RICHARD C. HEILMAN, Employee, v. HONEYWELL, INC., SELF-INSURED/SEDGWICK CLAIMS MGMT. SERVS., Employer/Appellant, and BLUE CROSS/BLUE SHIELD, ST. CROIX ORTHOPEDIC, TOWN CTR. CHIROPRACTIC, CTR. FOR DIAGNOSTIC IMAGING, and UNUM LIFE INS. CO., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 27, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY. Substantial evidence, including adequately founded medical opinion and the employee's testimony, supports the compensation judge's finding that the employee sustained a Gillette injury causally related to his work activities.

TEMPORARY TOTAL DISABILITY; MAXIMUM MEDICAL IMPROVEMENT. Where the employee was served with notice of maximum medical improvement on July 13, 1998, his entitlement to temporary total disability benefits ceased as of October 11, 1998, and the compensation judge erred by awarding temporary total disability benefits from October 12, 1998, through August 15, 1999.

APPEALS - SCOPE OF REVIEW. Where the employee appealed the award of temporary partial disability benefits but did not brief the issue, it is deemed waived. Minn. R. 9800.0900.

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. Substantial evidence, including expert medical testimony and the employee's testimony, supports the compensation judge's finding that the employee's chiropractic and VAX-D treatment was reasonable and necessary.

Affirmed in part and reversed in part.

Determined by: Rykken, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Carol A. Eckersen

OPINION

MIRIAM P. RYKKEN, Judge

The self-insured employer appeals from the compensation judge's determination that the employee sustained a Gillette-type injury to his low back on March 6, 1998, from the compensation judge's award of temporary total disability benefits between October 12, 1998 and August 15, 1999, and from the award of payment for medical and chiropractic expenses. We affirm as to the finding of a March 6, 1998 injury and affirm the award of medical and chiropractic expenses. We reverse with respect to the award of temporary total disability benefits.

BACKGROUND

In 1978, Richard C. Heilman, the employee, began working in an assembly position for Honeywell, Inc., self-insured employer, at age 33. On January 5, 1996, while working as a custodian, the employee stooped over a hay rack, which is a bin for storing stacks of cardboard, to pull out sheets of cardboard. As he twisted, the employee noted a sharp pain in his low back below his belt, extending into his left hip and left leg. He reported the injury to his foreman and received medical treatment the following day. Dr. Dan Feely diagnosed a low back strain, related to the employee's work activities, and released the employee to return to work within restrictions of no lifting over his shoulders or below his knees and no lifting, carrying or pushing more than five pounds. The employee also consulted John Valentini, D.C., who diagnosed an acute and severe lumbosacral sprain/strain along with acute and moderate radiculitis and subluxation and provided chiropractic care from January 12, 1996 through April 3, 1996. The employee noticed improvement from the chiropractic treatment, and eventually noted only a small ache below his belt line in his low back along with slight leg pain.

The employer, self-insured for workers' compensation liability, admitted primary liability for the employee's injury, and paid a total of 1.4 weeks of temporary total disability benefits between January 10 and April 2, 1996, based upon the employee's weekly wage of $500.00. The employee returned to work in April 1996, and was assigned to clean bathrooms, a different job than he performed pre-injury. By June 1996, the employee was released to work full duty as a janitor with the employer. The employee continued to clean bathrooms until March 1998. This job required repetitive bending, mopping, working on his knees to clean floors, and emptying 55-gallon trash barrels weighing approximately 20 to 50 pounds.

The employee continued to notice worsening pain in his low back, and by approximately January 1998 the employee noticed pain extending from his left hip to his ankle, which the employee associated with his repetitive bending and lifting activities required by his janitorial work. On February 3, 1998, the employee consulted Dr. Valentini, reporting low back and left hip stiffness. On March 6, 1998, the employee awoke with back pain so sharp that he was unable to walk. The employee reported his condition to his supervisor, and consulted Dr. Valentini on March 10. Dr. Valentini removed the employee from work as of March 10, 1998, and provided him with chiropractic treatment. The employee noticed improvement from the chiropractic treatment, which he received two to three times per week, from March 10, 1998 through September 28, 1998. The self-insured employer denied primary liability for the employee's claimed March 6, 1998, injury.

In April 1998, Dr. Valentini referred the employee to Dr. Steven Trobiani for a neurological evaluation; the employee consulted Dr. Trobiani on April 23, 1998, who diagnosed lumbar discogenic pain syndrome with S1 radiculopathy. An MRI scan taken on April 27, 1998, indicated a disc herniation at the L4-5 level, with degeneration or dehydration at three other levels. Dr. Trobiani also referred the employee to Dr. Bruce Bartie for a surgical consultation.

