

CASE NO. A11-834

STATE OF MINNESOTA
IN SUPREME COURT

Karl Anderson,

Employee-Respondent,

vs.

Frontier Communications,

Employer-Relator,

and

American Casualty Company of Reading, PA,

Insurer-Relator.

BRIEF AND APPENDIX OF KARL ANDERSON, EMPLOYEE-RESPONDENT

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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 THE LEGAL ISSUES

- I. DID THE TRIAL COURT COMMIT MISTAKES OF FACT IN DETERMINING THAT MR. ANDERSON AS A REASONABLE PERSON KNEW HE HAD A COMPENSABLE WORK-RELATED INJURY IN EITHER APRIL OR JULY 2007.**

Workers' Compensation Court of Appeals Held:

Substantial evidence did not support the Trial Court's conclusion that Mr. Anderson failed to give timely notice of his work-related low back Gillette-type injury and thereby reversed the Trial Court's denial of workers' compensation benefits.

- II. DID THE TRIAL COURT COMMIT AN ERROR OF LAW BASED ON THE TRIAL COURT'S ERRONEOUS APPLICATION OF THE LAW RELATING TO NOTICE PROVISIONS IN A GILLETTE-TYPE INJURY.**

Workers' Compensation Court of Appeals Held:

The Trial Court erred in finding a failure to give timely notice of the Gillette-type injury.

- III. DID THE TRIAL COURT ERR IN FINDING THAT THIS EMPLOYER WAS NOT ON INQUIRY NOTICE BASED ON THE NUMBER OF YEARS WORKED BY THE INJURED WORKER AND THE KNOWN PHYSICAL DEMANDS OF THE INJURED WORKER'S POSITION.**

Workers' Compensation Court of Appeals:

Did not reach this alternative issue.

STATEMENT OF THE CASE

Mr. Anderson worked for Frontier Communication from 1987 as a telephone line technician. He claims that he sustained a Gillette-type injury in the nature of a low back spondylolisthesis and degenerative disc disease culminating in disability on July 4, 2007. On that date, Frontier Communication was insured by CNA Insurance Company. The parties stipulated that Mr. Anderson's average weekly wage on the date of culmination was sufficient to entitle Mr. Anderson to the maximum permanent total disability rate.

On June 10, 2009, Mr. Anderson served a Claim Petition asserting that he sustained a Gillette-type work injury culminating in disability on July 4, 2007, while employed at Frontier Communication. Mr. Anderson claimed entitlement to temporary total disability benefits from and after July 4, 2007, and a rehabilitation consultation and services as necessary. The employer and its workers' compensation insurance company timely filed an Answer denying Mr. Anderson sustained a Gillette-type injury and asserting lack of timely notice as an affirmative defense.

On May 7, 2010, Mr. Anderson amended his Claim Petition to alternatively claim permanent total disability benefits from and after July 5, 2007, based on the vocational report of Jan Lowe dated May 3, 2010.

On June 3, 2010, the Honorable Jane Gordon Ertl conducted a hearing on the merits with testimony from Mr. Anderson and Angela Hubrig. On August 17, 2010, the Compensation Judge served and filed the Findings and Order. The Compensation Judge found that Mr. Anderson had met his burden of proof that he sustained a Gillette-type injury to his low back culminating in disability on July 4, 2007. In addition, the Compensation Judge found that Mr. Anderson has been permanently and totally disabled since July 5, 2007. However, the Trial

Court denied Mr. Anderson's claim on the basis that he failed to provide timely notice to the employer and its insurer.

On September 13, 2010, Mr. Anderson timely appealed to the Workers' Compensation Court of Appeals on the sole issue of whether the employer had timely notice of the claimed Gillette injury. On April 11, 2011, the Workers' Compensation Court of Appeals issued its Decision reversing the Compensation Judge's determination. The employer and its insurer timely appealed to this esteemed Court.

STATEMENT OF FACTS

Mr. Anderson, a 55-year old man, is a high school graduate. Post-high school, he attended but did not complete a 9-month technical program for welding. Other than high school and the incomplete welding program, Mr. Anderson has no other formal education. [Unappealed Finding 1; T.36]

Mr. Anderson's past work experience includes working in heavy construction in the mining industry as a janitor; side dump operator; grader; railroad fireman and railroad engineer. He also worked in the past as a construction laborer; a production worker for Gould Batteries; a hardware store stock person; sales and as a guitar player. [Unappealed Finding 1; T.37-40]

Mr. Anderson began with a predecessor of Frontier Communication in 1985 in Texas. At that time, he was a contract worker doing telephone cable installation and repair. In 1987, he was hired by Frontier Communication in Michigan as a telephone line technician. From 1987 until July 2008, Mr. Anderson was a union member. In 1992, Frontier transferred Mr. Anderson to Wheaton, Minnesota, where he worked until July 4, 2007. [T.41-43; Unappealed Finding 2]

At the Wheaton location, Frontier Communication employs two employees. One is the inside person and the other is the technician working outside the office. Mr. Anderson worked

full-time with regular overtime three or four days per week. As he was the only repair technician, he was essentially on call 24-7. The geographical area that Mr. Anderson performed his job duties was a 6700 square mile area in west central Minnesota. He drove a 1-ton bucket truck that had a 36-foot reach and regularly used ladders, shovels and large rolls of telephone cable and fiber optic cable.

