ROBERT E. STULEN, Employee, v. HALVORSON CO., INC., and UNITED FIRE & CAS. INS. CO., Employer-Insurer/Appellants, and BLUE CROSS & BLUE SHIELD OF MINN., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 6, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - INTERVENING CAUSE; CAUSATION - MEDICAL TREATMENT. Substantial evidence supports the compensation judge's determination that the employee's activities on September 21 and 22, 1997 were not a superseding, intervening cause, and the employee's need for medical treatment was causally related to his admitted 1983 work injury.

EVIDENCE - RES JUDICATA. The compensation judge erred in finding this court's prior decision on May 22, 1996 was res judicata on the issue of whether the permanent treatment parameters barred compensation for chiropractic and massage therapy expenses, where the current claim involved a different period of time, and different sections of the permanent treatment parameters were raised and argued.

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS. Substantial evidence supports the compensation judge's finding that the chiropractic and therapeutic massage treatment rendered was medically necessary within the meaning of Minn. R. 5221.6200, subp. 3.B.(2) of the permanent treatment parameters.

Affirmed in part and vacated in part.

Determined by Johnson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Jennifer Patterson

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal the compensation judge's finding that the employee's activities on September 22, 1996 were not a superseding, intervening cause of the employee's subsequent need for medical treatment. The employer and insurer also appeal the compensation judge's award of chiropractic and therapeutic massage treatment after July 12, 1996. We affirm, in part, and vacate, in part.

BACKGROUND

Robert E. Stulen, the employee, sustained an injury to his low back on December 7,

1983, while working for Halvorson Company, Inc., the employer, then insured by United Fire & Casualty Insurance Company. The employer and insurer accepted liability for the employee's injury and paid workers' compensation benefits. During the following years, the employee experienced periodic flare-ups of low back pain for which he sought chiropractic care. An MRI scan in October 1991 showed degenerative disc changes in the three lower lumbar levels, with a central protrusion or herniation at L3-4 and a bulging disc at L4-5.

On August 10, 1994, the employee saw his treating chiropractor, Jennifer A. Heveron, D.C., at Greenlake Chiropractic complaining of increased low back pain. Thereafter, the employee treated as needed with Dr. Heveron. An MRI scan taken on October 12, 1994 again showed three-level degenerative disc disease with a mild right-sided protruding disc at L4-5 and a mild central bulging disc at L3-4. The employee was also tested and evaluated at the Mayo Clinic.

The employee filed a medical request in February 1995 seeking payment for medical and chiropractic treatment from and after August 10, 1994. In a Findings and Order served and filed September 1, 1995, the compensation judge ordered the employer and insurer to pay the employee's outstanding expenses at Greenlake Chiropractic. The employer and insurer appealed the award of chiropractic expenses to the Workers' Compensation Court of Appeals. The appellants argued the chiropractic treatment was barred by the permanent treatment parameters, specifically Minn. R. 5221.6600.[1] In a decision filed May 22, 1996, a panel of this court affirmed the award of chiropractic expenses through August 17, 1995, the date of the hearing before the compensation judge, affirming the judge's finding that the contested chiropractic treatment was outside the purview of Minn. R. 5221.6600.[2] Stulen v. Halvorson Co., Inc., slip op. (W.C.C.A. May 22, 1996).

On September 21, 1996, the employee bent over to pick up a wrench and heard or felt a pop in his low back. (T. 67-68.) The following day the employee and his family took their pontoon boat out on Green Lake in Spicer, Minnesota. The employee drove his truck and boat trailer carrying the pontoon boat to the boat ramp at the lake. He backed the trailer into the water and unhooked the boat. The boat then floated free. After the boat ride, the employee performed the same procedure in reverse. As the employee was driving away, he noticed a couple that was having difficulty pulling their boat out of the water. The employee offered to help by attaching a chain to the other car to pull it up the boat ramp. The employee moved his truck into position, opened the door and started to climb out of the cab to hook up the chain. As the employee moved his left leg out of the truck door he experienced the onset of severe low back and leg pain. A man from the other vehicle attached the chain between the two vehicles. The employee drove his

[1] Minn. R. 5221.6600, subp. 1.C. provides that "no further passive treatment modalities . . . are indicated" for "chronic management" patients.

