LISA EMERSON, Employee, v. STATE OF MINN., DEP'T OF VETERANS' AFFS., SELF-INSURED, Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 13, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - INTERVENING CAUSE; EVIDENCE - EXPERT MEDICAL OPINION. Where the employee's car heater had gone out in the middle of the winter six hours from home en route back to Minnesota from Montana but the employee had persisted in completing the trip, the compensation judge erred as a matter of law in finding the employee's activity so unreasonable, negligent, dangerous, or abnormal as to constitute a superseding/intervening cause of the employee's subsequent symptoms. Accordingly, the court reversed the judge's denial of the employee's claim on that basis, together with the judge's rejection of the treating physician's opinion for failure to reference the ride.

PRACTICE & PROCEDURE - REMAND; CAUSATION - AGGRAVATION; TEMPORARY BENEFITS - FULLY RECOVERED. Where it was unclear from the judge's other findings whether the compensation judge found the employee's work-related condition to be continuing up to the event which the judge erroneously found to be a superseding/intervening cause of the employee's subsequent condition, and where the issue of complete resolution of the employee's work injury a year prior to that event had clearly been raised at hearing but was not acknowledged or determined by the judge in his Findings and Order, the matter was remanded to the compensation judge for express findings and an appropriate order as to whether or not the employee's work-related condition was resolved by or was still continuing as of the purportedly intervening event.

Reversed and Remanded.

Determined by Pederson, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Donald C. Erickson

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's denial of benefits based on a conclusion that the employee's current back problems are attributable to an intentional activity sufficiently unreasonable and dangerous as to constitute a superseding/intervening cause. We reverse the judge's finding of a superseding/intervening cause of the employee's condition, and we remand for express findings, and an appropriate order, as to whether or not the employee's work-related condition had resolved or was continuing at the time of the alleged aggravation.

BACKGROUND

On January 17, 1996, Lisa Emerson sustained a work-related injury to her thoracic spine when she slipped and fell in the course of her employment as a Licensed Practical Nurse at the Minnesota Department of Veterans' Affairs' Veteran's Home in Silver Bay, Minnesota. Ms. Emerson [the employee] was thirty-two years old at the time and was earning a weekly wage of $408.00. She was examined that same day by Physician's Assistant Louise Curnow at the Bay Area Health Center in Silver Bay, who noted that the employee was complaining of numbness and jabbing pain in the right mid back area. On examination, PA Curnow found the employee to be "in no distress," with full range of motion in the upper extremities, although she did have "some increased discomfort" in her right and mid back area with rotation of her arm. PA Curnow found tenderness to palpation and apparently some spasm in the right mid back area, but spinal range of motion was good, and straight leg raising caused no discomfort. PA Curnow diagnosed right mid back strain with some spasm, treated the employee with electrical stimulation, prescribed Flexeril and some stretching exercises, and restricted the employee to light duty, with no lifting over ten pounds. The Veteran's Home [the employer] accepted liability for the injury and commenced payment of benefits.

The employee treated three times more at the Bay Area Health Center in the month that followed. On January 23, 1996, her symptoms appeared worse, and the doctor, while continuing his mid thoracic strain/sprain diagnosis, wondered if she might have a rib slightly out of position at the vertebrae. By February 2, 1996, however, after a session of physical therapy, the employee was feeling much better, and PA Curnow released her to return to work with fewer restrictions. By February 15, 1996, the employee was reported to be "feeling much better" and "pretty much doing her regular duties at work without any difficulty." Examination revealed "no distress," good range of motion of the upper extremities, good strength, no palpable spasms along the paraspinous muscles, minimal tenderness in the right mid to lower thoracic area, and good spinal range of motion. PA Curnow diagnosed "[m]id thoracic muscle strain, resolved" and released the employee to return to her regular duties without restrictions, although she did continue medication for "muscle spasms because she said occasionally she might get some spasms." On that same date, PA Curnow completed a Health Care Provider Report, indicating that the employee had reached maximum medical improvement [MMI] on that date with regard to her work injury, having sustained no permanent partial disability as a consequence of the injury. On April 8, 1996, the employee was served with PA Curnow's report. In addition to medical expenses, the employer paid temporary total disability benefits from January 19, 1996, through February 4, 1996.

