

JOHN P. BUTLER, JR., Employee, v. METRO SHEET METAL and FEDERATED INS. CO., Employer-Insurer, GEN. SHEET METAL and CNA/TRANSCON. INS. CO., Employer-Insurer/Appellants, and AIR CONDITIONING ASSOCS. and STATE FUND MUT. INS. CO., Employer-Insurer, and FOOT CLINICS, LTD., P.A., WALGREEN CO. and MINNHEALTH FAMILY PHYSICIANS, Intervenors, and SHEET METAL #10 BENEFIT FUND, Intervenor/Cross-Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 4, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY; CAUSATION - SUBSTANTIAL CONTRIBUTING CAUSE; CAUSATION - AGGRAVATION; CAUSATION - PRE-EXISTING CONDITION. Where it was apparent that the judge was fully familiar with the employee's entire medical record and based his decision on a careful scrutiny of it, and where that medical record contained ample objective medical evidence other than formal expert medical opinion, the compensation judge's conclusion that complications of the employee's hammertoe condition were causally related to his brief work as a sheet-metal worker for one of three defending employers was not clearly erroneous and unsupported by substantial evidence, even absent a definitive and employer-specific supporting medical opinion.

GILLETTE INJURY - DATE OF INJURY; GILLETTE INJURY - ULTIMATE BREAKDOWN. Where there was testimony that the employee continued to work even after the date of Gillette injury found by the judge only to retain some income while he sought workers' compensation coverage for his surgery, where it was on that same date that the doctor who eventually performed the surgery first asserted the need for it, where two or three days prior to that date the employee had informed his foreman that he needed to see a doctor for his problem, where the chronicity of the employee's problem was amply documented in the medical records immediately post-dating that date, where the employee testified that his condition finally became "unbearable" on that date, and where medical records contained ample evidence of the frequent debridement procedures that were apparently essential to maintaining the employee's basic functionality as he prepared for surgery, the compensation judge's finding of liability against the second defending employer, rather than against the third, for whom the employee was working on the date of his surgery, was not clearly erroneous and unsupported by substantial evidence.

INTERVENORS; PRACTICE & PROCEDURE; ATTORNEY FEES - EDQUIST FEES; ATTORNEY FEES - SUBD. 7 FEES. Where there was no express or other apparent basis for the judge's award of temporary total disability benefits directly to the employee instead of reimbursed to the intervenor who had already paid disability benefits during the time at issue, where the employee agreed that reimbursement to the intervenor was appropriate but requested Edquist fees on the amount reimbursed and fees pursuant to Minn. Stat. § 176.081, subd. 7, relative to those Edquist fees, and where there was no objection to the employee's request for Edquist and subdivision 7 fees, the compensation

judge's order of payment directly "to the employee" was modified to provide for reimbursement to the intervenor, and the request for Edquist fees and subdivision 7 fees was granted.
Affirmed in part and modified in part

Determined by Pederson, J., Wilson, J. and Wheeler, C. J.
Compensation Judge: William R. Johnson

OPINION

WILLIAM R. PEDERSON, Judge

Employer General Sheet Metal Company and its insurer, CNA/Transcontinental Insurance Company, appeal from the compensation judge's conclusion that the employee's foot condition and the necessity of its treatment were substantially caused by the employee's work for that employer. Intervenor Sheet Metal #10 Benefit Fund cross appeals from the judge's order of reimbursement "to the employee" of disability benefits evidently paid by that intervenor. We affirm on the appeal and modify on the cross-appeal.

BACKGROUND

In about September of 1994, John Butler, a sheet metal worker, came to Minnesota from New York, where he had been receiving treatment for about eleven years for a hammertoe deformity and a dropped metatarsal, for the past four of those years from podiatrist Dr. James DiNapoli. Since moving to Minnesota in 1994, Mr. Butler [the employee] has worked for various employers, including a year's employment from October 1994 to October 1995 with General Sheet Metal [General]. In June of 1997, the employee was employed with Metro Sheet Metal [Metro], and on June 13, 1997, he went off work from that job in order to obtain treatment for his hammertoe condition. Metro, for whom the employee had worked for about two months without seeking treatment, was insured at the time against workers' compensation liability by Federated Insurance Company [Federated].