[2] The employer and insurer raised no other permanent treatment parameters as defenses in the case. Accordingly, this court limited our discussion of the parameters to the applicability of Minn. R. 5221.6600.

vehicle and pulled the car up the ramp. The employee then drove home and was taken by ambulance to the emergency room at Rice Memorial Hospital where he was admitted.

At Rice Memorial Hospital, Dr. Lyle Munneke prescribed bed rest, oral analgesics, anti-inflammatories and muscle relaxants. The employee had not improved by September 24, 1996, and was taken by ambulance to the Mayo Clinic where he was also admitted. The employee gave a history of feeling a "konk" in his back while straightening up from a forward flexed position and an exacerbation of pain two days before while attempting to get out of his car. Musculoskeletal low back pain was diagnosed. Rehabilitation was provided and the employee was discharged on September 26, 1996. (Pet. Ex. G.)

The employee testified his symptoms subsided very little after September 26, 1996. He returned to Dr. Heveron who provided massage treatment from October 25, 1996 through February 14, 1997. He also continued to receive chiropractic treatment from Dr. Heveron through July 13, 1998. The employee testified he did not have a treatment schedule with Dr. Heveron, but went in to see her when his back became very painful. He testified he received relief within a couple of hours of this treatment. (T. 59-61.)

The employee was examined by Dr. Mark Engasser on September 29, 1997. The doctor diagnosed chronic myoligamentous strain of the lumbosacral spine with disc degeneration at L3 to S1. Dr. Engasser opined the incident of September 22, 1996 was a substantial aggravating factor, and believed the employee's activity on September 22, 1996 was a superseding and intervening cause of the need for medical treatment thereafter. Finally, Dr. Engasser opined the employee was not in need of further chiropractic treatment. Rather, he proposed a home back strengthening and flexibility program. (Resp. Ex. 1.)

The employee was examined by Dr. Robert A. Wengler on April 8, 1998. He diagnosed back and right leg pain secondary to degenerative disc disease of the lumbar spine. The doctor did not believe the employee was a candidate for surgery at that time. Dr. Wengler opined the September 22, 1996 incident was a recurrent event causally related to the employee's initial back injury in December 1983. Finally, Dr. Wengler opined occasional chiropractic care would be necessary to treat acute recurrent episodes of low back pain. (Pet. Ex. H.)

The employee filed a medical request on May 16, 1997 seeking payment of various medical expenses, including massage therapy from October 25, 1996 to February 14, 1997 and chiropractic treatment from July 12, 1996 to July 13, 1998. The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on July 28, 1998. In a Findings and Order filed September 10, 1998, the compensation judge found (1) the incident of September 22, 1996 was not a superseding, intervening cause of the employee's subsequent need for medical treatment; (2) the massage and chiropractic treatment provided to the employee between July 12, 1996 and July 13, 1998 was necessary to relieve the employee from the effects of the 1983 work injury; (3) this court's May 22, 1996 decision was res judicata on the issue of whether the permanent treatment parameters barred chiropractic treatment after August 17, 1995; and (4) the employee had established that chiropractic care for the symptomatic relief of flare ups

was reasonable and necessary within the meaning of Minn. R. 5221.6200, subp. 3.B.(2). Accordingly, the compensation judge ordered the employer and insurer to pay the chiropractic and massage therapy received by the employee subject to the fee schedule. The employer and insurer appeal.

STANDARD OF REVIEW

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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). "[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A.) 1993).

DECISION

Superseding, Intervening Cause

The employer and insurer argue the employee's activities on September 22, 1996 constitute a superseding and intervening cause of his subsequent need for medical treatment. They contend the compensation judge's finding to the contrary is not supported by the evidence or law in the case and must be reversed. We disagree.

