

CHERYL (OSTROVIAK) CLARK, Employee/Appellant, v. MESABA AVIATION, INC., and AM. MOTORIST INS./KEMPER NAT'L INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 30, 2000

No. [REDACTED SSN]

HEADNOTES

NOTICE OF INJURY - SUBSTANTIAL EVIDENCE. Where both the employee and her treating physician denied the employee had sustained any work-related injury until well after the 180 day notice period, the compensation judge reasonably found the employer did not have, within that time period, knowledge of such information as would put a reasonable person on inquiry, and that the employee failed to give timely statutory notice of her personal injuries.

Affirmed.

Determined by: Johnson, J., Wheeler, C.J., and Rykken, J.
Compensation Judge: Jeanne E. Knight

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's finding that she failed to give the employer statutory notice of her June 29, 1997 and August 6, 1997 injuries. The employee further appeals the compensation judge's denial of her claim for wage loss benefits from November 1, 1997 through October 26, 1998 and from the judge's denial of payment for an MRI scan. We affirm.

BACKGROUND

Cheryl (Ostroviak) Clark, the employee, was hired by Mesaba Aviation, Inc., the employer, on May 15, 1995, as a flight attendant. The employee had a pre-employment physical at the Airport Medical Clinic on May 2, 1995, and was medically recommended for the position of a flight attendant. (Pet. Ex. C-10.) Initially, the employee flew in smaller turboprop airplanes. (T. 22.)

The employee was off work from January 24 through May 1, 1997 due to a non-work knee injury. (T. 83, 98.) Shortly after her return, in June 1997, the employee began training on a 70-seat jet. On or about June 29, 1997, the employee was in Rochester, Minnesota, performing in-flight training consisting of take-off and landings followed by an emergency evacuation procedure. After the jet landed, the emergency door slides were deployed to practice an emergency exit. The flight attendants role-played assisting passengers jumping from the plane. Then each flight attendant exited the plane down the rubber slide. The employee testified when

she landed on the ground at the end of the emergency slide, she felt a jolt on the right side of her neck. At the end of the practice, the employee went home. (T. 27-29.) She did not fill out an injury report or submit one to her supervisor although the employee knew the employer had a policy for reporting work injuries. (T. 30.)

On June 30, 1997, the employee saw Dr. Severseike at the Fairview EdenCenter Clinic. The doctor recorded a history of “a lump in the right side of her neck for about six months. Also some pain in the neck when she moves her head. She thinks she might have possibly had a neck strain or whiplash type of thing from riding a snowmobile this winter and this could possibly be it.” (Pet. Ex. C-12.) The employee did not tell the doctor about the emergency slide incident the day before. (T. 84.) On examination, Dr. Severseike palpated a “very tiny pea sized or smaller nodule along the border of the sternocleidomastoid muscle on the right side. It does appear to be slightly tender as well.” The doctor recommended the employee be rechecked in a month. (Pet. Ex. C-12.) The employee returned to the clinic on July 18, 1997 and saw Dr. John Juola. The employee complained of increased pain in her right neck and low back pain, but denied any injury. On examination, Dr. Juola found a tender mass in the right lateral neck, decreased range of cervical motion and low back tenderness. (Pet. Ex. C-12.)

On July 24, 1997, the employee was examined by Dr. John E. Sherman, an orthopedic surgeon, at the request of Dr. Juola. Dr. Sherman recorded that approximately three months previously, the employee noticed a lump in the right side of her neck with neck pain and minimal pain in the right trapezius. The employee complained of daily neck pain and pain on rotation of her head. An MRI scan of the cervical spine showed a small to moderate left sided C5-6 herniated disc with secondary mild cord deformity and mild central canal stenosis. Dr. Sherman concluded the lump in the employee’s neck was a lymph node. He opined the employee’s pain might be due to the C5-6 degenerative changes. Dr. Sherman recommended physical therapy and anti-inflammatory medication as needed. (Pet. Ex. C-9.)

