SHANTIE L. DURGA, Employee/Appellant, v. SUPERAMERICA and PACIFIC EMPLOYERS INS. CO./CIGNA, Employer-Insurer, and SUPERAMERICA, SELF-INSURED/ FRANK GATES SERV. CO., Employer.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 24, 2000

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's denial of temporary partial disability benefits from January 7 through February 3, 1999 on the basis the employee was not restricted from working her normal hours during this period of time.

CAUSATION - TEMPORARY AGGRAVATION. Substantial evidence supports the compensation judge's finding that the employee's February 3, 1999 low back injury was a temporary aggravation of a pre-existing back condition which resolved on or before May 4, 1999.

TEMPORARY PARTIAL DISABILITY - CALCULATION OF BENEFITS. Substantial evidence supports the compensation judge's determination that the employee's wage loss after February 3, 1999 was attributable solely to that injury, and his award of wage loss benefits based on the employee's wage loss on that date.

TEMPORARY PARTIAL DISABILITY - EARNING CAPACITY. Substantial evidence supports the compensation judge's use of an imputed wage to compute the employee's temporary partial disability benefits from and after February 23, 1999.

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's denial of permanent partial disability for a low back injury.

VACATION OF AWARD - NEWLY DISCOVERED EVIDENCE. The newly discovered evidence asserted as a basis for vacation of the Findings and Order is essentially duplicative, and probably would not have affected the outcome of the litigation, and must, therefore, be denied.

Affirmed.

Determined by: Johnson, J., Wheeler, C.J., and Wilson, J.
Compensation Judge: Bradley J. Behr

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's denial of temporary partial disability benefits following her June 12, 1998 knee injury. The employee also appeals the compensation judge's finding that her low back injury on February 2, 1999, was a temporary aggravation of a pre-existing condition and the compensation judge's denial of wage loss and permanent partial disability benefits. We affirm. The employee further petitions to vacate the compensation judge's Findings and Order based on newly discovered evidence. We deny the petition.

BACKGROUND

Shantie L. Durga, the employee, began working for SuperAmerica, the employer, in 1995. The employee operated the cash register and did cleaning and cooking. (T. 20-21.) She was paid $8.00 an hour and earned a weekly wage of $544.82. On June 12, 1998, the employee injured her right knee. The employer and Pacific Employers Insurance Company/CIGNA admitted liability for this personal injury.

The employee saw Dr. Kevin Wall at the Airport Clinic on June 13, 1998.[1] Dr. Wall referred the employee to Dr. Richard Strand who examined the employee on July 9, 1998. Dr. Strand ordered an MRI scan and released the employee to return to work at a sitting job only. The MRI scan on July 23, 1998, showed a complex tear involving the anterior one-half of the lateral meniscus. On September 30, 1998, Dr. Strand performed a near total lateral meniscectomy of the right knee at Fairview Southdale Hospital. He later prescribed physical therapy. On October 29, 1998, Dr. Strand released the employee to return to work eight hours a day at a sitting job only. The doctor noted the employee's response to pain was "a bit excessive." On December 15, 1998, Dr. Strand found the employee had full range of motion and a good gait but observed snapping in the employee's right knee when she walked. The doctor prescribed anti-inflammatory medication and a knee sleeve. The doctor released the employee to return to work with a 15 minute sitting break every hour. (CIGNA Ex. 2.)

Following surgery, the employee returned to work at SuperAmerica. The employee testified, however, she never felt able to return to a 40 hour week because of the pain in her knee. (T. 35-36.) The employee acknowledged the employer allowed her to sit down 15 minutes out of each hour as recommended by Dr. Strand. (T. 38.) The employer and CIGNA paid temporary partial disability benefits to the employee through January 7, 1999, and paid the employee for a two percent permanent partial disability for the right knee injury. (T. 10-11.)

