SANDRA E. BESCHEINEN, Employee/Appellant, v. INDEP. SCH. DIST. #181, SELF-INSURED, adm'd by BERKLEY ADM'RS, and INDEP. SCH. DIST. #181 and STATE FUND MUT. INS. CO., Employer-Insurer/Cross-Appellants, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 8, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - TEMPORARY AGGRAVATION. Substantial evidence supported the compensation judge's finding that the employee's February 14, 1994, injuries were temporary in nature.

PERMANENT PARTIAL DISABILITY - BACK. Substantial evidence supported the compensation judge's findings that the employee's 1994 injury was not a substantial contributing cause to the employee's ratable permanent partial disability to her cervical spine; that the employee sustained 10% permanent partial disability of the body as a whole as a substantial result of her 1996 injury to her cervical spine; and the compensation judge's finding that the employee sustained no permanent partial disability to her thoracic and lumbar spine.

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supported the compensation judge's finding that the employee is not permanently and totally disabled as a substantial result of her 1996 injury.

APPORTIONMENT - PERMANENT PARTIAL DISABILITY. Substantial evidence supported the compensation judge's denial of statutory apportionment of the employee's cervical spine disability and permanency rating to the employee's 1994 injury, as the employee's medical and chiropractic records generated prior to the employee's 1996 injury did not clearly evidence a pre-existing disability, nor was the employee functionally disabled prior to her 1996 injury.

CONTRIBUTION & REIMBURSEMENT. Since we have affirmed the compensation judge's finding that the 1994 injury was temporary and the denial of statutory apportionment, we affirm the compensation judge's denial of State Fund's petition for contribution and reimbursement.

Affirmed.

Determined by: Rykken, J., Wheeler, C.J., and Pederson, J.

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals the compensation judge's finding that the employee's 1994 injury was temporary in nature, the denial of permanent partial disability benefits for the lumbar

and thoracic spine, and the denial of permanent total disability benefits. State Fund appeals the finding that the employee's 1994 injury was temporary in nature, the denial of permanent partial disability for the lumbar spine, and the compensation judge's denial of statutory apportionment and denial of State Fund's petition for contribution and reimbursement. We affirm.

BACKGROUND

In 1987, Sandra Bescheinen, the employee, began working as a custodian for Independent School District No. 181, the employer. The employee sustained a variety of work-related injuries while working for the employer. On December 5, 1990, the employee fell on ice, and was treated by Dr. Thomas Holbrook, a chiropractor, for upper back, neck, and head complaints but missed no time from work nor was she given any work restrictions following this injury. On November 30, 1992, the employee injured her left ankle while working. On February 14, 1994, the employee slipped on the edge of a dumpster, landing on her back and buttocks. The employee again treated with Dr. Holbrook for upper back, lower back, and tail bone pain. The employee missed three to four weeks of work following this 1994 injury.

The employee was able to return to her regular job full time after her 1994 injury, but testified that she used caution when lifting and requested more assistance from co-workers for heavy tasks. Dr. Holbrook assigned no formal work restrictions after this injury. The employee continued to seek treatment from Dr. Holbrook approximately once per month for upper back and lower back pain, which she testified lessened but did not fully resolve. At the time of the 1992 and 1994 injuries, the employer was self-insured for workers' compensation liability. The employer accepted liability for the 1992 ankle and 1994 low back injuries and paid various medical expenses and benefits, but disputed liability for a cervical injury in 1994.

On October 9, 1996, the employee was required to do extra lifting which resulted in an increase in her neck and back pain. Born on October 11, 1943, the employee was 52 years old at the time of this injury, and earned an average weekly wage of $589.92. On that date, the employer was insured for workers' compensation liability with State Fund Mutual Insurance Company (State Fund), which accepted liability for a cervical injury and paid various treatment expenses, wage loss benefits, and rehabilitation expenses. The employee sought chiropractic treatment from Dr. Holbrook, and later sought medical treatment from Dr. Joseph Engel, who recommended physical therapy and pool therapy.

The employee began working with QRC Debra Bourgeois in September 1997. At that time, the employee's restrictions were: lift or carry up to 5 pounds, 30 times per hour, no overhead reaching, limit tilting head forward and bending, sit to one hour, stand with movement, work for four hours per day for four weeks, and evaluate for full time. The employee was unable to work as a custodian with these restrictions. Attempts were made to place the employee in a different position with the employer, including cafeteria monitor and library aide, but these positions did not work for the employee. The employee then attempted a part-time light duty custodial position. The employee had difficulty completing the cleaning of the required number of classrooms for this position. The employer then contacted a physical therapist, Ken Omundson,

who worked with the employee to increase her work activities. The employee worked with Mr. Omundson for about six months, but was unable to increase her pace. The employee's employment was terminated because the employer determined it could not accommodate her restrictions in light of her inability to increase her productivity. The employee's last day of work with the school district was June 2, 1999.

