SAFIO FARAH, Employee, v. MALL OF AM. and TRAVELERS INS. CO., Employer-Insurer/Appellants, and PROGRESSIVE INS. CO., BLAKE CHIROPRACTIC, DAY STAR WELLNESS CTR., LTD., and EDINA PLASTIC SURGERY, LTD., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 1, 2001

No. [REDACTED SSN]

HEADNOTES

ARISING OUT OF & IN THE COURSE OF. Substantial evidence supports the compensation judge's finding that the employee's injury sustained in a motor vehicle accident, while the employee was a passenger in a vehicle driven by another employee and used for car-pooling, which occurred in the employer's parking lot, arose out of and in the course of her employment.

CREDITS & OFFSETS. The compensation judge's award of reimbursement to the no-fault insurer is reduced to the extent of workers' compensation benefits owed to the employee during the period of time when no-fault wage loss benefits were paid to the employee.

CREDITS & OFFSETS. The compensation judge's award of a credit to the employer for wage continuation payments paid to the employee is vacated. Because it is the insurer, not the employer, who may be liable for future workers' compensation benefits, the employer does not have any future liability against which it can claim a credit. This issue is remanded to the compensation judge to review any contractual agreement existing between the employee and the employer concerning reimbursement of wage continuation benefits in the event of an award of temporary disability benefits, and to determine whether a reimbursement is due to the employer, the amount due, and whether Edquist fees should be deducted from that reimbursement.

Affirmed in part, modified in part, vacated in part and remanded in part.

Determined by: Rykken, J., Wheeler, C.J., and Wilson, J.
Compensation Judge: Jennifer Patterson

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal from the compensation judge's finding that the employee's injury arose out of and in the course of her employment with the employer, and from the finding concerning the amount of credit allowed to the employer for wage continuation benefits it paid to the employee. We affirm, modify, vacate and remand.

BACKGROUND

This claim arises from an injury to her forehead, cervical spine and lumbar spine that Ms. Safio Farah, the employee, sustained on May 30, 1999. On that date, the employee was employed by the Mall of America, the employer, which was insured for workers' compensation liability in the state of Minnesota by Travelers Property and Casualty Company, the insurer. Born on February 1, 1977, the employee was twenty-two years old on the date of her claimed injury, and earned a weekly wage of $340.00.

The employee began working for the Mall of America on November 5, 1996, performing cleaning and housekeeping duties on a full-time basis. The employee traveled to and from work in a car pool, along with co-workers, in a car owned by one of the co-workers. The owner of the car typically parked her car either in the lot at the Mall of America reserved for employees or in an underground parking lot often reserved for contractors and, at times, open to general employees and the public. (Finding No. 6.) On May 30, 1999, the employee traveled with the car pool and worked a shift from 6:00 a.m. until 2:30 p.m. After finishing her assigned work duties, she put away her equipment and changed clothes before punching out on a time clock and leaving work. She and her co-workers left together and walked together to the car.

One of the co-workers who held a valid driver's learning permit obtained permission from the car's licensed owner to drive the car home. Apparently shortly after starting to drive the car, the driver attempted to steer the car and hit the wall of the parking lot. According to the accident report completed by an investigating police officer, (Er. Ex. 3.) the accident occurred when the car's driver made an unskilled U-turn and hit a pillar with the left front bumper of the car. At the time of the accident, the employee was seated in the front passenger seat; she hit her forehead on the car's windshield, cracking the windshield. (Er. Ex. 3.) The employee was taken from the scene of the accident by ambulance to Methodist Hospital, where she received approximately 30 stitches for a horizontal cut on her forehead above her eyebrows.

Following the accident, the employee developed headaches, neck pain radiating into her upper thoracic spine, and shoulder, left arm and low back pain. Between June 1 and June 4, 1999, the employee received chiropractic treatment from Timothy Gatzmeyer, D.C., who diagnosed cervical, thoracic and lumbar strain/sprain. Between June 7 and November 3, 1999, the employee received chiropractic treatment at Blake Chiropractic Clinic, where she reported pain in her cervical and upper thoracic area, left shoulder and left arm and headaches. She also reported low back pain. Jonathan Steele, D.C., diagnosed the employee as having sustained a "cervicothoracic sprain/strain; substantial to severe, with associated cervicocranial syndrome, as well as muscle spasm and segmental dysfunction in the lumbar spine" and recommended a trial of conservative care. (Ee. Ex. D.)

