

LYNN R. SNICKERS, Employee/Cross-Appellant, v. FINGERHUT CORP. and TRAVELERS INS. CO., Employer-Insurer/Appellants, and MN DEP'T OF HUMAN SERVS. and SMDC HEALTH SYS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 28, 1999

No. [REDACTED SSN]

HEADNOTES

ARISING OUT OF & IN THE COURSE OF - SPECIAL HAZARD. It was not unreasonable for the compensation judge to conclude that injuries sustained by the employee when she fell on ice on the public sidewalk in front of the employer's premises were compensable, where the record supported the conclusion that the ice was caused by soft drinks provided by the employer and spilled by coworkers, thereby constituting a "special hazard" of the employee's employment.

MAXIMUM MEDICAL IMPROVEMENT - SERVICE OF MMI REPORT. The compensation judge properly concluded that MMI was not effective until service of the MMI report.

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, particularly the employee's treatment records, supported the compensation judge's conclusion that the employee's condition satisfied the requirements for permanent partial disability benefits under the applicable permanent partial disability rules.

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS. The permanent treatment parameters are not applicable to treatment expense claims where the employer and insurer have denied liability for the employee's injury.

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. Substantial evidence supported the compensation judge's denial of chiropractic treatment claims. The fact that the judge did not analyze every factor listed in pertinent case law provides no grounds for reversal of his decision.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Donald C. Erickson.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's finding that the

employee's slip on ice on a public sidewalk arose out of and in the course of her employment and from the judge's award of temporary total disability benefits, permanent partial disability benefits, and pool therapy expenses.¹ The employee cross-appeals from the judge's denial of chiropractic expenses incurred after January 9, 1997. We affirm.

BACKGROUND

The employee was employed by Fingerhut Corporation [the employer] as a telemarketer, working in the employer's office on the third floor of the Harbor Center Building in Duluth, Minnesota. The employer provided beverages for employees at the work site. On January 31, 1996, the employee's team leader advised her team not to discard their beverages outside of the building. After the employee clocked out at 10:00 p.m. on that same date, she took the elevator from the third floor down to the first floor and exited the building onto a public sidewalk. The employee testified that it was a "freezing cold" evening and that the sidewalk was "a little bit" icy and covered with "a little bit" of snow. When she was almost to the curb, the employee slipped on caramel-colored ice and sustained the injuries here at issue. The employee testified that, in addition to the caramel-colored ice, there were miniature ice cubes on the sidewalk similar to those dispensed in the employer's break room.

The employee was treated in the emergency room of St. Mary's Medical Center on February 1, 1996. At that time she gave a history of landing on her left buttock and striking her head on the ground when she fell. She was diagnosed as suffering from a soft tissue injury and possible mild concussion and was taken off work for two to three days.

The employee returned to the emergency room on February 5, 1996, complaining of "severe occipital headache . . . with buttocks pain in her coccygeal region, particularly on sitting." X-rays taken at that time showed a possible coccygeal fracture. The employee was taken off work for three more days.

The employee treated with her family doctor, Dr. Craig Gilbertson, on February 9, 1996, complaining that "it hurts to sit too long." Dr. Gilbertson's notes reflect that the employee had "no persistent headaches, light-headedness, dizziness or visual symptoms and no neck problems or upper back or even low back symptomatology. There has been no leg weakness, numbness or tingling." His examination revealed that the employee was "quite tender" at the distal coccyx. He released the employee to return to work in her home health aide position, which she had also held on the date of injury, but not to return to work with the employer as a telemarketer.

The employee worked in her home health aide position from February 8, 1996, to February 23, 1996. During this period, on February 19, 1996, the employee was seen by

¹ Other issues raised on appeal were not briefed and are deemed waived. Minn. R. 9800.0900, subp. 2.

Dr. N. Batsdorf, complaining of left neck and scapular burning pain and pain in the left occiput. Dr. Batsdorf took the employee off work and referred her for physical therapy evaluation and treatment. The employee returned to see Dr. Gilbertson on February 29, 1996, complaining of worsening pain in her neck, shoulders, and low back. Dr. Gilbertson noted that pool therapy and physical therapy were not helping, but he recommended that this treatment continue.

