COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017095-00**

Roger Dugas	Employee
Bristol County Sheriff's Department	Employer
Bristol County	Self-insurer

REVIEWING BOARD DECISION
(Judges Levine, McCarthy and Carroll)

APPEARANCES
Seth J. Elin, Esq., for the employee
Robert M. Novack, Esq., for the self-insurer

LEVINE, J. The self-insurer appeals an administrative judge's award of weekly § 35 partial incapacity benefits. We agree with the self-insurer that the judge's conclusion that the employee gave timely notice of his 1997 eye injury is error. We therefore recommit the case for further findings on this issue.

Roger Dugas, who was sixty-three years of age at the time of the hearing, had been a correctional officer with the Bristol County Sheriff's Department for twenty-seven years. His first fourteen years were spent at the Ash Street facility, a maximum security facility with a violent atmosphere. (Dec. 4, 7-8.) In 1987, the employee transferred to a minimum security facility known as DRNCAC, where he felt the inmates did not pose a physical threat to other inmates or to correctional officers. (Dec. 7-8.)

The employee alleged that he suffered three injuries in the course of his employment with the employer. The first two were physical injuries to his left eye, and the third was an emotional injury as the result of an order that the employee transfer back to the Ash Street facility. The first injury occurred on August 25, 1985. The employee attempted to break up a fight between several inmates when he was struck in the left eye. One month before this altercation, he had had cataract surgery; and, after the injury at

work, he had to have further surgery to repair the damage to the eye. The employee remained out of work for three months and then returned to his position. Although his vision was normal, he often had inflammation, redness, pain and light sensitivity, for which he was prescribed special glasses to filter out ultraviolet rays. (Dec. 9-10, 19-20.) The self-insurer paid indemnity and medical benefits for the 1985 injury. (Dec. 5.)

Mr. Dugas' vision was stable until September 25, 1997, when he suffered a second injury to his left eye while in firearms training. After kneeling and firing his gun, the employee fell while trying to stand up. The left side of his head struck the ground. At the time, there were a number of training officers or other correctional officers in the vicinity. The employee felt "okay" after the fall, and completed his training. The next day he noticed a decrease in vision which, he alleged, dramatically worsened over the course of the week. At one point during the week, he went to the internal affairs office and called his doctor, telling him that he had fallen at a firing range that week and that his eye was bothering him. Corey Rose, a clerk in the office, overheard the employee's side of the conversation. (Dec. 9-11, 12 13.) On September 29, 1997, the employee underwent a repair of the retinal detachment of his left eye. Following the surgery, he had essentially no vision in his left eye. (Dec. 21.) Again, he was out of work for three months; he received sick pay rather than workers' compensation benefits. He did not fill out an incident report or file a workers' compensation claim. (Dec. 11, 13.) Despite his visual problems, he was able to perform his job duties at DRNCAC, as it was a " 'non-threatening environment.' " (Dec. 12.)

On January 25, 2000, the employee told a joke at roll call which offended a female officer. As a result, the employee was given a written warning, ordered to do sensitivity training, and reassigned to the Ash Street facility. The employee told his superiors that he feared his visual limitations would make him vulnerable to attack by inmates and therefore he could not work at Ash Street. He filed a grievance, which was resolved by allowing him to use the sick bank to accumulate enough time to retire. (Dec. 14.)

The employee also filed a claim for workers' compensation benefits, alleging that, given his visual problems, the order to transfer back to Ash Street caused him to experience stress and anxiety. (Dec. 4-5.) The self-insurer did not accept the claim, and, following a § 10A conference, an administrative judge denied the claim. The employee appealed to a hearing de novo. (Dec. 3.) Prior to hearing, the employee filed a motion to join a claim for the August 20, 1985 eye injury and the September 25, 1997 aggravation of that eye injury. The judge allowed the motion over the self-insurer's objection. (Dec. 5.)

Pursuant to § 11A, an impartial physician examined the employee regarding his alleged psychiatric injury. The judge found the § 11A report adequate as to the psychiatric injury, but determined that the medical issues were complex due to the eye injury claim. She therefore allowed the parties to submit additional medical evidence as to the employee's visual impairment. Sua sponte, the judge allowed the parties to submit additional medical evidence for the "gap" period prior to the date of the impartial examination. (Dec. 5-6.)

