DAVID A. SIMEK, Employee, v. CUB FOODS and LIBERTY MUT. INS. CO., Employer-Insurer/Appellants, and MINNEAPOLIS RETAIL MEATCUTTERS H&W FUND and FAIRVIEW HOSP. and HEALTHCARE SERVS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 4, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY. Where the judge referenced the opinions of two medical experts in immediate follow-up to her reference to the employee's testimony as to the rigorousness of his work activities, it was clear that the compensation judge was mindful of the requirement that a finding of a Gillette injury depends primarily on medical evidence, and the judge's finding of a Gillette injury was not contrary to law for misapplication of Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994).

EVIDENCE - EXPERT MEDICAL OPINION; CAUSATION - SUBSTANTIAL EVIDENCE. Where the judge's decision was supported by expert medical opinion based on hypothetical facts ultimately credited by the compensation judge, the medical opinions, coupled with the employee's work history, treatment history, and other testimony as to symptom development, quite reasonably constituted evidence sufficient to support a finding of a Gillette injury, and the compensation judge's finding of such an injury was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Wilson, J. and Hefte, J.
Compensation Judge: Jennifer Patterson.

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's finding of primary liability for a Gillette-type injury. We affirm.

BACKGROUND

Prior to 1993, David Simek [the employee] worked for five years in factory jobs and for seven years in landscaping and tree nursery jobs. His avocations have included vegetable and flower gardening, which he does on two acres of land that he rents as a hobby farm, and shrub and tree trimming, which he does both on his own property and occasionally for neighbors and

other friends. The employee has evidently experienced some apparently minor back pain for most of his adult life, for one episode of which he received a brief course of chiropractic care in the early or mid 1980s.

In July of 1993, the employee became employed by Cub Foods [the employer], first as a janitorial worker and subsequently as primarily a produce stocker. In the latter job, the employee normally worked about thirty to thirty-two hours a week stocking produce and three to six hours a week as a customer service representative. The employee's work as a stocker apparently entailed first unloading boxes and other packages of produce from trucks and transporting them into the employer's cooler, usually with the assistance of a motorized pallet jack; then restacking the products by hand, either onto shelves in the cooler or onto manual pallet jacks or carts; and then transporting the products out onto the employer's sales floor on those hand jacks or carts and restacking them onto display counters. The original stacks of produce packages on the trucks were evidently up to six feet high, the packages were restacked up to about four feet off the floor on the manual jacks and carts, and the shelves in the cooler and on the sales floor were sometimes up to about six feet off the floor.

In April of 1996, the employee assisted a sister of his in moving all of her furnishings out of her home and into a storage facility. This work occupied the employee for about four or five hours a day on each of three days spread over a three-week period. About this same time, April of 1996, the employee began to experience an increase in his low back pain, but he was able to continue working for the employer for about two more months without seeking medical help. Near the end of June 1996, however, noting that his low back pain was beginning to cause him to limp, the employee sought treatment from chiropractor Dr. Laurie Reiner, who treated him on June 28 and July 1, 1996. This was the employee's first formal treatment for any low back symptoms since his chiropractic treatments in the mid 1980s. Dr. Reiner's records report a history of low back pain and scoliosis, with an onset of progress in that pain in April 1996. Under "known aggravating factors" in her records Dr. Reiner lists "lifts all day long." Dr. Reiner's records indicate also that the employee's low back pain had recently increased and was currently sharp, tingling, frequent, increasing during the day, and "down into left leg." They indicate also that the employee attributed his pain to lifting one hundred pounds "many times" in a "[b]ent forward" and "[t]wisted" position and that his physical activity at work included "[r]epeated motion." The employee's treatment with Dr. Reiner was apparently unsuccessful, and on July 4, 1996, the employee requested and was refused permission from his supervisor to go home early from work.[1] The following day, July 5, 1996, the employee and a friend took a seven-hour trip by car to Lincoln, Nebraska. Three days later, on July 8, 1996, while walking in a park

[1] Employment records indicate that the employee's supervisor recalled the employee's reporting back pain "once or twice during the 4 weeks before [the employee] went on vacation" on July 5, 1996, that the supervisor also recalled the employee's asking to go home early on July 4, 1996, and that the employee nevertheless did end up working his full shift on that date. The same records also indicate, however, that the supervisor didn't recall that the employee's request to leave early on July 4, 1996, was due to back pain.

in Lincoln, the employee experienced a sharp onset of pain that now radiated suddenly all the way from his low back down into his toes. The pain was so severe that it caused the employee to vomit. The employee rode back home to Minnesota lying down in the back seat of the car.

