

LARRY L. BLAKE, Employee v. LITCHFIELD SHIPPING and MIDWEST SAFETY GROUP/ADMIN. CLAIM SERV. INC., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 18, 1998

HEADNOTES

GILLETTE INJURY--SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee had sustained a Gillette injury culminating on May 5, 1997.

PERMANENT PARTIAL DISABILITY--SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee was entitled to a 9 percent permanent partial disability award for a disc herniation at L4-5.

MEDICAL TREATMENT & EXPENSE--REASONABLE & NECESSARY. Substantial evidence supports the compensation judge's finding that the employee's October 9, 1997, MRI scan was reasonable and necessary.

Affirmed.

Determined by Hefte, J., Wilson, J., and Johnson, J.
Compensation Judge: Jeanne E. Knight

OPINION

RICHARD C. HEFTE, Judge

The employer and insurer appeal the compensation judge's findings that the employee sustained a Gillette injury culminating on May 5, 1997, that the employee was entitled to an additional permanent partial disability award, and that the October 1997 MRI scan was reasonable and necessary. We affirm.

BACKGROUND

On May 2, 1992, Larry Blake (employee) sustained an admitted work-related back injury while working as a truck driver for Litchfield Shipping (self-insured employer). The employee delivered eggs on his route, which included the loading and unloading of the truck. The employee was trying to loosen a stuck egg rack when he felt pain in his back and burning pain in the left leg. The employee suffered a herniation and disc fragment at L5-S1 and bulge at L4-5. The employee underwent an L5-S1 microdiscectomy on May 19, 1992, with Dr. Thomas Bergman. The surgery was successful, and the employee had no left leg pain after the surgery. In August

1992, the employee was released to work full time with a restriction of limited flexibility in the back. The employee initially returned to a light duty job, then returned to trucking full time in October 1992. The employee no longer delivered eggs on his trucking route so he would not have to deal with the egg racks, but he was occasionally required to move boxes weighing from 5 to 50 pounds between pallets. That winter, the employee began to notice a dull aching pain in his back towards the end of the work week. Sitting, bouncing and jarring while driving would bother the employee's back. In the spring of 1993, the employee began having intermittent left leg pain. A May 26, 1993, lumbar MRI showed a probable residual or recurrent disc fragment at L5-S1 which was effacing the left S1 nerve root. The employee testified that his pain grew worse over time. Occasionally the employee would have pain in the right leg, but he testified that it was not as bad as the left leg. The employee had temporary pain relief with cortisone injections. The employee began having symptoms in both legs. In March 1996, Dr. Bergman recommended that the employee stop driving trucks. In early 1997, the employee was referred for physical therapy. The pain continued to worsen. Again in March 1997, Dr. Bergman recommended that the employee stop driving trucks because it "is very clear that his long hours of truck driving affect his back condition to the point it is extremely difficult for him to live without significant pain." The employee decided to leave his job and gave two weeks notice on approximately April 15, 1997. On May 5, 1997, the employee lifted a 50 pound box of cheese and immediately experienced severe right leg pain. The employee did not return to work as a truck driver after that day. By June, the acute exacerbation of the employee's pain had resolved, but he continued to have right leg pain. The employee saw Dr. Robert Wengler in late June 1997. The employee reported to Dr. Wengler that he was relatively free of symptoms for about 5 months after the 1992 surgery until he returned to work and developed recurrent leg pain.

In July 1997, the employee returned to work with the employer as a dispatcher at a wage loss. An MRI was performed on October 9, 1997, indicating recurrent herniation at L5-S1 with apparent effacement of the S1 nerve root on the left, right lateral and far lateral disc herniation at L4-5, with extrusion of disc material and possible impingement on the lateral foraminal and extra-foraminal segment of the right L4 nerve root. Dr. Wengler concluded that the L4-5 herniation had been present in 1992, but was not symptomatic until May 1997, and that the employee's work activities had contributed to the development of the employee's symptoms in the nature of a Gillette injury. On October 16, 1997, the employee underwent an independent medical examination with Dr. Mark Friedland. Dr. Friedland opined that the employee's ongoing symptomatology was the result of the employee's pre-existing juvenile discogenic disease.