The employee subsequently sought no care for her mid back for nearly two years, although she did seek medical attention for other problems during that period. No medical records after February 16, 1996, and prior to January 1998 reflect any complaints of pain in the thoracic area of the employee's back. In mid January, 1998, the employee drove from her home in Silver Bay to Montana, to celebrate a late Christmas with her family over a long weekend. On her return trip to Minnesota, the heat in the employee's car went out somewhere in North Dakota, and the employee was left driving for several hours without heat through subfreezing temperatures to

complete her trip home to Minnesota. The employee stayed that night, about January 19, 1996, with her brother in Clearwater, Minnesota. In bed that night, the employee began experiencing severe muscle spasms in the same area of her thoracic spine where her work injury symptoms had been located two years earlier. The employee's relatives furnished her with ibuprofen and assisted her in applying ice, and her brother, who was a physical therapist, treated her with electrical stimulation, ultrasound, and manual manipulation. She slept the entire following day, and the next day she received additional physical therapy and drove home to Silver Bay.

On January 22, 1998, the employee sought medical attention from Dr. Gail Baldwin at The Duluth Clinic. Dr. Baldwin's records note the employee's work injury two years earlier, indicating that she "has been doing pretty well lately, though on return from a trip to Montana, through which time she drove, the back tightened up on her terribly." Dr. Baldwin does not mention the absence of a heater on the drive back from Montana. The doctor found mid thoracic muscle spasm, diagnosed "[b]ack strain, probably secondary to long periods in a single position in the car," prescribed medication, and restricted the employee to single shifts with no lifting over ten pounds. On February 4, 1998, the employee followed up with Dr. Kathryn Halverson at the same clinic, her regular physician. Dr. Halverson's records also note that the employee's history of a work injury two years earlier, reporting that the employee "said she had PT and improved" but "has been mildly symptomatic since that time . . . but [her injury] has not prevented her from working or participating fully in her usual activities." Dr. Halverson also mentions the trip from Montana, reporting that "it was cold in the car because the blower was out." Dr. Halverson's treatment notes go on to detail the employee's symptoms and activities and immediate treatment by her brother upon arrival in Minnesota. On examination, Dr. Halverson found "slight prominence of the right perithoracic area," diagnosed "exacerbation of distant perithoracic strain now with rhomboid inflammation," and recommended further physical therapy, deep fascial massage, stretching, strengthening, and continued use of anti-inflammatories and ice.

On April 27, 1998, after treating with Dr. Halverson three or four more times, the employee was examined by Physical Medicine and Rehabilitation Specialist Dr. Thomas Silvestrini, on referral from and in consultation for Dr. Halverson. Dr. Silvestrini diagnosed a thoracic strain and prescribed physical therapy with Diane Brickley, a therapist with osteopathic background. The employee continued regular treatment with Dr. Silvestrini for about a year, normally carbon copying his treatment reports to Dr. Halverson and Ms. Brickley. The employee worked with Ms. Brickley for about six months, until being discharged on November 3, 1998, with her short term but not her long term goals met.

On November 9, 1998, the employee filed a Claim Petition, alleging entitlement to one day of temporary total disability benefits, to permanent partial disability benefits likely to be rated at 2.5% of the whole body, to various medical benefits, and to rehabilitation benefits, all consequent to her thoracic spine injury of January 17, 1996. In its Answer on November 24, 1998, the employer denied liability for the employee's recent disability and treatment.

On April 27, 1999, Dr. Silvestrini concluded that the employee was subject to a permanent impairment of 2.5% of her whole body, pursuant to Minn. R. 5223,0380, subp. 3.B. Dr. Silvestrini concluded further,

> In the absence of any history other than what [the employee] has provided me, I believe it is probable that her current symptoms are secondary to injury she sustained in 1996. To my knowledge, this is the only incident that resulted in injury to her thoracic spine, and all services that I provided and all therapy I prescribed have been secondary to that injury.

Nowhere in his medical records does Dr. Silvestrini reference the employee's cold car ride home from Montana in January 1998.

