THERESA SCHMIT, Employee/Appellant, v. FINGERHUT CORP. and TRAVELERS INS. CO., Employer-Insurer, and AMALGAMATED COTTON GARMENT & ALLIED INDUS. FUND, ST. CLOUD HOSP., and REGIONAL DIAGNOSTIC RADIOLOGY, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 23, 1999

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - SURGERY. Where the employer and insurer's doctor opined that employee's 1997 fusion surgery was not reasonable and necessary because conservative treatment was not attempted, the compensation judge is supported by substantial evidence and is not clearly erroneous in finding such surgery to be unreasonable and unnecessary.

MEDICAL TREATMENT & EXPENSE - SURGERY. Where the employer and insurer's doctor opined that fusion surgery performed in 1998 was not reasonable and necessary because certain diagnostic tests had not been performed to isolate the source of the employee's pain, and where such tests may have been performed, the basis for the compensation judge's decision to deny payment is called into question and the matter should be remanded for further consideration.

TEMPORARY TOTAL DISABILITY. Temporary total disability benefits may be awarded after unreasonable and unnecessary surgery. Matter remanded to compensation judge for reanalysis.

Affirmed in part and remanded in part.

Determined by Wheeler, C.J., Wilson, J., and Pederson, J.
Compensation Judge: Jeanne E. Knight.

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's determination that the surgical procedures performed on April 23, 1997 and April 16, 1998 were not reasonable or necessary to cure or relieve the employee from the effects of her January 15, 1997 work injury and did not meet the treatment parameters. We affirm the compensation judge's determination with respect to the 1997 surgery, but remand the issue concerning the compensability of the surgery performed on April 16, 1998.

BACKGROUND

The employee, Theresa Schmit, was first employed by Fingerhut Corporation, the

employer, on July 31, 1989, as a shipper. Thereafter, until her Gillette injury[1] of January 15, 1997, she served in a number of different capacities for the employer. At the time of her injury the employee was 40 years of age and had a weekly wage of $353.63.

From the time of her initial employment until her injury in January of 1997 the employee had several instances of treatment for low back pain. She was first treated in August 1990, when she complained of pain radiating into both legs. She testified that the pain was the result of positioning during surgery for her Crohn's disease, a gastrointestinal disorder. She indicated that her symptoms resolved within 24 hours of receiving pain medication.

The employee was next treated in November 1991 at the Cold Spring Medical Clinic for a four to six-week history of back pain. She indicated that she had never had back pain before and that there was no radiation into her buttocks or legs. She was advised by her physician that there was nothing wrong with her and she did not seek any further treatment. (Joint Ex. 9.)

The employee apparently experienced some low back symptoms while at home in the early part of 1993. She received physical therapy during February 1993 with resolution of her symptoms by March 1 of that year. From 1993 through the end of 1996 the employee had no complaints of low back pain, except those associated with her Crohn's disease. She had no restrictions on her activities. She did receive some physical therapy in December 1995 and January 1996 following colon surgery. On that occasion she complained of a constant low back ache but with no symptoms in her legs. This physical therapy treatment was successful in relieving her symptoms.

In January 1997, the employee began to develop low back symptoms which she associated with the bending and lifting required in her job as a "picker." The progression of her symptoms increased and the employee consulted with her gastroenterologist, Dr. Brad E. Currier. From February 27 through April 1997 the employee was on leave of absence. Dr. Currier requested that an MRI be performed on the employee's lumbar spine, which was completed on March 19, 1997. The results of the MRI indicated that the employee had degenerative disc disease at L4-5 and L5-S1 with a small annular tear and central disc bulge at L4-5 with no nerve root impingement or stenosis. At the L3-4 level there was a suggestion of a "far left lateral disc bulge" but there was no indication of disc herniation, degeneration or nerve root impingement. The report indicated that there was no disc abnormality noted at the upper lumbar levels. (Joint Ex. 4.)

