ROGER NELSON, Employee, v. JOHNSON BUILDERS & DEVS. and STATE FARM GROUP, Employer-Insurer, FULLERTON BLDG. SYS. and CNA INS. CO., Employer-Insurer, and FULLERTON BLDG. SYS. and U.S.F.&G., Employer-Insurer/Appellants, and HEALTH PARTNERS, INC., and PRAIRIE REHAB. SERVS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 30, 2001

No. [REDACTED SSN]

HEADNOTES

NOTICE OF INJURY. The compensation judge erred in finding the employee first knew he sustained a Gillette injury on April 29, 1999 with receipt of a medical opinion on causation, and that the employer had timely notice on May 10, 1999, where the employee's testimony and the medical evidence establishes the employee knew or should have known that his flare up of low back symptoms on about March 8, 1998, was likely related to his work activities and caused disability and the need for medical treatment.

Reversed, in part, and remanded.

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

OPINION

Fullerton Building Systems and U.S.F.&G. appeal the compensation judge's finding that the employee gave timely notice of his March 8, 1998 injury to the employer. We reverse and remand for additional findings.

BACKGROUND

Roger Nelson, the employee, sustained a low back injury on September 3, 1983, while working for Johnson Builders and Developers. (Stipulation 1.) The employee was off work for approximately one month following this injury and received a month of chiropractic treatment. (Finding No. 1.) On October 30, 1989, the employee was seen at the Worthington Chiropractic Clinic complaining of low back pain. Thereafter, the employee returned to the clinic periodically for treatment of low back pain. (Pet. Ex. B.)

The employee began working for Fullerton Building Systems on November 4, 1992. Initially, the employee's job was to assemble trusses, a part of the roof assembly on buildings. The job required the employee to bend, twist and turn in assembling the trusses. The heaviest part which the employee lifted was 80 pounds of lumber. (T. 62-66.) Some time in 1995 or 1996, the employee moved to the stacking department. In that job, the employee stacked the trusses at the job site using a forklift. On occasion, the employee would also be required to stack loose lumber by hand. Some pieces could weigh up to 100 pounds. Approximately 20 to

30 percent of the employee's time was spent stacking lumber and the rest driving the forklift. (T. 74-76.) In approximately January 1997, the employee moved to the shipping and receiving department. (T. 77.) This job required the employee to lift and carry lumber, plywood and small parts and load them on a truck. The heavier items the employee lifted with a forklift and about 50 percent of the freight he carried by hand. (T. 84-85.)

On July 16, 1993, the employee injured his low back while working for Fullerton, then insured by CNA. (Stipulation 2.) The employee was off work approximately two weeks as a result of this injury and received five chiropractic treatments. (Finding No. 4.) By July or early August 1993, the employee returned to his usual job without limitations. Following the July 1993 injury, the employee continued to have temporary, episodic flare-ups of low back pain. (Finding No. 6.) On December 20, 1994, the employee was examined by Dr. Jorge H. Johnson at Sioux Falls Neurological Associates. The employee stated he twisted wrong and experienced an onset of low back pain. The doctor felt the employee could have a herniated disc at L5-S1 on the right based upon his symptoms. Dr. Johnson ordered physical therapy which was performed at the Worthington Regional Hospital. (U.S.F.&G. Ex. 5.) The employee returned to see Dr. Johnson on January 20, 1995. The doctor instructed the employee in William's exercises. The employee continued to seek periodic chiropractic treatment thereafter. (Pet. Ex. B.)

On January 13, 1997, the employee sustained another injury to his low back while working for Fullerton, then insured by U.S.F.&G. (Stipulation 3.) The employee saw Dr. Ebbers at Worthington Chiropractic and received treatment regularly through March 26, 1997. (Pet. Ex. B.)

The employee testified that on or about March 8, 1998,[1] he got to work an hour early, as usual. There had just been a heavy snow and the employee shoveled some of the snow away from a path leading to the back door of the employer's premises. As he did so, he experienced low back pain in the same area as his prior injuries. The employee testified he told his supervisors, Jerome Woodbury and Delray Hoefker about this injury. (T. 90-91.) Mr. Woodbury did not recall the employee reporting to him that he had injured his back shoveling snow. (T. 248-49.)

