JUNE EDWARDS, Employee/Appellant, v. INTERIM PERS. and ITT SPECIALTY RISK SERV., Employer-Insurer/Cross-Appellants, and MERRILL CORP. and WAUSAU INS. CO., Employer-Insurer, and UNITED HEALTH CARE INS. CO./MEDICARE, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 17, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - AGGRAVATION. Substantial evidence, including expert opinion, supported the compensation judge's decision that the employee's fall at work permanently aggravated the employee's preexisting low back condition.

GILLETTE INJURY - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert opinion, minimally but adequately supported the compensation judge's denial of the employee's Gillette injury claim.

PRACTICE & PROCEDURE. Where it was evident that medical causation was not disputed at hearing, the compensation judge erred in making findings on that issue.

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert opinion, supported the compensation judge's decision that the employee was temporarily totally disabled when she stopped work, despite the fact that no physician removed her from work until several weeks later.

Affirmed in part and vacated in part.

Determined by: Wilson, J., Pederson, J., and Rykken, J.
Compensation Judge: Danny P. Kelly

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's denial of her Gillette injury[1] claim against Merrill Corporation and from the judge's finding that the employee's continuing shoulder symptoms and certain treatment were not causally related to her admitted shoulder injury. Interim Personnel and its insurer cross-appeal from the judge's denial of the Gillette injury claim, from the judge's finding that a January 28, 1998, injury permanently aggravated the employee's preexisting low back condition, from the judge's award of temporary total disability benefits, and

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

from the judge's apparent award of medical expenses for low back treatment rendered prior to the January 28, 1998, injury.[2] We affirm in part and vacate in part.

BACKGROUND

In July of 1997, at age 66, the employee began working for Interim Personnel [Interim], a temporary employment agency, after having spent the previous 15 years caring for her disabled husband. The employee was placed by Interim at a printing facility with the Merrill Corporation [Merrill], where she worked in the mail room. This job involved placing mail into a machine, which sealed and stamped it, and placing the stamped mail into plastic bins or "totes," which were then taken to the post office. The work evidently required repetitive lifting, twisting, and bending.

On January 28, 1998, the employee slipped on ice in the Merrill parking lot after her shift, landing hard on her right hip and buttocks. After reporting the incident the following day, the employee was sent by Interim to Dr. Basil LeBlanc, who diagnosed a hip contusion and later lumbar and sacroiliac strain. Dr. LeBlanc provided some conservative care and found the employee at MMI, with no need for restrictions, in March of 1998. The employee's weekly wage on January 28, 1998, was $184.98. Interim and its insurer admitted liability for an injury to the employee's hip and leg and apparently paid certain benefits.

In April of 1998, the employee went to work for Merrill directly, continuing to perform her same mail room job. A month later, on about May 26, 1998, she sustained a work-related left shoulder injury for which Merrill and its insurer admitted liability. The employee's weekly wage on the date of this injury was $324.00.

Also in May of 1998, the employee sought additional treatment for low back and leg symptoms from Dr. J. W. Peters, who provided conservative care for what he thought was a sacroiliac joint sprain. After an August 1998 lumbar MRI scan suggested the possibility of nerve compression, Dr. Peters referred the employee to Dr. Paul Hartleben, an orthopedic surgeon, who became the employee's treating physician relative to her low back complaints. By April of 1999, following a CT myelogram, Dr. Hartleben had concluded that the employee was not a surgical candidate, and the employee continued to work for Merrill for some time without additional low back treatment. However, her shoulder symptoms worsened, despite conservative care, shortened hours, and a job reassignment,[3] and, on April 27, 1999, the employee underwent surgery on her left shoulder, consisting of an arthroscopic subacromial decompression and acromioclavicular resection. The employee was off work for a short period and then evidently returned to her job in the employer's mail room. She testified that she continued to have problems with shoulder, low

[2] Interim also appeals from the judge's decisions as to maximum medical improvement [MMI], liability for other treatment expenses, and permanent partial disability benefits. However, because Interim's arguments are dependent solely on our resolution of the Gillette injury claim, we need not consider these issues separately.

[3] From February of 1999 to April of 1999 the employee worked in the typesetting or proofreading room, rather than the mail room.

back, and leg pain after her return to work and that, the longer she worked, the worse the back and leg pain became. In September of 1999, she cut back her hours to half time.[4] Then, on February 18, 2000, the employee stopped working entirely, later testifying that she simply could not tolerate the work any longer and that she believed that the repetitive mail room work had contributed to the worsening of her low back condition.

In March of 2000, the employee was seen by Dr. Robert Wengler and also again by Dr. Hartleben. Dr. Hartleben ordered nerve blocks for diagnostic purposes and concluded, based on those tests, that the employee's low back and leg symptoms were neurologic in nature. Subsequently, on June 28, 2000, Dr. Hartleben performed bilateral decompressive laminotomies at L4-5 and L5-S1. The post-surgical diagnosis was spinal stenosis causing bilateral radiculopathy, worse on the right than the left.

