

JOEY D. STREICH, Employee/Appellant, v. FED. EXPRESS CORP., SELF-INSURED/SEDGWICK JAMES, Employer, and HEALTHSYSTEM MINN., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 17, 2001

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE. Where the employer's attorney, at the hearing, solely raised the defense of causal relationship for medical and chiropractic expenses incurred before the independent medical examination, the compensation judge's finding that chiropractic expenses incurred before that date were unreasonable and unnecessary must be vacated. Since the compensation judge found that those expenses were causally related to the work injury, the denial of those expenses must be reversed.

CAUSATION-AGGRAVATION. Substantial evidence supports the compensation judge's finding that the employee had sustained a temporary aggravation as a result of his 1998 work injury, not a permanent injury.

PERMANENT PARTIAL DISABILITY. Substantial evidence supports the compensation judge's finding that the employee had not sustained any permanent partial disability as a result of his 1998 work injury.

Affirmed. in part, vacated in part, and reversed in part.

Determined by: Rykken, J., Wheeler, C.J., and Johnson, J.
Compensation Judge: Gary M. Hall.

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals the compensation judge's denial of chiropractic expenses and permanent partial disability benefits, and the compensation judge's finding that the employee's 1998 work injury was a temporary aggravation. We affirm in part, vacate in part and reverse in part.

BACKGROUND

On August 18, 1998, Joey Streich, the employee, injured his low back lifting a heavy box while working for Federal Express Corporation, the self-insured employer. The employee was twenty-nine years old at the time. He was working approximately 24 hours per week as a handler for the self-insured employer and also was working full-time as a school and charter bus driver for Septran, Inc.

The employee delayed reporting the injury to the employer until approximately September 8, 1998. (T. 37, 156.) On September 9, 1998, the employee first sought treatment from Dr. Tim Fargo, D.C. After the employee reported the injury, the employee's night manager referred the employee to the Airport Clinic. He initially treated with Dr. Thomas Haas at the Airport Clinic on September 29, 1998. The employee reported low back pain with mild right leg radiculitis. Dr. Haas assigned physical work restrictions of lighter lifting, no reaching below knee level, and occasional bending and twisting. The employer initially provided light duty work, for approximately two months, but denied liability for the injury. The employee returned to the Airport Clinic on October 6, 1998, when he saw Dr. Kevin Wall and reported improvement and some left leg pain. Dr. Wall stated that the employee's intermittent lower extremity symptoms could represent some mild radiculitis, but that they were improving spontaneously. Dr. Wall referred the employee for a short regimen of physical therapy, and assigned continued work restrictions of avoiding significant lifting over 20 pounds, avoiding prolonged twisting and bending at the waist, reaching below knee level or above shoulder height, or prolonged sitting or standing over 4 hours. The employee testified that he did not attend the recommended physical therapy as his workers' compensation claim was denied and he could not afford paying the costs himself. (T. 38.)

In December 1998, the employee was placed on unpaid medical leave, of a nine-months' duration accordingly to company policy, since he was still on work restrictions and since the employer considered the injury to be nonwork-related. The employee had continued working as a bus driver at Septran after his 1998 work injury at Federal Express. On December 15, 1998, Dr. Wall declined to release the employee to return to work without restrictions, even though the employee asked to be taken off restrictions so that he could return to work for the employer. According to Dr. Wall's chart note of December 15, 1998, the employee requested an MRI, which Dr. Wall did not believe was clinically indicated. Dr. Wall also stated that the employee requested another referral to physical therapy, which Dr. Wall resubmitted. (Ee. Ex. E.). In January 1999, the employee began chiropractic treatment with Dr. Jason Wilson, D.C.

The employee has a previous history of back injuries. He reported to his doctors that he had sustained a low back injury in approximately 1992 or 1993 while employed by Metro Mark, Inc., a printing company. He reported missing no time from work, but instead worked light duty and received medical treatment for an unknown period of time. The record contains no medical records documenting this injury.

