ROGER D. KOSTIUK, Employee, v. STEENBURG CONSTR. and MD. CAS. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 20, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - MEDICAL TREATMENT; CAUSATION - INTERVENING CAUSE. Where it was supported by properly founded expert medical opinion that the employee's anterior cruciate ligament tear was causally related to the work injury to the medial and lateral menisci in his knee, the compensation judge's award of payment for the employee's past and recommended right knee surgery and related treatment was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that the torn ligament occurred off the job while raking the lawn.

CAUSATION - MEDICAL TREATMENT; EVIDENCE - EXPERT MEDICAL OPINION. Where evidence supporting the judge's decision as to causation of the chiropractic expenses at issue, including ample medical and chiropractic evidence and opinion uncited by the judge, was sufficient to overcome a mistake in the judge's expressed basis for rejecting the opinion of the independent medical examiner, and where the employee's use of chiropractic care was modest and reasonable, the compensation judge's award of payment for the chiropractic care at issue was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Johnson, J. and Rykken, J.
Compensation Judge: Donald C. Erickson

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's conclusion that the employee's 1978 work injury was a substantial contributing factor in his need for certain past and proposed surgery and other treatment for his right knee and certain chiropractic treatment for his low back. We affirm.

BACKGROUND

On February 27, 1978, Roger Kostiuk [the employee] sustained an injury to his right knee and to his low back in the course of his employment as a laborer with Steenburg Construction [the employer]. He sought treatment on that date with chiropractor Dr. C. M.

Carney, who diagnosed (1) acute lumbosacral strain with retrolisthesis of L-5 relative to S1, (2) a recurrent internal derangement of the right knee, and (3) early discogenic spondylosis at L5 and S1. In June of 1978, Dr. Carney referred the employee to orthopedic surgeon Dr. James Phillips concerning the employee's right knee condition. Dr. Phillips apparently performed an arthrogram of the right knee on July 17, 1978, which was read to reflect a small tear to the midportion of the medial meniscus. Because the employee's symptoms were primarily on the lateral side of the knee at the time, Dr. Phillips prescribed only physical therapy. The employer and insurer ultimately admitted liability for the employee's injuries and initially paid benefits through January 25, 1979, at which time the employee was released by Dr. Phillips to return to lighter duty work.

About four years later, on January 29, 1983, the employee sought medical care again for his right knee, subsequent to playing basketball. He eventually underwent arthroscopic surgery on the knee, performed by Dr. Clinton Moen on July 29, 1983. Dr. Moen removed a small tear from the lateral meniscus and some loose cartilage from the lateral compartment, and he removed a large "bucket handle" tear and the anterior and posterior horns of the medial meniscus.

In July of 1984, the employee returned to Dr. Carney with complaints of moderately severe low back pain that he said had been a continuing problem ever since his February 1978 work injury. Radiographic studies were read to reveal discogenic spondylosis at L5-S1 and chronic retrolisthesis at L5 relative to S1, and Dr. Carney diagnosed chronic strain/sprain syndrome with bilateral paraspinal myofascial fibrositis, together with minimal right L5 radiculitis. In January of 1985, the employee was examined also by orthopedic surgeon Dr. Duane Person. Dr. Person diagnosed degenerative disc disease at L5-S1, with some nerve root compression that was causing some radicular pain, together with evidence of the employee's past right knee surgery. Dr. Person concluded that both the low back condition and the right knee condition were causally related to the employee's February 1978 work injury. On February 11, 1985, the employee was examined for the employer and insurer by neurosurgeon Dr. David Johnson. Dr. Johnson agreed that both the employee's right knee problems and his low back problems were related to his February 1978 work injury, "assuming his history is correct."

