KEVIN L. PETERSON, Employee, v. ARROW PONTIAC GMC and MADA/BERKLEY RISK ADM'RS, Employer-Insurer/Appellants, and HEALTHCARE RECOVERY, INC./MEDICA CHOICE, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 5, 2001

No. [REDACTED SSN]

HEADNOTES

EVIDENCE - CREDIBILITY; CAUSATION - SUBSTANTIAL CONTRIBUTING CAUSE. Where the decision was supported by properly founded expert medical opinion and by expressly "highly" credited testimony of the employee as to his symptoms during the interim, the compensation judge's conclusion that the employee's disability and need for medical care culminating in surgery in February 2000 was causally related to the employee's 1997 work injury was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Rykken, J., and Wheeler, C.J.
Compensation Judge: Rolf G. Hagen

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's determination that the employee's low back injury of February 10, 1997, was a substantial contributing factor in his need for medical treatment, surgery, and consequent wage replacement benefits after January 17, 1999. We affirm.

BACKGROUND

On February 10, 1997, Kevin Peterson was leaning over the fender of a car installing an alternator in the course of his job as a service technician with Arrow Pontiac GMC. As he straightened and backed away from the car, Mr. Peterson [the employee] felt excruciating pain in his low back which caused him to drop to his knees. Co-workers helped him to his feet, and he was taken to the Allina Occupational Health Clinic, where he was seen by Dr. Clarence Henke. The employee complained to Dr. Henke of extreme pain in his lower back and an inability to move his right leg. He also described weakness, shooting pain, and tingling in the right leg. Dr. Henke noted a limited range of motion of the lumbar spine in all directions, as well as moderate spasm in the lumbar area. Straight leg raising tests revealed restriction bilaterally, with complaints of low back pain. Dr. Henke diagnosed a lumbar strain and took the employee off work. Arrow Pontiac GMC [the employer] admitted liability for the injury and commenced payment of

temporary total disability benefits and related medical expenses. On the date of his injury, the employee was thirty-two years old and was earning a weekly wage of $693.25.

On February 17, 1997, the employee reported to Dr. Henke that he had "shooting pain in his lower back and a burning sensation in his right leg." On physical examination, the employee's range of motion was somewhat improved, but the doctor noted that the employee was weak on the right side when he stood on his toes or on his heels. In a Report of Workability on that same date, Dr. Henke diagnosed back pain with radiculopathy, continued the employee's pain medication, and referred the employee for an MRI scan of the lumbar spine. The MRI, performed that same day, was interpreted as showing (1) a "small contained midline disc protrusion L3-4 and L4-5 without focal extrusion or neural impingement," and (2) "[m]ild degenerative disc changes in the lower three lumbar interspace levels with some loss of hydration without interspace narrowing," with normal facet joints and neural foramina. On February 19, 1997, Dr. Henke referred the employee for one week of physical therapy, recommending that he apply ice to his back when he was at home. The following week, Dr. Henke continued the employee's physical therapy and prescribed a low back support.

By March 3, 1997, the employee reported that his back was feeling much better. The employee was last seen by Dr. Henke on March 10, 1997, when he reported that he was not in any pain and had only a little soreness every once in awhile. He denied any shooting pain or weakness in either arm or leg, and he reported that he wore his back brace most of the time when lifting or bending. On examination, the employee reportedly sat comfortably during the patient interview and was able to get from a sitting to a standing position easily and from a supine to a sitting position easily. His gait pattern was normal, and palpation revealed no tenderness. Range of motion of the back was normal in all directions, and neurological examination of the lower extremities also revealed no abnormalities. The doctor opined that the employee had reached maximum medical improvement without evidence of permanent partial disability. No restrictions were issued, but the employee was advised to return to the clinic as needed. Dr. Henke's concluding diagnosis was lumbar strain. The employee continued working as a service technician/mechanic for the employer until early April 1998. The employee lost no time from work during this period and did not seek medical attention for his back. He performed all of the work that was assigned to him, and he did not complain to his employer that he was experiencing any kind of back problem.