The employee also suffered a back injury in May 1996 while working at Lacy Construction, and reported primarily neck and upper back pain, but also reported low back pain, middle back pain, right and left arm pain and/or numbness and/or tingling, and headache. At the time he was injured in 1996, the employee was pushing 200 pounds of cement in a wheelbarrow when he hit a dip in the ground with his left foot and twisted his body from his ankle to his neck. The employee apparently continued to work for at least a week, but thereafter was unable to continue working. Following his 1996 injury, the employee initially received chiropractic treatment at the Northwestern College of Chiropractic, and was diagnosed with a thoracic sprain/strain. After this initial chiropractic treatment, the employee treated at the Physician's Neck & Back Clinic beginning in September 1996. The employee testified that he primarily noted numbness and pain radiating into his hands following this injury. The September 3, 1996, report

by Dr. Charles Kelly of the Physician's Neck and Back Clinic lists the employee's chief complaint as being "neck and/or upper back pain," with other complaints being low and middle back pain, pain, numbness and tingling in both arms, and headache. However, the report also states that the employee advised that he "developed low back pain in the sense that the mid-back pain was radiating down to the low lumbar region. . . This will occasionally radiate into the buttock." Dr. Kelly diagnosed the employee has having a cervical strain, mechanical low back pain, deconditioning syndrome and thoracic strain. (Ee. Ex. F.) The employee underwent 22 physical therapy treatments and was released to return work by September 24, 1996, within physical work restrictions. In September 1996, the employee began working as a bus driver for Septran. By October 14, 1996, the employee had been released to work without restrictions. A January 2, 1997, discharge note by Dr. Kelly states that the employee had reached maximum medical improvement and had sustained no permanent impairment associated with the employee's cervical or lumbar areas.

On May 6, 1999, the employee filed a claim petition, alleging an injury of August 18, 1998, and claiming entitlement to temporary partial disability benefits since September 19, 1998; an indeterminate amount of permanent partial disability benefits; payment of medical and chiropractic expenses; and provision of a rehabilitation consultation. The employee later amended his claim petition to claim a weekly wage of \$613.21 earned from his two jobs.

In July 1999, Dr. Wilson referred the employee to Dr. Timothy Garvey at the Twin Cities Spine Center. Dr. Garvey diagnosed a herniated disc most likely at the L5-S1 level with left leg radiculopathy, and recommended an MRI. The employee testified that he did not undergo an MRI at that time, since payment for medical expenses had been denied by the self-insured employer. (T. 50.)

On August 3, 1999, the employee underwent a medical evaluation with Dr. David Boxall at the request of the self-insured employer. The employee reported current symptoms of left-sided low back pain, left leg pain, numbness in the posterior left thigh, occasional lateral left ankle symptoms, and some weakness in the left leg. The employee reported to Dr. Boxall that at that time he was lifting weights up to three times a week, pressing up to 130 pounds, and performing daily workouts which could include weight lifting, shoulder machines, pull-ups, back strengthening, leg workouts and cardiovascular strengthening on a recumbent bicycle and arm bicycle. Dr. Boxall determined that the employee's August 1998 injury with subsequent radicular complaints were suggestive of a disc herniation, but that since the employee's lumbar spine examination was objectively "entirely normal" and since the employee was capable of lifting weights three times a week up to 130 pounds, that injury was temporary in nature and had resolved. Dr. Boxall also determined that the employee had reached maximum medical improvement from all injuries to his low back area as of August 3, 1999, had sustained no permanent partial disability as a result of his August 18, 1998, injury, and had no restrictions on his activities at home or on the job as a result of that injury. Dr. Boxall made no specific determination in this report concerning the reasonableness or necessity of medical or chiropractic treatment already received by the employee. In his report, Dr. Boxall provided his opinion concerning the need for future treatment, stating as follows:

RECOMMENDATIONS FOR TREATMENT: At this time I have no further suggestions for treatment. He is managing well, is very active in a strengthening, cardiovascular, conditioning and weight lifting program. Specifically, I do not see a need for further formalized ongoing therapy as would be provided by a physical therapist or chiropractor.

