

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the  
Appeal of Mary E. Oakley  
From the Decision of the  
Governing Committee of  
the Minnesota Automobile  
Assigned Claims Bureau.

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Howard L. Kai be I  
,  
Jr., an Administrative Law Judge from the Office of Administrative  
Hearings, on  
October 24, 1989 in St. Paul , Minnesota. The record closed December  
7, 1989,  
upon receipt of the last post-hearing brief.

Mary E. Oakley (hereinafter Appellant), P.O. Box 261, Solon  
Springs,  
Wisconsin 54873, appeared on her own behalf without benefit of  
counsel. James  
A. Stein, of Hessian, McKasy and Soderberg, P.A., 1010 Landmark Towers,  
345 St.  
Peter Street, St. Paul, Minnesota 55102, appeared on behalf of the  
Minnesota  
Automobile Assigned Claims Bureau.

This Report is a recommendation, not a final decision. The  
Commissioner  
of the Minnesota Department of Commerce will make the final decision  
after a  
review of the record which may adopt, reject or modify the Findings  
of Fact,  
Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat.  
14.61, the final decision of the Commissioner shall not be made  
until this  
Report has been made available to the parties to the proceeding for  
at least  
ten days. An opportunity must be afforded to each party adversely  
affected by  
this Report to file exceptions and present argument to the  
Commissioner.  
Parties should contact Michael A. Hatch, Commissioner, Minnesota  
Department of  
Commerce, 500 Metro Square Building, Seventh and Robert Streets,  
St. Paul,  
Minnesota 55101, to ascertain the procedure for filing exceptions or  
presenting  
argument.

STATEMENT OF ISSUE

Should the decision of the governing committee of the Minnesota Automobile Assigned Claims Bureau approving termination of Appellant's no-fault benefits by Illinois Farmers Insurance, Inc. be affirmed or reversed?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Appellant is a 38-year-old housewife and mother of four children (9, 10, 13 and 15) who also works part-time in their family-owned painting contracting business.

2. In 1972, Appellant first injured her neck in an automobile accident where she was a passenger in a trailer that was struck by a truck.

3. The injury was treated regularly for a year after the accident and once a month for the next seven years by Dr. Lang, a Superior, Wisconsin chiropractor.

4. In November of 1980, Appellant transferred to Dr. Steve Lund, another Superior chiropractor who treated her periodically until April 1985 for headaches and soreness in her neck and shoulder.

5. In 1984, Appellant was involved in a car accident where the car she was riding in struck a deer.

6. In April 1985, Appellant switched to Dr. Gary Johnson, a Duluth chiropractor, who has treated her headache and left shoulder problems since then.

7. Dr. Johnson discovered "a micro-evulsion of the pectoralis minor muscle" -- a partial tear of the muscle fibers -- causing the weakness and "nagging discomfort" in the left shoulder region. He treated the migraine headaches by adjusting the first and second cervical vertebrae, which gave her temporary relief from those symptoms. There was no neurological deficit at that time.

8. On July 3, 1986, Appellant was a passenger in a car that backed into a tree. The accident caused some minor temporary neck soreness.

9. In November or December of 1986, Appellant's car struck another deer on the roadway causing her some transient neck soreness after the collision.

10. On June 2, 1988, Appellant was a passenger in the right front seat of a car that stopped in traffic and was struck in the rear by another. The impact forced the car she was in to strike the vehicle in front of her.

11. Appellant was shaken but ambulatory after the accident, first noticing stiffness in the back of her neck about an hour later.

12. The day after the accident, the pain in her neck and upper back was severe, radiating through both shoulders into both arms and hands, particularly the central digits. She sought treatment from Dr. Johnson, who examined her and concluded that her new symptoms are due to a neurological deficit that "is entirely due to the June 2, 1988 accident."

13. Since the accident, the region of treatment has changed to the fifth and sixth cervical vertebrae because the shoulder girdle, arm and hand are mainly supplied by the nerve roots C5, C6, C7, C8 and T1.

14. Prior to the 1988 accident, the doctors did not impose any work restrictions. Appellant worked painting rooms including ceilings (where she had to bend her head back and work with her hands and arms above her head) during those years, earning \$11,845 to \$17,590 per year.

15. Since the 1988 accident, Dr. Johnson has advised her to avoid such physical activity which may prolong her healing time and/or aggravate her condition, requiring surgery.

16. Appellant's insurer at the time of the accident refused to cover her because she is a Wisconsin resident and her car never left her garage.