Dr. Bartie examined the employee on May 21 and 28, 1998. Dr. Bartie diagnosed degenerative spondylosis at the L4-5 level with a contained disc herniation and resolving sensory radiculopathy at the L5 level. Dr. Bartie gave the employee an epidural steroid injection, and did not recommend surgery nor any other additional treatment.

In June 1998, Dr. Trobiani prescribed a course of VAX-D, vertebral axial decompression, treatments for the employee. The employee underwent 15 treatments, provided by Dr. Bertsch, and noted relief of his leg pain. The self-insured employer denied payment for the VAX-D treatments. By the fall of 1998, the employee's back and leg symptoms gradually worsened. By report dated October 19, 1998, Dr. Trobiani recommended that the employee remain off work due to his pain, until undergoing another regimen of VAX-D treatments. The employer continued to deny payment for past and future VAX-D treatments. The employee consulted Dr. Trobiani monthly, through June 1999. During this period the employee's findings on examination were essentially unchanged. Dr. Trobiani released the employee to return to work as of August 2, 1999, with restrictions of no repetitive stooping, twisting, crunching, squatting, kneeling, pushing and pulling; no running, jumping or climbing; and no lifting or carrying of weights in excess of twenty pounds.

While the employee remained off work, he received short-term disability benefits from the self-insured employer between October 8, 1998 and April 8, 1999, in the amount of $7,587.56 (Er. Ex. 4), and also long-term disability benefits from UNUM from April 22 through July 22, 1999, in the amount of $4,206.25.

On August 16, 1999, the employee returned to work in light assembly, and attempted to work overtime as he did while working as a custodian for the employer, but felt he did not have the strength to work those extra hours. By August 30, 1999, Dr. Trobiani reviewed a proposed job for the employee, in which he would set up and operate a punch press, but denied his approval for the job until the employee had completed the prescribed VAX-D treatment. The employee continues to work in a light-duty assembly position for the employer, earning a wage less than his March 1998 pre-injury weekly wage of $600.00.

Although work hardening and exercise improved the employee's back symptoms, he still noticed an occasional dull pain in his back and pain in his left hip, along with occasional tingling or "dropsy" sensations in his left leg. The employee last consulted Dr. Trobiani on November 11, 1999, at which time his condition had not changed on examination. Dr. Trobiani continued the employee's prescription pain medication and again recommended VAX-D treatments.

At the request of the self-insured employer, the employee underwent examinations with Dr. Joseph Tambornino on May 26, 1998 and July 20, 1999. In conjunction with his first examination, Dr. Tambornino reviewed only the employee's chiropractic records, but no records from Dr. Trobiani or Dr. Bartie. Following that examination, Dr. Tambornino diagnosed a low back strain with symptoms unsubstantiated by abnormal examination findings, along with minimal findings on MRI scan of questionable clinical significance, and determined that a three-week

course of chiropractic treatment would have been appropriate to treat the employee's minor strain, but that no other treatment was necessary.

In Dr. Tambornino's opinion, the incident when the employee awakened with low back pain in March 1998 did not constitute evidence of an injury at work. In his opinion, the March 1998 onset of symptoms was "merely a minor strain" which had healed within three to six weeks. Dr. Tambornino found that the employee required no limitations on his activities at home or work, and that he needed no further medical care as a result of his work-related injury on January 5, 1996 or his incident in March of 1998. Dr. Tambornino found no objective findings of abnormality, and therefore determined the employee had sustained no permanent partial disability as a result of his 1996 injury or 1998 incident. Dr. Tambornino indicated that the employee had reached maximum medical improvement (MMI) within three weeks of the onset of his minor low back strain symptoms.[1] On July 13, 1998, the employer served the employee with notice of MMI along with Dr. Tambornino's May 26, 1998 medical report.

At the time of the employee's July 20, 1999 examination, Dr. Tambornino had available for review both medical and chiropractic records. Following the employee's July 20, 1999, examination, Dr. Tambornino diagnosed a herniated disc at the L4-5 level which had healed, based on the lack of objective findings. Dr. Tambornino assigned a permanency rating of zero percent and determined that the employee had reached MMI by approximately three months following his January 5, 1996 work-related injury. Dr. Tambornino did not recommend VAX-D treatments, and stated that he considered those to be another method of traction which was unnecessary to cure the employee's low back strain. Dr. Tambornino also stated that the chiropractic treatment provided "was not necessary to obtain healing and relief of the previously diagnosed condition," based on the lack of objective and abnormal findings. In addition, Dr. Tambornino believed that the monthly neurologic visits with Dr. Trobiani were not necessary to cure or relieve the employee's lumbar strain condition, and that a single visit for a neurological evaluation would have been reasonable. Dr. Tambornino recommended against any further medical treatment or any other kind of care.

