

MARIA A. OLSON, Employee, v. CANTERBURY WEST, LTD. and WAUSAU INS. CO.,  
Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS  
FEBRUARY 5, 1999

No. [REDACTED SSN]

HEADNOTES

**MEDICAL EXPENSES & TREATMENT - SURGERY.** Where the employee's treating physicians recommended a repair of a failed fusion, where conservative treatment had been ineffective and where the employee testified the repair surgery helped her condition, the compensation judge was supported by substantial evidence in finding the repair surgery to be reasonable and necessary.

**PENALTIES; SETTLEMENT - INTERPRETATION.** Where the employer and insurer executed a stipulation for settlement which the compensation judge interpreted to require the employer and insurer to pay for certain of the employee's medical expenses, the employer and insurer's failure to pay those expenses justified the imposition of a penalty, payable to the assigned risk safety account, under Minn. Stat. § 176.221, subds. 3 and 3a.

Affirmed.

Determined by Wheeler, C.J., Pederson, J., and Hefte, J.  
Compensation Judge: Joan G. Hallock.

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's determination that the employee had not attained maximum medical improvement as of April 15, 1997, that the fusion repair surgery performed on July 3, 1997 was reasonable and necessary, that the employee was entitled to temporary total disability benefits after July 15, 1997, and that penalties were appropriate as a result of the nonpayment of medical bills by the employer and insurer. We affirm.

BACKGROUND

The employee, Marie A. Olson, sustained a work-related low back injury while working for the employer, Canterbury West, as a live-in caretaker on August 21, 1991. At the time the employee was 55 years of age. The employee slipped and fell on some stairs, landing on her buttock and experienced low back pain with right lower extremity discomfort which subsequently developed into numbness in both lower extremities. The employee was seen by her

physician, Dr. Steven McCabe, on August 22, 1991. Dr. McCabe initially diagnosed a low back strain, but eventually the employee was referred to Dr. Leo J. de Souza, an orthopedic surgeon. Initially she was treated conservatively with physical therapy and medication. The employee received temporary total disability benefits from August 22, 1991 through February 28, 1992.

In early March 1992 the employee returned to work as an in-home caregiver for an elderly woman. This position ended in late 1992. The employee found another in-home caregiver position in January 1993. While in this employment, on November 23, 1993, the employee fell forward, landing on her stomach, while helping her patient. This incident did not change the employee's back symptoms. Because the employee had significant pain and feared putting her patient at risk, she left this employment on November 23, 1993 and sought the payment of temporary total disability benefits from the employer and insurer. (Unappealed Findings and Order of 7/18/94.) The employer and insurer resisted this payment, alleging that the 1991 injury was merely a temporary aggravation of underlying preexisting back problems which had originated from prior injuries in 1975 and 1977. The disputed matter came on for hearing before a compensation judge at the Office of Administrative Hearings on July 12, 1994. In Findings and Order, issued July 18, 1994, which were not appealed by the employer and insurer, the compensation judge determined that the employee was entitled to temporary total disability benefits from November 23, 1993 and continuing and that the employer and insurer were liable for the expenses of a TENS unit as a result of the August 1991 injury.

In reaching her decision in 1994, the compensation judge noted in her memorandum that while the employee did sustain back injuries in 1975 and 1977, each of which was followed by fusion surgery, the employee had recovered from these incidents and indicated that her back was "fantastic" after the second fusion. The compensation judge noted that no evidence to the contrary was presented at the hearing. The compensation judge specifically indicated that she found the employee's testimony credible in all respects, including the fact that following her injury of August 21, 1991 she experienced constant pain in her low back and numbness and cramping in her legs, with the right leg being worse than the left. The employee testified that her toes had felt numb for at least the last year and that the right leg had no feeling in it at all. The employee testified that she was provided with physical therapy which provided no relief and that two injections had offered her only temporary relief. The compensation judge further credited the employee's testimony that her symptoms had become progressively worse since the date of the 1991 injury and that she was in constant pain, slept poorly and could move only slowly. (Findings and Order of 7/18/94, pp. 3-4.)

