

JEAN M. OSTERTAG, Employee/Appellant, vs. KOTTKES BUS SERV. and STATE FUND MUT. INS. CO., Employer-Insurer and MINN. DEP'T OF ECON. SEC. and HRI FOR MEDICAL CHOICE, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 14, 2001

No. [REDACTED SSN]

HEADNOTES

EVIDENCE—RES JUDICATA. In an earlier decision, the compensation judge specifically did not decide the issue of whether the employee had sustained a temporary or permanent aggravation as a result of the March 19, 1999, work injury; therefore principles of res judicata did not apply to the compensation judge's findings in this matter.

CAUSATION—AGGRAVATION. Substantial evidence, including expert medical testimony, supports the compensation judge's finding that the employee had sustained temporary aggravations of pre-existing conditions to her right shoulder and right knee as a result of her March 19, 1999, work injury.

CAUSATION. Substantial evidence supports the compensation judge's finding that the employee had not sustained new injuries as a result of her work activities on February 23, 2000.

Affirmed.

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

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals the compensation judge's findings that the employee had sustained temporary aggravations of pre-existing conditions as a result of her March 19, 1999, work injury and that the employee did not sustain new work injuries on February 23, 2000. We affirm.

BACKGROUND

In November 1993, Jean Ostertag, the employee, began working as a bus driver for Kottkes Bus Service, the employer, which was insured for workers' compensation liability by State Fund Mutual Insurance Company, the insurer. On March 19, 1999, the employee was injured in a motor vehicle accident while driving a bus for the employer. At the time of her injury, she was 44 years old. The employer and insurer admitted liability for back, left shoulder, and right hand injuries.

Following her injury on March 19, 1999, the employee was examined at the emergency room at Mercy Hospital. The employee consulted Dr. Flake on March 31, 1999, reporting bilateral shoulder pain, tight wrist pain, thoracic back pain, lumbar back pain, and right knee pain. She had treated with Dr. Flake in the past for bilateral shoulder and right knee conditions. Dr. Flake restricted the employee from returning to work, and provided the employee with a right thumb spica cast and a sling on her left side. He prescribed physical therapy primarily for her thoracic area. On April 28, 1999, Dr. Flake assessed impingement with post-traumatic aggravation, left shoulder, right knee pain, right wrist and hand pain. Dr. Flake recommended a right knee MRI and left shoulder surgery, for which the insurer denied liability. In May 1999, the employee was released for light-duty work, sorting nuts and bolts, but the reaching tasks increased her symptoms so Dr. Flake removed her from this light-duty work.

On August 2, 1999, the employee was evaluated by Dr. James Gannon at the employer and insurer's request. Dr. Gannon opined that the employee had sustained temporary aggravations of her pre-existing conditions as a result of the March 1999 accident, and that no further treatment was necessary as a result of the accident. On August 25, 1999, Dr. Flake released the employee to return to work driving her regular bus route. The employee was able to drive her regular route, but any additional driving increased her symptoms. The employee continued to experience symptoms in her right knee and both shoulders, but did not seek any treatment from October 1999 through January 2000.

The employee had a significant medical history before the March 19, 1999, injury, including back, neck, right shoulder, left shoulder, and right knee conditions. The employee has had multiple right knee surgeries, in 1968, 1970, and 1978. The employee treated for bilateral shoulder pain in 1983 and 1988. In 1992, the employee was treated for right shoulder pain and diagnosed with probable sprain with secondary impingement syndrome. In December 1993, the employee treated with Dr. Flake for right shoulder impingement syndrome and right knee pain. The employee had no work restrictions at any of these times. In March 1996, the employee underwent her fourth right knee surgery. At that time the diagnosis was chronic recurrent dislocation of the right patella, severe chondromalacia, medial meniscus tear, popliteal cyst and severe degenerative arthritis. After recovery, the employee did not have work restrictions for her right knee. On February 21, 1997, the employee sustained a work injury to her left shoulder and thumb, but did not miss work. On September 16, 1998, the employee sustained another work-related injury to her left shoulder. The employee was treated with anti-inflammatories and later an injection. The employee's shoulder improved after the injection. On January 6, 1999, the employee treated with Dr. Flake for increased pain in her right shoulder, and was treated with cortisone shot which improved the employee's symptoms. The employee was not given work restrictions at that time by Dr. Flake. From January 1999 through March 19, 1999, the employee was able to work without restrictions, driving her regular route, an activity bus, and charter bus routes.

