

NO. A11-834

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State of Minnesota
In Supreme Court

Karl L. Anderson,
Employee/ Respondent,
vs.

Frontier Communications,
Employer/ Relator,
and

American Casualty Company of Reading, PA,
Insurer/ Relator.

EMPLOYER/INSURER RELATORS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF ISSUES

ISSUE

- I. Is there substantial evidence to support the Compensation Judge's factual finding that the Employee knew at least by the July 4, 2007 low back fusion surgery date, that there was a work related connection between his low back condition and that the Employee failed to provide statutory notice within 180 days of that knowledge as required by Minn. Stat. Sec. 176.141?

In the Decision and Order served and filed on April 11, 2011, the Minnesota Workers' Compensation Court of Appeals held that there was not substantial evidence and substituted its own findings for those of the Compensation Judge. Having substituted its own findings, the Workers' Compensation Court of Appeals reversed the Compensation Judge's determination that the Employee failed to provide timely notice as required by Minn. Stat. § 176.141.

STATEMENT OF THE CASE

This matter came on for hearing before the Honorable Jane Gordon Ertl, a workers' compensation judge, on June 3, 2010. Following the hearing, Judge Ertl's Findings and Order were served and filed on August 17, 2010. Judge Ertl, in pertinent part, made a factual determination that the Employee did not give timely notice to his employer even though he knew in his own mind after talking to Dr. Manuel Pinto on May 7, 2007 that his work aggravated or caused his low back condition. As a result of his low back condition, the Employee underwent fusion surgery on or about July 4, 2007. The parties stipulated that the Employee did not give notice to the Employer until May 13, 2009, nearly two (2) years after his first low back surgery.

Since the Employee failed to provide timely notice, as required by Minn. Stat. Sec. 176.141, Judge Ertl denied the Employee's workers' compensation claims in their entirety. The Employee timely appealed Judge Ertl's factual findings and order to the Minnesota Workers' Compensation Court of Appeals.

Oral argument was heard on January 24, 2011. In a decision served and filed on April 11, 2011, the Workers Compensation Court of Appeals substituted its own factual findings regarding when the Employee knew that his low back condition was related to his vigorous work activities. Based on its substituted factual findings, the Workers Compensation Court of Appeals reversed Judge Ertl's decision and awarded the Employee workers' compensation benefits.

The Employer and Insurer timely appealed the April 11, 2011 decision of the

Workers' Compensation Court of Appeals.

STATEMENT OF FACTS

Karl Anderson, hereinafter "Employee," was 55 years old at the time of the workers compensation hearing. The Employee lived and worked in the Wheaton, Minnesota area, which is approximately 60 miles west of Alexandria, Minnesota. The Employee is a high school graduate. In addition, he has some technical training. The Employee's prior employment includes construction, truck driving, sales, and production line work. Further, he also has been a musician for several years. [Findings and Order at 3].

The Employee worked for Frontier Communications, hereinafter "Employer," and its predecessors from 1985 at various locations around the country, including Texas and Michigan. The Employee transferred to Wheaton, Minnesota in 1992. The Employee worked with one other individual and together they covered a 600 to 700 square-mile territory. The Employee's job duties included marking cables, digging, driving, installing, and generally maintaining cable wiring and its equipment. This was a physical job. Id.

The Employee testified at length regarding the physical demands of the job. See Transcript (hereinafter "T") at 44-65. The job required the ability to: (1) work on ladders and bucket trucks as well as in confined spaces; (2) to lift up to 70 pounds; (3) work outside in extreme conditions including inclement weather; and (4) sit, stand, climb, walk on uneven terrain, and bend and stoop for extended periods on a regular basis. Id. See also Respondent's Exhibit 11.

