MARK A. SAWYER, Employee, v. SHEEHY CONSTR. and LIBERTY MUT. INS. CO., Employer-Insurer, BOR-SON CONSTR., SELF-INSURED/CRAWFORD & CO., Employer-Insurer/Appellants, DONALD FRANZ CONSTR. and MUT. INS. CORP. OF AM., Employer-Insurer, and ADOLPHSON & PETERSON, INC., SELF-INSURED/GALLAGHER BASSETT SERVS., Employer-Insurer/Cross-Appellants, and MN DEP'T OF ECON. SEC. and TWIN CITIES BRICKLAYERS HEALTH & WELFARE FUND, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 7, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - TEMPORARY AGGRAVATION. Substantial evidence supports the compensation judge's finding that the employee's personal injury on February 9, 1989 at Sheehy Construction was temporary and that no liability was apportionable to that injury.

APPORTIONMENT - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's determination that the employee's admitted injury on June 14, 1996 at Bor-Son Construction was permanent and his apportionment of one-third of the liability for the employee's benefits to that injury.

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert medical opinion, supports the compensation judge's determination that the employee sustained a personal injury to his low back on May 28, 1999 while employed by Adolphson & Peterson.

Affirmed.

Determined by: Johnson, J., Wilson, J., and Rykken, J.
Compensation Judge: Bradley J. Behr

OPINION

THOMAS L. JOHNSON, Judge

Bor-Son Construction, Self-Insured/Crawford & Company (Bor-Son), appeals the compensation judge's finding that the employee's June 14, 1996 injury was a permanent injury and the compensation judge's apportionment of one-third of the liability to that injury. Adolphson & Peterson, Inc., Self-Insured/Gallagher Bassett Services (A&P), cross-appeals the compensation judge's finding that the employee sustained a personal injury on May 28, 1999 and the judge's apportionment of one-third of the liability to that injury. A&P also appeals the compensation judge's finding that the employee's February 9, 1989 injury with Sheehy Construction was temporary. We affirm.

PROCEDURAL HISTORY

The employee filed a claim petition seeking payment of temporary total and temporary partial disability benefits from and after June 1, 1999, together with permanent partial disability benefits and medical expenses. At the hearing, the parties stipulated the employee sustained personal injuries on February 9, 1989, while employed by Sheehy Construction; on June 14, 1996, while working for Bor-Son; on either May 13 or May 28, 1998, while working for Donald Franz Construction; and on May 10, 1999, while working for A&P. The employee also alleged a Gillette injury on May 28, 1999, which was denied by A&P. The parties further stipulated the May 1998 injury at Donald Franz Construction was not a substantial contributing factor to the employee's claimed disability.

In a Findings and Order filed December 13, 2000, the compensation judge found the employee's injury at Sheehy Construction was not a permanent injury and apportioned no liability to that injury. A&P appeals this finding. The judge found the Bor-Son injury on June 14, 1996 was a permanent injury and apportioned one-third of the liability for benefits to that injury. Bor-Son appeals this finding. In an unappealed finding, the compensation judge apportioned one-third of the liability to A&P's admitted injury on May 10, 1999. Finally, the judge found the employee sustained a personal injury at A&P on May 28, 1999 and apportioned one-third of the liability to that injury. A&P appeals this finding.

BACKGROUND

Mark Sawyer, the employee, was trained as a bricklayer and became a journeyman in 1978. Thereafter, the employee worked exclusively as a bricklayer except for a five-year period from 1980 to 1985. The employee worked for various contractors doing primarily commercial work. (T. 29-31.) He testified he had low back pain in 1983 for which he sought treatment in Santa Fe, New Mexico. (T. 32-33.) In 1985, the employee returned to the Twin Cities and went to work for Sheehy Construction. On September 28, 1988, the employee saw Keith Johnson, D.C., complaining of low back pain with numbness in the left leg. On examination, Dr. Johnson noted some limitation of lumbar extension and muscle spasm. The employee apparently was off work for several days. Dr. Johnson provided 15 chiropractic treatments from September through December 5, 1998. (Pet. Ex. L.)

