STEVEN J. WIRRER, Employee/Cross-Appellant, v. BOSTROM SHEET METAL WORKS, INC. and CNA/TRANSCON. INS. CO., Employer-Insurer/Appellants, and SHEET METAL #10 BENEFIT FUND, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 20, 2001

No. [REDACTED SSN]

HEADNOTES

NOTICE OF INJURY. Particularly under the facts of this case, the compensation judge properly concluded that claimant foreman's knowledge of his own injury could not be imputed to the employer for purposes of satisfying the notice requirements of Minn. Stat. § 176.141.

NOTICE OF INJURY - TRIVIAL INJURY RULE. Substantial evidence supported the compensation judge's decision that the notice period began running when the employee returned to work and was unable to perform a substantial part of his usual work due to his work-related condition.

PRACTICE & PROCEDURE - RIPENESS. Where the employee had not yet sought approval of retraining, it was premature to determine whether the filing of the employee's amended claim petition satisfied the requirements of Minn. Stat. § 176.102, subd. 11(c) (1996).

Affirmed in part and vacated in part.

Determined by Wilson, J., Johnson, J., and Rykken, J.
Compensation Judge: Paul V. Rieke.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's decision as to the effect of the employee's claim for retraining. The employee cross appeals from the judge's decision that the employer did not have timely notice or actual knowledge of the employee's knee injury. We vacate the judge's finding as to retraining and affirm his finding as to notice of injury.

BACKGROUND

On September 20, 1996, the employee was involved in a motor vehicle accident in the course and scope of his employment with Bostrom Metal Works [the employer]. At the time of the injury, the employee was employed by the employer as a sheetmetal field foreman at a 3M plant in St. Paul, running a crew that performed all of 3M's sheetmetal work at that plant. The employee's job entailed a substantial amount of ladder climbing as well as some paperwork. The employer, a small company, is located elsewhere in St. Paul, and the employee was seldom called

upon to visit the employer's shop, but work orders were sent back and forth, and the employee spoke to the shop by telephone.

Immediately following his accident, the employee was taken by ambulance to St. John's Hospital, where he complained of head and neck pain. The examining physician diagnosed acute cervical strain and advised the employee to follow up with his own physician. The employee subsequently consulted Dr. Bruce Bartie for treatment of neck and shoulder pain. Dr. Bartie referred the employee for a cervical MRI before starting him on physical therapy for neck, shoulder, and back symptoms.

On November 14, 1996, the employee returned to Dr. Bartie for re-evaluation. Indicating that the employee's neck and shoulder symptoms had been improving, Dr. Bartie released the employee to light-duty work with a lifting limit and instructions to avoid overhead work and cervical extension. The employee returned to light-duty work for the employer the following day, and he continued working in that capacity, full time, without additional medical treatment, until August of 1997.

On August 12, 1997, the employee returned to see Dr. Bartie, who indicated that the employee's neck and shoulder symptoms were better but the employee had been experiencing a "new problem" with sciatica into the left lower extremity. The employee also reported that his left knee buckled when walking, and he subsequently received conservative care and testing for these complaints as well as continuing shoulder pain.

In July of 1998, the employee underwent arthroscopic surgery on his left knee. Shortly thereafter, he had the first of two surgeries on his right shoulder, to treat a torn rotator cuff. Following the second shoulder surgery, performed in January of 1999, the employee returned to work for the employer on a very part-time basis.

On September 9, 1999, the employee filed a claim petition alleging entitlement to medical benefits related to his left knee condition, which he contended was caused by the September 20, 1996, work-related motor vehicle accident. In their answer, the employer and insurer admitted a neck injury but denied liability for a knee injury and further denied that they had received statutory notice of that injury. On March 29, 2000, the employee filed an amended claim petition, listing retraining as a claimed benefit due to injury to the "left knee/right shoulder/neck and back." In response, the employer and insurer admitted liability for a neck and shoulder injury but denied liability for a left knee and back injury and again denied notice with respect to the employee's left knee claim.

