

JEROME A. BANGS, Employee/Appellant, v. BLOOMINGTON ELEC. and STATE FUND MUT. INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 16, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION – SUBSTANTIAL CONTRIBUTING CAUSE; CAUSATION – AGGRAVATION. Substantial evidence, including expert opinion, supported the compensation judge's decision that the employee's work injury was merely a temporary aggravation of the employee's pre-existing low back condition.

PRACTICE & PROCEDURE. A compensation judge's findings should not consist merely of a recitation of the evidence; rather, the judge should indicate which evidence she accepts as more probable than not and, if possible, explain why.

Affirmed.

Determined by Wilson, J., Johnson, J., and Pederson, J.
Compensation Judge: Carol A. Eckersen

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's finding that the employee's May 6, 1997, work injury was temporary in nature. We affirm.

BACKGROUND

The employee became a journeyman electrician in 1973. He was a member of the electricians' union and worked as an electrician continuously from 1984 to May of 1997. The employee began working for Bloomington Electric Company [the employer] in June of 1996. Prior to that time, he had been treated for low back pain. In December of 1995, Dr. T. Holt prescribed Vicodin for back pain and some shoulder pain, which were "exacerbated by overworking." On February 25, 1997, the employee was seen by Dr. S. Menaker, complaining of back pain after twisting at work and feeling a sharp pain in his back. Dr. Menaker noted that the employee "says he has trouble like this frequently." The employee apparently did not file a workers' compensation claim although urged by Dr. Menaker to do so. Dr. Menaker prescribed Vicodin for the injury.

By March of 1997, the employee was treating with Dr. K. Bardwell, who diagnosed chronic low back strain, noted that the employee was having difficulty working, and prescribed

more Vicodin. On April 16, 1997, the employee returned to Dr. Bardwell, who indicated that the employee was changing jobs. Dr. Bardwell decided to taper the employee off of Vicodin, noting that “[i]f we do not get complete relief with change of job and off medications, definitely need to get him in some Physical Therapy. So far he has resisted.”

On May 7, 1997, the employee returned to Dr. Bardwell, reporting that he had been working under a restriction of one-handed work on May 6, 1997, when he turned with a heavy weight and strained his left shoulder and back. Dr. Bardwell took the employee off work and prescribed MS Contin and physical therapy. The employee was noted to be slightly improved on May 14, 1997, and Dr. Bardwell switched the employee back to Vicodin.

X-rays taken on May 21, 1997, revealed degenerative changes in the lumbar spine. Dr. Bardwell released the employee to return to work, two hours a day, with restrictions, on May 28, 1997, and on September 22, 1997, he opined that the employee had reached maximum medical improvement [MMI].

The employee then treated with Dr. Mark Agre, a physical medicine and rehabilitation doctor. Dr. Agre made no changes in the employee’s restrictions but discussed tapering the employee off of Vicodin. The doctor arranged for an MRI of the employee’s lumbar spine on August 12, 1997, which showed degenerative disc changes at L2-3, L3-4, and L4-5, with a left bulging disc at L3-4 encroaching on the left L3 foramen. Dr. Agre opined that the L3-4 disc was asymptomatic and recommended facet injections. On August 21, 1997, Dr. Agre indicated that the employee could work two hours per day in light-duty work. Six weeks later, on October 9, 1997, Dr. Agre released the employee to work four hours per day with restrictions, and he again recommended facet injections or a work hardening program. The employer offered the employee a light-duty job on October 7, 1997, installing light switches and receptacles. The employee did not accept the offered job and testified that he did not feel he could perform that work.

The employee next came under the care of Dr. Roy Yawn, his family doctor.¹ Dr. Yawn’s treatment for the employee’s low back symptoms consisted primarily of renewing Vicodin prescriptions.

On October 30, 1997, the employee was seen by independent medical examiner Dr. Gary Wyard. Dr. Wyard diagnosed low back pain with degenerative changes and opined that the employee had reached MMI, that he did not need any type of driving restrictions, that he did not need any other specific limitations or restrictions, and that he did not need any specific ongoing care or treatment.

