JOHN C. ANGELSON, Employee/Appellant, v. MINNEAPOLIS ATHLETIC CLUB and RELIANCE INS. CO., Employer-Insurer/Cross-Appellants, and MINNEAPOLIS ATHLETIC CLUB and ZURICH-AM. INS. GRP., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 11, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY. Substantial evidence, including expert opinion, supported the compensation judge's decision that the employee sustained a Gillette injury culminating in 1993.

PRACTICE & PROCEDURE - STATUTE OF LIMITATIONS. A subsequent insurer's payment of benefits for a 1993 injury does not toll the statute of limitations regarding a 1990 injury. Gillette injuries are subject to the six-year statute of limitations contained in Minn. Stat. § 176.151(1).

NOTICE OF INJURY - TRIVIAL INJURY. Substantial evidence, including the employee's own testimony, supported the compensation judge's conclusion that the employee's 1990 injury was not subject to the trivial injury rule.

PERMANENT PARTIAL DISABILITY - WEBER RATING. Under the circumstances of this case, the compensation judge erred in failing to award the employee permanent partial disability benefits for his bilateral shoulder condition pursuant to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990), where there was sufficient evidence in the record upon which to base a rating.

APPLICABLE LAW - CONTROLLING EVENT. Where the employee sustained a work injury to his shoulders in 1990 and a separate Gillette-type work injury to his shoulders culminating in 1993, the law in effect in 1993 was controlling.

Affirmed in part and reversed in part.

Determined by Wilson, J., Johnson, J., and Rykken, J.
Compensation Judge: Danny P. Kelly.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's findings regarding the statute of limitations, a Gillette injury[1] culminating on June 16, 1993, the law governing the employee's

[1] See Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 32 W.C.D. 105 (1960).

entitlement to benefits, and the employee's entitlement to permanent partial disability benefits. The employer and Reliance Insurance Company cross appeal from the compensation judge's findings regarding a Gillette injury culminating on June 16, 1993, the statute of limitations, and the law governing the employee's entitlement to benefits.[2] We affirm in part and reverse in part.

BACKGROUND

The employee began working for the Minneapolis Athletic Club [the employer] in 1959 as a busboy, moving into the position of waiter in 1970. The physical activities of this waiter job involved lifting sixty to seventy pounds overhead, carrying food on trays, and walking up and down flights of stairs.

The employee was seen by Dr. Kevin Weber on June 18, 1990, with a history of "arthralgias in his shoulders." Medical records for that date reflect that the employee had been carrying trays overhead, at work, for years. The employee sustained a Gillette injury to his left and right shoulders culminating on or about June 18, 1990,[3] when Zurich-American Insurance Group [Zurich-American] was the employer's workers' compensation carrier. On August 8, 1990, Dr. James Haefemeyer ordered x-rays, which were interpreted as being normal, and diagnosed rotator cuff tendinitis and impingement syndrome.

The employee gave notice to the employer in 1990 of his shoulder problems. No first report of injury was filed. The employee did not miss any time from work at that time and testified that he performed his regular work activities from June of 1990 up to June of 1993, with modifications and by asking co-workers for help. Medical treatment rendered to the employee's shoulders between June of 1990 and June 16, 1993, was apparently paid for by his health insurance plan.[4]

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[2] The employee appealed from numerous other findings, which were not briefed, including those concerning notice, first report of injury, average weekly wage, and apportionment. The employer and Reliance appealed from a finding regarding a first report of injury but did not brief that issue. Issues raised on appeal but not briefed are deemed waived. Minn. R. 9800.0900, subp. 1.

[3] This is taken from Finding 4. While both the employee and Reliance appealed from Finding 4, neither of them addressed this part of the finding in their brief, and at oral argument both argued that the employee did in fact sustain an injury on June 18, 1990.