The matter came on for hearing before a compensation judge on November 16, 2000. The primary issues were whether the employee had sustained a left knee injury in the September 20, 1996, accident; if so, whether the pertinent statutory notice requirements had been satisfied with respect to that injury; and the effect of the employee's amended claim petition for retraining. At hearing, the employee clarified that he was not yet seeking retraining but had filed the amended claim petition in order to preserve the claim, and he sought a ruling from the judge "with respect to whether or not that claim for retraining is still viable." The employer and insurer responded by asserting that, because the employee was not then ready to proceed with a retraining

claim, the employee had no choice but to either withdraw the claim or have it dismissed. Evidence submitted at hearing included the employee's medical records, a report from the employee's QRC, and the testimony of the employee, the employee's wife, and one of the employee's coworkers. The judge also took judicial notice of the First Report of Injury, apparently completed on the day of the employee's accident, listing "sore neck" as the nature of the injury.

In a decision issued on November 27, 2000, the compensation judge determined that the employee had in fact injured his left knee in the September 1996 accident but that the employee's claim for that injury was barred for lack of timely notice. With respect to the retraining issue, the judge ruled that the claim had been preserved by virtue of the filing of the employee's amended claim petition. Both parties 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 (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 Foods 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.

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

1. Notice of Injury

Pursuant to Minn. Stat. § 176.141, the normal outside time limit for giving an employer notice of a work injury is 180 days. It is essentially undisputed that no one in a supervisory capacity, outside of the employee himself, was aware of the employee's knee injury prior to August of 1997, when the employee returned to see Dr. Bartie again nearly a year after the work accident. However, the employee made two claims with respect to the notice issue: (1) that, because he was a foreman, his knowledge of his own injury should be imputed to the employer; and (2) that, under the trivial injury rule, knowledge by the employer of the employee's knee injury

in August of 1997 was in fact timely. The compensation judge rejected both arguments, and we find no error in his decision to this effect.

It is well-settled in Minnesota that knowledge by a foreman is imputed to the employer, at least with respect to a subordinate's work injury. See, e.g., Yerhart v. Geo. A. Hormel & Co., 303 Minn. 540, 225 N.W.2d 851, 27 W.C.D. 780 (1975); Sobczyk v. City of Duluth, 245 Minn. 569, 73 N.W.2d 795, 19 W.C.D. 263 (1955); Rinne v. W.C. Griffis Co., 234 Minn. 146, 47 N.W.2d 872, 16 W.C.D. 348 (1951). We could find no Minnesota authority indicating whether a foreman's knowledge of his or her own work injury may be used to satisfy the notice requirements of Minn. Stat. § 176.141. However, Professor Larson's treatise provides that "the fact that the claimant is in a supervisory position does not mean that his or her own knowledge of the injury is notice to the employer,"[1] a statement apparently consistent with the majority of jurisdictions that have considered the issue. See, e.g., Taylor v. Soran Restaurant, Inc., 960 P.2d 1254 (Idaho 1998); Wietharn v. Safeway Stores, Inc., 820 P.2d 719 (Kan. Ct. App. 1991); Hunt v. Sherwin Williams Co., 624 P.2d 489 (Mont. 1981); Nebenhaus v. Lydmark Corp., 435 N.Y.S.2d 101 (App. Div. 1980); Renco, Inc. v. Nunn., 474 P.2d 936 (Okla. 1970). But see Moreno v. Las Cruces Glass & Mirror Co., 818 P.2d 1217 (N.M. Ct. App. 1991).[2] Cases addressing the point are premised largely on the courts' recognition of the potential for conflict of interest. In Minnesota, as in most jurisdictions, the purpose of the notice provision is to "enable the employer to furnish immediate medical attention in the hope of minimizing the seriousness of the injury as well as to protect the employer by permitting him to investigate the claim soon after the injury." Kling v. St. Barnabas Hosp., 291 Minn. 257, 261, 190 N.W.2d 674, 677, 26 W.C.D. 53, 56 (1971). Absent knowledge by an employer representative or agent outside of the claimant, there is no opportunity for investigation by anyone acting primarily with the employer's best interests in mind. The possibility for fraud is obvious.

