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and communication with each other, because such orders prevented them from speaking to or making any sort of contact with each other. As such, the parties had to rely on their attorneys and the court to act as intermediaries.

Although LaLinda argues that the contentious nature of these proceedings was entirely Jeffrey's fault, the record reveals that both Jeffrey and LaLinda engaged in behavior which contributed to their poor communication and cooperation with each other. Essentially, the record reveals that both parties incurred costly attorney fees because they could not get along with each other and could not reach some sort of agreement on any issue. Based on this evidence, we cannot say that the district court abused its discretion in ordering each party to pay for his or her own attorney fees. We affirm the decision of the district court.

V. CONCLUSION

Upon our review of the record, we find that the district court did not abuse its discretion in its valuation and distribution of the marital estate, in its award of alimony to LaLinda, or in its failure to order Jeffrey to pay LaLinda's attorney fees. Accordingly, we affirm the decision of the district court in its entirety.

AFFIRMED.

RANDALL WISSING, APPELLEE, V.
WALGREEN COMPANY, APPELLANT.
823 N.W.2d 710

Filed November 20, 2012. No. A-12-361.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is no sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Findings of fact made by a compensation court trial judge are not to be disturbed upon appeal to a review panel unless they are clearly wrong, and

if the record contains evidence to substantiate factual conclusions reached by the trial judge, a review panel shall not substitute its view of the facts for that of the trial judge.

3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
4. **Workers' Compensation: Limitations of Actions.** There are two exceptions to the statute of limitations found in Neb. Rev. Stat. § 48-137 (Reissue 2010): (1) where a latent and progressive injury is not discovered within 2 years of the accident which caused the injury and (2) where a material change in condition occurs which necessitates additional medical care and from which an employee suffers increased disability.
5. ____: ____. The 2-year limitations period contained in Neb. Rev. Stat. § 48-137 (Reissue 2010) is tolled when a claimant suffers a latent and progressive injury.
6. ____: ____. Neb. Rev. Stat. § 48-137 (Reissue 2010) will not begin to run until it becomes, or should have become, reasonably apparent to the claimant that a compensable disability was present.
7. ____: ____. If an employee suffers an injury which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, the worker's failure to file a claim or bring suit in time will not defeat his right to recovery, if he gave notice and commenced the action within the statutory period after he learned that a compensable disability resulted from the original accident.
8. **Workers' Compensation: Limitations of Actions: Proof.** The mere fact that an employee does not know the full extent of his injury from a medical standpoint does not make it latent so as to toll the running of the limitations period, particularly where medical facts were reasonably discoverable, and the burden of proving the injury to have been latent and progressive is upon the employee.
9. **Workers' Compensation: Limitations of Actions.** Where an injury is latent and progressive, the period of limitation for workers' compensation benefits begins to run when the true nature thereof is first discovered by the claimant.
10. ____: ____. In the case of a latent injury, the time for commencement of a workers' compensation action is 1 year after the employee obtained knowledge that the accident caused the compensable disability.
11. **Workers' Compensation: Limitations of Actions: Proof.** Where an injury from which a workers' compensation claim arises is latent and progressive, the statute of limitations is tolled until it becomes reasonably apparent, or should have become apparent to the employee, that a compensable disability is present, and the burden of proving the latent and progressive nature of the injury is on the employee.
12. **Workers' Compensation: Limitations of Actions.** Knowledge that there is a compensable disability, and not awareness of the full extent thereof, is the factor which controls in determining when the statute of limitations with respect to a workers' compensation claim begins to run.
13. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.

Appeal from the Workers' Compensation Court. Affirmed.

Jenny L. Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellee.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

INTRODUCTION

Randall Wissing received an award of workers' compensation benefits from his employer, Walgreen Company (Walgreen), after the trial judge found that Wissing's claim for benefits arising out of a work-related accident on January 1, 2007, was not barred by the statute of limitations set forth in Neb. Rev. Stat. § 48-137 (Reissue 2010) because his injury was latent and progressive and therefore the statute of limitations was tolled. That decision was affirmed by the review panel of the Nebraska Workers' Compensation Court, and Walgreen now appeals to this court.

