AMY J. SEBASKY, Employee, v. MIDWEST PLASTICS, INC., and ATLANTIC MUT. COS., Employer-Insurer/Appellants-Petitioners, and FINGERHUT and TRAVELERS INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 3, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY. Substantial evidence, including several expert opinions, supported the compensation judge's conclusion that the employee did not sustain a Gillette injury while working for a subsequent employer.

VACATION OF AWARD - MISTAKE; VACATION OF AWARD - NEWLY DISCOVERED EVIDENCE; VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Under the facts of this case, the employer did not establish grounds to vacate the compensation judge's decision on the basis of either mutual mistake, newly discovered evidence, or a substantial change in the employee's medical condition.

Affirmed.
Petition to vacate award on stipulation denied.

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

OPINION

DEBRA A. WILSON, Judge

Midwest Plastics, Inc., and its workers' compensation insurer, Atlantic Mutual Insurance Company, appeal from the compensation judge's finding that the employee did not suffer a Gillette injury[1] while employed by Fingerhut, and miscellaneous other findings. Midwest also petitions this court to vacate the compensation judge's August 3, 1998, findings and order based on newly discovered evidence, mutual mistake of fact, and substantial change in medical condition. We affirm the findings and order and deny the petition to vacate.

BACKGROUND

The employee sustained a work-related injury to her low back on May 29, 1981,

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

while working for Midwest Plastics, Inc. [Midwest]. The employee received extensive treatment after that injury, and surgery was first performed on September 24, 1981, when she underwent a discectomy at the L5-S1 level. A second surgery, in the form of a facectomy and partial discectomy, was performed on May 10, 1982. In February of 1985, the employee had a chymopapain injection. The employer and insurer admitted liability for the injury and paid benefits.

The employee began treatment with Dr. Thomas Rieser in August of 1986. Seven months later, on March 18, 1987, Dr. Rieser performed a two-level fusion, involving the L4-5 and L5-S1 levels. The employee was off work for approximately a year after this procedure and then returned to work at Sears Department Store in a light-duty, part-time clerical job. In 1989 the employee underwent surgery for removal of her fusion hardware, following which she was off work for several months. In March of 1990, Dr. Rieser recommended permanent restrictions of fifteen pounds lifting, no repetitive bending or lifting, taking regular breaks, and no sitting or standing for more than one hour without a change in position. The employee returned to work at Sears but continued to have pain along the graft site, and she returned to Dr. Rieser for flare-ups, including low back pain and leg pain and/or numbness, in June of 1990, September of 1990, March of 1991, December of 1991, September of 1992, and September of 1993. In September of 1993, Dr. Rieser first indicated that the "level above the fusion site" might be involved. However, an MRI scan at that time showed no disc pathology. Throughout this period, Midwest and its insurer admitted ongoing liability for the employee's need for time off and medical treatment, and they paid the employee benefits for more than 35% permanent partial disability of the back, with a close-out to 40%.

In September of 1994, the employee took a job with Fingerhut, because Sears was going to shut down. Her job at Fingerhut involved working on the phone from her telemarketing work station. She worked at a standard sit-down station for about a year and then requested and was given a "sit/stand station" because she liked the option of being able to alternate sitting and standing.

The employee did not treat with Dr. Rieser again until June 20, 1997. At that time, the employee reported pain in the same location as she had had since the 1987 fusion surgery. Dr. Rieser initially treated the employee conservatively and, in July of 1997, performed a right sacroiliac joint injection, which did not provide any relief.

The employee filed a claim petition on September 23, 1997, seeking temporary total disability benefits continuing from June 15, 1997, and payment of medical expenses with regard to the 1981 injury. Midwest denied liability for these benefits and moved to join Fingerhut as a party to the action, alleging that the employee had sustained a Gillette injury to her back while working for Fingerhut. Midwest and its insurer, which paid temporary total disability benefits from June 16, 1997, through January 28, 1998, and medical expenses under a temporary order, subsequently filed a petition for contribution against Fingerhut. The claim petition and the petition for contribution were consolidated for purposes of hearing, which took place on May 20, 1998. In findings and order filed on August 3, 1998, the compensation judge found that the

employee did not suffer a Gillette injury at Fingerhut and that the employee's disability and need for medical treatment from and after June 16, 1997, were causally related to the 1981 work injury at Midwest. Midwest appealed and also filed a Petition To Set Aside Award/Petition to Vacate Findings & Order. The bases for the petition were mutual mistake of fact, newly discovered evidence, and a substantial change in medical condition. Fingerhut objected to the petition to vacate, and the appeal and petition were consolidated by order filed September 23, 1998.