On March 31, 1998, the employee filed a claim alleging that he sustained work-related injuries on January 5, 1996, and March 6, 1998 and claiming entitlement to ongoing temporary total disability benefits, commencing March 10, 1998, along with payment for chiropractic expenses. The self-insured employer denied liability for the employee's ongoing disability, denied primary liability for the employee's alleged Gillette-type[2] injury on March 6, 1998, and asserted that the employee's 1996 injury was temporary in nature and therefore was not a substantial contributing cause to the employee's disability after March 10, 1998. In October 1998, the parties entered into a partial stipulation for settlement, settling claims for temporary total and temporary partial disability benefits to date, permanent partial disability benefits to the extent of 20 percent of the body as a whole due to the employee's lumbar spine condition and other

[1] It is unclear from Dr. Tambornino's May 26, 1998, report as to whether he was referring to a "minor low back strain" on January 5, 1996 or March 6, 1998.

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

related claims, all settled on a to-date basis. On October 12, 1998, a partial Award on Stipulation was served and filed. The balance of the employee's claims for temporary disability benefits was referred to the Office of Administrative Hearings for trial. By agreement of the parties, the interests of the medical intervenors were to be addressed by a medical request or independent claim petition.

On October 15, 1998, the employee filed a medical request, requesting approval for ten sessions of VAX-D treatments. The self-insured employer denied payment for the requested treatment. Following an administrative conference held on November 18, 1998, a representative of the Commissioner of the Department of Labor and Industry issued a decision and order pursuant to Minn. Stat. § 176.106, denying the employee's claim. The specialist determined that this treatment is a passive treatment modality subject to the provisions of the Minnesota workers' compensation treatment parameters, Minn. R. 5221.6200, subp. 3, and that the medical information did not support departure from the treatment parameters. The employee appealed from this decision, and requested a formal hearing.

The request for formal hearing and the additional claims outlined in employee's claim petition were consolidated for hearing. UNUM Life Insurance Company intervened to seek reimbursement of $4,206.25 for disability benefits paid between October 8, 1998 and April 8, 1999. Blue Cross and Blue Shield of Minnesota intervened for reimbursement of $4,768.27 in medical bills. Four medical and chiropractic providers intervened for reimbursement of medical expenses incurred by the employee.

Hearing was held on October 28, 1999. In Findings and Order served and filed January 31, 2000, the compensation judge found that the employee sustained a temporary low back strain on January 5, 1996 and a Gillette-type injury to his low back on March 6, 1998, both arising out of and in the course and scope of his employment with the self-insured employer. The compensation judge determined that the employee reached maximum medical improvement as of May 26, 1998, and that service of Dr. Tambornino's report was accomplished on July 13, 1998. The compensation judge also determined that the employee was entitled to temporary total disability benefits from October 12, 1998 through August 15, 1999, and temporary partial disability benefits continuing from August 19, 1999. The compensation judge determined that UNUM, the intervenor, was entitled to reimbursement of the long-term disability benefits paid to the employee, and that the self-insured employer was entitled to a credit for indemnity (short-term disability) benefits paid. She also determined that the employee's claimed medical and chiropractic care was reasonable, necessary, and causally related to the employee's work injuries, and accordingly ordered reimbursement to the medical and chiropractic intervenors. The compensation judge also approved ten additional VAX-D treatments. The self-insured employer appeals.

STANDARD OF REVIEW

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).

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Nature and Extent of March 6, 1998 Injury

The compensation judge determined that the employee sustained a Gillette-type injury to his low back on March 6, 1998, which arose out of and in the course and scope of his employment. The self-insured employer appeals this finding, arguing that there was no foundation for a Gillette opinion and that the compensation judge did not apply the appropriate analysis to determine whether the employee sustained a Gillette-type of injury.

In a written employee statement, completed April 8, 1998, as part of his application for illness and accident benefits under the employer's weekly indemnity benefit plan, the employee wrote that:

> Due to bending over toilets cleaning them back [sic] weakened more over the years and just gave out. I have never had full strength or ability in my lower back since 1-5-96 and have had to wear a back brace from time to time since then.

