

KEVIN W. OTIS, Employee, v. PRO STAFF PERS. SERVS. and TRAVELERS PROP. & CAS. INS. CO., Employer-Insurer/Appellants, and HEALTHPARTNERS, INC. and GREAT W. LIFE INS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 15, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL CONTRIBUTING CAUSE. Although he may not have reviewed the employee's entire past medical records, where it was clear from the record that the employee's doctor was aware of the employee's recent work and treatment history, and where the compensation judge evidently credited the employee's testimony and clearly did review the past medical records and was aware that the doctor had not, it was not unreasonable for the judge to accept the treating doctor's opinions over the IME's and accordingly to find that the employee's work injury was a substantial contributing cause of the employee's disc herniation, consequent disability, and need for medical treatment about three weeks after the injury.

CAUSATION - INTERVENING CAUSE. Although both the employee's treating doctor and the employer and insurer's IME testified that a cough can precipitate a disc herniation, and even if the employee's disc herniation was ultimately caused by a coughing episode, the court could not, as a matter of law, conclude that the coughing episode was so "unreasonable, negligent, dangerous, or abnormal" as to constitute a superseding/intervening cause of the employee's condition.

NOTICE OF INJURY - SUBSTANTIAL EVIDENCE. Where the court construed the compensation judge's memorandum as an implicit finding that the judge accepted the employee's testimony that he had returned home after his medical appointment and contacted the employer's agent and advised her that he had injured his back at work, the judge's conclusion that the employer received proper notice of injury was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Wilson, J., and Johnson, J.
Compensation Judge: Kathleen Nicol Behounek

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's determination that the employee's work injury was a substantial contributing cause of the employee's L3-4 disc

herniation and that the employee provided the employer with statutorily timely notice of his injury. We affirm.

BACKGROUND

On July 15, 1999, Kevin W. Otis sustained a work-related injury to his low back while working for Pro Staff Personnel Services, a temporary staffing agency. Mr. Otis [the employee] was fifty-one years old on that date, and Pro Staff [the employer] was insured against workers' compensation liability by Travelers Property and Casualty [the insurer]. The employee had worked for the employer since 1997, and in late May of 1999 had been assigned to a Sears Department Store that was undergoing major remodeling. The employee's duties at Sears included building and tearing down shelving units and moving merchandise throughout the store. On the date of injury, the employee was engaged in moving heavy store fixtures to the back of a semi trailer for unloading when he developed sharp pain in his low back which extended into the right buttock.

The employee did not immediately report his injury to the employer and continued to perform his usual duties during his assigned shifts at Sears through July 30, 1999. The employee did not seek medical attention during this period of time but treated himself at home with ice packs and aspirin or Advil. On August 2, 3, and 4, 1999, the employee missed work because of a sinus infection. On August 4, 1999, the employee reported to the Quello Clinic with complaints of a sore throat, cough, headaches, and pain and pressure in the sinuses. The employee did not mention his recent injury or low back symptoms. He was treated for sinusitis and advised to follow up in ten days if his condition had not resolved.

The following day, August 5, 1999, the employee returned to the Quello Clinic, where he saw Dr. Daniel Peterson with a complaint of increased low back pain. Dr. Peterson recorded that

[t]he [employee] was doing well until yesterday when he coughed real hard when he was laying down and felt a significant pain in his right lower back and since then, it has tightened significantly. It is in spasm to the point that he can barely get up out of a chair or anyplace. He had significant difficulty and it took him about a half hour just to get in and out of the car, to get her[e] for the appointment. He had been doing well before this. He had one back injury several years ago, had pain for a little bit but never really needed any big interventions. He had been doing well recently except for the cold that was causing him to cough.

Dr. Peterson's diagnosis was acute musculoligamentous low back strain. He provided the employee with a brochure and information regarding home stretching techniques, icing techniques, and positions for sitting and standing. The employee was also given a prescription for medication and instructions to return if his symptoms persisted or worsened. Dr. Peterson's office note for this visit does not include any reference to an injury at work.

On August 12, 1999, the employee returned to see Dr. Peterson with persistent back pain and radicular symptoms in the right leg. A lumbar CT scan was ordered for August 16, 1999, and two days later the employee reviewed the scan results with Dr. Peterson's associate, Dr. David Lang. The scan was interpreted as showing a "broad based right paracentral disc protrusion at L3-4 resulting in posterior displacement of the right L3 nerve root as it exits the neural foramen." Consequently, Dr. Lang arranged for an orthopedic consultation with Dr. Thomas Rieser. Neither the August 12 nor the August 18, 1999, office notes contains any reference to a work injury.