On September 18, 1998, the employee was examined by Dr. Robert Wengler. Dr. Wengler diagnosed advanced degenerative disc disease of the lumbar spine with “a documented lateral disc herniation at L3-4 on the left,” and he advised the employee that “he would probably require a spine fusion if anything were to be done.” Dr. Wengler opined that the “events of May 6, 1997 resulted in a significant aggravation of a pre-existing condition” and that the

¹ In his brief, the employee stated that he also treated with Dr. Kvamme. Records from this doctor were apparently lost and are not a part of the record before this court.

employee was totally disabled from sustained gainful employment “in any strenuous physical capacity.”

Dr. John Dowdle performed an independent medical examination of the employee on March 5, 1999, and diagnosed chronic degenerative disc disease. It was his opinion that the degenerative disc disease pre-existed the May 1997 work injury and that the work injury constituted a temporary aggravation of that underlying condition. Dr. Dowdle agreed with Dr. Wyard’s opinion as to MMI, and he did not find the employee to be a candidate for fusion surgery because of “the significant psychogenic components to his illness” and because of his dependency on Vicodin. He stated that the employee had been capable of performing light-duty work since November of 1997.

The employee’s attorney provided Dr. Wengler with a copy of Dr. Dowdle’s report, and, in a letter dated April 12, 1999, Dr. Wengler stated that his opinion was unchanged and that the employee had “sustained a significant disc injury on May 7, 1997.” On May 25, 1999, Dr. Wengler testified by deposition that “[the employee] had some pre-existing degenerative disc disease in the lumbar spine. But I think he blew out a disc at L3-4 on the left side in May of 1997.” He rated the employee as having a 12% whole body impairment, for the herniated disc, as a result of the May 1997 injury and “10% for the multiple level degenerative disc disease due to which occurred in the course of his employment prior to that.”

The employer and insurer admitted liability for the May 1997 injury and paid temporary total disability benefits from May 7, 1997, through November 6, 1997, when an order on discontinuance was served and filed, allowing them to discontinue temporary total disability benefits based on the employee’s failure to accept the October 7, 1997, job offer.

On November 28, 1998, the employee filed a claim petition, seeking temporary total disability benefits continuing from November 7, 1997, and approval for surgery. In an amended claim petition filed on June 3, 1999, the employee sought permanent total disability benefits. The claim petition proceeded to hearing, at which time issues included whether the May 1997 work injury was permanent or temporary in nature, whether the employee had reached MMI, whether the employee had refused an offer of suitable light-duty work, whether the employee was entitled to temporary total or permanent total disability benefits, and whether the employee had any permanent partial disability as a result of the May 1997 work injury. Evidence introduced at hearing included a surveillance tape showing the employee “performing light electrical tasks” for his son, who is an electrical contractor.²

In a decision filed on April 13, 2001, the compensation judge found that the May 1997 work injury was a temporary injury ending November 7, 1997, that the employee had reached MMI as of that date, and that the employee had refused an offer of suitable light-duty work, had not diligently sought work, and was not entitled to permanent total or temporary total disability benefits. The judge also found that the employee did have a 10% whole body disability but that it was unrelated to the work injury. The employee appeals.

² See unappealed Finding 10.

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

The employee contends that "the heart of the compensation judge's decision was her conclusion that the work injury of May 6, 1997 was a temporary injury." At oral argument, employee's counsel admitted that the compensation judge "apparently" found the employee's testimony lacking in credibility but contends that the judge "should have stated that and indicated why." It is the employee's position that Minn. Stat. § 176.371 requires the compensation judge to discuss credibility in her memorandum and that, without a more detailed discussion by the judge as to why she accepted certain evidence over conflicting evidence, this court is left to "pore through the record to see whether or not there are bits of evidence which, when added together, constitute sufficient evidence."

