MAUREEN O'BRIEN AZINGE, Employee/Appellant, v. CCP/ADAPTED LIVING PROGRAMS and MINNESOTA ASSIGNED RISK PLAN/BERKLEY RISK ADMIN'RS., Employer-Insurer, and MEDICA/HEALTHCARE RECOVERIES, INC., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 25, 2001

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including various medical opinions, supports the compensation judge's denial of the employee's claims for a 3.5 percent or 10 percent permanent partial disability for the low back.

TEMPORARY AGGRAVATION; INTERVENING, SUPERSEDING CAUSE. Where the compensation judge found the employee sustained a temporary injury to her low back on November 13, 1993, but made no finding determining when the personal injury resolved, and where the compensation judge concluded the employee's need for treatment after July 1999 was the result of a superseding, intervening cause but failed to make findings identifying the superseding, intervening event or whether the event or activity was so unreasonable, negligent, dangerous or abnormal as to break the chain of causation, the compensation judge's findings must be vacated and the matter remanded for redetermination.

Affirmed in part, and vacated and remanded in part.

Determined by: Johnson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Kathleen Nicole Behounek

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's findings that (1) her work injury of November 13, 1993, resulted in a temporary aggravation of her back; (2) the employee's personal injury resulted in no permanent partial disability; and (3) the employee's need for treatment from and after July 1999 was related to superseding, intervening injuries or activities and not to the employee's work injury. We affirm the compensation judge's finding that the employee sustained no permanent partial disability as a result of her personal injury. We vacate findings 12 and 13 and remand the case to the compensation judge for further findings consistent with this opinion.

BACKGROUND

Maureen O'Brien Azinge, the employee, worked as a Rehabilitation Counselor II for CCP/Adapted Living Programs, the employer. The employee's wage was $210.00 a week.

Her job duties included assisting disabled persons in their homes. On November 13, 1993, the employee injured her low back while transferring a quadriplegic patient. (T. 24.) The employee did not immediately seek medical attention and continued to work for the employer performing the same duties. (T. 28.)

The employee first sought medical treatment on May 31, 1994, with Dr. Robert Ercolani. The employee gave the doctor a history of an injury in November 1993 while she was lifting a large client and noted low back pain the following day. The employee complained of recurrent pain since then, particularly when lifting. On examination, the doctor found full range of lumbar motion with minor pain to palpation in the right sacroiliac region. The doctor prescribed a muscle relaxant and physical therapy and limited the employee's lifting to no more than 35 pounds. On July 20, 1994, Dr. Ercolani noted the employee's back pain was improving but not resolved and he continued her restrictions. (Pet. Ex. K.)

The employee left her job with the employer on July 28, 1994, and went to Germany for six months. While in Germany, the employee studied German for four weeks and then worked as a nanny for a family. (T. 34.) The employee testified she continued to have low back problems while in Germany but sought no medical treatment. The employee stated she did, however, perform the home exercises she had been taught in physical therapy. (T. 34-35.) While in Germany, the employee went sledding with friends and aggravated her low back in the same area as her work injury. She testified she did not seek medical treatment because she had no insurance coverage. (T. 35-36.)

Upon her return to the United States, the employee went to work for Dungarvin, where she worked from 1995 to 1997. (T. 37.) She testified the job entailed house duties for disabled persons but required less lifting than her job with the employer. The employee conceded she had no work restrictions while working for Dungarvin and missed no time from work because of low back pain. (T. 70-71.) In January 1996, the employee also obtained a job as a reserve teacher with the Minneapolis Public Schools teaching German to middle and high school students. (T. 48.)

The employee returned to see Dr. Ercolani on March 20, 1995. The employee told the doctor her low back pain had persisted and stated she had recently moved and was lifting a lot of heavy boxes. The doctor diagnosed chronic low back pain with a normal examination and prescribed further physical therapy. By report dated May 30, 1995, Dr. Ercolani opined the employee had reached maximum medical improvement and sustained no permanent partial disability. (Pet. Ex. K.) The employee was next examined by Dr. Jerry Reese, an orthopedic surgeon, on referral from Dr. Ercolani. The doctor obtained x-rays and conducted an orthopedic examination, both of which were normal. Dr. Reese diagnosed chronic low back strain, very mild, and recommended the employee stop jogging. (Resp. Ex. 5.) The employee last saw Dr. Ercolani on May 6, 1996, with complaints of continued localized low back pain without radiation. On examination, the doctor found a full range of lumbar motion without pain, negative straight leg raising and again diagnosed chronic low back pain. Dr. Ercolani stated the employee reached MMI on May 6, 1996 without any permanent disability. He stated medically he could offer the employee nothing more and recommended she continue her home therapy. (Pet. Ex. K.)

