PATRICK MURPHY, Employee, v. FRANA & SONS, INC., and CNA/CONT'L CAS. CO., Employer-Insurer/Appellants, and CONSOL. BLDG. and GEN. CAS. INS. CO., Employer-Insurer, and ALLINA MED. GRP. for COON RAPIDS MED. CLINIC.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 13, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - MEDICAL TREATMENT. Substantial evidence supports the compensation judge's finding that the employee sustained a work-related shoulder injury in 1996 and then, while working for a different employer in 1997, sustained a shoulder injury that was temporary in nature, and that the initial pre-existing permanent injury was responsible for the employee's future medical expenses, except for certain medical expenses ordered to be shared when the employee was being treated for the temporary injury.

ATTORNEY FEES - .191 FEES. The award to the employee's attorney of a Minn. Stat. § 176.191 attorney fee is supported by substantial evidence as the dispute in the case was primarily between the two employers and insurers.

Affirmed.

Determined by Hefte, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: James R. Otto

OPINION

RICHARD C. HEFTE, Judge

The employer, Frana & Sons, Inc., and insurer, CNA/Continental Casualty Company, appeal from the compensation judge's finding that the employee's work injury of March 7, 1997 was a temporary aggravation of a pre-existing condition of the employee; and also appeal the finding and order that the employee's attorney is entitled to a reasonable attorney fee under Minn. Stat. § 176.191. We affirm.

BACKGROUND

Since 1984 Patrick J. Murphy, the employee, has been employed as a carpenter for a number of different construction companies. The employee worked for Frana & Sons, Inc., the employer, (hereinafter referred to as Frana) on three different occasions, most recently beginning with a period of employment in November 1993.

The employee testified he began to experience physical pain and symptoms at work in January 1996. He described his symptoms as "knots in the low back below my shoulder blade area in the middle of my back, and I was having warm sensations in my shoulders, and I was having tingling shooting into my fingertips." (T. 21.) Frana and its workers' compensation insurance carrier, CNA/Continental Casualty Company (CNA) accepted liability, reporting the work-related injury date as February 21, 1996.

The employee initially saw Dr. Gehry Sower on February 21, 1996 who prescribed physical therapy. Later the employee was referred to Dr. Randall Chadwick, Jr., an orthopedic surgeon, who continued thereafter to be the employee's treating physician. Dr. Chadwick reported that the employee said "[h]e thinks that his symptoms were aggravated when he was doing a lot of heavy overhead work back in November." (Ex. A.) On September 4, 1996, the employee had surgery performed by Dr. Chadwick on his right shoulder in the nature of an acromioplasty and a distal clavicle resection. Following the surgery, the doctor prescribed physical therapy. The physical therapist advised the employee that he could "return to work at 2 weeks with no use of the right arm until 6 weeks . . . . Patient able to return to full duty work by 3 to 4 months, including overhead work." (Id.)

After being off work for two weeks in September 1996 following his right shoulder surgery, the employee returned to light-duty work for Frana. The employee's right arm was in a sling and he apparently used his left arm to perform "clean up" type work. At this time the employee's left shoulder started to bother the employee with symptoms that included knots and warm sensations in the left shoulder around the shoulder blade area, together with tingling down to his fingertips. On September 13, 1996 the physical therapist noted the employee's complaints as to his left shoulder and reported "he was starting to have the same symptoms in this [left] shoulder as in the right." At this time Dr. Chadwick requested physical therapy treatment be commenced on the employee's left shoulder. (Id.)

The employee testified that in November 1996, following two months of physical therapy, that he believed his problems in both shoulders had resolved. The employee continued to work for Frana until February 1997, at which time the employee was laid off because of a lack of available work. On February 24, 1997, the employee began work for the employer, Consolidated Building (hereinafter Consolidated) who was insured for workers' compensation liability by General Casualty Company. The employee's duties at Consolidated were in the nature of framing work in buildings, which included continuous and frequent overhead work and heavy lifting. A couple of days after he started working for Consolidated the employee began to experience symptoms again in both shoulders. He described his symptoms as a knotting sensation in both shoulder blades and upper back as well as tingling down both arms to his fingers. Because of his bilateral shoulder condition, the employee returned to see Dr. Chadwick on March 7, 1997 for further treatment.