[4] The employee testified, and the compensation judge found, that the employee received prescriptions, cortisone injections, and physical therapy for shoulder symptoms beginning in 1990 and continuing to June 16, 1993. While both the employee and Reliance appealed from Finding 4, neither party addressed this part of the finding in their brief. We note, however, that the medical records received into evidence at the time of hearing show only two cortisone injections during this period (on June 10, 1991, and on November 25, 1992); no prescriptions for the shoulder complaints (while Feldene prescriptions were renewed during this period, it is obvious that the medication was prescribed for treatment of ankle arthritis), and no evidence of physical therapy

The employee treated with Dr. Kumiko Nomoto on June 16, 1993, complaining that he had been experiencing bilateral shoulder pain intermittently for the past three years. Medical records for that date reflect that "[f]or the last one week pt has been having increased pain and difficulty lifting heavy objects. Pt works at athletic club over the last 35 years and sometimes he lifts greater than 60 pounds." Dr. Nomoto diagnosed tendinitis of the upper extremities, prescribed ibuprofen, heat application and physical therapy, and took the employee off work. The employer completed a first report of injury on June 16, 1993, which described the nature of the injury as, "John contends that after 35 years of heavy lifting on the job it has caused serious problems in shoulder [and] back." Reliance Insurance Company [Reliance] was the employer's workers' compensation carrier at that time and initially admitted liability for the injury.

X-rays taken on July 28, 1993, showed advanced arthritis of the AC joint in both shoulders, and MRIs performed on August 23, 1993, revealed large tears of the rotator cuffs. Shortly thereafter, on September 8, 1993, the employee began treatment with Dr. Gary Wyard, who performed rotator cuff repair surgery on October 20, 1993, and March 28, 1994. The employee returned to work with the employer, on a part-time basis with lifting restrictions, beginning on June 9, 1994. Reliance paid temporary total disability benefits while the employee was off work and temporary partial disability benefits until September 29, 1998, at which time Reliance discontinued temporary partial disability benefits based on the statutory 225-week limit on temporary partial disability benefits for a June 16, 1993, injury date.

The employee filed an objection to Reliance's notice of intention to discontinue benefits. When the matter proceeded to an administrative conference, the employee argued that his shoulder injury occurred prior to the October 1, 1992, effective date of the 225-week limitation on temporary partial disability benefits. The compensation judge granted Reliance's request to discontinue. On December 24, 1998, the employee filed a claim petition, alleging work injuries on June 18, 1990, and June 16, 1993, and seeking temporary partial disability benefits and permanent partial disability benefits for 6% of the whole body for each shoulder. On October 22, 1999, Reliance filed a petition for contribution against Zurich American, seeking contribution or reimbursement for benefits paid after the June 18, 1993, work injury. The claim petition and petition for contribution were consolidated for purposes of hearing, by order filed November 4, 1999.

The case proceeded to hearing before a compensation judge of the Office of Administrative Hearings on December 2, 1999. At that time, Reliance denied that the employee had sustained a Gillette injury culminating on June 16, 1993. In findings filed on January 28, 2000, the compensation judge found, in part, that the 1990 injury was not a trivial injury; that Gillette injuries are subject to a three-year statute of limitations; that the employee sustained a

being prescribed until 1993. However, in his October 19, 1999, report, Dr. Edward Szalapski stated, "[t]he records are quite extensive, but they do show that Mr. Angelson presented for care in 1990 and 1991 for bilateral shoulder problems and that he was receiving medications and steroid injections for these problems on an ongoing basis." It is unclear whether additional medical records exist, for the period June 1990 to June 1993, which were not offered into evidence at the time of trial.

Gillette injury culminating on June 16, 1993; that payments by Reliance for the 1993 injury did not toll the statute of limitations for the 1990 injury; that the employee's claim petition and Reliance's petition for contribution against Zurich-American for a 1990 injury were barred by the statute of limitations; that the law in effect at the time of the 1993 injury was controlling; and that the employee had "failed to articulate with specificity a permanent partial disability claim using the applicable permanent partial disability schedule in effect 1985 through June 30, 1993." The employee and Reliance 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 (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.

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

1993 Gillette Injury

Reliance contends that the compensation judge's finding of a Gillette injury culminating in June of 1993 is not supported by substantial evidence. The employee contends that the 1993 injury was not "a new injury" but rather "a consequential injury which is simply a continuation of an earlier injury." We are not persuaded.