The employee received no further medical treatment for her low back until July 14, 1999. (T. 77.) She then sought treatment with Lori Tenenbaum, D.C. The employee gave a history of low back problems since her 1993 injury, but stated her back pain was better during her pregnancy. However, as her child grew, the employee stated that lifting her daughter in and out of her crib caused low back pain. Dr. Tenenbaum commenced a regimen of chiropractic treatment. The employee last saw Dr. Tenenbaum on December 1, 1999. (Pet. Ex. H.)

The employee saw Dr. Joseph Cove, an orthopedic surgeon, on September 9, 1999, complaining of low back pain since November 1993, which significantly worsened in July 1999. The employee reported her back pain had resolved during her pregnancy but was now aggravated by lifting her daughter in and out of the crib. An MRI scan showed a mild broad-based disc bulge at L5-S1, which Dr. Cove described as "essentially unremarkable" with "a hint of dehydration at L4-5 but nothing that indicates an annular tear." Dr. Cove recommended a more vigorous exercise program, anti-inflammatory medication and physical therapy. (Pet. Ex. G.) The employee received four physical therapy sessions at NovaCare in October 1999. The discharge summary noted the employee's symptoms were still present on the right side of her back, but they were mild. (Pet. Ex. J.)

The employee was in a car accident on December 11, 1999. On December 13, 1999, the employee saw Peter Kelzenberg, D.C., at the Osseo Chiropractic Clinic complaining of cervical and thoracic pain. Dr. Kelzenberg commenced chiropractic treatment for a cervical-thoracic strain/sprain. (Pet. Ex. E.) The employee also saw a doctor at Camden Physicians on December 30, 1999, complaining of low back pain aggravated by her car accident as well as upper neck and shoulder pain. The doctor diagnosed lower lumbar pain which possibly reoccurred following the car accident. (Pet. Ex. 4.)

On June 2, 2000, the employee saw Dr. John Levitt at the Park Nicollet Clinic complaining of chronic low back pain. Dr. Levitt suggested the employee see Dr. Rimando, a physical medicine specialist. On June 27, 2000, Dr. Rimando diagnosed a work injury in 1993 aggravated by the December 1999 car accident. The doctor recommended the employee obtain MedX treatment at Physicians Diagnostics and Rehabilitation Services. (Pet. Ex. Q.) The employee did obtain therapy at Physicians Diagnostics and Rehabilitation Services in June and July 2000. (Pet. Ex. C.)

On June 6, 2000, the employee was examined by Dr. Mark Friedland at the request of the employer and insurer. The doctor diagnosed complaints of low back pain without objective corroborative findings on examination or radiographic studies. The doctor opined the employee did not injure her low back in November 1993. Assuming, however, the employee did sustain an injury the doctor opined the employee reached maximum medical improvement by May 6, 1996, and stated the employee sustained no permanent partial disability. The doctor opined the employee was capable of working on a full-time basis without physical restriction. Finally, the doctor opined the employee's treatment subsequent to her December 1999 car accident was attributable solely to the car accident and not to the 1993 personal injury. (Resp. Ex. 1.)

The employee was evaluated by Dr. Michael Davis on September 11, 2000, on referral by her attorney. The doctor obtained a history from the employee, reviewed her medical

records and conducted an orthopedic examination. Dr. Davis concluded the employee sustained a lumbosacral strain on November 13, 1993, and rated a 3.5 percent permanent partial disability secondary to that injury.[1] The doctor recommended the employee avoid repetitive bending, twisting and heavy lifting. Dr. Davis further opined the December 11, 1999 car accident aggravated the employee's low back condition and caused a soft tissue injury to the cervical spine. The doctor apportioned 60 percent of the responsibility for the medical treatment after the car accident to the 1993 work injury and 40 percent to the car accident. The doctor stated that eight to ten weeks of conservative care was reasonable following the car accident. (Pet. Ex. A.)