(Er. Ex. 4.)

At hearing, the employee testified that the repetitive bending and twisting in his job of cleaning bathrooms and emptying trash caused a gradual onset of low back and left leg pain. He testified about his increasing difficulty with his job duties until February and March 1998, and that his left leg symptoms began approximately three months before his injury on March 6, 1998. (T. 184.)

The self-insured employer argues that the history presented by the employee at hearing is inconsistent with the histories provided by the employee prior to the claimed injury in

March 1998. The self-insured employer also argues that Dr. Valentini determined that the employee's Gillette injury occurred between March 6 and March 10 of 1998, and that Dr. Valentini testified that he did not know what the employee had been doing during that time period, at or away from work, and that at some unknown point in time the employee advised his supervisor that his back pain was aggravated by his work duties.

Compensation is allowed for injuries that occur as a result of repetitive minute trauma caused by the performance of job duties. As held by the Minnesota Supreme Court in Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994), an employee must prove a "causal connection between [the] ordinary work and ensuing disability," and evidence of a specific work activity causing specific symptoms leading to a disability "may be helpful as a practical matter," but a determination of a Gillette injury "primarily depends on medical evidence." Steffen, 517 N.W.2d at 581.

The compensation judge relied upon the opinion of Dr. John Valentini, the chiropractor with whom the employee treated in 1996 and again in 1998. She also relied upon the opinion of Dr. Trobiani, the neurologist with whom the employee first treated in 1998 at the referral of Dr. Valentini. A review of Dr. Valentini's and Dr. Trobiani's records indicates that they each obtained a history from the employee, consistent with that testified to at trial, that the employee's symptoms had gradually worsened since his 1996 injury and had worsened by March 6, 1998 to the point that he was unable to continue working.

By contrast, Dr. Tambornino, who examined the employee on two occasions in 1998 and 1999, determined that the employee sustained no work-related injury in March of 1998, and that the March 1998 onset of symptoms was "merely a minor strain" which would heal within three to six weeks.

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. See Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985). In this case, the judge's decision is sufficiently supported by the employee's testimony concerning his initial symptoms in 1996, the worsening of his symptoms in early 1998, and a culmination of his symptoms by March 6, 1998, and is also supported by Dr. Valentini's chiropractic opinion and Dr. Trobiani's medical opinion. 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.

Temporary Total Disability Benefits

The compensation judge also found that the employee reached maximum medical improvement on May 26, 1998, based on Dr. Tambornino's opinion, and that the employee was served with notice of MMI on July 13, 1998. Ninety days after an employee has reached MMI, and a written medical report indicating that the employee has reached MMI is served on the employee, the employee's entitlement to temporary total disability compensation shall cease. Minn. Stat. § 176.101, subd. 1(j) (1995). In this case, 90 days post-service of MMI occurred on

October 11, 1998. However, the compensation judge awarded the employee's claim for temporary total disability benefits from October 12, 1998 through August 15, 1999, a period of time when the employee contends he was off work on the advice of Drs. Valentini and Trobiani, but remained in contact with the return-to-work coordinator for the self-insured employer.

The self-insured employer appealed from the compensation judge's Conclusion of Law No. 3, and briefed the specific portions which addressed entitlement to temporary total and temporary partial disability benefits and the causal relationship between the employee's reduction in earning capacity and his 1998 injury. The self-insured employer did not brief the section of that Conclusion concerning the date on which the employee reached MMI, nor did the employee appeal from the compensation judge's conclusion that the employee had reached MMI. The employee addressed the MMI issue in his responsive brief on appeal, but the issue of whether the employee reached MMI as of May 26, 1998 is not properly before this court, since it was not addressed in the employer's appellate brief, nor was it appealed by the employee. We therefore are unable to address that issue, pursuant to Minn. R. 9800.0900, subps. 1 and 3.

In spite of her finding that the employee reached and was served with notice of MMI on July 13, 1998, the compensation judge awarded payment of temporary total disability benefits from October 12, 1998 through August 15, 1999, a period of time after the expiration of the 90-day post-MMI period. As the employee's entitlement to temporary total disability benefits ceased as of October 11, 1998, the award of temporary total disability was clearly erroneous. See Northern States Power Co., 229 N.W.2d at 524. We therefore reverse the portion of Conclusion of Law No. 3, which indicates that the employee is entitled to temporary total disability benefits from October 12, 1998 through August 15, 1999, and also reverse Orders No. 1 and 5, which order payment of temporary total disability benefits to the employee and reimbursement or credit to the employer and UNUM for any indemnity and disability benefits paid between October 12, 1998 through August 15, 1999.

