LOUIS C. VAN EPS, Employee, v. AMP, INC., and TRAVELERS INS. CO., Employer-Insurer/Appellants, and BLUE CROSS/BLUE SHIELD OF MINN., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 16, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY. Where the records of two of the employee's treating doctors supported it, the compensation judge's conclusion that the employee had sustained a Gillette-type injury to his low back was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that nonwork-related gastrointestinal and psychological problems were also factors in the employee's going off work.

NOTICE OF INJURY - GILLETTE INJURY. Where it was clear that a letter from the employee's treating doctor documenting work-related aggravation of the employee's low back condition was sent directly to the employer, where it was not unreasonable for the compensation judge to rely in part on that doctor's recommendation of work-related disability status, and where a later letter of that doctor was sent to the employer referencing as significant those same symptoms of degenerative disc disease that had been identified as work-related, the compensation judge's conclusion that the employer had actual knowledge of the employee's Gillette injury was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Hefte, J., and Wheeler, C.J.
Compensation Judge: Paul V. Rieke

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from findings of the compensation judge that the employee sustained a Gillette-type injury[1] in the course of his employment and that the employer received notice of that injury within the time period allowed by Minn. Stat. § 176.141. We affirm.

BACKGROUND

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

Louis Van Eps began working as a sales representative for AMP, Incorporated, on March 15, 1975, and continued working in that capacity until March 28, 1994, the date of the claimed injury herein. On March 28, 1994, Mr. Van Eps was fifty-nine years old and was earning an average weekly wage of $884.62. AMP, Incorporated [AMP, separately or jointly with its insurer], is a producer of bulk battery cable and electrical items necessary to maintain a truck or other heavy piece of equipment.

Between 1975 and 1984, Mr. Van Eps [the employee] was responsible for sales contacts in the five-state area of North and South Dakota, Iowa, Wisconsin, and Minnesota. After 1984, his territory was limited to Minnesota and North Dakota. The duties of the job changed little over nineteen years. The employee testified that he would drive a one-ton van loaded with product an estimated seven to twelve hundred miles each week. He indicated that the vans he drove were not comfortable for his back and that, because of a wall behind the seat, he was unable to comfortably adjust the seat. His scheduled sales trips would take him away from his home four to five days per week. Product handling was performed by the employee entirely by hand. Each month, the employee would pick up about two thousand pounds of product at a freight station and transfer it to a mini storage facility, where he would unload it. Subsequently he would load the merchandise from the storage facility into his van and then unloaded it again upon sale to a customer. Items he lifted ranged anywhere from a few pounds to seventy-five pounds.

The employee first presented with low back complaints at the Mound Medical Clinic in March of 1981, and he was subsequently referred to and examined by orthopedist Dr. Gary Wyard, on March 31, 1981. At the hearing, the employee testified that the onset of his back complaints occurred following a slip and fall that he experienced while carrying approximately eighty pounds of customer product at a location in Willmar, Minnesota. He testified that the employer had asked him not to report the injury as a workers' compensation claim. AMP denied knowledge of any such 1981 work injury. The medical records dating from 1981 reference back and leg complaints with no history of a specific episode of onset. After an additional visit to Dr. Wyard in 1981, the employee next sought treatment for his back in December 1982 and then, with a significant increase in symptoms, in June 1984. On August 21, 1984, he underwent a lumbar decompression for removal of a large herniated disc at L5-S1 and for central spinal stenosis at L4-5-S1 and subarticular stenosis at L4-5. Surgery was performed at Abbott Northwestern Hospital by spine surgeon Dr. Charles Burton. The work-relatedness of the alleged injury in 1981 was not an issue at the hearing, and the compensation judge issued no findings on the matter. While off from work in 1981 and 1984, the employee sought compensation through AMP's disability plan. Disability claim forms completed at the time reflect that he was claiming benefits due to illness rather than to a "work injury" or an "off job injury."

