

TIMOTHY K. KORDELL, Employee, v. TAPPERS, INC., and AM. COMP. INS. CO./RTW, Employer-Insurer/Appellants, and HEALTHPARTNERS, INC., FAIRVIEW HOSP. & HEALTH SERV., DUCHIEN CHIROPRACTIC, INC., ORTHOPAEDIC CONSULTANTS, and MN DEP'T OF LABOR & INDUS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 1, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY. Substantial evidence, including medical records, the medical opinions of the employee's treating physician and chiropractors, and testimony by the employee and employer representatives concerning the type of duties performed by the employee, supported the compensation judge's finding that the employee's work activities for the employer resulted in a Gillette injury in the nature of a permanent aggravation of the employee's pre-existing degenerative changes in his cervical spine.

CAUSATION - AGGRAVATION; CAUSATION - PRE-EXISTING CONDITION. Substantial evidence, including medical records, the medical opinions of the employee's treating physician and chiropractors, and lay testimony, supported the compensation judge's finding that the employee's activities for the employer resulted in a permanent aggravation of the employee's pre-existing degenerative changes in his cervical spine.

MAXIMUM MEDICAL IMPROVEMENT. Where the employee was awarded temporary total disability benefits for a brief period of time beyond the expiration of 90 days post-MMI, that portion of the compensation judge's order is remanded to the compensation judge for determination of the statutory basis for the award of benefits.

Affirm in part, vacate in part and remand.

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

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal from the compensation judge's determination that the employee sustained a Gillette¹ injury on July 13, 1999, arising out of and in the course and scope of his employment at Tappers, Inc. We affirm in part, and reverse in part and remand.

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

BACKGROUND

Claimed Gillette Injury of July 13, 1999

Timothy K. Kordell, the employee, commenced work for Tapper's, Inc., the employer, on June 21, 1999, working as a panel saw operator. The employee claims that he sustained a Gillette injury on July 13, 1999, as a result of his work as a panel saw operator. On July 13, 1999, the employee was 43 years old and earned a weekly wage of \$400.00. On that date, the employer was insured for workers' compensation liability in the state of Minnesota by American Compensation Insurance Company/RTW, the insurer.

The employer is engaged in the manufacture of cabinets. As a panel saw operator, the employee cut sheets of plywood, melamine or particle board. These sheets measured four feet by eight feet, and weighed approximately 80 pounds per sheet. The employee estimated that he cut approximately 20 sheets per hour. Using a forklift, the employee positioned a bundle of sheets on a hydraulic scissors lift. He then raised the scissors lift so that the material was positioned slightly above the bed of the panel saw. The employee then manually pushed a quantity of sheets off the bundle, typically three or four at one time, sliding the sheets onto the bed of the saw. Once the panels were on the saw bed, he lined them up, and pushed the stack of sheets through the saw to make the necessary cuts, first to length and then to width.

After the employee cut the boards to the proper size, he picked them up off the saw bed and stacked them on a pallet. The number of cut boards the employee carried at one time depended upon their size. He estimated that he typically carried a stack of cut boards weighing ten pounds, but could carry up to 50 to 60 pounds of cut boards. The employee testified that the most physically demanding aspect of this job occurred when he cut single sheets, as he would grab one full sheet and carry it back to the saw bed; he performed that task approximately four times during his tenure with the employer. He also testified that he utilized the most physical force when pushing the boards off the bundle and onto the saw bed. The employee testified that he was able to perform this work, testifying that "it was very hard work, it was harder than what I was used to but I was still capable of doing it." (T. 79.)

On July 13, 1999, the employee awoke in extreme pain with a pinching sensation in his neck. His pain radiated down into his right shoulder and right elbow. He also experienced numbness from his right elbow, extending down into his fourth and fifth fingers on his right hand. The employee telephoned his supervisor, Lance Hartkopf, advising him of his symptoms. He advised Mr. Hartkopf that he was not sure whether this happened at work. (T. 82.) The employee spoke in person with Mr. Hartkopf on July 15, and advised him that he felt the work was too physical for him and "that it wasn't a good fit there." (T. 82.)

