

MICHAEL A. BALMA, Employee/Appellant, v. ANOKA-HENNEPIN INDEP. SCH. DIST. #11, SELF-INSURED/PREFERRED WORKS, INC., Employer, and MN DEP'T OF ECONOMIC SEC./RI and LEE MEMORIAL HOSP., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 28, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert medical testimony, supports the compensation judge's determination that the employee failed to prove he sustained a work-related injury to his right shoulder on September 26, 1991 in the course and scope of his employment with the employer.

Affirmed.

Determined by: Johnson, J., Wilson, J., and Pederson, J.
Compensation Judge: Nancy Olson

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's finding that the employee failed to prove he sustained a personal injury to his right shoulder on September 26, 1991.¹ We affirm.

BACKGROUND

Michael A. Balma, the employee, was employed by Anoka-Hennepin Independent School District #11, the employer, on September 26, 1991. The employer was self-insured for workers' compensation liability with claims administered by Preferred Works, Inc. The employee contends he sustained a personal injury to his right shoulder on September 26, 1991 when a co-employee, Randy Sveningson, grabbed his right shoulder and spun him around. (T. 32-35.) The employee testified he felt a tearing sensation in his right shoulder with pain running down the back of his arm. The employee stated he reported the incident to Louis Klingelhoets, his supervisor, and told Mr. Klingelhoets he would be following up with his doctor. (T. 37-41.) Following the incident, the employee continued to experience pain in his right arm for which he took Advil and Tylenol. The employee testified he sought treatment at the Mork Clinic sometime within the first 30 days after the incident. (T. 43-44.) Within that first 30 days, the employee also began to

¹ The compensation judge made twenty-one factual findings and the employee appealed them all. In his brief, the employee focuses on the compensation judge's findings regarding the claimed right shoulder injury.

experience neck pain and headaches. The employee missed no time from work until he was terminated from his job on September 28, 1992. (T. 45-47.)

Randy Sveningson, a cabinet maker for the employer, worked in the same area as the employee. He testified he previously had discussions with the employee about the employee's smoking in the employer's van. On September 26, 1991, Mr. Sveningson testified he again discussed with the employee the smoking issue. At some point, the employee turned to walk away and Mr. Sveningson touched him on the left shoulder to let him know the conversation was not over. Mr. Sveningson testified the employee whirled around and instructed him not to touch him again. Mr. Sveningson denied he grabbed the employee's right shoulder and denied he spun the employee around. (T. 130-135.)

Louis Klingelhoets, the director of buildings and grounds for the employer since 1991, supervised the workers in the cabinet shop, including the employee. Mr. Klingelhoets testified the employee contacted him on September 26, 1991 and asked to see him. They met for about a half an hour in Mr. Klingelhoets' office and discussed the incident involving Mr. Sveningson. Mr. Klingelhoets testified the employee told him Randy put a hand on his shoulder and made a disparaging comment to the employee. Mr. Klingelhoets asked the employee how Randy put a hand on his shoulder and was told it was not a push or a shove or anything like that. The employee assured Mr. Klingelhoets he was not injured. (T. 146-151.) On September 27, 1991, Mr. Klingelhoets spoke with Randy Sveningson and asked him whether there was any shoving, pushing, grabbing or other physical confrontation involved in the September 26 incident. Mr. Sveningson reported he only touched the employee on the shoulder. (T. 154-155.) Mr. Klingelhoets testified the employee never told him he sustained an injury on September 26, 1991 and never asked permission to leave work to seek medical care for a shoulder injury. (T. 152-153.)

By letter dated November 19, 1991, Mr. Klingelhoets wrote to the employee regarding a number of incidents involving the employee, including one where a "co-worker physically put his hands on your shoulder." In a letter dated November 20, 1991, the employee responded that "on 9-26-91 Randy did not place his hand on my shoulder but rather grabbed my shoulder . . ." (Resp. Ex. 2.) On January 29, 1992, Mr. Klingelhoets prepared a Supervisor's Report of Injury giving a date of injury of December 16, 1991. The report stated "no information regarding a physical injury" and stated "it was reported to me that Mike was going to a doctor, the reason was not specified." (Pet. Ex. BB.)