On July 22, 1999, the employee underwent an independent medical examination for the employer by Dr. Peter Daly, who reviewed the employee's entire symptom and medical history, including that surrounding her trip in the cold car in January 1998. Upon conclusion of his review and examination, Dr. Daly diagnosed "[r]ight thoracic myofascial strain status post January 17, 1996, injury, previously resolved" and "[n]onwork-related right thoracic myofascial pain status post January 1998 symptom onset." It was Dr. Daly's opinion that the employee's January 1996 work injury did not substantially contribute to her January 1998 thoracic spine complaints and need for medical treatment, which Dr. Daly concluded had "resulted from a nonwork-related setting and environmental exposure to cold." Dr. Daly stated that, even "[a]ssuming [the employee] did have intermittent symptoms following the January 1996 work event, despite lack of any medical treatment for them, the symptoms she experienced in January 1998[] did not result from any work activities." Dr. Daly also concluded that the employee had already reached MMI, that no physical restrictions were necessary, that she had no structural abnormalities, that she had sustained no permanent partial disability as a result of her back condition, and that no further formal care or treatment were necessary.

The matter came on for hearing on April 5, 2000. In his opening statement at hearing, the employee's attorney indicated that it was the employee's position that she had never been symptom free since her work injury and that her work-injured condition had been aggravated by stressful but normal and responsible driving in a cold car in January 1998. The employee asserted that, according to Minnesota law, "where a work injury creates a permanently weakened physical condition . . . . the causal link between the work injury and [a] subsequent aggravation is broken only when the aggravation is a result of unreasonable, negligent, dangerous or abnormal activity on the part of the employee."[1] The employer's attorney, in his opening statement, indicated that it was the employer's position "[t]hat the January, 1996 work injury resolved completely" a few months after its occurrence and that the symptoms that appeared in January 1998 were the product of "a subsequent non-work related injury." The employer's attorney asserted further that this latter injury resulted in diagnosis of "a new condition of rhomboid strain," whereas, according to medical evidence, "the 1996 [work-related] injury incident involved a resolved thoracic myofacial strain [from which the employee had] reached maximum medical improvement, no restrictions." In concluding his opening statement, the employer's attorney reiterated that the employee's post-January 1998 condition was the

[1] See Eide v. Whirlpool Seeger Corp., 260 Minn. 98, 102; 109 N.W.2d 47, 49-50, 21 W.C.D. 437, 441 (1961).

result of "a subsequent event, a non-work related event, which I believe is sufficient as a super[s]eding intervening cause if one wants to argue that, or is as I say a subsequent non-work related injury in and of itself" (emphasis added).

The employee testified at hearing in part that she felt better following her physical therapy in January and February of 1996 but that she has never been pain free, that "there's always been a pain in my back." She explained that, for the following two years, "I felt like I could go to work but I--I hurt all the time and I just dealt with it myself." She indicated that she continued to work through the pain, which was most pronounced with lifting or bending activities. She testified that she nevertheless refrained from returning to a doctor during this period "[b]ecause I didn't think it was to the point where I needed to go in to get therapy." She testified, however, that she did eventually talk to her union representative about her ongoing pain and she did "[e]very once in a while" complain to her supervisors "that the load, it just isn't healthy for anybody."

At the conclusion of the hearing, the compensation judge indicated that the record would be kept open thirty days post hearing, to permit submission by both counsel of written analyses of "the case law applicable to new injuries and whether those new injuries break the chain of causation from an original injury." The judge further explained, "what I'd like from both counsel is an analysis of whether the activities of the employee on the long weekend when she went to North Dakota constitute under the case law unreasonable, negligent, dangerous, or abnormal activity sufficient to break the chain of causation from the original injury." Both parties subsequently submitted memoranda "summarizing the case law applicable to the issue of severance of the causal link between the original work injury and a subsequent aggravation."[2] In his eventual Findings and Order, filed November 9, 2000, the compensation judge listed as the threshold issue in the case "[w]hether or not the employee's non-work related activities in mid-January 1998 constitute a super[s]eding, intervening cause that breaks the chain-of-causation from the employee's injury of January 17, 1996." The judge neither identified nor resolved any issue as to whether or not the employee's work injury had resolved prior to January 1998, although at Finding 32 he did conclude generally that "[t]he employee did not sustain her burden of proving by a preponderance of the evidence that her need for treatment in 1998 and 1999 was related to her 1996 work related injury." Moreover, the judge also found expressly, at Finding 33, that "[t]he employee's activities in 1998 in driving for many hours in an unheated car, constitute a super[s]eding, intervening cause that breaks the chain of causation from the employee's admitted injury in 1996." 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.

