JANEL BRUMMUND, Employee/Appellant, v. CENTURY MFG. and ST. PAUL INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 18, 1998

HEADNOTES

GILLETTE INJURY - SUBSTANTIAL EVIDENCE. Where the employee's treating chiropractor had not identified a new, November 1995 work injury until fully a year after that date, and where there was independent medical opinion in March of 1996 that the employee was not subject to any restrictions or need for any further treatment and that the employee's treatment since November 1995 had not been necessary or reasonable, the compensation judge's October 1997 finding that the employee had not sustained a Gillette-type injury in November 1995 was not clearly erroneous and unsupported by substantial evidence. This was held notwithstanding the judge's suggestion in his memorandum that the employee's symptoms after November 1995 appeared to be still related to an earlier, February 1995 work injury, an inference apparently contrary to an unappealed October 1996 finding by a different judge that the February 1995 injury had reached MMI by July 1995 and had healed and that treatment rendered subsequent to November 1995 was reasonable and necessary but not related to the February 1995 injury.

EVIDENCE - RES JUDICATA. Where there had been no appeal from an October 1996 decision that the employee's February 1995 work injury had reached MMI by July 1995 and had healed and that treatment rendered after November 1995 was reasonable and necessary but unrelated to the February 1995 injury, and where the issue before a different compensation judge in September 1997 was the occurrence and consequences of a Gillette-type injury with the same employer in November 1995, the second judge did not fail to give res judicata effect to the earlier decision by denying benefits for a November 1995 injury while volunteering an inference in his memorandum that the employee's symptomology after November 1995 appeared to be still related to her February 1995 injury.

Affirmed.

Determined by Hefte, J., Johnson, J., and Wilson, J.
Compensation Judge: James R. Otto

OPINION

RICHARD C. HEFTE, Judge

The employee appeals from the compensation judge's denial of her claim for benefits consequent to a new work injury. We affirm.

BACKGROUND

On February 27, 1995, the employee sustained a specific work-related injury to her mid and upper back when she slid down some steps in the course of her employment with Century Manufacturing [the employer]. The employee saw Dr. Daniel Lussenhop at the Airport Medical Clinic. Dr. Lussenhop diagnosed mild upper back strain, prescribed medication and ice, and recommended certain restrictions. When she returned to Dr. Lussenhop on March 6, 1995, the employee reported definite improvement but continued discomfort in the right side of her upper back. Dr. Lussenhop diagnosed resolving upper back strain, extended the employee's restrictions for three more days, and released the employee to return to full duty on March 9, 1995. The employee's upper back soreness continued, and on June 8, 1995, she returned to the Airport Clinic. Range of movement in her neck was found on that date to be diminished, and mild spasm was palpable. After a neurological exam proved normal, the employee was prescribed medication and referred for a week of physical therapy. Upon rechecking the employee on June 16, 1995, Dr. Lussenhop reported that the employee was feeling quite a bit better and that her examination was essentially normal. On those findings, Dr. Lussenhop released the employee to return to work with no limitations, indicating that she was at MMI with 0% permanent partial disability. The employee was served with Dr. Lussenhop's report on July 27, 1995.

The employee apparently sought no treatment from mid June through mid November 1995. On November 13, 1995, she presented to Dr. Lussenhop symptoms similar to those for which she had been treated following her February work injury. Dr. Lussenhop indicated at that time that he was somewhat doubtful that [the employee's] current symptoms are necessarily related to the fall that she sustained eight or nine months ago. He indicated also that he had told [the employee] that if this is to be treated it may have to be treated as a new work comp injury, one that seemed to him [i]n any event . . . quite mild. The employee was prescribed medication and referred for a week of physical therapy. At the employee's first session on that same date, therapist Dick Belmont reported that the employee's pain was at a level seven on a scale of one to ten. He reported also that the employee had complained of constant problems since the time of injury in February 1995 and [i]n the morning of 11-13-95 . . . a gradual increase in pain. On November 20, 1995, the employee advised Mr. Belmont that her pain had decreased from its earlier level seven to a level three or four and that she felt ready to discontinue her therapy. Mr. Belmont discharged her to a home program. On that same date, Dr. Lussenhop assessed the employee's thoracic back strain as being resolved. He released the employee to return to full duty without restrictions, indicating that she had attained MMI with 0% permanent partial disability. On November 27, 1995, the employee was terminated from her employment with the employer, essentially for low productivity.