On November 30, 2000, the matter came on for hearing before a compensation judge for resolution of the employee's claims for various benefits as a result of her injury of January 28, 1998, with Interim, her left shoulder injury of May 26, 1998, with Merrill, and a Gillette-type low back injury allegedly occurring on February 18, 2000, the employee's last day of work for Merrill. Merrill denied liability for any Gillette-type low back injury occurring during their period of employment. Other issues included whether the employee's January 28, 1998, injury with Interim was temporary or permanent, whether any of the employee's claimed wage loss was causally related to the employee's May 1998 shoulder injury with Merrill, and the extent of permanent partial disability attributable to the employee's shoulder injury and back condition. Evidence included medical and rehabilitation records, the deposition testimony of Drs. Hartleben and Wengler, and reports from independent examiners Drs. Paul Wicklund and Larry Stern.

In a decision issued on January 29, 2001, the compensation judge found, in relevant part, that the employee had not sustained a Gillette-type low back injury on February 18, 2000, as claimed; that the employee's January 28, 1998, injury with Interim had permanently aggravated her lumbar degenerative disc disease and radiculopathy secondary to stenosis; that she had a 24% whole body impairment relative to her low back injury; that she had a 2% whole body impairment relative to her shoulder condition; that she was entitled to temporary total disability benefits after February 18, 2000, through September 27, 2000, as a result of her low back condition alone; and that she had not reached MMI from the effects of her January 28, 1998, work injury. The judge also determined that the employee had not proven that her current shoulder symptoms were causally related to her May 26, 1998, shoulder injury, and he denied a shoulder treatment expense. Interim and its insurer were ordered to pay the employee all benefits awarded for the employee's low back condition, including benefits for permanent partial disability, treatment, including surgery, and temporary total disability. The employee and Interim and its insurer appeal.

STANDARD OF REVIEW

[4] The reason for the reduction in hours is disputed. There is evidence in the record suggesting that the employee reduced her hours to care for her husband. However, the employee testified that it was her symptoms that caused her to go to half-time work.

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

Shoulder Condition

At hearing, the employee submitted a summary of outstanding medical expenses that included a $251.51 charge for treatment rendered at Shoulder & Sports Medicine on October 5, 2000, less than two months prior to hearing, and related medical mileage. In his findings, the compensation judge determined as follows:

> 30. The employee has failed to establish by a preponderance of the evidence that her current left shoulder symptomology is causally related to the May 26, 1998 personal injury.
>
> 31. The employee has failed to establish by a preponderance of the evidence that the medical treatment and associated medical mileage for the left shoulder treatment received October 5, 2000 at Shoulder and Sports Medicine is causally related, reasonable and necessary to cure and relieve the effects of the May 26, 1998 personal injury.

On appeal, the employee contends that the compensation judge erred in issuing these findings because causation for the employee's ongoing shoulder symptoms, and need for treatment, was not at issue at the hearing. We agree.

At the beginning of the hearing, the parties laid out their positions as to the substantive issues. One of the primary disputes concerned whether the employee had sustained a Gillette injury to her low back on February 18, 2000, while employed by Merrill. Virtually all of the unpaid medical expenses were related to low back treatment – all except the October 5, 2000, shoulder treatment expense ultimately denied by the judge. When asked by the judge about outstanding medical expenses, the employee's attorney replied, "The shoulder bills have all – whatever's left on the shoulder is just in process. They've never really denied any bill that I'm

aware of." In explaining her position as to the issues in general, counsel for Merrill and its insurer indicated that none of the claimed wage loss was attributable to the employee's shoulder injury, only to the employee's low back condition, that a permanent partial disability determination for the employee's shoulder condition would be premature given the employee's contention that MMI had not been reached, and that, with regard to the claimed medical expenses, some were unrelated to either the employee's shoulder or low back condition and so would not be payable. It may be true that the employee submitted no medical opinion evidence specifically tying her ongoing shoulder complaints to the May 1998 injury. However, it is also true that Merrill and its insurer submitted no medical opinion evidence establishing any other cause, and counsel for Merrill never even suggested at hearing that Merrill was not responsible for the employee's ongoing shoulder symptoms and treatment.