The physical work required by Mr. Anderson varied from day to day but involved digging dirt, carrying cable, repairing buried cable, laying emergency cable, bending, stooping, walking on uneven ground, crawling, pulling cable, crouching and lifting on a regular basis between 80 and 100 pounds. [Unappealed Finding 2; T.47-61]

At the time Mr. Anderson began working in Wheaton, Minnesota; he had no restrictions on his physical activity and had no prior low back complaints or medical treatment. [T.46; Unappealed Finding 3]

On July 30, 1996, Mr. Anderson sought medical treatment for a low back strain brought on when he experienced symptoms when getting out of his truck. Treatment was provided by his family physician at the Wheaton Community Clinic. He received injections of Demerol which resolved the low back pain. On June 29, 1998, Mr. Anderson again felt low back symptoms when getting out of his truck and sought medical treatment and again receiving a shot of Demerol. [Unappealed Findings 3 and 4; T.65-67]

In 2004 and 2005, Mr. Anderson's low back symptoms progressively worsened. Mr. Anderson was asked if he sought medical care in 2004 or 2005 for these symptoms that were progressing. Mr. Anderson denied seeking any medical treatment for these increasing low back symptoms between 2004 and early 2007. When asked why, Mr. Anderson stated "I just figured I was getting old." [T.67-68]

By March 2007, the low back pain had increased to the point where he was icing his back nightly in order to sleep. He then sought medical care with Dr. Stanley Gallagher, his family doctor for low back pain and hand/wrist pain. Dr. Gallagher took an x-ray which revealed degenerative changes of the low back. Dr. Gallagher following the examination and x-ray results attributed the hand/wrist and low back symptoms to degenerative changes. [T.68; Ex. I; Unappealed Finding 5]

Dr. Gallagher referred Mr. Anderson for an epidural steroid injection with Dr. Orandi in Fergus Falls. [T.69] When the low back symptoms did not resolve, Dr. Gallagher referred Mr. Anderson to Manuel Pinto, M.D. at the Twin Cities Spine Center who first saw Mr. Anderson on May 8, 2007. Between March 2007 when Mr. Anderson first sought medical treatment and July 4, 2007, he received medical treatment from three doctors, Dr. Gallagher; Dr. Orandi; and Dr. Pinto. None of these doctors provided work restrictions related to his back condition to Mr. Anderson during this 4-month period of time. Mr. Anderson continued to work without restrictions doing his full-duty position until July 4, 2007. [T.70; Unappealed Finding 5]

Mr. Anderson testified that his pain symptoms would worsen over a work day and over a work week. [T.70-71] Mr. Anderson was asked:

Q: Were there things that made your back pain worse?

A: Just about everything I did made my back worse.

Q: Okay. What do you mean everything you did?

A: Well, I was a pretty physical guy. I mean I like sports and, you know, I like to fish, and I like to golf, and one by one those things just kind of fell by the wayside." [T.71]

Dr. Pinto, on May 8, 2007, diagnosed a Grade 2 spondylolisthesis at L5-S1; spinal stenosis at L5-S1; and degenerative disc disease at L4-5 and L5-S1. Dr. Pinto scheduled Mr.

Anderson for surgery on July 6, 2007, consisting of an anterior discectomy and fusion at L4-5 and L5-S1 with instrumentation and a posterior lateral fusion at L4-5 and L5-S1. [Unappealed Finding 6; Ex. J]

In April and May of 2007, Mr. Anderson reported his back pain and the time off required for medical appointments to his supervisor, John Flock, who was officed in St. Cloud. In addition, Mr. Anderson told Mr. Flock, in early June 2007 regarding the planned low back surgery. [T.77-78]

Following the first surgery on July 6, 2007, Mr. Anderson experienced excruciating pain and a revision surgery was done on July 12, 2007, due to recurrent L5 radiculopathy. [Unappealed Finding 6; Ex. L] On February 15, 2008, one additional surgery was done to remove the pedicle screws and reinsert one of the support rods. [Unappealed Finding 6; Exs. J and L]

Mr. Anderson had short-term disability benefits through the Prudential which provided 100% of his salary for the first ninety days post-disability. He then had a policy of long-term disability which provided for 65% of his earnings on a monthly basis. These benefits were paid to Mr. Anderson. The long-term disability policy required Mr. Anderson to apply for social security disability benefits. [T. 76] Mr. Anderson was found permanently and totally disabled by the Social Security Administration and benefits were awarded. [Ex P]

