

ANTHONY C. WILLIAMS, Employee/Appellant, v. QUEBECOR PRINTING and KEMPER  
NAT'L INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
AUGUST 9, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. The compensation judge's finding that the employee did not sustain a low back injury on May 15, 1996 is unsupported by substantial evidence. There is no evidentiary support or legal basis for the judge's conclusion that the employer and insurer do not have primary liability for the employee's low back injury. As the compensation judge's finding of no primary liability for the low back injury may have affected the judge's resolution of the employee's claims for benefits, the related findings are vacated and the case is remanded for redetermination.

Reversed, vacated and remanded.

Determined by Johnson, J., Pederson, J., and Wheeler, C.J.  
Compensation Judge: Joan G. Hallock

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's finding that the employer and insurer do not have primary liability for an alleged low back injury on May 15, 1996 and from the denial of benefits. We reverse, vacate and remand.

BACKGROUND

Anthony Williams, the employee, began working for Quebecor Printing, the employer, in April 1995. (T. 23.) On May 15, 1996, the employee was working on a stitching machine. His duties included assembling books and magazines by stacking and feeding the pages into the stitching machine. Once the books or magazines were assembled, the employee "brick stacked" the books at the end of the machine. (T. 27.) On that day, the employee reached up and lifted a wooden pallet from a stack of pallets, preparing to brick stack the completed products. The pallet weighed approximately 30 to 40 pounds. As the employee set the pallet down, he felt a "tear or pull or a hurt" in his back, approximately six inches above the belt line. He told a co-worker that he hurt his back and then told his supervisor, Sandy Hayes. Ms. Hayes told the employee to sit down for the rest of the evening. (T. 44-45.) The next day, the employee called Ms. Hayes and told her he was having back problems. Ms. Hayes instructed him to come in to

work and she would then send him to the Airport Clinic. (T. 44.)

The employee saw Dr. Kevin T. O’Connell at the Airport Clinic on May 16, 1996. Dr. O’Connell noted the employee’s chief complaint was “right mid back pain which began the evening before when the employee was lifting a pallet overhead and felt “a sharp pain in his right thoracolumbar<sup>1</sup> area.” The doctor noted restricted motion on right and left lateral bending and diagnosed right mid-back strain. Dr. O’Connell released the employee to return to work, subject to restrictions. (Pet. Ex. C.) The employee took a previously scheduled vacation for one week and then returned to work with the employer at a different job designed to accommodate his restrictions. The employee continued to have back pain and returned to see Dr. O’Connell on May 29, 1996. On examination, the doctor noted tenderness along the parascapular borders.<sup>2</sup> The diagnosis was “parascapular strain, slight improvement.” The doctor prescribed three sessions of physical therapy. (Pet. Ex. C.)

The employee saw Beth Ihry, a registered physical therapist at Gallery Physical Therapy Center, Inc. on May 30, 1996. Ms. Ihry noted the employee’s major complaint was “intermittent left lower thoracic pain” which became worse with lifting. Her assessment was “mid to lower thoracic pain.” (Resp. Ex. 2.) The employee returned to see Dr. O’Connell on June 6, 1996. On examination, the doctor noted mild tenderness in the right and left parascapular borders and diagnosed a resolving mid-back strain. Dr. O’Connell concluded the employee had reached maximum medical improvement (MMI) and had sustained no permanent partial disability. The doctor stated the employee could return to work at full duty on June 13, 1996. (Pet. Ex. C.)

On June 13, 1996, the employee returned to his regular job as a stitcher. (T. 77-78.) The employee testified he continued to have pain while working. (T. 49.) The employee returned to see Dr. O’Connell on July 12, 1996 and asked the doctor for time off from work to heal. On examination, Dr. O’Connell noted mild tenderness in the right parathoracic musculature and mid-line thoracolumbar area, without spasm. X-rays of the thoracic and lumbar spine were essentially normal with some possible irregularity of the plate at L5. The diagnosis was “thoracolumbar strain - - mild reoccurrence. Patient’s complaints are out of proportion to his objective findings.” The doctor told the employee he needed “appropriate restrictions” but did not need to be completely disabled. The doctor allowed the employee to return to work subject to restrictions and scheduled an orthopedic examination with Dr. Richard Strand. (Pet. Ex. C.)

The following Monday, July 15, 1996, the employee called his supervisor, Ms. Hayes, and quit his job because he felt he could no longer do it. Ms. Hayes transferred the employee to Ms. Lakso in human resources. (T. 50-54.) Ms. Lakso testified she had spoken with

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<sup>1</sup> Thoracolumbar is defined as “pertaining to the thoracic and lumbar parts of the spine.” Dorland’s Illustrated Medical Dictionary 1363 (26th ed. 1985).