The employee first received chiropractic treatment for his symptoms from Dr. Orin DuChien on July 13, 1999, and again on July 14 and 19. He then consulted Dr. Brenda Sommerdorf at Fairview Northland Clinic on July 19, reporting neck and right upper extremity symptoms. The employee received a total of eight chiropractic treatments between July 13 and August 4, 1999, but discontinued as the chiropractic treatment was not alleviating his symptoms. At a follow-up medical appointment on August 13, 1999, Dr. Chris Pensinger diagnosed medial

epicondylitis with ulnar nerve neuropathy. He referred the employee for an EMG, which he underwent on August 30, 1999, and which was interpreted as being abnormal and consistent with a C8-T1 radiculopathy. The employee underwent an MRI of his cervical spine on September 18, 1999, which was interpreted to show a subacute or old herniated disc at the C7-T1 level to the right with advanced foraminal compromise and a central discogenic spur at C3-4 and C6-7.

The employee's symptoms persisted. He testified that his initial neck and shoulder pain dissipated but that the numbness in his right hand and arm persisted. He also noted that the strength in his right arm was weakening, a symptom he had not experienced before his July 13, 1999 injury. He attempted working for a different employer, Tru Therm Aluminum, starting on September 13, 1999. This position was less physical than his position for the employer, and was similar to work that he had done previously for another employer. However, while at Tru Therm, he found that he dropped hand tools, as he was unable to hang onto them due to right hand weakness. He discontinued working for Tru Therm on September 24, 1999, due to his ongoing symptoms. He testified that, "I didn't feel that I could continue working there with the hand the way it was and . . . I think it was shortly after I found out the results of the MRI and the actual severity of the injury." (T. 94.)

At Dr. Pensinger's referral, the employee consulted Dr. Jeffrey Dick, orthopedic surgeon, on October 1, 1999. Dr. Dick recommended a trial of physical therapy treatments and an epidural steroid injection to treat his symptoms. By October 15, 1999, Dr. Dick recommended surgery. On October 18, 1999, the employee spoke to supervisor Lance Hartkopf, and completed a First Report of Injury. Dr. Dick performed surgery on November 1, 1999, in the nature of a foraminotomy decompression on the right side at the C8 level.

Dr. Dick released the employee to return to work in by mid-February 2000, restricting him to a 50-pound weight limit. The employee worked with a rehabilitation counselor associated with the Vocational Rehabilitation Unit of the Department of Labor and Industry and ultimately returned to work on May 26, 2000 as a laborer for Caprice Doorcraft, a cabinet building company. The employee testified that his job at Caprice Doorcraft was less physically demanding than his job for Tapper's, Inc. However, he continued to experience symptoms in his neck and right upper extremities while employed by Caprice. The employee testified that while he worked for Caprice Doorcraft, he still noticed a dull ache in his neck. He also experienced a flare-up of his symptoms, including a sharp, shooting pain in late July 2000. This flare-up occurred in a similar fashion to his flare-up on July 13, 1999: the employee awakened one morning with a sharp shooting pain in his neck. He testified, however, that this flare-up was not as severe as the one he experienced on July 13, 1999. He received eight chiropractic treatments between July 24 and August 7, 2000. The employee quit his job at Caprice Doorcraft in late July 2000 when he "decided that the type of work done at Caprice was probably a little too physical for [him], too." (T. 106.) Dr. DuChien restricted the employee from work between July 26 and August 7, 2000. By August 6, 2000, the employee secured a clerical position with the U.S. Food Service, and remained employed there at the time of the hearing. The employee testified that the duties of this clerical position are within his physical work restrictions. (T. 107.)

Employee's Previous Medical History

The employee's medical history includes previous neck and right arm symptoms similar to those he experienced on July 13, 1999. The employee consulted Park Nicollet Medical Center on January 28, 1992, complaining of upper back pain and neck discomfort that he felt upon awakening that morning. There are no additional references in 1992 to medical treatment for the employee's neck and back pain. The employee first began treating with Dr. DuChien, chiropractor, on April 8, 1994. Dr. DuChien's records reflect that the employee awoke on the morning of April 8, 1994, noting shooting pain extending down his right arm into his elbow and also pain in his neck and shoulders. The employee was unable to recall any specific injury he sustained in April 1994 to produce those symptoms. He received three chiropractic treatments from Dr. DuChien between April and September 1994 for those symptoms, but received no ongoing chiropractic care until 1996.

The employee next treated with Dr. DuChien on September 3, 1996, complaining of pain in his right shoulder which had been present for approximately one week, along with numbness in the fourth and fifth fingers on his right hand. The employee received approximately 30 chiropractic treatments for his neck symptoms between September and December 1996. In part due to financial reasons, the employee underwent chiropractic treatments on a less frequent basis, approximately eight times in 1997, sixteen times in 1998 and nine times in 1999, prior to July 13, 1999, the date of the employee's claimed injury. Between April and June 1999, the employee received chiropractic treatments for both his neck and low back symptoms. The employee's last treatment prior to his claimed injury was on July 7, 1999, after he had worked for the employer for over two weeks, and involved treatment for low back and neck symptoms. Dr. DuChien's records on that date state that the employee was "doing pretty good." (Ee Ex. H.)

