KERRY D. JESSEN, Employee/Cross-Appellant, v. MATHEW HALL LUMBER CO. and LUMBER INS. CO., Employer-Insurer/Appellants, and MAIERS TRANSP. & WAREHOUSING, INC., and STATE FUND MUT. INS. CO., Employer-Insurer, and MEDICA CHOICE FOR HRI, MN DEP'T OF HUMAN SERVS. and ST. CLOUD HOSP., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 19, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY. Substantial evidence supports the compensation judge's conclusion that the employee did not sustain a Gillette injury on January 10, 2000 while working for Maiers Transport & Warehousing.

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert medical opinion, supports the compensation judge's finding that the substantial contributing cause of the employee's surgeries was the employee's October 9, 1997 work injury to his low back.

CAUSATION - SUPERSEDING, INTERVENING CAUSE. The employee's conduct on April 11, 1999, bending over to pick up a kitten, was not unreasonable, negligent, dangerous or abnormal and the compensation judge reasonably concluded the incident was not a superseding, intervening cause of the employee's disability.

MEDICAL TREATMENT & EXPENSE. The bills submitted by the employee for certain medical expenses are not sufficient to support the compensation judge's order awarding payment. The judge's award is vacated and the matter is remanded for further findings regarding the compensability of the specified bills.

TEMPORARY PARTIAL DISABILITY. The employee's testimony and his submission of a W-2 statement reflecting his gross earnings from ASP provides substantial evidence to support the compensation judge's computation of the employee's earnings in this post-injury job. Payroll records from General Security offered post-hearing suggest the employee may have had greater earnings than that computed by the compensation judge and the judge's finding is vacated and the computation of the employee's earnings at General Security is remanded for reconsideration.

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including the adequately founded opinion of the independent medical examiner, supports the compensation judge's award of a 20 percent permanent partial disability rather than the 30 percent claimed by the employee.

Affirmed in part and vacated and remanded in part.

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

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer, Mathew Hall Lumber Company and Lumber Insurance Company, appeal from the compensation judge's finding that the employee did not sustain a Gillette injury on January 10, 2000, the judge's finding on causation, and his award of benefits to the employee. The employee cross-appeals from the compensation judge's denial of his claim for a 30 percent permanent partial disability. We affirm in part and vacate and remand in part.

BACKGROUND

Kerry D. Jessen, the employee, sustained an injury to his lumbar spine on October 9, 1997, while working for Mathew Hall Lumber Company. The employee earned a weekly wage of $449.43. Mathew Hall and its insurer, Lumber Insurance Company, admitted liability for the employee's injury but contended it was only temporary.

On October 9, 1997, the employee was seen by Dr. Basil C. LeBlanc, complaining of an acute onset of low back pain. The doctor diagnosed a lumbar strain and referred the employee to Jeffrey J. Varner, D.C., for chiropractic treatment. On October 15, 1997, Dr. LeBlanc found tenderness in the employee's paraspinal muscles, but noted he had a good range of motion and a normal neurologic examination. On October 21, 1997, the employee saw Dr. Arlys Solien complaining of continuing low back pain radiating into the right knee and left groin area. Dr. Solien ordered an MRI scan which showed an annular tear at L4-5, a minimal central disc protrusion at L5-S1 and mild chronic degenerative disc changes at both levels. The doctor diagnosed low back pain with an annular tear at L4-5, restricted the employee's work activities and referred him to Dr. Garry Banks at the Midwest Spine Institute.

The employee first saw Dr. Banks on November 26, 1997. Following a review of the employee's records and an examination, the doctor diagnosed disc degeneration from L4 to the sacrum, a lumbar strain and a central L5-S1 disc protrusion. The doctor opined the employee sustained a lumbar strain superimposed upon pre-existing degenerative disc problems and recommended the employee continue with physical therapy. By March 4, 1998, the employee reported considerable improvement. On examination, Dr. Banks noted only minimal restriction of lumbar mobility with no tenderness or spasm. The doctor opined the employee had reached maximum medical improvement (MMI) and did not have permanent partial disability. The doctor released the employee to return to work with a 60-pound lifting restriction.