17. The car Appellant was riding in was insured by Wisconsin Mutual Insurance Company which does not write business in Minnesota and is not licensed here. It denies any liability because the accident happened in Duluth, Minnesota.

18. For some reason that is not clear in the record, American Family Insurance Company which covered the auto that rear-ended the one Appellant was riding in, has also refused to cover her losses.

19. Four and one-half months after the accident, on October 18, 1988, the Assigned Claims Bureau determined that Appellant had a valid application for assignment of an insurance company to cover her medical and wage losses. The Bureau assigned Illinois Farmers Insurance Company (hereinafter Farmers) to handle her claims.

20. Farmers investigated the accident and insurance details with the full cooperation and assistance of the Appellant, who supplied them with all her medical and wage loss records.

21. Farmers agreed to cover her medical bills, mileage and the \$250.00 per week statutory maximum for wage losses.

22. In a December 22, 1988 letter to American Family Insurance, Dr. Johnson recommended referring Appellant to an orthopedic M.D. if she had not improved 75% by the end of January, 1989.

23. Instead, on January 12, 1989, Farmers requested Appellant to see Dr. Sheldon Segal, a Duluth physician hired by the insurance company to perform an adverse physical examination on February 10, 1989.

24. The February 10 evaluation consisted of a 15-minute interview and a 10-minute physical examination. Based on this evaluation and a review of her x-rays, Dr. Segal wrote Farmers the same day concluding that:

Ms. Oakley is capable of performing light duty work and regular employment. . . . The healing period for the June 2, 1988 accident has ended. . . . My only treatment recommendation for Ms. Oakley would be to carry out a home exercise program related to her neck.

25. Based on Dr. Segal's report, Farmers notified Appellant that it would discontinue paying medical and wage loss benefits on the date of the notice, February 27, 1989.

26. Appellant appealed this discontinuance to the Assigned Claims Bureau's governing committee on March 1, 1989, which met and considered it on March 3, 1989. However, the Board informed Appellant on March 20 that it was delaying final action because it "obtained additional information as to the possible availability of insurance coverage for you relating to your injuries

27. Appellant's condition did not improve and she resumed seeing Dr. Johnson the week of March 20, without any assurance that insurance would cover the treatment costs.

28. In accord with his earlier recommendation, because Appellant's condition had not improved appreciably, Dr. Johnson referred her to Dr. Richard Freeman, M.D., at the Duluth Neuroscience Institute. Dr. Freeman first examined her on May 31, 1989, recommending EMG and MRI tests to pinpoint the problem.

29. The MRI scan on June 8, 1989, documented a C5, 6 disc herniation as the source of her pain and muscle weakness.

30. On July 10, 1989, the Assigned Claims Bureau notified Appellant that it had decided to uphold Illinois Farmers' determination to terminate benefits and that neither the Bureau nor Farmers would "incur the expense of obtaining any additional doctors' reports or evaluations at the present time."

31. Appellant appealed that decision to the Commissioner of Commerce who ordered this contested case hearing to gather the facts and recommend proper legal implementation of the no-fault law.

32. Appellant also continued to pursue her second medical opinion, potentially at her own expense, returning to Dr. Freeman on July 24, 1989, for his further evaluation based on her current condition and the MRI and EMG testing. He needed a functional capacities assessment to definitively prescribe limitations on physical activities during treatment, but concluded in the interim that:

Under the circumstances, she cannot function as a painter or in any capacity where she has to have a static flexion or extension of the head and neck.

33. Appellant continued to seek treatment of her symptoms on a more or less weekly basis from Dr. Johnson at a minimal (\$20 or \$32) charge during July and August.

34. Appellant returned to Dr. Freeman on September 11, 1989, for his advice based on the functional capacities assessment, which was performed by St. Luke's Hospital in Duluth on August 1, 1989.

35. Dr. Freeman specifically vetoed returning to work on September 11, 1989 and prescribed cervical traction, heat ultrasound and shoulder massage plus medication, administered by Dr. Johnson. He asked Appellant to return for reevaluation in four weeks.

36. The work restriction is echoed in a letter from Dr. Johnson on October 9, 1989 which advises that:

Her prognosis is guarded at this time. An accident such as this needs quite a long healing time.

37. Appellant concluded her referral visits with Dr. Freeman on October 9, 1989. He reiterated his September 11 prescriptions to remedy her cervical myofascial pain, which he concluded was caused by the June 2, 1988 accident:

From a historical viewpoint, her latest accident appears to be the coup de gras.

