RHONDA LEININGER, Employee/Appellant, v. DAYTON HUDSON CORP., SELF-INSURED, Employer.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 9, 2000

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - DISMISSAL; DISCONTINUANCE - NOTICE OF DISCONTINUANCE; STATUTES CONSTRUED - MINN. STAT. § 176.238, SUBD. 5. Where the employer had supplied some of the pertinent medical records at the administrative conference on its NOID, and where the record was kept open for several months after the hearing before the compensation judge on the employer's petition to discontinue benefits to permit the employee fuller opportunity to study and develop the medical evidence, the compensation judge did not err in denying the employee's motion to dismiss the employer's Petition to Discontinue on a conclusion that the employer had substantially complied with the requirement in Minn. Stat. § 176.238, subd. 5, that the supporting medical records be actually attached to the Petition to Discontinue.

DISCONTINUANCE; EVIDENCE - BURDEN OF PROOF. Where, at hearing n a Petition to Discontinue benefits, evidence was introduced by the employer to the effect that the employee's work accident had not been a substantial contributing factor in her low back condition, the court concluded as a matter of law that its substance constituted a prima facie case for the proposition for which it was introduced - - that is, that the evidence was sufficient to proving entitlement to discontinuance absent any showing by the employee to the contrary.

PRACTICE & PROCEDURE - MATTERS AT ISSUE. Where, after admitting liability for a work injury and paying benefits for a brief period of time, the employer had filed but not prevailed on an NOID based implicitly on primary liability, where the employee had subsequently filed a Claim Petition for benefits including penalties for noncompliance with the order on the NOID, where that Claim Petition had been consolidated for hearing together with the employer's Petition to Discontinue Benefits but, subsequent to apparently substantial pretrial, had not been expressly mentioned at hearing, the compensation judge did not err by stating the issue in her Findings and Order as whether or not the employee had sustained an injury to her low back arising out of and in the course of her employment.

CAUSATION - SUBSTANTIAL EVIDENCE. Where the compensation judge did not materially misstate or evidently misunderstand or ignore the facts in deciding the case, and where her decision was not unreasonable in light of the entire medical record and as supported by expert medical opinion, the compensation judge's conclusion that the employee did not prove a work injury to her low back arising out of and in the course of her employment was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Johnson, J. and Wilson, J.
Compensation Judge: Jennifer Patterson

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's refusal to dismiss a petition to discontinue benefits, from the judge's assignment of the burden of proof, from her identification of issues for decision, and from her statement of the evidence.[1] We affirm.

BACKGROUND

Rhonda Leininger sustained work-related injuries to her low back in both October 1985 and January 1986, and in May of the latter year she sustained yet a third back injury in a fall down some stairs at the Metrodome. By October of that year, orthopedic surgeon Dr. Paul Cederberg had concluded that Ms. Leininger [the employee] was subject to a 9% whole-body impairment as a result of a herniated disc at L5-S1 of her lumbar spine. In July of 1989, the employee was hospitalized for over a week for radicular symptoms in her right leg, and in October of that year neurosurgeon Dr. Mahmoud Nagib performed a bilateral hemilaminectomy and discectomy at the problematic L5-S1 level of the employee's spine. The employee developed radicular symptoms in her left leg subsequent to that surgery, and in June of 1990, after reporting foot drop symptoms and an inability to sleep due to low back pain, she was hospitalized again for over a week for treatment of her low back. Neurological examination during that hospitalization revealed an absent left ankle reflex, marked weakness of dorsiflexion, and a numb left thigh and calf. Between 1989 and 1997, the employee was treated for injuries sustained in at least six different motor vehicle accidents, several of which involved treatment specifically to her low back. By the spring of 1998, the employee had undergone seven lumbar MRI scans and two lumbar CT scans and had been hospitalized for in-patient conservative treatment of her low back condition several times.