Following the MRI the employee was referred to Dr. A. Reginald Watts, a neurosurgeon in St. Cloud, for further evaluation. She was first seen by him on March 26, 1997 with complaints of episodic back problems with some tingling in her legs. She indicated that the pain was mild at the onset but had gradually increased in severity. Dr. Watts' initial observation was that the employee "very likely has discogenic lumbar pain, but this may be, in part, secondary

[1] See Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

to minor instability in the lower lumbar spine." The lateral flexion and extension x-rays, apparently done in his office, were interpreted by Dr. Watts to indicate that "there is more movement between L3-4 and L4-5 than I would consider to be within the usual realm." Based on these x-rays Dr. Watts ordered provocative discography at L3-4, L4-5 and L5-S1. These tests were performed on March 27, 1997. The discography report indicates that the employee had markedly abnormal disc morphology and considerable concordant pain at levels L4-5 and L5-S1. At level L3-4 her disc morphology was considered to be normal but she did have some concordant pain during the injection of that disc. (Joint Exs. 7, 10.)

The employee was next seen by Dr. Watts on April 1, 1997. She was released to return to work wearing a TLSO brace and restricted to a ten-pound lifting limit. In his April 2, 1997 letter to Dr. Currier, Dr. Watts indicated, "I suspect she has discogenic pain secondary to the changes at L4-5 and L5-S1. I believe it is likely that she would best be helped by a fusion at L4-5 and L5-S1. I recommend that we proceed with a set of Ray Cages at each level. I have requested a TLSO for the diagnostic value of external fixation to help with our decision-making as well as for the potential use should we elect to proceed with fusion." The employee remained at work until April 22, 1997. She testified that during that period of her work she continued to experience back symptoms.

On April 23, 1997, Dr. Watts performed an anterior fusion at spinal levels L4-5 and L5-S1. The employee testified that her low back pain and left leg numbness were much less after the surgery. The employee returned to work on August 11, 1997, working under restricted hours and lifting limitations. Although she felt "great" on her return to work, as time went on her symptoms in her low back returned. By early September her left leg was very irritated and she had increased numbness in her foot. She was removed from work by Dr. Watts on September 11, 1997. The employee continued to see Dr. Watts on several occasions until March of 1998 when he ordered "lumbar spine films." Notes in Dr. Watts' records indicate that he interpreted the lateral flexion and extension view x-rays, apparently again taken in his office, as showing "no movement at the fuse segments over L4-5 and L5-S1. However, there is a suggestion that there may be mild movement at L3-4."[2] Based on this conclusion Dr. Watts ordered a repeat discography at spinal level L3-4 "to see whether there has been a change in the amount of pain and whether the pain remains concordant." (Joint Ex. 7, office of note of 3/4/98.)

A provocative discography was performed at spinal levels L1-2, L2-3 and L3-4 on March 6, 1998. The results were that at L3-4 the employee was found to have normal disc morphology and nonconcordant pain. At levels L2-3 and L1-2 abnormal disc morphology was found but with concordant pain only at level L2-3. (Joint Exs. 7, 10.) An MRI was performed on March 18, 1998, which showed no evidence of any nerve root impingement. The fusion at L4-5 and L5-S1 was shown to be healing properly with no movement at either level. In a letter to Dr. Barnaby at the Cold Spring Clinic, dated March 20, 1998, Dr. Watts indicated that, "The MRI

[2] There is no record from a radiologist concerning the lateral flexion and extension films taken in March 1997 or March 1998, only Dr. Watts' notes of his interpretation.

scan does not show hard reason for her continuing problems. A provocative discography showed 9-10 concordant pain at the L2-3 level with an abnormal discogram. I will review the discography as we cannot find clues to the problem on the basis of the MRI." (Joint Ex. 7.)

As a result of Dr. Watts' interpretation of the diagnostic testing he recommended a second fusion surgery at levels L2-3 and L3-4. On April 10, 1998, Dr. Watts performed a presurgical physical examination. In his notes from that exam, he noted that, "Theresa has experienced progression of her lumbar disc degeneration and is now experiencing surgically significant discogenic pain at L2-3. Because of the presence of 8/10 pain at the L3-4 level, it is highly likely that if L3-4 was not fused at this time, it would be necessary to do it at a later date." (Joint Ex. 4.) The surgery was performed on April 16, 1998. The employee testified that following the surgery, while she was getting stronger, as of the date of hearing her left foot/toe numbness remained along with pain in the knee, calf and ankle.