38. The Bureau concedes in its post-hearing memorandum that Farmers "should pay expenses relating to Dr. Freeman's analysis and for the MRI analysis requested by him." The Commissioner is consequently left with deciding whether to order reparations for:

(a) Dr. Freeman's non-MRI costs "relating to" his second-opinion, including appellant's visits, EMG and functional assessment capacities testing;

(b) Treatment by Dr. Johnson pending the outcome of Dr. Freeman's analysis and thereafter, in accord with his prescriptions; and

(c) Wage losses since termination of benefits on February 27, 1989.

39. Appellant has not documented what she could be earning as a nurse, if her disability did not prevent such employment. She has not actively sought such employment in the past and has not presented any substantial evidence of potentially foregone income from that occupation.

40. Appellant has documented her wage losses in the family business. She was capable of earning \$12,000 per year prior to the accident doing "hands-on" painting, which has since been proscribed by her doctors. Since the accident she has continued to answer phones and keep the books for this business at the rate established in joint tax returns since 1982 of \$5,500. Her wage losses consequently since termination of benefits by Illinois Farmers have been \$12,000 per year or \$230 per week.

Based upon the foregoing Findings of Fact, the Administrative  
Law Judge  
makes the following:

## CONCLUSIONS

1. That the Commerce Commissioner and the Administrative Law Judge duly acquired and now have jurisdiction pursuant to Minn. Stat. 14.50 and 65B.63, subd. 1.

2. That the order for hearing was proper in all respects and that the Commissioner of Commerce has fulfilled all other relevant substantive and procedural requirements of law and rule.

3. That Illinois Farmers is legally obligated to continue paying Appellant's assigned medical claims until:

(a) She recovers fully from the injuries; or

(b) the statutory limits on recoveries are exhausted; or

(c) its responsibility is terminated by the district court pursuant to Minn. Stat. 65B.45.

4. That Illinois Farmers is also legally obligated to reimburse Appellant's wage losses during this period of disability in the amount of \$230.00 per week.

5. That the above Conclusions are arrived at for the reasons set forth in the Memorandum which follows and which is incorporated into these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

## RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commerce Commissioner reverse the decision of the Governing Committee of the Assigned Claims Bureau terminating Appellant's benefits, ordering payment of claims in accord with the above Conclusions, plus statutory interest on accrued unpaid claims since February 27, 1989, pursuant to Minn. Stat. 65B.54, subd. 2.

Dated this                      day of December, 1989.

HOWARD L. KAIBEL JR  
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped.

MEMORANDUM

Counsel for the Claims Bureau stresses repeatedly that Appellant's symptoms are largely subjective. This is not a novel situation in cases of injuries such as those herein. As the Minnesota Court of Appeals noted in Ruppert v. Milwaukee Mutual Insurance Company, 392 N.W.2d 550 (1986):

Soft tissue injuries are difficult to substantiate with objective evidence. This does not mean such injuries are not real and do not require medical treatment.

In this case, the testimony of Appellant's physician and chiropractor is supported by the record and was not made improbable by any reasonable inferences which might be drawn from the record. Indeed, in this case the MRI scan ultimately disclosed the disc herniation precisely where Dr. Johnson predicted it would be, at C5 and 6. This location and the resulting symptoms are different from those treated prior to the June 1988 accident. Both doctors conclude that they are specifically caused by that accident.

The insurance company has had notice throughout of Claimant's "proposed specified procedure or treatment for rehabilitation" pursuant to Minn. Stat. 65B.45 and the appropriate way of objecting to such treatment in subdivision 3 is to bring an action for a determination that it is not responsible for the cost. Similarly, the statute also provides a procedure to deal with Appellant's refusal to undertake the home exercise recommended by Dr. Segal and rejected as premature by her doctors. It can move the district court under subdivision 4 of that section to reduce or terminate benefits. The court would then have to decide if the refusal was reasonable, considering:

All relevant factors, including the risks to the injured

persons, the extent of the probable benefit, the place where the procedure, treatment, or training is offered, the extent to which the procedure, treatment or training is recognized as standard and customary, and whether the imposition of sanctions because of the person's refusal would abridge the right to the free exercise of religion.

