PHYLLIS M. KELLY, Employee/Appellant, v. METRO. COUNCIL, SELF-INSURED, Employer/Cross-Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 3, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - TEMPORARY AGGRAVATION. Substantial evidence supports the compensation judge's finding that the employee's December 1997 work injury resulted in a temporary aggravation of her pre-existing low back condition.

MEDICAL TREATMENT & EXPENSE - CHIROPRACTIC TREATMENT. Substantial evidence supports the compensation judge's award of medical expenses for VAX-D treatment, rejecting the employer's argument that the VAX-D treatment is chiropractic mechanical traction and therefore that the treatment parameters and fees schedules governing chiropractic mechanical traction should be applied.

Affirmed.

Determined by: Rykken, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Harold W. Schultz, II

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals the compensation judge's finding that the employee's low back injury was a temporary aggravation of a pre-existing condition. The self-insured employer cross-appeals the compensation judge's award of medical treatment expenses.[1] We affirm.

BACKGROUND

[1] The cross-appellant's brief was due on November 15, 1999, and was not filed until December 10, 1999, as part of the respondent's brief. Minn. R. 9800.1710 provides that dismissal of an appeal is discretionary with the court where the cross-appellant is in default for less than 30 days. A failure to timely file a cross-appellant brief is a technical, non-jurisdictional defect. Progressive Casualty Ins. Co. v. Kraayenbrink, 365 N.W.2d 229 (Minn. 1985). Although the cross-appellant's brief was not timely filed, it is now filed and the defect has been cured in the record. It appears from the cross-appellant's brief that the cross-appeal is meritorious and we find no prejudice to any party because of the cross-appellant's failure to comply with the rules. This court has discretion to consider a late brief pursuant to Minn. R. 9800.0900, subp. 6. We have exercised that discretion in this case, and have considered the employer's cross-appeal on the merits, given the facts and circumstances peculiar to this case.

On December 4, 1997, Phyllis Kelly, employee, fell and injured her low back while working as a staff specialist for the Metropolitan Council, the self-insured employer. The employee's injury occurred when she slipped and fell while walking back to her office, falling against a filing cabinet and landing on her buttocks on the floor. The employer initially admitted primary liability and paid for the employee's initial medical expenses.

The employee also has a history of low back problems. In October 1986, the employee sought treatment at the River Valley Clinic for low back and right leg pain after bailing water from a flooded basement. In January 1989, the employee was seen again at the River Valley Clinic for low back pain. Dr. Halverson recommended a CT scan, which was performed on February 6, 1990 and showed minimal disc bulging at L3. On May 27, 1995, the employee injured her low back in a motor vehicle accident and developed low back and leg pain. The employee was treated conservatively, then referred to Dr. Phudhiphorn Thienprasit for a neurosurgical consultation. An MRI indicated disc herniations at L5-S1 and L4-5, with impingement on the left L4 nerve root, and multilevel disc space desiccation and spurring at L2-3. Dr. Thienprasit recommended surgery. The employee underwent a foraminotomy with excision of the L4-5 disc on the right on September 12, 1996. The employee was off work for five weeks, then returned to her regular job with the employer, which consisted of her sitting at a computer table most of the day. By April 27, 1997, the employee was released to work with no restrictions. The employee was seen in October 1997 by Dr. Halverson for constant moderate low back pain. The employee testified that she also experienced occasional twinges in her legs.

The employee first sought treatment for the December 4, 1997, work injury on December 30, 1997. The employee was treated by Dr. Steven Castle at Allina Occupational Health, who noted mild tenderness in the low back and restricted range of motion. Dr. Castle recommended restrictions of alternating standing and sitting as tolerated and no lifting over ten pounds, and referred the employee to Dr. Thienprasit. A January 15, 1998, MRI showed no recurrent disc herniation, but showed degenerative disc disease at L4-5. The radiologist's initial report also mentioned "moderately advanced changes of spondylolisthesis in the lumbar region. This report was later corrected by Dr. Jeffrey Magnuson, the radiologist, who indicated that the report should have read "moderately advanced changes of spondylosis in the lower lumbar region." Dr. Thienprasit opined that the “degenerative disc disease at the L4-5 level which in conjunction with her back pain on motion symptoms may indicate a need for an interbody fusion.” Dr. Thienprasit also recommended a discogram and therapeutic injections to determine whether an interbody fusion was appropriate.

