

DAMIAN CHAVEZ, Employee/Appellant, v. FRIEDGES LANDSCAPING, INC., and W. NAT'L MUT. INS. CO., Employer-Insurer, and NEUROLOGICAL ASSOCS. OF ST. PAUL, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS  
JANUARY 3, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee had not shown that he had clinical findings on examination consistent with the test result of non-localized right ulnar neuropathy and that he had not sustained a separate injury of right ulnar neuropathy as a result of his work activities.

JOB SEARCH - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee had not conducted a diligent job search.

Affirmed.

Determined by: Rykken, J., Pederson, J., and Wheeler, C.J.  
Compensation Judge: Jennifer Patterson

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals the compensation judge's finding that the employee did not sustain an ulnar neuropathy condition that was causally related to his work activities and the finding that the employee did not conduct a diligent job search. We affirm.

BACKGROUND

In 1995, Damian Chavez (employee) began working in landscaping for Friedges Landscaping (employer). The employee primarily laid sod, planted trees, and built stone retaining walls. The employee was born on April 12, 1960, in Mexico. He attended four years of elementary school in Mexico, can read and write in Spanish, but does not read or write in English and uses translators in his day-to-day life. His work history includes laboring jobs in Mexico. In 1995, he moved to the United States and worked for nurseries except during the winter months when he worked in factories. (Finding Nos. 3 and 4.) In late summer or fall 1997, the employee began to notice symptoms of pain and stiffness in his right hand while laying sod at a school, but sought no medical treatment for those symptoms.

In November 1997, the employee was laying stones to build a retaining wall when three fingers of his right hand became stiff, and he experienced pain in his arm from his fingers to

his elbow. The employee felt unable to continue working and sought medical treatment at Aspen Clinic's Urgent Care Center on November 13, 1997. He was told to return the following day for a neurological consultation. The employee was examined by a neurologist, Dr. Kenneth Hoj, the next day. Dr. Hoj noted difficulty in extension of three fingers in the right hand, alteration of sensation in the right hand, tenderness at the right elbow, and difficulty in obtaining reflex responses. The employee was taken off work and asked to return to the clinic in three weeks if there was no improvement. The employee returned to Dr. Hoj on December 16, 1997, continuing to report weakness in his little and ring fingers in the right hand. Dr. Hoj noted muscle weakness in the right hand and diminished right elbow reflexes, and ordered an EMG. The EMG was performed on December 17, 1997, and indicated right median neuropathy consistent with carpal tunnel syndrome, and a right ulnar neuropathy. Dr. Hoj diagnosed right carpal tunnel syndrome and a non-localized right ulnar neuropathy which he opined were both related to the employee's work activities.

In January 1998, Dr. Hoj referred the employee to Dr. Melissa Barton for a surgical opinion and further evaluation of his carpal tunnel condition. Dr. Barton performed right carpal tunnel release surgery on April 15, 1998. Dr. Barton indicated that the employee could return to light duty work on April 23, 1998, and could resume full duties June 4, 1998, based on his carpal tunnel condition. At a May 14, 1998 appointment with Dr. Barton, the employee reported ongoing neck pain. Dr. Barton deferred to Dr. Hoj for any restrictions or recommendations due to any non-carpal tunnel syndrome conditions such as the employee's reported neck pain.

By September 15, 1998, Dr. Barton determined that the employee had reached maximum medical improvement from his right carpal tunnel syndrome, and rated the employee as having 0% permanent partial disability of the body as a whole for his carpal tunnel condition.<sup>1</sup> Dr. Barton did not further address the employee's right ulnar neuropathy, since that condition was not operable. The employee continued to treat with Dr. Hoj. In a November 10, 1998 report, Dr. Hoj opined that the employee had sensory symptoms and motor findings related to an ulnar neuropathy condition. The doctor recommended a strengthening program and indicated the employee should work within a 20 pound lifting restriction. Dr. Hoj also recommended a cervical spine MRI scan to rule out any discogenic source for the employee's reported neck, shoulder and arm pain. Dr. Hoj opined that the employee had not yet reached maximum medical improvement.

On May 15, 1998, the employee underwent an independent medical examination with Dr. Chris Tountas. Dr. Tountas noted swelling of the digits of the right hand, and reported the employee's inability to fully extend his middle, ring and small fingers. Dr. Tountas also noted a significant decrease in strength and complaints of pain with attempts at testing the intrinsic musculature of the right hand. The employee's right hand grip strength was significantly less than the left. Responses to pin prick testing were normal. Additional neurological testing results were outlined by Dr. Tountas in his report. He also commented, however, that he was "concerned about [the employee's] very diffuse nonanatomic pain complaints." Dr. Tountas stated:

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<sup>1</sup> Dr. Barton does not cite to the Workers' Compensation Permanent Partial Disability Schedules.