When Mr. Anderson received his social security disability award, a lump sum was awarded for the 12 month period before the date of his application. The Prudential, who provided the short and long-term disability benefits to Mr. Anderson, claimed entitlement to 100% of this lump sum back payment of SSDI benefits. [Ex. D] Mr. Anderson sought legal counsel regarding Prudential's claim for reimbursement in early 2009. [Ex. P, T. 78-79]

Between the date of the first surgery and this consultation with an attorney in early 2009, Mr. Anderson did not know about the concept of a Gillette injury and no medical doctor had correlated the physical work demands of his job over the years with either the cause of; the permanent aggravation of; or a substantial acceleration of his low back arthritic condition. [Unappealed Finding 14] Immediately following this legal consultation and explanation of Gillette-type injuries, Mr. Anderson discussed the relationship of his job duties and his low back condition with Dr. Gallagher. Dr. Gallagher provided a report dated May 8, 2009, indicating that the minute repetitive trauma over many years as a telephone line technician was a definite substantial contributing factor to the acceleration of his pre-existing back problem. [Ex. I]

On May 26, 2009, Dr. Pinto, responding to a request for his medical opinion on causation from Mr. Anderson's attorney, issued his report finding that the repetitive minute trauma over the many years of employment as a line technician was a substantial contributing cause to the permanent aggravation and substantial acceleration of Mr. Anderson's pre-existing low back degenerative condition. [Ex. G]

Mr. Anderson provided a copy of Dr. Gallagher's opinion letter dated May 8, 2009 to his attorney on May 13, 2009. On that same date by certified mail, the employer was provided notice of Mr. Anderson's low back work-related condition. [T.20; Ex. R]

The employer sent Dr. Pinto a letter dated July 7, 2008, providing Dr. Pinto with a written job description. The written job description was developed on January 1, 2005, and details the physical demands of Mr. Anderson's position. [Ex. 11] In the employer's letter to Dr. Pinto dated July 7, 2008 from Cheri Brix, Senior Human Resources Manager, she indicates "that the position he filled in the past is a physically demanding one." [Ex. 11] Dr. Pinto responded on July 10, 2008 to Ms. Brix indicating that at that time, Mr. Anderson had not recovered

sufficiently enough to return to his pre-injury physically demanding job but that he may be able to do it at some point in the future. [Ex. 13] Mr. Anderson was then terminated by Frontier as he had not returned to work within one year which was company policy. [Ex. 11]

As part of this workers compensation litigation, Mr. Anderson provided statutory notice to his health insurer, Anthem Blue Cross and Blue Shield, of its right to intervene. Anthem responded via facsimile that it does not intervene in workers' compensation cases when the plan is self-funded and that both the workers' compensation medical benefits and the health insurance benefits come out of the same account for Mr. Anderson. [Ex. D] Because the claims were handled out of the health insurance portion of the account, Mr. Anderson was required to pay a deductible and twenty (20) percent of each bill plus his own mileage expenses totaling \$7,459.45. [Ex. M]

Following the claim for workers' compensation benefits, Mr. Anderson was referred to Dr. John Dowdle for an adverse medical examination. Dr. Dowdle concluded that Mr. Anderson had a pre-existing degenerative condition of his low back that originated as a teen from a developmental condition. Dr. Dowdle was of the opinion that the work activities Mr. Anderson did over many years for this employer did not cause, aggravate or accelerate this pre-existing degenerative low back condition. [Ex. 1]

No medical doctor before May 7, 2009 told Mr. Anderson that the low back condition was related to his work. When specifically asked regarding his back pain, Mr. Anderson testified as follows:

Q: In that 5-6 year period of time before March 2007, your back pain would be present when you were active?

A: It hurt all the time.

Q: And it hurt when you were on... when you were inactive, correct?

A: Correct.

Q: It didn't matter what you were doing when you had back pain all the time, correct?

A: Well, it progressively got worse through the day, and by the end of the day I was sitting on the ice box. [T. 110]

When asked about any discussions with Dr. Pinto, Mr. Anderson testified:

A: I don't remember any conversation with Dr. Pinto on what was the direct cause.

Q: And I think on direct examination you thought it was arthritis?

A: Yea.

Q: That was going on in your body?

A: I figured I was just getting old. [T.112]

A vocational report was submitted from Jan Lowe to the Court. Ms. Lowe concluded that Mr. Anderson is permanently and totally disabled from sustained gainful employment. [Ex. F] The adverse vocational report indicated that it was premature to determine whether Mr. Anderson could return to sustained gainful employment. [Ex. 9] Dr. Dowdle opined that Mr. Anderson was unable to physically tolerate sustained gainful employment. [Ex. 1]

The Compensation Judge found that Mr. Anderson had sustained a Gillette-type injury in the nature of a permanent aggravation and acceleration of his pre-existing low back condition. The Compensation Judge found that Mr. Anderson was permanently and totally disabled from all jobs in his labor market. However, the Compensation Judge found that Mr. Anderson did not give timely notice and that the employer was not on inquiry notice at the time Mr. Anderson left work to undergo surgery on July 5, 2007. Mr. Anderson timely appealed. On April 11, 2011, following oral argument on January 4, 2011, the Workers' Compensation Court of Appeals issued its decision reversing the Trial Court. The employer/insurer then appealed to this Court.

