JUANA CARREON, Employee, v. ARMOUR SWIFT ECKRICH, INC., SELF-INSURED/GALLAGHER BASSETT SERVS., Employer/Appellant, and MN DEP'T OF LABOR & INDUS./VRU, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 23, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY. Substantial evidence supports the compensation judge's finding that the employee sustained a Gillette injury while working for the employer.

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee had not reached maximum medical improvement.

TEMPORARY TOTAL DISABILITY - JOB SEARCH. The compensation judge could reasonably conclude that the employee reasonably believed that she was still an employee of the employer from August 2, 1998, through December 28, 1998, and that the limited job search after December 28, 1998, was sufficiently diligent where the employee received no rehabilitation assistance, she has minimal English speaking skills and she requires an interpreter.

Affirmed.

Determined by: Rykken, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: James R. Otto

OPINION

MIRIAM P. RYKKEN, Judge

The self-employed insurer appeals the compensation judge's findings that the employee sustained a work-related injury to her left arm, that she had not reached maximum medical improvement, and that she had performed a diligent job search. We affirm.

BACKGROUND

Juana Carreon, employee, began working for Armour Swift Eckrich, self-insured employer, which operated a meat processing plant, in July 1992. The employee was born in Mexico in 1955 and is approximately 44 years of age. Her primary language is Spanish. The employee testified that she had no left arm problems before working for the employer. The employee worked on an assembly line, and for approximately one year and eight months, she was required to break apart sheets of cheese which had been scored into slices. The employee broke

apart eight slices at a time to place into trays for lunch packets. The employee performed this repetitive task continuously for her entire shift. The plant's temperature was kept at 40 degrees.

In approximately May 1994, the employee developed symptoms in her left upper extremity, including pain in her palm, wrist, elbow and shoulder. The employee did not miss any time from work but was eventually transferred to a different position called the stack saver position. This position involved observing a machine which sliced and stacked the meat in order to correct any errors, such as removing end pieces which would result in a bad slice. This position was not part of the assembly line. The employee continued to work in this position until she was taken off work in August 1998.

The employee treated with several doctors and chiropractors. The employee initially treated with Dr. Pat Scheidt at the Watonwan Memorial Hospital, who referred her for physical therapy. In July 1994, the employee began physical therapy. The initial examination by the therapist indicated:

> Patient shows full passive and active ROM of left upper extremity. Pain is present throughout ROM of left shoulder and intensifies at the extreme of flexion, abduction, and external rotation. Cervical spine ROM is within normal limits with pain increasing in left upper trap area on left rotation and right side bending. No thoracic transverse plane tightness is present. Patient is extremely tender in the left suboccipital area. Scapular mobility is within normal limits in the medial and lateral aspect. Superior angle of scapula is mildly restricted and very tender to palpation. Left wrist, hand, and elbow ROM is actively and passively within normal limits. Left wrist flexion and extension is painful causing increased discomfort in wrist and anterior forearm. Left deltoid and upper lateral brachium is also very tight and restricted. Left upper trapezius shows multiple trigger points radiating in the shoulder and neck and head to palpation. Significant fibrosis, tightness, and tenderness is also present in the left upper trapezius, upper rhomboid area. Left pectoralis major and subscapularis muscle are also mildly tender, but not as restricted as other muscles just noted.

The therapist's assessment was "cumulative trauma syndrome to left upper quarter with significant soft tissue and myofascial restrictions." By October 1994, the employee had residual but localized myofascial restrictions, tightness, and tenderness still present in the left deltoid and upper trapezius area, but her symptoms had decreased.

