MARY A. ADERMAN, Employee/Appellant, v. CARE FREE LIVING RET. HOMES and MINN. ASSIGNED RISK PLAN/WAUSAU INS. CO., Employer-Insurer, and MN DEP'T OF HUM. SERVS., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 24, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY; EVIDENCE - EXPERT MEDICAL OPINION. The compensation judge improperly imposed on the employee a standard of proof similar to that set forth in Reese v. Northstar Concrete, 38 W.C.D. 63 (W.C.C.A. 1985), rejected by the supreme court in Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994). The compensation judge also erred by drawing an adverse inference from the absence of an opinion from the employee's treating doctor. We, accordingly, vacate and remand for reconsideration under the proper standards.

Vacated and remanded.

Determined by: Johnson, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Gary P. Mesna

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's finding she did not sustain a Gillette-type[1] personal injury arising out of her employment, and appeals the compensation judge's denial of her claim for benefits. We vacate Finding 4, and related provisions of Findings 6, 10 and 11, and remand the case to the compensation judge for reconsideration.

BACKGROUND

Mary A. Aderman, the employee, worked for the employer, Care Free Living Retirement Home, for approximately one month in 1988 and from March 1990 through November 1994. (T. 31.) During all relevant time periods, the employer was insured by Wausau Insurance Company.

The employee worked for the employer as a dietary aide. The employee typically

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

worked between 32 and 38 hours per week, commencing at 6:00 a.m. until approximately 1:00 p.m. (T. 31-32, 35.) Meals were served to residents of the retirement home in a communal dining room. As part of her job, the employee served breakfast, a snack and lunch to the residents. Beginning at 6:00 a.m. the employee set up the tables in the dining room by placing placemats, silverware, napkins, plates, glasses, cups and other items on the table. Just before the residents began arriving at 7:00 a.m., the employee took out ice water, juices, milk and coffee. The employee worked alone from 6:00 until 7:00, when a second dietary aide came on duty. The employee and the other aide divided the dining room in half. The residents arrived sporadically between 7:00 and approximately 9:30 in the morning. As they arrived, the employee and the other aide took their breakfast orders, delivered them to the cook and then delivered the meals to the resident. Between 68 and 75 people were served breakfast on an average day. (T. 33-37.)

After breakfast was completed, the employee and the other dietary aide cleared the tables, brought the dishes to the dishwasher, washed them in a dishwasher and put the dishes away. Dirty dishes were placed into a bin, loaded on a cart, wheeled into the kitchen and loaded into the dishwasher. (Resp. Ex. 4 p. 10-12.) The aides next cleaned the tables, swept the floor and at times spot mopped the floor. (T. 38-39.) Between 9:30 and 10:00, a morning snack was available for the residents. The aides set up a table outside the kitchen door containing snacks such as cookies. Most residents came and helped themselves to items of food and drink. (T. 128.) The employee helped some residents obtain a snack and carried it to where the resident was sitting. After the snack was completed the dietary aides cleaned the table area. (T. 39.)

During the noon meal, a total of four dietary aides worked in the dining room. The employee and the other aides set up the tables in the same manner as for breakfast. The noon meal was personally served by the aides to 68 to 75 residents. The employee carried six plates of food at a time, three in each hand. After lunch, the dirty dishes were taken to the kitchen in the same manner as after breakfast. The noon meal was typically completed by 12:30. (T. 39-42.) The employee and the other aides also cleaned the tables and the floor after lunch. (T. 42.)

In addition to these duties, the employee helped prepare food for breakfast and lunch, helped wash and stack dishes, fill flour and sugar containers and put away weekly grocery orders. (T. 43-48.) The employee described the pace of the job as "pretty steady, pretty - - there was always something to do." The employee testified the only time she took a break was for 15 to 20 minutes after the morning snack. (T. 49.) Grocery orders arrived twice a week, on Wednesday and Friday. Ms. Stanger and the employee put the groceries away. The job took 20 to 30 minutes on Wednesday and somewhat less on Friday. (T. 133-134.) Grocery items included cans of fruit cocktail, vegetables, frozen meat, half gallon containers of milk and cases of lettuce. (Resp. Ex. 4, p. 18.) At some point, the employee also began cooking two days a week. (T. 51.)

On December 31, 1978, the employee was seen at Fairview Riverside Hospital with complaints of a constant dull backache. The employee was seven months pregnant at the time. (Pet. Ex. C-9.) On April 15, 1991, the employee saw a specialist in obstetrics and gynecology, Dr. Michael Flanagan. She complained of low back pain and left lower quadrant pain which

reoccurred bimonthly and premenstrually. On April 18, 1991, Dr. Flanagan performed a D&C and a diagnostic laparoscopy with biopsies of bilateral ovarian cysts.