In March of 1996, the employee was referred to Dr. Jed Downs, an occupational medicine specialist at the Duluth Clinic. Dr. Downs ordered a cervical MRI, a left upper extremity EMG, and a lumbar MRI, all of which were interpreted as normal. In May of 1996, Dr. Downs recommended a three- to four-week trial of chiropractic treatment, and the employee began treating with Dr. Graf LeSavage. Dr. Downs continued to recommend chiropractic treatment until November 19, 1996, when he noted that the employee had not made any significant improvement in the last four to six weeks and concluded that the employee had reached maximum medical improvement [MMI]. Dr. LeSavage diagnosed hyperextension/flexion injury of the cervical spine, chronic severe myofascial pain syndrome over the left paracervical and shoulder area, cervicocranial syndrome, chronic severe left sacroiliac strain/sprain, and possible L4-5 facet syndrome. The employee treated with Dr. LeSavage an average of two to three times a week until the date of hearing.

The employee filed a claim petition on May 2, 1997, seeking temporary total disability benefits continuing from January 31, 1996, permanent partial disability benefits, rehabilitation benefits, and medical expenses. In their answer, the employer and insurer denied that the employee's injury was work-related.²

The employee was examined by independent medical examiner Dr. Paul Yellin on September 12, 1997. Dr. Yellin opined that the employee had significant subjective complaints with no objective clinical findings. He placed no restrictions on the employee and opined that she had no permanent partial disability. In contrast, on June 4, 1998, Dr. Downs opined that the employee was "permanently disabled."

The claim petition proceeded to hearing on September 1, 1998. In a decision filed on November 20, 1998, the compensation judge found, in relevant part, that "it is more likely than not that the soft drink that had been discarded on the sidewalk, and on which the employee slipped and fell, had been provided by the employer to another employee," and that "spilled pop" constituted a "special risk," making the employee's resulting injuries compensable. The judge went on to award temporary total disability benefits until January 5, 1998, permanent partial disability benefits for a 9.1775% impairment of the whole body, chiropractic expenses to

² The employer initially accepted liability for the employee's injuries and paid temporary total disability benefits from February 1 through April 25, 1996, at which time they filed a notice of intention to discontinue benefits, giving the following reason: "Upon further investigation, Ms. Snickers['] fall was not within the course and scope of her employment. It also does not fall under the ingress/egress rules. Therefore, all payments were made based on a mistake of fact."

January 9, 1997, and medical expenses. Both parties appeal.

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

Arising Out of and In the Course of Employment

To be compensable under the workers' compensation statute, an injury must arise "out of and in the course of employment" while an employee is "engaged in, on, or about the premises where the employee's services require the employee's presence as a part of such service at the time of the injury and during the hours of such service." Minn. Stat. § 176.011, subd. 16. The phrase "in the course of" refers to the time, place and circumstances of the injury; "arising out of" connotes a causal connection between the injury and the employment. Gibberd v. Control Data Corp., 424 N.W.2d 776, 780, 40 W.C.D. 1040, 1047 (Minn. 1988).

The compensation judge found that, while the employee's injury occurred after she had clocked out for the day and after she had left the employer's premises, her injury was compensable because it occurred "within a reasonable period of time after her shift and [she] was using a normal path of ingress and egress to her place of employment." The judge cited Simonson v. J.C. Knight, 174 Minn. 491, 219 N.W. 869, 5 W.C.D. 114 (Minn. 1928), Starrett v. Pier Foundry, 488 N.W.2d 273, 47 W.C.D. 176 (Minn. 1992), and Birch v. Hance Distrib., 58 W.C.D. 37 (W.C.C.A. 1997), in support of his finding.³ We are not necessarily convinced by the

³ In each of those cases, the employees were injured in locations found to be extensions of the employers' premises. In Simonson, the employee was injured entering the employer's premises through an entrance used "in the main" only by employees. In Starrett, the employee was injured when he tripped getting out of his car in the employer's parking lot. In Birch, all

compensation judge's analysis on this point, in that we see no persuasive reason to treat the public sidewalk in the present case as an extension or part of the work premises. However, the compensation judge also found the employee's injuries compensable on an alternative ground, the "special hazard" doctrine. Specifically, he concluded that soft drinks provided by the employer had been spilled on the sidewalk in front of the premises by an employee of the employer, causing the ice upon which the employee fell, and constituting a "special hazard" of the employee's employment. This conclusion, if reasonable, provides an independent basis for compensability.

