GARY L. OLSON, Employee, v. PARKER HANNIFIN and HARTFORD INS. CO., Employer-Insurer/Appellants, ACROMETAL, INC., SELF-INSURED, Employer/Appellant, and MILLS MOTORS, INC., and ITT HARTFORD/SPECIALTY RISK SERVS., Employer-Insurer, and MN DEP'T OF LABOR & INDUS./VRU, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 28, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence including expert medical opinion supports the compensation judge's finding that the employee's injuries of January 22, 1999 and/or February 8, 1999 at employer Mills Motors were temporary in nature, that they resolved by early July 1999, and that the employee's disability and need for medical treatment thereafter was the result of the prior injuries sustained at employers Parker Hannifin and Acrometal.

Affirmed.

Determined by Wilson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Harold W. Schultz, Jr.

OPINION

STEVEN D. WHEELER, Judge

The employer Parker Hannifin and its insurer and the self-insured employer Acrometal jointly appeal from the compensation judge's finding that the employee's injuries on January 22, 1999 and February 8, 1999 were temporary in nature and that their effects ended by early July 1999. We affirm.

BACKGROUND

The employee, Gary L. Olson, was born in 1956 and is 45 years of age. He sustained an admitted work-related injury to the low back on March 14, 1984 while working as a materials handler for the employer Parker Hannifin. The injury occurred when the employee slipped while moving a 150-pound steel rod. He experienced low back pain and pain in his legs, worse on the right. After the injury, the employee received conservative medical treatment for his low back condition for about two years, including physical and occupational therapy. (5/24/95 F&O: Finding 5.)

After 1984 the employee was placed on permanent restrictions which included limiting standing to less than two hours, alternating postures, avoiding bending or twisting, and limiting lifting to 22-28 pounds frequently and 50 pounds at maximum. A CT scan of the lumbar

spine on October 26, 1985 showed disc space narrowing at L4-5 and a large herniation of the L4-5 disc and minimal annular bulging at L5-S1 without nerve root compression at either level. In October 1985 the employee's treating physician, Dr. Alexander Lifson, M.D., offered the employee three treatment options: nerve blocks, fusion surgery, or learning to live with his condition. The employee elected to live with his pain. The employee was subsequently rated for this injury with a seven percent permanent partial disability for a healed sprain with chronic loss of range of motion substantiated by findings on a scan at a single symptomatic level. (5/24/95 F&O: Findings 5, 6, 7 & memorandum at 9.)

The employee sustained a second admitted work injury to the low back on September 17, 1991 while working as a machine operator for the employer Acrometal. This job involved twisting and bending to insert parts into a machine. On that date about halfway into his work shift the employee experienced an onset of tightness and pain in the same part of the low back injured in 1984 and was taken to Brainerd Medical Center. The employee's low back symptoms following this injury were more intense and persistent than in 1984. His right leg pain was also worse. New clinical findings included a loss of sensation in the S1 dermatome of the right leg and muscle weakness in the right great toe extensor muscle. On November 26, 1992 the employee underwent an L4-5 disc excision and nerve root exploration at both the L4-5 and L5-S1 levels. His permanent partial disability following the 1991 work injury was rated at 11 percent for the L4-5 disc and an additional seven percent for the L5-S1 disc. Both the 1984 and 1991 injuries were found to be substantial contributing causes to the employee's low back condition following the 1991 injury. (5/24/95 F&O: Findings 8 - 13.)

After the 1992 surgery the employee returned to work with the employer Acrometal under restrictions established in a functional capacities assessment in 1993. Thereafter, the employee experienced back and leg symptoms on occasion and had "good days" and "bad days," with flare-ups of his back condition which did not necessarily correspond to changes in the level of his activity. He continued to treat medically in follow-up care with his treating physician, Dr. Peter Schmitz, M.D. (Olson Dep. dated 3/17/00 at 31-33; 3/20/2001 F&O: Findings 4, 5 [unappealed].)

In August 1995 the employee, employer Parker Hannifin and its insurer, and employer Acrometal entered into a stipulation for settlement which paid the employee a lump sum for a close-out of claims for permanent partial disability compensation through 18 percent of the whole body. In addition, the settlement allocated ongoing liability for workers' compensation benefits as between Parker Hannifin and Acrometal. An award on stipulation was served and filed on August 31, 1995. (Judgment Roll.)

