injury on January 18, 1993 and paid no benefits or medical expenses immediately following this injury, alleging that the employee's injury resulted from his snow shoveling. The employee received follow-up medical treatment through Northport Medical Center, and was also referred to Dr. Irfan Altafullah, Minneapolis Clinic of Neurology. On March 26, 1993, Dr. Altafullah examined the employee, diagnosed a soft tissue injury at the thoracolumbar junction, and recommended physical therapy. Dr. Altafullah also assigned a 30-pound lifting restriction, which he later rescinded after a follow-up medical examination on April 23, 1993. At his July 9, 1993, appointment with Dr. Altafullah, the employee reported ongoing pain. At that point, the employee continued to experience pain in his mid-back towards his left side, and noticed an area of numbness in his mid-back, approximately the diameter of a softball. (Resp. Ex. 2.) Dr. Altafullah recommended an EMG of the upper extremities, and an MRI scan of the employee's thoracic spine. The EMG was normal; the MRI detected a degenerative disc at the T10-11 level, with a slight protrusion of the disc eccentric to the left. (Resp. Ex. 3.)

The employee's last medical appointment in 1993 was on July 27, 1993, with Dr. Altafullah. On that date, the employee consulted with Dr. Altafullah regarding the results of the EMG and MRI scan. Dr. Altafullah recommended against any further active medical intervention, and instead recommended a program of regular exercise for the employee.

On May 11, 1994, the employee sustained an injury to his mid back while continuing his work with the employer. On that date, the employer was insured for workers' compensation liability by State Fund Mutual Insurance Company (insurer). The employee sustained an injury while reaching overhead to pull a tote bin down off the top of stacked desks. This tote weighed approximately 40 to 50 pounds, according to the employee's estimate. As the employee reached up to lift the tote bin, he turned or twisted his body to move the tote bin away from the desks. As he lowered the tote bin to the ground the employee noted a sharp pain in his back. He completed his work shift, reported the injury and returned home. (T. 41-43.) According to the employee's hearing testimony, the intensity of pain noted after this incident was worse than the pain noted following the incident in January 1993. (T. 71.) Following his May 1994 injury, the employee received additional medical treatment from Northport Medical Center. His treating physician, Dr. Duane Orn, initially assigned physical work restrictions of no lifting or carrying over 25 pounds, and prescribed anti-inflammatory medication. The employee continued working within these restrictions. As of June 3, 1994, the employee was released to return to

work without restrictions. By that point, however, the employee still reported to Dr. Orn that he noted a residual numbness with episodic itch in a softball-sized area just below his left scapula, the same symptoms he experienced after his prior (1993) injury. (Resp. Ex. 6.)

On June 28, 1994, at the referral of Dr. Orn, the employee underwent a neurological examination with Dr. David Danoff, for a surgical consultation. Dr. Danoff recommended against thoracic surgery. (Resp. Ex. 4.) The employee continued to work for the employer, working without assigned physical work restrictions, but continuing to consult with Dr. Orn for episodic thoracic symptoms. The employee's last medical visit to Dr. Orn during this period was on October 13, 1994, at which time he reported that he was asymptomatic. (Resp. Ex. 6.)

The employee did not treat for his thoracic symptoms between November 1994 through March 1995. The employee consulted Dr. Steven Lebow, Noran Neurological Clinic, on April 26, 1995, at the referral of his attorney. At that time, Dr. Lebow did not recommend any physical work restrictions for the employee. On that date, Dr. Lebow stated that the employee was at maximum medical improvement, and assigned a permanency rating of 5% permanent partial disability to the body as a whole. Dr. Lebow initially recommended a thoracic epidural injection; the employee underwent a series of four injections in May and June 1995, which provided temporary relief to him. The employee again consulted Dr. Lebow on August 11, 1995, reporting that he had not received lasting relief with the epidural steroid injections. Dr. Lebow recommended that a physical therapist review the employee's exercise program in order to make necessary revisions. Dr. Lebow also prescribed pain medication. By September 13, 1995, the employee again consulted Dr. Lebow, and reported continued left-sided radicular pain, and discomfort at the T9-10 level. Dr. Lebow recommended a TENS unit, which the employee utilized, but which provided no relief to him. (Pet. Ex. B.)

On November 14, 1995, the employee again consulted Dr. Lebow, due to increasing symptoms. The employee noted increased pain in his mid back, after bending down to stop a small child from running into him. The employee again reported numbness and tingling in a softball-sized area right below his left scapula, the same as he had reported earlier. To treat this flare-up of symptoms, Dr. Lebow recommended additional physical therapy, nerve blocks at the T10-11 level, and an ongoing exercise program. Dr. Lebow recommended against surgery but later referred the employee to Dr. Ensor Transfeldt for additional consultation. Dr. Transfeldt examined the employee on May 17, 1996, and recommended continued conservative therapy. Dr. Transfeldt suggested that surgery may be appropriate in the future, depending upon the development of the employee's pain. (Resp. Ex. 2.)