LEGAL ARGUMENT

I. THE WORKERS' COMPENSATION COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT AS THE TRIAL COURT COMMITTED MISTAKES OF FACT IN DETERMINING THAT MR. ANDERSON AS A REASONABLE PERSON KNEW HE HAD A COMPENSABLE WORK-RELATED INJURY IN EITHER APRIL OR JULY 2007.

A. Standard of Review.

The Workers' Compensation Court of Appeals must determine whether "the Finding 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 NW2d 54, 59, 37 WCD 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 WCD at 240. Similarly, 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." Northern States Power Co. v. Lyon Food Products, Inc., 304 Minn. 196, 201, 229 NW2d 521, 524 (1975).

B. The Workers' Compensation Court of Appeals correctly found that substantial evidence did not support the Trial Court's determination on lack of timely notice under the facts of Mr. Anderson's case.

The duty of an employee to inform an employer of a work-related injury is complicated in a Gillette-type case. Over the years, multiple rulings regarding the date of injury in a Gillette injury has further increased the complexity of the notice issue in a workers' compensation claim. The date of disablement is many times a hotly contested fact question when multiple employers

are involved. Compensation Judges and the workers' compensation attorneys deal with such concepts as repetitive minute trauma, substantial contributing cause of the disability, substantial contributing cause of an aggravation of a pre-existing condition and substantial acceleration of a pre-existing condition. However, for the average worker, especially those in blue-collar occupations, these are all foreign terms and concepts.

Professor Larson, who is deemed to be one of the most learned scholars as it relates to workers' compensation issues, indicates that:

The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease. 3A. Larson, *The Law of Workers' Compensation* §78.41 (1976).

Each of the terms within that definition must be understood for the proper analysis of whether an injured worker gave timely notice. Certainly, Mr. Anderson as a reasonable man recognized the seriousness of his low back condition when he asked for leave to undergo surgery. He understood at the time he requested leave that the nature of his condition was an arthritic, degenerative low back condition. However, absolutely no evidence existed that Mr. Anderson knew of the compensable character of his condition.

Mr. Anderson worked for this employer for over twenty years doing heavy physical labor. However, he worked essentially alone and without co-workers. His daily activities involved working from his truck repairing and installing telephone lines and fiber optic cables. His only other co-employee was an office employee whom Mr. Anderson saw only in the morning when Mr. Anderson stopped by the shop and picked up his work assignments. Mr. Anderson for twenty years did not have the advantage of seeing or hearing about any other co-employees who experienced workers' compensation claims for which he would have some

knowledge of Gillette-type injuries or a relationship between the many years of heavy physical labor and his low back condition.

Mr. Anderson also has a limited education. He has a high school diploma and less than nine months of vocational technical training as a welder. No evidence exists that he studied the law or had any medical knowledge that would somehow put him as a reasonable person in a position to ask whether or not the twenty years of heavy physical labor substantially accelerated the degenerative process in his low back or permanently aggravated that condition. These concepts were not known to Mr. Anderson until he sought legal counsel on his long term disability policy in early 2009.

It is undisputed that Mr. Anderson did not know what a Gillette injury was until he consulted with the undersigned in early 2009. The Trial Court placed much emphasis on the testimony of Mr. Anderson that he was aware that the work activity aggravated his low back condition. Mr. Anderson's testimony as it relates to his low back symptoms was that any physical activity aggravated his condition. He testified that he was a physical person actively participating in such activities as golfing, playing hockey and fishing. He further testified that as his symptoms increased with these activities, he one by one stopped doing them. Unfortunately, he could not stop working as he was his sole support and had financial support obligations for his sons although he knew that he was worse at the end of the day and worse at the end of a week from his responsibilities at work. However, that does not in and of itself mean that he knew it was a *compensable* work-related injury.

A fair review of Mr. Anderson's testimony is that he believed the cause of his low back problem was his advancing age and the degenerative arthritis that developed. Certainly, all of the medical records from March 2007 to the present confirm that he, in fact, has a multiple level

degenerative low back condition. He is 55 years old. He testified he figured he was just getting old and that was the “cause” of his back condition. None of the medical records in 2007 from his treating doctors document any discussions with Mr. Anderson about his job duties and the interrelationship that may exist so as to provide Mr. Anderson with the requisite medical causation needed to provide notice to his employer. In fact, none of his three treating doctors placed any physical restrictions on his work activities between March of 2007 and July of 2007 when he was taken off work for surgery. Certainly, if any one of the three doctors had discussed his work duties with Mr. Anderson between March and July of 2007, any one of them may have placed restrictions on him. All of these records discuss his progressive degenerative low back condition. This further establishes that Mr. Anderson did not have the requisite knowledge not only of what a Gillette-type injury is but also that his arthritic back condition could be a *compensable work-related* injury.

