

GAIL KOZLAK, Employee/Appellant, v. MINNEGASCO, SELF-INSURED, Employer.

WORKERS' COMPENSATION COURT OF APPEALS

MAY 24, 2000

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. Where it was clear that the judge had carefully evaluated all medical evidence presented in this case and had made her decision in reliance on the opinion of a medical expert, and where the judge's decision was not otherwise unreasonable, the compensation judge's conclusion that the shoulder surgery at issue was neither reasonable and necessary nor causally related to the employee's work injury was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

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

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's conclusion that proposed shoulder surgery was neither causally related to the work injury nor reasonable and necessary medical treatment. We affirm.

BACKGROUND

Gail Kozlak [the employee] is currently fifty-five years old and has worked for Minnegasco [the employer] since 1980. Sometime in 1985, while working for the employer, she evidently sustained injuries to three discs in her neck and to the disc at L5-S1 of her low back. Since shortly after that injury, she has treated with physiatrist Dr. Anne Brutlag, who has assigned various restrictions over the years.<sup>1</sup>

In April of 1995, the employee was working in the employer's storeroom and warehouse facility, gathering repair parts to fill orders for appliance repairs. The parts were stored on shelves running from the floor to above her head. The employee's work required her to lift and

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<sup>1</sup> We note that both the employee's treating physicians and the employer's IME apparently reviewed medical information beyond that offered into evidence at the hearing. In fact, it is evident from Findings 4 and 5 that the compensation judge evidently also considered reports and records in the file in addition to the medical exhibits. However, we have limited our analysis of the employee's medical treatment to the evidence offered at hearing before the judge.

carry objects weighing from almost nothing up to twenty-five pounds. On April 6, 1995, as the employee stood in one of the aisles of the storeroom, a box about two feet long and eight inches deep and square, weighing approximately four pounds, fell from a shelf and struck the employee on the back of her neck and right shoulder. The employee experienced pain in the neck and shoulder, and, when her symptoms subsequently worsened, on April 19, 1995, she sought treatment again with Dr. Brutlag. Dr. Brutlag prescribed physical therapy and trigger-point injections, as well as anti-inflammatory medications, focusing initially more on the employee's neck than on her shoulder but making an injection also into the shoulder.<sup>2</sup>

In September 1995, Dr. Brutlag completed a Maximum Medical Improvement Physician's Report, in which she diagnosed the employee's April 6, 1995, injury as an acute exacerbation of a chronic cervical and thoracic strain. Dr. Brutlag indicated that the employee had reached maximum medical improvement [MMI] from that injury on July 26, 1995, with no permanent partial disability, and she released the employee to return to her former employment.

The employee continued to work for the employer subsequent to April 6, 1995, performing the same job duties without any change in her work restrictions from those under which she had worked prior to April 6, 1995. In June of 1996, the employee was referred for a bone scan because of right clavicle and sternoclavicular joint prominence. The scan showed an increased activity of the right sternoclavicular joint. The radiologist concluded that this finding could be consistent with previous trauma, degenerative changes, cartilage growth, or malignancy, and he recommended clinical correlation.

In January 1997, Dr. Brutlag referred the employee to orthopedist Dr. Christopher Olson. The employee complained of pain in the acromioclavicular joint region, aggravated by lying on her right side and associated with occasional sharp pain when she tried to use her arm away from her body. A January 28, 1997, x-ray showed mild degenerative changes of the right acromioclavicular joint and right shoulder joint. Dr. Olson diagnosed chronic AC joint arthritis or extensor arthritis and recommended an arthroscopy of the right shoulder and an open resection of the outer end of the employee's clavicle. The employee elected not to schedule surgery at that time.

On July 15, 1997, in response to an inquiry from the employer's claims administrator, Dr. Brutlag wrote, "I am uncertain as to whether the need for right shoulder surgery for the degenerative arthritis of her AC joint directly relates to her April 6, 1995, work injury." Dr. Brutlag requested that the question be posed to Dr. Olson. In a letter dated September 25, 1997, Dr. Olson responded by stating, "I have reviewed my notes on Gail Kozlak, and it is my opinion that there is no significant relationship between her injury on April 6, 1995, and her left

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<sup>2</sup> In subsequent testimony, the employee testified that, although she initially focused more on her neck pain than on her shoulder pain because of her previous injury, her shoulder was also sore just after the injury, and she did have trouble lifting her arm. She testified also that she did not recall any specific problems with her right shoulder prior to April 6, 1995. She testified that she had noted some improvement with the trigger-point injections, including improvement from the injection into the shoulder joint, but that "it still wasn't right."

shoulder degenerative arthritis” (emphasis ours).<sup>3</sup> The employee again saw Dr. Olson on October 20, 1997, with continued right shoulder pain, both in the region of the acromioclavicular joint and at the medial end of the collar bone. Dr. Olson reported that the employee’s physical examination findings were essentially unchanged, and he continued to recommend surgery.