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. 1 Arthur Larson & Lex K. Larson, Workers' Compensation Law § 13 (1995). Where a work injury creates a permanently weakened physical condition which an employee's subsequent normal physical activities aggravate to the extent of requiring additional medical care, such additional care is compensable. Nelson v. American Lutheran Church, 420 N.W.2d 588, 590, 40 W.C.D. 845, 851 (Minn. 1988); Peniston v. City of Marshall, 192 Minn. 132, 255 N.W. 860, 8 W.C.D. 172 (1934). However, if a subsequent aggravation of the initial injury arises from an independent intervening cause not attributable to the employee's customary activity in light of the employee's condition, then such additional medical care for the aggravation is not compensable. Rohr v. Knutson Constr. Co., 305 Minn. 26, 232 N.W.2d 233, 28 W.C.D. 23 (1975). The causal link between the work injury and the subsequent aggravation is broken when the aggravation is the result of "unreasonable, negligent, dangerous or abnormal activity on the

part of the employee." Eide v. Whirlpool Seger Corp., 260 Minn. 98, 102, 109 N.W.2d 47, 49-50, 21 W.C.D. 437, 441 (1961).

In the Eide case, the employee sustained a back injury requiring disc surgery. Thereafter, the employee injured his left knee while playing badminton, necessitating a cast from the employee's left thigh to his left ankle. The employee's gait was altered due to the cast which exacerbated his low back injury. Ultimately, the employee was hospitalized for treatment for both his knee and back. The employer and insurer denied liability for the medical treatment and contended the badminton injury was an independent intervening cause of the resultant disability. At the hearing, a medical expert testified the need for medical care was due, in substantial part, to the original work injury which was later aggravated by the employee's altered gait. The court concluded badminton was not a dangerous or an unusual activity and there was no evidence the employee had been instructed to abstain from engaging in such activities. The court further noted that expert medical testimony supported the conclusion that the original injury remained a substantial contributing cause of the employee's disability. Accordingly, the court affirmed the finding that the knee injury was not a superseding intervening cause of the employee's disability.

In Gaspers v. Minneapolis Elec. Steel Castings Co., 290 N.W.2d 743, 32 W.C.D. 266 (Minn. 1979) the employee sustained a low back injury in 1969, and underwent an L4-5 laminectomy. Eight years later, the employee fell while roller skating and felt immediate low back pain. The employee required a second laminectomy and fusion at the L4-5 level and sought benefits following the roller skating accident. At the hearing a medical expert testified the roller skating accident was the sole cause of the employee's disability after the 1977 fall, and opined the work injury was not a substantial contributing cause of his disability. The supreme court affirmed this court's determination that the roller skating injury was a new injury and the work injury was not a substantial contributing cause of the employee's disability after January 1977.

In this case, the compensation judge concluded the employee's activities on September 21 and 22, 1996 were not superseding, intervening causes of the employee's disability after September 22, 1996. The employer and insurer contend this finding is clearly erroneous, arguing these activities must be considered unreasonable and abnormal in light of the employee's restrictions to avoid "twisting with weight" and his 15-year history of back problems. We are not persuaded. The compensation judge reasonably found that bending over to pick up a wrench, flexing forward and going for a boat ride with one's family are ordinary life activities. None of the employee's activities on September 21 or 22, 1996 appear unreasonable, negligent, dangerous or abnormal within the meaning of the Eide case. Rather, the activities which the appellant contends constitute an intervening cause are rather innocuous and do not appear to exceed the employee's restrictions. Further, there was no evidence the employee was expressly advised not to perform any of these activities. Finally, it appears the medical diagnosis was the same before and after the September 1996 incidents. These facts, coupled with the medical opinion of Dr. Wengler, provide evidentiary support for the compensation judge's determination that the chain of causation was not broken by an independent, intervening cause. We, therefore, affirm.

Chiropractic and Massage Treatment

The employee sought payment for chiropractic expenses from July 12, 1996 through July 13, 1998 and for massage therapy from October 25, 1996 through February 14, 1997. The compensation judge found this treatment was necessary to relieve the employee from the effects of his 1983 work injury, and awarded the medical expenses claimed, subject to the fee schedule. However, the employer and insurer contend all of the treatment is barred by the permanent treatment parameters, specifically Minn. R. 5221.6200, subps. 3.A., 3.B., 3.C. and 3.H. The compensation judge concluded that this court's 1996 decision was res judicata on the issue of whether the permanent treatment parameters bar further chiropractic care. The judge further held, in the alternative, that the chiropractic care provided was reasonable and necessary within the meaning of Minn. R. 5221.6200, subp. 3.B.(2). (Findings 9, 10.)

