DARRELL PERSEKE, Employee/Appellant, v. KLEESPIE TANK & PETROLEUM and N. RIVER INS. CO./CRUM & FORSTER, Employer-Insurer/Cross-Appellant, and KLEESPIE TANK & PETROLEUM and VALLEY FORGE INS. CO./CNA INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 10, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Where it was based in large part on the credibility of witnesses and was supported by expert medical opinion, the compensation judge's conclusion that the employee's injury was limited to a coccyx fracture and did not include a low back injury was not clearly erroneous and unsupported by substantial evidence.

CAUSATION - TEMPORARY AGGRAVATION. Where it was based on the totality of the evidence, on credibility determinations, and on expert medical opinions, the compensation judge's conclusion that the employee's second injury was a temporary one that resolved about a month after its occurrence was not clearly erroneous and unsupported by substantial evidence.

TEMPORARY BENEFITS - FULLY RECOVERED. Where the judge's decision that both of the employee's work-related injuries had resolved no later than February 9, 1999, was well supported by expert medical opinions and implicit credibility determinations, and where the employee's request for a second opinion as to the necessity of surgery and pleadings between the two insurer's were all filed subsequent to that date, there was, pursuant to Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987), no need to address the employee's appeal from the judge's fixing of statutory MMI at November 5, 1999, his appeal from the judge's denial of attorney's fees pursuant to Minn. Stat. § 176.191, or his appeal from the judge's denial of the second opinion.

CONTRIBUTION & REIMBURSEMENT. Where there was no indication in the judge's decision that the judge intended to limit awarded reimbursement for the period at issue to wage replacement alone, and so not to include reimbursement for rehabilitation and medical benefits, no modification of the judge's decision was necessary to imply a requirement that all of those benefits be reimbursed.

PENALTIES - NOTICE OF DISCONTINUANCE. Where, pursuant to an affirmed conclusion of the compensation judge below, the two insurers' liability for any consequences of a work injury ended prior to the filing of either NOID at issue, there was, pursuant to Woelfel v. Plastics, Inc., 371 N.W.2d 215, 218, 38 W.C.D. 43, 46 (Minn. 1985), no basis for the compensation judge's award of penalties for the insurer's failure to pay benefits up until the date of the administrative conferences, notwithstanding the court's decision in Saarela v. Sun Country Airlines, slip op. (W.C.C.A. Sep. 25, 1998).

Affirmed in part and reversed in part.

Determined by Pederson, J., Wheeler, C. J., and Wilson, J.
Compensation Judge: Carol A. Eckersen

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's conclusions that he did not sustain a low back injury in December 1998, that his January 1999 injury was only temporary, that he was not entitled to a second medical opinion as to the need for surgery, that he reached maximum medical improvement in November 1999, and that he was not entitled to attorney's fees pursuant to Minn. Stat. § 176.191. On cross-appeal, the employer and insurer North River Insurance Company/Crum & Forster Insurance Group join conditionally in the employee's appeal from the judge's conclusion that the employee's January 1999 injury was only temporary, and they cross-appeal also from the judge's conclusions that North River is entitled to reimbursement from insurer Valley Forge Insurance Company/CNA Insurance Company for benefits only from January 28, 1999, through February 9, 1999, and that the employee is entitled to penalties from North River for its suspension of actual payment of benefits prior to conferences on its notices of intention to discontinue. We reverse the award of penalties and affirm on all other issues.

BACKGROUND

On December 8, 1998, Darrell Perseke sustained a work-related injury when he fell from a ladder while employed as a welder with Kleespie Tank & Petroleum, by whom he had been employed for about three weeks. On that date, Mr. Perseke [the employee] was forty-two years old and was earning a weekly wage of $450.00, and Kleespie Tank & Petroleum [the employer] was insured against workers' compensation liability by North River Insurance Company/Crum & Forster Insurance Group [North River]. Immediately following his injury, the employee was seen at the Douglas County Hospital Emergency Room, where he complained of increasing pain in the coccyx ("tailbone") area, denying any neurological symptoms, leg weakness, numbness, incoordination, incontinence, or "any other injury." Examination revealed marked tenderness to palpation of the distal sacrum but "no particular tenderness to palpation of the L[umbar] spine," "no contusion, abrasion or deformity" in either of those areas, "no particular muscle spasm in the paraspinal muscles," and negative findings on a straight leg test bilaterally. Lumbar x-rays were taken that revealed normal vertebrae height and alignment on lateral view, a scoliotic curve to the right on AP view, and the possibility of a hairline fracture of the tailbone. The attending physician, Dr. Scott V. Leddy, upon consultation with an orthopedist, diagnosed a distal tailbone fracture, took the employee off work for a week, prescribed medication and ice application, and instructed the employee to see family physician Dr. Anthony Lussenhop.