(Resp. Ex. 1.)

On October 29, 1999, Dr. Wilson opined that the employee had sustained a 10 percent permanent partial disability of the body as a whole as a result of his August 18, 1998, injury.¹ Dr. Wilson also stated that the employee had reached maximum medical improvement from his August 18, 1998, injury by August 9, 1999.

On December 4, 1999, the employee was involved in a motor vehicle accident and afterwards reported upper back and neck symptoms as well as low back pain. The employee continued his chiropractic treatment with Dr. Wilson after this accident. On January 13, 2000, the employee underwent a lumbar MRI which indicated a small right posterolateral disc herniation causing mild impingement on the right S1 nerve but no left-sided nerve root compression at this level. On February 8, 2000, the employee complained of shooting pain in his left leg, headache, and tightness in his upper back. On February 22, the employee reported left-sided neck pain, and pain in his mid-and lower back. (Resp. Ex. 6.) In March 2000, Dr. Boxall reviewed the employee's subsequent medical records, and indicated that his opinion remained unchanged, emphasizing that the January 13, 2000, MRI revealed no explanation for the employee's left leg symptoms.

A hearing was held on March 8, 2000. The issues at the hearing included whether the alleged August 18, 1998 injury arose out of and in the course of employment; the nature and extent of any injury that occurred on August 18, 1998; a claim for temporary partial disability benefits from December 1, 1998, and continuing; whether the employee has reached maximum medical improvement from the alleged August 18, 1998, injury; a claim for 10 percent permanent partial disability benefits; calculation of the employee's weekly wage on the date of injury; the reasonableness, necessity and causal relationship of disputed medical treatment; reimbursement of medical expenses paid by intervenor, HealthSystem Minnesota; and a claim for a QRC consultation.

The compensation judge found that the employee had sustained a work-related injury to his low back on August 18, 1998, but the injury was a temporary aggravation of a preexisting low back condition which resolved by August 3, 1999. The compensation judge found that the employee earned an average weekly wage of \$474.25 on August 18, 1998, based on his earnings at Federal Express and Septran. The compensation judge denied temporary partial disability benefits, permanent partial disability benefits, and a rehabilitation consultation. The compensation judge found that the disputed medical treatment before August 4, 1999, was reasonable, necessary, and causally related to the August 18, 1998 injury, but that the chiropractic

¹Dr. Wilson's Health Care Provider Report does not specify on which section of the permanency schedules he bases this 10% rating.

treatment provided by Dr. Wilson at Urban Chiropractic before August 4, 1999 was unreasonable and unnecessary, even though causally related to the 1998 injury. The compensation judge found that treatment after the August 3, 1999, examination by Dr. Boxall was not causally related to the 1998 injury.

The employee appeals the finding that the 1998 injury was a temporary aggravation, the denial of chiropractic treatment expenses for treatment before August 4, 1999, and the denial of permanent partial disability benefits.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1998). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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

Chiropractic Expenses

The compensation judge found that the chiropractic treatment provided by Dr. Wilson before August 4, 1999, was causally related to the August 18, 1998 injury, but was unreasonable and unnecessary. The employee argues that the reasonableness and necessity of chiropractic treatment before Dr. Boxall's examination on August 3, 1999 was not at issue since the parties stipulated at the hearing that the only defense to those expenses was lack of causal relationship to the injury. By contrast, the employer claims that the only stipulation made at the hearing was the employee's weekly wage while working for Federal Express. The transcript states:

THE COURT: Also off the record we set out the issues we're going to deal with today so I'm going to read those into the record as well. Issue 1, did the alleged August 18, 1998 injury arise out of and in the course of employment.

No. 2, is the employee entitled to temporary partial disability benefits from December 1, 1998, and continuing.

No. 3, is the employee entitled to 10 per cent permanent partial disability benefits.

No. 4, what was the employee's average weekly wage on the date of injury.

No. 5, the nature and extent of any injury that occurred on August 18th of 1998.

No. 6, the reasonableness and necessity of all treatment after the IME report from Dr. Boxall. Do you have the date of that report, Ms. Cajacob?

