LORETTA E. NELSON, Employee, v. ENGINEERED POLYMERS CORP. and CIGNA INS. CO., Employer-Insurer, and SCIMED LIFE SYS, INC., SELF-INSURED/COMPCOST, INC., Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 6, 1999

No. [REDACTED SSN]

HEADNOTES

APPORTIONMENT - EQUITABLE; APPORTIONMENT - GILLETTE INJURY. The compensation judge erred in apportioning liability for the medical expenses attributable to a single Gillette injury where there was not almost uncontroverted medical opinion as to apportionment, as required by Michels v. American Hoist & Derrick, 269 N.W.2d 57, 31 W.C.D. 55 (Minn. 1978). Equitable apportionment for wage loss attributable to two separate injuries may be appropriate, but a remand is required for further findings as to causation and the equitable apportionment factors delineated in Goetz vs. Bulk Commodity Carriers, 303 Minn. 197, 226 N.W.2d 888, 27 W.C.D. 797 (1975).

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's treating doctor's testimony, supported the compensation judge's decision as to MMI.

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Where there was no evidence that the employee failed to cooperate with rehabilitation assistance, which was directed toward investigation of retraining, and where there was no evidence that job search was raised as an issue to the compensation judge, the judge's conclusion that the employee was entitled to temporary total disability benefits through 90 days post-MMI would not be reversed, despite the fact that the employee apparently failed to make any search for work during the period in question.

Affirmed in part, reversed in part, and remanded.

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

OPINION

DEBRA A. WILSON, Judge

SciMed Life Systems, Inc., appeals from the compensation judge's equitable apportionment of liability for wage loss and medical expenses, from the judge's decision as to maximum medical improvement, and from the judge's conclusion as to the employee's entitlement to temporary total disability benefits. We affirm in part, reverse in part, and remand for further

proceedings.

BACKGROUND

The employee began working for SciMed Life Systems, Inc. [SciMed] in May of 1991. Her job duties for this employer involved work known as "crimping" or "crimp bonding," a process in which the employee, looking through a microscope, attached valves to heart catheters, using a syringe filled with glue. The employee, who is right-handed, held the syringe in her right hand, using her right thumb to depress the plunger to apply the glue.

At some point the employee began experiencing symptoms in her right index finger, starting with an enlarged knuckle, which her treating physician, Dr. Matthew Putnam, diagnosed as "trigger finger" or flexor tenosynovitis. Conservative care failed to alleviate the symptoms, and on February 27, 1992, Dr. Putnam performed surgery in the nature of an "A-1 pulley release and limited flexor tenosynovectomy." Dr. Putnam ultimately concluded that the employee could not return to crimp bonding and had sustained a 3.6% permanent partial disability of the whole body[1] due to her trigger finger condition, which he attributed to her work at SciMed. SciMed, self-insured, admitted liability for a work-related right index finger injury occurring on November 14, 1991.

Following her recovery from surgery, SciMed provided the employee with light work, which the employee left for reasons unrelated to her right index finger injury in about July 1992. Over the next several years, the employee held jobs at Fingerhut and a casino, neither of which required repetitive work with her hands. The employee sought little or no additional treatment for any hand, wrist, or index finger symptoms during this period; according to her testimony at hearing, the symptoms from the November 1991 injury resolved completely after she left SciMed.

On or about August 27, 1996, the employee began working for Engineered Polymers Corporation [EPC] in a job that primarily involved sanding pieces of plastic with a power sander, which she gripped with her hands. This job was full time and included substantial overtime. Within a few weeks, by mid September 1996, the employee began experiencing bilateral upper extremity symptoms, including tingling and burning in her fingers, wrist pain, pain shooting up into her arms, and a ripping or tearing sensation in her palms. These symptoms increased as time went on, especially after thirteen straight days of work, and, finally, on October 8, 1996, the employee sought treatment. Physicians eventually diagnosed bilateral carpal tunnel syndrome, and on December 20, 1996, the employee filed a claim petition alleging entitlement to wage loss and medical expense benefits from EPC due to "repetitive trauma syndrome - right and left hands." The employee underwent carpal tunnel release surgery on the right on February 10, 1997, and on the left on May 19, 1997. Dr. Putnam performed both

[1] Dr. Putnam at one point assigned a 5.4% rating, which he later lowered due to improvement in the employee's range of motion.

procedures.

The employee began receiving rehabilitation assistance in August of 1997. She took a housekeeping job at the Hinkley Casino on November 15, 1997, but she left the job after about a month because it allegedly exceeded the restrictions recommended by Dr. Putnam. The employee then apparently underwent physical therapy for several weeks, after which her QRC investigated retraining. On March 30, 1998, the employee enrolled in a pharmacy technician program.