Dr. Steele referred the employee to Steven Noran, M.D., a neurologist, who examined her on July 14, 1999. The employee reported to Dr. Noran that her neck pain since the accident had been her major problem, with pain extending into her upper back. Dr. Noran diagnosed a cervical injury with cervical myoligamentous sprain/strain syndrome, along with forehead lacerations. He recommended that the employee return for a follow-up appointment in

four weeks and prescribed no medications. Dr. Noran stated that, "I would agree that if her work at the Mall of America is heavy, that she should refrain from this at this time." Dr. Steele completed disability certificates restricting the employee from working between June 7 and August 16, 1999. Dr. Steele released the employee to return to work on a half-time basis by August 19, 1999, and she returned to work on that basis. By September 7, 1999, Dr. Steele released the employee to return to work six hours per shift; by November 2, 1999, Dr. Steele released the employee to work on a full-time basis. At the time of the hearing on December 13, 2000, the employee continued to work on a full-time basis for the employer.

The employer paid wage continuation benefits to the employee for a portion of the time she was off work, in the amount of $2,083.00. Progressive Insurance Company, the automobile insurance carrier for the car's owner, paid no-fault benefits to the employee, including wage loss benefits, in the amount of $2,866.00.

On September 10, 1999, the employee filed a claim petition, alleging a work-related injury on May 30, 1999, and claiming entitlement to temporary total, temporary partial and permanent partial disability benefits, a rehabilitation consultation, and payment for chiropractic and medical expenses. In their answer to the employee's claim petition, filed on October 1, 1999, the employer and insurer denied primary liability for the employee's claimed injury, alleging that the injury arose off the work premises and outside of work hours and therefore was not compensable under the Minnesota workers' compensation law.

On April 10, 2000, Dr. Paul Cederberg examined the employee at the request of the employer and insurer. Dr. Cederberg diagnosed a resolved cervical strain, healed right forehead laceration and mild lumbar strain. Based upon his review of medical records, he concluded that the seventy chiropractic treatments which the employee received over a five-month period following the motor vehicle accident were not reasonable. He concluded that an appropriate amount of time for chiropractic treatment would have been four to six weeks following the accident, and that the remainder of the chiropractic treatment, including a referral to the Noran Neurological Clinic, was not reasonable and necessary. Dr. Cederberg concluded that the employee's strains to her neck and low back were temporary in nature, that there was no objective evidence of any permanent injury to the employee's low back or neck, and that she needed no further medical treatment. (Er. Ex. 1.)

A hearing was held before a compensation judge at the Office of Administrative Hearings on December 13, 2000. In Findings and Order served and filed January 26, 2001, the compensation judge found that the employee's injury arose out of and in the course of her employment and that the employee was entitled to payment of temporary total disability and temporary partial disability benefits. The judge also found that a twelve-week portion of the employee's chiropractic expenses was compensable and denied the remainder of her claimed chiropractic expenses. The employer and insurer 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). Factfindings 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 Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Arising Out of and in the Course of Employment

It is a well-settled rule in Minnesota law that, in order to establish entitlement to workers' compensation benefits, the employee must prove that the injury arose out of and in the course of her employment. Nelson v. City of St. Paul, 249 Minn. 53, 81 N.W.2d 272, 19 W.C.D. 120 (1957); Minn. Stat. § 176.011, subd. 16; Minn. Stat. § 176.021, subd. 1. The employer and insurer appeal from the compensation judge's finding that the employee's injury arose out of and in the course of her employment with the employer, arguing that such a finding was clearly erroneous.

The words "arising out of" refer to the causal connection between the injury and the employment, whereas "in the course of" refers to the time, place, and circumstances of the incident causing the injury. See, e.g., Gibberd v. Control Data Corp., 424 N.W.2d 776, 780, 40 W.C.D. 1040, 1047 (Minn. 1988). The "arising out of" requirement is a causation test although "not necessarily in the proximate cause sense." Gibberd at 780. For an injury to arise out of the employment, there must be a causal connection between the employment and the injury. Lange v. Minneapolis-St. Paul Metro. Airport Comm'n, 257 Minn. 54, 99 N.W.2d 915, 21 W.C.D. 61 (1959). The requisite causal connection "exists if the employment, by reason of its nature, obligations or incidents may reasonably be found to be the source of the injury-producing hazard." Nelson v. City of St. Paul, 249 Minn. 53, 55, 81 N.W.2d 272, 275, 19 W.C.D. 120, 123 (1957).

