DENNIS J. CARSTENSEN, Employee, v. ST. CLOUD STATE UNIV., SELF-INSURED, Employer, and ITT HARTFORD INS. CO. and GROUP HEALTH PLAN, INC., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 5, 1998

No. *[redacted to remove social security number]*

HEADNOTES

GILLETTE INJURY - SUBSTANTIAL EVIDENCE. Substantial evidence, including test results and expert opinion, supported the compensation judge's conclusion that the employee sustained a Gillette injury in the nature of a stress fracture.

APPEALS - SCOPE OF REVIEW; EVIDENCE; TEMPORARY BENEFITS. Where the employer stipulated at hearing that the employee was temporarily partially and temporarily totally disabled by his condition for the periods claimed, the court would not reverse the awards on appeal on grounds of insufficient evidence.

Affirmed.

Determined by Wilson, J., Hefte, J., and Johnson, J.
Compensation Judge: David S. Barnett.

OPINION

DEBRA A. WILSON, Judge

The self-insured employer appeals from the compensation judge's findings that the employee sustained a Gillette-type[1] injury arising out of and in the course of his employment with the employer and that the employee was entitled to temporary disability benefits.[2] We affirm.

BACKGROUND

The employee began work as a janitor for St. Cloud State University [the employer] in 1973. Beginning in about 1993, the employee was assigned to clean three multi-level buildings

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

[2] The employer appealed also from the judge's conclusion that a November 21, 1994, injury was not a superseding, intervening cause of the employee's subsequent disability. That issue was not briefed, however, and is therefore waived. Minn. R. 9800.0900, subp. 1.

that had no elevators. The employee's duties involved more stair climbing during the school year than during the summer.[3]

On November 7, 1994, the employee experienced pain in his lower left leg when going down some stairs at work. He was seen by Dr. William Styles on that date, to whom he reported aching pain in that area over the past several days. Dr. Styles found localized tenderness in the left mid tibia and ordered an x-ray, which the radiologist interpreted as showing an osteoid osteoma or a stress fracture. The employee was given an anti-inflammatory and told to keep off the leg as much as possible. However, the employee continued to work.

When the employee was seen again on November 9, 1994, Dr. Styles noted continued localized tenderness. An x-ray taken on that date was interpreted as showing no evidence of cortical rounded radiolucency to suggest osteoid osteoma and as representing a normal radiographic appearance for this patient or very early subtle stress fracture. A bone scan performed on November 15, 1994, revealed posterior medial tibial cortical increased uptake involving the mid to distal shaft and diffuse increased uptake to the entire tibia. Dr. Styles opined that the bone scan findings were consistent with a stress fracture.

On November 21, 1994, the employee performed his usual work activities for the employer, but he later testified that his leg was bothering him a lot that day, causing him to limp. That morning the employee called Dr. Styles' office and received the results of the bone scan. Later that day, after work, the employee stepped on an awl while installing a shelf in his daughter's dorm room and sustained a spiral fracture of the midshaft of his left tibia. The following day he underwent an intramedullary rodding of the left tibia fracture.

The employee filed a claim petition on December 11, 1995, alleging that he had sustained a work-related injury to his left leg on November 7, 1994, that was a substantial contributing factor in his November 21, 1994, spiral fracture, seeking temporary total disability from November 21, 1994, to April 10, 1995, temporary partial disability continuing from April 10, 1995, and undetermined permanency benefits and medical expenses. The employer denied primary liability.

The matter proceeded to hearing on December 20, 1996, and April 30, 1997. At hearing the parties stipulated, in part, that the employee had an average weekly wage of $672.86 on the date of the alleged injury ($495.20 from the employer and $179.96 from self-employment[4]); that medical treatment for the employee's left leg was reasonable and necessary; that the employer had timely notice of the alleged injury; that the employee sustained a 4% whole body permanent

[3] Since 1993, the employee has worked not only for the employer but also at self-employment, repairing pallets.

[4] We note that $495.20 plus $179.96 does not add up to $672.86. However, neither party appealed from the judge's finding that the employee's average weekly wage was $672.86.

partial disability; that the employee had been temporarily totally disabled from November 22, 1994, through April 9, 1995, as a result of his condition; and that the employee had been temporarily partially disabled from April 10, 1995, through May 16, 1995.

The issues raised at hearing included whether the employee had sustained a Gillette-type injury to his left leg on November 7, 1994, arising out of and in the course of his employment with the employer; whether the November 21, 1994, incident constituted a superseding, intervening cause of the employee's condition; and the employee's entitlement to attorney fees. In findings filed on July 14, 1997, the judge found that, as a substantial result of his work activities with the employer, the employee had sustained minute trauma to his left tibia, culminating on November 7, 1994, and resulting in a stress fracture, and that the incident of November 21, 1994, did not constitute a superseding, intervening cause of the employee's subsequent disability. The compensation judge also ordered, in part, that the employer pay the employee the appropriate temporary disability benefits . . . . The 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 (1992). 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 contends that there was insufficient foundation for the medical opinions that stated that the employee sustained a Gillette-type injury in the nature of a stress fracture of the left tibia. We are not persuaded.

