LARRY BOTHUM, Employee/Appellant, v. JOHN DEERE CO. and JOHN DEERE INS., Employer-Insurer, and BLUE CROSS/BLUE SHIELD OF MINN. and JOHN DEERE CO., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 9, 1998

HEADNOTES

GILLETTE INJURY - SUBSTANTIAL EVIDENCE; CAUSATION - GILLETTE INJURY. Where the judge's findings regarding the absence of pre-breakdown low back problems were relevant to the credibility of the employee's testimony in general, and where the judge's decision was supported by the adequately founded medical opinions of a treating physician and an independent examiner, together with other evidence, the compensation judge's decision that the employee had not proven that he had sustained a Gillette-type injury as alleged was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Wilson, J., Johnson, J., and Hefte, J.
Compensation Judge: Nancy Olson.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's conclusion that the employee failed to prove that he sustained a Gillette-type injury[1] as alleged. We affirm.

BACKGROUND

The employee began working for the John Deere Company [the employer] in about 1967. For about two years he worked primarily at filling orders and sorting returned goods in the employer's warehouse. The work filling orders entailed picking machine parts from warehouse bins, placing them into containers on a large hand-propelled cart, and then transporting them via the cart to the shipping dock. The sorting work entailed the reverse activities, removing the parts from incoming freight cars or trucks at the shipping dock and transporting them to warehouse bins. The parts, or bundles of parts, could weigh up to seventy pounds. The carts apparently weighed about two hundred pounds empty and usually about five hundred but sometimes up to fifteen hundred pounds loaded.

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

In 1969, the employee began a term of about fifteen years as a forklift operator, transporting larger items and pallets of items between the warehouse and the unpaved yard outside. For about three days in April 1984, the employee was disabled from work due to back pain. The condition was not reported as a workers' compensation injury, and the notice pertaining to the disability indicates that the preparer [did]n't know when or how it had occurred. Apparently that same year, the employee was reassigned to work primarily inside the warehouse again. His job now entailed jockeying parts on the hand-propelled carts about half the time and operating a forklift over warehouse floors the other half. About that same year, 1984, the employee entered into a business partnership to manage and maintain about a dozen residential rental properties. Four years later, the employee also acquired and began operating and maintaining a secondhand store with his wife.

The employee spent the weekend of October 3 and 4, 1992, at his lake cabin. On the morning of October 5, 1992, prior to going to work, he experienced severe pain in his low back, radiating down to his calves. With his wife's assistance, he got into his car and went for treatment to Dr. Anton Lyzenga. Dr. Lyzenga reported that the employee had had [o]ff and on lower back pain for several mo[nth]s. He reported that yest[erday] the pain started and this morning [the employee] could hardly get up. Dr. Lyzenga noted also that the employee works for [the employer] and does a good amount of lifting although not heavy.

On October 13, 1992, Dr. Lyzenga diagnosed sciatic pain presumably due to a central bulging disc and referred the employee to orthopedist Dr. Richard C. Strand. When he saw Dr. Strand the following day, the employee reported that he had been having intermittent pain since the preceding July. Dr. Strand concluded that he was unable to find any specific injury that [the employee] had at work. Dr. Strand added, however, that the employee had run a forklift for about ten years, works as a part man for [the employer] and has done a lot of heavy lifting and that this certainly could have contributed to his present back problem. Dr. Strand took the employee off work and ordered a CT scan. The CT scan, conducted that same date, was read to reveal a large extruded disc with probable nerve root impingement at L5-S1, a disc bulge with mild central stenosis at L4-5, and a minimal disc bulge at L3-4.

On October 22, 1992, the employee saw Dr. Strand's partner, surgeon Dr. Jerry Reese. The following day, Dr. Reese performed a laminectomy and discectomy at the L5-S1 level of the employee's spine. Dr. Reese's treatment notes on November 11, 1992, indicate that [a]ctivity limits were discussed at length. The [employee] does warehouse work but will not be capable of doing this for quite sometime. Dr. Reese instructed the employee on that date to ask his employer if any sedentary-light work is available following the next return. On December 17, 1992, the employee returned to work with the employer full time, restricted to lifting no more than ten pounds.

On January 8, 1993, the employee first reported that his condition was work related, and a first report of injury, completed four days later, indicated that the injury had occurred when the employee [d]rove fork truck over bumpy pavement 5 years ago when working as a material

handler. The report indicated that [n]o other related activity [was] reported which could contribute to [the] injury.

