FRANK C. SKOGEN, Employee/Appellant, v. DIVERSIFIED BUILDERS AND DESIGN and GENERAL CASUALTY INS. CO., Employer-Insurer/Cross-Appellants, and KENNETH MOBERG, QRC, and NORTH COUNTRY REG'L HOSP., Intervenors, and DR. DAVID NELSON, BEMIDJI CLINIC-MERITCARE, UPPER MISSISSIPPI MENTAL HEALTH CTR, MINNESOTA SPINE CTR., ST. LUKE'S HOSP.-MERITCARE, MERITCARE CLINIC NEUROSCIENCE, EMPI, INC., and MN DEP'T OF HUMAN SERVS., Potential Intervenors/Medical Providers.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 12, 1999

No. [REDACTED SSN]

HEADNOTES

EVIDENCE - EXPERT MEDICAL OPINION. Where he interviewed the employee, reviewed the employee's medical records, and reviewed surveillance videotapes of the employee's activities, the physician upon whose opinion the compensation judge relied had adequate foundation for his opinion as to the nature and extent of the employee's disability, and the judge did not err in adopting that opinion.

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. Under the circumstances presented here, a second MRI scan, not permissible under the treatment parameters, or departure rules, or Jacka v. Cola-Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998), was not compensable, and the judge's decision to the contrary was clearly erroneous and unsupported by substantial evidence.

Affirmed in part and reversed in part.

Determined by Wilson, J., Pederson, J., and Hefte, J.
Compensation Judge: Rolf G. Hagen.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's decision as to the nature of the employee's work injury, his restrictions, his entitlement to a discogram, and his attainment of maximum medical improvement [MMI]. The employer and insurer appeal from the judge's award of treatment expenses for a second lumbar MRI scan. We reverse the award for the MRI scan but affirm as to all other issues.

BACKGROUND

On June 26, 1996, the employee sustained a work-related injury to his low back while employed by Diversified Builders and Design [the employer].[1] He subsequently received treatment from Dr. Bruce Wilson and underwent several diagnostic tests, including a lumbar MRI scan and a lumbar CT scan and myelogram, performed in August of 1996. The scans showed degenerative changes and small disc bulges at L4-5 and L5-S1. The employee ultimately received extensive conservative care, including chiropractic treatment, physical therapy, trigger point injections, and traction, and he also tried a TENS unit and several medications. However, despite this treatment, he continued to complain of severe symptoms, including severe back and leg pain and also bladder problems.

Unable to understand the employee's lack of progress, Dr. Wilson referred the employee to Dr. Manuel Pinto, who ordered another lumbar MRI scan and ultimately recommended a discogram. Dr. Pinto's records reflect that he ordered the lumbar MRI, which was performed on May 27, 1997, after he reviewed the employee's other test results[2] and found "no evidence of an MRI of the lumbar spine being done." The report from the May 27, 1997, MRI again indicated that the employee had degenerative changes at L4-5 and L5-S1, with slight bulging of the discs at those two levels but no stenosis or herniation, and the radiologist concluded by noting that there was "[l]ittle change . . . when compared with the previous study of 8-2-96." After reviewing the scan results, Dr. Pinto reiterated his recommendation to proceed with a discogram, in order to determine whether the employee would be an appropriate candidate for fusion surgery.

On July 7, 1997, the employee was evaluated by Dr. Loran Pilling, who interviewed the employee and his wife, administered an MMPI and Medical Stress Inventory, and reviewed the employee's medical records. In his July 7, 1997, report, Dr. Pilling recommended that the employee undergo the discogram recommended by Dr. Pinto and that the two doctors then discuss the case to decide on a treatment approach. Dr. Pilling also indicated that, while the employee had chronic pain syndrome, chronic pain treatment would probably be of little benefit if surgery were not recommended. If, on the other hand, the employee were to have the surgery, he should first undergo two to three weeks of pain clinic treatment to prepare him for the procedure.

In early August of 1997, the insurer forwarded to Dr. Pilling videotapes of surveillance conducted on the employee over the course of several days, including May 15, 16, and 17, 1997, and July 7, 1997--the date of Dr. Pilling's initial evaluation.[3] After reviewing the

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[1] The employer and insurer apparently denied primary liability, but a compensation judge determined, in an earlier decision issued on February 19, 1997, that a work injury had occurred as claimed.

[2] In his May 5, 1997, office note, Dr. Pinto indicated that he had "received the multiple films of [the employee's] spine," which "include[d] an MRI of the cervical and thoracic spine of August 10, 1996, and plain x-rays and also a myelogram/CT of August 9, 1996."

[3] According to the evidence submitted at trial, videotaped surveillance was performed on

tapes, Dr. Pilling changed his diagnosis from chronic pain syndrome to conscious symptom exaggeration and distortion of facts, "with the diagnosis of malingering as the explanation." About two weeks later, in a report dated August 19, 1997, Dr. Pilling recommended less severe restrictions than had previously been set[4] and advised that further medical care be discontinued "until the secondary gain issue and the symptom exaggeration are resolved." Finally, Dr. Pilling indicated, contrary to his earlier opinion, that the employee had reached MMI. This report was served on the employee on August 26, 1997.

