

DONALD J. LOWRY, Employee/Appellant, vs. A-1 LIQUOR and TIG INS. GROUP/CRAWFORD & CO., Employer-Insurer and MN DEP'T OF LABOR & INDUS./VRU, BLUE CROSS/BLUE SHIELD/BLUE PLUS and ST. PAUL RADIOLOGY, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS  
DECEMBER 10, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert medical opinion, supported the compensation judge's decision that the employee did not injure his low back during an incident at work.

Affirmed.

Determined by: Rykken, J., Johnson, J., and Wheeler, C.J.  
Compensation Judge: Rolf G. Hagen

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals from the compensation judge's finding that the employee did not sustain a work-related injury to his low back on September 13, 2000, and from the compensation judge's consequential denial of the employee's claim for workers' compensation benefits. We affirm.

BACKGROUND

Donald Lowry, the employee, began working for A-1 Liquor, the employer, in approximately 1996. The employee eventually became the assistant manager for the employer; his duties included stocking shelves, selling wine, running the cash register, cleaning floors and receiving product delivered to the store.

Claimed Injury of September 13, 2000

The employee claims that he sustained an injury on Wednesday, September 13, 2000, that arose out of and in the course and scope of his employment. On that date, the employer was insured for workers' compensation liability by TIG Insurance Group, the insurer. The employee was 37 years old on that date, and earned a weekly wage of \$512.50. The employee claims that as he reached down to dust a store shelf, he experienced a sharp pain in his lower back. He felt pain when he stood up, and needed to walk in a hunched over manner because of his low back pain. The employee claims that he advised his manager, Tracy Zarembinski, that his back

hurt (T. 20, 57-60);<sup>1</sup> he then completed his work shift, including assisting another co-employee, Michael Gibbons, with stocking product onto shelves.

The employee testified that he experienced severe pain and had difficulty sleeping that evening, and that he woke up in the middle of the night on September 13, 2000, sensing severe low back pain and left leg pain. He initially consulted a nurse practitioner on Thursday, September 14, 2000, complaining of neck pain radiating into his lower back and left arm. The nurse's chart note dated September 14, 2000, states that the employee "[w]as at work and felt a twinge. Last [night] wasn't too bad so took an ibuprofen. Awoke in the middle of the night [with] pain down L. arm and into L. low back." The nurse diagnosed cervicalgia and lumbar strain, and prescribed pain medication and low back exercises. The employee advised Todd Norman, owner of A-1 Liquor, that his back was out and that he hoped to return to work by the following Monday. (T. 24-25.)

The employee reported to the HealthEast Emergency Room on Saturday, September 16, 2000. The emergency room chart note lists the employee's chief complaint as increased low back pain for the past two days, radiating into his left leg. The employee also reported subjective numbness and tingling in his left leg. Although the employee testified that he advised the emergency room physician that his left low back problems were related to a work activity, the hospital chart note from that date does not mention a work-related injury. The chart note states that "this gentleman has had problems ever since 1986 when he was involved in an electrical injury," and that the employee had sought treatment for a cervical spine injury since 1986.<sup>2</sup> The emergency room physician diagnosed "lumbar pain exacerbation" and recommended bed rest for two days, and no bending, lifting or twisting for one week.

The employee consulted Dr. Leinaala Crawford, one of the physicians at his family clinic, on September 20, 2000, complaining of extreme back pain with left leg weakness. Dr. Crawford's chart note states that:

S: He is here for follow up of his back pain. He is here leaning to the right side complaining of extreme back pain with left leg weakness. Denies any bowel or bladder problems. Denies any numbness or tingling. Has noticed [fasciculation]<sup>3</sup> in his extremities

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<sup>1</sup> Ms. Zarembinski testified that the employee did not advise her on September 13, 2000, that he hurt himself. (T. 149.)

<sup>2</sup> According to a background letter from the employee's attorney to one of the employee's treating physicians, the employee injured himself on August 10, 1986. As he vacuumed a floor while at work, "a frayed cord touched the frame, giving him an electrical shock. He managed to disengage himself from the machine and fell back against some metal chairs and railings surrounding the chairs." The employee experienced neck symptoms following this injury. (Er. Ex. 1.)

