

DEROLD OTTERSTETTER, Employee/Appellant, v. WAYMOUTH FARMS, INC., and ST. PAUL FIRE & MARINE INS. CO., Employer-Insurer, and MN DEP'T OF LABOR & INDUS./VRU, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS  
SEPTEMBER 22, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - TEMPORARY AGGRAVATION. Substantial evidence supports the compensation judge's determination that the employee's July 31, 1997 work-related injury was a temporary aggravation of the employee's pre-existing low back and left leg condition.

Affirmed.

Determined by: Johnson, J., Rykken, J., and Wilson, J.  
Compensation Judge: Rolf G. Hagen

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's finding that the employee's July 31, 1997 personal injury was a temporary aggravation of a pre-existing condition that resolved by April 8, 1998. We affirm.

BACKGROUND

Derold Otterstetter, the employee, first injured his low back on September 13, 1977, in Texas, when he fell through a ceiling while blowing insulation. (T. 22-23.) The employee treated off and on for about a year after that injury, but testified the symptoms eventually resolved and he recovered from this injury. (T. 25-26, 70-71.)

On October 31, 1990, the employee, then working for Imprints, sustained a work-related injury changing a tire on his foreman's vehicle. While lifting the new tire to place it on the rim, the employee stated "something just pulled in my back and started hurting real bad." (T. 28.) He identified the pain as being in his low back and left leg with tingling and numbness extending into his left leg. (T. 28-29.) The employee sought treatment from Steven Bolls, D.C., on October 31, 1990, complaining of low back pain. X-rays showed a Grade I degenerative spondylolisthesis of L5 on S1 with degenerative disc disease throughout the lumbar spine. Dr. Bolls diagnosed lumbar radiculitis due to spondylolisthesis and began chiropractic treatment. On April 8, 1991, the employee complained of tingling and numbness in his posterior thighs. A

CT scan of the lumbar spine on April 9, 1991, showed Grade I 20 percent spondylolysis and spondylolisthesis at L5-S1 resulting in stenosis at both lumbosacral foramina, a small central disc protrusion at L4-5 suspicious for a central annular tear and contained herniation, without nerve root compression, and narrowing of the L4-5 foramina suggesting the possibility of a left L4 impingement. The employee received chiropractic treatment for approximately one year after this injury. (T. 75.) Dr. Bolls' records reflect consistent complaints of low back pain with a burning feeling in the back of both legs. (Resp. Ex. 2.) The employee testified he had periodic flare-ups of his low back and leg condition following the October 1990 injury. (T. 80-81.) The employee filed a claim petition and eventually settled his case with Imprints on a full, final and complete basis in August 1991.

In March 1992, the employee went to work for Decorative Packaging as a laborer. One of the employee's jobs was to operate a silk screen machine which required continual use of his left foot on a pedal for seven hours at a time. The employee experienced numbness in his left leg and pain in his low back after operating this machine all day. The pain did not cause him to seek medical attention, however, or prevent him from working. A day or two after working the silk screen machine the symptoms would go away. (T. 32-37.)

On March 17, 1997, the employee saw Dr. Joanne Rogin at the Minneapolis Clinic on referral from Dr. C. Edward Vaurio. Dr. Rogin reported a "several month history of tingling from his thigh to his foot which is present much of the time. It increases with standing for a long period of time and is relieved by extending his left leg . . . . He does have chronic low back pain following an injury years ago but does not feel this has worsened." Dr. Rogin found evidence of a peripheral neuropathy possibly related to the employee's long-term use of Dilantin, an antiseizure medication. (Resp. Ex. 3.)

In June 1997, the employee went to work for Waymouth Farms, the employer, packaging products on an assembly line. The employee packed bags of candy of various sizes into larger boxes for shipment and then stacked the filled boxes on a skid. The boxes generally weighed from 10 to 15 pounds. (T. 38-41.) On July 31, 1997, the employee was placing shrink-wrap on a box. He bent down and pulled the shrink-wrap and felt something pop in his low back. (T. 42-43.) The employee reported the incident to his supervisor, Ron McCarney, who prepared an accident report. (Resp. Ex. 4.)