The employee has worked with her QRC in searching for a job within her restrictions. The employee underwent vocational testing, and the QRC recommended searching for jobs in areas such as hostess, child care aide, food preparation, customer service, cashier, and light assembly. The employee looked for work from August 30, 1999, through September 12, 1999, then from September 27, 1999, through October 3, 1999. In a September 1999 report, the QRC opined that the employee would have difficulty finding a job paying her pre-injury wage given her lack of education, prior work history, restrictions, and vocational evaluation results. The employee did not graduate from high school, but completed the eleventh grade. Prior to working for the employer, the employee had worked in a garment factory, as a bartender, as a machine operator, and operated a second-hand store. The QRC testified at the hearing that finding employment for the employee would be extremely difficult given her restrictions and academic abilities. The QRC opined that the employee was permanently and totally disabled.

On September 22, 1999, the employee underwent a vocational evaluation with Richard Van Wagner at the employer's request. Mr. Van Wagner also conducted a labor market survey, and concluded that the employee could find work in the local labor market and was not permanently and totally disabled.

The employee filed a claim petition on July 19, 1999, for temporary partial disability benefits, permanent partial disability benefits, and permanent total disability benefits. The employer and State Fund filed a petition for contribution and/or reimbursement against the self-insured employer. A hearing was held on October 7, 1999. The compensation judge awarded 10 percent permanent partial disability of the body as a whole for the employee's cervical spine injury but denied the employee's claims for permanent partial disability benefits for the lumbar and thoracic spine and permanent total disability benefits and denied State Fund's petition for contribution and reimbursement and its claim for statutory apportionment of permanency benefits. The employee appeals, and State Fund cross-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 (1998). 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

Temporary Injury

The compensation judge found that the employee sustained work-related injuries to her neck, upper back, and right ankle on February 14, 1994, in the nature of temporary aggravations which resolved on or before December 6, 1994, and that the employee did not sustain permanent injuries to her cervical spine, thoracic spine, right ankle, lumber spine or coccyx as a result of her 1994 injury. The employee argues that the medical evidence supports a finding that the employee sustained permanent injuries to her cervical spine, upper back, right ankle, and lumbar spine in 1994, even though she had a prior history of neck pain, upper back pain, and headaches before 1994, since she continued to experience pain and continued to seek treatment with Dr. Holbrook through 1994 and 1995 for her upper back and neck and there was no history of a new injury during that time. The employee was off work for three to four weeks after the 1994 injury, but was then able to return to work without formal restrictions. She testified that Dr. Holbrook advised her to be careful, and that she requested assistance with heavy lifting.

While there is evidence in the record which would support a finding contrary to that of the compensation judge, it is not the function of this court to retry the case or to substitute its judgement for that of the compensation judge. The standard on review is not whether there is evidence that might support a finding contrary to the compensation judge's, but rather whether the judge's finding is supported by substantial evidence in the record as a whole. Minn. Stat. § 176.421, subd. 1(3). 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's memorandum indicates that he carefully reviewed the employee's medical and chiropractic records. Substantial evidence supports the compensation judge's finding that the employee did not sustain permanent injuries to her cervical spine, thoracic spine, right ankle, lumber spine or coccyx as a result of the 1994 injury. Therefore, we affirm.

Permanent Partial Disability

The employee also argues that no substantial evidence exists in the record to support the compensation judge's finding that the 1994 injury was not a substantial contributing factor to the employee's ratable permanent partial disability to her cervical spine.

Dr. Litman opined that following a 90 day period after the 1996 injury, he would apportion liability for the employee's disability as two-thirds to the 1994 injury and one-third to the 1996 injury. However, there is no medical report in the record assigning a permanency rating to the employee's cervical condition after the 1994 injury. The employee continued to treat with Dr. Holbrook after the 1994 injury up to the 1996 injury, but was able to work at her regular job. The compensation judge interpreted Dr. Holbrook's records to indicate that her neck symptoms were minimal in comparison to her tailbone complaints and had resolved by December 1994. The compensation judge attributed any increase in neck symptoms in 1995 to pre-existing problems for which the employee was treated before the 1994 injury. The compensation judge did not err by finding that the 1994 injury was not a substantial contributing cause of the employee's rateable cervical permanent partial disability.

The employee also argues that the compensation judge erred by finding that the employee sustained no permanent partial disability to her thoracic and lumbar spine. As trier of fact, a compensation judge is responsible for determining the degree of permanent partial disability after considering all evidence and relevant legal factors in a case. Erickson by Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 43, 35 W.C.D. 523, 528 (Minn. 1983); see Jensen v. Best Temporaries, 46 W.C.D. 498, 500-01 (W.C.C.A. 1992). Accordingly, medical testimony is considered helpful but not dispositive on the issue of disability. Id.; see Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 529, 41 W.C.D. 634, 640 (Minn. 1989) (determination of degree of permanency rests with compensation judge not member of medical profession).

