JEROME SCHREIER, Employee, v. BRUNING CONSTR. and GRINNELL MUT. REINSURANCE CO., Employer-Insurer/Appellants, and BLUE CROSS/BLUE SHIELD OF MINN., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 27, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION. Substantial evidence supports the compensation judge's finding that the employee's low back disc herniation was medically causally related to the employee's work injury.

ARISING OUT OF & IN THE COURSE OF - Substantial evidence supports the compensation judge's award of workers' compensation benefits where the employee was on the employer's premises, during work hours, performing work-related activities when he experienced a popping noise in his low back and began to experience pain, and was later diagnosed with a disc herniation and treated with surgery. Medical records and the employee's testimony support the conclusion that the incident was work-related where the employee's work activities included lifting and carrying windows shortly before the incident.

Affirmed.

Determined by Rykken, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Peggy A. Brenden

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal the compensation judge's finding that the employee's lumbar disc herniation was medically causally related to the employee's injury and that the low back injury arose out of his employment with the employer. We affirm.

BACKGROUND

On June 23, 1999, Jerome Schreier, the employee, was working as a construction worker for Bruning Construction, the employer, which was insured for workers' compensation liability in the state of Minnesota by Grinnell Mutual Reinsurance Company, the insurer. The employee was 32 years old at the time, and earned a weekly wage of $461.49. On that date, the employee installed windows on a five-level building. The employee was required to carry fire windows and frames weighing between 20 and 40 pounds, up two flights of stairs. While walking up a flight of stairs, at a time when he was not carrying windows, the employee experienced a popping sensation and sound in his back and he felt some low back pain. A co-worker who was walking near the employee testified that he heard a "popping sound" while he and the employee

walked up the stairs. (Ee Ex. F.) The employee continued working, and did not seek treatment until June 28, 1999, when he was treated by his chiropractor, Dr. Kevin Evans, for pain in his low back and leg. The employee reported constant moderately severe restricted movement as well as dull and sharp pain in his low back. The employee continued to work, and Dr. Evans told him to limit bending and twisting. On July 19, 1999, Dr. Evans took the employee off work. The employee completed a "Workers' Compensation Questionnaire" on July 20, 1999, in which he stated "I was going up the steps at Shalom Hills Farm and I felt something in my low back feel like it moved and got a burning sensation there." (Er. Ex. 6.) The employer also filed a first report of injury on July 20, 1999, for a back injury sustained on June 23, 1999. Thereafter, the employer and insurer denied primary liability for that claimed injury. On August 2, 1999, the employer and insurer filed another first report of injury indicating that the employee reported an injury with pain in his left hip and left leg.

On August 24, 1999, Dr. Evans referred the employee to Dr. Walter Carlson, orthopedic specialist. Dr. Carlson examined the employee on August 27, 1999. He referred the employee for an MRI of the lumbar spine, which was conducted on August 30, 1999, and which indicated a moderate-sized central and left paracentral disc herniation at L4-5 with compromise of the left L5 nerve rootlet. On August 31, 1999, the employee underwent a microdiscectomy at the L4-5 level on the left, performed by Dr. Carlson. That surgery initially improved the employee's symptoms. He had recurrent symptoms and underwent another MRI on October 25, 1999, which indicated no recurrent disc herniation, and a discogram which indicated concordant pain at L4-5. The employee was referred to physical therapy and later was treated with epidural steroid injections. By October 18, 1999, Dr. Carlson released the employee to return to work with limitations of no bending, lifting or twisting. The employee was eventually able to return to his regular job duties.

On November 19, 1999, the employee filed a claim petition for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, and medical treatment expenses. The employer and insurer denied that the employee sustained an injury arising out his employment. Blue Cross and Blue Shield intervened for medical expenses paid. On March 31, 2000, the employee was examined by Dr. Jack Drogt at the employer and insurer's request. Dr. Drogt recorded the following history of the employee's injury: On June 23, 1999, "he and a co-worker were installing windows . . . . In the course of his duties of lifting and carrying windows up a stairway, he noted the onset of low back pain. Initially he had low back pain only. However, in the ensuing two weeks he developed left low back discomfort radiating into the left buttock that shortly thereafter radiated down the leg into the foot and ankle." Dr. Drogt noted the employee's pre-existing back problems and prior chiropractic treatments; the employee had treated with his chiropractor for low back pain periodically since 1993. Dr. Drogt concluded that the employee had sustained a work-related injury to his low back on June 23, 1999.

A hearing was held on December 13, 2000. One of the issues at the hearing was whether the employee was carrying a window at the time that he heard the popping sound in his back. The compensation judge found that the employee was not carrying anything at that time. This finding was not appealed. The compensation judge further found that the employee had sustained a herniated disc at the L4-5 level on June 23, 1999, while walking up stairs at the work

site, and that this injury had arose out of the employee's work activity on June 23, 1999. The employer and insurer appeal.

STANDARD OF REVIEW

A decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which the Workers' Compensation Court of Appeals may consider de novo. Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

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 (2000). 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

Medical Causation

The compensation judge found that the employee sustained a herniated disc while walking up stairs on June 23, 1999. The employer and insurer argue that there is no medical evidence to support this finding, claiming that proving a causal connection between a sensation in the employee's back and the occurrence of a herniated disc requires medical support. The employer and insurer argue that the employee may already have had the herniated disc when he first began treating for low back pain, stiffness and soreness in 1993.

