

STEVE MICKLE, Employee, vs. ROYAL TIRE and ROYAL AND SUN ALL., INC., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 2, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION; TEMPORARY TOTAL DISABILITY. Substantial evidence, including the employee's testimony regarding the nature of his job, and the employee's ability to perform such a physically demanding job from December 1998 to May 1999 before his work injury, supports the compensation judge's finding that the employee's temporary total disability from and after May 5, 2000 was causally related to the employee's work injury.

Affirmed.

Determined by: Rykken, J., Wheeler, C.J., and Wilson, J.
Compensation Judge: James R. Otto

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal the compensation judge's findings that the employee had sustained a permanent aggravation of a pre-existing condition that was causally related to his work injury and that the employee had not reached maximum medical improvement. We affirm.

BACKGROUND

On May 13, 1999, Steve Mickle, the employee, sustained a low back injury while working for Royal Tire, Inc., which was insured for workers' compensation liability by EBI Companies. On that date, the employee was 27 years old and earned a weekly wage of \$473.83. The employee had started working for the employer in January 1998 as a service technician, and was transferred to the warehouse in December 1998.¹ In that position, the employee handled shipping and receiving of tires, which required the employee to load and unload trucks and stack tires. The employee testified that he threw 120 to 140 pound tires over his head 500 to 600 times per day. On the day of the injury, the employee lifted a tire while making a delivery and felt a stinging pain in his back and radiating into his buttocks, legs and up into his shoulders. The employee reported the injury and was off work one day, but did not seek treatment until August

¹ There are conflicting references to the employee's date of hire. The employee testified that he began working for the employer in January 1998. However, the First Report of Injury lists a hire date of May 1, 1998.

1999 with Dr. Kevin Myhre, Montevideo Clinic. The employee was treated with anti-inflammatory medication, was referred to physical therapy, and was given restrictions of no lifting over 10 pounds, no repetitive bending, twisting or turning. The employee continued to work his regular job, which required physical duties outside his restrictions. He received follow-up treatment at the Montevideo Clinic.

A September 20, 1999 CT scan indicated a disc protrusion at L5-S1. The employee was referred to Dr. Chang, neurologist, who examined the employee on October 29, 1999. Dr. Chang recommended an MRI scan to evaluate whether surgery was required. A November 12, 1999, MRI indicated a mild broad based disc bulge at the L4-5 level and a mild broad based disc bulge and tiny central disc protrusion at the L3-4 level. In December 1999, the employer and insurer referred the employee to a physiatrist, Dr. Mark Thibault, who recommended physical therapy and restrictions similar to Dr. Myhre's but allowed lifting up to 30 pounds.

In February 2000, the employee was placed in a different job inspecting remanufactured tires, which did not involve lifting, but did require bending, turning, and twisting. At Dr. Thibault's recommendation, the employee underwent two sessions of Med-X treatment, which exacerbated his condition. In March 2000, Dr. Myhre referred the employee to Dr. David Kraker for an orthopedic surgical evaluation. This referral was apparently initially denied. On April 6, 2000, the employee returned to Dr. Myhre, who released him from work until he could see Dr. Kraker. Dr. Thibault, however, released the employee to return to work and scheduled another MRI. The employee underwent the MRI in April 2000. Dr. Thibault reviewed the MRI, determined that surgical intervention was not necessary, and returned the employee to his original restrictions. The employee consulted Dr. Kraker on his own on May 4, 2000. Dr. Kraker recommended a six week course of physical therapy and home exercise and took the employee off work during this time. The employee's condition improved and the employee was released to work on August 4, 2000 with restrictions of 5 to 10 pounds lifting, no twisting, bending or reaching. Dr. Kraker recommended a discogram and intradiscal electrothermal (IDET) therapy, which apparently was not approved by the insurer.

Dr. Thibault referred the employee to Dr. Anthony Bottini, a neurosurgeon, on August 30, 2000. Dr. Bottini diagnosed chronic mechanical low back pain from degenerative disc disease at L4-5. Dr. Bottini opined that continued conservative measures would not be effective and discussed surgical alternatives such as IDET therapy, but recommended anterior interbody fusion with instrumentation.