The employee preferred to avoid surgery, and therefore sought a second opinion from Dr. Ronald Tarrel at the Noran Clinic on May 7, 1998. Dr. Tarrel recommended a relatively new form of treatment called vertebral axial decompression, or VAX-D, and referred the employee to the VAX-D Low Back Clinic operated by Gerald Seliski, D.C. The employee personally paid $3000 in advance for the VAX-D treatment, understanding that she was obtaining a $500 cash incentive discount. The employee underwent a total of 48 VAX-D treatments starting in May 1998. At first, the employee received four to five treatments per week; by late July the employee was receiving one treatment per week. Her last treatment was November 16, 1998. The employee

testified that she only had short term relief from the treatments even when she had many treatments per week.

The self-insured employer denied the employee's claim for payment of the VAX-D treatments. The employer also argued that the employee's injury was a temporary aggravation of the employee's pre-existing lumbar condition and not a substantial contributing cause of the employee's ongoing low back problems. At the request of the self-insured employer, the employee underwent a medical examination with Dr. Paul Wicklund on March 20, 1999. Dr. Wicklund opined that the employee's December 4, 1997, work injury was a temporary aggravation of the employee's pre-existing condition, three to four months in duration, and that the same disc degeneration and bulging discs evident on current radiographic studies were present as early as a 1990 CAT scan. Dr. Wicklund also determined that the employee needs work restrictions of no repetitive bending, twisting and stooping, and no lifting over 25 pounds, but that these restrictions are based on the employee's pre-existing low back condition and did not result from her December 4, 1997 injury. Dr. Wicklund also opined that the VAX-D therapy was not reasonable and necessary to cure or relieve the effects of the employee's 1997 injury.

The employee filed a medical request on December 1, 1998, claimed payment for the VAX-therapy and related medical mileage expenses. Following an administrative conference held on February 8, 1999, a compensation judge issued on Order on Medical Request pursuant to Minn. Stat. §176.106, determining that the employee's VAX-D therapy was reasonable and necessary treatment to cure or relieve the effects of the employee's December 4, 1997 work injury, and awarding payment for the therapy and related mileage.

The self-insured employer appealed from that decision, and filed a request for formal hearing on April 6, 1999. The employee filed an additional medical request on March 15, 1999, alleging entitlement to payment for medical expenses incurred at the Noran Neurological Clinic from December 3, 1998 through January 28, 1999. The request for formal hearing and the medical request were consolidated for hearing, which was held on June 8, 1999. The compensation judge found that the employee's December 4, 1997, work injury was a temporary aggravation which lasted one year from the date of injury, and denied the employee's claim for medical expenses incurred from December 3, 1998 through January 28, 1999. The compensation judge also found that the VAX-D treatment was reasonable and necessary in the attempt to cure and relieve the effects of the employee's injury, and awarded reimbursement of the VAX-D treatment at the rate of 85% of the standard charge.

The employee appeals the compensation judge's finding that the work injury was a temporary aggravation, and from the denial of the claimed medical expenses. The self-insured employer does not appeal from the compensation judge's finding that the VAX-D treatment was reasonable and necessary to cure or relieve the effects of the employee's work injury. However, the self-insured employer appeals the compensation judge's determination of the amount of reimbursement owed for the VAX-D treatments.

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 (1998). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, findings of fact may 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

Temporary Aggravation

The employee argues that the compensation judge erred by finding that the employee's low back condition was a temporary aggravation which resolved one year after the work injury. Several factors may be considered when determining whether an aggravation of a pre-existing condition is temporary or permanent, including: (1) the nature and severity of the pre-existing condition and the extent of restrictions and disability resulting therefrom; (2) the nature of the symptoms and extent of medical treatment prior to the aggravating incident; (3) the nature and severity of the aggravating incident and the extent of restrictions and disability resulting therefrom; (4) the nature of the symptoms and extent of medical treatment following the aggravating incident; (5) the nature and extent of the employee's work duties and non-work activities during the relevant period; and (6) medical opinions on the issue. "Which of these factors are significant in a particular case and the weight to be given to any factor is generally a question of fact for the compensation judge." Wold v. Olinger Trucking, Inc., slip op. (W.C.C.A. Aug. 29, 1994).

The compensation judge's findings address the elements of factors outlined in Wold. The compensation judge noted the employee's history of pre-existing low back problems, and the nature and severity of the employee's pre-existing condition, as well as the extent of the employee's restrictions and disability prior to and following her 1997 work injury. In his findings, the compensation judge outlines the employee's treatment for her condition in 1986, 1989, and 1990.