The employee was seen by Dr. Bentz at the Mork Clinic on October 11, 1991, complaining of a cough, pain in his sinuses and pain in his right shoulder and anterior chest with hot and cold flashes since he awoke that morning. The doctor recorded no history of a right shoulder injury on September 26, 1991. On examination, the doctor noted tenderness to palpation over the right anterior upper chest. The employee was non-tender about the shoulder and arm with good range of motion of the arm. Dr. Bentz diagnosed bronchitis/ upper respiratory infection with a muscle pull, possibly from coughing. The employee returned to the Mork Clinic on November 8, 1991 and saw Mark Shoemaker, a physician's assistant. The employee complained of cold

symptoms ongoing for the past six months with periodic shortness of breath and cough. The diagnosis was possible reactive airway disease. Mr. Shoemaker prescribed Seldane and a Ventolin inhaler and advised the employee to quit smoking. The employee returned to the Mork Clinic on December 16, 1990 complaining of chronic fatigue. The diagnosis was chronic fatigue secondary to mild depression with a recommendation to see a psychologist. On December 23, 1991, the employee complained of lack of sleep due to problems at work. Mr. Shoemaker prescribed Amitriptyline. On January 27, 1992, Mr. Shoemaker noted the employee was exhibiting symptoms of anxiety, depression, shortness of breath, headaches and achiness which the employee attributed to his work. On February 7, 1992, Dr. Roullard examined the employee for depression and increased his prescription for Elavil. On February 10, 1992, Mr. Shoemaker stated the employee could return to work without restrictions and concluded the employee had suffered a work-related injury in the nature of emotional stress. (Pet. Ex. Z.)

On June 16, 1992, the employee was seen at the Mork Clinic complaining of “neck aches.” Motrin was prescribed. On July 25, 1992, the employee saw Mr. Shoemaker complaining of “rt. upper back pain radiating down his elbow and started about five days ago. Has been doing a lot of screwing in screws with about a five pound screw gun.” Mr. Shoemaker diagnosed scapular strain and continued the Motrin. (Pet. Ex. Z.) A Physician’s Report prepared by Mr. Shoemaker was provided to the employer. The report dated June 26, 1992 noted a work-related injury of scapular strain. (Pet. Ex. BB.) On July 30, 1992, Mr. Shoemaker diagnosed depression and anxiety secondary to the work environment and referred the employee to a psychiatrist. In September and October 1992, the employee was hospitalized in Mercy Hospital for depression which the employee attributed to his job with the employer. (Resp. Ex. 9.) The employee continued to treat at the Mork Clinic for depression, coughing, cold symptoms and a right knee injury on December 1, 1993. (Pet. Ex. Z.)

On March 16, 1996, the employee saw Dr. Boardman at the Aspen Medical Clinic complaining of “a two-month history of gradual increase in right shoulder pain not associated with trauma.” The doctor diagnosed a rotator cuff injury with some impingement. On March 19, 1996, Dr. Messich at the Aspen Clinic recommended shoulder surgery. (Pet. Ex. Y.)

The employee moved to Florida at some point and began treating with Dr. Leah Lynch, an internist. The employee saw Dr. Lynch on March 24, 1997 complaining of right shoulder pain following an “injury prior to moving to this state on his old job as a cabinet maker.” Dr. Lynch referred the employee to Dr. Mark Farmer for consideration of a surgical repair. (Pet. Ex. Q.)