In February of 1998, the employee received two chiropractic treatments at the CorrectCare Chiropractic Center in part for low back pain, where examination confirmed grade 1 lumbosacral paraspinal muscle spasm on the left. She returned for another treatment on April 23, 1998, when her symptoms included "low back discomfort increasingly over the past couple of days." About a week thereafter, on May 2, 1998, after working as a "floating" sales associate for the Dayton Hudson Corporation [the employer], the employee reported to her employer that she had sustained a work-related injury to the right side of her back, with symptoms from the middle of her back down into her buttocks, and was experiencing frequent spasms. She indicated that the

[1] In her Notice of Appeal, the employee also asserted an appeal from a finding, Finding 21, in which the compensation judge concluded that "the employer does not have to pay a penalty for the delayed payment of" certain benefits that had previously been ordered payable in an earlier proceeding. The issue was not addressed in the employee's brief, however, and therefore it is deemed waived and will not be decided. See Minn. R. 9800.0900, subp. 1.

injury had occurred consequent to her catching her toe three times that day in some torn carpeting in the course of her job. The employee was about thirty-one years old at the time and was apparently earning an average weekly wage of about $84.00.[2] Two days subsequent to the incident, on May 4, 1998, the employee saw Dr. Robert Peterson at the Urgent Care Facility at Park Nicollet Medical Center, to whom she reported spasms in the right lower back and discomfort in the back of her right thigh. Dr. Peterson diagnosed acute low back strain, prescribed medication, and recommended that the employee take some days off work to recover. The employee apparently tried to return to work about two weeks later, but on May 17, 1998, she was taken back off work again with low back pain radiating down the back of her left thigh.

On June 10, 1998, the employee was seen in follow-up by Dr. Robert Gorman, who noted her "[l]ong history of chronic low back pain." The employee indicated to the doctor at that time that she was not interested in going through physical therapy or rehabilitation and wanted instead to see if she could "manage things on her own," and Dr. Gorman released her to return to work without restrictions. By July 29, 1998, the employee was evidently feeling physically able to go on a two-week missionary trip to Guatemala, where she apparently assisted with painting, bending wire, and running a medical clinic. On September 24, 1998, Dr. Gorman noted that the employee had "completed her trip to Guatemala without significant difficulty" but continued to be frustrated by left leg sciatica complaints, and the doctor ordered an MRI scan and referred the employee to rehabilitation specialist Dr. Anne Brutlag. The scan, conducted on October 5, 1998, was read to reveal a broad-based central herniated nucleus pulposus at L4-5 that might be impinging on the L5 nerve rootlet.

The employee subsequently commenced treatment with Dr. Brutlag, and Dr. Brutlag in turn referred the employee for a consultation with Dr. Nagib. In his report to Dr. Brutlag on November 12, 1998, Dr. Nagib indicated that he had recommended a high-volume myelogram-CT to rule out various diagnoses but that the employee "obviously is not interested in pursuing these studies." The employee's problems continued, and on January 21, 1999, she underwent a lumbar myelogram and CT scan as recommended by Dr. Nagib, which were read to reveal a right paracentral herniated disc at L5-S1, in addition to the herniated disc at L4-5. From January 31 to February 2, 1999, the employee was hospitalized for treatment of left flank pain, but on February 2, 1999, Dr. Nagib advised against surgical intervention. On February 9, 1999, Dr. Brutlag indicated that she was referring the employee for a consultation with neurosurgeon Dr. Christine Cox, who also, upon her examination of the employee on February 24, 1999, found no basis for surgical intervention. On March 4, 1999, the employee went off work again, and the employer, self-insured against workers' compensation liability, filed its First Report of a work injury to the employee on May 2, 1998, nearly a year earlier, and commenced payment of benefits.

On March 18, 1999, the employee was taken to an emergency room, having experienced an apparent seizure and been discovered face down at the foot of some stairs. On April 19, 1999, about a month and a half after admitting liability and commencing payment of

[2] The employee alleged this weekly wage in her eventual June 8, 1999, claim petition. It was stipulated at hearing that all issues regarding the employee's weekly wage were reserved for later proceedings.

benefits, the employer filed a Notice of Intention to Discontinue [NOID] payment of benefits as of April 15, 1999, on grounds that benefits were "being denied based on pre-existing condition, and the idiopathic injury doctrine. Our injury Temp aggravation to a pre-existing condition. Cl[ai]m[an]t back to pre-existing status, paym[ent] made [in] error."[3]