Upon his return to Minnesota, the employee immediately sought treatment and was referred to orthopedic surgeon Dr. Peter Strand. When he saw Dr. Strand on July 17, 1996, the employee informed Dr. Strand that he "began having problem[s] in April when he was helping his sister move and noted a pain in his buttock on the left side." Dr. Strand diagnosed a ruptured intervertebral disc at L4-5 on the left and subsequently ordered an MRI scan. The MRI, conducted July 26, 1996, was unofficially read[2] to reveal instead only degenerative disc disease at L4-5 and L5-S1, with a "questionable small central protrusion at L5-S1 without evidence of nerve root impingement or spinal stenosis." Dr. Strand referred the employee for epidural steroid injections, which were apparently administered on July 31, 1996. The injections proved to be of only temporary relief, and Dr. Strand referred the employee to Dr. Strand's partner Dr. John Sherman for a consultation as to the prospects of surgery. Noting that he had reviewed the employee's recent MRI scan and that it "demonstrates a large left lateral disc herniation at the L5-S1 level," Dr. Sherman suggested, on August 28, 1996, an L5-S1 microdiscectomy as a viable treatment option. On September 3, 1996, radiologist Dr. Dwight Hager signed a "[c]orrected report" on the employee's July 26, 1996, lumbar MRI scan, in which he noted a "mild bulging of the L4-5 annulus without evidence of focal herniation or . . . stenosis" but also "a moderate sized far left lateral L5-S1 disc herniation with disc material in the lateral aspect of the L5-S1 foramen obscuring the L5 nerve root." On September 10, 1996, Dr. Sherman performed an L5-S1 microdiscectomy with lateral discectomy.

On December 11, 1996, evidently in response to a letter from a case manager at the insurer, Dr. Strand indicated that he was "unable to state to a reasonable degree of medical certainty that [the employee's] employment at [the employer] was a substantial contributing factor to his ruptured disc at the level of L4-5 on the left." The case manager's own letter does not appear to be in evidence, nor does any factual hypothetical or other reference to the employee's problems at L4-5 that that letter might have contained. Subsequently, on February 5, 1997, the employee's attorney also wrote to Dr. Strand, presenting him with a set of hypothetical facts concerning the employee's low back condition and requesting the doctor's opinion as to whether the employee's work at the employer over the years was a significant factor contributing to the problem that had been surgically repaired.[3] The hypothetical documented a history of occasional back pain dating back to the early 1980's and a profile of work for the employer since 1993 that involved lifting up to seventy pounds and "frequent if not constant bending, lifting, stooping and twisting, sometimes carrying heavy weights." The attorney's hypothetical also made reference to the employee's

[2] The initial MRI report, which was faxed, was unsigned; a note at the bottom of its first page states in part, "The final official report will be signed by a radiologist."

[3] Which was actually at L5-S1, as opposed to the L4-5 level referenced in Dr. Strand's December 11, 1996, report to the case manager.

"helping his sister move her household sometime in the middle of April, 1996, where he did no physical activity much different than his activity at work." The hypothetical recounted also the employee's request to leave work early on July 4, 1996, and his subsequent trip to Nebraska and sudden onset of severe pain while there. On February 25, 1997, Dr. Strand responded to the attorney's letter, indicating as follows:

> Assuming the hypothetical facts which you have given me[,] essentially that the [employee] worked as a landscaper and did have some back pain from time to time between 1981 and 1988 and that the [employee] went to work for [the employer] and did heavy work requiring bending, lifting, and stooping, it would be my opinion that these activities would be a significant contributing factor in his eventually developing a ruptured disc requiring surgical intervention.

On April 7, 1997, the employee filed a claim petition, alleging entitlement to compensation for temporary total, temporary partial, and possible permanent partial disability, together with related medical benefits, consequent to a Gillette-type injury[4] to his low back on July 4, 1996.

On July 24, 1997, the employee was examined for the employer and insurer by Dr. Gary Wyard. Dr. Wyard diagnosed a herniated disc at L5-S1 on the left, with joint changes at L4-5. Based on a hypothetical history provided by the employer and insurer's attorney, it was Dr. Wyard's opinion in part that the employee had been subject to "a degenerative disc which ultimately ruptured while [he was] in Lincoln, Nebraska" and that the employee's "work activities for [the employer] through July 4, 1996, [were not] a substantial contributing factor to th[at] diagnosed condition," although, due to that same condition, the employee "may have experienced some symptoms as a result of moving his sister in April of 1996."

