

MICHAEL HOUGHTON, Employee, v. CITY OF BUHL, SELF-INSURED, Employer, and MINN. DIVERSIFIED INDUS. and AMERICAN COMP. INS. CO., Employer-Insurer/Appellants, and MEDICA CHOICE, MN DEP'T OF ECON. SEC. and MN DEP'T OF LABOR & INDUS./VRU, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 16, 2001

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT - SUBSTANTIAL EVIDENCE. Where the employee's physician stated that the treatment to the lower extremities was necessitated by work activities, the compensation judge was supported by substantial evidence in awarding payment.

CAUSATION - SUBSTANTIAL EVIDENCE. Where the employee's physician stated that the employee's March 11, 1999 injury at the employer was an aggravation of an earlier admitted injury at another employer, the compensation judge was supported by substantial evidence in awarding benefits against the March 11, 1999 employer.

Affirmed.

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

OPINION

STEVEN D. WHEELER, Judge

The employer, Minnesota Diversified Industries ("MDI"), and its insurer appeal from the compensation judge's findings that the employee sustained an injury to his hands and wrists requiring treatment in January and February 1999, and that on March 11, 1999, the employee sustained an aggravation of an earlier admitted low back injury. We affirm.

BACKGROUND

The employee, Michael Houghton, was born on May 12, 1957 and is currently 43 years old. For many years he worked seasonally on an as-needed basis for the employer, the City of Buhl. This work typically included such duties as operating loaders and bobcats to repair sidewalks, cutting grass and weeds, and planting trees. On September 18, 1996 the employee sustained an admitted injury to his back when he and another city worker were attempting to move a loader tire from the bucket of a loader to a storage building. The employee felt a "pop" in his back and pain in his low back. Within a day or so the employee developed shooting pains down his left leg to his toes. (Findings 1, 3, 4 [unappealed]; Exh. 14 at 7, 15-17, 36-41).

The employee was seen by Dr. Mark Wagner, M.D., at the Duluth Clinic in Hibbing, Minnesota on the date of the injury. Dr. Wagner diagnosed an acute lumbar strain. When the employee returned to Dr. Wagner on September 23, 1996, he indicated that his back pain had worsened. Deep tendon reflexes at the left knee and ankle were decreased as compared to the right and the employee could not perform straight leg raising. Dr. Wagner recommended a CT or MRI scan. (Finding 3 [unappealed]; Exh. 21: 9/18/96, 9/23/96.)

A lumbar MRI scan was performed on October 16, 1996 at the University Medical Center in Mesabi, Minnesota. The scan showed a central disc protrusion at the L4-5 level with ventral effacement of the dural sac. Based on the MRI findings, Dr. Wagner added a further diagnosis of degenerative disc disease. (Findings 5, 6 [unappealed]; Exh. 16 at 27.)

By December 1996, physical therapy notes indicated that the employee was able to walk without a limp and had gained improvement in lumbar range of motion. On January 6, 1997, his physical therapist, Gerald Wyland, noted that the employee was showing significant improvement in range of motion and functional ability but no change in subjective complaints of pain. (Finding 7 [unappealed]; Exh. L: 1/6/97; Exh. 16 at 119.)

The employee testified that on January 22, 1997 he slipped on ice when entering his physical therapy clinic and experienced increased lower back pain. He was seen by Dr. Wagner on January 27, 1997 and reported numbness and tingling in the posterolateral left leg. On examination Dr. Wagner found no objective symptoms and that the employee showed full range of motion and no obvious neurologic deficits. The employee also reported numbness and tingling in his left upper extremity, but Dr. Wagner found this to be in a non anatomic distribution. On January 28, 1997 Dr. Wagner released the employee to work with restrictions against any repetitive lifting, bending or twisting and against lifting over 20 pounds. (Findings 8, 9 [unappealed]; Exh. L: 1/22/97; Exh. B: 1/27/97, 1/28/97.)

The employee was referred to a specialist in occupational medicine, Dr. Jed E. Downs at the Duluth Clinic. On May 21, 1997, Dr. Downs examined the employee and concluded that the employee had work-related back pain with components of mechanical, myofascial and dural tension-related back pain. He recommended a sacroiliac injection preparatory to further physical therapy and possible home exercise protocols. (Finding 11 [unappealed]; Exh. D: 5/21/97.)

