JEFFREY FIESELER, Employee/Appellant, v. DALCO ENTERS., INC., and KEMPER NAT'L INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 24, 2001

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - BACK. Substantial evidence supported the compensation judge's determination of a 3.5 percent permanent partial disability. The compensation judge was not required to adopt the 7 percent rating offered by the employee's treating chiropractor where the basis for the rating was not fully explained and no supporting radiological evidence was submitted in evidence.

Affirmed.

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

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's rating of the employee's permanent partial disability from his May 11, 1998 work injury at 3.5 percent rather than 7 percent as proposed by the employee's chiropractor, Dr. Bradley C. Boisen, D.C. We affirm.

BACKGROUND

The employee, Jeffrey L. Fieseler, was born in 1972 and is 28 years old. He graduated from high school in 1990. After high school, the employee worked in a car wash, was employed by a car rental company and a car dealership cleaning cars, and worked for awhile as a block tender for a masonry company. (Findings 3, 4 [unappealed]; T. 10-20.)

In August 1996 the employee was working for a furniture store, Total Bedroom, delivering and installing bedroom furniture. On August 30, the employee sustained a work injury to the low back while unloading a box from a semitrailer. The employee was treated at the emergency room at St. Mary's Hospital where an x-ray was apparently taken and interpreted by the radiologist as showing that the "lumbar spine is negative." The employee was given muscle relaxers. He began treating with his chiropractor, Dr. Bradley C. Boisen, D.C., a few days later. The record does not include most of the medical records relating to this injury, but it appears that the employee treated primarily with Dr. Boisen, whose diagnosis was of a lumbar strain. On December 10, 1996, Dr. Boisen released the employee to full time work without restrictions and

opined that the employee had sustained no permanency. Thereafter the employee treated sporadically with Dr. Boisen for his back on an as-needed basis in 1997 and early 1998. (T. 10-20 ; Exh. 1; Exh. 4: 1/27/97; Finding 5 [unappealed].)

In 1997 the employee continued to work for Total Bedroom without loss of time until the store closed in June 1997. In November 1997 the employee began working for the employer, Dalco Enterprises, delivering janitorial supplies. This job required the employee to unload products weighing from a few pounds to as much as 500-600 pounds. The heavier items were generally unloaded with a pallet jack, wheeled cart, or barrel cart, but use of these devices was not always possible on all deliveries. The employee was able to perform this work untroubled by regular low back symptoms from November 1997 to May 11, 1998, and treated with Dr. Boisen occasionally on a "preventative maintenance" basis. (T. 19-26; Findings 7-8 [unappealed].)

On May 11, 1998, the employee was cleaning his truck at the beginning of his work shift, and while pulling a pallet jack out of a stack of empty pallets, he experienced a "pop or crack" in his back, and shortly afterwards had an onset of pain and tightness in his lower back on bending over to pick up some light-weight materials in his truck. The employee reported the injury to his supervisor and was advised to seek medical attention. He was unable to climb into his pickup truck and was taken home by another employee and then was taken by his wife to see Dr. Boisen. The employee's weekly wage as of the date of injury is stipulated at $413.22. (T. 27-30; Findings 2a, 10 [unappealed].)

Dr. Boisen's records for May 11, 1998 state that the employee was complaining of midline bilateral lower lumbar pain. His lumbar range of motion was noted to be significantly limited in all planes due to pain. The employee denied leg pain. The doctor also noted that "old xrays indicate Lt L-S facet tropism." He treated the employee with passive lumbosacral adjustment, "accupressure" and electrical stimulation, and recommended that the employee ice his back, rest at home, and use a lumbar belt when upright. The employee was taken off work. (Exh. C: 5/11/98; Exh. B.)

On May 22, 1998 Dr. Boisen released the employee to return to work on May 26, 1998 with the restriction that he not lift more than 35 pounds. However, on May 26, 1998 the employee told Dr. Boisen that he did not feel ready to operate the clutch on the delivery truck. Dr. Boisen noted that the employee continued to be very stiff and sore, and continued the employee off work unless very light duty work was available, with no lifting over 15 pounds. (Exh. C: 5/26/98; Exh. B.)