On December 6, 1995, the employee was examined by chiropractor Dr. Jerrold Wildenauer. She suggested to Dr. Wildenauer that her condition had been caused by her fall down stairs in February 1995. Dr. Wildenauer diagnosed chronic cervical and thoracic sprains, headache, and chronic lumbosacral strain. The following day he referred the employee to neurologist Dr. Lowell Baker. The employee saw Dr. Baker on December 12, 1995. She

reported to Dr. Baker that she had had neck pain and stiffness without radicular symptomatology ever since her February 1995 work injury. She indicated also that, to a lesser degree, she was incapacitated also by thoracic back pain and stiffness. On examination, Dr. Baker found tenderness and decreased range of motion in the employee's mid and upper back, together with moderate spasm in the neck region. On those findings, Dr. Baker diagnosed cervical and thoracic back pain secondary to strain, together with [h]eadaches, posttraumatic in nature, all post work accident, February 27, 1995.[1] Dr. Baker administered nerve block injections, and the following day Dr. Wildenauer certified that the employee's condition was work-related, indicating that the employee had identified February 27, 1995, as her date of injury. On December 15, 1995, Dr. Baker restricted the employee from working with her head and neck in repetitive or static positions, from using her arms above shoulder height, and from lifting greater than ten pounds.

On January 2, 1996, the employee filed a workers' compensation claim for temporary total, temporary partial, and permanent partial disability benefits and medical expenses related to her February 27, 1995, work injury. Over the course of the following months, the employee continued to treat with Dr. Wildenauer and with Dr. Baker. Cervical and thoracic radiographs on January 15, 1996, revealed mild dextroscoliosis of the mid and upper thoracic spine, mild levoscoliosis of the thoracolumbar spine, thoracic hypokyphosis, but no evidence of osseous pathology or acute fracture. An electroencephalogram on January 24, 1996, to rule out a closed head injury as the cause of the employee's headaches and neck and back pain, proved normal. An MRI scan of the employee's cervical spine on the same date revealed minimal disc bulging at C5-6, but no evidence of disc herniation or spinal stenosis. An MRI of the employee's thoracic spine apparently at the same time revealed congenital fusion of the T3 and T4 vertebral bodies but no other abnormality and again no evidence of herniation or stenosis. On February 23, 1996, Dr. Baker reported to Dr. Wildenauer that a complete neurologic examination of the employee on that date had revealed decreased cervical and thoracic tenderness and spasm, with increased range of motion.

On March 19, 1996, the employee was examined for the employer and insurer by Dr. Mark Engasser. On examination of the employee's neck, Dr. Engasser found no occipital or cervical spinous process tenderness, normal cervical range of motion, no evidence of muscle tightness or spasm, no pain at the AC joints or bicipital grooves or greater tuberosities, full range of upper extremity motion bilaterally, negative impingement sign bilaterally, and no evidence of thoracic outlet syndrome or peripheral vascular disease. On examination of the employee's thoracic and lumbar spine, Dr. Engasser found no evidence of spasm or tightness, full range of motion, no lumbar spinous process tenderness or paravertebral discomfort, no sacroiliac or sciatic notch tenderness or lumbar facet pain, and no evidence of motor weakness with heel-and-toe walking. Examination of the employee's lower extremities was equally unremarkable. There was no evidence of nerve root tension signs or radiculopathy in either the upper or the lower extremities. Dr. Engasser diagnosed the employee's February 27, 1995, work injury as a temporary myoligamentous strain of the cervical and upper thoracic spine. He concluded that the

[1] Dr. Baker's thoracic diagnosis actually refers surprisingly to a motor vehicle accident on February 27, 1995. The reference appears to be a mistake.

employee had reached MMI from the effects of this injury on November 20, 1995. He concluded also that the injury had not resulted in any permanent restrictions or impairment or any need for further medical or chiropractic care. Finally, it was his opinion that the treatment rendered by Drs. Wildenauer and Baker had not been necessary or reasonable.

