ROBIN FITZGERALD, Employee, v. DAVIDSON HOTEL CO. d/b/a MINNEAPOLIS N. HILTON and AM. INT'L INS./FIREMAN'S FUND, Employer-Insurer/Appellants, and ALLINA HEALTH SYS. d/b/a MERCY HOSP., CTR. FOR DIAGNOSTIC IMAGING, MINN. DEP'T OF LABOR & INDUS./VRU, ST. MICHAEL CHIROPRACTIC CLINIC, BLUE CROSS & BLUE SHIELD of MINN., MINNEAPOLIS ORTHOPAEDIC & ARTHRITIS INST., and SUBURBAN RADIOLOGIC CONSULTANTS, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 9, 1999

No. [REDACTED SSN]

HEADNOTES

NOTICE OF INJURY - GILLETTE INJURY. Substantial evidence supports the compensation judge's finding that the employee gave timely notice of her February 10, 1997 Gillette-type neck injury on August 19, 1997, where the evidence supports the inference that it was not "reasonably apparent" to the employee that her work activities had resulted in a possible compensable disability until after consultation with an attorney at the recommendation of the employee's surgeon.

Affirmed.

Determined by Johnson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Peggy A. Brenden

OPINION

THOMAS L. JOHNSON, Judge

The Davidson Hotel Company d/b/a Minneapolis North Hilton and American International Insurance/Fireman's Fund, appeal the compensation judge's finding that the employee gave timely notice of her neck injury pursuant to Minn. Stat. § 176.141. We affirm.

BACKGROUND

Robin Fitzgerald, the employee, sustained an injury to her low back in January 1985 while working as a nursing assistant. In 1985, the employee also began experiencing cervical problems. She treated with a chiropractor for both her low back and neck. Periodically thereafter, the employee received chiropractic treatment for neck pain. The employee denied her neck pain affected her daily living, caused her to miss work or affected her ability to work. (T. 26-29.)

On September 27, 1996, the employee was hired by the Davidson Hotel Company

d/b/a Minneapolis North Hilton, the employer, insured by American International Insurance/Fireman's Fund. The employee worked as a line cook from 3 p.m. to midnight, five days a week. Her job required her to work in a standing position during most of her eight-hour shift. When she arrived at work, the employee assembled necessary pots, pans and utensils. She then put water on to boil, prepared potatoes, and collected meats and other food items. Once she completed stocking her line, the employee prepared foods such as soups, stocks, sauce, meat, fish, salad, vegetables and appetizers. In addition to cooking, the employee performed various cleaning tasks including scrubbing counter surfaces, cleaning the stove and the floor and changing oil in the deep fryer. The employee testified her job duties required her to look down quite a bit and use both arms in a repetitive fashion. (T. 38-56.) Within a couple of weeks after starting work for the employer, the employee began to experience neck problems. (T. 93.) She testified that lifting and bending at work aggravated her neck pain. (T. 60-61.)

On November 14, 1996, the employee saw Michael F. Hosko, D.C., complaining of neck pains, headaches and low back pain. She told the doctor her neck problems were aggravated by her work. (T. 97.) X-rays revealed severe degenerative disc disease at C6-7. On examination, Dr. Hosko noted the employee's cervical range of motion was restricted. Chiropractic treatment was initiated.

On January 22, 1997, the employee saw Dr. Jeffrey Nipper at Ramsey Medical Center complaining of left hip, low back and cervical spine pain. An x-ray of the cervical spine showed a C6-7 joint space loss without subluxation. The doctor's examination of the employee's cervical spine showed full and painless range of motion and his neurologic examination was normal. Dr. Nipper concluded the employee had a significant C6-7 degenerative process without radiculopathy and recommended anti-inflammatory medication.

The employee did not work from February 10 through February 23, 1997. She testified her neck pain had worsened by that time and she needed time off to see if it would help. The employee returned to work on or about February 24, 1997 and worked until March 2, 1997. By the next morning, the employee experienced significant neck pain which, for the first time, radiated into her right shoulder and arm. (T. 66-69.) She was seen on March 3, 1997 by Dr. Hosko complaining of radicular pain into the right arm. On examination, Dr. Hosko noted weakening of right grip strength, hypoactivity of the biceps and radiobrachialis reflex and a positive cervical foramina test. (Pet. Ex. C.)

The employee was seen by Dr. Long at Ramsey Clinic that same day, complaining of a stiff neck for the last few weeks now radiating into her right shoulder and arm with numbness in her fingers and hand. The employee told Dr. Long she thought her work aggravated her neck. The physical examination showed mild weakness and pain in the right upper arm. Dr. Long diagnosed neck pain syndrome consistent with a C6-7 radicular flare-up. The doctor took the employee off work and prescribed medication and physical therapy. On April 9, 1997, Dr. Long again examined the employee and diagnosed chronic hip pain syndrome and neck pain syndrome improving. The employee's cervical radicular symptoms were gone. Dr. Long found no clear cause for the employee's symptoms and recommended an orthopedic or neurologic evaluation.

On June 20, 1997, the employee returned to see Dr. Long for evaluation of her neck pain. The employee gave a history of ongoing symptoms for five or six months. The doctor ordered an MRI scan which showed a small to moderate central disc herniation at C4-5 and a moderate-sized right ventral disc herniation at C5-6 displacing the spinal cord dorsally and to the left. Dr. Long referred the employee to Dr. William Kane, an orthopedic surgeon, who saw the employee on July 10, 1997. The employee complained of right shoulder pain with occasional radiation into her right forearm. The doctor found a 40 percent loss of range of cervical motion and noted herniated discs at C4-5 and C5-6 based on the MRI scan report. Dr. Kane recommended fusion surgery. On July 17, 1997, Dr. Kane performed an anterior cervical discectomy and fusion at C4-5 and C5-6. The employee returned to see Dr. Kane on July 31, 1997. She and the doctor discussed "whether or not she is a candidate for a workers' comp claim and I've advised them to seek legal counsel on this particular matter." (Pet. Ex. F.) Following a period of recuperation, the employee was released to return to work on February 27, 1998, subject to certain physical restrictions.