Dr. Paul T. Wicklund examined the employee on May 29, 1998, on behalf of Mathew Hall and Lumber Insurance Company. The employee then reported his condition had plateaued but he complained of daily low back pain, particularly at night. Dr. Wicklund diagnosed multi-level degenerative disc disease with a minimal disc protrusion at L5-S1. The doctor concluded the employee's injury was a low back strain from which he recovered without permanent partial disability. Dr. Wicklund opined the employee had restrictions due to his underlying degenerative condition but not due to his personal injury.

The employee continued to work for Mathew Hall following his personal injury on a full-time basis until August 1998, when he voluntarily left that job to work for Randy Cassens Trucking. The employee worked as a truck driver and unloaded, by hand, boxes of lettuce weighing between 20 and 50 pounds. In January 1999, the employee took a job with a school district driving a school bus and performing custodial work.

The employee next received treatment for his low back on January 6, 1999, from Brian L. Hilberd, D.C. The employee then complained of low back pain since a work injury in the fall of 1997. He stated his low back pain recently worsened and complained of shooting pains in his back radiating into his left leg. Dr. Hilberd provided chiropractic treatments on nine occasions through March 2, 1999, when he released the employee to return as-needed.

On April 11, 1999, the employee was at home, bent over to pick up a kitten and had an immediate onset of excruciating low back pain. The employee went to the St. Cloud Hospital Emergency Room and then was admitted to the hospital. An MRI scan on April 12, 1999, reflected an annular tear at L4-5 and a large left paracentral extruded disc herniation at L5-S1 causing severe impingement on the left S1 nerve root. Dr. A. Reginald Watts examined the employee, diagnosed a central and left L5-S1 disc extrusion and recommended surgery. The doctor performed a micro-discectomy on April 15, 1999. The employee was discharged from the hospital on April 16, 1999, with instructions to remain off work.

In May 1999, the employee returned to his job as a school bus driver which he held prior to his surgery. On September 9, 1999, the employee obtained a job as a truck driver for Maiers Transport and Warehousing, Inc., at a weekly wage of $829.28. His duties included driving and unhooking the trailer but required no loading or unloading. On January 10, 2000, while returning from a trip to Wisconsin, the employee testified he experienced an onset of low back pain which gradually increased as he drove to Minnesota. When he got back to St. Cloud, the employee told his dispatcher he was unable to continue working because of low back pain.

The employee went to the St. Cloud Hospital Emergency Room on January 10, 2000. An MRI scan showed a small to moderate recurrent or residual left disc herniation at L5-S1 slightly touching the left L5 nerve root and a moderate disc bulging at L4-5 not significantly changed since the April 1999 scan. A CT scan showed a large annular tear at L4-5 with no focal disc herniation and an extensive annular tear at L5-S1 with bilateral neural foraminal narrowing. A discogram reflected 7 out of 10 concordant pain at L5-S1 and 5 out of 10 discordant pain at L4-5. The employee again saw Dr. Watts who recommended a discectomy and interbody fusion at L5-S1 and possibly also at L4-5. The employee obtained a second opinion from Dr. Jeffrey Gerdes who agreed a discectomy and L4-5 to L5-S1 fusion were appropriate. On January 27, 2000, Dr. Watts performed an anterior lumbar discectomy and two-level interbody fusion. The employee was discharged on January 31, 2000. The employee underwent a second surgery in April 2000 as a result of an infection.

Dr. Robert Wengler examined the employee on April 3, 2000, on referral from the employee's attorney. The doctor opined the employee injured his low back on October 9, 1997, causing a rupture of the annular fibers of the L5-S1 disc which ultimately extruded requiring

surgery in April 1999. Thereafter, Dr. Wengler opined the disc reherniated necessitating the L4-5 and L5-S1 interbody fusion. Dr. Wengler rated permanent partial disability under Minn. R. 5223.0390, subp. 5.B., which provides for a ten percent rating for a fusion surgery at multiple levels. The doctor further rated nine percent for radicular pain or radicular paresthesia under Minn. R. 5223.0390, subp. 4.D., to which he added another two percent for his surgery under section 2, and nine percent for an additional concurrent lesion at section 4. Dr. Wengler thus rated a total 30 percent permanent disability.