The Employee's supervisor, John Flock, lived and worked out of Milaca,

Minnesota, approximately 150 miles away. [T-77]

The Employee had spondylolysis and spondylolisthesis with resultant degenerative disc changes. This type of condition occurs during the teenage years and is a pre-existing condition. Respondent Exh. 1 (Dr. John Dowdle IME report)

Around 2004/2005 the Employee's low back began to get progressively worse. Although the Employee did not seek formal medical attention during this period of time, he was nightly sitting on ice packs after work to "freeze his tailbone" so he "could sleep and make it to work the next day." [T. 68] This continued until March 2007. During this period, the Employee never told the Employer about his low back difficulties or that he thought it was related to his work activities. [T. 102]

In March 2007 the Employee sought medical care with Dr. Stanley Gallagher. In April 2007 the Employee was referred to Fergus Falls for epidural injections.

In the following testimony, the Employee acknowledges **he knew** as early as April 2007 and no later than July 4, 2007 that his work activities were aggravating or causing his low back difficulties.

Q. By April of '07 you knew that the work activities that you were doing at Frontier Communications were aggravating your low back, correct?

A. Correct.

Q. And by—and in any event you knew by July 4th of 2007 that the low back was aggravated by your work activities at Frontier Communications, correct?

A. Correct.

[T.100, Ln 21 – T.101, Ln 3]

On May 7, 2007 the Employee saw Dr. Manuel Pinto for the first time. [T. 68-71. See also Findings and Order at 3]. The Employee told Dr. Pinto about his work. The relevant history states:

The patient works for a telecommunication company and does a lot of physical labor including working up and down the telephone poles installing equipment. He sometimes lifts 50-60 pounds of weight. He is presently still working full time. The patient used to smoke two packs per day for about 20 years. However, he quit smoking one week ago.

The contemporaneous medical records do not record Dr. Pinto's comments to the Employee about causation. However, **the Employee acknowledges he knew there was a causal connection between his low back condition and his work activities after his discussion with Dr. Pinto in May 2007.**

Q. And in that conversation he asked you the type of work that you did, right?

A. Are you talking about the first time I saw him?

Q. Sure.

A. Okay, go on.

Q. All right. Did he – did he ask you what type of work you did?

A. Yes.

Q. And did you have a conversation with him about that work?

A. Yeah.

Q. And what did he – what did he tell you about that work?

A. Well, I told him it was a physical job and he said – he basically told me that well, we can fix your back and it needs to be taken care of.

Q. Okay. And after you had that conversation in May of '07 with Dr. Pinto –

A. Uh-huh.

Q. You knew that the work activities were causing your – were a cause of your low back problems or aggravating your low back problems, is that right?

A. Correct.

[T.104, Ln 12 – T.105 Ln 7]

See also [T.113, Ln 6-23] (assumed in April 2007 and as late as July 2007 that the work activities were causing or aggravating his low back problem.)

The Employee explained, in the following exchange, which in the first question starts with cross-examination from his prior deposition, **how he knew that his work activities were a cause of his low back difficulties.**

Q. [Answer:] Well, the more I thought about my back the more I realized it. And the question was when did you first realize it? And the answer was after I talked to Pinto. Did I read that testimony correctly?

A. Yeah.

Q. All right. And your testimony remains that you realized it after you talked to Pinto?

A. Well, after I saw the first x-rays and the MRIs and the results and how much damage was done to my back, and they explained that everytime (sic) I bent over that there was two and a half centimeters of travel in my spinal cord, I mean in my back, and that it was pinching my spinal cord, that's when I realized from all the stooping and bending that I'd been doing all these years that my discs were wore out and they had to be replaced.

Q. **And you knew that in May of '07?**

A. **That's when I – that's my own conclusion.**

Q. Thank you. No further questions.

[T. 115, Ln 11 – T. 116, Ln 3]

Dr. Pinto performed low back fusion surgery on July 4, 2007.
The parties stipulated that the Employer was given notice on May 13, 2009.

ARGUMENT

I. **Compensation Judge Jane Ertl made a factual finding that the Employee failed to give timely notice. The Workers' Compensation Court of Appeals cherry picked evidence in order to reverse Judge Ertl's factual findings. By substituting its own findings, the WCCA usurped Judge Ertl's role as fact finder and violated its proper role as an appellate court.**

A. EMPLOYEE FAILED TO GIVE TIMELY NOTICE

Minn. Stat. § 176.141, provides in relevant part:

Unless knowledge is obtained or written notice given within 180 days after the occurrence of the injury no compensation shall be allowed, except that an employee who is unable because of mental or physical incapacity, to give notice to the employer within 180 days from the injury, shall give the prescribed notice within 180 days from the date the incapacity ceases.

