

SANDRA FRIEDRICH, Employee/Appellant, v. FIRST BANK SYS. and ST. PAUL FIRE & MARINE INS. CO., Employer-Insurer, and FIRST BANK SYS., SELF-INSURED/CONSTITUTION STATE SERV. CO., Employer-Insurer, and HORMEL FOODS CORP. and FIRST BANK SYS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 5, 1999

No. [REDACTED SSN]

HEADNOTES

WAGES - CALCULATION. Where the compensation judge did not accept the employee's proof of the number of days worked in the 26 week period preceding the work injury and there was no other evidence of the number of days worked, the compensation judge did not err by using an alternate method of determining the employee's weekly wage for her part-time position.

TEMPORARY PARTIAL DISABILITY. Where there was no difference between the employee's wage at the time of the injury and her wage when she returned to work, the employee was not entitled to temporary partial disability benefits.

CAUSATION - MEDICAL TREATMENT; PRACTICE & PROCEDURE - REMAND. Where the compensation judge's reason for denial of certain medical expenses was based on the fact that the medical evidence did not indicate a time period for how long the aggravation was causally related, a remand is required for reconsideration of whether the employee's work injury was a substantial contributing cause of the aggravation of the employee's preexisting stomach condition.

GILLETTE INJURY - ULTIMATE BREAKDOWN; NOTICE OF INJURY; PRACTICE & PROCEDURE - REMAND. Where the compensation judge did not indicate whether the date of injury claimed was the date of culmination of the employee's left upper extremity Gillette-type work injury, a remand is required for reconsideration of the notice issue.

Affirmed in part, vacated in part, and remanded.

Determined by Hefte, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Cheryl LeClair-Sommer

OPINION

The employee appeals the compensation judge's finding that the employee did not give adequate notice of a left upper extremity injury, the finding that the employee's stomach problems were not causally related to her work injury, the calculation of the employee's weekly wage, and the determination that the employee was not entitled to temporary partial disability benefits. We affirm in part, vacate in part, and remand.

BACKGROUND

Sandra Friedrich (employee) was employed as a teller at First Bank Austin (employer). In February 1993, the employee's and all tellers' hours were permanently reduced from full time to between 28 and 32 hours per week. The employee signed a memorandum acknowledging the change. On March 22, 1993, the employee sustained an admitted injury to her thoracic spine when she fell on ice in the parking lot. Neither the employee nor any other teller had returned to full-time work prior to the employee's work injury. At that time, the employer was insured for workers' compensation liability by St. Paul Fire and Marine Insurance Company (St. Paul). The employee received temporary total disability benefits and returned to her pre-injury job with the employer in May 1993. The employee worked fewer hours initially, and received temporary partial disability benefits. In October 1993, the employee was able to work her regular part-time hours of 28 to 30 hours per week. The employee's benefits were paid based on a weekly wage of \$257.17, which was apparently calculated by multiplying the employee's hourly wage rate by 32 hours per week. The employee was paid for a 10.5% permanent partial disability for her thoracic spine injury.

On March 2, 1995, the employee was examined by Dr. Robert Wengler. Dr Wengler opined that the employee had sustained a 10.5% permanent partial disability for her thoracic spine condition and that the employee had right carpal tunnel syndrome, which would be rated as 3% permanent partial disability of the whole body. On June 24, 1996, the employee was examined by her treating physician and reported painful hands, right greater than left. The employee was referred to Mayo Orthopedics, and was told to wear a right wrist splint while at work and bilateral wrist splints while asleep at night. Dr. William Cooney at the Mayo Clinic diagnosed right carpal tunnel syndrome and recommended surgery, and also recommended a cortisone injection for her left hand. The employee continued to work for the employer until October 30, 1996, when she underwent right endoscopic carpal tunnel release surgery. The employee then developed triggering of her right long finger and underwent a second surgery to correct this condition. The employee returned to work on January 1, 1997, in her regular position. On March 14, 1997, the employee underwent a left endoscopic carpal tunnel release surgery. The employee received short term disability through the employer while she was off work for her carpal tunnel surgeries. On April 7, 1997, the employee again returned to her regular position with the employer, and has continued in that position through the date of the hearing. In October 1997, the employee began working part-time as a cashier for another employer in addition to her job with the employer, and has continued in that position also through the date of the hearing.