The matter came on for an administrative conference on May 13, 1999. The employer contended that rehabilitation benefits should not be paid and that the condition at issue was only a temporary aggravation of a preexisting low back condition. The employee contended that the employer had not established that the condition for which she was being treated was not the admitted injury of May 2, 1998. On May 19, 1999, by an Order on Discontinuance Pursuant to Minn. Stat. § 176.239, Compensation Judge Jane Gordon Ertl denied the employer's request and ordered that the employer continue to pay temporary total disability benefits. In her accompanying memorandum, Judge Ertl explained that,

> [a]lthough the employer contends that employee sustained a temporary aggravation, the medical records do not substantiate that contention. The employer submitted medical records regarding treatment from 1995 through 1997 and a MRI February 17, 1999. None of these records establish that employee has recovered from the temporary aggravation admitted by the self-insured employer and returned to her pre-existing condition. Employer has not met its burden of proof.

On May 28, 1999, the employer filed a Petition to Discontinue Workers' Compensation Benefits as of May 26, 1999, "based on the employee's extensive pre-existing condition and/or the Idiopathic Injury Doctrine," asserting that, "[a]t the time liability was initially mistakenly accepted, self-insured employer was unaware of the employee's long-standing lower back problems including the employee's hemilaminectomy of 1990." As had also been the case with the employer's NOID, no medical records or other documentation were attached to the employer's petition. Subsequently, on June 8, 1999, the employee filed a Claim Petition, alleging entitlement to temporary total disability benefits continuing from April 18, 1999, to penalties for the employer's failure to pay benefits pursuant to Judge Ertl's Decision and Order of May 19, 1999, and to unspecified out-of-pocket expenses, all consequent to a work-related injury to her low back on May 2, 1998. On July 8, 1999, the employer answered the employee's Claim Petition, denying liability for the alleged work injury and for the penalties claimed, affirmatively alleging that the "employee's current condition and disability is solely related to longstanding pre-existing low back injuries." On July 15, 1999, the employer's Petition to Discontinue and the employee's Claim Petition were ordered consolidated for hearing, in that "the separate cases present substantially the same issues of fact and law" and that "a holding in one case would affect the rights of the parties in the other case."

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[3] Subsequently, on April 29, 1999, the employer filed also a Rehabilitation Request, indicating that it would no longer be paying for rehabilitation services for the employee pursuant to its NOID and requesting that the two matters be consolidated.

An IME of the employee had originally been scheduled with Dr. Thomas McPartlin for July 2, 1999, and, after several times being rescheduled, was finally conducted on September 10, 1999. Based on an examination of the employee and an extremely lengthy and detailed records review, Dr. McPartlin summarized his conclusions as follows:

> My impression therefore is that this patient's back problem is a product of a long preexisting problem in its gradual progression with time and is uninfluenced by the episodes that the patient describes. There are not [sic] physical findings that support the presence of a new injury but rather findings that reflect an old injury. There is no disability related to work activities, no need for treatment relative to any work-related injury and no need to limit activities relative to any work-related injury.

Subsequent to Dr. McPartlin's IME, the employer evidently[4] made one payment of benefits to the employee, for the time span June 25 to September 10, 1999, but made no further payment.

The consolidated matter came on for hearing before Compensation Judge Jennifer Patterson on September 28, 1999, having been rescheduled to that date from September 2, 1999, to accommodate the employee's IME with Dr. McPartlin. At the hearing, the employee moved to dismiss the employer's petition to discontinue benefits, on grounds that the employer, in filing its petition, did not comply with the requirement in Minn. Stat. § 176.238, subd. 5, that a petition to discontinue benefits must include the medical records and other information upon which the petition is based. The employee contended that the employer had provided no such information to support its petition to discontinue until five days earlier, September 18, 1999, when she received service of the report of the employer's independent medical examiner. The employer argued in response that some medical records had been introduced into evidence at the administrative conference on the employer's NOID, that the IME was delayed through no fault of the employer's, that a report of the IME was served as expeditiously as possible, and that the statute had therefore been complied with. Also at the hearing, the employer's attorney indicated that he intended to advise his client to pay penalties "for whatever period it turns out that benefits weren't paid and they certainly should have been paid based upon [Judge Ertl's May 19, 1999] order." The compensation judge denied the employee's motion to dismiss the employer's Petition to Discontinue, based on what she saw as case law's "strong policy that cases be decided on the merits and not on technicalities." To ensure that the employee had adequate effective notice of and opportunity to supplement the medical record before her, the judge permitted the record to remain open for what eventually became an extended period of time post hearing.