Beginning on May 28, 1997 the employee received additional physical therapy treatment at the Duluth Clinic. On June 16, 1997 the physical therapist, Gerald Wyland, reported that the employee showed no dysfunction in the sacrum or the lumbar spine although he continued to have significant myofascial tightness in the hip flexors and piriformis. He summarized the results of physical therapy through that date as showing increased mobility but little change in subjective complaints. He recommended that the employee be phased into a conditioning program on exercise equipment in physical therapy or possibly a transition to health club workouts. (Finding 12 [unappealed]; Exh. L.)

The employee was seen again by Dr. Downs on June 18, 1997. In addition to his low back and leg complaints the employee reported that he had experienced occasional numbness and tingling in the left arm, worse in the morning and clearing during the day. Dr. Downs prescribed another epidural steroid injection to be followed with aggressive dural mobilization on one occasion and then physical therapy to continue addressing myofascial restriction and mechanical dysfunction. He opined that the employee had work restrictions of a 20-pound lifting limit and allowance for periodic postural changes. (Finding 13 [unappealed]; Exh. D.)

On July 16, 1997 Dr. Downs diagnosed the employee as having recurrent mechanical back pain secondary to poor pelvic control and instability, along with deconditioning. He found that the employee had made significant improvement in overall myofascial components of his pain and improvement in range of motion, although the employee was complaining of increased subjective symptoms. The employee complained of "some left arm dysthesias." Dr. Downs provided the employee with a work release to work six hours per day with a 30-pound lifting restriction. (Finding 14 [unappealed]; Exh. D.) In July 1997 the employee began working for the employer, Minnesota Diversified Industries ("MDI") making tote boxes and performing handle welding, initially at six hours per day. (T. 43-4.)

On October 6, 1997 the employee reported to Dr. Downs that he was working six hours per day at MDI performing box folding and plastic welding. The employee's range of motion was intact and Dr. Downs diagnosed mechanical back pain with minimal objective findings, including no evidence of spasm. The doctor concluded that the employee had reached maximum medical improvement with a zero percent permanent partial disability. Dr. Downs issued a work ability report continuing the employee on a 30-pound lifting restriction and permitting him to progress to eight hours work per day as tolerated. The employee did subsequently progress to working eight hours per day with the employer. (Finding 17 [unappealed]; Exh. 16 at 115, 116.)

As a result of an exacerbation of back pain, the employee missed a few days of work during late October, November and December 1997. He was seen during this period by Dr. Wagner, who, on February 10, 1998, noted that the employee had not missed further work. Dr. Wagner referred the employee to Dr. Scott McBride, D.C., for chiropractic care. (Finding 13 [unappealed]; Exh. B.)

On April 17, 1998 the employee returned to Dr. Wagner in follow-up for his low back condition. On examination Dr. Wagner found straight leg raising was negative bilaterally and noted that the employee walked without a limp and was able to go from sitting to standing and to the examination table without difficulty. Dr. Wagner diagnosed back pain syndrome and continued the employee on medications. A TENS unit was also prescribed. (Finding 20 [unappealed]; Exh. B.)

The employee next returned to Dr. Wagner on June 3, 1998. Straight leg raising continued to be negative. The employee reported subjective numbness and tingling on the lateral thigh downward to the posterior calf on the left. Dr. Wagner noted that the employee's

chiropractor had expressed concern that the employee's continuing pain might be a radiculopathy extending down the left lower extremity. He recommended a repeat MRI scan. (Exh. B.)

The self-insured employer opposed a repeat MRI but agreed to a neurologic consultation. The employee was seen for the consultation on July 13, 1998 by a neurologist, Dr. Woolcott S. Holt, M.D. Dr. Holt noted that the employee's neurologic examination was normal. He opined that the employee had minimal deficits and no evidence to suggest a radiculopathy. He diagnosed chronic low back pain. In his opinion, the employee was able to perform light and sedentary work, although he could not return to work involving lifting of 50-100 pounds on a consecutive basis. (Exh. I.)

During the remainder of 1998 the employee treated for his low back chiropractically with Dr. McBride but did not specifically seek treatment for the low back from his medical physicians, although he was seen on several occasions by various physicians for problems with a hernia and for gastric symptoms related to medication taken for the low back condition.

