KAY HECKEL, Employee, v. CROWN, CORK & SEAL and PACIFIC EMPLOYERS INS. CO., Employer-Insurer/Appellant, and KMART CORP., SELF-INSURED, Employer-Insurer, and HEALTHPARTNERS, INC., Intervenor

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 21, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY. Substantial evidence, including expert opinion, supported the compensation judge's conclusion that the employee did not sustain a Gillette injury with a second employer.

CAUSATION - TEMPORARY AGGRAVATION. Substantial evidence, including expert opinion, supported the compensation judge's conclusion that the employee sustained only temporary aggravations in the course and scope of her employment with a second employer.

TEMPORARY PARTIAL DISABILITY - WORK RESTRICTIONS. Substantial evidence, including expert opinion, supported the compensation judge's conclusion that the employee was limited to working only four hours a day as a result of her work injury.

Affirmed.

Determined by Wilson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Harold W. Schultz II

OPINION

DEBRA A. WILSON, Judge

Crown, Cork & Seal appeals from the compensation judge's findings that the employee did not sustain a Gillette injury culminating in April of 1998, while employed by Kmart; that the employee's specific injury in April of 1998 was temporary in nature; and that the employee is not capable of working forty hours per week. We affirm.

BACKGROUND

The employee sustained a work-related injury to her back on October 21, 1986, while working for Crown, Cork & Seal [Crown] as a production worker. The employee's diagnosis was grade II spondylolisthesis with left leg pain. On February 16, 1987, she underwent a hemilaminectomy at L4-5 and L5-S1, and fusion at L5-S1, which was causally related to the October 1986 injury.

The employee's surgeon, Dr. William Simonet, released the employee to return to sedentary work on June 23, 1987, but she did not return to work at that time. In July of 1987, the employee began treating with Dr. Richard Golden. A CT scan in August of 1987 revealed grade II spondylolisthesis at L5-S1, with "degenerative changes of the facets L5-S1 bilaterally with mild to moderate left neural foraminal stenosis." Dr. Golden recommended a chronic pain program, which the employee completed at Sister Kenny in 1988.

Crown had the employee examined by independent medical examiner Dr. Stephen Barron on April 5, 1988. He opined that the employee had sustained a 17.5% whole body impairment and that she was capable of working with a ten-pound lifting limit and no frequent bending from the waist. On May 26, 1988, Dr. Golden prepared an R-33, indicating that the employee could work eight hours per day with restrictions that included no squatting or crawling, only occasional bending, stooping, crouching, kneeling, pushing and pulling, and occasional lifting of up to twenty-four pounds.

In October of 1988, the employee began working for Kmart on a part-time basis,[1] moving to full-time employment after approximately six months. About six months later, in September of 1989, the employee treated with Dr. Golden for sharp pains traveling from her left foot and ankle up into the buttock area. Dr. Golden's assessment at that time was "post-traumatic degenerative changes of the lumbar spine with past history of lumbar spine fusion with new symptoms. . . ." An MRI performed on October 9, 1989, revealed ongoing spondylolisthesis of L5 on S1 and a solid fusion.

The employee sustained an injury on March 7, 1991, while setting up a display at Kmart. She subsequently treated at Group Health, where she was diagnosed with acute back strain and was taken off work. Office notes reflect the strain had resolved as of March 12, 1991.

On April 25, 1991, the employee injured her back again at Kmart while pushing a rack of clothes. She again treated at Group Health, was diagnosed as suffering from low back pain, and was released to her regular duties on May 6, 1991. In 1992, the employee returned to Group Health on two occasions with continuing complaints of low back pain with no precipitating event. In 1993, the employee made one such visit to Group Health for treatment. On June 15, 1995, the employee was seen by Dr. K. Lucas, at Group Health, after squatting down at home that morning and being unable to get up. Dr. Lucas diagnosed an acute low back strain, and the employee was prescribed physical therapy.

The employee was seen by orthopedist Dr. Robert Barnett on August 21, 1996, for evaluation of her back. Dr. Barnett ordered an MRI, which was performed on September 18, 1996, and demonstrated no evidence of disc herniation, neurologic impingement, or stenosis, but

[1] While the employee was released to return to full-time work, Kmart had only part-time work available at that time.

which was consistent with possible pseudoarthrosis of her posterior spine fusion. Dr. Barnett limited the employee's activities to "as tolerated." In a letter dated September 4, 1996, Dr. Barnett opined that the employee was experiencing an exacerbation of ongoing problems with her lumbosacral spine "related to her condition that pre-dated her employment at K-Mart." Later in that letter, he stated, "I do not feel that her job at K-Mart is necessarily responsible for a change in her spinal condition."