Following his visit with Dr. Lang on August 18, 1999, the employee telephoned the employer and spoke with Julie Rausch, the branch manager of the employer's Burnsville office. He advised Ms. Rausch of his work injury on approximately July 15, 1999, indicating that he had just found out that he had a herniated disc. Ms. Rausch completed a first report of injury on August 18, 1999, and faxed it to the employer's claim specialist, Nancy White. Both Ms. Rausch and Ms. White subsequently testified that they first obtained knowledge of the employee's back injury on August 18, 1999.

On August 27, 1999, the employee was seen by Dr. Rieser for evaluation of low back pain, right hip and buttock pain, and right posterior leg pain extending to the foot and toes. The employee described to Dr. Rieser the onset of low back pain after unloading a semi trailer of awkward and heavy store fixtures. Dr. Rieser noted that the employee had initially used ice for his pain but, because of persistent pain and increasing leg pain, had subsequently sought medical care at his family clinic on August 5, 1999. The doctor indicated that the employee had reported that he had also injured his low back at work about two years ago but that the pain had subsided and he had experienced no further problem until the present situation. The employee had denied any other spine injury or problem prior to two years earlier. Dr. Rieser diagnosed a lateral L3-4 disc herniation on the right side related to a work injury in July 1999 and recommended two epidural steroid injections at the L3-4 level and referral for physical therapy.

The employee reported to Dr. Rieser on October 27, 1999, that the epidural steroid injection he had received was not at all helpful. He had continued to have problems sleeping, and he described burning in his lower back and pain in the buttocks. Dr. Rieser continued to relate the employee's condition to the July 1999 work injury and ordered an MRI scan for October 29, 1999. The scan was interpreted as showing a "right lateral to far lateral disc herniation [at L3-4] which posteriorly displaces but does not definitely compress the exiting right L3 nerve root."

On November 5, 1999, the employee filed a claim petition, seeking temporary total disability benefits continuing from August 5, 1999, as well as permanent partial disability benefits and medical and rehabilitation benefits consequent to a low back work injury on July 15, 1999. The employer and insurer responded by denying that the employee had sustained a work-related injury on July 15, 1999, or provided any statutory notice of one.

On January 14, 2000, the employee underwent a lateral discectomy at L3-4 on the right side. In follow-up two weeks later, Dr. Rieser noted that the employee had been doing well for about a week and then had begun having some lower back pain and pain down into the leg. On February 11, 2000, the employee reported some general backache on the side of the incision, but

the nerve irritation he was having down the leg had resolved. Dr. Rieser recommended physical therapy and a return visit in four weeks.

The employee returned to Dr. Rieser on March 10, 2000, with complaints of pain below the surgical incision and some aching in the leg. Dr. Rieser ordered a lumbar CT scan on March 15, 2000, which was interpreted by the radiologist as showing “moderate if not moderate to severe right foraminal stenosis as a result of asymmetric disc bulge and a broad based right lateral disc protrusion into the neural foramen. This would affect the exiting right L3 nerve root.” These findings were essentially confirmed by an additional MRI study performed on March 29, 2000.

On March 3, 2000, the employee was seen for an orthopedic evaluation by Dr. Larry Stern at the request of the employer and insurer. In his report issued March 30, 2000, Dr. Stern diagnosed status post lumbar laminectomy and discectomy for a herniated disc at the L3-4 level on the right and a recurrent L3-4 herniated disc on the right, as noted on the CT scan of March 15, 2000. Dr. Stern noted that there was no history of a work injury in the Quello Clinic office note of August 5, 1999, but that Dr. Rieser had reported a specific history of a work-related injury when he saw the employee on August 27, 1999. Dr. Stern opined that the employee had not reached maximum medical improvement as a result of his back condition and that “it is likely that [the employee] will need a repeat lumbar laminectomy.”

On April 17, 2000, the employee returned to see Dr. Rieser for discussion of his diagnostic tests and his ongoing symptoms. Dr. Rieser recommended an anterior/posterior fusion with decompression of the L3 nerve root with a total facetectomy. The employee elected to proceed with the recommended surgery, and it was performed on May 26, 2000.

On October 3, 2000, Dr. Rieser testified by deposition. In the course of his deposition, Dr. Rieser opined that the employee’s work injury of July 15, 1999, caused an initial weakening of the employee’s L3-4 disc, which gradually progressed to complete rupture in early August. Dr. Rieser conceded that degenerative changes were present at that level prior to July 15, 1999, but that the employee’s work injury contributed to a further weakening of the disc. He concluded that the employee had been temporarily totally disabled since his initial examination on August 27, 1999, that the employee had not reached maximum medical improvement, and that the employee’s medical treatment, including the surgeries of January 14, 2000, and May 26, 2000, was causally related to the injury of July 15, 1999.