The employee was laid off from his job with Acrometal in March 1996. He began working for the employer Mills Motors in April 1997 as a working supervisor of lube technicians. This job consisted of paperwork and some physical activity. According to the employee's deposition testimony he experienced an increase in his symptoms on January 26, 1999 when he slipped on some spilled oil or antifreeze, but did not fall. The employee testified that while he mentioned the incident to a supervisor at work he had declined to fill out an injury report as he thought it was only another flare-up. The employee was seen by Dr. Schmitz that day, but no history of an incident at work that day was recorded. Dr. Schmitz prescribed anti-inflammatories

and physical therapy and suggested that the employee remain off work for four weeks. The employee, however, did not take time off work, and did not return for a scheduled follow-up examination on February 2, 1999. (Olson Dep. dated 3/17/00 at 29, 40-45, Ee Exh. 3; 3/20/2001 F&O: Findings 7, 8, 9, 10, 11 [unappealed].)

The employee testified that on February 8, 1999 he again slipped on some oil or anti-freeze at work, falling to one knee with his left arm extended to break his fall. By the next day he could not straighten up. He mentioned this incident to a supervisor also but again did not file an injury report. The employee next returned to Dr. Schmitz on February 16, 1999 with pain in his back and buttock and down his leg. The doctor recommended that the employee work moderate duty and undergo an MRI scan. According to the employee's testimony he told Dr. Schmitz of the February 8, 1999 incident. Dr. Schmitz testified that he recalled hearing about the incidents from the employee but did not document them in early 1999 and could offer no explanation as to why they were not recorded in his notes. (Olson Dep. dated 3/17/00 at 46-47, Ee Exh. 3; Schmitz Dep. at 6-9; 3/20/2001 F&O: Findings 12, 13, 14 [unappealed].)

The employee testified that for the most part he continued with his full work duties from February 1999 into the summer of that year, although he might have gone home early on a couple of occasions. The employee treated sporadically with Dr. Schmitz. An MRI, suggested by Dr. Schmitz, was not performed as no party would agree to accept responsibility for payment. (Olson Dep. dated 12/2/99 at 35-36; 3/20/2001 F&O: Finding 16 [unappealed].)

The employee testified in his January 15, 2001 deposition that the pain in his back and leg progressively worsened from February of 1999 up to the summer of that year, although in an earlier deposition he had testified that his condition stayed the same from February 16 to April 30, 1999 and that he could not recall how his condition was between April 30, 1999 and July 1999. (Olson Dep. dated 1/15/01 at 51-2; 3/20/2001 F&O: Finding 17 [unappealed].)

The employee was off work on July 4, 1999 because of the Independence Day holiday. On the morning of July 5, 1999 he awoke and could not get out of bed because of pain in his back and legs. He was unable to report for work. The employee testified that there was no immediate precipitating event that brought about this onset of symptoms. (Olson Dep. dated 12/2/99 at 28; 3/20/2001 F&O: Finding 18 [unappealed].)

He was seen by Dr. Dale Hadland, M.D., at the Brainerd Medical Center on July 12, 1999. Dr. Hadland recorded that the employee had "been ill with low back pain for 2 wks. On the 5th he apparently fell and since that time has been experiencing rt lower lumbar pain." Dr. Hadland prescribed Naprosyn and Flexeril and took him off work. The employee also saw Dr. Schmitz on July 20, 1999. Dr. Schmitz again prescribed Naprosyn and suggested that the employee could attempt light duty work. He told the employee to return in one week. (Ee Exhs. 2, 3; 3/20/2001 F&O: Findings 19, 20 [unappealed].)

On July 28, 1999, the office manager for Mills Motors completed a First Report of Injury for "Lower Back Pain" occurring "Sometime the Week of 2-8-99." The document states that the employer was notified of the injury on July 26, 1999. (Judgment Roll; 3/20/2001 F&O: Finding 21 [unappealed].)

On July 30, 1999 Dr. Schmitz wrote a report justifying his recommendation for an MRI. In this report, he stated that " . . . on 4/30/99, he still had increased symptoms and his straight leg raise was positive. On that basis, I renewed my recommendation for an MRI of his back. There has been no evidence of any new injury, and it is my opinion that this exacerbation is solely related to the previous work injuries." (Employee's Exh. 3; 3/20/2001 F&O: Finding 22 [unappealed].)

Dr. Schmitz next saw the employee on August 2, 1999 and recommended that he remain off work for two weeks. On August 17, 1999 Dr. Schmitz continued the employee off work for five weeks. At that time, the employee complained of pain in his back and numbness in both legs. (Employee's Exh. 3; 3/20/2001 F&O: Finding 23 [unappealed].)

