ALAN B. TURCOTTE, Employee, v. DETROIT MARINE, INC., and JOHN DEERE INS. CO., Employer-Insurer, and DAIRY SUPPLY CO. and FARM BUREAU INS. CO., Employer-Insurer/Appellants, and U.S. DEP'T OF VETERANS AFFS. and MINN. DEP'T OF ECON. SEC., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 18, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee sustained an injury to his cervical spine and left arm on February 18, 1994. The issue of whether the injury was a temporary or permanent aggravation of his pre-existing condition remains open.

PRACTICE & PROCEDURE - PREMATURE FINDING. Where the compensation judge authorized a repeat MRI scan to more fully diagnose the employee's cervical spine condition following the employee's February 18, 1994 injury, the judge did not err in finding that a determination of the parties' claims regarding apportionment, permanent partial disability, and attainment of maximum medical improvement (MMI) were premature.

Affirmed.

Determined by Johnson, J., Wilson, J., and Hefte, J.
Compensation Judge: Jeanne E. Knight

OPINION

THOMAS L. JOHNSON, Judge

Dairy Supply Company and Farm Bureau Insurance Company appeal the compensation judge's finding that the employee sustained a personal injury arising out of his employment on February 18, 1994, and the judge's findings that determination of maximum medical improvement, apportionment and the employee's claim for permanent partial disability benefits was premature. We affirm.

BACKGROUND

On April 18, 1989, Alan B. Turcotte, the employee, sustained an admitted, work-related injury while working as a mechanic for Detroit Marine, Inc., insured by John Deere Insurance Company. A CT scan and myelogram taken August 15, 1989, revealed a herniated disc

at C5-6 on the left. On September 6, 1989, a C5-6 hemilaminectomy and discectomy was performed by Dr. John Mullen at the VA Hospital in Minneapolis. The employee was discharged on September 15, 1989 with instructions to avoid heavy lifting for the next eight weeks. (Pet. Ex. C.)

The employee returned to work at Detroit Marine approximately six months after his surgery in a light-duty job. Although the employee eventually resumed some of his pre-injury duties, he was unable to do any work requiring heavy lifting. Detroit Marine went out of business in the fall of 1991. (T. 40-43, 79.) The employee then obtained a job with Audubon Marine performing small engine repair. This company also went out of business. (T. 46, 80.) On January 5, 1993, the employee was hired by Dairy Supply Company to install and service dairy farm equipment. During the hiring process, the employee told the employer he could not lift heavy items or work in a fixed position for more than a short time. (T. 47-48, 81.)

On April 27, 1993, the employee saw Dr. Sunny S. Kim at the Institute for Low Back Care at the request of Dairy Supply Company. The employee denied any new injury or problems and testified the company wanted a record of his limitations. Dr. Kim noted the employee had a flare-up about a month previously while looking up and pushing upwards. Dr. Kim diagnosed a resolving, temporary aggravation of the employee's left cervical radiculopathy. The doctor stated the employee could work on a moderate-duty basis, eight hours a day, with a 30 pound restriction. (Pet. Ex. D.)

In February 1994,[1] the employee fell off a ladder while working on a pipeline in a barn. The employee testified his neck and left arm pain was worse than it had been for several years. (T. 55.) The employee saw Dr. Kim on February 23, 1994. An x-ray showed cervical lordosis and osteophytes at C5-6 and C6-7. The doctor noted limited cervical range of motion and a normal neurological examination. Dr. Kim prescribed Toradol, an anti-inflammatory medication, and advised the employee to make another appointment if his symptoms persisted.

The employee was off work for three or four weeks after the February 1994 incident. He returned to Dairy Supply but testified he was unable to do all of the jobs assigned to him and was unable to work on a full-time basis. (T. 59-60.) On May 13, 1994, Dr. Kim signed a Report of Work Ability listing February 22, 1994 as the date of injury, and assigning a 30 pound lifting restriction from April 1, 1994 extending indefinitely. (Pet. Ex. D.) The employee was laid off by Dairy Supply sometime around June 1, 1994. (T. 61.) By report dated July 7, 1994, Dr. Kim opined the employee had reached maximum medical improvement (MMI), rated zero permanent partial disability, and stated no further medical treatment was advised.[2] This MMI report was served on the employee on September 14, 1994. (Pet. Ex. G.)