EPC and its insurer paid the employee benefits under a temporary order after receiving an opinion from Dr. Mark Holm, their independent examiner, attributing 75% of the responsibility for the employee's condition to her work at EPC. Dr. Holm also attributed liability to SciMed, and SciMed was joined as a party to the proceedings. When the matter came on for hearing before a compensation judge on April 17, 1998, issues included equitable apportionment of liability for wage loss benefits and medical expenses after October 8, 1996, maximum medical improvement [MMI], and whether SciMed was entitled to a credit for the employee's failure to attend an independent medical examination.

At hearing, the parties stipulated that the employee had sustained a work-related injury to her right index finger on November 14, 1991, while employed by SciMed; that she had sustained an injury in the nature of bilateral carpal tunnel syndrome on October 8, 1996, while employed by EPC; and that she had been served with notice of MMI on September 24, 1997, and December 29, 1997. Evidence submitted in connection with the disputed issues included the employee's medical records, her rehabilitation records, an itemization of benefits paid by EPC, reports by Dr. Holm, reports and deposition testimony by Dr. Putnam, and reports and deposition testimony by Dr. William Call, SciMed's independent examiner. Subsequent to the hearing, on June 2, 1998, the employee and EPC filed a stipulation for settlement, settling all of the employee's claims against EPC related to the October 8, 1996, injury, except future medical expense claims. An award on stipulation was issued on June 22, 1998.

In a decision issued on August 28, 1998, the compensation judge concluded in part that the employee had reached MMI effective December 29, 1997. The judge also apportioned liability for 25% of the employee's wage loss and medical expenses from and after October 8, 1996, to SciMed and 75% to EPC,[2] and SciMed was ordered to reimburse EPC accordingly. [3] SciMed appeals.

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[2] The compensation judge also concluded that SciMed was not entitled to a credit for the missed independent medical examination. SciMed appealed from this finding but did not address it in its brief, so the issue is deemed waived. Minn. R. 9800.0900, subp. 1.

[3] By the time of hearing, the employee was not claiming entitlement to any benefits beyond those already paid by EPC.

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 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.

"[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

Equitable Apportionment

The compensation judge's finding on the issue of equitable apportionment reads as follows:

> 7. Following her injury at EPC, the employee sustained wage loss and incurred medical expenses. Both the injury at SciMed and the injury at EPC contributed to the employee's disability from and after October 8, 1996. They contributed on the following basis:
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> SciMed - 25%
> EPC - 75%

In her memorandum, the judge explained that her apportionment decision was based on her choice between conflicting expert opinions:

> The Court rejects the opinion of Dr. Call because he fails to adequately explain his reasoning for determining there is no causal connection between these two admitted hand injuries. In part he relies on the distance [between the employee's trigger finger injury

> and the employee's carpal tunnel condition] and the operative findings of Dr. Putnam to make a conclusion which is not at all consistent with the explanation of Dr. Putnam, who not only had the opportunity to treat the employee but also was able to view the employee's problems first-hand during surgery. Given the symptomatology of this employee and progression of her problems, to simply discount any connection between her finger and wrist problems, because of their distance in terms of inches, seems overly simplistic and unrealistic.
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> The Court accepts the explanation of Dr. Putnam which was offered concerning the relationship between the two hand injuries. At his deposition, Dr. Putnam was questioned extensively regarding his causation and apportionment opinion. His answers were thoughtful and scientific and were offered not only with sufficient precision but also sufficient factual and medical foundation to be adopted by this Court. Dr. Putnam had the advantage of treating this employee before and after both work related injuries, since his treatment of this employee's hands predate the SciMed injury.[4] This perspective of Dr. Putnam, which was offered in a clear and logical manner, with more than adequate detail, clearly explained why both injuries were substantial contributing factors and the apportionment for the two injuries should be divided on a SciMed 25%, EPC 75% basis. The fact that Dr. Holm agreed with Dr. Putnam only further supports the accuracy of his assessment.

On appeal, SciMed argues in part that the judge erred in relying on the opinion of Dr. Putnam because that opinion was based on inadequate factual foundation. However, after review of the entire record, we are satisfied that Dr. Putnam, the employee's treating physician, was sufficiently aware of the employee's work activities and symptoms to render a competent opinion on the disputed issues.[5] We therefore reject SciMed's arguments in this regard.

SciMed's primary argument is that the compensation judge erred as a matter of law

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[4] The employee evidently sustained a work-related injury to her left wrist in 1988 while employed by a different employer, and Dr. Putnam performed surgery to treat that condition. All experts in the present matter agree that the 1988 injury is essentially irrelevant to the employee's current hand and wrist condition.

