MARIA L. MORENO, Employee, v. ADVERT. UNLIMITED and TRAVELERS INS. CO., Employer-Insurer, and ADVERTISING UNLIMITED and CNA INS. CO., Employer-Insurer/Appellants, and SLEEPY EYE MUN. HOSP., SLEEPY EYE MED. CLINIC, and BLUE CROSS/BLUE SHIELD OF MINN., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 3, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL CONTRIBUTING CAUSE; CAUSATION - GILLETTE INJURY. Substantial evidence, including expert opinion, supported the compensation judge's decision that the employee sustained work-related Gillette injuries to her low back and left shoulder as a result of her work activities.

APPEALS - SCOPE OF REVIEW. Issues not raised at the hearing level may not be raised for the first time on appeal.

Affirmed.

Determined by Wilson, J., Rykken, J., and Pederson, J.
Compensation Judge: Gary P. Mesna.

OPINION

DEBRA A. WILSON, Judge

The employer and CNA Insurance Company appeal from various findings pertaining to their liability for the employee's left shoulder and low back conditions. We affirm.

BACKGROUND

The employee began employment with Advertising Unlimited [the employer] in 1990, working on a seasonal and then job-share basis before attaining full-time status sometime in 1992. The employer produced worship bulletins and calendars, and the employee loaded, operated, and unloaded various machines used in the production process. For the first five years of full-time employment, the employee was primarily assigned to a machine called the "Shuttle Stamper Stitcher," which is used to make small desk calendars. Subsequently, the employee worked in a unit called the "645 Cell," which then contained at least four other machines: a laminator, the "C & P" machine, the "645" machine, and the "Two-Up" machine. It is essentially undisputed that operating each of these machines required repetitive hand and arm use. In addition to "feeding" the machines with the appropriate paper or cardboard stock, the employee stacked the finished products and packed them into cartons, which ultimately weighed up to forty pounds and which the employee would then lift or otherwise move when full. The employee estimated that,

when operating the Shuttle Stamper Stitcher, she spent fifty percent of her time bending to lift full cartons. The employee also testified that some of her job duties necessitated repetitive reaching at or over shoulder level, for example, feeding the C & P machine with cardboard pieces and taking calendar pads off a skid to load the Two-Up machine.

The employee has a history of low back pain dating back to at least 1983, when she injured herself while working as a nurse's aide in Texas. She apparently had continued intermittent symptoms and received treatment, including chiropractic care, for low back pain both before and after commencing employment with the employer in 1990. Other conditions for which the employee received treatment during her work for the employer include left shoulder symptoms, eventually diagnosed as a partial rotator cuff tear and/or adhesive capsulitis, and hand, wrist, and arm numbness and pain, eventually diagnosed as bilateral carpal tunnel syndrome. Specific incidents or injuries referenced in the employee's medical records include the employee's 1983 back injury in Texas, a March 1994 motor vehicle rollover, after which the employee complained of neck, chest, and left scapular pain, and an October 1996 incident in which the employee reportedly strained her low back moving furniture at home. Physicians who treated or evaluated the employee for these conditions included Dr. Mario DeSouza, one of the employee's primary treating physicians, Dr. V. K. Murthy, and Drs. Chris Tountas, Robert Wengler, and Joseph Teynor, independent medical examiners. All of the independent examiners agreed that the employee's carpal tunnel condition was work-related. However, Dr. Wengler went on to find work-relatedness for the employee's left shoulder and low back conditions, while Dr. Teynor did not.

On September 19, 1997, the employee underwent surgery to treat a herniated disc at L5-S1, first diagnosed by CT scan on August 3, 1997. She also underwent carpal tunnel release procedures on January 28, 1999, and February 11, 1999. The employee has to this point declined surgery to treat her left shoulder condition, which has improved.

In May of 2000, the matter came on for hearing before a compensation judge to determine liability for alleged Gillette-type[1] injuries to the employee's hands and wrists, left shoulder, and low back. Various potential dates of injury were asserted, and two insurers defended against the employee's claims: CNA Insurance Company, which insured the employer against workers' compensation liability on all pertinent dates through December 31, 1997, and Travelers Insurance Company, which came on the risk on January 1, 1998.