At hearing, the parties stipulated that the employee sustained an industrial injury to his eye on August 20, 1985. However, in its post-hearing brief, the self-insurer contested liability for that injury as well as the alleged 1997 eye injury and the alleged psychiatric injury. The judge found that the employee did suffer an industrial injury to his left eye in 1985. (Dec. 7, 9.)

Regarding the 1997 eye injury, the judge credited the employee's account of the incident at the firing range. (Dec. 13.) She also credited the testimony of Dr. Goodman and Dr. Geller and found that the severe trauma to the eye in 1985 weakened the retina sufficiently so that the mild trauma in 1997 triggered the retinal detachment. Even if the employee did not strike his head, the fall at the firing range could have caused his retina to detach. (Dec. 14, 23-24.)

With respect to the alleged psychiatric injury, the judge found that the employee's transfer to the Ash Street facility was a bona fide personnel action within the meaning of

§ 1(7A), and with no intention to inflict emotional harm to the employee.[1] (Dec. 17.) In addition, the judge found that, even if § 1(7A) did not apply, the employee had failed to meet his burden of proof under a simple causation standard since he had failed to prove that "but for" the eye injury, his depression and anxiety would not have occurred. Thus, his psychiatric injury was not a sequela of his physical eye injury. (Dec. 18, 26.)

The judge found the employee partially incapacitated as a result of his left eye injuries. (Dec. 24.) She further found him "capable of obtaining and sustaining several entry level positions in the open labor market" and "precluded from only work which would put him, or those that he may be entrusted to protect, in danger of bodily harm." (Dec. 28.) She found that Mr. Dugas could not return to the minimum security facility, DRNCAC, where he was last employed because "he was given no option to stay. . . . Even in a minimum-security facility, he would be perceived as a risk to himself and his fellow officers." (Dec. 28-29.) Accordingly, the judge assigned the employee a minimum wage earning capacity of $270.00 per week, and awarded him ongoing § 35 partial incapacity benefits beginning on February 10, 2000.[2] (Dec. 29, 32.)

The self-insurer first argues that the employee was not entitled to § 35 benefits because his loss of income was related to a bona fide personnel action taken in response to his misconduct, rather than to his eye injuries. Second, the self-insurer maintains that the judge erred in admitting certain medical records for impeachment purposes only. We find no merit to these arguments, and summarily affirm the judge's decision on those issues. However, we do agree with the self-insurer that the judge erred in concluding that

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[1] General Laws c. 152, § 1(7A), provides, in relevant part:

> No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

[2] The judge also denied and dismissed the employee's and the self-insurer's § 14 claims. (Dec. 29.)

the employee satisfied the notice requirements as to his 1997 eye injury. We therefore recommit the case for further findings on this issue.

On the notice issue, the judge found that the employee did not file a compensation claim or an incident report since he was receiving a full pay check while he was out of work and " 'as long as he was getting paid he didn't care where it came from.' " (Dec. 13.) The judge credited the employee's account of the injury on September 25, 1997. She also credited the testimony of three officers who were present at the firing range, although she noted that their testimony was not consistent as to the mechanics of the fall or whether the employee struck his head. (Dec. 13.) The judge further credited the testimony of Corey Rose, the clerk in internal affairs, that she heard the employee call his doctor and tell him that he had fallen at the firing range and that his eye was bothering him. (Dec. 11, 13.) The judge found her testimony "probative on the issue of the Department's notice of an injury as well as substantiating the employee's allegation that while he did not experience immediate vision problems that he did so within a few days of the incident." (Dec. 13-14.) The judge concluded:

> I find that the employee did not act unreasonably with reference to his injury of 1997, within the meaning of the Statute. There are several indications that the employer knew or should have known about his injury in 1997. I do not find it unreasonable that the employee did not file a workers [sic] compensation claim immediately as he stated that he was "getting a paycheck and he didn't care where it came from".

(Dec. 30.)

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.[3] Such notice is to be in

[3] Section 41 further provides that a claim may not be maintained unless "any claim for compensation due with respect to such injury is filed within four years from the date the employee first became aware of the causal relationship between his disability and his employment." The self-insurer did not raise at hearing that the employee failed to file his claim within four years. Proper notice of injury and proper claim for compensation are two distinct issues. Theis v. Design Pak, 5 Mass. Workers' Comp. Rep. 124, 125 n. 2 (1991). Section 41 does not operate to bar compensation unless the self-insurer raises it as an issue. Newsome v.

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)

"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).

