HAROLD L. JOHNSON, Employee, v. FERRELLGAS and RELIANCE NAT'L/LINDSEY MORDEN CLAIMS SERVS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 12, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - MATTERS AT ISSUE; CAUSATION - PERMANENT AGGRAVATION. Substantial evidence, including medical records, lay testimony, and expert medical opinion, supported the compensation judge's finding that the employee's August 5, 1996 work injury caused or contributed to a permanent aggravation of the employee's low back stenosis condition.

Affirmed.

Determined by Wilson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Ronald E. Erickson

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's finding that the employee's August 5, 1996 injury was a substantial contributing cause of his lumbar back problems. We affirm.

BACKGROUND

The employee, Harold L. Johnson, was born in October 1925 and is 73 years old. The employee worked for the Becker County Highway Department for more than ten years, then as a route sales and meat delivery driver for about 24 years, until 1982. He next worked as a farm laborer until 1986, when he sustained a work-related injury to his right wrist. In 1987, at age 62, the employee retired and drew Social Security retirement benefits. However, in March 1993 the employee returned to the labor force in order to finance payment of his wife's medical expenses, accepting work with the employer, Ferrellgas, a propane gas company. His work duties for Ferrellgas included delivering and setting up propane tanks and painting and maintaining tanks, as well as assisting with the unloading of tanks from rail cars. (T. 10-19.)

On August 5, 1996 the employee sustained an admitted work injury at Ferrellgas when a 500-600 pound propane tank he and another employee were moving slipped and he attempted to stop or hold it. The employee experienced an immediate onset of pain below the

belt line in the middle of the back and developed pain down into the buttocks and legs within the next two to three days. The employee sought medical attention for his low back pain at the Dakota Clinic on August 26, 1996, where he was seen by a family practitioner, Dr. Abigail Ring. Dr. Ring diagnosed an acute low back strain, restricted the employee from lifting over ten pounds, limited activities such as twisting, climbing and kneeling and prescribed Naprelan. (T. 20-23; Exh. A: 8/26/96.)

The employee's back pain did not resolve over the next several months, despite eight sessions of physical therapy. He also developed radiation of his back pain into the groin and upper right thigh. Dr. Ring referred the employee to Dr. W. David Ferraraccio, for an orthopedic consultation. Dr. Ferraraccio saw the employee on November 13, 1996 and diagnosed degenerative disc disease at L4-5 and lumbar osteoarthritis. He recommended that the employee undergo a CT scan to rule out disc herniation. A lumbar CT scan on January 10, 1997 revealed moderate spinal stenosis at the L3-4 and L4-5 levels. The employee underwent two epidural steroid injections in March 1997 on the recommendation of Dr. Ferraraccio but experienced no relief. (Exh. A: 9/9/96 - 4/8/97; Exh. 1.)

On April 22, 1997 the employee was seen by Mickey Syrquin, D.O., for a neurosurgery consultation. Dr. Syrquin ordered an MRI scan of the employee's lumbar spine. The MRI, done on May 5, 1997, revealed a mild to moderate diffuse intervertebral disc bulge at L2-3 causing borderline spinal stenosis, fairly extensive severe spinal stenosis at L3-4 and L4-5 secondary to diffuse intervertebral disc bulging and herniation and facet hypertrophic changes, and a midline diffuse disc bulge at L5-S1 with no focal neural foraminal stenosis. On the date of the MRI, Dr. Syrquin recommended that the employee undergo surgery to alleviate his leg pain and improve his right leg strength. The employee told Dr. Syrquin that he wanted to think it over and not to "rush into anything." The employee was seen by Dr. Robert Fielden, an orthopaedic surgeon, for a surgical opinion on behalf of the employer and insurer on May 27, 1997. Dr. Fielden diagnosed an acute back strain superimposed on degenerative facets and disc changes. He opined that a permanent problem had arisen from the work incident but did not think that decompression surgery would relieve the employee's back pain. Dr. Fielden did not believe that the employee's leg complaints were sufficient to justify a major decompression surgery. On July 15, 1997, the employee returned to Dr. Syrquin in follow-up and Dr. Syrquin explained that the surgery he would recommend would likely consist of a two-level decompression with medial facetectomies and foraminotomies at L3-4 and L4-5. The employee continued to think it over and, as of October 27, 1997, when he next returned to Dr. Syrquin, he still had not decided. (Exh B; Exh. 3: Dep. Exh. 1.)