On November 29, 1999, responding to various queries of the employee's attorney, Dr. Brutlag indicated that the employee had undergone surgery on November 26, 1999, performed by Dr. Mark Larkins, who had taken over the employee's care. Dr. Brutlag expressed in part her opinion "that the work injury of May 2, 1998, was the cause of [the employee's] current

[4] According to stipulations reported by the compensation judge at the beginning of the hearing below.

radiculopathy, and has resulted in the need for [the employee] to have an additional surgery on her lumbar spine."

In a Findings and Order filed January 5, 2000, the only issue identified by Judge Patterson as being before her for decision was "Did the employee sustain a specific injury to her low back on May 2, 1998 arising out of and in the course and scope of her employment or were her low back and leg symptoms and treatment from that point on caused by preexisting low back and leg conditions?" In Finding 19, the judge concluded in part that "[t]he employee has not carried the burden of proving she had a work injury to her low back arising out of and in the course and scope of her activities on May 2, 1998." The employee had also asserted entitlement to penalties for the employer's delay in payment of benefits ordered pursuant to the administrative hearing on the employer's NOID, and in Finding 21 the judge found also that "[b]ecause of the retroactive [effect] of [the] finding of no liability for a work injury, the employee was not entitled to temporary total disability benefits for the time span June 25 to September 10, 1999 and the employer does not have to pay a penalty for the delayed payment."[5] 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.

"[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 Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

[5] The judge's decision on the penalties issue was apparently based in part on her understanding that "[a]t the September 28, 199[9] hearing, the employer's attorney admitted that penalties would be due for the failure to pay temporary total disability benefits in a timely manner provided that the employee was entitled to temporary total disability benefits" (emphasis added here).

Denial of Dismissal of the Petition to Discontinue

At the hearing, the employee moved to dismiss the employer's Petition to Discontinue for the employer's failure to attach medical evidence as required under Minn. Stat. § 176.238, subd. 5. The employee's motion was pursuant to Minnesota Rule 1415.1700, subp. 2, which provides that a "judge may, on the judge's own motion or upon motion of a party with notice to the parties, dismiss an action or claim for failure to prosecute; or to substantially comply with this chapter, the act, or an order of a judge" (emphasis added). Minnesota Statutes § 176.238, subd. 5, provides that a petition to discontinue benefits "shall include copies of medical reports or other written reports or evidence in the possession of the employer bearing on the physical condition or other present status of the employee which relate to the proposed discontinuance" (emphasis added). The employer's petition did not include such copies or evidence, although it is evident from the May 19, 1999, Order on Discontinuance of Judge Ertl, from which that petition followed, that such records were already part of the litigational proceedings at that level. Citing case law allowing a compensation judge some flexibility in enforcing certain statutory filing requirements in order to ensure that cases are "decided on the merits and not on technicalities,"[6] the judge denied the motion but ordered the record to remain open for thirty days post hearing[7] to ensure that the employee had adequate opportunity to supplement the medical record before her. In Finding 20 of her subsequent Findings and Order, and citing additional case law, the compensation judge further explained her denial of the employee's motion to dismiss in part as follows:

> The Petition to Discontinue Compensation Benefits set out as the ground for discontinuing benefits the employer's retroactive denial of primary liability. The employee had notice of the ground for the employer's Petition to Discontinue Benefits in May 1999. Failure to attach all medical reports to a Petition to Discontinue does not entitle an employee as a matter of law to an indeterminate continuance of temporary total disability benefits where an employer has attempted to comply with statutory requirements and the employee has actual notice of the basis for discontinuance.