To frame the question in the manner the Trial Court did was to put Mr. Anderson in a non-winnable position. In order to establish a Gillette-type injury, the injured worker must establish that the overall work activities were either the cause of; the permanent aggravation of; or a substantial acceleration of a pre-existing condition. Therefore, to establish a Gillette injury, an injured worker must be able to honestly testify that the symptoms increased over a day of work or over a week of work and that the symptoms were becoming increasingly worse.

Mr. Anderson testified honestly. He testified that his symptoms did increase over the course of a work day and over the course of a week. However, he also testified that all activity and even inactivity was making his low back symptoms increase. He believed he was just getting old. Absolutely no evidence exists that Mr. Anderson had any reason to know that this

increase of symptoms regardless of what physical activity he was doing whether at work or not was a *compensable* work injury as required by the notice provisions.

The knowledge that he may have had a *compensable work-related* injury did not occur until he met with his legal counsel in April 2009. Mr. Anderson had no knowledge that this was a Gillette-type injury or that it may be compensable until this consultation. Immediately after receiving that knowledge, Mr. Anderson spoke with his treating doctor, Dr. Gallagher, who issued a written report provided the medical causation link. Mr. Anderson then immediately provided that information to his attorney and notice was served on the same day.

The employer and insurer assert that the Workers' Compensation Court of Appeals engaged in "cherry picking" and erred by substituting its factfinding for that of the Trial Court's. "Cherry picking" is not a legal concept. The following definition of that term found on wiseGEEK web page is as follows:

Cherry picking has a few different definitions, but it is most often thought of as the process of selecting a small amount of information or data to attempt to prove a point, while ignoring contradicting information. When cherry picking information, a person may end up with a faulty theory or position on a topic because all relevant information was not considered. A person might cherry pick information either on purpose or inadvertently, such as when a person might inadvertently only look at data that is easy to find, presenting a false impression. The term is more commonly used with someone who purposefully ignores contradicting information, however.

The term *cherry picking* likely originates with the process of picking fruit from a tree. When picking a type of fruit, such as cherries, a person might search for only the best cherries, such as those that are the healthiest. By only picking the best cherries, another person who sees the harvest might make the incorrect assumption that all cherries on the tree are as healthy. In another application of the term, a person might only select the cherries that are easiest to reach, regardless of quality. By ignoring healthier cherries higher in the tree, the person might end up with an unripe or diseased batch of cherries that doesn't present the correct picture of the quality of the tree's fruit.

Assuming this definition, it appears to be the argument of the employer/insurer that the Court of Appeals gleaned certain facts from the record and ignored others in reversing the Trial Court. The defect in this assertion is that all of the facts considered by the Court of Appeals were facts

specifically found by the Trial Court. For example, the Trial Court found that Mr. Anderson did not know what a Gillette-injury was until consulting with an attorney in 2009; that none of Mr. Anderson's doctors placed restrictions on his job duties before his last date of work; that his medical doctors diagnosed his condition as degenerative disc disease; and that all physical activities he did after 2005 increased his symptoms.

A fair review of the entire record as evidenced by the detailed decision of the Workers' Compensation Court of Appeals reveals that absolutely no evidence, must less substantial evidence, supported the Trial Court's decision regarding untimely notice. Mere knowledge by Mr. Anderson that all physical activities increased his low back symptoms including his work activities appears to be the basis of the Trial Court's finding on notice. This does not constitute substantial evidence and therefore, the Workers' Compensation Court of Appeals correctly reversed the Trial Court.

II. THE WORKERS' COMPENSATION COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT BASED ON THE TRIAL COURT'S ERRONEOUS APPLICATION OF THE LAW TO THE UNDISPUTED FACTS.

A. Standard of Review.

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which the Appellate Court may consider *de novo*. Krovchuk v. Koch Oil Refinery, 48 WCD 607, 608 (WCCA 1993).

B. The Trial Court applied an erroneous legal standard in determining that Mr. Anderson failed to provide timely notice.

The case law clearly establishes that an injured worker does not need to understand the concept of a Gillette injury in order to have the requisite knowledge to place that injured worker on a duty to give notice of a work injury. The key word in this analysis of whether timely notice was given in this case is the word *compensable*. When did Mr. Anderson know he may have had

a compensable work-related injury? Certainly, he knew that the work activity, just as his physical activities outside of work, aggravated his low back. However, he did not have any knowledge that it may be a *compensable* work-related injury until he spoke with an attorney in early 2009.