On November 20, 1997 the employee was seen by Dr. Gary Gasser, in the neuroscience department of the MeritCare Clinic in Fargo, North Dakota for a second opinion concerning his low back pain syndrome. After examining the employee, reviewing the available medical records, and taking the employee's history, Dr. Gasser opined that the employee showed evidence both of a chronic low back pain syndrome following his work injury and of lumbar stenosis. Dr. Gasser noted, however, that he had been provided only with a photocopy of the employee's MRI scan and that the copy was inadequate to clearly discern the anatomy on the

study. He offered a preliminary opinion on causation to the effect that he "suspect[ed] that the patient has underlying degenerative changes in the spine contributing to a lumbar stenosis and then perhaps had increased disc bulging with the incident in August of 1996 with a significant axial load on the spine at that time which now is causing a back pain syndrome as well as the radiating pain into the lower extremities and hip." Dr. Gasser deferred rendering an opinion as to appropriate treatment until he received the actual MRI study. (Exh. C: 11/20/97.)

After reviewing the MRI scan, Dr. Gasser stated that "the best I could put his case together is that he does have an underlying arthritic condition of the spine causing lumbar stenosis and that when he caught the heavy tank that he probably did bulge out some disc material further, causing his current symptoms." He reiterated this opinion on January 30, 1998, stating that "the best way to put his story together is that he did have a tremendous amount of spondylitic changes in the lumbar spine and then when he caught the 1000-pound tank like he did, that most likely bulged out the disks at these already very tight levels and caused the onset of his acute pain syndrome that he has been experiencing since that time." Dr. Gasser had "no problem" with the possibility of a decompression surgery approach to the employee's treatment, although he also considered continued conservative management as an option. On June 24, 1998 Dr. Gasser again offered the same view as to the probable causation of the employee's pain syndrome and continued to opine that the employee was a candidate for decompressive surgery. (Exh. C: 12/10/97, 1/30/98, 6/24/98.)

In the meantime, the employee was again seen by Dr. Fielden on March 30, 1998 on behalf of the employer and insurer. Dr. Fielden diagnosed chronic back pain and central stenosis with degenerative and bulging discs at L3-4 and L4-5. He opined that the employee's August 1996 work injury had resulted in a low back strain with back pain, but that there was no definite evidence that the injury had caused any permanent change to the employee's degenerative discs, stating that "[w]ithout neurological findings or radiological changes suggesting a herniation there is nothing to base a permanent aggravation from the stress of the injury," although "the stress on the degenerative spine did initiate symptoms and these have persisted to some degree and would be in part injury-related." Dr. Fielden recommended against the proposed surgery unless the employee were to develop more leg symptoms that further limited his walking or develop any bowel or bladder dysfunction. He attributed any potential need for the surgery solely to the employee's stenosis, which he opined was in no way affected by the work injury. (Exh. 3: Dep. Exh. 2.)

The employee filed a medical request on August 10, 1998 requesting the proposed low back surgery. The employer and insurer filed a medical response on August 24, 1998 refusing to authorize surgery and alleging that "[t]he proposed surgery is not payable because it is not related to the work injury, is neither necessary nor reasonable, is unlikely to produce significant relief of the employee's symptoms, and its [sic] inconsistent with the medical treatment parameters." (Judgment Roll.)

The matter came on for hearing before a compensation judge of the Office of Administrative Hearings on February 24, 1999. Following the hearing, the judge found that "the

employee's back problems were significantly caused or contributed [to] by the work injury of August 5, 1996," but that the proposed surgery was not reasonable and necessary. The employer and insurer appeal from the finding of a causal relationship between the work injury and the employee's low back condition. (Judgment Roll: Finding 15.)

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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 first argue that, because the compensation judge denied the employee's proposed surgery as not reasonable or necessary the finding of a causal relationship between the August 5, 1996 work injury and the employee's low back problems was unnecessary to the judge's decision and should be vacated, or that this court should pronounce the finding as without subsequent collateral estoppel effect.