[5] One of SciMed's complaints is that Dr. Putnam was not aware of the employee's sanding work at EPC, and it is true that Dr. Putnam initially assumed, erroneously, that the employee's work for EPC was similar to her work at SciMed. However, Dr. Putnam was informed, during the course of his deposition, of the essential nature of both jobs, and his opinions did not change.

in apportioning liability to SciMed, because apportionment of liability for a single Gillette injury[6] is not appropriate, pursuant to Michels v. American Hoist & Derrick, 269 N.W.2d 57, 59, 31 W.C.D. 55, 57 (Minn. 1978), in the absence of "almost uncontroverted medical testimony [that] will permit a precise allocation of responsibility." Id. In response, EPC contends that the compensation judge did not apportion liability for a single Gillette injury, in contravention of Michels, but instead properly apportioned liability between two Gillette injuries - - the November 14, 1991, right trigger finger injury at SciMed and the October 8, 1996, bilateral carpal tunnel syndrome injury at EPC - - as expressly permitted by Sanchez v. Land O'Lakes, 43 W.C.D. 113 (W.C.C.A. 1990).[7] The language of the compensation judge's decision, written in terms of the relative contribution of both injuries, supports EPC's position. However, close analysis of the evidence and claims reveals that SciMed has the better argument on this point.

The medical evidence in this matter is somewhat confusing, and Dr. Putnam may have inadvertently contributed to the confusion by at times indicating that he was allocating liability to the employee's 1991 injury at SciMed. For example, during his deposition, he responded "yes" when asked whether he "apportioned liability as 25 percent to the 1991 injury." Dr. Holm, too, in his February 5, 1997, report, indicated that "25% liability" for the employee's "restrictions and wage loss [was attributable] to the 199[1] trigger finger condition." It is, however, evident, that what both doctors were actually saying is that the employee's bilateral carpal tunnel syndrome was attributable on a 25/75 basis to the employee's work activities at both SciMed and EPC.

Both Dr. Putnam and Dr. Holm suggested that flexor tenosynovitis was the underlying cause of both the employee's trigger finger condition and her bilateral carpal tunnel syndrome. In his November 25, 1997, report, Dr. Holm indicated that, "[s]ince the thickening of the flexor tendon linings in [the employee's] right hand began while she was employed at SciMed Systems, I am, therefore, apportioning 25% of the responsibility for the thickening of the flexor tendon linings that resulted in carpal tunnel syndrome in 1996." In his deposition, Dr. Putnam testified that "the condition that would have caused the patient to develop trigger finger . . . also would have been expected to overload the tendon within the carpal canal. So the reason for apportionment is not specifically that the trigger finger caused the carpal tunnel syndrome."[8] Later, Dr. Putnam elaborated by indicating that the employee's job activities at SciMed contributed

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

[7] In Sanchez, this court explained that Michels applies only when the issue is apportionment of liability for a single Gillette injury; "in cases involving multiple compensable injuries, whether Gillette or specific, apportionment of liability between employers/insurers should be made with reference to the principles generally applicable to equitable apportionment." Sanchez, 43 W.C.D. at 123 (emphasis added).

[8] In fact, he acknowledged that it would be "ludicrous" to say that the employee's right trigger finger condition caused carpal tunnel syndrome in the employee's left hand.

to bilateral carpal tunnel syndrome, and he concluded that, because the employee's bilateral carpal tunnel syndrome was "a reflection of [the employee's] exposure to the activity" over time, that is, "the volume of repetitive trauma that she saw," it would not be "fair to apportion it 100 percent to EPC." In a discussion concerning the concept of Gillette injuries, Dr. Putnam testified that the employee did not sustain such an injury "specifically at EPC . . . [b]ut if you expand the question and say did she have repetitive trauma over time, then I believe the answer would be yes." Finally, Dr. Putnam indicated that one of the "more common offending job types" in the development of carpal tunnel syndrome is the kind of job the employee was doing at SciMed.

Dr. Putnam's opinion, expressly accepted by the compensation judge, clearly indicates that the employee's bilateral carpal tunnel syndrome constitutes a single Gillette injury caused by a combination of the employee's work activities at SciMed and at EPC. As such, liability for the disability caused by the carpal tunnel syndrome alone may not be apportioned, under Michels, unless there is almost uncontroverted medical opinion permitting a precise allocation of liability. The medical expenses at issue - - those incurred from and after October 8, 1996, the date of the employee's bilateral carpal tunnel syndrome injury - - are all apparently related solely to the carpal tunnel condition.[9] Therefore, the issue with regard to liability for those medical expenses becomes whether the medical opinions in this matter may be considered substantially "uncontroverted."