Following the compensation judge's order, the employee was paid temporary total disability benefits from November 23, 1993 continuously through July 25, 1997. (Resp. Ex. 1, NOID of 7/30/97.)

Following the compensation judge's decision, the employee continued to be treated on a conservative basis by Dr. de Souza. A lumbar discogram and CT scan from July 29, 1994 indicated that "[a]ll discs were morphologically abnormal and post-diskography CT scanning revealed a circumferential annular disruption at L4-5, bilateral subarticular stenosis with moderate

central stenosis at L4-5, a Grade III annular tear at L3-4, and severe central spinal stenosis at the L3-4 level.” (Report of Dr. David Ketroser dated 10/27/94, attached to NOID filed 11/14/94, contained on the judgment roll.) Dr. de Souza advised the employee that she should undergo a decompression fusion from L2 to L4. A second opinion was obtained from Dr. Ensor Transfeldt at the Twin City Spine Center. After Dr. Transfeldt concurred, Dr. de Souza performed a decompression at L3-4 followed by intertransverse fusion with instrumentation at the same level on August 23, 1995. (Pet. Ex. D, notes by Dr. de Souza of 9/18/95.) At the time of the surgery, the primary diagnosis by both doctors was spinal stenosis. Dr. Transfeldt, in his May 26, 1995 report, indicated that the employee had “multi segment disc degeneration of the lumbar spine. The CTs and MRIs of her spine show that she has a fairly severe central and lateral recess stenosis at L3-4 level together with some mild foraminal stenosis. She also has mild foraminal stenosis at the L4-5 level.” (Pet. Ex. C.)

Following the surgery, the employee was primarily seen by Dr. de Souza. The employee initially did well but later it was determined that the bone graft in the intertransverse area between L3 and 4 was not secure. Dr. de Souza expressed concern that the employee’s smoking may be interfering with the success of the fusion. He recommended the use of a bone stimulator, which the employee began using on February 19, 1996. By October 28, 1996, Dr. de Souza had concluded that the fusion was not successful. He recommended that the employee undergo a CT scan and then be examined by Dr. Transfeldt to determine whether additional surgery may be necessary. (Pet. Ex. D.)

CT scans were performed in October of 1996 and the employee was examined by Dr. Transfeldt on November 26, 1996. His notes from that date indicate that the CT scans showed “definite residual stenosis at the L4-5 level and more significant subarticular stenosis at the L5-S1 level. The CT report does talk about a pseudoarthrosis at the L3-4 level.” Dr. Transfeldt discussed various treatment alternatives with the employee. The employee indicated to Dr. Transfeldt that following the 1995 surgery she actually did quite well for awhile but gradually began developing increasing leg pain which was associated with numbness in her lower legs which she described as having “a stocking distribution.” Following a discussion of a possible need for additional tests to determine whether the employee had a pseudoarthrosis condition, which would require an anterior/posterior fusion rather than a less intrusive posterior decompression with instrumentation, the employee indicated that “for the time being” that she would prefer the nonoperative approach since she was able to control her symptoms with Tylenol. (Pet. Ex. C.)

On February 7, 1997, the employee filed a medical request seeking payment of medical mileage and out-of-pocket expenses related to travel to see her treating physicians. The employer and insurer responded by indicating that payment was refused because the employee had moved to Jamestown, North Dakota, and such expenses were unreasonable.

The employee was examined by Dr. Jack Droggt at the request of the employer and insurer on March 8, 1997. Dr. Droggt opined that the employee’s 1995 surgery was related to preexisting multi-level degenerative disc disease. Dr. Droggt also indicated that the employee had reached maximum medical improvement from the 1991 injury after approximately one year.

