



### 03/09/93 LISA A. ZITTERKOPF v. REGION I OFFICE

2 NCA 788 (1993) | Cited 0 times | Nebraska Court of Appeals | March 9, 1993

SIEVERS, Chief Judge.

This is an appeal by an employee, Lisa A. Zitterkopf, who contends that the award on rehearing in her favor from the Nebraska Workers' Compensation Court was inadequate in several respects. We are called upon to examine only factual issues. Therefore, the summary of applicable law which we used in *Stock v. Phillips Mfg. Co.*, 1 NCA 2451 (1992), is equally applicable here.

Our review of a workers' compensation case is limited. It is well established that a decision by the Nebraska Workers' Compensation Court after rehearing has the same force and effect as a jury verdict, and findings of fact will not be set aside unless, after reviewing the record in a light most favorable to the successful party, the appellate court determines that those findings are clearly erroneous. *Wiese v. Becton-Dickinson Co.*, 239 Neb. 1033, 480 N.W.2d 156 (1992); *Miller v. Goodyear Tire & Rubber Co.*, 239 Neb. 1014, 480 N.W.2d 162 (1992); *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991); *Omaha Processors v. Bloomquist*, 237 Neb. 223, 465 N.W.2d 731 (1991).

Pursuant to Neb. Rev. Stat. § 48-185, we will not set aside, modify, or reverse a workers' compensation decision if there is sufficient competent evidence in the record to warrant the compensation court's order, judgment, or award. See *Kraft v. Paul Reed Construction & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991). In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991).

1 NCA at 2455.

These legal principles, as a practical matter, mean that one who appeals from the Workers' Compensation Court on factual issues carries a very heavy burden of persuasion at the appellate level. We conclude that affirmance is required except as to the matter of several medical bills.

Much of the evidentiary record before us deals with an alleged injury to Zitterkopf's right knee on October 23, 1990. However, she wisely concedes in her brief that she "has not established a medical cause and effect of her right knee problem." The evidence concerning the right knee fails to establish causation, and therefore, we need not deal any further with the knee injury.



## 03/09/93 LISA A. ZITTERKOPF v. REGION I OFFICE

2 NCA 788 (1993) | Cited 0 times | Nebraska Court of Appeals | March 9, 1993

Zitterkopf, who was working in a residential setting with mentally retarded clients on behalf of the Region I Office of Mental Retardation, claims to have injured her lower back when lifting a client on November 30, 1990. The rehearing panel found that she had sustained a compensable injury to her back as she alleged and awarded her temporary total disability benefits from December 1, 1990, through January 24, 1991. Zitterkopf argues that the Workers' Compensation Court was clearly wrong in terminating temporary total disability benefits after January 24. The question presented is quite straightforward: Is there evidence, when viewed most favorably to the employer as well as with the benefit of every inference reasonably deducible therefrom, that demonstrates her temporary total disability ended on January 24?

The leading case on entitlement to temporary total disability still is *Uzendoski v. City of Fullerton*, 177 Neb. 779, 131 N.W.2d 193 (1964), where the court said that "temporary disability should be paid to the time when it becomes apparent that the employee will get no better or no worse because of the injury." *Id.* at 787, 131 N.W.2d at 198. The court further explained, "Temporary disability contemplates the period the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident." *Id.* at 788, 131 N.W.2d at 199. With that standard for entitlement in mind, we turn to the medical evidence.

Dr. Ernest Beehler, a Scottsbluff neurosurgeon, examined Zitterkopf on January 11, 1991, and authored a report to her family physician about that examination. His findings, as reported, included the following:

back ranges well in all directions . . . I don't see any swelling . . . there was no sciatic foramen tenderness. The DTRs were equal as were sensation and motor function. Straight leg raising was well carried out. She has a little tenderness over the (supra) pubic area. She states that she had some bladder problems that you were aware of. The neurological was really rather negative. . . . The symptoms that she described certainly do not appear to be radicular . . . at this point I do not find any evidence of anything wrong other than the subjective symptoms.

However, due to her complaints, Dr. Beehler ordered simple x rays of the lumbar spine as well as magnetic resonance imaging (MRI), which was completed January 18, 1992. The report on the MRI was normal with "no evidence of bulge or herniation."

Zitterkopf argues that the Workers' Compensation Court must take into account the "To Whom It May Concern" letter of Dr. Beehler dated January 24, 1991, wherein he said that she was "not able to work at the present time due to her low back injury . . . she is still undergoing diagnostic tests at this time." We have previously recited what this same physician wrote 13 days earlier on January 11, 1991, about Zitterkopf, and in that letter, he also suggested a possible bladder infection and performing a pelvic MRI if the lumbar MRI did not reveal anything, which turned out to be the case. The inconsistencies between these two reports, if any, are for consideration by the fact finder, not the appellate court.



### 03/09/93 LISA A. ZITTERKOPF v. REGION I OFFICE

2 NCA 788 (1993) | Cited 0 times | Nebraska Court of Appeals | March 9, 1993

Zitterkopf was seen in April 1991 by Dr. Terry Himes, a Scottsbluff neurologist, and a myelogram and a computerized tomography scan of the sacroiliac joint were then performed. There were minimal findings which neither the radiologist nor Dr. Himes felt correlated in any way with Zitterkopf's symptoms. Dr. Himes also reported at that time that he was convinced that "significant psychological factors are contributing to her ongoing report of pain." The evidence further established that Zitterkopf had been treated for depression and anxiety in 1989 and 1990 prior to her back injury of November 30, 1990. Additionally, Zitterkopf was hospitalized for 13 days in January 1991, the same time Dr. Beehler's reports referred to above, for treatment of depression under the care of a psychiatrist.