The matter eventually came on for hearing on March 10, 1998. Issues at hearing included the employer and insurer's primary liability for a Gillette-type injury in July of 1996.[5] At the hearing, the employee testified in part that he had had occasional low back pain during the years he was doing factory and landscape work, but "[n]ot a whole lot." He testified also in part that his subsequent work, at the employer, required "an extensive amount of bending, twisting, stooping, [and] lifting to get the work done throughout the day." The employee also testified that, in assisting with his sister's move in April 1996, he had only lifted boxes, not furniture and

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

[5] Also at issue at the hearing was the propriety of Fairview Southdale Hospital's intervention claim; the judge's finding in the negative on that issue is not at issue here on appeal. The parties stipulated at hearing that, if the employee successfully proved the employer and insurer's primary liability, all claimed benefits would be paid.

appliances, and that those boxes weighed no more than the boxes that he regularly lifted at work for the employer. He testified also that, whereas prior to April 1996 he had been experiencing some low back pain about two or three times a week, by the end of April 1996 the frequency of his pain had increased to about three or four times a week. He indicated also that, while the frequency of his pain had thus increased, the intensity of his symptoms did not change significantly in the weeks during and immediately following his work for his sister.

Following the hearing, the record was kept open pending the filing of a deposition of Dr. Wyard, who testified subsequently on April 16, 1998. On direct examination in that deposition, based on a set of hypothetical facts presented by the employer and insurer's attorney, Dr. Wyard reiterated his conclusion that the employee's disc herniation was attributable to preexisting degenerative changes in the employee's low back. He explained that by "preexisting" he meant "of a natural deterioration; I attribute it to his onset of low back pain moving his sister in April of 1996; and also to the event in Lincoln, Nebraska." He also testified on cross-examination, however, that, if the employee was frequently, if not constantly, bending and twisting under weights up to seventy pounds, it was possible that this activity could have caused his low back injury. The doctor testified also under cross examination that, if the boxes that the employee lifted in assisting his sister with her move were no heavier than the boxes the employee regularly lifted in his work for the employer, the employee's work for the employer over a period of three years was more taxing on his back than was his assistance of his sister with her move. The record closed on April 20, 1998, after admission of Dr. Wyard's testimony, and by Findings and Order filed May 13, 1998, the compensation judge concluded in part that the employer and insurer were primarily liable for the alleged injury. The employer and insurer appeal.

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 (1996). 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

In her Memorandum, the compensation judge stated as follows:

> The case Steffen v. Target Stores[, Inc., 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994)] held that an employee may suffer a Gillette injury as the result of strenuous work performed for an employer over the years even though the onset of symptoms occurs off the job. This case changed the preexisting case law on Gillette injuries which had held that there was no Gillette injury without the gradual onset of symptoms related to performing specific work for an employer.
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> Steffen supports the award of benefits in this case. The employee's detailed testimony about his job duties for the employer showed that he spent about six hours of every regular work shift repetitively bending, twisting, squatting, reaching and lifting. Dr. Sherman's opinion [6] that this work placed a strain on the employee's low back above and beyond that of daily life was persuasive. Even Dr. Wyard on cross-examination agreed that excessive bending and twisting is bad for a low back.

In light of these observations, the compensation judge concluded that the employee had sustained a Gillette-type injury while working for the employer on July 4, 1996, as alleged, even though the employee's ultimate breakdown did not occur until four days later in Nebraska. The employer and insurer contend that this was a "mistaken application" of Steffen, due to which the employee's alleged injury was found compensable merely "because the employee's work involved repetitive activities." In concluding as she did, they contend, the judge "failed to recognize that there had been no showing by the employee that the allegedly repetitive work activities [at the employer] actually caused the disc herniation." They argue[7] that "if the judicial standard for Gillette injuries is that the work activities must simply be a substantial contributing cause, without regard for whether the ultimate breakdown is due to non-work-related events, the door will be swung wide open for Gillette injury claims in any case where an employee's job involves physical labor."[8]

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[6] The judge's reference to the opinion of Dr. Sherman is presumably intended to be a reference to the February 25, 1997, opinion of Dr. Sherman's partner, Dr. Strand, since the record contains no causation opinion of Dr. Sherman.

[7] In their July 9, 1998, response to this court's inquiry as to the necessity of oral argument.

[8] The employer and insurer add at this point in their letter that, "[a]lthough we do not argue that the law should be changed with respect to the black letter rule that the work activities need not be the sole cause of an employee's injury, merely a substantial contributing cause, there must be careful distinctions drawn in those cases where the ultimate breakdown of the employee's condition results from activities outside of work." They do not, however, suggest what these "careful distinctions" should be, and their phrase "results from" seems to us to only beg the question at issue.

They argue finally that "[s]hould this interpretation be allowed to stand, the burden will be on the employee to show only that the job is of a repetitive nature" (emphasis added), that "whenever an employee has a job which involves repetitive tasks and the employee suffers from a physical disability, a Gillette injury is proven." We are not persuaded.