On January 19, 1998, the employee was examined on behalf of the employer by orthopedist Dr. Lloyd Leider. Dr. Leider obtained a history from the employee, and reviewed relevant medical records, including prior x-ray and bone scan findings. In a report of that date, Dr. Leider indicated that the etiology of problems evident on the bone scan was complex and unrevealed by the scan. On examination, Dr. Leider reported that the employee’s active and passive range of motion were within normal limits and that her right shoulder girdle was normal on examination. He opined that the employee’s continued complaints did not appear to correlate with any objective abnormalities on clinical examination. He concluded that she had neither impingement symptoms nor impingement findings on clinical examination. He related the employee’s degenerative joint disease at the acromioclavicular and sternoclavicular joints to the normal aging process. Dr. Leider opined that surgery, if carried out, would be for symptoms related to aging and not for the results of any work injury. He recommended no further evaluation or treatment as a result of the April 6, 1995, injury.

On September 9, 1998, the employee was referred for an evaluation by orthopedist Dr. Alan Markman. Dr. Markman examined the employee and found a full range of motion with some loss of strength on examination. He reported that x-rays showed a forward tilt to her acromion with some mild narrowing of the subacromial space. Dr. Markman’s impression was that the employee had at least “some signs and symptoms consistent with impingement,” but he did not know whether she had any damage to her rotator cuff. The doctor therefore referred the employee for an MRI scan on September 18, 1998, which showed that her rotator cuff tendons were intact and that she had no significant rotator cuff tendinitis. The radiologist noted further that the scan showed moderate AC joint arthrosis with minor inferior hypertrophic changes. He also found mild subacromial/subdeltoid bursal inflammation. Dr. Markman concluded the employee would be a good candidate for a right shoulder scope and decompression, including a right AC joint resection.

On October 13, 1998, the employee filed a claim petition requesting approval of the right shoulder surgery recommended by Dr. Olson and Dr. Markman. The employer denied liability for the proposed surgery, based upon the report of Dr. Leider, and forwarded additional records to Dr. Leider for review. In an addendum report dated December 10, 1998, Dr. Leider opined that the recommended surgery was not reasonable and necessary. Dr. Leider reviewed the actual MRI scan and concluded that the study showed very minor degenerative changes but no

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<sup>3</sup> At the hearing, counsel for the employer contended that Dr. Olson’s reference to the employee’s left shoulder degenerative arthritis is an obvious typographical error. Counsel for the employee, however, would not stipulate to this interpretation and indicated that, from the employee’s perspective, “we can only guess as to what [Dr. Olson] meant.” In addition, counsel argued that Dr. Olson’s September 25, 1997, letter was inconsistent with a lengthy narrative of his on June 11, 1999, which was submitted into evidence.

evidence of any chronic irritation or wear and tear changes, nor any acute evidence of a tear in the rotator cuff. He also noted that on Dr. Markman's examination of September 9, 1998, the employee had a full range of motion at the right shoulder girdle and no distinct tenderness in or about the right shoulder cap. Further, the employee's mild degenerative changes, he opined, do not correlate with any objective findings on clinical examination.

In a report dated June 11, 1999, Dr. Olson explained the basis for the recommended surgery. He stated,

By detaching the outer end of the collar bone from the scapula or shoulder blade, we would reduce her pain in the acromioclavicular joint by elimination of the joint and reduce her pain and tenderness at the sternoclavicular joint by reducing the mechanical forces transmitted from the arm to the medial end of her collar bone.

He further explained that the presence of a stiff sternoclavicular joint as a result of chronic degenerative disease would make the acromioclavicular joint more vulnerable to injury of the type that the employee had in this instance. On June 14, 1999, Dr. Brutlag issued a report whereby she agreed with the surgical recommendations of Dr. Olson and Dr. Markman. She also opined that the shoulder injury of April 6, 1995, was a substantial contributing cause of the employee's right shoulder pain and of her consequent need for clinic visits, steroid injections, medicines, and physical therapy.

The issues of the reasonableness and necessity of the proposed surgery and its relationship to the work injury came on for hearing before Compensation Judge Carol A. Eckersen on June 16, 1999. Evidence presented at hearing included the testimony of the employee, the deposition testimony of Dr. Leider, and portions of the employee's medical records. In a findings and order issued on August 16, 1999, the compensation judge specifically adopted the opinions of Dr. Leider and denied the employee's entitlement to the proposed right shoulder surgery, concluding that the surgery was neither reasonable and necessary nor causally related to a work injury. The employee appeals.