Dr. Peter J. Daly examined the employee on January 20, 1999, at the request of CIGNA. On examination, he found trace effusion in the right knee with stable ligaments and full range of motion. Dr. Daly reviewed the prior x-rays and MRI scan of the right knee. He diagnosed persistent right knee subjective pain without significant objective abnormalities. The doctor recommended further physical therapy once a week for the following six weeks. Dr. Daly released the employee to return to work "full time (8 hours per day) as it becomes available" with a restriction of sit down duties 15 minutes each hour. (CIGNA Ex. 1.)

[1] The medical records of the Airport Clinic are not in evidence.

On February 3, 1999, the employee slipped and fell on ice while working for the employer. The parties stipulated the employee's weekly wage on that date was $273.74. The employer was then self-insured with claims administered by Frank Gates Service Company.

The employee went to the emergency room at Fairview Southdale Hospital on February 3, 1999. She gave a history of falling on ice, landing on her buttock, and complained of low back and right knee pain. Dr. Grimm noted tenderness in the lumbar and sacral areas of the spine with a mild effusion of the right knee. A spinal x-ray showed spondylolisthesis at L5-S1 of an undetermined age. An x-ray of the right knee was normal. Dr. Grimm diagnosed back pain with spondylolisthesis at L5-S1 and a possible internal derangement of the right knee. (Pet. Ex. 5.)

The employee returned to see Dr. Strand on February 8, 1999, complaining of pain in her right leg and low back. The doctor reported the employee was wearing a knee immobilizer and was using crutches. An x-ray of the lumbar spine showed degenerative "spondylo" at L5 on S1. On examination of the employee's knee, Dr. Strand noted no swelling, some "don't touch me tenderness" with good range of motion and muscle strength. Examination of the employee's back also revealed "don't touch me tenderness" at the skin level without spasm or tightness of the lumbar muscles. Dr. Strand's neurological examination was normal and straight leg raising was negative. Dr. Strand recommended the employee remove the knee splint and commence physical therapy for her back and knee. The doctor stated the employee's subjective complaints far outweighed any objective findings. Dr. Strand re-examined the employee on February 15, 1999, at which time she was still walking with crutches and complaining of low back pain with pain radiating into both legs. The doctor felt the employee did not sustain a serious injury and her trouble was pain behavior. The doctor kept the employee off work and ordered continuing physical therapy. On February 22, 1999, Dr. Strand released the employee to return to work four hours a day for one week, six hours a day during the second week and stated he would then re-examine the employee. On March 8, 1999, Dr. Strand noted a classical functional reaction to his examination with "don't touch me tenderness." Dr. Strand found no muscle spasm and concluded the employee was displaying psychophysiologic pain with no serious organic problem. On April 26, 1999, Dr. Strand noted the employee's complaints were "heavily functional." He released the employee to work six hours a day for a week, then eight hours a day subject to restrictions on lifting, carrying, pushing and pulling. An MRI scan of the right knee on May 12, 1999 showed no significant abnormality after the partial meniscectomy. Dr. Strand re-examined the employee's knee on June 2, 1999 and concluded the employee was magnifying her symptoms. The doctor opined the employee was able to work eight hours a day and just needed to change her position often. (Self-Insured Ex. A; CIGNA Ex. 2.)

The employee was off work and totally disabled from February 3 through February 22, 1999. She returned to work for the employer on a part-time basis on February 23 through March 23, 1999. The employee then left the United States to attend her father's funeral. (T. 29.) She returned to work for the employer on a part-time basis from April 22 through June 2, 1999. The employee then left work on June 2, 1999 because of a non-work-related medical condition. (T. 8.)