<sup>2</sup> The scapula is the large triangular bone in the back of the shoulder, called the shoulder blade. Dorland’s Illustrated Medical Dictionary 1174 (26th ed. 1985).

Dr. O'Connell on July 12, 1996 and discussed modified work for the employee consistent with Dr. O'Connell's restrictions. On July 15, she spoke with the employee and told him she had light-duty work available consistent with Dr. O'Connell's restrictions. The employee told her there were "other personal reasons" for not returning to work and he was going to quit. (T. 91-93.)

The employee testified that over the next two months he signed up with two temporary agencies, Manpower and Pro Staff. He received job offers from the temporary agencies, but concluded he could not physically do the work and turned them down. (T. 54-55.) On September 15, 1996, the employee found a job at Fundraising and Communication Services (FACS) as a telemarketer. The employee worked approximately five hours a day, up to six days a week and was paid \$9.00 an hour. The employee testified the job was basically five hours a day with occasional work on weekends. He testified he was only able to work five days in a row because he would be in a lot of pain by the end of that time. (T. 56-57.)

The employee saw Dr. Strand on July 25, 1996, complaining of lower thoracic and upper lumbar pain which went down into his low back. On examination, the doctor noted full range of motion with muscle tightness but no spasm. Dr. Strand reviewed the spinal x-rays which he concluded were essentially normal. The doctor diagnosed a musculotendonous strain of the back and recommended further therapy and a return to light-duty work. The employee returned to see Dr. Strand on September 10, 1996. The doctor noted the employee's examination was unchanged and concluded he was "not having any luck figuring out what is wrong with this guy and making him better." He recommended the employee see Dr. Frank Wei for an ongoing treatment program. (Resp. Ex. 1.)

The employee returned to see Dr. O'Connell on August 6, 1996 for follow-up of "his thoracolumbar strain." On examination, the doctor noted mild tenderness in the low lumbar and upper SI area. The diagnosis was a lumbar strain. On September 25, 1996, Dr. O'Connell noted "non anatomic tenderness of a diffuse nature in the low back, left parathoracic, right parathoracic." The diagnosis was mid-back strain. Dr. O'Connell felt a series of chiropractic treatments would be medically appropriate and approved 12 sessions. (Pet. Ex. C.)

On September 30, 1996, the employee saw Stephen F. Martini, D.C., complaining of mid and lower back pain with radiation into both legs. Dr. Martini's records reflect the employee stated that "initially the pain was in the mid back area indicating with his hand the thoracolumbar region. It seemed to move down into his lower back and he developed symptoms into both his legs." On examination, Dr. Martini noted the employee was exhibiting signs and symptoms of thoracolumbar back pain. The diagnosis was acute traumatic thoracolumbar and lumbosacral spine sprain/strain which he related to the work injury of May 15, 1996. Dr. Martini instituted chiropractic treatment. (Pet. Ex. A.) On October 24, 1996, Vinton Albers, D.C., took x-rays at the request of Dr. Martini. His impression was minimal levoscoliosis of the upper thoracic spine, minimal dextroscoliosis of the thoracolumbar spine, right rotation of the thoracolumbar vertebrae, thoracic hypokyphosis and disc space narrowing at T8 to T10 consistent with degenerative disc disease. By report dated December 16, 1996, Dr. Martini opined the employee might have a degenerative disc in the thoracolumbar area and recommended an MRI

scan. On January 3, 1997, Dr. Martini limited the employee to 15 hours of work per week. In March 1997, he increased that to 30 hours per week. An MRI scan of the lumbar spine taken January 31, 1997 showed mild scoliosis and small Schmorl's nodes from T10 through T12 and at L3. (Pet. Ex. G.)

The employee last saw Dr. O'Connell on October 16, 1996. At that time the employee complained of right mid-back pain radiating into the right low back. Dr. O'Connell's physical examination was essentially normal. He diagnosed mid-back strain with no objective findings. The doctor stated the employee's subjective complaints of pain were inconsistent with his examination findings. Dr. O'Connell concluded the employee's condition was medically stable and stated he could work without restrictions. (Pet. Ex. C.)

On February 20, 1997, the employee saw Dr. Mark Thomas at the request of the employer and insurer. The employee complained of aching pain in the mid-lumbar region on the right with occasional aching in the buttocks and posterior thighs. The orthopedic and neurological examinations were within normal limits. Dr. Thomas diagnosed a lumbar strain. The doctor reviewed the January 1997 MRI scan and concluded the Schmorl's nodes were a normal anatomic variance causing no disability. Beyond that, the MRI scan was normal. (Resp. Ex. 4, p. 9-10.) The doctor further concluded the x-ray report showing mild scoliosis was of no significance and was an asymptomatic problem. (Resp. Ex. 4, p. 12.) Dr. Thomas concluded the employee could work without restrictions and sustained no permanent partial disability as a result of his injury.