The employee sought treatment from Dr. Ebbers on March 8, 1998 reporting severe low back pain that began as a dull ache several days before. The doctor took the employee off work and commenced chiropractic treatments. (Pet. Ex. B.) On March 17, 1998, the employee returned to see Dr. Johnson. The doctor recorded the employee experienced recurrent low back pain about a week and a half previously while shoveling snow. The doctor reviewed an MRI scan obtained on March 12, 1998, which showed bulging discs at L3-4, L4-5 and L5-S1 without evidence of nerve root compression or distortion of the dural sac. Dr. Johnson recommended physical therapy and weight loss. The employee returned to work with the employer on March 24, 1998, but continued to receive chiropractic treatment from Dr. Ebbers. (Pet. Ex. B.) On June 15, 1998, the employee was seen by Dr. Mark W. Fox, also with Sioux Falls Neurological Associates. The doctor reviewed a discogram which he stated was positive at L3-4, L4-5 and L5-S1. The doctor recommended a lumbar interbody fusion at L3-4 through L5-S1 which he performed in July

[1] March 8, 1998 was a Sunday. The employee did not work on Sundays. (T. 91-92, 217.)

1998. Following surgery, the employee underwent physical therapy. On February 22, 1999, Dr. Fox released the employee to return to work four hours a day with a 20-pound lifting restriction. The employee apparently had no work available for the employee within his restrictions and he remained off work through September 26, 1999.

By report dated April 29, 1999, Dr. Fox opined the employee's July 15, 1993 and January 13, 1997 injuries were substantial contributing causes of the employee's lumbar spine abnormality and subsequent surgery. The doctor further stated: "Along with the specific injuries, I believe the type of work activities, on a repetitive, daily basis was also a contributing cause of the deterioration of his lumbar spine." (Pet. Ex. B.)

Dr. John Dowdle examined the employee on August 14, 1999, at the request of CNA. The doctor diagnosed degenerative disc disease with an anterior lumbar fusion. Dr. Dowdle opined the employee sustained injuries on July 16, 1993 and January 13, 1997, both of which were temporary aggravations of his underlying degenerative disc condition. The doctor opined the employee sustained an injury on March 8, 1998, while shoveling snow which injury was a permanent aggravation of the employee's underlying condition. Dr. Dowdle apportioned liability 25 percent to the March 8, 1998 injury and 75 percent to the employee's underlying degenerative disc condition. (CNA Ex. 1.)

On May 22, 2000, the employee was examined by Dr. Mark Friedland at the request of State Farm Group. The doctor opined the employee's 1983 injury was a lumbosacral strain/sprain which resolved after two weeks of treatment. He opined the 1993 injury was permanent because the employee thereafter had continuing low back pain. The doctor further concluded the January 1997 and the snow shoveling incident on March 8, 1998, were temporary exacerbations of the employee's pre-existing lumbar degenerative disc disease. However, the doctor also opined the employee sustained a Gillette personal injury culminating in July 1998. Dr. Friedland apportioned liability 50 percent to the 1993 injury and 50 percent to the 1998 Gillette injury. (Johnson Ex. 1.)

The employee filed a claim petition on May 10, 1999, seeking payment of temporary total and permanent partial disability benefits together with medical expenses. In a Findings and Order filed January 3, 2001, the compensation judge found the employee's personal injuries on September 3, 1983, July 16, 1993, and January 13, 1997 were temporary injuries which fully resolved.[2] The compensation judge found the employee sustained a Gillette personal injury on or about March 8, 1998, arising out of his employment with Fullerton.[3] The compensation judge further found the employee first knew he sustained a Gillette injury when he received Dr. Fox's report dated April 29, 1999. Finally, the compensation judge found the employer was first notified of the March 8, 1998 personal injury on May 10, 1999, when the employer was served

[2] The appellants appealed these findings but in their brief did not address these issues. Issues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by the court. Minn. R. 9800.0900, subp. 2.

