DIRK E. CANNON, Employee/Appellant, v. FED. EXPRESS, SELF-INSURED/ALEXSIS-RSKCO, Employer/Cross-Appellant, and MN DEP'T OF ECON. SEC., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 16, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL CONTRIBUTING CAUSE. Substantial evidence, including expert opinion, supported the judge's decision that the employee had fully recovered from the physical effects of his work injuries.

PRACTICE & PROCEDURE. The compensation judge's findings and references to chronic pain syndrome would be vacated where the issue was not properly before her.

Affirmed in part and vacated in part.

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

OPINION

DEBRA A. WILSON, Judge

Both parties appeal from the compensation judge's decision as to the nature and extent of the employee's work injuries and from certain findings concerning the employee's entitlement to temporary partial disability benefits. We affirm in part and vacate in part.

BACKGROUND

The employee began working as a courier for Federal Express [the employer] in 1988. His job involved handling and delivering packages weighing up to 75 pounds. During the course of his employment with the employer, the employee sustained injuries in two work-related accidents. The first accident occurred on about December 6, 1993, when the employee slipped on ice while delivering a package, falling and striking his neck against some stairs. A CT scan taken shortly thereafter disclosed some "chronic" cervical degenerative changes, and the employee was diagnosed as having a mild concussion along with cervical and thoracic strain. The employee testified that he experienced symptoms from the base of his neck down into his back following this fall, but he evidently missed little or no time from work.

The second incident at issue, on January 10, 1994, was a motor vehicle accident in which the work van the employee was driving went into a ditch. The employee was taken by his manager to a hospital emergency room and then received follow-up treatment, from Dr. Katherine

Kostamo, for complaints of back and neck pain. Dr. Kostamo diagnosed "muscular back strain," recommended restrictions on lifting, bending, twisting, and pushing/pulling, and prescribed medication and physical therapy. Within a short time, Dr. Kostamo began questioning whether the employee was compliant with physical therapy instructions, and, in late February of 1994, Dr. Kostamo suggested that stress resulting from personal problems,[1] along with the employee's "prolonged activity at a computer station at home," "may be more a component of [the employee's] continued neck and back pain than his fall or motor vehicle accident." By March of 1994, Dr. Kostamo was noting that the employee exhibited inappropriate responses on physical examination, such as flinching and jumping in reaction to "very minimal palpation anywhere on his back or neck." In a March 24, 1994, treatment note, Dr. Kostamo again reported the presence of exaggerated behaviors and suggested the possibility of functional overlay. The employee's x-rays and neurological exams were normal.

The employee became dissatisfied with Dr. Kostamo and transferred his care to Dr. Michael DeBevec in April of 1994. In his initial evaluation on April 7, 1994, Dr. DeBevec diagnosed "chronic regional myofascial pain syndrome in the neck and the back, post motor vehicle accident and work related injury," and he recommended additional physical therapy, trigger point injections, use of antidepressants, and continued restriction to light-duty work. The employee, who had been performing very part-time light-duty work, resigned from the employer in early May 1994. Almost immediately thereafter he began a sales job for Security Systems.

The employee continued to receive intermittent treatment with Dr. DeBevec until October 3, 1994. On that date, the employee's neurological exam was normal, except for pinprick sensation in the right foot, a new finding of "questionable significance." Dr. DeBevec again diagnosed "[c]hronic regional myofascial pain syndrome," noting that the employee "appears at present to be a chronic pain patient." In the plan portion of his report, Dr. DeBevec wrote as follows:

> I think this man is at his MMI and has 0% PPD. Continue his exercises indefinitely. No restrictions for his current job, but I think his pain probably precludes any future job that involves repetitive bending, heavy lifting, etc. Follow up on a p.r.n. basis. I discussed this with his QRC Stewart Hunter from Intra Corp.

Dr. DeBevec also completed a work ability report, indicating that the employee had no need for restrictions.

The employee had very little treatment for low back or neck symptoms over the next six years, and records from his care for a variety of other conditions contain few notations

[1] Medical records indicate that the employee was involved in a child custody dispute at the time.

concerning any history of low back or neck complaints.[2] One office note from July of 1997 indicates that the employee had been receiving chiropractic treatment for low back pain for about six weeks, but the chiropractor's records are not part of the record. The employee testified that he experienced continuing back and neck pain but that he did not seek treatment for these symptoms because he thought nothing could be done for him. He also testified that he took over-the-counter pain relievers to help alleviate the symptoms. During this six-year period, the employee worked at a variety of jobs, including self-employment, and was also apparently unemployed for several years.

In September of 1998, the employee filed a claim petition alleging entitlement to wage loss benefits and benefits under Minn. Stat. § 176.101, subd. 3t(b) (repealed 1995), as a result of a "back injury" occurring on January 10, 1994, the date of his work-related motor vehicle accident. In December of 1998, the self-insured employer had the employee examined by Dr. David Boxall, who reported that the employee's work injuries were merely temporary and had resolved by February of 1994. Dr. Boxall also indicated that there was a functional, or psychological basis, for the employee's complaints.

