JERRY RUTER, Employee, v. HENNEPIN PAPER CO. and KEMPER NAT'L INS. CO., Employer-Insurer/Appellant, and BLUE CROSS/BLUE SHIELD OF MINN., MN DEP'T OF LABOR & INDUS., ST. CLOUD HOSP., and MN DEP'T OF HUM. SERVS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 18, 1999

No. [REDACTED SSN]

HEADNOTES

OCCUPATIONAL DISEASE - DISABLEMENT; PRACTICE & PROCEDURE - STATUTE OF LIMITATIONS. While the employee had knowledge of the cause of his respiratory condition in March 1993, the condition had not resulted in disability at that time. Therefore, the three year statute of limitations under Minn. Stat. § 176.151(4) did not begin to run in March 1993. The employee was not disabled until he was off work in March 1996.

NOTICE OF INJURY. Where the employee had not given notice of his back injury within 30 days, but had given notice within 180 days, the employee was unaware that his back condition had worsened as a result of the work injury, and there was no prejudice to the employer for the delayed notice, the compensation judge could reasonably conclude that notice was sufficient.

Affirmed as modified.

Determined by Hefte, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Harold W. Schultz

OPINION

RICHARD C. HEFTE, Judge

The employer and insurer appeal the compensation judge's finding regarding the date that the employee's occupational disease culminated and the finding that sufficient notice of the employee's back injury had been given. We affirm as modified.

BACKGROUND

Jerry Ruter (employee) began working for Hennepin Paper Company (employer) on October 27, 1976, when he was 25 years old. During all relevant times, the employer was insured for workers' compensation liability by Kemper National Insurance Company (insurer). At the time of the hearing, the employee was 46 years old. The employer's business involves making paper using raw wood, chemicals, and dyes, which results in fumes in the air at the employer's plant. The employee began having respiratory problems in the 1980's. In 1983, the employee's family physician, Dr. M.E. Neudecker, diagnosed the employee with bronchitis. The

employee was treated for throat and nasal problems and upper respiratory infections, and testified that Dr. Neudecker told him that if his symptoms continued he should probably find another occupation. In the early 1990's, the employee experienced sneezing, coughing, inflamed sinuses, headaches, and a burning sensation in the lungs. By March 1993, the employee realized that his condition was related to his work, but he continued working and was treating only occasionally at that time, and did not report his condition to the employer. In 1994, Dr. Neudecker referred the employee to specialists at the St. Cloud Ear, Nose & Throat, Head & Neck Clinic, Allergy Associates, and Allergy & Asthma Associates. In 1995, the employee was referred to Dr. Malcolm Blumenthal at the University of Minnesota Asthma and Allergy Program. Dr. Blumenthal diagnosed that the employee had rhinitis, sinusitis and hyper reactive airways/asthma. In June 1996, Dr. Blumenthal concluded that the employee's work exposure was a significant contributing factor to his respiratory disability.

The employee also had low back problems. In June 1993, the employee sustained a low back injury that was not related to his work. An MRI scan indicated mild bulging at L3-4, L4-5 and L5-S1 with associated degenerative changes and no evidence of discrete herniated nucleus pulposus at any level. The employee was treated through October 1993, when he felt he was totally recovered. In January 1994, he injured his low back again while moving furniture at home and was treated with medication. The employee thought that the effects of this injury lasted about ten days. The employee injured his low back again on or about April 1, 1994, after falling on some ice at home. On April 4, 1994, Dr. Neudecker diagnosed "contused back and right sacroiliac strain." On April 13, 1994, the employee again injured his back when he tripped on a bolt at work. The employee was treated with medication, and told not to lift over 50 pounds and to be careful with lifting and bending.

