

ROCCI J. DEBRETO, Employee, v. U.S. STEEL CORP., SELF-INSURED, Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS

MAY 9, 2000

No. [REDACTED SSN]

HEADNOTES

NOTICE OF INJURY - GILLETTE INJURY. Where the employee's work activities caused injury culminating in disability in July of 1997, and the employee gave the employer notice that his condition was work-related in April or May of 1997, the compensation judge correctly determined that the employer had statutorily adequate notice of injury as required by Minn. Stat. § 176.141.

ATTORNEY FEES - EDQUIST FEES. Pursuant to Edquist v. Browning-Ferris, 380 N.W.2d 787, 38 W.C.D. 411 (Minn. 1986), 20% of the reimbursement awarded to the employer, for sickness and accident benefits paid by the employer to the employee, should be deducted for fees payable to the employee's attorney; the compensation judge erred in using "its aliquot share" to determine the employer's liability for those fees.

Affirmed in part and reversed in part.

Determined by Wilson, J., Johnson, J., and Rykken, J.
Compensation Judge: Donald C. Erickson

OPINION

DEBRA A. WILSON, Judge

The self-insured employer appeals from the compensation judge's findings that the employer had timely notice of the employee's work injury and that the employer is obligated to pay "its aliquot share of attorneys fees" out of sickness and accident benefits reimbursed to the employer. We affirm in part and reverse in part.

BACKGROUND

The employee has worked as a machinist for the employer since June of 1973, setting up and operating various metal cutting machines. Much of the employee's work time is spent using his hands to turn cranks, raise and lower levers, and use a wrench.

On July 24, 1989, the employee was seen by Dr. J. Davis, at the Duluth Clinic, with several complaints, one of which was that his left arm and hand had been going to sleep, mostly at night. Dr. Davis diagnosed low grade carpal tunnel syndrome and recommended night splints, which the employee used thereafter.

The employee continued performing his work as a machinist, without time loss, but by 1996 he began noting tingling and numbness almost every night and sometimes during the day, either while on the job or while doing other activities. On January 23, 1996, the employee was seen at the employer's dispensary, complaining of a sore left wrist and requesting a wrist brace. Records from that visit reflect that "[the employee] feels its arthritis as he has this in other joints." X-rays taken at that time revealed mild degenerative osteoarthritic changes in the wrist.

The employee was seen by Kimberly Biron, RN, at the Duluth Clinic on November 4, 1996, complaining of the spontaneous onset of right thumb pain and swelling one week before. On that same date, the employee underwent an EMG ordered by an internist, Dr. Alan Johns. The EMG revealed bilateral carpal tunnel syndrome, left worse than right.

The employee was then seen by an orthopedist, Dr. Joseph Henry, on December 17, 1996. Dr. Henry noted the employee worked as a machinist and recommended carpal tunnel release surgery, first on the left. In a note dated April 24, 1997, Dr. Henry opined that the employee's work as a machinist "is an exacerbating factor contributing to the need for surgery." The employee submitted that note to Maureen Saunder, in the employer's personnel department. About a month later, on May 22, 1997, the employee underwent an independent medical examination with Dr. R.H.N. Fielden, at the employer's request. Dr. Fielden concluded that "[the employee's] work is not a significant contributing cause of this syndrome."¹ The employer filed a notice of denial of primary liability in reliance on that opinion.

The employee underwent left carpal tunnel release surgery with Dr. Henry on July 14, 1997, and was off work until September 2, 1997, at which time he returned to work for the employer. While off work, the employee received short-term sickness and accident benefits from the employer.

On March 17, 1998, Dr. Johns issued a report, stating that "[i]t is most reasonable to determine that the job as a machinist for the past 24 years is a substantial contributing factor in causing or accelerating the patient's bilateral carpal tunnel syndrome. The chart does not reflect any other causative factor than his job as a machinist." Several months later, on July 8, 1998, the employee filed a claim petition, seeking temporary total and permanent partial disability benefits.