Basic fairness requires notice and opportunity to be heard before decisions as to benefit entitlement may be made. See Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 869 (Minn. 1988). The employee's shoulder injury was admitted, and Merrill and its insurer had voluntarily paid various benefits related to that condition, including permanent partial disability benefits[5] and treatment expenses for surgery. In fact, an exhibit prepared by Merrill acknowledges that the employee's shoulder surgeon had issued permanent shoulder restrictions as of November of 1999. Given the history of the case, Merrill's statement of its position, and the lack of medical opinion evidence suggesting any other cause for the employee's complaints, the employee simply had no reason to believe that liability for her ongoing shoulder condition was disputed. Therefore, we conclude that the judge erred in issuing Findings 30 and 31, as quoted above, and we vacate those findings. If the parties cannot agree regarding responsibility for the October 5, 2000, treatment expense, they may litigate the matter in another proceeding, where they will have a reasonable opportunity to present evidence on the issue.

Liability for the Employee's Low Back Condition and Related Benefits

The employee appeals from the compensation judge's denial of her claim of a Gillette-type low back injury culminating on February 18, 2000, her last day of work for Merrill. Interim and its insurer join in the employee's position on this issue and also argue that substantial evidence does not support the judge's decision that the employee's January 28, 1998, injury constituted a permanent aggravation of the employee's preexisting lumbar degenerative changes. We are not persuaded.

The record easily supports the compensation judge's decision that the employee's January 1998 injury was permanent. It is undisputed that the employee had a history of occasional treatment for low back symptoms for a number of years prior to her slip and fall in the parking lot at work. However, there is no evidence that any physician ever imposed ongoing restrictions on the employee's activities prior to the January 1998 injury. Moreover, Drs. Wicklund, Wengler,

[5] Merrill and its insurer had paid the employee benefits for a 2% whole body impairment, in accordance with the opinion of Dr. Stern, who concluded that the employee had sustained a partial tear of her rotator cuff. The employee was claiming benefits for a 10% whole body rating at the time of the hearing. The compensation judge found a 2% impairment, which, on appeal, the employee agrees is appropriate given that she has not yet reached MMI.

and Hartleben all agreed that the January 1998 injury was a substantial contributing cause of the employee's low back-related disability and need for treatment, including surgery. Interim and its insurer have not argued that these opinions have any fatal foundational defects, and, finding none, we view these opinions as more than sufficient to support the judge's finding that the January 28, 1998, injury permanently aggravated the employee's preexisting condition.

The evidence supporting the judge's denial of the employee's February 18, 2000, Gillette injury claim is somewhat less substantial. In explaining his decision on this issue, the judge specifically relied on "the opinions of Dr. Hartleben and Dr. Stern." We concede that Dr. Hartleben did not offer any express opinion relative to the Gillette injury claim, as he was not asked any questions specific to that issue. However, it is nevertheless true that Dr. Hartleben attributed the aggravation of the employee's preexisting low back condition only to her January 28, 1998, slip and fall at work; no other specific cause was suggested by his testimony. As for Dr. Stern, we are not persuaded that his opinion demonstrates a misunderstanding of the requirements for a Gillette injury claim in Minnesota, as alleged by the employee. Rather, Dr. Stern's report reasonably indicates that he is aware that an aggravation may constitute a Gillette injury and that he found no Gillette because degenerative changes take years to develop and there were no significant new findings that led to the need for the employee's surgery. We would also note that we see no indication that the employee raised any objection to Dr. Stern's opinion at hearing. Finally, it should be pointed out that, while Dr. Wengler found that the employee's work activities through February 18, 2000, had substantially aggravated her low back condition, supporting the employee's claim, he also acknowledged that the employee's inability to continue working after February 18, 2000, "could be" consistent with the "normal degenerative process for spinal stenosis." In other words, the mere fact that the employee's condition deteriorated while she was working does not necessarily establish that the work substantially contributed to the deterioration.

The employee's concerns about Dr. Stern's opinion are not entirely without merit, and more explanation by the judge on this and other issues would have been helpful.[6] However, after careful consideration, we cannot conclude that the judge erred as a matter of law in accepting Dr. Stern's opinion as to the employee's Gillette injury claim. As such, given our affirmance of the judge's finding that the employee's January 28, 1998, injury was permanent, we also affirm his decision ordering Interim and its insurer to pay all benefits awarded as a result of the employee's low back condition after January 28, 1998.[7]

Temporary Total Disability

[6] The judge's decision does not include a memorandum. In factually and/or legally complex cases, a memorandum is always useful and frequently necessary for adequate appellate review of the judge's decision.

[7] However, to the extent that the judge mistakenly awarded some medical expenses for treatment prior to January 28, 1998, as Interim alleges and the employee concedes, we vacate that portion of the award.

As previously noted, the compensation judge awarded the employee temporary total disability benefits from February 19, 2000, through September 27, 2000, payable by Interim. In their only argument not dependent on the issue of medical causation, which was resolved above, Interim contends that the judge erred in awarding benefits prior to March 29, 2000, as no physician had removed the employee from work prior to that date. However, both Dr. Wicklund and Dr. Wengler indicated that the employee had been totally disabled beginning in February of 2000. As such, substantial evidence supports the judge's decision on this issue, and we affirm.