

MARK LEVINGS, Employee, v. PARK INN INT'L and ACCEPTANCE INDEM. INS. CO./PREFERRED WORKS, Employer-Insurer/Appellants, and PARK INN INT'L and MINN. ASSIGNED RISK PLAN/BERKLEY ADM'RS, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 8, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - PERMANENT AGGRAVATION. Substantial evidence, including expert opinion and evidence as to the employee's symptoms, restrictions, and need for treatment, supported the compensation judge's decision that the employee's November 1994 work injury substantially aggravated the employee's preexisting degenerative arthritis.

APPORTIONMENT - PERMANENT PARTIAL DISABILITY. Substantial evidence supported the compensation judge's denial of statutory apportionment where it was reasonable to conclude that there was insufficient evidence of permanent loss of range of motion prior to the employee's work injury.

Affirmed.

Determined by Wilson, J., Rykken, J., and Pederson, J.
Compensation Judge: Gregory A. Bonovetz.

OPINION

DEBRA A. WILSON, Judge

The employer and Acceptance Indemnity Insurance Company appeal from the compensation judge's decision as to liability for benefits related to the employee's right hip condition. We affirm.

BACKGROUND

The employee commenced employment with Park Inn International [the employer] in May of 1992, working first in the laundry and then in the employer's maintenance department. The latter assignment included numerous miscellaneous job duties, such as light electrical work, plumbing, carpentry, snow shoveling, mowing, sweeping, and pool maintenance.

In April of 1993, the employee experienced some right hip and right knee symptoms after slipping and falling on ice at work. He reported the incident to his employer but sought no medical care, missed no time from work, and did not modify his activities. The

employee testified that his symptoms “seemed to resolve” except for intermittent knee problems, “almost like . . . a trick knee or something.” Later that year, in October of 1993, the employee experienced low back pain after stepping down off a table to the floor at work. This time the employee sought medical treatment, and he was diagnosed with lumbar strain, instructed in William’s exercises, and restricted to light duty work for a short time. The employee testified that these symptoms also resolved and that he did not receive follow-up care after his initial treatment.

On April 7, 1994, the employee experienced severe right hip pain when he twisted his right leg after his right foot became caught between two pallets in a storage area at work. The employee testified that he “heard and felt a crunch” and that the employer sent him to St. Mary’s Medical Center for evaluation. The records from that evaluation indicate that the employee reported having experienced right hip and knee pain for a year after falling on ice. X-rays disclosed “[a]dvanced right hip osteoarthropathy,” and the physician recommended further evaluation, which was apparently scheduled for April 29, 1994. However, the employee did not attend the follow up examination and in fact sought no additional medical treatment for more than six months. The employee lost no time from work, other than for the evaluation on the date of injury, and he continued to perform his usual job duties. He testified that he had no real continuing hip or leg symptoms unless he did too much repetitive twisting and turning, which would make his hip “flare up a little bit.”

On November 29, 1994, the employee experienced severe right hip pain again when he slipped again on ice at work. He notified the employer of the incident and eventually sought treatment at St. Luke’s Medical Clinic on December 7, 1994. At that time, the employee was complaining of throbbing in his right hip after sitting, standing, or walking for too long. The employee reported to the doctor, Dr. Katherine Kostamo, that he had experienced a right hip strain in April of 1994 and that an orthopedist had advised him then that he would eventually need a right hip replacement. On follow-up with Dr. Kostamo on December 15, 1994, the employee reported being “much better,” noting that the employer was able to accommodate the restrictions that had been recommended by the doctor. After reviewing the employee’s x-rays, Dr. Kostamo diagnosed severe osteoarthritis of the right hip and indicated that the employee could return to regular duty “using common sense with lifting,” “no lifting more than 25 pounds at this point, if possible.”

The employee continued working for the employer, with restrictions, for about two years, until November 1996, when he quit, he alleges, because the walking, bending, stooping, and other requirements of his job had been aggravating his hip and knee condition.¹ In the interim, the employee was seen intermittently by Dr. Kostamo and also by Dr. Peter Goldschmidt, an

¹ The employee returned to his job, at the employer’s request, for about six weeks in the spring of 1997, allegedly quitting again because the job was even more strenuous than before. He subsequently participated in a job seminar and eventually obtained work as a caretaker in his apartment complex. Still later, he worked as a census taker.

orthopedist. Dr. Goldschmidt eventually indicated that the employee's preexisting hip condition had "probably" been aggravated by his work activities and that the employee had a 6% permanent partial disability related to that condition.²

The employee was also evaluated by at least three other physicians. Dr. Jed Downs, from whom the employee had sought a second opinion, indicated in part that the employee's hip condition had been precipitated by a congenital leg length discrepancy and that "all occupational exposures could be implicated as minimally accelerating . . . his condition." Dr. Mark Engasser, who examined the employee on behalf of one of the employer's insurers, agreed that the employee's hip condition was substantially caused by the employee's leg length inequality, indicating that the work incidents had aggravated the employee's underlying condition only temporarily. Dr. Thomas Litman, another insurer's examiner, reserved any opinion as to causation pending review of all of the employee's x-rays; no further report from this examiner is contained in the record. All physicians essentially agreed that the employee should observe certain restrictions due to his hip condition and that the employee had developed right knee symptoms as a result of his hip condition. The reports from these examiners also contain opinions as to maximum medical improvement [MMI].