We first consider whether substantial evidence of record supports the compensation judge's finding that the employee's injury occurred "in the course of employment." The compensation judge found that the "accident occurred in the employer's parking ramp while attempting to leave the employer's premises as an incident to employment." (Finding No. 9.) The judge also found that even though the employee was inside the car and not walking through the ramp when the accident occurred, "her injuries arose out of her employment as an incident to the employment because she was leaving the employer's premises on the most direct route from her place of work to her home." (Finding No. 10.) The employer and insurer argue, however, that the employee was not on the "premises" of the employer at the time of the motor vehicle accident, since she was in a car not under the employer's control, a car that was privately owned and driven by someone other than the injured employee. The employer and insurer argue that the concept of "premises" should not be extended to a privately-owned motor vehicle driven by someone other than the injured worker. The employer and insurer argue that once the employee stepped into a privately-owned motor vehicle, she stepped out of the realm over which the employer could exercise control.

The judge focused on the employee's location at the time of her injury, and found that she was injured shortly after her work shift ended while still on the employer's premises.[1] In an unappealed finding, she found that the owner of the car pool car "usually parked either in a lot reserved for employees or in an underground parking lot often reserved for employees of contractors and, at times, open to general employees and the public." (Finding No. 6.) She also found, as supported by the record, that the motor vehicle accident occurred very shortly after the car's driver started driving the car. (Finding No. 9.) In this case, the employee had just left the employer's building after work, proceeding directly to the parking lot where her car pool car was parked. The compensation judge found that the employee credibly testified concerning the circumstances surrounding the accident, specifically that there was an understanding that the driver of the car planned to drive home in the most direct way possible after leaving work. These factors satisfy the first requirement that the employee's injury was "in the course" of her employment.

Whether the employee's injury "arose out of" her employment, in other words, whether the employment was the source of some hazard which resulted in the employee's injury, is more tenuous in view of the facts in this case, and we therefore review that issue further. In Bohlin v. St. Louis County/Nopeming Nursing Home, 61 W.C.D. 69 (W.C.C.A. 2000) (summarily aff'd Jan. 16, 2001), this court reviewed Minnesota case law and discussed, at length, the increased risk test and the positional risk test, two tests utilized to analyze whether an injury "arose out of" employment. The primary test for determining whether an injury arises out of the employment is the "increased risk" test. This test requires a showing that the "injury was caused by an increased risk to which the claimant, as distinct from the general public, was subjected by his or her employment." 1A. Larson and L.K. Larson, Workers' Compensation Law § 3.00 (1999). In

[1] The Minnesota Supreme Court has previously defined "premises" to include parking lots or parking areas adjacent to premises leased by an employer, available to and used by the employees of the tenant-employer. See Merrill v. J.C. Penney, 256 N.W.2d 518, 30 W.C.D. 278 (Minn. 1977); Goff v. Farmers Union Accounting Serv., 308 Minn. 440, 241 N.W.2d 315, 28 W.C.D. 372 (1976).

Minnesota, the supreme court has stated, "[t]he 'arising out of' requirement refers to the causal connection between the employment and the injury. This requirement requires a showing of some hazard that increases the employee's exposure to injury beyond that of the general public." Kirchner v. County of Anoka, 339 N.W.2d 908, 911, 36 W.C.D. 335, 337 (Minn. 1983). The injury need not be peculiar to the employment, so long as the injury-producing risk or hazard has its origin or source in the employment. See Larson, § 3.00; Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719, 15 W.C.D. 395 (1949).

Although the "arising out of" and "in the course" requirements express two different concepts, in practice these requirements are not independent, but "are elements of 'a single test of work-connection.'" United Fire & Casualty Co., 510 N.W.2d 241, 243 (Minn. Ct. App. 1994) (citing A. Larson, Workmen's Compensation for Occupational Injuries & Death § 29.00 (1993)). Larson notes that in any given case, a certain minimum level of work-connection must be established. Thus, if the "course" test is weak but the "arising" test is strong, the necessary minimum quantum of work-connection will be met, as it is also if the "arising" test is weak and the "course" factor is strong. But if both the "course" and "arising" elements are weak, the minimum connection to the employment will not be met. Larson, § 29.01.