The employee claimed that he had sustained a specific injury on May 5, 1997, while lifting the 50 pound box, and a Gillette injury culminating on the same date. A hearing was held on December 19, 1997. The compensation judge found that the employee had sustained a permanent Gillette injury culminating in May 1997 and that the employee had sustained a specific temporary work injury on May 5, 1997, that the employee was entitled to an additional 9 percent permanent partial disability and ongoing temporary partial disability benefits, and that the October 1997 MRI scan was a reasonable and necessary medical expense. The self-insured employer appeals.

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, "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

Gillette Injury

The employer does not dispute that the employee sustained a specific temporary injury while lifting the 50 pound box on May 5, 1997, which resolved by July 1, 1997. The employer argues that there is not substantial evidence to support the compensation judge's finding that the employee sustained a Gillette injury culminating in May 1997 and therefore, the employer claims that the employee's low back symptoms are causally related to his 1992 work injury. A Gillette injury is a result of repeated trauma or aggravation of a preexisting condition which results in a compensable injury when the cumulative effect is sufficiently serious to disable an employee from further work. Gillette v. Harold, Inc., 257 Minn. 313, 321-22, 101 N.W.2d 200, 205-06, 21 W.C.D. 105 (1960); see also Carlson v. Flour City Brush Co., 305 N.W.2d 347, 350, 33 W.C.D. 594, 598 (Minn. 1981). In order to establish a Gillette injury, an employee must "prove a causal connection between [his] ordinary work and ensuing disability." Steffen v. Target Stores, 517 N.W.2d 579, 581, 50 W.C.D. 464, 467 (Minn. 1994). While evidence of specific work activities causing specific symptoms leading to disability "may be helpful as a practical matter," determination of a Gillette injury "primarily depends on medical evidence." Id.

The employer argues that the employee's symptoms after June 30, 1997, when the employee's temporary injury had resolved, were the same as those he experienced since March 1993 and were causally related to the 1992 injury and that the objective medical evidence does not show any changes. The employee was able to return to work after the 1992 injury, and testified that he was relatively pain free for about five months until he returned to work. Before the May 5, 1997, specific injury, Dr. Matthias recommended that the employee stop truck driving "as this seems to be causing most of the problems more than anything else." In March 1996, Dr. Bergman

stated that "it is extremely unlikely that [the employee] will be able to continue working as a truck driver at the same level of capacity that he has been working." In March 1997, Dr. Bergman stated: "It is very clear that his long hours of truck driving affect his back condition to the point it is extremely difficult for him to live without significant pain." The compensation judge could reasonably conclude that the employee's 1992 injury did not continue to be the cause of the employee's symptoms, but that the employee's work activities over the next few years caused a new Gillette injury. Substantial evidence supports the compensation judge's finding that the employee sustained a Gillette injury culminating in May 1997. Therefore, we affirm.

Permanent Partial Disability

The employee received a 9 percent permanent partial disability rating after the 1992 injury for the herniation and surgery at L5-S1. The employer claims that the compensation judge's finding that the employee was entitled to an additional 9 percent rating for the L4-5 disc herniation under Minn. R. 5223.0390, subp. 4.D, is not supported by substantial evidence, arguing that the employee has no objective radicular symptoms. A compensation judge is responsible to determine under which rating category an employee's disability falls, based on all relevant evidence, including objective medical findings. Jensen v. Best Temporaries, 46 W.C.D. 498, 500-01 (W.C.C.A. 1992). Although permanency ratings offered by physicians may assist the compensation judge in making this determination, these opinions are not binding. Erickson by Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 43, 35 W.C.D. 523, 528 (Minn. 1983). In order to receive a permanent partial disability rating, the employee must prove each element of the scheduled disability. Knudson v. Twin City Hide, Inc., 40 W.C.D. 336, 338 (W.C.C.A. 1987) (citing Davies v. Marriott-Host Int'l, 39 W.C.D. 631, 633 (W.C.C.A. 1987)). A compensation judge's finding regarding the rating of permanent partial disability is one of ultimate fact and must be affirmed if it is supported by substantial evidence. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987).