On November 25, 1996, the employee was seen by Dr. Frank Wei, who diagnosed chronic low back pain and deconditioning and recommended that the employee decrease her work to three hours a day. The employee apparently worked her reduced hours for some period thereafter.

On March 6, 1998, the employee was seen at Apple Valley Medical Center, complaining of back pain after moving a rack at Kmart earlier in the day. The diagnosis at that time was low back pain and grade I spondylolisthesis. A first report of injury was filed for this injury.

In April of 1998, the employee was working at Kmart when her leg buckled, causing her to grab onto a cart to keep herself from falling. The employee was seen by Dr. Lynn Koch at HealthPartners on April 28, 1998. At that time, Dr. Koch restricted the employee to working four hours per day and lifting no more than ten pounds. Dr. Koch also prescribed physical therapy and referred the employee to Dr. Manuel Pinto. In a letter dated July 23, 1998, Dr. Koch opined that the employee's condition was an exacerbation of her long-standing back pain and prior injury. "Her work activities at Kmart probably have some contribution to her current symptoms, but I do not perceive it to be the major contributor to her current symptoms."

The employee first saw Dr. Pinto on July 29, 1998. His assessment was that the employee had a possible foraminal stenosis, possible retrolisthesis, and possible L4 disc degeneration or facet arthropathy, and he ordered another MRI. In his office note of September 9, 1998, Dr. Pinto reported that the MRI showed some dehydration of the L3-4 and L2-3 discs, that the facet joints at L4-5 looked arthritic, and that the employee had only mild stenosis in the L5-S1 disc. He recommended that discograms be done from L1 to L5, and, after reviewing those tests, Dr. Pinto released the employee to work for four hours a day, with restrictions on bending, lifting, and twisting. He also recommended a pain management program.

The employee filed a claim petition against both Crown and Kmart, seeking temporary partial disability benefits, permanent partial disability benefits, medical expenses, and rehabilitation services. The claim petition alleged no specific date for any injury occurring at Kmart. The matter proceeded to hearing on April 1, 1999. At the time of trial, the employee was not claiming any injuries at Kmart, but issues included whether the employee had sustained specific injuries to her back while working at Kmart, whether the employee had sustained a

Gillette[2] injury on April 28, 1998, arising out of her work activities at Kmart, whether the employee's injuries at Kmart were temporary or permanent, and whether the employee was entitled to payment of the claimed wage loss benefits and medical bills. In findings filed on June 14, 1999, the compensation judge found, in part, that the employee had sustained injuries at Kmart on March 7, 1991, and April 25, 1991, and that the employee had testified to "incidents" occurring at work on March 6, 1998, and in April of 1998, but that these injuries were temporary in nature. The judge also found that the employee had not sustained a Gillette injury while employed by Kmart and that she was not physically capable of performing full-time work. The judge awarded temporary partial disability benefits and medical expenses against Kmart from March 6, 1998, to ninety days post April 28, 1998. Crown and its insurer were ordered to pay temporary partial disability benefits and medical expenses thereafter. Crown and its insurer appeal.

STANDARD OF REVIEW

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, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

Crown and its insurer contend that substantial evidence does not support the compensation judge's finding that the employee did not sustain a Gillette injury culminating in April of 1998, or, in the alternative, that substantial evidence does not support the finding that the specific injury the employee sustained in April of 1998 was only temporary in nature. Crown and its insurer also contend that the employee is capable of working a forty-hour work week.

Gillette Injury

It is the position of Crown and its insurer that "the employee's testimony regarding the Kmart injuries should be viewed [as] suspect . . ." and that the compensation judge erred by failing to take into account the medical opinions that supported Crown's claim of a Gillette injury.

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

We are not persuaded.

First, the compensation judge noted in his memorandum that the employee testified credibly with respect to her ongoing symptoms. Assessment of a witness's credibility is the unique function of the trier of fact. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989). We find no evidence that would support Crown's contention that the employee "does not want to establish a new injury due to the change in workers' compensation laws which would limit her benefits."

Second, Crown and its insurer contend that "medical records are replete with references showing that the employee's work activities at Kmart did aggravate her back condition" and that Dr. Paul Wicklund opined that the employee had sustained a Gillette injury while at Kmart. While there certainly is evidence that would support a finding of a Gillette injury, the issue before this court is whether substantial evidence supports the judge's decision to the contrary. Substantial evidence does support the judge's finding in this regard.

The compensation judge stated in his memorandum that he accepted the testimony of Dr. Thomas Litman regarding causation of the employee's condition. Dr. Litman conducted an independent medical examination for Kmart on February 1, 1999. He later testified that, since 1986, the employee had increased degenerative changes in her back but that those changes "are not greater than one would expect from the passage of time alone." He further testified that he could not attribute any of those changes to the work the employee performed at Kmart.

