DAVID ERICKSON, Employee/Cross-Appellant, v. VIRACON, INC., and NAT'L UNION FIRE INS. CO., adm'd by CRAWFORD & CO., Employer-Insurer/Appellants, and HEALTHCARE RECOVERIES, INC. FOR MEDICA CHOICE, INST. FOR LOW BACK AND NECK CARE, and MN DEP'T OF LABOR & INDUS., REEMPLOYMENT INS. DIV., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 15, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY; EVIDENCE - EXPERT MEDICAL OPINION; EVIDENCE - CREDIBILITY. Where the treating doctor's opinion that was relied on by the judge in finding causation of a Gillette-type injury was based on a history of personal knowledge of the employee's case, where the compensation judge was aware of the factual basis for the doctor's opinion, where the employee testified that he and the doctor extensively discussed the nature of his employment duties and that the description he provided to the doctor was consistent with his testimony at trial, and where the compensation judge reasonably credited the employee's testimony, the treating doctor's reports were not insufficient to establish an opinion as to causation, even though they did not set forth clearly the facts upon which the doctor relied or the rationale behind his conclusion, and the compensation judge's reliance on that conclusion in finding causation of a work-related injury was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Rykken, J., and Johnson, J.
Compensation Judge: John E. Jansen

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's determination that the employee sustained a Gillette-type injury[1] to his low back in the course of his employment. The employee cross-appeals from the judge's failure to rule on the employee's claim for temporary partial disability benefits. We affirm the judge's determination of a Gillette injury and modify the Findings and Order to include an award of temporary partial disability benefits.[2]

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

[2] In their response brief filed February 25, 2000, the employer and insurer stipulated that, should the employer ultimately be found liable for benefits, the judge's findings may be modified to include the award of temporary partial disability benefits.

BACKGROUND

David A. Erickson was employed by Viracon, Inc., between July 6, 1987, and October 25, 1997. Viracon, Inc. [the employer], is a glass manufacturer located in Owatonna, Minnesota. Throughout most of his ten years with the employer, Mr. Erickson [the employee] worked in the employer's tempering department, working twelve-hour shifts, alternating between thirty-six-hour and forty-eight-hour work weeks. Most of the glass produced by the employer is quarter-inch-thick plate glass. The sheets of glass produced vary in size from about twelve inches square to up to eighty-four inches wide by varying lengths. The glass sheets weigh anywhere from two pounds to two hundred pounds or more. During his ten years of employment with the employer, the employee worked in several job classifications, including "unloader," at which he worked for the first several months of his employment, "logo loader," at which he worked for about six years, and then "recorder," at which he worked for his last three years.

According to his eventual testimony, the employee first noticed the back symptoms here at issue in early June 1997. He described his symptoms as loss of mobility, stiffness, and aching. He testified that by September he began to experience radiating pain down the back of his left leg, which eventually included numbness in his calf and toes. He testified that on October 24, 1997, he was very stiff and sore and could hardly get out of bed. He testified that he left a voice mail message for his supervisor, reporting back pain and indicating that he would not be in to work.[3] The employee testified that he stayed in bed that day and made an appointment to see his family doctor.

On October 28, 1997, the employee saw Dr. Richard Griffin at the Owatonna Clinic. Dr. Griffin noted that the employee presented with a two-month history of low back pain and a recent exacerbation, with pain traveling down the posterior left leg to just below the knee. The doctor further noted that "[h]e did miss work this weekend at Viracon, but is convinced that this is not particularly related to work since he primarily works with computers." Dr. Griffin diagnosed a low back strain and referred the employee for physical therapy. The employee returned to Dr. Griffin on December 10, 1997, reporting progressive left calf burning and parethesis to his left dorsal foot with intensification of leg pain. Dr. Griffin reported that the employee's "[s]ymptoms seem to be worse when working at Viracon, but he is really uncertain as to the etiology of his pain." Dr. Griffin's impression was low back pain with radicular symptoms suggestive of a herniated disc, and he referred the employee for an MRI scan. The employee's MRI was interpreted as showing degenerative disc disease at L3-4, L4-5, and L5-S1, with a very large noncontained disc herniation at L4-5.