In this case, the "in the course of" test is relatively strong, as described above, and the factors supporting the "arising out of" requirement are relatively weak, since the employee was not directly engaged in activities related to her work. However, given the employee's testimony concerning the circumstances surrounding her work shift and her immediate departure after her work shift, we conclude the employee has provided sufficient evidence to sustain her burden of proof.

In so doing, we recognize that this is a very close case. We recognize that the mere fact of being on the employer's premises does not, in every case, constitute a compensable work-related injury. See, e.g., Bohlin. As we stated in Bohlin, "[w]hen a line is drawn, there are always cases very close to each side of the line. No absolute rule can be derived, since there are too many factual variables that could affect the result. See Larson, § 13.01[1]." Bohlin at 81. We also concluded in Bohlin that whether there exists the requisite causal connection between the work activities and the injury is a question of fact. In view of the particular facts of this case, however, it was reasonable for the compensation judge to determine that the employee's work injury arose out of and in the course of her employment. Those findings are supported by evidence which a reasonable mind would accept as adequate, are not clearly erroneous, and therefore should be affirmed.[2]

[2] In their notice of appeal, the employer and insurer also appealed from the compensation judge's awards of temporary disability benefits and chiropractic expenses, but made no argument in their brief regarding those issues. Issues raised in the notice of appeal but not briefed are deemed waived. Minn. R. 9800.0900, subp. 1. Therefore, those issues are waived and will not be addressed.

Claims for Reimbursement of No-Fault Insurance Benefits and Wage Continuation Payments

The compensation judge found that the no-fault insurance carrier was entitled to full reimbursement for the wage loss benefits it paid to the employee during the period she was temporarily totally disabled, and also found that the employer was entitled to a "credit" for only a portion of the wage continuation benefits it paid to the employee. The employer and insurer appeal, arguing that the compensation judge erred as a matter of law by these findings. At issue on appeal is whether the compensation judge's findings concerning this reimbursement and credit are clearly erroneous.

Reimbursement to No-Fault Insurance Carrier

In her Findings and Order, the compensation judge awarded temporary total disability benefits to the employee between June 1 to August 18, 1999.[3] The compensation judge found that the no-fault insurer, Progressive Insurance Company, was entitled to full reimbursement for wage loss benefits pursuant to Minn. Stat. § 65B.61 (2), which requires that no-fault wage loss benefits paid during the employee's period of temporary disability be reimbursed to the no-fault insurance carrier, to the extent of workers' compensation benefits due for that identical period.[4] That section states as follows:

> Subd. 2. If benefits are paid or payable under a workers' compensation law because of the injury, no disability income loss benefits are payable unless the weekly workers' compensation disability benefits are less than the weekly disability benefit as set out in section 65B.44, subdivision 3, in which case the reparation obligor shall pay to the injured person the amount that the weekly disability and income loss benefits payable under section 65B.44, subdivision 3, exceeds the weekly workers' compensation disability benefits.

Minn. Stat. § 65B.61 (2). The compensation judge also ordered that Edquist attorney fees be deducted from the amount reimbursed to the no-fault insurer. See Edquist v. Browning Ferris,

[3] The period of June 1 to August 18, 1999, equates to 11.3 weeks. At a base weekly compensation rate of $226.67, the temporary total disability benefits owed for that period of time totaled $2,561.37.

[4] Progressive Insurance's payment records state that the employee's "disability [start date]" was May 31, 1999, and that her "disability end [date]" was August 17, 1999, and that Progressive paid no-fault wage loss benefits for a total of 57 days between June and August 18, 1999. (Progressive Ex. 1.) This number of days seems to correspond with the number of work days the employee missed between June 1 and August 18, 1999, the time period during which the employee was entitled to payment of temporary total disability benefits.

380 N.W.2d 787, 38 W.C.D. 411 (Minn. 1986). See also, Minnich v. Isenberg Equipment , Inc., 61 W.C.D. 319 (W.C.C.A. 2001).