The employee had prior low back and neck problems, resulting from a 1989 motor vehicle accident and two work-related injuries or aggravations in 1991 and 1992. The record is not clear as to whether the employee had been assigned permanent restrictions at the time he began working for the employer in 1998.

On May 3, 2000, the employer's human resources director left a telephone message for the employee indicating that light duty work was available for the employee. The employee responded, stating that he had an appointment with Dr. Kraker on May 4, 2000. On May 4, 2000, Dr. Kraker released the employee from work. On May 5, 2000, the employee filed a claim petition for temporary total disability benefits, and a medical request to change physicians from

Dr. Thibault to Dr. Myhre and Dr. Kraker. Also on May 5, 2000, the employee filed a rehabilitation request to change his Qualified Rehabilitation Consultant (QRC) from Colleen Peterson to Craig Galvin.

On May 15, 2000, the employer and insurer filed a Notice of Intention to Discontinue Benefits, stating as follows:

This employee was released to light duty by Dr. Thibault. As of 5/3/00, his employer has had work available within these restrictions. In addition, this employee is not cooperating by providing authorization to obtain his prior medical records. We are unable to complete our investigation without these.

On May 22, the employer and insurer filed a Rehabilitation Response, objecting to a change in QRC. They contended that the employee was not qualified for rehabilitation assistance since the employer had work available for the employee within his work restrictions and since the employee was not permanently precluded from engaging in his usual and customary occupation or from engaging in the job he held at the time of the injury. The employer ultimately agreed to a change of QRC to Craig Calvin. The QRC met with the employer and the employee at the job site to review which duties were within Dr. Kraker's restrictions. The employee was scheduled to return to work with the employer after the October 31, 2000, hearing.

Also on May 22, the employer and insurer filed a Medical Response, objecting to the employee's request to change treating physicians. The employer and insurer stated, in part, that the employee had failed to return authorizations allowing the release of medical records, which had stalled investigation of the employee's medical history and had required a postponement of the medical examination scheduled with Dr. Wyard. The employer and insurer also contended that the employee's request to change treating physicians was unnecessary and that until prior medical records could be obtained, they could not agree to a change in treating physicians.²

An administrative conference was held on June 1, 2000, the presiding compensation judge determined that there were reasonable grounds to discontinue the employee's temporary total disability benefits, based on Dr. Thibault's restrictions. The employee filed a request for formal hearing, which was consolidated with the employee's claim petition. On August 24, 2000, at the request of the employer and insurer, the employee underwent a medical examination with Dr. Gary Wyard. Dr. Wyard opined that the employee had sustained a temporary aggravation of a pre-existing condition, that he could work with restrictions and that his need for restrictions was not causally related to the employee's 1999 work injury.

The hearing was held on October 31, 2000. The issues included the nature and extent of the employee's May 13, 1999, work injury, the employee's entitlement to temporary total disability benefits from and after May 5, 2000, whether the employee had unreasonably refused

² The record does not indicate when this medical issue was resolved. However, Finding No. 5, which was not appealed, states: "Mr. Mickle's treating physician from and after May 4, 2000 was Dr. David P. Kraker of Advanced Spine Associates, P.A."

light duty work, and whether the employee was entitled to temporary partial disability benefits on March 29, and April 7 through April 13, 2000. The compensation judge found that the employee had sustained a permanent aggravation-type injury and an acceleration-type injury to his pre-existing degenerative lumbar disc disease condition, with a resulting probable protruding disc at his L5-S1, a probable bulging disc at his L4-5 disc space, and a probable slight disc protrusion at his L3-4 level; that the employee's work activities, specifically on May 13, 1999, were the proximate contributing cause of the employee's condition and need for treatment after May 13, 1999; and that the employee was entitled to temporary partial disability benefits on the relevant dates and temporary total disability after May 5, 2000. 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 (2000). 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 employer and insurer argue that the compensation judge's finding that the employee's work injury had resulted in a permanent aggravation of his pre-existing condition is not supported by substantial evidence and that the employee is not entitled to temporary total disability benefits after May 3, 2000. The employer and insurer claim that the employee was not credible, and that the records of Dr. Kraker are inadequate to support a claim for temporary total disability benefits.