On June 16, 1997, the employee recommenced work with General, from whom he took vacation back to New York on July 1, 1997. On July 7, 1997, while back in New York, he sought treatment for his feet again from Dr. DiNapoli, who indicated in a letter on that date "To Whom It May Concern" that, in his opinion, the employee's foot conditions had been "exacerbated through the years by work conditions including the wearing of work boots" and would "need to be corrected surgically." The employee returned to Minnesota and continued to work for General for about another month, and on about August 19, 1997, he evidently informed his foreman that his feet had grown extremely sore and that he needed to see a doctor. Two or three days later, on August 22, 1997, he saw podiatrist Dr. Jeffrey Pellersels for pain resulting from bilateral corn, callous, and hammertoe conditions. Dr. Pellersels debrided the employee's lesions and noted, "It does sound as though he probably is going to have some surgery for hammertoe correction in the fall." On the date of that examination, the employee was thirty-eight years old and was earning an average weekly wage of \$898.42, and General was insured against workers' compensation liability by CNA Insurance Company [CNA]. On evidently that same date, the employee was informed by General that he was being laid off.

About three days after his layoff from General, the employee commenced apparently similar work with Air Conditioning Associates [ACA]. He saw Dr. Pellersels for lesion debridement again on September 15, 1997, on which date Dr. Pellersels noted that he and the employee “briefly went over the surgery today” and that the employee would “be calling if he wants to talk about a surgical consult.” On September 17, 1997, General completed a First Report of Injury, indicating that it had been notified of the injury on August 22, 1997. On September 25, 1997, Dr. Pellersels completed a Health Care Provider Report, diagnosing the employee’s condition as hammertoes and hyperkeratoses, indicating that his “first examination for this injury” had been on August 22, 1997. Dr. Pellersels further indicated that, while he saw “no injury” per se, the “injury or disease” had been “aggravated or accelerated” by the employee’s work activity and “will require hammertoe correction in future.” On October 13, 1997, Dr. Pellersels saw the employee again, noting on that date that the employee “presents today for surgical consultation for his hammer toes” and “wants to do his left foot first.” The employee worked for ACA without loss of work time until October 21, 1997, when he went off work preparatory to undergoing hammertoe repair surgery on his left foot the following day.¹ On that date, ACA was insured against workers’ compensation liability by State Fund Mutual Insurance Company [State Fund].²

On October 23, 1997, Dr. Pellersels wrote to CNA, indicating that the employee’s “hammer toes and the hyperkeratotic lesions are aggravated by his type of work,” that “[m]ore than likely if he was at a sit down job . . . he may not have to have any surgery,” and that “[t]he callouses are a result of the hammer toes deformity.” Coverage was apparently not forthcoming, however, and on November 17, 1997, the employee filed a Claim Petition, alleging against General entitlement to temporary total disability benefits continuing from October 23, 1997, together with unspecified medical and rehabilitation benefits and possible permanent partial disability benefits, all consequent to a work-related Gillette-type injury³ to his feet sustained on August 22, 1997. In their Answer, filed December 4, 1997, General and CNA denied liability for the alleged injury.

On December 10, 1997, the employee underwent an independent medical evaluation for General and CNA by podiatrist Dr. Michael Joyce. It was Dr. Joyce’s conclusion that the employee’s hammertoe condition was “an inherited, structural, developmental deformity” but that the employee appeared to have had a longstanding problem with ill-fitting shoes which had aggravated the condition beginning as early as 1980. Dr. Joyce concluded also, however, that, since the condition had been present since the 1980s, the employee’s two-month period of employment with General in 1997 was not a substantial contributing factor in the condition of his feet. A few months later, on April 8, 1998, the employee was examined also by Dr. Robert Wengler, who opined, based on a review of medical literature, that the employee’s work footwear and the amount of time that he had spent on his feet during the course of his employments as a sheet metal worker had resulted in his work being a

¹ Surgery on the right foot was eventually performed on January 28, 1998.

