PATRICIA A. COFFIN, Employee, v. VEE CORP. and CNA INS. CO., Employer-Insurer/Appellants, and VEE CORP. and TIG INS. CO., Employer-Insurer/Cross-Appellants, and UNION LABOR LIFE INS. CO., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 24, 1998

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

HEADNOTES

GILLETTE INJURY - DATE OF INJURY. Substantial evidence, including the employee's medical records and at least one expert opinion, supported the compensation judge's decision that the employee had sustained a Gillette injury, due to performing in a heavy costume, as claimed, and the date of injury chosen by the compensation judge was adequately supported by ascertainable events such as assignment of restrictions.

CAUSATION - SUBSTANTIAL CONTRIBUTING CAUSE. Substantial evidence, including the employee's medical records and testimony and expert opinion, supported the compensation judge's decision that the employee's last two work injuries were a substantial contributing cause of the employee's disability for the period at issue.

APPORTIONMENT - EQUITABLE. Substantial evidence supported the compensation judge's equitable apportionment of liability for benefits given expert opinion and evidence as to the nature and severity of the employee's injuries and her symptoms between injuries, especially given the unusual number of injuries involved.

REHABILITATION - RETRAINING; EARNING CAPACITY. Substantial evidence, including medical evidence as to disability and vocational evidence as to employability and potential earnings, supported the compensation judge's conclusion that the employee had a loss of earning capacity for purposes of eligibility for retraining and temporary partial disability benefits.

ECONOMIC RECOVERY COMPENSATION. The compensation judge erred as a matter of law in awarding the employee economic recovery compensation for her permanent impairment where the employee was in the midst of retraining at the time of the hearing.

Affirmed in part and reversed in part.

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

OPINION

DEBRA A. WILSON, Judge

The employer and CNA Insurance Company appeal from the compensation judge's decision that the employee sustained a work-related Gillette[1] injury on about May 9 or 10, 1995; that the May 1995 injury and a November 1994 injury were substantial contributing causes of the employee's disability; that CNA is liable for 65% of benefits due; and that the employee is entitled to temporary partial and retraining benefits. The employer and TIG Insurance Company appeal from the compensation judge's equitable apportionment of liability for wage loss, medical, and permanent partial disability benefits and from the judge's award of economic recovery compensation for the employee's permanent impairment. We reverse the judge's award of economic recovery compensation but affirm as to all other issues.

BACKGROUND

From September of 1989 through May of 1995, the employee worked for Vee Corporation [the employer] as a dancer in national tours of Sesame Street Live. The employee worked initially as the character Baby Kermit, wearing a costume that weighed about thirty pounds and a head piece that weighed about seven pounds. However, during most of the tours, the employee played the character Elmo, wearing a costume weighing about twenty pounds, a head piece weighing about five to seven pounds, and, occasionally, accessories such as hats and glasses, which might weigh an additional pound or two each. The employee's dance numbers were energetic, involving nearly constant motion and some acrobatics, such as cartwheels, and the employee at times helped to maneuver heavy props containing other Sesame Street characters, such as Big Bird in his nest and Oscar in his garbage can. Each show lasted about an hour and a half, including a fifteen minute intermission, and the employee performed in seven to ten shows a week. Tours typically ran nine to eleven months, usually August through May.

At least ten first reports of injury were completed for injuries allegedly sustained by the employee while performing in Sesame Street Live.[2] The employee testified that, in addition to the specific back, neck, and other injuries noted in the first report forms, she often experienced what the dancers called Muppet neck, a feeling of neck strain associated with dancing

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

[2] Including a February 14, 1990, report (neck, low back, and pelvic pain); an October 21, 1990, report (back and neck pain); a December 14, 1990, report (bruised arm and shoulder pain); a May 22, 1991, report (back strain); a November 5, 1991, report (left pectoral and shoulder strain); an October 30, 1992, report (wrist strain); a November 29, 1992, report (shoulder tendinitis and neck and back injury); a March 14, 1993, report (twisted ankle); an August 24, 1993, report (overall pain in back and neck); and a November 18, 1994, report (lower back injury as well as reoccurrence of neck and upper back).

with the heavy costume heads. The employee testified that if she had considered Muppet neck a reportable injury, she would have had to fill out a first report of injury virtually every day.