Determination of a Gillette injury "primarily depends on medical evidence." Steffen v. Target Stores, 517 N.W.2d 579, 581, 50 W.C.D. 464, 467 (Minn. 1994). The only diagnosis with regard to the employee's shoulders, prior to June of 1993, was tendinitis and impingement syndrome. X-rays taken in 1990 were normal. Medical records reveal limited treatment to the shoulders prior to June 1993, and the employee continued in his job as a waiter

without losing time from work. When the employee saw Dr. Nomoto on June 16, 1993, he reported intermittent shoulder pain over the previous three years. He also reported having increased pain and difficulty lifting objects in the previous week. The employee was taken off work because of his symptoms for the first time in 1993. In August of 1993, MRIs for the first time revealed that the employee had large tears of both rotator cuffs. Surgery was subsequently performed on both shoulders.

Dr. Edward Szalapski, Jr., performed an independent medical examination on October 19, 1999. In a report of that date, and in an addendum report of December 1, 1999, Dr. Szalapski stated that there was no way of knowing whether or not the employee had tearing of his rotator cuff prior to the 1993 MRIs, that tearing of the rotator cuffs "is likely to be a progressive problem," and that the employee's job was a substantial contributing factor in causing his disability.[5] This evidence provides substantial support for the judge's finding that the employee sustained a Gillette injury culminating in June of 1993.

Time Limitations

Minn. Stat. § 176.151 provides in relevant part as follows:

> **176.151 Time Limitations**
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> The time within which the following acts shall be performed shall be limited to the following periods, respectively:
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> (1) Actions or proceedings by an injured employee to determine or recover compensation, three years after the employer has made written report of the injury to the commissioner of the department of labor and industry, but not to exceed six years from the date of the accident.
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> * * *
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> (4) In the case of injury caused by X-rays, radium, radioactive substances or machines, ionizing radiation, or any other occupational disease, the time limitations otherwise prescribed by Minnesota Statutes 1961, chapter 176, and acts amendatory thereof, shall not apply, but the employee shall give notice to the employer and commence an action within three years after the employee has knowledge of the cause of such injury and the injury has resulted in disability.

[5] Specifically, Dr. Szalapski opined, "[i]f, on the other hand, it cannot be substantiated that Mr. Angelson was a weight lifter, then his job would be a substantial contributing factor." Mr. Angelson testified that he lifted weights only from 1965 to 1970 and that he did no overhead lifts.

Minn. Stat. § 176.151(1) and (4). In the present case, the compensation judge found that Minn. Stat. § 176.151(4) is the controlling statute of limitations for Gillette-type injuries. We do not agree.

In Jones v. Thermo King, 461 N.W.2d 914, 43 W.C.D. 458 (Minn. 1990), the supreme court held that, "at least for the purpose of the statute of limitations, . . . a Gillette-type bilateral carpal tunnel syndrome is a personal injury. We find it difficult to characterize a condition resulting from 'repetitive minute trauma,' Gillette, 257 Minn. at 321-22, 101 N.W. 2d at 205-06, as a disease." Jones, 461 N.W.2d at 916-17, 43 W.C.D. at 460. Thus, Minn. Stat. § 176.151(1) would apply, and, since no first report of injury was filed, the employee had six years to initiate a proceeding to recover compensation benefits. The finding that Minn. Stat. § 176.151(4) is the controlling statute of limitations is therefore reversed. It is undisputed, however, that the employee did not file his claim petition within six years of the 1990 injury.

Trivial Injury Rule

The employee contends that the statute of limitations did not run on the 1990 injury because he filed a claim petition within six years from the date that he realized that he had sustained a compensable work injury. At oral argument, counsel for the employee argued that the employee could not have known that his work injury was compensable until he lost time from work. Reliance also cross-appealed on the issue of the trivial injury rule, contending that the employee "was not aware a Gillette-type injury could be compensable" until 1993, and that the compensation judge erred by not making specific findings as to when the employee understood the compensability of his injury. We are not persuaded by either argument.