Temporary Partial Disability Benefits

The compensation judge concluded that the employee had physical work restrictions as a result of his March 6, 1998 injury, that he returned to work with the self-insured employer in a modified job, and that his reduction in earnings is causally related to his 1998 injury. As a result, the compensation judge concluded that the employee is entitled to temporary partial disability benefits from August 19, 1999, the date when he returned to work for the self-insured employer, and continuing. (Conclusion of Law No. 3.) The self-insured employer appealed from the award of temporary partial disability benefits. However, the employer did not brief this issue on appeal. Instead, the employer appealed the overriding issue of whether the employee sustained a work-related injury in 1998. Issues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by this court. Minn. R. 9800.0900. Therefore, we need not address the issue of entitlement to temporary partial disability benefits commencing August 19, 1999.

Chiropractic Treatment and VAX-D Treatment

In her findings of fact, the compensation judge extensively outlined the medical, chiropractic and VAX-D treatments the employee underwent following his January 5, 1996 and March 6, 1998 work-related injuries. She concluded that the employee is entitled to payment of the claimed medical and chiropractic expenses, as the care was causally related to the work injuries, and was reasonable and necessary. The compensation judge also concluded that the employee is entitled to approval for ten additional VAX-D treatments, and that the medical intervenors are entitled to reimbursement.

The employee received chiropractic care from Dr. Valentini following his March 6, 1998 injury. The employee testified that the chiropractic treatment provided him with relief from his low back and left leg symptoms. (T. 205) The self-insured employer contends that the chiropractic care rendered by Dr. Valentini was not reasonable or necessary and exceeds the treatment parameters.[3] The employee argues that the care meets the required standards.

In her memorandum, the compensation judge cited the factors set forth in Horst v. Perkins Restaurant, 45 W.C.D. 9 (W.C.C.A. 1991), to evaluate the reasonableness and necessity of chiropractic treatment, and stated that those factors provide the appropriate standard to apply. Those factors are listed below:

(1) The employee's opinion as to the relief obtained in terms of extent, frequency and duration of treatment.
(2) The possibility of other conditions not discovered by the chiropractor causing the employee's problem.
(3) The setting up of a weekly schedule with no reduction to an as needed status.
(4) The period of relief from pain, in particular whether persistent pain returns.
(5) The use of alternative medical providers in the event of continuing pain.
(6) The employee's overall activities and the extent of the employee's ability to continue to work.
(7) The recommendation of long term chiropractic care into the future which results in a maintenance rather than injury treatment.
(8) The psychological dependency of the employee on chiropractic care.

Horst, 45 W.C.D. at 11.

The compensation judge also cited the following factors:

[3] The self-insured employer did not specifically address the medical treatment parameters in his brief and we therefore do not address the applicability of the treatment parameters on appeal.

(1) Evidence of a reasonable treatment plan;
(2) Documentation of the details of treatment;
(3) Degree of duration of relief resulting from the treatment;
(4) Whether the frequency of treatment was warranted;
(5) The relationship of the treatment to the goal of returning the employee to suitable employment;
(6) Potential aggravation of underlying conditions by additional chiropractic treatment;
(7) Duration of treatment; and
(8) The cost of treatment in light of relief provided.

Field-Seifert vs. Goodhue Co., slip op. (W.C.C.A. Mar. 5, 1990).

In her memorandum the compensation judge applies these factors to the employee's chiropractic treatment, noting that Dr. Valentini's daily treatment notes and records are fairly detailed, that there is evidence of a treatment plan, and that referrals were made by Dr. Valentini to other providers for alternative evaluation or care. The compensation judge also refers to the employee's testimony that he obtained relief from the treatment and to Dr. Valentini's testimony that he worked to decrease the frequency of treatments over the course of his care.

The employer and insurer argue that the employee's testimony does not support the finding that the chiropractic treatment was reasonable and necessary. The employer argues that the chiropractor detected spasm, leg pain and a disarticulation of the lumbar spine throughout the course of treatment and also by the end of the treatment regimen. The employer also cites the employee's description of his overall activities as not varying during the course of chiropractic treatment, since the employee claims he was always limited to a fairly severe degree. The employer also argues that the chiropractor did not follow the treatment plan as originally developed, and that when treatment was ineffective, the chiropractor did not stop or reduce treatment, change modalities, or develop alternatives to chiropractic care. Finally, the insurer argues that the chiropractic care was a costly and ineffective treatment arising from "a deal between the employee and chiropractor" whereby the latter would not charge the employee if the chiropractor could not obtain insurance reimbursement.