The employee sustained an admitted injury to his low back on February 9, 1989, while working for Sheehy and returned to Dr. Johnson on February 10, 1989. He reported an immediate onset of right-sided low back pain with weakness into the right thigh while lifting a concrete cap stone weighing from 130 to 140 pounds. On examination, the doctor found limited range of motion and muscle spasm with a normal neurological examination. The employee received eight treatments from Dr. Johnson from February 10 to February 27, 1989. Dr. Johnson released the employee to return to work on February 13, 1989 with a twenty-pound lifting restriction. (Pet. Ex. L.)

The employee testified that time and the treatments from Dr. Johnson improved his low back symptoms. Eventually, he returned to work for Sheehy doing all of his previous duties including brick and block work. From the spring of 1989 until June 13, 1996, the employee worked

for various contractors doing brick and block work. He testified he had no physical difficulties performing the regular duties of his job and did not recall seeking any medical treatment for low back problems during this period. (T. 42-44.)

On June 14, 1996, the employee was working for Bor-Son when he sustained an admitted personal injury to his low back. The employee testified he lifted a heavy, awkward block and felt a spasm or a "tearing" in his back. He left work and sought medical care at the Buffalo Hospital Emergency Room. (T. 45-46.) The employee complained of moderate to severe lower left lumbar pain. On examination, Dr. Groshens noted mild tenderness of the left lower lumbar muscles, but straight leg raising was negative without radicular pain. The doctor diagnosed low back pain, probably muscular, and prescribed Flexeril. Dr. Groshens took the employee off work on June 15 and released him to return to work without limitations on June 17, 1996. (Pet. Ex. K.)

The employee testified he returned to a light-duty job at Bor-Son which he described as rubbing walls. He testified he worked for two or three more weeks at this light-duty job and then left Bor-Son's employ. The employee did not recall returning to block work with Bor-Son after his injury. (T. 48-49.) The employee's payroll records reflect he worked for Bor-Son through the week ending September 20, 1996. (Bor-Son Ex. 3.) Ricky Morris was the employee's supervisor at Bor-Son. He testified it was possible the employee did work rubbing walls for up to a week after his injury. The employee, however, could not have done this light-duty job during his last 14 weeks with Bor-Son because there was not that amount of work to do on that particular project. Rather, Mr. Morris testified the employee would have returned to his regular duties laying block or brick after about one week rubbing walls. (T. 156-159.)

On August 26, 1996, the employee sought treatment at Brennen Chiropractic Health Center complaining of left-sided low back pain without radiation. He gave a history of symptoms on approximately July 4, 1996, while laying block at work with a recent onset on August 24 with no particular cause. Dr. Brennen diagnosed lumbar sprain/strain with muscle spasm and commenced a course of chiropractic treatment. By report dated May 29, 1997, Dr. Brennen noted the employee had not reached maximum medical improvement but stated the employee discontinued care effective March 20, 1997. The employee returned to see Dr. Brennen on June 12, 1997, stating that his back had been doing well until recently when his low back began to hurt at work. (Pet. Ex. J.)

In October 1997, Bor-Son retained John Samuelson & Associates, Inc. to conduct surveillance of the employee. The employee was observed on October 14, 20, 21, 22, 28 and 29, 1997, and Mr. Samuelson prepared a report summarizing the observations of the employee on those dates. The employee was videotaped on October 21, 22, 28 and 29, 1997. On each of those dates, the employee was working as a bricklayer for Mikkelson, Wulff Construction Company in Plymouth, Minnesota. The investigation firm obtained nine hours and 43 minutes of videotape of the employee at the job site, which was edited down to approximately 45 minutes. (Bor-Son Ex. 2.) The videotape shows the employee entering and exiting his vehicle at the job site, lifting and carrying blocks, bricks, tools and construction material, spreading mortar, laying blocks and bricks, climbing scaffolding and walking. The videotape shows the employee bending from the waist, twisting and turning as he laid blocks and bricks. (Bor-Son Ex. 5.)

On May 13, 1998, the employee sustained an admitted low back injury while working for Donald Franz Construction (Franz). The employee returned to see Dr. Brennen on June 1, 1998, complaining of an onset of low back pain subsequent to heavy lifting at work. Dr. Brennen treated the employee on six occasions. By July 22, 1998, the doctor noted the employee was feeling pretty good with definite improvement. (Pet. Ex. J.) The employee recalled missing only one day at work as a result of his injury. He testified the treatment with Dr. Brennen helped improve his condition and he was able to perform all of his work duties for Franz. (T. 54-55.)

