THERESE A. SCHOLZ, Employee, v. LEBISTRO CAFÉ and CIGNA INS. CO., Employer-Insurer, and TGI FRIDAY and ROYAL INS. CO., Employer-Insurer, and TGI FRIDAY and RELIANCE INS. GRP., Employer-Insurer/Appellants, and BLUE CROSS/BLUE SHIELD OF MINN., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 4, 1999

No. [REDACTED SSN]

HEADNOTES

EVIDENCE - CREDIBILITY; CAUSATION - GILLETTE INJURY. The compensation judge did not err in relying on the hearing testimony of the employee, which the judge found persuasive, on the facts of this case. Substantial evidence, including the testimony of the employee and the opinions of three of the four medical experts, supports the compensation judge's determination that the employee sustained a Gillette injury to her low back culminating in disability on November 18, 1996.

Affirmed.

Determined by: Johnson, J., Wheeler, C.J., and Rykken, J.
Compensation Judge: Carol A. Eckersen

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer, TGI Friday and Reliance Insurance Group, appeal from the compensation judge's finding that the employee sustained a Gillette[1] injury culminating on November 18, 1996, while the appellants were on the risk We affirm.

BACKGROUND

Therese A. Scholz, the employee, sustained an admitted injury to her low back on March 30, 1985, while employed as a waitress at LeBistro, insured by CIGNA Insurance Company. The employee attended college, worked as a waitress, and was employed as an administrative assistant at Blue Cross/Blue Shield between 1985 and 1987. She suffered a second, admitted low back injury on June 21, 1987, while working as a waitress at TGI Friday, then insured by Royal Insurance Company.[2] After the 1987 injury, the employee left TGI Friday

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

[2] In a previous Findings and Order, served and filed March 6, 1989, a compensation judge

and was employed in various jobs, mostly waitressing, and attended college periodically. Between 1987 and 1994, the employee experienced episodic low back and right leg pain which she associated with prolonged standing, bending, lifting or walking. Her symptoms remained about the same and were in the same location as her symptoms after the 1987 injury. (Unappealed findings 2, 5, 7, 8; T. 42-44.)

The employee returned to work for TGI Friday, the appellant employer, in 1994. TGI Friday was insured by Reliance Insurance Group as of November 1996. On November 15, 1996, the employee returned to Dr. Charles Burton, her treating physician, reporting that her right buttock and right leg pain had worsened over the past summer. On exam, Dr. Burton noted significant tenderness of the right sciatic notch and positive straight leg raising on the right at 45 degrees. He prescribed muscle relaxant and pain medications and referred the employee for an MRI scan. The scan, taken November 17, 1996, showed two-level disc degeneration with annular tears at L4-5 and L5-S1 with secondary changes in the facet joints. On November 22, 1996, upon review of the MRI scan, Dr. Burton recommended aggressive conservative treatment and took the employee off work.

Following treatment, the employee attempted a return to part-time, light-duty work on January 16, 1997. She experienced a sharp increase in her low back and right leg pain and was unable to continue working. On March 3, 1997, noting the employee had not improved, Dr. Burton recommended consideration of a two-level fusion. On April 15, 1997, the employee underwent surgery in the nature of a two-level discectomy and anterior lumbar interbody fusion with titanium threaded fusion cages at L4-5 and L5-S1. The employee suffered complications following the surgery due to an infection at the bone graft site in her left hip, requiring further surgery and treatment.

The employee's low back and right leg symptoms showed substantial improvement following the surgery, and on July 2, 1997, Dr. Burton released the employee to return to half-time work. The employee returned to work as a part-time hostess for TGI Friday in July 1997. She continued, however, to experience considerable pain over the bone graft site in the left hip. The employee was referred for various treatments which were largely unsuccessful, and on March 4, 1998, Dr. Burton recommended the employee leave restaurant employment and search for less strenuous work. The employee ceased working as a hostess for TGI Friday shortly thereafter, and had not returned to work as of the date of hearing. On May 6, 1998, Dr. Burton referred the employee to Dr. George Kramer for prolotherapy at the graft site. The employee continued to treat with Dr. Kramer through the date of hearing apparently with good results.

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found the employee sustained a personal injury to her low back on March 30, 1985, while employed by LeBistro/CIGNA, and an aggravation of her pre-existing low back condition on June 21, 1987, while employed by TGI Friday/Royal. The compensation judge apportioned liability for the employee's wage loss, permanency and medical expenses 75 percent to LeBistro/CIGNA, and 25 percent to TGI Friday/Royal. The compensation judge's determination was affirmed by this court. Costello-Scholz v. LeBistro Café, slip op. (W.C.C.A., Oct. 12, 1989).