The special hazard rule applies where, by virtue of the employment, an employee is exposed to a hazard which originates on the employment premises or is a part of the working environment, or if the employment peculiarly exposes the employee to an external hazard that subjects the employee to a greater personal risk than one has when pursuing ordinary personal affairs. See, e.g., Nelson v. City of St. Paul, 249 Minn. 53, 81 N.W.2d 272, 19 W.C.D. 120 (1957).⁴ The employer and insurer contend initially that substantial evidence does not support the compensation judge's finding that pop spilled by an employee of the employer caused the ice upon which the employee fell on January 31, 1996. While this is a very close call, we find minimally adequate evidence to support the judge's finding.

The judge found credible the testimony of the employee and her fiancé that there was caramel-colored ice and ice cubes in the area where the employee slipped and fell. Assessment of a witness' credibility is the unique function of the trier of fact. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989), citing Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988).

The judge also found it more likely than not that the caramel-colored ice and the ice cubes came from an employer-provided beverage, which had been discarded by a co-employee as he or she exited the building. The employee's testimony that the ice cubes were similar to the miniature ice cubes dispensed in the employer's break room, combined with the admission of Jacklyn Harvey-Whiteman, the employee's team leader, that she had told her team "there could be no more pop spilling outside of the building, especially because it was very cold that night . . . ,"

parties agreed that the employee's injury in the employer's parking lot occurred on the premises; the issue was whether the time of the injury (half an hour after work) was within a reasonable period of time for egress from the job. Cf. Satack v. State, Dep't of Public Safety, 275 N.W.2d 556, 31 W.C.D. 260 (Minn. 1978) (compensation denied to an employee who fell on ice on a public sidewalk ten feet from a walk leading to the entrance of the building in which she worked).

⁴ In Nelson, a school teacher was struck by a ball hit from the school playground as she was walking on a public sidewalk alongside the playground before the start of her work day. In finding the injury compensable, the supreme court noted that, "if the injury has its origin with a hazard or risk connected with the employment and flows therefrom as a natural incident of the exposure occasioned by the nature of the work, it arises out of the employment." Id. at 56, 81 N.W.2d at 276, 19 W.C.D. at 123.

provides evidence that a reasonable mind might accept as adequate to support the judge's finding.⁵ Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Hengemuhle, 358 N.W.2d at 60, 37 W.C.D. at 240.

Finally, the judge concluded that the spilled pop was a "special risk" of the employee's employment. On this issue, the employer and insurer contend that "the route used by the employee to cross the sidewalk and street was common to members of the general public and the hazard faced by her falling because of the pop spill was the same hazard faced by the general public." We are not convinced.

It was not unreasonable for the compensation judge to conclude that the employee's employment created a special risk or hazard that led to her injury. The employer provided soft drinks to its employees and was aware that some employees were discarding their pop on the sidewalk as they left the building. Even the employer itself was aware that the spilled pop created a hazard, as evidenced by testimony that the employee's team leader had advised her team that very evening not to discard their beverages on the sidewalk "because it was very cold that night." Moreover, the employee testified that the door she used to exit the building was the only exit available at that time of night. While the employer and insurer contend that they are nevertheless not liable because Ms. Harvey-Whiteman had warned employees that night not to throw their pop outside the building, we know of no authority that would relieve an employer of liability by virtue of such warning. The judge's finding of compensability, on the basis of a "special hazard," is affirmed.

Temporary Total Disability Benefits

The compensation judge awarded temporary total disability benefits from February 2 to February 8, 1996, and from March 1, 1996, to January 5, 1998⁶ (ninety days after service of Dr. Yellin's report on the employee and her attorney).