At the hearing, the parties entered into various stipulations, including the following: "The employer paid $2,083.00 in wage continuation to the employee at the rate of 60 percent of her regular weekly wage and is entitled to a credit for these payments," and that the "no-fault intervenor paid $2,866.00 in wage loss benefits to the employee."[5] (Finding No. 2e and h; T. 7.) It is not clear from the employer and insurer's brief whether they argue that only the employer, and not the no-fault insurer, is entitled to a credit, as stipulated to at hearing. The employer and insurer argue that notwithstanding the stipulation to a credit due the employer, the compensation judge instead ordered that the no-fault insurer would be reimbursed for no-fault wage loss benefits. The employer and insurer argue that the parties' stipulation should be honored, that the employer should be awarded a full credit, and that the compensation judge's decision to effectively eviscerate the stipulated agreement was an error of law.

At issue on appeal, therefore, is whether the compensation judge's award of a reimbursement to the no-fault insurer was clearly erroneous. As outlined above, reimbursement to the no-fault carrier is required by statute. The compensation judge did not err by concluding that the no-fault carrier should be reimbursed by the insurer. However, the compensation judge ordered full reimbursement to the no-fault insurer, which would result in a payment to the no-fault insurer in an amount exceeding the temporary total disability benefits payable for the same time period ($2,866.14 paid in no-fault wage loss benefits vs. $2,561.37 awarded in temporary total disability benefits.) Therefore, whereas Order No. 3a awards full reimbursement to Progressive, the no-fault insurer, we modify that order to state as follows:

> 3a) To the extent Progressive Insurance paid no-fault basic economic recovery benefits for time spans that overlap time spans for which the employee was entitled to temporary total disability benefits, it shall be reimbursed *to the extent of workers' compensation benefits owed to the employee for that period, in the amount of $2,561.37.*

(Emphasis added to indicate modified portion of order.)

Credit for Wage Continuation Benefits Paid by Employer

The compensation judge also addressed the employer's claim for a credit for a portion of the wage continuation benefits paid to the employer, and found that

> Although the parties stipulated that, in the event the employee prevailed, the employer would be entitled to a credit for wage

[5] The employer actually paid $2,083.76 in wage continuation benefits and Progressive Insurance actually paid $2866.14 in no-fault insurance wage loss benefits. (Er. Ex. 2; Progressive Ex. 1.)

> continuation sums paid to the employee, this credit can be applied only to temporary total and temporary partial disability benefits still owed to the employee after full reimbursement of the no-fault carrier.

(Finding No. 20.) The compensation judge ordered that

> The employer shall have a credit for the remainder of the temporary total and temporary partial disability benefits due as a result of the wage continuation sums paid to the employee after her May 1999 injury.

(Order 3b) The employer and insurer appeal this finding and order, arguing, that as noted above, the stipulation for an employer credit should be honored. At issue on appeal is whether the compensation judge erred by awarding a portion of the "credit" claimed by the employer.

The employee has been fully compensated for temporary total disability owed between June 1 and August 18, 1999. The no-fault insurer has been awarded reimbursement of the statutorily-allowed amount of wage loss benefits it paid to the employee. Since the employer paid wage continuation benefits to the employee during the same period for which she already has been paid temporary total disability benefits, the employee received duplicate wage loss payments for that period of time, and the employer claims entitlement to a full "credit" for that duplicate payment.

Although the parties stipulated to a "credit" to the employer, it appears that they were referring to a reimbursement as between the workers' compensation insurer and the employer, in the event that the employee's claim for temporary disability benefits was awarded. Because it is the insurer, not the employer, who may be liable for future workers' compensation benefits, the employer does not have any future liability against which it can claim a credit. Absent evidence of a contractual agreement between the employee and the employer concerning reimbursement of wage continuation benefits in the event of an award of temporary disability benefits, the compensation judge and this court have no basis to award a reimbursement to an employer for payments it made to an employee.

We therefore vacate that portion of Finding No. 20 and Order No. 3b relative to the credit to be granted to the employer, and we remand that issue to the compensation judge. We ask that the compensation judge review the stipulation articulated by the parties during the hearing concerning the "credit" to be allowed the employer, and to review any contractual agreement that exists between the employer and the employee concerning credit of reimbursement for wage continuation benefits in the event of an award of workers' compensation benefits. The compensation judge should determine whether a reimbursement is due to the employer, the amount due, and whether Edquist fees should be deducted from that reimbursement.