In April 1998, the employee obtained a management position as a shop foreman with Suburban Chevrolet. The employee worked for Suburban Chevrolet until December 1998, at which time his position was eliminated. In August 1998, the employee experienced a flare-up in his low back while sitting at his desk at Suburban. He stated later that he felt a "tingeing sensation" in the back and that he subsequently listed and dragged his right foot and was unable to put pressure on it. The employee was able to work through this incident with the use of ice and heat and exercise, and he did not seek medical attention or miss any time from work because of it. On January 4, 1999, the employee obtained a position as a line mechanic with Jim Lupient Oldsmobile. This job involved work similar to that which he had performed with the employer. The employee apparently had no difficulty performing this job until he again experienced a flare-up of his back pain in mid January. He was at a bowling alley with some friends at the time, and, while sitting in a chair, lifted the friend's small child and again experienced a "tingeing" or

"burning sensation" in his low back. He later estimated the child's weight to be about twenty pounds. On January 18, 1999, the employee obtained medical treatment at the Park Nicollet Urgent Care Clinic. He was seen by Dr. David Walcher, a specialist in internal medicine, to whom he reported right-sided back pain with no leg symptoms. He advised Dr. Walcher that he had had difficulties with his back for a few years. He reported experiencing a sudden recurrence of pain in his back while picking up the child the previous day. Dr. Walcher diagnosed acute back pain, "probably on top of chronic prior . . . stress injury."

On January 27, 1999, the employee was seen by chiropractor Dr. Leon Frid, for an evaluation and advice on treatment of his lower back condition. On that date, the employee complained of severe low back pain, antalgia, and right lower extremity pain and numbness. The employee provided Dr. Frid with a history of similar symptoms following the 1997 injury with the employer and periodic bouts of back and leg pain since that date. Dr. Frid diagnosed lumbar disc syndrome, right lower extremity radiculopathy, and chronic lumbosacral sprain/strain injury. He recommended physical therapy for evaluation and treatment and a program of manual chiropractic manipulation. He also recommended a repeat MRI scan and referred the employee to Dr. Alexander Axelrod, for adjunctive medical care and evaluation. The employee evidently did not follow through with Dr. Frid's recommendations.

On January 29, 1999, the employee was seen in follow-up by Dr. Walcher, who diagnosed probable L4-5 radiculopathy on the right side, ordered an MRI scan, and requested the films from the employee's 1997 scan. The employee underwent the recommended MRI scan on February 2, 1999. The radiologist, Dr. Barbara Luikens, noted that she was comparing the current scan with the scan performed on February 17, 1997. Dr. Luikens noted that the current scan findings "appear to have progressed since 2/17/97." She reported that the current scan showed a contained, herniated nucleus pulposis eccentric to the right at L3-4, central at L4-5, and eccentric to the right at L5-S1. She felt that there may be impingement of the L4 and S1 nerve rootlets in the lateral recesses. She also noted central canal stenosis with probable impingement of the L5 nerve rootlets bilaterally related to the herniation at L4-5.

Dr. Walcher subsequently referred the employee to neurosurgeon Dr. Mark Larkins, who ordered a lumbar myelogram and post myelogram CT scan on February 23, 1999. In a letter to the employee's attorney dated June 4, 1999, Dr. Larkins opined that "[i]t would seem reasonable that the work incident of 2/10/97 significantly impacted Mr. Peterson's condition and could certainly be deemed work related." He went on to recommend surgery to repair the herniated disc demonstrated on the myelogram. The employee did not pursue surgery at that time and continued working for Jim Lupient Oldsmobile as a mechanic.

On September 20, 1999, the employee filed a Medical Request, seeking payment of certain medical expenses, including the expense of the low back surgery proposed by Dr. Larkins. The insurer filed a Medical Response on September 24, 1999, refusing to pay the outstanding medical expenses or to approve the proposed surgical procedure.