Based on its position that the employee's work activity was so light in nature that it could not have caused the severe low back difficulties and the need for fusion surgery, the employer denied liability from the outset of this matter. As a result, on June 9, 1997, the employee filed a claim petition seeking temporary total disability from February 27, 1997 through April 1, 1997, and from April 23, 1997 "to the present and continuing." A claim for permanency was reserved. The employee also claimed entitlement to payment for medical expenses, including the spinal surgery. The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on June 2, 1998. The issues before the compensation judge were whether the employee had sustained a Gillette-type injury culminating on January 15, 1997, and whether the employee's fusion surgeries were reasonable and necessary and within the treatment parameters. The compensation judge determined that the employee had sustained a Gillette-type injury as alleged but found that both the 1997 and 1998 surgeries were not reasonable and necessary and did not meet the treatment parameters. The compensation judge awarded temporary total disability benefits from February 27, 1997 through April 1, 1997, but denied all wage loss benefits following the two surgeries. The employee appeals from the denial of payment for the fusion surgeries and claims for subsequent wage loss.

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

The issue before this court is whether there is substantial evidence to support the compensation judge's determinations with respect to denial of payment for the fusion surgeries under the reasonable and necessary standard.[3] In general, an employee has the burden of proving that her medical expenses and treatment are reasonable, necessary and causally related to her work injury. See, e.g., Atkins v. University Health Care Ctr., 405 N.W.2d 233, 39 W.C.D. 898 (Minn. 1987). The reasonableness and necessity of medical treatment under Minn. Stat. § 176.135 is a question of fact for the compensation judge. See Hopp v. Grist Mill, 499 N.W.2d 812, 48 W.C.D. 450 (Minn. 1993). As each of the fusions surgeries were preceded by different factual circumstances, we will treat each separately in this decision.

April 23, 1997 Fusion Surgery

The compensation judge determined that the fusion surgery conducted on April 27, 1997 at the L3-4 and L5-S1 levels was not reasonable and necessary based primarily on the testimony of Dr. Mark Engasser, an orthopedic surgeon who conducted an independent medical examination of the employee on behalf of the employer and insurer on September 8, 1997. Dr. Engasser opined that the first surgery was not reasonable and necessary because the treatment of choice for degenerative disc disease would be extensive conservative care, including anti-inflammatory medications and reconditioning or physical rehabilitation. He testified, in his deposition, that in approximately 80% of cases the conservative care is extremely helpful and permits the avoidance of surgery. He also testified that surgery should be used only as a last resort and that in the case at hand the employee had no conservative care prior to her 1997 surgery. In addition, the compensation judge relied on the treatment parameters which indicated that nonoperative care would be the first choice of treatment, citing Minn. R. 5221.6200, subp. 11A (regional low back pain), which states, "Initial nonsurgical treatment must be the first phase of treatment for all patients . . ." and Minn. R. 5221.6200, subp. 12A (radicular pain, with or without regional low back pain, with no or static neurologic deficits), which states, "Initial nonsurgical treatment is appropriate for all patients . . . and must be the first phase of treatment."

The employee's principal argument on appeal is that the compensation judge should have accepted the opinions of the employee's surgeon, Dr. Watts, and the testimony of her medical expert, Dr. Robert Wengler, whose deposition testimony was offered in support of the employee's position. The employee also points out that in his deposition Dr. Engasser indicated that the first

[3] It is unnecessary to consider whether the surgeries were also inconsistent with the treatment parameters since the parameters did not apply to the employee's treatment until after there had been a finding of liability. Minn. R. 5221.6020, subp. 2.

fusion was "on the edge of being reasonable" and that he recognized that if a patient had a good result that the surgery was necessary. The employee indicates that after the first surgery she felt much better until she returned to work in August 1997. The employee argues that the results of the surgery support the conclusion that it was appropriate in her case to cure and relieve her symptoms. She points out that the symptoms she experienced after returning to work in August of 1997 were determined to be related to other problems that she had at different spinal levels than those treated in the first surgery.

