GARY W. ANDERSON, Employee, v. ELLISON MEAT CO. and SAFECO INS. COS., Employer-Insurer/Appellants, and MN DEP'T OF ECONOMIC SEC. AND MN DEP'T OF HUMAN SERVS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 21, 1998

HEADNOTES

CAUSATION - GILLETTE INJURY; CAUSATION - SUBSTANTIAL CONTRIBUTING CAUSE. Where the employee's testimony that his prior shoulder problems had essentially resolved by the time of his hire by the employer was supported in the medical records of three doctors, and where there was medical opinion by two other doctors, including the independent medical examiner, that the employee's work for the employer was a contributing factor in at least a brief period of the employee's disability, the compensation judge's conclusion that the employee sustained a Gillette-type injury while working for the employer was not clearly erroneous and unsupported by substantial evidence.

JOB SEARCH - SUBSTANTIAL EVIDENCE; TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the employee's job search was extremely minimal at best, but where the employee during the benefit period at issue was in substantial pain, was undergoing substantial physical therapy, and had not been provided with rehabilitation assistance, the compensation judge's conclusion that the employee was not disqualified for temporary total disability benefits for lack of a diligent job search was not clearly erroneous and unsupported by substantial evidence.

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the employee essentially conceded that records of his rotator cuff surgery identified a nearly full-thickness tear but his surgeon expressly concluded that the injury should be rated as a full-thickness tear, the compensation judge's rating of the injury at 6% of the whole body, as a full thickness tear under Minn. R. 5223.0450, subp. 3.A.(2), rather than at 2% of the whole body, as a partial thickness tear under Minn. R. 5223.0450, subp. 3.A.(1), was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Wilson, J., Hefte, J., and Johnson, J.
Compensation Judge: Paul v. Rieke

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's conclusion that the employee sustained a Gillette-type injury[1] to his right shoulder on May 26, 1995, and, in the alternative, from the judge's award of benefits for certain periods of temporary total disability and compensation for a 6% rather than a 2% permanent whole body impairment.[2] We affirm.

BACKGROUND

In December of 1994, the employee sustained an injury to his right shoulder while working as a forklift driver for Ketterling Services, Inc. [Ketterling], a recycling company. He sought treatment from his family physician, Dr. W. E. Vogel, and from chiropractor Jeffrey Priebe, who referred him to neurologist Dr. Mark Gregg. Nerve conduction studies and an EMG ordered by Dr. Gregg proved normal, but x-rays were read on January 12, 1995, to reveal rotator cuff disease, Aand partial or complete tear could not be excluded. On January 24, 1995, however, orthopedic surgeon Dr. Robert C. Suga found the employee's x-rays unremarkable, diagnosed rotator cuff strain, and released the employee to return to work restricted from lifting over thirty pounds. On January 26, 1995, Dr. Priebe completed a report indicating in part that the employee could return to work with certain restrictions against lifting, reaching or working above the shoulder, stooping, and repeated bending. One week after that, on February 2, 1995, Dr. Vogel issued a report indicating that the employee had reached maximum medical improvement [MMI] on January 15, 1995, that he had not sustained any permanent partial disability, and that further treatment was not planned. The following day, Dr. Priebe completed a return to work form indicating that the employee was still subject to certain restrictions, but on March 29, 1995, he released the employee to perform his regular work.

About April 7, 1995, the employee became employed by the Ellison Meat Company [the employer], at least in part to load and unload frozen meat on the loading dock. About two or three weeks later, he evidently informed both his immediate supervisor and his production manager and safety officer, Alan Sheldon, that he was having shoulder pain on the job, and he

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[1] See Gillette v. Harold Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

[2] The employer and insurer appealed also from various other findings, including findings as to notice of injury, various additional periods of temporary disability, maximum medical improvement, the form of permanency benefits, reimbursement of medical expenses, and entitlement to rehabilitation services. The employer and insurer have not, however, briefed these issues, and therefore we will not address them. See Minn. R. 9800.0900 (issues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by the court); see also Anderson v. Stremel Bros., 47 W.C.D. 99 (W.C.C.A. 1992).

asked for lighter duty work. He was subsequently transferred from the loading dock to an assembly line on the production floor, where he apparently handled less meat each day than he had handled on the loading dock but where much of the work was head-high or higher. When the employee's shoulder pain continued, Dr. Priebe referred the employee back to Dr. Suga, who on May 25, 1995, diagnosed stage II impingement syndrome, noting that the employee had been doing quite well until he started a new job doing a lot of lifting at a meat packing plant. Dr. Suga discussed treatment options with the employee, injected Depo-Medrol into the shoulder, prescribed impingement exercises and capsular stretching, and indicated that the employee could Acontinue to work as tolerated. Dr. Suga reported the following day to Dr. Priebe that the employee had Asome residual subacromial bursitis which has flared up by his new activities at work. That same day, the employee apparently brought in some new work restrictions[3] to his employer and was terminated. The employee subsequently began collecting reemployment insurance benefits and, over the course of about the next two months, evidently contacted about eleven potential new employers.