On December 15, 1998, the employee saw Dr. Lussenhop, who found the employee to be "[i]n no distress," although "exquisitely tender over the coccygeal area" and "fairly tender over the right SI joint." Dr. Lussenhop assessed "[s]tatus post fall with coccygeal fracture" and "[r]ight hamstring strain" without numbness or tingling. On that diagnosis, the doctor prescribed Percocet, Vicodin, and continued Naprosyn and took the employee off work for another week. In a Report of Work Ability dated December 22, 1998, Dr. Lussenhop indicated that the employee's

right hamstring strain had resolved, although "low midline back/coccyx pain persist." Dr. Lussenhop issued work restrictions, and the employee returned to work for the employer at light duty on December 28, 1998.

When he saw the employee again on January 5, 1999, Dr. Lussenhop indicated that the employee's tailbone area pain was much improved and that he was "moving easier and having relatively few problems sitting." He noted on that same date, however, that the employee was "having some low back stiffness, that is increased with activity," although he was experiencing "[n]o numbness or tingling in the legs" and was requiring no Vicodin or Percocet for his pain. Upon objective examination, the doctor indicated further that, although he had "some mild tenderness in the paraspinous musculature of the low back," the employee had "[n]o midline spinous process tenderness. No spasm. Normal range of motion." Dr. Lussenhop diagnosed "[s]tatus post fall with coccyx fracture improved" and "[l]ow back pain, secondary to fall, as well as some deconditioning because of his inactivity with the coccyx fracture," and he referred the employee for up to six sessions of physical therapy over the next two weeks. On a Report of Work Ability on that same date, Dr. Lussenhop reported that the employee's tailbone pain was better but his low back pain was "worse again," diagnosing "Low back pain. - Deconditioned" in addition to the tailbone fracture. Dr. Lussenhop released the employee to work with restrictions which he identified as moderate duty, referring the employee for physical therapy, "again for conditioning."

On January 8, 1999, the employee commenced physical therapy under a "[h]istory of coccyx fracture with secondary low back pain due to deconditioning." Physical therapy records indicate that the employee had "started to notice low back pain increasing" within two or three days after his work injury. On examination, forward bending of the lumbar spine to touch fingertips to knees precipitated sharp increases in low back pain, but manual muscle testing of the lower extremities revealed no significant findings, and sensation to touch was intact, as was toe and heel walking. The employee reported increased low back pain to his physical therapist on January 18 and 25, 1999. On January 26, 1999, the employee saw Dr. Lussenhop again, who noted that the employee's "[l]ow back discomfort area seems to be causing more problems really than the coccygeal pain. He does have significant problems with the coccyx area though with prolonged sitting, i.e. driving, etc." In a Report of Work Ability completed on that same date, the doctor changed the employee's release to work from "Moderate Duty" to "Light Duty."

On January 29, 1999, the employee called in to cancel his physical therapy appointment, stating that his back was too painful, and on February 1, 1999, he and his wife returned to see Dr. Lussenhop. In his treatment notes for that date, Dr. Lussenhop indicated that the employee was reporting noncompliance by his employer with his lifting restrictions and that "[w]hile at work on Thursday, 1-28-99, he was lifting some 2.5" steel rod that he estimated weigh[ed] some 800 lb[s]," and "[f]elt a pull and immediate pain in his low back area." The employee also reported that this low back pain was accompanied by some radiation down his legs. The employee and his wife had come to Dr. Lussenhop seeking a "second opinion" as to the possibility "that there may have been a fracture on the initial x-ray series done at the hospital, that was not appreciated on the initial films." Dr. Lussenhop declined to make the referral without reexamining the employee, and the employee declined to be reexamined. On February 3, 1999, the employee reported to his physical therapist that he had returned to work with increased restrictions on January 26, 1999, two days later had experienced increased pain at work after

attempting to lift too much, and since that time had had continued significant low back pain and also leg pain. Physical therapy records for that same date indicate that the employee was not willing to work on any of the strengthening activities recommended by his therapist on January 26, 1999. On February 7, 1999, the employee executed an employer's "Employee Injury/Illness Report," on which he indicated that he gave notice to the employer on January 25, 1999, of a work injury on January 20 (sic), 1999.[1] On February 8, 1999, the employee was terminated for lack of available work within his restrictions, and the employer and North River commenced payment of temporary total disability benefits. On the date of his alleged injury, January 28, 1999, the employee was earning a weekly wage that remains in dispute, and the employer was insured against workers' compensation liability by Valley Forge Ins. Co./CNA Ins. Co. [CNA].