Dr. Wicklund re-examined the employee on April 11, 2000, and his deposition was taken on April 12, 2001. He diagnosed an L5-S1 disc herniation with an average surgical result and degenerative disc disease resulting in an anterior L4-5/L5-S1 fusion. Dr. Wicklund opined the October 9, 1997 injury resulted in a temporary low back strain superimposed on pre-existing degenerative disc disease. The doctor concluded this injury was not a cause of the employee's need for surgery, but opined the April 11, 1999 incident bending over to pick up a kitten caused a large free fragment disc herniation at L5-S1 necessitating the need for the microdiscectomy. The doctor also opined the employee sustained a second work-related injury at Maiers Transport on January 10, 2000, causing a worsening of the employee's degenerative disc disease and resulting in the fusion surgery performed by Dr. Watts. Dr. Wicklund agreed with the ten percent rating for a multiple level fusion under Minn. R. 5223.0390, subp. 5.B. In addition, Dr. Wicklund rated ten percent permanent disability for symptoms of pain or stiffness at multiple vertebral levels under Minn. R. 5223.0390, subp. 3.C.(2) for a total 20 percent permanent disability. The doctor divided the permanency equally between the April 9, 1999 incident and the Gillette injury at Maiers Transport.

Dr. John Dowdle examined the employee on July 7, 2000, on behalf of Maiers Transport and State Fund Mutual Insurance Company. The doctor diagnosed a herniated disc at L5-S1 on the left, mechanical low back pain post laminectomy and degenerative disc disease at L4-5 and L5-S1 with mechanical low back pain. The doctor opined the L5-S1 disc protrusion shown on the November 1997 MRI scan was a manifestation of the employee's underlying degenerative disc condition which pre-existed the October 1997 work injury. He stated the need for the microdiscectomy and fusion surgeries resulted from the employee's underlying degenerative disc condition and the aggravation of that condition which occurred in the bending incident of April 11, 1999. In his opinion, the October 9, 1997 injury was not a substantial or contributing cause of the need for the surgeries. Dr. Dowdle opined the employee did not sustain a Gillette-type personal injury as a result of his work activities for Maiers Transport. Finally, the doctor concluded all of the medical treatment was reasonable and necessary and the employee had a 20 percent whole body disability for the two-level fusion.

By report dated April 16, 2001, Dr. Gerdes opined the employee's October 9, 1997 injury was a substantial contributing cause of the two subsequent surgeries as documented by the degenerative changes shown on the MRI scans. The doctor stated the January 10, 2000 injury may have been a factor but was much less a factor than the prior injury and found no way to allocate responsibility between the two injuries. Finally, Dr. Gerdes opined all of the employee's medical treatment was reasonable and necessary and he rated a 30 percent whole body disability.

The employee was off work from January 10 through June 15, 2000. On June 16, the employee began a job for ASP of Moorhead as a security guard earning $7.00 an hour. On September 1, 2000, the employee became a supervisor earning $9.00 per hour with a .50 per hour differential. The employee remained in this job until January 12, 2001, a period of 28 weeks. The employee next obtained a job as a security guard for General Security Services earning $9.00 an hour. The employee continued at General Security Services up to the date of the hearing.