In May 1997 Frana and CNA refused to pay for medical services being provided by Dr. Chadwick based on their conclusion that the employee had suffered a new bilateral shoulder injury while working for Consolidated from and after February 1997. This injury was alleged by

Frana and CNA to have occurred on May 7, 1997 and was in the nature of a wear and tear and/or repetitive or overuse type of injury to the employee's shoulders.

The employee served a medical request on or about September 9, 1997, alleging that certain medical expenses to date were not paid by Frana and CNA which were the result of the employee's bilateral shoulder injuries of February 21, 1996. Frana and CNA denied responsibility for the disputed expenses for the employee's medical care. A decision and order pursuant to a Minn. Stat. § 176.106 conference was served and filed November 19, 1997 concluding that Frana and CNA were responsible for the payment and reimbursement of the disputed medical care and treatment expenses. On December 9, 1997, Frana/CNA filed a request for a formal hearing on the disputed medical expense issue. At the same time, Frana/CNA filed a motion for joinder requesting that Consolidated and its insurer General Casualty be made a party in this matter. It was alleged that joinder should be granted because the employee sustained a new permanent injury while working for Consolidated and that Consolidated and General Casualty should be responsible for all or a substantial part of the employee's claim for medical care and treatment expenses subsequent to this new injury. Motion for joinder was granted as well as the request for a formal hearing and all issues were consolidated in one hearing before a compensation judge.

Following the hearing, which was heard on August 5, 1998, the compensation judge issued his findings and order wherein he found that the heavy-duty carpentry work the employee performed for Consolidated Building "temporarily aggravated Mr. Murphy's pre-existing bilateral upper extremity/shoulder condition and resulted in a new temporary aggravation, daily wear and tear, overuse type personal injury to Mr. Murphy's bilateral upper extremities on March 7, 1997." (Finding 5.)[1] The compensation judge ordered that Frana/CNA and Consolidated/General Casualty pay the employee's attorney's fees and costs pursuant to Minn. Stat. § 176.191 on a 90/10 split. The employer Frana and insurer CNA 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

[1] The compensation judge, who found the employee sustained a temporary aggravation of his pre-existing bilateral shoulder injury while working for Consolidated, did order Consolidated to pay a portion of the employee's medical expenses incurred subsequent to the apparent date the employee ceased working for Frana and to the date of the hearing only; however, Frana and CNA was determined to be liable for all future benefits subsequent to the hearing. The compensation judge also ordered that CNA provide the employee with a rehabilitation consultation.

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

Temporary Aggravation

Frana and CNA claim that substantial evidence does not support the compensation judge's finding that the employee's injury while working for Consolidated/General Casualty was a temporary aggravation of the employee's pre-existing bilateral shoulder condition.[2] Frana and CNA maintain that the employee sustained a permanent left shoulder new injury as a result of his work at Consolidated on or after February 24, 1997 and therefore should accordingly be responsible for the resultant workers' compensation benefits to the employee from this permanent injury. Frana and CNA contend that the compensation judge's finding is not supported by substantial evidence and is clearly erroneous. We disagree.

Frana and CNA assert that the compensation judge erred in that he did not distinguish in his decision between separate work injuries to the employee's right shoulder initially and then later the employee's injury to his left shoulder. They maintain that the employee's original work injury on February 21, 1996 was to the employee's right shoulder. Then after the employee had surgery to his right shoulder on September 4, 1996, the employee's left shoulder injury, which occurred within a couple of weeks, was a temporary injury at that time. The employee did testify he felt that in November 1996, after two months of shoulder and back physical therapy, that his shoulder problems had resolved. And, when the employee had left shoulder problems, after his work was terminated at Frana, February 1997, Frana claims that the injury to his left shoulder was a new and permanent injury as a result of his work at Consolidated.