On January 13, 2000, the employee was referred to orthopedic surgeon Dr. John Stark. The employee provided Dr. Stark with a history of his work-related injury and subsequent symptoms. Dr. Stark concluded that the employee had a left L5 radiculopathy clinically due to an

L5-L6 contained disc herniation and lateral recess stenosis. He recommended a central decompression.

The day after Dr. Stark's examination, the employee was seen by neurologist Dr. Daniel Randa at the request of the employer and insurer. Dr. Randa personally reviewed the various films of the employee's lumbar spine, including the MRI scans performed on February 17, 1997, and February 2, 1999, and the lumbar myelography and contrast enhanced CT scan of February 23, 1999. Dr. Randa also reviewed and summarized all of the employee's medical records, including those from Dr. Larkins and Dr. Walcher at Park Nicollet Medical Center, Dr. Frid, Dr. Stark, and United Occupational Health. Dr. Randa concluded that the employee sustained a lumbosacral musculoligamentous strain injury superimposed upon mild degenerative lumbar spondylosis as a consequence of his February 10, 1997, work injury. He opined that that injury had resolved in approximately thirty days and was unrelated either to the employee's current complaints or to the February 1999 MRI scan findings.

On January 18, 2000, the employee filed a second Medical Request, seeking a change of physicians from Dr. Larkins to Dr. Stark. A Medical Response was evidently filed, contesting the requested change of physicians.[1]

The employee returned to Dr. Stark on February 7, 2000, complaining of severe back and leg pain and urinary urgency and retention. He advised Dr. Stark that "he has severe distress and has had such distress for 'three years'." The employee was admitted to the hospital on a semi-emergency basis, and Dr. Stark carried out a central decompression at L4-5 on February 8, 2000.[2]

On February 24, 2000, the employee returned to Dr. Stark in follow-up of his lumbar decompression. He reported that he was doing well, with resolution of back and leg pain, and that he felt better than he had in many years. Dr. Stark noted that he had reviewed the IME report from Dr. Randa, including the medical records contained therein. He stated that, "[q]uite the contrary to physician Randa, it is my opinion that the patient's clinical findings, and imaging were all classic for collapsed L4-L5 segment and related nerve compression. The 1997 and 2000 MRIs show narrowing of the L4-5 interspace with related nerve compression." Dr. Stark went on to state that, "[b]y history, Mr. Peterson suffered from the same low back and right leg pain in varying degrees from 1997 to the 1999 bowling alley incident, with an exacerbation of pain at that time." Dr. Stark concluded that the 1997 injury was a significant contributing factor in the employee's need for surgery.

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[1] The Medical Response is alluded to in appellants' brief, but is not contained in the file of the Department of Labor and Industry.

[2] The scans that were performed on February 23, 1999, demonstrated that the employee has six lumbar vertebrae instead of the normal five. In his report of January 13, 2000, Dr. Stark diagnosed a contained disc herniation at the L5-L6 level. His note also explains that this is the "conventional L4-L5" level. The surgery performed by Dr. Stark on February 8, 2000, was to the level previously identified as L5-L6.

On February 29, 2000, the employee's claims came on for hearing before a compensation judge at the Office of Administrative Hearings. By agreement of the parties, the issues were expanded to include claims for temporary total disability and temporary partial disability benefits continuing from February 7, 2000. At the hearing, the employee testified that between March 10, 1997, and April 1998, his symptoms had never totally cleared and that he had continued to experience pain and discomfort in his back as well as tingling and numbness into his lower extremities. He testified that he had treated his own symptoms with exercises, heat, ice, and Tylenol or aspirin as needed and that he had worn his back support as he felt necessary. He testified also that he had made the move to Suburban Chevrolet in April 1998 in part because the shop foreman position was less physical and was less of a strain on his back. He testified further that the flare-up of his back symptoms at the bowling alley in January 1999 was very similar to the flare-up he experienced in August 1998 while working at Suburban Chevrolet. By Findings and Order issued May 1, 2000, the compensation judge determined that the employee's injury of February 10, 1997, was a substantial contributing factor in his need for surgery in February 2000, noting expressly in his Memorandum that he had "placed great weight upon the opinions of the treating/surgical physician" and that he had "found the employee's testimony to be highly credible." On these conclusions, the judge awarded the medical and disability benefits at issue. 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