The employee's claim petition proceeded to hearing, and in findings and order filed on November 8, 1999, a compensation judge found, in part, that the employee's work activities as a machinist were a substantial contributing factor in his development of bilateral carpal tunnel syndrome, that the employer had statutorily adequate notice of injury, that the employee was entitled to temporary total disability benefits during his time off work, and that the employer was

¹ The employer subsequently had the employee re-examined by Dr. Fielden, and in a report dated January 8, 1999, Dr. Fielden stated that "[the employee] does a lot of work with his hands and wrists in his work which could relate to carpal tunnel," but the doctor ultimately opined that the carpal tunnel syndrome was "a naturally occurring event."

entitled to reimbursement of sickness and accident benefits, “less its aliquot share of attorneys fees.” The employer appeals.²

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

Notice

The compensation judge found that the employee’s work activities culminated in disability on July 14, 1997. The employer appealed from the judge’s decision on this point but did not address the issue in its brief. Therefore, for purposes of this appeal, the date of injury is undisputed. See Minn. R. 9800.0900, subp. 1. The employer does argue, however, that the judge erred in finding that the employee gave the employer timely notice of injury. The employer contends that the employee was aware that his work activities were causing his carpal tunnel symptoms prior to 1996 and that “[t]here is no evidence that the employee reported to the employer prior to May 14, 1997, that he had a work-related carpal tunnel condition.” We are not persuaded by the employer’s arguments.

Minn. Stat. § 176.141 requires that notice be given to the employer within 14, 30, or 180 days “after the occurrence of the injury,” depending on the circumstances. The legal injury date in the present case is July 14, 1997, and the employer’s argument that the employee should have given notice sooner than May of 1997, which was already prior to the culmination date of the injury, has no merit. In any event, substantial evidence supports the judge’s finding that the employee did not have knowledge that his work activities were causally related to his carpal tunnel syndrome until April 24, 1997, and the first report of injury reflects that the employer received

² The employer appealed from the judge’s finding that the employee’s bilateral carpal tunnel syndrome was causally related to his work activities; however, because the employer did not brief it, that issue is deemed waived. Minn. R. 9800.0900, subp. 1.

notice of the injury on April 30, 1997. The finding that the employer had timely notice of the injury is affirmed.

Attorney Fees

The compensation judge found that the employer was entitled to reimbursement of sickness and accident benefits paid to the employee, “less its aliquot share of attorneys fees.”³ The employer contends that, pursuant to Edquist v. Browning-Ferris, 380 N.W.2d 787, 38 W.C.D. 411 (Minn. 1986), 20% of the amount to be reimbursed should be deducted as and for attorney fees.⁴ We agree.

In Edquist, the Minnesota Supreme Court reversed a decision of the Workers’ Compensation Court of Appeals and reinstated the findings and determination of a compensation judge, who had ordered that 20% be deducted for fees to the employee’s attorney from the amount to be reimbursed to an intervenor. That case contained no explanation for the supreme court’s use of the 20% figure, rather than the 25/20 formula set forth in Minn. Stat. § 176.081, subd.1, or some other percentage. However, subsequent to Edquist, the supreme court has continued to use the 20% figure when determining fees to be paid out of reimbursement awarded to an intervenor. See Mann v. Unity Medical Ctr., 442 N.W.2d 291, 41 W.C.D. 1171 (Minn. 1989); Ransom v. Ford Motor Co., 472 N.W.2d 134, 45 W.C.D. 45 (Minn. 1991). Accordingly, we reverse the judge’s award of “aliquot share of attorneys fees” and order that, from the award of reimbursement to the employer of \$2,321.43 for sickness and accident benefits, 20% be deducted and paid to the employee’s attorney as and for Edquist fees.

³ The employer’s counsel apparently wrote to the compensation judge by letter dated November 10, 1999, requesting clarification of the term “aliquot share of attorneys fees.” The judge responded by letter dated November 22, 1999, stating that “it was my intent that the employer pay the same percentage of attorneys fees as the employee. This is not 20% but will be a number between 20 and 25 percent.” The judge went on to give a hypothetical.

⁴ The employee did not cross appeal, but contends that the 25/20 formula set forth in Minn. Stat. § 176.081, subd. 1, should be used to calculate attorney fees withheld from the sickness and accident benefits.