On the day after his termination, February 9, 1999, the employee saw Dr. Lussenhop again, continuing to complain of pain in the midline low back area. X-rays of his sacrum and tailbone area revealed some sacralization of L5 and some disc space narrowing at L5-S1 but otherwise appeared essentially normal. Dr. Lussenhop diagnosed low back pain, low back strain "secondary to deconditioning," and an improved tailbone fracture. He indicated that the employee would be commencing treatment on February 16, 1999, with orthopedic surgeon Dr. David Kraker, who, Dr. Lussenhop indicated, would be the employee's new treating physician, as arranged by the employee and his attorney. Dr. Lussenhop indicated that the employee was released to work with "[n]o change in his restrictions in the meantime."

The employee saw Dr. Kraker on February 16, 1999. On examination, Dr. Kraker noted moderate tenderness at the lumbosacral junction, tenderness in the mid thoracic spine, mild paraspinal spasm, and decreased range of lumbar motion. The doctor reviewed the employee's February 9, 1999, x-rays and found them to be "unremarkable" and revealing of "no specific abnormality" except for some evidence of "mild retrolisthesis at L4-5 which may be within normal limits" and of "sacralization at left L5-S1." On those findings Dr. Kraker diagnosed a chronic lumbar strain, mid-thoracic strain, and transitional lumbosacral junction with sacralization at left L5-S1. The doctor also referred the employee for an MRI scan, prescribed medication and physical therapy, and continued the employee's restriction to working only at light duty. On February 22, 1999, the employer and CNA filed a Notice of Insurer's Primary Liability, denying liability on grounds that the employee was working outside his restrictions at the time of any January 1999 injury, that he did not report any incident to his supervisor at the time, and that any aggravation of his prior injury was a continuation of that injury

On March 2, 1999, Dr. Kraker reported that the employee's back pain was worse than his leg pain, referencing only the employee's December 8, 1998, work injury. The employee

[1] The exact date of the employee's January injury and his notice of it to the employer are matters of confusion throughout the record. For instance, while the employee's history to Dr. Lussenhop on February 1, 1999, was of a January 28, 1999, injury, a "Supervisor's Accident/Incident Investigation Report–Injury/Illness Report" of record indicates that the employee informed his supervisor on February 4, 1999, of a work injury to his low back on January 20, 1999. Personnel records from the employer also indicate, however, that the employee called in to work on January 20, 1999, to say that he needed the whole day off on that date and was scheduled to undergo an MRI scan. We find no record of an MRI scan on that date.

underwent an MRI scan on March 23, 1999, which revealed in part a "high signal intensity" annular tear and disc bulge at L4-5 that was contacting the nerve root, together with disc degeneration that was compatible with juvenile discogenic disc disease. On April 13, 1999, the employee saw Dr. Kraker again, who concluded that the annular tear revealed on the employee's MRI was the cause of the employee's persistent discomfort. Dr. Kraker concluded that any back pain the employee had after his injury of December 8, 1998, "was aggravated and greatly increased on 1/20[sic]/99," noting that "[the employee] does feel that the second injury was more significant." On May 17, 1999, the employer and North River served on the employee a Notice of Intention to Discontinue [NOID] temporary total disability benefits as of May 18, 1999, on grounds that there had been "a new injury that worsened the employee's condition," based on Dr. Kraker's treatment note. North River apparently suspended payment of benefits as of the date of its NOID.

On May 20, 1999, the employee requested an Administrative Conference pursuant to Minn. Stat. § 176.239, subd. 2, contending that "the original 12/8/98 injury remains a substantial contributing cause of [the employee's] off-work status." The conference was held on June 14, 1999, and on June 21, 1999, the judge issued an Order on Discontinuance pursuant to Minn. Stat. § 176.239, denying discontinuance on grounds that there had been "no allegation of a superseding intervening cause of the employee's disability, but merely a new injury that worsened the employee's condition." The judge indicated that there had been no medical records attached to the NOID, that a review of medical records supplied by counsel for the employee reflected no change in the employee's restrictions subsequent to the alleged new injury on January 28, 1999, and that there was also "no medical opinion relating the employee's present disability solely to the alleged new injury." On June 30, 1999, the employer and North River reinstated payment of benefits retroactive to May 19, 1999.

