ALLEN B. SHARE, Employee/Appellant, v AMERICAN SUPPLY CO., INC., and MINNESOTA ASSIGNED RISK PLAN/OCCUPATIONAL HEALTHCARE MGMT., Employer-Insurer, and TEAM CARE of MINN., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 30, 1999

No.[REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert medical opinion, supports the compensation judge's finding that the employee's work activities were not a substantial contributing cause of his low back injury on January 8, 1996.

Affirmed.

Determined by Wilson, J., Pederson, 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 work duties were not a substantial contributing cause of his low back injury, and from the consequent denial of benefits. We affirm.

BACKGROUND

The employee, Allan B. Share, is the president and sole shareholder of the employer, American Supply Company, Inc. The employee started this company in 1990. He customarily worked at the company office each weekday from sometime between 6:00 and 8:00 in the morning until between about 5:00 and 6:00 in the afternoon, and occasionally worked from two to four hours on Saturdays. In addition to overall management duties, the employee spent about 70 or 75 percent of each of his workdays in preparing catalog layouts, in the course of which he sat "hunched over" a standard office desk. In the morning of January 8, 1996, the employee had been working on catalog layouts for "a couple of hours" when he was called to another part of the employer's offices. He testified that as he pushed back from his desk and stood up, he experienced a "popping" sensation and stiffness in his low back. The employee called his chiropractor, Dr. Victor Youcha, and arranged to come to Dr. Youcha's office for a chiropractic adjustment within the next hour. Dr. Youcha advised the employee to not work the rest of the day and ice his back. (T. 22-25; Exh. A.)

The employee continued to treat chiropractically with Dr. Youcha and obtained only temporary relief. He next saw Joseph Bertsch, D.C., on August 16, 1996. Dr. Bertsch referred the employee to Dr. Steven S. Lebow for a neurologic assessment and evaluation to determine whether the employee might be a suitable candidate for Dr. Bertsch's Vax-D lumbar traction therapy. Dr. Lebow saw the employee on August 29, 1996. Dr. Lebow noted the following history:

> He is a 38-year-old gentleman who had a cumulative trauma injury on January 8, 1996. He basically had been leaning over a desk putting together brochures, and he slowly developed back pain. He has had back pain before but this radiated down his left leg to his calf.

Dr. Lebow ordered a low back CT scan. The scan was performed on September 12, 1996 and revealed a large broad-based central and left-sided disc herniation at the L5-S1 level with disc material extending into the left L5-S1 neural foramen and impinging on the exiting left L5 nerve. (Exhs. B, C, D, E.)

Dr. Lebow recommended that the employee undergo the Vax-D treatment and a back stabilization program. The employee underwent 20 sessions of Vax-D therapy with Dr. Bertsch and reported almost complete resolution of his symptoms. Dr. Bertsch then referred the employee to Physical Therapy Orthopaedic Specialists, Inc. (PTOSI) for the back stabilization program which consisted of five sessions of physical therapy treatment. At his initial physical therapy evaluation at PTOSI, the therapist recorded a history of back pain off and on for 15 years, followed by the incident at work in January 1996 when the employee stood up from his desk and developed low back pain which eventually radiated down the left leg and into the foot. (T. 29-33; Exhs. C, E, F.)

The employee was able to discontinue ongoing chiropractic treatment for his low back symptoms after completing the Vax-D program. He had a return of his back pain in December 1997 and returned to Dr. Bertsch who treated him with an additional 12 Vax-D sessions. In February 1998, the employee underwent three additional Vax-D sessions for residual pain, and on March 14 and April 10, 1998, he returned to Dr. Bertsch for chiropractic adjustment. (T.33-40.)

On March 2, 1998 the employee was examined by an orthopedic surgeon, Dr. Lloyd L. Leider, on behalf of the employer and insurer. The employee told Dr. Leider that, prior to his January 1996 injury, he had experienced occasional stiffness and tightness in his low back, but without ongoing symptoms or radicular leg symptoms. The employee stated that he had treated chiropractically as needed for these symptoms over many years. The employee related his present low back symptoms to the incident on January 8, 1996 when he stood up from his desk and experienced a popping sensation and developed low back pain and, shortly thereafter, developed radicular pain into the left leg. Dr. Leider opined that the employee's present low back complaints were not "a continuing manifestation of any preexisting back condition," but instead resulted from

the employee's disc herniation which was a separate and new injury on January 8, 1996. He further opined that none of the employee's work activities for the employer had constituted a significant contributing factor to his disc herniation. (Exhs. 5, 7.)

