

BARBARA SEEGER, Employee/Appellant, v. PROGRESSIVE BEAUTY INT'L and CNA INS., Employer-Insurer, and METRO. ORTHOTIC LAB., NORAN NEUROLOGICAL CLINIC, P.A., and JOHN G. STARK, M.D., P.A., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 15, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including medical records and expert medical opinion, supported the compensation judge's determination that the employee's fusion surgery and associated permanent partial disability and temporary total disability was not causally related to the employee's 1991 work injury.

Affirmed.

Determined by Wilson, J., Pedersen, J., and Wheeler, C.J.
Compensation Judge: William R. Johnson

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's finding that the employee's March 27, 1991 work injury was temporary rather than permanent and that this injury was not a substantial contributing cause of the employee's low back fusion surgeries on September 3, 1996 and May 8, 1997. The employee further appeals from the compensation judge's finding that the surgeries were not reasonable or necessary, and from the denial of temporary total disability benefits, medical expenses and permanent partial disability resulting from the surgeries, as well as from the denial of a rehabilitation consultation. We affirm.

BACKGROUND

On March 27, 1991 the employee, Barbara Seeger, was working for the employer, Progressive Beauty Enterprises, as a shipper. On that date she was lifting a heavy box at work when she experienced a shooting pain in her lower back. She was seen at the Urgent Care Center at Park Nicollet the same day. She was diagnosed with mechanical back pain and advised to avoid weight lifting at work for one week. The employee worked at a light duty job with the employer for a few weeks. Her symptoms did not improve and she returned to the Urgent Care Center on March 30, 1991 where she was diagnosed with a low back strain. On April 2, 1991 she was seen by her family physician, Dr. N. J. Kaeding, at a previously scheduled appointment at the Family Practice clinic at Park Nicollet. She reported that her low back pain was "not really any better."

Dr. Kaeding scheduled the employee for a lumbar CT scan. The employee returned to Dr. Kaeding on April 16, 1991. Dr. Kaeding noted that the CT scan had shown minimal contained bulging of the discs at L4-5 and L5-S1. The employee was continued on strict bed rest for one week. (T. 13-16; Exh. 12: 3/27/91 - 4/16/91; 10/28/92 F&O: Finding 3.)

The employee continued treatment at the Family Practice clinic at Park Nicollet. She was seen there by Dr. John R. Kasmirski on April 22, 1991 and reported persistent back pain and pain over the right SI joint. Straight leg raising revealed pain in the right SI joint. Back range of motion was normal. Dr. Kasmirski diagnosed an SI dysfunction with contained bulging lumbar discs.¹ He instituted a course of physical therapy treatment at Park Nicollet's Department of Rehabilitation Services. (Exh. 12: 4/22/91.)

An epidural steroid injection was performed on May 30, 1991, but did not give significant improvement. An EMG on June 25, 1991 was negative for S1 radiculopathy. The employee was referred to a neurosurgeon, Dr. Edward G. Hames, for a surgical opinion. Dr. Hames saw the employee on July 30, 1991. Examination of neurological and motor functions were normal. Dr. Hames made a potential diagnosis of a chronic pain problem, but scheduled an MRI scan to assist in making more definitive recommendations. The MRI scan was performed on August 2, 1991. On August 6, 1991, Dr. Hames reported that the MRI studies demonstrated small central disc bulges at L4-5 and L5-S1 with associated disc dehydration, but "... certainly nothing that we feel is really of pathological significance." He thought it "... likely that ... these changes were present before her work-induced accident," which he considered to have been a "significant soft tissue injury which is aggravated by the profound stress as outlined in the [employee's] social history." He concluded that the employee had no condition that merited surgical attention. (Exh. 12: 4/22/91 - 6/18/91, 2/11/92; Exh. 14.)

The employee was seen for an independent medical examination by Dr. Jerry T. Reese on September 18, 1991. Dr. Reese did not believe that the employee had sustained a new injury on March 27, 1991, but at most had sustained a temporary aggravation of a pre-existing problem. He further opined that the employee had reached maximum medical improvement from the March 27, 1991 incident without any permanent partial disability related to the alleged work injury. Dr. Reese also diagnosed bilateral hip bursitis, worse on the right than the left. He did not relate this condition to the work injury. (Exh. 9.)