On February 22, 1985, the parties executed a stipulation for full, final, and complete settlement of all of the employee's claims for benefits consequent to his 1978 work injury up to and including February 14, 1994, and up to the extent of 15% permanent partial disability of the back and 10% permanent partial disability of the right leg. Claims for future medical expenses were expressly left open. That stipulation expressly acknowledged that "the employee sustained a meniscal tear of the cartilage of the right knee," but, while specifying "no more than" a 10% permanent partial disability of the back, did not expressly acknowledge the occurrence of a low back injury. An Award on Stipulation approving this agreement was filed April 4, 1985.

The employee continued to treat periodically at the chiropractic firm of Dr. C.M. Carney. On September 20, 1988, responding to a letter from the insurer questioning its liability for continuing treatment, Dr. Michael Carney, an associate of Dr. C.M.Carney, indicated his

opinion that all of the employee's treatment at his office since July 1984 had been "necessary as a direct result of the injury [the employee] sustained on 2-22-1978."

On April 20, 1990, the employee received emergency treatment for his right knee after twisting it while doing yard work. On April 21, 1990, he underwent a consultation with orthopedic surgeon Dr. Mark Carlson, who diagnosed "[a]nterolateral instability secondary to old anterior cruciate tear and partial meniscectomy." On May 3, 1990, the employee underwent an MRI scan. The scan was read as reflecting a recurrent bucket handle tear in the posterior horn of the medial meniscus, a small horizontal tear in the anterior horn of the medial meniscus, a possible tear in the lateral meniscus, a completely torn anterior cruciate ligament, a patellar chondromalacia, and a large cartilaginous defect involving articular cartilage of the medial femoral condyle. On May 23, 1990, Dr. Carlson performed a surgical reconstruction of the anterior cruciate ligament, also removing both the posterior horn of the medial meniscus and two loose bodies of full thickness articular cartilage.

Subsequent to his surgery, the employee continued to be bothered by medial joint line pain and anterior knee pain. Dr. Carlson recommended another arthroscopic procedure, and on April 30, 1991, the employee was examined for the employer and insurer by orthopedic surgeon Dr. Paul Wicklund. Dr. Wicklund concluded in part that the anterior cruciate ligament tear had been the result of a superseding intervening injury in April of 1990 and that the employee's need for surgery from and after April 21, 1990, had not been a result of his 1978 work injury. On August 2, 1991, the employee underwent the exploratory arthroscopic surgery recommended by Dr. Carlson. A meniscal fragment was removed from the medial meniscal compartment, and the site of the previous meniscectomy was debrided.

On November 18, 1991, another Award on Stipulation was issued, approving a to-date Stipulation for Settlement under which the employer and insurer, reserving all of their defenses to liability, agreed to pay medical expenses incurred by the employee for reconstruction of his right anterior cruciate ligament and two arthroscopic surgeries.

In February of 1992, the employee returned to see Dr. Michael Carney for continuing chronic low back pain that was still constant and moderately severe and now radiating into the left thigh and calf. On April 3, 1992, the insurer declined to pay for further chiropractic treatment absent any "explanation why treatment was suspended for eight years or why treatment has again commenced." In a letter to the insurer on May 20, 1992, Dr. Carney indicated that the employee "had just gotten tired of living with the pain for so long" and that it was his, Dr. Carney's, opinion that the current treatment was "directly related to the injury of 2-27-78."

About five years later, on July 10, 1997, the employee saw orthopedist Dr. Joel Zamzow, complaining of swelling and instability in his right knee. Dr. Zamzow diagnosed chronic anterior cruciate ligament insufficiency, probable meniscal tears, and degenerative joint disease and ordered an MRI scan. The scan was conducted on August 8, 1997, and was read to reveal "[c]hronic tears of both menisci," together with minor joint effusion and "complete disruption of the anterior cruciate ligament." Dr. Zamzow recommended arthroscopic surgery.

On November 19, 1997, the insurer declined to pay for the treatment and related expenses.

