

MARK LINTNER, Employee, v. EDINA COUNTRY CLUB and MICH. PHYSICIANS MUT. LIABILITY INS. CO., Employer-Insurer/Appellants, and FAIRVIEW SOUTHDALE HOSP. and MEDICA/HRI, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS  
SEPTEMBER 16, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE; EVIDENCE - CREDIBILITY. Where initial medical histories of the employee's injury appeared contrary to the compensation judge's decision, but where the employee's clear testimony and theory of injury generally incorporated those histories and the employer and insurer's witnesses' testimony was indefinite and unrebutting of that theory, the compensation judge's finding of a work-related injury in credence of the employee's testimony and theory of injury was not clearly erroneous and unsupported by substantial evidence.

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY; MEDICAL TREATMENT & EXPENSE - SURGERY. Where the judge's decision was based on credible medical opinion that was in turn not based on any false premises, and where the judge's decision was not otherwise unreasonable, the compensation judge's conclusion that the employee's surgery and related medical expenses were reasonable and necessary was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Johnson, J. and Wheeler, C.J.  
Compensation Judge: Kathleen Nicol Behounek

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's finding of a work-related injury and from the judge's conclusion that related surgery and its consequences were reasonable and necessary. We affirm.

BACKGROUND

In February of 1997, Mark Lintner was employed as a bartender at the Edina Country Club, in which capacity he had been working for about seven and a half years. Mr. Lintner was thirty-eight years old at that time and was earning an average weekly wage of

\$512.48. In addition to serving customers, his duties at his job included preparing for events by setting up and stocking bars.

On Thursday, February 20, 1997, Mr. Lintner [the employee] sought treatment with his family physician, Dr. Richard Burman, for what Dr. Burman's notes indicate was a swollen lower back, with numbness into both legs and pain with movement. Dr. Burman's records report a history of a "Sunday [February 16, 1997] AM cough [with] sudden onset of pain in lower back [and] aching pain going down left leg." The following day, Friday February 21, 1997, the employee commenced treatment with orthopedic surgeon Dr. David Boxall, who had performed a laminectomy at L5-S1 of the employee's spine about eleven years earlier. Dr. Boxall's treatment notes for February 21, 1997, indicate that the employee was being seen "for a flare-up in his back complaints reporting that last Sunday he was at home when he sneezed, developed sharp low back pain and some pain and numbness radiating down the left leg into the foot." X-rays revealed disc space narrowing with post-operative changes at L5-S1, together with minor narrowing at L4-5, and epidural steroid injections were prescribed and administered.

On February 24, 1997, the controller at the Edina Country Club [the employer], Kimberly Delaney, completed a First Report of Injury, on which she indicated that the employer had been notified four days earlier, on February 20, 1997, of a "pulled [or] pinched disk in lower back" that the employee claimed occurred on Saturday February 15, 1997. The Report indicated that the activities of the employee at the time of the injury were "unsure - - possibly lifting a beer keg."

When the employee next saw Dr. Boxall, on March 7, 1997, Dr. Boxall noted that the employee had reported only fifteen minutes of relief from his pain after his epidural injections. Nevertheless, noting that the employee was back at work with symptoms that "overall are tolerable," Dr. Boxall advised the employee that he didn't "have any other suggestions at this time other than to continue with his exercises and give it another month to see if [the condition] won't improve on its own."

The employee subsequently saw Dr. Kevin Nelson, who referred him for a lumbar MRI scan. The scan, conducted on March 17, 1997, revealed a small central disc protrusion at the L5-S1 level, with "some adjacent enhancing tissue, consistent with granulation tissue," and mild effacement of the thecal sac, but no evident nerve root displacement. Dr. Nelson referred the employee to neurosurgeon Dr. John Seymour, who examined the employee on March 31, 1997. In his letter to Dr. Nelson on that date, Dr. Seymour recounted that the employee "reinjured his back on February 16 [sic], 1997, when he was moving a keg of beer around as part of his employment." The doctor noted in his letter that he had reviewed the employee's MRI scan and found it to reveal a small central disc herniation at L5-S1, surrounded on the MRI image by "enhancing scar tissue." Dr. Seymour indicated also in his letter that, on examination, "[s]traight leg raising is strongly positive on the left at 45 degrees and on the right at about 60 degrees," although knee and ankle reflexes were intact, heel-and-toe walking was possible without difficulty, and sensory testing showed only mild diminished sensation to pin and only in the S1 distribution on the left. Dr. Seymour summarized these findings as manifesting "no significant neurological