The employee continued to treat for her low back symptoms and trochanteric bursitis at Park Nicollet. She also underwent a pain program. On February 11, 1992 Dr. Stephanie Boyle, one of the employee's treating physicians at Park Nicollet, opined that the employee had reached maximum medical improvement. She recommended that the employee continue to perform low back exercises and aerobic conditioning, recommending that this be

¹ Subsequent chart notes state that the employee's medical history is "significant for right hip dislocation in 1986 which was reduced under general anesthesia without surgical treatment." (Exh. 12: Outpatient Rehab Clinic chart note date stamped June 13 or 18 [partially illegible] 1991.)

performed independently at a health club. In Dr. Boyle's opinion, the employee had sustained a 17.2 percent permanent partial disability. (Exh. 12: 2/11/92.)

On March 9, 1992 the employee filed a claim petition alleging entitlement to permanent partial disability benefits for disc herniations at two levels and seeking reimbursement for the expenses of her pain clinic treatment. The employee's claims were heard by Compensation Judge William R. Johnson at the Office of Administrative Hearings on September 2, 1992. Following the hearing, the judge found, among other things, that the employee had failed to prove that she had sustained any permanent partial disability as a result of the March 27, 1991 work injury. This determination was based on two factors: first, the judge's conclusion, adopting the opinions of "the majority of the physicians who have seen the employee, that what she really has are preexisting degenerative problems," and second, on a finding that even if the employee's disc degeneration had been found to be causally related to the employee's work injury "there is no persuasive showing of nerve root impingement based on the MRI scan." The judge also denied permanent partial disability from the work injury on the basis that "[t]here is also no history of spasm or postural abnormality which would justify rating the employee's condition under Minn. Rule 5223.0070, subp. (1)(A)(2) or (3)." (Judgment Roll: 3/9/92 CP; 10/28/92 F&O: Findings 4-5, Mem. at 5.) The compensation judge's findings and order were affirmed following appeal to this court. Seeger v. Progressive Beauty Enterprises, slip op. (W.C.C.A. Mar. 29, 1993).

The employee returned to Dr. Boyle on March 8, 1993 in follow up of her low back condition and reported that she had sustained a flare up of her low back pain and bilateral extremity numbness in about the last week of December 1992. The employee underwent additional sessions of physical therapy for this flare up in her symptoms through sometime in April 1993. The employer and insurer refused payment for the treatment after June 1993 on the basis that the employee had sustained a new injury in or about that month. The employee filed a medical request seeking reimbursement for the medical expenses. The matter proceeded to hearing, again before Compensation Judge William R. Johnson, who characterized the issue as whether the employee was entitled to reimbursement for expenses "incurred while treating her sprain/strain condition resulting from her work injury." The judge found that the employer and insurer had failed to prove its theory that the employee had sustained a new injury in June 1992, and awarded reimbursement. (Exh. 12: 3/8/93 - 3/30/94; Judgment Roll: 5/3/95 F&O and Mem. at 5 [unappealed].)

The employee apparently continued to treat for her back symptoms periodically at Park Nicollet. An August 29, 1995 chart note reveals that she was seen in the Outpatient Rehabilitation Clinic for follow up of a progressive increase in her chronic low back pain. The assessment on that date was that "the pain at this point in time is primarily discogenic with a component of facet arthropathy. An MRI scan was recommended. On September 21, 1995 the employee was again seen in Outpatient Rehabilitation. The employee's MRI scan was reported to have shown no significant change from that done previously, showing evidence of L4-5 and L5-S1 herniation with dehydration of the disc. (Exh. 12: 8/29/95, 9/21/95.)

The employee eventually began treating at the Institute for Low Back and Neck Care in Minneapolis where she was first seen by Dr. Richard M. Salib on June 24, 1996. Dr. Salib recommended that the employee consider either participation in a low back rehabilitation program or possible fusion surgery from L4 to the sacrum. (Exh. 3: 6/24/96.)