² The employee’s average weekly wage on October 21, 1997, is not of record, but the parties have stipulated that it was sufficient to entitle the employee to the maximum workers’ compensation rate for any benefits that might be due.

³ See Gillette v. Harold Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

substantial contributing factor in the development of the painful foot callouses that ultimately necessitated his corrective surgery and the associated temporary total disability.

On April 20, 1998, Sheet Metal #10 Benefit Fund was granted intervention on its claim that it had paid \$12,938.08 in medical and disability benefits at issue in the employee's claim. On May 4, 1998, Dr. Pellersels released the employee to return to work, apparently at light duty. On May 11, 1998, orders were issued granting intervention also to Minnesota Health Family Physician's P.A. and Foot Clinics, P.A., Ltd. On May 30, 1998, the employee evidently returned to work at his profession as a sheet metal worker. About a year later, on April 7, 1999, the employee amended his claim petition, in part to allege temporary total disability only through May 30, 1998, and to allege Gillette-type injuries against seven employers in addition to General Sheet Metal, including Metro and ACA, on dates ranging from November 13, 1995, to October 22, 1997.

On August 20, 1999, the employee was examined for ACA by orthopedist Dr. Dennis Callahan. It was Dr. Callahan's opinion that, although certain footwear such as pointed-toe high-heeled shoes may be problematic in causing complications stemming to a hammertoe deformity, the kind of boots worn by the employee at his work were "in no way contributory to the development of his hammer toe deformities," nor did Dr. Callahan know of any evidence relating the development of a hammertoe deformity to the amount of time one spends on one's feet.

All named employers had denied liability, and ultimately, on October 25, 1999, an order was issued dismissing all but Metro, General, and ACA. On January 25, 2000, Dr. Wengler testified by deposition. Dr. Wengler agreed that, where there were "multiple employers for relatively short periods of time, [it was] difficult if not impossible to pick from a medical standpoint which employment would be a substantial contributing cause." He testified in part that "they all are [substantial contributing causes] to an equal extent." On January 31, 2000, Dr. Joyce also testified by deposition. It was Dr. Joyce's opinion in part that debridement of calluses and corns consequent to hammertoes, in order to provide sufficient space inside shoes to minimize rubbing, was as effective as surgical repair for relief of pain, although not as permanent a solution.

The matter came on for hearing on February 1, 2000. Issues at hearing included whether the employee had sustained a Gillette-type work injury to his feet bilaterally and, if so, whether it had occurred on June 13, on August 22, or on October 21, 1997. At the hearing, the employee testified in part that his pain in August 1997 had reached a level ten on a scale of zero to ten, that at that time "[t]he corns were unbearable on the top of my foot," and that it was at that time that he finally acknowledged to himself, "I have to have surgery." By Findings and Order filed April 10, 2000, the compensation judge concluded in part that the employee had sustained a Gillette-type work injury to his feet in the course of his employment with General on August 22, 1997, and that there was no evidence to support a finding that he sustained any such injury while employed with Metro or ACA. The judge acknowledged in his decision that the employee's hammertoe condition was a hereditary deformity and that the employee had been told even as early as the late 1980s or early 1990s that he would probably someday have to have the condition surgically corrected. He concluded, however, that the employee's preexisting hereditary hammertoe condition "in conjunction with [his] occupation" had "caused another injury, namely the employee's painful corns and calluses." Pursuant to this conclusion, the judge found that the employee had been temporarily totally disabled by his August 22, 1997, work injury from

October 22, 1997, to May 30, 1998, and he concluded that all four intervenors, together with various other providers who had not intervened, were entitled to reimbursement. On that finding he ordered in part that General should pay “to the employee” benefits for temporary total disability from October 23, 1997, to May 30, 1998. General and CNA appeal from the finding of liability, and intervenor Sheet Metal #10 Benefit Fund cross appeals from the award of disability benefits “to the employee.”