Dr. Paul Yellin examined the employee on July 8, 1999 at the request of the self-insured employer. On examination, Dr. Yellin found no swelling in the employee's right knee but the employee complained of pain to even light touch around her knee. At times during his examination, Dr. Yellin noted the employee had full and unlimited range of motion but on formal testing of range of motion she was unable to fully straighten her knee or to bend beyond 90 degrees. Range of motion of the employee's back was markedly limited during formal testing but unlimited at other times during the examination. Dr. Yellin found no muscle spasm in the employee's low back although she was markedly tender and pulled the doctor's hand away from even the lightest touch in the lumbar spine. Dr. Yellin diagnosed a lateral meniscus tear caused by the June 12, 1998 injury resulting in a lateral meniscectomy. The doctor found no pathology regarding the employee's left knee. With regard to the February 3, 1999 injury, Dr. Yellin found no significant low back pathology and opined the injury did not aggravate the prior right knee injury. Dr. Yellin stated the employee sustained no permanent injury to her low back or knees as a result of the February 3, 1999 injury. He concluded any temporary injury which occurred on February 3, 1999 had resolved and that the employee had reached maximum medical improvement (MMI). The doctor rated a three percent whole body disability secondary to the right knee meniscectomy. Finally, Dr. Yellin restricted the employee to no repetitive kneeling, squatting or crawling with a 20 pound lifting limit. (Self-Insured Ex. B.)

Dr. Douglas A. Becker examined the employee on September 1, 1999. On examination, he noted the employee walked with a significant limp on the right side. The doctor found two/four effusion in the right knee with pain at the extremes of motion. Examination of the lumbar spine showed a full range of motion with L4 tenderness but without spasm. Straight leg raising in the doctor's neurovascular exam was normal. Dr. Becker diagnosed a lateral meniscus tear of the right knee and a permanent aggravation of pre-existing degenerative disc disease of the lumbar spine. Dr. Becker opined the injuries of June 12, 1998 and February 3, 1999 were significant contributing factors to the onset of right knee pain and low back pain, respectively. Dr. Becker rated a three percent permanent partial disability for the right knee injury and a seven percent permanent partial disability for the lumbar spine injury. (Pet. Ex. 2.)

On September 30, 1999, the employee was examined by Dr. Gary Wyard at the request of CIGNA. On examination, the doctor noted a "touch-me-not type of response" to examination of the right knee and low back. He concluded his motor testing was unreliable because of "Ms. Durga's give away and cogwheel resistance." Dr. Wyard diagnosed low back pain without objective clinical or x-ray findings and post lateral meniscectomy of the right knee. The doctor found nothing to suggest any specific low back injury and no specific objective findings to support the employee's subjective complaints of right knee pain. The doctor stated the employee could work without restrictions. He opined the employee reached MMI from the effects of the February 3, 1999 injury three months after the injury date. Dr. Wyard rated no permanent disability of the low back and rated a three percent permanent disability of the right knee. (Pet. Ex. 3.)

The employee filed a claim petition on March 30, 1999 seeking wage loss, permanent partial disability and medical benefits. The case was heard by a compensation judge at

the Office of Administrative Hearings on March 22, 2000. In a Findings and Order filed April 19, 2000, the compensation judge found the employee failed to prove she sustained a personal injury to her low back on June 12, 1998 or her right knee on February 3, 1999. The judge further found the employee's low back injury sustained on February 3, 1999 was a temporary aggravation of a pre-existing degenerative condition, and that the aggravation had resolved on or before May 4, 1999. The judge found the employee failed to prove she was restricted from working her regular hours from January 7, 1999 through February 3, 1999 and denied temporary partial disability benefits during that period. The judge awarded temporary total disability benefits from February 3 through February 23, 1999 and temporary partial disability benefits from February 23 through March 23, 1999 and from April 22 through May 3, 1999. Finally, the judge awarded an additional one percent permanent partial disability benefit secondary to the right knee injury. The employee appeals the compensation judge's finding that the February 3, 1999 low back injury was a temporary injury and the consequent denial of wage loss and permanent partial disability benefits. The employee further appeals the judge's denial of temporary partial disability benefits from January 7 through February 3, 1999, and the calculation of wage loss benefits after February 3, 1999. The employee further petitions to vacate the compensation judge's Findings and Order contending newly discovered evidence mandates a new hearing.

DECISION

Temporary Partial Disability Benefits Through February 3, 1999

From January 7 through February 3, 1999, the employee worked for the employer on a part-time basis. The compensation judge found the employee failed to prove she was restricted from working her normal hours and found the employee's earnings during this period were not representative of her earning capacity. The compensation judge, accordingly, denied temporary partial disability benefits. The employee argues the employer and insurer failed to introduce evidence that full-time work was available to the employee. Accordingly, the employee asserts the compensation judge's finding is unsupported by substantial evidence.