On February 23, 2000, the employee was required to switch busses while her regular bus was being serviced. Initially, she could not adjust the seat in her new bus to allow her right knee to be in a comfortable position. She also experienced difficulty opening and closing the door, which increased her symptoms. The employee operated this bus for about 45 minutes and

opened the door about 11 times. The employee testified that she had difficulty using her right leg to push the accelerator pedal, and eventually used her left leg to push the accelerator. (T. 37-40.) The employee was able to switch to another bus for her run later that day; that next bus was not as difficult to operate. The employee reported her symptoms to the employer, and filled out a first report of injury for her increase in symptoms. She consulted Dr. Flake on February 25, 2000. The employee completed her shift on February 25, 2000. That same day, after a meeting with her supervisors, the employer terminated her employment, claiming among other things that she had failed to properly maintain her bus.

On March 1, 2000, the employee consulted Dr. Flake, reporting increased pain in her right shoulder and right knee. Dr. Flake concluded that as a result of her driving on February 23, 2000, the employee had sustained aggravations of her pre-existing injuries. He recommended a course of physical therapy and assigned physical work restrictions relative to her right knee and both shoulders. Dr. Flake again examined the employee on May 10, 2000; the employee reported continued problems with her right shoulder and right knee. Dr. Flake referred the employee for an MRI of her right knee on May 11, 2000, which showed changes in the patellar tendon and medial patellar retinaculum when compared to a previous MRI scan of February 5, 1996. Dr. Flake viewed an MRI scan of the right shoulder taken on May 11, 2000, and noted quite severe impingement with degenerative changes of the AC joint and subacromial changes very similar to the employee's left shoulder. That MRI showed no evidence of rotator cuff tear, but showed a possible anterior glenoid labrum tear. Dr. Flake recommended surgery for the employee's right shoulder and right knee. On June 6, 2000, the employee underwent a right knee arthroscopy and right shoulder arthroscopy. The employee continued to follow-up with Dr. Flake, and underwent physical therapy. Her symptoms in her right shoulder continued post-surgery. On October 4, 2000, Dr. Flake noted that there was no mechanical basis for the continued pain, and he suggested a possible referral to a pain clinic. By February 5, 2001, the employee reported to Dr. Flake that she continued to note right arm, hand and shoulder pain. Dr. Flake recommended continued physical therapy.

A hearing was held before Compensation Judge Danny Kelly on May 5, 2000. The issues litigated at that hearing included the nature and extent of the March 19, 1999, injury, whether the employee was entitled to temporary partial disability benefits, whether a left shoulder surgery and right knee MRI were reasonable and necessary and causally related to the March 19, 1999, injury, and an intervention claim. The compensation judge found that the employee had sustained severe aggravations of her pre-existing conditions as a result of the March 19, 1999, injury, and that the surgery and MRI were reasonable and necessary and causally related to the work injury. The compensation judge also found that the employee had sustained injuries to the right shoulder, right wrist, and right knee as a result of that work injury, but specifically found that the nature of the March 19, 1999, injury, whether it was temporary or permanent in nature, was unknown at the time of the May 5, 2000, hearing because additional treatment had been recommended. No appeal was taken from this decision.

On August 21, 2000, the employee underwent another evaluation with Dr. Gannon at the employer and insurer's request. At that time, the employee's right knee was stiff and sore. The employee reported ongoing pain, decreased strength and decreased motion in her right shoulder. Dr. Gannon concluded that the employee had not sustained a work-related injury on

February 23, 2000, as a result of driving a different bus for 45 minutes. Dr. Gannon also concluded that the employee received no permanent injury to her right shoulder or right knee as a result of her March 19, 1999, work injury. He based this opinion on the employee's history, medical records, and on the results of the MRI scans of the employee's right knee and right shoulder, taken on May 11, 2000.

A second hearing was held on February 22, 2001, before Compensation Judge Jennifer Patterson. By the time of the second hearing, the employee had not been released for work, and was undergoing physical therapy for her right knee and right shoulder. The employee had not yet scheduled the left shoulder surgery awarded by Judge Kelly. The issues at the second hearing included whether the employee had sustained temporary or permanent injuries to her right shoulder and right knee, whether the employee sustained a new work injury to her right shoulder and right knee on February 23, 2000, and whether the employee's termination for misconduct barred receipt of temporary total disability benefits. The compensation judge found that the employee had sustained temporary aggravations of pre-existing conditions to her right shoulder and right knee as a result of her March 19, 1999, work injury and that the employee had not sustained any new injuries to her right shoulder and right knee while performing her work activities on February 23, 2000. The compensation judge also found that the employee had not committed misconduct sufficient to deny recommencement of temporary total disability benefits under Minn. Stat. § 176.101, subd. 1(e)(1). The employee appeals from those findings adverse to her claims.