MMI

⁵ The employer and insurer also contend that the compensation judge inappropriately admitted photographs of the sidewalk in front of the Harbor Center Building over objection. The photos were admitted for illustrative purposes only, as all parties agreed that the street and curb area in front of the building had been rebuilt after the injury. The compensation judge, however, in his memorandum, commented that the photos showed a dark stain on the sidewalk in the area where the employee fell. Finding substantial evidence, without the photos, to support the judge's factual finding as to spilled pop, we find that the admission of the photos, while questionable, was not reversible error.

⁶ The reference, at one point, in Finding 49 to January 5, 1995, is obviously a typographical error.

The employer and insurer contend that the employee reached MMI on November 19, 1996, as reported by Dr. Downs, and that temporary total disability benefits should not continue beyond that date. The employer and insurer also advance several arguments as to why Dr. Downs' report did not need to be served to effectuate MMI.⁷ We are not convinced. MMI is not effective until notice of MMI is served upon the employee. Sletten v. American Hoist & Derrick, 39 W.C.D. 346 (W.C.C.A. 1987). When an MMI report is not served as part of a notice of intention to discontinue benefits or a petition to discontinue benefits, Minn. R. 5221.0410, subp. 3C, sets forth specific requirements for the cover letter, which must be included. Because the employer and insurer did not meet their obligations regarding service of Dr. Downs' report, we affirm the judge's finding that MMI was reached with service of Dr. Yellin's report.

Reasonable and Diligent Search for Work And/or Withdrawal from the Labor Market

The employer and insurer contend that the employee is not entitled to temporary total disability benefits because Dr. Yellin released the employee to work without restrictions and the employee admitted that she did not conduct any job search after the injury. The compensation judge, however, relied on the opinions of the employee's treating doctors indicating that the employee had not been released to return to work. The records of Drs. Gilbertson, LeSavage, and Downs establish that they never released the employee to return to work after February 9, 1996. A judge's choice between expert opinions is generally upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). The employer and insurer have not argued that any of these doctors' opinions are lacking in foundation.

An employee who has not been released to work has no obligation to look for employment. Accordingly, the judge's award of temporary total disability benefits is affirmed.

Permanent Partial Disability Benefits

The compensation judge found that the employee had sustained a 9.1775% permanent partial disability of the whole body (3.5% related to the cervical spine, 3.5% related to the lumbar spine, and 2.5% related to the thoracic spine, reduced by the multiple injury formula). The employer and insurer dispute that the employee exhibited the "involuntary muscle tightness or decreased range of motion" required by Minn. R. 5223.0370, subp. 3B (cervical spine), and Minn. R. 5223.0390, subp. 3B (lumbar spine). We are not convinced.

A compensation judge's finding as to a rating of permanent partial disability is one of ultimate fact. Erickson by Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 35 W.C.D. 523

⁷ These include the fact that the employee was not represented by counsel, that the employee had not contested an April 1996 NOID, that the employee was not currently receiving benefits, and that the employer and insurer were unaware of any pending claim.

(Minn. 1983). The records of Dr. LeSavage provide substantial evidence that the employee exhibited involuntary muscle tightness or decreased range of motion. Dr. LeSavage's daily clinic notes repeatedly reflect "pain and stiffness," tightness in the cervical and lumbar musculature, and changes in range of motion. The employer and insurer's argument that Dr. LeSavage is "less than credible" is not persuasive. Assessment of credibility is the unique function of the trier of fact. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989). The judge's award of permanent partial disability benefits is affirmed.

Pool Therapy Expenses

The employer and insurer contend that the pool therapy and physical therapy exceeded the twelve-week limit contained in the treatment parameters and that none of the exceptions to the parameters is applicable. The treatment parameters, however, are not applicable where an employer and insurer have denied liability for an injury. Dawson v. University of Minn., slip op. (W.C.C.A. May 6, 1999). The employer and insurer also mention in their brief that "pool therapy, physical therapy, and chiropractic treatment was duplicative." However, this defense to the treatment expense claim was never raised before the compensation judge. The judge's award of pool therapy expenses is affirmed.