The employee next went to work for A&P in November 1998 doing primarily brick work and some block work. Prior to May 10, 1999, the employee described his back as fatigued and weakening. (T. 58.) On May 10, 1999, the employee sustained an admitted injury to his low back at A&P. The employee returned to see Dr. Brennen, and gave a history of low back pain while moving concrete block at work. The doctor took the employee off work for two days and instituted a regimen of chiropractic treatment. On May 12, 1999, the doctor released the employee to return to work with restrictions on lifting, bending and twisting. The employee returned to work for A&P rubbing walls for two days and then was transferred to a job laying brick.

On Friday, May 28, 1999, the employee testified he laid brick most of the morning. In the afternoon, the employee said he was raising and lowering a scaffold with a ratchet for about an hour and a half. At the end of that time, the employee described his back as "red hot, very inflamed, very fatigued." On Saturday morning, the employee stated his back felt the same. Later that day, a friend brought a Bobcat to the employee's house to grade a small hill. The employee's friend unloaded the Bobcat, did the landscaping for the employee and then removed some debris from near his garage. The employee stated he watched his friend perform all of this activity but did help him load a piece of wood into the bucket of the Bobcat. The employee testified that as he squatted down to push the wood into the bucket, he again felt low back pain. (T. 65-69.) The following Monday was Memorial Day and the employee did not work. On Tuesday, June 1, 1999, the employee called A&P to tell them his back had gone out due to the work he did on Friday. (T. 71.)

The employee returned to see Dr. Brennen on June 1, 1999, and gave a history of reaggravating his back while jacking up scaffolding at work. The doctor treated the employee on three occasions. (Pet. Ex. J.) On June 7, 1999, the employee saw Dr. Mark Houghland at the Buffalo Clinic complaining of low back pain. The employee reported no specific injury that led to his symptoms. The doctor diagnosed a musculoskeletal injury and prescribed physical therapy. (Pet. Ex. F.) The employee saw Dennis Lundquist, a physical therapist at NovaCare, on June 8, 1999. The employee told Mr. Lundquist he sustained a low back injury on May 12, 1999, while helping a brick tender. A course of physical therapy was commenced. (Pet. Ex. H.) The employee returned to see Dr. Houghland on June 21, and the doctor recommended an orthopedic consultation. (Pet. Ex. F.)

The employee saw Dr. David Fey, an orthopedic surgeon, on June 29, 1999. The doctor recorded a three-week history of low back pain with tingling and numbness along the left thigh. The employee reported incapacitating low back pain twice in May, the last time at the end of May. Dr. Fey diagnosed recurrent low back pain with potential left lower leg radiculopathy and

recommended continuing physical therapy. On July 26, 1999, the doctor released the employee to return to work with a thirty-pound lifting restriction for one month. The employee returned to see Dr. Fey on September 16 with continuing complaints of low back and left leg pain. The doctor ordered an MRI scan which showed a disc protrusion at L4-5 abutting the right L4 nerve root, a disc protrusion at L5-S1 which appeared to impinge on the left S1 nerve root and some arthropathy at the L5-S1 facet. On December 30, 1999, the employee complained to Dr. Fey of low back pain particularly with lifting. (Pet. Ex. G.)

The employee filed a claim petition seeking temporary total and temporary partial disability benefits secondary to injuries with Sheehy, Bor-Son, Franz and A&P. The employee's attorney had his client evaluated by Dr. Robert A. Wengler and each of the employers obtained an independent medical evaluation. Each doctor was presented with a hypothetical question and asked to apportion liability to different injuries. The following chart prepared by counsel for Bor-Son reflects the different medical opinions regarding apportionment and the liability findings of the compensation judge.

