CHARLES H. FERN, Employee, v. RIVERHOUSE CORP. and ARGONAUT GREAT CENT. INS., Employer-Insurer/Appellants, and RIVERHOUSE CORP. and AM. STATES INS. CO., Employer-Insure

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 29, 2001

No. [REDACTED SSN]

HEADNOTES

GILLETTE INJURY - DATE OF INJURY. Sufficient ascertainable events occurred on July 16, 1999, where the employee sought medical care on that date, was diagnosed with chronic arthritis in the CJC joints of both thumbs, was prescribed anti-inflammatory medication and braces to immobilize the joints, the doctor opined the employee's condition was caused by his work activities, and the doctor advised the employee to modify his work activities. Substantial evidence supports the compensation judge's determination that the employee sustained a Gillette injury to both thumbs culminating on July 16, 1999.

GILLETTE INJURY - CAUSATION. There is substantial evidence to support the compensation judge's determination that the employee's work from March 30 to July 16, 1999, during coverage by American States Insurance Company, was not a substantial contributing cause of the employee's bilateral CMC joint arthritis. The judge properly refused to apportion liability for the injury to American State based on his causation finding.

APPORTIONMENT - SUBSTANTIAL EVIDENCE. In cases where the evidence would support a number of apportionment determinations, this court will not substitute its judgement for that of the compensation judge. As there is substantial evidence to support the compensation judge's 50-50 apportionment of liability for the employee's three work-related injuries between Argonaut Great Central and American States, the judge's decision must be affirmed.

Affirmed.

Determined by: Johnson, J., Wilson, J., and Rykken, J.
Compensation Judge: Ronald E. Erickson

OPINION

THOMAS L. JOHNSON, Judge

The employer and Argonaut Great Central Insurance appeal the compensation judge's finding that the employee sustained a Gillette-type[1] personal injury on July 16, 1999, caused by his work activities prior to March 30, 1999. They also appeal the compensation judge's

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

assignment of 50 percent of the liability for temporary total disability benefits, medical expenses and rehabilitation expenses to Argonaut Great Central. We affirm.

BACKGROUND

Charles H. Fern, the employee, worked for Riverhouse Corporation, the employer, from 1987 to June 17, 2000 as a butcher and meatcutter. Argonaut Great Central Insurance provided workers' compensation liability coverage for the employer from May 17, 1996 to March 30, 1999. Thereafter, coverage was provided by American States Insurance Company.

The employee's typical workday consisted of cutting and grinding meat and making sausage. During his last three to five years of employment, the amount of time spent making sausage gradually increased. The employee estimated that during the last three to five years he spent an average of three hours a day over the course of a week making sausage. To make sausage, the employee first cut and then ground meat. He then placed 85 pounds of ground pork in a tub and added seasonings. The employee then mixed the meat and seasonings which required squeezing and gripping the mixture with his hands. The meat was generally cold when the employee mixed it for sausage. This process took ten to fifteen minutes. After the sausage was mixed, the employee stuffed it into hog casings. The employee then squeezed the sausage into links, twisted the links and tied them off.

Commencing in 1997, the employee began to feel tightness and pain in his hands. This condition progressively worsened. By the summer of 1999, the pain in the employee's thumbs had progressed to the point where he was unable to use his thumbs. In addition, the pain in his hands progressed to the point where he was having difficulty lifting heavy objects.

The employee saw Dr. H. William Park on July 16, 1999, and gave a history of an acute onset of bilateral hand pain at the base of the thumb about three weeks previously. X-rays of the metacarpal joints showed significant degenerative joint disease, worse on the right than the left. Dr. Park diagnosed bilateral chronic arthritis of the carpometacarpal [CMC] joint of the thumb significantly aggravated by a work injury. The doctor prescribed anti-inflammatory medication, thumb immobilization by use of braces and modified work activities. On August 3, 1999, Dr. Park re-examined the employee and recommended he continue to use the braces for at least another six weeks. The employee saw Dr. Park on December 14, 1999, and reported a history of a recent onset of left thumb triggering. The doctor diagnosed a trigger thumb on the left hand aggravated by work activities and prescribed anti-inflammatory medication. A CT scan of the left hand on February 9, 2000, showed degenerative joint disease and osteoarthritis involving the first CMC joint and STT articulations. Dr. Park then recommended a fusion of the employee's thumbs.

On March 1, 2000, the employee was examined by Dr. William Call at the request of American States. Dr. Call diagnosed pantrapezial arthritis on the left with significant CMC joint involvement and a left trigger thumb. On the right side, Dr. Call also diagnosed CMC joint arthritis with a large cuistic lesion at the base of the thumb metacarpal. The doctor opined the employee's job activities exacerbated his condition and apportioned liability 50 percent to American States and 50 percent to Argonaut Great Central.

