BERNICE BARTON, Employee, v. PHOENIX ALTERNATIVES, INC. and AMERICAN COMPENSATION INS. CO./RTW, INC., Employer-Insurer/Appellants, and CARDIAC SURGICAL ASSOCS., P.A., TWIN CITIES SPINE CTR., and ALLINA HOME OXYGEN & MEDICAL EQUIP., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 27, 2000

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - SURGERY; MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. Substantial evidence, including expert opinion, supported the compensation judge's decision that a four-level fusion procedure was reasonable, necessary, and consistent with the applicable treatment parameters, despite the treating surgeon's failure to review the employee's previous treatment records and despite the fact that the operative report was not available for the compensation judge to consider in making her decision.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Penny Johnson

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's conclusion that a four-level fusion procedure was reasonable and necessary to treat the employee's work-related back injury. We affirm.

BACKGROUND

On October 16, 1997, the employee sustained a work-related injury to her low back while employed by Phoenix Alternatives [the employer].[1] She sought treatment the following day,

[1] The First Report of Injury indicates that the employee was employed by the employer as a "program associate." The record contains little information about the employee's specific job responsibilities, but the employee described the circumstances of her injury as follows:

> On October 16 - - we lift people who are incapable of going to the bathroom or getting on a commode or a changing table, and we had this gentleman who needed his brief changed. A brief is a diaper - - in an adult manner it's a brief. So I, being the tallest of both of us,

was prescribed medication, and was released to work with restrictions. An MRI scan performed on October 23, 1997, revealed multi-level degenerative changes and spinal stenosis, and the employee was referred to a neurosurgeon, Dr. Phudiphorn Thienprasit, who ordered a myelogram and prescribed a back brace. The employee continued to complain of worsening symptoms, however, and on January 20, 1998, Dr. Thienprasit performed two-level decompression surgery.

The employee was off work for about two months after her surgery and began a four-week course of physical therapy in early February of 1998 in an attempt to alleviate her continuing symptoms, which included back and hip pain, lower extremity symptoms, difficulty walking, and trouble sleeping. The employee worked reduced hours for some period prior to resuming full-time restricted work in about July of 1998.

Despite another round of physical therapy in August of 1998, and trials of several different medications,[2] the employee's symptoms apparently worsened; she began complaining that her legs were giving out, that she was unable to get even two hours of sleep a night due to pain, and that she was experiencing bladder symptoms. She ultimately became dissatisfied with Dr. Thienprasit's care and filed a request to change physicians, which was granted on October 23, 1998. Shortly thereafter, on November 11, 1998, the employee began treating with Dr. Manuel Pinto.

At the time of her initial evaluation by Dr. Pinto, the employee was complaining of low back and radiating lower extremity pain, weakness in her legs, dragging of her foot, and falling more often. Noting that the employee had a history of diabetes, Dr. Pinto was concerned that she had developed some peripheral neuropathy, and he recommended an EMG to evaluate that possibility. He also ordered another MRI scan and a discogram. On December 13, 1998, following the MRI and the discogram, Dr. Pinto concluded that a four-level fusion procedure, with

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> take the back side of the person, and we went to lift this person onto the changing table, and my co-worker didn't lift on three. She dropped him and I held onto the client to protect the client and got him onto the table. And at that time I kind of figured that I may have pulled a muscle, and I did help my client - - change my client and help my client off, and my co-worker did the same thing going back into the chair. She dropped his legs. She didn't wait for him to be down in his chair, and she dropped his legs, and he - - she pulled me over the back of his chair, and that's when the lights went out.

When asked what she meant by "the lights went out," the employee responded that she had back pain, which was "just excruciating," that ran down into both legs and feet.

[2] Medications noted in the employee's medical records included Ultram, tricyclic antidepressants, Daypro, amitriptyline, and Vicodin.

foraminotomies, represented the employee's only reasonable hope for any significant relief from her symptoms.

On January 20, 1999, Dr. John Sherman examined the employee on behalf of the employer and insurer. Dr. Sherman concluded that the employee had symptomatic degenerative disc disease with spinal stenosis and radicular-type complaints, but he recommended an EMG, to rule out significant peripheral neuropathy, as well as selective nerve blocks, prior to proceeding with surgery. Dr. Sherman also indicated that, even if surgery were warranted, such surgery should be limited to decompression with fusion at only one level.

An EMG performed on February 18, 1999, disclosed "no evidence of peripheral neuropathy," and the nerve root injections performed in March of 1999 confirmed the need for repeat decompression of the L4 and L5 nerves. Following these tests, on May 10, 1999, Dr. Pinto performed the four-level fusion procedure, with decompression, that he had originally recommended the previous December.

On June 10, 1999, about a month after the employee's surgery, the matter came on for hearing before a compensation judge for resolution of a dispute as to the compensability of that procedure. Evidence included some of the employee's medical records, the report of Dr. Sherman, the deposition testimony of Dr. Pinto, and the employee's testimony as to her symptoms both prior to and following her May 1999 fusion surgery. In a decision issued on August 13, 1999, the compensation judge resolved the issues in the employee's favor, finding that the four-level fusion and decompression surgery performed on May 10, 1999, was reasonably required to cure and relieve the effects of the employee's October 16, 1997, work injury. The employer and insurer appeal.

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

The employer and insurer essentially concede that the employee's four-level fusion surgery was causally related to the employee's October 16, 1997, work injury.[3] They argue, however, that the judge erred in finding the surgery reasonable and necessary, contending (1) that Dr. Pinto's opinion as to reasonableness and necessity lacked foundation because he did not review the employee's prior medical records; (2) that the judge's decision was clearly erroneous and unsupported by substantial evidence because she made her decision without considering the operative report from the surgery; and (3) that the judge's finding as to reasonableness and necessity is inconsistent with the applicable treatment parameters. We are not persuaded by any of these arguments.