The employee returned to see Dr. Flanagan on April 6, 1992, complaining of left-sided pelvic and low back pain over the last two months. (Pet. C-8.) The employee testified to a gradual onset of low back pain in 1992 while at work. (T. 56-57.) On July 26, 1992, the employee was seen at the St. Cloud Hospital with complaints of low back pain with radiation into the left leg, worse over the last two months. An x-ray was normal except for minimal narrowing of the L4 interspace. The diagnosis was sciatica. (Pet. Ex. C-7.) The employee returned to Dr. Flanagan in August 1992, who referred her to Dr. Michael A. Amaral, an orthopedic surgeon. The employee saw Dr. Amaral on August 17, 1992, and gave a history of an insidious onset of low back pain over the last year radiating into her left leg. An MRI scan taken August 19, 1992 showed a small posterior bulging disc at L5-S1 which minimally indented but did not displace the thecal sac and a minimal central bulging disc at L4-5. On review of x-rays, however, Dr. Amaral felt the disc was more significant than that shown in the MRI scan and ordered a lumbar myelogram and CT scan which showed an extradural defect at L4-5 indenting the anterior portion of the thecal sac with impingement on both the right and left L5 nerve root sheaths. Dr. Amaral concluded the employee had a free disc fragment at L4-5 on the left and scheduled surgery. On August 26, 1992, Dr. Amaral performed an L4-5 hemilaminectomy and discectomy. By October 1, 1992, Dr. Amaral noted the employee was doing well and ordered physical therapy. The doctor released the employee to return to work part-time with a zero pound lifting restriction and no bending, twisting, or stooping. (Pet. Exs. C-5, C-7.)

The employee returned to work for the employer at a light-duty position in October 1992. At some point, the employee returned to her normal duties and testified she was able to perform the duties of her job although she was more careful. (T. 63-64.) Sometime in 1993, the employee increased her hours by working two extra shifts on the weekends and every holiday. In addition, she performed unpaid volunteer work at the retirement home. She worked approximately 45 hours a week for several months. From the time she returned to work until June 1994 the employee experienced occasional cramping in her left leg but experienced no low back pain. (T. 65-68.)

On June 8, 1994, the employee returned to see Dr. Amaral and gave a history of doing well until recently when she lifted her grandson and noticed an immediate onset of left buttock and leg pain.[2] On examination, Dr. Amaral noted positive straight leg raising with decreased strength of the hamstring and an absent ankle jerk on the left. The diagnosis was an S1 radiculopathy possibly secondary to an L5-S1 herniated disc. An MRI scan taken June 9, 1994 showed diffuse bulging at L4-5, the area of the prior surgery, with evidence of a recurrent disc herniation. Dr. Amaral prescribed bed rest and recommended an epidural steroid injection which was performed on June 14, 1994. The employee's symptoms continued and Dr. Amaral

[2] The doctor's note states the employee "left her grandson." (Pet. Ex. C-5.) The employee testified the pain began when she lifted one of her grandchildren. (T. 68.)

recommended a second surgery. On June 29, 1994, Dr. Amaral performed a second hemilaminectomy and discectomy at L5-S1. (Pet. Ex. C-5 and 7.) On September 17, 1994, the employee went to the St. Cloud Hospital emergency room complaining of an onset of low back pain the evening before. The diagnosis was disc syndrome. (Pet. Ex. C-7.)

The employee again returned to work with the employer and worked until November 1994, when she resigned. The employee and her husband then moved to Garrison, Minnesota. The employee has not worked since. (T. 78-80.)

On March 26, 1995, the employee returned to the St. Cloud Hospital emergency room with complaints of pain in her right back and buttock. The diagnosis was back strain. On May 18, 1995, the employee returned to see Dr. Amaral complaining of severe left leg pain of several days duration which came on while the employee was lifting some objects. An MRI scan taken May 18, 1995 was consistent with a recurrent disc fragment at the L4-5 level. Dr. Amaral performed a third hemilaminectomy and discectomy at L4-5 on May 22, 1995. (Pet. Ex. C-5 and 7.)

The employee was examined by Dr. Robert Wengler on October 2, 1997. In preparation for the examination, Dr. Wengler was provided copies of the employee's medical records and a hypothetical question outlining the employee's job duties prepared by her attorney. Dr. Wengler diagnosed discogenic left leg sciatica secondary to recurrent disc herniations at the L4-5 level. Dr. Wengler opined the employee's work duties were a substantial contributing cause of the initial disc herniation at L4-5 and L5-S1 and the subsequent herniations at L4-5 occurred as a direct consequence of the initial injuries. Dr. Wengler re-examined the employee on December 22, 1998 and concluded the employee was totally disabled from any type of gainful employment. (Pet. Ex. B.)

Dr. Paul Cederberg examined the employee on July 29, 1998 at the request of the employer and insurer. In preparation for his examination, Dr. Cederberg was provided with copies of the employee's medical records, a medical summary and a written description of the employee's job duties prepared by counsel for the employer and insurer. Dr. Cederberg diagnosed two-level degenerative discs with recurrent disc herniations at L4-5 with left S1 radiculopathy and a herniated L5-S1 disc, status post hemilaminectomy. Dr. Cederberg opined the employee's work activities were not a substantial contributing cause of her lumbar spine problems, and that she did not sustain a Gillette injury while working for the employer. (Resp. Ex. 1.)