On March 3, 1998, the employee was examined again by Dr. Carlson. Concluding that the original ligament graft had apparently either ruptured or elongated, Dr. Carlson agreed with Dr. Zamzow's recommendation of surgery, adding "I do feel that [the employee's] present condition is related to his initial injury." On March 24, 1998, the employee filed a Claim Petition alleging entitlement to payment for the right knee surgery recommended by Dr. Zamzow consequent to his work injury of February 27, 1978. On March 31, 1998, the employer and insurer denied liability for the treatment on grounds that it was necessitated by causes wholly unrelated to the 1978 injury.

On June 30, 1998, the employee was examined for the employer and insurer by Dr. Nolan Segal. After examining the employee and reviewing his records, Dr. Segal concluded that the employee's 1978 work injury "has absolutely nothing to do with his current knee problems and is not in any way substantially related to the subsequent occurrences to his knee such as the 1990 occurrence." Dr. Segal added that "[t]here really is, in fact, no evidence in the medical records to suggest any significant knee injury in 1978." With regard to the employee's low back problems, Dr. Segal stated in the medical history section of his report, "Records indicate that [the employee] was seen on February 5, 1974, with a four to five week history of back pain and it was hard for him to sit," and "[h]e was seen on August 15, 1977, with an acute lumbar strain. There is no record as to how he hurt his back at that time." Apparently on these bases Dr. Segal concluded that the employee's 1978 low back injury "clearly would represent a temporary aggravation of a preexisting low back condition," which he concluded "would have lasted . . . until July 10, 1978, at the very most." Dr. Segal concluded in summary that there was "clear-cut" evidence that the employee's current problems were not in any way related to his 1978 work injury,

On March 4, 1999, the employee was examined again by Dr. Person. Dr. Person concluded in part that the employee's 1978 right knee injury caused the knee to be "more prone to be injured [by] just twisting" and that "the old injury made [the employee's] knee more susceptible to have an anterior cruciate ligament injury [such as] that he sustained in 1990." Dr. Person concluded also that "there is no question that [the employee's] 1978 injury was such that he sustained permanent injuries to both his low back and his knee," that the employee's "occasional visits to the chiropractor are the necessity of the residuals from his 1978 back injury," and that "his use of the chiropractor is a reasonable and necessary medical procedure." On April 21, 1999, Dr. Michael Carney agreed in a letter to the employee's attorney that the employee "utilizes chiropractic care in a very modest and reasonable manner" and only "when his pain level is severe and he is unable to continue to work."

The matter came on for hearing on April 29, 1999. Issues at hearing included the following: (1) the employer and insurer's liability for payment of $1,100.28 in medical bills for the employee's August 1997 MRI, his August 1998 examination by Dr. Carlson, and a radiologist's reading of his July 1997 x-ray and his August 1997 MRI; (2) the employer and insurer's liability for payment of $367.00 in chiropractic bills incurred by the employee for treatment in July and August 1998; and (3) whether or not the employee's 1978 work injury to his

right medial and lateral menisci was a substantial contributing factor in his need for subsequent surgery to his right anterior cruciate ligament, so as to entitle the employee to proceed with the right knee surgery recommended by his treating physicians. By Findings and Order filed June 1, 1999, the compensation judge concluded in part that the 1978 injury was a factor in the employee's need for all of the medical and chiropractic treatment at issue, both past and recommended. 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

1990 Knee Surgery

Pursuant to their 1991 Stipulation for Settlement in this matter, the employer and insurer paid all medical expenses incurred by the employee in the course of his 1991 right knee surgery, but they reserved all defenses to liability for the injury repaired. In his decision below, the compensation judge, relying on the opinion of Dr. Person, concluded that the employee's 1978 work injury to his right knee was a substantial contributing factor in the employee's 1990 non-work knee injury and subsequent need for surgery in 1990 and 1991. Accordingly, the judge also found the employee entitled to the follow-up repair surgery currently recommended by Drs. Zamzow and Carlson. In his Memorandum, the compensation judge acknowledged that the yard work being performed by the employee at the time of his 1990 non-work injury "undoubtedly contributed to the employee's knee problems and need for surgery." However, he concluded that the yard work was nevertheless not an intervening cause of the employee's injury sufficient to supersede the employer's liability, in that doing yard work was a "normal" activity of life. The judge noted that, according to Dr. Person, the employee's 1978 work injury caused him to be more susceptible to further injury, and the judge cited an earlier decision of this court to the effect that such a "causal link between [a] work injury and [a] subsequent aggravation is broken [only] when the aggravation is the result of 'unreasonable, negligent, dangerous or abnormal activity on the