The employee filed a claim petition on May 20, 1997, alleging work injuries on March 30, 1985 and June 21, 1987, and seeking temporary total disability benefits from and after November 22, 1996 and payment of medical expenses. On September 15, 1997, the employee was examined by Dr. Michael Davis, an orthopedic surgeon, at the request of LeBistro and CIGNA. Dr. Davis opined that the employee sustained a Gillette injury culminating in the fall of 1996, and apportioned liability for the employee's subsequent wage loss and medical expenses 50 percent to the March 30, 1985 injury, 25 percent to the June 21, 1987 injury and 25 percent to the 1996 Gillette injury. On October 31, 1997, LeBistro and CIGNA filed a motion seeking joinder of TGI Friday and its insurer, Reliance Insurance Group, based on Dr. Davis's independent medical examination (IME). An order granting the motion for joinder was issued by the workers' compensation division at the Department of Labor and Industry on November 17, 1997. Subsequently, LeBistro/CIGNA and TGI Friday/Royal paid temporary total benefits, medical expenses and rehabilitation benefits pursuant to several temporary orders.

On December 18, 1987, Dr. Mark Friedland, an orthopedist, examined the employee on behalf of TGI Friday/Royal. Dr. Friedland also concluded the employee had sustained a Gillette injury in November 1996 as a result of her work activities at TGI Friday. He further concluded that the June 21, 1987 injury was not a substantial contributing factor to the employee's ongoing problems, and apportioned responsibility for the employee's wage loss and medical expenses 90 percent to the 1985 injury and 10 percent to the Gillette injury. On February 17, 1998, the employee was seen by Dr. David Boxall, an orthopedist, at the request of TGI Friday/Reliance. Dr. Boxall concluded there was no evidence to support a Gillette injury as a result of the employee's work activities at TGI Friday, noting that her back did not improve after she stopped working in the fall of 1996.

On April 8, 1998, the employee filed an amended claim petition, adding a claim against TGI Friday and Reliance for a Gillette injury in November 1996, and an additional claim for temporary partial disability from July 7, 1997 to March 14, 1998. On July 2, 1998, in response to a letter from the employee's attorney, Dr. Burton opined the employee's need for surgery could be evenly attributed to a congenitally small spinal canal, her first back injury in 1985 and a second back injury in 1992. Although requested to address whether the employee had suffered a Gillette injury, Dr. Burton did not respond to the question. In a second report on August 14, 1998, in response to a letter from counsel for TGI Friday/Royal, Dr. Burton concluded that the employee had sustained three significant injuries to the spine: the 1985 and 1987 work-related injuries and a Gillette injury that produced segmental disability of the spine. He allocated liability 20 percent to congenital factors, 40 percent to the 1985 injury, 10 percent to the 1987 injury and 30 percent to the Gillette injury.

The case came on for hearing before a compensation judge at the Office of Administrative Hearings (OAH) on December 16, 1998. The parties stipulated the employee was temporarily totally and temporarily partially disabled for the periods claimed. LeBistro/CIGNA and TGI Friday/Royal further stipulated that liability between them should be apportioned 75 percent to CIGNA and 25 percent to Royal in accordance with the 1989 Findings and Order. The

parties further advised the court that the employee, LeBistro/CIGNA and TGI Friday/Royal had reached a settlement the previous day. A Partial Stipulation for Settlement was submitted to OAH on February 5, 1999, providing for a full, final and complete closeout of workers' compensation benefits relating to the 1985 and 1987 injuries, excluding future medical expenses, between the named parties. (Finding 1; T. 5, 13, 16-19.) A Partial Award on Stipulation was issued on February 9, 1999. The contribution claims against TGI Friday and Reliance remained pending. A Findings and Order was served and filed on February 22, 1999, as amended on March 11, 1999. The compensation judge found the employee had sustained a Gillette injury arising out of and in the course of her employment with TGI Friday on November 18, 1996. The judge apportioned liability 75 percent to the 1985 and 1987 injuries (apportioned between them in accordance with the 1989 Findings and Order) and 25 percent to the 1996 Gillette injury. The compensation judge further found CIGNA and Royal were entitled to contribution or reimbursement from TGI Friday/Reliance for wage loss, rehabilitation and medical expenses paid by them. TGI Friday and Reliance 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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). 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

The appellants, TGI Friday and Reliance, contend that substantial evidence does not support the compensation judge's finding that the employee sustained a Gillette injury culminating in disability on November 18, 1996. They assert the employee's testimony in support of a Gillette injury was impeached by prior, inconsistent deposition testimony and was not credible. They further argue that the medical evidence offered in support of a Gillette injury was based on the employee's "revised" history, was not adequately founded, and was improperly relied upon by the compensation judge. We disagree.

