

NO. A11-834

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' REPLY BRIEF

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ARGUMENT

- A. THE 180-DAY NOTICE REQUIREMENT OF MINN. STAT. § 176.141 IS TRIGGERED WHEN A REASONABLE PERSON SHOULD RECOGNIZE THE NATURE, SERIOUSNESS, AND PROBABLE COMPENSABILITY OF THEIR INJURY. “PROBABLE COMPENSABILITY” IS A TERM OF ART. IT MEANS WHEN A REASONABLE PERSON SHOULD KNOW OF THE **PROBABLE CAUSAL CONNECTION** BETWEEN THEIR INJURY AND WORK ACTIVITIES. IT DOES NOT MEAN WHEN THE EMPLOYEE KNOWS OF THE POTENTIAL WORKERS COMPENSATION BENEFITS AVAILABLE.

JUDGE ERTL MADE A FACTUAL DETERMINATION THE EMPLOYEE KNEW OF THE CAUSAL CONNECTION NO LATER THEN JULY 4, 2007. JUDGE ERTL’S FINDING IS ENTITLED TO DEFERENCE. THE WCCA’S SUBSTITUTED FINDING, BASED ON CHERRY-PICKED TESTIMONY, MUST BE REVERSED.

The Employee, in the Respondent’s brief, argues that he did not know of the “probable compensability” of his back condition until after talking with his attorney in May 2009. This was nearly two years after the date of his July 4, 2007 low back fusion surgery, which the parties stipulated was the date of injury. “When employee knew or reasonably should have known a [] Gillette injury was causally related to his employment [] is a question of fact to be resolved by the compensation judge.” Swenson v. Cal Mech., 50 W.C.D. 1 at 13 (WCCA 1993). Judge Ertl’s factual determination that the Employee knew no later than July 4, 2007 is entitled to deference.

As stated above “probable compensability” is a term of art that means a reasonable person knew or should have know of the causal connection between the injury and their employment. In Swenson, the court cited the familiar notice test. In also articulated what it means.

Generally, in cases involving a latent injury, such as a Gillette injury, the notice period under Minn. Stat. Sec. 176.141 does not begin to run until the employee as a reasonable person should have recognized the nature, seriousness and probable compensability of the injury [Issacson v. Minnetonka, 411 N.W.2d 865 at 867, 40W.C.D. 270 at 274 (Minn. 1987)]. Accordingly, the 180-day notice period does not begin to run until the employee appreciates, or should have appreciated, not only the nature and gravity of his condition, **but also the probable casual relationship of the injury to his employment.**

There are many ways an employee can get knowledge of the probable causal connection.

In Gillette-type injuries an employee must, within 180 days, give “notice to the employer when he was aware, **by his own experience**, or the opinion of a doctor, that the work likely contributed to his problems and disability.” (Emphasis added)

Beckmann v. Quebeco Printing, (W.C.C.A. June 9, 1997) (quoting Reese v. North Star Concrete) (citation omitted). In Jones v. Thermo King, 461. N.W.2d 915, at 917 (Minn. 1990), the Court noted that the notice period begins when “the employee has sufficient notice from **any source**” to put the employee on notice (emphasis added). The level of knowledge an employee must have is sufficient information that would “move a reasonable person to make inquiry concerning his rights.” Bloese v. Twin City Etching, 316 N.W.2d 568 at 570 (Minn. 1982).

In the case at bar, the Employee concedes he knew as early as April 2007 and no later than July 4, 2007 that his work activities **caused or aggravated his low back**. Further, the Employee acknowledges he knew after talking with Dr. Pinto in May 2007 and after contemplating the work he had been doing for the Employer. See Relator’s brief at 5-7. See also, Transcript (T) at 110, Ln 21; T.101, Ln 3; T.104, Ln 12; T.105, Ln

7; T.113, Ln 1 - T.116, Ln 4. In short, the Employee knew of the work connection. Further, at a minimum, no later than July 4, 2007 he had sufficient information to move a reasonable person to “make inquiry concerning his rights”, based on his own experience and discussions with doctors.

