SYLVIA P. JESSE, Employee/Appellant, v. NORTHWEST AIRLINES, INC. and KEMPER NAT'L INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 14, 2000

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - DISMISSAL; PRACTICE & PROCEDURE - STATUTE OF LIMITATIONS. Where there were factual issues as to whether the employee's alleged multiple chemical sensitivity syndrome constituted an occupational disease for statute of limitations purposes, and whether the employee was incapacitated for purposes of the three-year extension on filing provided by Minn. Stat. § 176.151(3), the compensation judge erred in dismissing the employee's claim, on statute of limitations grounds, pursuant to Minn. Stat. § 176.322, because not only legal issues remained as specified by that provision.

Vacated and referred to OAH for assignment to a compensation judge.

Determined by Wilson, J., Pederson, J., and Johnson, J.
Compensation Judge: Gary M. Hall

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's decision under Minn. Stat. § 176.322 that her claim is barred by Minn. Stat. § 176.151(4), the three-year statute of limitations applicable to occupational diseases. We vacate the judge's decision and refer the matter to the Office of Administrative Hearings for assignment to a compensation judge.

BACKGROUND

The employee began working as a flight attendant in 1968, employed first by North Central Airlines, then Republic Airlines, and then Northwest Airlines [the employer]. On October 28, 1996, she filed a claim petition, alleging entitlement to medical expenses, rehabilitation benefits, and temporary total or permanent total disability benefits after November 1, 1990, the claimed date of injury, as a result of "multiple chemical sensitivity." The employer and insurer denied liability, and, after several delays,[1] the matter proceeded to a pre-trial conference on December 20, 1999, before Compensation Judge Gary Hall. During the pre-trial conference, apparently held by telephone, the parties evidently asked the judge to issue a decision, based on

[1] The employee was forced to change attorneys after filing her claim petition, requiring additional time to secure new counsel, and the matter was the subject of several motions to dismiss or strike and several extensions.

stipulated facts, as to whether the employee's claim was governed by the six-year limitations period contained in Minn. Stat. § 176.151(1), or the three-year limitations period contained in Minn. Stat. § 176.151(4), and as to whether the limitations period should be extended for an additional three years, due to the employee's alleged incapacity, pursuant to Minn. Stat. § 176.151(3).

On February 3, 2000, following the telephone conference, the employer and insurer filed a notice of motion and motion for summary judgment, with attached memorandum of law and affidavits from the employer and insurer's attorney, addressing in part the issue of whether the employee's alleged multiple chemical sensitivity syndrome should be considered a Gillette injury[2] or an occupational disease for statute of limitations and notice purposes. The employer and insurer apparently also submitted exhibits, including medical records, in connection with their motion. The employee filed a response to a previous demand by the employer and insurer for admissions, a memorandum in opposition to summary judgment, affidavits from the employee and her attorney, and exhibits of the employee's own, again including some medical records.

The opening paragraph of the compensation judge's "Findings and Order," filed February 24, 2000, reads as follows:

> The above-entitled matter came on for pretrial, pursuant to notice, before Gary M. Hall, a Compensation Judge of the Office of Administrative Hearings, on December 20, 1999 by telephone. At the pretrial the parties requested a decision based on stipulated facts in lieu of a formal hearing. (It should be noted that although the written motion requested a summary judgment, the statutory authority for such a decision falls under Minn. Stat. § 176.322 and is not technically a Summary Judgment).

As issues, the judge listed "[w]hether the alleged multiple chemical sensitivity syndrome is governed by the notice and statute of limitations requirements for an occupational disease or for a Gillette injury?" and "[w]hether the employee's claim is barred for failure to act within the applicable notice and statute of limitation requirements." After specifying the issues, the judge listed fifteen "stipulations," reciting various events and background information concerning the employee's employment history, her physical complaints, communications to the employee from her physicians about the nature and cause of her condition, and her pursuit of social security disability benefits. Then, in "Findings," the judge determined that the employee's alleged multiple chemical sensitivity syndrome was governed by the notice and statute of limitations provisions applicable to occupational disease, that the employee had failed to commence her action against the employer and insurer within the pertinent three-year period, and that the employee had not been mentally or physically incapable of commencing an action in a timely manner. The judge therefore dismissed the employee's claim petition with prejudice. The employee appeals.

STANDARD OF REVIEW

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

"[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

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

> **176.151. Time limitations**
>
> The time within which the following acts shall be performed shall be limited to the following periods, respectively:
>
> (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.
>
> * * *
>
> (3) In case of physical or mental incapacity, other than minority, of the injured person or dependents to perform or cause to be performed any act required within the time specified in this section, the period of limitation in any such case shall be extended for three years from the date when the incapacity ceases.
>
> (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.