Minn. Stat. 65B.44, subd. 2 provides in part:

Medical expense benefits shall reimburse all reasonable expenses for necessary medical, surgical, xray, optical, dental, chiropractic, and rehabilitative services, including prosthetic devices, prescription drugs, necessary ambulance and all other reasonable transportation expenses incurred in traveling to receive covered medical benefits, hospital, extended care and nursing services. (Emphasis added).

Appellant has met her burden of showing that her claim is reasonable and necessary by more than a preponderance of the evidence.

Contrary to the unsubstantiated declaration in the Board's final brief, the injuries here are not ones which "ordinarily would heal within a few weeks time, and certainly within three months." Any cursory review of appellate decisions involving whiplash injuries of this nature would corroborate Dr. Johnson's opinion that such injuries frequently take a long time to heal. See, for example, Carl v. Pennington, 364 N.W.2d 455 (Minn. Ct. App. 1985); Ruppert v. Milwaukee Mutual Insurance Company, 392 N.W.2d 550 (Minn. Ct. App. 1986); and Rud v. Flood, 385 N.W.2d 357 (Minn. Ct. App. 1986). Ruppert is about as directly in point as a legal precedent can be, right down to the herniation at

C5, 6. Appellant there had three prior accidents and nine years of prior chiropractic treatment. There was explicit doctor testimony that the rear-end latest accident caused the injuries, which were very similar and required very similar recommended treatments, which in that case lasted four years. The appeals court took the somewhat unusual step of ruling the trial court findings and conclusions to be clearly erroneous, holding that:

The evidence only supports one conclusion, that Ruppert is entitled to receive the expenses she proved at trial in addition to the interest penalty provided for under Minn. Stat. 65B.54, subd. 2.

Anyone reading the Findings of Fact in the attached Report and the allegations regarding the record in the Board's final brief will wonder if both writers were talking about the same case. The Commissioner should be cautious

in accepting any of the allegations in that brief at face value, particularly those that are at odds with the Findings herein. Statements such as "no doctor has performed any tests whatsoever" to confirm her condition and "no doctor has confirmed that Ms. Oakley is unable to earn income as a result of the 1988 accident" are simply not true. This may be why the Board erred in denying the appeal in the first place. Tests confirming Appellant's condition were performed and two doctors have specifically directed Appellant not to return to her former employment, stating unequivocally that the restriction was a result of the accident.

The Board's final brief misconstrues Minn. Stat. 65B.44, subd. 3 in stressing the definition of inability to work as not being able to engage in "any" substantial gainful employment. The Commissioner is doubtless aware of the proper construction of the income loss benefit provisions of the no-fault Act which clearly requires compensation in precisely this situation. See, Chacos v. State Farm Mutual Automobile Insurance Company, 368 N.W.2d 343 at 346-47 (Minn. Ct. App. 1985) and Rindahl v. National Farmers Union Insurance Companies, 373 N.W.2d 294 (Minn. 1985). Allowing the claimant to engage in light duty work merely reduces benefits without removing eligibility. See i v. Transamerica Insurance Company, 412 N.W.2d 329 (Minn. Ct. App. 1987).

Prior to the accident, Appellant was able to earn \$12,000 a year painting homes and apartments in addition to the \$5,500 she was paid for answering phones and doing bookwork. She still does the paper work and phones, so this income must be deducted in computing her economic loss benefits:

Compensation for lost income shall be reduced by the income received while the injured person is actually able to work (Minn. Stat. 65B.44, subd. 3).

The income loss benefit weekly payments should consequently be reduced to \$230.00.

The only legal authority cited anywhere in the final briefs of counsel for the Board is Bregier v. National Family Insurance Company, 411 N.W.2d 892 (Minn. Ct. App. 1987). It is cited for the proposition that testimony of an insurer's doctor is a sufficient basis for denial of benefits. Closer review of the case indicates that the court held such testimony could be sufficient evidence to support a jury verdict, where "this court must view the evidence in the light most favorable to the jury verdict" at 896. This case does not involve review of a jury verdict and the opinions of the experts must be examined, resolving any contradictions. In this case Appellant's doctors' testimony is more credible, based on much more thorough evaluations and is

corroborated by the objective testing. see, Carl v. Pennington, supra. Another factor considered, which does not appear in the record, is the Administrative Law Judge's first-hand observation of the credibility of the Appellant -- based on 17 years experience observing and evaluating witness demeanor.

In summary, it is concluded that the injuries here are real, not faked. They are a direct result of the June 1988 accident. The treatment prescribed is, and has been, appropriate and legally compensable.

H.L.K., Jr.