The employee filed a claim petition claiming injuries on October 9, 1997 and January 10, 2000, and seeking temporary total, temporary partial and permanent partial disability benefits, together with payment of medical expenses. The case was heard by a compensation judge at the Office of Administrative Hearings on April 17, 2001. In a Findings and Order filed June 18, 2001, the judge found the employee's October 9, 1997 injury resulted in a 20 percent whole body disability and was the cause of the employee's medical expenses. The compensation judge further found the employee failed to prove a Gillette injury on January 10, 2000, and the incident on April 11, 1999 was not a superseding intervening event. Finally, the compensation judge found the employee was temporarily and totally disabled from January 10 through June 15, 2000 and temporarily and partially disabled thereafter as a consequence of the October 9, 1997 injury. Mathew Hall and Lumber Insurance Company were ordered to pay all benefits to the employee. Mathew Hall and Lumber Insurance Company appeal. The employee cross-appeals from the denial of his claim for a 30 percent permanency.

DECISION

Gillette Injury on January 10, 2000

Mathew Hall and Lumber Insurance Company first argue the compensation judge's finding that the employee did not sustain a Gillette injury on January 10, 2000 is unsupported by substantial evidence. The appellants argue the employee was not receiving treatment when he began working for Maiers Transport in September 1999. It was not until the employee experienced an acute onset of low back pain on January 10, 2000, while driving his truck, that he required further treatment. Immediately thereafter, the employee underwent a two-level fusion. In viewing the evidence as a whole, the appellants assert, the compensation judge's conclusion is clearly erroneous and must be reversed.

Whether the employee sustained a Gillette injury depends primarily on the medical evidence. Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1984). Questions of medical causation fall within the province of the compensation judge. Felton v. Anton Chevrolet, 513 N.W.2d 457, 50 W.C.D. 181 (Minn. 1984). Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988).

The employee's job with Maiers Transport involved driving from St. Cloud, Minnesota to the Chicago, Illinois, area and returning. The job did not require the employee to load or unload the freight. Dr. Dowdle and Dr. Wengler opined the employee did not sustain a Gillette injury on January 10, 2000. The compensation judge accepted these opinions. While there

is expert testimony to the contrary, it is the responsibility of the compensation judge to resolve conflicts in expert testimony. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Substantial evidence supports the compensation judge's conclusion that the employee did not sustain a Gillette injury on January 10, 2000. The decision of the compensation judge is, therefore, affirmed.

Causation

The compensation judge found the surgical procedures on April 15, 1999 and January 27, 2000, were caused, in substantial part, by the employee's injury of October 9, 1997. The appellants contend this finding is clearly erroneous and unsupported by substantial evidence.

The November 1997 MRI scan showed mild chronic degenerative changes at L4-5 and L5-S1 with an annular tear at L4-5 and a minimal central disc protrusion at L5-S1. There was no evidence on the scan, the appellants contend, of a disc herniation or neural impingement at any level. The employee's symptoms after his personal injury gradually resolved and he was able to return to work. Except for approximately two months of chiropractic treatment in January 1999, the employee had no medical treatment from March of 1998 until April 11, 1999. Dr. Wicklund and Dr. Dowdle both opined the October 1997 injury was a temporary strain secondary to the employee's pre-existing degenerative disc disease. Both doctors opined the employee's injury was not a substantial contributing cause of his ultimate need for surgery. Rather, the doctors stated the employee's need for the surgeries were a result of the April 11, 1999 incident superimposed on his underlying degenerative disc disease. For these reasons, the appellants contend the compensation judge's finding of causation is unsupported by substantial evidence. We are not persuaded.

Dr. Wengler opined the employee's October 9, 1997 injury caused a rupture of the annular fibers of the L5-S1 disc which ultimately extruded and required surgery in April 1999. The compensation judge specifically adopted his opinion. The appellants contend Dr. Wengler's opinion is inconsistent with the 1997 MRI scan which showed an annular tear at L4-5 rather than at L5-S1 as the doctor opined. Whether such an inconsistency existed is a factor which the compensation judge could have considered in deciding whether or not to accept the opinion of Dr. Wengler. The 1997 MRI scan does not, however, mandate the conclusion espoused by the appellants. Dr. Wengler stated the 1997 injury "resulted in a tear of the annular fibers of the L5-S1 disc that had deformed slightly by the time the original MRI was done in November of 1997. This lesion subsequently extruded as is documented in the 2nd MRI done in April of 1999." (Pet. Ex. B.) Dr. Wengler's causation opinion is within the area of his expertise and was adequately founded. We cannot conclude the compensation judge's reliance on his opinion was clearly erroneous and, accordingly, affirm.

