PATTY M. OTTO, Employee, v. MIDWEST OF CANNON FALLS and FIREMANS FUND INS. CO., Employer-Insurer/Appellants, and MEDICA/HEALTHCARE RECOVERIES, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 28, 1999

No. [REDACTED SSN]

HEADNOTES

ARISING OUT OF & IN THE COURSE OF - SUBSTANTIAL EVIDENCE. The employee's testimony, coupled with expert medical opinion concluding that the employee's injury was work-related, provide minimally adequate support for the compensation judge's determination that the employee suffered a work-related injury on November 7, 1995.

ARISING OUT OF & IN THE COURSE OF - PROHIBITED ACT. The compensation judge properly concluded that the receipt of compensation benefits for the July 13, 1996 injury was not barred by a safety rule prohibiting employees from standing or walking on pallets.

Affirmed.

Determined by Johnson, J., Hefte, J., and Pederson, J.
Compensation Judge: Ronald E. Erickson

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal the compensation judge's finding that the employee sustained two work-related injuries to her right knee and the consequent award of benefits. We affirm.

BACKGROUND

Patty M. Otto, the employee, went to work for Midwest of Cannon Falls, the employer, in July 1989. (T. 24.) The employer warehouses and ships giftware items. The employee began work as a picker/packer which entailed extensive walking throughout the warehouse. (T. 24-25.) The job required the employee to go to bins, pick products off the shelves and pack them into boxes for shipping to customers. Individual items weighed from two to three pounds and the average weight of a case of items was 10 to 15 pounds. (T. 70, 87-88.) The employee performed this job until 1995 when she was promoted to a lead position. This job required the employee to pick full cases of product and stock them on pallets, direct other workers and help with problems. (T. 26.) This job also required extensive walking. (T. 27.)

On July 10, 1995, the employee was treated at the River Valley Clinic for "soreness on the medial side of the knee over the last 1½ weeks. Denies any trauma, denies any locking or buckling." The doctor's examination was normal and the diagnosis was nonspecific patellofemoral pain. (Pet. Ex. B-3.) The clinic note did not specify whether the employee was complaining of left or right knee pain. The employee did not recall which knee was bothering her. (T. 46-47.) The compensation judge found the employee sought treatment on July 10, 1995 for her right knee but found she did not experience continuing problems from and after July 10, 1995. (Finding 4.) This finding was unappealed.

On November 7, 1995, the employee testified she was "walking in the shipping area and my right knee locked up." (T. 28.) At that time, the employee was walking away from her supervisor's desk, moving in a straight line on a smooth, level concrete floor. She was not carrying anything at the time, did not step over or around anything and did not slip, trip or stumble in any way. The employee testified she was having no ongoing difficulty with her knee and was able to perform all of her duties prior to that time. (T. 48-50.) The employee reported the incident to her supervisor who prepared an accident investigation report. (Resp. Ex. 2.) Initially, the knee "kind of stung," but gradually became more painful and symptomatic. (T. 29, 53.)

On November 22, 1995, the employee sought medical attention for her right knee with Dr. Halvorson at the River Valley Clinic. The doctor noted the employee "twisted her knee at work on 11-15-95 while walking. Pain in the medial portion of her right knee. The knee feels weak, and since that time, she has noticed more pain and she has been doing more walking. The knee has not locked on her. She has not had a similar episode. She has not had the same problem in the past." Dr. Halvorson diagnosed possible knee strain with a possible mild compression of the medial meniscus. The doctor allowed the employee to continue with her regular duties at work, recommended Advil and warm packs and asked the employee to return in a month. (Pet. Ex. B-3.) The employee returned to the River Valley Clinic on December 22, 1995 and saw Dr. Podratz. The doctor noted: "Work Comp from Midwest in Cannon Falls, here to recheck on knee which continues to be painful. Two month old injury - - please see note of 11/22/95 by Dr. Halvorson. Twisting injury with possible meniscal injury." Dr. Podratz diagnosed a resolved sprain/strain, patellofemoral syndrome, probable medial meniscal injury. The doctor advised the employee to wear a knee sleeve on a regular basis and to lose weight. (Pet. Ex. B-3.)