In treatment notes on January 14, 1993, Dr. Reese indicated that the employee was back working with no signs of being in acute distress, doing quite light stuff such as measuring bins, doing label work, etc. Dr. Reese indicated that the employee normally works as a picker and I think we will get him back to this eventually. On February 25, 1993, Dr. Reese noted that the employee's after the fact report of injury had been denied and that the employee was not certain whether he will follow through on this or not.

In September of 1993, the employee was involved in a motor vehicle accident. He saw Dr. Lyzenga again on October 13, 1993. Dr. Lyzenga diagnosed [r]ecurrent low back pain, suggestive of recurrent herniated disc and referred the employee back to Dr. Reese. On November 8, 1993, Dr. Reese found definite diffuse spasm in the low back. He emphasized, however, that straight leg raising and femoral stretch signs were absolutely negative bilaterally and that the employee's lower extremities were neurologically normal. Over the course of the next year, the employee continued to complain of low back pain. Dr. Reese continued to conclude, however, that the employee's subjective symptoms outweighed any objective findings.

In about November of 1994, it was determined that the employee could not perform all of the job duties at any job available to him at the employer. Subsequently, on December 11, 1994, he was evidently laid off and put on weekly short-term disability benefits, which were to convert to long-term disability benefits after a year. On February 10, 1995, the employee filed a claim petition for workers' compensation benefits based on a July 1993 Gillette-type work injury with the self-insured employer. The petition alleged entitlement to certain temporary total and temporary partial disability benefits, undetermined permanent partial disability benefits, and rehabilitation services.

The employee returned to see Dr. Reese on April 26, 1995. Dr. Reese noted for the first time that the employee was attributing his low back problems and need for surgery to repetitive work activities at the employer, indicating that the employee had referred specifically to years of repetitive driving of a forklift outside. On examination, Dr. Reese found no changes neurologically. He indicated that the employee had complained of frequent tingling throughout both legs but when invited to point out the location of the tingles had simply said front and back and everywhere. On June 22, 1995, Dr. Reese reported to an agent of the State Farm Insurance Company that he did not believe that the employee's September 17, 1993, car accident had significantly changed his low back condition or his long-term restrictions.

On July 6, 1995, the employee was examined for the employer by orthopedic surgeon Dr. Gary Wyard. It was Dr. Wyard's opinion, based on this examination and on review of information provided and reviewed with the employee, that the employee had not sustained a Gillette-type injury as a result of his employment activities at the employer. This opinion was essentially reiterated in deposition testimony on October 9, 1997. At that deposition, Dr. Wyard testified that he did not believe a lot in [the employee's attorney's] legal concept of a Gillette injury

in the case of the employee. He explained that in his opinion there was insufficient evidence from a medical, scientific standpoint to support such a theory. He also testified, however, that the concept of a Gillette-type back injury might well apply in the case of professional football linemen or roofers or perhaps dairy farmers. Such workers were different from the employee, he suggested, in that they might typically spend more of their working hours squatting over. Dr. Wyard explained further that he did not agree with the concept that just because you work and you develop something, that it came because of your work.

On September 21, 1995, Dr. Reese reported to the employee's attorney that [n]either I nor Dr. Strand received any specific history of injury occurring in the course of [the employee's] work. Therefore, he concluded, it would be my opinion that [the employee] did not sustain a specific Gillette-type injury on October 3, 1992. Furthermore, he added, it really was not until April 26, 1995, that [the employee] came to my office and wanted to relate his back problems to his work.

Dr. Strand had ordered a lumbar MRI scan, which was read on February 22, 1996, to reveal moderate spurring, spinal stenosis, and bulging of the disc annulus at L5-S1 without recurrent or residual disc herniation. A moderate disc herniation with mild impingement was observed at L4-5, however. On February 26, 1996, the employee saw surgeon Dr. John Sherman, who observed degenerative changes at L4-5 and L5-S1 on the MRI and ordered a lumbar discography. The discography, performed on March 1, 1996, was read to reveal abnormal morphology at L4-5 and L5-S1, with high concordant pain and pressure in the back and down both legs.

On April 19, 1996, the employee was examined by orthopedist Dr. Robert Wengler. On the basis of his examination and a history taken from the employee, Dr. Wengler concluded that the employee's documented herniations at L4-5 and L5-S1 had occurred over time due to the [l]ifting, carrying, pushing, pulling, and riding on the forklifts that the employee had done in the course of his work for the employer. On May 2, 1996, Dr. Sherman performed fusion surgery at the L4-5 and L5-S1 levels of the employee's spine. Dr. Wengler essentially reiterated his causation opinions after a follow-up examination of the employee on July 14, 1997, and in deposition testimony on October 7, 1997.