<sup>3</sup> Fasciculation is defined as the formation of fasciculi, which are small bundles of nerve, muscle or tendon fibers, or a small local contraction of muscles, visible through the skin,

in the upper and lower on left. Otherwise he states this has been going on for a long time. He has been in and out of the ER and our clinic over the last several months. Currently waiting for surgery and is in lidigation [sic] for several insurance issues.

O: Reveals a male in no apparent distress. With the exception of leaning over to the right. He states he is in severe pain. On palpation of his back muscles he almost starts crying. He clearly has very hypertonic muscle spasm of the left lumbar musculature. Deep tendon reflexes are within normal limits. Right lower extremity appears weaker in all motion in comparison to the right and also is decreased strength secondary to pain per patient.

A: Muscle spasm

(Ee. Ex. B.)

Dr. Crawford prescribed pain and anti-inflammatory medication. On September 24, 2000, the employee reported to Woodwinds Emergency Room reporting pain in his low back, radiating to his lower leg, and progressing to his left thoracic area and left upper extremity. According to the chart note on that date, the employee reported that while he was bending at work a week earlier he felt a “minor twinge of pain in his left lower neck that progressed to pain that appeared to be localized to his left lumbar area with some radiation to the left lower extremity.” He was diagnosed with back pain and possible cervical radiculopathy, and was prescribed pain medication.

On October 4, 2000, the employee reported to Dr. Crawford that his back felt much better, that the medication had helped him and that “he felt that he has had quite a bit of improvement,” but that he had “chest pain wrapping around his rib cage and thinks that he probably has disk disease in the thoracic spine of his back also.” Dr. Crawford examined the employee and diagnosed muscle spasm and degenerative disc disease,<sup>4</sup> and reported that:

There is no pain to palpation in the back musculature and he has had good range of motion of his neck muscles, upper extremities, and lower extremities. Deep tendon reflexes are within normal limits. Muscle strength is decreased secondary to pain. There does not appear to be any asymmetrical atrophy of his lower or upper extremities.

(Er. Ex. 1.)

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representing a spontaneous discharge of a number of fibers innervated by a single motor nerve filament. Dorland’s Illustrated Medical Dictionary, 654 (29<sup>th</sup> ed. 2000).

<sup>4</sup> The chart note states “muscle spasm and DJD at his spine” but does not identify at what vertebral levels.

On October 13, 2000, the employee consulted Dr. William Drehmel, his family doctor, reporting neck and back pain and neck stiffness. Dr. Drehmel diagnosed sciatic irritation and irritation at the C6-7 level. On October 25, 2000, Dr. Thomas Bergman conducted a neurosurgical evaluation of the employee at the referral of Dr. Drehmel; the employee had consulted Dr. Bergman in the past for his neck condition resulting from his 1986 work injury. Dr. Bergman advised the employee that in his opinion, the employee's low back symptoms did not relate to his previous neck injury and pre-existing condition but instead that the employee had sustained a new back injury in September 2000, with an onset occurring after bending over at work. Dr. Bergman diagnosed "some mild L5 nerve root irritation from spondylitic change and a mild disc bulge." He recommended conservative treatment as opposed to surgery. He stated that if the employee's symptoms did not improve in the next few months, then he would recommend an MRI scan to ascertain whether there is any significant nerve root compression. (Ee. Ex. B.) On October 25, 2000, based on this opinion from Dr. Bergman, the employee notified Mr. Norman at A-1 Liquor that he had sustained a low back injury at work, and asked Mr. Norman to refer the matter to the employer's workers' compensation carrier. (T. 27-28.) The employee testified that it was not until his appointment with Dr. Bergman that he realized he had sustained a new injury; prior to that appointment he thought his symptoms were related to his ongoing neck problems, even though he experienced different symptoms following the September 13, 2000 incident. (T. 22, 25-26.)

