MARK B. CLARK, Employee, v. EARL SCHEIB AUTO PAINTING and MN ASSIGNED RISK PLAN, Employer-Insurer and GREYHOUND LINES, INC. and SELF-INSURED, Employer-Insurer and WIPAIRE, INC. and TRAVELERS INS. CO., Employer-Insurer/Appellants and MEDICA CHOICE/HEALTHCARE RECOVERIES, INC., PHOENIX and MN DEP'T OF ECONOMIC SEC./RI.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 6, 1998

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

HEADNOTES

CAUSATION--GILLETTE INJURY. Substantial evidence, including expert medical opinion and the employee's testimony, supports the compensation judge's finding that the employee sustained a Gillette injury on May 4, 1994.

APPORTIONMENT--EQUITABLE. Substantial evidence supports the compensation judge's finding regarding apportionment which did not assign liability to a previous injury more than eleven years before the claimed Gillette injury where the employee had been able to work and had increased symptoms after the claimed Gillette injury. The compensation judge did not err by failing to indicate that Kaisershot was applicable. The compensation judge erred by assigning liability for future benefits.

INTERVENORS--REIMBURSEMENT. The compensation judge erred by ordering payment to an intervenor directly where the reimbursement at issue was not for medical expenses, but for short term disability benefits which should be subtracted from the employee's temporary total disability award.

Affirmed as modified in part and vacated in part.

Determined by Hefte, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Janice M. Culnane

OPINION

RICHARD C. HEFTE, Judge

Wipaire, Inc./Travelers Insurance Company appeal the compensation judge's finding that the employee sustained a Gillette injury on May 4, 1994, and the compensation judge's apportionment and reimbursement decisions. We affirm as modified in part and vacate in part.

BACKGROUND

On July 9, 1982, Mark Clark (employee) sustained an admitted low back injury after a fall while working as a mechanic for Greyhound Lines (self-insured). The employee underwent a laminectomy at L4-5 in 1983. The employee returned to work at Greyhound with restrictions in a light-duty position washing buses instead of performing his pre-injury job as a mechanic. Just before being laid off in 1985, the employee started painting buses. The employee was self-employed for a time doing light-duty mechanical work. In 1987, the employee and Greyhound entered into a full, final, and complete settlement, leaving open claims for medical expenses. In 1989, the employee worked for Tracy Oil as a mechanic changing oil. From 1990 to 1993, the employee was enrolled in school in an auto body painting program. In March 1993, the employee began working for Wipaire, Inc., which was insured for workers' compensation liability by Travelers Insurance Company (Wipaire/Travelers), doing body work on small airplanes. In October 1993, the employee underwent neck surgery for a nonwork-related condition and was off work until January 1994 when he returned to work for Wipaire, initially working light duty but eventually returning to his regular job duties.

On February 19, 1994, the employee sustained a work-related injury to his left arm and wrist, and he claimed that this injury also involved his low back. The employee was off work for one week and returned to his preinjury job at Wipaire. The employee's regular job duties required him to stand leaning over a bench. Two to three weeks after he went back to work, the employee's low back began to bother him. The pain worsened and spread to his legs. As of May 4, 1994, the employee could no longer work at Wipaire due to pain. On July 20, 1994, the employee underwent a right hemilaminectomy for recurrent L4-5 disc with discectomy and decompression and a left L4-5 hemilaminectomy with decompression of the left L5 nerve root. In early 1995, the employee began working full time as an auto painter for Earl Scheib, which was insured for workers' compensation liability by Minnesota Assigned Risk Plan (Earl Scheib/MARP). The employee had experienced low back pain while leaning over and painting a van roof from a ladder, which worsened over the following two weeks. In addition, on May 16, 1995, the employee sustained an admitted work-related injury to his low back. The employee has not worked since. On November 30, 1995, the employee underwent a right L4-5 hemilaminectomy. On February 11, 1997, the employee underwent a decompression and fusion at L4-5.