The matter came on for hearing before a compensation judge on October 16, 1998, for resolution of the employee's claims for wage loss benefits, medical expenses, and permanent partial disability benefits as a result of his injury on April 7, 1994, when the Minnesota Workers' Compensation Assigned Risk Plan [Assigned Risk Plan] provided the employer's insurance coverage, and/or his injury on November 29, 1994, when Acceptance Indemnity Insurance Company [Acceptance Indemnity] was on the risk. Both insurers contended that the employee's work injuries had at most aggravated the employee's underlying hip condition on a temporary basis. In his decision following the hearing, the compensation judge concluded in part that the April 1994 work injury was only temporary but that the November 1994 injury had substantially aggravated the employee's preexisting, underlying hip condition. The judge therefore ordered Acceptance Indemnity to pay medical expenses, certain wage loss benefits,³ and benefits for a 6% whole body impairment. Acceptance Indemnity appeals.

STANDARD OF REVIEW

² Dr. Goldschmidt's report of March 27, 1997, actually indicates that the employee has an 8% impairment, but it is evident from the report that 6% is the correct rating and that the 8% figure is due to some mathematical or typographic error. The employee concedes that 6% is the appropriate rating.

³ The compensation judge concluded that the employee had reached MMI effective October 12, 1995, and temporary total disability benefits were limited accordingly. See Minn. Stat. § 176.101, subd. 3e(b) (repealed 1995). Temporary partial disability benefits were awarded based on the employee's actual wages post-injury. The employee's entitlement to these benefits is disputed only on medical causation grounds

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

Causation

The compensation judge concluded that the April 1994 injury was temporary but the November 1994 injury substantially aggravated the employee's underlying right hip osteoarthritis. In its appeal on this issue, Acceptance Indemnity initially attacks certain underlying factual determinations of the judge. Acceptance Indemnity argues, for example, that the judge erred in concluding, in Finding 16, that the employee's right hip degenerative joint disease was "quiescent" prior to the November 1994 injury, noting that certain medical records and testimony indicate that the employee had been experiencing hip and knee pain since as early as April of 1993. However, in Finding 17, the judge indicated that, prior to November 29, 1994, the employee "on occasion, would experience a transitory increase in right hip pain, [but] in general between April 1994 and November 1994 the employee's symptomatology substantially decreased." This finding clearly indicates that the judge was aware of and considered the evidence regarding the employee's hip symptoms prior to the November 1994 work injury.

Acceptance Indemnity also contends that the judge erred in determining that the employee "slipped and fell and struck his right hip and right shoulder" in the November 1994 incident. However, the quoted language, taken from the insurer's brief, somewhat mischaracterizes the judge's finding, which is that "the employee slipped and twisted on ice, falling on his right hip and right shoulder." The judge's description is substantially consistent with the employee's testimony as to the incident, which reads in relevant part as follows:

A I slipped on this ice and kind of fell up against the bank that - - we had snowblowed a path out to the access for the hot tub and so the snow was built up by the hot tub there and I slipped and twisted and kind of fell up against that bank there (indicating).

Q What side had - - the court reporter has no ability to tell which way you're - -

A My right side; it was my right side.

Q - - which way you - - okay. And did any part of your body have contact with that snowbank or the ground?

A I think my hip, you know, my - - my right shoulder and my hip.

The employee later acknowledged that he did not fall with any real force, but, contrary to Acceptance Indemnity's argument, we see no indication that the compensation judge was materially mistaken as to the details of the November 29, 1994, incident.

Acceptance Indemnity further argues that the judge erred in concluding that increasing hip and knee symptoms caused the employee to quit his job with the employer in November of 1996. As sole support for this contention, the insurer points to a November 4, 1996, treatment note of Dr. Goldschmidt, wherein the doctor indicated that the employee had been "doing well particularly since buying a car so that he is not walking to and from work." The employee testified, however, that certain job activities, such as stair climbing, seemed to aggravate his symptoms and that he quit his job for that reason. The compensation judge specifically concluded that the employee was a very credible witness, and he apparently accepted the employee's account of the reason for his termination. Assessment of a witness's credibility is a unique function of the trier of fact. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989). We cannot conclude that the one medical entry cited by the insurer, quoted above, provides sufficient grounds to overturn the judge's conclusion on this point.