On appeal, the employee contends that the case law cited by the compensation judge does not apply in this case and that "[t]here is no question that the employer failed" to attach the records required by statute. We are not persuaded that the judge's denial of dismissal was improper.

In her Findings and Order, the compensation judge cited Woelfel v. Plastics, Inc., 371 N.W.2d 215, 38 W.C.D. 43 (Minn. 1985), and Scalf v. LaSalle Convalescent Home, 481 N.W.2D 364, 46 W.C.D. 283 (Minn. 1992). The employee contends that the Scalf case does

[6] This is Compensation Judge Patterson's phrase at hearing, not phrasing from the case law.

[7] The record eventually was kept open until December 10, 1999, about 2.5 months after the date of the hearing.

not apply because it construes the 120-day rule for IMEs found in Minn. Stat. § 176.155, which is not at issue here. She contends that the Woelfel case does not apply, both because the judge did not base her original ruling on it at hearing and because,

> in the present case, in contrast to Woelfel, there was an administrative conference which dealt with the merits of the argument made in the NOID. The employer lost and by the decision of the compensation judge was put on notice that it had not supplied sufficient support for its position. Surely at that point the employer must do something to try to comply with the statute when it filed its Petition to Discontinue.

We conclude however, that the same principle under which the supreme court in Scalf permitted compensation judges some flexibility in applying the 120-day rule for IMEs under Minn. Stat. § 176.155 applies at least as readily to permit a compensation judge, under Minnesota Rule 1415.1700, subp. 2, to determine whether an employer has "substantially compl[ied] with" the attachment provisions of Minn. Stat. § 176.238, subd. 5. In this case, several of the medical documents on which the employer's position was based were evidently available to the employee at the NOID conference, prior to the filing of the Petition to Discontinue that is at issue. Nor was the matter at issue at that conference materially different from what it was on the de novo petition. Basic fairness requires that parties be afforded reasonable notice and opportunity to be heard before decisions concerning entitlement to benefits are made. Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 869 (Minn. 1988). Here that basic due process right was satisfied, if not by the evidence presented at hearing before Judge Ertl, at least by the judge's ruling that she would keep the record open post-hearing to permit the employee's supplementation of the medical record.[8] We conclude that the compensation judge's denial of the employee's motion to dismiss the employer's Petition to Discontinue was not legally erroneous.

Assignment of the Burden of Proof

In Finding 19, the compensation judge concluded in part that "[t]he employee has not carried the burden of proving she had a work injury to her low back arising out of and in the course and scope of her activities on May 2, 1998." The employee notes that this is the only reference to any burden of proof in the judge's whole decision. She argues that, since primary liability was originally accepted and benefits commenced, at least the initial burden of proof in this case was on the employer to establish an evidentiary basis for discontinuance. See Violette v. Midwest Printing, 415 N.W.2d 318, 322, 40 W.C.D. 445, 453 (Minn. 1987) (the employer and

[8] That the judge chose to supplement her hearing ruling by expressly adding in her Findings and Order the ruling in Woelfel is certainly not grounds for precluding her reasoning from that case. Nor do we find Judge Ertl's May 19, 1999, conclusion, that medical evidence introduced at the NOID conference was insufficient to warrant discontinuance of benefits at that time, relevant to the issue as to whether that evidence should have been attached to the subsequent Petition from that conclusion; to the extent that it bore on the issue at the subsequent hearing, that conclusion put the employer only on notice to supplement its evidence, not on notice to attach that evidence.