The medical records reflect conflicting medical opinions concerning whether the employee sustained any permanent partial disability to her thoracic and lumbar spine. Dr. Engel, the employee's treating physician, opined that the employee had a 3.5% permanent partial disability to the lumbar spine and a 3.5% permanent partial disability to the thoracic spine. Dr. Thomas Balfanz examined the employee on August 29, 1997, and noted mild tightness and tenderness in the thoracic paraspinals bilaterally. The employee underwent independent medical evaluations with Dr. Thomas Litman on December 15, 1997, June 23, 1998, and March 16, 1999. Dr. Litman noted no muscle spasm in the thoracic or lumbar spine. On March 3, 1999, the employee underwent an independent medical examination with Dr. Gary Wyard, who opined that the employee sustained no permanent disability and no permanent work restrictions. 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).

The compensation judge found that the employee had not demonstrated objective findings of involuntary paradorsal muscle tightness of the thoracic spine or objective findings of reduced range of motion or involuntary paralumbar muscle tightness in the lumbar spine, relying upon the opinions of Drs. Litman, Wyard, and Balfanz. Substantial evidence supports the compensation judge's denial of permanent partial disability for the thoracic and lumbar spine, and we affirm.

Permanent Total Disability

The compensation judge found that the employee was not permanently and totally disabled. The employee argues that the employer is unable to accommodate her restrictions, in that the employee attempted to return to work for the employer, but ultimately the employer could not accommodate her restrictions. The employee's last day of work for the employer was in June 1999. The employee also argues that her job search has been unsuccessful, and that in her QRC's opinion, there were no appropriate jobs available for the employee in the local job market.

The employee did not look for work during the summer of 1999, looked for work in early September 1999, and did not look for work again from September 12, 1999, through September 27, 1999. The employee performed another job search from September 28, 1999, through October 3, 1999. The hearing was held on October 7, 1999. The compensation judge noted that this was an extremely limited job search. The employer's vocational expert opined that jobs were available in the area, although the compensation judge acknowledged that most of these identified jobs would require modifications. While an unsuccessful job search is not required for a finding of permanent total disability, the compensation judge could consider the limited nature of the job search as a factor in determining whether the employee was permanently and totally disabled. See Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 188, 30 W.C.D. 426 (Minn. 1978); Alden v. Minnesota Implement Co., 41 W.C.D. 756 (W.C.C.A. 1988). Given the limited job search, the employee's restrictions which allow her to perform light duty work, and the employee's willingness to work, substantial evidence supports the compensation judge's finding that the employee is not permanently and totally disabled. Accordingly, we affirm.[1]

Apportionment

State Fund argues that the compensation judge erred by denying statutory apportionment of the employee's cervical spine disability to the 1994 work injury since the employee continued to treat with Dr. Holbrook up to the time of the 1996 injury. Minn. Stat. § 176.101, subd. 4a(a) permits apportionment of a pre-existing disability if that disability is "clearly evidenced in a medical report or record made prior to the current personal injury" and if the disability functionally disabled the worker prior to the current personal injury. See Giese v. Green Giant Co., 426 N.W.2d 879, 881, 41 W.C.D. 286, 289 (Minn. 1988).

There is no report rating the employee's cervical condition after the 1994 injury. While a previous assignment of a permanency rating is not required by the statute, the pre-existing disability must be clearly evidenced in medical records generated prior to the work injury at issue. Hansen v. Kuppenheimer Men's Clothiers, 46 W.C.D. 359 (W.C.C.A. 1991), summarily aff'd (Minn. Mar. 31, 1992). The compensation judge could reasonably conclude that the employee's medical and chiropractic records do not clearly evidence a prior disability in order to determine or calculate a permanency rating. The employee continued to treat with Dr. Holbrook after the 1994 injury up to the 1996 injury, but was able to work at her regular job. Substantial evidence supports

[1] Given our resolution of this issue, we do not reach the employee's arguments that the permanent total disability thresholds in Minn. Stat. § 176.101, subd. 5 (1995) would not apply and are unconstitutional. This court does not have jurisdiction to consider constitutional issues.

the compensation judge's denial of statutory apportionment under Minn. Stat. § 176.101, subd. 4a(a), and we affirm.

Petition for Contribution and Reimbursement

Since we have affirmed the compensation judge's finding that the 1994 injury was temporary in nature and the denial of statutory apportionment of the employee's cervical spine disability, we affirm the compensation judge's denial of State Fund's petition for contribution and reimbursement.