In Jones, discussed above, the supreme court stated that for both personal injury and occupational disease, "the statute of limitations begins to run when the employee has sufficient information of the nature of the injury or disease, its seriousness, and probable compensability." Jones at 917, 43 W.C.D. at 461. Determination of the existence of a "trivial injury" is a question of fact. Davidson v. Bermo, 272 Minn. 97, 137 N.W.2d 567, 23 W.C.D. 623 (1965). In the instant case, substantial evidence supports the judge's finding that the 1990 injury was not a "trivial injury" so as to extend the limitations period.

Specifically, the employee testified that, in June of 1990, he related his shoulder problems to his work activities with the employer, that he first received medical treatment for his shoulders at that time, that he first received a diagnosis concerning his shoulders, and that his doctor related the employee's shoulder problems to his work activities. The employee further testified that he began, at that time, to alter the way he performed his work activities, also asking for help from co-workers. The employee described his pain in 1990 as being a ten out of ten. He also testified that he had sustained work-related injuries prior to 1990 for which he collected workers' compensation benefits, including at least one injury that resulted in payment of medical

expenses only. The employee's testimony provides substantial evidence for the compensation judge's finding that the 1990 injury was not a "trivial injury."[6]

Payment by a Subsequent Insurer and Statute of Limitations

An employer's payment of medical expenses or time loss benefits, in lieu of workers' compensation benefits, may toll the statute of limitations. Weidemann v. Kemper Ins. Group, 251 N.W.2d 117, 29 W.C.D. 376 (Minn. 1977); Savina v. Litton Indus., 330 N.W.2d 456, 35 W.C.D. 659 (Minn. 1983). Reliance paid workers' compensation benefits after the 1993 injury and contends that those payments operated to toll the statute of limitations regarding the 1990 injury, arguing that, "[i]f payment of medical or wage loss benefits by an employer in lieu of workers' compensation tolls the statute of limitation, certainly payment of workers' compensation benefits by an employer tolls the statute of limitations regardless of which insurer paid benefits." In further support of its position on this issue, Reliance cites the case of Livgard v. Cornelius Co., 243 N.W.2d 309, 28 W.C.D. 413 (Minn. 1976). Many of the facts of Livgard are difficult to decipher, but it is apparent that the employee there had three work injuries and that the employer and two of the insurers were contending that the statute of limitations had run on the first injury due to the employee's failure to commence a proceeding within six years of that injury. It is also apparent that a medical bill was paid within six years of the first injury, but it was unclear who paid it. The supreme court ultimately held that evidence supported the "inference drawn by the board" that the bill was paid "by the employer or insurer." Id. at 311, 28 W.C.D. at 416-17. At best, Livgard stands for the proposition that, where it is unclear who paid a medical bill, but the possibility exists that it was paid by the insurer on risk for the first injury, that payment may operate to toll the statute of limitations on the first injury.

In contrast to Livgard, it is definite in the present case that the insurer on risk for the 1993 injury paid the employee workers' compensation benefits and that those benefits were paid for an initially admitted 1993 injury. The compensation judge found that there was an injury in 1993, and we have affirmed that finding. The fact that some portion of compensation paid by Reliance in 1993 was ultimately apportioned to the 1990 injury does not mean that that compensation can be deemed compensation for the 1990 work injury. Thus, where workers' compensation benefits are paid by a subsequent insurer after a subsequent injury, those payments do not operate to toll the statute of limitations as to an earlier injury. See Sammarco v. Ford Motor Co., slip op. (W.C.C.A. Dec. 10, 1996).

Permanency

Dr. Wyard performed the surgeries on the employee's shoulders. In his office note of November 10, 1998, he opined, "I feel he has a permanent disability to the right shoulder of 6% based upon Workers' Compensation schedules. I feel he has a 6% disability to the left shoulder

[6] We know of no authority requiring time loss from work before an employee can be expected to recognize the compensability of his claim. Similarly, we find no support in the case law for Reliance's argument that ignorance of the law regarding Gillette injuries would allow an employee to extend the statute of limitations.

based upon current Workers' Compensation schedules. His disability is based upon 5223.0450 subp. 3A(2)." Minn. R. 5223.0450, was not in effect at the time of either the 1990 or 1993 injuries. However, on November 16, 1999, Dr. Wyard addressed this discrepancy in a letter to the employee's attorney, wherein he opined that "this rating would be essentially the same if he had been rated before the June 30, 1993 change in assessments. There was no specific rating for rotator surgery in the prior ratings and, therefore, I feel the rating provided is the one that more clearly presents the patient's diagnosed condition."

