COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 006902-10**

Mary J. Mason	Employee
Action, Inc.	Employer
Mass Bay SIG	Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Costigan and Horan)

The case was heard by Administrative Judge Maher.

APPEARANCES
Michael A. Torrisi, Esq., for the employee
David M. O'Connor, Esq., for the self-insurer at hearing
Byron G. Mousmoules, Esq., for the self-insurer on appeal

LEVINE, J. The self-insurer appeals from a decision in which the administrative judge ordered payment of a closed period of partial, followed by ongoing total, incapacity benefits for the employee's work-related neck and upper back injury. Because there is no evidence to support the judge's finding that the employee provided the requisite notice of a work-related injury to the employer/self-insurer, or that the employer otherwise had knowledge that the injury was work-related, we vacate the decision and recommit the case for further findings addressing whether there was prejudice to the self-insurer as a result of the lack of notice or knowledge.

The employee worked as a visiting nurse/health aide, assisting patients in their homes with personal hygiene, housekeeping and meal preparation. The employee began working in 1990 after she separated from her husband, whom she later divorced. In April 2007, she reached the age of sixty-five and continued to work. The employee intended to work until the age of seventy, because she was self-supporting and needed the income. The employee began to experience neck and upper back pain in the spring and summer of 2007. She felt a severe onset of pain in

September 2007, when she had to move an overweight patient. She called into the office to report that she could no longer work with that patient. (Dec. 7-8.) While at work on October 10, 2007, the employee experienced another onset of neck pain, accompanied by dizziness and nausea. She reported to the office that she could not work, and her supervisor, Gerry Anne Brown,[1] drove her home. The employee sought immediate treatment with her primary care physician, Dr. Amy Esdale. The employee's neck and shoulder symptoms continued, and she developed a tremor and weakness. She has treated conservatively and has not returned to work. (Dec. 9.)

In 2010, the employee claimed total incapacity benefits from October 10, 2007, and continuing. (Dec. 4.) The judge allowed the parties to introduce medical evidence in addition to the report of the impartial physician. (Dec. 5, 10.) The judge adopted the following opinions of Dr. Esdale: the employee's diagnoses are cervical sprain/strain and aggravation of pre-existing cervical degenerative disc disease; the cervical disc disease is work-related; and the work performed in 2007, culminating on October 10, 2007, was the major cause of the employee's disability and need for treatment. Dr. Esdale considered the employee disabled since October 10, 2007, due to severe neck pain and dizziness. (Dec. 10, 12.) The judge found the employee suffered a work-related injury. (Dec. 11, 12.) He found that the employee was partially incapacitated from October 10, 2007, to February 9, 2010, and totally incapacitated thereafter. (Dec. 12, 13.)

On the issue of notice raised by the self-insurer, the judge found:

> October 10, 2007[, the] employee's last day of work[,] she visited two patients in the morning before becoming dizzy and nauseous while having neck pain. I find the employee's testimony credible, that she reported to the office on that day with those symptoms, told her supervisor Ms. Brown that she was unable to work and was actually taken home by Ms. Brown and a co-worker. I find based on the employee's credible testimony and the opinions I have adopted by her primary care physician, that the employee was injured at work, and that the employer was notified.

[1] At page 9 of the decision, Ms. Brown is misidentified as "Ms. Jones." (Dec. 9.) At other places, (Dec. 8, 11), Ms. Brown is correctly identified.

(Dec. 11.)

The self-insurer contends that the employee failed to give notice of her alleged injury until she filed her claim approximately thirty months after her last day of work. Notice of an injury

> must be given to the insurer or employer "as soon as practicable after the happening thereof." G. L. c. 152, § 41. Such notice is to be in writing and state the time, place and cause of the injury. G. L. c. 152, § 42. However, "[w]ant of notice shall not bar proceedings, if it be shown that the insurer, insured or agent had knowledge of the injury, or if it is found that the insurer was not prejudiced by such want of notice." G. L. c. 152, § 44. The employee has the burden of proving notice or lack of prejudice to the insurer. Thibeault's Case, 341 Mass. 647, 649 (1961); Brunetti v. Avon Prods., Inc., 8 Mass. Workers' Comp. Rep. 71, 72 (1994). Either knowledge by the employer or lack of prejudice will excuse failure to give proper notice. See Swasey's Case, 8 Mass. App. Ct. 489, 495 (1979).

Dugas v. Bristol County Sheriff's Dep't, 17 Mass. Workers' Comp. Rep. 349, 353-354 (2003)(footnote omitted). "Knowledge of the injury" is used "in the statute in its ordinary sense as meaning actual knowledge, but not absolute certainty." Walkden's Case, 237 Mass. 115, 117 (1921). However, even if the employee becomes ill at work, unless there is indication that the illness was caused by an incident at work, known by the employer, the court has not found actual knowledge. Kangas's Case, 282 Mass. 155, 157-158 (1933)(employer knew only that the employee hemorrhaged after exertion at work, a common incident of her tuberculosis; court held that was insufficient to warrant a finding that the employer had knowledge of a work-related injury).

The judge's finding that the employee notified her employer that she had been injured at work, thereby satisfying the provisions of §§ 41 and 44, is not supported by the record. The employee's testimony does not support this finding. Thus, she testified that on October 10, 2007, her last day at work, she told Ms. Brown, "[t]hat I was in pain and I was dizzy and I was having a hard time trying to drive my car." (Tr. 34; see also Tr. 63.) When asked if she told Ms. Brown "that it was your neck that was causing your problems that day, and that's why you couldn't work?" she replied,

"Yes." (Tr. 63.). She further agreed that she told Ms. Brown "about [her] neck," (Tr. 67-68), and "that it was [her] neck that ailed [her]." (Tr. 82.) However, the mere onset or presence of pain and dizziness at work does not mean that the work caused those symptoms, see Kangas, supra, and the employee never testified she told Ms. Brown that her symptoms were work-related.