[3] There was conflicting testimony relative to the employee's notification to his employer of back pain on October 24, 1997. Wayne Hedberg, the employee's supervisor, testified that he did not receive a voice mail message from the employee on October 24 and that after about five phone calls to the employee's residence throughout the day he finally reached the employee at 4:00 p.m. Mr. Hedberg testified that the employee had no ready excuse for his absence and that, after he told the employee that his future with the company was out of his hands, the employee mentioned that his back was bothering him. The employee was terminated by the employer on October 25, 1997, for "numerous attendance violations."

On January 7, 1998, the employee was seen by orthopedist Dr. Gordon Welke, who in turn referred the employee to neurosurgeon Dr. Charles Burton at the Institute for Low Back and Neck Care. The employee saw Dr. Burton on January 12, 1998, and reported to him that he had been in good health until June 1997, when he began to experience back pain that began to radiate into his left leg. He indicated that, over a period of time, the back pain subsided but the left leg pain increased and became accompanied by numbness and weakness. Dr. Burton diagnosed long-standing three-level degenerative disc pathology, with a very large, noncontained disc herniation. He recommended microsurgical removal of the herniated fragment. On January 23, 1998, Dr. Burton performed a surgical diskectomy at L4-5.

On February 10, 1998, the employee wrote a letter to Dr. Burton, requesting his opinion as to the cause of his low back condition. The employee advised Dr. Burton that "It was a **hard labor** job I have been at for **10+ years**" (emphasis in original). He further advised the doctor that he used his back a lot in his employment at Viracon, carrying heavy sheets of glass, loading and unloading machines by hand, pushing and pulling 5,000-pound frames, and shoveling broken glass into dumpsters. In a chart note dated February 27, 1998, Dr. Burton stated, "From a review of this patient's medical records, it is clear that the type of work that he has done over the years has been directly and causally related to his present circumstance. It is, most probably, an example of a Gillette-type injury."

On March 26, 1999, the employee's attorney also wrote to Dr. Burton, requesting a causal relationship opinion. He advised the doctor as follows:

> Prior to his injury Mr. Erickson worked doing heavy manual labor requiring significant forward reaching and bending at least one time per minute. His work also required him to lift up 74 pounds by himself and infrequently lift sheets of glass with the aid of another weighing up to 200 pounds. He would lift items from as low as three inches off the floor to heights above his head. Mr. Erickson would also lift large sheets of glass laid out on a table for inspection. He would only lift one side tilting the glass up to inspect it. His job also required him to push frame carts with glass weighing up to 5,000 pounds. Mr. Erickson worked 12 hour days and he stood approximately nine hours each day. He performed these duties for 10 years.

On April 15, 1999, Dr. Burton responded to the employee's attorney by stating, "It would be my professional opinion that Mr. Erickson's work activities at Viracon between 1987 and 1999 [sic] were a substantial contributing factor in his difficulties and his need for surgery on 1/23/98." He added, "I would certainly characterize the 'injuries' sustained by Mr. Erickson as being classic for the 'Gillette' injury category."

On August 31, 1998, the employee filed a claim petition, alleging entitlement to temporary total disability benefits continuing from October 29, 1997, consequent to a Gillette-type

injury to his low back culminating on June 1, 1997. He also claimed entitlement to rehabilitation and medical benefits. The petition was subsequently amended to include claims also for temporary partial and permanent partial disability benefits, as well as out-of-pocket expenses. The employer and insurer denied liability for the injury, alleging that it was not work-related.

On December 14, 1998, the employee was examined at the request of the employer and insurer by orthopedist Dr. Mark Engasser. Dr. Engasser diagnosed lumbar disc herniation, left L4-5, status-post diskectomy. Dr. Engasser opined that the employee's work activities were not a substantial contributing cause of his lumbar spine problems and concluded that the employee did not sustain a Gillette injury while working for the employer.