The employee filed a claim petition in 1995 alleging an underpayment of wage loss benefits previously paid because an incorrect weekly wage had been used, entitlement to on-going temporary partial disability benefits, that the carpal tunnel injuries were work-related and claiming permanent partial disability and medical expenses for the carpal tunnel conditions, and that medications for a gastric stomach condition were casually related to her back injury. The employee alleged new dates of injury for the carpal tunnel conditions, March 2, 1995, for the right carpal tunnel condition and June 24, 1996 for a bilateral carpal tunnel condition. For those dates,

the employer was self-insured and its claims were administered through Constitution State Service Company.

A hearing was held on May 12, 1998. The compensation judge found that the weekly wage used by the employer for the 1993 spine injury was correct, that the employee was not entitled to on-going temporary partial disability benefits, and that the employee's need for treatment for a gastric stomach condition was not causally related to her back injury. The compensation judge determined that the employee had sustained a work-related carpal tunnel condition to her right hand on March 2, 1995, and a work-related bilateral carpal tunnel condition on June 24, 1996. The employee was awarded temporary total disability and 3% permanent partial disability for her right hand. The employee was denied benefits related to her left hand injury because she had not provided sufficient notice, and also for the triggering condition of her right hand because it was not work-related. 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 (1998). 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

Weekly Wage

The compensation judge found that the employee's weekly wage at the time of the March 1993 spine injury was \$253.17. An injured worker's wage loss benefits are to be based on the employee's weekly wage at the time of injury. Minn. Stat. § 176.101, subd. 1. Where wages are irregular or difficult to determine, or where the employee works part time, wages are usually calculated according to the formulas contained in Minn. Stat. § 176.011. Under the formulas, a daily wage is first determined by dividing the total wages earned in the 26 weeks prior to the injury by the number of days in which the employee actually performed work. Minn. Stat. § 176.011, subd. 3. The weekly wage is then determined by multiplying the daily wage by the number of days or fractional days per week normally worked. Where the number of days worked per week

is irregular, the days per week are calculated by dividing the number of days worked in the previous 26 weeks by the number of weeks in which work was actually performed. Minn. Stat. § 176.011, subd. 18.

The employee claims that since she was working part time at the time of the injury, the 26 week calculation should be used, resulting in a weekly wage of \$320.15. The statutory method of first calculating the employee's daily wage was not possible because the evidence did not indicate the number of days worked. The compensation judge did not accept the employee's proof of the number of days worked during the 26 week period preceding the injury. The evaluation of the evidence is within the province of the compensation judge. The question presented on appeal is whether the method employed by the compensation judge resulted in a wage determination which is a fair approximation of the employee's lost earnings. Where a compensation judge does not have available the evidence upon which to make calculations based on the statutory formulas, alternate calculation methods are acceptable as long as they fairly and reasonably approximate the employee's lost earning potential. Hansford v. Berger Transfer, 46 W.C.D. 303 (W.C.C.A. 1991); Decker v. Red Wing Shoe, 41 W.C.D. 763 (W.C.C.A. 1988). In this case, the compensation judge accepted the employer and insurer's calculation of the employee's weekly wage which was determined by multiplying her hourly wage by the average number of hours worked by the employee in her part-time position. Under the circumstances, the compensation judge's decision was not unreasonable. Therefore, we affirm.

Temporary Partial Disability

The employee received temporary partial disability benefits when she initially returned to work after the March 1993 injury, because she was working fewer hours than at the time of the injury. In October 1993, the employee was able to work her regular part-time hours with no wage loss. The employee alleges that since she was under physical restrictions from her 1993 thoracic spine injury, she was prohibited from seeking unrestricted work even though she could perform her preinjury job, and therefore she was entitled to ongoing temporary partial disability benefits. In order to be eligible for temporary partial benefits, the employee must establish a reduction in earning capacity which is causally related to the work injury. Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 864, 41 W.C.D. 42, 48 (Minn. 1988). An employee's entitlement to temporary partial disability benefits is based on the difference between the employee's wage on the date of injury and the wage the employee is able to earn in his or her partially disabled condition. Minn. Stat. § 176.101. In this case, there was no difference between the employee's wage on the date of injury in 1993 and her wage when she returned to work at her regular part-time hours in October 1993. Therefore, the employee is not entitled to temporary partial disability benefits.