Longstanding case law provides that 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. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). In the present case, the compensation judge specifically stated in her memorandum that she found Dr. Dowdle's opinion more persuasive than Dr. Wengler's. In his brief, the employee contends that Dr. Dowdle's opinion is directly contrary to the opinions of Drs. Bardwell, Kvamme, Yawn, and Wengler. We note, however, that Dr. Wengler was the only doctor to specifically opine that the employee's May 1997 work injury was permanent, and his opinion to that effect was apparently based in part on his conclusion that the employee "blew out a disc at L3-4 on the left side in May of 1997." Dr. Dowdle diagnosed mechanical low back pain and degenerative disc disease but found that the degenerative disc disease was pre-existing and had been aggravated by the work injury for a period of only three months. It was also Dr. Dowdle's opinion that the employee had no radicular symptoms and no findings consistent with a disc herniation. In explaining why she accepted the opinion of Dr. Dowdle over that of Dr. Wengler, the judge noted that Dr. Dowdle's opinion was consistent with Dr. Agre's interpretation of the employee's MRI scan. The evidence bears that out. Specifically, in his office note of August 26, 1997, Dr. Agre stated that "[the employee] has a left lateralized disc at L3-4 encroaching the left

L3 foramen. However, he is asymptomatic in this regard and I feel that he does not have a radiculopathy.”³

The employee does not argue that there are any specific facts assumed by Dr. Dowdle that are not supported by the evidence. Rather, the employee contends that a more detailed explanation for the judge’s choice of experts is necessary. However, nothing in the statute necessarily requires a judge to explain why she chose one expert opinion over another. Fowler v. City of St. Paul, slip op. (W.C.C.A. June 27, 2001). As there is no argument that Dr. Dowdle’s opinion is lacking in foundation, we affirm the judge’s choice between expert opinions.

The rest of the employee’s argument revolves around the compensation judge’s apparent rejection of the employee’s testimony and the judge’s failure to make a specific finding as to credibility. We acknowledge that the judge’s findings do not provide much real explanation for her decision; rather, those findings appear to be mere recitation of the evidence without definitive indication as to which evidence has been accepted as “more likely than not.” This court has on occasion found it necessary to remand a case for reconsideration and further findings where we were unable to determine the basis for the compensation judge’s determination. See, e.g., Mendez-Merino v. Farmstead Foods, slip op. (W.C.C.A. Aug. 7, 2001). However, in the instant case, it is obvious that the compensation judge did in fact reject the employee’s testimony, and the employee never argued on appeal that the judge lacked any basis to do so. Contrary to the employee’s argument, there is no **requirement** that a compensation judge make specific findings as to credibility of witnesses or discuss credibility in a memorandum; Minn. Stat. § 176.371 provides that a judge’s decision “shall include a memorandum only if necessary to delineate the reasons for the decision or to discuss the credibility of witnesses.” Here, the employee testified that he was unable to perform light-duty electrical work, but surveillance tapes showed him doing such work for his son. The judge noted this fact in her memorandum, and she did not abuse her discretion by failing to address credibility further.

Certainly, there was evidence in this case that would have supported alternative findings, and this court might have preferred a specific finding as to the employee’s credibility; however, where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the judge’s findings are to be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D.235, 240 (Minn. 1984). Having found the employee’s arguments ultimately unpersuasive, we affirm the judge’s decision in its entirety.⁴

³ We note that Dr. Gary Wyard’s report of October 30, 1997, also supports the compensation judge’s finding of a temporary injury. Contrary to the argument in the employee’s brief, Dr. Wyard did not conclude that the employee was capable only of light-duty work. Rather, Dr. Wyard stated that the employee had reached MMI, that he did not need any specific limitations or restrictions, and that he was capable of returning to the offered job, which was light-duty work.

⁴ The employee’s brief only addresses the issue of whether the 1997 work injury was permanent or temporary. Nowhere in the brief does the employee address the issues of MMI or temporary total, permanent total, or permanent partial disability benefits. Issues raised on appeal but not briefed are deemed waived. Minn. R. 9800.0900, subp. 2.