The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on August 29, 1999. At the hearing, evidence included the employee's medical records, the deposition of Dr. Engasser, and testimony from the employee and Mr. Hedberg. That testimony reveals a significant dispute between the parties as to the specific activities and physical requirements of the employee's jobs, particularly the recorder position.

The employee testified that, during a career such as his at the employer, an individual may be expected to lift items as heavy as sixty to eighty pounds. Heavier pieces would be lifted by two people or with a special hoist. After production, pieces of glass are stacked on A-frame wheeled carts or L-shaped "I" racks. A completed rack could weigh up to 5,000 pounds and would be moved by forklift. A-frame carts weigh between 3,500 and 5,000 pounds and are moved either by hand or with a three-wheeled tug. As a recorder, the employee testified that he would be standing for approximately nine hours of his twelve-hour shift. When a batch of glass came out of the furnace, he would measure the glass and verify its tag and then record its production on paper and in the computer. He would then indicate to the unloaders whether the glass should be placed on an A-frame cart or an "I" rack. Batches of glass would come through the furnace on a one-minute cycle. As one batch went into the furnace, one batch would come out. The load bed range for the furnace was eighty-four inches wide by one hundred forty-four inches long. The employee testified that as a recorder he was required to bend over tables of glass to measure the pieces to make sure that they matched the customer's order. He testified that at least once each minute he would lift one edge of a glass sheet above his head to inspect for defects. He testified that he would also assist the unloaders in moving the A-frames into position for loading and out of position after they had been loaded. He was also required, he said, to break glass out of the quench area of the furnace using a heavy bar. This broken glass would then have to be shoveled into a dumpster for removal.

Mr. Wayne Hedberg, the production supervisor in the employer's tempering department, testified that, after the glass rolls out of the furnace, the recorder typically views the glass and measures it by simply sliding a tape measure out and measuring across it. Mr. Hedberg disputed the suggestion that the recorder position required significant forward reaching and bending at least once a minute. He also indicated that inspection was actually performed by the furnace operator once every fifteen minutes. He disputed the employee's testimony that he would actually physically lift and inspect each piece of glass. Mr. Hedberg also emphasized that battery

operated tugs were available for moving A-frames and that the company had a full-time tugger assigned to the unloading portion of the line. In addition, he testified, utility persons, furnace operators, and unloaders were also available to move the frames. He testified that "A" frames were only fully loaded about ten percent of the time and that seventy-five percent of the glass was placed on "I" racks or vendor racks that would be moved by forklift. Mr. Hedberg disputed that a recorder would lift up to seventy-five pounds by himself or that he would have to maneuver sheets of up to two hundred pounds each. Mr. Hedberg emphasized that the employee's job as a recorder was to measure glass, to verify its size, to record it production on paper and on computer, and then to tag the glass.

In Findings and Order served December 9, 1999, the compensation judge found that the employee's work activities were a substantial contributing cause of his condition and awarded benefits. The employer and insurer appeal from the judge's primary liability determination, and the employee cross-appeals from the judge's failure to rule on the temporary partial disability claim.

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

Foundation and Credibility

The employer and insurer appeal from the compensation judge's finding that the employee sustained a Gillette injury to his low back on October 21, 1997. They essentially argue that there is no properly founded medical evidence causally relating the employee's job duties to the injury and that Dr. Burton's summary opinion, absent any explanation or any recitation of the facts relied upon, is insufficient to prove that causal connection. We disagree.

The employee has the burden of showing the causal connection between the work activities and any ensuing disability. 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). In this case, the compensation judge relied upon the opinions expressed by Dr. Burton that the employee's work duties caused his injury. Assuming adequate foundation for the opinions, this is all that is legally necessary to prove a Gillette injury. The doctor's failure to explain the mechanism of injury does not render a causation opinion void of foundation. Rather, the presence or absence of such testimony may go to the weight afforded to the testimony by the compensation judge.