The employee filed a claim petition seeking temporary total and permanent partial disability benefits and a rehabilitation consultation. The employer and insurer denied the employee sustained a personal injury and denied liability for benefits. The case came on for hearing before a compensation judge at the Office of Administrative Hearings on January 15, 1999. In a findings and order served and filed February 5, 1999, the compensation judge found the employee did not sustain a Gillette-type personal injury to her low back as a result of her work activities for the employer. Based on this finding, the compensation judge denied the employee's

claims. The employee appeals the denial of benefits.

STANDARD OF REVIEW

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A.) 1993).

DECISION

In his memorandum, the compensation judge stated he was more persuaded by the opinion of Dr. Cederberg than the opinion of Dr. Wengler. It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Where the facts assumed by the expert in the opinion are supported by the evidence, the compensation judge's choice of experts is generally upheld on appeal. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). In this case, however, the judge went on to list certain factors which influenced his decision. First, and most significant, according to the compensation judge, was the fact that the employee never complained that her work activities caused increased low back pain. Second, the compensation judge stated the medical records did not document complaints by the employee that her work activities caused low back pain. Third, the judge stated the employee did not testify her back complaints were worse at the end of the day or week and did not testify they were better when she was off work. Fourth, the judge concluded the employee's work duties were light and varied rather than heavy and repetitive. Finally, the compensation judge noted the treating physician, Dr. Amaral, did not opine the employee sustained a Gillette injury. (Memo at p. 4-5.) Taking these factors into consideration, the compensation judge concluded he was more persuaded by the opinion of Dr. Cederberg than the opinion of Dr. Wengler. Accordingly, the compensation judge denied the employee's claims. On appeal, the employee contends the reasons given by the compensation judge to support the denial of benefits are not legally correct. The employee argues the compensation judge's reliance on legally incorrect tests constitutes reversible error.

In Reese v. Northstar Concrete, 38 W.C.D. 63 (W.C.C.A. 1985), this court held that to prove a Gillette injury, an employee must prove that specific work activities resulted in specific symptoms leading cumulatively to disability. In Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994), the supreme court rejected that test and held there was no requirement an employee prove a gradual onset of pain associated with specific work activities. Rather, to establish a Gillette injury, an employee must "prove a causal connection between [his] ordinary work and ensuing disability." 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.

The compensation judge, in his memorandum, acknowledged the Steffen standard for proof of a Gillette injury. The first three reasons listed by the compensation judge for his

denial of the employee's claim do not, however, comport with the Steffen standard. The compensation judge went on to state "while it is no longer necessary to prove that specific work activities caused specific symptoms which ultimately led to disability, the employee still has the burden of proving a causal connection between her work activities and the ensuing disability." (Memo at 5.) This comment, together with the specific reasons given by the compensation judge for choosing the opinion of Dr. Cederberg over that of Dr. Wengler, appears to be an implicit adoption of the Reese standard. The memorandum suggests the compensation judge concluded the employee failed to meet her burden of proof, in part, because: (1) the employee did not complain that her work activities caused increased low back pain; (2) the medical records did not document complaints by the employee that her work activities caused her low back pain; and (3) the employee did not testify low back symptoms worsened at the end of the work day or work week. Under Steffen, such proof is not required since the test of a Gillette injury primarily depends on medical evidence.

The compensation judge also attached significance to the absence of an expert opinion from Dr. Amaral on the issue of whether the employee sustained a Gillette injury. Such reliance is legally erroneous. The employee is required to prove her case by a preponderance of the evidence. Minn. Stat. § 176.021, subd. 1a. While proof of a Gillette injury depends primarily on the medical evidence, Steffen, id., there is no requirement that the employee obtain or place in evidence the opinion of the treating physician. Nor may a compensation judge draw any adverse inference from the absence of a treating doctor's opinion. Dubois v. Clark, 253 Minn. 556, 93 N.W.2d 533 (1959). The employee presented the testimony of Dr. Wengler in support of her claim. A party has no duty to present any more evidence than the party considers necessary to prove the claim. Connolly v. Nicollet Hotel, 104 N.W.2d 721 (1960).

It appears the compensation judge improperly imposed on the employee the burden of proving her case using a Reese test. It further appears the compensation judge drew some inference adverse to the employee's claim based on the absence of medical testimony from Dr. Amaral. The compensation judge specifically stated these factors were significant in his decision to adopt the opinion of Dr. Cederberg over the opinion of Dr. Wengler. We conclude the compensation judge's choice of experts may have been tainted by his consideration of the Reese factors and the adverse inference. Accordingly, we vacate Finding no. 4, and related provisions of Findings 6, 10 and 11, and the compensation judge's order and remand the case to the compensation judge for reconsideration. On remand, the compensation judge should make further findings and order together with such memorandum as may be appropriate.