NICK BOUSKA, Employee, v. JESCO and ST. PAUL FIRE & MARINE INS. CO., Employer-Insurer/Appellants, and MINNESOTA CEMENT MASONS H&W FUND and MN DEP'T OF LABOR AND INDUSTRY/VRU and CARRIE M. ROSS THOMPSON, D.C., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 5, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE; EVIDENCE - CREDIBILITY. A compensation judge may generally accept not just all but any part of a witness's testimony. Where inconsistencies in the employee's statements pertained to injuries and employment other than the work injury alleged, and where the employee's severe herniated disc subsequent to the alleged date of injury was to a different side of his spine from his preexisting condition and its first symptoms were separated by several days' effective work from the nonwork-related job cited by the employer as the probable cause of the employee's herniated disc, the compensation judge's decision to credit the employee's claim of a work injury with the employer was not clearly erroneous and unsupported by substantial evidence.

Affirmed

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

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's conclusion that they bear primary liability for the work injury alleged by the employee. We affirm.

BACKGROUND

Nick Bouska has worked as a cement finisher for various companies for the past twenty years. About sixteen years ago, in 1984, he was treated by chiropractor Dr. G. T. Sutcliffe for a sharp, burning pain in his low back. In 1987 he was treated again by Dr. Sutcliffe, for what the doctor diagnosed as "[a]cute lumbosacral subluxation strain with associated vertebrogenic sciatica," which the doctor reported to be a work-related injury. In February of 1991, Mr. Bouska [the employee] sought treatment from Dr. G. Lundgren, to whom he reported having "intermittent back pain every couple of years" and "pain now in his low back, mainly on the left side radiating into the left hip." On June 1, 1992, the employee saw Dr. Donald Lynch, with renewed complaints of left-side radicular back pain, and Dr. Lynch diagnosed "[l]umbosacral disk disease suspected." On June 15, 1994, the employee returned with back pain to Dr. Lynch, who noted that the employee "has been using braces for 2-3 years" and diagnosed acute and chronic lumbosacral disc

disease. Dr. Lynch referred the employee for physical therapy, and the therapist's report on June 27, 1994, indicated that the employee's chief complaint was "continuous stabbing pain in the left lumbar and hip regions." On July 11, 1994, the employee underwent a lumbar CT scan, which was read to reveal a probable minimal contained disc herniation at L4-5, with no evidence of nerve root impingement, and a possible minimal contained disc herniation at L5-S1, also without evidence of nerve root impingement. On July 14, 1994, the employee saw Dr. A. Kim, who administered a trigger point injection into the posterior crest of the employee's low back. The following spring, on April 10, 1995, the employee was treated yet again for low back pain, together with decreased sensation in the left upper leg, this time by Dr. M. Lano, who diagnosed recurrent low back strain with left sciatica. By April 20, 1995, the employee was apparently much improved and was released to return to work with instructions in stretching and strengthening exercises.

In August and September of 1998, the employee received about twelve chiropractic treatments from Dr. Carrie Ross Thompson for symptoms in his back, primarily the low back and primarily on the left. About two months later, in November 1998, the employee began working without physical restrictions for Jesco [the employer], still as a cement finisher. About a month after that, on Saturday December 5, 1998, he evidently spent a day assisting a friend in laying about ninety yards of cement for a pole barn. When he returned to work on Monday December 7, 1998, the employee evidently complained to coworkers that his back was sore, but he apparently performed his job successfully at least through Wednesday December 9. On Thursday December 10, 1998, the employee's work entailed about four hours finishing edges of fresh cement by hand on his hands and knees and then about six or seven hours operating a "trowel machine." The trowel machine is a piece of power cement finishing equipment about the size of a riding lawnmower, which floats across fresh cement on a pair of spinning fan-like blades, smoothing as it moves. The operator of the machine sits atop the machine in a riding-lawnmower-type seat, steering it by pushing forward or pulling backward on either or both of two joy sticks, which normally have about twelve inches of play at their top ends. The employee operated the trowel machine for several hours on December 10, 1998, and evidently again for about twelve hours the following day.

