

JACK JOBE, Employee, v. J&J DIGGING and USF&G/ST. PAUL COS., Employer-Insurer/Appellants, and DONOVAN MESSENGER and MINN. ASSIGNED RISK PLAN/BERKLEY ADM'RS, Employer-Insurers.

WORKERS' COMPENSATION COURT OF APPEALS  
MAY 14, 2001

No. [REDACTED SSN]

HEADNOTES

APPORTIONMENT—GILLETTE INJURIES. Where the employee had sustained a right knee injury in 1967 and a consequential low back injury in 1977, substantial evidence supports the compensation judge's finding that the employee had not sustained a Gillette injury to his low back or right knee while working for a later employer from June 1995 through February 1997.

MEDICAL TREATMENT & EXPENSE. Substantial evidence, including expert medical testimony, supports the compensation judge's finding that the proposed low back surgery was reasonable and necessary.

Affirmed.

Determined by: Rykken, J., Johnson, J., and Pederson, J.  
Compensation Judge: Peggy A. Brenden

OPINION

MIRIAM P. RYKKEN, Judge

J&J Digging and its insurer, USF&G/St. Paul Companies, appeal the compensation judge's finding that apportionment was not appropriate since the employee had not sustained Gillette<sup>1</sup> injuries to his right knee and low back while working for another employer, and the compensation judge's finding that the proposed back surgery was reasonable and necessary. We affirm.

BACKGROUND

On November 9, 1967, Jack Jobe, the employee, sustained an admitted work-related injury to his right knee while working as a heavy equipment operator for J&J Digging, which was insured for workers' compensation liability by USF&G, now known as St. Paul Companies. In 1977, the employee sustained an injury to his low back which was adjudicated to be a consequential injury resulting from his 1967 right knee injury. J&J Digging and USF&G/St. Paul Companies (J&J Digging) paid various workers' compensation benefits based on each of these injuries.

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<sup>1</sup> Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 32 W.C.D. 105 (1960).

The employee has worked for several employers over the years as a heavy equipment operator. From June 1995 through February 1997, the employee worked full time plus overtime as a heavy equipment operator for Donovan Messenger, operating a backhoe, a skid loader, and a Caterpillar. The employee testified that operating the equipment aggravated his knee and his low back, and that his symptoms bothered him more while working for Donovan Messenger than they did before he started working there.

Since the 1967 injury, the employee has undergone eleven surgical procedures to his right knee. He has had three total knee replacement surgeries, in March 1987, April 1993, and February 1997. Before the last surgery, the employee was treated by Dr. Robert Heeter, who referred the employee to Dr. Gary Wyard. Dr. Wyard was concerned that the employee was continuing to perform heavy equipment operation, and referred the employee to Dr. Mark Friedland for a second opinion regarding the employee's knee condition. Dr. Friedland noted that the employee continued to work as a heavy equipment operator, which he thought was a major contributing cause and factor to the loosening of his total knee components, and indicated that surgery would only be appropriate if the employee was willing to discontinue his work as a heavy equipment operator. The employee agreed to stop working as a heavy equipment operator and underwent his last total knee replacement in February 1997. Since the last surgery, the employee has not been able to return to work.

Dr. Wyard also referred the employee to Dr. Jeffrey Dick for treatment of his low back condition. The employee began treating with Dr. Dick in March 1998. Initially, Dr. Dick recommended a three-level laminectomy. In November 1999, the employee underwent a repeat MRI. Dr. Dick compared the results with earlier scans, and concluded that there were no appreciable changes between 1997 and 1999. Between the MRI scans taken in 1992 and 1997, there were no changes at the L4-5 or L5-S1 levels, but there was some progression at the L3-4 level. In January 2000, Dr. Dick recommended that the employee undergo a three-level lumbar decompression with posterior spinal fusion with instrumentation and iliac crest bone graft. Dr. Dick determined that the employee's symptoms were caused by degenerative disc disease, facet disease, and spinal stenosis. Dr. Dick indicated that the employee's symptoms had progressed during the time that he worked for Donovan Messenger, that his low back condition was accelerated to a minor amount, and that the employee's work activities with Donovan Messenger from June 1995 through February 1997 aggravated the employee's back, but only by a small percentage.

On three occasions, September 29, 1988, May 5, 1999, and March 28, 2000, the employee was examined by Dr. David Boxall at the request of J&J Digging and its insurer. Dr. Boxall determined that the employee had sustained a Gillette injury as a result of his work activities with Donovan Messenger, since the employee's symptoms increased during this time. He apportioned liability for the medical care and treatment of the employee's right knee as two-thirds due to the 1967 injury and one-third due to the Gillette injury sustained while working for Donovan Messenger.