The employee retained counsel in June of 1995, and on about July 26, 1995, he filed a claim petition against Ketterling, based on his December 6, 1994, right shoulder injury, alleging entitlement to compensation for temporary partial disability from January 30, 1995, through March 31, 1995, for apparently intermittent temporary total disability continuing from April 21, 1995, and for undetermined permanent partial disability, together with payment of certain treatment expenses and attorney fees.

On August 22 and 29, 1995, the employee saw Dr. Suga again for a lot of shoulder aching and trouble raising the arm up and for Aradiating pain down the arm, with some numbness and tingling in the fingers. Noting that the employee ha[d]n't been able to work all summer and would Alike to have something done, Dr. Suga ordered a cervical MRI, which revealed that the employee's shoulder symptoms were due primarily to impingement rather than to any cervical disc disease. The employee was subsequently referred to Dr. Paul D. Reynen, who noted on September 19, 1995, that the employee had Ainjured his shoulder in a fall last year and Ahas been very sore since then. Dr. Reynen concluded that the employee had exhausted conservative treatment and indicated that the employee wished to proceed with surgery. About a week later, on September 27, 1995, the employee's attorney informed the employer that the employee believed he had been injured during his employment with the employer and that he was asserting a claim for workers' compensation benefits. Two days later, on September 29, 1995, the employee filed a medical request against Ketterling, alleging entitlement to the surgery recommended by Dr. Reynen.

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[3] Although in their reply brief the employer and insurer assert that Dr. Suga had given no specific restrictions, in their original appellant's brief the employer and insurer concede that [o]n May 26, 1995, the Employee brought in additional work restrictions to the Employer, and the employee testified that on that same date he handed Mr. Sheldon Asome slips from the doctor--notes and stuff.

On October 23, 1995, Dr. Reynen reported to the employee's attorney that, although he was not aware of exactly what the employee's duties were at the employer, it would appear that [it] would be a reasonable conclusion to draw that [the employee's work at the employer] was a culmination of events finally leading to [the employee's] disability, based on Dr. Suga's note that the employee had gotten along pretty well with his shoulder prior to his doing Aa lot of lifting at the meat packing plant. On November 17, 1995, Dr. Reynen performed an arthroscopic subacromial bursal decompression in the employee's right shoulder, with minimal open rotator cuff repair. Following this surgery, the employee underwent about six months of physical therapy. By February 22, 1996, Dr. Reynen was indicating in his treatment notes that the employee could return to a light duty type work right now but certainly nothing overhead and no significant lifting; about a month later he noted that the employee could begin doing some light duty activities with about five pounds overhead, Abut he needs to continue with his therapy over these next couple months; and on May 16, 1996, he released the employee to return to work without restrictions, adding, however, that the employee Adefinitely would do better if he is not doing overhead activities. Also on May 16, 1996, Dr. Reynen reported that the employee had reached MMI with a 6% permanent partial disability, pursuant to Minn. R. 5223.0450, subp. 3A(2), under which, he noted, a Arotator cuff tear, full thickness[,] rates 6% permanent partial impairment.

By May 20, 1996, all of the parties involved in the employee's claim against Ketterling had executed a stipulation for full, final, and complete settlement of the employee's claims against Ketterling, in exchange for payment of about $1,277.40 in medical and chiropractic expenses and payment to the employee of $8,000 in addition to unspecified temporary total disability and medical expense benefits already paid.[4] At the time of the stipulation, the employee was claiming entitlement to ongoing temporary total disability benefits, rehabilitation benefits, and payment of future medical expenses, in addition to payment or reimbursement of outstanding treatment and rehabilitation expenses. The stipulation provided in part that Ait is stipulated and agreed and specifically understood that the temporary personal injury to the Employee's right shoulder fully resolved without permanent partial disability, permanent restrictions and/or permanent residuals no later than 3-29-95" and that the Employee was released to his pre-injury employment with the pre-injury Employer on a full-time basis without restrictions by the treating chiropractor. On May 29, 1996, Compensation Judge Nancy Olson, for Compensation Judge Gary Mesna, issued an award on this stipulation, earlier versions of which had been three times disapproved by Compensation Judge David S. Barnett either for being overly broad or for closing out future medical benefits.[5]