Chiropractic Expenses

The compensation judge found that Dr. LeSavage had no documented treatment plan after January 9, 1997, and that there was no objective evidence of improvement after that date. Accordingly, the judge found that chiropractic care rendered after January 9, 1997, was not reasonable and necessary. The employee appeals from this finding, contending that, while the judge cited Horst v. Perkins Restaurant, 45 W.C.D. 9 (W.C.C.A. 1991), the judge did not address all of the Horst factors in evaluating the employee's claim. The employee also contends that substantial evidence does not support the judge's finding that the employee is psychologically dependent on chiropractic care.

In Horst, this court held that several factors may be relevant in determining whether chiropractic treatment is compensable. Those factors include: (1) the employee's opinion as to the relief obtained in terms of extent, frequency and duration of treatment; (2) the possibility of other conditions not discovered by the chiropractor causing the employee's problem; (3) the setting up of a weekly schedule with no reduction to an as-needed status; (4) the period of relief from pain, in particular whether persistent pain returns; (5) the use of alternative medical providers in the event of continuing pain; (6) the employee's overall activities and the extent of the employee's ability to continue work; (7) the recommendation of long-term chiropractic care into the future, which results in a maintenance rather than injury treatment; and (8) the psychological dependency of the employee on chiropractic care. Horst, 45 W.C.D. at 10-11. Other factors that may be pertinent to treatment expense claims include:

- (1) Evidence of a reasonable treatment plan;

- (2) Documentation of the details of treatment;
- (3) The degree and duration of relief resulting from the treatment;
- (4) Whether the frequency of treatment was warranted;
- (5) The relationship of the treatment to the goal of returning the employee to suitable employment;
- (6) Potential aggravation of underlying conditions by additional chiropractic treatment;
- (7) Duration of treatment; and
- (8) The cost of treatment in light of the relief provided.

Fuller v. Naegele/Shivers Trading, slip op. (W.C.C.A. April 14, 1993).

In the present case, the judge found that there was no documentation of a treatment plan after January 9, 1997. The employee contends that Dr. LeSavage prepared a treatment plan on June 16, 1996, which was amended in August of 1996 and again in either December of 1996 or 1997. However, while a formal treatment plan was prepared in June of 1996, we found no evidence of any amendments in August of that year. Rather, Dr. LeSavage's treatment notes for the month of August 1996 all reflect "TX today was unchanged." Further, while there is a notation on December 7, 1996, indicating that "[w]e are going to modify the TX schedule and manipulation will be at the T7-8 area, the T9 level, the C3 area on the right and to the right and left ilium and to the SI joint bilaterally," the significance of this modification is unknown, as the original treatment plan called for "light manipulation to the lower cervical spine and upper thoracics and to the left sacroiliac area." During the approximately 137 chiropractic treatments from December 7, 1996, through February 21, 1998, the employee's treatment has remained the same. The judge's finding of no treatment plan after January 9, 1997, is therefore supported by substantial evidence in the record.

The judge also found that there was no objective evidence of improvement after January 9, 1997, and Dr. LeSavage's records support this finding. The judge further found that the frequency of the care continued for two-and-a-half years at the rate of two to three visits per week, which the judge found to be unreasonable both in frequency and duration of relief. Again, this conclusion was not unreasonable, in that the employee testified that she has had over two hundred chiropractic treatments since 1996, that she has treated an average of two to three times a week, and that her symptoms are still the same.⁸ In addition, the employee testified that the relief she gets from a chiropractic treatment lasts only three hours to one day. The employee also testified that Dr. LeSavage schedules her for three treatments a week, although she does not always go that often. There is no evidence that Dr. LeSavage's treatments have moved the employee any closer to returning to work.

⁸ Although chiropractic records received into evidence cover only the period from June 13, 1996, through February 21, 1998, the employee testified that she continued to treat with Dr. LeSavage on a regular basis to the time of trial.

Given all of the evidence before the judge, it was reasonable for him to find that chiropractic treatments after January 9, 1997, were not reasonable and necessary to cure or relieve the effects of the employee's work injury. The fact that the judge did not make a specific finding regarding each of the Horst or Fuller factors does not render his conclusion reversible.