On June 20, 1997, the employee saw Dr. Abbott Kagan, II, an orthopedic surgeon. The employee gave a history of a confrontation with a co-worker in 1991 or 1992 in which he was pulled from behind and injured his right shoulder. Dr. Kagen recommended an MRI scan which was accomplished on June 27, 1997. The scan showed mild impingement of the supraspinatus muscle due to acromioclavicular joint hypertrophy with no evidence for rotator cuff tear. (Pet. Ex. Q.) Upon review of the scan, Dr. Kagen diagnosed a ganglion cyst or other fluid filled mass on

the surface of the supraspinatous tendon and recommended arthroscopy of the right shoulder. (Pet. Ex. R.)

The employee was examined by Dr. Mark Farmer on July 23, 1997. The diagnosis was probable anterior instability of the shoulder with an associated cyst. The doctor ultimately performed two surgeries on the employee's right shoulder, the first an open anterior capsular shift and the second a capsular shrinkage procedure. (Pet. Ex. N.) By report dated June 18, 1998, Dr. Farmer stated the employee "apparently sustained an injury to his shoulder in 1991, and he relates to me he was grabbed while at work sustaining an injury to the shoulder. Multiple medical records have not really demonstrated any evidence of problems with his shoulder since that time with the exception of some occasional rotator cuff tendinitis." On October 19, 1998, Dr. Farmer wrote:

I have recently received from him [the employee] the medical records from the Aspen Medical Group, and apparently they had scheduled him for surgery prior to him moving to Florida. I note in these records, however, that the shoulder pain was of three months duration and no specific injury and more specifically, in his physical examination, there is no apprehension which is consistent with no evidence of instability of the shoulder. As such, I cannot say that his original work injury is a substantial contributing cause to his current symptomatology.

(Pet. Ex. B.)

On January 14, 1998, the employee was examined by Dr. Douglas A. Becker, an orthopedic surgeon, at the request of the self-insured employer. Dr. Becker recorded a history of the employee being grabbed by his right shoulder by a co-worker and turned around. The employee reported an immediate onset of pain in his right shoulder which radiated into his wrist. Dr. Becker reviewed medical records from the Mork Clinic and Dr. Kagen, reviewed x-rays and conducted a physical examination. The doctor diagnosed a natural progression of right shoulder rotator cuff tendinitis and anterior capsular laxity of the right shoulder. The doctor opined the September 26, 1991 incident was not a substantial contributing factor to the employee's right shoulder condition. Dr. Becker based this opinion on his discussion with the employee and his review of the contemporaneous medical records, which he concluded did not substantiate an injury on September 26, 1991. The doctor stated the 1997 medical treatment was the result of right shoulder rotator cuff tendinitis and anterior capsular laxity, unrelated to any work injury. Dr. Becker prepared a second medical report on October 30, 1998, stating he reviewed additional medical records including records from Fairview Southdale Hospital, Mork Clinic, Cub Pharmacy, Nystrom and Associates, Kagen Orthopedics, Lee Memorial Hospital, Medical Associates, Aspen Medical Group and Orthopedic Specialists. Dr. Becker also reviewed the previous records provided to him and his prior medical report. The doctor stated the incident as described by the employee might stretch the posterior shoulder capsule. The surgery performed by Dr. Farmer was for an anterior capsular stretching problem, not the posterior capsule. The doctor concluded the

mechanism of the claimed injury was inconsistent with the anterior capsular tear for which the employee underwent repeated surgery. The doctor further opined the contemporaneous medical records were not consistent with an injury on September 26, 1991 to the right shoulder. (Resp. Ex. 1.)

