ROBERT G. DURAN, Employee/Appellant, v. BONGARDS' CREAMERIES, SELF-INSURED/BERKLEY ADM'RS, Employer, and ST. FRANCIS REGIONAL MED. CTR., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 13, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE; EVIDENCE - EXPERT MEDICAL OPINION. The compensation judge did not err in rejecting expert opinion that the employee sustained a right foot injury as a consequence of his admitted work-related left foot injury, where the expert in question had changed his opinion without explanation and did not explain the mechanism of injury.

Affirmed.

Determined by Wilson, J., Johnson, J., and Rykken, J.
Compensation Judge: Gary P. Mesna

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's finding that the employee's right foot condition was not causally related to his admitted work-related left foot injury. We affirm.

BACKGROUND

On July 3, 1996, the employee sustained a work-related injury to his left foot, while employed by Bongards' Creameries [the employer], when he twisted his left foot and fell while pushing a cart. The self-insured employer subsequently admitted liability for the injury. The employee was eventually diagnosed as having a torn posterior tibial tendon, and on December 5, 1996, Dr. Mark C. Gregerson performed a left posterior tibial tendon reconstruction. Following the surgery, the employee was in a variety of casts for several months. He subsequently had ongoing difficulties with his left foot, which never healed completely.

On June 16, 1997, the employee treated with Dr. Joseph Kandiko for "continued pain in his feet." The doctor's office notes for that date reflect that "[the employee] is quite tender on the right along the plantar fascia . . . . Persistent foot pain and different gait due to his surgery that was Work Comp."

On October 22, 1997, the employee returned to Dr. Gregerson with "new complaints of increasing swelling and pain in the arch of the right foot." Dr. Gregerson noted that

"[t]his has been going on for the last week and has increased with weightbearing. He has had no notable injury." X-rays at that time showed a large calcaneal spur, with no other pathology or degenerative changes noted, and Dr. Gregerson ordered an MRI.

The employee was admitted to St. Francis Regional Medical Center on October 24, 1997, with complaints of a painful right ankle. The employee was noted to have poorly controlled diabetes and was diagnosed with cellulitis of the right foot. He was treated with antibiotics and discharged on October 27, 1997.

An MRI of the employee's right ankle, performed on November 7, 1997, revealed "increased signal and thickening in the distal tibialis posterior tendon . . . ." The radiologist also noted that "[t]his is consistent with tendinitis or a partial tear. The tendon is still continuous and does not demonstrate rupture. The anterior talofibular ligament is not well seen. This is likely due to prior injury."

The employee continued to treat with Dr. Kandiko, who prescribed prednisone, and he was also referred to rheumatologist Dr. Paul Waytz for evaluation. In a letter dated January 5, 1998, Dr. Waytz stated that he could not establish a diagnosis of inflammatory arthritis. Dr. Gregerson maintained contact with Dr. Kandiko, discussing treatment recommendations for the employee. In December of 1997, Dr. Gregerson noted that Dr. Kandiko had reported that the employee had improved with a daily dose of prednisone, and that, for that reason, Dr. Kandiko felt the employee was not a surgical candidate. Dr. Gregerson agreed.

The employee returned to see Dr. Gregerson on January 20, 1998, with increased symptoms of discomfort in his right foot when off his medications. Dr. Gregerson noted that "[t]his patient has continued symptoms suggestive of the possibility of a posterior tibial tendon tear on his opposite site after surgical reconstruction did not improve completely . . . ." He then referred the employee to Dr. Dennis Callahan, also at Orthopedic Consultants, for evaluation and treatment recommendations. It appears that the employee saw Dr. Callahan sometime thereafter and that Dr. Callahan recommended a 3-D brace to immobilize the employee's ankle.[1] When seen again on February 20, 1998, the employee was noted to be improved. Reporting that the employee was returning at his lawyer's suggestion to determine the etiology of his problems, Dr. Callahan opined that Dr. Gregerson would be in a better position to render a causation opinion. Because the employee had responded to immobilization, Dr. Callahan recommended that an orthotic be obtained.

At some point, the employee requested approval from the employer to see a Dr. Hubbard for a second opinion.[2] His request was denied, but the employee was given a list of four doctors, specializing in foot and ankle injuries, to pick from, and he chose to see Dr. Lowell

[1] Based on Dr. Callahan's progress note of February 20, 1998, which implies that he had seen the employee before that date.