On November 5, 1998 a hearing was held before a compensation judge of the Office of Administrative Hearings. The compensation judge found that the employment was not a substantial contributing cause of the employee's injury on January 8, 1996, specifically adopting the medical opinion of Dr. Leider. (Finding 3.) 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 employee makes two arguments on appeal. First, the employee contends that the compensation judge erred in failing to find a work-related injury, asserting that there was unanimous agreement between two physicians expressing an opinion on causation that the employee's work activities were the cause of his injury on January 8, 1996. Specifically, the employee alleges that Dr. Lebow offered the opinion that the employee sustained a cumulative trauma injury as the result of several years of working hunched over his desk. The employee further claims that Dr. Leider, although disagreeing that employee's injury was the result of cumulative trauma, opined that the employee's specific injury on January 8, 1996 was work-related.

With respect to the opinion of Dr. Lebow, the employer and insurer argue that Dr. Lebow did not actually provide an opinion on causation. They point out that the only statement appearing in Dr. Lebow's records which bears on causation is found in Dr. Lebow's report to Dr. Bertsch following Dr. Lebow's first examination of the employee, in which Dr. Lebow states "I saw Allan Share today. He is a 38-year-old gentleman who had a cumulative trauma injury on January 8, 1996. He basically had been leaning over a desk putting together brochures, and he slowly developed back pain. He has had back pain before but this radiated

down his left leg to his calf." (Exh. C: 8/29/96 letter.) The employer and insurer assert that this statement was not an opinion on causation, but merely a recital of the history provided by the employee. The compensation judge did interpret Dr. Lebow's statement as a causation opinion, but found that the opinion was not persuasive because it was inconsistent with the employee's testimony that the employee's low back pain began suddenly when he got up from his chair (T.24), rather than slowly over the course of leaning over the desk putting together brochures. (See Finding 3; Mem. at 8.)

With respect to the opinion of Dr. Leider, the employee relies upon a statement in that physician's report dated March 2, 1998, in which Dr. Leider rates the employee's permanent partial disability at 12 percent, and goes on to state that "this can be considered due to his apparent work-related incident of January 8, 1996." (Exh. 5 at 4.) Elsewhere in the same report, Dr. Leider opined that none of the employee's work activities for the employer had constituted a significant contributing factor to his disc herniation. In his deposition testimony, Dr. Leider reiterated that he did not consider the employee's work activities a substantial contributing cause of his injury, and explained that "apparent work-related incident" was a reference to the employee's history of claimed causation for the injury. (Exh. 7 at 14.)

We do not agree with the employee's contention that both physicians clearly related the January 8, 1996 injury to the employee's work activities. It was reasonable for the compensation judge to interpret the medical opinion evidence as showing opposing opinions on the issue of whether the employee's work activities had substantially contributed to the January 8, 1996 injury. The choice between the divergent views of medical experts is for the compensation judge as finder of fact, and this court may not reverse unless the medical opinions relied upon by the judge were without adequate foundation. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). We therefore affirm the finding that the employee's work activities were not a substantial contributing cause of the employee's January 8, 1996 injury.

The employee next argues that the compensation judge erred in failing to find his injury compensable as an unexplained injury occurring at and during the hours of his employment, citing Duchene v. Aqua City Irrigation, 58 W.C.D. 223 (W.C.C.A. 1998). We disagree. The issue in the present case is purely one of medical causation determined on the resolution of conflicting medical opinion. Duchene has no application to the facts of the present case.[1]

[1] In Duchene, a compensation judge denied benefits to the employee where neither the employee nor any of the physicians offered an opinion or testimony to explain the mechanism of the employee's at-work knee injury. However, one of the employee's physicians had provided an ultimate opinion, though without explanation, that the injury was work-related, and the employer and insurer had failed to offer any medical evidence contraverting that opinion. See Duchene, 58 W.C.D. at ftn. 6. In a panel decision by this court, a majority of the panel reversed and awarded compensation. The employee in the present case has focused on and misinterpreted certain dicta in Duchene discussing the background of the "positional risk doctrine."