Procedural Background

On November 29, 1999, the employee filed a claim petition, claiming entitlement to temporary total disability benefits from July 14 through September 12, 1999 and from September 25, 1999 to the present and continuing; temporary partial disability benefits from September 13 to September 24, 1999; payment for medical expenses and provision of rehabilitation assistance and, if appropriate, retraining benefits. The employee later amended his claim petition to include a claim for payment of permanent partial disability benefits based upon a 14 percent whole body impairment rating relative to the cervical spine. In their answer, the employer and insurer denied primary liability for the employee's alleged Gillette injury of July 13, 1999, and denied liability for the claimed benefits.

On March 1, 2000, Dr. Joel Gedan, neurologist, examined the employee at the request of the employer and insurer. In his report dated March 1, 2000, Dr. Gedan referred to the employee's history of neck pain radiating into his right arm with right upper extremity weakness and numbness. Dr. Gedan determined that the employee's history and medical records are compatible with chronic recurrent episodes of right-sided neck pain from a right C8 radiculopathy. In Dr. Gedan's opinion, the employee's work activity for the employer in June and July 1999 was not a substantial contributing factor to any disability and associated medical treatment occurring from and after July 13, 1999. Dr. Gedan stated that "[t]here was no direct trauma or injury to his

neck. While it is possible that prolonged strenuous activity and lifting could be related to degenerative changes or an exacerbation of an underlying problem involving the cervical spine, it is my opinion that the work as a panel saw operator for three weeks did not significantly contribute to Mr. Kordell's cervical radiculopathy." (Er Ex. 1.) Dr. Gedan concluded that the employee's C8 radiculopathy related to his chronic recurrent problem and degenerative changes in his neck, and not to his work-related activities as a panel saw operator for the employer. Dr. Gedan also stated that "[c]ervical discs frequently herniate during sleep and it is a very common scenario for a person to awaken with cervical radiculopathy as happened with Mr. Kordell." (Er Ex. 1.) Dr. Gedan determined that the employee had likely reached maximum medical improvement (MMI) as of March 1, 2000. Dr. Gedan assigned a temporary 50-pound weight lifting restriction which could be removed by May 2000. Dr. Gedan believed that it was likely that no further restrictions would be placed on the employee's work activities after May 2000.

On March 14, 2000, the employer and insurer served the employee with Dr. Gedan's March 1, 2000 medical report and with notice of maximum medical improvement. In a supplemental medical report dated November 15, 2000 Dr. Gedan assigned a permanency rating of 14 percent permanent partial disability of the whole body. However, Dr. Gedan concluded that such permanency was irrelevant to this case, as the employee's work activities did not substantially contribute to the employee's permanency rating. Dr. Gedan also concluded that ongoing chiropractic care was no longer reasonable or necessary, nor causally related to any work-related exacerbation of the employee's cervical radiculopathy which occurred on or around July 1999.

Hearing was held on this matter on December 8, 2000. In a Findings and Order, served and filed January 3, 2001, the compensation judge found that the employee sustained a Gillette injury to his cervical spine due to his work activities for the employer, finding that the "employee's work activity with the employer herein during the period June 21 through July 12, 1999 resulted in a permanent aggravation of the employee's pre-existing degenerative changes in his cervical spine." (Finding No. 15.) The compensation judge found that the employee was temporarily totally disabled from July 14 - 15, 1999 as a result of his work-related injury, but denied his claim for temporary total disability benefits from July 16 through October 14, 1999, as he did not conduct a reasonably diligent job search during that period. The compensation judge awarded temporary total disability benefits from October 15, 1999 through May 26, 2000, as the employee was medically unable to continue working during a portion of that time, and had conducted a reasonably diligent job search following his release to return to work by his physician in mid-February 2000. The compensation judge also awarded temporary total disability benefits from July 26 through August 5, 2000, the period of time between the employee's jobs at Caprice Doorcraft and U.S. Food Service.

The compensation judge also found that the employee reached maximum medical improvement (MMI) with the service of Dr. Joel Gedan's medical report on March 14, 2000. The compensation judge awarded 14 percent permanent partial disability to the body as a whole as result of the employee's cervical spine condition, and determined that medical treatment claimed by the employee and the rehabilitation services provided by Minnesota Department of Labor and Industry/VRU were causally related to the employee's July 13, 1999 work injury.