In support of their position, the employer and insurer cite Weigel v. Miller, 574 N.W.2d 759 (Minn. App. 1998). In Weigel, a case involving a child protection order, the appellant, who had successfully sought the order, appealed from certain factual findings denying some of the allegations supporting the motion for the order. The Minnesota Court of Appeals dismissed the appeal on the basis that a prevailing party may not separately appeal a district court's findings of fact. However, in dicta, the Court stated that "District courts are equipped to recognize that unnecessary findings like those objected to here are not binding in subsequent proceedings." 574 N.W.2d at 760. The procedural and factual issues presented at an administrative hearing before a compensation judge, or on appeal before this court, are dissimilar to those presented at a child protection hearing before a district court judge. We are thus not persuaded that Weigel has any precedential value in the present appeal. However, this court has previously considered the same proposition now raised by the appellants. In Augustin-Stewart v. Evans Products, slip op. (W.C.C.A. April 7, 1998), an employer and insurer similarly sought vacation of a finding of a causal connection between a medical condition and work injury, for which proposed surgery had been determined not reasonable or necessary. In Augustin-Stewart, we noted that the issue of

causation had been directly raised by the appellants in their defenses before the judge below, and declined to vacate the finding on causation.

Following our prior reasoning in Augustin-Stewart, we decline to vacate the finding on the issue of causation. The employer and insurer here specifically raised the issue of causation as a defense in their August 24, 1998 medical response to the employee's medical request. (Judgment Roll.) In closing argument at the hearing below, the attorney for the employer and insurer reiterated that causation was one of the defenses for the judge's consideration:

> "Ms. Altman: Thank you, Your Honor. Let me address the causation issue first, because I do agree with Mr. Hannig that what's required here is kind of a two part analysis; first an analysis as to whether Mr. Johnson's stenosis was caused or aggravated by the August 5, 1996 accident and secondly whether the surgery that Mr. Johnson requests is necessary and reasonable treatment for his condition."

(T. 64-65.)

The employer and insurer directly invited a finding on the causation issue. Pursuant to Minn. Stat. § 176.371, "[t]he compensation judge's decision shall include a determination of all contested issues of fact and law. The question of causation was an integral part of the larger issue before the compensation judge and was placed at issue by the appellants. We cannot conclude that the compensation judge erred in rendering a determination on the issue of causation in this case.

The employer and insurer next argue that the finding on causation was unsupported by substantial evidence. They argue that the compensation judge erred in adopting the opinion of Dr. Gasser over that of their expert, Dr. Fielden. Generally, this court will not reverse a compensation judge's choice between opposing expert medical opinions unless the opinion relied upon lacks adequate foundation. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

The employer and insurer do not argue that Dr. Gasser's opinion lacked foundation, but they contend that the judge's reliance on his opinion was improper because Dr. Gasser's opinion was "entirely speculative and not based on a reasonable degree of medical certainty." (See Er/Ins. Brief at 9.) While Dr. Gasser's causation opinion was stated in terms of what that physician concluded had "probably" or "most likely" happened, specifically, that the work injury had increased the degree of disc bulging in the already degenerative disks and caused the employee's symptoms, Dr. Gasser clearly states that this opinion was his best medical explanation for the employee's condition in light of the medical history and examination and imaging findings. In Pommeranz v. State, Dep't of Public Welfare, the Minnesota Supreme Court discussed the requisite certainty for demonstrating causation by expert medical opinion in a workers' compensation case, and noted that "[i]t is well established that a medical opinion does

not have to express absolute certainty, its truth need not be capable of demonstration, and it is sufficient if it is probably true." 261 N.W.2d 90, 91, 30 W.C.D. 174, 176-177 (Minn. 1977). We cannot conclude that Dr. Gasser's opinion in this case was legally insufficient to permit the compensation judge to rely upon it.

In addition, we note that the compensation judge's finding on causation is further supported by the employee's testimony denying any significant low back symptoms prior to the work injury, by the fact that there was no evidence of any medical treatment for a low back problem before that date and by all of the medical evidence which indicates that the onset of the employee's significant low-back symptoms immediately followed the work injury.