On January 16, 1996, the employee saw Dr. Nils Fauchald, an orthopedic surgeon. The doctor recorded the following history:

> The [employee] states that on 11-07-95, just walking at Midwest of Cannon Falls, she felt a sharp knife-like pain in the anteromedial aspect of her left[1] knee. Said the pain lasted for just a few minutes but subsequently the knee swelled and actually has continued to

[1] Dr. Fauchald's reference to the left rather than right knee is clearly in error. The appellants do not dispute the doctor was referring to the employee's right knee.

> swell since that time. Pt. says that when she had the sharp pain it was like the knee locked up on her and she could neither bend nor straighten it for a few minutes. Then it gradually just gave way, not with a mechanical release, but just gradually. Patient said the same thing happened on 1-09-96, again walking at work on cement floor, when she just stepped over a small rise in the floor. Once again the knee locked in a similar manner.

An x-ray of the knee was negative. Dr. Fauchald diagnosed a plica or fat pad problem but noted a meniscus problem could not be ruled out. The doctor stated: "At any rate, the pt. had never had any problems with the knee previous to the episode that occurred at work and regardless of the nature of the problem, this would have to be considered work-related under the Workers' Compensation laws." (Pet. Ex. B-1.)

Dr. Fauchald re-examined the employee on February 13, 1996 and concluded arthroscopic surgery was indicated. In his chart note Dr. Fauchald stated: "I feel the problem should be considered work related under the laws of Workers' Compensation according to my understanding of it." (Pet. Ex. B-1.) On February 29, 1996, Dr. Fauchald performed a partial meniscectomy. The post-operative diagnosis was a tear of the medial meniscus and chondromalacia patella, right knee.

Following surgery, the employee was released to return to work with the employer. Initially, her duties were restricted but she eventually returned to full duty. (T. 36.) On July 13, 1996, the employee walked across a pallet, stepped down three inches to the floor and her right knee locked up. The employee was then carrying a box containing gift items but she had no recollection of the weight of the box. (T. 53-57.) The employee reported the incident to her supervisor. The employer again prepared an Accident Investigation Record which stated: "As Patty removed her right foot from on top a pallet she was stacking she felt a sharp pain (stabbing) to her right knee." (Resp. Ex. 2.) The employee returned to see Dr. Fauchald who performed a second arthroscopic surgery on August 1, 1996. The employee was off work for ten days and then returned to a light-duty job. (T. 38-40.) Eventually, the employee was transferred to a job which complied with the restrictions established by Dr. Fauchald. (T. 95-98.)

The employer had in existence a number Safety Guidelines, one of which prohibited walking or standing on pallets.[2] On November 8, 1994, the employee acknowledged in writing that she received and read the updated version of the Safety Guidelines dated September 28, 1994. (Resp. Ex. 4.) If an employee was cited for a safety violation, the usual procedure was that the employee's supervisor gave the employee a verbal warning. For a second violation the employee

[2] The pertinent Safety Guideline provides: "WALKING OR STANDING ON PALLETS IS NOT ALLOWED. Occasionally warehouse associates have to stand on pallets in the racking, examine the pallet for any damage before placing your weight on the pallet, use extreme caution." (Resp. Ex. 4.)

received a written warning and for a third violation a one or two-day suspension, depending on the severity of the violation. Continued violations of safety guidelines could result in termination. (T. 92-93.) After the employee reported the incident of July 13, 1996 to her supervisor, she and the supervisor discussed the fact the employee violated a safety guideline by standing on a pallet. The employee was given a Safety Reminder which stated the employee was standing on a pallet in violation of a company safety guideline. The employee's written response stated: "I was hurry I should have walk around pallet." (Resp. Ex. 3.)