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[1] The employee could not recall the date on which the incident occurred. (T. 52-53, 92-92.)

[2] Dr. Kim also noted the employee had a pre-existing condition, status post-cervical laminectomy, that affected the current disability, and stated no surgery had been performed.

The employee was off work until April 1998 when he obtained a job at a gas station and convenience store outside Detroit Lakes, Minnesota. The employee was working part-time, four hours a day, at the service station/store. The employee testified that, as of the date of the hearing, his condition had not improved. (T. 63-65.)

The employee was examined by Dr. Duane Person on November 5, 1996 at the request of the employee's attorney. The doctor recorded a history of the August 16, 1989 injury and the February 22, 1994 fall. On examination, Dr. Person noted cervical tenderness and reduced range of motion, decreased grip strength in the left arm and limited abduction on the left. The doctor diagnosed a herniated disc at C5-6 necessitating a hemilaminectomy and discectomy, chronic musculoligamentous strain with a probable recurrent herniated disc at C5-6 or another level, and multiple level cervical degenerative disc disease. Dr. Person gave a 14 percent permanent partial disability rating[3] and restricted the employee's work activities. The doctor stated, "I do strongly suspect that since the February 1994 injury that he has injured his neck more than I can diagnose at the present time. What I mean by that is I would not be surprised if he had a recurrent herniated disc at the C5-6 level, or he could have a herniated disc at another level. I believe that the first thing that should be done is a repeat MRI of his cervical spine. This would give a much better diagnosis, and it may be such that he would be benefited by more aggressive treatment, and that would of course be surgery." Finally, Dr. Person opined the employee had reached MMI from his cervical spine injuries. (Pet. Ex. E.) Dr. Person's report was served on the employee's attorney on January 16, 1997. (FB Ex. 5.)

Dr. Jack Drogt examined the employee on April 12, 1997 at the request of Dairy Supply and Farm Bureau. The doctor noted the employee demonstrated facet pain from C3 through C7, but all neurological tests were normal. Dr. Drogt concluded the employee sustained an injury on August 18, 1989 requiring a C5-6 hemilaminectomy and discectomy and a work-related injury on February 22, 1994 that temporarily aggravated the employee's pre-existing condition. Dr. Drogt concluded there was no objective evidence to suggest the employee had any additional physical impairment as a result of the February 22, 1994 injury, and opined the employee could return to work with his prior 30 pound lifting restriction. (FB Ex. 9.)

Dr. Gary Wyard examined the employee on April 18, 1997, at the request of Detroit Marine and John Deere. The doctor recorded a history of the August 1989 injury and surgery following which the employee stated, "he was 100% better after the surgery" and "ultimately worked without specific restrictions or limitations." The employee further reported "he would only occasionally have soreness and discomfort in the neck and arm." Dr. Wyard diagnosed post-cervical discectomy at C5-6 and long-standing cervical degenerative disc disease at C5-6. Dr. Wyard opined the employee reaggravated his neck condition on February 22, 1994, stating, "I feel Mr. Turcotte needs restrictions and limitations as a result of his injury on February 22, 1994. Prior to that he was working 60 hour weeks and had very minimal restrictions and limitations and

[3] See Minn. R. 5223.0370, subp. 4.D.(1) and (2).

got along satisfactorily." Finally, Dr. Wyard felt a repeat MRI scan might be beneficial to further diagnose the employee's current status. (JD Ex. 1.) This report was served on the employee and his attorney on May 1, 1997. (FB Ex. 7.)

On March 18, 1998, the employee saw Dr. Paul Hendrickson at the Detroit Lakes Clinic complaining of chronic pain, spasm and stiffness in his neck and pain radiating into his left arm. On examination, he noted tenderness and stiffness in the employee's upper neck and back, especially in the left rhomboid area. The doctor diagnosed chronic cervical pain with spasms, stiffness and radiation into the left arm, and depression. Dr. Hendrickson prescribed Elavil for the depression and opined the employee needed further evaluation. (Pet. Ex. A.)