On the basis of the varying medical opinions and the evidence in this matter we believe that the compensation judge's determinations, factual in nature, are supported by substantial evidence in the record. In this case, the medical experts differed in their opinions with respect to the necessity of the surgery and the compensation judge was free to select the opinion of Dr. Engasser over those of Dr. Wengler and Dr. Watts. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). It is also clear that the employee underwent no physical therapy or little other conservative treatment after the onset of her January 15, 1997 injury and before her surgery on April 23, 1997. The failure to undergo conservative care prior to the surgery is contrary to Dr. Engasser's opinion with respect to normal community standards of care. As a result, the compensation judge's denial of benefits with respect to the 1997 fusion surgery is affirmed.

April 16, 1998 Fusion Surgery

The compensation judge also determined that the fusion surgery conducted on the employee on April 16, 1998 was not reasonable or necessary. Again, she relied primarily on Dr. Engasser's opinion that the second surgery was also not reasonable and necessary. In her memorandum she stated that she accepted Dr. Engasser's reasoning that further testing was necessary prior to surgery. She believed that Dr. Engasser felt that the source of the employee's pain had not been adequately identified prior to the surgery. She quoted Dr. Engasser's deposition testimony in which he indicated that such testing was necessary to determine whether the pain was "soft tissue pain, a mild ligamentous pain or even a physiogenic pain, rather than just assuming it was discogenic pain." (Memorandum at p. 8.) The compensation judge also found that Dr. Engasser had opined that the second surgery was based on "wishful thinking." (Finding 20.)

On appeal, the employee points to Dr. Engasser's testimony explaining the basis for his opinion that the second surgery was not necessary and contends that it is based on an erroneous belief concerning testing done by Dr. Watts. Specifically, the employee points out that Dr. Engasser stated that before attempting the second surgery flexion and extension x-rays should have been taken in order to more precisely determine the source of the employee's continuing pain. The employee notes that Dr. Engasser believed that such studies had not been completed prior to the second surgery. It was the position of the employee that such studies actually had been completed by Dr. Watts in March 1998. The employee argues that both Dr. Watts and Dr. Wengler provided well founded opinions that the second surgery was supported by the results of the March 1998 discography studies and the fact that conservative treatment had been unsuccessful.

A review of Dr. Engasser's deposition testimony concerning the basis for his opinion objecting to the surgery indicates that he did suggest that certain flexion and extension x-rays be taken prior to the surgery. (Resp. Ex. 2, p. 27.) This testimony, however, was not the sole basis upon which he had given his opinion. In fact, Dr. Engasser went on at length explaining the basis of his opinion. (Resp. Ex. 2, pp. 26-28.) It is difficult to determine, based on the compensation judge's findings and memorandum, to what extent the compensation judge relied on the need for the flexion and extension x-rays in order to support Dr. Engasser's ultimate opinion. It appears, however, that lateral flexion and extension x-rays were taken at Dr. Watts' office on March 4, 1998. There are no radiology reports in the medical records provided in the record but simply a notation in Dr. Watts' records. In his note from that date he indicates that these x-rays showed that "there is no movement at the fuse segment over L4-5 and L5-S1. However, there is a suggestion that there may be mild movement at L3-4." (Joint Ex. 7.)

The fact that Dr. Engasser indicated that he felt that flexion/extension x-rays should have been taken prior to the second surgery, and that he assumed that none had been taken, does raise a question about the weight that his opinion should have been given by the compensation judge. Since it is unclear exactly how much weight the compensation judge gave to certain aspects of Dr. Engasser's explanation for his opinion, and this court refrains from making such factual determinations, the matter is remanded to the compensation judge for her to review the medical evidence and more specifically address the importance of these x-rays.

On remand the compensation judge is free to permit the parties to submit additional evidence on this issue, at her sole discretion.[4]

[4] On appeal the employee raised the issue of entitlement to temporary total disability benefits. A finding that surgery is not reasonable and necessary is not necessarily dispositive of a claim for temporary total disability thereafter. Smith v. Becklund Home Healthcare, slip op. (W.C.C.A. Nov. 17, 1997) and (W.C.C.A. Dec. 1, 1998). Therefore, on remand the compensation judge should also revisit the issue of entitlement to temporary total disability after both surgeries.