FACTUAL BACKGROUND

Wissing was involved in a work-related accident while employed by Walgreen on January 1, 2007, when he fell from a ladder and injured his right shoulder. On February 15 and July 19, Wissing underwent surgery by Dr. Scott Franssen for a torn rotator cuff and other injuries to his right shoulder. After a course of physical therapy, Wissing was given a permanent impairment rating of 15 percent on March 19, 2008. Dr. Franssen told Wissing that he would continue to have some shoulder pain, and on November 4, he wrote that Wissing would likely develop posttraumatic osteoarthritis, which can lead to ongoing pain and dysfunction. Walgreen paid all medical bills relating to the shoulder injury associated with the January 1, 2007, accident. The last payment was received by Wissing on April 30, 2008.

Wissing continued to experience pain of the same level, as Dr. Franssen indicated he would, until late July and early August 2010, when the pain increased substantially to the point where it was impossible for Wissing to sleep at night. On August 24, Wissing returned to Dr. Franssen to let him know he was experiencing an increase in pain over and above what was contemplated at the time he was originally released from care, as well as numbness and tingling. Dr. Franssen diagnosed Wissing with posttraumatic osteoarthritis and referred Wissing to Dr. Curtis Albers and Dr. Michael Longley for a full spine consultation and treatment. On February 2, 2011, Dr. Albers administered a cervical epidural steroid injection to Wissing, which cured the pain. On March 18, Wissing was examined by Dr. Longley, who concluded that Wissing had significant congenital spinal stenosis.

Wissing filed a complaint with the Workers' Compensation Court on October 20, 2010, alleging injury to his cervical spine as a result of the January 1, 2007, accident. At trial, the parties stipulated that the claim was barred by the 2-year statute of limitations found in § 48-137 unless there was an applicable exception. Walgreen argued that no applicable exception applied and that even if the claim was not barred, the injury was not compensable because it was not caused by the work accident. In response, Wissing claimed that the cervical spine injury was latent and progressive and that thus, the claim was not barred by the statute of limitations. Further, Wissing claimed that the cervical spine injury was caused by the January 1 accident.

At trial, Wissing testified that he continued to have lingering pain in his shoulder when he was released from Dr. Franssen's care, but that this was discussed and he was aware that the pain may not completely subside. The pain was the same dull pain until late July or early August 2010, when the pain became so severe that he could not sleep at night. Within a few weeks of the pain's becoming much more severe, Wissing returned to Dr. Franssen, who referred him to Dr. Albers and Dr. Longley for a spinal diagnosis.

At trial, reports from three physicians were accepted into evidence. In one such report, Dr. Longley, who diagnosed Wissing's spinal injury, wrote:

> Careful review . . . identifies that [for] his injury [on January 1, 2007], he was certainly treated for a shoulder injury and as part of the recovery started noticing increasing pain down the right arm. This was initially interpreted as apparently related to residuals from his shoulder. It was only more recently that he was evaluated for possible cervical spinal problems.
>
> . . . .
>
> . . . It is very difficult for me to ascertain whether the trauma is the source of his symptoms at this point or whether this was strictly related to his congenital stenosis and degenerative disc disease. This is especially true given the fact I am seeing him three years after his injury.

Dr. Ian Crabb, who examined Wissing on behalf of Walgreen on June 7, 2011, opined in another report:

> The patient's upper extremity pain, which began to get really severe for him in the summer of 2010 and eventually led him to receive an epidural steroid injection, was entirely related to his cervical spine. This is supported by the 100% relief he received from the epidural steroid injection done in February of 2011. The response to this injection proved that there are two separate conditions present viz, (1) the right shoulder rotator cuff tear and its sequelae and (2) cervical spine condition with radiculopathy. These are entirely separate problems. Although the patient feels he had some of the pain in the trapezius region at the time of the injury, the medical record does not support that as being a significant component of his injury. Furthermore, the patient had a substantial escalation in his symptoms in 2010 necessitating further medical treatment. The patient has underlying degenerative condition in the cervical spine as well as congenitally short pedicles, which predispose him to radiculopathy as the aging process affects the facet joints and intervertebral joints. There is no reason, or credible evidence

to link the cervical radiculopathy to his injury three years prior.