[2] This subject is identically stated in both parties' post-hearing memoranda.

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

The employee in this case alleged a compensable 1998 aggravation of her 1996 work injury. The employer defended on grounds that the 1996 work injury had fully resolved about a month after its occurrence and that any disability two years later was unrelated to the work injury. As indicated by the compensation judge in Findings 13 and 18, respectively, "[the employee] testified that she has always had a pain in her midback since January 17, 1996" (emphasis added), and she "testified that despite not receiving treatment, she continued to have symptoms periodically in her midback" (emphasis added) throughout the two-year interim between the 1996 injury and the 1998 alleged aggravation. On that premise--that, contrary to the employer's position, her work-related condition never fully resolved prior to January 1998--the employee contended at hearing that only an event constituting a superseding/intervening cause–an "aggravation [that] is the result of unreasonable, negligent, dangerous or abnormal activity on the part of the employee"[3]--could legally sever the causal link between her work injury and her post-January 1998 condition. The judge found the employee's January 1998 trip in a cold car to be such a superseding/intervening event and denied the employee's claim for a work-related aggravation. While finding also that the employee "did not sustain her burden of proving . . . that her need for treatment in 1998 and 1999 was related to her 1996 work related injury," the judge nowhere addressed directly the employer's initial and primary defense, that the work injury at issue was fully resolved prior to January 1998.

Superseding/Intervening Cause

Dr. Silvestrini found the employee's 1996 work injury to have been a substantial contributing cause of her post-January 1998 thoracic condition. In Finding 28, the compensation judge noted with double emphasis that "**[t]he history recorded by Dr. Silvestrini does not reflect an aggravation of the employee's symptoms due to her 1998 trip to Montana.**" In his Memorandum, the judge explained that "it appears from the medical records that Dr. Silvestrini was never advised of th[e] central and essential fact" of the employee's having driven for an extended period of time in an unheated car. On that inference, the judge went on to conclude as follows:

> In the absence of an accurate and complete history, Dr. Silvestrini's opinions on causation carry very little, if any, weight. Accordingly, the

[3] Quoting from the employee's attorney's opening statement.

> Compensation Judge finds the employee failed to sustain her ultimate burden of proof that her current claims for treatment and permanency were causally related to the 1996 injury.

Having thus discounted the expert medical support for the employee's position, the judge then went on to conclude that

> driving a vehicle for many hours in the winter without heat is, in the opinion of the Compensation Judge, an intentional activity of the employee that is so unreasonable, negligent, dangerous or abnormal that it breaks any possible chain of causation from the original admitted injury in 1996 to the need for treatment or the claim for disability after the 1998 activities. In short, it is an abnormal activity.

The employee contends that the judge erred (1) in presuming that Dr. Silvestrini was unaware of the employee's cold car ride, (2) in disregarding Dr. Silvestrini's opinion even if Dr. Silvestrini were unaware of the car ride, and (3) in finding that the employee's ride in the car was an activity "so unreasonable, negligent, dangerous and abnormal that it amounts to a superseding, intervening cause." We agree.

As the employee has noted, Dr. Silvestrini's examination of the employee was at the referral of Dr. Halverson, whom the employee had seen subsequent to her examination by Dr. Baldwin. It is evident from the records of both Dr. Halverson and Dr. Baldwin before her that their referrals were being made in consultation regarding a flare-up of symptoms expressly subsequent to and apparently triggered by the long ride in the cold car. In addition, as the employee has also noted, Dr. Silvestrini treated the employee for about a year and, during that time, referred the employee for physical therapy with a physical therapist of the doctor's own personal selection, Diane Brickley. Ms. Brickley also expressly referenced in her records the exacerbation of the employee's symptoms following her long car ride in January 1998. Under these circumstances, it was questionable at best for the judge to conclude that Dr. Silvestrini was unaware of the employee's long ride in the unheated car.