Acceptance Indemnity's overriding contention is that substantial evidence simply fails to support the judge's conclusion that the November 1994 injury - - and that injury alone - - substantially aggravated the employee's underlying degenerative hip condition. Certainly a reasonable factfinder could have rejected the employee's claim, in that two experts indicated that the work injuries only "minimally accelerated" or temporarily aggravated the employee's preexisting condition. Moreover, a case may certainly be made that Assigned Risk, the insurer responsible for the April 1994 injury, should bear at least some responsibility for the benefits at issue, because it was after the April 1994 injury that the employee was first diagnosed with degenerative arthritis, was told that he would eventually need a hip replacement, and admittedly experienced at least some continuing hip and knee symptoms. However, the issue is not whether some other result might have been justified but whether the decision of the compensation judge is supported by evidence that a reasonable mind might accept as adequate.

In a January 1995 treatment note, Dr. Kostamo wrote that the employee's "underlying severe osteoarthritis of the right hip" had been "[a]ggravated by intermittent strains and twisting from [the] reported work injury." Dr. Goldschmidt wrote in his March 27, 1997, report that the employee's "work activities probably aggravated a pre-existing condition." These two opinions provide minimally adequate support for the judge's conclusion that the employee's

hip condition is substantially work-related.⁴ Pommeranz v. State, Dep't of Public Welfare, 261 N.W.2d 90, 91, 30 W.C.D. 174, 176-77 (Minn. 1977) (“[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”). There is no medical opinion evidence specifically indicating that the November 1994 work injury alone substantially aggravated the employee’s preexisting condition, but there is other evidence that supports the judge’s conclusion in that regard. Specifically, the employee sought no follow up treatment after the April 1994 injury, he was not subject to any ongoing restrictions, he lost no time from work other than on the date of injury, and he did not modify his job activities in any significant way. In contrast, after the November 1994 injury, permanent restrictions were imposed, the employee, according to his testimony, was never again symptom free, and he received regular ongoing medical care. “[W]hether the employment [aggravated the preexisting condition] is a question of fact, not law, and a finding of fact on this point . . . based on any medical testimony or, in the commoner afflictions . . . based on the [trier of fact’s] expert knowledge even without medical testimony, will not be disturbed on appeal.” Bender v. Dongo Tool Co., 509 N.W.2d 366, 367, 49 W.C.D. 511, 513 (Minn. 1993), quoting 1. Larson, The Workmen’s Compensation, § 12.25 (emphasis added).

According to the record, the employee’s longstanding osteoarthritis was completely asymptomatic prior to his employment by the employer, and the record as a whole clearly supports the judge’s conclusion that the employee’s condition was aggravated and/or accelerated by his work activities and/or specific work injuries. While there is less compelling evidence to support the judge’s imposition of liability on Acceptance Indemnity alone, we are nevertheless unable to conclude that the judge’s decision is clearly erroneous and unsupported by the record as a whole. Therefore, while we might have decided the matter somewhat differently had we been in the factfinder’s place, we affirm the judge’s decision.

Permanent Partial Disability - Apportionment

It is essentially undisputed that the employee’s right hip condition meets the requirements for a 6% whole body rating pursuant to Minn. R. 5223.0500, subps. 4A(b) and 4C(3)(b).⁵ Acceptance Indemnity argues, however, that the compensation judge erred in failing to apportion permanent partial disability pursuant to Minn. Stat. § 176.101, subd. 4a, because records from the employee’s examination on April 7, 1994, months prior to their work injury, revealed sufficient limitation in abduction, external rotation, and internal rotation to justify a 6% rating at that time. Under the circumstances of the case, we are not convinced that the judge erred

⁴ Also, as previously indicated, Dr. Downs reported that the employee’s underlying osteoarthritis had been accelerated, if only minimally, by the employee’s work injuries or activities.

⁵ Minn. R. 5223.0500, subp. 4A(b), provides a 2% rating when hip flexion is limited to between 61 degrees and 90 degrees; subpart 4C(3)(b) provides a 4% rating when external rotation is limited to between 0 and 20 degrees and there is an external rotation contracture.

in ordering Acceptance Indemnity to pay the permanency benefits at issue.

We note initially that we see nothing in the record to indicate that Acceptance Indemnity raised the specific issue of statutory apportionment to the compensation judge, and, generally, issues not raised at the hearing level may not be raised for the first time on appeal. Perhaps as importantly, it would not have been unreasonable for the compensation judge to conclude that one day's examination results constituted insufficient evidence that the employee's range of motion limitations were permanent prior to the injury for which Acceptance Indemnity is liable. This is especially true since the examination in question took place on the date of an injury, and the employee testified that his symptoms substantially decreased thereafter, until the November 29, 1994, injury. We therefore affirm the compensation judge's order requiring Acceptance Indemnity to pay the employee benefits for a 6% whole body impairment.