In contrast, Dr. Franssen, the physician who treated Wissing immediately after the accident, wrote the following on March 4, 2011:

> It is my opinion with a high degree of reasonable medical certainty that patient's current spinal diagnosis is directly related to his right shoulder injury on or about [January 1, 2007,] at Walgreens in Grand Island . . . . His initial office visit on [January 3, 2007], the patient complained of right sided pain, discomfort, decreased range of motion, decreased muscle strength and some numbness and tingling ever since then to the right upper extremity. We have taken care of his mechanical issues with his right shoulder, however, the persistent numbness, tingling and pain has persisted and was recently addressed and an MRI corresponds with his symptomatology in the diagnosis of severe bilateral foraminal stenosis, C4-7 with multi-level degenerative disc disease and severe central stenosis C4/5 noted on MRI on [January 19, 2011]. . . .
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> . . . .
>
> . . . Patient did have numbness and tingling, decreased range of motion and function with pain on his initial presentation. We treated his shoulder and that is fixed. His pain, numbness and tingling, discomfort and weakness has persisted and was probably overlooked due to his shoulder and trying to save special studying and procedure cost. However due to his persistent symptomatology and objective findings, his MRI was warranted. His treatments are helping him and was [sic] definitely needed. Patient's symptomatology and objective findings can take time to present themselves as well as acute presentation.
>
> It is my opinion with a high degree of reasonable medical certainty with the information provided to me at this point in time that the patient's acute injuries on or about [January 1, 2007,] is [sic] the causation of his current symptomatology and that it was presented in his initial complaints. It has persisted and it has progressed to the

point which necessitated his current symptoms, diagnoses, clinical presentation and treatment plans.

PROCEDURAL BACKGROUND

The Nebraska Workers' Compensation Court found that Wissing's shoulder and spine injuries were caused by the January 1, 2007, accident and that the spine injury was latent and progressive and thus tolled the statute of limitations set forth in § 48-137. The court entered Wissing's award on September 14, 2011, ordering Walgreen to pay the medical expenses listed in exhibits 20 through 30 which were incurred for treatment of the right shoulder and cervical spine injuries, including future medical care. The review panel affirmed the Workers' Compensation Court's decision on April 11, 2012, and Walgreen appealed to this court on April 23.

ASSIGNMENTS OF ERROR

Walgreen alleges, renumbered and restated, that the trial court erred in (1) determining that Wissing's claim was not barred by the statute of limitations set forth in § 48-137 because his injuries were latent and progressive, thereby tolling the statute; (2) finding Walgreen liable for past and future medical expenses for the treatment of Wissing's cervical spine and right shoulder; and (3) finding Wissing's cervical spine condition was caused by the accident.

STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is no sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Davis v. Crete Carrier Corp.*, 274 Neb. 362, 740 N.W.2d 598 (2007).

[2,3] Findings of fact made by a compensation court trial judge are not to be disturbed upon appeal to a review panel unless they are clearly wrong, and if the record contains evidence to substantiate factual conclusions reached by the

trial judge, a review panel shall not substitute its view of the facts for that of the trial judge. See *Ideen v. American Signature Graphics*, 257 Neb. 82, 595 N.W.2d 233 (1999). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Lovelace v. City of Lincoln*, 283 Neb. 12, 809 N.W.2d 505 (2012).

ANALYSIS

Latent and Progressive Exception to Statute of Limitations.

[4] Section 48-137 provides:

> In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under the Nebraska Workers' Compensation Act, or unless, within two years after the accident, one of the parties shall have filed a petition as provided in section 48-173. . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment.