deficit” and prescribed physical therapy, concluding that it was “early at this point to consider the surgical option.” A month later, however, on April 29, 1997, noting that the employee’s pain had only grown worse in the course of his physical therapy, Dr. Seymour recommended disc surgery.

On May 2, 1997, Dr. Boxall wrote to the insurer, asserting that, except for the difference in straight leg raising, the employee’s neurologic findings had been identical for about a year. On that basis, combined with the fact that the disc herniation at issue was small, Dr. Boxall concluded that the employee was not a surgical candidate. He implied in his letter that his conclusion might be based in part also on the fact that the employee had been diagnosed with Munchausen’s syndrome, which Dr. Boxall claimed to be able to confirm based on his own previous treatment of the employee.<sup>1</sup>

The recommended surgery was delayed until August to accommodate the employee’s busy work schedule, and on August 25, 1997, Dr. Seymour performed a lumbar microdiscectomy at L5-S1 of the employee’s spine. Following his surgery, the employee developed a subcutaneous infection at the surgical site, which necessitated further medical treatment and debridement surgery and delayed his return to work by four to six weeks. As a result of his surgery and its complications, the employee was totally disabled from working from August 25, 1997, through December 4, 1997, when he returned to his job with some restrictions. Dr. Seymour’s office notes indicate that the employee’s symptoms had essentially resolved within about four months thereafter, except for “some numbness, particularly when he is more active at work or stands for a long time.” The employee’s low back condition was rated as a 2% permanent partial disability of the body as a whole, and his medical care resulted in an outstanding medical expense balance of over \$44,000.00.

On December 24, 1997, the employee filed a Claim Petition, alleging entitlement to temporary total disability benefits from August 24 through December 4, 1997, to temporary partial disability benefits continuing from December 4, 1997, and to various medical benefits, all

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<sup>1</sup> Munchausen syndrome is a psychological condition involving “the feigning of symptoms or a disease or injury in order to undergo diagnostic tests, hospitalization, or medical or surgical treatment.” Webster’s Medical Desk Dictionary 456 (1986). The employee was treated in 1976 and 1977, when he was 17 and 18 years old, for a chronically nonhealing ulcer of the left great toe. Contemporaneous medical records repeatedly indicate that manipulation of the wound was strongly suspected as a reason for its nonhealing. The employee underwent extensive psychiatric testing at the time, results of which suggested “a schizophrenic process with a severe learning disability.” See medical records of Dr. William Carter for November 11, 1977, in Employer and Insurer’s Exhibit 3. Following Dr. Boxall’s own disc surgery on the employee about ten years later, in February 1986, the employee’s surgical wound became infected for several months and “look[ed] as though someone has dug around in [it]”; Dr. Boxall also treated the employee for a lacerated thumb in the spring of 1987, following which it took a “very unusual length of time for healing to occur.” See Dr. Boxall’s treatment notes at June 11, 1986, and at April 29, 1987, in Deposition Exhibit #1 to Dr. Boxall’s deposition, Employer and Insurer’s Exhibit 1.

consequent to a work-related injury to his lumbar spine on February 15, 1997. The employer and insurer denied liability.

On September 29, 1998, Dr. Boxall indicated in a letter to the employer and insurer's attorney that his opinion regarding the necessity of the employee's August 1997 surgery remained unchanged. He supported his opinion by noting that, according to Dr. Seymour's records, the employee's numbness and tingling into the left leg continued post-operatively and yet no post-operative neurologic exam was undertaken. With apparent allusion to the employee's diagnosis of Munchausen's syndrome, he also noted that the employee's post-operative course of healing "was long and drawn out with persistent infections similar to my experience in dealing with him" and that, at the time of the surgery, "Dr. Seymour indicates that there was recent bruising at the site of the incision." In deposition testimony on December 3, 1998, however, Dr. Boxall conceded that he would not, after all, deny recurrent disc herniation surgery to an individual who needed it simply because the individual had Munchausen's syndrome. It remained Dr. Boxall's opinion, however, that the employee had not suffered a recurrent disc herniation and that the surgery at issue had not been reasonable and necessary.