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[4] A notice of benefit payment filed on June 7, 1996, indicates that Ketterling had paid the employee $413.28 in benefits for 4.2 weeks of temporary total disability between December 12, 1994, and January 27, 1995, and had paid a total of $2,008.31 in medical expenses to date.

[5] On February 29, the employee's attorney had written to Judge Barnett, requesting that the matter be set for hearing, with ex parte testimony to the court disclosing attorney/client privileged information explaining the employee's rationale for accepting the stipulation on the

On June 13, 1996, two weeks after obtaining the award in his claim against Ketterling, the employee filed a claim petition against the employer herein, alleging entitlement to temporary total disability benefits continuing from May 20, 1995, and payment of undetermined medical expenses due to a Gillette-type injury to his right shoulder culminating on May 20, 1995.[6] In that same month he commenced a job search; on August 5, 1996, he was served with Dr. Reynen's report of MMI; and on September 18, 1996, he requested rehabilitation assistance, which the insurer denied on October 7, 1996.

On September 25, 1996, the employee was examined for the employer by Dr. John Dowdle, who concluded that the employee had sustained only a temporary, two-month aggravation of a preexisting shoulder condition while working for the employer, that he had reached MMI with regard to that aggravation, that the employee's need for surgery in November of 1995 had been due to the preexisting condition, and that the employee had a 2% whole body impairment as a result of the preexisting condition, pursuant to Minn. R. 5223.0450, subp. 3A(1). In that same report, Dr. Dowdle recommended that the employee be restricted from doing overhead work and limited to fifty pounds lifting due to the preexisting shoulder condition. The employee was served with Dr. Dowdle's report of MMI by letter dated October 8, 1996.

When the matter came on for hearing on June 24, 1997, issues included primary liability, wage loss benefits, and the extent of permanent disability. The employee testified at hearing that, at the time of his hiring by the employer, it was his understanding that all restrictions on him had been lifted. He testified also that he had been working for the employer about two weeks when he first related the problems he was then experiencing in his right shoulder to his work activities at the employer. He testified also that his shoulder symptoms after starting work for the employer were more severe than, and otherwise different from, the symptoms that he had experienced after his injury at Ketterling.

Following the hearing, the compensation judge concluded in part that the employee had sustained a Gillette-type injury while working for the employer on about May 26, 1995, that the employee was entitled to temporary total disability benefits from May 26, 1995, through July 15, 1996, and for several shorter periods thereafter, that the employee was not disqualified for those benefits by lack of a diligent job search, and that the employee was entitled to benefits for a 6% whole body permanent impairment. The employer and insurer appeal.

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terms set forth. The stipulation approved by Judge Olson for Judge Mesna retains the language expressly closing out future medical expenses.

[6] This petition was amended in August 1996 to allege entitlement to compensation for a 6% permanent whole body impairment and again in May of 1997 to allege entitlement to compensation for temporary partial disability continuing from March 1, 1997.

STANDARD OF REVIEW

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 (1996). 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, Aunless 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

Primary Liability

The employer and insurer contend initially that substantial evidence does not support the compensation judge's conclusion that the employee sustained a work injury at the employer. We disagree.

In support of his finding of a Gillette type injury at the employer, the compensation judge emphasized that the employee's pre-injury condition had been diagnosed only as rotator cuff strain and that there was no indication that the employee was subject to any permanent disability such as is now his diagnosis. The judge noted also the employee's testimony that his shoulder problems had pretty much resolved by the time of his hire by the employer, and he concluded that that testimony was supported by the May 25, 1995, medical history taken by Dr. Suga, in which Dr. Suga reported that the employee had been Adoing quite well until he started a new job doing a lot of lifting at a meat packing plant. In addition to this evidence cited by the judge, we note that the medical records of Drs. Suga, Vogel, and Priebe in the early months of 1995, just prior to the employee's April employment by the employer, all similarly support the employee's testimony that his shoulder problems had essentially resolved by that time. In light of this evidence, together with Dr. Reynen's causation opinion on October 23, 1995, and the September 25, 1996, opinion of even Dr. Dowdle, that the employee sustained at least a temporary aggravation at the employer, we cannot conclude that the compensation judge's finding of a Gillette injury was unreasonable, and so we affirm it. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