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

At Finding 5, the compensation judge found that the employee sustained a Gillette-type injury on August 22, 1997, by virtue of the fact that that date was, in the judge’s opinion, “the date on which the employee decided that he could no longer work with this problem” and the date on which, the employee testified, he “was told that he would have to have surgery on his hammer toes.” The judge found that “[t]he medical and testimonial evidence overwhelmingly points to” that conclusion. General and CNA contend that substantial evidence does not support the conclusion that the employee’s work at General was a substantial contributing cause of the foot condition that required surgery or that any breakdown in that condition occurred on August 22, 1997, during the employee’s employment with General.

Causation

An employee claiming workers’ compensation benefits has the burden of proving that a work-related injury caused his disability, but it is not necessary for the employee to show that the work-related injury was the sole cause of his disability, only that the injury was a legal cause--that is, an appreciable or substantial contributing cause. Salmon v. Wheelbrator Frye, 409 N.W.2d 495, 497-98, 40 W.C.D. 117, 122 (Minn. 1987). Moreover, it remains a longstanding rule with regard to temporary disability

that when the usual tasks ordinary to an employee’s work substantially aggravate, accelerate, or combine with a preexisting disease or latent

condition to produce a disability, the entire disability is compensable, no apportionment being made on the basis of relative causal contribution of the preexisting condition and the work activities.

Vanda v. Minnesota Mining & Mfg. Co., 27 W.C.D. 379, 218 N.W.2d 458 (1974) (emphasis added); see also Wallace v. Hanson Silo Co., 28 W.C.D. 79, 235 N.W.2d 363 (1975). General and CNA do not contest these principles, but they contend that the judge's decision must nevertheless be reversed because "no medical provider opined the activities at General, [over] roughly two months, were a substantial contributing factor [in] the Employee's condition or need for medical treatment." General and CNA cite Scharber v. Honeywell, No. [REDACTED SSN] (W.C.C.A. May 22, 2000), for the proposition that reversal is necessary where statements of the factfinder "suggest a presumption that an employee's lay perception as to the causation of his condition are to be attributed greater weight than a medical expert's opinion as to the causation of that condition." They suggest that such a presumption is contrary to the supreme court's requirement in Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994), that, "[w]hile that kind of evidence may be helpful as a practical matter, . . . the question of a Gillette injury primarily depends on medical evidence." Steffen, 517 N.W.2d at 581, 50 W.C.D. at 467, citing Marose v. Maislin Transport, 413 N.W.2d 507, 512, 40 W.C.D. 175, 182 (Minn. 1987). We are not persuaded that the compensation judge applied the wrong standard or otherwise decided the issue unreasonably.

There is no indication that the judge based his decision on only the employee's "lay perception" as to the causation of his condition. To the contrary, there is ample evidence in the judge's decision that the judge was fully familiar with the employee's entire medical record, including treatment notes, clinical examination reports, etc., and that he based his decision on a careful scrutiny of all of that evidence. Neither Marose nor Steffen implies that a medical opinion, while certainly an important form of medical evidence, is the only form of medical evidence. Indeed, the court in Steffen specifically refers to the usefulness of "objective medical evidence coupled with the opinion of a medical expert . . . where the ultimate objective is the attainment of substantial justice according to the purposes of the Workers' Compensation Act." Steffen, 517 N.W.2d at 581, 50 W.C.D. at 467 (emphasis added). Here there was ample objective medical evidence available for the scrutiny of the judge other than formal expert medical opinion. While no physician may have formally attributed substantial causation to General in particular, at least three—Dr. DiNapoli, Dr. Pellersels, and Dr. Wengler—at least informally noted the employee's condition to be aggravated by the work that he did and by the footwear that he wore on the job. While a more definitive and employer-specific medical opinion as to causation might, of course, have been useful, such an opinion was not essential in light of the amplitude of this other medical evidence, reinforced as it is by the testimony of the employee. Cf. Reimer v. Minnit Tool/M.I.T. Tool Corp., 520 N.W.2d 397, 51 W.C.D. 153 (Minn. 1994) (a medical opinion was not essential in proving that deterioration in the employee's carpal tunnel condition was medically related to his post-injury job and that that job was therefore physically unsuitable for him; "while medical opinion is desirable, it is not essential given other reliable evidence").⁴ It was not unreasonable for the compensation judge to conclude from that other medical evidence that complications of the employee's

