GLEN STEIN, Employee, v. JENNIE-O FOODS, SELF-INSURED/ALEXSIS/RSKCO, Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 9, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - PERMANENT AGGRAVATION. Substantial evidence supports the compensation judge's finding that the employee had sustained a new permanent injury rather than a temporary aggravation of a pre-existing injury.

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee had sustained a 10 percent permanent whole body impairment rating as a result of his new injury.

Affirmed.

Determined by: Rykken, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Catherine A. Dallner

OPINION

MIRIAM P. RYKKEN, Judge

The self-insured employer appeals the compensation judge's findings that the employee sustained a permanent injury in January 1997 and that employee was entitled to a 10 percent permanent partial disability rating. We affirm.

BACKGROUND

On May 31, 1991, Glen Stein (employee) sustained an admitted low back injury while working in the maintenance department at Jennie-O Foods (self-insured employer). The employee experienced low back pain around the beltline and sharp pain in the left leg. The employee treated with Dr. Alexander Lifson, who diagnosed a lateral herniated disc at L4-5 on the left with left L4 radiculopathy. An October 11, 1991, MRI scan indicated a left-sided lateral L4-5 disc herniation with compression of the left L4 ganglion, central broad-based bulging at L5-S1, and moderate right sided lateral spinal stenosis with impingement on the right L5 ganglion. An October 28, 1991, CT scan indicated left lateral disc herniation with severe impingement on the left exiting nerve root and bilateral uncinate spurring at L5-S1 with mild to moderate left and moderate right L5 nerve root flattening. On December 6, 1991, the employee underwent an L4 laminotomy, L4-5 facetectomy, and removal of a large disc fragment at the L4-5 level on the left,

performed by Dr. Lifson. Following that surgery, Dr. Lifson determined that the employee had sustained 11% permanent partial disability of the body as a whole, pursuant to Minn. R. 5223.0070, subp. 1B(2)(b), as a result of his May 31, 1991 injury.

The employee was off work until February 1992 when he returned to work for four hours per day for a few weeks, then returned to his full work schedule including overtime at his pre-injury job in the maintenance department with no physical work restrictions. Sometime in 1992 or 1993, the employee transferred to the parts department where he continued to work overtime with no restrictions. This position required lifting boxes and delivering parts throughout the building. Other employees assisted him with lifting or moving large parts. During follow-up care in early 1992, the employee developed right leg pain and numbness, so Dr. Lifson ordered an MRI scan of the lumbar spine. The June 30, 1992 MRI indicated a recurrent left sided lateral foraminal disc herniation at L4-5, degenerative disc hydration, a central annular tear, and a small central contained disc herniation at L5-S1. Dr. Lifson prescribed physical therapy, exercise and non-steroidal anti-inflammatory medication. The employee did not treat any further with Dr. Lifson until after a new injury sustained on January 30, 1997.

On January 30, 1997, the employee injured his low back while reaching down to pick up a box of parts as he was seated at his desk. As he was lifting the box, the employee felt something snap and experienced a funny sensation in his back. The employee experienced symptoms in his right leg after this injury. The employee continued to work, including overtime, and did not seek treatment until February 27, 1997. The employee testified that he had more difficulty sleeping after this injury, had more severe symptoms, and developed right leg symptoms. The employee's spouse testified that the employee had more difficulty sleeping and could participate in fewer activities after the 1997 injury. The employee treated with a chiropractor from February 27, 1997, through April 1997, and again was referred to Dr. Lifson. The employee reported right leg pain with numbness and tingling as well as low back pain. A March 12, 1997, MRI indicated desiccation with herniation of the discs at the L4-5 and L5-S1 levels. The herniation at the L5-S1 level was centrally located; the herniation at the L4-5 level was on the right side. Dr. Lifson diagnosed two level lumbar degenerative disc disease involving the L4-5 and L5-S1 levels with a minimal, residual herniated disc foraminally at the L4-5 level on the left and a small herniated disc at the L4-5 level on the right with severe lateral spinal stenosis at the L5-S1 level.