The employer and insurer argue also that the employee's delay in filing his claim petition until after he had settled his claim against Ketterling both prejudiced the employer and insurer in defending against the claim and unfairly precluded any potential contribution and/or reimbursement action by the employer and insurer against Ketterling and its insurer. See Martin v. Thermoform Plastics, 46 W.C.D. 473 (W.C.C.A. 1992) (contribution and reimbursement are derivative of the employee's claims); but see Wolk v. Alliant Tech Sys., No. [*redacted to remove SSN*] (W.C.C.A. July 18, 1997).

With regard to their contention that the employee's delay in filing his claim resulted in prejudice, we would only note, as the compensation judge also concluded, that the employer and insurer were adequately put on notice of potential liability for a work injury when the employee complained to them in April of 1995 that his shoulder was hurting him when he worked. This is true notwithstanding the employer and insurer's assertion that the employee never gave an explanation as to why his shoulder hurt (emphasis added). Production Manager Sheldon's August 21, 1995, letter To Whom It May Concern is itself evidence that, [d]uring [the employee's] probation period, the employer could see [the job] wasn't healthy for the employee. When the employer made that observation in April of 1995, the employer and its insurer could easily have made any inquiry they deemed necessary to ensure the proper gathering of evidence relevant to defending against any potential claim. At any rate, there is no evidence that any defense available at the time of the injury was no longer available four months later when the employer and insurer were put on express notice of a claim by the employee's attorney. Therefore we will not reverse the judge's decision on grounds that any delay by the employee in filing his claim prejudiced the employer and insurer's defense.

With regard to the employer and insurer's contention that the employee's delay in filing his claim petition until after he had settled his claim against Ketterling unfairly precluded any potential contribution and/or reimbursement action by the employer and insurer against Ketterling and its insurer, the employee responds that this issue has already been addressed and settled in Johnson v. Tech Group, Inc., 491 N.W.2d 287, 47 W.C.D. 367 (Minn. 1992) (a settlement with regard to one injury does not affect the amount and period of compensation due under the law in effect at the time of a subsequent injury). We are not convinced that Johnson is applicable here, in that Johnson involved circumstances where settlement of the prior claim or claims preceded the subsequent injury, whereas the employee in the present matter settled his claim against the first employer, Ketterling, after his alleged injury with the second employer and after the employee's counsel had notified the second employer that the employee would be asserting a claim against it for benefits. However, the employer and insurer have made no claim that their liability should be limited, for example, to the portion of the employee's disability attributable to the May 26, 1995, Gillette injury, arguing instead simply that the compensation judge should have taken the earlier settlement into consideration and denied the employee's claim for benefits. Finding no support in the law for the requested remedy, we decline to reverse the judge's award of benefits on the basis of the employee's settlement with Ketterling.[7]

[7] We also note that it is not necessarily settled that an employer in these circumstances has no right to file a claim for contribution from the earlier employer and insurer. See Wolk v. Alliant

Job Search and Temporary Total Disability

The compensation judge awarded temporary total disability benefits for periods including the period May 26, 1995, through July 17, 1996. With regard to the issue of the sufficiency of the employee's job search to support the award, the employer and insurer concede that, if primary liability is affirmed, the employee is entitled to temporary total disability benefits from the date of his surgery, November 17, 1995, until February 22, 1996, when Dr. Reynen first noted that the employee might be able to work with substantial restrictions. They contest, however, any award of temporary benefits to the employee for the period prior to that date of surgery and any award of benefits for the period from February 22, 1996, to July 17, 1996, on grounds that the employee's job search during those periods was not reasonably diligent. While we acknowledge that the sufficiency of the employee's job search is certainly questionable, particularly with regard to the period February 22, 1996, through May of 1996, we cannot conclude that the judge's decision was unreasonable.

May 26, 1995, to November 17, 1995

In Finding 7, the compensation judge concluded that the employee did no job search during the nearly six month period between his termination from the employer and the date of his surgery, but the judge supported his award of benefits for the period nevertheless by finding that the employee's physical condition essentially precluded any sustained physical work activity during that period. The judge explained this finding and the award further by noting also that [t]he employee was in significant pain during this time and Athere was no rehabil[ita]tion or medical monitoring assistance offered the employee by the employer. The employer and insurer argue that Dr. Suga had released the employee to work with no specific restrictions during this time, that the employee had nevertheless sought neither work nor medical treatment, and that he has even acknowledged indicating to the Department of Economic Security that he was able to work during this period. We are not persuaded.