The compensation judge stated that the employee testified in a "highly credible manner." The employer and insurer claim that substantial evidence does not support this conclusion, arguing that the employee had failed to provide an accurate medical history to his medical providers. Assessment of the credibility of a witness is the unique function of the trier of fact. Brennan v. Joseph G. Brennan, M.D., P.A., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988). A finding based on credibility of a witness will not be disturbed on appeal unless there is clear evidence to the contrary. See Even v. Kraft, Inc., 445 N.W.2d 831, 835, 42 W.C.D. 220, 225-26 (Minn. 1989). At the hearing, the employee did not deny that he did not tell his treating physicians of his medical history, and indicated that he did not recall the specifics of his prior treatment or restrictions. The compensation judge assessed the credibility of the employee's

testimony regarding the nature of his job at the hearing and relied upon the medical records regarding treatment. We defer to his assessment.

The employer and insurer also argue that the employee had unreasonably refused light duty work. The employer's human resources director left a message indicating light duty work was available on May 3, 2000. The employee responded, indicating that he had an appointment with Dr. Kraker on May 4, 2000. Dr. Kraker took the employee off work at that appointment. The compensation judge could reasonably conclude that the employee did not unreasonably refuse light duty work.

The employer and insurer also argue that Dr. Kraker's medical records cannot support a claim for temporary total disability benefits since the records do not indicate any awareness of the employee's pre-existing conditions. The compensation judge did not solely rely upon Dr. Kraker's records, but emphasized the nature of the employee's work and his finding that Dr. Wyard's opinion was not persuasive, based upon other evidence, in making his determination. Questions of medical causation fall within the province of the compensation judge. Felton v. Anton Chevrolet, 513 N.W.2d 457, 50 W.C.D. 181 (Minn. 1994). It is well settled that injuries are compensable if the employment is a substantial contributing factor not only to the cause of the condition but also to the aggravation or acceleration of a pre-existing condition. Wallace v. Hanson Silo Co., 305 Minn. 395, 235 N.W.2d 363, 28 W.C.D. 79 (1975).

Several factors may be considered when determining whether an aggravation of a pre-existing condition is temporary or permanent, including: (1) the nature and severity of the pre-existing condition and the extent of restrictions and disability resulting therefrom; (2) the nature of the symptoms and extent of medical treatment prior to the aggravating incident; (3) the nature and severity of the aggravating incident and the extent of restrictions and disability resulting therefrom; (4) the nature of the symptoms and extent of medical treatment following the aggravating incident; (5) the nature and extent of the employee's work duties and non-work activities during the relevant period; and (6) medical opinions on the issue. "Which of these factors are significant in a particular case and the weight to be given to any factor is generally a question of fact for the compensation judge." Wold v. Olinger Trucking, Inc., slip op. (W.C.C.A. Aug. 29, 1994). Given the compensation judge's assessment of the employee's credibility, the employee's testimony regarding the nature of his job, and the employee's ability to perform such a physically demanding job from December 1998 to May 1999 before his work injury, substantial evidence supports the compensation judge's finding that the employee's temporary total disability from and after May 5, 2000 was causally related to the employee's work injury. Therefore, we affirm.

The employer and insurer also argue that the compensation judge erred by finding that the employee had sustained a permanent aggravation of his pre-existing condition and had not reached maximum medical improvement, relying upon Dr. Wyard's opinion to the contrary. The employer and insurer also apparently argue that the findings are contradictory—that if the employee had not reached maximum medical improvement, the compensation judge should not have been able to find that the aggravation was permanent. First, the compensation judge specifically rejected Dr. Wyard's opinion. Further, the compensation judge's finding that the employee had sustained a permanent aggravation does not contradict his finding that the employee had not

reached maximum medical improvement, but instead identifies the aggravation as not being temporary in nature. The compensation judge did not err by reaching such a conclusion.