The next day, the employee saw Dr. David Scott at West Metro Health reporting an acute onset of tingling dysesthesias in the left leg and pain in the buttocks. On examination, Dr. Scott found no muscle tenderness or spasm in the low back but found tenderness in the mid-left buttock area and a mildly decreased ankle jerk on the left. Straight leg raising was negative. The doctor diagnosed sciatica-piriformis syndrome and recommended two days of bed rest with ice. The employee returned to see Dr. Scott on August 4, 1997 with continued complaints. The doctor kept the employee off work. On August 8, 1997, Dr. Scott stated the employee was still unable to work and referred the employee to the Low Back Institute for further evaluation. (Pet. Ex. B.) On August 12, 1997, the employee saw Dr. Alexander Lifson at the Institute for Low Back and Neck Care. The employee complained of pain in the left side of his low back

radiating into the left buttock and left leg with tingling, numbness and weakness in the left leg. The employee told the doctor he had previous episodes of low back pain but had not experienced leg pain until July 31, 1997. X-rays showed a Grade I-II spondylolisthesis at the L5-S1 level. Dr. Lifson diagnosed spondylolisthesis at L5-S1 and acute left sciatic radiculitis, probably due to an acute herniation of the L5-S1 disc. (Pet. Ex. C.) An MRI scan on August 14, 1997 showed Grade I-II lytic spondylolisthesis at L5-S1 with severe lateral spinal stenosis bilaterally and compression of the exiting L5 nerve root, and severe degeneration of the L4-5 disc with no nerve root compression. (Pet. Ex. D.) After review of the MRI scan, Dr. Lifson noted surgery might eventually be required. (Pet. Ex. C.)

On August 1, 1997, the employee also sought treatment with Joel B. Wulff, D.C., at Brooklyn Park Chiropractic. The employee complained of severe low back pain with pain and tingling into his left leg following the July 31, 1997 injury. On examination, Dr. Wulff found limited range of motion, positive straight leg raising bilaterally, muscle spasm and reduced reflexes in the left leg. Dr. Wulff diagnosed a lumbar disc syndrome, spondylolisthesis and a lumbar sprain/strain with lumbar radiculopathy. The employee continued to receive chiropractic treatment from Dr. Wulff through December 15, 1998. (Pet. Ex. A.)

The employee was examined by Dr. Jerry T. Reese on October 8, 1997, at the request of the employer and insurer. The doctor took a history from the employee and reviewed medical records, including the August 14, 1997 MRI scan. On examination, Dr. Reese found significant muscle spasm in the low back with normal straight leg raising and normal neurologic findings. The doctor diagnosed Grade I-II lytic spondylolisthesis at L5-S1 with a normal neurologic examination. Dr. Reese concluded this was a pre-existing condition which was aggravated by the July 31, 1997 work injury, and anticipated the aggravation would be temporary. Dr. Reese opined the employee could work, subject to lifting restrictions, and concluded decompression surgery was not reasonable or necessary at that time. (Resp. Ex. 1.)

The employee returned to see Dr. Lifson on February 10, 1998 with continuing left leg pain. He underwent a lumbosacral epidural myelography and therapeutic injections into the L5 epidural space on February 11, 1998. (Pet. Ex. D.) The employee testified these injections helped for "a little while" and then his symptoms returned. (T. 56-57.) The employee was seen in follow-up by Dr. Lifson on February 26, 1998, with continuing complaints of left leg pain. The doctor concluded all possible conservative treatment was exhausted and recommended decompression surgery, with a posterior spinal fusion. (Pet. Ex. C.)

Dr. Reese re-examined the employee on April 8, 1998, again at the request of the employer and insurer. The doctor reviewed additional medical records and again took a history from the employee. Dr. Reese recorded that the employee told him he continued to experience low back pain with symptoms of numbness but no pain in his left leg. On examination, Dr. Reese found some mild bilateral paralumbar muscle spasm and limitation of motion. Straight leg raising was negative, reflexes were normal and the doctor found no evidence of any motor weakness. Dr. Reese opined the employee sustained a temporary aggravation of a pre-existing low back problem on July 31, 1997, from which he recovered. The doctor noted the employee's current

symptoms were no different than his symptoms prior to the work injury. The doctor opined the employee had reached maximum medical improvement and concluded the surgery recommended by Dr. Lifson was neither reasonable or necessary. (Resp. Ex. 1.)