Following recovery from surgery, the employee sought no medical attention for his back between February 6, 1985, and April 26, 1989. Upon returning to Dr. Burton in 1989, the employee complained of intermittent pain into the low back with radiation into the right leg. An MRI scan was performed on April 30, 1989, which resulted in a recommendation for conservative care, including physical therapy and a long-term exercise program. Apparently some time after his treatment in 1989, the employee was transferred to a position in which he drove a car rather

than a van. In November 1993, however, he again was required to drive a van and was assigned an extended van with additional cargo space. Starting in February 1994, the employee began having increased back and leg pain. He attributed the increase in symptoms to the larger van, which was not comfortable for him to drive, and to the additional loading and unloading that was now required of him. During the same period of time, his medical records reflect treatment for stresses at work and their physical manifestations, mostly of the gastrointestinal system. He complained of diarrhea and was also diagnosed with signs and symptoms of depression.

On March 28, 1994, the employee was taken off work by his treating physician, Dr. Milton Seifert, and, as he had done in 1981 and 1984, he applied for disability benefits rather than for workers' compensation benefits. Dr. Seifert referred him for physical therapy and a return visit to Dr. Burton. On May 2, 1994, the employee returned to Dr. Burton, who recommended an MRI scan. The employee's low back and right leg pain continued to worsen, however, and on August 29, 1994, he was admitted to Abbott Northwestern Hospital for surgical decompression at L4-5 on the right for lateral and spinal recess stenosis and decompression at L5-S1 on the right for lateral stenosis. The employee did not return to work for AMP after March 28, 1994.

On October 24, 1994, the employee filed a Claim Petition with the Department of Labor and Industry seeking total disability benefits continuing from March 28, 1994. In an Answer filed December 30, 1994, AMP denied primary liability as well as statutory notice. The case came on for hearing on September 29, 1998, before Compensation Judge Paul V. Rieke at the Office of Administrative Hearings. The parties stipulated that the employee was permanently and totally disabled as of March 28, 1994, but disagreed as to the cause. Judge Rieke determined that the employee had sustained a Gillette-type personal injury on March 28, 1994, and that the employer had received timely statutory notice pursuant to Minn. Stat. § 176.141. AMP appeals.

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

Gillette Injury

AMP contends that the compensation judge's finding of a Gillette injury culminating on March 28, 1994, is unsupported by substantial evidence in view of the entire record as submitted. They argue first that the employee's disability status on March 28, 1994, as requested by his family physician, was due to causes wholly unrelated to any claimed back injury. The employee was taken off work, they argue, for a gastrointestinal disorder and for a diagnosed clinical depression, and even the employee acknowledged that he was taken off on that date "not for my back problem, but for a -- can I say diarrhea problem, for one, and the depression." The employee submitted a claim for short-term disability benefits, not for workers' compensation benefits. AMP further argues that the employee's back condition worsened after he was taken off work and that it was not until after the second surgery on August 30, 1994, and the short-term disability benefits had expired, that the employee sought to claim workers' compensation benefits for his back. The claim of a back injury, AMP contends, was merely an afterthought. AMP argues finally that, as supported by the medical opinion of Dr. Paul Cederberg and the records of Dr. Seifert, the employee's back condition is related to the natural progression of his prior back problems, identified in 1981 and surgically corrected in 1984. They argue that the need for surgery in 1994 is due to the natural aging process and the natural progression of the degenerative disc disease of the lumbar spine, which would have occurred regardless of the employee's employment. We are not persuaded that the judge's decision was unreasonable.

While it is true that the employee was receiving treatment for other medical problems in March 1994, the medical records also support the compensation judge's determination that the employee's back pain contributed to his need for a leave of absence from work. In a March 9, 1994, office note, Dr. Seifert reported, "he still is having residuals of his dental work from December, but most of all he is having a lot of low back pain." In a letter dated March 18, 1994, Dr. Seifert wrote "Mr. Van Eps also has a long history of back pain that has now become much worse since he has been returned to working out of the van. It appears that his lumbosacral dysfunction is quite sensitive to these changes and would indicate a fairly significant amount of residual disability." Dr. Seifert concluded his letter by recommending a leave of absence for the employee. The doctor also referred the employee for physical therapy and recommended an appointment with Dr. Burton.

