MARY A. ADERMAN, Employee/Appellant, v. CARE FREE LIVING RETIREMENT HOME and MINNESOTA ASSIGNED RISK PLAN/WAUSAU INS. CO., Employer-Insurer, and MN DEP'T OF HUMAN SERVS., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 27, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY. Substantial evidence, including expert medical opinion with adequate foundation, supports the compensation judge's finding that the employee failed to prove she sustained a Gillette injury as a result of her work activities with the employer.

Affirmed.

Determined by: Johnson, J., Wilson, J., and Wheeler, J.,
Compensation Judge: Gary P. Mesna

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's finding on remand that she did not sustain a Gillette-type[1] personal injury arising out of her employment, and appeals the compensation judge's denial of her claim for workers' compensation benefits. We affirm.

BACKGROUND

Mary A. Aderman, the employee, worked for the employer, Care Free Living Retirement Home, for approximately one month in 1988 and from March 1990 through November 1994. (T. 31.)[2] During all relevant time periods, the employer was insured by Wausau Insurance Company.

The employee worked for the employer as a dietary aide. She typically worked between 32 and 38 hours per week, commencing at 6:00 a.m. until approximately 1:00 p.m. (T.

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

[2] The case was tried before Judge Mesna on January 15, 1999. Following a remand from the Workers' Compensation Court of Appeals, the compensation judge issued Findings and Order on Remand. All citations to the transcript and the exhibits refer to the testimony at the hearing on January 15, 1999 and the exhibits received in evidence at that hearing.

31-32, 35.) Meals were served to residents of the retirement home in a communal dining room. As part of her job, the employee served breakfast, a snack and lunch to the residents. Beginning at 6:00 a.m. the employee set up the tables in the dining room by placing placemats, silverware, napkins, plates, glasses, cups and other items on the table. Just before the residents began arriving at 7:00 a.m., the employee took out ice water, juices, milk and coffee. The employee worked alone from 6:00 until 7:00, when a second dietary aide came on duty. The employee and the other aide divided the dining room in half. The residents arrived sporadically between 7:00 and approximately 9:30 in the morning. As they arrived, the employee and the other aide took their breakfast orders, delivered them to the cook and then delivered the meals to the resident. Between 68 and 75 people were served breakfast on an average day. (T. 33-37.)

After breakfast was completed, the employee and the other dietary aide cleared the tables. Dirty dishes were placed into a bin, loaded on a cart, wheeled into the kitchen and loaded into the dishwasher. The employee then put the clean dishes away. (Resp. Ex. 4, p. 10-12.) The aides next cleaned the tables, swept the floor and at times spot mopped the floor. (T. 38-39.) Between 9:30 and 10:00, a morning snack was available for the residents. The aides set up a table outside the kitchen door containing snacks such as cookies. Most residents came and helped themselves to items of food and drink. (T. 128.) The employee helped some residents obtain a snack and carried it to where the resident was sitting. After the snack was completed the dietary aides cleaned the table area. (T. 39.)

During the noon meal, a total of four dietary aides worked in the dining room. The employee and the other aides set up the tables in the same manner as for breakfast. The noon meal was personally served by the aides to 68 to 75 residents. The employee carried six plates of food at a time, three in each hand. After lunch, the dirty dishes were taken to the kitchen in the same manner as after breakfast. The noon meal was typically completed by 12:30. (T. 39-42.) The employee and the other aides also cleaned the tables and the floor after lunch. (T. 42.)

In addition to these duties, the employee helped prepare food for breakfast and lunch, helped wash and stack dishes, fill flour and sugar containers and put away weekly grocery orders. (T. 43-48.) The employee described the pace of the job as "pretty steady, pretty - - there was always something to do." The employee testified the only time she took a break was for 15 to 20 minutes after the morning snack. (T. 49.) Grocery orders arrived twice a week, on Wednesday and Friday. Ms. Stanger and the employee put the groceries away. The job took 20 to 30 minutes on Wednesday and somewhat less on Friday. (T. 133-134.) Grocery items included cans of fruit cocktail, vegetables, frozen meat, half gallon containers of milk and cases of lettuce. (Resp. Ex. 4, p. 18.) At some point, the employee also began cooking two days a week. (T. 51.)

On December 31, 1978, the employee was seen at Fairview Riverside Hospital with complaints of a constant dull backache. The employee was seven months pregnant at the time. (Pet. Ex. C-9.) On April 15, 1991, the employee saw a specialist in obstetrics and gynecology, Dr. Michael Flanagan. She complained of low back pain and left lower quadrant pain which

reoccurred bimonthly and premenstrually. On April 18, 1991, Dr. Flanagan performed a D&C and a diagnostic laparoscopy with biopsies of bilateral ovarian cysts.

