MARVIN DAVIS, Employee, v. MINNTECH and RELIANCE INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 13, 2000

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY; MEDICAL TREATMENT & EXPENSE - SURGERY. Where the treating surgeon's recommendation of wrist fusion was sufficiently specific so as not to place an impermissible burden on the defending employer and insurer, where the judge's decision was not without medical support or contrary to uncontroverted medical opinion, and where an arguable mistake by the judge in the course of her findings was not fatal to the integrity of her decision, the compensation judge's award of payment for proposed wrist surgery was not clearly erroneous and unsupported by substantial evidence.

CAUSATION - MEDICAL EXPENSES. Where there was ample evidence in the medical record upon which the judge could infer a causal relationship between the employee's work activities and his need for the claimed wrist fusion, the compensation judge's award of payment for proposed wrist fusion surgery was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

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

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's award of payment for proposed wrist surgery. We affirm.

BACKGROUND

On December 18, 1997, Marvin Davis sustained a Gillette-type injury[1] to his right wrist in the course of his employment in the production area of the Minntech Corporation [the employer]. Mr. Davis [the employee] was twenty-eight years old at the time, had worked for the employer in various wrist-active capacities since March of 1994, and was currently earning a weekly wage of $573.00. The employee was taken on the date of his injury to the emergency room at North Memorial Hospital, where Dr. Paul Brunik found on examination "a small soft cyst palpable over the dorsum of the employee's right wrist. He has pain with resistance with

[1] See Gillette v. Harold Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

extension." On that finding Dr. Brunik diagnosed a ganglion cyst and right wrist extension tendinitis secondary to over-use. Dr. Brunik prescribed a wrist splint, icing, and ibuprofen and advised the employee to lift no more than five pounds with the right hand for one week and to avoid torquing and crimping actions.

On December 30, 1997, the employee was examined by occupational health specialist Dr. A. M. Nathani, who recommended continued use of the wrist brace and restricted the employee from lifting over ten pounds and from doing more than occasional twisting and rotating actions with his right hand. Dr. Nathani also referred the employee for physical therapy, noting, "[n]ot now but if pain persists, he may need to be referred to an orthopedic surgeon." The employee returned to see Dr. Nathani on February 6, 1998, when he was reported to have minimal improvement and definite swelling of the cyst, which was resulting in sharp pain and limitation of function. Dr. Nathani prescribed Advil and advised the employee to continue with home exercises, releasing him to return to work with restrictions against lifting over ten pounds[2] and against heavy grasping and referring him for examination by a surgeon.

On February 23, 1998, the employee was examined by orthopedic surgeon Dr. David Gesensway. X-rays revealed "significant abnormality through the entire carpus," with the lunate appearing to be in two pieces. Dr. Gesensway diagnosed "[r]ight wrist activity[-]related pain with significant carpal pathology," noting that "[t]he exact nature and etiology of this is unclear at this point" and that "[t]here is some secondary chronic synovitis." On those findings, Dr. Gesensway recommended an MRI scan. The employee was seen the following day also in the emergency room at the Hennepin County Medical Center, for pain and weakness in his right wrist, with some numbness and tingling. X-rays on February 27, 1998, were read to reveal no evidence of recent fractures, although there were "bony changes involving the carpal area which are consistent with recent or old ligament injuries and some old healed bone injuries." On March 13, 1998, the employee underwent the prescribed MRI scan, which was read to reveal an "[a]pparent old fracture of the lunate bone . . . with rotational abnormality of the navicular bone." On April 6, 1998, Dr. Gesensway diagnosed "[e]arly right wrist arthritis with carpal instability secondary to probable congenital abnormality of a bipartite lunate." He prescribed use of an anti-inflammatory and a splint and issued permanent restrictions against lifting or carrying over ten pounds with the right hand and against doing any repetitive gripping and grasping. Dr. Gesensway indicated that, should this nonoperative program prove ineffective in controlling the employee's symptoms, "then the only operative intervention to control pain would be wrist arthrodesis."

The employee subsequently returned to work for the employer but continued to experience chronic wrist pain, as documented in a North Memorial Health Care emergency room report dated May 7, 1998. The employee last worked for the employer in September 1998. On October 6, 1998, Dr. Gesensway opined that the employee had a "permanent work related aggravation of his pre-existing underlying congenital right wrist condition characterized by carpal instability secondary to bipartite lunate." He indicated at that same time that it was his "opinion that [the employee's] work activities represent a substantial and permanent contributing cause of

[2] This is according to Dr. Nathani's office notes; the doctor's Report of Workability on the same date limits lifting to 20 pounds.

his need for permanent work restrictions." On January 8, 1999, the employee was examined by Dr. Ronald Ercolani for Dr. Nathani. Dr. Ercolani diagnosed "[c]hronic right wrist arthritis secondary to bipartite wrist bone aggravated by conditions at work," recommending avoidance of repetitive flexion of the wrist and continuation of the ten-pound lifting restriction, anti-inflammatory drugs, home exercise, and splinting. Dr. Ercolani indicated that "[t]here is little more that can be done on a conservative basis. It is actually up to [the employee] at this point whether he wants to pursue more aggressive surgical management. I have encouraged him to delay that option as long as possible."