The employee was next seen in follow up for his back condition by Dr. Wagner on January 8, 1999. Dr. Wagner noted some diffuse tenderness to palpation. His office records note that no spasm was present and the employee had full range of motion. Dr. Wagner assessed the employee's back condition as stable. (Exh. B.)

On or about January 11, 1999 the employee informed his supervisors at MDI that he was experiencing left and right hand and wrist numbness causing him to drop things and that the problem was worsening. A first report of injury was prepared on January 14, 1999. (Finding 25 [unappealed¹]; DOLI File.)

On January 15, 1999 the employee returned to Dr. Wagner for reexamination of his hands. He reported to the doctor that his prior problem with some numbness, irritation and spasm in the hands had worsened during the past few weeks. On examination, no edema, erythema or tenderness to touch was noted. Phalen's, reverse Phalen's and Tinel's signs were negative. Dr. Wagner diagnosed an overuse syndrome consisting of either a possible ulnar neuropathy or a tendinitis with muscle spasm. He prescribed medication and recommended a neurology consultation. The employee returned to Dr. Wagner again for his upper extremity problems on February 10, 1997. The examination results were noted to be similar to those obtained on January 15. The employee complained of problems with certain work activities, and Dr. Wagner provided restrictions requiring the employee to alternate jobs every one to two hours. (Exh. B.)

The employee testified that the problems with his hands started about six months before he told his supervisors about them, and gradually grew worse and worse. He related his symptoms to duties he had been performing at work using his hands and wrists to fold boxes and

¹ A date of "July" 11, 1999 given in the finding appears to be the result of a clerical error. The first report of injury prepared on January 14, 1999 gives a date of injury of "January" 11, 1999. (DOLI File)

weld box handles at the rate of about 250-300 boxes per hour. After the employee reported his problem to the employer, he was removed from the box work for a period of time and given duties involving putting small chains together. He testified that his hands improved following the change in activity. (T. 57-58.)

On March 10, 1999, the employee was seen by his chiropractor, Dr. McBride, complaining of low back pain. The chart note of that date records that the employee “[d]id some snow shoveling yesterday. Was more sore afterwards.” The employee had missed work on March 9, 1999 due to his back symptoms. On March 10, 1999, Dr. McBride provided a work excuse stating that the employee was treated for an acute increase of chronic low back pain, and that [a]pparently [the employee’s] condition was aggravated by snow shoveling. As a result of that exacerbation, [the employee] was unable to work on 3-9.” (Exh. C.)

The next day, March 11, 1999, the employee was carrying boxes to and from a conveyor at work when he slipped on a pipe dropped by a mechanic and fell backwards, landing on his buttocks on a concrete floor. Immediately after this fall, the employee was sent by the employer to an unspecified physician who examined him and returned him to work. The next day, the employee went to Dr. Wagner’s clinic where he was seen by a physician’s assistant, Jody Arndt. The employee told Ms. Arndt that he had fallen on his tailbone at work and that after leaving work he felt a sharp pain in his low back, and was having pain radiating down the left leg with a pins and needles sensation in the left calf and foot. Ms. Arndt diagnosed a central lumbosacral strain with chronic back pain syndrome. (T. 50-1; Exh. F.)

The employee was next seen by his chiropractor on March 30, 1999. Dr. McBride prepared a workers’ compensation physician’s report for an injury on March 11, 1999. In the report, Dr. McBride diagnosed an acute cervico-thoracic/lumbo-sacral sprain/strain and myofascial pain syndrome with L5-S1 radiculopathy. He reported that the employee had been intermittently unable to work since the injury. He further noted that the employee had a previous injury to the spine and that “[t]his injury appears to be an exacerbation or further injury of old injury.” (Exh. C.)

On March 31, 1999 the employee was seen by Dr. Wagner and reported that he had experienced increasing back pain since falling at work on March 10, 1999. Dr. Wagner diagnosed an exacerbation to the employee’s back pain syndrome. (Exh. B.)

The records of Dr. McBride show markedly increased frequency of chiropractic treatments, which had been at about once per month between October 1998 and March 1999, to an average of about six per month in April, May and June 1999. The treatment tapered down to about once a week in July through September 1999. (Exh. C; T. 117.)