On Saturday December 12, 1998, the employee sought treatment with chiropractor Dr. Carrie Ross Thompson for symptoms of pain in his low back. Although on one line of her records Dr. Thompson reported no new injury since the employee's previous visit three months earlier, on another line she identified a new injury sustained while "pushing hard on trow[e]ling machine w/Rt. arm 12/10,11," also noting and diagraming severe <u>bilateral</u>, as opposed to primarily left-sided, low back and hip pain. Dr. Thompson's treatment on that date was apparently ineffective and, after trying to return to work on Monday December 14, 1998, the employee left work after two hours with complaints to the employer's safety coordinator/head of quality control, Robert Arbogast, that his back hurt too much to continue. The employee returned on that date to see Dr. Thompson, who reported "pain down right leg–onset at 2 AM this AM." On records for the following day, Dr. Thompson diagramed right-sided pain, severe, with foot numbness, and a day after that, on December 16, 1998, she also noted right leg numbness and referred the employee for an MRI scan and a consultation with Dr. Lynch.

Dr. Lynch examined the employee again on December 17, 1998, and found in part "very marked weakness of his right extensors of his foot and great toe." There was also "marked hypesthesia of the L5 nerve root distribution," and straight leg raising apparently on the right was "markedly positive also at about 20 degrees." The doctor concluded that the employee's case represented "a neurologic urgency with the marked development of a significant and possibly permanent injury to [the employee's] L5 nerve." The patient history at the Center for Diagnostic Imaging on that same date indicates that the employee's having to push "a sticking lever forward & back (for several hours ea[ch] day) . . . caused [low back pain] to return & also caused a new [complaint of] Rt. Leg pain, foot numb[ness]." The employee's lumbar MRI on that date was read to reveal at L5-S1 "a mild central bulging disk" and at L4-5 "a moderate-sized right[1] posterolateral herniated disk" with "extrusion of the disk material along the lateral recess inferiorly to the level of the lower L5" and compression of the L5 nerve roots.

The employee was seen on December 18, 1998, by neurosurgeon Dr. Andrew Smith. Noting the employee's foot drop and severe pain, Dr. Smith anticipated the necessity of surgery and immediately hospitalized the employee. On that same date, Dr. Lynch reached Mr. Arbogast at home, requested authorization to proceed with surgery, and was instructed to contact the insurer, which apparently denied liability. Three days later, on December 21, 1998, Dr. Smith performed a lumbar hemilaminectomy at L4-5 on the right, with excision of a large free-fragment herniated disc that had migrated over the body of L5. About a week after his surgery, on December 28, 1998, the employee gave a recorded statement to an agent of the insurer, in which he indicated in part that he had never asserted any previous low-back-related workers' compensation claims and that he was not currently employed at a second job in addition to his job with the employer. The employee's symptoms subsided in the weeks that followed his surgery, but he continued to have mechanical low back pain, together with weakness, numbness, and occasional pain around the right ankle and foot.

On March 11, 1999, the employee filed a Claim Petition, alleging entitlement to temporary total disability benefits continuing from December 15, 1998, consequent to a work-related injury to his low back on December 10, 1998. On the date of the alleged work injury, the employee had been thirty-seven years old and had been earning a weekly wage of $1,242.84. The employer and its insurer denied liability.

On May 3, 1999, the employee testified by deposition. At that deposition, the employee was asked if he had suffered any injuries besides that claimed with the employer. The employee answered that he had sustained "[j]ust pulled muscles" in his "[u]pper back" "[p]robably

[1] In the summary "Impression" section of his report, radiologist Dr. Chung Lee summarizes the finding at L4-5 as a "moderate-sized extruded herniated disk at L4-5 on the left" rather than on the right, as apparently indicated in this more detailed "Findings" section of the report. At his deposition on December 1, 1999, Dr. Andrew Smith, who eventually performed surgery on the employee's low back, indicated that he presumed that the inconsistent designation of a left-sided herniation was a typographical error, based both on Dr. Smith's independent reading of the same MRI scan and on his findings upon performance of the surgery.

somewhere between 10 and 15 years ago," although he "really d[id]n't recall" if he had seen a doctor for them or not.

On October 7, 1999, the employee was examined for the employer and insurer by Dr. Bruce Van Dyne. Dr. Van Dyne concluded that, because the employee had not reported acute radicular right-sided symptoms until December 14, 1999, the employee's "very light-duty work" on December 10, 1998, neither caused nor aggravated his current low back condition. Dr. Van Dyne conceded, however, that, if the employee "indeed had onset of significant low back and right leg pain while at work on 1[2]/10/98, then I would have to say that he did likely sustain an aggravation of his pre-existent degenerative disc disease at the L4-5 level as a result of his work activities on 12/10/98." Dr. Van Dyne subsequently viewed a videotape of the troweling machine in operation and thereafter concluded that the employee could not have sustained an injury to his low back while operating the machine even if one of the levers was stiffer than normal.