Minn. Stat. § 176.151(1), (3), and (4). In the present case, the parties apparently stipulated[3] that

[3] According to the "stipulations" contained in the judge's order. We could find no other record of any formal stipulations in the file. It appears that the judge may have drawn the "stipulations" from the affidavits, the employee's responses to the employer and insurer's request for admissions, and the medical records attached to the employer and insurer's motion for summary judgment and the employee's response thereto.

the employee left her employment due to her alleged work injury on November 1, 1990, that she gave notice of injury to her employer in January of 1991, and that she did not file a claim petition until October 23, 1996.[4] The compensation judge concluded that the employee's claim was governed by the notice and limitations provision applicable to occupational disease and that the employee was required to commence her action within three years of November 1, 1990. The judge also concluded that the employee had not been "mentally or physically incapable of commencing an action" so as to qualify for an extension of the filing period. While he made no specific finding on the issue, the judge explained, in his memorandum, his reasons for concluding that the employee's alleged multiple chemical sensitivity syndrome constituted an occupational disease, rather than a Gillette injury. He also explained why he rejected the opinions of several treating physicians regarding the employee's claimed incapacity.

The term "occupational disease" is defined by statute,[5] the concept of a "Gillette

[4] While the stipulated date for filing of the employee's claim petition was apparently October 23, 1996, that claim petition was not actually filed until October 28, 1996. The five-day discrepancy is not important here. The parties apparently also stipulated that the employer and insurer never admitted liability for the claimed injury and had never paid the employee any workers' compensation benefits.

[5] Minn. Stat. § 176.011, subd. 15, provides as follows:

> **Subd. 15. Occupational disease.** (a) "Occupational disease" means a disease arising out of and in the course of employment peculiar to the occupation in which the employee is engaged and due to causes in excess of the hazards ordinary of employment and shall include undulant fever. Ordinary disease of life to which the general public is equally exposed outside of employment are not compensable, except where the diseases follow as an incident of an occupational disease, or where the exposure peculiar to the occupation makes the disease an occupational disease hazard. A disease arises out of the employment only if there be a direct causal connection between the conditions under which the work is performed and if the occupational disease follows as a natural incident of the work as a result of the exposure occasioned by the nature of the employment. An employer is not liable for compensation for any occupational disease which cannot be traced to the employment as a direct and proximate cause and is not recognized as a hazard characteristic of and peculiar to the trade, occupation, process, or employment or which results from a hazard to which the worker would have been equally exposed outside of the employment.

injury" by case law.[6] However, while "occupational disease" may be statutorily defined, just what constitutes a "disease," per se, as opposed to "injury" from minute trauma, is not at all clear.[7]

It has been suggested that, when crafting this definition, the legislature "looked at the statutes of other states using definitions and liked them all!" Kirwin, Compensation for Disease Under the Minnesota Workers' Compensation Law, 6 Wm. Mitchell L. Rev. 619, 638 (1980).

[6] As summarized by the Minnesota Supreme Court in Steffen v. Target Stores,

> In *Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200 (1960)*, we held that an employee who is injured gradually by reason of the duties of employment and eventually becomes disabled is, under our workers' compensation law, no less the recipient of a compensable injury than one who suffered a single disabling trauma:
>
> > It is well established by the authorities that when the inevitable effects of an underlying condition are hastened by an injury that is sudden and violent or the result of unusual strain or exertion, the injury and its disabling consequences are compensable. It should further be conceded, however, that injuries may arise out of and in the course of the employment which do not occur suddenly or violently. In the course of one's ordinary duties injuries may occur daily which cause minimal damage, the cumulative effect of which in the course of time may be as injurious as a single traumatic occurrence which is completely disabling. We have been presented with no good reason why compensation should be paid in one instance and not in the other.

Steffen, 517 N.W.2d 579, 580-81, 50 W.C.D. 464, 466 (Minn. 1994) (quoting Gillette, 257 Minn. at 321, 101 N.W.2d at 206, 21 W.C.D. at 113).

[7] The separate term "disease" is not defined by statute, and cases addressing the issue cannot easily be reconciled. For example, in Jensen v. Kronick's Floor Covering Serv., the Minnesota Supreme Court explained that

> [t]he statutory [occupational disease] definition does not set out criteria from which one can exclusively classify the impairment resulting from repetitive minute trauma as either personal injury or occupational disease. Although the compensation board has heretofore treated this type of impairment [from carpal tunnel syndrome] as a personal injury, there is not sound basis in law or logic for reversing its classification [as an occupational disease]

Moreover, it is apparent that, in at least some cases, a "disease" may qualify as a compensable "personal injury," whether or not it also qualifies as an "occupational disease."[8] However, the fact that a "disease" may qualify as a personal injury for some purposes does not necessarily answer the legal questions raised in this case - - that is, what are the statute of limitations implications of classifying a disease as an "occupational disease," and may an employee suffering from what would qualify as an occupational disease choose to proceed under the personal injury provisions of the statute if to do so would allow the employee to avoid the three-year limitations period otherwise applicable to his or her condition.[9] Some authority suggests that such an employee should be able to proceed under either theory at his or her discretion,[10] but we can find no definitive answer to the question in relevant case law. In any event, whatever the legal effect of classifying

---

> pursuant to the expert medical testimony and factual findings of this case.