On May 29, 1998 Dr. Boisen released the employee to work with a lifting restriction of 50 pounds. However, on June 1, 1998 Dr. Boisen took the employee off work again due to an exacerbation of symptoms. The employee was under a 15-pound lifting restriction for most of June 1998. (Exh. B.)

The employee returned to work for the employer under restrictions at the end of June 1998. The employee thereafter performed modified job duties for the employer with varying

weight limits, often with the assistance of a co-employee who rode with him on delivery runs to assist in unloading heavier objects. (T. 38-39, Finding 12 [unappealed].)

Dr. Boisen treated the employee 43 times from the date of injury in May 1998 through August 1998. The employee was also seen by Dr. Heiling at the Olmstead Medical Group, who diagnosed back strain and prescribed medication. In addition to receiving chiropractic treatment from Dr. Boisen the employee participated in a strengthening program from August 25 through November 24, 1998 at the OFC Back Care Center. (Finding 11 [unappealed].)

The employee was seen by Dr. Dennis Olson, D.C., on December 9, 1998 on behalf of the employer and insurer. Dr. Olson found the employee's cervical, thoracic and lumbar ranges of motion all within normal limits. He reviewed x-rays taken on August 30, 1996 immediately following the employee's first work-related low back injury and noted that these were read by the physician at that time as "lumbar spine is negative." The employee was seen to arise easily from his chair and assume a normal stance. His movement on and off the examining table was "effortless, unimpaired, and brisk." The employee reported some light tenderness on palpation of the paravertebral musculature, but no spasm was noted. He denied any radicular symptoms and testing failed to bring out any aberrations of superficial sensation. Straight-leg raising was negative. Dr. Olson stated that he was unable to find any objective abnormalities during the course of his examination that could be related to the May 11, 1998 work injury. In Dr. Olson's opinion, the May 11, 1998 injury was a temporary reaggravation of the employee's prior injury. He found no objective basis for imposing any restrictions, although he thought it advisable that the employee should be "somewhat cautious in doing any heavy lifting" in light of having sustained two injuries to the low back within the past several years. Dr. Olson opined that the employee had not sustained any permanency as a result of the May 11, 1998 injury. (Exh. 1.)

On February 2, 1999 Dr. Boisen wrote a letter updating the employee's restrictions to permit him to lift up to 75 pounds on an occasional basis. Through 1999 up to the date of hearing on March 29, 2000 the employee continued to treat on an as-needed basis with Dr. Boisen for flare-up of his symptoms. (Exhs. A, C; Finding 21 [unappealed].)

On March 22, 1999 Dr. Boisen wrote a letter stating his opinion that the employee qualified for a 7 percent permanent partial disability, noting that his "back muscles are always tight upon presentation and there is left lumbosacral facet tropism." On November 12, 1999 Dr. Boisen again discussed the employee's permanency rating, correcting a prior typographical error in the citation to the rule under which he rated the employee, Minn. R. 5223.0390, subp 3C(1), and explaining that

> X-rays show that Mr. Fieseler has facet tropism at the left lumbosacral facet joint. I believe this has predisposed Mr. Fieseler to the two work related lumbosacral strain/sprains of Aug. 31, 1996 and May 11, 1998, and furthermore, I feel the injuries have resulted in instability of the lumbosacral spine. At this point in time, the body is recruiting the muscles around the instability to tighten up as a means to attempt to stabilize the instability. This leads to muscle

> imbalancing and fatigue, which the patient eventually feels as soreness (and eventually pain) and the doctor finds as tightness and ropiness within the muscles.

On March 21, 2000, the doctor reiterated his view that the employee was entitled to a seven percent permanency rating, and further opined that maximum medical improvement had been reached on or about March 29, 1999. (Exh. A.)