The employee remained off work as a result of his symptoms. Dr. Bergman prescribed physical therapy for the employee, which he commenced on November 27, 2000; he also referred the employee for further treatment with Dr. Drehmel. By February 9, 2001, Dr. Drehmel released the employee to work four hours per day, on a light-duty basis, within physical work restrictions of no bending and no twisting, and a lifting limit of 10 pounds. The employee attempted to return to work for the employer, but the employer advised him that they had no light-duty work available. The employee commenced searching for work with another employer, receiving rehabilitation assistance through the Vocational Rehabilitation Unit of the Department of Labor and Industry. As of the date of hearing, March 13, 2001, the employee had not yet returned to work.

The employee has continued to note back pain and pain in his left leg since his injury in September 2000. He testified that he is very uncomfortable when walking or staying on his feet, and that his low back symptoms require him to change positions frequently. Those symptoms prevent him from "horsing around" or wrestling with his son, and he no longer walks his dog, as he is afraid that "it could worsen my back." (T. 35.)

#### Previous Medical History

The employee has previously undergone treatment to both his neck and back. The employee sustained a work-related injury to his neck in 1986. Medical records in evidence date from June 1994 and document the employee's ongoing neck symptoms, including left arm numbness and pain in the left shoulder and neck, and a diagnosis of cervicalgia. By at least

November 1993, a neurosurgeon recommended cervical fusion surgery.<sup>5</sup> He has not yet undergone that surgery. The employee consulted his treating physician in February, June and July 2000, reporting ongoing neck pain. At hearing, the employee testified that he had ongoing physical work restrictions resulting from this neck injury, including no lifting over 10-15 pounds, no overhead work and no lifting his arms. (T. 53-54.)

Medical records in evidence document three separate occasions when the employee also sought medical treatment for low back symptoms. On August 14, 1994, the employee reported to the emergency room at St. John's Hospital, complaining of left lower back pain, pain radiating into his left leg, and numbness in his left thigh. The chart note states "injured back - yesterday picking up box." The consulting doctor diagnosed acute lumbar strain, and possible disc involvement, and prescribed pain medication. On November 11, 1994, the employee again reported to the St. John's Hospital emergency room complaining of a pain in his left low back for three weeks, along with a slight fever, cough and congestion. According to the hospital chart note on that date, the employee reported pain radiating from his left lower back, down his thigh and into his ankle. He reported no numbness or weakness in his thigh. The doctor also stated that "the patient does not believe that he has a kidney infection, but his girlfriend thought that he had a kidney infection because the pain was in his back." (Er. Ex. 3.) The doctor diagnosed back pain and upper respiratory infection, and prescribed pain medication.

On August 15, 1998, the employee sought medical treatment at the emergency room at St. John's Hospital for a chronic pre-existing neck problem, complaining of pain in his upper back and neck. The chart note states that the employee had been "suffering chronically from disc disease from his neck, pain in the back that comes and goes." The consulting physician diagnosed a "herniated nucleus pulposus, chronic" and prescribed pain medication.

### Procedural Background

On November 22, 2000, the employee filed a claim petition, alleging that as a result of a low back injury on September 13, 2000, he was entitled to ongoing temporary total disability benefits from September 14, 2000, as well as entitlement to payment of medical expenses and provision of a rehabilitation consultation. The employer and insurer denied primary liability, arguing that no incident or injury occurred on September 13, 2000, and asserting that the employee's alleged disability, if any, resulted from the employee's pre-existing cervical spine injury. On March 13, 2001, hearing was held to address the employee's claims. In a Findings and Order served and filed April 17, 2001, the compensation judge found that the employee failed to prove that he sustained a work injury to his low back on or about September 13, 2000. 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

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<sup>5</sup> The record does not contain medical records from 1993; this information is included in a notation in a 1996 medical chart note.

substantial evidence in view of the entire record as submitted.” Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, “they are supported by evidence that a reasonable mind might accept as adequate.” Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, “[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.” Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, “unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” Id.