There are two exceptions to this statute of limitations: (1) where a "latent and progressive" injury is not discovered within 2 years of the accident which caused the injury and (2) where a material change in condition occurs which necessitates additional medical care and from which an employee suffers increased disability. See *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

[5-10] Wissing relied on the first exception to the statute of limitations, claiming that his spinal injury was latent and progressive. The 2-year limitations period contained in § 48-137 is tolled when a claimant suffers a latent and progressive injury. See *Gloria v. Nebraska Public Power Dist.*, 231 Neb. 786, 438 N.W.2d 142 (1989). The statute will not begin to run until it becomes, or should have become, reasonably apparent to the claimant that a compensable disability was present. *Id.* If an employee suffers an injury which appears to be slight but which is progressive in its course, and which several

physicians are unable to correctly diagnose, the worker's failure to file a claim or bring suit in time will not defeat his right to recovery, if he gave notice and commenced the action within the statutory period after he learned that a compensable disability resulted from the original accident. See *Thomas v. Kayser-Roth Corp.*, 211 Neb. 704, 320 N.W.2d 111 (1982). The mere fact that the employee does not know the full extent of his injury from a medical standpoint does not make it latent so as to toll the running of the limitations period, particularly where medical facts were reasonably discoverable, and the burden of proving the injury to have been latent and progressive is upon the employee. See *id.* Where an injury is latent and progressive, the period of limitation begins to run when the true nature thereof is first discovered by the claimant. See *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972). In the case of a latent injury, the time for commencement of the action is 1 year after the employee obtained knowledge that the accident caused the compensable disability. See *Seymour v. Journal-Star Printing Co.*, 174 Neb. 150, 116 N.W.2d 297 (1962).

[11,12] In *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 371 N.W.2d 294 (1985), the court held that where an injury from which a workers' compensation claim arises is latent and progressive, the statute of limitations is tolled until it becomes reasonably apparent, or should have become apparent to the employee, that a compensable disability is present, and the burden of proving the latent and progressive nature of the injury is on the employee. Knowledge that there is a compensable disability, and not awareness of the full extent thereof, is the factor which controls in determining when the statute of limitations with respect to a workers' compensation claim begins to run. *Id.* The mere fact that an employee does not know the full extent of his injury from a medical standpoint does not make it latent so as to toll the running of the limitations period, particularly where medical facts were reasonably discoverable. *Id.*

In *Maxey*, evidence which showed that, following a work-related injury, the claimant sought medical treatment and was forced to take many days off was sufficient to support

the conclusion that his knee injury was not latent or progressive and therefore was not within the "latent and progressive exception" to the statute of limitations. According to a diary which the employee prepared from his employment records, he was off work in excess of 20 days from May 15, 1980, to May 15, 1982, all because of the pain in his knee. The employee took either sick leave or vacation time and did not make a claim for workers' compensation benefits. Other than the self-serving statements of the employee 3 years after the alleged accident, the court found there was no competent evidence presented that the knee injury was ever claimed to be work related. The employee knew he was suffering from some disability, as evidenced by the many days off, but he did not claim workers' compensation benefits, even though by his own admission he knew he was eligible for payment after 7 days. The court determined that he was certainly aware of the need for medical treatment, which he sought, but he never did claim to be entitled to compensation benefits for the particular injury.

The employee in *Maxey* cited to *O'Connor v. Anderson Bros. Plumbing & Heating*, 207 Neb. 641, 300 N.W.2d 188 (1981), and *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972), in support of his claim that his was a latent and progressive injury. However, the court quoted *Thomas v. Kayser-Roth Corp.*, 211 Neb. 704, 320 N.W.2d 111 (1982), for the following distinction:

> "In both the *O'Connor* case and the *Borowski* case, and cases of similar import where we have applied the latent exception, the evidence disclosed that indeed the initial accident was either trifling in nature or appeared to be healed and subsequently the injury began to get progressively worse. Specifically, in *Borowski* the employee was advised by the treating physician that while he suffered damages to the muscles of his upper leg and . . . it would be a slow healing process, he should not be alarmed and would fully recover. After a period of months the pain subsided. Thereafter, when the pain reoccurred, he consulted a physician on seven occasions and was assured that his condition was normal. It was not until sometime