On August 6, 1997, the employee worked on a Mesaba flight to Cincinnati.¹ The flight was turbulent and the captain instructed the flight staff to secure the galley early. The employee was walking down the aisle preparing to return to her seat when the plane hit turbulence which caused her to strike her head on the ceiling of the plane. She fell, landing on her tailbone on the arm of a seat, and experienced a total inability to turn her head to the left or the right due to pain. The employee did not report this incident to her supervisors or prepare an injury report although she was aware of workers’ compensation. The employee felt it was a “negative” to be off work due to an injury. The employee completed the return flight from Cincinnati the next day, and did not return to work for the employer thereafter. (T. 35-41.)

On August 6, 1997, the employee returned to see Dr. Juola complaining of continued neck pain which worsened when she was working. The employee did not give Dr. Juola

¹ In an unappealed finding, the compensation judge found the employee sustained an injury on August 6, 1997. Medical records, however, reflect the employee saw Dr. Juola on August 6, 1997, so the incident probably occurred on August 5, 1997. The mistake is, however, not relevant to the decision.

a history of a work injury the day before. (T. 89.) The doctor prepared a report dated August 6, 1997 stating “Cheryl Ostroviak² has been followed in our clinic since July 18th with neck pain. X-rays show degenerative disc disease at C5-6. Patient currently will be unable to work, starting August 6th and extending through August 20th.” (Resp. Ex. 5.) The employee delivered this report to her employer but did not tell them she was off work because of a work injury. (T. 90.)

The employee was examined by Kaye Krave, R.N., C.N.P., at the Institute for Athletic Medicine on August 12, 1997. Ms. Krave reported that the employee presented “with a history of neck soreness and a lump on the left side of the neck that began about March of 1997 without injury or incident. . . . She was recovering from knee surgery and was having rehabilitation with physical therapy and was off work during most of April when she did return to work in May. She noticed increased pain in the right neck to the top of the shoulder area. She was going through some training with a new jet. Her hours have been increasing over the summer and with both of these activities she has noticed steady increase in pain.” (Pet. Ex. C-8.) The employee did not tell Ms. Krave about either the emergency slide incident on June 29, 1997 or the Cincinnati incident on August 6, 1997. (T. 93.) Ms. Krave diagnosed right cervical pain, musculoligamentous in origin, a small to moderate left sided C5-6 herniated disc of questionable clinical significance and right sacroiliac joint area pain. Ms. Krave prescribed physical therapy and anti-inflammatory medication. The employee was kept off work pending a re-examination. (Pet. Ex. C-8.)

On August 13, 1997, the employee asked Dr. Juola to prepare and sign a Disability Claim Form for Mesaba. On the form, the doctor stated his diagnosis was a cervical strain which he stated did not arise out of her employment. (Resp. Ex. 3.) The employee reviewed the form and was aware Dr. Juola stated her condition was not work-related. The employee did not ask the doctor to change the form even though she believed she had sustained two work injuries. The Disability Claim Form was delivered to the employer. (T. 90-93.)

The employee received physical therapy at the Institute for Athletic Medicine which was monitored by Ms. Krave. On October 9, 1997, Ms. Krave continued the employee off work. On October 23, 1997, Ms. Krave released the employee to return to full-duty work. On November 20, 1997, Ms. Krave again stated the employee could return to work, full-duty, but limited the employee to 50 hours a month for the first month back. Ms. Krave re-examined the employee on December 15, 1997. Her diagnosis continued to be musculoligamentous cervical pain and a C5-6 herniated disc of questionable clinical significance. Physical therapy was continued, and the employee was released to return to work without restrictions. (Pet. Ex. C-8.)