In the case at bar, there was no evidence submitted or claim made that the Employee was mentally or physically incapacitated. Accordingly, the Employee was required to give notice within 180 days after the occurrence of the injury. The Minnesota Supreme Court has interpreted and clarified this requirement. The time for giving written notice begins to run when the Employee, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury or disease. Issacson v. Minnetonka, Inc., 40 W.C.D. 270, 411 N.W. 2d 865 (Minn. 1987); Bloese v. Twin City Etching, Inc., 34 W.C.D. 491, 316 N.W. 2d 568, (Minn. 1982). The limitation period does not begin to run from the time there exists a medical opinion on causation, but rather from the time the Employee has sufficient notice from any source to put the

Employee on notice. Jones v. Thermo King, 43 W.C.D. 458, 461, 461 N.W. 2d 915, 917, (Minn. 1990).

The WCCA has, of course, addressed the notice requirement of Minn. Stat. § 176.141. In Beckmann v. Quebeco Printing, (Slip Op.) (WCCA June 9, 1997), the Workers' Compensation Court noted:

An additional requirement for proving a Gillette injury is "to establish that the employee gave notice to the employer when he was aware, by his own obvious experience or the opinion of a doctor that the work likely contributed to his problems and disability." Reese v. North Star Concrete, 38 W.C.D. 63, 65 (WCCA 1985), summarily aff'd (Minn. August 12, 1985); C. Arthur Larson, *The Law of Workers' Compensation*, Section 78.41 (f), "Notice period does not begin to run until the employee acting as a reasonable person, understands the nature and gravity of the injury and causal relationship to employment."

In Issacson, the employee began working for an employer as a light-duty assembler in 1979. In early January 1982, the employee began to notice right arm and shoulder pain. She did not report this to her employer until November 1982 (well past the 180-day requirement). The compensation judge made an implicit finding that the employee had sufficient information in January 1982 to trigger the 180-day requirement. Since the employee failed to give notice within 180 days of notice, the compensation judge denied the employee's claim for workers' compensation benefits.

The WCCA vacated the compensation judge's factual findings and substituted its own finding that the employee had met the statutory notice requirement. The Minnesota Supreme Court reversed the WCCA decision. The Minnesota Supreme Court noted the substantial evidence to support the compensation judge's findings which included the employee had shoulder pain; was advised not to work because of pain; and she returned

to work notwithstanding the advice. Id at 866.

In the case at bar, the Employee had low back pain. He had been sitting on ice packs for years after each day's work to lessen the pain and make him able to go to work the following day. The Employee and Dr. Pinto discussed the Employee's work activities on May 7, 2007. Although no causation opinion is found in the office note, the Employee testified as follows:

A. Well, after I saw the first x-rays and the MRIs and the results and how much damage was done to my back, and they explained that everytime (sic) I bent over that there was two and a half centimeters of travel in my spinal cord, I mean in my back, and that it was pinching my spinal cord, that's when I realized from all the stooping and bending that I'd been doing all these years that my discs were wore out and they had to be replaced.

Q. And you knew that in May of '07?

A. That's when I – that's my own conclusion.

Q. Thank you. No further questions.

[T. 115, Ln 11 – T. 116, Ln 3]

In addition, the Employee testified his back was worse at the end of a work day and it was progressively getting worse throughout each week. Finally, from March 2007 to July 2007, the pain was getting progressively worse as well.