In April of 2001, not long before the hearing on the employee's claim petition, the employee was evaluated by Dr. Mark Seaburg, apparently for the purpose of obtaining a medical opinion in support of his claim. Dr. Seaburg noted tenderness in the mid thoracic region and lower lumbar region, but he also indicated that straight leg raising, gait, and x-rays were normal. The doctor recommended more physical therapy and wrote that the employee's upper and lower back pain was "perhaps related to injury ten years ago, but that is hard to say."

The matter came on for hearing before a compensation judge on May 11, 2001. Relying on the report and deposition testimony of Dr. Boxall, the employer took the position that the employee had fully recovered from the effects of his work injuries. Other disputed issues included whether the employee's wage loss for various periods was causally related to his work injuries.[3] The parties stipulated that the employee had reached maximum medical improvement [MMI] on October 3, 1994. Evidence consisted of the employee's medical records, including records related to psychiatric treatment, some employment records, and the employee's testimony.

In a decision issued on June 25, 2001, the compensation judge concluded, in part, that the employee had "healed completely from his December 6, 1993 and January 10, 1994 physical work injuries to his cervical, thoracic and lumbar spine by October 3, 1994." The judge also found that the employee had "chronic pain syndrome," an "emotional condition and not a physical injury," that the employee had restrictions related to his "emotional condition," but that "[t]here has been neither claim nor proof that any emotional diagnosis made from October 3, 1994

[2] The employee received treatment for wrist, elbow, and left knee symptoms, as well as psychiatric conditions. The employee has been diagnosed with bipolar disorder and attention deficit disorder.

[3] By the date of hearing, the employee had no wage loss in comparison to his date-of-injury weekly wage.

on was causally related to his December 6, 1993 and January 10, 1994 work injuries." Accordingly, finding no proven ongoing work-related injury, the judge denied the employee's claims for wage loss benefits after October 3, 1994. The judge did, however, make alternative findings concerning whether temporary partial disability benefits after October 3, 1994, would have been payable had the employee proved the existence of an ongoing compensable condition. Both parties appeal.

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

Nature and Extent of Injuries

As previously indicated, the compensation judge concluded that the employee had fully recovered from the effects of his physical work injuries as of October 3, 1994, that the employee did have "chronic pain syndrome," an "emotional condition," but that the employee had not claimed or proven any emotional injury causally related to his work-related accidents. As such, the judge denied the employee's claim for benefits after October 3, 1994, the agreed MMI date and the date of Dr. DeBevec's last treatment of the employee. On appeal, the employee contends that substantial evidence does not support the judge's finding that he had fully recovered from his physical injuries and that, in any event, if he has chronic pain syndrome, that condition is a compensable consequence of his work injuries. For its part, the employer contends that the record supports the judge's conclusion as to the duration of the employee's physical injuries but that the judge erred in concluding that the employee had an "emotional condition" of "chronic pain syndrome."

We conclude, initially, that substantial evidence supports the compensation judge's conclusion that the employee had fully recovered from his physical low back, mid back, and cervical injuries as of October 3, 1994, the date Dr. DeBevec found the employee at MMI with 0% permanent partial disability. It may be true, as the employee maintains, that Dr. DeBevec

reiterated a diagnosis of "chronic regional myofascial syndrome" on that date. The fact remains, however, that the employee had not exhibited any significant objective findings on examination for some time, and Dr. Boxall indicated that the employee had fully recovered from the effects of his work injuries well prior to Dr. DeBevec's October 3, 1994, examination. We would also note that the employee received almost no treatment for any back or neck complaints over the next six years, despite receiving medical care for a variety of other complaints, and that no physician imposed any specific restrictions related to any neck or low back condition during this period. Even Dr. Seaburg noted no objective findings and was extremely equivocal about causation when he examined the employee shortly prior to hearing. This and other evidence reasonably supports the compensation judge's conclusion on this issue.

The compensation judge's findings and discussion concerning chronic pain syndrome are troubling. For the compensation judge to conclude that the employee does in fact have chronic pain syndrome, based on a single, brief reference in a 1994 treatment note -- which indicated only that the employee "appears at present to be a chronic pain patient" -- is problematic at best, especially in the absence of any corroboration in the employee's most recent treatment records. Furthermore, the judge's characterization of chronic pain syndrome as an "emotional condition" is purely speculative on this record and has no apparent relevance to the employee's benefit claim. Finally, as the judge herself correctly noted, there was no claim or litigation before her relative to either the existence or cause of any supposed "chronic pain syndrome" condition. Basic fairness requires reasonable notice and opportunity to be heard on issues bearing on benefit entitlement. See Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 869 (Minn. 1988). Under these circumstances, we deem it necessary to vacate all findings and references by the judge concerning the employee's purported chronic pain syndrome condition.

Temporary Partial Disability Benefits

The compensation judge concluded that the employee had not proven any loss of earning capacity causally related to a compensable condition after October 3, 1994. However, she also made alternative findings covering what benefits would have been awarded had she found an ongoing work-related injury. Because we have affirmed the judge's finding of no ongoing compensable back or neck injury after October 3, 1994, we need not consider the parties' appeal of the judge's alternative findings. However, under the unusual circumstances of this case, we vacate those findings.