The compensation judge found:

> The employee has failed to articulate with specificity a permanent partial disability claim using the applicable permanent partial disability schedule in effect 1985 through June 30 1993. No citation by the employee to an appropriate schedule section has been made. A Weber rating for a non-scheduled injury would be appropriate if the employee establishes that the injury is a non-scheduled injury and falls outside the appropriate permanent partial disability schedule. Dr. Wyard's attempt to provide a Weber-type rating on November 16, 1999 is inadequate by rule and case law.

The employee contends that the compensation judge erred in not accepting Dr. Wyard's Weber-type[7] rating. We agree.

First, the compensation judge apparently denied the employee's claim for permanent partial disability benefits because the employee failed to establish "that the injury is a non-scheduled injury and falls outside the appropriate permanent partial disability schedule." One need only look to the permanency schedules in effect on June 16, 1993, to see that they contained no specific rating for rotator cuff tear.[8]

Second, the compensation judge denied the employee's permanent partial disability claim because Dr. Wyard's Weber-type rating was "inadequate by rule and case law." However, the judge made no citation to any specific rules or case law in support of his statement. While a remand for further explanation might have been appropriate, we decline to do so here. Reliance apparently does not dispute that the employee qualifies for a 6% rating for each shoulder if rated under the rules in effect as of July 1, 1993,[9] and "[i]t is undisputed that the new schedules may be

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[7] Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990). In that case, the supreme court held that the Commissioner of Labor and Industry lacked authority to promulgate rules precluding employees with nonscheduled permanent functional impairments from receiving permanent partial disability benefits.

[8] See Minn. R. 5223.0110, Musculo-Skeletal Schedule: Shoulder.

[9] Medical records, including MRIs, establish that the employee sustained full thickness tears of the right and left rotator cuffs for which the employee underwent surgical repair.

used to provide guidance for a Weber-type rating, even though those schedules would ordinarily be inapplicable given the employee's date of injury." Carlson v. Montgomery Ward, 55 W.C.D. 1, 6 (W.C.C.A. 1996).

Given the MRI findings of full thickness tears of the left and right shoulders, and given Dr. Wyard's opinion that 6% whole body impairment for each of the shoulders is the rating that most clearly represents the employee's diagnosed condition, we reverse the compensation judge and award the employee benefits for a 6% whole body rating for each shoulder.[10]

Other Issues

Reliance contended in its brief and at oral argument that there was no evidence to support the judge's apportionment of 80% responsibility to the 1993 injury and 20% responsibility to the 1990 injury. Reliance, however, did not appeal from that finding in its notice of appeal. While the employee appealed from the apportionment finding, he did not brief that issue and the issue is therefore waived for all parties.

The employee and Reliance appealed from the judge's finding that the law in effect on June 16, 1993, controls the employee's entitlement to benefits. However, counsel for Reliance admitted at oral argument that, if this court affirmed the judge's finding of a 1993 Gillette injury, then the law in effect at the time of that injury would govern the employee's entitlement to benefits. As we have affirmed the judge's finding of a 1993 Gillette injury, the law in effect in 1993 is controlling. See Joyce v. Lewis Bolt & Nut Co., 412 N.W.2d 304, 40 W.C.D. 209 (Minn. 1987).

[10] Permanency benefits are payable by Reliance, as we have affirmed the compensation judge's finding of a Gillette injury in June 1993 and there was no objective evidence of rotator cuff tears prior to 1993. Dr. Szalapski also rated the employee as having permanent partial disability, but his ratings appear duplicative and he provided insufficient explanation for the apparent overlap.