The supreme court has indicated that, "where an industrial accident creates a permanently weakened physical condition which an employee's subsequent normal physical activities may aggravate to the extent of requiring additional medical or hospital care, such additional care is compensable," except in "situations where aggravation of the original injury requiring additional medical or hospital care is the result of such unreasonable, negligent, dangerous, or abnormal activity on the part of the employee that it can be said that such additional care was not a natural consequence flowing from the primary injury." Eide v. Whirlpool Seeger Corp., 260 Minn. 98, 102; 109 N.W.2d 47, 49-50, 21 W.C.D. 437, 441 (1961). We acknowledge that the employee's long ride in the cold car in January 1998 may have been importantly taxing of her thoracic back muscles. However, under the facts of this case, we cannot but conclude as a matter of law that the employee's action in taking such a ride was not so "unreasonable, negligent, dangerous, or abnormal" as to constitute a superseding/intervening cause of her subsequent condition. Nor does the medical record conflict in any way with that conclusion. Accordingly, we reverse the judge's denial of benefits on that basis. In keeping with that

conclusion, we conclude also that the judge erred in rejecting Dr. Silvestrini's opinion solely on grounds that the doctor failed to refer to that ride in his reports.

Complete Resolution

The compensation judge's finding of "a super[s]eding, intervening cause that breaks the chain of causation from the employee's admitted injury in 1996" appears to presume by definition and by its own language that a continuing work-related condition remained in place in January 1998 to be superseded or intervened upon--that a chain of causation from the work injury existed to be broken. Although we have concluded that the judge's finding of a superseding/intervening cause must be reversed, the presumption of unresolved disability contained in that finding requires our remand.

It is evident from the employer's attorney's opening statement at hearing, as well as from his questioning on both cross and direct examination of witnesses, that the possible complete resolution of the employee's 1996 work injury prior to January 1998 was clearly at issue before the compensation judge. Indeed, that issue is itself a threshold issue to the issue of superseding/intervening cause. Although there is no evidence that the employer ever conceded its defense based on prior resolution, nowhere in his decision does the judge ever even identify prior resolution as an issue before him, much less does he definitively resolve it by a finding.

Nor can we reasonably infer a finding of continuing work-related disability in this case. The judge's only direct reference to evidence supporting such a conclusion is perhaps in Findings 13 and 18, in which the judge indicates that the employee "testified" to continuing thoracic problems between January 1996 and January 1998. In contrast, in Findings 15, 16, and 17, the judge expressly references evidence that would support a finding of prior resolution. In Finding 15, the judge expressly indicates that, "[o]ver the course of the [nearly two years prior to January 1998], the employee did not receive any additional care for her midback and performed all the duties of her employment," although she "did seek medical attention for other problems," none of the records of which "reflect [any] complaints of pain in the thoracic spine." In Finding 16, the judge cites the testimony of the employee's supervisors to the effect that "the employee exhibited no difficulty in performing the duties of her employment" during the interim period, the judge noting expressly that the employee periodically complained to her supervisors only "that the workload was not healthy, but did not specifically mention that she was having problems with her back." In Finding 17, the judge noted also that the employee continued to do wilderness hiking and canoeing during the interim.

It is unclear to us whether the compensation judge found the employee's work-related condition to be continuing up to the employee's cold car ride in January 1998, as would be implied in a finding of a superseding/intervening cause, or whether the judge found the employee's work-related condition to be resolved well in advance of that ride, as would be implied in Findings 15 through 17. We have held that the compensation judge erred in denying the employee's claim based on a superseding/intervening cause. However, we also conclude that the employee's entitlement to benefits must still be proven and confirmed by more express findings on the even more threshold question of prior resolution of the work injury, which was clearly at issue before the compensation judge at hearing. To that end, we remand the matter to the compensation judge for express findings, based on all evidence already presented, as to whether or not the employee's work-related condition was resolved by or was

still continuing as of the employee's cold car ride in January 1998. Only if the employee's work-related condition was actually continuing as of January 1998 is the employee entitled to the benefits at issue.