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.

DECISION

Appeal - Gillette Injury

Midwest initially argues that certain specific findings are not supported by substantial evidence and are clearly erroneous. First, Midwest contends that Finding 9 is inaccurate, in that the employee did not, while working at Fingerhut, continue to experience the same physical symptoms and complaints that she had had since the 1987 fusion surgery. We are not convinced. Finding 9 obviously refers to the employee's ongoing symptoms at Fingerhut prior to June 20, 1997. As the employee received no medical treatment during that period, the only evidence available to the compensation judge was the testimony of the employee. The employee testified that the same symptoms continued in her low back and both legs throughout her employment with Fingerhut. Therefore, substantial evidence supports the judge's finding.[2]

[2] What Midwest really argues in its brief is that the employee's symptoms on June 20, 1997, were different than the employee's prior symptoms. The compensation judge made specific findings in this regard. At Finding 13, he stated that, on June 20, 1997, "the pain was to the same location as it always had been. There were no new symptoms." Midwest did not appeal from this finding.

Midwest also contends that substantial evidence does not support Finding 10, that "[t]he employee testified that her duties [at Fingerhut] were within her restrictions" and that "she did not see [Dr. Rieser] from mid-1994 through June 1997." Technically, Midwest is correct on this point. The employee did not testify that her job at Fingerhut was within her restrictions,[3] and Dr. Rieser's records reflect that he did not treat the employee between October of 1993 (not mid-1994) and June of 1997. Therefore, for purely technical accuracy, we will modify Finding 10 accordingly.

Finally, Midwest contends that Findings 19, 20, and 21, which all deal with opinions of Drs. Rieser, Paul Wicklund, and Joseph Tambornino, are not supported by substantial evidence. We disagree. These findings are a paraphrasing of the doctors' opinions that are contained in reports and deposition testimony. The conclusions reached by the compensation judge as to the records of these three doctors were reasonable and must therefore be affirmed. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239. The judge's failure to specifically mention Dr. Wicklund's supplemental report is in no way cause for reversal. A compensation judge need not mention every medical record or opinion in a findings and order. See, e.g., Rothwell v. State, Dep't of Natural Resources, slip op. (W.C.C.A. Dec. 6, 1993).

Midwest's primary contention is that the judge's finding that the employee did not sustain a Gillette injury while employed at Fingerhut is not supported by substantial evidence in the record, is clearly erroneous, and is based on a misapplication of the law. Again, we are not convinced.

The opinion of Dr. Rieser supports the judge's findings. Dr. Rieser testified that the employee's symptoms in June of 1997 were a continuation of the employee's ongoing problems since the fusion surgery. On cross examination, he admitted that, if the employee was working outside her restrictions at Fingerhut, then "it may be cause for apportionment here." However, there is no evidence that the employee was working outside of her restrictions. The employee did not testify that her work at Fingerhut required her to exceed the restrictions placed on her by Dr. Rieser in March of 1990. The report of Dr. Joseph Tambornino, who conducted an independent medical examination of the employee for Fingerhut, also supports the judge's conclusion. In his report of April 30, 1998, Dr. Tambornino opined that the employee's symptoms had been unchanged over the years and that the work activity at Fingerhut did not aggravate or cause any new problems in her low back.

Only Dr. Paul Wicklund, who conducted an independent medical examination for Midwest, opined that the employee had sustained a Gillette injury while in the employ of Fingerhut. This opinion, set out in his report of November 20, 1997, and his deposition of January 12, 1998, was based in part on a representation that the employee was working sixty hours

[3] She also did not testify that that job exceeded her restrictions.

per week at Fingerhut.[4] However, it was later clarified that the employee was not working sixty hours a week at Fingerhut, but rather just over forty hours per week on the average. Dr. Wicklund responded to that new information in a one paragraph report dated May 15, 1998, in which he opined that "[i]n my opinion this work that she described at Fingerhut to me and the fact that she did work 40+ hours per week supports the fact that this repetitive work resulted in a Gillette injury . . . ." The compensation judge was not required to accept his opinion in this regard.