On June 25, 1997, the employee was examined by Dr. Jack Bert at the request of the employer and insurer. Dr. Bert obtained a history that the employee's knee "locked up" while the employee was walking on a smooth and level concrete floor on November 7, 1995. The employee described a second injury on July 13, 1996, when her right knee again locked up after stepping onto a smooth concrete surface from a pallet. The doctor diagnosed the employee's status as post-arthroscopic partial right medial meniscectomy and post-arthroscopic debridement of the medial compartment of the right knee. The doctor opined the employee's alleged injuries at work were totally unrelated to her current knee condition. He found "absolutely no evidence she sustained any type of injury at work which would cause a meniscal tear. It is my opinion she had a long-standing degenerative cleavage tear of the medial meniscus, which is the most common tear pattern in an obese patient without a rotational injury. Radial tears and horizontal cleavage tears classically occur due to age and weight related impact loading on the knee. It is my opinion, therefore, there is no significant causal connection between Ms. Otto's injuries and her work activities." (Pet. Ex. B-4.)

By letter dated February 16, 1998 to the employee's attorney, Dr. Fauchald stated:

> With regards to the work relatedness of the patient's problem the patient according to history available to me and to my records as per my note of January 16, 1996, clearly had the onset of her knee problem leading to the necessity for surgical intervention during activity at the workplace. The patient at surgery had what appeared to be a rather acute radial cleft tear of the medial meniscus with evidence of only minimal degenerative change. The patient did have mild chondromalacia patella which we often find as an incidental finding in patients this age when doing arthroscopic surgery. Though the patient is perhaps somewhat overweight I do not feel that this was a causative factor for the patient's injury as found at the time of surgery. (Pet. Ex. B-2.)

The employee filed a claim petition seeking temporary total and permanent partial disability benefits together with medical expenses. The employer and insurer denied liability contending the employee's injury was idiopathic and did not arise out of her employment. The case came on for hearing on June 17, 1998 before a compensation judge at the Office of Administrative Hearings. In a findings and order served and filed June 25, 1998, the compensation judge found the employee sustained personal injuries arising out of her employment

on November 7, 1995 and July 13, 1996. Further, the compensation judge found the employee was not barred from receiving benefits under the prohibited act doctrine. The employer and 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, "[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

Arising Out Of

The compensation judge found the employee sustained a personal injury to her right knee on November 7, 1995. On appeal, the employer and insurer contend this finding is legally incorrect and unsupported by substantial evidence. Rather, the appellants assert the employee failed to prove any causal connection between her work activities and her knee injury. There is no dispute that the November 7, 1995 injury occurred while the employee was walking normally on a smooth, level floor. The appellants contend the injury was not caused by an employment-related hazard but rather was a spontaneous or idiopathic injury which is not a compensable personal injury. The employee responds that an idiopathic or unexplained injury which occurs at work is compensable, citing Duchene v. Aqua City Irrigation, 58 W.C.D. 223 (1998), summarily aff'd May 21, 1998. Alternatively, the employee argues substantial evidence supports the compensation judge's finding that the employee's injury is compensable.

A personal injury is defined as an "injury arising out of and in the course of employment." Minn. Stat. § 176.011, subd. 16. The "arising out of" requirement is a causation test. For an injury to arise out of the employment, there must be a causal connection between the employment and the injury. Lange v. Minneapolis-St. Paul Metro. Airport Comm'n., 257 Minn. 54, 99 N.W.2d 915, 21 W.C.D. 61 (1959). The requisite causal connection "exists if the employment, by reason of its nature, obligations or incidents may reasonably be found to be the source of the injury-producing hazard." Nelson v. City of St. Paul, 249 Minn. 53, 55, 81 N.W.2d

272, 275, 19 W.C.D. 120, 123 (1957). The burden of proving a personal injury arising out of the employment is on the employee. Minn. Stat. § 176.021, subd. 1. The issue on appeal is whether the employee sustained that burden.