The employee was also treated by Dr. Vincent Garry at the University of Minnesota. In a letter to the employer dated March 19, 1996, Dr. Garry indicated that he and Dr. Blumenthal recommended that the employee have "a period of time away from work in order to establish whether or not improvement of his pulmonary function & chronic rhinitis might be achieved" and recommended a period of three weeks to one month. The employee took four weeks of vacation, then worked outside of the plant for about three weeks. The employee testified that while he was off work in March and April of 1996, his symptoms had almost disappeared, and that while he worked outside of the plant, his symptoms did not reappear. In May 1996, the employee returned to work inside the plant and his symptoms returned to the extent that he was not able to perform his job. On August 5, 1996, the employee underwent an independent medical examination with Dr. Thomas Mulrooney. Dr. Mulrooney diagnosed bronchial asthma and chronic allergic rhinitis, and concluded that the employee had sustained a work-related injury in the nature of a significant aggravation of a previously existing condition, allergic rhinitis and asthma, on January 13, 1995. Dr. Mulrooney recommended that the employee not return to work for the employer, or at least not inside the plant, and that the employee should avoid exposure to dusts or chemicals.

The employee attempted to return to work for the employer on September 30, 1996, using a mask. The employee's symptoms reappeared and his respiratory problems increased. On

October 9, 1996, the employee injured his back at work when he sneezed while bending over. The employee did not report the back injury to the employer. Dr. Blumenthal took the employee off work on October 10, 1996, due to his respiratory condition. In November 1996, the employee began treating with Dr. Deborah Rasmussen for his back condition. Dr. Rasmussen prescribed medication and physical therapy, and recommended an MRI. The MRI indicated a mid-line disc extrusion at L4-5 which appeared to impinge upon both L-5 nerve roots. On June 17, 1997, the employee underwent an independent medical examination with Dr. Thomas Litman, an orthopedic surgeon, who concluded that the employee had a L4-5 disc herniation on the right causing right L-5 radicular discomfort.

The employee filed a claim petition on April 29, 1996, alleging that the employee had sustained environmental bronchial asthma/hyper-reactive airway disease with the date of injury as January 13, 1995. The employee claimed temporary total disability benefits from March 18, 1996, and continuing, medical expenses, and rehabilitation services. A hearing was held on April 17, 1998. The compensation judge found that the employee had sustained an occupational disease in the nature of environmental bronchial asthma/hyper-reactive airway disease, culminating on January 13, 1995. The compensation judge also found that the employee sustained temporary injury to his low back on October 9, 1996, which lasted through December 5, 1997, and that the employer and insurer were not prejudiced by the employee's failure to give notice of the October 9, 1996, injury within 30 days. The employer and insurer appeal.

STANDARD OF REVIEW

In reviewing cases 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 (1998). 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

Occupational Disease

The employer and insurer did not appeal the compensation judge's finding that the employee's condition in the nature of environmental bronchial asthma/hyper reactive airway

disease was an occupational disease. The employer and insurer appeal the compensation judge's finding that the employee's occupational disease culminated on January 13, 1995, arguing that the employee knew he had sustained a compensable injury in March 1993. Therefore, the employer and insurer claim that the statute of limitations began to run in March 1993 and that the employee should have filed a claim for benefits by March 31, 1996. The employee filed his claim petition on April 29, 1996.

Minn. Stat. § 176.151(4) provides that in case of injury caused by occupational disease, "the employee shall give notice to the employer and commence an action within three years after the employee has knowledge of the cause of such injury and the injury has resulted in disability." "Knowledge of the cause" in this statute has been construed by the supreme court to mean "sufficient information concerning the nature of an injury or illness, its seriousness, and its probable compensability to move a reasonable person to make inquiry concerning his rights." Bloese v. Twin City Etching, 316 N.W.2d 568, 571, 34 W.C.D. 491, 497 (Minn. 1992); see also Jones v. Thermo King, 461 N.W.2d 915, 43 W.C.D. 458 (Minn. 1990). A medical opinion establishing causation is not required for an employee to have "knowledge of the cause." Id. The employer and insurer argue that the employee had sufficient information concerning his respiratory condition in March 1993 to have knowledge of the cause. In an unappealed finding, the compensation judge stated:

> The employee testified that by March 1993 he realized that his condition was related to work but he did not want to go on workers' compensation and create a financial hardship for his family. He was working at the time and only treating occasionally. He did not report the causal relationship to the employer at that time. There was no recorded treatment rendered to him in March 1993.