The matter came on for hearing on November 3, 1999, where the sole issue was whether the employer and insurer had primary liability for the alleged injury on December 10, 1998. The employee testified at hearing that the right joystick steering lever on the troweling machine that he drove for six or seven hours on December 10, 1998, was out of adjustment and that he had to hold on to it and press it forward at all times while driving, bracing his elbow on the inside of his right thigh. He testified also that he informed his foreman and supervisor, Denny Nelson, of the problem on that same date and that Mr. Nelson brought in a different troweling machine, which proved, however, to be in even worse working order. He testified that he then went back to operation of the original machine and that at the end of the day his low back was "getting tight," he "felt like something was pinching," and his right "leg was tingling a little." He testified also that, when he returned to work on the following morning, he also informed Mr. Arbogast of the problem and about mid afternoon also the employer's president, who apparently called a mechanic. The employee testified that by the end of the workday he was experiencing severe back pain and right leg pain and numbness.

Also testifying at hearing were Thomas Minnihan, equipment superintendent for the employer, Mr. Arbogast, and Leonard Mallery, a supervisor of the employee. Mr. Minnihan testified that it was he who repaired the employee's maladjusted troweling machine on December 11, 1998, shortly after noon and that, when the employee explained the problem to him, the employee mentioned only a steering problem, without any suggestion that the levers required any unusual pressure to operate. Mr. Minnihan testified also that he himself operated the machine before repairing it and found nothing unusual about the amount of pressure required to operate the levers. He testified also that the employee did not mention to him at all that day anything about back, right leg, wrist, or any other pain.

Testifying primarily from several pages of notes, Mr. Arbogast testified that the first time he ever saw the employee wearing a back brace was on Monday December 7, 1998, the first work day after the employee assisted his friend in pouring cement for the pole barn. He testified that, when he saw the employee three days later, on December 10, 1998, the employee requested and was temporarily provided use of a different troweling machine, which proved even

more faulty, but did not say anything the rest of the day about his machine not operating properly. Mr. Arbogast testified further that the employee came up to him the following day holding and rubbing his wrist, indicating that the troweling machine's steering was not operating properly and saying, "this is killing my wrist, you got to get somebody out here." Mr. Arbogast testified that the employee never indicated on either December 10 or December 11, 1998, that his low back or right leg were bothering him. He testified that, when the employee left work before noon with back and apparently leg pain on Monday December 14, 1998, Mr. Arbogast inquired as to whether he should fill out a first report of injury and the employee responded "no, [that] it wasn't work related and that he had a good chiropractor and he had good insurance and he'd take care of it." Mr. Arbogast testified that he first learned that the employee was claiming a work-related injury on Friday December 18, 1998, when Dr. Lynch called him at home to request authorization to proceed with surgery on the employee's back on a workers' compensation basis. Dr. Arbogast testified that he then called the employee and inquired about the claim and that the employee informed him that he had asked Mr. Mallery, his supervisor, on Tuesday December 15, 1998, to inform Mr. Arbogast that the employee had a work injury. Mr. Mallery testified in part that the employee never indicated to him that his back was sore because of any work activities.

Mr. Arbogast's testimony was primarily from several pages of neatly hand printed notes, which he testified were made essentially contemporaneous with the events described in them, acknowledging that they were all printed uniformly and in the same pen. Mr. Arbogast testified that he commenced the notes on December 7, 1998, apparently writing on that date also the entry for December 4, 1998, in which Mr. Arbogast reports that the employee "stated he had a pole barn to pour the next day" which "would take about 100 yards of concrete" and that Mr. Arbogast "didn't notice any discomfort or effort being made physically to perform any task." On cross examination, Mr. Arbogast testified that he began making his notes on the employee's condition and conversation on December 7, 1998, when he saw the employee with a back brace on, because he always "[a]bsolutely" commences such a record "anytime someone appears to be in discomfort or having some sort of pain" "[w]hen it's going to refer to a Work Comp [claim] or an injury."