245 N.W.2d 230, 232, 29 W.C.D. 69, 71 (Minn. 1976) (footnotes omitted). However, in Jones v. Thermo King, the court wrote, "it would appear, at least for the purposes of the statute of limitations, that a Gillette-type bilateral carpal tunnel syndrome is a personal injury," explaining, "[w]e find it difficult to characterize a condition resulting from 'repetitive minute trauma' . . . as a disease." 461 N.W.2d 915, 917, 43 W.C.D. 458, 460 (Minn. 1990).

[8] In Olson v. Executive Travel MSP, Inc., the employee contracted Influenza-Type B while traveling on business and developed subsequent complications, including chronic bronchiectasis. Noting that the parties had focused their arguments on the occupational disease issue, the Minnesota Supreme Court held, "[w]e are of the opinion, however, that this case involves the compensability of a personal injury under [Minn. Stat. § 176.011, subd. 16], thus obviating the need to address whether there was also a compensable occupational disease under subdivision 15." Olson, 437 N.W.2d 645, 646, 41 W.C.D. 793, 794 (Minn. 1989). In a footnote, the court indicated that, while the employer had "asserted that a claimant cannot seek compensation for a disease under the personal injury subdivision of the Act," "[a]pplication of this provision had not been previously so limited." Id. at n.1.

[9] Some claims for disease have certainly been denied as untimely pursuant to the three-year limit specified in Minn. Stat. § 176.151(4). See, e.g., Bloese v. Twin City Etching, Inc., 316 N.W.2d 568, 34 W.C.D. 491 (Minn. 1982). It is entirely possible, however, that at least some of these cases were treated as occupational disease cases because they were litigated that way. As this court noted in Fehling v. Dayton Rogers Mfg. Co., 28 W.C.D. 35, 40 n. 3 (W.C.C.A. 1975), "[n]eedless to say, of course, there will be factual situations that may be logically called a 'personal injury' or 'occupational disease.' " One advantage of occupational disease classification is the availability of a substantially longer period in which to give notice of injury. Compare Minn. Stat. § 176.151(4) (three years for occupational disease) with Minn. Stat. § 176.141 (180 days for personal injury).

[10] See Kirwin, Compensation for Disease Under the Minnesota Workers' Compensation Law, 6 Wm. Mitchell L. Rev. 619, 705 (1980).

a work-related condition as an occupational disease for statute of limitations purposes, we conclude that, under the circumstances of this case, the compensation judge erred in dismissing the employee's claim.

As indicated earlier, the parties apparently submitted the matter on stipulated facts, without formal hearing, and the compensation judge issued his decision under the authority of Minn. Stat. § 176.322. That provision reads in pertinent part that "[i]f the parties agree to a stipulated set of facts and only legal issues remain, the commissioner or compensation judge may determine the matter without a hearing based upon the stipulated facts. . . ." Id. (emphasis added). The compensation judge here did in fact make a legal determination that the employee's claim was governed by the three-year statute of limitations for occupational disease. However, in doing so, the judge necessarily also made the largely factual determination that the employee's alleged multiple chemical sensitivity syndrome qualified as an occupational disease.[11] The other issue decided by the judge - - whether the employee had been incapacitated so as to warrant a three-year extension of the limitations period - - was also clearly factual, in that the judge concluded that the employee's ability to give notice of injury and to pursue social security benefits outweighed the opinions of treating physicians who found the employee incapable of proceeding in a timely fashion due to the disability caused by her alleged work-related condition.

We are aware that this case has been lingering in the system for four years already and that the parties are interested in a final resolution. However, the record, such as it is, clearly establishes that this case was not appropriate for disposition pursuant to Minn. Stat. § 176.322, because not "only legal issues remain[ed]." See, e.g., Clay v. American Residential Mortgage Corp., 56 W.C.D. 37, 41 (W.C.C.A. 1996) ("so long as factual issues remain in dispute, Minn. Stat. § 176.322 is not applicable"). Therefore, we vacate the judge's decision and refer the matter to the Office of Administrative Hearings for a formal evidentiary hearing on the merits. Given our decision on this procedural point, it is premature to decide the legal issues raised by the parties' arguments.

[11] That this decision is largely factual in nature is amply illustrated by the judge's reasoning in the present case. Among other things, the judge indicated in his memorandum that he relied on the fact that the medical reports "refer to a disease or disease process" and that the employee referred to how "sick" she was getting. The validity of his rationale aside, the judge was obviously drawing a factual inference from the record. See also Jensen v. Kronick's Floor Covering Serv., 245 N.W.2d 230, 232, 29 W.C.D. 69, 71 (Minn. 1976) (supreme court found no sound basis to reverse a classification of carpal tunnel syndrome as an occupational disease "pursuant to the expert medical testimony and factual findings in this case").