Amy King was hired by Mesaba Aviation on August 29, 1997 as a human resource representative. She handled requests for leaves of absence, benefit-related questions, and workers’ compensation for pilots and flight attendants. Shortly after she started working, Ms. King reviewed disability slips from Kaye Krave, R.N., and learned the employee was on disability due to neck problems. Thereafter, she had a conversation with the employee when the employee was turning in some medical paperwork. Ms. King asked the employee if her condition was work-

² The employee changed her name to Clark following her marriage on July 17, 1999. (T. 17.)

related and the employee replied it was not. (T. 111-114.) Ms. King was unsure from Ms. Krave's reports whether the employee was fit to return to work as a flight attendant so she scheduled an examination with Dr. Zanick. (T. 116.)

The employee was examined by Dr. David Zanick on December 22, 1997, at the request of the employer regarding the employee's neck problem and her ability to work. According to Dr. Zanick, the employee told him "she noted a lump in the right side of her neck in April or May 1997. This was associated with some discomfort and there was no history of any injury." The doctor further noted, "in July she started having more neck discomfort related to sitting while doing the regional jet training. She never did file an occupational injury report. By August she stopped working because of neck pain." Dr. Zanick diagnosed chronic neck pain probably due to cervical disc disease. He stated the employee was not able to perform her regular duties as a flight attendant, but opined she was able to work subject to a 20 pound lifting restriction, avoidance of overhead work and avoidance of fixed head posturing. (Resp. Ex. 6.) Ms. King received and reviewed Dr. Zanick's report. She did not, however, inquire further of Dr. Zanick about the doctor's reference to neck discomfort during regional jet training. (T. 118, 121-23.)

Dr. Janiece Aldinger at the Minneapolis Clinic of Neurology examined the employee on January 30, 1998, on referral from Dr. Juola. Dr. Aldinger recorded a history that the employee "noticed a tender lump in the right side of her posterior neck in April of 1997. She gradually noticed an increase in neck stiffness over the next several months. . . . She also noted that when working as a flight attendant, the impact of the landing would hurt her neck." The doctor recommended an EMG of the right arm to rule out cervical radiculopathy. The EMG obtained on February 12, 1998, showed no evidence of right cervical radiculopathy. The doctor re-examined the employee on February 25, 1998, and opined the employee's neck pain was a combination of musculoskeletal cervical strain and the herniated C5-6 disc. (Pet. Ex. C-5.)

The employee received short-term disability benefits from August 6 through October 29, 1997. On December 30, 1997, Ms. King sent the employee an application for long-term disability benefits. Ms. King prepared the employer's portion of the form.³ The employee was asked to complete the section marked "employee's statement" and her physician was to complete the section marked "physician's statement." In response to the question whether the employee's condition was related to her employment the employee responded "I don't know for sure" and indicated she did not intend to file a workers' compensation claim. Dr. Juola completed the physician's statement and stated the employee's condition was not due to a work-related injury. By letter dated May 11, 1998, the employer was advised by Hartford Life and Accident Insurance Company that the employee's claim for long-term disability benefits was denied because of a lack of medical documentation to support the employee's claim for total disability. (Resp. Ex. 2.)

On January 19, 1998, Dr. Philip N. Rapport, an ear, nose and throat specialist, examined the employee on referral from Dr. Juola. Dr. Rapport recorded no history of any work-related injury. The doctor concluded the employee had a possible fibrosis or bony irregularity in

³ The name on the application is Amy Davies, Ms. King's name before her marriage.

the right side of her neck. He concluded the mass was probably musculoskeletal in nature. (Pet. Ex. C-6.)

On March 16, 1998, the employee was examined by Dr. Frank W. Wei, a specialist in physical medicine and rehabilitation, at the request of Dr. Juola. Dr. Wei recorded a history of right-sided neck discomfort for the past year. Dr. Wei recorded the employee stated that she was “in the process of being trained on a new aircraft for Mesabi. She started noticing right-sided neck pain that gradually developed over several months. . . . She continued to work as a flight attendant and then she did a 3 day trip and her right neck pain seemed to escalate at that point. She has been off work since 8-12-97.” Dr. Wei diagnosed chronic muscular strain to the cervicothoracic and scapular area on the right. (Pet. Ex. C-4.)