The employee calls our attention to other evidence that she contends does support the judge's finding.[2] However, this effort is unavailing, as the cited evidence fails to indicate that the employee notified Ms. Brown, or another supervisory employee, that she had been injured at work.[3]

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[2] Employee's counsel did this in a letter to us dated May 11, 2012, after our invitation at oral argument.

[3] In the aforenoted May 11, 2012 letter, counsel cites the following testimony in support of counsel's contention that the employee reported her injury to a "Mr. O'Brien" as well as to Ms. Brown:

> Q: And you mentioned I think at conference that right after the incident you tried to make an accident report to Ms. Brown or Mr. O'Reilly: is that true?
> A: Yes. I spoke with Mr. O'Reilly.

(Tr. 80-81.) Clearly, this testimony does not indicate that the employee spoke to or notified Ms. Brown about an accident. The judge did not find the employee reported an accident to Mr. "O'Reilly" (who appears to be Tim Reilly, the executive director of the agency [Tr. 123]) or Mr. "O'Brien"; in any case, this testimony is too indefinite to support such a finding.

Employee's counsel also argues that "[i]ndirectly, the preponderance of the evidence indicates [the employee] kept complaining to Ms. Brown that the work was too heavy, she was having symptoms and that she needed to drop a certain patient due to the strain and pain it caused her." However, he points to no testimony in support of this contention, and we have found none. The employee did testify that, on September 21, 2010, over two weeks before she left work, she called the office but admitted she did not speak with Ms. Brown. She spoke with "the scheduler, the girl who's at the desk," (Tr. 95), and told her that "I can't go there [to the three to four hundred pound client's house] anymore, it's too difficult, it's too hard on me." (Tr. 33-34.) Again, this statement does not indicate the employee had suffered an injury at work. Even if it could be viewed as such, there was no testimony or basis to find that the "girl at the desk" was "a supervisory employee or was otherwise a proper person to whom the employee was expected to give notice of an injury." Dugas, supra, at 355; see Nason, Koziol and Wall, Workers' Compensation § 15.3 at 453-454 (3rd ed. 2003).

Moreover, Ms. Brown's awareness that the employee left work on October 10, 2007 due to neck pain, dizziness and nausea does not indicate "knowledge" of an injury at work. See Kangas's Case, supra. "[W]here a supervisory employee has observed the claimant's symptoms in such circumstances as would indicate that they are the result of an accident or disease arising out of and in the course of the claimant's employment, such observation is imputable as knowledge of the employer under § 44 of the statute." Davidson's Case, 338 Mass. 228, 231 (1958). In the present case, the employee has not made such a showing. Ms. Brown's knowledge that the employee left work due to neck pain and dizziness, without more, does not equate to knowledge that her problems were work-related.

Therefore, since the employee has advanced no evidence from which a finding of proper notice or employer knowledge of a claim of a work-related injury could be made, the decision is vacated. The case nevertheless must be recommitted because, pursuant to § 44, lack of notice is excused "if it is shown that the insurer was not prejudiced by such want of notice." The judge must consider and make findings on whether the employee has satisfied her burden to prove that the self-insurer was not prejudiced by the lack of notice. See Fantasia's Case, 75 Mass. App. Ct. 655, 659 (2009), quoting Russell's Case, 334 Mass. 680, 682 (1956)("The burden of proving lack of prejudice with respect to both the failure to give notice and the delay in presenting the claim [rests with] the claimant"). For examples of prejudice to the insurer, see Fantasia, supra, at 659-660.

The self-insurer's other arguments are without merit. The employee's medical evidence, adopted by the judge, met her burden of proving that the alleged work injury was "a major cause" of her disability in this § 1(7A) combination injury case. (Dec. 10.) Therefore, any error in disallowing that defense to be raised, (Dec. 5), is harmless.

We decline the self-insurer's invitation to abandon the longstanding approach to the employee's burden of proving an intention to remain in the work force beyond

the age of sixty-five for the purposes of defeating § 35E's presumption of retirement.[4] See LaPointe v. Soulier and Zepka Constr. Co., 19 Mass. Workers' Comp. Rep. 114 (2005)(employee's testimony as to background facts and circumstances relevant to his intention to continue working may be sufficient corroborative evidence to rebut § 35E presumption of non-entitlement to benefits), citing Harmon v. Harmon's Paint and Wallpaper, 8 Mass. Workers' Comp. Rep. 432 (1994)(employee's testimony which sheds light on his life and environment permissible to address § 35E presumption); Tobin's Case, 424 Mass. 250, 254-255 (1997)(endorsing reasoning of Harmon).

Accordingly, we vacate the decision and recommit the case for further findings consistent with this opinion.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: ***August 21, 2012***

[4] General Laws c. 152, § 35E, provides, in pertinent part:

> Any employee who is at least sixty-five years of age and has been out of the labor force for a period of at least two years and is eligible for old age benefits pursuant to the federal social security act or eligible for benefits from a public or private pension which is paid in part or entirely by an employer shall not be entitled to benefits under sections thirty-four or thirty-five unless such employee can establish that but for the injury, he or she would have remained active in the labor market. The presumption of non-entitlement to benefits created by this section shall not be overcome by the employee's uncorroborated testimony, or that corroborated only by any of his family members . . . .