The employee testified her neck symptoms progressively worsened after she went to work for the employer. (T. 85.) She did not stop working, however, because she needed the job. (T. 97-98.) Eventually, however, her neck pain became so severe she did not feel she could continue to work. (T. 98-99.) On or about March 2, 1997, the employee called Michelle Hintz in the Human Resources Department and requested a medical leave because of her neck problems. Ms. Hintz told the employee she did not qualify for a leave of absence. (T. 106.) The employee did not tell her supervisor she sustained an injury at work. (T. 103-105.) On August 18, 1997, the employee retained Thomas D. Mottaz to represent her. (Pet. Ex. M.) The employee gave the employer a handwritten note dated August 19, 1997 stating: "I feel that my neck injury, March 02, 1997 was work related and would like you to file a workers' compensation claim." (Pet. Ex. K.)

The employee filed a claim petition on October 17, 1997, alleging a Gillette injury as a result of her work activities with the employer. The case came on for hearing on October 21, 1998 before a compensation judge at the Office of Administrative Hearings. In unappealed findings, the compensation judge found the employee sustained a Gillette-type personal injury on February 10, 1997 and gave notice of the injury to the employer on August 19, 1997. The compensation judge further found the employee gave timely notice of her injury under Minn. Stat. § 176.141. The employer and insurer appeal this finding.

STANDARD OF REVIEW

On appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. At

60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id.

DECISION

The compensation judge found the employee sustained a Gillette injury on February 10, 1997 and gave written notice of the injury to the employer on August 19, 1997. The compensation judge further found the employee did not know or have reason to believe her neck condition was the result of a compensable work injury until August 18, 1997, the date of her consultation with Mr. Mottaz. (Finding 3.) Based on this finding, the compensation judge concluded the employee's written notice to the employer on August 19, 1997 met the requirements of Minn. Stat. § 176.141. The employer and insurer contend the compensation judge misapplied the law and assert the compensation judge's findings have no evidentiary support. We are not persuaded.

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 time the incapacity ceases.

However, the time period for giving notice does not begin to run until the employee, as a reasonable person, should recognize the nature, seriousness and probable compensable character of the injury or disease. Issacson v. Minnetonka, Inc., 411 N.W.2d 865, 867 40 W.C.D. 270, 275 (Minn. 1987) citing 3 A. Larson, The Law of Workman's Compensation, § 78.41(a) (1983). In Issacson, the supreme court held that the time for giving notice under Minn. Stat. § 176.141 begins to run "from the time it becomes reasonably apparent to the employee that the injury has resulted in, or is likely to cause, a compensable disability." Id. The limitation period does not run from the time the employee is given a medical opinion as to causation but rather from the time the employee has sufficient notice from any source to put the employee on notice. Jones v. Thermo King, 461 N.W.2d 915, 43 W.C.D. 458 (Minn. 1990). The date by which the employee was aware of the disabling and compensable nature of the injury is usually a question of fact. Barcel v. Barrel Finish, 304 Minn. 536, 232 N.W.2d 13, 28 W.C.D. 4 (1975).

The employer and insurer argue the compensation judge's finding that the employee first obtained the requisite knowledge when she met with her attorney on August 18,

1997 is unsupported by substantial evidence. They argue the employee clearly knew very shortly after beginning work with the employer that her work activities aggravated her neck symptoms. Further, the employee knew that the longer she worked the worse the symptoms became. These facts, appellants argue, are established by the testimony of the employee and the histories she gave to the various medical providers. Accordingly, appellants contend, the employee clearly knew her neck condition was work-related and causing disability no later than February 9, 1997. They ask this court to reverse the finding of the compensation judge. We decline to do so.

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 the 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. The first medical record noting any work connection with the employee's cervical condition was on July 10, 1997 when the employee saw Dr. Kane. The employee filled out a spinal evaluation form which asked whether it was a workmen's compensation injury to which the employee responded no with a question mark next to it. When asked about the evaluation form, the employee testified she didn't know at that time whether she had a workers' compensation claim or not since she suffered no specific injury. (T. 193-194.) Following the fusion surgery on July 17, 1997, the employee returned to see Dr. Kane on July 31, 1997. The doctor's note states: "Some time was spent discussing whether or not she is a candidate for a workers' comp. claim and I've advised them to seek legal counsel on this particular matter." (Pet. Ex. F.) On August 18, 1997, the employee retained Mr. Mottaz. The employee provided the employer with written notice of her claimed injury the next day.

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 employee first questioned whether she sustained a compensable injury when she discussed that issue with Dr. Kane on July 31, 1997. Presumably, Mr. Mottaz told the employee on August 18, 1997 that she had a potential compensable claim. The compensation judge reasonably concluded, under the Issacson standard, that it was not "reasonably apparent" to the employee that she had a possible compensable disability until August 18, 1997. Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). Substantial evidence supports the compensation judge's finding that the employee first had sufficient knowledge of the probable compensable nature of a Gillette-type personal injury on August 18, 1997. Accordingly, the finding of the compensation judge is affirmed.