The employee was taken off work March 10, 1997, and returned to work April 10, 1997, but after a few days was again taken off work. The self-insured employer paid the employee temporary total disability benefits during these periods. On May 1, 1997, the employee underwent a CT scan, which Dr. Lifson read as indicating severe collapse of the L5-S1 disc space, extremely severe lateral spinal stenosis with almost complete obliteration of the L5 nerve root foramina and significant lateral spinal stenosis bilaterally at L4-5. Dr. Lifson released the employee to work on May 4, 1997, with no work restrictions indicated. The employee's supervisor apparently told the employee that he would work eight hours per day, 40 hours per week after he returned to work. The employee received temporary partial disability benefits based upon the 40-hour work week. Those temporary partial disability benefits were apparently

discontinued by the self-insured employer since there was no doctor's report indicating any restrictions on the number of hours the employee could work.[1] The employee was re-examined by Dr. Lifson on October 28, 1997. Dr. Lifson then set permanent restrictions for the employee of working eight hours per day, 40 hours per week, on a light-duty basis. In his report of March 3, 1998, Dr. Lifson rated the employee as having a 10 percent permanent whole body impairment rating as a result of the January 1997 injury.

On January 26, 1998, the employee underwent an independent medical examination with Dr. Mark Friedland, who opined that the central L4-5 and L5-S1 disc protrusions on the March 1997 MRI were very minimal, not clinically significant, and a result of the employee's degenerative disc disease. He opined that the employee at most had sustained a temporary exacerbation of a pre-existing L4-5 and L5-S1 degenerative disc disease with lateral stenosis bilaterally, and rated the employee as having 0% permanent partial disability of the body as a whole.

On February 12, 1998, the employee filed a claim petition alleging dates of injury of May 31, 1991 and of January 30, 1997. The employer denied primary liability for the January 1997 injury, even though the employer had originally admitted primary liability. A hearing was held on February 19, 1999. The compensation judge found that the employee had sustained a work-related permanent injury to his low back on January 30, 1997, and had sustained a 10 percent permanent partial disability of the body as a whole as a result of that injury. The employer appeals.

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 (1998). 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

[1] The record contains no Notice of Intention to Discontinue Benefits, nor any information indicating when temporary partial disability benefits were discontinued. The employee testified that he telephoned an insurance administrator's representative after his payments ceased. The payments apparently ceased on September 6, 1997, according to the employee's claim petition, and the employee was advised that no benefits were due because the employee had submitted no doctor's report indicating work restrictions on the number of hours the employee could work.

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

Causation

The employer appeals the compensation judge's finding that the employee's January 1997 work injury was permanent, arguing that the injury was a temporary aggravation of the employee's May 1991 work-related injury. The employee testified that after the January 1997 injury, he experienced increased symptoms, different symptoms in his right leg, increased difficulty sleeping, and that he could participate in fewer activities at home, including household chores and recreational activities. Both the employee and his spouse testified that the employee's pain and difficulties working increased throughout the course of his work shift, and that the employee was extremely fatigued after each workday. The compensation judge found this testimony to be credible.

Questions of medical causation fall within the province of the compensation judge. Felton v. Anton Chevrolet, 513 N.W.2d 457, 50 W.C.D. 181 (Minn. 1994). The compensation judge specifically found that Dr. Lifson's opinion was more persuasive than Dr. Friedland's opinion. The compensation judge stated in her memorandum:

> I have found the opinions of Dr. Lifson to be more persuasive than those of Dr. Friedland for a number of reasons. First, Dr. Lifson has been the employee's treating neurosurgeon since 1991. He had the opportunity to examine and evaluate the employee following the injury of May 31, 1997 and the injury of January 30, 1997. Dr. Lifson performed the employee's surgery on the low back in December 1991. Dr. Lifson examined all of the employee's lumbar and CT scans, including the most recent lumbar CT scan which was performed on the recommendation of Dr. Lifson on May 1, 1997. Dr. Friedland examined the films of several of the employee's lumbar MRI and CT scans but he apparently did not review the actual films of the employee's lumbar CT scan of May 1, 1997.