On August 2, 1999, the employee filed a Claim Petition, alleging against North River underpayment of temporary partial and temporary total disability benefits continuing from December 8, 1998, consequent to a work injury on that date to the employee's "back." In their Answer filed August 19, 1999, the employer and North River admitted the injury alleged but denied liability for the compensation at issue. In that Answer, they affirmatively alleged that "if the Employee has been disabled as set forth in the Claim Petition, such disability stems from incidents and injuries over which this answering Employer and Insurer have no responsibility or control" and that "the Employee sustained a new injury on or about January 28, 1999, during another period of workers' compensation coverage for which the Insurer [CNA] is a necessary party as the injury is a substantial contributing factor in the Employee's claims." On that same date, North River also filed a Petition to Discontinue its payment of temporary total disability benefits, on grounds that CNA was solely responsible for the employee's total disability subsequent to January 28, 1999, and that, "[p]ursuant to the Kirchner decision, [North River] is only liable for ongoing temporary partial disability benefits."[2] The employer and North River also

[2] See Kirchner v. County of Anoka, 339 N.W.2d 908, 36 W.C.D. 335 (Minn. 1983) and Kirchner v. County of Anoka, 410 N.W.2d 825, 40 W.C.D. 197 (Minn. 1987) (where an employee sustains successive separate work injuries for which different insurers are on the risk, each of which injuries results in a diminution of earning capacity, each insurer is liable for wage replacement benefits based on the difference between the employee's weekly wage at the time of

filed a Motion for Joinder of CNA, and on September 13, 1999, the requested joinder was ordered and the August 2, 1999, Claim Petition and the August 19, 1999, Petition to Discontinue were consolidated for hearing.

On September 14, 1999, the employee was examined again by Dr. Kraker, who reiterated a diagnosis of symptomatic degenerative disc disease at L4-5, noting that he had found on examination tenderness over the L4-5 areas, mild spasm, and limited range of motion. The doctor thereupon released the employee to return to light work with a permanent restriction against lifting more than thirty pounds, opining that the employee had reached maximum medical improvement [MMI] with a permanent disability but declining to recommend surgery.

On November 23, 1999, the employee was seen for a medical evaluation by orthopedic surgeon Dr. Michael Smith at the request of North River. Dr. Smith diagnosed lumbar degenerative disc disease, lumbar pain syndrome, and a healed coccygeal fracture. It was Dr. Smith's opinion that the employee did have a "high intensity zone lesion in his low back" but that "[t]here is insufficient evidence to say that this high intensity zone lesion was the result of any work injury of either the December 8, 1998, or January 20, 1999, event." He concluded that the January 1999 injury was "much more substantial [than the December 1998 injury] and has resulted in long-term complaints" and that, although those complaints "are largely subjective and somewhat inconsistent," it was "possible the January 20, 1999, injury has, at least on a subjective basis, led to the on-going aggravation of the underlying degenerative disc disease." The doctor concluded also that the December 8, 1998, injury was a coccyx fracture or contusion that had resolved without permanent consequences and that it was not a substantial contributing factor in the employee's current medical disability and treatment since January 20, 1999. Dr. Smith recommended discography as a means of further clarifying the employee's low back condition, opining that, if discograms should prove inconsistent, and the employee is not a surgical candidate, he should be presumed to have reached MMI.

On November 30, 1999, the employee was reexamined by Dr. Kraker, who again found mild spasm and restricted range of motion in the employee's back, indicating that he was recommending a referral for discography from L3 to S1. On a Report of Work Ability on that same date, Dr. Kraker indicated again that the employee had reached MMI, specifically with regard to his December 8, 1998, work injury. On January 13, 2000, the employee underwent a discogram that in part revealed 6/10 concordant pain at L4-5 with abnormal disc morphology. On January17, 2000, the employer and North River served another NOID, indicating that they were discontinuing payment of temporary total disability benefits on grounds that the employee had been released to work as of September 14, 1999, pursuant to Dr. Kraker's treatment note of that date. North River again apparently suspended payment of benefits as of the date of its NOID. On January 24, 2000, Dr. Kraker recommended a fusion at L4-5 of the employee's spine, and he restricted the employee to working no more than six hours a day. The employee requested a second opinion as to the advisability of the surgery, and both North River and CNA ultimately refused to pay for the

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the injury with that insurer and what the employee is able to earn at any succeeding employment; where temporary partial and temporary total benefits are reduced by imposition of a statutory maximum, the obligation of the earlier insurer is calculated first and the later insurer pays the remainder).

consultation. On January 28, 2000, the employee requested another administrative conference pursuant to Minn. Stat. § 176.239, subd. 2.

On February 3, 2000, the employee was examined by orthopedist Dr. David Boxall at the request of CNA. Upon examination of the employee and his medical records, Dr. Boxall diagnosed the following: (1) degenerative disc disease of the lumbar spine at L4-5 with bulging disc and annular tear; (2) evidence of significant symptom magnification and functional overlay, manifested by positive confusion test on physical exam and marked discrepancy in straight leg raising between seated and supine position; and (3) healed fracture of the coccyx. It was Dr. Boxall's opinion that the employee's December 1998 injury was a coccyx fracture only and did not include an injury to the lumbar spine. Dr. Boxall concluded that any injury on January 28, 1999, was not significant and did not affect the employee's pre-existing condition, particularly given that Dr. Kraker's initial treatment note on February 16, 1999, had made no mention at all of the incident on January 28, 1999. It was Dr. Boxall's opinion in the alternative that any back injury that the employee may have sustained to his low back on January 28, 1999, was only temporary and had resolved by February 9, 1999. Dr. Boxall indicated that he would place no restrictions on the employee's activities with regard to his lumbar spine and that, given the employee's statement that his symptoms had remained unchanged for twelve months, he would date MMI at February 9, 1999. Finally, Dr. Boxall found it noteworthy that the employee reported severe pain produced on discogram at two levels of his spine, which was inconsistent with the employee's objective evaluation and with his MRI scan, which had shown only one level to be abnormal.

