SCOTT A. PIERCE, Employee/Cross-Appellant, v. MINN. MINING & MFG. and OLD REPUBLIC INS. CO./HELMSMAN MGMT. SERVS., INC., Employer-Insurer/Appellants, and KORTECH and MINN. FIRE & CAS. INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 18, 2001

No. [REDACTED SSN]

HEADNOTES

GILLETTE INJURY - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert opinion, supported the compensation judge's decision that the employee did not sustain an injury while employed by a subsequent employer.

EARNING CAPACITY - SUBSTANTIAL EVIDENCE. Where the judge erred in apparently denying part of the employee's temporary partial disability claim based solely on the absence of written restrictions, the matter would be remanded for reconsideration and further findings.

Affirmed in part, reversed in part, and remanded.

Determined by Wilson, J., Johnson, J., and Pederson, J.
Compensation Judge: Bernard Dinner.

OPINION

DEBRA A. WILSON, Judge

3M Company appeals from the judge's findings that the employee did not sustain a Gillette injury in 1998 or 1999 while employed by Kortech and that Kortech did not have notice of any such injury. The employee cross appeals from the judge's finding denying a portion of his temporary partial disability claim. We affirm in part, reverse in part, and remand.

BACKGROUND

The employee began working for 3M as a laborer in 1984. On November 22, 1989, he sustained an admitted work-related injury to his low back. As a result of that injury, the employee underwent an L5-S1 discectomy on May 14, 1990, performed by Dr. Terence Gioe. On April 7, 1993, Dr. Gioe recommended permanent restrictions of no lifting more than thirty-five pounds and no repetitive bending or twisting activities. When his low back pain continued, the employee began treatment with Dr. John Dowdle on May 21, 1993. When first seen by Dr. Dowdle, the employee reported that sitting, prolonged standing, bending, and lifting all increased his pain. On June 16, 1993, Dr. Dowdle performed a lumbar laminectomy and disc excision at L5-S1. The employee continued to complain of low back and leg pain thereafter, but, by December 22, 1993, Dr. Dowdle had released the employee to work without restrictions,

although he rated the employee as having an 11% whole body impairment as a result of the back injury.[1]

The employee returned to Dr. Dowdle on September 5, 1997, at which time x-rays revealed substantial disc degeneration at the L5-S1 level. On October 3, 1997, the employee was seen for an exacerbation of back pain and leg pain, which had come on without any "specific inciting event." Dr. Dowdle performed an anterior lumbar interbody fusion at L4-5 and L5-S1 with BAK instrumentation on November 21, 1997. Dr. Dowdle released the employee to job search on February 18, 1998, restricted from lifting more than twenty pounds, repetitive bending, and prolonged single position activities. In March of 1998, the employee was laid off by 3M, but he began employment with Kortech Consulting on April 1, 1998, performing virtually the same work he had performed at 3M. Dr. Dowdle's notes for April 1, 1998, reflect that the employee was working four hours a day at that time and that the doctor was allowing him to increase to eight hours within his remaining restrictions.[2] The doctor's notes for April 23, 1998, reflect that the employee was "doing reasonably well," and a June 10, 1998, office note reflects the employee was having some stiffness in the morning but "overall he is doing well."

The employee went to Dr. Timothy Garvey on December 21, 1998, seeking a second opinion regarding ongoing low back and leg pain following the fusion surgery. He stated that activity caused him to experience increased symptoms. It was Dr. Garvey's opinion that the employee had a pseudoarthrosis at L4-5, and he recommended additional diagnostic testing. When the employee returned to Dr. Garvey on March 1, 1999, the doctor opined that a posterior exploration of the fusion would be reasonable. The employee filed a medical request on May 24, 1999, seeking to change doctors from Dr. Dowdle to Dr. Garvey. 3M filed an objection.

The employee was seen by independent medical examiner Dr. John Sherman on July 13, 1999. Dr. Sherman concurred with the "plans as outlined by Drs. Garvey and Dowdle," but noted that, "[i]rrespective of the approach adopted, Mr. Pierce will continue with significant restrictions, essentially those under which he is presently employed."

The employee returned to see Dr. Dowdle on August 18, 1999, in response to a findings and order filed August 6, 1999, denying the employee's request to change doctors until the employee had conferred again with Dr. Dowdle. Dr. Dowdle indicated that he needed to review the treatment and testing that had been done since he had seen the employee last. When the employee returned to Dr. Dowdle on September 14, 1999, the doctor noted some residual motion at the L4-5 level and recommended a facet fusion at that level. Dr. Dowdle also indicated that the employee could continue working, "as tolerated," pending surgery.