In a decision issued on July 19, 2000, the judge determined in part that the employee had sustained a Gillette-type injury (in the form of bilateral carpal tunnel syndrome) as a result of her work activities for the employer through January of 1999, and he ordered Travelers to pay benefits related to that condition. That decision is undisputed on appeal. The judge also found that the employee had sustained a Gillette injury to her left shoulder culminating on March 24, 1997, and to her low back culminating August 1, 1997, and he ordered CNA to pay benefits related to those conditions. In other findings, the judge briefly described the employee's medical history and concluded that the employer had received timely notice of all three Gillette injuries. The employer and CNA appeal.

[1] See Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 32 W.C.D. 105 (1960).

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

1. History and Onset of Left Shoulder Complaints and Low Back Pain

In Finding 7, the compensation judge found as follows:

> 7. The employee began having left shoulder pain in about March of 1997. She reported the pain to her supervisor and obtained medical care. The pain was related to her work activities at [the employer]. She had had some prior shoulder pain that was of a different nature and in a somewhat different location.

On appeal, the employer and CNA contend that Finding 7 is "unsubstantiated," arguing, for example, that "[i]t is undisputed Employee characterized her March 1997, shoulder complaints as the same as shoulder complaints Employee associated with her 1994 automobile accident." However, CNA's assertion to this effect is not strictly true. Although the employee was unable, at hearing, to recall the nature of her shoulder symptoms following her 1994 automobile rollover, medical records generated immediately after that accident indicate that the employee was experiencing discomfort "over the left trapezius and scapular area, up to the base of the neck on the left." In contrast, the employee described her 1997 symptoms as being located in the shoulder and upper arm. It is also worth noting here that the employee received no treatment for shoulder complaints following the 1994 accident. Similarly, the employer and CNA are simply incorrect in their contention that "[it is undisputed] that no medical treatment was rendered to the left shoulder until May of 1998," when Travelers was on the risk, in that the employee's medical records clearly reflect that she underwent physical therapy for her left shoulder condition in April of 1997. The point of this section of CNA's brief is unclear. However, to the extent that Finding 7 describes "the history and onset" of the employee's left shoulder symptoms, that finding is adequately supported by the record.

The employer and CNA also appear to argue that the judge's description of the employee's "history and onset of low back pain" is somehow erroneous, in some unspecified way, and they devote another section of their brief to this subject. However, nowhere in those arguments do the employer and CNA take specific issue with any specific factual finding made by the judge; they instead simply recite the judge's findings and then go on to describe other evidence bearing on causation. They note, for example, that the employee "did not identify any work aggravations to her back in the summer of 1997" and that the employee had "consistently attributed her low back problems to her 1983 injury to all persons or medical providers, except Dr. Wengler." Be that as it may, this section of CNA's brief contains no request for reversal of any findings or orders, or for any other relief. However, to the extent that CNA's factual assertions imply some kind of challenge to the judge's causation decision, we would note that the judge's finding of a work-related Gillette-type low back injury is supported by the opinion of Dr. Wengler, who testified on the subject, in some detail, by deposition. According to Dr. Wengler, the employee's low back condition may have begun with the 1983 incident in Texas, but the employee's work for the employer caused a continued deterioration that ultimately resulted in a herniated disc, necessitating the employee's September 1997 surgery. We see nothing in the record that would compel rejection of Dr. Wengler's opinion on this point.

2. Shoulder Injury and/or Liability

The employer and CNA also suggest that the judge erred both in accepting Dr. Wengler's opinion that the employee sustained a Gillette-type shoulder injury and in failing to find that the employee sustained a Gillette-type shoulder injury in May of 1998, when Travelers was on the risk,[2] rather than in March of 1997, when CNA was the relevant insurer We reject both arguments. Contrary to the assertion of CNA, Dr. Wengler did not assume that the employee performed work activities "reproducing the motion of a baseball pitcher." Rather, Dr. Wengler based his causation opinion on a lengthy hypothetical that substantially described the employee's job duties, and the compensation judge was entitled to rely on that opinion, despite other expert opinion to the contrary. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Furthermore, also contrary to the employer and CNA's contention, the employee identified several job duties that seemed to cause or aggravate her left shoulder symptoms: loading the C & P machine and the Two-Up machine, both of which at times required reaching at or above shoulder level, and operating the 645 machine. As for the employer and CNA's assertion that the judge erred in failing to find that the employee sustained a Gillette-type left shoulder injury culminating in May of 1998, we would note that we see no evidence that any party made any such claim at the