In addition to contingency fees in the amount of \$4,120.44, the compensation judge also ordered payment of Roraff/Heaton attorney fees to the employee's attorney in the sum of \$3,784.16, along with related payment of reimbursement of attorney fees pursuant to Minn. Stat. § 176.081, subd. 7, and taxable costs and statutory interest.

The employer and insurer appeal, alleging that the employee did not sustain a Gillette injury as a result of his employment with Tapper's, Inc., and also appeal from the award of temporary total disability benefits from July 26 through August 5, 2000, as that period of time was beyond the 90-day period post-maximum medical improvement, referred to in Minn. Stat. § 176.101, subd. 1(j).

In their notice of appeal, the employer and insurer also appealed from the award of attorney fees. However, they did not address that issue in their brief, and therefore that issue will not be addressed by this court.²

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

The employer and insurer appeal from the compensation judge's finding that the employee's work for the employer resulted in a permanent aggravation of the employee's pre-existing degenerative changes in his cervical spine, and therefore that the employee sustained a Gillette injury on July 13, 1999. The employer and insurer also appeal from the compensation judge's award of temporary total disability benefits between July 26 and August 5, 2000. We affirm in part and reverse and remand in part.

An employee who is injured gradually as a result of repetitive, minute trauma attributed to his work duties, and who becomes disabled as a result thereof, has established the

² Issues raised in the notice of appeal but not briefed are deemed waived. Minn. R. 9800.0900, subp. 1.

basis of a compensable work-related injury claim. As the Minnesota Supreme Court stated in Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200 (1960), the “important question is whether the employment is a proximate contributing cause of the disability.” Gillette, 101 N.W.2d at 206. Whether a Gillette injury has occurred, including a showing of causal connection between the employee’s ordinary work activities and his ensuing disability, constitutes a fact question to be determined by the compensation judge. See, Geim v. Robert Green Trucking, 46 W.C.D. 409 (W.C.C.A. 1992). Moreover, the question of a Gillette injury primarily depends upon medical evidence. Steffen v. Target Stores, 517 N.W.2d 579, 581, 50 W.C.D. 464, 467 (Minn. 1994), citing Marose v. Maislan Transport, 413 N.W.2d 507, 512 (Minn. 1987). In Steffen, the Minnesota Supreme Court stated that, “[w]hether given by testimony or written report, an opinion by a medical expert as to the causal link between the claimant’s disability and the job must be based on adequate foundation.” Steffen, 517 N.W.2d at 581, 50 W.C.D. at 467, citing Grunst v. Emanuel-St. Joseph Hosp., 424 N.W.2d 66, 68, 40 W.C.D. 1130, 1132 (Minn. 1998), and Jendro v. Brown Boveri Turbo Mach. Co., 355 N.W.2d 716, 719, 37 W.C.D. 158, 162 (Minn. 1984).

In her memorandum, the compensation judge explained that she based her conclusion that the employee sustained a work-related Gillette injury on three reasons. First, the employee’s work as a panel saw operator involved forceful and frequent use of the employee’s arms and shoulders and there was a close time connection between the onset of symptoms and the employee’s work activities. Second, although the employee had episodic neck symptoms prior to his July 1999 work injury, those were only periodic flare-ups and symptoms which were short-lived and did not interfere with his daily activities. Third, the compensation judge relied on the opinions of Drs. Dick, DuChien and Davidson,³ who each determined that the employee’s work activities for the employer were a substantial contributing factor in aggravating his pre-existing condition.

The employer and insurer argue that the medical opinions on which the compensation judge relies are flawed as they are not based upon adequate foundation. Foundation is actually an admissibility standard which determines a witness’s ability to testify on certain matters. “The competency of a witness to provide expert medical testimony depends upon both the degree of the witness’s scientific knowledge and the extent of the witness’s practical experience with the matter which is the subject of the offered testimony.” Reinhardt v. Colton, 337 N.W.2d 88, 93 (Minn. 1983). An expert’s lack of information, or receipt of incorrect information such as that alleged in this case, generally goes to the weight of the opinion rather than to its foundation. Crosby v. University of Minnesota, slip op. (W.C.C.A. Mar. 2, 1995).