The employee filed a claim petition seeking permanent partial disability benefits and payment of medical expenses as a result of a personal injury on November 13, 1993. The employer and insurer initially denied primary liability. The case was heard by a compensation judge at the Office of Administrative Hearings on October 3, 2000. The employer and insurer accepted liability for a temporary injury to the employee's lumbar spine on November 13, 1993. In a Findings and Order issued on November 27, 2000, the judge found the employee's work injury of November 13, 1993 resulted in a temporary aggravation of her low back, found the employee sustained no permanent partial disability as a result of her personal injury and found the employee's need for treatment from and after July 1999 was related to superseding, intervening injuries or activities and was not causally related to the employee's work injury of November 13, 1993. Accordingly, the compensation judge denied the employee's claims. 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

Permanent Partial Disability

The employee claimed entitlement to a 3.5 percent permanent partial disability under Minn. R. 5223.0390, subp. 3.B., as rated by Dr. Davis and Dr. Kelzenberg. Alternatively,

[1] See Minn. R. 5223.0390, subp. 3.B.

the employee claimed entitlement to a 10 percent permanent disability under Minn. R. 5223.0390, subp. 3.C.(2), which the employee contends is supported by the September 13, 1999 MRI scan indicating abnormalities at L4-5 and L5-S1. The compensation judge found the employee sustained no permanent disability as a result of her personal injury. The employee claims this finding is not supported by substantial evidence, contending the compensation judge failed to credit her testimony that she has suffered continuing pain and symptoms in her low back since her personal injury. These complaints, the employee notes, are supported by the medical records. Further, the employee asserts the opinion of Dr. Friedland is flawed, lacks foundation and cannot be relied upon by the compensation judge. Accordingly, the employee argues the compensation judge's denial of benefits should be reversed. We are not persuaded.

Entitlement to a 3.5 percent permanent disability under Minn. R. 5223.0390, subp. 3.B., requires symptoms of pain or stiffness in the lumbar spine substantiated by persistent objective clinical findings such as muscle tightness or decreased range of motion. Dr. Ercolani examined the employee on October 18, 1995 and May 6, 1996. Each of those examinations was negative and the employee demonstrated full lumbar range of motion. Dr. Ercolani noted no muscle tightness in the paralumbar muscles and rated a zero percent permanent partial disability. Dr. Reese found no tenderness or muscle spasm and concluded his low back examination was entirely normal. This evidence supports the compensation judge's denial of permanent partial disability benefits. While there certainly is evidence which would permit a different conclusion, it is the function of the compensation judge as the trier of fact to resolve conflicts in medical testimony. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

Dr. Friedland also opined the employee sustained no permanent partial disability as a result of her work injury. The employee contends this opinion lacks foundation because one of the bases for Dr. Friedland's opinion was his assumption that the employee's work for Dungarvin required the same lifting duties as her job with the employer. In fact, the employee argues, her job with Dungarvin involved much less lifting than her job with the employer. We are not persuaded by this argument. As noted above, subpart 3.B. requires proof of lumbar pain or stiffness substantiated by persistent objective clinical findings. Dr. Friedland noted no objective findings. Moreover, Dr. Friedland's assumption regarding the employee's subsequent work activities was only one of the bases for his opinions. In his report, the doctor stated he based his opinions on the employee's history, medical records, examination and radiographs. As a general rule, this level of information is adequate foundation for an expert medical opinion. See Reinhardt v. Colton, 337 N.W.2d 88 (Minn. 1983). Accordingly, the compensation judge could properly rely upon the doctor's opinion.

The employee further claims a ten percent permanent partial disability under Minn. R. 5223.0390, subp. 3.C., based upon the 1999 MRI scan. The employee contends this scan demonstrates abnormalities at two vertebral levels, L4-5 and L5-S1. Again, we conclude substantial evidence supports the compensation judge's denial of this claim. In his September 19, 2000 report, Dr. Davis stated the September 1999 MRI scan "shows some minor abnormality, but I do not believe it can be definitely ascribed to the November 13, 1993 incident. It may just represent mild degenerative change due to normal wear and tear over the years." (Pet. Ex. A.) Dr. Friedland opined the "minimal broad-based L5-S1 disc bulge noted on the MRI scan of September 17, 1999, is not clinically significant as was also indicated by Dr. Cove on

September 17, 1999 when he found this MRI scan was 'essentially unremarkable.' The patient certainly does not have any symptomology or physical findings that would be in any way consistent with lumbar radiculopathy." (Resp. Ex. 1.) The compensation judge could reasonably rely on these medical opinions. The compensation judge's denial of the permanent partial disability benefits is, therefore, affirmed.