The employee returned to see Dr. Flanagan on April 6, 1992, complaining of left-sided pelvic and low back pain over the last two months. (Pet. C-8.) The employee testified to a gradual onset of low back pain in 1992 while at work. (T. 56-57.) On July 26, 1992, the employee was seen at the St. Cloud Hospital with complaints of low back pain with radiation into the left leg, worse over the last two months. An x-ray was normal except for minimal narrowing of the L4 interspace. The diagnosis was sciatica. (Pet. Ex. C-7.) The employee returned to Dr. Flanagan in August 1992, who referred her to Dr. Michael A. Amaral, an orthopedic surgeon. The employee saw Dr. Amaral on August 17, 1992, and gave a history of an insidious onset of low back pain over the last year radiating into her left leg. An MRI scan taken August 19, 1992 showed a small posterior bulging disc at L5-S1 which minimally indented but did not displace the thecal sac and a minimal central bulging disc at L4-5. On review of x-rays, however, Dr. Amaral felt the disc was more significant than that shown in the MRI scan and ordered a lumbar myelogram and CT scan which showed an extradural defect at L4-5 indenting the anterior portion of the thecal sac with impingement on both the right and left L5 nerve root sheaths. Dr. Amaral concluded the employee had a free disc fragment at L4-5 on the left and scheduled surgery. On August 26, 1992, Dr. Amaral performed an L4-5 hemilaminectomy and discectomy. By October 1, 1992, Dr. Amaral noted the employee was doing well and ordered physical therapy. The doctor released the employee to return to work part-time with a zero pound lifting restriction and no bending, twisting, or stooping. (Pet. Exs. C-5, C-7.)

The employee returned to work for the employer at a light-duty position in October 1992. At some point, the employee returned to her normal duties and testified she was able to perform the duties of her job although she was more careful. (T. 63-64.) Sometime in 1993, the employee increased her hours by working two extra shifts on the weekends and every holiday. In addition, she performed unpaid volunteer work at the retirement home. She worked approximately 45 hours a week for several months. From the time she returned to work until June 1994 the employee experienced occasional cramping in her left leg but experienced no low back pain. (T. 65-68.)

On June 8, 1994, the employee returned to see Dr. Amaral and gave a history of doing well until recently when she lifted her grandson and noticed an immediate onset of left buttock and leg pain.[3] On examination, Dr. Amaral noted positive straight leg raising with decreased strength of the hamstring and an absent ankle jerk on the left. The diagnosis was an S1 radiculopathy possibly secondary to an L5-S1 herniated disc. An MRI scan taken June 9, 1994 showed diffuse bulging at L4-5, the area of the prior surgery, with evidence of a recurrent disc herniation. Dr. Amaral prescribed bed rest and recommended an epidural steroid injection which was performed on June 14, 1994. The employee's symptoms continued and Dr. Amaral recommended a second surgery. On June 29, 1994, Dr. Amaral performed a second

[3] The doctor's note states the employee "left her grandson." (Pet. Ex. C-5.) The employee testified the pain began when she lifted one of her grandchildren. (T. 68.)

hemilaminectomy and discectomy at L5-S1. (Pet. Ex. C-5 and 7.) On September 17, 1994, the employee went to the St. Cloud Hospital emergency room complaining of an onset of low back pain the evening before. The diagnosis was disc syndrome. (Pet. Ex. C-7.)

The employee again returned to work with the employer and worked until November 1994, when she resigned. The employee and her husband then moved to Garrison, Minnesota. The employee has not worked since. (T. 78-80.)

On March 26, 1995, the employee returned to the St. Cloud Hospital emergency room with complaints of pain in her right back and buttock. The diagnosis was back strain. On May 18, 1995, the employee returned to see Dr. Amaral complaining of severe left leg pain of several days duration which came on while the employee was lifting some objects. An MRI scan taken May 18, 1995 was consistent with a recurrent disc fragment at the L4-5 level. Dr. Amaral performed a third hemilaminectomy and discectomy at L4-5 on May 22, 1995. (Pet. Ex. C-5 and 7.)

The employee was examined by Dr. Robert Wengler on October 2, 1997. In preparation for the examination, Dr. Wengler was provided copies of the employee's medical records and a hypothetical question outlining the employee's job duties prepared by her attorney. Dr. Wengler diagnosed discogenic left leg sciatica secondary to recurrent disc herniations at the L4-5 level. Dr. Wengler opined the employee's work duties were a substantial contributing cause of the initial disc herniation at L4-5 and L5-S1 and the subsequent herniations at L4-5 occurred as a direct consequence of the initial injuries. Dr. Wengler re-examined the employee on December 22, 1998 and concluded the employee was totally disabled from any type of gainful employment. (Pet. Ex. B.)

Dr. Paul Cederberg examined the employee on July 29, 1998 at the request of the employer and insurer. In preparation for his examination, Dr. Cederberg was provided with copies of the employee's medical records, a medical summary and a written description of the employee's job duties prepared by counsel for the employer and insurer. Dr. Cederberg diagnosed two-level degenerative disc disease with recurrent disc herniations at L4-5 with left S1 radiculopathy and a herniated L5-S1 disc, status post hemilaminectomy. Dr. Cederberg opined the employee's work activities were not a substantial contributing cause of her lumbar spine problems, and concluded she did not sustain a Gillette injury while working for the employer. (Resp. Ex. 1.)