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). The compensation judge found that the employee had treated periodically with a chiropractor for episodes of low back pain before his June 23, 1999, work injury, but that he had no disability or permanent injury to his low back before the work injury. Also, the compensation judge found that the employee's back pain worsened during the next few days after June 23, 1999. These findings were not appealed. Dr. Drogt determined that the employee had sustained a work-related injury to his low back on June 23, 1999, after considering the employee's medical history, and noting that the employee had developed low back pain and leg pain with MRI evidence for disc herniation, necessitating subsequent surgical intervention. It is not necessary that a medical expert be able to

pinpoint the exact etiology of a condition for the resulting disability to be compensable. See, Mallick v. McPhillips Brothers Roofing, (W.C.C.A. Aug. 3, 1994) (exact cause of cluster headaches not required for finding of causal relationship) (citing Pommeranz v. State, Dep't of Public Welfare, 261 N.W.2d 90, 30 W.C.D. 174 (Minn. 1997)). Substantial evidence supports the compensation judge's finding that the employee sustained a herniated disc while walking up stairs at a work site on June 23, 1999. Accordingly, we affirm.

Arising out of Employment

A personal injury is defined as an "injury arising out of and in the course of employment." Minn. Stat. § 176.011, subd. 16. The "arising out of" requirement is a causation test. Gibberd v. Control Data Corp., 424 N.W.2d 776, 780, 40 W.C.D. 1040, 1047 (Minn. 1988). For an injury to arise out of the employment, there must be a causal connection between the employment and the injury. Lange v. Minneapolis-St. Paul Metro. Airport Comm'n, 257 Minn. 54, 99 N.W.2d 915, 21 W.C.D. 61 (1959). The requisite causal connection "exists if the employment, by reason of its nature, obligations or incidents may reasonably be found to be the source of the injury-producing hazard." Nelson v. City of St. Paul, 249 Minn. 53, 55, 81 N.W.2d 272, 275, 19 W.C.D. 120, 123 (1957). The burden of proving that a personal injury arose out of the employment is on the employee. Minn. Stat. § 176.021, subd. 1. The issue on appeal is whether the employee sustained that burden.

The primary test for determining whether an injury arises out of the employment in Minnesota is the "increased risk" test, which requires a showing that the "injury was caused by an increased risk to which the claimant, as distinct from the general public, was subjected by his or her employment." See 1 A. Larson and L.K. Larson, Workers' Compensation Law, § 3.00 (1999). The Minnesota Supreme Court has stated, "[t]he 'arising out of' requirement refers to the causal connection between the employment and the injury. This requirement requires a showing of some hazard that increases the employee's exposure to injury beyond that of the general public." Kirchner v. County of Anoka, 339 N.W.2d 908, 911, 36 W.C.D. 335, 337 (Minn. 1983). The injury need not be peculiar to the employment, so long as the injury-producing risk or hazard has its origin or source in the employment. See Larson, § 3.00; Briemhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719, 15 W.C.D. 395 (1949).

In awarding compensation in this case, the compensation judge relied upon Duchene v. Aqua City Irrigation, 58 W.C.D. 223 (W.C.C.A. 1998) ("arising out of" element found to be met where the employee sustained an unexplained knee injury), concluding that the employee's low back condition was a neutral risk, not obviously related to employment nor strictly personal to the employee, but an unexplained accident similar to the injury in Duchene. However, Duchene does not support the unqualified application of a positional risk test in cases which do not involve a truly neutral risk. Bohlin v. St. Louis County/Nopeming Nursing Home, 61 W.C.D. 69 (W.C.C.A. Sept. 20, 2000), summarily aff'd (Minn. Jan. 16, 2001). Whether the requisite causal connection exists between the work activities and the disability is a question of fact. A positional risk test may be appropriate in cases involving a truly neutral risk, such as being struck by lightning, a stray bullet, or a car or the risk of random assault. Bohlin, 61 W.C.D. at 76. Otherwise, the increased risk test is applicable. In Cauwels v. Schott's Inc., 61 W.C.D. 285 (W.C.C.A. 2001), this court stated that the risk or hazard of a rotator cuff tear was not neutral. Similarly, the risk of

a disc herniation in this case is not neutral. Therefore, the issue in this case is whether the employee met the increased risk test.

The "arising out of" and "in the course of" requirements are not independent, but "are elements of 'a single test of work-connection.'" United Fire & Casualty. Co., 510 N.W.2d 241, 243 (Minn. Ct. App. 1994) (citing A. Larson, Workmen's Compensation for Occupational Injuries & Death, § 29.00 (1993)). A certain minimum level of work-connection must be established. "[I]f the "course" test is weak but the "arising" test is strong, the necessary minimum quantum of work-connection will be met, as it is also if the "arising" test is weak and the "course" factor is strong. But if both the "course" and "arising" elements are weak, the minimum connection to the employment will not be met." Cauwels, 61 W.C.D. at 290-91 (citing Larson, § 29.01). In this case, the employee was on the employer's work site, during work hours, performing work activities at the time he heard the popping noise in his back and he began to feel pain. Therefore, the employee was "in the course of" his employment at that time. Dr. Drogt concluded that the employee had sustained a work-related injury on June 23, 1999, while performing work activities of lifting and carrying windows up stairs. The fact that the employee was not carrying a window at the moment that he heard the popping noise in his back does not negate that the employee had been involved in strenuous work activity including lifting and carrying the windows up the stairs shortly before the disc herniation occurred. Sufficient evidence supports the conclusion that the employee's work injury "arose out of" the employee's work activity and that the minimum level of work-connection has been met. Accordingly, we affirm.