> later that he was referred to an orthopedic surgeon who performed a myelogram and discovered the herniated disc caused by the initial injury.
>
> "Likewise, in *O'Connor* the employee was initially injured in September of 1965 while laying a sewer line in a ditch. He received compensation for this injury and continued thereafter working. It was not until October of 1977, when operating a cigarette machine, that the employee's left arm went completely dead. From the time of the accident until the original award, plaintiff was examined or treated by five different doctors—a general practitioner, three orthopedic surgeons, and a neurologist—none of whom diagnosed his subsequent condition. He repeatedly consulted his personal physician and periodically received ultrasonic treatments and physiotherapy. He was advised by a treating physician: 'It's all in your head. Go see a psychiatrist.' It was not until the incident resulting in the complete disability of his left arm that the worker's condition was fully diagnosed following the administration of a myelogram."

Maxey v. Fremont Department of Utilities, 220 Neb. 627, 637-38, 371 N.W.2d 294, 301-02 (1985). The court in *Maxey* also cited *Thomas* for the proposition that the mere fact that an employee did not know the full extent of his injury from a medical standpoint does not make it latent, particularly where the medical facts were reasonably discoverable.

Maxey is not analogous to this case for a number of reasons. While Wissing knew that his shoulder injury was a compensable disability, he was treated and compensated for this particular disability at the time of the accident and did not experience until August 2010 any symptoms inconsistent with the original diagnosis to alert him that he had an additional compensable disability. At that point in time, Wissing's symptoms changed, as the pain grew far worse than it had been. This situation is unlike that in *Maxey*, where the symptom the employee experienced, pain in his knee, remained the same since the time of the accident. The employee in *Maxey* never received, or filed a claim to receive, compensation benefits other than for the care provided on the date

of the injury. However, the employee in *Maxey* continued to suffer from the knee injury and sought treatment during the limitations period which was paid for by his own insurance provider rather than his employer. In fact, the employee submitted documentation to his insurance provider indicating that the knee injury was *not* work related. However, the employee admitted that he knew the injury was work related, even though he did not realize its full extent, but he did not file a claim or receive any compensation from the employer which would have functioned to toll the statute of limitations beyond the employer's payment of medical expenses for the day-of-injury treatment. As Wissing points out, a critical difference is that the employee in *Maxey* continued to receive medical treatment for the injury at issue during the period of time in which he could have filed a claim. Unlike the employee in *Maxey*, Wissing did not receive medical treatment for the injury at issue—namely the spinal injury—until August 2010, and he filed his claim shortly thereafter. Unlike the employee in *Maxey*, Wissing did not experience ongoing symptoms indicating an additional compensable injury, seek treatment for these symptoms, and request that his insurance pay for such treatment.

Walgreen also cites to *Maxey* in support of the argument that Wissing's spinal injury was reasonably discoverable. Walgreen argues that according to Dr. Franssen's report of March 4, 2011, the cervical spine problem was presented in Wissing's initial complaints and was probably overlooked in an effort to treat the more obvious rotator cuff tear. However, Dr. Franssen's report years later does not mean that the medical facts indicating a spinal injury were reasonably discoverable to Wissing, who was treated by Dr. Franssen for a shoulder injury and told that the pain remaining in his shoulder was something he would have to live with. Wissing had no reason to question the lingering ache or speculate that its source was an undiagnosed spinal injury. It was beyond Wissing's control that Dr. Franssen did not discover the spine condition immediately after the accident, and thus, it was not reasonably discoverable by Wissing even if it was reasonably discoverable by Dr. Franssen in retrospect.