The employee received intermittent treatment for back, neck, and other symptoms in various cities while on tour, and, by the time of the hearing, she had been treated or evaluated by numerous physicians, including Drs. Patricia Porter, Charles Gillespie, Steven Kastein, Michael Gaffin, L. Richard Wong, Robert Justino, Dale Barner, H. Carl Moultrie, Marc Manzione, Curtis Slipman, Joseph Iannotti, Harvey O'Phelan, and David Boxall. Much of the treatment, at least initially, was chiropractic care. The employee testified that it was easier to obtain chiropractic care, as opposed to medical care from an orthopedist, on short notice.

During the 1994-1995 tour, the employee's Elmo costume included chaps, cowboy boots, spurs, and a guitar, which increased the total weight of the costume to about forty-five pounds. For the employee, who was 5'3" and weighed 105 pounds, the extra costume weight made dancing much more difficult.

On May 9 or 10, 1995, after waking up with numbness in her arms and legs, the employee was seen by Dr. Moultrie, who diagnosed lumbar disc disease[3] and recommended restrictions on pushing, pulling, and lifting. As a result of these restrictions, the employee's choreography was modified, but she evidently completed the tour. In August of 1995, another physician, Dr. Manzione, indicated that the employee had made a good recovery and had no need for further treatment. However, the employee did not resume work with Sesame Street Live in the 1995-1996 tour, allegedly because of continuing neck and back symptoms.

After leaving employment with the employer, the employee worked as a bartender, at a wage loss, for several restaurants in and around her home town in Pennsylvania. In the fall of 1996, the employee entered Temple University to pursue a business administration degree. While in school, she obtained part-time clerical work to gain office experience. Because of earlier course work in the field, the employee expected to obtain her bachelors degree from Temple in three years or less.

The employee filed a claim petition alleging entitlement to various benefits from TIG Insurance Company, the employer's workers' compensation insurer from July 31, 1993, to July 31, 1994, and from CNA Insurance Company, the insurer on the risk from July 31, 1994, through the employee's last day of employment for the employer. Many of the employee's work injuries were admitted; however, when the matter came on for hearing on November 19, 1997, numerous issues were disputed, including the dates and the nature of certain work injuries; the employee's weekly wage on various alleged dates of injury; notice of injury; the employee's

[3] The employee testified that the employer's insurer authorized treatment for low back symptoms only, not for neck symptoms, and that Dr. Moultrie therefore declined to deal with the employee's cervical complaints. The same restriction allegedly applied to the employee's later treatment by Dr. Manzione.

entitlement to temporary partial disability benefits after August 7, 1995; the extent of the employee's permanent impairment, if any, resulting from her work injuries; apportionment of liability between TIG and CNA; and the employee's entitlement to retraining benefits after her September 11, 1996, enrollment at Temple University. One of the issues raised for the first time at hearing was whether the employee had sustained a Gillette-type[4] injury on or about May 12, 1995, in addition to the other alleged or admitted injuries. Evidence included various medical records and reports; deposition testimony by Dr. Boxall, CNA's expert examiner; live testimony by the employee and by vocational experts Alden Bjorklund and Jan Lowe; and videotaped clips of Sesame Street Live. The compensation judge offered the parties the opportunity to obtain updated medical opinions concerning the employee's potential May 1995 Gillette injury, but the parties apparently declined the offer.

In a decision issued on December 22, 1997, the compensation judge concluded in relevant part as follows: that the employee had sustained specific work-related injuries on February 14, 1990, October 21, 1990, December 14, 1990, May 22, 1991, November 5, 1991, October 30, 1992, November 29, 1992, August 24, 1993, February 28, 1994, March 4, 1994, and November 18, 1994; that the employee had sustained Gillette-type injuries on December 23, 1993, and May 9 or 10, 1995; that the employee's work injuries included soft tissue injuries to the employee's cervical, thoracic, and lower lumbar back areas; that the employer had adequate notice of all injuries; that the employee continued to experience symptoms and be subject to restrictions due to her injuries; that the employee had a loss of earning capacity as a result of her injuries; that all of the employee's work injuries were a substantial contributing cause of the employee's disability and need for medical care for the periods at issue; that the employee had, at minimum, a 10% whole body impairment; that economic recovery compensation [ERC] was payable for the employee's permanent impairment; that the employee was entitled to retraining benefits in connection with her enrollment at Temple University; that the employee was entitled to temporary partial disability benefits based on actual wages after August 7, 1995; and that equitable apportionment between insurers was appropriate, on a 35%(TIG)-65%(CNA) basis. Both insurers 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 (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

[4] The compensation judge indicated at hearing that he preferred the term [d]aily wear-and-tear injuries, formerly known as Gillette, and he used the daily wear-and-tear terminology in his findings and order.