On April 29, 1996, Dr. Wildenauer responded to the employee's attorney, asserting an opinion that the employee had sustained a permanent injury to both her cervical and thoracic spine directly attributable to the work injury of February 27, 1994. He also asserted that his treatment of the employee for that injury had been reasonable and necessary. In a similar report on May 20, 1996, Dr. Baker reiterated his December 1995 diagnosis of the employee, except to suggest now that the employee's cervical back pain was secondary to strain and bulging disc. It was also Dr. Baker's opinion that the employee's work injury on February 27, 1995, had been permanent and that Dr. Baker's treatment for that injury had been reasonable and necessary.

The matter was heard on August 29, 1996, before Compensation Judge Carol A. Eckersen. In a decision filed October 16, 1996, Judge Eckersen found that the employee was subject to a healed strain/sprain of her cervical and thoracic spine as a result of her February 27, 1995, work injury. She indicated also that the employee had reached MMI with regard to that injury with service of Dr. Lussenhop's report to that effect on July 27, 1995. In other findings, Judge Eckersen concluded that the outstanding treatment expenses for which the employee had sought payment, including the costs of treatment provided by Drs. Wildenauer and Baker, had been reasonable and necessary but not causally related to her February 27, 1995, work injury. Finally, Judge Eckersen also concluded that the employee was subject to 0% permanent partial disability as a result of her February 1995 work injury. There was no appeal from Judge Eckersen's decision.

On November 11, 1996, Dr. Wildenauer reported to the employee's attorney that he had Arecently had the opportunity to review chart notes from the Airport Clinic dated 11-13-95 and 11-20-95." He indicated that it appears that [the employee] may have sustained a new work injury that occurred on 11-12-96. He went on to state, If I assume that the February 27, 1995 injury was a temporary condition, and that [the employee's] condition did resolve, then the need for the medical care and treatment would be related to the November 12, 1995 injury.

On December 6, 1996, the employee filed a new claim petition, alleging entitlement to permanent partial disability benefits and to payment of certain outstanding treatment expenses related to a work injury on or about November 12, 1995. The petition came on for hearing on September 10, 1997. Issues at hearing included (1) the occurrence of a specific or a Gillette-type work injury to the employee on or about November 13, 1995; (2) notice of such an injury; (3) permanent partial disability attributable to such an injury; (4) the employer's liability for over $9,000 in outstanding treatment expenses attributable to such an injury; and (5) the res judicata effect of Judge Eckersen's decision on determination of these issues. In a decision filed October 14, 1997, Compensation Judge James R. Otto found that the employee had not sustained either a specific or a Gillette-type injury on or about November 13, 1995. In a separate finding, Judge Otto concluded that the employee had not proven that her work activities from February 27,

1995 to November 12, 1995 were a substantial contributing factor or an aggravating factor sufficient to result in a . . . >Gillette' type injury on November 13, 1995. Based on these findings, Judge Otto denied all of the employee's claims. The judge also found in part that Judge Eckersen's decision of October 16, 1996, was res judicata as to the issues determined therein. Notwithstanding this finding, Judge Otto subsequently offered in his explanatory memorandum a suggestion that the employee's symptomatology from and after November 11, 1995, appears to be related to her injury of February 27, 1995. 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

Personal Injury on or about November 13, 1995

The employee contends that Judge Otto erred in concluding that the employee failed to prove her claim of a new work injury on or about November 13, 1995. She argues that she had sustained no other intervening injury between February 1995 and November 1995 and that there was no evidence that the treatment provided by Drs. Wildenauer and Baker beginning December 1995, which had already been found to be reasonably necessary, was treatment for any type of idiopathic condition. We are not persuaded.

The mere fact that even reasonable and necessary treatment might have been rendered subsequent to a particular date does not prove the occurrence of a work-related injury on that or any other date. The employee still has the burden of proving that a work-related injury on the date at issue was a substantial contributing cause of the disability or condition that necessitated that treatment. See Salmon v. Wheelbrator Frye, 409 N.W.2d 495, 497-98, 40 W.C.D. 117, 122 (Minn. 1987). In this case, the symptoms being reasonably and necessarily treated after November 13, 1995, notwithstanding the employee's argument on appeal, might well have been either nonwork-related or related to a work injury on a date other than that alleged. Nor was it

the burden of the employer and insurer to prove any such alternative cause. See, e.g., Delong v. United Parcel Service, No. *[redacted to remove social security number]* (W.C.C.A. Oct. 10, 1996). Nor was it the judge's obligation to articulate, or even to hypothesize, any alternative cause of the employee's symptoms in November of 1995. The judge's only obligation in this case was to determine whether or not the employee had proved that she had in fact sustained a new injury on November 13, 1995, as a consequence of her work activities subsequent to February 27, 1995. That the judge may have inferred from the evidence and articulated in his memorandum a cause alternative to those post-February 1995 work activities was gratuitous. Nor does that hypothesized alternative cause in any way constitute a finding of fact.