Superseding, Intervening Cause

The appellants next assert the compensation judge erred in finding the April 1999 incident was not a superseding, intervening cause of the employee's need for surgery and resulting disability. They contend the employee's medical condition was relatively static until April of 1999. While bending over to pick up a kitten, the employee had an immediate onset of sudden and severe low back pain. An MRI scan two days later showed a large disc herniation at the L5-

S1 level with a free fragment. Both Drs. Wicklund and Dowdle opined the employee's surgeries were caused by the kitten lifting incident superimposed on the employee's pre-existing degenerative disc disease. The appellants contend the April 1999 incident was either a new and distinct injury or a superseding intervening cause which severed any causal link between the 1997 work injury and the ongoing disability. Accordingly, they ask the compensation judge's finding to the contrary be reversed.

As a general rule, "'[W]hen the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is a result of an independent intervening cause attributable to the claimant's own intentional conduct.'" Rohr v. Knutson Constr. Co., 305 Minn. 26, 29, 232 N.W.2d 233, 235, 28 W.C.D. 23, 26 (1975) (quoting 1 Arthur Larson, The Law of Workmen's Compensation § 13.00 (1972)). The causal relationship between the work injury and subsequent aggravation is severed when the need for additional medical care is the result of "unreasonable, negligent, dangerous, or abnormal activity on the part of the employee." Eide v. Whirlpool Seeger Corp., 260 Minn. 98, 102, 109 N.W.2d 47, 49-50, 21 W.C.D. 437, 441 (1961). The determination of whether a subsequent incident or event is a superseding, intervening cause of disability is one of fact, and the employer and insurer have the burden of proof. Turney v. Ebenezer Soc'y, 39 W.C.D. 809, 818 (W.C.C.A. 1986), summarily aff'd (Minn. Apr. 9, 1987). The employee's conduct, bending over to pick up a kitten, was not unreasonable, negligent, dangerous or abnormal. The compensation judge's conclusion that the incident was not a superseding intervening cause of the employee's disability is consistent with the law and evidence and is affirmed.

Medical Expenses

Mathew Hall and Lumber Insurance Company appeal the compensation judge's award of medical expenses. The appellants argue the evidence submitted by the employee at the hearing does not reflect an itemization of charges for the medical services, does not identify what medical services were provided, and includes charges for treatment unrelated to the work injury. The appellants therefore contend the award of medical expenses is unsupported by substantial evidence. We agree.

Petitioner Exhibit K14(b), a bill from Central Minnesota Neurosciences, Ltd., in the sum of $8,111.00, reflects a balance forward of $2,035.00 as of April 15, 1999. However, the exhibit contains no explanation or itemization of the balance forward. Petitioner Exhibit K14(e), a statement from Centracare Clinic, reflects charges for treatment for hypersomnia, a sleep disorder, a respiratory abnormality, cellulitis, and other treatment, some of it rendered prior to the 1997 injury. Petitioner Exhibit K14(g), a bill from Anesthesia Associates of St. Cloud, reflects only a balance forward of $2,432.00 and provides no itemization. The bill from Central Minnesota Emergency Physicians, Petitioner Exhibit K14(g), contains no description of the services provided.

The record does not contain substantial evidence supporting the award of certain of the medical expenses. The compensation judge's order that Mathew Hall and Lumber Insurance Company pay the foregoing bills is vacated. The matter is remanded to the compensation judge for further findings regarding the compensability of these bills. The compensation judge may, in his discretion, receive further evidence as he deems necessary to resolve this issue.