On April 13, 1999 the employee returned to Dr. Wagner and reported that he was experiencing intermittent periods of back spasm and was having difficulty working eight hours a day, but did not wish to cut back to six hours. On examination, Dr. Wagner noted that muscle spasm was present in the employee’s back and he exhibited guarding and resistance to attempts to test his range of motion. (Exh. B.)

The employee was permanently laid off by the employer, MDI, on April 14, 1999, and was still unemployed as of the date of hearing in November 2000. (Finding 44 [unappealed].)

The employee continued to treat with Dr. Wagner through the date of hearing. In letters dated January 3, 2000 and June 23, 2000 Dr. Wagner expressed the opinion that the employee had sustained an aggravation to his prior low back condition on March 11, 1999. In his June 23, 2000 letter, Dr. Wagner further expressed the view that the employee was not yet at maximum medical improvement from this aggravation. (Exh. B.)

The employee was examined on December 17, 1999 by Dr. Larry Stern, M.D., on behalf of the employer and insurer. He was also examined on January 12, 2000 by Dr. Mark Fisher, M.D., on behalf of the League of Minnesota Cities. Both Dr. Stern and Dr. Fisher opined that the employee had not sustained any work injuries attributable to his employment with MDI. (Exhs. 28, 29.)

On November 6, 2000 a hearing was held before a compensation judge of the Office of Administrative Hearings. In addition to various unappealed findings, the judge found the employee had sustained an aggravation to his low back condition on March 11, 1999, and that work activities at MDI had caused the employee to experience increased upper extremity symptoms. The judge ordered that MDI pay workers' compensation benefits and medical expenses related to the employee's low back condition subsequent to "March 13 [sic], 1999" through the date of hearing, and further ordered that MDI pay for Dr. Wagner's January and February 1999 treatment of the employee's upper extremity problems, together with the cost of the employee's medication for this condition. The employer MDI and its insurer appeal.

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

Back Condition

The compensation judge found that the employee had sustained a significant aggravation to his low back condition when he slipped and fell on the pipe at MDI on March 11, 1999. The judge also found that the employee's prior injury while working for the City of Buhl remained a substantially contributing factor to the employee's low back condition, but as no issue of apportionment was before him, he ordered, essentially, that the employer MDI and its insurer pay for the employee's medical expenses, disability benefits and other benefits awarded for his back condition for the periods subsequent to "March 13 [sic], 1999."²

The employer, MDI, and its insurer appeal, arguing that the judge's determination that the employee's fall on March 11, 1999 resulted in an aggravation to the employee's prior low back condition is unsupported by substantial evidence in the record. The appellant employer and insurer point to essentially three factors on appeal which they contend outweigh any evidence supporting the judge's findings: (1) that the employee's hearing and deposition testimony and some prior statements he made to physicians reflect that the March 11, 1999 injury resulted in a single day off work and that the employee's condition very shortly thereafter returned to the same level as immediately prior to that injury, (2) that the employee failed to make a claim for benefits from the March 11, 1999 injury date until the filing of his third amended claim petition on August 27, 1999, and (3) that there is evidence to support a finding that any aggravation in the employee's low back condition was the result of a non-occupational injury or injuries.

With respect to the first point, the compensation judge acknowledged that the employee's own testimony was in part contradictory to a finding that the March 11, 1999 work injury resulted in a significant exacerbation or aggravation to his prior back condition. However, the compensation judge discounted the employee's testimony, finding him to be "a poor historian." Instead, the judge relied more heavily on the medical records preceding and following March 11, 1999 to determine whether the employee's 1996 low back condition had been aggravated by the occupational injury on that date. On inspection of the record as a whole, we note that the employee's own assessment of his subjective symptoms was frequently at odds with the objective findings of his doctors, both before and after the incident. We note, also, that much of the employee's testimony as to his physical symptoms was vague and contradictory (see, e.g., T. 119-122). The judge's determination that the employee was a poor historian is, in essence, a determination as to the weight to be given to his testimony. As such, we must affirm the judge's assessment of the value of that testimony unless the judge's credibility assessment is clearly erroneous. We cannot say that such is the case here, and accept the judge's assessment of the employee's testimony as to the history and progression of his symptoms as unreliable.