MS. CAJACOB: August 3, 1999.

THE COURT: No. 7, is the intervenor entitled to reimbursement. And No. 8, is the employee entitled to a QRC consultation. Are there any corrections or additions to that?

MR. ROBICHAUD: Maybe just a clarification that we're seeking all the medical expenses that are outstanding, Twin City Spine Center, Urban Chiropractic, the bill at CDI, and Chiropractic Health & Wellness.

THE COURT: Okay.

MR. ROBICHAUD: So even though I think most of them haven't formally intervened.

THE COURT: Okay. But all of those bills are after the IME?

MR. ROBICHAUD: No, no, most of them are before the IME.

THE COURT: Okay. Is there a defense to the ones before the IME or are we - -

MS. CAJACOB: It would just be causal relation to an injury.

MR. ROBICHAUD: A primary denial. So I think it would be - -

THE COURT: For the primary denial.

MR. ROBICHAUD: Yeah. If you find the injury then I think all the - - you'd find that all the medical expenses up until the IME are reasonable and necessary.

THE COURT: And are we in agreement that due to the primary denial the treatment parameters don't apply here?

MR. ROBICHAUD: Right.

MS. CAJACOB: Right.

THE COURT: Okay.

MS. CAJACOB: But reductions to the fee schedule would apply.

THE COURT: Right. Okay.

MR. ROBICHAUD: Plus interest.

(T. 8-10.) (Emphasis added.)

The employer claims that the attorney's response that it would "just be causal relation" was a reference that Dr. Boxall's opinion only provided a defense on the issues of reasonableness and necessity of treatments received subsequent to his examination, and was not a stipulation that prior to that time the treatment was reasonable and necessary. We disagree. In response to a specific question by the compensation judge, the employer solely raised the defense of causal relationship relative to the treatment before August 3, 1999, and not the defense on the issues of reasonableness and necessity of the chiropractic treatment.

The compensation judge may make a determination of each contested issue of fact or law, but may not resolve matters not at issue. Minn. R. 1415.3000, subp. 2.E; see also Carroll v. Honeywell, Inc., No. [REDACTED SSN] (W.C.C.A. Mar. 31, 1992). In this case, the employer did not contest the reasonableness and necessity of treatment before August 3, 1999.² Therefore, we vacate the compensation judge's finding that the chiropractic treatment before August 3, 1999, was unreasonable and unnecessary to cure or relieve the effects of the employee's August 18, 1998 injury. Since the compensation judge found that the treatment was causally related to the 1998 work injury, we reverse the compensation judge's denial of expenses for this treatment.

Temporary Aggravation

The employee also appeals the compensation judge's finding that the employee's 1998 work injury was a temporary aggravation, arguing that substantial evidence does not support this finding and that the employee suffered a permanent injury. Several factors may be considered when determining whether an aggravation of a pre-existing condition is temporary or permanent, including: (1) the nature and severity of the pre-existing condition and the extent of restrictions and disability resulting therefrom; (2) the nature of the symptoms and extent of medical treatment prior to the aggravating incident; (3) the nature and severity of the aggravating incident and the extent of restrictions and disability resulting therefrom; (4) the nature of the symptoms and extent of medical treatment following the aggravating incident; (5) the nature and extent of the employee's work duties and non-work activities during the relevant period; and (6) medical opinions on the issue. "Which of these factors are significant in a particular case and the weight to be given to any factor is generally a question of fact for the compensation judge." Wold v. Olinger Trucking, Inc., No. [REDACTED SSN] (W.C.C.A. Aug. 29, 1994).