These facts are almost identical to the facts in Beckmann v. Quebecor Printing, *slip op* (WCCA 6/9/97). Mr. Beckmann worked in a physically strenuous job between 1965 and June of 1993. Mr. Beckmann had two specific work injuries: one to his low back in 1962 and another in 1991 to his head, low back, neck, and shoulders. In the mid-80's, Mr. Beckmann began noticing increased pain in his hips and low back. The doctors told Mr. Beckmann that it was arthritis and did not provide sufficient information to Mr. Beckmann that a Gillette-type injury may have occurred. Mr. Beckmann had bilateral hip replacement surgeries in 1993. He then returned to work until May 16, 1994 when he underwent neck fusion. Mr. Beckmann testified that the work activities aggravated his conditions but did not know about the concepts of substantial permanent aggravation/acceleration of underlying degenerative conditions. He did not know about these concepts and the probable *compensable* nature of the conditions until he met with an attorney. Following a consultation with an attorney in October of 1994, the notice time period for Mr. Beckmann then began running. Mr. Beckmann's attorney notified his employer on November 8, 1994. The Workers' Compensation Court of Appeals affirmed a finding of timely notice. The Court first outlined the legal standard:

Minn. Stat. §176.141 provides: 'Unless knowledge is obtained or written notice given within 180 days after the occurrence of the injury, no compensation shall be allowed.' Written notice of injury is unnecessary where the employer has actual knowledge. Ogren v. City of Duluth, 219 Minn. 555, 557, 18 NW2d 535, 537, 13 WCD 352, 355 (1945). 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. Northstar Concrete, 38 WCD 63, 65 (WCCA 1985) summarily aff'd (Minn. 8/12/85); see Arthur Larson, *The Law of Workers' Compensation*, §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." *Id.* at 14.

The Workers' Compensation Court of Appeals then went on to apply the facts of Mr.

Beckmann's case to this legal standard for timely notice in a Gillette-type claim:

The employee did testify that he recalled having increased pain at the end of a day's work or sometimes at the end of a week's work. However, the employee indicated he was never sure his physical problems were from work or old age. . . The employee testified his doctors only told him that he had arthritis and no doctor or any other party informed him that he had a work-related injury. He had no understanding that his physical complaints could be work-related until he consulted his present attorney in October of 1994...

The compensation judge reasonable rejected the employer and insurer's position and determined, under the facts herein, that the employee provided the employer and insurer with adequate notice of his claimed work-related injuries when he, as a reasonable person, became aware that his work activities more than likely contributed to or aggravated his physical problems and his hips and spine condition. *Id.* at 15.

In Fitzgerald v. Davidson Motel, *slip op* (WCCA 4/9/99), the Workers' Compensation Court of Appeals again addressed notice in a Gillette-type claim where the work activities aggravated a pre-existing degenerative condition. Ms. Fitzgerald had an admitted low back injury in January 1985 while working as a nurse's aide after which she also received some chiropractic care for neck pain. On September 27, 1996, Ms. Fitzgerald began working as a line cook for the Davidson Hotel. Ms. Fitzgerald testified that the work demands as a line cook requiring lifting and bending aggravated her neck condition. In November 1996, x-rays were taken of her neck which revealed degenerative changes. She missed some time from work and began having radicular symptoms in March 1997. At that time she actually told Dr. Long that she thought work aggravated her neck. On July 17, 1997, she underwent neck surgery with Dr.

William Kane. In a follow-up medical appointment with Dr. Kane, a discussion occurred regarding whether this may be a work-related condition. Dr. Kane recommended that she consult with an attorney. She met with an attorney on August 18, 1997, and on the following day, provided a written notice to her employer of the injuries which may be work-related. The WCCA affirmed a finding of timely notice stating:

Granted, the employee knew her work activities aggravated her neck symptoms within a few weeks of beginning work for the employer. She also knew by February 1997 that her symptoms had gotten worse. Nor is there any dispute the employee told Dr. Hosko and the doctors at Ramsey Clinic that work increased her neck symptoms. (Pet. Ex. D, F) ***Such knowledge is not, however, equivalent to knowledge that the employee had a probable compensable claim against the employer for a Gillette-type injury.***

In Svenson v. Kalmac, Inc., 50 WCD 1 (1993), a case which involved multiple employers pointing the finger at each other, the Court found that despite the injured worker having had multiple admitted work-related Gillette injuries to his knee, the notice time period began running at the time when the adverse doctor said that the work with a subsequent employer further aggravated the knee condition. In the present case, Mr. Anderson was never told by a doctor that he had a Gillette-type injury or that the work activity aggravated his pre-existing degenerative condition until 2009 when those physicians were specifically asked that question.