Some time in 1999 the employer decided to move most of its warehouse operations from Rochester, Minnesota, to La Crosse, Wisconsin. The employee was laid off on November 4, 1999 in the course of the changes to the employer's operations. The employee then began a search for other work with rehabilitation assistance. Other than a brief and unsuccessful attempt at working in a job cleaning cars for a used car dealer, Denaro Motors, which aggravated the employee's back symptoms, the employee was unemployed through the date of the hearing below, March 29, 2000. (Findings 13, 18, 19 [unappealed].)

The employee filed a claim petition on April 27, 1999 alleging entitlement to compensation for a 7 percent permanent partial disability and seeking payment of certain expenses of treatment with Dr. Boisen. On November 15, 1999 the employee filed an amended claim petition adding a claim for temporary total disability benefits from November 5, 1999. The employer and insurer answered alleging that the May 11, 1998 injury was a temporary aggravation of a prior injury from which the employee had fully recovered by December 9, 1998, denying that the chiropractic expenses were reasonable and necessary, denying temporary total disability compensation on the basis that benefits were sought for a period more than 90 days past the attainment of maximum medical improvement, and denying that the employee was entitled to a 7 percent permanency rating. (Judgment Roll.)

A hearing was held before a compensation judge of the Office of Administrative Hearings on March 29, 2000. The parties stipulated that maximum medical improvement had been reached no later than July 12, 1999, and the claim for temporary total disability benefits was apparently dropped. Following the hearing, the compensation judge found that the employee had sustained a permanent rather than a temporary injury on May 11, 1998, that the chiropractic care for which reimbursement was requested was reasonable and necessary, and that the employee was entitled to temporary partial disability compensation for the brief period during which he unsuccessfully attempted to work for Denaro Motors. On the issue of permanent partial disability, the compensation judge found that the medical records showed persistent findings of lumbar spasm and reduced range of lumbar motion, qualifying the employee for a 3.5 percent permanency rating, but the judge did not accept Dr. Boisen's opinion that the employee qualified for a 7 percent permanency rating on the basis of an alleged "facet trophism." The employee appeals solely from the judge's denial of the additional permanency.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire

record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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 may not be disturbed, even though this 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 compensation judge found that the employee was entitled to a 3.5 percent permanent partial disability rating under Minn. R. 5223.0390, subp. 3B, which provides:

> Subp. 3. Lumbar pain syndrome . . .
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> * * *
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> B. Symptoms of pain or stiffness in the region of the lumbar spine, substantiated by persistent clinical findings, that is, involuntary muscle tightness in the paralumbar muscles or decreased range of motion in the lumbar spine, but with no radiographic abnormality, 3.5 percent.

The employee, on the other hand, alleges that the compensation judge should have rated the employee with a 7 percent permanency, pursuant to subpart 3C(1) of the same rule, which provides:

> C. Symptoms of pain or stiffness in the region of the lumbar spine, substantiated by persistent clinical findings, that is, involuntary muscle tightness in the paralumbar muscles or decreased range of motion in the lumbar spine, and with any radiographic, myelographic, CT scan, or MRI scan abnormality not specifically addressed elsewhere in this part:
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> (1) single vertebral level, seven percent.

This proposed rating is based on the chart notation and letters written by Dr. Boisen stating that the employee's x-ray studies show a "left lumbosacral facet tropism." (Exh. A; Exh. C: 5/11/98.)

The compensation judge did not accept the opinion of Dr. Boisen, noting that no x-ray reports were placed into evidence and that "the term 'tropism' is not defined in any of the

medical records or reports in evidence. The Dorland's Medical Dictionary definition of tropism does not reference the spine."[1] (Finding 16.) The judge went on to conclude that

> Dr. Boisen's reading of x-rays as showing "tropism" is not sufficient to support the conclusion that the employee has evidence of anatomic abnormality in his lumbar spine shown on objective tests.

Id.