As Wissing points out, Walgreen attempts to expand the holding of *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 371 N.W.2d 294 (1985), beyond what was contemplated at the time the case was decided. Walgreen repeatedly relies on the proposition from *Maxey* that it is the knowledge of a compensable disability which controls, not the awareness of the full extent of the disability. Based on this maxim, Walgreen argues that it does not matter which specific body part was injured or that the cervical spine condition arose later. We find that the proposition of law from *Maxey* cannot be taken out of the context of the facts in which it was decided. In *Maxey*, the court was referring to the employee's knowledge of the compensable disability of the employee's injured knee, which he was aware of from the time of the accident, evidenced by his seeking out treatment paid for by his own insurance. Here, Wissing had no knowledge of a compensable disability relating to his spine, only to his shoulder, and that is why the spine injury is considered latent. While the spine injury may have manifested itself at the time of the initial treatment, it was overlooked by Dr. Franssen and the symptoms were diagnosed as part of the shoulder injury. The spinal injury did not manifest itself any differently until August 2010, when it became reasonably discoverable by Wissing because of the newly intense pain, at which point he sought medical treatment promptly.

Walgreen distinguishes *O'Connor v. Anderson Bros. Plumbing & Heating*, 207 Neb. 641, 300 N.W.2d 188 (1981), by arguing that Wissing was not misdiagnosed or in some way prevented from knowing that he had a claim for a compensable disability. However, the trial court found that Wissing was incompletely diagnosed, as Dr. Franssen missed the cervical spine condition in focusing on the more obvious injury, the torn rotator cuff. That finding of fact is not clearly erroneous, and we do not disturb it. Wissing was, in a sense, prevented from knowing that he had a claim for a compensable disability relating to his spine because he was told that the pain he was experiencing was consistent with his shoulder injury and would continue into the future. Thus, Wissing had no reason to discover the compensable disability of his spinal injury when he

had no reason to question Dr. Franssen's diagnosis until August 2010, at which point his symptoms changed and his pain became much more intense than he had been told to expect as a residual of his shoulder injury and surgery.

Wissing's case is more akin to *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972), where the employee was compensated for what appeared to be a minor work-related injury in 1965, but it did not become apparent until 1970 that he suffered from a herniated disk as a result of the accident. The court found that the employee did not know he had a back ailment until April 1970, and he commenced the action within 1 year from that date, so the statute of limitations did not bar the action, because the injury was latent and progressive. As the court explained, this exception applies where it later becomes apparent that a much more serious injury resulted from the accident than was at first supposed and the plaintiff had no knowledge of the more serious injury:

> "'If an employee suffers an injury, which appears to be slight, but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim, or bring suit within the time limited by law, will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.' . . ."

Id. at 657-58, 198 N.W.2d at 462.

Similarly, there can be little question that Wissing did not know he had a spine injury until August 2010. Although Wissing experienced ongoing dull pain, Dr. Franssen had attributed this symptom to the shoulder injury, and Wissing had no reason to question the pain that he was told he would experience. As in *Borowski*, it did not become apparent until years after the accident that a much more serious injury resulted from the accident than at first supposed, namely the spinal injury in Wissing's case. As soon as Wissing experienced symptoms incongruous with his initial diagnosis and treatment, he returned to his physician, and the cervical spine injury was subsequently diagnosed. Dr. Franssen failed to completely diagnose the injury until he referred Wissing to Dr. Longley

in August 2010. Wissing commenced his action within a year of his knowledge of the compensable disability of the spinal injury. Thus, we determine that the trial court did not err in finding that Wissing's spinal injury was latent and progressive and therefore tolled the statute of limitations.

Future Medical Care.

Walgreen claims that there is no dispute that Wissing knew by March 18, 2008, of both a compensable disability and need for future care resulting from the January 2007 accident. However, his knowledge related to the shoulder only. Wissing had no way of knowing of a compensable disability relating to his spine, including a need for future care, until his symptoms changed or worsened, leading to a proper diagnosis in August 2010. Walgreen argues that *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 371 N.W.2d 294 (1985), holds it is the knowledge of a compensable disability which controls, not the awareness of the full extent of the disability. However, we interpret *Maxey* to mean that the employee must have knowledge of a compensable disability in general, not necessarily how extensive the injury is. Here, Wissing did not know that he had a compensable spine injury at all, as he thought the only injury was to his shoulder, which had been treated. Walgreen argues that Wissing should have filed a petition within 2 years of the date of the last payment for future medical care. However, Wissing was prepared to live with the dull, tolerable pain that he was left with after the initial surgeries by Dr. Franssen and was unaware until August 2010 he would need future medical care related to his spine.