After noting that the employee had sustained another injury in November 1993, he stated that, “In my opinion, the symptoms after November of 1993 led to the apparent need for surgical intervention in 1995.” He indicated that the employee was not a surgical candidate but that if surgery was to be performed it was the result of the preexisting multi-level degenerative disc disease and not the incident which occurred in August 1991. (Unappealed Finding 6.) The parties stipulated that Dr. Droggt’s March 8, 1997 report had been served on the employee on April 15, 1997. (T. 5.)

On April 7, 1997, the employer and insurer filed a medical request seeking to discontinue any obligation to pay for further medical treatment for the employee, including surgery, based on Dr. Droggt’s report. On April 23, 1997, a representative of the Commissioner of the Department of Labor and Industry issued a decision denying the employee’s claimed mileage expenses on the basis that her interstate travel was unreasonable. On May 8, 1997, the employee filed a claim petition seeking approval of surgery recommended by Dr. Transfeldt. On May 12, 1997, the employee filed a request for a formal hearing on her medical mileage claim. These matters were consolidated on May 29, 1997.

By May 20, 1997, when the employee returned to see Dr. Transfeldt, she indicated that her symptoms were becoming progressively worse. She complained of anterior thigh pain and numbness and pain down both lower extremities. Dr. Transfeldt recommended decompression surgery at spinal levels L4-5 and L5-S1, and possibly at L2-3. On July 3, 1997, Dr. Transfeldt performed a repair of L3-4 pseudoarthrosis and the previous L3-4 fusion, together with “lumbar decompression bilaterally with L4 and L5 nerve root decompression and subarticular decompression and removal of scar tissue.” (Pet. Ex. C, surgical report of 7/3/97.)

On or about July 30, 1997, the employer and insurer filed a notice of intention to discontinue benefits on the basis that the employee’s entitlement to temporary total disability benefits expired on July 14, 1997, 90 days after the employee had been served with Dr. Droggt’s March 8, 1997 MMI report. (Resp. Ex. 1.) Following the 1997 surgery, at her deposition on September 24, 1997, the employee testified that she was showing very little improvement from the surgery. (Resp. Ex. 3, p. 14.) By September 30, however, when she visited Dr. Transfeldt the employee indicated that she was continuing to improve slowly. When seen by Dr. Transfeldt on November 18, 1997, the employee stated that she was still having some intermittent low back pain but that she is “much better that [sic] she was prior to the surgery.” Dr. Transfeldt noted at that time that the employee’s x-rays showed that the fixation was in good position and that it appears she had developed a solid fusion. At the hearing below, the employee testified that she felt that the 1997 surgery “has helped greatly.” She felt that this surgery had a good result for her back pain. (Pet. Ex. C; unappealed Findings 8 - 11.)

The various disputes between the parties were scheduled for hearing before a compensation judge at the Office of Administrative Hearings on December 30, 1997. Prior to the hearing, however, the matter was apparently settled. On February 26, 1998, the parties submitted an executed stipulation for settlement which was subsequently approved by an award on stipulation on February 27, 1998. Thereafter, a dispute arose concerning the proper interpretation of the

terms of the stipulation and the employer and insurer refused to pay any medical expenses related to the employee's surgery on July 3, 1997. The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on April 30, 1998. In her Findings and Order of June 12, 1998, Compensation Judge Hallock indicated that the employee had not reached maximum medical improvement on April 15, 1997 with the service of the report of Dr. Droggt, that the fusion repair surgery on July 3, 1997 was reasonable and necessary, that the employee was entitled to temporary total disability benefits to be continued from July 15, 1997 to the present and continuing, and that penalties were to be paid to the assigned risk safety account because the employer and insurer had failed to pay medical expenses called for in the February stipulation for settlement. The employer and insurer appeal from each of these findings.