On August 10, 1998, the employee filed a claim petition against J&J Digging, claiming permanent total disability benefits as a result of his right knee and low back injuries. On

March 30, 1999, J&J Digging brought a petition for reimbursement and contribution against Donovan Messenger and its insurer, Minnesota Assigned Risk Plan/Berkley Administrators (Donovan Messenger), alleging that the employee had sustained a Gillette injury to the right knee while working for Donovan Messenger. At the request of Donovan Messenger and its insurer, the employee was examined by Dr. Paul Wicklund on September 28, 1999. Dr. Wicklund determined that the employee had not sustained any Gillette injury to his back or knee as a result of the heavy equipment work that he did at Donovan Messenger and therefore that no apportionment of liability was appropriate. In January 2000, the employee settled his claim with both employers and insurers, leaving open only his claim for future medical expenses.

On March 6, 2000, the employee filed a medical request for approval of a lumbar decompression surgery and a fusion surgery. On March 7, 2000, J&J Digging and its insurer filed a petition for joinder and contribution and/or reimbursement against Donovan Messenger and its insurer. The medical request and petition were consolidated. A hearing was held on July 26, 2000. The compensation judge found that the proposed surgery was reasonable and necessary, and that the employee had not sustained a work injury while working for Donovan Messenger, and dismissed Donovan Messenger and its insurer from the case. J&J Digging and USF&G/St. Paul Companies appeal.

## 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

### Apportionment–Gillette Injuries

J&J Digging and its insurer argue that the compensation judge erred by denying apportionment of liability for the employee's right knee and low back injuries, claiming that the employee had sustained additional Gillette injuries to his right knee and low back while working for Donovan Messenger. The appellants argue that the compensation judge's findings that the employee had not sustained Gillette injuries to his low back and right knee while working for Donovan Messenger were not supported by substantial evidence. A Gillette injury is a result of

repeated trauma or aggravation of a preexisting condition which results in a compensable injury when the cumulative effect is sufficiently serious to disable an employee from further work. Gillette v. Harold, Inc., 257 Minn. 313, 321-22, 101 N.W.2d 200, 205-06, 21 W.C.D. 105, 111-13 (1960); Carlson v. Flour City Brush Co., 305 N.W.2d 347, 350, 33 W.C.D. 594, 598 (Minn. 1981). In order to establish a Gillette injury, there must be proof of a causal connection between an employee's ordinary work and ensuing disability. Steffen v. Target Stores, 517 N.W.2d 579, 581, 50 W.C.D. 464, 467 (Minn. 1994). While evidence of specific work activities causing specific symptoms leading to disability "may be helpful as a practical matter," determination of a Gillette injury "primarily depends on medical evidence." Id.

The appellants argue that the employee sustained a Gillette injury to his right knee while working for Donovan Messenger, citing the employee's testimony that his symptoms worsened while working there as a heavy equipment operator, Dr. Friedland's opinion, Dr. Wyard's reluctance to proceed with surgery while the employee continued to do heavy equipment operation, Dr. Boxall's opinion, and the employee's ability to continue working as a heavy equipment operator for so many years until after working for Donovan Messenger. The appellants acknowledge that the employee had a pre-existing, progressing right knee condition, but argue that his work activities for Donovan Messenger aggravated and accelerated the condition beyond its normal progression.

The employee underwent seven knee surgeries before he began working for Donovan Messenger. The compensation judge noted the nature of the employee's work activities for Donovan Messenger and the employee's testimony of increased symptoms, but found that the employee's work for Donovan Messenger did not substantially aggravate or accelerate the employee's knee condition. The compensation judge also specifically relied upon the employee's testimony and the deposition testimony of the employee's treating physician, Dr. Dick, in arriving at her conclusions.

Dr. Wicklund's opinion also supports the compensation judge's findings. Following Dr. Wicklund's examination of the employee on September 28, 1999, he concluded:

Based upon my history, physical, and review of the medical records, it's my opinion to a reasonable degree of medical certainty that Mr. Jobe's right knee problems date back to his original injury in 1967. This injury consisted of a medial meniscus tear as well as a medial collateral ligament strain. The subsequent operations done including his total meniscectomy and repair of the medial collateral ligament and repair and removal of loose bodies are all consistent with his original injury. He ultimately had to have a proximal tibial osteotomy because of this varus deformity that was also a result of the removal of the medial meniscus.

His first total knee arthroplasty was then done as a result of this degenerative medial compartment, removal of the medial meniscus, and subsequent varus deformity which resulted in ultimate complete degeneration of the right knee. He underwent the gradual failure of

this total knee arthroplasty as a result of loosening and osteolysis which resulted from the gradual wearing of the polyethylene. This is a well reported phenomenon and is unrelated to activities which would involve pressure of the right leg on a pedal or any other work activity but is rather related to the fact that the first generation polyethylene was not cross linked and therefore the surface of the polyethylene gradually deteriorated creating microscopic loose particles of polyethylene which lead to the development of loosening around the femoral and tibial components, therefore he had to undergo a second total knee arthroplasty with cement. The polyethylene used in all of these operations was first generation polyethylene and therefore the need for the second total knee revision in 1993 and the need for the third total knee revision in 1997 was not due to any trauma to the knee or any Gillette type injury but rather due to the mechanical properties of the polyethylene at that time which allowed for microscopic fraying and microscopic third body wear of the joint, loosening the joint and causing debonding of the cement with the bone. There is no indication that there was a Gillette injury. These phenomenon of loosening of total knees are well reported in the literature and are not the result of work but the result of the inherent properties of the plastic liner.