[3] The appellants also appealed the compensation judge's finding of a Gillette injury on March 8, 1998, but did not address the issue in its brief.

with the employee's claim petition, and that this notice was timely. Fullerton and U.S.F.&G. appeal the compensation judge's findings regarding notice.

DECISION

Fullerton Building Systems and U.S.F.& G. appeal the compensation judge's finding that the employee first knew he sustained a Gillette injury on April 29, 1999, and the finding that notice to the employer on May 10, 1999 met the requirements of Minn. Stat. § 176.141. The appellants assert both findings are legally incorrect and unsupported by substantial evidence. They contend the employee knew he injured his low back on or about March 8, 1998 while shoveling snow. On March 8, the employee saw Dr. Ebbers who provided treatment and took him off work. Accordingly, the appellants argue the employee knew or should have known by March 8, 1998 that work activities aggravated his low back condition causing disability and the need for medical treatment. The employee, Fullerton/U.S.F.& G. contend, was therefore required to give notice to the employer within 180 days of March 8, 1998.

Minn. Stat. § 176.141 provides that "[u]nless knowledge is obtained or written notice given within 180 days after the occurrence of the injury no compensation shall be allowed." The statutory notice period begins to run when the claimant, "as a reasonable person, should recognize the nature, seriousness and probable compensable character of his injury or disease." Issacson v. Minnetonka, Inc., 411 N.W.2d 865, 867, 40 W.C.D. 270, 274 (Minn. 1987).

The employee in this case alleged both a specific injury on March 8, 1998 and a Gillette injury culminating on March 8, 1998 or July 26, 1998. The compensation judge found, in an unappealed finding, that the employee sustained a Gillette injury on March 8, 1998. The judge further found the employee first knew or should have known that he sustained a Gillette injury when he received Dr. Fox's April 29, 1999 report. The judge concluded the employer was, therefore, given timely notice on May 10, 1999 with service of the employee's claim petition.

It is well established that the time in which to give notice does *not* begin to run from the time there exists a medical opinion on causation, but rather from the time the employee has sufficient information from any source to cause a reasonable person to believe the condition might be work-related. Jones v. Thermo King, 461 N.W.2d 915, 43 W.C.D. 458 (Minn. 1990); Bloese v. Twin City Etching, Inc., 3l6 N.W.2d 568, 34 W.C.D. 49l (Minn. 1982). The employee testified he hurt his low back on about March 8, 1998, attributing the injury to shoveling snow at work. He further testified he told his supervisors about the injury that same day. On March 8, he received medical care from Dr. Ebbers for severe low back pain. The doctor took the employee off work that day, and the employee remained off work until March 23, 1998. Thus, as of March 8, 1998, the employee had reason to know the flare-up of his low back pain was related to his work. He also knew this flare-up had caused an inability to work and had required medical care. Accordingly, by March 8, 1998, the employee knew or should have known the nature, seriousness and probable compensability of his low back injury.

That the compensation judge found the employee sustained a Gillette injury rather than a specific injury on March 8, 1998 does not change the analysis of the notice issue. We recognize the employee may not have been aware that his work activities over the years with

Fullerton contributed to his disability. That is, the employee may not have known that he sustained a "Gillette injury." However, an accurate understanding of the underlying circumstances leading to an injury is not necessarily determinative relative to whether timely notice of an injury has been given. Mehle v. Oglebay Norton Taconite Co., 57 W.C.D. 336 (W.C.C.A. 1997). Rather, the question is whether, and at what point in time, the employee was aware he had suffered a compensable injury. Here, the evidence establishes the employee knew or had reason to know by March 8, 1998 that the flare-up of his low back pain and symptoms was likely related to his work activities. We, therefore, reverse the compensation judge's findings regarding notice (findings 10 and 11).

The compensation judge made no finding determining whether the employee gave notice of his low back flare-up or the 1998 snow shoveling incident to his supervisors on about March 8, 1998, as alleged. We, accordingly, remand the case to the compensation judge to make findings regarding whether the employer had timely notice as required by Minn. Stat. § 176.141.