Earl Scheib/MARP paid various workers' compensation benefits, and sought contribution or reimbursement. Dr. Walter Bailey, Dr. Paul Wicklund, Dr. Paul Cederberg, and Dr. David Kittleson gave varying causation and apportionment opinions. A hearing was held on November 25, 1997. The compensation judge found that the employee had failed to prove that he sustained a work-related low back injury on February 19, 1994, but that the employee had sustained a Gillette injury which culminated on May 4, 1994, while working for Wipaire, and apportioned liability for the employee's disability as 50 percent to the employee's May 4, 1994, Gillette injury while working at Wipaire and 50 percent to the employee's May 16, 1995, injury at Earl Scheib. Wipaire and Travelers appeal.

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

Wipaire and Travelers argue that the compensation judge's finding that the employee sustained a Gillette injury culminating on May 4, 1994, while the employee was working for Wipaire is not supported by substantial evidence. 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.

After an independent medical examination, Dr. Wicklund opined that the employee had sustained a Gillette injury while working for Wipaire. Dr.Kittleson opined that the employee sustained specific injuries to his low back in 1994 and 1995, instead of Gillette injuries. Dr. Cederberg opined that the employee had not sustained an injury in 1994 while working at Wipaire. It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). The employee testified that he did not have low back pain in February 1994 when he returned to work. His regular work activities required him to bend over a bench. Two to three weeks after returning to work, the employee began to have low back pain. The low back pain worsened, and he started having leg pain as well until he could no longer work as of May 4, 1994. Substantial evidence

supports the compensation judge's finding that the employee sustained a Gillette injury culminating on May 4, 1994. Therefore, we affirm.

Apportionment

Wipaire and Travelers argue that the compensation judge erred by not holding Greyhound liable for medical expenses for the employee's low back, claiming that the compensation judge forgot that claims for medical expenses remain open against Greyhound under the settlement. The compensation judge noted in the stipulation portion of the Findings and Order that medical expenses were left open under the employee's settlement with Greyhound. The compensation apportioned liability as 50 percent to the May 4, 1994, injury and 50 percent to the May 16, 1995, injury, and did not apportion any liability to the employee's July 1982 injury at Greyhound. Equitable apportionment is not purely a medical question, but is a question of ultimate fact for the compensation judge to determine based upon all of the evidence submitted. Ringena v. Ramsey Action Programs, 40 W.C.D. 880, 883 (W.C.C.A. 1987), summarily aff'd (Minn. Mar. 28, 1988). Equitable apportionment is not to be based on any precise formula but on all the facts and circumstances of the case. Goetz v. Bulk Commodity Carriers, 303 Minn. 197, 226 N.W.2d 888, 27 W.C.D. 797 (1975). In determining apportionment, factors to be considered include the nature and severity of the injuries, the employee's physical symptoms following each injury, and the period of time between injuries. Id. at 200, 226 N.W.2d at 891, 27 W.C.D. at 800.

Dr. Walter Bailey, the employee's treating physician, opined in August 1995 that the employee's disability should be apportioned as 25 percent to the 1995 injury and 75 percent to the previous injury, referring to the 1994 injury which led to surgery. Therefore, Dr. Bailey's opinion was that 25 percent of the liability was attributable to Earl Scheib/MARP and 75 percent to Wipaire/Travelers. Dr. Paul Wicklund apportioned liability 60 percent to Greyhound, 20 percent to Earl Scheib/MARP, and 20 percent to Wipaire/Travelers. Dr. Cederberg opined that the employee's work activities at Wipaire did not contribute to the employee's disability and made no other apportionment opinion. Dr. Kittleson opined that liability for the employee's disability should be apportioned as one-third to Greyhound, one-third to Earl Scheib/MARP, and one-third to Wipaire/Travelers. The compensation judge is not bound by the medical apportionment opinions. Ringena, 40 W.C.D. at 883. In addition, where the record will support numerous apportionment determinations this court will not substitute its judgment for that of the compensation judge. Giem v. Robert Giem Trucking, 46 W.C.D. 409, 418 (W.C.C.A. 1992).