On June 12, 1998, the date of the employee's knee injury, the employee was paid $8.00 an hour and had a weekly wage of $544.82. Clearly, the employee worked substantial overtime prior to her injury. Effective November 2, 1998, Dr. Strand released the employee to return to work at a sitting job. The doctor prepared a Work Status Authorization Form in which he stated the employee could work eight hours per day, forty hours a week. On December 15, 1998, Dr. Strand prepared a second Work Status Authorization Form in which he restricted the employee to a 15 minute sitting break each hour. Dr. Strand, however, placed no limits or restrictions on the employee's hours of work per day or per week. (CIGNA Ex. 2.) By report dated January 20, 1999, Dr. Daly stated, "I think she could continue working with her restrictions of allowing for sit-down duties 15 minutes each hour. She could work full time (8 hours per day) as it becomes available." (CIGNA Ex. 1.)

The employee has the burden of establishing a diminution in earning capacity that is causally related to the disability. Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 864,

41 W.C.D. 42, 48-49 (Minn. 1988). The compensation judge found the employee failed to meet her burden of proof. The judge concluded that by January 7, 1999, the employee was capable of working the same number of hours she worked prior to her personal injury. By December 15, 1998, Dr. Strand placed no limitations on the number of hours the employee could work. Dr. Daly noted the employee could work full-time (8 hours per day). However, as the compensation judge noted, there is no evidence Dr. Daly was aware the employee worked overtime before her injury. The compensation judge concluded Dr. Daly's opinion was "not expressed as a restriction against any overtime hours." (Memo. p. 7.) This is a reasonable inference to be drawn from the evidence. "Where more than one inference may reasonably be drawn from the evidence, the compensation judge's findings shall be upheld." Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 371 (Minn. 1985). The compensation judge's denial of temporary partial disability benefits from January 7 through February 3, 1999 is supported by substantial evidence and is affirmed.

February 3, 1999 Personal Injury

The compensation judge found the employee's February 3, 1999 low back injury was a temporary aggravation of a pre-existing degenerative condition which resolved on or before May 4, 1999. The employee contends the compensation judge improperly apportioned liability to a pre-existing condition contrary to Larson v. Davidson-Boutell Co., 258 Minn. 64, 102 N.W.2d 712, 21 W.C.D. 205 (Minn. 1960).

An x-ray of the employee's lumbar spine on February 8, 1999, showed low grade anterior subluxation of L5 on S1 probably due to spondylolysis. In his report of February 8, 1999, Dr. Strand concluded the employee had pre-existing disease in her spine with degenerative facet changes and a "spondylo" at L5 on S1. (CIGNA Ex. 2.) Dr. Yellin also opined the employee had degenerative changes in her low back which pre-existed the February 3, 1999 injury. (Self-Insured Ex. B.) Substantial evidence supports the compensation judge's finding that the employee had a pre-existing degenerative condition.

The employee, however, misconstrues the Larson case. In that case, the court held an employer takes the employee with all the employee's pre-existing conditions. If the employment aggravates a pre-existing condition, the disability resulting from such an aggravation is compensable as a personal injury. In this case, the judge found the employee's work with the employer aggravated a pre-existing degenerative condition which resulted in a personal injury on February 3, 1999. Thus, this is not an issue of apportionment to a pre-existing condition as argued by the employee. Rather, the issue is the nature and extent of the February 3, 1999 low back injury.

The employee argues substantial evidence does not support the compensation judge's finding that the February 3, 1999 low back injury resolved by May 4, 1999, and asserts her testimony supports a conclusion that the February 3, 1999 low back injury was a permanent rather than temporary injury. We disagree. Dr. Yellin opined the February 3, 1999 personal injury was a temporary aggravation of her pre-existing degenerative disease which had resolved by July 8, 1999, the date of his examination. (Self-Insured Ex. B.) Dr. Wyard found no basis to conclude the employee sustained a specific low back injury and opined the employee reached MMI

three months from February 3, 1999. Dr. Strand and Dr. Wyard noted the employee demonstrated functional overlay and don't touch me tenderness. The compensation judge noted it was "certainly reasonable to be skeptical of the employee's subjective complaints." (Memo. at p. 8.) "Assessment of witness credibility is the unique function of the factfinder." Tews v. Geo. A. Hormel & Co., 430 N.W.2d 178, 180, 41 W.C.D. 410, 412 (Minn. 1988).