It would certainly not have been unreasonable for the compensation judge to conclude that the employee was physically capable of working and unentitled to benefits for not seeking work more diligently. However, a compensation judge is in a unique position to assess the credibility of witnesses, see Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (assessment of a witness's credibility is the unique function of the trier of fact), and it was not unreasonable for the compensation judge to conclude, having listened to the employee's testimony in light of the entire medical record, that the employee was too incapacitated by his injury to search more diligently for employment than he did. See Brening v. Roto-Press, Inc., 306 Minn. 562, 237 N.W.2d 383, 28 W.C.D. 225 (Minn. 1975) (the employee is the person most familiar with the limitations that her injury places on her, and her testimony alone may be sufficient to support a finding of total disability even in the face of contrary medical

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Tech Sys., No. [*redacted to remove SSN*] (W.C.C.A. July 18, 1997).

opinion). Only employee's who are capable of work are required to affirmatively seek employment as a prerequisite to obtaining total disability benefits. See Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 30 W.C.D. 426 (Minn. 1978); see also Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 733, 40 W.C.D. 948, 954 (Minn. 1988) (Aemployees who are capable of work must make a diligent job search to establish total disability (emphasis added)). Moreover, the judge's conclusion on this issue was further supported by the fact that the employee had no rehabilitation assistance at the time. See id., 421 N.W.2d at 734, 40 W.C.D. at 956 (whether the employer has undertaken to provide the employee with either work or QRC assistance in finding work is a consideration in determining the reasonableness of an employee's job search). Because it was not unreasonable, we affirm the compensation judge's award of benefits for the period May 26, 1995, to November 17, 1995. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

February 22, 1996, Through July 15, 1996

The employer and insurer acknowledge that the employee submitted job search logs for the period June 1996 to July 1996, and they do not contend that those logs are not substantial evidence of a reasonably diligent job search during that period. They contend, however, that the employee was medically released to work already by February 22, 1996, over three months prior to his documented job search, suggesting that his testimony to any job search prior to June of 1996 was indefinite at best. In support of his award of benefits for this period, the compensation judge emphasized that the employee was during this period subject to Asignificant restrictions, Ahad no vocational or medical rehabilitation assistance and was under a very rigorous and time consuming physical therapy program.[8] Although this appears to us to be a very close issue, and although had we been the factfinder in this case we might well have concluded that the employee's job search between late February and early June of 1996 was insufficient to support an award of benefits, we cannot say that the compensation judge's contrary conclusion was unreasonable, and therefore we affirm the judge's award of benefits. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Permanent Partial Disability

The employer and insurer contend that the employee's permanent impairment should have been rated at 2% under the schedules rather than at 6%. They argue that the rule relied on by Dr. Reynen and the compensation judge in assigning a 6% rating to the employee's rotator cuff tear, Minn. R. 5223.0450, subp. 3A(2), pertains to a full thickness tear and that the medical records of the employee's surgery clearly indicate that his injury was a nearly full thickness tear, a tear more properly rated under Minn. R. 5223.0450, subp. 3A(1), which assigns a 2% rating to tears of Apartial thickness. We are not persuaded.

[8] The employee had both dry and pool therapy a total of about three times a week during most of this period.

We are unable to locate, in the exhibits cited by the employer and insurer or elsewhere in the record, the surgical notes to which the employer and insurer refer, but the employee does not contend that such records do not exist or that they indicate other than a nearly full-thickness tear.[9] We conclude, however, that it was not unreasonable for the compensation judge to rely on Dr. Reynen's implicit conclusion that the tear he observed in performing the repair of the employee's rotator cuff constituted a full-thickness tear from a medical point of view. In further support of his conclusion, the compensation judge noted the employee's testimony as to his symptoms after the injury, which included the experience of swinging and drooping in the arm and shoulder. A finding of permanent partial disability is one of ultimate fact, see Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 39 W.C.D. 771 (Minn. 1987), and because it was not unreasonable for the compensation judge to conclude that Dr. Reynen's rating Amost adequately reflects the permanent disablement sustained by the employee, we affirm the judge's decision. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

[9] In his own brief, the employee references, by quotation, only the employer and insurer's reference to such notes.