On February 17, 2000, the employer and North River filed a Petition for Contribution and/or Reimbursement and Consolidation, asserting in part that the employee had sustained a work injury to his low back on January 20 or 28, 1999, and that this was a new injury, separate and unrelated to the employee's December 8, 1998, work injury, which was only to the employee's coccyx. The petition also sought consolidation of this same Petition with the employee's August 2, 1999, Claim Petition and the employer and North River's August 19, 1999, Petition to Discontinue. By letter to the Department filed February 29, 2000, the employee amended his claim petition to allege entitlement to penalties pursuant to Minn. Stat. § 176.225, alleging that North River had filed two NOIDs without legal basis and had, in each case, suspended weekly benefits on the date of service, prior to any administrative conference.

On April 28, 2000, Dr. Smith provided an addendum to his November 1999 report, after reviewing additional medical records and certain surveillance reports and videotapes provided to him by North River. In his addendum, Dr. Smith indicated that in his opinion, based on this additional information, and specifically in light of the inconsistencies on lumbar discogram, the employee was not a surgical candidate and so did not require a fusion. Dr. Smith acknowledged evidence of lumbar degenerative disc disease but indicated that, in his opinion, the employee's subjective complaints were out of proportion to his objective findings.

The matter came on for hearing on May 18, 2000. As of that date, the employee had been receiving temporary total disability benefits ever since his termination by the employer on February 8, 1999. The parties had stipulated prior to hearing that the employee had been served with MMI opinions on November 5, 1999, November 30, 1999, and February 9, 2000. Issues at

hearing included the following: (1) the nature and extent of the employee's December 8, 1998, work injury and specifically whether it included a low back injury in addition to a tailbone fracture; (2) whether or not the employee sustained a work-related injury on January 28, 1999, and, if so, its nature and extent; (3) North River's entitlement to discontinue temporary total disability benefits, based on either the employee's disability by a new injury or the employee's attainment of MMI; (4) the employee's entitlement to a second opinion regarding the necessity of surgery, based on either its causal relation to a work injury or its reasonableness and necessity; (5) North River's entitlement to reimbursement from insurer CNA, based in part on whether or not North River unnecessarily paid benefits after obtaining an MMI opinion on September 14, 1999, but before serving that opinion on November 5, 1999; (6) North River's entitlement to a credit if neither injury should be found compensable; (7) the employee's entitlement to penalties from North River for the latter's suspension of benefits while its NOIDs were pending; and (8) the employee's entitlement to attorney fees pursuant to Minn. Stat. § 176.191.

By Findings and Order filed July 25, 2000, the compensation judge concluded in part as follows: (1) that the employee's work injury on December 8, 1998, was limited to a coccyx fracture that healed by January 5, 1999, and did not include any additional low back injury; (2) that on January 28, 1999, the employee sustained a work-related low back strain that resolved by February 9, 1999, and was not substantially contributed to by the employee's coccyx fracture; (3) that the employer and North River were entitled to discontinue temporary total disability benefits; (4) that the employee was not entitled to a second medical opinion as to his need for low back surgery, in that any need for that care was not causally related to a work injury or reasonable and necessary; (5) that North River was entitled to reimbursement from CNA only for benefits paid from January 28, 1999, through February 9, 1999; (6) that North River was entitled to a credit for benefits paid during periods found not to be compensable; (7) that the employee was entitled to the penalties claimed for North River's suspension of benefits; and (8) that the employee was not entitled to attorney fees pursuant to Minn. Stat. § 176.191. The employee appeals, and the employer and North River cross 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

