BRUCE E. JOHNSON, Employee, v. A & B WELDING AND CONSTR., INC. and ILL. NAT'L INS. CO./AIG CLAIM SERVS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 21, 2000

No. [REDACTED SSN]

HEADNOTES

EVIDENCE - EXPERT MEDICAL TESTIMONY. The compensation judge could reasonably rely upon the expert medical opinion of a board certified orthopedist regarding causation of a thumb condition even though the doctor did not specialize in hand conditions.

INTERVENORS. A third party payer petitioned for reimbursement of medical expenses during pendency of appeal. Intervention status was granted as the other parties were not materially prejudiced by the timing of the petition, but the matter was remanded to compensation judge for determination of amount of reimbursement due to intervenor.

Affirmed and remanded.

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

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal from the compensation judge's finding that the employee sustained a Gillette-type[1] injury to his left thumb as a result of his work activity at the employer, and the corresponding award of temporary total, temporary partial and permanent partial disability benefits, medical expenses and rehabilitation consultation. We affirm.

BACKGROUND

Bruce E. Johnson, employee, was employed as a boilermaker for A & B Welding and Construction, Inc., employer, from November 25, 1997, to October 18, 1998, earning an average weekly wage of $900.00. On the employee's claimed injury date, August 28, 1998,[2] the

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

[2] On the employee's claim petition, the employee listed an injury date of August 28, 1998, as that is the date the employee first sought medical treatment for his left thumb with Dr. Richard L. Paulson. At hearing the employee listed an alternative injury date of October 18, 1998, as that is the date on which the employee notified the employer of his left thumb symptoms and his claimed work-related injury, and is the date when employer submitted an accident report to its

employer was insured for workers' compensation liability in the state of Minnesota by Illinois National Insurance Company/AIG Claim Services, insurer.

The employee is a licensed boilermaker, having completed a four-year apprenticeship program and course work in that field. He has worked as a boilermaker since 1993; he held various jobs prior to becoming a boilermaker, including mechanic, farmer, ranch hand, carpenter, stage hand, salesman, cook, construction and general laborer, and laborer in oil fields. As a boilermaker, the employee performed various jobs, including building new boilers, repairing boilers, maintenance work, metallurgy and welding. The employee also performed hammering, grinding and filing, and worked with various hand tools. The employee frequently lifted over 100 pounds and used his hands constantly. He is right hand dominant, but used his left hand for a considerable amount of time for most activities. Approximately 60 to 70% of the time, he used his hands to grasp tools and other objects.

The employee first noticed numbness in his left thumb in the spring of 1997, when employed by Vic's Welding, while operating a pneumatic wrench to install channel iron onto I-beams. On July 15, 1997, the employee consulted with Dr. Carol Krause, with whom he had previously treated for a shoulder injury. He saw Dr. Krause on that date, for follow-up examinations for his shoulder, back and knee pain. The employee reported to Dr. Krause that he had noticed left thumb symptoms for the past three or four months. Dr. Krause's chart note on that date states that "[h]e is not aware of any injury. He is not really sure that it is related to work. He has some numbness in the thumb." (Pet. Ex. C.) Dr. Krause provided the employee with exercises to aid the flexibility in his fingers and hands, referred the employee for instruction in an exercise program, and also discussed with the employee the possibility that he may need a nerve conduction study to rule out a radial nerve injury or carpal tunnel if his numbness did not subside.

The employee testified that he has regularly played guitar for the past thirty years, since age 16. After experiencing his initial left thumb symptoms in the spring of 1997, he continued to play guitar on a reduced basis, since his pain and numbness increased while playing guitar.

The employee was laid off from his job with Vic's Welding and thereafter worked as a boilermaker for three other employers before starting work with A & B Welding and Construction in November 1997. In 1997, the employee's left hand symptoms continued and fluctuated, based upon the type of work he performed. While working for A & B Welding and Construction, the employee's left thumb pain became more severe and his left thumb strength diminished.

On January 15, 1998, the employee sought a rheumatology consultation with Dr. P. M. Cosgrave. He reported that his thumbs had bothered him for the last six months, steadily worsening. Dr. Cosgrave ruled out any signs of inflammatory or degenerative arthropathy and

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insurance agent. (T. 104, 111, 117.) The compensation judge made no specific finding determining the exact date of injury.

recommended anti-inflammatory medication. Dr. Cosgrave also advised that the employee would be a good candidate for surgery, if the anti-inflammatory medication was ineffective.