The employee testified she had no problems with her right knee until the incident on November 7, 1995. (T. 48, 50.) After that incident, the employee experienced continual right knee pain which gradually worsened. (T. 52-53.) Dr. Halvorson noted the employee twisted her knee at work on November 15, 1995 while walking and diagnosed knee strain with a possible mild compression of the medial meniscus. The employee told the doctor she had not had a similar episode or problems before this incident. Dr. Halvorson considered the injury to be work-related. (Pet. Ex. B-3.) Dr. Fauchald reported that the employee experienced a sharp pain in her right knee while walking at work. He eventually concluded the employee sustained a meniscal tear and performed arthroscopic surgery. Dr. Fauchald noted the onset of the employee's symptoms was during work activities and opined the employee's knee injury was work-related. (Pet. Ex. B- 1, B-2.) The testimony of the employee, together with the opinion of Dr. Fauchald support the compensation judge's finding that the employee sustained a personal injury to her right knee on November 7, 1995 arising out of her employment. Questions of medical causation fall within the province of the compensation judge. Felton v. Anton Chevrolet, 513 N.W.2d 547, 50 W.C.D. 181 (Minn. 1994).

The employer and insurer contend the opinions of Dr. Halvorson and Dr. Fauchald lack foundation and the compensation judge erroneously relied upon them. Dr. Halvorson's opinion is flawed, the appellant argues, because he was under the impression the employee twisted her knee on November 15, 1995. This history, they assert, conflicts with the employee's testimony that her knee locked up on November 7, 1995. Dr. Fauchald's opinions lack foundation, the employer and insurer claim, because he failed to explain the mechanism of injury and apparently assumed the injury was work-related solely because it occurred at work. Finally, the employer and insurer argue that Dr. Bert had the most accurate history and, therefore, the compensation judge should have accepted his opinion that no causal connection existed between the injury and the work activities. We are not persuaded.

"Whether given by testimony or written report, an opinion by a medical expert as to the causal link between the claimant's disability and the job must be based on adequate foundation." Steffen v. Target Stores, 517 N.W.2d 579, 582, 50 W.C.D. 464, 467 (Minn. 1994). "The competency of a witness to provide adequate medical testimony depends on the degree of the witness's practical experience with the matter which is the subject of the offered testimony." Reinhardt v. Colton, 337 N.W.2d 88, 93 (Minn. 1983). In this case, both Dr. Halvorson and Dr. Fauchald treated the employee. Dr. Halvorson recorded that the employee twisted her knee while walking at work. This history is contrary to the employee's testimony that she did not twist her knee. We agree with the appellants that Dr. Halvorson lacked the proper foundation for his opinion that the employee sustained a work-related injury. To be of evidentiary value, a medical opinion must rest on a factual basis. Zappa v. Charles Mfg. Co., 260 Minn. 217, 224, 109 N.W.2d 420, 424, 21 W.C.D. 459, 467 (1961). Furthermore, the facts upon which the expert relies for his or her opinions must be supported by the evidence. McDonald v MTS Sys. Corp., 43 W.C.D. 83

(W.C.C.A. 1990), summarily aff'd (Minn. July 13, 1990). Dr. Fauchald, on the other hand, was provided with an accurate history of the injury. The doctor had some knowledge of the nature of the employee's work duties and her activities at the time of the injury. Although a close case, we cannot conclude that, as a matter of law, Dr. Fauchald lacked foundation for his expert opinion.

Dr. Fauchald opined that a causal relationship existed between the employee's work activities and her knee condition. Granted, the doctor did not discuss the mechanism of injury or explain how walking on a smooth floor damaged the meniscus. While that evidentiary failure may affect the weight the compensation judge gives to the expert's opinion, it does not necessarily render the opinion without foundation. Goss v. Ford Motor Co., 55 W.C.D. 316 (W.C.C.A. 1996). The compensation judge could, therefore, rely on the opinion of Dr. Fauchald. We acknowledge, however, the finding that the employee's injury on November 7, 1995 arose out of the employment is only minimally supported by the evidence. The employee's case would have been better presented had the employee offered expert medical testimony, either by report or deposition, explaining medically how the employee's work activities caused her knee injury.[3] However, the employee's testimony about the injury on November 7, 1995, the progression of symptoms leading to surgery and the lack of pre-existing symptoms does support the compensation judge's causation finding. Kelly v. C.M.I. Refrigeration Co., 304 Minn. 585, 231 N.W.2d 490, 27 W.C.D. 951 (1975). This testimony, coupled with the medical records and opinions, provide minimally adequate support for the employee's claim. See Reimer v. Minnit Tool/ M.I.T. Tool Corp., 520 N.W.2d 492, 51 W.C.D. 153 (Minn. 1994). Accordingly, we affirm the finding of the compensation judge.