part of the employee.'" Wefel v. Kunz Oil, 58 W.C.D. 602, 610 (W.C.C.A. 1998), quoting Eide v. Whirlpool Seger Corp., 260 Minn. 98, 102, 109 N.W.2d 47, 49-50, 21 W.C.D. 437, 441 (1961). The employer and insurer contend that Dr. Person's opinion was unsupported by the evidence, that the Wefel decision is clearly distinguishable, and that the judge erred further in relying on Dr. Person's opinion because it failed to assert a clear opinion as to causation. We are not persuaded.

The employer and insurer argue first that emergency treatment received by the employee in 1980 and 1982 for three non-knee-related injuries sustained while playing hockey and softball "demonstrate that [the employee's] knee was in very good condition following his injury of 1978" and so was not "permanently weakened" as Dr. Person suggested. We conclude, however, that it was not unreasonable for the judge to rely on the contested opinion of Dr. Person. In their April 1985 Stipulation for Settlement, the employer and insurer expressly agreed that "the employee sustained a meniscal tear of the cartilage of the right knee," and they did not appeal from the compensation judge's conclusion in Finding 4, that the employee's work-related right knee injury was in the form of tears to both the medial and the lateral menisci.[1] It would not have been unreasonable for the judge to accept expert opinion to the effect that such tears and the reduction in cushioning cartilage resulting from their repair would render the knee more vulnerable to injuries consequent to sudden twistings of the joint. That the employee was interested and able to participate actively in sporting activities does not in any way demonstrate that the excision of cartilage in his knee did not render that knee less securely cushioned and so reasonably more vulnerable to the ligament injury that ultimately occurred by twisting.

The employer and insurer contend also that the Wefel case is clearly distinguishable from the present case. They argue that, whereas in Wefel the employee's subsequent injury was an aggravation to the same area of his low back that had been injured in his work injury, in this case the employee's subsequent injury, to his anterior cruciate ligament, was to an entirely different part of his knee than had been injured in his 1978 work injury, the cartilage menisci. They argue that the ligament injured in 1990 was not only entirely unrelated to the menisci injured in 1978 but was still fully intact as late as the employee's 1983 surgical notes. We conclude, however, that the thrust of the Wefel holding, as quoted by the compensation judge, was to affirm the compensability of "every natural consequence that flows from the [primary] injury." Wefel, 58 W.C.D. at 610, quoting 1 Arthur Larson & Lex K. Larson, Workers' Compensation Law Sec. 13 (1995) (emphasis added). In this case, as suggested already above, it would not have been unreasonable for the compensation judge to conclude, supported by expert medical opinion, that the employee's anterior cruciate ligament injury was among the natural consequences of the employee's 1978 meniscal injuries.

Finally, the employer and insurer argue that Dr. Person's opinion lacked sufficient "factual foundation" to be properly relied on, in that "Dr. Person only indicated that the

[1] Moreover, in their brief the employer and insurer argue expressly from the fact that "the Employee's surgery following his 1978 injury was . . . to his meniscus."