The employee filed a claim petition seeking temporary total and permanent partial disability benefits and a rehabilitation consultation. The employer and insurer denied the employee sustained a personal injury and denied liability for benefits. The case was heard by a compensation judge at the Office of Administrative Hearings on January 15, 1999. In a Findings and Order served and filed February 5, 1999, the compensation judge found the employee did not sustain a Gillette-type personal injury to her low back as a result of her work activities for the employer. Based on this finding, the compensation judge denied the employee's claims. The employee appealed the denial of benefits. In a decision filed June 24, 1999, the Workers'

Compensation Court of Appeals vacated portions of the compensation judge's findings and remanded the case to the judge for reconsideration. Aderman v. Care Free Living Retirement Home, 59 W.C.D. 154 (W.C.C.A. 1999).

The remanded case was heard by Judge Mesna on October 13, 1999. No additional testimony was taken and no additional exhibits were offered or received in evidence.[4] In a Findings and Order on Remand filed November 24, 1999, the compensation judge found the employee did not sustain a Gillette injury as a result of her work activities for the employer. The employee appeals this finding and the denial of benefits.

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, 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

In Reese v. Northstar Concrete, 38 W.C.D. 63 (W.C.C.A. 1985), this court held that to prove a Gillette injury, an employee must prove that specific work activities resulted in specific symptoms leading cumulatively to disability. In Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994), the supreme court rejected that test and held there was no requirement an employee prove a gradual onset of pain associated with specific work activities. Rather, to establish a Gillette injury, an employee must "prove a causal connection between [his or her] ordinary work and ensuing disability." While evidence of specific work activities causing specific symptoms leading to disability "may be helpful as a practical matter," the court stated determination of a Gillette injury "primarily depends on medical evidence." Id. at 581, 50 W.C.D. at 466-67.

The employee argues the compensation judge, on remand, misapplied the Steffen test. In his memorandum, the compensation judge observed the "employee's work was generally

[4] The transcript of the hearing on October 13, 1999 consists of discussions between the court and counsel and the arguments of counsel.

quite light." The compensation judge also quoted from his February 5, 1999 memorandum stating, "the lifting was generally quite light, although there were a few heavier objects, including cartons of groceries. There was some bending involved with putting away groceries and with setting and clearing tables, but it was not extensive or repetitive." (Memo at p. 3.) The employee contends the compensation judge's conclusion regarding what "anatomical, biomechanical and physical factors were significant" is an improper application of the Steffen standard. We disagree.

The employee has the burden of proving a causal connection between her work activities and the resulting disability. Minn. Stat. § 176.021, subd. 1a; Steffen at 581, 50 W.C.D. at 467. Whether an employee sustained a Gillette injury is primarily, but not solely dependent on medical testimony. As a general rule, the compensation judge should consider the nature and extent of the employee's work duties. This consideration, in addition to the medical evidence and other facts unique to each case, are integral to a determination of legal causation. Ultimately, it is the responsibility of the compensation judge to weigh all of the evidence in the case to decide whether the work activities caused the disability. The compensation judge properly considered the employee's testimony and concluded the employee's job duties were generally quite light. This conclusion is supported by the evidence.

The employee argues, nonetheless, that light and non-repetitive work duties may result in a Gillette injury, citing Kuras v. St. Mary's Medical Ctr., slip op. (W.C.C.A. Jan. 21, 1998) and Tossey v. City of St. Paul, 58 W.C.D. 104 (W.C.C.A. 1998). We do not disagree. In both Kuras and Tossey, this court affirmed, on substantial evidence, a compensation judge's finding of a Gillette injury. Given this court's standard of review, however, cases affirmed on substantial evidence grounds have little or no precedential value. See, e.g., Carlson v. Nabisco Brands, slip op. (W.C.C.A. May 2, 1994). Here, the compensation judge found the evidence insufficient to establish a causal connection. We must affirm as there is substantial evidence in the record to support the judge's determination.

Foundation

Dr. Paul Cederberg examined the employee at the request of the insurer. He concluded the employee's work activities were not a substantial contributing cause of her lumbar spine problems and opined the employee did not sustain a Gillette injury while working for the employer. The employee argues Dr. Cederberg's opinions lack foundation and the compensation judge could not rely upon his opinions to deny the employee's claim. Specifically, the employee argues Dr. Cederberg's examination was cursory, and the doctor had inadequate knowledge of the nature and extent of employee's work activities.

Dr. Cederberg's medical report outlines his physical examination of the employee. The doctor measured flexion and extension and tested the employee's reflexes and her muscle strength. He reviewed the employee's prior medical records and summarized them in his report. The doctor was provided with a copy of the employee's deposition and a written description of the employee's job duties prepared by counsel for the employer and insurer. (Resp. Ex. 1.) "The

competency of a witness to provide expert medical testimony depends both on the witness' scientific knowledge and the extent 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). Dr. Cederberg examined the employee, reviewed the pertinent medical records and was aware of her job duties. Accordingly, the doctor had adequate foundation for his opinions and the compensation judge could reasonably rely on those opinions. Although Dr. Wengler reached a contrary conclusion, it is the compensation judge's function to choose between conflicting medical evidence. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). The decision of the compensation judge is, therefore, affirmed.