The employee returned to see Dr. Lifson on May 7, 1998. The doctor reviewed Dr. Reese's report of April 8, 1998, (Resp. Ex. 1) and noted that Dr. Reese stated the employee did not complain of left leg pain and complained of only minimal numbness and tingling in his left leg. The employee told Dr. Lifson this was a misstatement and stated he told Dr. Reese he had severe low back and left leg pain. Dr. Lifson concluded the employee required surgery and was able to work only at a very light-duty job, no more than eight hours a day. (Pet. Ex. C.) The employer was unable to accommodate these restrictions and terminated the employee. (T. 96.)

By report dated June 22, 1998, Dr. Wulff stated he reviewed the report prepared by Dr. Reese. Dr. Wulff concluded the findings on his examinations of August 1, 1997, March 23, 1998, and May 6, 1998 were significantly different than the examination findings reflected in Dr. Reese's report. Dr. Wulff further stated that in March and May 1998 the employee exhibited signs of significant discomfort, including an antalgic posture and muscle guarding. Dr. Wulff opined the July 31, 1997 injury was a substantial and contributing cause of the employee's condition and need for treatment. Dr. Wulff assigned restrictions and concluded the employee had not yet reached maximum medical improvement. (Pet. Ex. A.)

The employee filed a claim petition seeking wage loss benefits from and after May 8, 1998, and approval for the surgical procedure recommended by Dr. Lifson. The case was heard by a compensation judge at the Office of Administrative Hearings on April 23, 1998. In a Findings and Order filed May 12, 1998, the compensation judge determined the admitted July 31, 1997 low back injury was a temporary aggravation of a pre-existing spondylolisthesis condition which had completely resolved by April 8, 1998. Based on this finding, the compensation judge denied the employee's claims for wage loss benefits. The compensation judge further found the proposed surgery was reasonable and necessary treatment for the employee's spondylolisthesis condition but found the July 31, 1997 injury was not a substantial contributing cause of the need for surgery. The employee appeals.

## STANDARD OF REVIEW

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, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

## DECISION

The compensation judge found the July 31, 1997 low back injury was a temporary aggravation of a pre-existing spondylolisthesis condition which completely resolved by April 8, 1998. The employee contends this finding is unsupported by substantial evidence and is clearly erroneous. The employee asserts the evidence demonstrates his low back and left leg condition was only periodically episodic prior to July 31, 1997. He was able to work without limitation prior to his last personal injury, was unrestricted in his daily living and was not receiving ongoing medical care. After July 31, 1997, the employee contends, his condition dramatically worsened to the point where surgery is now required. This evidence, the employee asserts, is inconsistent with a finding of a temporary aggravation. Accordingly, the employee asks this court to reverse the compensation judge's finding. We decline to do so.

Several factors may be considered when determining whether an aggravation of a pre-existing condition is temporary or permanent, including: (1) the nature and severity of the pre-existing condition and the extent of restrictions and disability resulting therefrom; (2) the nature of the symptoms and extent of medical treatment prior to the aggravating incident; (3) the nature and severity of the aggravating incident and the extent of restrictions and disability resulting therefrom; (4) the nature of the symptoms and extent of medical treatment following the aggravating incident; (5) the nature and extent of the employee's work duties and non-work activities during the relevant period; and (6) medical opinions on the issue. "Which of these factors are significant in a particular case and the weight to be given to any factor is generally a question of fact for the compensation judge." Wold v. Olinger Trucking, Inc., slip op. (W.C.C.A. August 29, 1994).

The employee sustained low back injuries on September 13, 1977 and on October 31, 1990. Following the 1990 work injury, the employee complained of low back and left leg pain with tingling and numbness extending into his left leg. X-rays taken on October 31, 1990 showed a Grade I degenerative spondylolisthesis of L5 and S1 with degenerative disc disease throughout the lumbar spine. Dr. Scott diagnosed lumbar radiculitis due to spondylolisthesis. (Resp. Ex. 2.) In an unappealed finding, the compensation judge found that prior to July 31, 1997 the employee suffered from "multiple level degenerative disc disease of the lumbar spine including: Grade I 20% spondylolysis and spondylolisthesis at L5-S1 (resulting in stenosis at both lumbosacral foramina), central disc protrusion at L4-5 (possible contained herniation) and narrowing of the L4-5 foramina, left greater than right (suggesting possible L-4 impingement) (Exhibit 2)." (Finding 3.) Clearly, the employee had a significant low back condition which pre-existed his July 31, 1997 injury.