## DECISION

The employee appeals from the compensation judge’s finding that a preponderance of the evidence does not support the employee’s claim that he sustained a work-related low back injury on September 13, 2000. In that finding, and in his memorandum, the compensation judge spelled out his reasons for reaching that conclusion. Those reasons included the fact that the employee had a pre-existing back condition, multiple level degenerative disc disease of the lumbar spine, for which he has required medical treatment, and which resulted in low back pain and left leg radiculopathy, including numbness and tingling; that the employee’s testimony concerning his medical history was inconsistent with medical records in evidence; that the employee’s testimony at hearing was inconsistent with that of other witnesses; and that the employee’s primary treating physicians, Dr. Drehmel and Crawford, were not aware of the employee’s pre-existing low back condition and therefore their medical opinions were based upon inadequate foundation. The employee appeals from each finding and addresses each reason individually. We conclude that the reasons given by the judge reasonably support his ultimate decision in this case, and therefore affirm.

In his memorandum the compensation judge stated that “[t]his case was one primarily of credibility.” (Memo., p. 6) The compensation judge found the employee’s testimony to be contradictory with that of testimony presented by other witnesses. Witnesses who testified at the hearing included Leigh Harwell and Michael Gibbons, testifying at the request of the employee, and Tracy Zarebinski and Lee Seeley, testifying at the request of the employer and insurer. In his memorandum, the compensation judge cited specifically to the testimony provided by Mr. Lee Seeley, part-time employee for the employer. The compensation judge concluded that Mr. Seeley credibly testified that on September 13, 2000, the date of the claimed injury, he had observed the employee dusting a shelf, but observed no injury or pain behavior by the employee, and was not advised by the employee of any injury that day. The compensation judge also cited to three other portions of Mr. Seeley’s testimony. Mr. Seeley also testified that he saw the employee walking his dog in November 2000, contrary to the employee’s testimony that he had not walked his dog since his injury date. Mr. Seeley testified that he observed the employee at a boxing match in December 2000, observing the employee walking and cheering. In addition, Mr. Seeley saw the employee at a fishing contest in February 2001, and observed the employee fishing over a three-hour period of time, tending his fishing hole, moving from one fishing hole to

another, getting in and out of a chair, and not exhibiting—in Mr. Seeley’s opinion—pain behavior. The compensation judge found that Mr. Seeley testified credibly, and is “considered to have been a neutral witness.”

The employee argues that the compensation judge erred by giving weight to the testimony of Mr. Lee Seeley. The employer and insurer argue that even if the employee is under the impression that the judge should have believed the employee over Mr. Seeley, the judge is in the unique position of determining credibility of witnesses and his findings should be upheld.

"Assessment of witness credibility is the unique function of the factfinder." Tews v. Geo. A. Hormel & Co., 430 N.W.2d 178, 180, 41 W.C.D. 410, 412 (Minn. 1988). See also Even v. Kraft, Inc., 42 W.C.D. 220, 445 N.W.2d 831 (1989). It is not the role of this court to evaluate the credibility and probative value of witness testimony and to choose different inferences from the evidence than the compensation judge. Krotzer v. Browning-Ferris/Woodlake Sanitation Serv., 459 N.W.2d 509, 513, 43 W.C.D. 254, 260-61 (Minn. 1990); Redgate v. Sroga's Standard Service, 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). The compensation judge’s assessment of the credibility of the employee’s and other witnesses’ testimony is amply supported by the hearing testimony in its entirety. We therefore will not disturb the compensation judge’s conclusion that Mr. Seeley credibly testified as to the employee’s activities and that the employee’s testimony was not reliable.

The compensation judge also based his denial of the employee’s claim on a finding that “the employee had a pre-existing multiple level degenerative disc disease of the lumbar spine from which he has experienced low back pain and left leg radiculopathy including numbness and tingling and from which he has required treatment.” (Finding No. 3.) The record indicates the employee treated on three separate occasions in 1994 and 1998 for low back symptoms and for symptoms radiating into his left leg. Although the employee initially did not recall that treatment while testifying at the hearing, he later recalled treating for low back symptoms due to a potential kidney infection. In addition, a CT scan taken of the employee’s lumbar spine on September 26, 2000, indicated that the employee had multiple level degenerative disc disease, from levels L3 through S1, with moderate posterior bulges at each level. Based upon our review of the medical evidence as a whole, we conclude that the compensation judge’s finding that the employee had a pre-existing low back condition is adequately supported by evidence of record, and therefore affirm.