Temporary Aggravation

The employee sought payment by the employer and insurer of various medical expenses incurred in 1999 and 2000.[2] The compensation judge found the employee's November 13, 1993 injury resulted in a temporary aggravation of her back. The judge further found the employee's need for treatment from July 1999 and thereafter was related to superseding, intervening injuries or activities and was not causally related to the employee's work injury of November 13, 1993. The employee appeals these findings contending they are legally and factually unsupported.

When the effects of an employee's personal injury totally resolve without residual disability, restrictions or need for medical care, the employer and insurer have no further liability for benefits. Kautz v. Setterlin, 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1986). Although the judge found the employee's 1993 personal injury was temporary, the judge made no finding determining when the personal injury resolved.

The compensation judge also found the employee's need for medical treatment from and after July 1999 was related to superseding, intervening injuries or activities. A superseding, intervening cause is one which severs the causal link between the original personal injury and the resultant disability such that the original personal injury is no longer a substantial and contributing cause of the resultant disability. Buford v. Ford Motor Co., 52 W.C.D. 723 (W.C.C.A. 1995). The compensation judge's finding of a superseding intervening event, therefore, implicitly assumes the effects of the 1993 personal injury continued until that superseding, intervening event. Had the effects of the employee's personal injury ended before this intervening event, there could be no superseding, intervening event since there would be no causal link to be severed. In such case, the defense of superseding, intervening cause is irrelevant.

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[2] The employee sought payment of the following medical bills:

1. NovaCare Outpatient Rehabilitation Division - $222.00 for the period 10/6/99 through 10/15/99. (Pet. Ex. R.)

2. Physicians' Diagnostics and Rehabilitation - $3,072.88 for the period 6/29/00 through 9/14/00.

3. Cedar Island Chiropractic Clinic - $318.30 for the period 7/14/99 through 12/1/99.

4. Healthcare Recoveries - $1,603.64 for the period 7/14/99 through 9/17/99. (Intervention Claim.)

5. Park Nicollet Medical Center - $525.00 for the period 12/11/99 through 9/14/00. (T. 7-8, Pet. Ex. R & S.)

6. Medical co-pays - $400.00; mileage - $38.13. (T. 10.)

The compensation judge made no specific finding regarding the injury or activity which was the superseding, intervening cause of the employee's need for medical treatment from and after July 1999. In her memorandum, however, the compensation judge noted the employee admitted an aggravation to her low back while sledding in Germany in 1994 or early 1995. The judge stated in the memorandum "This incident is found to be a superseding, intervening injury to her low [back]." Where a work injury creates a permittedly weakened physical condition which an employee's subsequent normal physical activities aggravate to the extent of requiring additional medical care, such additional care is compensable. Nelson v. American Lutheran Church, 420 N.W.2d 588, 590, 40 W.C.D. 845, 851 (Minn. 1988). If, however, a subsequent aggravation of the initial injury arises from an independent intervening cause not attributable to the employee's customary activity in light of the employee's condition, then such additional medical care for the aggravation is not compensable. Rohr v. Knutson Constr. Co., 305 Minn. 26, 232 N.W.2d 233, 28 W.C.D. 23 (1975). The causal link between the work injury and the subsequent aggravation is broken when the aggravation is the result of "unreasonable, negligent, dangerous or abnormal activity on the part of the employee." Eide v. Whirlpool Seeger Corp., 260 Minn. 98, 102, 109 N.W.2d 47, 49-50, 21 W.C.D. 437, 441 (1961). The compensation judge made no factual findings whether the employee's sledding activities were a normal physical activity or were so "unreasonable, negligent, dangerous or abnormal as to constitute a superseding, intervening cause." Eide, id.

We conclude Findings 12 and 13 are not reconcilable. We therefore vacate these findings and remand the case to the compensation judge for further findings consistent with this opinion. The compensation judge shall make such findings on the existing record.