According to the employer, there is no concrete evidence of a stress fracture being present and there is nothing in the records to indicate that Mr. Carstensen was having any difficulties prior to November 7, 1994, with his left leg as a result of walking up and down stairs. Dr. Styles testified, however, that the x-ray on November 9, 1994, was consistent with a stress

fracture. We note also that the radiologist who conducted the bone scan on November 15, 1994, concluded that the [f]indings are most consistent with stress reaction and secondary hyperemia. Dr. Styles assumed that a stress fracture and a stress reaction were the same thing. Moreover, in his report of June 20, 1996, Dr. Dennis Callahan, the employer's independent examiner, opined that, [t]hough, I do not have the original bone scan nor the x-ray, it would appear that Mr. Carstensen had a stress fracture present before he sustained a fracture. The stress fracture itself would weaken the tibia and make it more likely to break with much less force than would be normally needed.[5]

There is no requirement that medical opinions be given with absolute certainty, only that they be given within a reasonable degree of medical certainty. The x-rays of November 7 and 9, 1994, and the bone scan of November 15, 1994, provided adequate foundation for Dr. Styles' and Dr. Callahan's opinions that the employee sustained a stress fracture of the left tibia prior to November 21, 1994.

The employer also contends that there is no foundation for Dr. Styles' causation opinion because Dr. Styles agreed with the other doctors that it would take a change in the employee's repetitive activity routine to cause a stress fracture and the employee had not had such a change in his routine. On cross examination by the employee's attorney, however, Dr. Styles was asked to assume that the employee's job had changed in September such that he was frequently performing stair climbing, and Dr. Styles was asked whether that type of change could produce a stress fracture.[6] Dr. Styles answered in the affirmative.

Finally, the employer contends that the doctors' opinions are lacking in foundation because the activities engaged in by Mr. Carstensen in his pallet business were never described to the doctors. Again, we are not persuaded. Dr. Styles was provided with a detailed hypothetical that explained the employee's various activities in his self-employment. While the hypothetical did not contain specific information regarding the lifting requirements of that work, there is no evidence that such information would have altered Dr. Styles' opinion. Accordingly, we find that the medical opinions relied upon by the compensation judge did have adequate foundation and were properly admitted into evidence and relied upon by the judge.

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[5] Dr. Callahan subsequently issued a one paragraph report on December 11, 1996, wherein he opined, as far as I can say with any medical certainty, that the work activities were not related to the development of a stress fracture. Dr. Callahan did not, however, change his opinion that the employee had in fact sustained a stress fracture.

[6] This hypothetical was consistent with the employee's testimony, and the judge found the employee's testimony to be credible. While the employer appealed from the judge's finding of credibility, the issue of credibility was not addressed in the employer's brief and is therefore deemed waived. Minn. R. 9800.0900, subp. 1.

As to the employer's argument that the employee did not complain of leg pain with stair walking prior to November 7, 1994, we note that there is no requirement that an employee testify to the gradual onset of pain associated with specific work activity in order to prove a Gillette-type injury. 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. Steffen v. Target Stores, 517 N.W.2d 579, 581, 50 W.C.D. 464, 467 (Minn. 1994).

The x-rays, bone scan, and opinions of Dr. Styles provide substantial evidence to support the compensation judge's finding of a Gillette-type injury, in the form of a stress fracture, arising out of and in the course of the employee's work with the employer. We therefore affirm that finding.

Temporary Disability Benefits

The employer contends that insufficient information exists upon which to base an award of temporary disability benefits. Specifically, the employer contends that there was no testimony as to whether or not there was even any loss of business in the employee's self-employment during any period from November 21, 1994, to May 16, 1995. However, the employer stipulated at hearing to the employee's average weekly wage and to the fact that the employee was temporarily totally disabled for the period claimed. Under these circumstances, the employer may not now challenge the temporary total benefit award on grounds of lack of evidence.

The employer's arguments with respect to the employee's claim for temporary partial disability benefits may have somewhat more merit, in that, while the employer stipulated that the employee was temporarily partially disabled during the periods claimed, no wage records were introduced; the employee instead merely introduced an exhibit purporting to show his post-injury earnings from the employer and submitted no evidence about post-injury earnings from self-employment. Accordingly, the compensation judge awarded only appropriate temporary disability benefits. We conclude that the employer did raise the issue of whether the employee had any wage loss associated with his self-employment in its post-hearing brief. However, given the stipulations as to temporary partial disability at the beginning at the hearing and the employer's failure to make it clear that it was asking the judge to address an additional issue, we find insufficient reason to reverse the judge's award. Therefore, temporary partial disability benefits are payable based on the difference between the employee's average weekly wage on the date of injury and the employee's actual earnings from the employer and self-employment (if any) during the period claimed. Unfortunately, any dispute as to the amount of the employee's earnings post-injury may have to be resolved by the filing of another claim petition.