The employee returned to see Dr. Burton on May 2, 1994, and in a letter to Dr. Seifert on that date, Dr. Burton stated that

> Mr. Van Eps has driven a van extensively in rural Minnesota and North Dakota as part of his work as a salesman. This has clearly been an occupational hazard in regard to his back. After 1989, Mr. Van Eps did not ride in a van until 11/93. After riding in the van, he noted significant aggravation of his back and leg pain. On 3/28/94 he became disabled and was no longer able to work.

In a letter dated June 17, 1994, Dr. Burton stated, "In my opinion, his extensive van driving was clearly an occupational hazard in regard to his back and was causally related to aggravation of underlying spine disease."

The medical records of Dr. Seifert, augmented by those of Dr. Burton, provide ample support for the compensation judge's finding of a Gillette injury in March 1994. In his Findings and Order and attached memorandum, the compensation judge specifically referred to the records and opinions of Dr. Seifert and Dr. Burton as supportive of his determination. As trier of fact, Judge Rieke had discretion to resolve any conflict in testimony among the medical experts. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Therefore, because it was not unreasonable for Judge Rieke to rely on the opinions of the treating doctors and the testimony of Mr. Van Eps that his symptoms worsened with driving and lifting activities, we affirm the judge's finding of a Gillette injury as claimed. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Notice

In Finding 6, the compensation judge determined as follows:

> The employee gave statutory notice of his work injury to the employer. The employer made payments of short-term disability benefits to the employee following March 28, 1994 and the employer had access to the employee's treating physician's letters and records which related that a portion of the employee's problems concerned his work activities and the employee's working out of a van.

AMP argues that the record contains absolutely no proof that notice of a work-related injury was given to the employer. It contends that the judge essentially concluded that an employer that "had access" to medical records documenting a work injury is automatically legally notified that the employee is claiming a work injury. In Martin v. Thermoform Plastics, 46 W.C.D. 476 (W.C.C.A. 1992), this court held that, where an employee fails to give notice to his employer of an alleged work injury, the fact that the employer paid medical expenses through its self-insured group policy did not constitute legally sufficient notice. In this case, AMP argues, the employee sought short-term disability benefits for which his employer was self-insured, and his doctor sent in a letter to substantiate his disability in order to get those benefits. AMP contends that this does not constitute notice of a workers' compensation injury. We disagree.

We acknowledge that it is the employee's burden to prove compliance with the notice provisions of the Workers' Compensation Act and that neither the employee nor AMP offered any direct testimony on the issue of notice. The judge's determination as to "actual knowledge" was based on his review of the medical records, and we believe that substantial evidence supports the judge's conclusion in this regard. We agree with AMP that the rather broad assertion that they "had access" to the employee's treating physician's letters and records does not

sufficiently support that conclusion. However, it is clear that Dr. Seifert's letter of March 18, 1994, was sent directly to AMP on April 7, 1994. As noted by the compensation judge, this report comments on the stress problems that the employee was experiencing but also indicates that he had had a long history of back pain which had become worse since he returned to working out of a van. As we have already indicated, it was not unreasonable for the compensation judge to rely in part on Dr. Seifert's recommendation of work-related disability status. Because it is also clear that Dr. Seifert directed a letter to the employer on July 18, 1994, referencing as significant those same symptoms of degenerative disc disease that have been found work related, we conclude, viewing the record as a whole, that substantial evidence exists to sustain the compensation judge's implicit conclusion that the employer possessed such information as would put a reasonable person on inquiry concerning the work-relatedness of the disability.

We acknowledge that there is evidence which would support a conclusion different from that drawn by the compensation judge. On appeal, however, the issue is whether there is substantial evidence of record to support the compensation judge. Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239. Substantial evidence reasonably supports Judge Rieke's finding that AMP had notice of Mr. Van Ep's work-related back injury. Accordingly, that finding of the compensation judge is affirmed. Id.