insurer have the burden of proving by a preponderance of the evidence that a discontinuance of benefits is warranted).[9] The employee concedes that, under current case law, the burden of proof in a discontinuance case may properly shift to the employee to demonstrate ultimate entitlement to compensation once the employer has made an initial showing of the evidentiary basis for its petition. See, e.g., King v. Farmstead Foods, 45 W.C.D. 292 (W.C.C.A. 1991); Larson v. Hauenstein and Burmeister, slip op. (W.C.C.A. Jun. 24, 1992). But she insists that the judge erred in this case in not assigning any burden of proof to the employer, contending that the judge "either was unaware that the employer had an initial burden of proof in this case or . . . chose not to apply it." Moreover, she apparently argues that any application of the shifting burden of proof in situations where the employer has once admitted primary liability and the employee is not the moving party does not comply with the mandate in Minn. Stat. § 176.001 that treatment of parties in workers' compensation determinations be "even-handed." "How can it be even-handed," she argues, "to require the employee to have the burden of proof when the employee has already met that burden to the satisfaction of the employer and insurer[?]" The employee asserts that the respective burdens of the parties in discontinuance hearings have never been clearly defined and that "[a]n explanation by the Court on the responsibilities of the parties in meeting their respective burdens would be beneficial not just to the parties in this case but in other cases as well." We conclude that the judge's failure to assert expressly the employer's initial burden of proof in this case was harmless error, and we will attempt to offer the clarification requested.

As the employee has conceded, the burden of proof at discontinuance hearings is initially with the employer and its insurer to demonstrate an evidentiary basis for discontinuance, but, upon such a showing, that burden shifts immediately to the employee to demonstrate ultimate entitlement to compensation. See King, 45 W.C.D. 292; Larson, slip op. (W.C.C.A. Jun. 24, 1992) (after the employer and insurer had introduced sufficient evidence to support a conclusion that employee's work injury was only a temporary aggravation, the compensation judge properly shifted the burden of proof to the employee to show entitlement to ongoing benefits). In this case, evidence was introduced by the employer, in the form of substantial medical records and the IME report of Dr. McPartlin, to the effect that the employee's tripping at work on May 2, 1998, had not been a substantial contributing factor in her low back pain subsequent to that date. We have examined that evidence and conclude, as a matter of law, that its substance constituted a prima facie case for the proposition for which it was introduced - - that is, that the evidence was sufficient to prove that the employee's condition subsequent to May 2, 1998, did not arise out of an in the course of her employment absent any showing by the employee to the contrary. While it might well have been better for the judge to have more clearly articulated the shifting burden of proof applicable in discontinuance proceedings, the judge did not err in this case by permitting the case to proceed, whether or not she expressly articulated that shifting burden of proof.[10]

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[9] This argument is particularly applicable in this case, given that discontinuance of benefits was expressly and affirmatively retained as an issue by the judge over the employee's motion to dismiss it.

[10] The burden of proof issue here on appeal is further implied and addressed in our subsequent decision as to the propriety of the judge's identification of the issues before her for determination.

Identification of Issues for Decision

In her Findings and Order, the compensation judge stated the issue for determination as "Did the employee sustain a specific injury to her low back on May 2, 1998 arising out of and in the course and scope of her employment or were her low back and leg symptoms and treatment from that point on caused by preexisting low back and leg conditions?" The employee contends that "[t]hat issue was never raised by the employer in its NOID; it was never raised by the employer in its petition to discontinue; it was never argued by the employer at the hearing; and the parties never agreed it was an issue." She contends that the judge was limited, pursuant to Minn. Stat. § 176.238, subd. 6, to deciding only issues raised in the employer's petition to discontinue and that "[e]xactly what issues those were to be is unclear from reading the pleading filed by the employer." She notes that, of the two bases for discontinuance identified in the pleadings - - "the employee's extensive pre-existing condition and/or the Idiopathic Injury Doctrine," only the preexisting condition basis was argued at hearing or addressed by the compensation judge. She argues that "[t]he pleadings state only that the employee had a previous condition" (emphasis added), that a denial of primary liability is not set out anywhere in those pleadings, that primary liability was never clearly denied until near the end of the hearing before Judge Patterson, and that "[t]he first time employee and her attorney were aware that this was an issue was when the Findings and Order were issued." Moreover, she notes, at no place in its NOID, in its petition to discontinue, or even in its argument to the judge did the employer ever seek reimbursement or credit under Minn. Stat. § 176.179 for benefits paid by mistake, natural remedies had more than mere discontinuance been clearly at issue. We are not persuaded that the judge improperly expanded the issues to be decided.