On August 28, 1998, the employee consulted with Dr. Richard L. Paulson, reporting substantial bilateral thumb pain, left greater than the right. Dr. Paulson diagnosed a left "gamekeeper thumb, subacute to chronic resulting in associated MP [metacarpal phalangeal] joint subluxation." By September 8, 1998, Dr. Paulson advised that he would attempt to repair the employee's ulnar collateral ligament in the future. The employee discontinued working on October 18, 1998; he testified that he "couldn't physically do the work anymore." (T. 58.) Dr. Paulson performed surgery on December 30, 1998, in the nature of a fixation of the left first metacarpal phalangeal (MCP) joint. By March 18, 1999, Dr. Paulson released the employee to return to work as of April 15, 1999, as a boilermaker, stating in his chart note that "restrictions are: as tolerated." The employee testified that, through the union, he tried to find work as a boilermaker in a light duty category, but that none was available. He also testified that he is aware of the requirements of a boilermaker job, and knows that he would "have trouble performing the job" (T. 62, 66) based on his ongoing symptoms. The employee returned to work on April 12, 1999, working as a furniture installer for A & M Business Interior Services, earning a reduced wage. The employee described this job as less strenuous (by half or less) than his job as a boilermaker. (T. 66.)

On April 9, 1999, Dr. William H. Call conducted an orthopedic consultation of the employee at the request of the employer and insurer. Dr. Call examined both thumbs, and diagnosed a well-healed right thumb metacarpal fracture, healed without carpal metacarpal arthritis. Dr. Call also diagnosed a previous ulnar collateral ligament repair in the left thumb. Dr. Call determined that the employee had sustained no Gillette-type injury to either his right or left hand and fingers as a result of his work with the employer, stating in his report that:

> Based on the information that I have at present, I do not feel that there is any connection between [the employee's] right thumb ulnar collateral ligament injuries, which are old and traumatic, and his claimed injury of 8/28/98. Likewise, I don't find any information in the history that he has given me that would link his left thumb ulnar collateral ligament condition (presuming that is, in fact, what he had, as I don't have the operative note and would like to receive it) and his job activities.[3]

(Resp. Ex. 4.)

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[3] Dr. Call stated in two other sections of his report that he would be able to answer questions concerning causation and suitability for work activities, once he was able to see a job videotape of the employee's work activities for the employer and once he was able to review the employee's operative reports and records after October 22, 1998. There is no indication in the record whether Dr. Call later reviewed those records or issued any supplemental report after review of such additional records.

Dr. Call placed no specific restrictions on the employee's activities, up to his examination date of April 9, 1999, other than to recommend a left thumb elastic supportive wrap or a very low profile left thumb MP splint for comfort. Dr. Call determined that the employee's need for such a splint for his left thumb was idiopathic or could perhaps be related to the employee's guitar playing or a previous assault or traumatic injury. Dr. Call restricted the employee to 50-pound lifting on the left side, with an increase as tolerated, but did not relate that restriction to a work injury.

Since Dr. Call found no work-related injury, he determined that maximum medical improvement and permanent partial disability determinations were irrelevant and that the employee had sustained 0% permanent partial disability of the body as a whole related to any alleged work-related injury to his left thumb. (Resp. Ex. 4.)

On August 31, 1999, Dr. Robert Wengler conducted an examination of the employee. Dr. Wengler diagnosed chronic instability of the metacarpal phalangeal joints of the right and left thumbs, also called "gamekeeper's thumb," following surgical repair of the ulnar collateral ligament on the left thumb. (Pet. Ex. F.) In Dr. Wengler's opinion, the employee's condition was casually related to his work activities. Dr. Wengler stated that:

> . . . instability developed as a function of stress to which these [metacarpal phalangeal] joints were subjected during the course of his employment as a boilermaker. The joints were historically symptomatic prior to his employment at A & B Welding but became significantly so as a function of his activities there to the extent that he chose to have surgical treatment to the left thumb. The work at A & B must be considered a material aggravation.

(Pet. Ex. F.)