A compensation judge's choice between experts is generally upheld if the facts assumed by the expert in rendering his opinion are supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). As noted by the compensation judge in his memorandum, the record does not contain evidence to support Dr. Wicklund's assumption that the employee was sitting or standing for extended periods of time during her employment at Fingerhut. In that the opinions of Dr. Rieser and Dr. Tambornino had accurate factual support, we accept the judge's choice of expert opinions. Those opinions, combined with the testimony of the employee, provide substantial evidence to support the judge's findings.

Midwest also contends that the compensation judge misapplied the law in that he did not consider that "a subjective aggravation of a significant preexisting injury can still constitute a 'new' Gillette injury." We are not convinced.

Again, Dr. Wicklund was the only doctor to find a Gillette injury. The compensation judge did not reject Dr. Wicklund's opinion because of any misapplication of the law, but rather because Dr. Wicklund did not have factual support for the assumptions underlying his conclusions. It was Dr. Wicklund's opinion that the employee was suffering from symptoms at the L3-4 level "with potential for actual physical changes at the L3-4 disc in the future." He explained that when two lumbar discs are fused (L4-5 and L5-S1) it changes the lordotic curve of the lumbar spine. He went on to testify, "[w]hen that happens, when you stand for long periods of time, the weight of your body concentrates its force at the L3-4 level. That would be true for both sitting and standing." Dr. Wicklund also testified that because the employee was sitting and standing more at work than at home, the work at Fingerhut was a substantial contributing factor in her ongoing symptoms. As there was no evidence that the employee stood or sat "for long periods of time" during her employment at Fingerhut or that she sat and stood more at work than at home, it was not unreasonable for the compensation judge to reject Dr. Wicklund's opinions.

[4] In the report, Dr. Wicklund specifically stated that "the reason for her current problem is due to her long work hours at Fingerhut (60 hours a week)." Similarly, in his deposition, he testified "whether it was simply a chair that was broken or whether she had to stand or sit more than normal, it is still my opinion that the combination of whatever happened in that regard, plus the sixty hours a week that she was working, were substantial contributing causes to her increase in symptoms."

Petition to Vacate

Midwest first contends that the findings and order should be vacated for mutual mistake, because none of the parties anticipated or contemplated that the employee's condition as of the date of hearing would result in a surgical recommendation by Dr. Rieser shortly thereafter. We do not find grounds to vacate on this basis. The issue before the compensation judge was whether or not the employee sustained a Gillette injury while in the employ of Fingerhut and which employer was responsible for payment of benefits. A subsequent suggestion that the employee undergo additional surgery is irrelevant to the issues that were before the compensation judge.

Secondly, Midwest contends that Dr. Rieser's April 28, 1998, chart note indicating that the employee's symptoms "are somewhat different" is newly discovered evidence. We disagree, in that the evidence was in existence at the time of the hearing on May 20, 1998, and could have been discovered by the exercise of reasonable diligence. Specifically, Dr. Rieser's office could have been contacted immediately before the hearing to see if there were any new records that Midwest did not already have in its possession. Therefore, this report does not constitute newly discovered evidence.

Third, Midwest contends that there has been a substantial change in condition since the time of hearing that was not clearly anticipated and could not have been anticipated. Again, we are not convinced. Discography performed on May 26, 1998, revealed for the first time "abnormal disc morphology with full-thickness central posterior annular tear" at L3-4. However, while there was no objective evidence of L3-4 disc injury at the time of hearing, both Dr. Rieser and Dr. Wicklund had long suspected that L3-4 was the problem after June of 1997. Dr. Wicklund had specifically noted the "potential for actual physical changes at the L3-4 disc in the future." Because this change was one that was anticipated, it cannot form a basis for vacation of the findings and order. Minn. Stat. § 176.461 (4). Accordingly, Midwest's petition to vacate is denied.