On May 27, 1998, the employee was re-evaluated by Dr. Zanick at the request of the employer. The doctor reported he previously examined the employee in December 1997, stating “[a]t that time, I had noted that she had developed some right sided neck pain in April or May 1997 unrelated to any injury.” Dr. Zanick stated the employee’s current diagnosis was unclear, but concluded the employee was not fit for regular work as a flight attendant. (Resp. Ex. 6.)

By letter dated August 27, 1998, Charles M. Cochrane, Esq., advised the employer he was representing the employee for injuries sustained in a “work-related accident.” Mr. Cochrane requested copies of specific documents and an itemized earnings statement from the employer. By response dated September 14, 1998, Ms. King provided wage information for the employee and stated: “Please be advised that at no time did Cheryl Ostroviak inform us that she had sustained a work related injury. She has maintained throughout her medical leave that the injury was a non work related injury.” (Resp. Ex. 5.) Ms. King testified the employee never filed an injury report with Mesaba. Ms. King stated she first became aware the employee claimed work injuries when she received Mr. Cochrane’s August 27, 1998 letter. (T. 114-115.) On October 26, 1998 the employer terminated the employee’s employment. (Resp. Ex. 5.)

On November 5, 1998, the employee was examined by Dr. A.V. Anderson at the request of the employee’s attorney. The employee stated her symptoms began in June 1997 while she was in flight training. The employee also gave a history of increased neck pain while practicing with the emergency slide and during a turbulent flight in August 1997. On examination, Dr. Anderson noted a deficit in grip strength of the left hand and wrist, cervical muscle spasm and reduced range of motion, paraspinal muscle spasm and reduced range of lumbar motion and a mild antalgic posture. Dr. Anderson diagnosed a musculoligamentous strain/sprain of the cervical, thoracic and lumbar spine, possible degenerative changes of the cervical and lumbar spine with symptoms of nerve compression, post-concussion syndrome with possible closed head injury and depression. The doctor related these conditions to repetitive type trauma to the cervical spine resulting from the employee’s duties as a flight attendant and the incident on August 6, 1997. The doctor opined the employee was unable to return to her job as a flight attendant and rated permanent disability of the cervical and thoracic spine. (Pet. Ex. B.)

On February 3, 1999, the employee was examined by Dr. Christine M. Cox at Neurosurgical Associates on referral from Dr. Juola. The doctor recorded a history of the employee hitting the top of her head and back of her neck on the ceiling of an airplane in June 1997. The employee related a second injury in August 1997 when turbulence caused her to be thrown around an airplane. Dr. Cox diagnosed neck pain with some mild new symptoms of left upper extremity pain and weakness. Dr. Cox recommended a cervical myelogram and CT scan and a repeat EMG. (Pet. Ex. C-3.) A cervical myelogram on February 16, 1999, showed an extradural defect at C5-6. A CT scan following the myelogram showed a small left foraminal disc herniation at C5-6 with deformity of the left C6 nerve root. (Pet. Ex. C-2.)

In April 1999, the employee filed a claim petition seeking payment of temporary total and permanent partial disability benefits resulting from an injury on August 6, 1997. In their answer, the employer and insurer denied the employee sustained a personal injury on that date. The case was heard by a compensation judge at the Office of Administrative Hearings on February 10, 2000. At the hearing, the employee claimed specific injuries in June 1997 and August 6, 1997, and a Gillette⁴ injury. In a Findings and Order filed April 10, 2000, the compensation judge found the employee failed to prove she sustained a Gillette-type personal injury as a result of her work activities with the employer. The judge found the employee sustained personal injuries to her neck on June 30, 1997 and August 6, 1997. These findings were not appealed. The compensation judge further found the employer first received actual notice of the employee's personal injuries on August 27, 1998 when the employee's attorney sent a letter to the employer. Finally, the compensation judge found the employee did not provide statutory notice to the employer of the June 30 or August 6, 1997 personal injuries within either 30 or 180 days of the personal injuries. Accordingly, the compensation judge denied the employee's claims for benefits. The employee appeals the judge's findings regarding notice and the consequent denial of benefits.