In his claim petition, filed January 6, 1999, the employee claimed entitlement to temporary total and temporary partial disability benefits, permanent partial disability benefits, payment for medical expenses related to his treatment for his left thumb injury, and also requested a rehabilitation consultation. The compensation judge awarded temporary total disability benefits to the employee from October 19, 1998, through April 11, 1999. The compensation judge also determined that the employee remains temporarily partially disabled from employment as a result of his work injury, in that he is restricted to work that he can tolerate and he cannot return to his previous job as a boilermaker. The compensation judge determined that the reduction in the employee's earnings is related to his work injury, and awarded temporary partial disability benefits based upon his earnings.

The compensation judge also determined that the employee has sustained a 2.72% permanent partial disability of the body as a whole as a result of his left thumb condition, determined that the claimed medical expenses related to the left thumb were compensable, and

also determined that the employee is entitled to a rehabilitation consultation, in order to determine if he is a qualified employee for rehabilitation services. 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

Qualification of Medical Expert

The compensation judge relied upon the medical opinion of Dr. Robert Wengler, and determined that the employee sustained a Gillette-type injury as a result of his work activities for the employer. The compensation judge stated in his memorandum that he was more persuaded by Dr. Wengler's opinion than the contrary opinion of Dr. William Call. We note that it is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). 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). Accordingly, it was within the compensation judge's discretion to choose between medical opinions, and on appeal we must uphold the compensation judge's choice between medical experts, as long as the facts assumed by that expert in rendering an opinion are supported by the evidence in the record. Nord, 360 N.W.2d at 342.

However, the employer and insurer argue that the compensation judge erred by considering the testimony of Dr. Wengler, in that Dr. Wengler disqualified himself as an expert for the specific condition alleged. The employer and insurer cite two ways in which they believe Dr. Wengler disqualified himself. First, at his deposition (Pet. Ex. F.), Dr. Wengler admitted that he does not treat "gamekeeper's thumb" and has not treated this condition for twenty years. Second, the employer and insurer argue that this lack of experience in treating gamekeeper's thumb

does not satisfy the experience requirement for competence to testify as a medical expert, as set forth in case law.

The qualifications of an expert do not usually go to the admissibility of the expert's opinion but merely to its weight. Ruether v. State of Minn., Mankato State Univ., 455 N.W.2d 475, 477, 42 W.C.D. 1118, 1121 (Minn. 1990), citing to Hagen v. Swenson, 306 Minn. 527, 528, 236 N.W.2d 161, 162 (1975). As stated in Reinhardt v. Coulton, 337 N.W.2d 88, 93 (Minn. 1983), the "competency of a witness to provide expert testimony depends upon both the degree of the witness's scientific knowledge and the extent of the witness's practical experience with the matter which is the subject of the offered testimony." In Reinhardt, the Minnesota Supreme Court referred to requirements that a medical expert "must have had a basic education and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians . . . that is of controlling importance in determining competency of the expert to testify . . . ." Reinhardt, 337 N.W.2d at 93, citing Cornfeldt v. Tongen, 262 N.W.2d 684, 692-93 (Minn. 1977) (quoting Pearce v. Linde, 113 Cal. App.2d 627, 629, 248 P.2d 506, 508 (1952)).

The employer and insurer argue that Dr. Wengler does not meet the minimum threshold to be an expert medical witness, as he has not had occupational experience with the condition of gamekeeper's thumb for twenty years, and therefore that Dr. Call's expert medical opinion is unopposed and must be fully considered. However, as testified to by Dr. Wengler at his deposition, he has been board certified by the American Board of Orthopaedic Surgery since 1971 and actively practices orthopedic surgery. He performs hand surgery, although he has a subspecialty in spine and adult reconstruction, practicing in the area of general orthopedics and trauma. Dr. Wengler further testified, on cross examination, that "you asked me if I'm a subspecialist in hand work. No, I don't have a subspecial interest in hand. But I do hand surgery. I prefer to pass it off to the hand surgeons though if they come my way." (Pet. Ex. F, Wengler depo., p. 29.) Dr. Wengler also testified that he has repaired gamekeeper's thumbs, although the last such surgery he performed was "probably 20 years ago." (Id., p. 31.) We disagree with the employer and insurer's argument that Dr. Wengler does not meet the minimum threshold to be an expert medical witness for the employee's specific thumb condition and that the compensation judge erred in considering his opinion at all. Dr. Wengler's deposition testimony does not rise to the level of disqualifying himself as an expert to render an opinion concerning causation of the employee's work-related injury.