The compensation judge also found that the employee’s hearing testimony was not reliable, and that it was inconsistent with medical records in evidence. (Findings 4 and 6.) In spite of his previous symptoms and previous treatment for low back condition, the employee testified that he did not have a low back problem or left leg symptoms before his claimed injury on September 13, 2000. (T. 21, 43.)<sup>6</sup> In his memorandum, the compensation judge stated that he placed significant weight on the medical evidence that indicates the employee had pre-existing problems with his low back, and specifically upon the fact that the employee continued to deny

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<sup>6</sup> However, after he was shown a medical chart note dated November 11, 1994, the employee testified that at one point he had low back symptoms of three weeks’ duration, due to an infection. (T. 50.)

prior problems or previous low back treatment. The compensation judge also concluded that not only were the medical records contradictory with the employee's testimony, but in many instances the records themselves contained contradictory statements or revisions of the employee's history given during the course of a medical visit. Upon our review of the medical records, we conclude that notations in the medical records support this conclusion by the compensation judge.

In addition, the compensation judge also stated that he found Dr. Stern's opinion to be more persuasive than that of the employee's treating physicians, and therefore that he relied upon that opinion in reaching his conclusions concerning the causation of the employee's symptoms. The compensation judge found that the opinions of Drs. Drehmel and Bergman lacked adequate foundation as they were not advised of the employee's prior low back problems and his prior treatment for those symptoms. The employee argues that the compensation judge improperly rejected the opinions of Drs. Drehmel and Bergman as lacking foundation. The issue here is not foundation, but instead is the weight to be given to the opinions of the expert witnesses. Both Drs. Drehmel and Bergman had treated the employee periodically since at least 1994, which is the earliest date of medical reports contained in the hearing record. Dr. Drehmel's chart notes refer to the employee's history of chronic neck symptoms and previous recommendations for surgery to his cervical spine; Dr. Bergman had examined and consulted with the employee numerous times in the past for his neck condition, at the referral of Dr. Drehmel, and referred to that previous treatment and surgical consultations in his report of October 25, 2000. Both doctors were aware of the employee's condition and complaints, and reviewed the lumbar spine CT scan taken in 2000.

Dr. Stern reviewed the employee's medical records in conjunction with his orthopedic examination of the employee. Although Dr. Stern made no comment in his report about the employee's pre-existing low back condition, he found no objective evidence of any "active orthopedic problem involving his low back" and no injury to his lower back that can be attributed to an alleged dusting episode on September 13, 2000. (Er. Ex. 5.)

The compensation judge is given discretion to determine the appropriate weight given to an opinion which is based on adequate foundation. In this particular case, the compensation judge found Dr. Stern's report to be persuasive, and specifically noted that the opinions of the treating physicians were "not given as significant a weight" as Dr. Stern's opinion. We note that it is the compensation judge's responsibility, as trier of fact, to determine the appropriate weight to be given to various experts' opinions and to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). We do not believe that the compensation judge has abused his discretion and find that there was adequate evidence in the record to support the compensation judge's selection of Dr. Stern's report as dispositive of the issue of the degree of disability caused by the alleged September 13, 2000 injury. Accordingly, we must affirm the compensation judge's choice between expert opinions.

#### Post-Hearing Exhibit

The employee attached an illustrative exhibit to his appellate brief, a police report regarding one of the witnesses who testified on behalf of the employer. This exhibit was not introduced into evidence at hearing nor was it introduced into the record during the 30-day post

hearing when the record was left open by the compensation judge. On that basis, the employer and insurer request that this illustrative exhibit be disregarded by this court.

The Workers' Compensation Court of Appeals' review is limited to evidence submitted to the compensation judge. Vagts v. Tromco Elec., 48 W.C.D. 622 (1993). Evidence not submitted at the hearing may not be considered by this court on appeal. As the illustrative exhibit was not submitted at hearing, this court cannot review it in conjunction with their review on appeal, and therefore this court has not considered that exhibit in rendering this decision.