The matter came on for hearing on October 10 and 15, 1997. The threshold issue at hearing was the employer and insurer's liability for a Gillette-type injury on October 2, 1992. Other issues included the occurrence of an intervening, superseding injury on September 17, 1993, as a result of the employee's motor vehicle accident on that date. The employee testified at hearing that he had been experiencing severe low back pain since the early days of his employment at the employer. He testified that, by October 5, 1992, his back had been bad for months before, and it just got to the point where I just couldn't even get up. The employee's wife also testified. She corroborated the employee's testimony and indicated that she had often used massage to help relieve the employee's pain at the end of his work day. The employee acknowledged under cross-examination that he had never reported any back pain to anyone at the employer prior to October 5, 1992. He also acknowledged that he had never requested any modification of his job prior to that

date and had not utilized his seniority to bid for a job less stressful on his back. The employee's supervisor at the employer from 1984 through 1994, Bert Skatrud, also testified at the hearing. Mr. Skatrud testified that, as he recalled, when the employee returned to work in December of 1992, the employee had explained that his early October 1992 back pain had first incapacitated him as he was getting out of his car upon returning from the lake, rather than the next morning. Mr. Skatrud testified also that the employee had suggested that the pain had been brought on by some remodeling or new decking that he had been doing at his cabin that weekend. The employee had testified that he had done no work at the cabin on the weekend in question. He had also acknowledged, however, that in his deposition earlier he had been unable to recall what activities he may have participated in, other than possibly mowing the lawn.

In a decision filed December 29, 1997, the compensation judge concluded in part that the employee had failed to prove that he had sustained a Gillette-type injury as claimed. The employee 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

The employee contends initially that the compensation judge erred as a matter of law in denying the employee's claim, arguing that the judge was subject to erroneous assumptions as to the meaning of Gillette v. Harold, Inc.. He argues that the judge improperly presumed that an employee must be aware of problems prior to the ultimate breakdown in order for benefits to be due under Gillette. We are not persuaded.

The employee testified repeatedly that he experienced severe low back symptoms for nearly the full twenty-five-year period of his employment with the employer. In Finding 3 of her decision, the compensation judge listed seven specific facts as evidence that the employee did not have any significant back problems related to his work. Four of these facts do appear to be

listed as evidence that the employee was personally unaware of any significant back problems prior to October 2, 1992. These four facts are, essentially, that the employee missed no time from work, that the employee could have opted for lighter work but did not do so, that the employee had undertaken additional self-employment involving heavy physical activities, and that the employee's pre-breakdown treatment records document other maladies but not low back complaints. It is clear to us, however, from Finding 2 earlier in her decision, that the judge was appropriately basing her decision not on any absence of pre-disability symptomology but on the expert opinions of Drs. Reese and Wyard. In Finding 2, the judge expressly accepted the opinions of those doctors, expressly rejected the opinion of Dr. Wengler, and expressly dismissed the opinion of Dr. Strand as being insufficiently certain. Furthermore, in the very first paragraph of her memorandum, the judge expressly indicated that she found the opinions of Drs. Reese and Wyard more persuasive than the opinion of Dr. Wengler. When the judge revisited the subject of the absence of any evidence of pre-breakdown symptomology, in the second paragraph of her memorandum, she did so in direct reference to the employee's credibility. She did not do so in reference to the sufficiency of his pre-breakdown symptoms in meeting any minimum standards for compensation under Gillette.[2]

The employee contends also that the judge's decision was unsupported by substantial evidence. He emphasizes that [t]he employer has not demonstrated by any evidence in this case that there was any independent intervening cause for the rupture of [the employee's] disc. He argues that the cross-examination testimony of Dr. Wyard completely supports the employee's claim. He claims also that [t]he opinions of Dr. Reese and Dr. Strand are predicated on no correct factual foundation and cannot be used to support either part[y]'s position (emphasis in original).[3] Again, we are not persuaded.

An employer does have the burden of proving an affirmative defense that an employee's disability is due to a particular superseding intervening cause. Junker v. B.F.I., Inc., No. *[redacted to remove Social Security Number]* (W.C.C.A. Feb. 5, 1997), citing Turney v. Ebenezer Soc'y, 39 W.C.D. 809, 818 (W.C.C.A. 1986); Hughes v. Karps Twin City Supply, No. *[redacted to remove Social Security Number]* (W.C.C.A. Nov. 27, 1996), citing Drews v. Kohls, 55 W.C.D. 33, 40 (W.C.C.A. 1996). Moreover, in Finding 4, the compensation judge expressly concluded that the employer's affirmative intervening cause defense had not been successful.