The compensation judge did not specifically mention Dr. Wicklund's opinion in her decision, but found that the employee's physicians had predicted in the late 1970s and into the 1980s that he would have progressive right knee difficulties which would increase in severity and frequency, as outlined by Dr. Wicklund. Substantial evidence, including the medical opinions of Drs. Dick and Wicklund, supports the compensation judge's finding that the employee did not sustain a Gillette injury to his right knee while working for Donovan Messenger.

The compensation judge also found that the employee had not sustained a Gillette injury to his low back while working for Donovan Messenger. The compensation judge noted that the employee had experienced a gradual progression of low back symptoms, which was consistent with a continuing manifestation of the employee's pre-existing low back injury, and that he had not required treatment nor missed any work due to his low back during that time. In addition, the compensation judge noted that the employee's MRI scans taken in 1992, 1997, and 1999 were essentially unchanged. The appellants argue that this was a misstatement of the evidence since there was progression of degeneration, disc bulging, and stenosis from 1992 to 1997. The 1997 MRI indicated that the employee's degenerative disc disease at L4-5 and L5-S1 was unchanged, there was mild degeneration of the L3-4 disc which had progressed since 1992, and slight progression of L3-4 disc bulging and mild to moderate central stenosis when compared to the 1992 examination. The compensation judge could reasonably conclude that these changes were not significant. Finally, the compensation judge accepted Dr. Dick's opinion that while the employee's symptoms had progressed during the time that he worked for Donovan Messenger, his low back condition was accelerated to a minor amount, and that the employee's work activities with Donovan Messenger from June 1995 through February 1997 aggravated the employee's back,

but only by a small percentage. Substantial evidence supports the compensation judge's finding, and we affirm.

Since the compensation judge found that the employee had not sustained Gillette injuries while working for Donovan Messenger, apportionment was denied. We conclude that the denial of apportionment by the compensation judge is supported by substantial evidence in the record and therefore must affirm. Hengemuhle, 358 N.W.2d 54, 37 W.C.D. 235.

### Surgery

The appellants argue that the compensation judge's finding that the proposed low back surgery was reasonable and necessary is not supported by substantial evidence. The compensation judge found that the three level laminectomy and three level fusion proposed by Dr. Dick are reasonably likely to significantly improve the employee's back and leg symptoms and increase his tolerance for activities. The appellants argue that Dr. Dick did not state that the employee's symptoms would "significantly improve." However, Dr. Dick specifically outlined the surgical procedures he recommended, and explained the basis for his recommendations. He testified that he expected that these surgical procedures would improve the level of the employee's symptoms, even though "not 100 percent" and that he expected the employee's level of functioning to improve also. (Ee. Ex. A.) He testified that, in his opinion, the surgery was reasonable and necessary. Based on Dr. Dick's testimony, the compensation judge could reasonably conclude that the surgical procedures recommended by Dr. Dick were "reasonably likely to significantly improve the employee's back and leg symptoms as well as increase his tolerance for activities" and that the recommended surgeries were reasonable and necessary. (Findings Nos. 9 and 11.)

The appellants also argue that further testing is necessary before such an extensive surgery. Dr. Dick diagnosed degenerative disc disease and spinal stenosis. Dr. Boxall determined that before considering the proposed surgery, three tests should be performed, a CT myelogram, nerve blocks, and evaluation for peripheral vascular disease, since peripheral vascular disease could mimic spinal stenosis. Dr. Dick agreed that the employee had peripheral vascular disease, but concluded that this was a secondary problem and that the employee's symptoms were not due to this disease, but instead were due to his low back condition, based upon the employee's description of his symptoms. Dr. Dick stated that the employee did not report symptoms of pain in his feet, calves and legs that progressively work up with prolonged walking, which can be symptoms of a vascular problem, and the employee's symptoms were relieved by bending forward and reproduced by extending, which would not be the case with a vascular problem. Dr. Dick specifically testified at his deposition that there were no potential results that he could obtain from peripheral vascular testing that would prove a contraindication for the proposed surgery.

The compensation judge adopted Dr. Dick's opinion, relying upon his considerable experience in this area, and specifically indicated that Dr. Dick had satisfactorily addressed Dr. Boxall's concerns about the need for additional testing. It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). Substantial evidence supports the compensation judge's finding that the proposed surgery was reasonable and necessary. Accordingly, we affirm.