The radiologist at the employee's October 1997 MRI scan reported that there was evidence of a right disc herniation at L4-5 which appeared to be contiguous with the extra-foraminal segment of the nerve. He concluded that the employee had a right lateral and far lateral disc herniation at L4-5 with cephalad extrusion of disc material and possible impingement on the lateral foraminal and extra-foraminal segment of the right L4 nerve root distal to the ganglion. Dr. Wengler reviewed the October 1997 MRI scan and concluded that the scan clearly showed pathology at the L4-5 level on the right impinging on the nerve root. The compensation judge could reasonably conclude that the employee's MRI scan showed lumbar nerve root impingement. The compensation judge explained her decision in the memorandum:

The 1992 CT scan showed a "diffuse bulging disc" at L4-5, "which slightly touched the anterior surface of the thecal sac . . . Exiting nerve roots are not effaced." The 1993 MRI did not report findings at L4-5, other than dehydration secondary to degenerative change. The March 1996 MRI again showed a bulging disc with no nerve root compression. The October 1997 MRI showed a right

lateral disc herniation, which "appears to be contiguous with the extra-foraminal segment of the nerve . . . This may account for the patient's right leg pain." Dr. Bergman opined this disc herniation was the same as seen on prior studies, and that it "clearly is asymptomatic given the lack of L5 radicular symptoms." Dr. Friedland concurs with this assessment. Dr. Wengler opines the L4-5 disc in fact has become symptomatic and that the employee has measurable atrophy in the right calf, which constitutes an objective radicular finding. After carefully considering all the evidence, including the depositions of Drs. Wengler and Friedland, the Compensation Judge adopts the opinion of Dr. Wengler that the L4-5 disc herniation is in fact symptomatic and the cause of the employee's present right leg complaints.

(Memo. at 9-10.) Substantial evidence supports the compensation judge's finding that the employee has sustained 9 percent permanent partial disability as a result of a disc herniation at L4-5. Accordingly, we affirm.

Medical Expense

The employer also argues that the employee's October 9, 1997, MRI scan was not reasonable and necessary. The reasonableness and necessity of medical treatment under Minn. Stat. § 176.135 is a question of fact for the compensation judge. See Hopp v. Grist Mill, 499 N.W.2d 812, 48 W.C.D. 450 (Minn. 1993). An employee has the burden of proving that his or her claimed medical expenses were reasonable, necessary, and causally related to his or her work injury. See, e.g., Adkins v. University Health Care Ctr., 405 N.W.2d 233, 39 W.C.D. 898 (Minn. 1987).

Dr. Matthias indicated on May 5, 1997, that the employee would see Dr. Bergman and probably would need an MRI. The employee underwent an orthopedic evaluation with Dr. Robert Wengler in June 1997. Dr. Wengler recommended that the employee have another MRI. Dr. Wengler testified in his deposition that in June 1997 he noticed visible atrophy of the employee's right calf muscles, and "it was for that reason that I really suggested that he get the MRI." Dr. Bergman indicated in May 1997 that he would hold off on any imaging studies unless the employee failed to improve. The employer argues that the employee did improve, therefore the MRI scan in October 1997 was not reasonable and necessary. While there was evidence of improvement in the employee's medical records, there was also evidence that the employee continued to have symptoms. Substantial evidence supports the compensation judge's finding that the October 9, 1997, MRI scan was reasonable and necessary. Therefore, we affirm.