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[1] At hearing the employee's counsel alleged that on May 6, 1998, Dr. Dowdle "gave [the employee] a rating of 22.5 percent." No such rating was included in the exhibits admitted into evidence, although counsel for Kortech acknowledged that the employee had such a rating as a result of the 1989 injury.

[2] Dr. Dowdle also notes a restriction of no repetitive lifting on this date.

When the employee returned to Dr. Garvey on November 29, 1999, Dr. Garvey reiterated that the employee had a surgical option available to him. The doctor also noted that the employee could continue "with his current light duty status." A Return To Work form completed that day indicated "no change physical restrictions" and that the employee was able to work with restrictions. When the employee returned to Dr. Garvey on December 27, 1999, the doctor noted that the employee could not tolerate eight hours of work per day, and he restricted the employee to four hours per day. Dr. Garvey continued the restriction on hours thereafter.

In January of 2000, the employee filed a claim petition, seeking temporary partial disability benefits continuing from December 15, 1999, as a result of the 1989 injury at 3M.[3] He was subsequently examined by independent medical examiner Dr. Stephen Barron on March 15, 2000, and, in his report of that date, Dr. Barron diagnosed the employee as having "postoperative multiple failed surgeries." Dr. Barron also opined that the employee had sustained a Gillette-type[4] injury to his low back on December 21, 1998, and that 70% of the responsibility for his medical care and treatment was related to the 1989 injury and 30% to the 1998 injury. Dr. Barron also opined that the employee "is not temporarily partially disabled from the work activities he presently performs."

3M apparently paid temporary partial disability benefits to the employee from April 2, 2000, through June 30, 2000, but filed a notice of intention to discontinue based on Dr. Barron's report. The employee prevailed at a subsequent administrative conference. On May 25, 2000, the employee filed an amended claim petition, adding Kortech as a potentially liable employer and December 21, 1998, as a date of injury. On September 21, 2000, 3M filed a petition to discontinue workers' compensation benefits and a petition for contribution and/or reimbursement against Kortech. The claim petition, petition to discontinue, and petition for contribution and/or reimbursement were subsequently consolidated for hearing.

On September 21, 2000, Kortech had the employee examined by independent medical examiner Dr. David Boxall. In a report of the date, Dr. Boxall diagnosed, in part, "[s]tatus post BAK fusion, L4-5 and L5-S1 November 21, 1997 with no change in symptoms postoperatively." Dr. Boxall also opined that, based on the employee's history, the employee had sustained a Gillette injury to the lumbar spine in November of 1999 "manifested by an increase in low back and right leg complaints necessitating his move to part time employment . . . ."

The case proceeded to hearing on October 26, 2000, at which time the employee was not claiming a Gillette injury against Kortech but was claiming temporary partial disability benefits continuing from April 4, 1998, as a result of the 1989 injury with 3M. 3M withdrew its petition for contribution and/or reimbursement at hearing but requested a determination as to apportionment. In a decision filed on January 18, 2001, a compensation judge found, in part, that 3M did not prove that the employee had sustained a Gillette injury while in the employ of Kortech, that Kortech did not have notice or knowledge of the claimed injury, and that the employee did

[3] The employee also sustained a March 1, 1995, work injury to the cervical spine that is not the subject of this appeal.

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

not prove that he was temporarily partially disabled from April 4, 1998, to December 27, 1999. 3M appeals and the employee cross appeals.

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. Gillette Injury

3M contends that the "weight of the medical evidence in this case strongly supports the finding of a Gillette-type injury," going on to detail how the records of Dr. Dowdle, Dr. Barron and Dr. Boxall all support a finding of a Gillette injury and how the employee's pre-hearing deposition clearly established a relationship between his work activities at Kortech and an increase in his symptoms. The function of this court on appeal, however, is not to determine whether the evidence will support an alternative finding but whether the findings are supported "by evidence that a reasonable mind might accept as adequate." Hengemuhle, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239. We find that substantial evidence does support the judge's finding.

The employee testified at hearing to a pattern of brief relief after each of his surgeries, followed by a gradual recurrence of symptoms. He further testified that, after the November 21, 1997, surgery, he felt good for about two to three months but that as he increased his activities his symptoms gradually returned. While the employee testified that certain work activities at Kortech caused an increase in his pain, he also testified that the pain would flare up on weekends when he was not working, sometimes "for no reason at all" or from "just stepping wrong, sleeping wrong, twisting wrong, just daily routine things it will flare up." The employee also testified that he did not think he sustained a new injury at Kortech.

In his letter of October 25, 2000, Dr. Garvey stated that the employee's symptoms were related to the lumbar fusion that he had for his 1989 work injury and that "at present does not appear to have new pathology that is causing him symptoms. As such, I do not believe that he has a new injury and that his current symptoms relate back to his original work-related injury of 1989."