However, substantial evidence supports the compensation judge's findings and conclusions in this matter. In unappealed Findings 1 and 2, the compensation judge did specifically address each shoulder injury separately. The compensation judge found that the

[2] Consolidated and General Casualty did not appeal the compensation judge's finding that the employee sustained a work-related overuse type injury while working at Consolidated. Its main position in this case has been that the work injury the employee sustained while working at Consolidated was a temporary aggravation of his pre-existing bilateral shoulder condition. Consolidated and General Casualty argue in their brief that the compensation judge's finding of a temporary aggravation type injury at Consolidated should be affirmed.

employee sustained a wear and tear and/or repetitive, or overuse personal type injury involving his right shoulder on February 21, 1996 that arose out of and in the course of his employment activities for Frana. (Finding 1.) In unappealed Finding 2 the compensation judge also found:

> That as a consequence of Mr. Murphy's daily wear and tear and/or repetitive, or overuse, type personal injury on or about February 21, 1996 and his consequential reduced use of his **right** upper extremity and consequential increased use of his **left** upper extremity prior to and following his surgery of September 4, 1996, Mr. Murphy sustained a **new** daily wear and tear and/or overuse type personal injury to his left upper extremity (and left shoulder) on or about September 4, 1996 that arose out of and in the course of his employment activities for Frana & Sons, Inc. from February 21, 1996 to and including (on or about) September 4, 1996.

(Emphasis added, bold face by compensation judge.)

The compensation judge separately found that the employee's left shoulder wear and tear and/or overuse injury which basically became a problem for the employee in September 1996, following his right shoulder surgery, arose out of and in the course of his employment activities for Frana from February 21, 1996 up to and including, on or about September 4, 1996. Therefore, although Frana attempts to separate the right and left shoulder injuries in its argument, unappealed Finding 2 concludes that both the right and left shoulder injury initially arose out of the employee's work activities from and after February 21, 1996 while the employee was working for Frana. And the evidence supports the fact that the employee's reduced use of his right arm and his increased use of his left arm contributed to the employee's pre-existing left shoulder injury becoming more of a problem for the employee in September 1996. It was reasonable for the compensation judge to conclude that the employee has had a bilateral shoulder problem causally related to his February 21, 1996, the date of his initial injury at Frana and continuing to the date of the hearing.

Frana and CNA had accepted liability for the employee's right shoulder problem after the employee's injury in February 1996 and accepted liability for the employee's left shoulder problem in September 1996. The left shoulder symptoms indicated by the employee after his injury in September of 1996 were the same symptoms as the employee's right shoulder symptoms the employee complained of after his upper back injury in February 1996. And, the employee indicated that he had the same symptoms in both shoulders shortly after commencing heavy work at Consolidated in 1997. The compensation judge reasonably found that the employee's bilateral shoulder condition had not completely resolved in 1996 and both shoulder injuries were temporarily aggravated as a result of his work at Consolidated in February and March of 1997.

Additional evidence supports the compensation judge's findings. When the employee first complained about his "overuse" problem in his back in January and February 1996, he did not limit his complaints to his right shoulder. He testified that he had knots below the

shoulder blade area in the middle of his back, warm sensations in his shoulders and tingling shooting into his fingertips. Also, the employee initially told Dr. Chadwick in 1996 that he felt his shoulder symptoms arose when he was doing a lot of heavy overhead work for Frana. The compensation judge may have reasonably inferred that this overhead work for Frana was performed with and affected both the employee's shoulders. After September 4, 1996, the employee was given physical therapy treatment to both his shoulders for approximately two months. At the completion of this physical therapy, and in November 1996, the employee returned to work, but was performing light-duty only. Having just completed two months of physical therapy in November 1996, the compensation judge could conclude that the employee could have reasonably felt that both his shoulder problems had resolved whereas the shoulders were actually just asymptomatic. After the employee was laid off by Frana from his light-duty job the employee began heavy-duty carpentry work for Consolidated, including overhead work. After a couple of weeks of this, the employee saw his treating doctor and complained of pain in both shoulders. The compensation judge reasonably found that the employee's work at Consolidated "temporarily aggravated Mr. Murphy's pre-existing bilateral upper extremity/shoulder condition and resulted in a new temporary aggravation, daily wear and tear, overuse type personal injury to Mr. Murphy's bilateral upper extremities on March 7, 1997." (Finding 5.)