Nature and Extent of the December 1998 Injury

At Conclusions of Law 1, 2, and 4, the compensation judge found the following, respectively: that the employee's December 8, 1998, injury was in the nature of a coccyx fracture that healed by January 5, 1999, and, implicitly, that that fracture was the only compensable injury sustained at that time; that the employee sustained a work-related low back strain on January 28, 1999, that resolved by February 9, 1999; and that "[t]he coccyx fracture was not a substantial contributing cause of the employee's disability from January 28, 1999, through February 9, 1999." The implication of these conclusions is that the employer and North River are ultimately liable for compensation only between December 8, 1998, and January 5, 1999. The employee contends initially that the judge's conclusion that the employee did not sustain a low back injury on December 8, 1998, in addition to his coccyx fracture was clearly erroneous as a matter of law. He argues that (1) the June 21, 1999, Order on Discontinuance included an unappealed conclusion that there was no proof of a superseding, intervening cause of the employee's disability on that date, that (2) the employer and North River had essentially admitted a back injury in their August 19, 1999, Answer to the employee's claim petition, and that (3) the employer and North River had acknowledged in their August 1999 Petition to Discontinue that they would remain liable for temporary partial disability benefits under the rationale of Kirchner. On a factual basis, the employee argues also that there is evidence of a December 8, 1998, low back injury in the employee's complaints of pain and x-rays on the date of the injury, in his medical and physical therapy records, and in his testimony as to the weeks immediately following December 8, 1998. We are not persuaded.

The June 21, 1999, Order on Discontinuance was only an interim administrative decision. That there was no proof of a superseding and intervening cause of the employee's disability offered at the administrative discontinuance conference was not dispositive of any issues at the May 2000 de novo hearing before the compensation judge below, nor is it of any issues before us. See Kyrola v. Murphy Bros., Inc., 57 W.C.D. 325 (W.C.C.A. 1997), citing Gowell v. Aitkin Community Hosp., 51 W.C.D. 127 (W.C..C.A. 1994). We acknowledge that the employer and North River did admit an injury to the employee's "back" in their August 1999 Answer to the employee's Claim Petition. We conclude, however, that, at least for purposes of such general pleadings, "back" may be read to include an injury to the employee's coccyx, implicit as that bone is in the employee's sacrum. With regard to any concession made by the employer and North River in their pleadings in August 1999, it is material to note that the employee had alleged in his claim petition entitlement to wage replacement benefits implicitly continuing from December 8, 1998. The alleged concession made by the employer and North River in their Answer eight months post injury was made only "if the Employee has been disabled as set forth in the Claim Petition" (emphasis added). After reviewing the totality of the evidence, including records of the employee's substantial medical history, the compensation judge at the de novo hearing below clearly concluded that the December 1998 coccyx injury had resolved by January 5, 1999. It is true that the employee was on that date prescribed two more weeks of physical therapy for low back pain that was "secondary to fall," but that pain was apparently secondary only to the extent that the employee had undergone "some deconditioning because of his inactivity with the coccyx fracture." At any rate, the judge found expressly that the employer and North River were liable

for wage replacement benefits only from December 8, 1998, through January 5, 1999, and that the employee's coccyx fracture was not a substantial contributing cause of any of the employee's disability from January 28, 1999, through February 9, 1999. We conclude that any concessions made by the employer and North River in August of 1999 were conditional on a finding of continuing disability related to the December 1998 injury for which they were liable. There being no such finding express or implicit, those conditional concessions are legally moot.

The compensation judge's decision is also supportable factually. The employee asserts that, in Finding 6 of the compensation judge, "the Court finds that there is no mention of low back pain on the first examination with Dr. Lussenhop on December 15, 1988." We find no such finding by the compensation judge. It is true that the judge makes no reference to Dr. Lussenhop's report that the employee was "fairly tender over the right SI joint," which the employee suggests was a material oversight. The SI joint, however, is a joint between the sacrum and the ilium or hip bone, not a joint between the sacrum and the lumbar spine. Moreover, the judge does make reference to Dr. Lussenhop's report of "pain at [the employee's] coccyx," arguably pain as near to the SI joint as pain at the L5-S1 joint would be. The employee also asserts that the judge "fails to note than an x-ray of the **low back** was taken on December 8, 1998" (emphasis in original); the judge does note, however, that an x-ray revealed the employee's coccyx fracture, and it seems only reasonable to suppose that this was a reference to an x-ray spanning at least a portion of the low back. The employee finds material also the fact that on January 5, 1999, Dr. Lussenhop diagnosed "[l]ow back pain, secondary to fall." That same diagnosis, however, reads in fuller form, "[l]ow back pain, secondary to fall, as well as some deconditioning because of his inactivity with the coccyx fracture" (emphasis added). Moreover, this finding follows immediately a report of an objective clinical examination that had revealed only "mild tenderness in the paraspinous musculature of the low back. No midline spinous process tenderness. No spasm," and "[n]ormal range of motion." Nor does the employee's initial physical therapy evaluation on January 5, 1999, "clearly" document an ongoing low back injury as the employee suggests, the employee's initial diagnosis on that date being a history of coccyx fracture with "secondary low back pain due to deconditioning" (emphasis added). Notwithstanding the employee's testimony that he did hurt his low back in addition to his tailbone on December 8, 1998, and that he did complain of a low back injury ever after that, this evidence is clearly not dispositive of a low back injury from the start, and Drs. Smith and Boxall both share that conclusion.