Admittedly, the employee's testimony together with the medical report of Dr. Becker would support a finding that the February 3, 1999 low back injury was permanent rather than temporary. Whether the record might support a different conclusion is not, however, the issue on appeal. 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, 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). As there is evidence that a reasonable mind might accept as adequate to support the compensation judge's finding of a temporary aggravation, it must be affirmed.

Compensation Rate for February 3, 1999 Injury

The compensation judge computed the employee's entitlement to wage loss benefits secondary to the February 3, 1999 injury based on the stipulated weekly wage of $273.74. (Stip. No. 1.) The employee contends that on February 3, 1999, she was working with a residual disability of her right knee secondary to the June 12, 1998 injury. Accordingly, the employee argues, wage loss benefits after February 3, 1999, should have been based on the higher wage on June 12, 1999, rather than the lower weekly wage on February 3, 1999. In support of this argument, the employee cites Kaisershot v. Archer Daniels Midland Co., 23 W.C.D. 706 (Industrial Comm'n 1966). We disagree.

The Kaisershot case provides a method of allocation of liability for wage loss benefits between employers and insurers in cases of multiple injury. The case does not govern determination of the employee's weekly wage or compensation rate on the date of an injury. Had the employee successfully proved entitlement to temporary partial disability benefits on February 3, 1999, the employer and CIGNA may have been liable for temporary partial disability benefits during periods of total disability thereafter. See Kirchner v. County of Anoka, 339 N.W.2d 908, 36 W.C.D. 335 (Minn. 1983). The employee failed to prove entitlement to temporary partial disability benefits after January 7, 1999. The compensation judge declined to apportion to the June 1998 injury any liability for wage loss benefits after February 3, 1999. Rather, the compensation judge concluded the employee's wage loss benefits after February 1999

"are attributed solely to the 2/3/99 injury." (Memo. p. 11.) There is substantial evidence to support this conclusion. Accordingly, the compensation judge properly based the employee's benefits from and after February 3, 1999 on her wage on the date of the second injury. Maddocks v. Ceridian/Computer Devise International, slip op. (W.C.C.A. Aug. 19, 1998); Daniels v. Eveleth Taconite, slip op. (W.C.C.A. June 7, 1991).

Temporary Partial Disability Benefits After February 23, 1999

The compensation judge awarded temporary partial disability benefits from February 23 through March 23, 1999 and from April 22 through June 2, 1999. The judge found, however, during these periods, the employee worked fewer hours than she was released to work by Dr. Strand and found the employee's actual earnings during these periods were not a fair representation of her earning capacity. Accordingly, the compensation judge used an imputed wage to compute the employee's temporary partial disability benefits. That is, the judge awarded temporary partial disability benefits based on the difference between the employee's wage on February 3, 1999 and $8.00 an hour times the number of hours to which Dr. Strand released the employee to work. The employee appeals this decision, again contending the employer failed to introduce evidence that full-time work was available to the employee. We are not persuaded.

On February 22, 1999, Dr. Strand released the employee to work four hours a day. On April 26, Dr. Strand released the employee to work six hours a day for a week and then eight hours a day, subject to restrictions. The employee never testified that the employer was unable to provide her with the number of hours of work to which Dr. Strand released her. Rather, it is implicit in the employee's testimony that she self-limited her hours because of pain resulting from her injuries. Accordingly, the compensation judge concluded the employee's actual earnings after February 23, 1999 did not accurately reflect her earning capacity. This is a reasonable inference to be drawn from the evidence. 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 use of an imputed wage to compute entitlement to temporary partial disability benefits is, accordingly, affirmed.