The employee again consulted Dr. Lebow on June 26, 1996, advising that the acupuncture therapy had not decreased his pain. He continued to note left thoracic pain with some radicular component. Dr. Lebow stated that it would be reasonable for the employee to proceed with considering thoracoscopic surgery if Dr. Transfeldt believed that it was indicated. (Pet. Ex. B.)

By February 1996, the employee started a new position with another employer,

Concurrent Plastics, working in shipping and receiving. The employee testified that the lifting tasks in this new position were lighter than those he was required to perform in his previous position for the employer, Business Essentials, and that he was able to sit while completing paperwork. (T. 54.) The employee later worked for another employer, Fleming, in inventory control and customer service, a light-duty job according to his testimony. The employee's back pain continued to remain the same, and was aggravated by prolonged sitting. (T. 56-57.) The employee testified that by April 1998, he was assigned to work in a freezer area at Fleming, from which Dr. Lebow restricted him due to his back condition. Following a resulting layoff from this position, the employee commenced work with Miller Machine.

On December 19, 1995, the employee filed a claim petition alleging work injuries on January 18, 1993 and May 11, 1994. He claimed entitlement to payment of permanent partial disability benefits based upon five percent permanent partial disability to the body as a whole, due to his thoracic spine, as well as payment for various medical expenses. The only insurer listed on that claim petition was State Fund Mutual Insurance Company, the insurer at the time of the May 11, 1994 injury. On April 9, 1996, the employee amended his claim petition to include Sentry Insurance Company, insurer at the time of the alleged January 18, 1993 work-related injury. The employee later amended his claim to include temporary partial disability benefits claimed from January 10, 1996 through February 21, 1998.

Prior to the hearing, the employee entered into a settlement with Business Essentials and Sentry Insurance Company, with respect to the alleged January 18, 1993 work injury. Those parties entered into a Pierringer release, as noted in the Stipulation for Settlement and the Award on Stipulation, served and filed on March 29, 1999. (Judgement Roll.) See Pierringer v. Hoger, 124 N.W.2d 106 (Wisc. 1963) and Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978). That settlement was made on a full, final and complete basis, closing out all claims, with the employer and Sentry Insurance Company maintaining its denial of primary liability for the claimed 1993 injury. As a result of this settlement agreement, the employee's claims as against Business Essentials/Sentry Insurance Company were dismissed, and that insurer is not party to this appeal.[1]

[1] The settlement agreement was termed by the parties to be a "Pierringer" release or settlement, designated to have the same effect as releases, settlements and/or agreements used in the cases of Pierringer v. Hoger, 124 N.W.2d 106 (Wisc. 1963) and Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978). The employee settled with Sentry Insurance Company, reserving his cause of action against State Fund Mutual Insurance Company. The employee also agreed to indemnify Sentry against any claims for contribution or reimbursement that may be made by any party, such as State Fund Mutual Insurance Company, who is adjudged or determined liable for workers' compensation benefits. We recognize the potential effect that a Pierringer release could have had on State Fund's future claims for reimbursement against Sentry Insurance, and that those claims could have remained valid in spite of the language contained in the settlement agreement. See Wolk v. Alliant Tech Systems, slip op. (W.C.C.A. July 18, 1997). Although no claims for reimbursement were raised by State Fund Mutual Insurance against Sentry Insurance, such claims may have arisen in the future, and may have been deemed valid under the principles set forth in Wolk. Herein, since no such claims are addressed on appeal, and since the compensation judge

At the hearing held on February 24, 1999, numerous claims against Business Essentials and State Fund Mutual Insurance Company were addressed, including entitlement to payment of temporary partial disability benefits, permanent partial disability benefits and medical expenses, as well the issues of whether the employee's May 11, 1994 injury was temporary or permanent in nature, and therefore whether the insurer on that date is liable for payment of any portion of the claimed benefits; whether the employee sustained a superceding, intervening injury in November 1995; and whether the employee's treatment with Dr. Steven Lebow represented an unauthorized change of treating physician.