The employer claims that Dr. Lifson's opinion lacked adequate foundation, arguing that Dr. Lifson did not examine the employee until almost three months after the January 1997 injury, that Dr. Lifson concluded that the employee could return to work on May 4, 1997 with no restrictions, had reached MMI, and had no permanent partial disability, and that when Dr. Lifson issued his March 3, 1998, opinion that the employee had sustained an additional 10 percent whole body impairment, he had not examined the employee since October 1997. A medical opinion which lacks adequate foundation may not be relied on by the compensation judge. McDonald v. MTS Sys. Corp., 43 W.C.D. 83 (W.C.C.A. 1990). However, "[t]he competency of a witness to

provide expert medical testimony depends upon both the degree of the witness' scientific knowledge and the extent of the witness' practical experience with the matter which is the subject of the offered testimony." Reinhardt v. Colton, 337 N.W.2d 88, 93 (Minn. 1983). An expert's lack of information, such as that alleged in this case, goes to the weight of the opinion rather than to its foundation. Crosby v. University of Minn., slip op. (W.C.C.A. Mar. 2, 1995). Thus, the issue is whether Dr. Lifson's opinion, in addition to the employee's medical record and testimony, constitutes "substantial evidence" supporting the compensation judge's decision.

Dr. Lifson was the employee's treating orthopedic surgeon after his May 1991 injury and was his treating physician since March 25, 1997. Dr. Lifson examined the employee on May 1, 1997 and again on October 28, 1997, when he gave the employee permanent restrictions of working eight hour days, 40 hours per week. We cannot conclude Dr. Lifson's opinion either lacked foundation or rested on so inadequate a factual basis as to render it without substantial weight. It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). Given the adequate foundation for Dr. Lifson's opinion, the compensation judge could reasonably rely on it.

In addition, the employee's testimony, his spouse's testimony, and his medical records indicate changes in the employee's symptoms and diagnosis after the 1997 injury. The employee and his spouse testified that after the 1997 injury, the employee's symptoms increased, he had more difficulty sleeping, and he could participate in fewer activities. Also, the employee experienced right leg pain after the 1997 injury. While the 1992 MRI indicated a small central herniation at L5-S1, the compensation judge noted that the 1997 MRI and CT scan indicated bilateral severe L5-S1 intervertebral foraminal stenosis bilaterally at L4-5, and herniated discs at L4-5 and L5-S1. Substantial evidence supports the compensation judge's finding that the employee sustained a new permanent work injury in January 1997 rather than a temporary aggravation of the employee's May 1991 injury. Accordingly, we affirm.

Permanent Partial Disability

The employer also appeals the compensation judge's finding that the employee sustained a 10 percent permanent partial disability of the body as a whole as a result of the January 1997 work injury. A compensation judge's finding regarding the rating of permanent partial disability is one of ultimate fact and must be affirmed if it is supported by substantial evidence. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987). After the May 1991 injury, the employee received an 11% whole body impairment rating, provided by Dr. Lifson. Dr. Lifson opined that after the January 1997 injury, the employee was entitled to a 10 percent whole body impairment rating, pursuant to Minn. R. 5223.0390, subp. 4.E., in addition to the 11 percent already rated. In contrast, Dr. Friedland opined that the employee was entitled to a zero percent permanent partial disability.

The employer argues that Dr. Lifson lacked proper foundation to assign a permanency rating, and argues that Dr. Lifson's assessment of the employee's disability therefore

was not credible. As discussed above, Dr. Lifson's opinion had adequate foundation. It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). Substantial evidence supports the compensation judge's finding that the employee sustained a 10 percent whole body impairment rating as a result of the January 1997 work injury, and we therefore affirm that finding.