The employee filed a claim petition seeking temporary total disability benefits from and after June 1, 1994 and 14 percent permanent partial disability benefits. A rehabilitation request was consolidated with the employee's claim petition. A Temporary Order dated August 19, 1997, directed Detroit Marine and John Deere to pay reasonable rehabilitation expenses for job search and placement. The case was heard by a compensation judge at the Office of Administrative Hearings on April 29, 1998. In a findings and order served and filed July 17, 1998, the compensation judge found the employee sustained a new injury on or about February 18, 1994, and ordered Dairy Supply and Farm Bureau to pay the February 23, 1994 bill of Dr. Kim. The compensation judge, however, made no finding whether the February 18, 1994 injury was a temporary or permanent aggravation. The judge concluded the record was inadequate to make that decision, and found a cervical MRI scan was necessary to more fully diagnose the employee's condition. Accordingly, the judge concluded the employee's claim for additional permanent partial disability benefits and any determination of MMI and apportionment between the employers and insurers were premature. Dairy Supply and Farm Bureau appeal from each of these findings and orders.

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).

DECISION

February 1994 Injury

Detroit Marine and John Deere contend substantial evidence does not support the compensation judge's finding that the employee sustained a personal injury to his cervical spine and left arm on or about February 18, 1994. The appellants further argue the compensation judge's apparent reliance on the opinion of Dr. Wyard warrants reversal, asserting Dr. Wyard's opinion lacks adequate foundation.

The appellants essentially argue the employee's condition was unchanged after the fall on February 18, 1994. They note the area of the employee's cervical pain was the same before and after the February injury; the employee's restrictions did not change; the employee saw Dr. Kim on only one occasion after the February 18, 1994 fall; and Dr. Kim rated no permanent disability as a result of the February 1994 injury. While these facts bear on whether the employee's February 18, 1994 injury was temporary or permanent, they do not mandate a reversal of the finding that the employee sustained a personal injury on that date. There is no dispute the employee fell several feet off a ladder, landing face down. He testified to an immediate increase in pain. (T. 57.) Within a day or two of the fall, the employee saw Dr. Kim, gave the doctor a history of the injury and told the doctor the fall aggravated his neck and arm pain. (Pet. Ex. D.) The compensation judge found the employee sustained a second injury on February 18, 1994 and ordered Dairy Supply and Farm Bureau to pay Dr. Kim's medical expenses for February 23, 1994. These findings are amply supported by the record and are affirmed.

The appellants further argue the compensation judge's apparent reliance on Dr. Wyard was misplaced because the doctor lacked adequate foundation for his opinion. Instead, they assert, the compensation judge should have accepted the opinion of Dr. Drogt. We find little merit to this argument.

None of the physicians who examined the employee, Dr. Person, Dr. Wyard or Dr. Drogt, opined that no personal injury occurred on or about February 18, 1994. Rather, their opinions focus on the extent and effect of the February 1994 work injury. In fact, Dr. Drogt opined the employee did sustain an injury on or about February 22, 1994, but concluded it was a temporary aggravation. (FB Ex. 9.) In short, the opinions of all of the medical examiners support the compensation judge's finding.

Apportionment/Permanent Partial Disability

The compensation judge concluded a determination of the parties' apportionment and permanent partial disability claims was premature and declined to decide these issues. Specifically, the judge approved an MRI scan to more fully diagnose the employee's current cervical condition. Concluding the apportionment and permanent partial disability claims could not reasonably be determined until the MRI scan was completed, the judge dismissed the claims without prejudice. We affirm.[4]

[4] The employee did not appeal from the dismissal of his claim for permanent partial disability benefits.