In the Findings and Order filed on March 15, 1999, the compensation judge found, in part, that the employee's January 18, 1993 injury did not arise out of and in the course of his employment, and that the employee's injury of May 11, 1994, resulted in a permanent aggravation of the employee's underlying condition. The compensation judge determined that the employee sustained a five percent permanent partial disability to the body as a whole, but that 2.5 percent of that rating could be apportioned pursuant to Minn. Stat. § 176.101, subd. 4a. The compensation judge denied the employee's claim for payment of temporary partial disability benefits, determining that the employee did not sustain a reduced earning capacity as a result of his 1994 work injury. The judge ordered medical expenses payable by the employer and insurer at the time of the 1994 injury, and approved the change in treating physician to Dr. Steven Lebow. The employer and State Fund Mutual Insurance Company 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 (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

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determined that the 1993 injury was not work-related, this court need not consider in what circumstances Sentry, the settling insurer, may have been liable for reimbursement or contribution to State Fund Insurance Company.

January 18, 1993 Injury

The employer and insurer appealed from the compensation judge's finding that the employee's claimed injury of January 18, 1993 did not arise out of and in the course of his employment (Finding No. 2), but did not specifically address the issue of whether that injury was work-related in their appellate 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 the court." Therefore, no further decision on this issue will be made by this court.[2]

May 11, 1994 Injury

The employer and insurer contend that the compensation judge erred in finding that the employee had sustained a permanent injury as a result of his May 11, 1994 injury. The compensation judge determined that the 1994 work-related injury resulted in a permanent aggravation of the employee's underlying condition. (Finding 4.) In so doing, the judge relied on both the employee's testimony at hearing and his contemporaneous medical records. The employee testified that between August 1993 and his injury on May 11, 1994, he "was feeling okay doing [his] job. Everything seemed to be fine." (T. 37.) The employee experienced some residual symptoms during this period of time, but none that required follow-up treatment, according to his testimony, and he was able to continue performing his job duties. The employee testified that following his May 1994 injury, his symptoms returned with a greater degree of intensity. His symptoms later subsided, but now persist on a daily basis as opposed to a weekly basis prior to the May 1994 injury. The contemporaneous medical records also indicate that the employee's symptoms persisted after his May 11, 1994 injury and that periodic medical treatment has continued through at least January 1999.

The employer and insurer argue that the employee's testimony concerning his symptoms was inconsistent and therefore unreliable. Whereas there are some discrepancies between the employee's deposition testimony and hearing testimony comparing his pre-May 11, 1994 and post-May 11, 1994 symptoms, the overall record contains substantial evidence to support the compensation judge's determination that the May 11, 1994 injury resulted in a permanent aggravation of the employee's underlying condition. That record consists of both the employee's medical records and his testimony. A fact finder may generally accept all or only part of any witness's testimony. See City of Minnetonka v. Carlson, 298 N.W.2d 763, 767 (Minn. 1980), as cited in Proffit v. Minnesota Harvest Apple Orchard, 48 W.C.D. 215, 219-20 (W.C.C.A. 1992) and Johnson v. L.S. Black Constr., Inc., slip. op. at 4 (W.C.C.A. Aug. 18, 1994). The

[2] We believe that whether the 1993 injury was work-related was not an issue for the judge to resolve, since State Fund had not asserted any claims for contribution or reimbursement as against Sentry Insurance. Since the parties have waived the issue of the work-related nature of the 1993 injury, however, this court need not address this issue, nor determine whether the compensation judge properly issued a finding concerning the 1993 injury.

compensation judge reasonably relied on certain portions of the employee's testimony. Such reliance resulted in factual determinations, supported by the medical evidence, which a reasonable mind might accept as adequate. Hengemuhle v. Long Prairie Jaycees, 385 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984.)

The compensation judge also relied on Dr. Steven Lebow's opinion, outlined in his report of April 26, 1995, that the employee sustained a permanent aggravation of his chronic thoracic problems on May 11, 1994. (Pet. Ex. B.) The compensation judge rejected the opinion of Dr. Thomas Litman, independent medical examiner, who determined that the employee sustained a temporary aggravation of his mid-back condition, lasting for 60 days, as a result of his injury on May 11, 1994. (Resp. Ex. 5.) A trier of fact's choice between expert opinions is generally upheld unless the facts assumed by the experts are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

As to the 1994 injury date, the employee's testimony, medical records and Dr. Lebow's opinions provide substantial evidence to support the compensation judge's determination that the 1994 injury was a permanent aggravation of the employee's underlying condition. For these reasons, we believe there is substantial evidence of record to support the compensation judge's finding that the work-related injury of May 11, 1994 resulted in a permanent aggravation of the employee's underlying condition, and we affirm this finding.