The employer filed its Petition to Discontinue on May 28, 1999, nine days after the filing of Judge Ertl's Order on Discontinuance. In "Attachment 'A'" of that petition, the employer asserted that benefits should be discontinued based in part "on the employee's extensive pre-existing condition," alleging clearly and expressly that, "[a]t the time liability was initially mistakenly accepted, self-insured employer was unaware of the employee's long-standing lower back problems including the employee's hemilaminectomy of 1990" (emphasis added). Subsequently, on June 8, 1999, the employee filed a Claim Petition, seeking temporary total disability benefits continuing from April 18, 1999, together with the additional benefits of certain unspecified out-of-pocket expenses and penalties for the employer's failure to pay benefits ordered by Judge Ertl. In its July 8, 1999, Answer to that Claim Petition, the employer expressly and specifically denied paragraphs 3 and 6 of the Claim Petition, which had alleged that the employee sustained a personal injury arising out of and in the course of her employment with the employer on May 2, 1998. In that same Answer, the employer affirmatively alleged that the "employee's current condition and disability is solely related to longstanding pre-existing low back injuries" (emphasis added). Subsequently, by an Order filed July 15, 1999, the employee's Claim Petition was consolidated for hearing together with the employer's May 28, 1999, Petition to Discontinue.

Although hearing of the consolidated matter was several times rescheduled, there is no evidence that it was ever for any reason bifurcated, that the employee's claims in her Claim Petition were ever withdrawn or otherwise dismissed, or that any material assertion of either

petition aside from average weekly wage was ever reserved for a later proceeding. Thus, the employee bore both the secondary, ultimate burden of proving entitlement to the benefits contested by the employer's Petition to Discontinue and also the full burden of proving entitlement to those additional benefits asserted in her Claim Petition. Basic to both of those burdens, as we have implied earlier, was proof of an injury arising out of and in the course of employment. See Kverstoen v. Nelson, 212 Minn. 102, 2 N.W.2d 560, 12 W.C.D. 211 (1942) (the burden of proof in a workers' compensation matter rests upon the employee to establish, without speculation or conjecture, that the disability or injury arose out of and in the course of the employee's employment). See also Vroman v. City of Austin, 284 Minn. 541, 169 N.W.2d 61, 24 W.C.D. 931 (1969); Minn. Stat. § 176.021, subd. 1. Whatever may or may not have occurred off the record in what the compensation judge suggested at hearing had been a substantial pretrial, we can see no basis for the employee's suggestion now that primary liability was not fairly clearly the basis for the employee's Petition to Discontinue from the beginning. In that a decision of either and/or both of the pleadings that had been consolidated for hearing before Judge Patterson ultimately hinged on the employee's proof of an injury other than a temporary aggravation arising out of and in the course of her employment on May 2, 1998, the compensation judge's statement of the issue before her in those terms did not constitute an improper expansion of the issues for decision.

Statement of the Evidence

In her Finding 7, from which the employee appeals, the compensation judge concluded as follows:

> The employee's treatment records in evidence document many flare-ups of her low back and leg symptoms over the years not only from motor vehicle accidents but also from strenuous ordinary life activities. For example, on January 31, 1989, she had such severe lumbar spasms after riding 13 miles on an exercycle that Dilaudid was prescribed for her. Her health care treatment records in evidence also document flare-ups of symptoms brought on by less-than-strenuous activities. On January 10, 1991, she was treated at the Park Nicollet Clinic for a flare-up of low back and right leg pain brought on by sneezing. On July 13, 1995, she was treated for a flare-up of low back and leg symptoms at the Northbrook Clinic caused by lifting her 8-week-old son. Before May 2, 1998, the employee's low back and leg symptoms were so long standing and severe that they could be exacerbated by a sneeze.