Also, the record does not contain any clear medical opinion that the employee sustained a new, permanent injury to his left shoulder while working for Consolidated. Dr. Strand, who performed an independent medical examination for Frana, basically indicated that the employee has "not suffered further permanent partial disability due to his work at Consolidated Builders." (Frana Ex. 1.) Dr. Chadwick opined that "I would have to agree that the prior employment at Frana & Sons was a substantial contributing factor to the problems that he has now ongoing with his left shoulder. However it is clear that the pain seemed to flare up after he started the new job at Consolidated." The compensation judge noted in his memorandum that he based his findings on all treatment and medical opinions and reports. And he found, in unappealed Finding 6, that the employee's testimony was highly credible. Substantial evidence supports the compensation judge's findings on this issue and we affirm.

Minn. Stat. § 176.191, Attorney's Fees

This matter initially arose when the employee filed a medical request against Frana and after a conference hearing, the employee prevailed. The issues in dispute expanded when Frana requested a formal hearing and prevailed in joining Consolidated and General. The employee herein sought legal representation from his present attorney to represent him in this dispute. In a consolidated hearing, Frana/CNA claimed that the employee's medical expenses after February 1997 resulted from a new permanent injury which was incurred after the employee began work for Consolidated and that these medical expenses should be all, or partly the responsibility of Consolidated, and their insurer, General Casualty. An additional issue was whether the employee was entitled to a rehabilitation consultation.

A reasonable attorney fee may be assessed under Minn. Stat. § 176.191 where a

dispute exists under two or more employers or two or more insurers, and the dispute as to which is liable is a primary issue in the case. Sundquist v. Kaiser Eng's, Inc., 456 N.W.2d 86, 42 W.C.D. 1101 (Minn. 1990). The employer and insurers contend that .191 fees should not be payable here as the dispute was not primarily between insurers and employers. However, the compensation judge reasonably concluded, considering all the evidence in the case, that the dispute was primarily between the employers and insurers. Substantial evidence supports this factual determination. The issue of whether the employee sustained a work injury at Consolidated was an issue at the hearing herein and the compensation judge did not determine this issue in favor of Consolidated. Consolidated and General Casualty did not appeal this issue. It appears that Consolidated and their insurer's main position in this matter was that the employee's overuse work injury at Consolidated was a temporary injury. The compensation judge ordered that Frana and CNA provide the employee with a rehabilitation consultation. Frana and CNA noted an appeal on the rehabilitation issue, but did not address it in their brief. Issues raised in the notice of appeal but not addressed in the appellate brief are deemed waived. Minn. R. 9800.0900, subp. 1.

A review of the record supports the conclusion that primary focus was not on whether the employee was entitled to medical and rehabilitation services but on whether either or both potential insurers were responsible. On that basis, this is a classic case for .191 fees. Attorney fees are proper even though the compensability of an injury was at issue where the dispute was "'primarily' between the insurers" and the "sole issue of real importance" was apportionment of liability. Patnode v. Lyon's Food Prods., Inc., 312 Minn. 570, 572, 251 N.W.2d 692, 693 (1977); Sundquist, supra. There was no dispute as to whether the medical treatment and expenses were reasonable and necessary. The employee's attorney submitted his hourly billing for his .191 attorney fee, and no question was raised as to the reasonableness of his fee. Also, the employers and insurers argue that the attorney fee pursuant to Minn. Stat. § 176.191 should be limited to the 25/20 formula of the medical expenses as contained in Minn. Stat. § 176.081, subd. 1a. We disagree. The provision for the .191 attorney fee states the "claimant shall also be awarded a reasonable attorney fee, to be paid by the party held liable for benefits." The .191 statute makes no reference that the attorney fee is limited by the 25/20 formula; but, rather that the fee is to be a reasonable attorney fee. Cf. Crimmins v. NACM No. Central Corp., 45 W.C.D. 435 (W.C.C.A. 1991) (attorney fees awarded pursuant to Minn. Stat. § 176.191 and 176.981, subd. 8 (before the statutes were amended in 1995) not limited by the 25/20 formula contained in Minn. Stat. § 176.081, subd. 1a), summarily aff'd, (Minn. Nov. 26, 1991). The employee's attorney didn't request Roraff or Heaton fees and the statute doesn't require him to choose them if he is satisfied with .191 fees. The award of attorney's fees pursuant to Minn. Stat. § 176.191 is affirmed.