In November 1994, the employee began treating with Dr. Mario DeSouza at the New Ulm Medical Center for left arm cumulative trauma disorder. The employee gave a history of a gradual onset of pain with work and pain which at times restricted her from sleeping, and reported that she experienced no relief from an earlier prescribed Medrol dose pack. Dr. DeSouza

prescribed medication, Indomethacin, to "help her at least get to sleep," and indicated that the employee could work, but could not lift over 20 pounds, and was to limit repetitive use of her left arm. The medication did not provide much relief. In January 1995, the employee began treating with Dale Wohlrabe, D.C. for her left neck/upper back, left arm and shoulder. Dr. Wohlrabe recommended light duty work from January 27, 1995, through February 10, 1995. In June 1995, Dr. DeSouza diagnosed chronic left arm pain of unclear etiology, and recommended a physiatrist or a pain management clinic. Dr. DeSouza referred the employee for a consultation for evaluation of rehabilitation needs for chronic left arm and shoulder pain at the Sister Kenny Institute at Abbott Northwestern Hospital.

On February 27, 1996, the employee was evaluated by Dr. Todd Holmes at the Sister Kenny Institute with her husband, her case management consultant, and an interpreter. Dr. Holmes stated in his report that "[t]hrough discussions all parties established that this injury is slow onset and felt to be from accumulated trauma related to her work place." Dr. Holmes indicated that there was a question of left ulnar nerve neuropathy, and that there were major restrictions to second and third thoracic spines and rib cage. Dr. Holmes recommended an EMG and physical therapy and recommended against a pain management program evaluation while the employee continued physical therapy. In March 1996, Dr. DeSouza requested the EMG and also suggested physical therapy. The EMG on March 26, 1996 was negative.

From March 28, 1996, the employee underwent additional physical therapy with some improvement. In April 1996, Dr. DeSouza indicated that physical therapy could continue, or alternatively that she could be a candidate for a work hardening program. By May 1996, the physical therapy had reduced the employee's left arm pain with localization of residual arm pain to her left anterior deltoid, but her left upper quarter restrictions in the neck and upper trapezius area continued with quite severe symptoms, as did her headaches.

On May 8, 1996, the employee had two lipomae surgically removed, one from her left elbow and one from her right shoulder. Dr. William Scheidt, the surgeon, indicated that these fatty tumors were not work related. Dr. Scheidt also diagnosed costochondritis, an inflammation of the joints where the ribs join the sternum. He noted that this is sometimes seen in patients who work in refrigerated environments, and recommended anti-inflammatory medication and heat. In July 1996, Dr. DeSouza indicated that the employee could perform the stack saver job at her own pace, but would give her ongoing restrictions of no lifting over ten pounds, no reaching above the shoulder level on the left side, and avoidance of forceful pushing or pulling with the left arm. In December 1996, Dr. DeSouza opined that the employee's condition was causally related to her work activities, and that the employee had reached maximum medical improvement as of November 12, 1996. The employer served the employee with notice of maximum medical improvement on January 2, 1997.

In the summer and fall of 1996, the employee also treated at the Fairmont Clinic for left sided neck pain and left arm pain. Dr. C.P. Anderson ordered an MRI of the cervical spine and a CT scan of the head, which were both negative.

On August 14-15, 1996, the employee underwent a functional capacities evaluation at the New Ulm Medical Center. The occupational therapist recommended that the employee be provided with work tasks that alternate standing every 15 minutes and sitting every 5 minutes, allow her to complete 75% of the task to the right with 25% to the left, avoid any reaching of lifting past shoulder level, avoid any power pushing, lifting, or grasping with the left hand, and avoid reaching above shoulder height with left hand.

The employee began treating with a chiropractor, Lonnie Haken, D.C., in February 1997. The employee was taken off work by Dr. Haken in August 1998, who restricted the employee from working in the cold environment. Dr. Haken opined that the employee's injuries were due entirely to her employment with the employer. The employer did not have a job available for the employee in a warm environment. The employee visited the workplace for a few months to inquire whether they had work available for her, but was told to stop coming in and that they would contact her if work became available. The employee did not start looking for another job until January 1999 because she considered herself still employed by the employer and hoped they would find work for her. The employee's position has not been terminated by the employer. The employee continues to note left arm symptoms.