Medical Opinion (given in percent)	Pre-1989 condition	1989 injury (Sheehy)	1996 injury (Bor-Son)	1998 injury (Franz)	5/10/99 injury (A&P)	5/28/99 injury (A&P)
Sheehy IME Exhibit 1 - Dr. Thomas	50	0	0	0	25	25
BOR-SON IME Exhibit 4 - Dr. Park	0	0	0	0	100	
Franz IME Exhibit M - Dr. Barnett	50	25	0	0	12.5	12.5
A&P IME Exhibit 1 - Dr. Wicklund	50	25	25	0	0	0
Employee's IME Exhibit D - Dr. Wengler	0	0	0	0	50	50
Compensation Judge	0	0	33.3	0	33.3	33.3

In a Findings and Order filed December 13, 2000, the compensation judge found the employee was totally disabled from June 1, 1999 to August 1, 1999 and temporarily partially disabled thereafter. The compensation judge found the employee sustained permanent injuries on June 14, 1999, May 10, 1999 and May 28, 1999 and apportioned liability for benefits equally among the three injuries. Bor-Son appeals the compensation judge's apportionment to its 1996 injury and A&P cross-appeals the compensation judge's apportionment to a May 28, 1999 injury. A&P also appeals the compensation judge's apportionment of no liability to the 1989 injury with Sheehy.

DECISION

1. Sheehy Injury

The parties stipulated the employee sustained a personal injury to his low back on February 9, 1989, while employed by Sheehy. At issue was whether the injury was temporary or permanent. The compensation judge found this injury was not permanent and concluded that Sheehy and its insurer were not liable for benefits to the employee. A&P cross appeals, arguing the employee had continuing radicular symptoms into his right leg following his 1989 injury. The radicular symptoms continued after 1998, A&P contends, because they are documented by the 1991 MRI scan. The cross-appellant asserts the Sheehy injury is the only one which clearly corresponds with the L5-S1 findings on the 1999 scan.[1] Accordingly, A&P argues the February 1989 injury was permanent and the compensation judge erroneously failed to apportion liability to the injury. We are not persuaded.

Following his February 9, 1989 injury, the employee was off work for only a few days and received eight chiropractic treatments. Thereafter, the employee testified his low back symptoms improved and he returned to work for Sheehy at full duty. The employee received no further medical treatment for his low back until his 1996 injury at Bor-Son. The employee testified he had no physical difficulties performing the regular duties of his job thereafter until his June 13, 1996 injury. Dr. Thomas, Dr. Park and Dr. Wengler all apportioned no liability to the Sheehy injury. Substantial evidence supports the compensation judge's finding, and it is affirmed.

2. Bor-Son Injury

The compensation judge found the employee's admitted injury on June 14, 1996 at Bor-Son was a permanent injury and apportioned one-third of the liability for benefits to that injury. Bor-Son appeals this finding and contends there is insufficient credible evidence to support this finding. Rather, the appellant contends the greater weight of the credible evidence compels a conclusion that the 1996 injury was temporary and non-disabling.

Bor-Son argues the employee's testimony regarding the seriousness of the 1996 injury is contradicted by his medical records. The employee testified he was in significant pain after the Bor-Son injury and was forced to substantially limit his activities both at work and at home. The appellant points out, however, that Dr. Groshens examined the employee on June 14, 1996 and found only mild tenderness of the lumbar muscles. The doctor diagnosed muscular low back pain and released the employee to return to work without restrictions on June 17, 1996. Thereafter, the employee received no further medical treatment until August 26, 1996. He then saw Dr. Brennen and gave a history of symptoms on approximately July 4 at work, with a recent onset on August 24, 1996 with no particular cause. The appellant asserts the employee's medical records directly contradict his trial testimony. Accordingly, Bor-Son contends the compensation judge improperly relied on the employee's testimony to find a permanent injury in June 1996.

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[1] Presumably, A&P means the L4-5 disc protrusion abutting the right L4 nerve root. The L5-S1 disc protrusion impinged on the left L5-S1 nerve root. (See Pet. Ex. 6.)

Bor-Son further argues the employee's trial testimony regarding the physical effects of the 1996 injury is inconsistent and contradicted by other credible evidence. The employee testified he returned to light-duty work for about two or three weeks after his injury and then left Bor-Son. Bor-Son's payroll records, however, reflect the employee continued working for Bor-Son until September 20, 1996. Ricky Morris, the employee's supervisor, testified the employee did light-duty work for no more than a week after his injury and then returned to his regular duties laying block or brick. Further, the appellant argues the videotape, Exhibit 5, shows the employee doing block work without any physical problems in October 1996.