⁴ Our reference here to the more general rule in Reimer regarding job suitability is not to suggest that the standard in Steffen for direct causation of Gillette-type injuries may also be satisfied by merely "other reliable" evidence in general, as opposed to other specifically medical evidence.

hammertoe condition were related to his occupation as a sheet-metal worker. We acknowledge that, by August 22, 1997, the employee had worked for General for only about two months recently and for a total of fourteen months over the course of the work-related aggravation of his hammertoe condition. Nevertheless, it was also on that date that the severity of his pain first compelled the employee to see his eventual surgeon, Dr. Pellersels, and on that date that the surgeon first noted the definite prospect of surgery. In light of this evidence, we conclude that it was not unreasonable for the compensation judge to find that the employee's work for General constituted a substantial contributing cause of the lesions that eventually required surgery. Therefore we affirm that conclusion of the judge. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Date of Ultimate Breakdown

A Gillette-type injury occurs when the cumulative effect of repeated minute trauma is sufficiently serious to disable the employee from further work. Carlson v. Flour City Brush Co., 305 N.W.2d 347, 350, 33 W.C.D. 594, 598 (Minn. 1981). The point at which this disablement becomes legally effective is when an employee experiences an "ultimate breakdown" in the body member that has been under prolonged minute trauma related to work. Id., 305 N.W.2d at 350, 33 W.C.D. at 599, citing Jensen v. Kronick's Floor Covering Serv. & Hagens, Inc., Floor Covering, 29 W.C.D. 61, 66 (W.C.C.A. 1975) aff'd, 309 Minn. 541, 245 N.W.2d 230, 29 W.C.D. 69 (1976). General and CNA contend that, even if the employee's work for General did constitute a substantial contributing cause of the condition necessitating the employee's foot surgery, the ultimate breakdown in that condition did not occur until October 21, 1997, the date on which the employee went off work to undergo the surgery at issue. This was two months after his work for General ended, they argue, at which time the employee was employed by ACA, who should therefore have been held liable instead of General. We are not persuaded.

It is well established that the law does "not require an automatic determination that the employee sustained Gillette-type injuries on the day he [went off work]. The time by which he had sustained those injuries should be determined on all the evidence bearing on the issue." Schnurrer v. Hoerner-Waldorf, 345 N.W.2d 230, 233, 36 W.C.D. 504, 509 (Minn. 1984). "Ascertainable events" held by the supreme court to be material in dating a Gillette-type injury have included the employee's relief from his regular work because of his condition, his doctor's opinion that he requires surgery, the employee's recognition that he cannot continue to work because of his pain, and the employee's informing of the employer that he needs to quit. Schnurrer, 345 N.W.2d at 233, 36 W.C.D. at 508. This court has since found medically reported complaints, referral and consultation records, radiological records, and records of injections and other treatment to constitute the sort of "ascertainable events" that may constitute sufficient "medical evidence" to establish the date of a Gillette-type injury under the Steffen standard, even where the employee may not have associated specific work activities with her symptoms at the time. See Geldert v. Federated Propane, No. [REDACTED SSN] (W.C.C.A. Nov. 10, 1999).