On April 28, 1999, the employee was examined by orthopedist Dr. Thomas Walsh. Dr. Walsh diagnosed "[r]ight wrist pain, work aggravated," "[s]econdary to congenital/traumatic bipartite lunate" and "scapholunate instability." In his treatment notes, Dr. Walsh indicated that he and the employee had discussed treatment options including both "four-corner fusion with scaphoid excision, and complete wrist fusion." Dr. Walsh indicated also that, "[g]iven the unusual shape of the head of his capitate, I do not believe he would be a good candidate for isolated proximal row carpectomy," although "[p]ossibly, proximal row carpectomy with capsular interposition could be considered." Having noted that he had not yet had available the employee's MRI scan to review, Dr. Walsh went on to state,

> [The employee] states a good understanding and is inclined towards a four corner fusion. I would prefer to carefully evaluate the radial lunate joint before undertaking this option as there may be significant irregularities of this interval due to the lunate variant. If the joint surfaces of the two surfaces of the lunate are articulating smoothly with the lunate facet of the radius, he may be a candidate for a four-corner fusion which would simply then include incorporation of the two segments of the lunate in the fusion.

Dr. Walsh thereupon indicated that he would review the employee's x-rays with his associates, indicating that "[i]f the radiolunate joint is not well preserved, the best option would probably be complete wrist fusion." He indicated that the employee would be monitoring his symptoms over the next one or two months and would be giving "careful consideration to the surgeries we have discussed." Two days later, in the "Instructions and Comments" blank on a Work Ability Report dated April 30, 1999, Dr. Walsh wrote "Recommend Surgery (limited wrist fusion) for symptomatic carpal instability." On June 10, 1999, the employee filed a Medical Request, seeking payment for "wrist fusion surgery as recommended by the employee's physician, Dr. Thomas Walsh."

Three weeks prior to his April 28, 1999, examination by Dr. Walsh, the employee had also been examined by Dr. William Call for the employer and insurer. In his eventual report, dated April 7, 1999, but not issued until August 13, 1999, Dr. Call indicated that he was "also in receipt of Dr. Walsh's evaluation note of April 28, 1999. He recommends a four-corner fusion with excision of the scaphoid." Dr. Call went on to enumerate several opinions, including the following: (1) that the employee "had a transient synovitis of the wrist associated with work

activities at [the employer] that had resolved by today's examination"[3]; (2) that the employee's work activities had been a significant contributing factor in his need for treatment of his right wrist in December 1997 but that "[t]he congenital anomaly [the employee's bipartite lunate], however, is the main cause . . . . Without the congenital anomaly, the treatment would not have been necessary"; (3) that the employee's "subjective symptoms of synovitis of the wrist were a temporary aggravation of his preexisting condition," which "aggravation has resolved"; (4) that the employee had reached maximum medical improvement [MMI] from his work injury with 0% permanent partial disability; (5) that the employee required no work restrictions with regard to his work injury but with regard to his congenital anomaly should lift no more than forty pounds with his right side and wear a splint at work; and (6) that the employee's work for the employer did not contribute substantially to any need for surgery. Regarding the recommended surgical options, Dr. Call stated,

> I doubt that a proximal radial carpectomy would be effective given the abnormal shape of [the employee's] capitate. Likewise, I would think that a four-bone intercarpal fusion (four-corner fusion) would be difficult to achieve given the bipartite nature of the lunate and might lead to further abnormal mechanics with respect to the radius. I would recommend instead a nonsurgical approach with lifting restrictions and anti-inflammatories for symptomatic control until and unless [the employee] develops significant radiocarpal arthritis and then would recommend a wrist fusion.

Dr. Call went on to state further in this regard,

> The surgery to the right wrist as recommended by Dr. Walsh is among the group of procedures that would be considered reasonable by hand surgeons. I think, however, that the fusion would be technically difficult to achieve given the bipartite nature of the lunate. Also, even if successful fusion of the bipartite lunate to the four-corner fusion mass could be achieved, [the employee] might find increased pain as a result of disordered mechanics between the radius and the lunate. In my opinion, the surgery is not necessary as a result of any work injury, but rather, if the surgery is carried out it is the result of his congenital anomaly. I would counsel against the surgery.