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

November 18, 1994, Injury

The first report of injury covering the employee's November 18, 1994, injury indicates that the employee sustained a lower back injury as well as reoccuring [sic] neck and upper back [injury] from previous workman's comp from 8-93" due to dancing in costume pushing a heavy object[5] down a ramp. On appeal, CNA contends that substantial evidence does not support the compensation judge's conclusion that this injury was a substantial contributing cause of the employee's disability for the period at issue. In support of this contention, CNA points out that the employee had several neck and back injuries prior to November 18, 1994, and that Dr. Boxall testified that the November 1994 injury was merely temporary, resolving by at least August of 1995. Moreover, according to CNA, Dr. Slipman, one of the employee's own treating physicians, attributed all of the employee's continuing cervical problems to an August 1993 injury, when TIG was on the risk. We are not persuaded that the compensation judge's decision on this issue is clearly erroneous and unsupported by substantial evidence.

We note initially that the employee's testimony provides at least some support for the judge's causation decision. When the employee described the November 1994 incident at hearing, she indicated that, while she had had previous back and neck injuries, this was a little more involved this time, and that her neck and back pain continued to worsen after this injury, despite treatment. The compensation judge expressly found the employee's testimony to be highly credible, and a finding of credibility is a unique function of the trier of fact. See Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989). More importantly, perhaps, the judge's decision is supported by the opinion of Dr. O'Phelan, who reported on December 6, 1996, that the employee's November 18, 1994, injury was a contributing factor to [the employee's] current disability and as such, contributing to the need for the medical care she received. The fact that Dr. O'Phelan characterized the November 1994 injury as a Gillette injury rather than a specific injury has little bearing on the validity of his opinion as to the permanent nature of the injury. Contrary to CNA's contention, the fact that the employee continued working without significant lost time following the November 1994 injury is essentially irrelevant to the foundation for Dr. O'Phelan's opinion.

[5] Oscar in his garbage can.

Because the employee's testimony and the report of Dr. O'Phelan support the compensation judge's decision that the employee's November 1994 injury remained a substantial contributing cause of the employee's disability for purposes of the benefits at issue in this proceeding, we affirm the judge's decision on this point.

May 1995 Gillette Injury

CNA contends that the compensation judge erred in concluding that the employee sustained a Gillette injury culminating in disability on May 9 or 10, 1995. According to CNA, the employee offered no evidence, beyond her own allegations, to support the claim, and the only medical evidence supposedly addressing the issue of a Gillette injury was the testimony of Dr. Boxall, who found no evidence of a Gillette injury here. We are not persuaded.

It is true, as CNA suggests, that a determination on the issue of whether the employee sustained a Gillette injury is dependent largely on the medical evidence. See, e.g., Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994). At the same time, however, the issue of when a Gillette injury occurred is dependent on all the facts and circumstances. See Schnurrer v. Hoerner-Waldorf, 345 N.W.2d 230, 233, 36 W.C.D. 504, 508 (Minn. 1984). In the present case, the judge's conclusion that the employee sustained a Gillette injury is supported not only by the employee's testimony as to her symptoms and her work activities but by the medical records and medical opinions of several physicians. For example, as early as May of 1994, Dr. Justino concluded that the employee's prognosis was guarded, indicating that, due to the strenuous physical demands of the employee's job and her history of injuries, it is probable that she will continue to have aggravation episodes of pain that could develop into a permanent condition. In February of 1997, Dr. Slipman indicated that [t]he use of the costume in the course of [the employee's] dancing . . . led to subtle and repeated injuries to the employee's cervical and lumbar structures, and Dr. Slipman concluded that the employee had developed the conditions described in his report as a consequence of the employee's cumulative injuries. Finally, Dr. O'Phelan, although not specifying a May 1995 date of injury, suggested that the employee's condition was the result of Gillette injuries caused by the employee's performance of activities she was not physically strong enough to perform.

As to the compensation judge's decision as to the timing of the injury, the record contains sufficient ascertainable events, as specified in Schnurrer, to support a May 1995 injury date. Specifically, in mid May of 1995, Dr. Moultrie ordered a lumbar CT scan, which apparently for the first time disclosed lumbar degenerative changes, and the doctor at that time recommended restrictions on lifting, pushing, and pulling. Furthermore, while the employee was able to finish the 1994-1995 tour, she was not able to rejoin the company thereafter.

