

BARBARA L. FREYHOLTZ, Employee/Appellant, v. BLACKDUCK SCHOOL DIST. #32 and AMERICAN COMP. INS. CO./RTW, INC., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
JANUARY 18, 2000

No.[REDACTED SSN]

HEADNOTES

NOTICE OF INJURY - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's testimony and the documentary records, supported the compensation judge's finding that the employee failed to provide the employer with timely notice of injury, that the injury was not trivial in nature, and that the failure to so provide notice was not the result either of the employee's mistake, inadvertence, ignorance of fact or law or inability, or of fraud, misrepresentation or deceit on the part of the employer or agent.

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. Substantial evidence, including expert opinion, lay testimony and medical records, supported the compensation judge's findings that chiropractic treatment and associated expenses and time lost from work after the first twelve weeks of care was not reasonable or necessary.

Affirmed.

Determined by Pedersen, J., Rykken, J., and Wheeler, C.J.  
Compensation Judge: Gary P. Mesna

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's dismissal of her claim as barred by failure to give timely notice to the employer, and from the underlying findings that the employee's injury was not trivial in nature and that the employee's failure to give timely notice of her injury to the employer was not due to mistake, inadvertence, or ignorance of law or fact. We affirm.

BACKGROUND

The employee, Barbara Freyholtz, began working part time for the employer, the Blackduck School District, in about 1990 or 1991, performing cleaning work at the school after the end of the school day. On September 17, 1996, the employee sustained a work-related injury to her middle and upper back while moving a desk. (T. 18-22, 24; Findings 1, 3.)

The employee already had an appointment scheduled for the following day, September 18, 1996, with her chiropractor, Dr. Cindy Luke Bates, with whom she had been

treating since July 8, 1996 for menopausal problems and for a soreness and tingling in the right shoulder, hand and arm, which Dr. Bates diagnosed as a right rotator cuff strain. When seen by Dr. Bates on September 18, 1996 the employee related that mopping floors, scrubbing gum off desks and moving desks the previous day at work had caused low and mid back and neck pain radiating to the arms. Dr. Bates told the employee that she had injured her back at work. (T. 21-23, 46-47, 49, 69, 75-79, 83-84; Exh. C: 7/8/96 treatment note & health appraisal questionnaire, 7/17/96 progress report, 9/18/96 treatment note, 10/27/96 & 4/30/97 health care provider reports.)

The employee testified that she was initially reluctant to report the injury to her employer, because she “felt maybe it wasn’t too big of a deal” and “didn’t take it too seriously at first.” She estimated that she had not reported it for “a few days,” but could not “recall exactly how long it was.” (T. 23.) On cross-examination, the employee acknowledged that the October 22, 1996 date reflected on the First Report of Injury sounded like an accurate time frame for the date on which she reported the injury to the employer. (T. 47.)

The employee was not taken off work by Dr. Bates but did sporadically take sick leave from work when she was sore following chiropractic treatments on about eight separate days between October 21, 1996 and November 17, 1997. (Exh. I.)

Dr. Bates’ Physician’s Report dated October 23, 1996 imposed various work restrictions and the employee continued to work for the employer through the date of hearing under these restrictions. As of the date of hearing, the employee estimated that she had received close to 100 chiropractic and physical therapy treatments from Dr. Bates for the work injury. Dr. Bates testified at the hearing that the employee would continue to require ongoing chiropractic and physical therapy treatment. (T. 28-32, 43, 58, 91-92, 113-114; Exh. C: 10/23/96 physician’s report.)

The employee was seen by Dr. Nolan M. Segal, an orthopedic surgeon, on behalf of the employer and insurer on May 26, 1998. Dr. Segal opined that, as of that date, the employee exhibited the symptoms of a mild chronic cervical strain and mild chronic right thoracic strain, but that these symptoms were consistent with her pre-existing condition and causally unrelated to the September 17, 1996 injury. He further opined that the employee did not need work restrictions or further medical or chiropractic treatment or physical therapy. Finally, Dr. Segal expressed the opinion that the first 12 weeks of passive treatment received by the employee for her September 17, 1996 injury would be considered reasonable and necessary, but that all subsequent treatment was excessive. (Exh. 1.)

On March 5, 1999 a hearing was held before a compensation judge of the Office of Administrative Hearings to consider the employee’s claims for payment of medical and chiropractic expenses and related mileage and entitlement to temporary benefits. The defenses offered by the employer and insurer were a denial of causation from the alleged injury, failure by the employee to provide timely notice of injury, and that the employee had received treatment beyond that which was reasonable or necessary and which exceeded that provided by the medical treatment parameters. Following the hearing, the judge found that the employee had sustained an

injury to the mid and upper back on September 17, 1996, but not to the right shoulder or arm. The judge found that the employee had failed to provide timely notice of the injury and further determined that the injury was not trivial and that the employee had failed to show that the failure to give such notice was due to her mistake, inadvertence, ignorance of fact or law or inability, or to fraud, misrepresentation or deceit on the part of the employer or agent. The judge accordingly denied benefits. In addition, the judge found that the chiropractic treatment during the first twelve weeks was reasonable and necessary, and that the time lost from work during this period was causally related to the work injury. Chiropractic treatment and time off work after the first twelve weeks was denied as unreasonable and unnecessary. The employee appeals from the findings and conclusions on the issue of notice, and from the denial of reimbursement for chiropractic expenses.

## STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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

### Notice of Injury

Pursuant to Minn. Stat. § 176.141, where notice of injury is provided to the employer more than 30 days but less than 180 days after the injury, compensation may be allowed in the absence of prejudice to the employer if the employee "shows that failure to give prior notice was due to the employee's or beneficiary's mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation, or deceit of the employer or agent."<sup>1</sup>

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<sup>1</sup> The subdivision reads, in its entirety:

Unless the employer has actual knowledge of the occurrence of the injury or unless the injured worker, or a dependent or someone in behalf of either, gives written notice thereof to the employer within 14 days after the occurrence of the injury, then no compensation shall be due until the notice is given or knowledge obtained. If the notice is given or the knowledge obtained within 30 days from the

In the present case the compensation judge denied compensation on the basis that notice was not given until after thirty days following the injury and no showing of these mitigating factors was made by the employee. On appeal, the employee's first argument appears to be that the compensation judge could have inferred from the employee's testimony and from the record as a whole that the employee's failure to timely report her injury was "a result of ignorance of fact and law, and should be excused under the statute considering the close proximity to the reporting deadline." (Employee's Brief at 4.) Specifically, the employee points to her testimony that she did not "take it too seriously at first" and that she thought her chiropractor could take care of the problem. This testimony might, in an appropriate context, provide some support for a judge's finding that an employee's failure to give notice within thirty days of injury was the result of mistake, inadvertence, or ignorance of law or fact, but it is far from evidence which compels such a conclusion. In the absence of more definitive evidence on the point, the issue is one in which competing inferences may be drawn from the evidence. We cannot here conclude that the compensation judge clearly erred in finding that the employee had not established the existence of the mitigating factors provided in the statute.

The employee next argues, without specific case citations, that the notice statute should have been deemed to have been tolled under the "trivial injury" doctrine. In such cases, the notice period is "tolled" until such time as the employee, "as a reasonable person, should recognize the nature, seriousness and probable compensable character of his injury." Issacson v. Minnetonka, Inc., 411 N.W.2d 865, 867, 40 W.C.D. 270, 274 (Minn. 1987). Here, the compensation judge found that the notice requirement was not tolled by a trivial injury. We note that this determination is adequately supported by the employee's knowledge of the nature and probable compensable character of the injury obtained at the latest on the date of her chiropractic visit on September 18, 1996, the day immediately after the injury. As on the prior question whether

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occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation unless the employer shows prejudice by such want, defect, or inaccuracy, and then only to the extent of the prejudice. If the notice is given or the knowledge obtained within 180 days, and if the employee or other beneficiary shows that failure to give prior notice was due to the employee's or beneficiary's mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation, or deceit of the employer or agent, then compensation may be allowed, unless the employer shows prejudice by failure to receive the notice, in which case the amount of compensation shall be reduced by a sum which fairly represents the prejudice shown. 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.

mitigation was shown, the fact that some support for a contrary result might also be present on this issue does not permit this court to reverse the factual finding made by the compensation judge. Id.

Finally, the employee argues that “the Bench and the Bar have largely ignored the ‘14’ and ‘30’ day notice provisions.” (Employee’s Brief at 4.) In Wood v. Airco Industries, 45 W.C.D. 342 (W.C.C.A. 1991), summarily aff’d, Oct. 30 1991, this court observed, in affirming a denial of benefits for failure to give notice within 180 days, that the scope of the circumstances which allow an employee to be excused for failure to give notice within 180 days is quite broad and allows an employee wide latitude in showing why notice was not given within 180 days. While such a showing may be relatively simple, and while the broad scope of the potential mitigating circumstances may have diminished the extent to which the requirements of the statute are commonly raised and litigated, it remains true that the burden of showing such mitigation is on the employee. The question before the judge was factual in nature and depended on his interpretation of the evidence and his assessment of the employee’s credibility. Under the evidence submitted, and the inferences permissibly drawn therefrom, the compensation judge did not clearly err in finding that the employee failed to prove any of the statutory factors provided in mitigation of untimely notice. While we may have decided the factual question differently, given the trial judge’s discretion to resolve these issues we are compelled to affirm his decision.

#### Chiropractic Treatment

Our affirmance of the employee’s appeal from the finding of insufficient notice effectively renders moot the appeal from the denial of chiropractic and related expenses and time off work following the first twelve weeks of treatment. Nonetheless, we note that there is substantial support in the record for the compensation judge’s findings that treatment and associated expenses and time off work were unreasonable after this initial twelve-week period. In addition to support provided by the expert medical opinion of Dr. Segal, we note that it was reasonable for the compensation judge to conclude, based on the chiropractic records and the testimony of the chiropractor and the employee, that the treatment after this period failed to satisfy the test of reasonableness under factors such as those articulated in Horst v. Perkins, 45 W.C.D. 9 (W.C.C.A. 1991), and other cases.