On August 18, 1999, the employer and insurer filed a Medical Response to the employee's request for surgery, refusing to pay for the treatment on grounds including that "[t]he medical evidence is equivocal regarding the need for surgery, and there is no causal connection

[3] The examination here referenced is presumably the examination on April 7, 1999, since there is no evidence in Dr. Call's report that the doctor reexamined the employee after that date preparatory to issuance of his report on August 13, 1999.

between the alleged need for surgery and the claimed work injury of December 18, 1997." In support of their position they cited the opinion of Dr. Call.

By letter dated September 3, 1999, Dr. Walsh informed the employee's attorney that, "to a reasonable degree of medical certainty, [the employee] sustained a work aggravation of his wrist instability that was permanent in nature" on the "formal work injury date of 12/18/97." The matter came on for hearing on that same date, September 3, 1999. Issues as stipulated at hearing included "whether the recommended wrist fusion surgery is reasonable, necessary and within the treatment parameters" and "whether the [employee's] right wrist injury of December 18, 1997 is a substantial contributing cause in the alleged need for surgery." At hearing, the employer and insurer admitted liability for a work injury but only for a temporary and resolved synovitis of the wrist, not for any other or permanent injury. On cross-examination, counsel for the employer and insurer asked of the employee, "So the only fusion you're asking for from this Judge and from my client is the four-bone fusion?", to which the employee responded, "The fusion or the rod [total fusion], whichever will stop the pain, whichever the doctors can do to stop the clicking and the pain in there." By Findings and Order filed November 1, 1999, the compensation judge ordered in part that "the employee is entitled to pursue wrist surgery, and the employer and insurer have liability for the proposed surgery." 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

On appeal, the employer and insurer contend that the compensation judge's award of payment for surgery in this case was both clearly erroneous and unsupported by substantial evidence. They argue that the specific nature of the surgery awarded was never identified either by the employee or by the judge, that "[t]his places an impermissible burden on the Employer and Insurer in defending a claim," and that allowing such an unspecified claim and vague award is both impractical and unfair to the party defending. They argue also, moreover, that the judge's

award was also factually improper, in that it was contrary to uncontroverted medical evidence and unsupported by any medical opinion that the surgery at issue was reasonable and necessary and causally related to the employee's work injury. We are not persuaded.

It is true that, by itself, the compensation judge's order of treatment does appear to be very general, asserting as it does only the employee's general entitlement "to pursue wrist surgery" and the employer and insurer's nearly as general liability "for the proposed surgery." It is also evident to us, however, from the statement of issues both at the hearing and at the beginning of the judge's Findings and Order, that the only wrist surgery truly at issue in this case was "fusion" surgery, in either of only two forms. Although three or perhaps four surgical procedures were at various times being considered by the employee's doctors, only two of those procedures were, contrary to suggestions by the employer and insurer, being considered seriously - - the four-corner fusion and the complete fusion. Nor did either the employer and insurer or their independent medical examiner ever assert at any time prior to issuance of the judge's decision that they were unable to defend against the employee's claim for lack of specificity. Dr. Call was clearly familiar enough with all of the procedures being considered by Dr. Walsh to opine in some detail against their reasonableness, necessity, and causal relationship to the employee's work. In the end, and contrary to the apparent suggestion of the employer and insurer, Dr. Walsh did recommend fusion surgery, and he did so on a clearly implied conclusion that surgical action needed to be taken to relieve the employee's ongoing symptoms.[4] Although there may remain some ambiguity as to which of two forms of fusion Dr. Walsh would recommend most readily, we conclude that it was neither unreasonable nor improper nor prejudicial to the employer and insurer for the compensation judge to accept Dr. Walsh's expert opinion recommending fusion surgery.[5] 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).

The employer and insurer contend also that the employee's claim was not only fatally vague but also "without any medical support," rendering the contrary opinion of Dr. Call uncontroverted. They argue that Dr. Gesensway was of the opinion "that surgery was not necessary as of the time he examined the Employee," that Dr. Walsh's report and chart notes only

[4] The employer and insurer assert in their brief that, "[i]n [his April 28, 1999] report, Dr. Walsh did not opine that surgery was necessary to cure or relieve the Employee from the effects of the work injury. Rather, he discussed a number of possibilities. . . . . He did not recommend any one of these surgeries." Two days after the report cited, however, on a Work Ability Report clearly dated "4/30/99" and duly admitted as part of the medical record, Dr. Walsh expressly "[r]ecomm[ed] surgery (limited wrist fusion) for symptomatic carpal instability."