In the present case, the First Report of Injury lists Robert Vranicar, the employer's president, as the employee's supervisor. The employee testified that he reported to Kelly Summerville, the employer's vice president, and the employee's coworker, a sometimes crew foreman himself, testified that he would have reported a work injury of his own to one of those men. In other words, this is not a situation in which there was simply no appropriate employer representative available to take an injury report. Therefore, while there may be circumstances not envisioned here that might change the analysis, we hold that the compensation judge properly applied the majority rule in concluding that the employee's knowledge of his own knee injury did not satisfy the notice requirements of Minn. Stat. § 176.141.

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[1] A. Larson and L.K. Larson, Larson's Workers' Compensation Law § 176.03[2][b] (2000).

[2] In Moreno, the New Mexico court rejected the majority rule, basing its decision on the cannons of statutory construction. Because the applicable statute itself specified that no written notice was required when any superintendent, foreman, or other agent in charge of the work had actual knowledge of injury, the court felt constrained to follow the letter of the statute, even though the language was at odds with its purpose. The court also noted, however, that the claimant there, who was president, chief executive officer, and sole shareholder of the corporation, had given notice to the corporate secretary.

With regard to the employee's claim for application of the trivial injury rule, the compensation judge concluded that, by November of 1996, the employee knew that he had sustained a significant work-related injury to his left knee, triggering the running of the statutory notice period. See Issacson v. Minnetonka, Inc., 411 N.W.2d 865, 40 W.C.D. 270 (Minn. 1987) (statutory time for giving notice begins to run from the time it becomes reasonably apparent that the injury has resulted in, or is likely to cause, a compensable disability). On appeal, the employee argues that the injury was in fact trivial, at least prior to the sumer of 1997, because he received no medical treatment from mid November of 1996 until August of 1997 and had hoped that his left knee would improve over time. However, the employee acknowledged having noticed left knee swelling and pain almost immediately after the accident, and, following his return to work on November 15, 1996, he was unable to perform one of the main requirements of his usual job, because of his knee condition. The employee himself testified that sheetmetal work is "ninety percent ladder" and that he was virtually unable to climb ladders because he could not "trust [his] knee." Both the employee and a coworker also testified that other members of the crew picked up the slack for the employee, and the employee's wife noticed that the employee had trouble with stairs at home within two or three months of the employee's September 1996 accident.

The record indicates that the employer had no notice or actual knowledge of the employee's left knee injury until sometime after the employee returned to Dr. Bartie for treatment in August of 1997. Because the compensation judge properly determined that the employee's knowledge of his own injury could not be imputed to the employer, and because substantial evidence supports the judge's decision that the employee was aware of the seriousness of his knee injury beginning in November of 1996, we affirm the judge's decision barring the employee's knee injury claim, for lack of timely notice, pursuant to Minn. Stat. § 176.141.

2. Effect of the Retraining Claim

Minn. Stat. § 176.102, subd. 11(c) (1996), provides in part that "any request for retraining shall be filed with the commissioner before 104 weeks of any combination of temporary total or temporary partial compensation benefits have been paid," specifying that "retraining shall not be available" after that point unless the request was filed within the specified 104-week limit. Id. In the present case, the parties agreed that 104 weeks of temporary total and/or temporary partial disability benefits had been paid as of May 17, 2000, and that the employee had been timely notified of the 104-week limitation, as mandated by Minn. Stat. § 176.102, subd. 11(d). It is also undisputed that the employee filed his amended claim petition, listing a claim for retraining, on March 29, 2000, prior to the end of the 104-week limitation set by statute.