[2] Denise Larson, claims examiner, testified that she understood the employee was requesting a second opinion as to his left foot.

Lutter. Dr. Lutter examined both of the employee's feet on February 10, 1998, and opined that he agreed with Dr. Callahan's treatment of the employee.

The employee returned to see Dr. Lutter on November 24, 1998, with a history of his right ankle giving way, and feeling unstable, with pain along the medial side. Dr. Lutter opined that the employee had lateral ligament instability on the right, which he had not noted on his last exam, and recommended surgery to treat the employee's right ankle/foot condition. On January 14, 1999, Dr. Lutter issued a letter report, stating, "[t]he assumption is that at the time of his 7/3/96 injury he sustained an injury to the posterior tibial tendon on the right side."

On March 1, 1999, the employee filed a claim petition, claiming an injury to his right foot on October 22, 1997, and seeking penalties and the approval of the surgery recommended by Dr. Lutter. The employer subsequently attempted to set up an independent medical examination, but the employee objected, contending that Dr. Lutter had already conducted an independent medical examination on the employer's behalf. A compensation judge ultimately ordered that the employer must use Dr. Lutter as its independent medical examiner. That order was appealed to the Workers' Compensation Court of Appeals, and, in a decision filed October 12, 1999, this court dismissed the appeal for lack of subject matter jurisdiction.

On January 20, 2000, in response to a letter from the employee's attorney, Dr. Lutter opined that the employee's July 3, 1996, left foot injury was "a substantial contributing factor to the consequential *Gillette* injury to his right foot culminating in November of 1997." Dr. Lutter went on to explain that "[t]he mechanism of injury of this right foot is related to the fact that the left foot injury produced a mechanical situation in which it was necessary for him to overload the right foot. This was a substantial and contributing factor to the right foot injury."

The claim petition proceeded to hearing on February 23, 2000, at which point the employee was claiming a consequential injury to his right foot occurring on October 22, 1997. In a decision filed on April 27, 2000, the compensation judge found that a preponderance of the evidence did not show that the torn posterior tibial tendon in the employee's right foot was a consequential injury caused by overloading the right foot following the left foot injury. He therefore denied the employee's request for approval of the surgery recommended by Dr. Lutter. 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 (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 employee contends that he "submitted medical reports and provided testimony that clearly proves the causal relationship between the July 3, 1996 work related left foot injury and the claimed October 1997 consequential right foot Gillette injury" and that the compensation judge erred in not awarding his claim. We are not persuaded.

As the employee correctly points out, a compensation judge "is not free to disregard unopposed medical opinions." Olson v. Midwest Printing Co., 347 N.W.2d 43, 46, 36 W.C.D. 623, 627 (Minn. 1984) (citing DeHaan v. Farmers Union Mktg & Processing Ass'n, 302 Minn. 552, 555, 225 N.W.2d 21, 23, 27 W.C.D. 683, 686 (1975)). However, there is a difference between disregarding an unopposed medical opinion and rejecting it on the basis of other evidence. Clark v. Archer Daniels Midland, slip op. (W.C.C.A. Feb. 14, 1994). In addition, a compensation judge is generally not bound by medical opinion when making factual determinations.

Here, the compensation judge amply explained his conclusion that Dr. Lutter's opinion as to causation was not persuasive. Specifically, the judge found that, without further explanation from the doctor, it was difficult to determine how overuse of the right foot could result in a torn tendon. In addition, the judge pointed out that, on January 14, 1999, it was Dr. Lutter's opinion that the injury to the employee's right foot had occurred on July 3, 1996, whereas on January 20, 2000, Dr. Lutter opined that the employee had sustained a Gillette injury to his right foot culminating in November of 1997, which was causally related to the employee's July 1996 left foot injury. Dr. Lutter offered no explanation for his change in opinion.

While the evidence might well have supported a contrary decision, and while we might have reached a different conclusion had we been the trier of fact, our function on appeal is to determine whether the findings "are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239. The compensation judge's decision to reject Dr. Lutter's causation opinion was not unreasonable under the circumstances, and, finding no other basis to reverse, we affirm the judge's findings and order in its entirety.