In an order issued on December 8, 1997, a settlement judge allowed the employer and insurer to discontinue temporary total disability benefits effective November 24, 1997, based on the employee's attainment of MMI effective with service of Dr. Pilling's report. The employee then filed an objection to discontinuance, which was consolidated for hearing with previously filed medical and rehabilitation requests. In January of 1998, the employee began a job search with the assistance of a QRC, and on February 18, 1998, the employee obtained part-time work with a company called Nortech, Inc. The job became full time in late March of 1998.

On May 27, 1998, the matter came on for hearing before a compensation judge for consideration of the employee's objection to discontinuance and the medical request concerning the discogram recommended by Dr. Pinto.[5] Issues delineated by the compensation judge were the nature of the employee's June 26, 1996, work injury and his current restrictions; MMI; the employee's entitlement to temporary total disability benefits from November 24, 1997, to February 17, 1998; whether the proposed discogram was reasonable and necessary; and whether certain past medical treatment, including the May 27, 1997, MRI scan, was reasonable and necessary.

In a decision issued on July 23, 1998, the compensation judge accepted Dr. Pilling's most recent opinion as to the nature of the employee's injury, his need for restrictions, MMI, and the reasonableness and necessity of the proposed discogram. The compensation judge also concluded, however, that the other treatment expenses, including the May 1997 MRI scan, were compensable. Both parties appeal.

STANDARD OF REVIEW

April 24 and 25, 1997; May 15, 16, and 17, 1997; June 15 and 16, 1997; and July 7 and 26, 1997. It is clear from his report that Dr. Pilling reviewed at least the May 1997 and July 7, 1997, surveillance tapes.

[4] The restrictions set in Dr. Pilling's August 19, 1997, report would allow the employee to lift and carry 35 pounds frequently and 50 pounds occasionally, to squat, crouch, reach above shoulder level, bend, stoop, and push/pull frequently, and to drive as needed. In his July report, Dr. Pilling had recommended considerably more restrictive limitations.

[5] The rehabilitation requests were withdrawn at the commencement of the hearing.

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

Dr. Pilling's Opinion and Related Issues

In his August 6, 1997, report, issued after he reviewed the surveillance videotapes, Dr. Pilling wrote in part as follows:

> The video tapes showed a man performing many activities that he and his wife claimed he couldn't do. He, for example, told me on July 7, 1997 that he couldn't "do anything in the yard." The video tapes show him actively involved in yard activity. On May 16, 1997, the video tape shows him spading a small patch of dirt behind his garage, dragging a cooler across the yard, getting up and down from the ground where he was sunbathing, walking without any limp, planting pots of flowers, carrying those pots, removing a tarp from his trailer, and, on more than one occasion, squatting and staying in the squatting position for over a minute without any evidence of pain behavior. He also, on the following day, removed a spare tire from his camper and did all the preparatory work to close up the camper.
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> On the day that he saw me, July 7, 1997, he showed a significant limp. On previous occasions he did not limp or had a slight limp, but nothing to the degree that was seen on July 7, 1997. The most obvious explanation for the discrepancies is that he is showing symptom exaggeration for secondary gain.
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> * * *

> I took into consideration other explanations for the discrepancies I observed before I made the diagnosis of malingering. A possibility is use of excessive amounts of pain medication which then would have allowed him to participate in the activities that are observed on the video tapes. His wife admitted that he probably takes two Vicodin at a time, on occasion. This excessive use of medication, which would cover up his pain for a brief period of time, would be difficult to see as the reason for the discrepancies when one considers the time frame of the video tapes. For example, on May 16th the video was run from 12:00 noon until 7:40 p.m. To cover his pain during that period of time he would probably have to have used two Vicodin every two to three hours during that time frame.
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> One would also expect, if he had done that, that the following day he would have considerable pain behavior as a result of the extreme activity that he performed on May 16th. The video tape on May 17th did not show extreme pain behavior and, in fact, when he finished removing the spare wheel from the camper and putting the vinyl cover on the camper, he walked without a limp.

In his subsequent report, dated August 19, 1997, Dr. Pilling recommended certain restrictions and indicated that the employee was at MMI.

The compensation judge essentially adopted Dr. Pilling's opinion on virtually all issues in dispute at the hearing. Although noting, in his memorandum, that he had "not made a finding that the employee [was] a malingerer," the judge discussed the employee's credibility as follows:

> Having reviewed the surveillance tape/reports (Exhibits 1 and 2), it is clear to this Compensation Judge that employee's physical capabilities do not correlate with his hearing testimony (and the history given to Dr. Pilling) and to his continuing complaints of pain; in fact, the employee's hearing testimony (and history given to Dr. Pilling) and the surveillance tapes/reports are contradictory. Based on this contradiction, this Compensation Judge does not find the employee's hearing testimony regarding his physical capabilities/limitations and continuing complaints of pain to be credible.