The employee asserts on appeal that the compensation judge erred in failing to adopt Dr. Boisen's opinion and rating, arguing that

> . . . there was no evidence presented to contradict the treating chiropractor, [and] the compensation judge's decision to ignore part of his report is contrary to the evidence. This is not a case where there are conflicting reports on a specific issue and the judge must find a method to weigh opposing testimony. In this case, the primary health care provider evidenced knowledge and understanding of the applicable Rule, actually quoted the Rule, and including [sic] a description of his observations showing that his opinion was consistent with the Rule. Absent contrary or conflicting evidence the compensation judge should not be permitted to split hairs to find some reason for questioning the provider's opinion.

(Employee's brief at 6-7.)

We do not accept the employee's argument, and cannot conclude that the compensation judge's findings were unsupported by the evidence or that the judge committed an error of law in this case.

A compensation judge's finding regarding the rating of permanent partial disability is one of ultimate fact and must be affirmed if it is supported by substantial evidence.

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[1] Dorland's Medical Dictionary defines "tropism" as

> "the turning, bending, movement, or growth of an organism or part of an organism in response to an external stimulus. Such response may be either positive (toward) or negative (away from the stimulus). By extension, used as a word termination affixed to a stem denoting the nature of the stimulus (phototropism) or the material or entity for which an organism or substance shows a special affinity (neurotropism), usually applied to nonmotile organisms."

Dorland's Medical Dictionary, 29th edition, published by W.B. Saunders Co., 2000.

Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987). As trier of fact, a compensation judge is responsible for determining the degree of disability after considering all evidence and relevant legal factors in a case. Erickson by Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 43, 35 W.C.D. 523, 528 (Minn. 1983); see Jensen v. Best Temporaries, 46 W.C.D. 498, 500-01 (W.C.C.A. 1992). Accordingly, medical testimony is considered helpful but not dispositive on the issue of disability. Id.; see Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 529, 41 W.C.D. 634, 640 (Minn. 1989) (determination of degree of permanency rests with compensation judge, not member of medical profession).

In order to show entitlement to a specific permanent partial disability rating, the employee must prove each element of the scheduled disability. Knudson v. Twin City Hide, Inc., 40 W.C.D. 336, 338 (W.C.C.A. 1987) (citing Davies v. Marriott-Host Int'l, 39 W.C.D. 631, 633 (W.C.C.A. 1987)). Here, the employee was required to prove the existence of a ratable radiographic, myelographic, CT scan, or MRI scan abnormality.

The sole evidence offered on this issue was the ultimate opinion of Dr. Boisen, without any supporting x-ray reports or other radiological evidence. In addition, Dr. Boisen did not offer any definition or explanation of the anatomical nature of a "facet tropism" and the employee offered no medical or chiropractic documentation to explain this condition, despite the fact that this abnormality is apparently not one defined in commonly available medical reference materials expressly listed in Minn.R. 5223.0010, subp. 4, as those specifically applicable to the interpretation of the disability schedules.

While an expert's ultimate opinion *may* be sufficient to sustain an employee's burden of proof on a medical issue, a compensation judge is not *required* to accept such an ultimate opinion as a matter of law, and this is particularly true in rating permanent disability.

We note, further, that it is not entirely accurate to suggest that there was no contrary evidence as to the existence of a radiographic abnormality. On May 11, 1998, when Dr. Boisen saw the employee immediately after the most recent work injury, he noted in his records that "old x-rays indicate Lt L-S facet tropism." (Exh. C: 5/11/98). Further, in his letter opinion dated November 12, 1999, Dr. Boisen opined that the facet tropism "predisposed Mr. Fieseler to the two work related lumbosacral strain/sprains of Aug. 31, 1996 and May 11, 1998." (Exh. A: 11/12/99 letter). It is thus reasonably apparent that the "facet tropism" condition alleged by Dr. Boisen was one which predated both injuries and therefore should have been apparent on the x-rays taken immediately following the 1996 work injury. However, the evidence indicates that the August 31, 1996 x-rays were read by a radiologist as normal for the lumbar spine.

We affirm the compensation judge's finding of a 3.5 percent, rather than a 7 percent, permanent partial disability.