The judge also refers to the employee's 1995 motor vehicle accident, post-accident symptoms and medical treatment, surgery and residual symptoms. The employee's medical records show that after the 1995 motor vehicle accident, an August 19, 1996 MRI scan indicated

a right L4-5 far lateral disc herniation abutting the post-ganglion portion of the right L4 root; left posterior L5-S1 disc herniation abutting, but not clearly compressing, the left S1 root; multilevel disc space desiccation; and disc bulge and anterior peridiscal spurring at L2-3. The employee underwent surgery on September 11, 1996, a foraminotomy with excision of L4-5 foraminal disc on the right. After the surgery, the employee still had some pain in her lower back, but was able to continue working. She was assigned no specific physical work restrictions other than a recommendation by Dr. Thienprasit that she should "get up and walk around if I felt it was hurting . . . ." (T. 39.) In October 1997, however, the employee was seen by Dr. Halverson at the North Hill Clinic and reported constant mid low back pain and constant moderate low back pain.

The employee's medical records and hearing testimony reflect that after her December 4, 1997, work injury, the employee was sore, but was able to continue working and did not seek treatment until December 30, 1997, when she reported aching throughout the low back and right leg pain. In January 1998, the employee underwent another MRI, which indicated previous surgical removal of the focal foraminal/extra-foraminal disc protrusion at L4-5, which had been noted on the MRI taken on August 19, 1996; no evidence of residual or recurrent disc protrusion at the L4-5 level; that the broad based left paracentral disc protrusion seen on the left at L5-S1 was no longer visualized and was likely also removed; and moderately advanced changes of spondylolisthesis in the lower lumbar region. This report was later corrected by the MRI interpreter, Dr. Jeffrey Magnuson, to indicate moderately advanced changes of spondylosis, not spondylolisthesis.

The compensation judge had the opportunity to review the employee's medical records as well as testimony presented by Drs. Tarrel and Wicklund, and Dr. Seliski Dr. Tarrel testified that as a result of the December 4, 1997 injury, the employee aggravated her chronic, underlying low back condition (spondylolisthesis and degenerative changes) and developed a chronic lumbar sprain (Tarrel depo., p. 39-40). Dr. Tarrel also testified that the December 4, 1997 work was a permanent aggravation of the employee's underlying chronic low back condition, and that the employee had a permanent low back sprain (Tarrel dep., p. 41).

By contrast, Dr. Wicklund opined that the employee's December 4, 1997 injury was temporary in nature, lasting only three to four months, testifying that

> The slip and fall from a purely objective orthopedic standpoint was temporary. Nothing changed in her lumbar spine after that slip and fall to cause the kind of subjective complaints she's having. So I considered it a temporary aggravation of her underlying back condition. Temporary in the sense that perhaps some muscles were strained, something happened to flare-up her back and leg pain, but nothing on the MRI evidenced the fact that structurally her back was different.

(Wicklund depo., p. 21)

The employee unquestionably experienced additional symptoms and required medical treatment following her injury on December 4, 1997, as indicated in her testimony and medical records. However, the compensation judge determined that the employee's December, 1997, work injury was temporary in nature, resolving by one year post-injury. It is the task of this court, on factual matters such as this one, to review the entire record and 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 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." Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239; Redgate v. Sroga's Standard Service, 421 N.W.2d at 734, 40 W.C.D. at 957.

In this case, the compensation judge weighed all of the medical evidence and ultimately relied upon Dr. Wicklund's opinions when concluding that as a result of her December 1997 injury, the employee sustained a temporary aggravation of her pre-existing condition. A compensation judge'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, 37 W.C.D. 364, 372 (Minn. 1985). In this case, the facts underlying the opinions of Dr. Wicklund, certified orthopedic surgeon, are supported by the medical records in evidence. Since the compensation judge reasonably relied on the medical opinion of Dr. Wicklund, we affirm the compensation judge's conclusion that the employee sustained a temporary aggravation of her pre-existing low back condition which resolved a year after her December 4, 1997 work injury. See Nord, 360 N.W.2d at 342-43, 37 W.C.D. at 372-373; Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Medical Expenses

The self-insured employer cross-appeals the compensation judge's award of medical expenses for the employee's VAX-D treatments. The compensation judge determined that "the VAX-D treatment was reasonable and necessary in the attempt to cure and relieve her from the effects of the December 4, 1997 injury" (Finding No. 32), and ordered reimbursement to the employee in the amount of $2,975, which is 85% of the standard charge of $3,500, along with statutory interest. (Order No. 1.) The employer did not appeal the finding of reasonableness and necessity, nor did the employer argue that the amount charged by Dr. Seliski for the VAX-D therapy was in excess of the "usual and customary charge" referred to in Minn. R. 5221.0500, subp. 2B. Instead, the self-insured employer appeals from the compensation judge's interpretation of both the treatment parameters' and medical fee schedule's applicability to this treatment and the judge's corresponding calculation of the amount to be reimbursed to the employee.