[5] Interestingly, the employer and insurer assert in their brief that "[i]t is only on cross-examination of the Employee that it comes out that the Employee is asking for one particular, a four-corner wrist fusion." Although the employee, from his lay perspective, naturally expressed a preference for the procedure that would permit the most flexibility - - i.e., the four-corner fusion - - elsewhere in his testimony he clearly expressed a willingness to undergo whichever of the fusions his providers might ultimately recommend upon consultation.

list "multiple options that may be considered after further investigation and further work up." They contend that "[t]his is not the simple medical causation issue that sometimes compensation judges may consider without expert medical testimony" but "an extremely complicated medical issue"; "[c]ertainly, a lay person, including the compensation judge," they argue, "would have no ability to discern between a four-bone fusion, total fusion, isolated proximal row carpectomy and proximal row carpectomy with capular interposition." They argue that, of the alternative surgeries that he considered, Dr. Walsh "provided no opinion that one or the other is necessary," whereas "Dr. Call addresses these issues carefully and with precision."

These arguments notwithstanding, we conclude that the judge's decision was not medically unfounded. Although he recommended against fusion of the employee's wrist as he saw it and as he observed the employee's symptomology on April 7, 1999, Dr. Call himself indicated in August 1999 that he too "would recommend a wrist fusion" in the event the employee "develops significant radiocarpal arthritis." By this time Dr. Ercolani had already diagnosed chronic arthritis of the wrist. Moreover, although he considered the wrist fusion recommended by Dr. Walsh "technically difficult to achieve given the bipartite nature of the lunate," Dr. Call concedes that it is "among the group of procedures that would be considered reasonable by hand surgeons," and he certainly does not contend that such fusion, although technically difficult, would be technically futile or impossible. Again, as we suggested in our earlier discussion of the specificity of Dr. Walsh's opinion, we do consider Dr. Walsh's recommendation of fusion in his April 30, 1999, Report of Work Ability to be of sufficient specificity to be relied upon by a compensation judge, nor do we find Dr. Call's opinion "uncontroverted" by virtue of its perhaps greater detail.

The employer and insurer also contend, finally, with substantial repetition of their earlier arguments, that the compensation judge's award of payment for wrist fusion was unsupported by substantial evidence, not only because of its apparent reliance on Dr. Walsh's more general expert opinion but also because of certain purported "mistakes" in the judge's findings. The employer and insurer contend, for instance, that the compensation judge apparently assumes erroneously that Dr. Walsh was refraining from recommending one fusion procedure over the other pending his surgical opening of the wrist itself. While we grant that the judge may have inferred such a motive by the doctor and that such a motive is not necessarily born out by the evidence, we conclude that this "mistake" by the judge is not fatal to the judge's conclusion. Regardless of the reasons underlying its arguable lack of specificity, Dr. Walsh's recommendation of fusion must survive or not on the reasonableness of both alternatives and the credibility with which the judge views the opinions of these two physicians and their consultation networks. As we reiterated earlier, 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. Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985). Here there is no evidence that Dr. Walsh's opinion was based on any false premises.

Finally, the employer and insurer have contended that, even if he may have demonstrated the reasonableness and necessity of fusion surgery to cure or relieve his symptoms, the employee has not sufficiently demonstrated that those symptoms, and so the proposed surgery,

are causally related to his work injury. We conclude in this regard, however, that there is a substantial body of evidence in the medical record associating the employee's work with the symptoms here to be cured by surgery. On the date of the work injury itself, Dr. Brunik directly associated the preexisting cyst with "extension tendinitis secondary to over-use" (emphasis added). Subsequently, x-rays pursuant to Dr. Gesensway's examination in February 1998 identified "bony changes involving the carpal area which are consistent with recent or old ligament injuries" (emphasis added). In October of that year Dr. Gesensway expressly found the employee subject to "permanent work related aggravation of his pre-existing underlying congenital right wrist condition characterized by carpal instability secondary to bipartite lunate" (emphasis added), that instability being the subject of the eventually requested fusion. Dr. Gesensway also expressly opined that the employee's work activities were a "substantial and permanent contributing cause of his need for permanent work restrictions," very reasonably an association of the work activities with the surgery compelled by those restrictions. As referenced earlier, Dr. Ercolani in January 1999 diagnosed right wrist arthritis that was both secondary to the employee's bipartite wrist bone condition and aggravated by conditions at work, clearly associating the employee's work with the condition here compelling fusion. Dr. Walsh himself, of course, diagnosed from the start "[r]ight wrist pain, work aggravated," clearly associating the employee's work with those symptoms which he eventually recommended surgery to relieve. Moreover, it would not have been unreasonable for the compensation judge to find somewhat artificial Dr. Call's contrary opinion, that "the surgery is not necessary as a result of any work injury, but rather, if the surgery is carried out it is the result of his congenital anomaly."

Because it was neither clearly erroneous nor unreasonable, we affirm the compensation judge's award of payment for right wrist fusion surgery in this case. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.