## 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

On appeal, the employee argues that Dr. Leider’s opinions, upon which the compensation judge relied, are fatally lacking in foundational support. Because this is so, she argues, the compensation judge’s decision is not based on substantial evidence and therefore must be reversed. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985) (the trier of fact’s choice between expert conflicting opinion need not be upheld if the accepted opinions lack adequate foundation); see also Winkels v. Independent Sch. Dist. #625, 46 W.C.D. 44, 58 (W.C.C.A. 1991). In this case, Dr. Leider acknowledged on cross examination that he retired from the practice of medicine at the end of 1998. He stated that he was off the “call schedule” during 1998 and did minimal surgical treatment. He indicated that his practice was mainly in the office “to sort of wind up my practice.” Dr. Leider described his practice as a general orthopedic practice over the years, and he admitted that he has never personally performed an arthroscopic shoulder surgery of the type being recommended by Dr. Markman. The employee argues this lack of knowledge and experience is fatal to the foundation for Dr. Leider’s opinion. We are not persuaded.

It is clear from a careful review of the findings issued by Judge Eckersen that she carefully evaluated the medical evidence presented in this case. Dr. Leider testified that he has been a licensed medical doctor since 1956. He practiced in the specialty of orthopedic surgery since 1971, and he was board certified in that specialty. Over the years he has evaluated and treated patients with shoulder-related problems. At Finding 10, the compensation judge found the following:

Dr. Lloyd Leider examined the employee at the request of the employer . . . on January 19, 1998. He had a complete factual history and all relevant medical records providing a complete foundation for his opinions. Dr. Leider reviewed the bone scan which showed a pick up at the sternoclavicular area of the right shoulder girdle. He noted that the etiology of the pick up is multifactorial and that findings on the scan did not indicate the etiology. Dr. Leider examined Ms. Kozlak and found her active and passive range of motion within normal limits and a normal shoulder examination. He opined that her complaints do not correlate with any objective findings and diagnosed a normal examination of the right shoulder girdle. He did not find impingement symptoms. He noted that the employee has a diagnosis of degenerative disc disease [sic] at the acromioclavicular and sternoclavicular joints based on the plain x-ray films. He related this to normal aging. Dr. Leider opined that

surgery, if done, would be for symptoms from aging, not for the results of any work injury. He did not recommend further treatment, evaluation or surgery as a result of the April 6, 1995 injury. Dr. Leider reviewed additional records and issued an addendum report on November 9, 1998 [sic].<sup>4</sup> He reviewed the actual MRI scan and report from September 1998. Dr. Leider found that the recommended surgery was not reasonable and necessary. He reasoned that the MRI showed very minor degenerative changes but no evidence of chronic irritation, wear, tear or acute evidence of a tear in the rotator cuff. He also noted that Dr. Markman also had [found] full range of motion on examination and did not note any distinct areas of tenderness. The employee's mild degenerative changes do not correlate with objective findings on examination. Dr. Leider reiterated these opinions in his June 14, 1999 deposition. Though he does not himself perform the type of surgery recommended, Dr. Leider is familiar with the surgery and is qualified to render an opinion. He stated that he did not feel there were any objective factors present which would suggest she would benefit from surgery.

In her memorandum, the compensation judge commented on the opinions of the several medical doctors and provided her rationale for accepting the opinions of Dr. Leider. It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. See Nord, 360 N.W.2d 337, 37 W.C.D. 364. In this case, the judge felt that Dr. Leider had the most accurate factual history and complete relevant medical records to support his opinions and that his reasons for reaching his conclusions were well explained. She specifically stated that she found his opinions more persuasive than the opinions of Drs. Olson and Markman. The judge also found that Dr. Brutlag's opinions were not persuasive. It is not the role of the reviewing court to make its own evaluation of the credibility or probative value of conflicting testimony or to choose from among possible inferences different from those drawn by the compensation judge. Krotzer v. Browning-Ferris/Woodlake Sanitation, 459 N.W.2d 509, 43 W.C.D. 254 (Minn. 1990). "The point is not whether [the reviewing 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 Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). Because the conclusion of the compensation judge was not unreasonable, we affirm. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

In her brief, the employee also argued that substantial evidence does not support the compensation judge's determination that the employee did not meet her burden of proof. The judge's findings contain no such determination. Her findings and order are based exclusively on her resolution of the conflict in expert testimony. The employee presumably is referring to the last sentence of the judge's Memorandum, in which she states that "[t]he employee has not shown by a preponderance of the evidence that the proposed surgery is reasonable, necessary and causally

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<sup>4</sup> The referenced November 9, 1998, report was actually dated December 10, 1998.

related to the work injury.” The employee proceeds to argue that a preponderance of the evidence does support the fact that the employee’s right shoulder injury suffered on April 6, 1995, was a substantial contributing factor in her need for the proposed surgery and that the surgery was reasonable and necessary. It is the function of this court to review the record to determine whether substantial evidence exists to support the findings of the compensation judge, not to determine whether substantial evidence supports a contrary conclusion. Concluding that the judge’s decision in this case was not unreasonable and is adequately supported by the evidence, we affirm. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.