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, 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 Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

⁴ Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

DECISION

Minn. Stat. § 176.141 sets forth the notice requirements for personal injuries. The statute provides that “[u]nless knowledge is obtained or written notice given within 180 days after the occurrence of the injury no compensation shall be allowed.” The compensation judge found the employee sustained work injuries on June 29, 1997 and August 6, 1997 but failed to provide the employer with statutory notice within 180 days of the injuries. Accordingly, the compensation judge denied the employee’s claims.

The employee acknowledges she never filled out an injury report or gave verbal or written notice to the employer of either the June or August 1997 personal injuries. (Ee Brief, p. 11.) The employee asserts, however, that the employer had actual knowledge of her personal injuries. She, therefore, contends the compensation judge erroneously denied benefits. If the employer has actual knowledge of an injury within the statutory notice period, the written notice required by the statute is unnecessary. Fitch v. Farmers Union Grain Terminal Ass’n, 274 Minn. 234, 143 N.W.2d 192, 23 W.C.D. 831 (1966). Actual knowledge within the meaning of the statute is “knowledge of such information as would put a reasonable man on inquiry.” Rinne v. W.C. Griffis Co., 234 Minn. 146, 47 N.W.2d 872, 16 W.C.D. 348 (1951). “Mere knowledge of disability following a traumatic injury is not sufficient, for the facts and circumstances of either the disability or the injury must be such as would put a reasonable man on inquiry that the disability is work-related.” Davidson v. Bermo, Inc., 272 Minn. 97, 137 N.W.2d 567, 23 W.C.D. 623 (1965).

The employee contends the employer had actual knowledge of the employee’s injuries when it received Dr. Zanick’s report of December 22, 1997, which included a history of increased neck pain “related to sitting while doing the regional jet training.” (Pet. Ex. C-10; Resp. Ex. 6.) This report, the employee asserts, placed the employer on inquiry notice and required the employer to investigate further. Accordingly, the employee argues, the employer had statutory notice within 180 days of both personal injuries. We are not persuaded.

Dr. Zanick only “noted” that “in July [the employee] started having more neck discomfort related to sitting while doing jet training.” The doctor also reported the employee provided “no history of any injury” and had not filed an occupational injury report. (Pet. Ex. C-20; Resp. Ex. 6.) At best, Dr. Zanick’s report provides only a very tenuous suggestion that the employee may have sustained a work-related injury. At that time, the employer also had in its possession Dr. Juola’s report of August 6, 1997, which made no reference to any work injury and the Disability Claim Form in which Dr. Juola stated the employee’s neck condition was not work-related. Ms. King testified the only indication she had that the employee’s cervical condition might be related to her work activity was the reference to jet training in Dr. Zanick’s December 22, 1997 report. (T. 118.) Previously, however, Ms. King had asked the employee if her neck condition was work related and the employee told Ms. King it was not. In January 1998, the employee and Dr. Juola filled out the long-term disability benefits application. The employee was asked whether her condition was related to her employment and she responded “I don’t know for sure” and stated she did not intend to file a workers’ compensation claim. Dr. Juola again stated the employee’s condition was not due to a work-related injury. Since both the employee and her treating physician

denied the employee sustained any work-related injury, we fail to see what could have been accomplished by further inquiry by the employer. The compensation judge could reasonably conclude the employer did not have, within 180 days of either injury, knowledge of such information as would put a reasonable person in inquiry. The decision of the compensation judge is, therefore, affirmed.

The employee also appeals the compensation judge's denial of wage loss benefits and the judge's denial of payment for an MRI scan. In view of our decision on the notice issue, we do not reach these issues.