ROBERT B. JOHNSON, Employee, v. OLD DUTCH FOODS and CNA INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 14, 2000

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - SURGERY; APPEALS - STANDARD OF REVIEW. Where it was supported by experienced expert medical opinion, the compensation judge's conclusion that proposed fusion surgery was reasonable and necessary treatment for the employee's low back work injury was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that the employee had not appeared to benefit importantly from four previous surgical procedures.

Affirmed.

Determined by Pederson, J., Johnson, J. and Rykken, J.
Compensation Judge: Jeanne E. Knight

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's conclusion that proposed low back surgery is reasonable and necessary treatment for the employee's work injury. We affirm.

BACKGROUND

On March 2, 1990, Robert B. Johnson sustained a severe herniation of a lumbar disc in the course of his employment with Old Dutch Foods. Mr. Johnson [the employee] was twenty-five years old at the time and was earning a weekly wage of $339.32. Old Dutch Foods [the employer] and its insurer admitted liability for the injury and commenced payment of workers' compensation benefits. The employee received treatment for his injury initially from Dr. Charles Cooley, who performed a laminectomy and discectomy at L5-S1 on April 16, 1990. About a year later, on April 19, 1991, the employee returned to Dr. Cooley with "chronic pain secondary to nerve damage secondary to the severe herniated disc," and Dr. Cooley recommended that the employee change jobs to one in which he would not have to bend or lift and would be able "to get up and about" regularly. Dr. Cooley opined on that date that the employee had reached maximum medical improvement [MMI], and about five months later, on September 27, 1991, he concluded that the employee would not benefit from further diagnostic testing.

In March of 1992, the employee began treating with orthopedic surgeon Dr. James Ogilvie. Dr. Ogilvie ordered an MRI scan, which was conducted on March 21, 1992. Noting on April 16, 1992, that the scan had showed "marked degeneration and bulging of the [L]5-[S]1 disc, with a considerable amount of peridural fibrosis," Dr. Ogilvie recommended work modification, failing which "then I would offer him a 5-1 fusion." He indicated that, with such surgery, "the nerve could be explored and hopefully [de]compressed but his fusion would be more predictable in treatment of his back pain than it would be for his leg pain." On May 29, 1992, the employee was examined for the employer and insurer by Dr. Mark Engasser. Dr. Engasser acknowledged that there was "a relative indication for surgery" but noted that "[f]usion surgery would help his back pain to some degree but probably would not help his left leg symptoms considering the amount of fibrosis present." On about August 18, 1992, the employee underwent a posterior spinal fusion and hemilaminectomy with decompression on the left at L5-S1, as proposed by Dr. Ogilvie.

The employee's symptoms subsided in the year following his surgery, leaving him with only occasional back pain although still some leg pain. By November 4, 1993, he was working again from five to seven hours a day at a job which required him to bend and twist, but he was experiencing a concomitant return of low back pain with such work, although his pain would subside again with rest. By an MMI Physician's Report dated December 10, 1993, Dr. Ogilvie indicated that the employee's final diagnosis was L4-5 (sic) disc degeneration surgically treated by fusion, that the employee had reached MMI with regard to that condition on January 15, 1993, and that no further treatment of the employee's low back was advised. On May 27, 1994, the employer and insurer filed a Notice of Intention to Discontinue Workers' Compensation Benefits [NOID], on which they indicated that the employee had been served notice of MMI on December 20, 1993, and that benefits had been discontinued ninety days thereafter. The NOID indicated that the employee had by that time been paid a total of $56,644.34 in medical expenses and a total of $52,323.37 in other compensation, including economic recovery compensation for a 17.5% permanent partial disability of the whole body.

Although his back pain had subsided following his August 1992 surgery, the employee continued to have L5-S1 distribution leg pain, and in September of 1994 he underwent a CT scan. On the basis of that scan, Dr. Ogilvie concluded on February 9, 1995, that proper treatment required surgical removal of the hardware installed at the employee's previous surgery to permit exploration of the S-1 nerve root. On March 6, 1995, the employee filed a Medical Request seeking payment for such surgery, and on August 22, 1995, the surgery was performed, evidently including a left L5-S1 foraminotomy. Four months later, on December 14, 1995, noting that the employee's symptoms were basically still the same as they had been prior to his surgery, Dr. Ogilvie indicated that he had "no other surgical option for [the employee] and would recommend that he concentrate on activity modifications rather than additional surgical procedures as a method of controlling his pain."