On December 10, 1998, Dr. Seymour also testified by deposition. In the course of his deposition, Dr. Seymour rendered an opinion that the employee's August 1997 surgery was necessitated by a recurrent disc herniation at L5-S1 and that "the cause was a work injury that [the employee] suffered, and it was relating to lifting a keg of beer." He testified that the surgery was necessitated by the presence of some scar tissue related to the employee's 1986 surgery, explaining that scar tissue "sticks to things around it, so it sticks to the nerve root and makes people with recurrent disk herniations more likely to have symptoms with a relatively - - with a smaller disk than they had the first time around." Dr. Seymour testified also that he did not believe that the employee had Munchausen's syndrome and that, even if he did have it, he should not be denied disc surgery simply because of that condition. He emphasized in this regard that the employee's post-surgery healing complications were due not to a series of infections but to one single infection and that "[t]his infection was deep under the skin. It was not, primarily, a skin infection. It didn't look like anything had been rubbed into the skin or didn't look like anything had been done to penetrate the incision. I saw no evidence whatsoever of it."

The matter eventually came on for hearing about a year later, on December 11, 1998. Issues at hearing included whether or not the employee had sustained a work-related injury to his low back on February 15, 1997, and whether or not he was entitled to various benefits stemming from such an injury, including payment for his August 1997 surgery. At the hearing, the employee testified that his low back pain had come on suddenly on the evening of Saturday, February 15, 1997, as he attempted to lift a seventy-five-pound keg of beer in the course of his job with the employer. He testified that he reported the injury to the manager on duty at the employer, John Lahti, that same evening and then to his immediate supervisor, Brian Bergee, three days later, on Tuesday February 18, 1997, the first day he was due back to work. He testified also that he called the controller at the employer, Kimberly Delaney, two days after that, on February 20, 1997, the same day he first sought medical attention, to see that a report of a work injury was being completed pursuant to his reports to Mr. Lahti and Mr. Bergee. He testified that he also reported

such a work injury to Drs. Burman and Boxall on February 20 and 21, 1997, respectively, adding in his account to them that “it hurt to sneeze.” The employee testified also that his back pain has been very substantially diminished since his August 1997 surgery. Mr. Lahti also testified at the hearing, in part that he recalled being informed that the employee had injured his back lifting a keg of beer but did not recall when or by whom he was so informed. Ms. Delaney also testified at the hearing, in part that, although she believed the employee first contacted her on February 24, 1997, the employee may have contacted her on February 20, 1997, the date that she had indicated on the First Report of Injury to be the date of the first notice of injury to the employer. She testified also that, according to normal protocol at the employer, the employee would have made his first report of any injury to his supervisor rather than to her directly.

By Findings and Order filed February 3, 1999, the compensation judge concluded in part that the employee had sustained a work-related injury to his low back on the date and in the manner alleged. The judge concluded further that the low back surgery performed by Dr. Seymour in August 1997 had been reasonable and necessary to cure and relieve the effects of that injury, and that the employee’s follow-up medical expenses were also reasonable and necessary. On those findings, the judge ordered the employer and insurer to pay the benefits and medical expenses at issue. The employer and insurer appeal from the finding of a work injury on February 15, 1997, and from the conclusion that the employee’s August 1997 surgery and related treatment were reasonable and necessary treatment for such an injury.

## 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

### Work-Related Personal Injury

The compensation judge evidently credited the employee’s testimony to a work-related injury on February 15, 1997. The employer and insurer argue that the only evidence

supporting the employee's theory of injury is that testimony itself and that, given the contrary suggestions implied in the first histories of the injury taken by Drs. Burman and Boxall, the employee cannot be found to have borne his burden of proving that his injury was work related.<sup>2</sup> This is a difficult issue, but we are not persuaded that the judge's decision is clearly erroneous and unsupported by substantial evidence.

