MICHAEL ANDERSON, Employee, v. BOR-SON CONSTR., INC., and CRAWFORD & CO., Employer-Insurer/Appellants, and MILLENNIUM NEUROSURGERY and MINN. LABORERS HEALTH & WELFARE FUND, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 28, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including the testimony of the employee found credible by the compensation judge, supports the finding that the employee sustained a work-related low back injury on May 9, 2000 while working for the employer.

Affirmed.

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

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal the compensation judge's finding that the employee sustained an injury to his low back arising out of and in the course of his employment on May 9, 2000. We affirm.

BACKGROUND

Michael Anderson, the employee, sustained an injury to his back in 1992 while working for Graus Construction. The employee was seen at the emergency room at the Regina Medical Center on November 16, 1992, complaining of low back pain without numbness, tingling or weakness. The employee reported lifting a pack of cement and twisting at the same time, resulting in pain on the left side of his low back. The doctor diagnosed low back strain with muscle spasm and prescribed Flexoril, Motrin and ice. An x-ray of the lumbar spine and sacroiliac joints showed no evidence of acute bony abnormality. (Pet. Ex. H.) The employee returned to work the next day and continued to perform all of the duties of his job at Graus. (Finding 3.)[1]

After leaving Graus Construction, the employee went to work for Marimack Construction as a general laborer. The employee worked on building remodeling projects involving tearing out walls and ceilings and removal of debris. The employee used a 16-pound sledge hammer to knock down walls, loaded up block in a wheelbarrow and removed the debris

[1] References are to unappealed factual findings from the January 8, 2001 Findings and Order.

from the building. The employee described this as heavy work. The employee then left Marimack and returned to work for Graus for a two-week period before going to work for BOR-SON Construction, Inc., the employer, on March 18, 2000. (T. 51-53.)

The employee worked at one of the employer's projects at Hastings High School as a brick tender. His job duties included setting up scaffolding, carrying blocks, bricks and mortar to the bricklayers and clean up. The employee was physically capable of performing his job duties. He had an occasional low backache from the heavy work but did not seek medical care or miss time from work. (Finding 4.) The employee testified that prior to May 9, 2000, he had seen a chiropractor on a few occasions for back pain. (T. 56.)

During the afternoon of May 9, 2000, the employee testified he was shoveling mud for a block tender when he felt his back "give out." (T. 56.) The employee testified his supervisor, Larry Mikla, asked him later that day if his back was bothering him, and the employee said it was. Mr. Mikla then put the employee on cleanup detail in the afternoon. (T. 58-59.)

On May 9, 2000, the employee saw Gerald W. Rupp, D.C., complaining of low back pain. Dr. Rupp recorded no history of an injury. The doctor diagnosed lumbar and lumbosacral subluxations and provided adjustments. (Pet. Ex. G.) That same day, the employee also saw Dr. Gary Moody at the River Valley Clinic complaining of left-sided low back pain over the last four to five days. The doctor recorded the employee was working construction doing a fair amount of shoveling. Dr. Moody diagnosed acute low back strain. The employee returned to see Dr. Moody on May 10 with continued low back pain. The doctor noted the employee was "walking somewhat stooped over." On examination, Dr. Moody noted significant left paraspinous muscle spasm, very limited range of motion and prescribed physical therapy. A lumbar MRI scan showed disc herniations at L4-5 and L5-S1 with extruded fragments at the L4-5 level. (Pet. Ex. F.)

On May 11, 2000, the employee received physical therapy at the River Valley Clinic. The physical therapist recorded the employee's complaints as chronic low back pain with a recent flare-up last week. The therapist recorded the employee was "shoveling a lot at home. Pt does construction as occupation." Finally, the therapist recorded a date of injury of May 6, 2000, which was a Saturday. (Pet. Ex. F.) The employee denied giving this history to the physical therapist. (T. 88.)

The employee returned to see Dr. Moody on May 17, 2000. The doctor recorded the employee "clarifies his history in that he feels that as of 5/9 his pain had become significantly worse and he realized that he couldn't work and sought medical attention. Construction work with shoveling led up to this situation." The doctor reviewed the MRI scan with the employee, diagnosed significant two-level disc disease and recommended a surgical consultation. Dr. Moody then referred the employee to Dr. Arturo Camacho, a neurosurgeon. (Pet. Ex. F.)

Dr. Camacho examined the employee on May 26, 2000, and recorded a history of an injury on May 9, 2000, while the employee was shoveling. The doctor diagnosed right L5 and S1 radiculopathy secondary to herniated discs at the right L4-5 and L5-S1 inner spaces. The doctor recommended a two level laminectomy, which he performed on July 20, 2000. Based upon the

history provided by the employee and a hypothetical question presented by the employee's counsel, the doctor concluded the employee's work at BOR-SON on May 9, 2000, was a significant contributing cause of his back condition. (Pet. Ex. C.)