While it may be true that the chiropractic treatment notes themselves do not particularly support the conclusion that the disputed treatment resulted in any substantial objective improvement in the employee's condition, whether treatment is reasonable and necessary under case law standards is a question of fact. The employee's testimony and other factors cited and reviewed by the compensation judge adequately support the compensation judge's determination that the chiropractic treatments were reasonable and necessary.

The compensation judge also awarded payment for VAX-D treatments the employee received between June 16 and July 6, 1998, and approved payment for an additional ten VAX-D treatments in the future. The employer appeals, arguing that the recommendation by

Dr. Valentini for VAX-D treatments was made without an apparent physical examination and was based solely upon the employee's subjective complaints.

The employer also argues that discrepancies existed in the testimony presented by the chiropractor who provided the VAX-D treatments, Dr. Jay Bertsch, in that he failed to describe why the employee was a suitable candidate and the criteria upon which his assessment for the employee's need for VAX-D treatment was based. The employer cites to the findings on examination between June and July 1998, which were no different and in many ways worse at the end of the VAX-D treatment regimen. In contrast to the employer's arguments, Dr. Bertsch testified that the employee's low back and left leg symptoms had resolved by the end of his initial VAX-D treatments, and that the employee was able to complete the treatment sooner than is typical. (T. 131-134.) Dr. Bertsch defined VAX-D as treatments which utilize "a mechanized table . . . for the treatment of lumbar discogenic pain syndromes." Dr. Bertsch described the mechanism of the treatments, and testified that he did not "treat patients with lumbar discogenic pain syndromes that hadn't tried previous care. So, in other words, it's the stubborn unresponsive lumbar disc problems that we would treat." (T. 112. 115).

The employer contests the employee's and the chiropractor's claim of complete resolution of back pain when, at the same time, the chiropractor allegedly found "moderate spasm" in the employee's lumbar spine. The employee testified that he obtained significant relief from these treatments, that by the end of his three-week course of treatment in 1998 his leg symptoms were gone, that he could bend and do other activities he had been unable to do since his injury, and that he "just felt like a new man." (T. 192.) It is true that by the time of the hearing on October 28, 1999, the employee testified that his back is sore at the end of a work day, that he still notices a dull pain in his lower back and occasionally in his left hip, and that he still notices some tingling and "give-way" symptoms in his left leg. (T. 203-204.) However, the employee also testified that his work hardening through the employer, and the exercises he performs to build up his back muscles, are improving his current symptoms. (T. 203.) The employee also testified that his back pain "is not as bad as it was." (T. 203.)

The employer argues that all these discrepancies point to ineffective results from the VAX-D treatments, and appeals the determination that such treatment was reasonable and necessary.

As medical support for its assertions, the employer relies on the opinions of Dr. Tambornino, who is of the opinion that the VAX-D treatment is "merely another method of lumbar traction" and was not necessary to obtain healing and relief of the employee's diagnosed condition. (Resp. Ex. 2.) The employer also asserts that the compensation judge's reliance on journal articles submitted by Dr. Bertsch was "inappropriate," and that she erred in considering those to be evidence of the efficacy of VAX-D treatments.

Again, whether treatment is reasonable and necessary under case law standards is a question of fact, and must be affirmed if substantial evidence of record supports the compensation judge's decision. The compensation judge relied on the employee's testimony that the VAX-D

treatments significantly reduced his low back pain and resolved his left leg pain, more relief than he obtained through other modalities. The compensation judge stated that the cost of VAX-D is significantly greater but justified by the results in this case, and that it was a specific treatment plan for care during a limited period of time. The compensation judge found that the employee showed by a preponderance of the evidence that the VAX-D treatments were reasonable, necessary, and causally related to his work injury, and therefore awarded payments for past and future VAX-D treatments. The medical and chiropractic records in evidence adequately support the compensation judge's finding, and we affirm.

The compensation judge also awarded payment for expenses incurred by the employee from Dr. Bartie, Center for Diagnostic Imaging, and Northstar Neurological Clinic, along with medical expenses paid by the intervenor, Blue Cross/Blue Shield, to various medical and chiropractic providers. For the same reasons articulated above, we affirm the compensation judge's award of those additional medical and chiropractic expenses.