On October 9, 2000, Dr. Stern also testified by deposition and was provided with additional records pertaining to the employee, which included low back and right leg complaints.¹

¹ Records presented to Dr. Stern included the following: (1) a First Report of Injury for an incident on April 8, 1981, in which the employee “pulled muscle in his back” (Resp. Ex. 3); (2) a First Report of Injury for an incident on September 29, 1981, in which the employee bruised his tailbone (Resp. Ex. 3); (3) a consultation record from Northfield City Hospital dated August 29, 1984, in which orthopedist Dr. H. William Park obtained a history of low back pain with right leg pain intermittently for about a year and provided a diagnosis of possible mild discogenic low back pain (Resp. Ex. 3); (4) a First Report of Injury for an incident of June 21, 1986, in which the

In response to questions following a lengthy hypothetical, Dr. Stern opined that the employee's low back condition was caused by "his pre-existing back situation prior to July of 1999, in which he evidenced complaints of low back pain and right leg pain, combined with the sneezing or coughing episode on August 4, 1999, which led to the enlargement of a herniated disc." Dr. Stern further opined that the employee's injury of July 15, 1999, was "trivial and insignificant," based on the fact that the employee did not mention it to his treating doctor on August 5, 1999. On cross-examination, Dr. Stern agreed that lifting heavy fixtures as described by the employee could result in a disc herniation at L3-4. He also agreed that it was possible that a disc injury could have occurred on July 15 that got progressively worse over time until the employee sneezed or coughed and thereby made it worse yet.

Julie Rausch testified by deposition of October 24, 2000, in part that the employee's report of his injury to her on August 18, 1999, was her first knowledge of it. Ms. Rausch admitted that it was possible that the employee could have spoken with someone other than herself about his injury before August 18, 1999, but she also testified that such contact was unlikely in view of office policies and the fact that she noted on the first report that she "received this information from Kevin on August 18, 1999. He did not contact Pro Staff until today."

The employee's claims came on for hearing on October 25, 2000. Issues at hearing included whether or not the employee had sustained a work-related injury to his low back on July 15, 1999, and, if the employee had sustained the injury as claimed, whether or not the injury was a substantial contributing cause of his disability and need for medical treatment from and after August 5, 1999. Also at issue was whether the employee provided notice of his claimed injury to his employer within the requirements of Minn. Stat. § 176.141.

The employee testified at the hearing that he had no recollection of any serious injuries to his back prior to July 15, 1999. The employee testified that he had no difficulty performing his job while working on the Sears assignment, that he did not have any low back pain or right leg pain at the time, and that he was not working under limitations or restrictions. He testified also that his symptoms were fairly consistent between July 15, 1999, and August 5, 1999. He indicated that continuing to work caused pain and discomfort but that he obtained relief by icing his back and elevating his feet at night. The employee testified that on August 4, 1999, he was lying on the couch icing his back and decided to get up and get a glass of water. The employee stated, "I stood up and I had this excruciating pain down my right leg, all the way down to the tip of my toes." The employee testified that when he saw Dr. Peterson on August 5, 1999, the doctor

employee had slipped while exiting a car and had landed on his back (Resp. Ex. 3); (5) records of consultations with orthopedist Dr. H. John Park at Northfield Hospital relative to low back and right leg pain stemming from the incident of June 21, 1986, including Dr. Park's impression of "probable resolving low back contusion and low back muscle strain and possible resolving herniated disc, perhaps at L4-5 level" (Resp. Ex. 7); (6) a First Report of Injury for an incident of November 16, 1987, in which employee's "lower back went out" after lifting a stretcher (Resp. Ex. 3); (7) notes from Quello Clinic for September 21 and October 27, 1994, in which the employee was recorded to have complained of low back pain and pain in the right leg (Resp. Ex. 8); and (8) notes of Prior Lake Chiropractic of a visit of October 19, 1994, in which the employee complained of pain in his lower right back and in his right leg to behind right knee (Resp. Ex. 6).

was in a hurry to leave for a vacation and did not record his history of a work-related injury. The employee testified also that, following his medical appointment on August 5, 1999, he telephoned his employer and advised either Amy or Caroline that he had been injured at work and that he was going to be off work for awhile. The employee's testimony regarding his back symptoms and treatment at home was corroborated by the testimony of his wife, Katherine Otis.