It is true, as the employer and insurer allege, that Dr. Pinto admitted that he did not review a substantial volume of medical records that pre-dated his treatment of the employee. However, he did become the employee's treating physician, he took the employee's history, he examined the employee on several occasions, and he had the results of an MRI scan, a discogram, and an EMG. The history contained in Dr. Pinto's records is generally consistent with the employee's prior medical records, and the employer and insurer have not cited anything in those prior records that would have or should have altered Dr. Pinto's opinion, which was based on the results of diagnostic tests and on the employee's symptoms. It is also evident to us that Dr. Sherman disagreed with the proposed procedure not because of anything in the employee's prior medical records but because of his belief that "[t]here is little or no evidence to support the efficacy of four-level anterior posterior fusions in resolution of axial back pain in degenerative disc disease." In other words, there was really no dispute as to the nature of the employee's condition; this was a simple difference of opinion as to the propriety of a given treatment modality. Under these circumstances, we find no basis to conclude that Dr. Pinto's opinion as to the employee's need for a four-level fusion lacks any necessary foundation.

We are similarly unconvinced by the employer and insurer's contention that the judge's decision is clearly erroneous given that the operative report from the May 10, 1999, procedure was not available for her review.[4] Dr. Pinto explained in some detail, following the employee's surgery, why a four-level fusion was the appropriate treatment option, and the employer and insurer have offered no support for their contention that the operative report should be considered "critical" to the judge's reasonableness and necessity determination. Again, it is apparent from Dr. Sherman's report that there is little dispute as to the nature of the employee's condition, and Dr. Pinto, prior to surgery, even performed the tests suggested by Dr. Sherman to

[3] Even Dr. Sherman agreed that the work injury was a substantial contributing cause of the condition that prompted the surgery.

[4] At hearing, the employee's attorney indicated that he had tried but was unable to obtain the report because Dr. Pinto had not yet dictated it. Following the hearing, the employee's attorney was unable to submit the report within the 45 days allowed by the judge for that purpose. According to a letter in the file, the doctor had still not dictated the report by the time the record closed.

rule out peripheral neuropathy and to determine the source of the employee's pain. Therefore, while an operative report may be a useful part of the record in a case like this, where the surgical procedure at issue has actually been performed prior to hearing, the judge did not err by deciding the question without it.[5]

Finally, we reject the employer and insurer's contention that the judge's approval of fusion surgery is inconsistent with the applicable treatment parameters. Minn. R. 5221.6500, subp. 2, governs spinal surgery, and the employer and insurer argue that three pertinent provisions of the rule have not been satisfied here. First, they argue that Dr. Pinto failed to provide a "minimum of eight weeks of initial nonsurgical care," as required by 5221.6500, subp. 2A(2)(a)i. However, the employee's medical records clearly establish that her condition failed to improve despite well more than eight weeks of nonsurgical care. In fact, despite two four-week rounds of physical therapy, exercises, and numerous medications, the employee's condition apparently worsened in the sixteen-month period following her initial decompression surgery in January of 1998. Contrary to the employer and insurer's suggestion, the fact that Dr. Pinto himself did not provide the conservative treatment in question is completely irrelevant. Substantial evidence overwhelmingly supports the conclusion that the requirements of Minn. R. 5221.6500, subp. 2A(2)(a)i, were met.

The employer and insurer next argue that Minn. R. 5221.6500, subp. 2A(2)(b), was not satisfied because Dr. Pinto "did not obtain a second opinion" concerning the employee's need for a four-level fusion. However, the rule cited by the employer and insurer indicates that surgery may be appropriate if, among other things, "a second opinion confirms that decompression of the lumbar nerve root is the appropriate treatment for the patient's condition," id. (emphasis added); the cited rule requires no second opinion confirming the need for fusion. Moreover, the employer and insurer's examiner, Dr. Sherman, indicated that decompression surgery would be appropriate if selective nerve blocks produced significant resolution of the employee's leg pain, and the March 11, 1998, report from the nerve root injection procedure clearly establishes that the employee did indeed experience significant improvement from the procedure. We therefore conclude that the requirements of Minn. R. 5221.6500, subp. 2A(2)(b), were met as well.[6]

Finally, the employer and insurer argue that there is no evidence that the employee was suffering from "incapacitating low back pain," as required by Minn. R. 5221.6500, subp. 2C. Again, we are not persuaded. The employee testified that her pain was "so horrific" that she could not sleep more than two hours a night, that she could not perform any household activities or yard work, that she could do nothing at home except "lay on the couch and try to get comfortable," and that her work hours were reduced and then finally discontinued altogether by Dr. Pinto because she was simply worn out from the pain. This evidence is more than adequate to support the

[5] We would also observe that litigation over proposed surgery frequently occurs prior to the performance of the procedure. Obviously, no operative report is available at all in such cases.

[6] See also Minn. R. 5221.6500, subp. 2A(3) ("Repeat surgical decompression of a lumbar nerve root is not indicated at the same nerve root unless a second opinion, if requested by the insurer, confirms that surgery is indicated").

conclusion that the employee was incapacitated by her back pain. See Kappelhoff v. Tom Thumb Food Mkts., slip op. (W.C.C.A. Oct. 22, 1999) (the requirement of Minn. R. 5221.6500, subp. 2C, concerning incapacitating back pain, may be satisfied by less than total disability).

Because substantial evidence in the record as a whole easily supports the compensation judge's decision that the four-level fusion procedure performed by Dr. Pinto was reasonable, necessary, and consistent with the treatment parameters cited by the employer and insurer, we affirm the judge's decision in its entirety.