The employer and insurer argue the compensation judge erred, as a matter of law, in awarding the disputed medical expenses. In the prior appeal in this case (Stulen I), this court affirmed the compensation judge's award of chiropractic treatment from January 4, 1995 [3] through August 17, 1995. The issue then before the court was whether the permanent treatment parameters, specifically Minn. R. 5221.6600, subp. 1.C., barred the award of chiropractic expenses. The court concluded that rule was not applicable based upon the facts in that proceeding.

Principles of res judicata "bar subsequent proceedings to determine claims which were litigated in a prior proceeding." Alexander v. Kenneth R. LaLonde Enters., 288 N.W.2d 18, 20, 32 W.C.D. 312, 314 (Minn. 1980). In workers' compensation cases, the doctrine of res judicata does not bar litigation of issues not specifically litigated previously. Westendorf v. Campbell Soup Co., 309 Minn. 550, 550-51, 243 N.W.2d 157, 158, 28 W.C.D. 460, 460 (1976) (per curiam). The claim before the judge in this proceeding was entitlement to medical expenses for chiropractic treatment and massage therapy provided between July 12, 1996 and July 13, 1998. Neither the issue of compensability for chiropractic treatment or massage therapy rendered after August 17, 1995, nor whether the treatment is barred by subparts 3.A., 3.C. and 3.H. of the permanent treatment parameters was litigated in Stulen I. Thus, the prior decision cannot be res judicata. Finding 9 is, accordingly, vacated.

The employer and insurer also argue that both chiropractic treatment and massage therapy are limited to a maximum of 12 calendar weeks pursuant to Minn. R. 5221.6200, subps. 3.A., 3.C. and 3.H, and that the employee has clearly exceeded that time period. They contend that the employee may receive treatment beyond the 12 week period only if "exceptional circumstances" are shown, citing Jacka v. Coca Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998). We disagree.

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[3] The permanent treatment parameters became effective January 4, 1995 and apply to all medical treatment provided after that date. Jacka v. Coca Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998). We note Stulen I was issued prior to the supreme court's decision in Jacka.

The 12 week rule for passive care is not an absolute limit. Various provisions allow additional treatment under certain circumstances. See, e.g., Minn. R. 5221.6050, subp. 8; Minn. R. 5221.6200, subps. 3.B.(1) and 3.B.(2). The compensation judge found the employee's testimony, the chiropractic treatment records, and the expert opinions of Dr. Heveron and Dr. Wengler "support the effectiveness of passive treatment in maintaining the employee's employability," and concluded the employee had shown the treatment rendered was medically necessary within the meaning of Minn. R. 5221.6200, subp. 3.B.(2).[4] (Finding 10.) There is more than adequate evidence to support this finding.[5] We, accordingly, affirm the award of medical expenses for chiropractic treatment and therapeutic massage received by the employee between July 12, 1996 and July 13, 1998.

[4] Minn. R. 5221.6200, subp. 3.B.(2) provides, in pertinent part, that "treatment may continue beyond the additional 12 visits [see Minn. R. 5221.6200, subp. 3.B.(1)] . . . based on documentation in the medical record of the effectiveness of further passive treatment in maintaining employability." "Medically necessary treatment" means "health services for a compensable injury that are reasonable and necessary for the diagnosis and cure or significant relief of a condition consistent with any applicable treatment parameter." Minn. R. 5221.6040, subp. 10.

[5] Since we have affirmed the compensation judge's finding that the chiropractic/massage therapy treatment was medically necessary within the meaning of the permanent treatment parameters, we need not address whether "exceptional circumstances" are present justifying a departure from the rules in this case. But see Asti v. Northwest Airlines, ___ N.W.2d ___, 59 W.C.D. ___ (Minn. Feb. 11, 1999.)