In September 1999 the employee attempted a return to work at Mills Motors in a job as a porter, which involved driving cars from the lot to the main building and running them through the car wash. He tried this for a couple of hours but could not physically tolerate the activities. He remained off work during the remainder of 1999. (Olson Dep. dated 3/17/00 at 76-78; 3/20/2001 F&O: Finding 24 [unappealed].)

On December 1, 1999, the employee underwent a medical examination on behalf of the employer Parker Hannifin with Mark Friedland, M.D., an orthopedic surgeon. Dr. Friedland opined that the February 8, 1999 incident at work was a significant twisting injury to the low back resulting in a lumbosacral strain/sprain and a permanent exacerbation of the employee's pre-existing L4-5 and L5-S1 degenerative disc disease. He initially apportioned liability 30% to the 1984 and 1991 injuries combined, 35% to the January 1999 injury and 35% to the February 1999 injury, but in his deposition changed the percentages of apportionment of liability, allocating 50% to the combined effects of the 1984 and 1991 injuries and 50% to the February 1999 injury. Dr. Friedland thought that the employee could work within certain restrictions. (Friedland Dep.: Dep. Exh. 1; 3/20/2001 F&O: Finding 25 [unappealed].)

A functional capacities evaluation was performed on January 3, 2000 at St. Joseph's Medical Center. It established restrictions within a 4- hour work day which included prohibitions against bending, stooping and crouching. (Ee's Exh. 5; 3/20/2001 F&O: Finding 26 [unappealed].)

The employee was seen by another orthopedic surgeon, Dr. Paul Wicklund, M.D., on April 4, 2000 for a medical evaluation on behalf of the employer Mills Motors. He opined that the employee did not sustain a permanent injury as a result of his work at Mills Motors in either of the specific incidents reported in January and February of 1999. Dr. Wicklund stated that the employee's symptoms over the years, including in early 1999, were "consistent with ongoing irritation of the lumbar nerve roots . . . surrounded by scar tissue" and found that his MRI findings were "consistent with the residuals from laminectomy and disc removal." He also thought that the employee could work within restrictions. (Wicklund Dep.: Dep. Exh. 1; 3/20/2001 F&O: Finding 27 [unappealed].)

The employee testified that he tried to work for three or four days at Northwood Turf and Power in mid April 2000, but on or about April 14, 2000 he woke up with swelling through his back and "stomach" and had difficulty getting out of bed. He saw Dr. Bardolph who

took him off work until he could be assessed by Dr. Schmitz. Dr. Schmitz referred the employee to Richard M. Salib, M.D., of the Institute for Low Back and Neck Care. (Olson Dep. dated 1/15/01 at 4-12, 42; 3/20/2001 F&O: Finding 29 [unappealed].)

The employee had a lumbar MRI performed on May 8, 2000. The MRI was read as showing an apparent post-operative scar at L4-5 with encasement on the right L5 nerve root with an apparent enhancing scar, possible mild underlying disc bulging at L4-5 without obvious impingement or stenosis, and a probable mild enhancing scar centrally at L5-S1 with only minimal anterior impression on the sac. No high grade areas of stenosis were seen. Dr. Salib evaluated the employee on July 21, 2000 and diagnosed degenerative disc disease at spinal levels L4-5 and L5-S1 with acute low back and leg pain, which was not radicular in nature. Dr. Salib opined that the employee's current need for treatment was the result of the work-related injury of January 1999. A diagnostic and therapeutic facet injection at the L4-5 level was performed on August 15, 2000. It did not provide any relief, and Dr. Salib recommended that the employee undergo surgery. The employee has, however, declined surgery due to the risks involved. (Ee's Exhs. 4, 6, 7; 3/20/2001 F&O: Findings 30-32 [unappealed].)

In deposition testimony, Dr. Schmitz offered the opinion that the employee had sustained a new injury at Mills Motors in the form of an aggravation to his existing condition, though he acknowledged that he could not find any new pathology on the employee's May 2000 MRI scan. He declined to give an apportionment of liability as between the employee's injuries. In his view, the employee has reached maximum medical improvement from the effects of all of his injuries. (Schmitz Dep.; 3/20/2001 F&O: Finding 33 [unappealed].)