Although perhaps contrary to the employee's position, particularly given their specificity as to the date of the at-home event, the extremely brief histories in Dr. Burman's and Dr. Boxall's records, identifying an onset of pain after a cough or sneeze at home on Sunday February 16, 1997, are not necessarily preclusive of the employee's position. The employee's version of the facts generally incorporates these histories, and, particularly given Dr. Seymour's acceptance of it, the compensation judge was entitled to credit the employee's testimony. See Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (assessment of a witness's credibility is the unique function of the trier of fact), citing Spillman v. Morey Fish Co., 270 N.W.2d 781, 31 W.C.D. 187 (Minn. 1978). Moreover, the judge's crediting of the employee's position is left secure by the testimony of Mr. Lahte himself, who was unable to testify as to the time or agent by which he learned of the employee's claim of an injury lifting a keg of beer. Similarly, it is also left secure by Ms. Delaney's inability to testify that either she or someone else at the employer was not informed by the employee of such an injury at least by the date of the employee's first appointment with Dr. Burman.

"Although the Workers' Compensation Court of Appeals is required to look at all the evidence in performing its review function, it must give due weight to the compensation judge's opportunity to judge the credibility of the witnesses and must uphold the findings based on conflicting evidence or evidence from which more than one inference might reasonably be drawn." Even v. Kraft, Inc., 445 N.W.2d 831, 834, 42 W.C.D. 220, 225 (Minn. 1989), citing Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59-60 (Minn. 1984). Moreover, this court exceeds its reviewing authority when it attempts to substitute its own view on what was essentially an issue of witness credibility. See Tolzmann v. McCombs-Knutson Assocs., 447 N.W.2d 196, 42 W.C.D. 421 (Minn. 1989). This is true even where there is not an express finding of witness credibility by the compensation judge. See Provost v. Morrie's Imports, slip op. (W.C.C.A. Jan. 14, 1992). Although, under Flansburg v. Giza, 284 Minn. 199, 201-02, 169 N.W.2d 744, 746, 25 W.C.D. 3, 6 (1969), unopposed expert medical testimony cannot be disregarded, such testimony is not, after all, necessarily conclusive upon the trier of fact so long as it is at least considered by the judge. See Tuomela v. Reserve Mining Co., 299 Minn. 203, 204, 216 N.W.2d 638, 639, 27 W.C.D. 312, 313 (1974). Moreover, in light of Dr. Seymour's eventual testimony, the early records of Drs. Burman and Boxall here at issue were not, after all, entirely unopposed. On these grounds, and because the judge's decision was not otherwise unreasonable or clearly erroneous, we affirm the judge's finding of a work-related injury on February 15, 1997.

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<sup>2</sup> The employer and insurer do not appear to argue on appeal that the employee did not sustain even a nonwork-related injury to his low back about the time alleged.

## Reasonableness and Necessity of the Surgery

The compensation judge found that the surgery performed by Dr. Seymour in August 1997 was reasonable and necessary treatment for the employee's February 1997 work injury, as were consequent and related medical expenses. The employer and insurer contend that Dr. Seymour did not have adequate foundation for recommending surgery, that his recommendation was unsupported by any evidence of neurological deficit, that the length of time between the injury and the surgery manifests an absence of any urgency, and that continued leg symptoms following the surgery manifest the surgery's ineffectiveness. Noting also that the cost of the treatment at issue was "substantial," they argue that "relief of subjective symptoms alone is an inadequate basis upon which to award substantial medical benefits." We are not persuaded.