[T. 70 through 71]

The parties stipulated the date of injury was July 4, 2007. The Employee had the first of several low back surgeries. The first surgery was a fusion surgery. The Employee was paid medical benefits from his health insurer and he also received short-term disability benefits. Later, he received long-term disability benefits. The Employee,

as a result of the surgery, would require significant time to recuperate. In fact, the Employee has never gone back to work since then. All of this provided substantial evidence to support the compensation judge's factual determination that the Employee knew or should have known at least by July 4, 2007 that his work activities aggravated or caused the low back problem. [Finding 15] The Employee should have notified the Employer. The Employee did not do so. The parties stipulated that notice was not given until May 13, 2009. The compensation judge's factual findings should have been affirmed. Hengemuhle v. Long Prairie Jaycees, 3. W.C.D. 235, 358 N.W. 2d 54 (1984). The WCCA's substituted factual findings should be reversed.

In Bloese, the compensation judge made factual findings the employee did not give proper notice or commence his case within the statutory period required by the statute at issue. In Bloese, the court found the employee began coughing by the end of her work day in February 1974. In May 1974, the employee requested a fellow worker obtain a list of the chemicals used at the employer's factory. She advised that although she was told by her doctor she should not work because her asthma, she continued to work at the employer. The employee asserted that although she was suspicious there was a relationship between her work and illness, "it just didn't ring a bell because even though my doctor said it was job related...I just never, we never thought too much about it." In 1979 the employee obtained an attorney and commenced a proceeding in April 1979.

The case is significant in that the Minnesota Supreme Court reversed the WCCA and reinstated the factual findings of the compensation judge. In doing so, the Minnesota

Supreme Court discussed that “knowledge” means that the employee is aware of sufficient information concerning the nature of an injury or illness, its seriousness, and its probable compensability to move a reasonable person to making inquiry concerning his rights. (*Emphasis added*) *Id.* at 571. It should be noted that Bloese is an occupational disease and a statute of limitations case. However, the Minnesota Supreme Court in Issacson noted in footnote 5 “that the underlining principles for excusing otherwise untimely notice are the same so the rules governing application of the principles should be the same.”

In the case at bar, a reasonable person would have made inquiry into his rights after thinking there was a connection between work in May 2007, undergoing a major surgery in July 2007, and knowing, leading up to that surgery, he would be out of work for a period of time in order to recover. At least a reasonable person, in this case Judge Ertl, could believe that a person would do so. In the case at bar, the Employee did not make an inquiry of his rights with the Employer. The Employee conceded he never told the Employer in 2007. Rather, the Employee waited until May 13, 2009. The WCCA decision must be reversed.

B. THE WORKERS’ COMPENSATION COURT OF APPEALS CHERRY PICKED THE FACTS TO SUPPORT ITS DECISION TO SUBSTITUTE FACTUAL FINDINGS. IN DOING SO THE WORKERS’ COMPENSATION COURT OF APPEALS USURPED THE FACT-FINDING ROLE OF JUDGE ERTL.

In Gibberd v. Control Data Corp., 424 N.W.2d 776 (Minn. 1988), the Minnesota Supreme Court gave a historical overview of the evolving authority of the WCCA to reject a compensation judge's factual findings and substitute its own. Before 1983, the

WCCA had little limitation on its ability to ignore the compensation judge's findings. It could "in essence, ignore those findings, and proceed to find the facts anew by giving little or no deference to the findings of the referee and compensation judges." Id at 779.

That changed in 1983. Minn. Stat. § 176.441, Subd. 1 was enacted. Regarding findings of fact, the WCCA must affirm the compensation judge's findings of fact if supported by substantial evidence. Although, Minn. Stat. § 176.441, Subd. 1 was repealed, the limitation on the WCCA's authority remains, in Minn. Stat. § 176.421, Subd. 1 and in case law. See Hengemuhle v. Long Prairie Jaycees, 3. W.C.D. 235, 358 N.W. 2d 54, 59-60 (Minn. 1984).

If more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Further, the WCCA is not to substitute its view of the evidence for that adopted by the compensation judge if the compensation judge's findings are support by evidence that a reasonable mind might except as adequate. Gibberd at 779 quoting Hengemuhle at 59-60.

If the WCCA substitutes its findings, the focus of the Minnesota Supreme Court "scrutiny of the record is on whether the WCCA's rejection of the compensation judge's findings and substitution of its own was clearly and manifestly erroneous in light of its duty not to reject those findings unless they are unsupported by substantial evidence." Id.