The employee argues that the 1996 injury had resolved, that he was released without restrictions by January 1997, and that the 1998 injury resulted in a herniated lumbar disc. The compensation judge emphasized that the employee had previously sustained a significant back injury in 1996 that twisted his whole body from his ankle to his neck. The compensation judge noted that the employee had reported low back pain with radiation into the buttocks and legs after his 1996 injury. The compensation judge, relying upon Dr. Boxall's opinion, concluded that the employee's 1998 injury was a temporary aggravation which had fully resolved by August 3, 1999, when the employee had resumed most of his recreational activities. Dr. Boxall rendered an opinion that the employee's August 1998 injury with radicular complaints were suggestive of a disc herniation, but that since the employee's lumbar spine examination was objectively normal and since the employee was capable of lifting weights three times a week up to 130 pounds, the injury was temporary in nature and had resolved. Dr. Boxall also determined that the employee had reached maximum medical improvement from all injuries to the low back area as of August 3, 1999, had sustained no permanent partial disability as a result of his August 1998 injury, and had

² In his notice of appeal, the employee also appealed the compensation judge's finding that the disputed medical treatment after August 3, 1999, was not causally related to the August 18, 1998, work injury, but makes no argument in his brief regarding this issue. Issues raised in the notice of appeal but not briefed are deemed waived. Minn. R. 9800.0900, subp. 1. Therefore, this issue is waived and will not be addressed.

no physical work restrictions as a result of that injury. We see no defect in Dr. Boxall's understanding of the employee's condition or history that would require rejection of his opinion. Because the record as a whole, in particular the opinion of Dr. Boxall, supports the compensation judge's decision that the August 18, 1998, injury was a temporary aggravation of the employee's pre-existing low back condition, we affirm his decision on this issue.

Permanent Partial Disability

The employee also argues that the compensation judge erred by denying the employee's claim for permanent partial disability for a herniated lumbar disc. The employee claims that the compensation judge ignored uncontroverted medical testimony that the employee sustained a herniated disc.

In his report dated October 29, 1999, Dr. Jason Wilson, D.C., assigned a permanency rating of 10% permanent partial disability of the body as a whole, although he did not cite the permanency rules on which he based that rating. (Ee. Ex. B.) In a Health Care Provider Report dated May 1999, Dr. Tim Fargo, D.C., who first examined the employee on September 9, 1998, stated that the employee sustained no permanent partial disability as a result of his August 18, 1998, injury. (Er. Ex. 3.) Dr. Boxall determined that while the employee had experienced symptoms suggestive of a herniated disc, he had not sustained any permanent partial disability as a result of his 1998 work injury. He assigned a 0% rating pursuant to Minn. R. § 5223.0390, subp. 4.A.³ (Er. Ex. 1.) The compensation judge, stating that he relied upon Dr. Boxall's opinion, found that the employee had not sustained any permanent partial disability as a result of the August 18, 1998, work injury since the employee's condition had fully resolved by August 3, 1999.

As of the time of Dr. Boxall's examination of the employee on August 3, 1999, the employee had not yet undergone an MRI of his lumbar spine, and was only reporting left leg symptoms, even though the employee's medical records indicate that he also experienced right leg symptoms. The employee relies upon the January 13, 2000, MRI taken after his December 1999 motor vehicle accident which indicated a small right sided L5-S1 disc herniation mildly compressing the S1 nerve root. The MRI report stated that there was no left sided nerve root compression. Dr. Boxall reviewed the medical records generated since his examination of the employee on August 3, 1999, including those records generated following the employee's motor vehicle accident on December 4, 1999, and stated that his medical opinions remained unchanged (Er. Ex. 9); he specifically stated that his opinion remained unchanged after reviewing the MRI since it did not reveal any explanation for the employee's left leg symptoms.

³Minn. R. § 5223.0390, subp. 4.A. states as follows:

Subp. 4. Radicular syndromes.

A. Radicular pain or radicular paresthesia, as defined in part 5223.0310, subparts 43 and 44, with or without lumbar pain syndrome, not substantiated by persistent objective clinical findings, regardless of radiographic findings, zero percent.

The compensation judge could reasonably rely upon Dr. Boxall's opinion that the employee had no ratable permanent partial disability related to his 1998 work injury, despite other expert opinion to the contrary. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Substantial evidence supports the compensation judge's finding that the employee had not sustained any permanent partial disability as a result of his 1998 work injury. Accordingly, we affirm.