² The March 13, 1999 date appears several times, apparently as an inadvertent error, in the judge's findings and order for the date of the March 11, 1999 injury. The payment order is modified to conform to the actual date of injury.

Similarly, we do not think that the timing of an employee's claim is dispositive as to its merits. While the employee's failure to claim benefits from a March 11, 1999 injury until the filing of his third amended claim petition may, in a sense, be indirect evidence to the employee's understanding of the nature his injuries, it is not necessarily compelling evidence that the claim eventually raised was without merit. Many factors contribute to the timing of an employee's claims, and here, where the compensation judge expressly found that the employee was a poor historian, there are manifold possible interpretations of why the claim from this injury may have been added as an amendment to the employee's claim petition. For example, the employee's attorney may have fully perceived that this injury date was significant only after a full review of the medical records received subsequent to the initial claim in this matter. We do not find clear error in the judge's failure to consider the timing of the claim significant in this case.

Finally, while there was some evidence that non-work activity, such as the snow shoveling the employee performed on March 9, 1999, caused at least a flare up of the employee's back condition from time to time, the evidence as a whole sustains a conclusion that such flare ups were temporary and of brief and limited duration. The question for our review is not whether another interpretation of the evidence might have been reached by the judge, but whether the findings that the judge actually made have substantial support in the record.

The compensation judge expressly found that the medical records did not support those parts of the employee's testimony in which he stated that one day after the March 11, 1999 injury he had returned to the same level of pain in his low back that he had prior to that injury. The judge stated that "the medical records do not support his testimony and instead reflect a continuity of increased symptoms after the [March 11, 1999³] aggravation." (Finding 34.) The employer and insurer dispute this finding, but we conclude that the medical records do support the judge's finding that the March 11, 1999 work injury resulted in a protracted period of increased symptoms. The employee's treating physician and treating chiropractor, who were in a position to most closely monitor the employee's symptoms before and after the March 11, 1999 fall, both addressed this event in their records as an aggravation or exacerbation to the employee's prior back problems. Their examination findings and the increased frequency of treatment following the March 11, 1999 fall also lend support to the judge's findings. We conclude that the judge's determination that the employee's March 11, 1999 fall at MDI resulted in a significant aggravation to his pre-existing low back condition is adequately supported in the record, and affirm.

Medical Treatment of Upper Extremities

The appellants' briefs do not provide a detailed argument to support their appeal on the award of medical expenses for treatment to the employee's hands and wrists in January and February 1999, other than to state that

the medical records and reports indicate that there is no specific incident causing the injury which gave rise to the complaints and

³ The judge's finding erroneously cites a date of March 13, 1999 for this injury. See footnote 2, supra.

symptoms in the upper extremities. A review of the medical records show that such symptoms and conditions began with the September 18, 1996 City of Buhl injury or even possibly before that with [a] car accident and surgery to the right hand.

(Appellants' brief at 10.)

The record does indicate that the employee had some sporadic complaints of numbness and tingling in his upper extremities which preceded his employment with MDI. Such symptoms were reported to Dr. Wagner and Dr. Downs in 1997. There is no indication, however, that the employee's physicians found that these symptoms were sufficiently severe as to require any treatment, and the medical records do not disclose any treatment at that time. In addition, we note that the employee testified to his belief that he had first started to have such symptoms as a result of the 1996 work injury. Apparently it is this evidence on which the appellants rely for their appeal on this issue.

We conclude that, notwithstanding the foregoing, there was substantial evidence to support the compensation judge's finding and order on this issue. The timing and intensity of the employee's upper extremity problems, as reflected in the medical records, together with the employee's testimony as to the relationship between his worsened symptoms, work duties, and the medical treatment obtained for the condition, adequately support the judge's determination.

Other Issues

In their Notice of Appeal, MDI and its insurer listed as an issue "the failure of Judge Erickson to rule on the issue of whether Employee's claim was barred by lack of notice." (Judgment Roll: Notice of Appeal at 3, item z.) This issue was neither argued nor raised in the appellants' briefs to this court. Pursuant to Minn. R. 9800.0900, subp. 1, "[i]ssues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by the court."