The employee saw Dr. David Falconer, a hand surgeon, on April 11, 2000. An EMG of the employee's wrists demonstrated moderate to severe left carpal tunnel syndrome and mild right carpal tunnel syndrome. The doctor recommended surgery. On June 28, 2000, Dr. Falconer performed a left thumb arthroplasty, a left carpal tunnel release and a trigger release of the left thumb. On December 13, 2000, Dr. Falconer performed a right thumb carpometacarpal resectional arthroplasty, a right carpal tunnel release and a bone graft at the base of the metacarpal joint and a cyst removal from the base of the metacarpal. The employee was off work from June 28, 2000 through March 6, 2001.

Dr. Mark Fischer examined the employee on January 15, 2001, at the request of Argonaut Great Central. His deposition was taken on February 23, 2001. Dr. Fischer diagnosed bilateral CMC arthritis, bilateral carpal tunnel syndrome and bilateral trigger thumb. The doctor opined all of these injuries were Gillette-type injuries resulting from the employee's work activities. Dr. Fischer stated that carpal tunnel syndrome and trigger thumb injuries can develop over a period of months, whereas the CMC arthritis takes years to develop. Dr. Fischer opined the employee's carpal tunnel syndrome and trigger fingers were related, in substantial part, to the employee's work activities from November through December of 1999. The doctor stated the employee's CMC arthritis resulted from the employee's work activities up to July 16, 1999, but found no medical basis to apportion responsibility for that injury between the two insurers.

The deposition of Dr. Call was taken on March 6, 2001. The doctor stated the employee's CMC joint arthritis injury culminated on July 16, 1999 when the employee saw Dr. Park for the first time. The doctor testified the CMC arthritis was exacerbated by the employee's work, but opined the employee's work activities from March 30 through July 16, 1999 were not a significant contributing cause of that condition. The doctor based his opinion on his conclusion that the arthritic changes shown on the x-ray were very long standing and three months of work activities would not have caused any significant change in the employee's arthritic condition. Dr. Call opined the employee's work activities from May 17, 1996 through March 30, 1999 were a substantial contributing cause of the CMC arthritic condition.

The employer and American States paid benefits to the employee under a Temporary Order and sought contribution and/or reimbursement from Argonaut. The claim was heard by a compensation judge on March 8, 2001. In a Findings and Order filed May 3, 2001, the compensation judge found the employee sustained three separate Gillette injuries caused by his work activities: (1) bilateral CMC joint arthritis occurring on July 16, 1999; (2) a bilateral trigger finger injury on December 14, 1999; and (3) bilateral carpal tunnel syndrome on May 11, 2000. The compensation judge found Argonaut Great Central solely liable for the first personal injury and found American States solely liable for the second two personal injuries. The judge found all three injuries contributed to the employee's disability and need for medical treatment, and found each insurer 50 percent liable for the workers' compensation benefits paid to the employee. Argonaut appeals the compensation judge's finding that it is solely liable for a Gillette injury on July 16, 1999, and appeals the judge's equal apportionment of liability between the two insurers.

DECISION

Date of Gillette Injury

The compensation judge found the employee sustained a Gillette-type personal injury to both thumbs culminating on July 16, 1999. The appellant contends this finding is unsupported by substantial evidence. The appellant acknowledges that while the employee had a manifestation of a work injury in July 1999, the injury was not sufficiently serious to disable the employee until June 2000. The appellant contends the compensation judge should have chosen the date of June 28, 2000 as the date of the Gillette injury.

As a general rule, injuries resulting from repeated trauma result in a compensable personal injury when their cumulative effect is sufficiently serious to disable the employee from further work. Carlson v. Flour City Brush Co., 305 N.W.2d 347, 33 W.C.D. 594 (Minn. 1981). The Carlson case does not, however, require an automatic determination that the culmination of the employee's Gillette injury is the first day of total disability. It is not mandatory that an employee be totally disabled from work activity or suffer a wage loss in order to conclude a Gillette injury has occurred. Johnson v. Lakeland Bean Co., 39 W.C.D. 884 (W.C.C.A. 1987). Rather, a compensation judge may consider other ascertainable events to find an earlier culmination date. Schnurrer v. Hoerner-Waldorf, 345 N.W.2d 230, 36 W.C.D. 504 (Minn. 1984). The date on which minute trauma culminates in a Gillette-type injury is not so much a medical question as a question of ultimate fact for the compensation judge. Id.

The employee first received medical attention for his thumb condition on July 16, 1999. Dr. Park diagnosed chronic arthritis in the CMC joints of both thumbs which he opined was caused by the employee's work activities. The doctor prescribed anti-inflammatory medication, braces to immobilize the employee's thumbs and recommended modified work activities. Thereafter, the employee had continued periodic medical care for the arthritic conditions in his thumbs. Sufficient ascertainable events occurred on July 16, 1999 to conclude the employee sustained a Gillette-type personal injury on July 16, 1999. See Trego v. Associated Leasing, slip op. (W.C.C.A. Jan. 9, 1998); Plaster v. Palani Constr., slip op. (W.C.C.A. May 15, 1996). The compensation judge's finding is, therefore, affirmed.