The compensation judge relied upon the opinions of Dr. Jeffrey Dick, the surgeon who performed the cervical spine surgery on the employee in 2000, and on the opinions of employee’s treating chiropractors, Dr. DuChien, who treated the employee periodically between 1994 and 2000, and Dr. Davidson, who took over Dr. DuChien’s chiropractic practice in 2000. The employer and insurer argue that those opinions lack foundation since all three medical experts were presented with background information by the employee’s counsel which contained two false

³ The memorandum refers to Dr. Davis and Exhibit I; this is a typographical error, as Employee’s Exhibit I is a report issued by Dr. Nathan Davidson. We modify the memorandum to reflect this spelling change to Dr. Davidson.

premises: first, that the employee missed time from work on July 8 and 9, 1999, due to neck symptoms, when he actually missed work because his child was ill, and that the employee lifted boards or panels weighing 100 pounds each, while the boards actually weighed approximately 80 pounds each. The employer and insurer argue that this inaccurate information caused each of the three doctors to assume that the employee had experienced symptoms while employed by the employer in July 1999, and also that the employee had performed more rigorous duties than he actually did while working as a panel saw operator.

The employer and insurer's argument assumes that each of those doctors' opinions was based solely on the background information presented by employee's counsel, an assumption not borne out by the evidence in the record. The record reflects that each of the doctors relied on information independent of the background information letters prepared by counsel for the employee. In his report dated July 5, 2000, Dr. DuChien, the employee's treating chiropractor, explained that he had reviewed the employee's medical and chiropractic records. In addition, Dr. DuChien had treated the employee periodically over an approximately six-year period of time, had conducted period examinations of the employee, obtained histories directly from the employee and reviewed radiographic studies. Dr. Dick also reviewed the employee's medical and chiropractic records, reviewed radiographic studies and performed surgery on the employee, and had an opportunity to obtain a history directly from the employee prior to and following the employee's surgery. Dr. Davidson also reviewed the employee's medical and chiropractic records, including those of his predecessor, Dr. DuChien, in addition to the information provided by counsel, before rendering his opinion on causation.

As a general rule, this level of information concerning a patient establishes a doctor's competence to render an expert opinion. See Grunst v. Immanuel-St. Joseph Hosp., 424 N.W.2d 66, 68, 40 W.C.D. 1130, 1132-33 (Minn. 1988). It is well-established under Minnesota case law that expert opinion may be based upon personal knowledge of the case, among other things. See Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 188 (Minn. 1978). Based on evidence of record, there was adequate "foundation" for the opinions of Drs. Dick, DuChien and Davidson, and the judge did not err in relying upon those medical opinions when reaching her conclusions. See, e.g., Goss v. Ford Motor Co., 55 W.C.D. 361 (W.C.C.A. 1996) (a doctor's opinion does not lack foundation merely because he may not have had a complete description of all of the employee's job duties); see also Olson v. Menasha Corp., slip op. (W.C.C.A. Sept. 25, 1998); Trego v. Associated Leasing, slip op. (W.C.C.A. Jan. 9, 1998); Stuhr v. Northwestern Travel Serv., Inc., slip op. (W.C.C.A. Sept. 3, 1997). Moreover, a trier of fact's choice between conflicting expert testimony is to be upheld unless the facts assumed by the expert in rendering the opinion are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 342-343, 37 W.C.D. 364, 372-73 (Minn. 1985). As substantial evidence supports the compensation judge's conclusion that the employee sustained a Gillette injury on July 13, 1999, we affirm that finding.

The employer and insurer also appeal from the compensation judge's award of temporary total disability benefits from July 26 through August 5, 2000, a period of 1.6 weeks. During this period of time, the employee was unemployed. He quit his job at Caprice Doorcraft in July 2000, because those tasks caused him to be sore each day. Dr. DuChien also restricted the employee from work during this period. On August 6, 2000, the employee secured a clerical position with U.S. Food Service, a position which he said was within his physical work restrictions.

But for certain exceptions, entitlement to temporary total disability benefits expires 90 days after an employee reaches MMI. Minn. Stat. § 176.101, subd. 1(j). The employer served the employee with notice of MMI on March 14, 2000; the 90-day period post-MMI expired on June 12, 2000. The period of time between July 26 and August 5, 2000, therefore, was well beyond the 90-day period post-MMI. The compensation judge awarded benefits for this period of time but provided no explanation for that award. We therefore vacate that portion of Order No. 1 which refers to payment of temporary total disability benefits from July 26 through August 5, 2000, and remand this matter to the compensation judge for determination of the employee's entitlement to benefits during that period of time under any of the statutory exceptions raised at trial. See, e.g., Minn. Stat. § 176.101, subd. 1(e)(2). The compensation judge should make that determination on the existing record.

To the extent that our order affects the employee's entitlement to contingency fees, Order No. 8 is also remanded to the compensation judge for recalculation, as may be necessary, in light of her decision on remand.