The compensation judge concluded that the employee's February 1997 work injury substantially contributed to the employee's need for medical treatment over two years later and ultimately to his need for surgery in February 2000. In the Memorandum accompanying his decision, the judge stated that he had "placed great weight upon the opinions of the treating/surgical physician, Dr. Stark and upon the hearing testimony of the employee," the latter of which the judge expressly found to be "highly credible." The judge also stated his further conclusion that the employee had been "driven to continue working during extended periods of time without medical treatment not[]withstanding he had periodic low back pain with

radiculopathy and periodic flare-ups/exacerbations." The employer and insurer contend that the judge's reliance on the opinion of Dr. Stark was not reasonable, arguing that Dr. Stark's opinion was based on an erroneous history of severe symptoms for three years and on an observation of stenosis with nerve root compression on the 1997 MRI scan which, they argue, is contrary to the radiologist's report and to Dr. Randa's interpretation of the scans. The employer and insurer contend that the employee had been subject to degenerative spondylosis of his lumbar spine even before his February 1997 work injury, that the February 1997 injury was merely an aggravation of that preexisting condition, and that the employee's return to work thereafter without restrictions and his failure to seek any medical treatment again until January 1999 are evidence that the work-injury aggravation was long resolved before the incurrence of the expenses here at issue. We are not persuaded that the judge's decision is unsupported by the evidence.

Dr. Stark evidently credited the history provided to him by the employee, and this history was materially identical to the history of periodic flare-ups and ongoing back and leg symptoms that the compensation judge found "highly credible" in implicitly finding that the employee had sustained a permanently weakened back condition as a result of his February 1997 work injury. The judge expressly acknowledged that the employee underwent no medical treatment or wage loss between March 1997 and January 1999, but upon opportunity to observe the demeanor of the testifying employee he nevertheless credited the employee's testimony that he had ongoing symptoms after being discharged by Dr. Henke in March 1997. Assessment of a witness's credibility is the unique function of the trier of fact. Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988), citing Spillman v. Morey Fish Co., 270 N.W.2d 781, 31 W.C.D. 187 (Minn. 1978). We cannot conclude that the judge exceeded his discretion in finding that the employee's symptoms persisted following his February 1997 work injury.

As to the issue of medical causation, Dr. Stark opined that the employee's back problem in 1999 and 2000 was causally related to his 1997 work injury. Concluding to the contrary, Dr. Randa opined that the employee's work injury in 1997 had not been significant and that the employee's back condition was solely related to the lifting incident at the bowling alley. Relying on the opinion of Dr. Stark rather than on that of Dr. Randa, the compensation judge concluded that the employee had protrusions into the spinal canal as early as 1997 and that the employee had an ongoing low back strain that in time would inevitably have required surgical intervention. The judge thus resolved the conflict in favor of the employee. 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. Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985). Moreover, a compensation judge has considerable discretion in choosing among conflicting expert opinions. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 39 W.C.D. 771 (Minn. 1987). In this case, the facts assumed by Dr. Stark were also ones in evidence in direct testimony to, and expressly credited by, the compensation judge, and we defer to the judge's unique discretion to credit that evidence.

Questions of medical causation fall within the province of the compensation judge. Felton v. Anton Chevrolet, 513 N.W.2d 457, 50 W.C.D. 181 (Minn. 1994). While the evidence in this case might well have supported a contrary decision, the judge's decision to accept Dr. Stark's causation opinion was not unreasonable under the circumstances. Therefore we affirm the judge's

Findings and Order in its entirety. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).