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[2] The judge explained in her memorandum that [t]he employee and his spouse[']s testimony on [the severity of his back pain for several years] is not consistent with the employee's lack of lost time due to back problems, lack of medical care, and significant outside activities involving physical work.

[3] The latter statement quoted here is from the employee's notice of appeal. In his brief, the employee nevertheless proceeds to quote with some emphasis Dr. Strand's statement that the employee's work activities certainly could have contributed to his present back problem. The employee does not, however, apparently rely on that statement as expert medical opinion supporting his claim.

The judge made clear in her memorandum, however, that her finding on this issue was irrelevant to her decision, which was based solely on the employee's failure to prove his claim.[4] Whatever might be an employer's affirmative defenses, it remains the employee's burden to prove that he sustained a work-related injury to begin with. In this case, the compensation judge found the expert and lay testimony and medical evidence supporting the employer's position more persuasive than that supporting the employee's position.

The principal medical evidence at issue in this case is the expert medical opinion of Drs. Reese, Wyard, and Wengler. As referenced earlier, in Finding 2 the compensation judge expressly asserted her reliance on the opinions of Drs. Reese and Wyard and her rejection of the opinion of Dr. Wengler. The employee contends that the opinion of Dr. Reese is entirely without foundation. He suggests that Dr. Reese, in his eagerness to perform surgery, relied entirely on histories taken by Dr. Strand and that Dr. Strand never took any detailed work history. Dr. Reese did, however, treat the employee on at least a dozen occasions. In the course of that treatment, Dr. Reese frequently issued and reissued work restrictions addressed directly to the employer. Treatment notes suggest that these restrictions were based on a reasonable understanding of the employee's work activities. While adequate foundation is necessary for a medical expert's opinion to be afforded evidentiary value, the expert need not be made aware of every relevant fact. Bossey v. Parker Hannifin, No. *[redacted to remove Social Security Number]* (W.C.C.A. Mar. 14, 1994). In this case, we conclude that Dr. Reese, the employee's surgeon and treating physician over several years, had adequate foundation for his causation opinion.

The employee contends further that Dr. Wyard's own testimony supports rather than disproves the employee's position. Dr. Wyard acknowledged on cross-examination that the sedentary requirements of his own earlier work as a radiologist had contributed to the doctor's own herniated disc. The employee argues that this testimony flies in the face of Dr. Wyard's refusal to find the employee's own work sitting and even bouncing on a forklift injurious to the employee's low back. However, Dr. Wyard's position on this issue does not appear to be that sitting itself necessarily causes disc herniation but that certain steady sedentary activity can be more conducive to the development of a herniated disc than more vigorous and varied activity might be. In direct examination he testified as follows.

> As a matter of fact, many people who have sit down jobs and are sedentary have herniated discs, bad backs, even more so than people that are up and active.
>
> In my own personal experience, I used to have a herniated disc and a bad back, and it's when I was in radiology and sitting not doing much. Now that I'm an orthopedic surgeon and

[4] The compensation judge explained in her memorandum that [f]indings on this issue were only included so that this issue would be addressed should the decision on primary liability be appealed.

> up and around and active and pushing and pulling and bending and twisting, I don't have any low back problems anymore.

It would not have been unreasonable for the compensation judge to infer from such testimony that Dr. Wyard found the employee's work activities sufficiently varied and active so as not to be materially contributing to the degeneration and herniation of his lumbar discs.

In addition to the opinions of Drs. Reese and Wyard, there is other evidence that the employee's low back problems were unrelated to his work. The judge noted in Finding 3 that the employee's ultimate herniation occurred at home after a weekend at the lake. In that same finding the judge noted testimony that the employee had initially attributed his condition to work at the lake. The judge noted also in that finding that the employee had not performed the work to which he most attributed his condition since 1985. It was not unreasonable for the compensation judge to weigh these factors as evidence adverse to the employee's claim.

A trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985). In this case, we see no evidence of any false premises underlying the causation opinions of Dr. Reese and Dr. Wyard. Because it was not unreasonable for the compensation judge to rely on these opinions, and because the judge's decision was also otherwise not unreasonable, we affirm the judge's conclusion that the employee did not sustain a Gillette-type injury as alleged. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.