Medical Expenses

The employee claimed that a preexisting gastric stomach condition was aggravated by her use of anti-inflammatory medications prescribed for her 1993 thoracic spine condition, and therefore that the cost of the Tagamet medication used to treat her gastric stomach condition after the injury was compensable. The employer is liable for any medical treatment reasonably

required at the time of the injury and any time thereafter to cure and relieve from the effects of the injury. Minn. Stat. § 176.135, subd. 1(a). An employee has the burden of proving that his or her claimed medical expenses were reasonable, necessary, and causally related to his or her work injury. See, e.g., Adkins v. University Health Care Ctr., 405 N.W.2d 233, 39 W.C.D. 898 (Minn. 1987). Dr. Robert Wengler opined in a March 2, 1995, report that the anti-inflammatory medication aggravated the employee's gastric ulcer and any treatment for that condition "at the present time" was therefore causally related to her work condition. The compensation judge found that the evidence failed to establish that the employee's back injury was a substantial contributing factor to the aggravation of the employee's preexisting gastric condition. The employee had been treated in the past for the gastric condition, and the employee continued to take medications for the gastric condition through the date of the hearing. However, the reason given by the compensation judge in the memorandum was that employee's medical evidence did not designate a time period related to the alleged aggravation. There is no medical opinion in the record that the employee's aggravation of her stomach condition was not causally related to her use of anti-inflammatory medications. We vacate the compensation judge's finding that the employee had failed to establish that the employee's back injury was a substantial contributing cause of the employee's aggravation of her preexisting gastric condition. We remand for further consideration of whether the employee's back injury was a substantial contributing factor to the aggravation and need for treatment of the employee's preexisting gastric condition and resulting prescription expenses.

Notice

The compensation judge found that the employee provided sufficient notice to the employer of the March 2, 1995, work injury to the right upper extremity when the claim petition was filed on May 3, 1995, and also that the "employer had adequate inquiry notice of the June 24, 1996 work injury to the right hand and wrist prior to the October 30, 1996 surgical procedure to the right hand and wrist when the employee supplied the employer with the leave of absence and total disability slips indicating the then proposed surgery to the right hand and wrist." (Finding 6.) The compensation judge found that the evidence failed to establish that the employer had adequate notice of the employee's left carpal tunnel injury since the "record contains no evidence that the employer received notice of a potential injury or possible surgery to the left hand and wrist within 180 days of June 24, 1996." (Id.) Minn. Stat. § 176.141 provides, in relevant part:

Unless knowledge is obtained or written notice given within 180 days after the occurrence of the injury no compensation shall be allowed, except that an employee who is unable, because of mental or physical incapacity, to give notice to the employer within 180 days from the injury shall give the prescribed notice within 180 days from the time the incapacity ceases.

The compensation judge found that the employee had sustained a Gillette-type injury which arose out of and in the course and scope of employment with the employer on June 24, 1996, in the nature of bilateral carpal tunnel syndrome when treatment was sought at the Austin

Medical Clinic. 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); Carlson v. Flour City Brush Co., 305 N.W.2d 347, 350, 33 W.C.D. 594, 598 (Minn. 1981). While it is not necessary that the employee be disabled from all work activities or suffer a wage loss to establish when a Gillette injury has occurred, and other "ascertainable events" may support a finding as to the date of a Gillette injury, the date on which minute trauma culminates in a Gillette-type injury is not so much a medical question as a question of ultimate fact for the compensation judge, to "be determined on all the evidence bearing on the issue." Schnurrer v. Hoerner-Waldorf, 345 N.W.2d 230, 36 W.C.D. 504 (Minn. 1984). For example, a diagnosis of carpal tunnel syndrome and the use of wrist splints at work might constitute "ascertainable events" sufficient to establish a date of injury. See Trego v. Associated Leasing, slip op. at 7 (W.C.C.A. January 9, 1998). In this case, however, the employee was diagnosed on June 24, 1996, but told to wear a wrist splint at work on the right wrist, and to wear splints on both wrists at night. Seeking medical care, stopping work, self-treatment, and alteration of work methods may also be "ascertainable events" to support a finding of the date of a Gillette injury. See Plaster v. Palani Constr., slip op. at 5 (W.C.C.A. May 15, 1996). The employee in this case did not lose any time from work due to her left carpal tunnel condition until March 14, 1997, when she had surgery. The compensation judge's findings, order and memorandum do not indicate whether she considered whether the employee's left carpal tunnel syndrome had culminated on June 24, 1996, the date of injury originally claimed at the hearing. We vacate the compensation judge's findings that the employee sustained a Gillette-type injury on June 24, 1996, and had failed to establish that the employer had adequate notice of a June 24, 1996, work injury to the left upper extremity. We remand for consideration of whether "ascertainable events" had established a date of culmination for the left upper extremity injury before the employee's surgery on March 14, 1997, and whether the employee had given adequate notice within the required time period.