Although he has these pain complaints, there did not appear to be any visible or measurable atrophy of the dominant right arm when compared with the left. I would question whether there is a significant element of symptom magnification and guarding.

(Resp. Ex. 3.)

Dr. Tountas opined that the employee's carpal tunnel condition was causally related to his work activities, but did not comment on whether the employee had any ulnar neuropathy condition. He recommended restrictions of sedentary work with minimal use of the right hand, a repeat EMG and possibly physical therapy to treat ongoing right arm symptoms.

In June 1998, surveillance videotape of the employee showed him performing yard work, picking up and moving piles of sticks, moving split wood, raking, starting a mower by pulling the starter cord with his right arm, and pushing the mower over what appeared to be a bumpy lawn. (Resp. Ex. 1.) After reviewing this videotape, Dr. Tountas issued a report on November 30, 1998, in which he opined that the employee had considerably improved by two months post-surgery, that the employee demonstrated unrestricted use of the right hand, and that the videotape did not demonstrate any pain behavior. Dr. Tountas also opined that the employee did not need physical therapy nor a repeat EMG for follow-up treatment, and that he could return to work without restrictions. Dr. Tountas further commented that he believed the videotape supported his initial impression regarding a significant element of symptom magnification and guarding. (Resp. Exs. 3 and 4.)

The employee was released for light duty work in April 1998, but did not begin a job search. He testified that even though Dr. Barton had released him to return to work on April 23, 1998, Dr. Hoj told him he should not return to work at that time. He also testified that he did not look for work between April 23 and May 6, 1998, since he believed that the employer was obligated to offer him light-duty work.

In May 1998, the employee began a limited job search. The employee was provided no rehabilitation assistance by the employer and insurer since they had denied primary liability for the claimed injury. The employee testified that his job search was limited by his inability to speak or read English, and that he required a friend's assistance for translation. In May 1998, the employee made two job contacts. From June 1998 through September 1998, the employee averaged three job contacts per week, mostly at landscaping companies. The employee's job logs ended in September 1998, when he started looking for light factory work. He testified that during the months he searched for work, he felt he would have been physically capable of performing the same factory work he did before 1997. He also believed that some of the employers to whom he applied did not offer employment due to his bandaged arm. As of the hearing on March 19, 1999, the employee had found no work.

This matter came on for hearing before a compensation judge on March 19, 1999. At that time, the employee claimed that he had sustained a Gillette-type injury effective

November 13, 1997, in the nature of bilateral carpal tunnel syndrome and a right ulnar neuropathy condition. The employee claimed entitlement to temporary total disability benefits, medical expenses and rehabilitation benefits. As medical support for his claim, the employee relied upon the records and reports of Dr. Hoj and Dr. Barton. The employer and insurer denied primary liability, denied that the employee had sustained a Gillette-type injury on November 13, 1997, and denied that any benefits were due, based primarily on the reports of Dr. Tountas.

The compensation judge found that the employee's carpal tunnel condition was causally related to his work activities, and awarded medical expenses and temporary total disability benefits related to this condition from November 13, 1997 through April 23, 1998. The compensation judge found that the employee had not sustained an ulnar neuropathy condition related to his work activities. She also found that the employee had not conducted a diligent job search after being released for light duty work after his carpal tunnel surgery, denied temporary total disability benefits after April 24, 1998 and denied rehabilitation benefits. 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 (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, "[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

### Causation

Questions of medical causation fall within the province of the compensation judge. Felton v. Anton Chevrolet, 513 N.W.2d 457, 50 W.C.D. 181 (Minn. 1994). The compensation judge found that the employee had failed to prove that he has clinical findings on examination consistent with the test result of non-localized right ulnar neuropathy, or that he sustained a separate injury in the nature of a right ulnar neuropathy as a result of his work activities. The employee argues that the compensation judge ignored the uncontroverted medical opinion of Dr. Hoj in making these findings. Dr. Hoj opined that the employee was suffering from a right

ulnar neuropathy that was causally related to his work activity. By contrast, Dr. Tountas did not discuss the presence or etiology of a ulnar neuropathy condition in his May 15, 1998, report, but noted the employee's pain complaints and recommended physical therapy and a repeat EMG for further evaluation of pain complaints. Dr. Tountas also questioned whether there was a significant element of symptom magnification and guarding.