Prohibited Act

On July 13, 1996, the employee re-injured her right knee when she stepped down off a pallet onto the floor. The employee knowingly violated a safety rule stating that walking or standing on pallets was not allowed. The employee acknowledged that she should have walked around the pallet but she was in a hurry. (Resp. Ex. 3.) The employer and insurer assert the employee's violation of the safety rule was conduct which took the employee outside the scope of her employment and bars compensation.

"Where an employer expressly prohibits the doing of a certain specific act, the disregard of which is not reasonably foreseeable to the employer, a violation thereof takes the employee outside the scope of his employment and injuries resulting therefrom are not compensable even though the act might be considered to be in furtherance of the employer's business." Bartley v. C-H Riding Stables, Inc., 296 Minn. 115, 206 N.W.2d 660, 26 W.C.D. 675 (1973). The principle underlying the prohibited act doctrine is that an intentional violation of a specific order or prohibition of the employer may take the employee outside the scope of the employment. "There are prohibitions which limit the sphere of employment and prohibitions

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

which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent the recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere." Rautio v. International Harvester Co., 180 Minn. 400, 231 N.W. 214, 6 W.C.D. 213 (1936), citing Eugene Dietzen Co. v. Industrial Bd. of Ill., 297 Ill. 11, 116 N.E. 684 (Ill. 1917). The compensation judge concluded the prohibited act doctrine did not bar the employee's receipt of benefits for the January 13, 1996 personal injury. The judge stated the violation of this safety rule "is not the type of violation that would preclude one from benefits under a misconduct-type of theory." (Mem. at 6.) We agree.

Whether the employee's performance of a prohibited act takes the employee outside the sphere of the employment depends, in part, on the nature of the act or conduct which is prohibited. Not every safety rule limits the scope of employment. The less hazardous the conduct prohibited by the safety rule, the more likely the rule proscribes conduct within the scope of employment. Further, the more routine or minor the prohibited conduct, the more foreseeable it is an employee will violate the rule. In Rautio v. International Harvester Co., id., the employee was specifically instructed not to enter a particular mine because of a danger of cave in. The employee entered the mine and was killed in a cave in. In Anderson v. Russell-Miller Milling Co., 196 Minn. 358, 267 N.W. 501, 9 W.C.D. 125 (1936) the employee was asphyxiated by lethal gas in a mill he had been specifically told not to enter. In Walsh v. Chas. Olson & Sons, Inc., 285 Minn. 260, 172 N.W.2d 745, 25 W.C.D. 42 (1969) the employee was specifically instructed not to use a particular machine on the employer's premises. The employee ignored the prohibition and was injured while using the machine. In Bartley v. C-H Riding Stables, Inc., id., the employee was specifically prohibited from riding a particularly spirited horse which had previously thrown two other employees. In Brown v. Arrowhead Tree Serv., Inc., 332 N.W.2d 28, 35 W.C.D. 818 (Minn. 1983) the employee was injured when he fell from a tree while attempting to remove the top of the tree from a power line right-of-way. The employee was previously specifically instructed to leave that particular tree alone. In each of the cited cases, the act or conduct prohibited by the employer was inherently hazardous and likely to result in injury if violated. Further, in each case, the employee was specifically instructed verbally not to perform a specific act. Finally, in each case the employer did not reasonably foresee the employee would disregard the prohibition. The case before us is clearly distinguishable from the cited cases. Walking or standing on pallets is inherently much less hazardous conduct than the prohibited acts in the above cited cases. The prohibition here was not a specific verbal instruction but was only one of many written safety rules. Finally, the employer had a process in place to deal with violations of safety rules ranging from a verbal warning to a written report to termination in the event of multiple and continuing violations. The employer clearly anticipated that employees might violate this or other safety rules. (T. 91-94.) We affirm the compensation judge's conclusion that the receipt of compensation benefits for the July 13, 1996 injury was not barred under the prohibited act doctrine.