Given especially the compensation judge's unique perspective in the assessment of a witness's credibility, see Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988), we cannot conclude that the judge's reliance on the expert opinions of Drs. Smith and Boxall was unreasonable. See Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985) (a trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence). Therefore we affirm the judge's conclusion that the employee's injury of December 8, 1998, was limited to his tailbone fracture and did not include a low back injury as that term is normally understood. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Nature and Extent of the January 1999 Injury

The compensation judge found that the employee sustained only a temporary injury on January 28, 1999, that resolved by February 9, 1999. The employee contends that the judge's finding is unsupported by substantial evidence. He argues first that "the [compensation judge] found that there were no changes in the restrictions given by Dr. Lussenhop when he first examined [the employee] after the January 28, 1999 work injury" and that "[t]his is clearly erroneous." He also asserts that the report on the employee's February 9, 1999, x-rays shows "a change in the normal curve of the thoracic spine as well as degenerative changes of the thoracic spine and disk space narrowing at L5-S1," arguing that this proves "incorrect" the compensation judge's finding that "[a]n x-ray of the sacrum and coccyx was negative" (emphases added). The employee argues further that Dr. Kraker's finding of muscle spasm in the employee's low back on February 16, 1999, and the finding of an annular tear at L4-5 on the employee's March 23, 1999, MRI scan also disprove the judge's conclusion. Finally, he argues that both Dr. Boxall's and Dr. Smith's reports reflect a permanent injury and that the pieces of those reports that the judge used to support her decision were taken out of context. We are not persuaded.

In Finding 9, the compensation judge indicated that Dr. Lussenhop had recommended no change in the employee's restrictions on February 9, 1999, pending the employee's evaluation by Dr. Kraker. The employee argues that this finding by the judge was clearly erroneous, in that the employee had been released to work at moderate duty on January 5, 1999, whereas Dr. Lussenhop's Report of Work Ability on February 9, 1999, reflects a light duty restriction. We note, however, that, according to an earlier Report of Work Ability executed by Dr. Lussenhop on January 26, 1999, the employee had already been restricted to light duty as of January 26, 1999, two days prior to the date of the alleged second injury. Thus the judge did not err in finding that the doctor's restrictions on February 9, 1999, remained unchanged.

With regard to the employee's argument pertaining to x-rays, we need note only that the judge's characterization of the "sacrum and coccyx" films as being negative clearly is not impeached by the fact that films of the thoracic and lumbar back revealed curvature, degenerative changes, and a disc space narrowing. These thoracic and lumbar findings have little bearing on the condition of the employee's sacrum and coccyx, nor do they necessarily reflect any injury or even clear abnormality in the lower thoracic and upper lumbar regions of the employee's back, where the judge acknowledged Dr. Lussenhop's finding of only some "mild tenderness." Indeed, even Dr. Kraker found the x-rays to be "unremarkable" and revealing of "no specific abnormality."

We acknowledge Dr. Kraker's February 16, 1999, finding of mild spasm and the March 23, 1999, MRI finding of an annular tear at L4-5. However, these items alone do not persuade us to reverse, in light of the detailed opinions of Drs. Smith and Boxall supportive of the judge's decision. Both Dr. Smith and Dr. Boxall thoroughly reviewed the employee's medical record and acknowledged the MRI evidence. Dr. Smith found the employee's ongoing complaints in November 1999 to be "largely subjective and somewhat inconsistent" and possibly related to the incremental development of a "high intensity zone lesion," which the doctor classified as most often "a result of progressive degenerative changes rather than a specific accident." He concluded unequivocally that the employee's December 1998 injury was not a substantial contributing factor in the employee's current medical treatment since January 1999, and he found no objective evidence that the January 1999 injury was permanent. Inconsistent pain responses in the

employee's discogram further persuaded Dr. Smith that the employee's "subjective complaints are out of proportion to his objective findings." More unequivocally, Dr. Boxall found "no evidence of ongoing injury to the lumbar spine," concluding that he "would place no restrictions on [the employee's] activities whatsoever." Like Dr. Smith, Dr. Boxall found the employee's responses on discogram to be inconsistent with both his objective findings on examination and the objective findings on the MRI scan. The employee argues that Dr. Boxall's opinion is inconsistent, in that he rated the employee has having a 1% whole body permanent partial disability even as he classified the employee's injury as a "temporary aggravation." We note, however, that Dr. Boxall's permanency rating of 1% was apparently a typographical error, since Dr. Boxall clearly and specifically made his rating under Minnesota Rule 5223.0390, subpart 4.A., which provides for a 0% rating for "[r]adicular pain or radicular paresthesia . . . not substantiated by persistent objective clinical findings, regardless of radiographic findings."