To establish a Gillette injury, an employee must "prove a causal connection between her ordinary work and ensuing disability." Steffen v. Target Stores, 517 N.W.2d 579, 581, 50 W.C.D. 464, 467 (Minn. 1994). As in any case, the employee's burden of proof may be met by submission of relevant evidence, including the employee's testimony and expert medical opinion. At the hearing, the employee described her work at TGI Friday from 1994 to 1996 in some detail. She testified her low back pain and right leg pain increased in both frequency and

intensity during that time. The employee stated the TGI Friday job required prolonged standing and longer hours which increased her back and leg pain, and that in the three or four months prior to November 1996, she was working shorter and shorter shifts and leaving early or requesting a "sub" with more frequency because she was unable to tolerate the pain. (See T. 45-51, 54, 67-74, 76-77, 109, 111.)

At the hearing, the appellants offered into evidence portions of the employee's deposition testimony, taken on August 19, 1997 by the attorney for LeBistro/CIGNA, to impeach the employee's hearing testimony.[3] (Reliance Ex. 2; T. 78-92, 95-96; see also T. 106-10, 114-15.) The appellants argue that the employee's deposition testimony was wholly inconsistent with her testimony at the December 16, 1998 hearing and the employee's testimony was not, therefore, credible. The compensation judge, however, specifically found the employee's hearing testimony persuasive. (Mem. at 8.) It is clear the compensation judge considered the arguments and testimony presented by the appellants at the hearing - - the same arguments made on appeal - - and concluded the employee was a credible witness. The assessment of witness credibility is the unique function of the trier of fact. Dille v. Knox Lumber/Div. of Southwest Forest, 452 N.W.2d 679, 680, 42 W.C.D. 819, 821 (Minn. 1990); Even v. Kraft, Inc., 445 N.W.2d 831, 834-35, 42 W.C.D. 220, 225-26 (Minn. 1989). This court must give due weight to the compensation judge's opportunity to judge the credibility of a witness, and must uphold the judge's credibility determination unless it is manifestly contrary to the evidence as a whole. Even, id. "The point is not whether we . . . might have viewed the evidence differently, but whether the findings of the compensation judge are supported by evidence that a reasonable mind might accept as adequate." Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). Having carefully reviewed the deposition testimony submitted, we cannot conclude that the compensation judge's reliance on the employee's hearing testimony was manifestly unreasonable so as to require reversal.

Moreover, while evidence that specific work activities caused specific symptoms leading to disability "may be helpful as a practical matter," determination of a Gillette injury "primarily depends on medical evidence." Steffen, id. Thus, expert medical opinion plays a significant role in the ultimate determination of causation in a Gillette injury case. The appellants argue at length that Dr. Burton's opinion was "collusively contrived" and was based upon an inadequate and inaccurate factual foundation. We are not persuaded. Dr. Burton based his opinion on his extensive treatment history with the employee, and his causation opinion is consistent with the facts found by the compensation judge.

Furthermore, the compensation judge did not rely extensively on the opinions of Dr. Burton, but found the opinion of Dr. Davis, who examined the employee on behalf of TGI Friday/ Royal, to be most persuasive. (Mem. at 9.)[4] Dr. Davis noted the employee's job at TGI

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[3] See Minn. R. Civ. P. 32.01; David F. Herr & Roger S. Haydock, Civil Rules Annotated 132-141 (3d ed. 1998); see also Minn. Stat. § 176.411.

[4] The judge, in fact, specifically *rejected* Dr. Burton's apportionment conclusion, finding

Friday (after 1994) required her to be on her feet for prolonged periods of time and her low back condition gradually worsened. He concluded the employee had sustained a Gillette injury in the fall of 1996, observing the employee had increasing pain while working for TGI Friday in the several months preceding the Gillette injury and had finally reached the point where she "couldn't take it anymore." (Joint Ex. 10). The compensation judge adopted both the causation and apportionment opinions of Dr. Davis, concluding his opinion "most closely approximates the employee's description of her injuries and the lengthy medical records" in the case. (Mem. at 9.) Dr. Friedland also opined the employee had sustained a Gillette injury in November 1996. A copy of the employee's August 19, 1997 deposition was included in the records reviewed by Dr. Friedland. Of the four medical opinions submitted, only one, Dr. Boxall, the appellant's expert witness, concluded the employee had not sustained a Gillette injury in 1996.

It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. The compensation judge's choice between conflicting medical opinions will not be reversed so long as there is adequate foundation for the expert's opinion. See Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). The causation opinions expressed by Dr. Burton, Dr. Davis, and Dr. Friedland are based on a history consistent with the facts found by the compensation judge and are supported by adequate foundation. We, therefore, affirm.

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the arguments of LeBistro/CIGNA, relying on Dr. Burton's opinion, to be "[un]supported by the facts or the law of this case." (Mem. at 9.)