At the request of the employer, the employee underwent a medical examination with H.W. Park, M.D., on March 1, 1999. Dr. Park concluded that the employee has subjective complaints of left shoulder, low back and left arm pain without any objective findings of any chronic structural lesions such as tendinitis or arthritis. Dr. Park noted that the employee's subjective complaints had remained the same after she had stopped working in August 1998, and concluded that she had not sustained a work-related injury.

A hearing was held on July 22, 1999. The compensation judge found that the employee had sustained a work-related Gillette injury to her left upper extremity on May 19, 1994. The compensation judge also found that as a result of her continued employment for the employer through August 3, 1998, the employee sustained further Gillette injuries to her left upper extremity "with resulting involvement of the soft tissues in her thoracic back, her cervical back as well as her entire upper and possibly to her lower back." (Finding 2.) As a result of these injuries, the compensation judge found that the employee was medically unable to work since August 3, 1998, and unable to return to any competitive gainful employment since that date because of her disability in combination with her education, training, experience, and lack of English speaking or writing skills. The compensation judge awarded temporary total disability benefits, rehabilitation benefits and medical expenses, allowed the employee to choose a rehabilitation consultant, and found that the employee had not reached maximum medical improvement. The self-insured employer appeals.

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 (1998). Where evidence

conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, findings of fact may 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

Causation

The self-insured employer appeals the compensation judge's finding that the employee sustained a Gillette injury while working for the employer. In order to establish a Gillette injury, an employee must "prove a causal connection between [his] ordinary work and ensuing disability." Steffen v. Target Stores, 517 N.W.2d 579, 581, 50 W.C.D. 464, 467 (Minn. 1994). While evidence of specific work activities causing specific symptoms leading to disability "may be helpful as a practical matter," determination of a Gillette injury "primarily depends on medical evidence." Id. Selection of a date of injury of a Gillette injury is not a medical decision, however, but a question of fact to be determined by the compensation judge. Ellingson v. Western Insurance Co., 42 W.C.D. 565, 574 (W.C.C.A. 1989).

The employer argues that the employee's symptoms are subjective and that Dr. Haken's opinion is not substantial evidence to support the finding that the employee's condition is work related. In reviewing factual findings on appeal this court is not to assess the substantiality of evidence that would have supported a contrary decision but to assess the substantiality of evidence supporting the decision of the compensation judge. Evidence is substantial if it is, in light of the record as a whole, "evidence that a reasonable mind might accept as adequate," granting "due weight to the opportunity of the compensation judge to evaluate the credibility of witnesses appearing before the judge." Hengemuhle, 358 N.W.2d at 59-60, 37 W.C.D. at 239-40. Moreover, "where the 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." Id. at 60, 37 W.C.D. at 240. "The point is not whether [the appellate court] might have viewed the evidence differently, but whether the findings of the compensation judge are supported by evidence that a reasonable mind might accept as adequate." Redgate v. Sroga's Standard Service, 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988).

The employer argues that Dr. Haken's opinion should be disregarded. Dr. Haken opined that the employee's injuries were due entirely to her employment with the employer. In addition, Dr. Holmes stated in his report that "[t]hrough discussions all parties established that this injury is slow onset and felt to be from accumulated trauma related to her work place." The compensation judge specifically adopted Dr. Haken's opinion over that of the employer's expert, Dr. Park. It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985).

Substantial evidence supports the compensation judge's finding that the employee's upper left extremity and related conditions are work related. Accordingly, we affirm.

The employer also argues that the compensation judge erred by finding that the employee had sustained a subsequent Gillette injury on or about August 3, 1998. The compensation judge found that the employee "sustained further and additional daily wear and tear type injuries in the nature of accumulated repetitive daily trauma type, overuse injuries to her left upper extremity, with resulting involvement of the soft tissues in her thoracic back, her cervical back as well as her entire upper and possibly to her lower back." The employee's medical records indicate on numerous occasions that the employee's symptoms worsened with her work activities. The compensation judge did not err by making this finding of a subsequent Gillette injury on or about August 3, 1998.