The employee decided to pursue consideration of surgery. Another MRI was performed on July 8, 1996 which again showed a small annular tear and herniation at L5-S1 without displacement or deformation of nerve root and a small annular tear at L4-5 without nerve root impingement. A discogram was also performed which showed a normal disc at L3-4 without pain reproduction but produced pain at L4-5; discography was not performed at L5-S1 because it was thought to be clearly abnormal by MRI. Based on the employee's testing, Dr. Steven Lebow at the Noran Clinic recommended that the employee undergo an anterior-posterior fusion from L4 to the sacrum. (Exhs. 3, 8.)

The employee underwent the fusion surgery on September 3, 1996 with a pre-operative diagnosis of internal disc disruption and instability at L4-5 and L5-S1 with full-thickness annular tears. However, subsequent CT scans in January and April 1997 demonstrated nonunion at the L5-S1 level, and a repeat fusion in the form of a pseudoarthrosis salvage procedure was carried out on May 8, 1997. (Exhs. 3, 11.)

On July 11, 1997 the employee filed a claim petition seeking permanent partial disability, temporary total disability benefits and reimbursement for medical expenses related to the fusion procedure. The employer and insurer answered denying liability. (Judgment Roll.)

The employee was examined by Dr. Robert Hartman, an orthopedic surgeon, on behalf of the employer and insurer on November 10, 1997. In his opinion, the employee's injury on March 27, 1991 had been a soft tissue injury, consistent with a strain of the lumbar paravertebral muscles, which would normally have resolved at a maximum of twelve weeks following the injury. He opined that the employee's subsequent low back symptoms and surgical treatment for those symptoms were unrelated to the 1991 work injury and were instead causally related to chronic pre-existing multi-level degenerative disc disease, with the employee's rheumatoid arthritis and history of bipolar disorder also being potentially contributing factors. Finally, Dr. Hartman opined that the initial fusion surgery had not been reasonable or necessary for the treatment of the employee's low back symptoms and was contraindicated. (Exh. 1.)

Following hearing before Compensation Judge William R. Johnson on October 14, 1998, the judge found that the employee had failed to prove that her current permanent partial disability was causally related to the 1991 work injury. The judge accordingly denied the employee's claims for medical expenses, temporary total disability and permanent partial disability benefits associated with or resulting from the fusion surgeries, and for a rehabilitation consultation. The employee appeals.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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 compensation judge's denial of benefits in this case rested entirely on the finding that the employee's surgery and resulting permanent partial disability, temporary total disability and medical expenses were not causally related to the effects of the March 27, 1991 work injury but instead were wholly caused by the effects of pre-existing degenerative disc disease.² The employee's appeal alleges that this finding was unsupported by substantial evidence and that the compensation judge committed various errors of law. The employee further appeals from the compensation judge's finding that the fusion surgery was not reasonable or necessary for the treatment of the employee's degenerative disc disease.

We conclude, first, that substantial support is present in the record to support the compensation judge's finding on causation. There is no dispute that the condition for which the employee underwent surgical treatment was one of structural degenerative changes to the employee's lumbar spine at the L4-5 and L5-S1 levels, specifically internal disc disruption and instability at L4-5 and L5-S1 with full-thickness annular tears. The structural problems at the L4-

² In Seeger v. Progressive Beauty Enterprises, slip op. (W.C.C.A. Mar. 29, 1993), this court affirmed Compensation Judge Johnson's October 1992 determination that the employee's 1991 work injury had not resulted in permanent partial disability. The new permanent partial disability alleged in this case arises solely from the fact that the employee has undergone two-level fusion surgery for lumbar disc, for which surgical procedure a 22.5 percent permanency rating is provided pursuant to Minn. R. 5223.0070, subp. 1D. This subpart provides the following permanency ratings: "Spinal fusion surgery for single vertebral level with or without laminectomy, 17.5 percent. Add five percent for each additional vertebral level." No other ratable permanency has been alleged in this case. The period of temporary total disability is solely associated with recuperation from the two surgical procedures. The medical expenses are those associated with the surgery and with treatment of the condition for which surgery was performed.