On May 31, 2000, Mr. Mikla provided a recorded statement to Lori Gabrielson.[2] In response to a question about what he knew about the employee's injury, Mr. Mikla stated the employee was fine in the morning. In the afternoon, Mr. Mikla said the employee was "favoring his back, like it was sore." The employee told Mr. Mikla it happened while he was shoveling mud. Mr. Mikla told the employee to fill out an injury report, but the employee replied "oh, it's probably just a pulled muscle." Mr. Mikla stated the employee came to the job site the next morning and said he was still sore and was going to see his doctor. On May 30, 2000, the employee told Mr. Mikla he wanted to fill out an injury report but did not do so before because he thought his condition was only a pulled muscle. Mr. Mikla stated he prepared a First Report of Injury on May 30, 2000. (Pet. Ex. I.)

Dr. Robert Barnett, Jr. examined the employee on July 17, 2000, at the request of the employer and insurer. The doctor was provided the employee's medical records prior to his examination. He obtained a history from the employee of an onset of symptoms on May 9, 2000, while doing a lot of bending and shoveling activities. The doctor diagnosed a two-level disc herniation and concluded the employee had been appropriately treated. Dr. Barnett concluded the employee had symptoms of back pain off and on since a work injury in 1992. The medical records suggested to the doctor that the employee injured his back at home on May 6, 2000, with an increase in low back pain thereafter. The doctor also noted the contemporaneous medical records reflected no history of an injury on May 9, 2000. Dr. Barnett concluded the employee did not sustain a work injury on May 9, 2000. (Resp. Ex. 2.)

The employee's claim for benefits was heard by the compensation judge on November 1, 2000. At the hearing, the employee testified he did not work on Monday, May 8, and stated he injured his back on May 9, 2000. The employee acknowledged that while shoveling he had back pain for four or five days before May 9, but denied he gave that history to Dr. Moody on May 9, 2000. (T. 86-87.) The employee further denied that he told the physical therapist at the River Valley Clinic that he injured his low back while shoveling at home. (T. 88.)

Bruce Bombard was the project superintendent at the Hastings project and one of his duties was to make reports concerning work injuries. Mr. Bombard testified he talked to Larry Mikla on or about May 17, 2000, and prepared notes of his conversation. One entry states "Larry [Mikla] told Mike that he needed to get a first report filled out. Mike told Larry that he didn't think it was anything and probably wasn't from work anyway." Mr. Bombard further recorded in his notes: "Mike said that it wasn't from work & he wasn't claiming it as a work injury, he said that he thought he had a 'pulled muscle' & that he 'probably did it at home.'" (Resp. Ex. 3.) All of Mr. Bombard's information concerning the employee's claimed injury was based on information obtained from Mr. Mikla. (T. 28-29.) Jerry Jerome worked as a bricklayer for the employer at the Hastings project. Mr. Jerome testified that on the afternoon of May 9, 2000, the

[2] Ms. Gabrielson was apparently a representative of the employer and/or the insurer.

employee complained to him of low back pain. The employee did not, however, state he had injured himself shoveling mud. (T. 80-82.)

In a Findings and Order filed January 8, 2001, the compensation judge found the employee sustained an injury to his low back on May 9, 2000, arising out of his employment with the employer and awarded benefits. The employer and insurer appeal.

DECISION

On appeal, the appellants ask this court to reverse the compensation judge's factual finding of a personal injury contending the finding is not supported by substantial credible evidence. They point out the contemporaneous medical records from Dr. Rupp and Dr. Moody make no reference to any injury on May 9, 2000. Mr. Bombard's notes from his conversation with Mr. Mikla also support a conclusion that the employee did not sustain an injury at work. They further note the employee did not tell the employer about a May 9, 2000 work injury until after Dr. Camacho told him on May 26, 2000 he would need surgery. A conclusion that the employee did not injure himself at work, appellants assert, is consistent with the contemporaneous medical records, the notes from Mr. Bombard's May 17, 2000, conversation with Mr. Mikla and the testimony of Mr. Jerome. The employee's testimony, on the other hand, appellants contend, is inconsistent, not credible and not corroborated by any written documents. Accordingly, the appellants argue the compensation judge erred in relying on the employee's testimony to find the employee sustained a personal injury with the employer.

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). "Assessment of witness credibility is the unique function of the factfinder." Tews v. Geo. A. Hormel & Co., 430 N.W.2d 178, 180, 41 W.C.D. 410, 412 (Minn. 1988). It is not the role of this court to evaluate the credibility and probative value of witness testimony and to choose different inferences from the evidence than the compensation judge. Krotzer v. Browning-Ferris/Woodlake Sanitation Serv., 459 N.W.2d 509, 513, 43 W.C.D. 254, 260-61 (Minn. 1990).

In her memorandum, the compensation judge carefully evaluated the conflicting versions of the events and the different inferences to be drawn from the evidence. The compensation judge found credible the employee's testimony that he had occasional low backaches, but on May 9, 2000, felt a sharper pain for which he sought medical attention. The compensation judge further noted the employee's testimony was corroborated by the statement given by Mr. Mikla and the testimony of Mr. Jerome. The compensation judge could reasonably rely on this evidence in reaching her conclusion. While the evidence may support a different result, this court's standard of review is to 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). The decision of the compensation judge is supported by substantial evidence and is, accordingly, affirmed.