Temporary Partial Disability Benefits

The compensation judge ordered Mathew Hall and Lumber Insurance Company to pay temporary partial disability benefits for the period June 16, 2000 through December 31, 2000, and from January 13, 2001 through the date of the hearing.[1] The appellants contend the employee offered insufficient documentation of his actual earnings during these periods and contend the judge's award is clearly erroneous.

From June 16, 2000 through January 12, 2001, the employee testified he worked full-time at ASP. The employee stated he earned $7.00 an hour until approximately September 1, 2000, when he became a supervisor and received a raise to $9.00 per hour with a .50 an hour differential. He stated he worked an average of 40 hours a week. Petitioner Exhibit I, a W-2 statement from ASP, reflected gross earnings of $9,488.17 for the year 2000. The compensation judge found the employee earned $338.86 with ASP. On January 13, 2001, the employee went to work for General Security Services. He testified he generally worked 40 hours a week and earned $9.00 an hour. In support of his claim, the employee offered one pay stub from General Security which showed current and year-to-date earnings for the period ending March 30, 2001. The compensation judge found the employee earned $360.00 a week with General Security.

The employee's testimony regarding his employment at ASP, together with the W-2 form, provides substantial evidence supporting the compensation judge's computation of the employee's earnings at that employment. While wage records may be the best evidence of post-injury earnings, such records are not legally required as a prerequisite to an award of temporary partial disability benefits. The compensation judge's award of benefits from June 16, 2000 through December 31, 2000 are affirmed.

At the hearing, the employee offered into evidence only one pay stub from General Security covering a two-week period ending March 30, 2001. Based on this exhibit, together with the employee's testimony, the compensation judge found the employee's weekly earnings at General Security were $360.00 a week. Following the hearing, the employee moved this court to supplement the record with additional payroll records from General Security. That motion was denied. Based on our review of these records, it appears they may document earnings by the employee at General Security in excess of the $360.00 per week found by the compensation judge. We therefore vacate the compensation judge's determination regarding the employee's earnings at General Security. On remand, the compensation judge should review these records and reconsider the employee's earnings at General Security Services Corporation as appropriate.

Permanent Partial Disability

The compensation judge found the employee sustained a 20 percent whole body disability secondary to his October 9, 1997 back injury. The employee cross-appeals this finding,

[1] Order No. 4 awards temporary partial disability benefits from "January 134," 2001, to the present. Clearly this is a typographical error and benefits are payable from and after January 13, 2001. See Finding 16.

asserting it is unsupported by substantial evidence. The employee contends the compensation judge should have awarded the 30 percent permanent disability rated by Dr. Wengler.

Dr. Wengler gave a rating of ten percent for a fusion surgery at multiple levels under Minn. R. 5223.0390, subp. 5.B. The doctor further rated nine percent for radicular pain or radicular paresthesia under Minn. R. 5223.0390, subp. 4.D., to which he added another two percent for the employee's surgery under section 2, and nine percent for an additional concurrent lesion at section 4. Dr. Wengler thus rated a total 30 percent permanent disability. Dr. Wicklund agreed with the ten percent rating for a multiple level fusion under Minn. R. 5223.0390, subp. 5.B. In addition, Dr. Wicklund rated a ten percent permanent disability for symptoms of pain or stiffness at multiple vertebral levels under Minn. R. 5223.0390, subp. 3.C.(2) for a total 20 percent permanent disability.

The compensation judge is responsible for determining under which rating category an employee's disability falls, based on all relevant evidence, including objective medical findings. Jensen v. Best Temporaries, 46 W.C.D. 498, 500-01 (W.C.C.A. 1992). Although permanency ratings offered by physicians may assist the compensation judge in making this determination, these opinions are not binding. Erickson by Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 43, 35 W.C.D. 523, 528 (Minn. 1983). A compensation judge's finding regarding the rating of permanent partial disability is one of ultimate fact and must be affirmed if it is supported by substantial evidence. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987). Dr. Wicklund's opinions regarding permanent partial disability were adequately founded and the compensation judge could reasonably adopt them. The judge's award of a 20 percent permanent partial disability must, therefore, be affirmed.