By Findings and Order filed December 8, 2000, the compensation judge concluded in part that the employee had sustained a work-related injury to his low back on the date and in the manner alleged. The judge concluded further that the employee had experienced a significant increase in symptoms on August 4, 1999, when he stood up from the couch after icing his back. She also determined that the employee's work injury of July 15, 1999, was a substantial contributing cause of his L3-4 disc herniation and resulting disability and need for medical treatment. She found that the employer had proper notice of the employee's injury as required by Minn. Stat. § 176.141. 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 (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

Substantial Contributing Cause

On appeal, the employer and insurer contend that the compensation judge's determination that the employee's injury of July 15, 1999, is a substantial contributing cause of his L3-4 disc herniation is unsupported by substantial evidence. They argue that the employee's work injury was insignificant and that the cause of the employee's condition was the coughing episode documented in Dr. Peterson's chart note of August 5, 1999. They emphasize that the employee continued working for the employer at his normal job duties after the work injury with no loss of time from work and with no medical attention until August 5, 1999. The history presented to Dr. Peterson clearly indicates that the employee "was doing well until yesterday when he coughed real hard." The employee provided no history of a work injury to Dr. Peterson. The employer and insurer point out that before August 4, 1999, the employee was able to drive himself

to and from work, to perform normal work duties, and to work a normal shift. After August 4, the employee was not even capable of driving himself to the doctor's office. Even the employee and his wife acknowledge a dramatic change in the employee's condition on August 4. The employer and insurer contend that the compensation judge glossed over the significance of what occurred on August 4, and that the evidence clearly supports a finding that the employee did not sustain damage to the L3-4 disc and exiting nerve root until the evening of August 4, 1999, and that the coughing event on that date was the cause of the employee's condition. We are not persuaded.

We acknowledge that there is evidence in the record to support the employer and insurer's position that the work injury was not a substantial contributing factor in the employee's L3-4 disc herniation and consequent surgeries. Pursuant to this court's standard of review, however, the issue is not whether the evidence will support alternative findings but whether substantial evidence supports the judge's findings. Where evidence conflicts or more than one inference can be drawn from the evidence, the judge's findings are to be affirmed. Hengemuhle, 358 N.W.2d at 60, 37 W.C.D. at 240. In the present case, there is substantial evidence in the record to support the judge's decision on this issue.

The judge determined that, although the employee had a history of difficulties with his low back requiring medical treatment, he received no significant treatment for his low back from 1986 to August 1999. The employee had no restrictions on his work activities during that time, nor did he have any low back symptoms that interfered with his ability to fully perform his work duties from 1986 through July 15, 1999. The judge accepted the employee's testimony that he continued to experience pain in his low back after July 15, 1999, and treated his symptoms at home. The judge also accepted the employee's testimony that his significant increase in symptoms on August 4, 1999, did not begin when he coughed but began instead when he stood up from the couch.

At hearing, the parties agreed that liability in this case hinged on the compensation judge's assessment of the employee's credibility. At Finding 11, the judge found that, "the employee's testimony, although inconsistent with some of the medical treatment records, was credible." In a memorandum accompanying her Findings and Order, the judge stated:

Based upon the employee's testimony and demeanor at hearing, the corroborating testimony of the employee's wife, and the documentary evidence submitted in this case, the compensation judge finds that the employee was a credible witness and has sustained his burden of proving that he sustained a work related injury as claimed.

The assessment of witnesses' credibility is the unique function of the trier of fact. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989), citing Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 41 W.C.D. 79 (Minn. 1988). It is not the role of this court to make our own evaluation of credibility or of the probative value of conflicting testimony. Rather, we must give due weight to the compensation judge's opportunity to observe the witnesses and to judge their credibility. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988).

In her memorandum, the judge also explained that she adopted the opinion of the employee's treating physician, Dr. Rieser, that the employee's work injury was a substantial contributing cause of the disc herniation and resulting disability and medical treatment. The judge noted that

Dr. Rieser testified that although the work injury may not have caused the employee's disc to immediately herniate, it was sufficient to weaken or result in a tear in the disc. Based on the employee's history of ongoing symptoms following the July 15, 1999 work injury, Dr. Rieser concluded that the ultimate herniation of the disc and resulting nerve impingement was causally related to the weakening or tear caused by the work injury.

The judge went on to state that

Dr. Stern, testifying for the employer and insurer, agreed hypothetically that if the employee had injured his low back on July 15, 1999 lifting heavy fixtures at work, had chronic back pain with increasing leg pain until August 5, 1999, when he had a coughing incident where the pain became more acute, that the July 15, 1999 [injury] would be a substantial contributing factor in the disc herniation and resulting need for medical care. The hypothetical presented to Dr. Stern is consistent with the facts determined in this case and supports the conclusion that the work injury was a substantial contributing cause of the employee's disability and need for medical treatment relative to his low back.