We conclude, based on the totality of the evidence before us, that it was not unreasonable for the compensation judge to find that the employee's January 1999 injury was a temporary one that resolved by February 9, 1999. On that basis we affirm that finding. See Hengemuhle, 358 N.W.2d at 55, 37 W.C.D. at 239. Given our affirmance of the compensation judge's conclusion that all work-related disability in this case had resolved by February 9, 1999, we need not address the employee's appeal from the judge's fixing of statutory MMI at November 5, 1999,[3] his appeal from the judge's denial of attorney's fees pursuant to Minn. Stat. § 176.191, or his appeal from the judge's denial of a second opinion as to the necessity of surgery.[4] See Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987) (an employee is not entitled to continuing wage replacement or rehabilitational benefits unless he continues to be disabled by the work injury at issue). The factual issues in this employee's case were clearly closely contestable ones, and had we been the factfinder we may well have decided some of them differently. However, given that the judge's decision is well supported by expert medical opinions, given that the judge's decision was not unreasonable in light of those opinions and the medical record in general, and given the judge's unique position particularly with regard to matters of credibility, we will not reverse the compensation judge's conclusions with regard to matters on appeal by the employee. See Nord, 360 N.W.2d at 342-43, 37 W.C.D. at 372-73; Hengemuhle, 358 N.W.2d at 55, 37 W.C.D. at 239; Brennan, 425 N.W.2d at 839-40, 41 W.C.D. at 82.

Reimbursement

[3] The employee's appeal from this issue essentially readdresses the issues of disability resolution by February 9, 1999, and appears to ignore the difference between actual resolution of a work-related condition and statutory MMI, which requires service of notice of that resolution on the employee.

[4] The employee's appeal on the issue of attorney fees pursuant to section 191, which was based on an argument that so many of the issues at the hearing below "were all generated based on pleadings filed by [North River] attempting to place some of the responsibility for the herniated disk on the second injury," was conditioned on an assumption "[that] there is a reversal on the finding of [no] permanent injury on one or both of the injury dates."

At Order 2, the compensation judge ordered that "[t]he employer and CNA shall pay temporary total or temporary partial disability benefits from January 28, 1999 through February 9, 1999" and that "[t]hey shall reimburse North River for benefits paid during this period." Further, at Conclusion of Law 6, the judge found that North River was "not entitled to reimbursement from CNA," apparently referring to any claims by North River for reimbursement for any periods aside from that twelve-day period. Apparently finding ambiguity in Order 2's award of reimbursement "for benefits paid during" the period from January 28 through February 9, 1999, North River contends that the judge's order should be modified to include reimbursement for medical, in addition to wage replacement, benefits paid during that period.[5] We agree that reimbursement during this period should not be limited to wage replacement alone, but we find no indication in either Order 2 or the judge's memorandum that the judge intended such a limitation. Therefore, because we conclude the judge's order included reimbursement for medical expenses paid during the twelve-day period, no modification of the judge's decision is required.

Penalties

Citing case law authority,[6] the compensation judge found that the employee was entitled to penalties in the amount of 25% of wage replacement benefits delayed, for North River's twice suspending payment of benefits from the dates of its filing of two NOIDs to the dates of the ensuant administrative conferences. Referencing Minnesota Statutes § 176.239, subd. 3, the employer and North River contend that "[t]he statute dictates that benefits are not due through the date of the conference until the employee attends the conference, and then, only if the commissioner does not order otherwise" (emphasis in original). We reverse on other grounds the judge's award of penalties.

In the present case, the employer and North River's liability for any consequences of a work injury was found to have ended no later than February 9, 1999, before the filing of either NOID at issue. We find no basis for the award of penalties on benefits that were not owed. The supreme court has indicated very clearly that it will not "ascribe to the legislature an intent to require an employer . . . to remain under a continuing liability to pay compensation to an employee who is found to be no longer disabled or to be no longer disabled because of his work injury." Woelfel v. Plastics, Inc., 371 N.W.2d 215, 218, 38 W.C.D. 43, 46 (Minn. 1985). Accordingly, the judge's award of penalties against the employer and North River is reversed.

SEPARATE CONCURRING OPINION

[5] The employer and North River apparently infer a limitation in Order 2 from the fact that the sentence in which the judge ordered reimbursement to North River generally for "benefits paid" during the 12-day period is preceded by a sentence in which the judge ordered CNA to pay specifically "temporary total or temporary partial disability benefits" during the period, without mentioning in that sentence any obligation to pay medical or other benefits. They concede that no limitation is evident in the judge's explanatory Memorandum.

[6] Saarela v. Sun Country Airlines, slip op. (W.C.C.A. Sep. 25, 1998).

DEBRA A. WILSON, Judge

I concur with the result reached by the majority.