As acknowledged by the compensation judge in his memorandum, an expert's degree of expertise is one, but not the only, factor to consider in determining how much weight to give a medical opinion. It is within the compensation judge's discretion to assess the weight and sufficiency of a medical expert's opinion. Ruether, 455 N.W.2d at 477. Both medical experts, Dr. Wengler and Dr. Call, are board certified as orthopaedic surgeons. Dr. Call's professional letterhead states that he also has been board certified by the American Society for Surgery of the Hand, since 1981, and holds a Certificate of Added Qualifications in Hand Surgery. (Resp. Ex. 4.) Both Dr. Call's and Dr. Wengler's reports outline the information on which they base their opinions, including history received from the employee, physical examination of the employee,

and review of his medical records. Based upon the information reviewed by Dr. Wengler, which is included in the hearing record, it appears that he had adequate foundation to render a medical opinion in this matter, and it was within the compensation judge's discretion to rely upon Dr. Wengler's medical opinion as opposed to that of Dr. Call.

The employer and insurer also argue that this case is similar to the fact scenario in Swanson v. Chatterton, 160 N.W.2d 662 (Minn. 1968). This case is distinguishable from Swanson. At issue in Swanson was the alleged negligence of a treating orthopaedic surgeon in performing and providing post-surgical treatment for a suprocondylar fracture. The medical expert whose testimony was proffered by the plaintiff in Swanson was a specialist in internal medicine, with a subspecialty in pulmonary diseases, who but for limited exceptions had no substantial experience or expertise in the direct care of orthopedic patients. That expert's testimony was excluded by the trial court. The Minnesota Supreme Court affirmed that exclusion, stating that "the trial court made clear that it was not excluding the testimony merely because the witness was not a specialist in orthopedic surgery" but that the expert had not established his qualifications to render an opinion in this particular field by a "sufficient showing that he had had the opportunity and the means of acquiring the special knowledge or experience essential to giving authoritative answers to the particular questions posed." Swanson, 160 N.W.2d at 667. In this case, Dr. Wengler is board certified as an orthopedic surgeon, has performed hand surgery and therefore the compensation judge could reasonably have concluded that Dr. Wengler has demonstrated adequate knowledge and experience to address the issues herein.

In addition, the employer and insurer also argue that Dr. Wengler's report was based on an incorrect assumption that the employee began working for A & B Welding in the summer of 1997, whereas the employee's date of hire at the employer was November 27, 1997. The employer and insurer emphasized that, based upon the employee's medical records, the employee's condition had progressed for six months by January 1998, which places the onset of his left thumb symptoms prior to his employment with A & B. Indeed, there is no dispute by the employee nor by Dr. Wengler that the employee's symptoms commenced prior to his employment with A & B Welding; the employee, however, testified that his work at A & B Welding aggravated his left thumb symptoms, a factor taken into consideration by the compensation judge when rendering his opinion on causation of the employee's injury.

Again, as the supreme court noted in Ruether, the qualifications of an expert do not usually go to the admissibility of the expert's opinion but merely to its weight. It was not clearly erroneous for the compensation judge to consider Dr. Wengler's medical opinion and deposition testimony, along with the medical opinion of Dr. Call, and to give greater weight to Dr. Wengler's opinion in arriving at his determination concerning causation of the employee's left thumb injury. Accordingly, we affirm the compensation judge's decision in its entirety.

Petition for Intervention

During the appeal of this matter, a dispute has arisen concerning the rights of a potential invervenor, Boilermakers National Health and Welfare Fund (Boilermakers). By separate Order, this court has granted intervention status to Boilermakers.

However, we remand the matter to the compensation judge for determination of the amount of reimbursement owed to Boilermakers. The compensation judge awarded payment of the employee's medical expenses as outlined in Petitioner's Exhibit E. Based upon a review of the intervenor's Petition to Intervene and the supporting documentation, it appears that medical expenses paid by the intervenor on behalf of the employee were incurred with the same medical providers itemized in Exhibit E. It is not clear from the record, however, as to whether there is any duplication between the hearing exhibit and those expenses itemized in the intervenor's Petition to Intervene. We therefore remand this matter to the compensation judge, specifically for the purpose of determining the amount of reimbursement owed to Boilermakers. The compensation judge, in his discretion, may take additional testimony or allow additional evidence into the record to address the intervention claim.