In her Finding 19, the compensation judge further supported as follows her conclusion that the low back condition at issue did not arise out of and in the course of the employee's work for the employer:

> A preponderance of the evidence of record including the employee's more than 12 year history of low back and leg symptoms with

> multiple exacerbations some related to motor vehicle accidents, some related to strenuous personal activities, and at least one brought on by the non-strenuous act of sneezing; the fact that the employee saw her chiropractor nine days before May 2, 1998 and reported increasing low back symptoms; the employee's testimony about seeing Dr. Peterson at the Park Nicollet Clinic on May 4, 1998 only because her employer insisted that she go; the fact that the employee did not return to any of the many doctors who had treated her low back and leg symptoms over the years in the first two and one-half months after May 2, 1998 even though she had a long history of seeking out substantial treatment for flare-ups of symptoms; the fact that the employee returned to her sales associate job during the summer of 1998 with no restrictions on performing those particular job duties; the fact that she successfully completed a missionary trip to Guatemala including painting, an activity at least as strenuous as sales at Daytons; the fact that the employee did not seek out substantial treatment until 4 months and 22 days after May 2, 1998, that is, until September 28, 1998; and the opinion of Dr. McPartlin, support the conclusion that stumbling on a carpet three times on May 2, 1998 at work was not a substantial contributing factor to the employee's low back and leg symptoms and need for treatment from May 2, 1998 on. The employee has not carried the burden of proving she had a work injury to her low back arising out of and in the course and scope of her activities on May 2, 1998.

The employee contends, finally, that substantial evidence does not support the compensation judge's decision, in that the judge either misstated, "misunderstood or ignored" the evidence presented in the case. As one of two examples, she cites the judge's findings that the employee's low back condition prior to May 2, 1998, could be exacerbated by "a sneeze" or by the "non-strenuous act of sneezing." The employee argues that these findings "are simply wrong," in that the January 1991 medical record on which those findings were based indicates that the sneezing at issue was repetitive rather than singular and does not indicate that it was "non-strenuous." As a second example of mistreatment of the facts by the judge, the employee argues that the judge ignored the employee's own testimony as to the condition of her low back during the two and a half years immediately preceding the date of her alleged injury, focusing instead on other evidence and concluding, "without basis, that the employee was not a reliable witness with regard to medical care." We are not persuaded.

The employee concedes that the judge's finding as to the employee's vulnerability to injury by sneezing "may appear minor at first," but she argues that it was nevertheless "central to [the judge's] conclusion that the employee's preexisting back condition was so precarious that the work injury of May 2, 1998 was irrelevant to the development of symptoms." She notes in this regard that "[t]he uncontested evidence was that the employee tripped three times at work on

that date and that she saw the employer's doctor on May 4, 1998 who diagnosed a lumbar strain due to that incident." That diagnosis, however, even supported by the later opinion of Dr. Brutlag, is entitled to no more medical credibility than is the diagnosis of Dr. McPartlin, who concluded, after very substantial review of the employee's medical records, that the employee's low back problems subsequent to May 2, 1998, were unrelated to the tripping incident in any material way. See Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985) (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). Nor do we find anything either misrepresentative or dispositive in the fact that the judge, in recounting the employee's medical history, did not expressly reference the relative lack of treatment incurred by the employee during the two plus years immediately preceding May 2, 1998. Indeed, there is evidence that the employee was, after all, experiencing and being chiropractically treated for low back pain less than two weeks prior to her alleged work injury. Given the substantial length and complexity of the employee's low back medical history, it was not unreasonable for the compensation judge to conclude in Finding 8 that "the employee is not a reliable source of information about her past medical history" and to place greater evidentiary weight on documented records. This is particularly true given the broad deference generally granted to compensation judges in matters related to the credibility of witnesses. See Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (assessment of a witness's credibility is the unique function of the trier of fact), citing Spillman v. Morey Fish Co., 270 N.W.2d 781, 31 W.C.D. 187 (Minn. 1978). We conclude that it was not unreasonable for the judge to infer from the employee's medical records, particularly as supported by the expert opinion of Dr. McPartlin, that the employee was subject to a preexisting condition that was not substantially aggravated by her tripping on the carpet on May 2, 1998.

Concluding that the judge did not materially misstate or evidently misunderstand or ignore the facts in deciding this case, concluding that the judge's decision was not otherwise unreasonable in light of the entire medical record and as supported by expert medical opinion, and having concluded that the judge's decision was not improper as a matter of law, we will not reverse the judge's decision for being either clearly erroneous or unsupported by substantial evidence. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.