The evidence concerning the nature and extent of the employee's condition and ability to work after his June 14 injury is conflicting. The compensation judge concluded the employee was mistaken as to when he returned to light-duty work at Bor-Son, noting that Dr. Brennen first assigned that restriction on August 28, 1996. The judge, however, concluded the employee was essentially correct regarding the length of his light-duty assignment. (Memo at p. 7.) When he saw Dr. Brennen on August 26, 1996, the employee reported a history of a work injury on approximately July 4, 1996. The compensation judge concluded this was a mistaken reference to the June 14, 1996 injury. (Memo at p. 7.) The compensation judge further concluded the videotape, Bor-Son Exhibit 5, showed the employee's pace in certain motions were somewhat slow and deliberate, particularly when descending the scaffolding. These are reasonable conclusions to be drawn from conflicting evidence. Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988).

The compensation judge observed the employee was not always the best historian, but found the employee was a credible witness. (Finding 4.) "Assessment of witness credibility is the unique function of the factfinder." Tews v. Geo. A. Hormel & Co., 430 N.W.2d 178, 180, 41 W.C.D. 410, 412 (Minn. 1988). We acknowledge there are inconsistencies in the employee's testimony. However, the weight to be given the employee's testimony is a matter for the trier of fact and this court will not reverse a compensation judge's determination in the absence of clear error. Our review of the record does not compel a conclusion that the compensation judge's finding of credibility was clearly erroneous.

The compensation judge relied on Dr. Wicklund's opinion apportioning liability to the June 1996 injury with Bor-Son. (A&P Ex. 1.) Bor-Son, however, contends Dr. Wicklund's opinions lack foundation and contend the compensation judge could not reasonably rely upon them. The appellant argues Dr. Wicklund relied on false, inconsistent and uncorroborated information and was provided an inaccurate hypothetical question. Specifically, appellant asserts Dr. Wicklund's apportionment to the Bor-Son injury assumed the employee had been disabled from work following his Bor-Son injury and that he had numbness and tingling in his leg since that injury. These assumptions, Bor-Son contends, are unsupported by the evidence. Further, Dr. Wicklund was apparently unaware the employee returned to full-duty work laying block after the Bor-Son injury. For these reasons, they contend the compensation judge's reliance on Dr. Wicklund's opinion was legally erroneous and the compensation judge's apportionment against Bor-Son must be reversed.

Dr. Wicklund's deposition was taken on October 17, 2000. In the deposition, the doctor was given a hypothetical question propounded by counsel for A&P. We have carefully reviewed that hypothetical question and find it essentially consistent with the employee's testimony at the hearing regarding the nature and effects of his injury at Bor-Son. In any event, Bor-Son participated in the deposition and had full opportunity to propound different hypothetical questions to Dr. Wicklund. In fact, in response to questions by Bor-Son's counsel, Dr. Wicklund testified his apportionment opinion would not change whether or not the employee missed time from work following the Bor-Son injury. (A&P Ex. 1, p. 36-37.) We cannot conclude Dr. Wicklund's opinion lacked foundation. Rather, given the number of injuries and the conflicting testimony, the question is ultimately which medical opinion the compensation judge chose to adopt. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). The compensation judge's apportionment of liability to the 1996 Bor-Son injury is supported by substantial evidence and is, therefore, affirmed.

We acknowledge there is evidence in the record to support Bor-Son's position that its work injury was not a substantial contributing cause of the employee's disability. Under 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. Findings of fact are not to be disturbed unless they are manifestly contrary to the weight of the evidence or not supported by evidence that a reasonable mind might accept as adequate. 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.

3. May 28, 1999 A&P Injury

The compensation judge found the employee sustained a personal injury on May 28, 1999. The cross-appellant contends the employee had only one injury at A&P, not two. A&P argues the employee's work on May 28 was not so strenuous as to cause a new injury. In any event, there was no significant change in the employee's condition after May 28, 1999. Accordingly, A&P contends the compensation judge's finding of an injury on May 28 is legally erroneous and must be reversed. We are not persuaded.

The employee testified he was raising and lowering a scaffold using a rachet for about an hour and a half on May 28, 1999. Thereafter, the employee stated his back was very sore. On Tuesday, June 1, 1999, the employee saw Dr. Brennen and gave the doctor a history of the incident on May 28. Drs. Thomas, Barnett, and Wengler all opined the employee sustained a personal injury on May 28, 1999 and each doctor apportioned varying percentages of responsibility to that injury. We conclude there is substantial evidence of record supporting the compensation judge's finding, and it is affirmed.