Permanent Partial Disability

The compensation judge found the employee sustained no permanent partial disability secondary to her February 3, 1999 low back injury. The employee argues this finding must be reversed because the compensation judge erroneously apportioned the employee's permanent disability to a pre-existing condition. Further, the employee contends even if she had a pre-existing condition, the February 1999 injury permanently aggravated that condition. Accordingly, the employee contends the compensation judge should have awarded the seven percent permanent partial disability for grade I spondylolisthesis[2] as rated by Dr. Becker. We are not persuaded.

[2] See Minn. R. 5223.0930, subp. 3.D(1).

The issue in this case is not one of apportionment of permanent partial disability under Minn. Stat. § 176.101, subd. 4a. Rather, the question is whether the February 3, 1999 injury resulted in any permanent disability to the employee's lumbar spine. Dr. Yellin and Dr. Wyard opined the employee sustained no permanent partial disability as a result of her February 3, 1999 injury. The compensation judge could reasonably rely on these opinions. The compensation judge's denial of permanent partial disability is supported by substantial evidence, and is affirmed.

Petition to Vacate

The employee requests this court vacate the Findings and Order of Judge Behr filed April 19, 2000, contending the employee was denied adequate medical care and treatment by the employer and Dr. Richard Strand and contending newly discovered evidence supports the employee's claim of a permanent injury to her low back on February 3, 1999.

On May 3, 2000, the employee underwent an MRI examination of her lumbar spine which showed three level lumbar disc hydration especially at L4-5 and L5-S1, grade I spondylolisthesis at L5-S1 and a small central disc herniation at L4-5. On May 10, 2000, the employee was seen by David R. Atkinson, D.C. On examination, Dr. Atkinson found lumbar muscle tenderness and spasm, limited range of motion, positive straight leg raising bilaterally. The doctor diagnosed degenerative disc disease and spondylolisthesis and commenced a course of chiropractic treatment. This information, the employee asserts, proves the employee has significant low back pathology which was undetected and undiagnosed prior to the March 22, 2000 hearing. The information constitutes newly discovered evidence justifying vacation of the judge's findings and order. We disagree.

Minn. Stat. §§ 176.461 and 176.521, subd. 3, govern this court's authority over petitions to vacate. An employee must establish cause for us to exercise this authority. The sole cause alleged by the employee in this case is newly discovered evidence. For relief to be granted on the grounds of newly discovered evidence, the evidence must satisfy the following requirements:

> (1) the evidence must be relevant and admissible;
> (2) the evidence, although in existence at the time of award, could not have been discovered with the exercise of reasonable and due diligence;
> (3) the evidence is not merely collateral, impeaching, cumulative, or duplicative; and
> (4) the evidence must be such to have had a probable effect upon the outcome of the litigation.

Gruenhagen v. Larson, 310 Minn. 454, 459, 246 N.W.2d 565, 569 (Minn. 1976); Brown v. Bertrand, 254 Minn. 175, 94 N.W.2d 543 (Minn. 1959); Regents of the University of Minnesota v. Medical Inc., 405 N.W.2d 474, 478 (Minn. App. 1987), pet. for rev. denied (Minn. July 15, 1987).

The MRI scan and report of Dr. Atkinson were both generated after the hearing before the compensation judge. Clearly, the evidence was not in existence at the time of the award. The May 3, 2000 MRI scan demonstrated degenerative disc disease and grade I spondylolisthesis at L5-S1. X-rays ordered by Dr. Grimm on February 3, 1999 and by Dr. Strand on February 8, 1999, showed the same or similar conditions. (Pet. Ex. 5; Self-Insured Ex. A; CIGNA Ex. 2.) Dr. Atkinson's diagnosis was consistent with the MRI findings. Nothing in Dr. Atkinson's report is substantially different from Dr. Becker's opinions contained in Petitioner's Exhibit 2. Thus, the new evidence, while relevant and admissible, is essentially duplicative and probably would not have affected the outcome of the litigation. Accordingly, the employee's petition to vacate is denied.