At hearing, the employer argued that because VAX-D therapy is traction, administered by a chiropractor, the treatment parameters and fee schedules governing mechanical chiropractic therapy must be applied. The compensation judge did not accept this argument and accordingly did not apply the treatment parameters related to chiropractic traction. On appeal, the employer first argues that VAX-D therapy is mechanical traction therapy, citing testimony by both

Drs. Tarrel and Wicklund. Dr. Wicklund testified that he has researched the VAX-D therapy, but has not sent any patient to the VAX-D Low Back Clinic (where the employee received her therapy). Dr. Wicklund referred to the therapy as "a traction technique that's applied to the body." (Wicklund depo. p. 27). Dr. Tarrel, contrary to the arguments set forth by the employer, did not directly testify that VAX-D therapy is considered "traction." Instead, it was *employer's counsel* who referred to "this traction you called vertebral axial decompression," and "that kind of traction," when questioning Dr. Tarrel. (Tarrel depo., p. 82-83)

Dr. Seliski, the chiropractor who administered the VAX-D therapy, testified that this type of therapy is "different" than chiropractic traction, as it involves "an attended procedure for . . . approximately forty-five minutes to an hour" as opposed to unattended chiropractic traction for ten to fifteen minutes. Dr. Seliski also testified that this therapy is "not even considered traction," in part because "traction cannot decompress a disc," one of the goals of the VAX-D therapy. (Seliski depo., p. 123).

The compensation judge apparently rejected the employer's argument that the VAX-D therapy is identical to chiropractic traction, and that the chiropractic treatment parameters should apply, since he concluded that the proper amount of payment should be based on Minn. R. 5221.0500, subp. 2B. This rule applies, in part, to medical procedures not specifically listed in the medical fee schedule, Minn. R. 5221.0100, et. seq. In his memorandum, the compensation judge explained his rationale for awarding these medical payments, stating:

> The employee is awarded reimbursement of the VAX-D treatment. The treatment at the VAX-D Low Back Clinic was a good faith attempt to improve her condition. It provided temporary relief and she was able to continue working during that time. However, it did not provide 'permanent' relief. The rationale for awarding reimbursement of 85% of the $3500.00 standard treatment charge is contained in Minn. Rule 5221.0500, subp. 2B and Olson v. Allina Health System, 59 W.C.D. 37 (1999).

(Memo. p. 7.)

Minn. R. 5221.0500, subp. 2B, of the Department of Labor and Industry Fees for Medical Services, states in pertinent part that for medical treatment not enumerated in the medical fee schedule,

> ...the payer's liability [for] payments shall be limited to 85 percent of the provider's usual and customary charge, or 85 percent of the prevailing charge for similar treatment, articles, or supplies furnished to an injured person when paid for by the person, whichever is lower.

The case cited by the compensation judge, Olson v. Allina Health System, 59 W.C.D. 37 (W.C.C.A. 1999) addressed, *inter alia,* the applicability of this rule to VAX-D treatments. In Olson, this court affirmed the compensation judge's determination that VAX-D therapy was not "traction" and therefore applied the formula listed above in Minn. R. 5221.0500, subp. 2B, and rejected that employer's argument that since VAX-D therapy is not specifically listed in the medical fee schedule, the provider of the VAX-D therapy should have used a chiropractic procedure code for traction, since that code was the "closest" to the type of procedures provided by VAX-D therapy. This court also determined that to imply a requirement for providers to apply a procedure code to a service or procedure not listed in the fee schedules, such as VAX-D, would negate the language allowing providers to charge a percentage of their usual and customary charge for unlisted procedures. Olson, 59 W.C.D. at 50.

As in Olson, the compensation judge determined that the employee's VAX-D therapy was reasonable and necessary to cure or relieve the effects of her injury. While cases affirmed on substantial evidence grounds have little precedential value because of the standard of review for this court, see, e.g., Carlson v. Nabisco Brands, slip op. (W.C.C.A. May 2, 1994), the compensation judge could reasonably refer to the fact scenario and legal arguments set forth in Olson in reaching his conclusion concerning the VAX-D therapy. The compensation judge could also reasonably conclude, based on Dr. Seliski's deposition testimony, that the VAX-D treatment was not chiropractic mechanical traction and therefore that the corresponding treatment parameters and fee schedule did not apply. See Nord, 360 N.W.2d at 342-43, 37 W.C.D. at 372-373. The compensation judge then properly concluded that the proper amount of reimbursement for the VAX-D therapy is found in Minn. R. 5221.0500, subp. 2B, consistent with Olson. We, therefore, affirm the compensation judge's order for reimbursement at the rate of 85% of the standard charge of $3,500, along with statutory interest.