The record as a whole, including the medical records and reports, supports the compensation judge's conclusion that the employee sustained a work-related Gillette injury as a result of cumulative stress caused by performing strenuous dance activities in a heavy costume, and the judge's choice of May 9 or 10, 1995, as the culmination date of injury was reasonable in

light of all the circumstances. While the record might perhaps have supported other possible dates of injury as well, we find no basis to reverse the judge's decision on this issue.

Equitable Apportionment

The compensation judge found TIG liable for 35% of medical expenses incurred by the employee after November 17, 1994,[6] and 35% of all awarded wage loss, retraining, and permanent partial disability benefits; CNA was ordered to pay the remaining 65% of those benefits. In his memorandum, the judge indicated that he found the apportionment opinion of Dr. O'Phelan reasonable and appropriate. On appeal, CNA contends that the judge's decision is inconsistent with the medical evidence, in that Dr. O'Phelan's 35/65 apportionment did not take into account any Gillette injury in May of 1995. We agree that, since the judge found an additional injury in May 1995 that was not considered by Dr. O'Phelan, Dr. O'Phelan's apportionment does not precisely fit the facts here. However, equitable apportionment is not merely a medical determination, but one dependent on all the facts and circumstances, including the nature and severity of the injuries and the employee's symptoms between injuries. See, e.g., Goetz v. Bulk Commodity Carriers, 303 Minn. 197, 200, 226 N.W.2d 888, 891, 27 W.C.D. 797, 800 (1975). Moreover, it is important to note that the compensation judge in this matter did not attribute 65% of the employee's disability to the May 1995 injury but rather apportioned 65% liability to CNA, which was on the risk for both the employee's November 1994 injury and her May 1995 injury. The same evidence that supports the judge's decisions as to the occurrence of a May 1995 Gillette and as to the continuing effects of the employee's November 1994 and May 1995 injuries supports the judge's decision to allocate some liability for the employee's disability to CNA.

CNA also argues, in the alternative, that this court should accept Dr. Boxall's opinion apportioning only 35% liability to CNA and the remaining 65% to TIG.[7] This was one possible outcome of the hearing below. However, the record might have supported any number of equitable apportionment determinations, and, under such circumstances, we will not reverse. See Giem v. Robert Giem Trucking, 46 W.C.D. 409, 418 (W.C.C.A. 1992).

In its appeal of the compensation judge's apportionment decision, TIG argues initially that apportionment was inappropriate because there was no uncontested medical opinion permitting a precise allocation of liability between insurers, as specified by Michels v. American Hoist & Derrick, 269 N.W.2d 57, 31 W.C.D. 55 (Minn. 1978). While acknowledging that the holding of Michels is applicable only to equitable apportionment of liability for disability resulting from a single Gillette injury, see Sanchez v. Land O'Lakes, 43 W.C.D. 113 (W.C.C.A. 1990), TIG

[6] The judge ordered TIG to pay 100% of the medical expenses incurred by the employee between August 23, 1993, a date of injury for which TIG was responsible, and November 18, 1994, the first date of injury for which CNA was on the risk. This award was not appealed.

[7] Dr. Boxall's apportionment to this effect was hypothetical, because Dr. Boxall found no continuing disability from any of the employee's work injuries, and no Gillette injury at all.

argues that Michels is nevertheless applicable here because the employee's disability was due solely to the May 1995 Gillette.[8] We are not persuaded. Several physicians attributed some responsibility for the employee's condition to the employee's separate August 1993 injury, for which TIG is liable. Given that evidence, it was not unreasonable for the judge to attribute a portion of the employee's disability to that injury.

Finally, TIG contends that the judge erred as a matter of law in apportioning liability for permanent partial disability benefits, contending that there was no preexisting disability clearly evidenced in a medical report or records made prior to the current personal injury, as specified in Minn. Stat. § 176.101, subd. 4a. However, the compensation judge here used equitable rather than statutory apportionment principles. In equitable apportionment situations, the statutory requirements of Minn. Stat. § 176.101, subd. 4a, do not apply.[9] Finally, contrary to TIG's argument, the medical records and the employee's testimony do reasonably suggest that the employee was in fact disabled to some extent, due to the August 1993 injury, prior to the occurrence of the injuries for which CNA is liable.

Given the complex facts of this case, including the unusual number of injuries involved, we cannot conclude that the compensation judge's 35/65 equitable apportionment of liability for wage loss, medical, retraining, and permanent partial disability benefits was unreasonable, and we affirm his decision.