Although the employee in the present case continued to work in his pain even after the date of ultimate breakdown as found by the judge, he testified that he felt compelled to do so in order to retain some income while he sought workers' compensation coverage for his surgery. Moreover, it was on that same date that the doctor who eventually performed the surgery, Dr. Pellersels, first asserted the

need for it. Two or three days prior to that date the employee had informed his foreman that he needed to see a doctor for his problem, and the chronicity of the problem at this time is amply documented in the medical records immediately post-dating his August 22 appointment. These several consultations following that date demonstrate an escalation of treatment on that date when compared with the fact that the employee had had only one treatment—with Dr. DiNapoli in New York—in apparently at least about three months prior to that date. The employee testified that his condition finally became “unbearable” on that date, and it was not unreasonable for the judge to credit that testimony. See Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (assessment of a witness's credibility is the unique function of the trier of fact). The medical records also contain ample evidence of the frequent debridement procedures that were apparently essential to maintaining the employee’s basic functionality as he prepared for his surgical repair.

In light of this evidence, it was not unreasonable for the compensation judge to conclude that the employee sustained the ultimate breakdown in his bilateral foot condition on August 22, 1997, the date on which the employee’s pain evidently peaked and plateaued, the date on which his maintenance treatment suddenly escalated, and the date on which his operating surgeon presumed surgery to be imminent. Therefore we affirm the judge’s conclusion that the ultimate breakdown in the employee’s work-related bilateral foot condition occurred on that date for purposes of establishing a Gillette-type injury. See Hengemuhe, 358 N.W.2d at 59, 37 W.C.D. at 239.

Cross-appeal by Intervenor Sheet Metal #10 Benefit Fund

At Finding 9, the compensation judge concluded that the employee was temporarily totally disabled from October 22, 1997, to May 30, 1998. At Finding 13, the judge concluded also in part that Sheet Metal #10 Benefit Fund [the intervenor] had “presented itemized information indicating a claimed reimbursement of \$5,764.84, plus statutory interest, representing the cost of medical benefits paid on behalf of the employee and \$11,999.82 in disability benefits paid to the employee during the period of claimed temporary total disability.” In that same finding, the judge stated, “Having established that the treatment for his feet was for a work related condition, the Compensation Judge finds that the Intervenor is entitled to reimbursement.” The reference here appears to be only to the claimed medical benefits; the judge made no express finding as to the intervenor’s entitlement to reimbursement of the \$11,999.82 in disability benefits that it had paid. In fact, to the contrary, the judge indicated in Order 1 that General should pay “to the employee benefits for temporary total disability from October 23, 1997 to May 30, 1998, subject to the withholding of attorney fees pursuant to Minn. Stat. § 176.081, subd. 1” (emphasis added).

On cross-appeal, the intervenor contends that the award to the employee rather than to the intervenor “[c]learly . . . resulted from inadvertence or mistake.” The intervenor asks this court to amend the compensation judge’s Findings and Order to include both a finding that the intervenor is entitled to reimbursement of the disability benefits it paid during the period of the employee’s temporary total disability and an order compelling General and CNA “to reimburse the Fund the \$11,999.82 it paid to the employee in disability benefits.” In his responding letter brief dated July 17, 2000, the employee agrees that reimbursement to the intervenor is appropriate, but he asks that Edquist fees be withheld and paid on the amount reimbursed to the intervenor and that reimbursement also be made to the employee, of attorney’s fees pursuant to Minn. Stat. § 176.081, subd. 7, relative to the Edquist fees. Finding no

express or other basis for the judge's award of temporary total disability benefits directly to the employee instead of reimbursed to the intervenor, and having received no objection to the employee's request for Edquist and subdivision 7 fees and seeing nothing improper in the latter, we modify the judge's Findings and Order in accordance with the cross-appeal, and we grant the respondent employee's request.