Employee's original injury to his knees caused a permanently weakened condition that made them more susceptible to further injury" and did not specifically opine that the employee's current problems are causally related to the 1978 injury. However, while medical opinion evidence as to causation is desirable, it is not essential where there is other reliable evidence on the issue. See Reimer v. Minnit Tool/M.I.T. Tool Corp., 520 N.W.2d 397, 51 W.C.D. 153 (Minn. 1994). Dr. Person's opinion as to the vulnerability of the employee's work-injury-damaged right knee clearly constitutes other reliable evidence, particularly in its context among the related opinions of the employee's several treating physicians and in light of the medical records' documentation and the employee's own testimony as to the employee's history of symptoms. Whatever evidentiary weakness might be identified in Dr. Person's framing of his causation opinion as an assertion of the probable effects of the 1978 injury instead of as an attribution of the probable cause of the employee's current condition is a matter of that opinion's evidentiary weight, not, as the employer and insurer would suggest, its "factual foundation."

Because it was supported by properly founded expert medical opinion and was otherwise not unreasonable, we affirm the compensation judge's decision as to the compensability of the employee's past and recommended right knee surgery and related treatment. See Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985) (a trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence); Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

1998 Chiropractic Treatment

The compensation judge also awarded payment of certain chiropractic expenses claimed by the employee for treatment to his low back in July and August of 1998, allegedly related to his 1978 work injury. Among the findings of the compensation judge in support of that award was Finding 34, which reads as follows:

> In 1974, the employee was involved in a motor vehicle accident and injured his neck. Dr. Segal attributes the employee's current low back problems to this accident; however, the medical records submitted into evidence reflect that this accident caused cervical not lumbar spine problems. Accordingly, Dr. Segal's opinion regarding causation of the low back problems is rejected.

The employer and insurer argue that Dr. Segal never attributed the employee's low back problems to a 1974 motor vehicle accident and that, indeed, the employee's first motor vehicle accident of record occurred in February 1975. They contend that Dr. Segal's reference in his opinion was to a February 1974 medical report of unexplained low back pain that the employee had been experiencing for "four to five weeks" on that date, four years prior to his work injury. They argue that, because the judge's reasons for rejecting Dr. Segal's opinion were not supported by substantial evidence, and because "chiropractic treatment approximately 20 years after the work injury is simply not reasonable and necessary medical treatment," the judge's award of payment

of the chiropractic expenses at issue should be reversed. We are not persuaded.

We grant that the compensation judge was mistaken in finding that Dr. Segal was attributing the employee's current low back problems to the 1974 motor vehicle accident in which the employee injured his neck. It is clear, however, that the judge relied importantly in other parts of his decision on the opinion of Dr. Person, who concluded with clear certainty that the employee's "1978 injury was such that he sustained permanent injuries to . . . his low back." Moreover, Dr. Michael Carney expressed a similar opinion several times, and even Dr. Johnson, after examining the employee for the employer and insurer, concluded as much, "assuming [the employee's] history is correct." There is no evidence that the employee's history as it was understood by Dr. Johnson was materially incorrect. As the employee has argued, the employee worked effectively at heavy labor prior to his work injury and was unable to do so after that injury due to the continuousness and severity of his low back pain. Dr. Segal's summary of the medical history of the preexisting condition to which he attributes this severe and ongoing pain spans only three very brief sentences in his fourteen-page report. In light of this fact, we find more than a little perfunctory the doctor's conclusion that the evidence in this case is "clear-cut" that neither the employee's low back problems nor even his current knee problems are "in any way" related to his knee and low back work injuries. We conclude that evidence supporting the judge's decision as to causation of the chiropractic expenses at issue, including ample medical and chiropractic evidence and opinion uncited by the judge, is sufficient to overcome the mistake in the judge's expressed basis for rejecting Dr. Segal's opinion and so to overcome any necessity of remand. Therefore, concluding also, in keeping with the Spring 1999 opinions of Drs. Person and Michael Carney, that the employee's use of chiropractic care has been modest and reasonable, we affirm the decision as to chiropractic expenses. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239; see also Nord v. City of Cook, 360 N.W.2d at 342-43, 37 W.C.D. at 372-73.