In a post-hearing deposition on December 1, 1999, and based on a detailed set of hypothetical facts, Dr. Smith testified that it was his opinion that the employee's work driving the troweling machine for the employer on December 10, 1998, was a substantial contributing factor in the employee's subsequent right-sided radicular problems and ultimate need for surgery. Dr. Smith had not seen the videotape of a properly functioning troweling machine as had Dr. Van Dyne, nor had the employee informed him of the work that he had done on the pole barn on December 5, 1998. Dr. Smith did note, however, the fact that the employee had worked for several full days apparently without any serious physical problem following his work on the pole barn but was subject to "clearly . . .one of the most severe expressions of a herniated disc that I've seen in my career" after going off work from the employer on December 14, 1998.

By Findings and Order filed January 26, 2000, the compensation judge concluded in part that the employer and insurer had primary liability for a low back injury to the employee on December 10, 1998. The judge's conclusion was based in important part on her acceptance of

the opinion of Dr. Smith, on her finding that the employee's prior low back problems "affected his left lower back and hip" whereas "[t]he current injury is to the right lower back and leg," and on her express finding that "the employee's testimony that he was injured while working with the troweling machine on December 10 and 11, 1998" and "that he had to push hard on the right joystick to control the direction of the machine, causing him low back pain, is credible." 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

At hearing, the employee's credibility was aggressively impeached on grounds that his prehearing statements and deposition testimony as to his prior low back injuries and outside employments had been deceptive and at best inconsistent with each other and with his testimony at hearing. The compensation judge nevertheless found expressly that "the employee's testimony that he was injured while working with the troweling machine on December 10 and 11, 1998 is credible," emphasizing in her memorandum that "[t]he credibility of the employee is the main focus of this case." In that same memorandum, the judge clearly acknowledged the employer and insurer's arguments "that the employee has a long history of lower back problems and that he sustained a new injury on or about December 5, 1998 while pouring a pole barn floor for a friend" and "that the employee failed to reveal prior injuries and side jobs while the case was under investigation, thus compromising his credibility." The judge nevertheless went on to reiterate in that memorandum, as she had clearly implied in her decision proper, that "[t]he employee's earlier back problems all involved his left lower back and left hip/leg," whereas "[t]he first indication of right sided problems was after the incident of December 10, 1998." Moreover, she explained,

> [t]he employee's work pouring a pole barn admittedly caused him to have some soreness. However he was able to return to his regular job, working regular long hours without problems. It was not until

> he used the troweling machine with the malfunctioning joystick that he began to have serious problems.

"The medical records are consistent with his testimony," she added. The employer and insurer contend on appeal that "the Employee lied about so many material facts that the record is almost devoid of any credible testimony on behalf of the Employee." We are not persuaded that the judge's credence of the employee's testimony exceeded her discretion or that her decision is otherwise unsupported by substantial evidence.

There is clearly an argument to be made that the employee's documented prehearing statements appear to reflect a reluctance on the part of the employee to be fully forthcoming about his pre-December 10, 1998, low back problems and even about his work on his friend's pole barn. However, even if we were to concede that the employee's credibility as to his past injuries and as to his side job appears weak in the transcript of these statements, it is essential to emphasize that those past injuries and that outside employment are not the subject of the employee's claim against the employer. It is not whether he injured himself earlier, which is transparently evident in the medical record regardless of the drift of the employee's own statements, but whether he also injured himself on December 10, 1998, while employed by the employer. Similarly, it is not whether he may have been performing a physically heavy side job on December 5, 1998, which was essentially conceded at hearing, but whether the work he was doing for the employer on December 10, 1998, was sufficiently heavy to have caused the injury alleged. As this court has frequently reiterated, a factfinder is not required to accept all or none of a witness's testimony but generally "may accept all or only part of" that testimony. Proffit v. Minnesota Harvest Apple Orchard, 48 W.C.D. 215, 219-20 (W.C.C.A. 1992) (quoting City of Minnetonka v. Carlson, 298 N.W.2d 763, 767 (Minn. 1980)) (emphasis added here). Moreover, the assessment of a witness's credibility is the unique function of the trier of fact. Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (citing Spillman v. Morey Fish Co., 270 N.W.2d 781, 31 W.C.D. 187 (Minn. 1978)).

In this case, the judge's decision is sufficiently supported by the evidence cited by the judge as to the right-side location of the employee's problem after December 10, 1998, and the several-day interim of effective work between that date and the employee's preceding work on the pole barn project. Moreover, it is supported also by Dr. Thompson's chiropractic records for December 12, 1998, in which the employee's pain is immediately related to his work on December 10, 1998, and also by the expert medical opinion of Dr. Smith. See Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985) (a trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence). Because the judge's decision was not unreasonable in light of the evidence, we affirm. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.