Since there is no medical evidence directly contradicting Dr. Hoj's opinion, the employee claims that the compensation judge erred by not accepting that opinion. There is a difference, however, between disregarding unopposed medical opinion and rejecting it on the basis of other evidence. Clark v. Archer Daniels Midland, slip op. at 6 (W.C.C.A. Feb. 14, 1994). In making factual determinations, a compensation judge is not bound by medical opinion. Expert medical opinion or testimony is not necessarily conclusive upon the trier of fact. However, such opinion or testimony cannot be disregarded. Tuomela v. Reserve Mining Co., 299 Minn. 203, 204, 216 N.W. 638, 639, 27 W.C.D. 312, 313 (1974) (*per curiam*) (citing Flansburg v. Giza, 284 Minn. 199, 201, 169 N.W.2d 744, 746, 25 W.C.D. 3 (1969)). After Dr. Tountas reviewed the videotaped evidence which showed the employee performing yard work, picking up and moving sticks, moving split wood, raking, starting a mower by pulling the starter cord with his right arm, and mowing the lawn, he opined that the employee had demonstrated unrestricted use of his right hand, that he did not need physical therapy or an EMG, and that he could return to work without restrictions. The compensation judge found that this videotaped evidence supported Dr. Tountas's opinion about the employee's level of functioning. (Finding No. 13.) Based upon Dr. Tountas' opinion and the videotaped evidence, the compensation judge chose not to accept Dr. Hoj's opinion, concluding that the employee had not shown that he had clinical findings on examination consistent with the test result of non-localized right ulnar neuropathy, and that he had not sustained a separate injury of right ulnar neuropathy as a result of his work activities. Therefore, because the record includes substantial evidence that supports the judge's conclusion concerning the employee's claimed right ulnar neuropathy, we affirm that finding.

### Job Search

The compensation judge found that the employee was not entitled to temporary total disability benefits because he had not performed a diligent job search. The burden of proving an adequate job search is on the employee. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988). The determination of whether or not an employee's job search is diligent is a question of fact for the compensation judge to resolve. Bauer v. Winco/Energex, 42 W.C.D. 762, 768 (W.C.C.A. 1989). "[T]he issue of whether or not an employee has sought work with reasonable diligence must be viewed within the context of the scope of rehabilitation assistance which has been provided by the employer and insurer." Hunter v. Crawford Door Sales, slip op. at 3 (W.C.C.A. August 4, 1993). However, a lack of rehabilitation assistance does not make a virtual lack of any job search sufficient. See Evink v. Roger E. Duncan, slip op. (W.C.C.A. May 17, 1991). While the employee's job search efforts should be weighed in the context of a lack of rehabilitation assistance, it does not relieve the employee of his obligation to diligently seek employment. Stephens-Hahn v. Lakeland Envelope Co., slip op. (W.C.C.A. July 30, 1992).

In this case, the employee was never provided rehabilitation services since the employer and insurer denied primary liability for the employee's claimed injuries. The compensation judge denied the employee's claim for rehabilitation benefits. The employee did not appeal from the compensation judge's finding that because he no longer has restrictions on his activities arising out of his carpal tunnel syndrome, he is not entitled to rehabilitation benefits (Finding 18), nor did the employee appeal the compensation judge's order denying his claim for rehabilitation benefits (Order 7). We have not addressed the issue of entitlement to rehabilitation benefits, since the scope of review by this court is limited to the issues raised by the parties in the notice of appeal. Ruether v. State of Minnesota, 455 N.W.2d 475, 479, 42 W.C.D. 1118, 1124 (Minn. 1990).

The compensation judge considered the employee's language limitations and the lack of rehabilitation services, but found that the employee had made no job search from April 24, 1998, through May 6, 1998, and that from May 7, 1998, through June 9, 1998, the employee only applied for jobs beyond his restrictions. The compensation judge also determined that from and after June 10, 1998, when the employee was released with restrictions, the employee's job search of approximately three job contacts per week was not diligent. While we recognize that the employee's language skills and other factors such as lack of rehabilitation assistance made his job search more difficult, we cannot conclude that the compensation judge clearly erred in determining that this level of job search was insufficiently diligent to establish entitlement to temporary total disability benefits for the period claimed. Therefore, we affirm.