Although Dr. Rieser may not have had the benefit of reviewing the employee's past medical records, it is clear from the record that Dr. Rieser was aware that the employee was performing his job at Sears without limitations or physical difficulty prior to July 15, 1999. It is evident that the doctor was also aware that the employee continued to work after that date and did not obtain medical treatment until August 5, 1999. Moreover, the compensation judge did review the records and was aware that Dr. Rieser had not reviewed them. Under these facts, we conclude that it was not unreasonable for the compensation judge to accept Dr. Rieser's opinions over Dr. Stern's, where the judge had fully assessed the employee's past medical history and accepted the employee's testimony as to his low back condition before and after the injury of July 15, 1999. A compensation judge's choice between conflicting expert opinions is generally upheld unless the facts assumed by the expert are not supported by substantial evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). While adequate foundation is necessary for a medical opinion to be afforded evidentiary value, the expert need not be aware of every relevant fact. Bossey v. Parker Hannifin, slip op. (W.C.C.A. Mar. 14, 1994). When viewed as a whole, the evidence of record adequately supports the judge's acceptance of Dr. Rieser's opinion. Accordingly, we affirm the judge's conclusion that the employee's injury of July 15, 1999, was a substantial contributing cause of the employee's L3-4 disc herniation, consequent disability, and medical treatment.

Superseding/Intervening Cause

The employer and insurer contend that the compensation judge failed to weigh the immediate effects of the work injury in light of the sudden onset of pain following the employee's coughing episode at home on August 4, 1999. They argue that, even if the employee continued to experience some symptoms related to the injury of July 15, 1999, the episode at home severed the causal link between the work injury and the resultant disability, such that the work injury can no longer be characterized as a substantial contributing cause of the employee's disc herniation. Their position, they argue, is supported by the well-founded opinion of Dr. Stern, that the employee had a weakened disc before July 15, 1999, that the employee's low back pain and right buttock pain following his work injury were not severe enough to cause a need for medical care or loss of time from work, and that the events of August 4, 1999, were sufficiently dramatic to have been the cause of the employee's disc herniation. We are not persuaded.

The supreme court has indicated that, "where an industrial accident creates a permanently weakened physical condition which an employee's subsequent normal physical activities may aggravate to the extent of requiring additional medical or hospital care, such additional care is compensable," except in "situations where aggravation of the original injury requiring additional medical or hospital care is the result of such unreasonable, negligent, dangerous, or abnormal activity on the part of the employee that it can be said that such additional care was not a natural consequence flowing from the primary injury." Eide v. Whirlpool Seeger Corp., 260 Minn. 98, 102, 109 N.W.2d 47, 49-50, 21 W.C.D. 437, 441 (1961).

We acknowledge the testimony of Drs. Stern and Rieser that a cough can precipitate a disc herniation. However, even if the employee's disc herniation was ultimately caused by a coughing episode, a scenario apparently not accepted by the compensation judge, we cannot, as a matter of law, conclude that coughing is so "unreasonable, negligent, dangerous, or abnormal" as to constitute a superseding/intervening cause of the employee's subsequent condition. In this case, the judge accepted Dr. Rieser's opinion that the work injury created a permanently weakened physical condition which was evidently aggravated on August 4, 1999. Accordingly, we reject the argument that any coughing episode was a superseding/intervening cause.

Notice

At Finding 14, the compensation judge determined that the employer had notice of the employee's work injury no later than September 18, 1999. Given the testimony of even the employer's witnesses, Julie Rausch and Nancy White, we assume this is a typographical error and that the judge meant August 18, 1999. Nevertheless, as asserted by the employer and insurer, any notice even by the August 18 date was not notice within thirty days of the injury as is required by Minn. Stat. § 176.141. Nor did the employee allege mistake, inadvertence, ignorance of fact or law, or inability as grounds for failing to give notice within thirty days. Accordingly, the employer and insurer contend that the compensation judge's award should be reversed. We do not agree.

At Finding 9, the compensation judge noted that the employee testified that after his medical appointment of August 5, 1999, he returned home and contacted either Amy or

Caroline at the employer and advised her that he had injured his back at work. In her memorandum, the judge indicated that this testimony was not rebutted and that “[i]n either case, the employer had notice of the employee’s injury as required by Minn. Stat. § 176.141.” We construe the judge’s memorandum as an implicit finding that she accepted the employee’s testimony on this issue. This is also consistent with Finding 11, in which the judge found the employee’s testimony to be credible in general. Therefore, we affirm the judge’s determination on notice. Hengemuhle, 358 N.W.2d 54, 37 W.C.D. 235.