Both Dr. Holm and Dr. Putnam have apportioned liability for the employee's carpal tunnel condition on a 25/75 basis, with 25% liability attributed to SciMed. Dr. Call, however, indicated that the employee's carpal tunnel syndrome was solely the result of the employee's work activities at EPC. Contrary to the arguments of both EPC and the employee, the fact that Dr. Call does not agree with Dr. Putnam's theory of injury does not justify rejecting Dr. Call's opinion for purposes of determining whether the requirements of Michels have been met. See, e.g., Carlson v. Flour City Brush Co., 305 N.W.2d 347, 351, 33 W.C.D. 594, 600-01 (Minn. 1981) ("The expert testimony with respect to apportionment cannot realistically be viewed as uncontroverted since Dr. Johnson, in denying the existence of a causal relationship between employee's work and her present condition, in effect also denied that apportionment could be made"). Therefore, given the substantial difference of opinion between experts, the judge's apportionment of liability to SciMed for the employee's medical expenses after October 8, 1996, must be reversed.

Different causation considerations may apply as to apportionment of liability for wage loss benefits. If it were clear that all of the employee's wage loss after October 8, 1996, was solely attributable to the employee's single bilateral carpal tunnel Gillette injury at EPC, we would again reverse the judge's 25/75 apportionment as inconsistent with Michels. The employee did, however, sustain a discrete, permanent, trigger finger injury in 1991 in the course and scope

[9] Certainly the employee's carpal tunnel release surgeries are attributable to the carpal tunnel condition, and there is no evidence that the employee received treatment for her right trigger finger condition after October 8, 1996.

of her employment with SciMed, and this injury necessitated surgery, resulted in permanent impairment, and may subject the employee to at least minimal restrictions on her activities. If some of the employee's wage loss is attributable to the employee's trigger finger injury as well as the employee's carpal tunnel condition, Michels is not controlling. Rather, this would be a case in which, under Sanchez, apportionment between two Gillette injuries would be permissible despite the disagreement between the experts.

As previously indicated, the 25/75 apportionment opinions of Dr. Holm and Dr. Putnam do not relate to apportionment of disability between the two injuries but to apportionment of liability for the employee's carpal tunnel condition itself. As such, those medical opinions provide no real support for the judge's 25/75 allocation of liability for wage loss benefits. At least on the surface, SciMed's relief from liability for the employee's carpal tunnel condition should affect the equation. Also, we see no indication that the judge considered any of the factors outlined in Goetz v. Bulk Commodity Carriers, 303 Minn. 197, 226 N.W.2d 888, 27 W.C.D. 797 (1975), that are ordinarily applicable to equitable apportionment decisions of this kind.[10] For these reasons, and because equitable apportionment is a question of fact, we conclude that the matter must be remanded to the judge for reconsideration on the issue of SciMed's liability for wage loss benefits following the employee's October 8, 1996, bilateral carpal tunnel injury. Again, any periods of wage loss attributable solely to the employee's carpal tunnel condition are solely the responsibility of EPC. The compensation judge may in her discretion allow the parties to submit additional evidence to aid her in making this decision.

MMI

The compensation judge concluded that the employee had reached MMI effective with service of Dr. Putnam's MMI report on December 29, 1997. On appeal, SciMed contends that the compensation judge erred in this regard and that the record compels the conclusion that the employee reached MMI effective with service of Dr. Call's MMI report on September 23, 1997. We are not persuaded. As the compensation judge noted, Dr. Putnam, the employee's treating physician, indicated that the employee's condition continued to improve into December of 1997. Even Dr. Holm, EPC's examiner, predicted that the employee would not reach MMI until about November of 1997, past the date chosen by Dr. Call.

MMI is a question of ultimate fact for the compensation judge to resolve. Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 41 W.C.D. 634 (Minn. 1989). Especially given Dr. Putnam's testimony, we cannot conclude that the compensation judge erred in determining that the employee did not reach MMI until December 29, 1997.[11]

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[10] Factors to be taken into consideration in reaching an apportionment decision include, but are not limited to, the nature and severity of the initial injury, the employee's physical symptoms following the initial injury and up to the occurrence of the second injury, and the nature and severity of the second injury. Goetz, 303 Minn. at 200, 226 N.W.2d at 891, 27 W.C.D. at 800.

[11] Even this latter MMI date is only seven months after the employee's second carpal

Temporary Total Disability

SciMed contends that the compensation judge erred in concluding that the employee was entitled to temporary total disability benefits after December 16, 1997, when she left her housekeeping job, through 90 days post-MMI, because the employee conducted no job search during that period. We are not persuaded. The employee had rehabilitation assistance during this period, and rehabilitation efforts were directed toward investigation of retraining. See, e.g., Bauer v. Winco/Energex, 42 W.C.D. 762 (W.C.C.A. 1989) (where the employee has rehabilitation assistance, the issue is not so much whether she conducted a diligent job search as whether she made a good faith effort to cooperate with rehabilitation). Perhaps as importantly, the employee's job search, or lack thereof, was not an issue raised by any party at the hearing before the compensation judge. Under these circumstances, we will not reverse the judge's decision on this issue.

tunnel operation. Also, the employee apparently underwent additional physical therapy as late as December of 1997.