In the Trial Court's Memorandum, the Court relied heavily on the case of Dickenson v. Minnesota Vikings Football Club, *slip op.*, (WCCA 9/9/08) in explaining the rationale for finding a lack of timely notice. The facts of Dickenson are exactly opposite from the facts in the present case. Mr. Dickenson played defensive tackle for the Vikings from 1961 to 1971 and had at least six specific work injuries that were reported involving his neck, low back, mid-back, and left knee but continued to play football. In 1971, Mr. Dickenson was traded and only played part of the 1972 season for another NFL team. He then worked in computer sales full time until age 64

and then part time until age 70. Medical treatment for his claimed Gillette-type injuries began in 1981. He consulted with two different attorneys regarding these injuries in 1985 and 1992. On October 18, 1996, he retained a workers' compensation attorney who referred Mr. Dickenson to Dr. Robert Wengler for an independent medical evaluation. Dr. Wengler issued his April 29, 1998 report concluding that Mr. Dickenson had Gillette-type injuries culminating in disability on his last day of employment with the Vikings in 1971. Another report was issued by Dr. Wengler on December 22, 2000. However, no notice was provided to the Vikings until the Claim Petition was filed on December 26, 2002. The Trial Court found, and the Workers' Compensation Court of Appeals affirmed, that Mr. Dickenson knew before December of 1996 that he may have had sustained compensable work-related injuries. By December of 1996, Mr. Dickenson had consulted with three attorneys. Even after a medical opinion letter in April of 1998, Mr. Dickenson did not give notice until over four years later. Those facts are not remotely similar to the present claim where Mr. Anderson first learned on the probable compensable nature of low back condition when meeting with his attorney for the first time in April of 2009 and then immediately consulting with his family doctor who promptly issued a causation report. This medical causation report was timely served on the employer.

The evidence based on Mr. Anderson's credible testimony establishes that the Trial Court was clearly erroneous in determining that Mr. Anderson had, as a reasonable person, enough knowledge in April or July 2007 to know that he had a *compensable* work-related injury. Mr. Anderson did not know about the concept of a Gillette injury and certainly provided ample testimony regarding his understanding that he was getting old and that his back was just wearing out in the form of arthritis. Absolutely no testimony rebutting this fact was provided and none of the contemporaneous medical records provide any evidence on medical causation other than

degenerative disc disease. This knowledge does not equate to knowledge that he had a *compensable* work injury. Therefore, the trial court erred as a matter of law by imposing an incorrect notice standard in a Gillette-type claim when the court concluded that because Mr. Anderson knew that the work aggravated his low back symptoms, he also knew that he may have a *compensable* work injury. This constitutes reversible error by the Trial Court. Therefore, the Workers' Compensation Court of Appeals properly reversed this notice finding.

III. THE TRIAL COURT COMMITTED MISTAKES OF FACT IN FINDING THAT THIS EMPLOYER DID NOT HAVE TIMELY INQUIRY NOTICE.

The Minnesota Workers' Compensation Act provides specific parameters for notice to an employer of a compensable work-related injury. The two policy reasons for having notice requirements in the law are: (1) protection is provided to the employer so it can do a prompt investigation of any injury which promotes safety for all employees; and (2) the employer can insure that an employee receives prompt medical attention and treatment to limit its future exposure for wage loss and medical benefits. See, e.g. Pojanowski v. Hart, 288 Minn. 77, 81, 178 NW2d 913, 916, 25 WCD 206, 209 (1970).

Two types of notice are recognized in Minnesota. An employer can have actual notice by an employee telling the employer within the timeframes of a traumatic injury, an occupational disease, or Gillette-type injury. The second type of notice is inquiry notice which is the responsibility of an employer to inquire whether or not a condition is work-related.

Inquiry notice is such information that would put a reasonable employer on inquiry that the disability is work-related. Green v. W&W Generator Builders, 27 WCD 654, 224 NW2d 157 (Minn. 1974).

In Mulholland v. Carl Erickson Trucking, *slip op* (WCCA 6/4/98), the WCCA indicated that, "An employer does not need to be provided with clear and convincing evidence of medical

causation, merely that the facts known to the employer be such as to reasonably suggest the possibility that a compensable injury may have occurred." In Mulholland, the employee was a truck driver who sustained a sudden stab of shoulder pain while getting into his truck on November 11, 1993. Following that short period of pain, he also had increases in his shoulder pain on February 3, 1994 and November 4, 1994, despite periods of time of complete resolution. The facts in this case show that the employer had an obligation to ask either the employee or a medical provider whether the condition was related to his repetitive work activity.

In Wold v. Walgreens Corp., *slip op* (WCCA 11/8/06), the WCCA affirmed the denial based on a Gillette notice defense. In the Wold case, the employee suspected that her work activities caused her neck symptoms as early as 2000. However, she did not provide notice until her Claim Petition was filed in 2004. This is not timely notice as the employee did not provide any reason to this employer to inquire whether the condition was work-related.

Many of the decisions quoted by the Trial Court in the Memorandum to the Findings and Order relate to specific work injuries rather than Gillette-type injuries. Given the nature of what a Gillette-type injury is, it is not always appropriate to use cases where specific injuries occurred. For example, in Rinne v. W.C. Griffs Co., 243 Minn. 146, 47 NW2d 872, 16 WCD 348 (1951), a worker jumped from a heavy equipment grader and landed on his back. His immediate supervisor saw him jump and land but Mr. Rinne did not complain of any symptoms on that date, October 5, 1948. Mr. Rinne was laid off for the season on November 16, 1948. He did not provide notice of this injury to the employer causing disability until January 24, 1949. The Court ruled in the Rinne case that just because the employer saw an event that may have caused injury, this is insufficient notice that an injury actually occurred. However, this is a specific injury rather than a Gillette-type injury.