On December 20, 2000 a hearing was held by written submission before a compensation judge of the Office of Administrative Hearings. The judge determined, among other matters not relevant for the purposes of this appeal, that the employee's 1999 work injuries at employer Mills Motors were temporary in nature, that they resolved "by early July 1999" (Finding 39), and that the employee's disability and need for medical treatment thereafter was the result of the prior injuries at Parker Hannifin and Acrometal. Employer Mills Motors was ordered to pay benefits only for the period from January 26, 1999 through July 1, 1999. Employer Parker Hannifin and its insurer and self-insured employer Acrometal jointly appeal from this determination.

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 accepted the expert opinion of Dr. Wicklund that the employee's work injuries at Mills Motors were at most a sprain/strain which resolved no later than July 1999. Generally, this court must affirm a compensation judge's choice between divergent expert medical opinions where the opinion adopted has sufficient foundation. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). The appellants argue, however, that the opinion of Dr. Wicklund was based on an inaccurate and incomplete medical history and therefore lacked sufficient foundation.

The appellants' principal assertion on appeal is that Dr. Wicklund failed "to factor the 1999 Mills injuries into his opinion." (Appellants' brief at 14.) Specifically, the appellants base their argument on statements by Dr. Wicklund in his examination report and deposition testimony that they contend suggest he failed to accept the occurrence or contemporary significance of these injuries. In his report, Dr. Wicklund noted that these work incidents were not recorded in the relevant history in Dr. Schmitz' office notes, and stated that ". . . assuming that the history given to Dr. Schmitz was correct, it appears that [the employee] did not consider the slip and twist at work to be a significant new injury. . . ." (Wicklund Dep.: Dep. Exh. 1.) In the deposition testimony relied on by the employer and insurer (*see* Er-Ins Brief at 13), Dr. Wicklund was asked about the omission of a description of the work incidents from Dr. Schmitz' records. Dr. Wicklund explained that:

> When I say a history to be correct, I'm assuming that whatever the patient said to the doctor at the time he saw the doctor was then recorded, if it was significant, by the doctor in a typed form, so that the doctor could remember, the next time he saw the patient, what had transpired . . . so I'm assuming that whatever histories [the employee] gave to Dr. Schmitz were recorded properly, and I'm assuming then that that would be an accurate history; so when I say that there was nothing in the history, I'm assuming that Dr. Schmitz was doing his proper job of recording, and the patient was doing the best he could to tell him what was wrong.
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> Q. And apparently the employee did not tell him of an injury in January, an injury in February, or awakening in July?
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> A. It's not recorded, so he must not have said anything - - well, there's two options: He didn't say anything, or the doctor heard it and didn't write it down.

(Wicklund Dep. at 37-38.) The appellants contend that as Dr. Schmitz testified that the employee had told him of the incidents, but he had for some reason failed to record the details,

Dr. Wicklund's opinion as to whether the employee sustained a temporary or permanent aggravation in 1999 at Mills Motors was without a factually correct foundation and should be ignored, citing Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). (Er-In Brief at 11-12.)

First, we note that Dr. Wicklund did acknowledge the possibility that the employee told Dr. Schmitz about the incidents. The compensation judge was free, however, to assume that the doctor did not record them because they were not considered significant by either the employee or Dr. Schmitz. Thus, the compensation judge could find that the underlying assumptions proposed to be fact by the appellants were accepted by Dr. Wicklund and as a result his opinion was based on facts not inconsistent with the testimony of Dr. Schmitz. Finally, and most importantly, Dr. Wicklund's deposition reveals that his opinion was not based primarily, or even significantly, on the absence of a description of the 1999 work incidents from the contemporaneous medical records. Instead, his opinion was based primarily on the mechanics of a twisting injury as described by the employee, the absence of any changed pathology on MRI scans which could be related to a permanent aggravation from such an incident and the overall history of the employee's symptomology both before and after the 1999 work injuries. (See, i.e., Wicklund Dep. at 25-28.) The appellant's attack on Dr. Wicklund's opinion goes more to the persuasiveness of the opinion, but does not raise sufficient doubt to permit us to find that the opinion lacked sufficient foundation to be accepted by the compensation judge.

The appellants also argue that "the bulk of the witness testimony supports the conclusion" contrary to that reached by the compensation judge, that the employee's injuries at Mills were "contributing factors" to the employee's current disability. Certainly, there was evidence which could have supported such a finding. The compensation judge, however, concluded that the greater weight of the evidence, including the reasoning in Dr. Wicklund's opinion, supported the finding that the 1999 work injuries were temporary in nature.. As we have found adequate foundation for Dr. Wicklund's opinion, we affirm the compensation judge's finding.

Based on the entire record, the compensation judge's findings are affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984).