Retraining/Temporary Partial Disability Benefits

CNA contends that the employee is not entitled to either retraining or temporary partial disability benefits because she has no ongoing loss of earning capacity. In support of this argument, CNA maintains that both Dr. Manzione and Dr. Boxall have indicated that the employee is capable of working without restrictions.[10] However, the compensation judge expressly rejected

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[8] As part of this argument, TIG asserts that the compensation judge himself specifically attributed the employee's permanent partial disability solely to the employee's May 1995 Gillette injury. This position is not unreasonable in view of the language used by the judge in Finding 13, in which he indicated that the employee had a 10% impairment as a result of [her] cumulative type, daily wear and tear type, soft tissue injuries . . . . It is, however, evident from his decision as a whole that the judge placed some responsibility for the employee's permanent impairment on the employee's August 23, 1993, injury, which occurred during TIG's period of coverage. It is also possible--despite the judge's description of that injury as specific in Finding 4--that the judge characterized the August 1993 injury as a separate Gillette injury, in accordance with the opinion of Dr. O'Phelan.

[9] See Stone v. Lakehead Constructors, 533 N.W.2d 36, 52 W.C.D. 637 (Minn. 1995). TIG did not specifically address or dispute the applicability of Stone.

[10] We note, however, that Dr. Manzione did not actually indicate that the employee had no need for restrictions; rather, in his August 8, 1995, office note, he indicated that the employee had

CNA's position on this issue, concluding, based on the opinions of Dr. Slipman and Dr. O'Phelan, that the employee was unable to continue working as a dancer due to her work-related condition. A compensation judge's choice between conflicting expert opinions is generally upheld unless the facts assumed by the expert are not supported by substantial evidence. See, e.g., Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). We find no basis to overturn the compensation judge's decision in this case.

CNA also contends that, even assuming that the employee is subject to limitations, as indicated by Drs. Slipman and O'Phelan, the employee nevertheless has no loss of earning capacity because she is physically capable of working as a bartender, full time, with no wage loss. As regards this argument, CNA relies on the testimony of employment expert Jan Lowe, who indicated that the employee could earn $500 to $600 a week, equivalent to her pre-injury wage, within her restrictions, as a bartender in the Philadelphia area. However, the compensation judge indicated that Ms. Lowe's testimony was not fully credible, and Ms. Lowe's opinion was contradicted by the opinion of employment expert Arlen Bjorklund, who testified that the employee had a clear loss of earning capacity related to her work injuries and that even full-time bartending would not pay what Ms. Lowe suggested. Also, the record indicates that the employee does not like bartending and that some tasks associated with that job could exceed her restrictions. Finally, the employee did in fact have a wage loss while working as a bartender, and there is no real evidence that she could have reasonably increased either her hours or her pay in that job. Contrary to CNA's argument, nothing in the record compels the conclusion that Ms. Lowe's vocational opinion as to earning capacity is more persuasive than Mr. Bjorklund's.

Finally, CNA contends that the employee is not entitled to temporary partial disability benefits because she voluntarily removed herself from the full-time labor market by enrolling at Temple University in September of 1996. This argument is specious. The compensation judge approved the employee's request for retraining, and that approval is well supported by the testimony of Mr. Bjorklund, the labor market study conducted in connection with the employee's proposed retraining plan, the vocational testing, and the employee's high performance so far in her chosen field of study. We note also that there is no argument or evidence that the employee's specific course of study is somehow inappropriate or that she has no reasonable expectation of finding suitable employment after graduation. Enrollment in a formal course of study that is ultimately approved as retraining cannot, as a matter of law, constitute withdrawal from the labor market for purposes of wage loss benefit eligibility.

The judge's award of retraining and temporary partial disability benefits is affirmed.

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made a good recovery and had no need for further treatment.

Economic Recovery Compensation

Without explanation, the compensation judge awarded the employee ERC for her permanent partial disability. On appeal, TIG argues that the judge erred in this regard, in that the employee is currently in retraining. We agree. Under Minn. Stat. § 176.101, subds. 3e(b) and 3p (repealed 1995), ERC is not payable unless the employee fails to obtain suitable employment within 90 days post MMI or 90 days after the end of an approved retraining plan, whichever is later. Id., subd. 3p. We therefore reverse the judge's award of ERC as premature, and hold that the employee is as of yet entitled to only impairment compensation for her permanent partial disability.