The trial court determined that Wissing's claim for future care was not barred by the statute of limitations, because his complaint was filed within 2 years of the date of Dr. Franssen's November 4, 2008, report that future medical care would be needed for the shoulder condition. Walgreen correctly argues that the statute of limitations begins to run from the date of the accident or the date of the last payment, not the date of an opinion regarding the need for future medical care. Thus, as stipulated, the statutory period expired on April 30, 2010, 2 years after the date of the last payment. However, as we

determined above, the spine injury falls within the latent and progressive exception to the statute of limitations, and therefore, the claim for future care, which is part of the claim for treatment, was proper when filed within a year of discovering that a compensable injury of the spine also resulted from the January 2007 accident. Thus, the trial court reached the correct result in finding that Walgreen was liable for future medical care relating to the spinal injury despite its mistaken use of the date of Dr. Franssen's report, November 4, 2008, from which to start the 2-year count when the statute of limitations would run. Instead, the count begins when the employee has knowledge that a compensable disability resulted from the accident. As determined above, Wissing became aware of the compensable disability of his spinal injury in August 2010.

Cervical Spine Condition Caused by Accident.

[13] Walgreen contends that there is no credible evidence of a cervical spine problem resulting from the January 2007 accident, but that is exactly what Dr. Franssen opines, and his testimony is certainly credible evidence, as he was the only physician that testified through report who had treated Wissing directly after the accident. Walgreen repeatedly contends that Wissing had no complaints of neck pain early in his treatment, specifically during his visit to the emergency room, and that there was no mention of ongoing numbness, tingling, or other significant symptoms at the last appointment for the shoulder or during the following 2 years. However, the record shows that Wissing did complain of pain, numbness, and tingling in his shoulder and arm at the initial appointment with Dr. Franssen and that Wissing continued to experience pain in his shoulder after he was released from care, as he had been told he would by Dr. Franssen. These are the same symptoms, albeit much more severe, that caused further diagnostic procedures that produced the diagnosis of a spinal injury. We note that Dr. Crabb, Walgreen's expert, reported that Wissing's upper extremity pain, rather than numbness and tingling, was entirely related to his cervical spine. Thus, the pain in the shoulder was related to the spine, and this was

identified by Wissing immediately after the accident. Thus, the trial court was not incorrect in finding that the cervical spine condition was caused by the January 2007 accident, as there was credible evidence supporting this factual determination. We recognize that Walgreen introduced expert opinion to contradict Wissing's expert's opinion, but our task is not to choose between competing and conflicting expert testimony. See *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003) (where record presents nothing more than conflicting medical testimony, appellate court will not substitute its judgment for that of compensation court).

CONCLUSION

Accepting the findings of fact made by the trial court judge, as they are not clearly wrong, we determine that the court did not err in finding that the latent and progressive exception applied in this instance to toll the statute of limitations, and therefore, Walgreen was liable for past and future medical expenses for the treatment of Wissing's cervical spine and right shoulder. Further, the trial court did not err in determining that the cervical spine condition was caused by the accident, a factual determination supported by the evidence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JAMES GRIFFIN, APPELLANT.
823 N.W.2d 471

Filed November 27, 2012. Nos. A-11-1084, A-11-1085.

1. **Mental Competency.** Concerning the issue of competency of the defendant, it is the trial court's responsibility to assess and make a determination concerning competency when the issue is brought to the court's attention.
2. **Mental Competency: Attorney and Client.** Attorneys have a duty, when a question of a client's competency arises, to ensure that the client is competent or to bring to the attention of the court that there is a question of the client's competency.
3. **Mental Competency: Convictions: Sentences: Due Process.** Issues of competency of criminal defendants to be convicted and sentenced implicate fundamental and long-established due process principles.