On appeal, the employee makes various arguments as to why the judge erred in adopting Dr. Pilling's opinions, contending, for example, that Dr. Pilling's opinion lacks foundation because he conducted no physical examination of the employee and that, because the judge rejected Dr. Pilling's diagnosis of malingering, the judge was required to accept Dr. Pilling's

earlier diagnosis of chronic pain syndrome. The employee also maintains repeatedly that Dr. Pilling's comments regarding the potential effect of medication defy common sense and that decisions as to an employee's disability and need for treatment cannot be based on "surreptitiously obtained videotaped footage of an employee functioning under the influence of narcotic pain medication." However, after review of the entire record, we find no merit in the employee's position. Dr. Pilling is a medical doctor who interviewed the employee, reviewed his medical records, and reviewed the surveillance videotapes. He was in fact the only physician to consider the tapes; Dr. Pinto was not provided with either the tapes or the written surveillance reports. Under these circumstances, Dr. Pilling clearly had adequate "foundation" to render opinions as to the employee's condition. Furthermore, it is evident that the compensation judge's decision was based in large part on his own assessment of the employee's credibility, and, having reviewed the videotapes, we find no grounds to second-guess the judge's conclusions in this regard.[6] Whether or not the employee has been "malingering," the record as a whole easily supports the judge's determinations as to the nature and extent of the employee's disability, the appropriate restrictions, the employee's need for a discogram,[7] and the employee's attainment of MMI. We therefore affirm those findings. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985); Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989).

The May 27, 1997, MRI Scan

The employee underwent a lumbar MRI scan on August 2, 1996, and the employer and insurer were ordered to pay for that expense in a previous proceeding. At the most recent hearing before the compensation judge, the employer and insurer argued that the second lumbar MRI scan, ordered by Dr. Pinto and performed on May 27, 1997, was not permissible under the applicable treatment parameters.

In his memorandum, the compensation judge conceded that the second MRI scan was duplicative, and he essentially acknowledged that the expense would not ordinarily be compensable under the treatment parameters.[8] However, citing Jacka v. Coca-Cola Bottling Co.,

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[6] The tapes of the employee's activities are not particularly dramatic. What they do show, however, is an individual repeatedly bending from the waist, working bent over from the waist, and doing activities overhead, with virtually no sign of pain or limitations.

[7] The only purpose of the proposed discogram was to evaluate the employee's need for surgery. In a May 5, 1997, letter, Dr. Pinto indicated that surgery would be appropriate "only . . . if [the employee's] symptoms are very severe and unresponsive to conservative care." The compensation judge simply did not believe that the employee had severe symptoms.

[8] Minn. R. 5221.6100, subp. 1D (1995), governs "[r]epeat imaging, of the same views of the same body part with the same imaging modality." None of the criteria listed in this rule was met. See also Minn. R. 5221.6050, subp. 6B(1) ("If the employee has reported that care for an injury has previously been given: (1) Where a previous health care provider has performed diagnostic imaging, a health care provider may not repeat the imaging . . . except as permitted in

580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998), the compensation judge nevertheless found the test compensable, explaining as follows:

> [I]t is very clear from the medical evidence (Dr. Pinto's notes) that he was not provided with a copy of the original MRI scan of August 1996 nor was he aware of his [sic] existence. All records were provided to him absent the first MRI scan. Therefore, it was reasonable and necessary for Dr. Pinto to prescribe the second MRI scan and good cause exists for a departure from the treatment parameter rules thereby . . . .

We are unable to affirm this award. Neither the rules regarding diagnostic imaging nor the specific departure rules, Minn. R. 5221.6050, subp. 8, can be construed to cover the circumstances presented here. Therefore, under Jacka, the second MRI scan is compensable only if this is one of "those rare cases in which departure is necessary to obtain proper treatment." 580 N.W.2d at 36, 58 W.C.D. at 408. The facts here simply do not satisfy that criterion. Dr. Pinto did have the results of the lumbar CT and myelogram, and he did not contact Dr. Wilson to determine whether a lumbar MRI scan had been performed, despite reference in Dr. Wilson's referral letter to MRI results.[9] We intend no criticism of either Dr. Pinto or the hospital that conducted the scan; both may have proceeded reasonably under the circumstances. It was not, however, the fault of the employer and insurer, either, that a duplicative and unnecessary diagnostic test was performed. Therefore, finding no basis to impose liability on the employer and insurer under either the treatment parameters or under Jacka, we reverse the judge's award of this expense.

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part 5221.6100"); Minn. R. 5221.6050, subp. 6C ("An employee's refusal to provide authorization for release of medical records does not justify repeat treatment or diagnostic testing").

[9] Dr. Wilson's referral letter to Dr. Pinto mentions MRI results, and, while the employee also had cervical and thoracic MRIs, his complaint was and always had been his low back.