Dr. Wildenauer himself did not identify a work injury on November 13, 1995, until fully a year after that date. Moreover, it was Dr. Engasser's opinion in March of 1996, only four months after the date of the alleged new permanent injury, that the employee was not at that time subject to any permanent restrictions or impairment or any need for any further treatment of any kind. Indeed, it was Dr. Engasser's opinion that the treatment rendered by Drs. Wildenauer and Baker after the date of the alleged injury had not been necessary or reasonable to begin with. Given this medical evidence and opinion, it was not unreasonable for the compensation judge to conclude that the employee had failed to prove that she sustained a compensable work injury, certainly not a permanent one, on or about November 13, 1995. Because it was not unreasonable, we affirm that factual conclusion. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Res Judicata

In her October 16, 1996, decision, Judge Eckersen concluded that the employee's February 1995 work injury was healed and that the employee had reached MMI with regard to it by July 27, 1995. While indicating in a finding that Judge Eckersen's decision was res judicata as to the issues determined therein (emphasis added), Compensation Judge Otto volunteered in his memorandum his own informal inference that the employee's post-November 11, 1995, symptomology appears to be related to her injury of February 27, 1995. The employee contends that Judge Otto's decision failed to give res judicata effect to Judge Eckersen's findings. This is a somewhat troublesome issue, but we are not persuaded.

A compensation judge's explanatory memorandum is intended to assist us in understanding the reasoning behind the judge's findings. It does not, however, define the issues litigated by the parties for decision by the judge. Moreover, it is always possible and perhaps probable that different compensation judges might draw contrary inferences and reach contrary conclusions with regard to identical evidence of record. However, only conclusions as to issues actually litigated before the judge are subject to recording as findings and to our appellate review.[2]

[2] This is not to say that a memorandum may not on occasion reveal thinking by the judge that is by definition inconsistent with a proper decision, factually or legally. However, because determination of an alternative cause of the employee's condition in November 1995 was not an issue threshold to the judge's decision in this case, the inference here at issue does not constitute such thinking.

See, e.g., Carroll v. Honeywell, Inc., No. *[redacted to remove social security number]* (W.C.C.A. Mar. 31, 1992) ("The compensation judge may make a determination of each contested issue of fact or law, but may not resolve matters not at issue. Minn. R. 1415.3000, subp. 2.E."); Deryke v. Pet Food Warehouse, No. *[redacted to remove social security number]* (W.C.C.A. Sep. 18, 1997). The only issues before Judge Otto were the factual occurrence and consequences of a work injury on or about November 13, 1995, and the legal res judicata effect of Judge's Eckersen's decision on determination of that factual issue. With regard to the latter, legal issue, Judge Otto concluded that Judge Eckersen's decision was res judicata as to the issues determined therein. That legal conclusion was proper and well defined, and it implicitly left Judge Eckersen's decision without res judicata effect on the remaining, factual issue in this case. Because it was not an issue determined in Judge Eckersen's decision, Judge Otto could have decided this factual issue in this case in favor of either party without concern over conflict with Judge Eckersen's decision. The judge's indefinite factual inference in his memorandum, that the employee's symptomology after November 11, 1995, appears to be related to her February 1995 work injury, is not a necessary premise threshold to his factual decision in this case, nor is it an otherwise reviewable finding. The duration of the employee's February 1995 injury was an issue before Judge Eckersen for her determination, not before Judge Otto for his. That Judge Otto may have drawn an inference with regard to that issue that was apparently contrary to the inference drawn by Judge Eckersen herself is irrelevant to the propriety of his decision as to whether or not the employee proved the occurrence of a work injury in November 1995. Concluding that it was proper in both its articulation and its application, we affirm Judge Otto's finding as to the res judicata effect of Judge Eckersen's decision.