A judge's choice between expert opinions is generally upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). 3M contends that Dr. Garvey's opinion is not supported by the evidence because Dr. Garvey did not discuss any specifics regarding the employee's work at Kortech, because Dr. Garvey ignored his notation from December 21, 1998, that activity caused an increase in the employee's symptoms and because, contrary to Dr. Garvey's statement, there was new pathology, specifically a failed arthrodesis. We are not persuaded.

First, the absence of a specific description of the employee's work activities at Kortech does not render Dr. Garvey's opinions unsupported by the evidence. Second, while the December 21, 1998, notation in Dr. Garvey's records states that activity caused an increase in the employee's symptoms, the employee testified that all activity, including activity away from work, caused such an increase. Finally, Dr. Garvey's comment that there is no new pathology is not unsupported in the record. When Dr. Garvey first saw the employee on December 21, 1998, he suspected a failed arthrodesis, and the history he took from the employee was that his symptoms returned three months after the 1997 surgery. That would place the employee as having symptoms consistent with a failed arthrodesis in February of 1998, months before he began work for Kortech. Accordingly, we find that the testimony of the employee and the records and opinions of Dr. Garvey provide substantial evidence to support the judge's finding that the employee did not sustain a Gillette injury while employed by Kortech.

2. Notice

This issue is rendered moot by our affirmance of the judge's finding regarding a Gillette injury. We note, however, that it is difficult to follow 3M's argument that Kortech knew or should have known about the employee's Gillette injury when the employee himself testified that he did not think he had sustained a Gillette injury.

3. Temporary Partial Disability Benefits

The employee contends that the compensation judge erred when he awarded temporary partial disability benefits only after December 27, 1999, because there were no written restrictions prior to that date. We agree that basing the denial of temporary partial disability benefits solely on the absence of written restrictions was error.[5]

The compensation judge found that the employee had not proven by a preponderance of the evidence that he was temporarily partially disabled as a result of the effects of the personal injury from April 4, 1998, to December 27, 1999, but that the employee was temporarily partially disabled from and after December 27, 1999. At Finding 18 the compensation judge detailed the December 27, 1999, restriction that Dr. Garvey had placed on the number of hours that the employee could work. The only further explanation for his findings on temporary

[5]We note that on February 18, 1998, Dr. Dowdle restricted the employee to twenty pounds of lifting and no bending or prolonged single positions. There is no evidence that this doctor ever removed those restrictions and on September 14, 1999, Dr. Dowdle opined that the employee should "continue as tolerated @work pending surgery."

partial disability is set out in the first sentence of the judge's memorandum, in which he states that "[t]he employee has ongoing restrictions as opined by various physicians; and temporary partial disability has been awarded from and after December 27, 1999 when Dr. Garvey, [the] employee's subsequent physician, set forth specific restrictions." This court has held that specific written restrictions are not a prerequisite to a finding of temporary partial disability. Flaten v. Kohl's, slip op. (W.C.C.A. Mar. 19, 1998); Nelson v. Northern Milk Prods., slip op. (W.C.C.A. Dec. 11, 1998); Carlson v. Northland Paper Supply, slip op. (W.C.C.A. Jan. 8, 1999). To the extent the compensation judge denied temporary partial disability benefits from April 4, 1998, to December 27, 1999, based solely on the lack of written restrictions, that decision is reversed.

An injured employee demonstrates entitlement to temporary partial disability benefits by showing that he has sustained an actual loss of earning capacity that is causally related to a disability resulting from the work injury. Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976).[6] Once a disabled employee returns to work, his actual wages are generally presumed to be representative of his post-injury earning capacity. French v. Minn. Cash Register, 341 N.W.2d 290, 36 W.C.D. 385 (Minn. 1983). This presumption may be rebutted with evidence indicating the employee's ability to earn is greater than the post-injury wage. Einberger v. 3M Co., 41 W.C.D. 727 (W.C.C.A. 1989). Earning capacity is a question of fact to be determined by a compensation judge. Noll v. Ceco Corp., 42 W.C.D. 553 (W.C.C.A. 1989). We therefore remand for reconsideration of the issue of whether the employee was entitled to temporary partial disability benefits from April 4, 1998, to December 27, 1999, based on the existing record, and for an explanation by the judge as to his credibility determinations (if any) and the evidence relied upon in making the findings. Our decision here should not be read as dictating any particular result on remand.

[6] 3M appears to contend, in part, that there was no reduction in earning capacity because the employee did not have sustained and consistent time loss from work until November of 1999.