The employee received chiropractic treatment for about one year following his 1990 injury at Imprints. The employee acknowledged he had numerous flare-ups of his low back and left leg condition after the 1990 injury. (T. 80-81.) Although the employee was able to work

after the 1990 injury, the employee testified that while working at Decorative Packing between 1992 and 1997, he had periodic flare-ups of back and left leg symptoms after working on the silk screen machine. (T. 33-36.) In March 1997, the employee saw Dr. Rogin and gave a history of chronic low back pain since the 1990 injury. The employee also told Dr. Rogin he experienced tingling in the left leg from thigh to foot which got worse after standing for a long period of time. (Resp. Ex. 3; T. 80-81.) It is apparent from the evidence that the employee's pre-existing condition remained symptomatic through at least March 1997.

Following the July 31, 1997 injury, the employee saw Dr. Scott and complained of low back pain with an acute onset of tingling and numbness into his left leg. Dr. Lifson similarly recorded complaints of low back pain radiating into the left leg with tingling, numbness and weakness in the left leg. These are essentially the same symptoms the employee had experienced since his 1990 injury at Imprints. The 1991 CT scan showed Grade I spondylolisthesis at L5-S1 with stenosis at both lumbosacral foramina. The MRI scan in August 1997 showed Grade I-II lytic spondylolisthesis at L5-S1 with lateral spinal stenosis bilaterally. Dr. Lifson diagnosed Grade I-II lytic spondylolisthesis at L5-S1 with degeneration of the L4-5 disc. The compensation judge could reasonably conclude the medical evidence documents little significant objective change in the employee's condition.

Dr. Reese, in his examination of October 8, 1997, found significant muscle spasm and limited range of motion but other orthopedic and neurologic tests were normal. The doctor diagnosed Grade I-II lytic spondylolisthesis at L5-S1 which condition, the doctor opined, pre-existed the July 31, 1997 injury. The doctor further opined the work injury aggravated the pre-existing condition on a temporary basis. By the date of his second examination, April 8, 1998, Dr. Reese's examination was essentially normal. Dr. Reese determined the employee's symptoms were the same as existed prior to the work injury and concluded the effects of the temporary aggravation had ceased and the employee reached maximum medical improvement.

The compensation judge specifically adopted Dr. Reese's opinions. (Memo at p. 9.) Although Dr. Lifson rendered a contrary opinion, it is the function of the compensation judge to choose between conflicting medical opinion. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). The compensation judge did so and we find no evidentiary or legal basis to reverse the judge's decision. Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). Considering all the medical records, together with the opinion of Dr. Reese, the compensation judge could reasonably conclude the July 31, 1997 injury was a temporary aggravation of the employee's pre-existing condition. We, accordingly, affirm.

The compensation judge further found the surgery proposed by Dr. Lifson was reasonable and necessary to treat the employee's spondylolisthesis condition. However, the judge additionally found the July 31, 1997 work injury was not a substantial contributing factor in the need for the proposed surgery. (Finding No. 9.) The employee argues these two findings are inherently inconsistent and contradictory. It is factually impossible, the employee argues, to find

both that the employee recovered from the 1997 work injury and returned to his prior condition of being fully functional and the finding that the employee's condition deteriorated to the point of requiring surgery. Rather, the employee argues, the only logical conclusion is that the July 31, 1997 work injury was a substantial contributing cause to the employee's total disability and need for surgery. We disagree.

The issue before the compensation judge was whether the July 31, 1997 work injury was a substantial contributing factor in the need for the proposed surgery. The compensation judge found it was not because the 1997 injury was a temporary rather than a permanent aggravation of the employee's pre-existing condition. Having resolved that issue, the question of whether or not the proposed surgery was reasonable and necessary to treat the employee's condition was moot. Accordingly, the finding that the surgery was reasonable and necessary was unnecessary for the resolution of this case and cannot serve as a factual basis upon which to reverse the compensation judge's determination. "[I]n order to recover workers' compensation benefits, the employee must establish that his work-related injury is a substantial contributing factor to his current disability." Steinhaus v. F.B. Clements, 47 W.C.D. 22, 30 (W.C.C.A. 1992). Questions of medical causation fall within the province of the compensation judge. Felton v. Anton Chevrolet, 513 N.W.2d 457, 50 W.C.D. 181 (Minn. 1994). Substantial evidence supports the compensation judge's conclusion that the 1997 work injury was a temporary aggravation. Accordingly, the compensation judge properly denied the employee's claim for workers' compensation benefits.