(Finding 7.) However, Minn. Stat. § 176.151(4) requires not only knowledge of the cause, but also that the injury result in disability before the three year statute of limitations begins to run.

An occupational disease is legally contracted "when it manifests itself so as to interfere with bodily functions to such an extent that the employee can no longer substantially perform the duties of his employment." Anderson v. City of Minneapolis, 258 Minn. 221, 226, 103 N.W.2d 397, 401, 21 W.C.D. 258 (1960); Dunn v. Vic Manufacturing Co., 327 N.W.2d 572, 575, 35 W.C.D. 473 (Minn. 1982). Disablement occurs when the employee is disabled due to the injury from earning full wages at his or her last employment, the employee takes another job at reduced wages upon medical advice to avoid exposure to the occupational hazard, or the employee requests a job change to avoid further exposure to the occupational hazard. Lundmark v. Nokomis Sheet Metal, 45 W.C.D. 213, 217 (W.C.C.A. 1991) (where employee had retired before disablement occurred, court determined date at which the employee would have been disabled to establish date of disablement), summarily aff'd (Minn. Sept. 4, 1991); see Lee v. Catholic Cemeteries, 58 W.C.D. 621 (W.C.C.A. 1998) (employee's claim for work-related hearing loss barred by statute of limitations where the employee had knowledge of causation and admitted that before he stopped working due to retirement more than three years before his claim was filed, his

hearing loss had affected his ability to perform his job and potentially put him in danger), summarily aff'd (Minn. Dec. 16, 1998).

In March 1993, the employee in this case was still working full time at his regular position and was only treating occasionally for his symptoms. The compensation judge could reasonably conclude that the employee's respiratory condition had not resulted in disability as of March 1993 and, therefore, that the statute of limitations did not begin to run at that time. Accordingly, we affirm that conclusion. The compensation judge also concluded that the employee "was not disabled from his respiratory condition until Drs. Blumenthal and Garry stated in March 1996 that he required time away from work in order to establish whether or not improvement of his pulmonary function and chronic rhinitis might be achieved. (Memo. at 11.) There is no evidence that the employee lost any time from work due to his respiratory condition or that the condition affected his ability to perform his job before March 1996. Therefore, we modify the compensation judge's findings to state that the employee's date of disablement for statute of limitations purposes was March 18, 1996, which was the beginning date of the employee's temporary total disability claim at the hearing. The employee's medical expenses from before March 18, 1996, remain compensable. Medical expenses in occupational disease cases are compensable "even if the employee is not disabled from earning full wages at the work at which the employee was last employed." Minn. Stat. § 176.135, subd. 5.

Notice

The employee provided notice of his October 9, 1996, back injury on February 20, 1997. Minn. Stat. § 176.141 provides that notice received within 180 days after the injury is sufficient "if the employee . . . shows that failure to give prior notice was due to the employee's . . . mistake, inadvertence, ignorance of fact or law, or inability, . . . unless the employer shows prejudice." The employer and insurer argue that the employee did not show that the failure to give notice was due to mistake, inadvertence, ignorance of fact or law, or inability.

It is well established that "[t]he purpose of the notice provision is to protect the employer by permitting it to investigate the claim soon after the injury and to enable the employer to furnish immediate medical attention to the employee to minimize the seriousness of the injury." Otterson v. 21st Century Genetics, slip op. (W.C.C.A. Mar. 23, 1995) (citing Kling v. St. Barnabas Hosp., 291 Minn. 257, 190 N.W.2d 674, 26 W.C.D. 53 (1971)). While the employee was taken off work immediately after the October 9, 1996, back injury, his inability to work was primarily due to the respiratory condition. The employee asserts that he was unaware that his back condition had worsened due to the October 9, 1996, injury until he was told of the disc herniation by a doctor in February 1997. The compensation judge could reasonably conclude that there had been "mistake, inadvertence, or ignorance of fact or law" by the employee. As there was no evidence that the delay in notice prevented the employer and insurer from adequately defending its position, the compensation judge was supported in finding that the employer and insurer were not prejudiced as a result of the delayed notice. The compensation judge could reasonably conclude that the notice was sufficient. Therefore, we affirm.