While the judge might better have cited Schnurrer v. Hoerner-Waldorf, 345 N.W.2d 230, 36 W.C.D. 504 (Minn. 1984), and cases flowing from it, as authority for finding a Gillette injury on a date predating the employee's actual going off work, we see, contrary to the assertions of the employer and insurer, no indication that the compensation judge based her finding of liability "only" on the fact that the employee's work activities were repetitive. As is implied in the judge's decision, Steffen does provide authority for finding a Gillette-type injury without documentation of the "specific manner" in which "specific work activity caused specific symptoms which led cumulatively and ultimately to disability constituting personal injury due to work," which had earlier been the requirement under Reese v. North Star Concrete, 38 W.C.D. 63, 65-66 (Minn. 1985). However, as is also clearly implied in the judge's decision, such a Gillette finding must still be supported primarily by the medical record, see Steffen, 517 N.W.2d at 581, 50 W.C.D. at 467 ("as we've said before[,] the question of a Gillette injury primarily depends on medical evidence. Marose v. Maislin Transp., 413 N.W.2d 507, 512 (Minn. 1987)"), preferably the medical record further supported by expert medical opinion, see Steffen at 581, 50 W.C.D. at 467 (application of the Reese standard to establish the required causal relationship is unfair "where there is objective medical evidence coupled with the opinion of a medical expert").[9] The judge's reference to the opinions of Drs. Sherman [Strand] and Wyard clearly manifests the judge's awareness of that requirement.

The employer and insurer contend further that, on a purely factual basis, the employee did not meet his burden of proving that his back condition was causally related to his work activities at the employer. They argue without citation that, in order to sustain a finding of causation in Gillette injury cases, "there must be sufficient medical testimony that the injury caused the condition in question," based on a reasonable degree of medical certainty. They argue that Dr. Strand's February 25, 1997, opinion was the only evidence to qualify as such testimony and that even that evidence is of little evidentiary value for lack of foundation, in that it "assumes hypothetical facts which fail to include the most critical and relevant piece of information: that the employee's low back condition significantly changed after helping his sister move in April." They contend that the employee's low back condition predated his work at the employer and apparently, contrary to Dr. Strand's opinion, was more reasonably and more severely aggravated by the employee's assistance in his sister's move in April 1996 and perhaps events in Nebraska a few days after the date of the alleged work injury than it was by the employee's activities at work. We are not persuaded.

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[9] While expert medical opinion as to causation is desirable as evidence, a judge's conclusion as to causation may be upheld without it where there is other reliable evidence on the issue. See Reimer v. Minnit Tool/M.I.T. Tool Corp., 520 N.W.2d 397, 51 W.C.D. 153 (Minn. 1994).

Early in their brief, the employer and insurer emphasize that "no mention was made by Dr. Strand [in his February 25, 1997, causation opinion] either of the moving incident in April or of the incident which took place in Nebraska in July." Both the April moving activities and the "incident" in Nebraska were, however, referenced conspicuously in the hypothetical presented to Dr. Strand, the latter in some detail. It is true that the hypothetical presented to the doctor contained few details of the move itself, other than the fact that it was "vigorous activity" "no[t] much different than his activity at work." Such information was sufficient for purposes of foundation, however, in that the degree and quality of any change in the employee's low back symptoms in the course of April 1996 has always been not a simply identifiable fact but a bona fide factual issue in this case. Moreover, having suggested early that it was somehow critical in determining what caused the employee's low back condition, the employer and insurer never do analyze "the incident which took place in Nebraska" for any causative elements. Dr. Strand did have apparently accurate and essentially uncontested information as to the general nature and rigorousness of the employee's activities in assisting his sister in April 1996. Given this foundational information, Dr. Strand's causation opinion is not rendered unfounded by the mere fact that the quality of the change in the employee's symptoms between April and June 1996 remained at issue prior to the judge's eventual decision. See Bossey v. Parker Hannifin, slip op. (W.C.C.A. Mar. 14, 1994) (while adequate foundation is necessary for a medical opinion to be afforded evidentiary value, the expert need not be made aware of every relevant fact).

The opinions of Drs. Strand and Wyard were medically authoritative opinions apparently based on a reasonable degree of certainty[10] in light of hypothetical facts ultimately credited by the compensation judge, including the fact that the employee's symptoms increased some in frequency but not in intensity for most of the two months following April 1996. These opinions, coupled with the employee's work history, treatment history, and other testimony as to symptom development, quite reasonably constitute evidence sufficient to support a finding of causation. Therefore we affirm the judge's decision. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239; see also Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (assessment of a witness's credibility is the unique function of the trier of fact).

[10] Citing case law, the employer and insurer emphasize that "it is not enough for a medical expert to opine that the injury may, or could have, caused the injury or disability in question" (emphasis added). Dr. Strand's February 25, 1997, statement that, assuming the hypothetical facts ultimately credited by the compensation judge, "it would be my opinion that these activities would be a significant contributing factor in [the employee's] eventually developing ruptured disc" (emphasis added) is clearly not such an indefinite opinion.