Apportionment of Gillette Injury

The compensation judge found the employee's work activities from April 1 through July 16, 1999 were not a substantial contributing cause of the employee's bilateral thumb joint arthritis. Argonaut appeals this finding and contends it is legally erroneous. The appellant argues the employee proved no ascertainable event during its period of coverage. Further, the appellant asserts the employee performed essentially the same job duties and lost no time from work between July 16, 1999 and June 28, 2000. The appellant argues the compensation judge improperly apportioned a single Gillette injury contrary to the court's decision in Michels v. American Hoist & Derrick, 269 N.W.2d 57, 31 W.C.D. 55 (Minn. 1978) (equitable apportionment of liability for a single Gillette injury is inappropriate unless almost uncontroverted medical testimony will permit a precise allocation of responsibility).

The issue before the court is not one of apportionment but rather of causation. In Tannahill v. Mid-American Lines, Inc., 40 W.C.D. 728 (W.C.C.A. 1987), this court noted that while the last employer and insurer are generally liable for disability resulting from Gillette injuries, "this rule is subject to the finding that during the last period of employment the work duties performed by the employee must have been a substantial contributing factor to the employee's disability." Id. at 728. The "imposition of liability on the last insurer is not automatic but must rest on proof connecting the employee's disability to the employee's job duties during that insurer's period of coverage." Crimmins v. NACM No. Central Corp., 45 W.C.D. 435, 439 (W.C.C.A. 1991); see also Wolff v. Cercom, slip op. (W.C.C.A. Feb. 2, 1999).

We have affirmed the compensation judge's finding that the employee sustained a Gillette-type personal injury in the nature of bilateral CMC joint arthritis on July 16, 1999. American States's coverage of the employer commenced on April 1, 1999. The compensation judge in his memorandum noted the "short period of time between March 30, 1999 and July 16, 1999 was not of sufficient duration or exposure to be a substantial contributing cause of the employee's work injury." (Memo at 5.) The medical opinion of Dr. Call supports this conclusion.

We acknowledge the employee continued to perform the same work duties after July 19, 1999 until his surgery in June 2000. Further, the employee testified that the Christmas season was his peak time for sausage-making and during the 1999 Christmas rush his hand symptoms increased. There is evidence of record which might support a conclusion that the employee sustained a second Gillette injury to the CMC joints on June 28, 2000, causally related to his work activities from and after July 16, 1999. Had the compensation judge found the employee sustained a second Gillette injury, the compensation judge could have considered whether equitable apportionment of liability between the two injuries was appropriate. See Sanchez v. Land O'Lakes, Inc., 43 W.C.D. 113 (W.C.C.A. 1990). That issue was not, however, presented to the compensation judge for resolution. Absent a finding of a second Gillette-type personal injury to the CMC joints during American States's coverage, equitable apportionment would be inappropriate. Atkinson v. NSP, 55 W.C.D. 347 (W.C.C.A. 1996). The compensation judge's finding is, therefore, affirmed.

Apportionment of Benefits

The compensation judge found Argonaut liable for the June 16, 1999 Gillette injury and American States liable for Gillette injuries on December 14, 1999 and May 11, 2000. The surgeries on June 28, 2000 and December 13, 2000 were for treatment of all three injuries. The judge found all three of the conditions contributed to the employee's need for medical treatment and disability and ordered an equal apportionment between Argonaut and American States. Argonaut contends this decision lacks rationality and logic. It contends each injury should bear an equal share of the liability and Argonaut should reimburse only one-third of the benefits to American States.

Equitable apportionment is not a finding based on a precise formula but instead is based on all the facts and circumstances of a case. Goetz v. Bulk Commodity Carriers, 303 Minn.

197, 200, 226 N.W.2d 888, 891, 27 W.C.D. 797, 800 (1975); Harvala v. Noeske Lumber, 44 W.C.D. 118, 126 (W.C.C.A. 1990). In this case, the employee's surgeries in June and December 2000 were to cure and relieve the effects of all three personal injuries. The compensation judge concluded it was impossible to determine with any degree of precision the amount of the medical expense attributable to each injury. Accordingly, the compensation judge concluded apportioning the responsibility equally between the two insurers was appropriate. The compensation judge could have apportioned the liability one-third to each injury. His failure to do so, however, is not grounds for reversal. In cases where the record would in fact support almost any number of apportionment determinations, we will not substitute our judgment for that of the compensation judge. Giem v. Robert Giem Trucking, 46 W.C.D. 409, 418 (W.C.C.A. 1992). The compensation judge's decision is affirmed.