While adequate foundation is certainly necessary for a medical opinion to be afforded evidentiary value, an expert need not be made aware of every relevant fact in order for his opinion to have evidentiary weight. See Bossey v. Parker Hannifin, slip op. (W.C.C.A. Mar. 14, 1994). It is apparently true that Dr. Seymour in this case had not, prior to his recommendation of surgery, reviewed certain medical records documenting the employee's treatment for prolonged infections many years earlier, a lapse focused on by the employer and insurer in their examination of Dr. Seymour at his deposition. Dr. Seymour did examine the employee at least three times over the course of nearly five months prior to the surgery, however, and either he or a practice associate examined the employee at least twenty more times over the course of over seven months post surgery. Particularly in that Dr. Seymour saw "[no] way at all" that the employee might have been responsible for intentionally causing his own infection during this period and "no evidence whatsoever" of wound manipulation during that time, Dr. Seymour's apparent unawareness of the employee's diagnosis of Munchausen's syndrome many years earlier does not diminish the weight of his opinion that the employee's surgery and subsequent treatment were reasonable and necessary and causally related to his work injury. Moreover, both Dr. Seymour and Dr. Boxall conceded, after all, that a patient's having Munchausen syndrome should not preclude a recommendation of surgery perceived to be otherwise necessary. We conclude that the foundational basis for Dr. Seymour's opinion was neither inadequate nor insubstantial.

In her Memorandum, the compensation judge asserted that the surgery here at issue was warranted by MRI evidence, by the employee's lack of response to physical therapy, and by "the objective neurological findings that were present on examination." The employer and insurer argue that the judge was mistaken in this conclusion, in that, they argue, "Dr. Seymour never found any objective neurological findings." It is true that Dr. Seymour generally agreed under cross examination with the employer and insurer's attorney's suggestion that surgery was initially delayed for lack of "significant" neurological deficits. However, Dr. Seymour's report to Dr. Nelson on March 31, 1997, indicates that the doctor did clearly find straight leg raising tests to be "strongly positive" bilaterally and sensory tests to be mildly positive in the S1 distribution on the left. Nor does the conservative route toward surgery manifested by the five-month interval between the employee's work injury and his surgery demonstrate a lack of sufficient urgency or causal relationship between the injury and the surgery. This is particularly true given the

employee's clear testimony that, between the date of his injury and the date of his surgery, his back remained painful and sometimes swollen, leaving it difficult for him to lift, to do the twisting required to serve customers at parties, and even to stand. It was not unreasonable for the compensation judge to credit the employee's explanation that he postponed his surgery in order to better serve his employer during the employer's busy summer season, even though he was in need of surgery.

An employer must furnish such medical and surgical treatment for a work-related injury "as may reasonably be required at the time of the injury and any time thereafter to cure and relieve from the effects of the injury." Minn. Stat. § 176.135, subd. 1(a). It is long and well established that "cure and relieve" (emphasis added) means "cure or relieve." See, e.g., Hall v. Midway Hospital, slip op. (W.C.C.A. Feb. 27, 1992), citing Castle v. City of Stillwater, 235 Minn. 502, 51 N.W.2d 370, 17 W.C.D. 103 (1952); Eberle v. Miller, 170 Minn. 207, 212 N.W. 190, 4 W.C.D. 272 (1927); Seesz v. Basic builders, Inc., slip op. (W.C.C.A. Jan. 12, 1989); Richards v. Acme Heating, Sheet Metal & Roofing Co., 23 W.C.D. 41 (W.C.C.A. 1963). In this case, although the medical record does indicate the presence of some remaining and recurrent symptoms following the employee's surgery, the employee's testimony is clear that he felt "Oh, far - - far better" at the time of the hearing than he did prior to his surgery - - "like a new person, basically. I can move around. I can lift my daughter. I have no problem." The compensation judge was entitled to credit this testimony as evidence that the effects of the employee's work injury were relieved by the August 1997 surgery and that the employee's ability to work was improved, notwithstanding the employer and insurer's argument that the employee suffered no actual loss of work time prior to his surgery.

Dr. Boxall conceded that Dr. Seymour is a respected and conservative surgeon, and it was not unreasonable in this case for the compensation judge to credit Dr. Seymour's opinion over that of Dr. Boxall. 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). Nor have the employer and insurer offered any evidence that the "substantial" costs of the employee's treatment by Dr. Seymour were in any way unreasonable for being excessive. Because Dr. Seymour's opinions as to the employee's treatment were not based on any false premises, and because the judge's decision based on those opinions was not otherwise unreasonable, we affirm the compensation judge's conclusion that the employee's August 1997 surgery and related treatment expenses were reasonable and necessary. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.