In Gibberd there was conflicting evidence in the testimony as to whether the employee's death was a random act of street violence or in any manner related to the employee's work. The employee was apparently killed while on a lunch break and away from the employer's premise. The compensation judge found there was no causal link

between the unfortunate death and the employee's work activities.

The WCCA disregarded that finding, and relying on cases that predate 1983, found the death was work-related even though in Gibberd there was no admitted evidence the employee was threatened because of his work or that the employee was in any way furthering the employer's interests while away from the employer's premise on the night he was killed. The Minnesota Supreme Court reversed the WCCA's substituted findings and reinstated those findings of the compensation judge. It noted the WCCA gave little or no deference to the unique finder of fact function of the compensation judge.

In the past, the Minnesota Supreme Court has had to remind the WCCA of its proper appellate role. See Krotzer v. Browning-Ferris/Woodlake Sanitation Service, 459 N.W. 2d 509 (Minn. 1990) at 512-513. In Krotzer, the Minnesota Supreme Court, once again reversing the WCCA's substituted findings, stated:

Repeatedly, we have admonished that where a compensation judge's findings are supported by evidence that a reasonable mind might accept as adequate, they should be left undisturbed. [Ruther v. Mankato State University, 459 N.W. 2d 475, 478 (Minn. 1990)] at 478; Schnider v. Schnider, 449 N.W. 2d 171, 173 (Minn. 1989); Tolzmann v. McHolmes-Knutson Associates, 447 N.W. 2d 196, 198 (Minn. 1989); and Redgate v. Standard Srogas Service, 421 N.W. 2d 721, 734 (Minn. 1988). But in this case, as in the four cases just cited, members of the reviewing panel elected "to make [their] own" evaluation of the credibility and probative value of witness testimony and to choose different inferences from the evidence than the compensation judge. This is not the Workers' Compensation Court of Appeals' role. Redgate, *Supra* at 734.

In the case at bar, the WCCA placed great weight on the Employee's statement that he thought he was "getting old." [T- 68]. Further, the WCCA placed great weight on the fact the May 7, 2007 office note does not contain a causation opinion.

The statement by the Employee that he thought he was just getting old and his statements he thought there was a work connection after discussing it with Dr. Pinto on May 7, 2007 are in conflict. Further, there is other evidence that is an apparent conflict with the “getting old” statement: (1) the Employee testified he was sitting on ice after each day of work so he could go back to work; (2) the Employee stated his job was very physically demanding and required extensive bending and stooping as well as lifting heavy weights and working in awkward places; (3) that the Employee’s back was getting worse after a day of work and after each week of work; and (4) the Employee’s back was getting progressively worse through the date of the surgery in July 2007.

At a minimum, the Employer and Insurer respectfully submit that in light of the contrary evidence cited above that more than one inference can be drawn from the evidence. The WCCA, by cherry picking the “getting old” testimony, minimized the contrary conflicting evidence cited above. In short, the WCCA reweighed the evidence, which is not its role. At a minimum it can be said the evidence cited above provides substantial evidence to support the compensation judge’s findings. Since the compensation judge was the finder of fact, her decision should have been affirmed. The WCCA’s decision should be reversed.

The WCCA also relied on the fact there was not a formal causation opinion contained in the May 7, 2007 office note of Dr. Pinto. First, there was no evidence submitted that the office note detailed everything that was said at the May 7, 2007 meeting with Dr. Pinto and the Employee. Second, the focus should not be on what is or is not contained in a medical record, but rather what the Employee knew on or after the

office visit.

All that is known is that the Employee, after that conversation, believed in his own mind there was a work-related connection. That is what he testified to! T 115, Ln 11 – T 116, Ln 3. Substantial evidence supports the compensation judge's factual findings. The WCCA's decision must be reversed.

The WCCA relies in significant part upon the decision of Fitzgerald v. Davidson Hotel (WCCA April 9, 1999) and Beckmann v. Quebeco Printing, (WCCA June 9, 1997) to support its decision.