On January 10, 1996, the employee underwent another examination by Dr. Engasser, who concluded that the employee was at MMI from his surgeries and from his work injury. Dr. Engasser concluded also that the employee was currently able to work four hours a day, provided he could change positions frequently and did not sit for more than an hour at a time,

did no more than occasional bending, stooping, squatting, and lifting, lifted no more than twenty-five pounds at a time, and did no kneeling or crawling. Dr. Engasser recommended that the employee work that four hours a day for a month, then progress to six hours a day for the following two weeks, and then go to full-time work. He indicated that the employee's restrictions should be considered permanent and that in his opinion the employee did not require any additional medical care for his back.

Later that year, on November 21, 1996, Dr. Ogilvie noted that the employee had been having increasing radicular symptoms of undetermined etiology,[1] "[p]ossible arachnoiditis." To rule out the latter diagnosis, Dr. Ogilvie ordered a myelogram and CT scan, which were conducted on November 26, 1996. The tests were read to reveal no stenosis and little change since the employee's MRI of March 21, 1992. On January 27, 1997, the employee also underwent another lumbar MRI scan, which revealed in part a "[p]robably sequestered disk fragment within the anterior aspect of the left L5-S1 neuroforamen" but otherwise little change since the 1992 MRI. On March 6, 1997, Dr. Ogilvie recommended further surgical exploration of the L5 nerve root, in order to "place the nerve in a non-compressed environment to give it the maximum likelihood for healing." On April 15, 1997, the recommended surgery was performed, along with decompression of the left S1 nerve. On August 14, 1997, four months later, the employee still had "continued chronic left sciatica," and Dr. Ogilvie concluded that the employee's symptoms were "not amenable to continued surgical treatment."

On March 5, 1998, the employee returned to see Dr. Ogilvie, complaining of increased back and leg pain so severe that he had become incontinent. Dr. Ogilvie referred the employee to neurologist Dr. Canstantino Iadecola, who examined the employee on April 7, 1998, and ordered thoracic and lumbosacral MRI scans and an EMG. On May 5, 1998, the employee was again examined for the employer and insurer by Dr. Engasser. Dr. Engasser again concluded that the employee had reached MMI from the effects of his work injury and surgeries and that his condition was not amenable to additional surgery. Dr. Engasser concluded also that it was important for the employee to return to the work force, and he saw no reason why the employee could not do so within restrictions. The MRIs and EMG ordered by Dr. Iadecola were conducted on May 11, 1998, the MRIs revealing no thoracic abnormalities and no lumbosacral changes since the January 1997 scan and the EMG proving normal. On June 23, 1998, after reviewing those results, Dr. Iadecola concluded that the best course of action for the employee "would be to continue with muscle relaxants and analgesics" and to pursue urological treatment.

On October 22 and 23, 1998, the employee underwent a functional capacities evaluation [FCE] earlier awarded pursuant to a May 7, 1998, Medical Request. Results of the study were interpreted to indicate that the employee was capable of working eight hours a day in

[1] The previous August, the employee had undergone a chronic pain evaluation by Dr. John Bowar. Noting that the employee had apparently reached "maximum surgical treatment options," Dr. Bower had indicated that a "pain program may be a choice of developing a tolerance and mental hardening along with some of the associated reconditioning that a work hardening approach would not do" but that he "could not guarantee that it would allow [the employee] to return to work."

a physically light duty job that would allow for frequent changes of position, although he was not expected to return to a full eight-hour work day without a graded work-hardening program beginning with four hours. The assessment also indicated that the employee might "also benefit from a structured exercise and activity program, though his symptoms seem to be controlling his functional performance."

On December 9, 1998, with his complaints continuing, the employee underwent a discogram at the request of Dr. Ogilvie. In treatment notes dated January 28, 1999, Dr. Ogilvie indicated that the discogram had been "very faithful in reproducing [the employee's] back and leg symptoms" and, while negative at L4-5, was "markedly positive at [L]5-[S]1 under his previous fusion." On those findings, Dr. Ogilvie concluded that "an anterior threaded bone dowel would be a reasonable way [of treating the employee's pain] although even that may not completely relieve all of his back and leg symptoms." On February 26, 1999, the employee filed an Amended Medical Request, asserting entitlement to payment for the anterior fusion surgery proposed by Dr. Ogilvie. The employer and insurer refused, and on March 23, 1999, the employee was examined again by Dr. Engasser. In reports on that date and on April 27, 1999, Dr. Engasser indicated that it was clear to him that the employee was "not a candidate for a fusion after having undergone four surgeries" and would not obtain any substantial improvement in his condition or significant pain relief by means of the fusion recommended by Dr. Ogilvie.