5 and L5-S1 levels of the employee's lumbar spine were already present in the initial CT scan performed shortly after the employee's work injury and did not markedly change in subsequent radiological studies over the succeeding six years leading up to the surgery. On August 6, 1991 Dr. Hames, a neurosurgeon to whom the employee was referred for consideration of surgical treatment, reported that the central disc bulges and associated disc dehydration at L4-5 and L5-S1 demonstrated in the MRI studies likely were "present before her work-induced accident," which he considered to have been a soft tissue injury. (Exh. 14.) Dr. Jerry T. Reese, who examined the employee on September 18, 1991, also opined that the employee's structural defects at L4-5 and L5-S1 were a pre-existing problem and that the 1991 work injury had not caused any permanent aggravation to that condition. (Exh. 9.) Dr. Robert Hartman, who reviewed the employee's history and examined her after the first fusion surgery, similarly offered the medical opinion that the employee's 1991 work injury had resulted in a soft tissue injury which had long since resolved and that the employee's ongoing low back problems were the result of a pre-existing degenerative disc disease not precipitated or permanently aggravated by the work injury. (Exh. 1.)

Although a contrary medical opinion was expressed by Dr. John G. Stark (see Exhs. A, B), the compensation judge's choice between conflicting expert opinion is to be upheld unless the expert's basis for the opinion rendered was without adequate foundation in the record. Nord v. City of Cook, 360 N.W. 2d 364, 37 W.C.D. 364 (Minn. 1985).

Citing Minn. Stat. §176.101, subd. 4a, the employee argues that the compensation judge's finding on causation was insufficiently supported as a matter of law where no medical report or record made prior to the work injury disclosed a degenerative disc condition. That subdivision provides as follows:

Subd. 4a. Preexisting condition or disability; apportionment. (a) If a personal injury results in a disability which is attributable in part to a preexisting disability that arises from a congenital condition or is the result of a traumatic injury or incident, whether or not compensable under this chapter, the compensation payable for the permanent partial disability pursuant to this section shall be reduced by the proportion of the disability which is attributable only to the preexisting disability. An apportionment of a permanent partial disability under this subdivision shall be made only if the preexisting disability is clearly evidenced in a medical report or record made prior to the current personal injury. Evidence of a copy of the medical report or record upon which apportionment is based shall be made available to the employee by the employer at the time compensation for the permanent partial disability is begun.

Where a work injury results in permanent partial disability, this statute provides a limited right to apportion part of such disability against a clearly demonstrated pre-existing congenital or traumatic condition which also contributes to the disability. However, the evidentiary requirements of this subdivision with respect to evidence of the pre-existing condition

apply only to situations in which permanent partial disability has in part resulted from the work injury. It has no application to the threshold question of substantial contributing cause as to whether a work injury has, in and of itself, resulted in permanent partial disability. As we have concluded that substantial evidence supports the compensation judge's determination that the employee's 1991 work injury did not result in permanent partial disability, this statute is not applicable to this case.

As we have discussed in the factual background to this case, the compensation judge, in the second of two prior decisions, served and filed on May 3, 1995, found that the employee had sustained a flare up of the low back condition associated with the 1991 work injury and awarded reimbursement of certain medical expenses for physical therapy treatment rendered during approximately March and April 1993. (Judgment Roll: 5/3/95 F&O and Mem. at 5 [unappealed].)

The employee points out that in Finding 6 of this prior decision the compensation judge stated that “. . . she has simply sustained, and probably will sustain in the future, a flare up of her condition resulting from the work injury.” The employee argues, in essence, that this finding constitutes a determination of an ongoing work-related condition such that subsequent low back symptoms for which the employee obtained treatment would be, as a matter of *res judicata*, causally related to the 1991 work injury.

We note, first, that prognostications of future events by the finder of fact constitute mere dicta to which the doctrine of *res judicata* is not applicable. Further, we note that the compensation judge's memorandum reveals clearly his finding that the physical therapy treatment for which reimbursement was awarded was rendered “while treating her sprain/strain condition resulting from her [1991] work injury.” (Mem. at 5.) There is no evidence that the employee's treating physicians performed fusion surgery to treat a flare up of a low back muscular strain or sprain. The compensation judge's finding denying a causal relationship between the work injury and the employee's pre-existing degenerative disc disease in this case was not in conflict with any prior finding having a *res judicata* effect.