## 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

### Spinal Surgery

The employee underwent a spinal decompression and repair of her spinal fusion at level L3-4 on July 3, 1997. This surgery was performed by Dr. Ensor Transfeldt. The compensation judge made the following finding with respect to the surgery:

Based upon a preponderance of the evidence the surgery of July 3, 1997 was reasonable and necessary. Although the employee's result was not as good as hoped, the employee, herself, terms the 1997 surgery a success. Surgery was reasonable and necessary because conservative treatment was ineffective and the employee's symptoms continued to get worse. Dr. Transfeldt and Dr. de Souza felt that surgery was the only option left.

As a result of this finding the compensation judge also concluded that the employee had not reached maximum medical improvement (MMI) in April 1997 with the service of Dr. Drog't's medical report and that the employee's temporary total disability should not be discontinued in July 1997.

The employer and insurer argue that the compensation judge's determination with respect to the reasonableness and necessity of the surgery, and the resultant award of temporary total disability after July 15, 1997, is not supported by substantial evidence in the record and is clearly erroneous. The employer and insurer cite the following evidence and arguments in support of its position: (1) According to Dr. Drog't's March 1997 opinion the employee was not a good candidate for repeat fusion surgery. He noted that the employee had poor results from the surgery in 1995. Dr. Drog't also indicated that the employee's problems were not as significant as her treating physicians suggested and that many of her difficulties were as a result of functional overlay. Dr. Drog't stated that the employee was capable of returning to work with restrictions and without any further surgical intervention. (2) The 1997 surgery did little to help the employee's condition, which further supported Dr. Drog't's presurgery predictions. The employer and insurer point to the employee's testimony in her deposition on September 24, 1997, that the surgical procedure was of very little help, and the QRC's testimony that the surgery had not significantly improved the employee's condition.

The only issue before us is whether the compensation judge's determination is supported by substantial evidence in the record and is not clearly erroneous. While the compensation judge could have accepted the opinion of Dr. Drog't and the arguments of the employer and insurer with respect to the wisdom of the surgery, she did not. The compensation judge, instead, relied on the opinion of Dr. Transfeldt, who felt that the surgical procedure was the only treatment option available to the employee, given that long term conservative treatment had not assisted the employee. In addition, the compensation judge relied on the employee's testimony that while the surgery did not initially give her much relief by the time of the hearing in April 1998 she felt that it was a success. We note from Dr. Transfeldt's notes that by November 18, 1997, x-rays indicate that the employee had developed a solid fusion, which could be considered to have been an improvement over the results of the 1995 surgery. Based on this evidence, the compensation judge was supported by substantial evidence in finding that the July 3, 1997 surgery was reasonable and necessary to improve the employee's condition. Her determination is affirmed. As the employer and insurer's arguments with respect to the date of maximum medical improvement and temporary total disability were based solely on its argument concerning the reasonableness and necessity of the surgery, those issues are resolved by our affirmation of the compensation judge's determination with respect to the surgery.

### Penalties

The compensation judge found that the stipulation of settlement executed by the parties in February 1998 provided for the employer and insurer to pay certain medical bills. As a result of the employer and insurer's failure to pay these medical bills she found that pursuant to

Minn. Stat. § 176.221, subds. 3 and 3a, and Minn. R. 5220.2780, subp. (1), (2) and (3), that the employer and insurer should pay penalties to the assigned risk safety account.

On appeal, the employer and insurer do not argue about the amount of the penalty but contend that the compensation judge has misinterpreted the terms of the stipulation for settlement. They contend that certain portions of the stipulation, drafted by the employee's attorney, are "complicated, contradictory and confusing" and that a reasonable reading of the stipulation did not require them to pay for the employee's treatment, including the cost of the July 3, 1997 surgery. As additional support for their argument they point out that the very issue before the compensation judge was the reasonableness and necessity of the surgery and had the stipulation resolved that issue it would have been unnecessary to litigate the matter.<sup>1</sup>

As noted above, the compensation judge interpreted the stipulation for settlement to contain an agreement by the employer and insurer to pay certain medical expenses specified in the stipulation. We agree that the compensation judge's interpretation was reasonable. The portions of the stipulation which required payments by the employer and insurer are found in Part III, paragraphs D, E, F and G. These provisions provide as follows:

D. The employer and insurer shall pay and the employee shall accept, \$2,250.00 as a full, final and complete settlement and closing out of any and all claims for medical mileage and out-of-pocket expenses to the date of October 1, 1997.