On July 30, 1999, the employee's Medical Request for the additional surgery came on for hearing. Issues at hearing included whether the anterior interbody fusion at L5-S1 proposed by Dr. Ogilvie was reasonable and necessary. The employee testified at hearing that he currently has low back pain "all day every day," which radiates all the way down into his left leg to his toes and sometimes also across into his right buttock. He testified that Dr. Ogilvie had given the surgery a seventy to seventy-five percent chance of eliminating most of his pain. He indicated that he wanted to undergo the surgery because "[t]he pain just gets to be so much every day - - every day" and "'[m]edication is doing things to me" and "there just doesn't seem to be anything else they can do." He testified that he was willing to take the chance on the surgery even though there was a possibility that it won't help him at all, because it provides at least an opportunity "[t]o improve the quality of my life" with regard to work and to activities with his friends and with his twelve-year-old son, for whom he has parental custody as a divorced single parent. By Findings and Order filed August 30, 1999, the compensation judge concluded in part that the surgery proposed by Dr. Ogilvie was reasonable and necessary treatment for the employee's work injury, although she did recommend in her memorandum "that the employee again discuss with Dr. Ogilvie his chances of success or failure, to make sure that he fully understands them." 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

The compensation judge concluded that the surgery here at issue was reasonable and necessary treatment for curing or relieving the effects of the employee's work injury. The employer and insurer contend in their brief that, "[w]hile all parties involved would hope for some improvement in the employee's symptoms with yet another surgery, the Employee's own testimony as to the lack of any improvement in his symptoms following four prior surgeries belies any reasonable expectation for improvement following a fifth surgery." We conclude that the judge's decision was not unreasonable, and so we affirm.

In her brief memorandum, the compensation judge noted conspicuously, "The employee is young." Yet, as the judge indicated and detailed in her findings,[2] because of his pain the employee has felt unable to work more than four hours a day at his very accommodating sedentary job and has experienced great difficulty performing the daily home and recreational activities that would normally be incumbent on him as the single parent of an adolescent child. The judge acknowledged expressly that Dr. Ogilvie had earlier opined that there were no surgical options remaining for the employee, but just as expressly she noted that the doctor "has since changed his mind, based on the positive discogram at L5-S1." Just as expressly, and with support in the record, the judge found that, although the "employee understands there is no guarantee that the proposed surgery will help him," he "wants the surgery if there is a chance it might help him" to "work more, and be able to enjoy his life more." Given this factual context and the supporting expert opinion of Dr. Ogilvie, it was not unreasonable for the compensation judge to conclude that the proposed surgery is reasonable and necessary treatment for the employee's work injury.

There is certainly ample and substantial evidence to support a conclusion contrary to that reached by the compensation judge, and such a conclusion would also have been affirmable. On factual matters such as this one, however, although we are not to look only at the evidence that supports the compensation judge's findings, see Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239, it is the task of this court not to assess the substantiality of evidence that would have supported a contrary decision but to assess the substantiality of evidence supporting the decision of the judge. As we have indicated above in our standard of review, supportive evidence is substantial if it is, in

[2] The employer and insurer have appealed from all of the judge's material findings, but there is reasonable basis for them in the record.

light of the record as a whole, "evidence that a reasonable mind might accept as adequate," granting "due weight to the opportunity of the Compensation Judge to evaluate the credibility of witnesses appearing before the judge." Id., 358 N.W.2d at 59-60, 37 W.C.D. at 239-40. Moreover, as we have also indicated above, "where the 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." Id., 358 N.W.2d at 60, 37 W.C.D. at 240. "The point is not whether [the appellate court] might have viewed the evidence differently, but whether the findings of the compensation judge are supported by evidence that a reasonable mind might accept as adequate." Redgate v. Sroga's Standard Service, 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988).

In this case the decision of the compensation judge is supported by the studied expert opinion of Dr. Ogilvie, a certified surgeon long familiar with the employee's condition and certainly very practiced in the procedures here proposed. 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 facts premising Dr. Ogilvie's opinion are neither evidently false nor importantly different from those premising the opinion of Dr. Engasser, on which the employer and insurer medically rely. Because it is supported by experienced expert medical opinion and is not otherwise unreasonable, we affirm the compensation judge's conclusion that the surgery here at issue is reasonable and necessary treatment for the employee's low back work injury. See Nord, 360 N.W.2d at 342-43, 37 W.C.D. at 372-73; Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.