The employee filed a claim petition in August 1997 seeking temporary total, temporary partial and permanent partial disability benefits together with medical expenses and rehabilitation services secondary to an alleged right shoulder and psychological injury on September 26, 1991. In its answer, the self-insured employer denied the employee sustained a personal injury arising out of his employment and alleged lack of notice and contended the employee's claim was barred by the statute of limitations. The case initially came on for hearing before Judge Otto at the Office of Administrative Hearings. In Findings and Order filed November 18, 1998, the compensation judge dismissed the employee's claim petition, with prejudice. The employee appealed to the Workers' Compensation Court of Appeals. By decision filed May 6, 1999, a panel of this court reversed the order of the compensation judge and remanded the case to the Office of Administrative Hearings for further proceedings. The remanded case came on for hearing before Judge Nancy Olson on August 10, 1999.² In Findings and Order filed August 23, 1999, the compensation judge found the employee failed to prove by a preponderance of the evidence that he sustained a right shoulder injury on September 26, 1991. The employee again appeals.

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). 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, 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

The employee contends on appeal the factual evidence and medical evidence support his claim that he sustained a right shoulder injury on September 26, 1991. The employee points to specific testimony and medical records and asserts this evidence compels a conclusion that he met his burden of proof.

² At the hearing, the employee withdrew any claim of a psychological condition or injury secondary or consequent to the claimed shoulder injury. (T. 7-8.)

The employee testified Randy Sveningson came up from behind him, grabbed him by the right shoulder and pulled him around. (T. 33-36.) The employee immediately felt a pulling or tearing sensation in the joint of his right shoulder with pain running down the back of his right arm. (T. 37-39.) That same day, the employee testified he reported the incident to Mr. Klingelhoets, told him he injured his right shoulder and that he would be following up with his doctor. (T. 40.) Initially, the employee treated his injury with Advil and Tylenol but his shoulder did not improve and he sought treatment at the Mork Clinic. (T. 41-44.) He stated he left work early for his doctor's appointments and told Mr. Klingelhoets he was doing so. (T. 50.) The employee denied any further accidents or injury to his right shoulder after September 26, 1991. (T. 71.) Dr. Kagen opined the September 26, 1991 incident was a substantial contributing cause of the employee's shoulder surgery and the subsequent disability. This evidence, the employee contends, is sufficient to meet his burden of proof in the case. Accordingly, the employee asks that we reverse the compensation judge's decision.

There is evidence in the case, which if accepted by the compensation judge, would support a contrary result. It is not, however, the function of this court to retry the case or to substitute its judgment for that of the compensation judge. This court may reverse a compensation judge's factual findings only when they are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3). Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988).

The compensation judge considered the employee's testimony, but noted it was contradicted by the testimony of Randy Sveningson and Louis Klingelhoets. (Finding No. 3.) "Assessment of witness credibility is the unique function of the factfinder." Tews v. Geo. A. Hormel & Co., 430 N.W.2d 178, 180, 41 W.C.D. 410, 412 (Minn. 1988). It is not the role of this court to evaluate the credibility and probative value of witness testimony and to choose different inferences from the evidence than the compensation judge. Krotzer v. Browning-Ferris/Woodlake Sanitation Serv., 459 N.W.2d 509, 513, 43 W.C.D. 254, 260-61 (Minn. 1990). The compensation judge further found the employee's contemporaneous medical records contain no history of a right shoulder injury on September 26, 1991. (Finding No. 1.) This finding is consistent with the evidence. The records from the Mork Clinic contain no history of a right shoulder injury as described by the employee. The first medical record which identifies a September 1991 injury as the cause of right shoulder pain is Dr. Lynch's note dated March 24, 1997. (Pet. Ex. Q.) Finally, there is a conflict among the medical experts in the case. Dr. Kagen opined the employee sustained an injury to his right shoulder on September 26, 1991. Dr. Farmer stated he could not say the September 26, 1991 work injury was a substantial contributing cause of the employee's right shoulder symptoms. Dr. Becker opined the employee did not sustain an injury to his right shoulder on September 26, 1991. The compensation judge specifically adopted Dr. Becker's opinion. (Finding No. 2.) We note that 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).

Based upon a careful review of the record, we conclude substantial evidence does support the decision of the compensation judge. The compensation judge's decision must, therefore, be affirmed.