[2] Actually, the heading of this section of the employer and CNA's brief reads as follows: "Whether the trial judge applied the proper analysis and standard in finding cumulative trauma injuries to the employee's low back and left shoulder." However, nowhere in this section of their brief do the employer and CNA discuss the employee's low back condition, only her shoulder condition. However, again, to the extent that the employer and CNA dispute causation for the employee's low back condition, the judge's decision is, as indicated earlier, supported by the opinion of Dr. Wengler.

hearing below.[3] Issues not raised before the compensation judge may not be raised for the first time on appeal. See, e.g., Levings v. Park Inn Int'l, No. [REDACTED SSN] (W.C.C.A. Sept. 8, 1999).

Substantial evidence, including the employee's testimony and the opinion of Dr. Wengler, supports the compensation judge's decision that the employee sustained a Gillette-type left shoulder injury during CNA's period of coverage. For this reason, and because we see no indication that the judge applied any kind of erroneous legal standard in evaluating that claim,[4] we affirm the judge's decision on this issue.

3. Notice of Injury

The employer and CNA contend that the compensation judge erred in finding that the employer had proper notice of the employee's August 1, 1997, low back injury pursuant to Minn. Stat. § 176.141, arguing that, because "it is undisputed [that] Employee did not report her low back symptoms . . . as work related until October, 1997," a remand is required for analysis by the judge on the issue of prejudice due to "late" notice.[5] We reject this argument.

At the beginning of the hearing, during a discussion of the issues before the judge for decision, the following exchange occurred:

> THE COURT: Then as I understand it you're denying notice on two of the injuries, that would be the November 1, '96 and the March 24, '97 injuries, is that correct?

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[3] The employee claimed a May 1998 hand and wrist injury as one of her alternative injury dates. However, there was no shoulder injury claim for that date, either by the employee or by CNA.

[4] While the employer and CNA appear to make some argument about the legal standard applicable to Gillette injury claims, the gist of the argument is not clear. However, to the extent that CNA may be suggesting that the standard articulated by the supreme court in Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994), is not applicable to "overuse syndromes," that argument has no merit. Pursuant to Steffen, the standard set out in Reese v. North Star Concrete, 38 W.C.D. 63 (W.C.C.A. 1985), has no continuing application in Gillette injury cases, for "overuse syndrome" claims or otherwise.

[5] Minn. Stat. § 176.141 sets 14-day, 30-day, and 180-day notice limits, with 180 days as the outside limit for timely notice. If notice is given after 30 but within 180 days, compensation may be allowed if the failure to give earlier notice was due to "mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation, or deceit of the employer . . . unless the employer shows prejudice," in which case compensation may be reduced to the extent of the prejudice. Id.

MR. PATERA: At this point it would be the November 1, '96 Gillette.

THE COURT: Just that one?

MR. PATERA: Yes.

The November 1, 1996, potential Gillette injury referenced by Mr. Patera, counsel for CNA, was a left shoulder injury, not a back injury,[6] and nowhere in the hearing record did CNA ever specifically dispute notice with regard to the employee's low back claim. Accordingly, given the statements quoted above, CNA arguably waived the issue. However, even if notice with regard to the employee's August 1, 1997, injury was in fact disputed, the record reasonably supports the judge's conclusion, stated in his memorandum, that "[t]he employee told the employer in a timely manner what she knew about her injuries and the cause. She cannot be expected to provide more information than she had." The employee was initially uncertain whether her low back condition was related to her work for the employer or whether it was simply a continuation of her 1983 Texas injury, and the employer and CNA offered no evidence whatsoever even suggesting prejudice.[7] See Minn. Stat. § 176.141. Under these circumstances, no remand is warranted. The judge's decision is affirmed.

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[6] In fact, the judge made no finding of any injury effective November 1, 1996, or thereabouts.

[7] The employee received treatment for her low back condition immediately after the August 1, 1997, injury date, and the employer accommodated the restrictions recommended by the employee's physicians, even while denying liability. As such, there is simply no basis in the record for CNA's assertion that "[t]he Employer, had no opportunity to obtain quick medical attention or remove Employee from allegedly irritating job duties."