STANDARD OF REVIEW

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. 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, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

Temporary Aggravation

The employee argues that the compensation judge substituted findings regarding the nature of the employee's injury, as decided in Judge Kelly's Findings and Order served and filed June 8, 2000, violating principles of res judicata. Principles of res judicata "bar subsequent proceedings to determine claims which were litigated in a prior proceeding." Alexander v. Kenneth R. LaLonde Enters., 288 N.W.2d 18, 20, 32 W.C.D. 312, 314 (Minn. 1980). Unappealed findings of a compensation judge have a res judicata effect. Brix v. General Accident & Assurance Corp., 254 Minn. 21, 27, 93 N.W.2d 542, 546, 20 W.C.D. 281, 287 (1958); Denny v. Halcon Corp.,

44 W.C.D. 290, 295-96 (W.C.C.A. 1990). The doctrine of res judicata, however, does not bar further proceedings to determine claims not litigated in prior hearings. Westendorf v. Campbell Soup Co., 309 Minn. 550, 550-51, 243 N.W.2d 157, 158, 28 W.C.D. 460, 460 (1976) (per curiam).

In his June 8, 2000, decision, Judge Kelly did not decide the issue of whether the employee had sustained a temporary or permanent aggravation as a result of the March 19, 1999, work injury. Judge Kelly specifically stated that the nature of the March 19, 1999, injury was unknown at the time of the May 5, 2000, hearing because additional treatment was recommended. (Findings and Order served and filed June 8, 2000, Finding 7.) Res judicata does not apply to the compensation judge's findings in this matter.

The employee also argues that substantial evidence does not support the compensation judge's findings that the employee sustained temporary aggravations to her right shoulder and right knee as a result of her March 19, 1999, work injury. 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., No. [REDACTED SSN] (W.C.C.A. Aug. 29, 1994).

Dr. Gannon concluded that as a result of her March 19, 1999, injury, the employee had sustained temporary aggravations of her pre-existing conditions. He noted that the employee's right knee MRI in 2000 indicated moderate chondromalacia, while the 1996 MRI had indicated severe chondromalacia, and that the 2000 MRI did not indicate any new injury after 1999. Dr. Gannon also opined that the right shoulder injury from the March 1999 accident was temporary, noting that the May 2000 MRI of the shoulder indicated longstanding developmental changes unassociated with any acute trauma. Given the medical testimony, the employee's extensive medical history, and that she was able to return to work without restrictions in August 1999, the compensation judge could reasonably conclude that the injuries sustained on March 19, 1999, were temporary. Substantial evidence supports the compensation judge's finding that the employee sustained temporary aggravations of pre-existing conditions as a result of her March 19, 1999, work injury. Accordingly, we affirm.

New Injury

The employee claimed that she had sustained new injuries to her right knee and right shoulder as a result of driving a different bus on February 23, 2000. The employee argues that she sustained a substantial increase in her right knee and right shoulder pain after driving that different bus on February 23, 2000. An ergonomic consultant examined the two busses driven by the employee that day, and testified that more force was required to open and close the door, press the foot pedals, and turn the steering wheel on the first bus operated by the employee. She relies

on the opinion of Dr. Flake, who examined the employee on March 1, 2000, and determined that the employee had aggravated her right knee and shoulder conditions on February 23, 2000, due to her bus driving activities.

The employer and insurer relied on Dr. Gannon's opinion. Dr. Gannon concluded that driving a different bus for 45 minutes could not cause new injuries to the employee's right shoulder or right knee. The compensation judge stated in her memorandum:

The opinion of Dr. Gannon that the mechanical force put on the employee's right shoulder and right knee as the result of driving a bus for 45 minutes and opening the door 11 times, even though the driving and the opening required more force than necessary on the bus she usually drove, was not significant enough to injure the employee's right shoulder and right knee was accepted. His opinion was further supported by the fact that the right knee and shoulder surgeries performed by Dr. Flake in 2000 were performed to treat longstanding problems and diagnoses and not anything new. As far back as 1996, the employee experienced a flare-up of right knee symptoms from simple walking without a fall or a twist to the knee and that flare-up of symptoms led to the employee's fourth knee surgery. (Memo., p. 7.)

It is the compensation judge's responsibility, as trier of fact, 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). Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). We acknowledge that both Drs. Flake and Gannon presented plausible reasons for their opinions on the causation and the nature of the employee's injuries. However, substantial evidence supports the compensation judge's finding that the employee did not sustain any new injuries as a result of her work activities on February 23, 2000. We affirm.