By contrast, in Grapevine v. City of Worthington, 33 WCD 186, 302 NW2d (Minn. 1980), compensation benefits were awarded to a firefighter. The facts in that case supported a finding that the employer was on inquiry notice despite Mr. Grapevine never reporting in 1973 that his heart attack may have been related to the stress of his job as a firefighter. Mr. Grapevine was at a picnic when called to answer a fire alarm. However, he did not actually go to the fire as he was called off. That afternoon he had intense symptoms of a myocardial infarct at home. He did not tell his employer at that time that the myocardial infarct was as a result of the stress from his employment. However, two years later on July 28, 1975, Mr. Grapevine had a second heart attack. At that time, his medical doctor indicated that the second attack was caused by the first attack was due to the stress related to fire fighting. The Court ruled that this employer knew of the stresses of a firefighter and therefore were on inquiry notice of the relationship between the stress in 1973 and the myocardial infarct.

In the present case, it is undisputed that this employer knew of the physical demands of Mr. Anderson's position. Mr. Anderson testified that he told his direct supervisor of his increased back pain in March and April 2007, when he first sought medical treatment. Again in June 2007, Mr. Anderson informed his supervisor of the need for time off from work to undergo back surgery. This testimony was unrefuted by the employer in this case.

The documents in Exhibit 13 reveal that one year after Mr. Anderson was off work for back surgery, this employer wrote to Mr. Anderson's primary treating physician. In that letter, the employer admits that Mr. Anderson's position was physically strenuous. Frontier Communication is a very large national company and certainly understands the basic concept of a Gillette-type low back injury for its employees who are working extensive hours in physically demanding positions. In addition, the employer attached Mr. Anderson's written job description

to Dr. Pinto. This written job description was developed by the employer in 2005, two years before Mr. Anderson's symptoms increased to the point he sought medical care. Mr. Anderson told his employer at the time he sought treatment that he was seeking treatment for his low back condition. A reasonable employer had sufficient information at that point to inquire from either Mr. Anderson or his doctors whether the employee's work demands were a substantial, contributing factor in Mr. Anderson's low back condition.

When viewing the two basic purposes for the notice requirement, this employer had the protection of the notice requirement. No specific injury occurred while Mr. Anderson worked for Frontier Communication from 1987 for the next twenty years. No specific safety concerns are raised. The second purpose of the notice requirement is to allow an employer to assure that proper medical treatment is provided so that it can limit its future exposure to workers' compensation liability for this employee.

Frontier Communication's workers' compensation claims as well as their health insurance claims are self-funded programs. Frontier Communication can reduce its liability by denying workers' compensation claims and having its employees use health insurance and short and long-term disability rather than workers' compensation benefits. The Blue Cross/Blue Shield administrator admits that the medical treatment is covered either by workers' compensation or health insurance through the same account. If this case had been handled as a workers' compensation case, it would cost that account, just on the medical benefits, an additional \$7,459.45. This is the amount that Mr. Anderson paid out-of-pocket for his medical treatment when it is handled as a non-work-related condition. Therefore, this employer has an incentive to deny all workers' compensation claims and a disincentive to simply ask one of Mr. Anderson's doctors whether the low back condition may be a compensable work-related Gillette-type injury.

This is contrary to the stated purpose of the Minnesota Workers' Compensation Act which is to place the cost of workplace injuries on the employers rather than on the citizens of the State of Minnesota.

When taking all of the factors into consideration in this case, it is apparent that this employer had sufficient information to place it on a duty to inquire as early as March 2007 and certainly by July 2007 whether or not the twenty years of heavy physical labor as a telephone lineman was a substantial contributing cause of Mr. Anderson's need for low back surgery. The employer has offered no evidence that it is prejudiced by Mr. Anderson's inability to give notice before 2009 when he first found out that he may have sustained a compensable work-related Gillette-type injury. Therefore, the Compensation Judge erred in concluding that this employer did not have sufficient reasons to ask whether or not this was work-related in 2007.

CONCLUSION

The Workers' Compensation Court of Appeals properly reversed the Trial Court's conclusion that Mr. Anderson failed to give timely notice to his employer as substantial evidence does not exist to support that finding and because the Trial Court erred in its application of the notice provisions of the workers' compensation statute to the facts in Mr. Anderson's claims. Therefore, Mr. Anderson respectfully requests that the Workers' Compensation Court of Appeals decision be affirmed in all respects.

Dated: June 23, 2011

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01 and 3, for a brief produced with a proportional font in Times New Roman in Font Size 12 using the Microsoft Word application. It contains 616 lines of text.

Dated: June 23, 2011

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