First in Beckmann, the WCCA acknowledged that the standard of review was whether there was substantial evidence to support the compensation judge's decision that the employee did not have notice until he discussed the matter with his attorney. It was a fact question. The compensation judge's determination of that fact question was affirmed by the Court of Appeals. In the case at bar, the Employee's knowledge is still a fact question. The compensation judge's findings should likewise be affirmed.

Second, Beckmann does not stand for the proposition that an employee does not know the compensability of an injury until he talks with an attorney. Rather, it stands for the proposition that the 180-day notice period begins when the employee knows from **any source** that there is a causal connection between his injury and his work activities.

Third, Fitzgerald was a WCCA affirmance of the compensation judge's finding of fact. The court noted,

We acknowledge there is evidence which would support a conclusion different than that drawn by the compensation judge. On appeal, however, the issue is whether there is substantial evidence of record to support the

finding of the compensation judge.

The WCCA then proceeded to outline why there was substantial evidence to support the compensation judge's determination, even though there was contrary evidence. The compensation judge found that the employee knew of the work-related injury only after she spoke with her attorney. The WCCA affirmed the findings of the compensation judge, notwithstanding the contrary evidence.

In the case at bar, the Employee's candid responses under cross-examination as outlined in the Statement of Facts, provide substantial evidence upon which the compensation judge could determine that the Employee knew as early as April 2007 and no later than July 4, 2007 that his work activities were a cause or aggravating his low back condition.

In regard to the "getting old" comment, the compensation judge obviously discounted that statement and accepted contrary statements from the Employee about when and what he knew. Substantial evidence supports the compensation judge's determination regarding when the Employee knew of the causal link between his low back and work activities.

It is ironic that the WCCA cites these affirmance decisions in support of its decision in the case at bar. In Metters v. Northwest Airlines, (WCCA August 17, 2005), the court in rejecting the employee's arguments of the significance of the Beckmann and Fitzgerald decisions stated:

Further, in both cases, this court affirmed factual determination by the compensation judge and we have repeatedly observed that, under our standard of review, cases affirming a compensation judge on substantial evidence grounds

have limited presidential value Figgs v. Dungarvin Slip Op. (WCCA December 9, 2004). In addition, we have previously explicitly rejected the argument that employee's understanding of the legal concept of a Gillette is a necessary prerequisite to the knowledge that triggers the notice requirement. Cf. Flanagan v. Bellboy Corp, Slip. Op. (WCCA April 27, 1992).

In the case at bar, the Employee asserts he did not know of the work relatedness of his low back condition (notwithstanding his testimony to the contrary) until he received the reports of Dr. Pinto and Dr. Gallagher. What the Employee knew and when he knew it are fact questions. Just like in Issacson, Bloese, Jones, Fitzgerald and Beckmann, the compensation judge's resolution of those factual findings should have been affirmed rather than reversed.

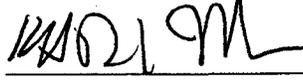
CONCLUSION

The Employer and Insurer respectively assert that once again this court is called upon to remind the WCCA of its proper appellate role. The evidence stated above, including the Employee's testimony regarding the condition of his low back, his thoughts following discussion with his doctor in May 2007, as well as the significant low back fusion surgery the Employee underwent in July 2007 provide substantial evidence for Judge Ertl's findings and order. Although the Employee and WCCA disagree with Judge Ertl's decision, it must be acknowledged that at a minimum a reasonable person could accept the aforementioned evidence as adequate proof of the Employee's knowledge. Judge Ertl's decision is based upon evidence that a reasonable person might accept as adequate. Accordingly, the WCCA's decision must be reversed. Hengemuhle, Gibberd, and Krotzer.

Dated: 6/3/11

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**STATE OF MINNESOTA
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CASE TITLE:

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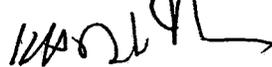
CERTIFICATION OF BRIEF
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NUMBER: WC10-5174

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 580 lines and 5,200 words. This brief was prepared using Microsoft Office Word 2003.

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