The above citations provide the substantial evidence to support Judge Ertl’s factual findings regarding when the Employee knew or should have known. Judge Ertl, as the fact finder, was in the best position to judge the credibility of the witnesses and weigh the conflicting evidence the Employee gave. The Employee in the Respondent brief cites testimony he gave that conflicts with the testimony cited above. It was Judge Ertl’s role to sort out the conflicting testimony and decide when the Employee knew of the causal connection between the injury and his employment. Tolzman v. McCombs-Knutson Associates, 447 N.W.2d 196 (Minn. 1989). The WCCA’s substituted factual findings usurped her role as fact finder.

Even though the WCCA apparently would have found differently regarding the notice issue had it been the fact finder, Judge Ertl’s finding must be reinstated since they are supported by substantial evidence. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54 (Minn. 1954). See also Relator’s brief at 5-7. See also Transcript (T) at 110, ln 21 – T.101, Ln 3; T.104, Ln 12 – T.105, Ln 7; and T.113, Ln 1 – T.116, Ln 4. The WCCA has, in effect, reweighed the evidence. The WCCA placed great weight on the Employee’s statement that he felt he was getting old and minimized the Employee’s contradicting evidence cited above. On page 12 of the Respondent’s brief, the Employee cites a definition of the common term “cherry picking”. The Employer/Insurer

respectively asserts that the WCCA's actions by reweighing the evidence match the definition quoted.

The Employee alleges that he did not know what a Gillette injury was; however, "If the Employee knew or had reason to know that his [work activities were] making his back worse, it is irrelevant employee had no understanding of a Gillette injury as a legal concept." Flanagan v. Bellboy Corporation, et al, (W.C.C.A. April 27, 1992). Based on the evidence cited above, substantial evidence supports Judge Ertl's factual finding that the Employee knew that his work activities were making his back worse no later than July 4, 2007. The WCCA's substituted factual findings must be reversed.

B. JUDGE ERTL'S FACTUAL DETERMINATION THAT THE EMPLOYER DID NOT HAVE INQUIRY NOTICE IS SUPPORTED BY SUBTANTIAL EVIDENCE. NO EVIDENCE WAS SUBMITTED THAT THE EMPLOYER KNEW THE EMPLOYEE'S BACK CONDITION WAS RELATED TO HIS WORK ACTIVITIES. JUDGE ERTL'S FACTUAL FINDING MUST BE AFFIRMED.

The Employee argues that since he told his supervisor, Mr. John Flock, he was undergoing surgery the Employer had "inquiry notice" of the Employee's July 4, 2007 Gillette injury. This position is not supported by case law. Whether the facts known to the employer within the notice period following an injury are sufficient to constitute actual notice is a question of fact for determination by the compensation judge". Mulholland v. Carl Erickson Trucking, (W.C.C.A. 1998). Although the Employer had knowledge that the Employee was going to undergo back surgery, no evidence was presented to establish that the Employer knew the need for back surgery was related to

the Employee's work activities. Indeed, the Employee conceded he never told his supervisor even though he knew in his own mind no later than July 4, 2007 that it was!

The "doctrine of inquiry notice" is a part of the judicial definition of the statutory phrase "actual knowledge." Denais v. Minnesota Mining & Mfg. Co., (WCCA June 15, 2009). In Pojanowski v. Hart, 288 Minn. 77, 178 N.W.2d 913 (1970), the employee worked for a pharmacist. The employee stepped on a tack at work and punctured her foot. Unfortunately, she had complications including an infection, in part, because she was diabetic. Although the employee had prescriptions filled by her pharmacist employer and the pharmacist employer was aware of her condition, the employee never told the employer about the tack incident until after the notice period had expired. The employee argued since the employer was aware of the disability that was enough for purposes of the notice statute. The Minnesota Supreme Court disagreed. It held the employer must have knowledge of the alleged work connection of the disability. Accordingly, the Minnesota Supreme Court affirmed the commission's factual determination.