E. The employer and insurer will pay, provide or reimburse and shall continue to pay reasonable, necessary medical expense for the cost of medical treatment arising out of the incident and injury described in Part I, including the reasonable and necessary costs for surgery detailed in Part II, item A.1. while still maintaining their denial of reasonableness and necessity for the surgery.

F. The employer and insurer acknowledged the agreement between the employee and Attorney Timothy J. McCoy, whereby the employee retained Attorney Timothy J. McCoy for representation herein and shall pay to Attorney Timothy J. McCoy the amount of \$2,250.00 pursuant to Minn. Stat. § 176.135 as interpreted in Roraff.

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<sup>1</sup> This latter argument is not persuasive because the terms of the settlement clearly show that the employer and insurer maintained "their denial of reasonableness and necessity for the surgery." (Pet. Ex. G, Part III, ¶ E.)

G. The employer and insurer shall pay or reimburse to Attorney Timothy J. McCoy the sum of \$108.09 for costs and/or disbursements.

In addition to the above provisions, in Part III, paragraph L, the parties provided that “notwithstanding the above payments and provisions, the employer and insurer do not admit any liability for and maintain all of their rights and defenses against any future claims related to the employee’s surgery of July 3, 1997.”

The critical language to be interpreted is found in Part III, paragraph E. Paragraph E states that the employer and insurer “will pay . . . for the cost of medical treatment . . . including” the surgery referred to in “Part II item A.1.” Part II, paragraph A.1, identifies the surgery as that “undertaken on July 3, 1997.” The language in the paragraph which states that the employer and insurer maintained “their denial of reasonableness and necessity of the surgery” appears to relate to the provision in paragraph L which indicates that the employer and insurer’s primary concern was to maintain their rights and defenses against “any future claims related to the employee’s surgery of July 3, 1997” (emphasis added). It was certainly reasonable for the compensation judge to conclude that the language in paragraph E, when read alone or in the context of paragraph L, clearly expressed an agreement by the employer and insurer to pay most, if not all, of the employee’s “to date” medical expenses, specifically including the costs associated with the July 3, 1997 surgery.

As additional support for this conclusion, we note that attached to the original copy of the stipulation for settlement contained in the judgment roll was a copy of Dr. Transfeldt’s office notes from November 18, 1997 and an itemization of medical expenses as of September 19, 1997 and as of January 2, 1998. These itemizations total in excess of \$20,000. If the expenses related to the surgery were not to be paid under the terms of the stipulation, as the employer and insurer contend, then the only medical expenses which unambiguously were to have been paid were the employee’s medical mileage and out-of-pocket expenses of \$2,250.00 under Part II, paragraph D. If those were the only medical expenses to be paid under the settlement, we wonder why, in paragraph F, the employer and insurer agreed to pay Roraff fees to the employee’s attorney in the amount of \$2,250.00. Given most employers’ and insurers’ reluctance to pay Roraff fees, especially for the recovery of limited medical expenses, this Roraff fee seems generous. A reasonable conclusion for the compensation judge to have made was that it was more likely that the Roraff fees were being paid for having obtained an agreement by the employer and insurer to pay both the medical mileage expenses and the more than \$20,000 in medical expenses related to the July 3, 1997 surgery.

Under the circumstances of this case, we reject the employer and insurer’s argument with respect to the reasonable interpretation of the stipulation for settlement. The compensation judge’s determination with respect to the employer and insurer’s obligation to have made payment of medical expenses is affirmed. As a result, we also affirm the order for the employer and insurer to make payment of penalties for failure to timely pay its obligations under the stipulation for settlement, as confirmed by the award on stipulation of February 27, 1998