In his pre-trial statement, and at hearing, the employee explained that he was not seeking retraining benefits per se but rather a ruling as to his entitlement to bring such a claim in the future. In connection with this issue, he submitted a June 2000 report by his QRC, who indicated that, given the uncertainties with respect to the employee's ability to return to his pre-injury occupation, "retraining should be reserved as a potential step in returning him to his

preinjury earning capacity."[3] Rejecting the employer and insurer's contention that the employee's retraining request must be dismissed for lack of evidentiary support, the compensation judge found instead as follows:

> The facts of this case do not bar a future claim by the employee for retraining benefits. In this instance, the filing of the Claim Petition before 104 weeks of wage loss compensation was paid preserved the employee's claim for retraining benefits. The Court finds that the employee's claim for retraining benefits is premature, but not to be dismissed. The Court preserves the employee's ability to claim retraining benefits in the future with respect to compensable injuries which he sustained on September 20, 1995.

(Emphasis added.) The judge erred in issuing this ruling.

The case now before us is for all relevant purposes identical to Davidson v. Northshore Mfg., 60 W.C.D. 69 (W.C.C.A. 1999). In that case, the employee filed a rehabilitation request regarding retraining in order to preserve his rights under the statute, and the parties then sought a decision as to whether the filing of the request satisfied the requirements of Minn. Stat. § 176.102, subd. 11(c), despite the fact that the employee was not yet actually seeking retraining benefits. Vacating the decisions below on the issue, this court, sitting en banc, wrote as follows:

> It is undisputed that there is no present claim for retraining here; that is, the employee is not seeking approval of "a formal course of study in a school setting which is designed to train the employee to return to suitable gainful employment." Minn. Stat. § 176.011, subd. 23. Rather, the employee filed his rehabilitation request in order to preserve his rights should he decide to pursue retraining at some point in the future. That circumstance may well never come to pass, and, while it is understandable for the parties to want guidance as to how the requirements of Minn. Stat. § 176.102, subd. 11(c), may be satisfied, nothing in the workers' compensation act allows for either advisory opinions or declaratory judgments. The issue is not ripe; no benefits are yet at stake. Cf. Katzenmeyer v. M.T.S. Systems, Inc., No. [REDACTED SSN] (W.C.C.A. Apr. 4, 1995) (where no doctor had recommended surgery and the employee did not wish to pursue surgery at the time of hearing, the compensation judge properly concluded that the issue as to approval of surgery was not ripe for determination); see also Makitalo v. Sears, Roebuck & Co., No. [REDACTED SSN] (W.C.C.A. May 9, 1995) (the issue of whether a [justiciable] controversy exists may be raised on the court's own motion). We therefore vacate the decisions of both

[3] As of the date of hearing, the employee was working for the employer on a two-hour per day, three-day per week basis. He has had continuing significant trouble with his right shoulder, despite the two surgeries.

> compensation judges as premature, and we dismiss this appeal. The employee filed his rehabilitation request, notifying the employer and insurer of his request for retraining, and a decision as to whether that filing satisfies the statute may be made if and when the employee actually seeks approval of some specific retraining plan in the future.

Id. at 72-73.[4]

To reiterate: a decision as to an employee's ability to bring a retraining claim under Minn. Stat. § 176.102, subd. 11(c) (1996), is not appropriate in the absence of an actual, present dispute over the employee's entitlement to retraining benefits. As in Davidson, the employee here filed a pleading concerning retraining, and the effect of that filing may be determined if and when the employee seeks retraining benefits in the future. In the meantime, any decision on the issue is premature, and we accordingly vacate the judge's finding.

[4] The employer and insurer contend that Davidson is distinguishable because, in Davidson, both parties were seeking a ruling on statutory interpretation, whereas, in the present case, the employer and insurer are contesting the employee's claim. We are unpersuaded that these differences compel a different result.