Maximum Medical Improvement

The employer also argues that substantial evidence does not support the compensation judge's finding that the employee is not yet at maximum medical improvement. Maximum medical improvement (MMI) is defined as "the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon reasonable medical probability." Minn. Stat. §176.011, subd. 25. Maximum medical improvement "occurs upon medical proof that the employee's condition has stabilized and will likely show little further improvement." Polski v. Consolidated Freightways, Inc., 39 W.C.D. 740, 742 (W.C.C.A. 1987). Whether MMI has been reached is a question of ultimate fact for the compensation judge to decide. Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 528-29, 41 W.C.D. 634, 639 (Minn. 1989). The burden of proving maximum medical improvement is normally on the employer and insurer. Burns v. Firestone Tire & Rubber, slip op. (W.C.C.A. June 29, 1993).

Dr. DeSouza opined that the employee had reached MMI as of November 12, 1996. In March 1999, Dr. Haken opined that the employee would get worse if she went back to work with her arms and hands, but that if she does not work with her hands and arms and obtains treatment, she will improve but it will be a slow, long process. Dr. Haken believed that the employee's pain would lessen but that her function would improve less than her pain level. Again, it is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). The compensation judge could reasonably rely on Dr. Haken's opinion. Therefore, substantial evidence supports the compensation judge's finding that the employee had not reached MMI, and we affirm.

Temporary Total Disability Benefits

The employer argues that the employee is not entitled to temporary total disability benefits because she did not perform a diligent job search. Generally, in order to be entitled to temporary total disability benefits, an employee must, if she is able to work within her restrictions, engage in a reasonably diligent job search. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729,

733, 40 W.C.D. 948, 954 (Minn. 1988). A diligent job search is a search that is reasonable in light of all the facts and circumstances of the case, including the rehabilitation assistance provided to the employee. Id. at 734, 40 W.C.D. at 956; see also Noll v. CECO Corp., 42 W.C.D. 553 (W.C.C.A. 1989). Whether an employee has engaged in a reasonably diligent job search is a question of fact for determination by the compensation judge.

From August 3, 1998 through December 28, 1998, the employee did not conduct any job search. In this case, the employee believed that she was still an employee of the employer, and she had received no rehabilitation assistance from the employer, other than initial case management services from November 1995 through December 1996. The employee approached the employer for several months to ask whether there was work available for her, and was finally told that they would call her if work was available. The employee's position was not terminated. Where there appears to be a reasonable possibility that an employee will return to work with the employer, it may not be necessary that the employee engage in an immediate search for employment to be eligible for temporary total disability benefits. Jacobson v. Seaboard Farms, slip op. (W.C.C.A. May 6, 1996); Glasow v. Gresser Concrete Masonry, slip op. (W.C.C.A. Apr. 18, 1995). Under the circumstances of this case, the compensation judge could reasonably conclude that the employee had a reasonable expectation of returning to work for the employer and that a diligent job search was not required for the employee to be eligible for temporary total disability benefits during this time period. Therefore, we affirm the compensation judge's award of temporary total disability benefits from August 3, 1998, through December 28, 1998.

The employer also argues that the employee's job search after December 28, 1998, was not sufficient to qualify as a diligent job search. The determination of whether or not an employee's job search is diligent is a question of fact for the compensation judge to resolve. Bauer v. Winco/Energex, 42 W.C.D. 762, 768 (W.C.C.A. 1989). "The reasonableness and diligence of the employee's work search is viewed within the scope of assistance provided by the employer and insurer; and must, therefore, be judged as reasonable and diligent within this requirement of providing rehabilitation services." Okia v. David Herman Health Care Ctr., 38 W.C.D. 261, 263 (W.C.C.A. 1985) (citation omitted), summarily aff'd (Minn. Nov. 27, 1985); see also Taylor v. George A. Hormel & Co., 42 W.C.D. 633, 639 (W.C.C.A. 1989). In this case, the employee was not provided with rehabilitation assistance in her job search, she has minimal English speaking skills, and requires an interpreter to assist her. The compensation judge could reasonably conclude that her limited job search would not disqualify the employee from receiving temporary total disability benefits under these circumstances. Accordingly, we affirm.