Likewise, in Issacson v. Minnetonka, 411 N.W.2d 865 at 867, 40W.C.D. 270 at 274 (Minn. 1987) the employer was aware the employee had a shoulder problem. However, the compensation judge found the employer did not have knowledge that there was an alleged work connection until told by the employee after the notice period had expired. The WCCA reversed the compensation judge's findings. The Minnesota Supreme reversed the WCCA's decision and reinstated the compensation judge's findings.

In the case at bar, the Employee's argument is essentially the same as the employees' arguments in Pojanowski and Issacson. The Employee argues that since the Employer knew he was receiving medical care and would undergo surgery, the Employer had inquiry notice. However, the Employee never told the Employer that he thought it was work related. Further, the Employee called no additional witnesses or submitted any additional evidence to establish the Employer knew the Employee's back condition was related to his employment. The Employee has the burden of establishing that the notice requirement has been met. Bedau v. David Herman Nursing Home, WCCA October 20, 1992. In the case at bar, the Employee did not meet that burden. Judge Ertl correctly found the Employer did not have inquiry notice.

The Employee relies on Mulholland v. Carl Erickson Trucking, (WCCA June 4, 1998) to support its position that the Employer, in the case at bar, had inquiry notice. The reliance is misplaced. In Mulholland the Court of Appeals noted "actual knowledge in this context is present where the employer has enough information to put a reasonable employer on inquiry as to whether a work injury has occurred. There must be more than the knowledge of medical symptoms, however, and 'an employer must have some information connecting work activity with [the] injury'." (*quoting Issacson*).

In Mulholland, inquiry notice was found because the **employee told the employer he had injured his shoulder at work, was medically off work for a time as a result, and informed his supervisor that his "right arm 'went out' while tarping the load and that he was going to have to see a doctor."** (Emphasis added) With this information, the Court of Appeals affirmed the lower court's finding that the employer

was aware of enough facts to warrant inquiry concerning whether the employee's work activities following the two prior right shoulder injuries were a substantial contributing factor in further aggravating the employee's condition by November 5, 1994. On that date, the employee asserted that a Gillette-type injury culminated.

In the case at bar, the Employee never told the Employer that in the years before 2007 he had been sitting on ice at night so that he could sleep through the night and work the next day. This was not a case in which the supervisor saw the Employee on a daily basis. John Flock lived and worked nearly two hours away in Milaca, Minnesota. In June 2007, the Employee only told John Flock that he was going to have low back surgery. That is not enough! The Employee states he knew as early as April 2007 and no later than July 4, 2007 that his work activities aggravated or caused his low back injury. Since the Employee knew, he should have notified the Employer. He did not do that. Accordingly his claims were appropriately denied by Judge Ertl.

CONCLUSION

The Employee knew of the “probable compensability” of his injury no later than July 4, 2007. The term means an employee knows or should know of a probable causal connection between the injury and their employment. The Employee’s own testimony provides the substantial evidence to support Judge Ertl’s factual findings. See Relator’s brief at 5-7. See also Transcript (T) at 110, ln 21 – T.101, Ln 3; T.104, Ln 12 – T.105, Ln 7; and T.113, Ln 1 – T.116, Ln 4.

The WCCA violated its appellate role and usurped Judge Ertl’s role as fact finder. Rather than giving deference, the WCCA reweighed the evidence to reach their desired result.

Because Judge Ertl’s factual findings are supported by substantial evidence, this court must reverse the WCCA and reinstate Judge Ertl’s findings and decision.

RESPECTFULLY SUBMITTED,

Dated: July 8, 2011

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CERTIFICATION OF BRIEF LENGTH

Frontier Communications

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and

American Casualty Company of Reading, PA

Insurer/Relator.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 186 lines and 2,031 words. This brief was prepared using Microsoft Office Word 2003.

Dated: July 8, 2011

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