In November 1997, the employee filed a claim petition seeking temporary total disability benefits from July 20 through September 14, 1996, temporary partial disability benefits from and after September 15, 1996, 10 percent permanent partial disability benefits payable as economic recovery compensation and outstanding medical expenses. The case was tried before a compensation judge at the Office of Administrative Hearings on December 2, 1998. In a Findings and Order served and filed January 28, 1999, the compensation judge found the employee sustained an admitted thoracic strain on May 15, 1996 but found "the employer and insurer do not have primary liability for an alleged low back injury of May 15, 1996." The compensation judge further found the employee was not entitled to temporary total, temporary partial or permanent partial disability benefits. Finally, the compensation judge denied payment for the MRI scan, chiropractic treatment after November 6, 1996 and treatment for the lumbar spine. The employee 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 (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

### Nature and Extent of Injury

The compensation judge found "the employer and insurer do not have primary liability for an alleged low back injury of May 15, 1996." (Finding 35.) The employee contends the employee's injury was admitted by the employer and insurer and the compensation judge erroneously required the employee to prove liability for an admitted injury. Further, the employee argues the compensation judge's finding is unsupported by substantial evidence. The employer and insurer argue the employee has the burden of proving he sustained a work-related injury and contend the compensation judge's finding is supported by substantial evidence of record.

The compensation judge found the employee sustained an admitted thoracic injury on May 15, 1996. (Finding 3.) This finding is unappealed. The compensation judge apparently concluded the employee also had some undefined low back condition unrelated to his personal injury. In support of this conclusion, the compensation judge found "the employee made no report of low back problems to any doctor until he saw Dr. Strand on July 25, 1996. Up until that time, the employee had been complaining of mid back pain." We conclude this finding is unsupported by the evidence.

On May 16, 1996, the day after the admitted injury, Dr. O'Connell recorded the employee's complaint of "a sharp pain in his right thoracolumbar area." The doctor diagnosed a right mid back strain. (Pet. Ex. C.) On July 12, Dr. O'Connell found tenderness in the employee's thoracolumbar area and diagnosed a mild reoccurrence of a thoracolumbar strain. The doctor then ordered lumbar x-rays. (Ex. C.) The record is clear that the employee complained of lumbar pain immediately following his injury and those complaints were recorded by Dr. O'Connell.

The compensation judge further found "no doctor has made the necessary connection between the employee's work activities and his low back problems. . ." (Finding 35.) This finding is also unsupported by the evidence. Dr. Martini specifically testified the employee's work injury was a "musculoligamentous sprain type of injury to the thoracal lumbar spine and the lumbosacral spine." (T. 105.) Dr. Strand saw the employee for an orthopedic evaluation of the employee's condition caused by the May 15, 1996 work injury. On examination, the doctor noted tenderness and tightness in the "lower thoracic upper lumbar region." Dr. Strand diagnosed a musculotendinous strain of the back. Dr. Thomas, the independent medical evaluator selected

by the employer and insurer, also diagnosed a lumbar strain.

The compensation judge apparently concluded the employee had two discrete and separate diagnoses: a work-related thoracic injury and a non work-related lumbar condition. We find no medical support for this conclusion. Dr. O'Connell diagnosed the employee's injury as a "mid back strain" and, on other occasions, as a "thoracolumbar strain." (Pet. Ex. C.) Dr. Strand diagnosed a "musculotendonous strain of the back." (Resp. Ex. 1.) Dr. Thomas diagnosed the employee's condition as a "lumbar strain." (Resp. Ex. 4, p. 10.) The doctors evidently concluded the May 1996 injury included both thoracic and lumbar components. No doctor opined the employee's lumbar condition, whatever the diagnosis, was caused by something other than the work injury.

We conclude the compensation judge's finding that the employee did not sustain a low back injury on May 15, 1996 is unsupported by substantial evidence and reverse. Further, we find no evidentiary support or legal basis for the conclusion that the employer and insurer do not have primary liability for the low back injury and also reverse that finding.

#### Denial of Benefits

The employee also appealed the compensation judge's denial of his claims for temporary total and temporary partial disability benefits, permanent partial disability and medical expenses. The employee did not, however, address any of the benefit entitlement issues in his brief. Normally, issues raised in the notice of appeal but not addressed in the brief are waived. Minn. R. 9800.0900, subp. 1. In this case, however, we are concerned that the compensation judge's finding that the employer and insurer do not have primary liability for a low back injury may have affected the judge's resolution of the benefit issues.<sup>3</sup> Accordingly, we vacate Findings 36, 37, 38, 39 and 40 and remand the case to the compensation judge for further findings on the existing record.

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<sup>3</sup> For example, the compensation judge denied payment for the MRI scan because it involved treatment of the lumbar spine.