Normally, a compensation judge must determine "all contested issues of fact and law and [make] an award or disallowance of compensation or other order as the pleadings [and] evidence . . . require." Minn. Stat. § 176.371. However, in conducting a hearing, "the compensation judge is not bound by common law or formal rules of pleading or procedure." Minn. Stat. § 176.411. Here, among the various claims made, the employee requested authorization for an MRI scan which had been denied by the employers and insurers. Diagnosing a probable recurrent herniated disc at C5-6 or another level, Dr. Person had recommended a repeat cervical MRI scan to establish a more accurate diagnosis and determine appropriate future treatment. (Pet. Ex. E.) Similarly, Dr. Wyard observed there had been very little assessment since the employee's February 22, 1994 injury, stating, "a repeat MRI may be beneficial in determining his current status." (JD Ex. 1.) Agreeing that an MRI scan was appropriate, the compensation judge reasonably held that a determination regarding the nature and extent of the February 1994 injury would be premature. Substantial evidence supports this conclusion. While a compensation judge should normally resolve all contested issues raised by the parties, there is no prejudice to any party in the unique circumstances presented by this case.[5] We, accordingly, affirm the compensation judge's decision.

Maximum Medical Improvement

Dairy Supply and Farm Bureau also appeal the compensation judge's finding that a determination of MMI was premature. (Finding 31.) The appellants argue an MRI scan is a diagnostic tool, not a form of treatment. See Zak v. Trachuck, Inc., slip op. (W.C.C.A. November 18, 1988). Accordingly, they argue the lack of an MRI scan does not preclude a finding of maximum medical improvement. Detroit Marine and John Deere additionally argue the compensation judge erred because all of the medical opinions concluded the employee had reached MMI. They further contend the compensation judge's failure to make a finding prejudices both employers and insurers. We are not persuaded.

We acknowledge that Dr. Person, Dr. Drogt and Dr. Wyard opined the employee reached maximum medical improvement for his cervical spine injuries.[6] However, maximum medical improvement is not exclusively a medical issue. It is an issue of fact to be determined by the compensation judge after considering medical records, medical opinions and other relevant

[5] The compensation judge authorized a cervical MRI scan which, we understand, has been completed. The employers and insurers were also ordered to pay future rehabilitation costs with Dairy Supply and Farm Bureau as the paying agent. The judge dismissed the apportionment and permanent partial disability claims without prejudice, thus the employee or either employer and insurer may file a new petition to resolve these issues.

[6] Dr. Kim's MMI report appears to indicate that MMI was reached for the employee's August 18, 1989 injury as of July 7, 1994. Although acknowledging that the employee had a pre-existing condition in the nature of a cervical laminectomy, Dr. Kim's report does not specifically address the February 18, 1994 injury, and indicates that no surgery had been performed.

evidence. Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 41 W.C.D. 634 (Minn. 1989).

The employee complained to Dr. Person of continuing difficulty with his neck and left arm with weakness, numbing and tingling in his left arm and hand. On examination, Dr. Person noted limited motion of the cervical spine and left shoulder and diminished grip strength on the left. He concluded the employee might have a recurrent herniated disc at C5-6 or another level, but could not provide a more definitive diagnosis without a repeat MRI scan. Dr. Person presented a range of treatment options from conservative care to surgery, dependent on the results of the scan. Dr. Wyard also obtained a history of ongoing complaints of neck pain and left arm symptoms. The doctor noted the employee has had "very little assessment since the injury of February 22, 1994, and certainly, a repeat MRI may be beneficial in determining his current status." (JD Ex. 1.) Based on this evidence, the compensation judge reasonably concluded that until the results of the MRI scan were obtained and a course of treatment determined or ruled out, a determination of MMI would be premature.

Finally, the compensation judge's failure to determine MMI does not prejudice the employers or insurers. The compensation judge denied the employee's claim for temporary total disability benefits through the date of hearing, thus neither employer and insurer has any liability for temporary total disability benefits during the period at issue.[7] The compensation judge found only that a determination of MMI was premature. Thus, the employers and insurers retain the right to assert the employee reached MMI upon service of the medical reports of Dr. Kim, Dr. Drogt, Dr. Wyard or Dr. Person. For these reasons, we affirm the findings of the compensation judge.

[7] The compensation judge found the employee was not medically disabled from and after June 1, 1994 and had failed to make a diligent search for work. She accordingly denied temporary total disability benefits through the date of hearing. (Findings 25, 26, 27.) The employee did not appeal.