Although there is some conflict and uncertainty in the medical evidence, there is sufficient evidence in the record for the Workers' Compensation Court to have concluded that her temporary disability from the November 30, 1990, occurrence did not extend beyond January 24, 1991. The law is clear that an appellate court does not substitute its judgment for that of the Workers' Compensation Court when the record presents conflicting medical testimony. *Gray v. Fuel Economy Contracting Co.*, 236 Neb. 937, 464 N.W.2d 366 (1991). Furthermore, the fact finder may accept or reject an opinion of an expert witness. *Thilking v. Travelers Ins. Co.*, 240 Neb. 248, 482 N.W.2d 548 (1992). Here, the compensation court could find that by January 24, 1991, the evidence was that her condition would not get better or worse. The finding of the Workers' Compensation Court with respect to the length of temporary total disability is not clearly erroneous, and for us to conclude otherwise would require that we ignore the legal principles involving our limited review of factual issues on appeal from the Workers' Compensation Court. Since there is sufficient evidence to support the Conclusion of the Workers' Compensation Court concerning the length of temporary total disability, we affirm that finding.

The Workers' Compensation Court specifically rejected the opinion of a Dr. Magsamen, a Fort Collins, Colorado, physician who saw Zitterkopf on one occasion, that she had sustained a 5-percent permanent partial disability. In rejecting that opinion, the trial court found that none of the treating and examining doctors whom she had seen in Scottsbluff (we count four) assessed any permanency. Although Zitterkopf does not assign this finding as error, it is significant for the next assignment of error, the failure to award vocational rehabilitation.

To receive vocational rehabilitation, an injured employee must establish that the compensable injury makes the employee "entitled to compensation for total or partial disability which is or is likely to be permanent." Neb. Rev. Stat. § 48-162.01(6) (Reissue 1988). In *Snyder v. IBP, Inc.*, 222 Neb. 534, 537-38, 385 N.W.2d 424, 427 (1986), the court stated: "Since the record supports the compensation court's finding that there was no disability after June 10, 1984, there can be no disability which is or is likely to be permanent. There is, therefore, no basis upon which the compensation court might have ordered vocational rehabilitation." This Conclusion from *Snyder* is directly applicable to the denial of vocational rehabilitation in the instant case, and therefore, Zitterkopf's assignment of error in this regard is without merit.



### 03/09/93 LISA A. ZITTERKOPF v. REGION I OFFICE

2 NCA 788 (1993) | Cited 0 times | Nebraska Court of Appeals | March 9, 1993

Finally, Zitterkopf claims error in the failure of the compensation court to order the employer and its workers' compensation insurance carrier to pay three medical bills which were received into evidence. Neb. Rev. Stat. § 48-120 (Cum. Supp. 1992) provides that "the employer shall be liable for all reasonable medical, surgical, and hospital services . . . which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health." In construing that statute, the Nebraska Supreme Court has held: "Where the evidence shows that certain medical and hospital expenses have been incurred by an injured employee, a prima facie case is made out, and in the absence of any showing that the expenses incurred were unreasonable, the proof will be held sufficient." *Schoenrock v. School District of Nebraska City*, 179 Neb. 621, 628, 139 N.W.2d 547, 552 (1966).

The first medical expense at issue is exhibit 19, in the amount of \$134, which is comprised of a \$95 bill from Dr. Beehler for consultation on January 11, 1991, and a \$39 charge for a visit to his office on January 22. The award on rehearing does not specifically address Dr. Beehler's charges, perhaps through inadvertence. In any event, the January 11 bill for \$95 is supported by a lengthy letter of that same date to Zitterkopf's family physician. Although there is historical mention of the knee and examination of it for swelling, it is apparent that Dr. Beehler's services on that date involved examination of Zitterkopf with reference to her complaint of back pain. The statement for the office visit on January 22 shows "diagnosis L.B.P." (low back pain). There is no showing that the charges are unreasonable, and they clearly relate to the back injury, which the Workers' Compensation Court found to be compensable. Therefore, the matter is remanded to the Workers' Compensation Court with directions to order payment of the medical bills shown in exhibit 19.

Zitterkopf next complains of the compensation court's disallowance of Dr. Himes' bill for services of April 1, 1991. That bill is in evidence as exhibit 38 and reflects nerve conduction studies and electromyography on that date with a total charge of \$504.85. Dr. Himes testified in his deposition that he saw Zitterkopf on April 1 at the request of Dr. Beehler for an opinion "regarding her chief complaint of low back pain and pain involving the posterior aspect of her right leg." Dr. Himes' deposition testimony makes it clear that he performed a physical examination which included the lower back and that he "did electrical studies of her back and leg." There was no evidence from either defendant to establish that the charges were unreasonable, and the Workers' Compensation Court's award on rehearing contains no specific findings with reference to this bill.

Given the standard for payment of medical bills in the Workers' Compensation Court from *Shoenrock* and the uncontroverted evidence that a substantial portion of the services were related to the lower back problem, it was clearly error not to order payment of that portion of this bill which related to the compensable back injury. Accordingly, upon remand, the Workers' Compensation Court shall determine the portion of Dr. Himes' April 1, 1991, billing in the amount of \$504.85 contained within exhibit 38 which is attributable to the compensable lower back injury, and order that amount paid by the defendants. In all other respects, the award on rehearing of April 9, 1992, is affirmed.



## **03/09/93 LISA A. ZITTERKOPF v. REGION I OFFICE**

2 NCA 788 (1993) | Cited 0 times | Nebraska Court of Appeals | March 9, 1993

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