While it may have been preferable for Dr. Burton to have set forth the facts he relied upon, together with a rationale for his causal relationship opinion, the ultimate determination of medical causation is within the province of the compensation judge. Felton v. Anton Chevrolet, 513 N.W.2d 457, 50 W.C.D. 181 (Minn. 1994). "The competency of a witness to provide expert medical testimony depends upon both the degree of the witness's 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). While it is true that failure to obtain a proper history can sometimes render an opinion without foundation, we do not believe that such is the case here. First of all, Dr. Burton was the employee's primary treating physician and was basing his opinion on his personal knowledge of the case. The compensation judge was aware of the factual basis for Dr. Burton's opinion. The employee's letter to Dr. Burton of February 10, 1998, and the employee's attorney's letter to Dr. Burton of March 26, 1999, were both part of the record. It is evident that Dr. Burton had this information before him when issuing his opinion regarding the occurrence of a Gillette injury. Further, the employee testified that he and Dr. Burton extensively discussed the nature of his employment duties, including the duration for which he performed the various positions. He testified that the description he provided to Dr. Burton was consistent with his testimony at trial. Given this evidence, we cannot conclude that Dr. Burton's reports were insufficient to establish a causal relationship opinion or that the compensation judge was unreasonable in relying upon them. A judge's choice between conflicting expert opinions will not be overturned on appeal unless the facts assumed by the expert are not supported by the record as a whole. Nord, 360 N.W.2d 337, 37 W.C.D. 364. None of the facts assumed by Dr. Burton appear to us to be unsupported by the record.

The employer and insurer further contend that the testimony and evidence offered at trial as to the nature of the employee's work in the recorder position were "radically different" from the information submitted to Dr. Burton as to that job. They contend that the written description of the recorder job and the testimony of Mr. Hedberg and Dr. Engasser make it clear that the recorder position cannot be construed as a heavy labor job or a heavy job at all. They argue that Dr. Burton was asked to assume that the employee performed work activities that were in fact performed by others, if at all. We cannot agree.

One of the crucial issues in this case was the question of the actual physical duties of the recorder position. The employee testified to having to do significant reaching, bending, and lifting. Mr. Hedberg testified to the contrary. The compensation judge found the employee to be credible and accepted his testimony regarding his performance of the recorder job. In the memorandum attached to his findings, the judge explained that he viewed the employee's testimony as to his job duties to be supportive of a conclusion that the job was far more physically strenuous than understood by Dr. Engasser. We agree that the evidence offered at the hearing is

subject to differing interpretations, but we do not agree that the compensation judge's acceptance of the employee's version as credible is unsupported by substantial evidence. It was the responsibility of the compensation judge to resolve conflicts in testimony and ultimately to weigh all of the evidence in the case to decide whether the employee's work activities caused his disability. The compensation judge properly considered the employee's testimony and concluded that the employee's job duties were physically strenuous and that they substantially contributed to his low back injury. Where evidence is conflicting or more than one inference may reasonably be drawn, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988). "Assessment of witness credibility is the unique function of the factfinder." Tews v. Geo. A. Hormel & Co., 430 N.W.2d 178, 180, 41 W.C.D. 410, 412 (Minn. 1988). This court must give due weight to the compensation judge's opportunity to observe the witness and to judge his credibility. A finding based on credibility of a witness will not be disturbed on appeal unless there is clear evidence to the contrary. See Even v. Kraft, Inc., 445 N.W.2d 831, 835, 42 W.C.D. 220, 225-26 (Minn. 1989).

Given the compensation judge's crediting of the employee's testimony, finding here no basis to overturn the judge's choice between experts, and because Dr. Burton's opinion constitutes adequate medical evidence to support the judge's decision, we affirm the judge's finding of a Gillette injury.

Temporary Partial Disability

At the outset of the hearing, the employee set forth his claim for benefits, including a claim for temporary partial disability benefits. The employee cross-appeals from the compensation judge's failure to address the issue of temporary partial disability benefits in his Findings and Order. In their response brief, filed February 25, 2000, the employer and insurer stipulated that, should the employer ultimately be found liable for benefits, the judge's findings may be modified to include the award of temporary partial disability benefits. Consequently, we modify the compensation judge's findings to include an award of temporary partial disability benefits in accordance with Petitioner's Exhibits 3 and 7.