Permanent Partial Disability

The employer and insurer appeal from the compensation judge's determination that the employee sustained a five percent permanent partial disability to the body as a whole, pursuant to Minn. R. 5223.0380, subp. 4.D.(1). That permanency rating was assigned by Dr. Lebow, in his report dated April 26, 1995. (Pet. Ex. B.) One requisite condition for this permanency rating is the presence of either chronic radicular pain or radicular paresthesia persistent despite treatment. The particular components of this permanency rating are noted by Dr. Lebow and also in the medical report of Dr. Ensor Transfeldt, dated May 17, 1996, in which Dr. Transfeldt refers to "thoracic disc herniation with severe lower thoracic pain in keeping with the disc degeneration and disc herniation. There does not appear to be any significant spinal cord involvement although he does appear to have some possible radicular involvement with some dermatomal sensory change." (Resp. Ex. 2.) The compensation judge determined, based upon the medical records, that the required elements were present to entitle the employee to the five percent rating. A compensation judge's finding regarding the rating of permanent partial disability is one of ultimate fact and must be affirmed if it is supported by substantial evidence. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 174, 39 W.C.D. 771, 778 (Minn. 1987). Based upon the medical evidence of record, therefore, the judge reasonably found that the employee has a five percent permanent partial disability to the body as a whole, and we affirm that finding.

Statutory Apportionment of Permanent Partial Disability

The compensation judge apportioned a portion of the employee's permanency

rating, pursuant to Minn. Stat. § 176.101, subd. 4a, based upon the employee's pre-existing impairment prior to his injury on May 11, 1994. The compensation judge determined that the pre-existing impairment was 2.5 percent permanent partial disability to the body as a whole, pursuant to Minn. R. 5223.0380, subp. 3.B. The employee did not appeal from this finding. The employer and insurer argue that the compensation judge erred in apportioning only 2.5 percent permanent partial disability to the body as a whole, asserting that all or at least three percent of the permanent partial disability rating assigned to the employee is due solely to the employee's pre-existing condition.

Apportionment of a permanent partial disability and therefore a reduction in payment of permanency benefits is allowed by the Minnesota Workers' Compensation statute in very specific circumstances. Minn. Stat. § 176.101, subd. 4a(a), provides: "An apportionment of a permanent partial disability under this subdivision shall be made only if the preexisting disability is clearly evidenced in a medical report or record made prior to the current personal injury." See generally Giese v. Green Giant Co., 426 N.W.2d 879, 881, 41 W.C.D. 286, 289 (Minn. 1988). Additionally, in order to qualify for apportionment under subdivision 4a, prior medical evidence of disability must be sufficient to independently permit the preexisting disability to be rated. Spies v. Gateway Glass, 47 W.C.D. 143, 146 (W.C.C.A. 1992) (citing Sass v. Blachowski Truck Line, Inc., 42 W.C.D. 640, 644 (W.C.C.A. 1989)), summarily aff'd (Minn. Aug. 10, 1992); see Minn. R. 5223.0250 (A) (rating of preexisting impairments). A previous assignment of a permanency rating is not required by the statute; what is required is that the pre-existing disability be clearly evidenced in medical records generated prior to the work injury at issue. Hansen v. Kuppenheimer Men's Clothiers, 46 W.C.D. 359 (W.C.C.A. 1991), summarily aff'd (Minn. Mar. 31, 1992).

In this case, the employee's pre-May 1994 medical records do clearly evidence the symptoms outlined Minn. R. 5223.0380, subp. 3.B. (see Dr. Altafullah's reports of March 26 and July 9, 1993). (Resp. Ex. 2.) The employee's medical records also outline the employee's loss of use or impairment function resulting from his pre-existing condition, which predated the employee's May 11, 1994 injury. Substantial evidence of record therefore exists to support the compensation judge's statutory apportionment of 2.5 percent permanent partial disability to the body as a whole to the employee's pre-existing condition as well as the corresponding determination of and assignment of 2.5 percent permanent partial disability to the body as a whole as related to the 1994 work injury. We therefore affirm the compensation judge's finding in that regard.

Payment of Medical Expenses

The compensation judge determined that the employee's medical bills incurred following his May 11, 1994 injury are compensable, as they related to treatment that was causally related to that 1994 work injury. The employer and insurer originally appealed from the findings and order related to payment for medical expenses, (Findings 11, 13 and 14; Order 2), 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 the court."[3] Therefore, no further decision on this issue will be made by this court.

[3] We note, however, that at issue was whether the employee's 1994 injury represented a substantial contributing cause of the employee's need for the disputed medical treatment, in spite of the employee's pre-existing permanency and condition. An employee need not prove that his employment was the sole cause, only a substantial contributing cause, of the disability for which benefits are sought. Swanson v. Medtronics, Inc., 443 N.W.2d 534, 536, 42 W.C.D. 91, 94-95 (Minn. 1989). In this case, substantial evidence of record existed to support the compensation judge's findings that the 1994 injury represented a substantial contributing cause of the employee's need for medical care following that injury.