The employee was examined by Crown's independent medical examiner, Dr. Wicklund, on November 24, 1998. In his report of November 27, 1998, he diagnosed grade II spondylolisthesis and chronic back pain. It was his opinion that the employee's symptoms at that time were due to a "bending over incident" at Kmart in April 1998. In his deposition, taken in March of 1999, Dr. Wicklund was given a hypothetical that described the April 1998 incident as the employee's legs giving out and her grabbing onto a cart to avoid falling. Dr. Wicklund testified that the employee had sustained a permanent injury in the incident in April of 1998 and that the employee also sustained a Gillette injury culminating at that time.

A judge's choice between experts whose testimony conflicts is generally upheld unless the facts assumed by the expert in rendering his opinion are not supported by evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Crown and its insurer have raised no specific facts relied upon by Dr. Litman that are not supported by the evidence. In fact, Dr. Litman was given a lengthy hypothetical that is consistent with the employee's testimony. We therefore affirm the judge's acceptance of Dr. Litman's opinion and the judge's finding that the employee did not sustain a Gillette injury culminating in April of 1998.

Temporary Aggravation

Crown and its insurer contend that the compensation judge relied solely on the opinion of Dr. Litman in determining whether the employee's April 7, 1998, injury was temporary in nature, in contradiction to this court's holding in Wold v. Olinger Trucking, slip op. (W.C.C.A.

Aug. 29, 1994), which, according to Crown, requires the judge to apply six factors.[3] We disagree with Crown's interpretation. Contrary to Crown's position, the Wold case merely lists six factors that "may" be considered in determining whether an injury is temporary or permanent. We also indicated in that case that which of the factors are significant in any particular case, and the weight to be given any factor, is for the compensation judge to determine.

The employee in the present matter sustained a significant injury in 1986, which led to significant time off work, fusion surgery, a 17.5% whole body permanent partial disability rating, and significant permanent work restrictions. She testified that her problems have been ongoing since that time. In addition to Dr. Litman's opinion that the employee's injuries at Kmart were only temporary and had resolved within ninety days, the records of Dr. Barnett could be interpreted as supporting the employee's claim that those injuries were only temporary. That evidence, combined with the employee's testimony, provides substantial evidence to support the judge's finding that the employee's injuries at Kmart were temporary in nature, and we therefore affirm his decision on this issue.

Ability to Work

Crown and its insurer cite Krutsch v. Federal Cartridge, 48 W.C.D. 156 (W.C.C.A. 1992), for the proposition that the compensation judge erred in relying on the medical opinions of Drs. Koch and Pinto to the effect that the employee should limit her work to four hours per day. Crown contends the Krutsch decision "states that you must look at more than just physicians' opinions." This is an inaccurate statement of this court's holding in Krutsch. In Krutsch, the issue was the suitability of a job offer where the employee had not been released to return to work by his treating doctor. This court merely held that "[g]iven this fact [that the employee's treating doctor had not released him to return to work], the compensation judge could have concluded that

[3] This court, in the Wold case, stated:

> Factors to consider in determining whether a work-related incident is a temporary or permanent aggravation of a pre-existing condition may include, but are not limited to (1) the nature and severity of the pre-existing condition and the extent of restrictions and disability resulting therefrom; (2) the nature of the symptoms and extent of medical treatment prior to the aggravating incident; (3) the nature and severity of the aggravating incident and the extent of restrictions and disability resulting therefrom; (4) the nature of the symptoms and extent of medical treatment following the aggravating incident; and (5) the nature and extent of the employee's work duties and non-work activities during the relevant period; and (6) medical opinions on the issue. Which of these factors are significant in a particular case and the weight to be given to any factor is generally a question of fact for the compensation judge.

the job was not suitable or that the employee's refusal of the job was reasonable, but the compensation judge was not required to do so." Id. at 165.

In the present case, both Drs. Koch and Pinto have opined that the employee is only capable of working four hours per day. In addition, Dr. Litman testified that he would allow the employee to work only as many hours as she can tolerate. The employee testified that she is only able to work four hours per day.

Crown also appears to contend that it is inconsistent for the compensation judge to find no permanent injury at Kmart and yet find a restriction on work hours that did not exist before the employee began work for Kmart. We find no inconsistency, in that the compensation judge accepted the opinion of Dr. Litman, who stated that the employee's condition in 1998 had significantly changed since 1988 but that he would not attribute those changes to the employee's work activities at Kmart.

Substantial evidence, in the form of doctors opinions and the employee's testimony, supports the compensation judge's finding that the employee was only able to work four hours per day at the time of trial, and we therefore affirm the judge's finding in that regard.