> Oral notice alone does not make out knowledge on the part of the employer. But an oral report of injury to the employer or a qualified agent, together with additional circumstances indicating that the employer acted on the report or acquired further information confirming the injury, warrants a finding that the employer had knowledge of the injury. Prompt filing of an employer's report of injury supports a finding of knowledge. Furnishing of medical care, or arranging for medical examination, is further evidence that the employer had knowledge of the injury.
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> An agent of the employer, such as a foreman or other *supervisory employee, must receive the oral report*, if it is to give rise to an inference of knowledge on the part of the employer. The following have been held proper persons for receipt of notice: the employer himself, foreman, superintendent, local representative of the employer, timekeeper, or paymaster, company nurse or first aid attendant. On the other hand, mention of the injury to a fellow-worker, working foreman or "second hand," or subordinates of the injured employee has been held not to constitute notice to an agent of the employer.

L. Locke, Workmen's Compensation, § 443 (2d ed. 1981) (emphasis added; footnotes omitted).

M.B.T.A., 11 Mass. Workers' Comp. Rep. 182, 186 (1997). Accordingly, we address only the issue of proper notice.

We also note that because the 1997 injury is said to be an aggravation of the 1985 eye injury, and not a recurrence, notice is required. Compare Sulham's Case, 337 Mass. 586, 590 (1958).

Here, the judge addressed the issue of knowledge but made no findings on whether the self-insurer was prejudiced by the lack of notice. She appeared to find that the employer received notice of the employee's eye injury caused by a fall on the firing range when Corey Rose, a clerk in internal affairs, overheard the employee's telephone call to his doctor several days after the incident. (Dec. 11, 13-14.) However, the judge made no finding that Ms. Rose was a supervisory employee or was otherwise a proper person to whom the employee was expected to give notice of an injury. Indeed, there was no testimony that would support such a finding. (December 5, 2001 Tr. 32-38.) She was merely a clerk whose job duties did not include any responsibility to receive information about workers' compensation injuries.[4] Locke, supra.

The courts have consistently found lack of notice where the only witness or person to whom an oral report was made was not a supervisory employee. In Thibeault's Case, supra, the employee alleged that she had two heart attacks at work. The court reversed the board's finding that the employer had knowledge that the first heart attack was work-related; the only person who knew of the lifting incident alleged to have caused the heart attack was a fellow nurse who did not supervise the employee. In Hatch's Case, 290 Mass. 259, 262 (1935), the court declined to attribute to the insurer or employer knowledge of two co-employees, who saw the employee looking ill at work after clearing away snow and whom employee later told that snow shoveling was too tough for him. Compare Morrison's Case, 332 Mass. 658, 661-662 (1955) (the employee gave proper notice of eye injury; he told his foreman he must have rubbed his eye with his glove; the foreman saw the swollen eye and advised the employee to go to the factory hospital); and Theis v. Design Pak, 5 Mass. Workers' Comp. Rep. 124, 125 (1991) (where employee reported the facts of work incident to both the company comptroller and company treasurer and was taken from work to the hospital by ambulance, the insured had

[4] Ms. Rose testified that in 1997, her job duties as a clerk in internal affairs included being "in charge of fingerprint cards, Bureau of Criminal Identification, inputting the inmates' history into the computer, data entry." (December 5, 2001 Tr. 34.)

knowledge of the injury). Thus, as a matter of law, notice to Ms. Rose was not notice to the self-insurer.

The judge concluded that there were "several indications that the employer knew or should have known" about the employee's injury in 1997.[5] (Dec. 30.) Although the judge did not specify what these indications were, it appears that, in addition to Ms. Rose's awareness of the employee's injury, the judge was referring to the "knowledge" of the three officers whose testimony she credited regarding the 1997 injury. (See Dec. 13.) One of them, Susan Cripps, was not a supervisor, so even if she had knowledge of an injury to the employee (which her testimony does not indicate she did), such knowledge could not be imputed to the employer. Edward Raposa and Steven Assad, both training officers, were arguably supervisory employees. However, officer Assad testified only that he helped the employee up from a kneeling position,[6] but did not witness him fall. (Dec. 11; December 5, 2001 Tr. 15, 23, 25.) Officer Raposa testified that it was standard procedure for a training officer to report an injury received by an employee during training. He said that he saw the employee "out of the corner of his eye" try to get up and fall backwards, but he did not see him hit his head. The employee did not report an incident to him. (Dec. 12; January 23, 2002 Tr. 63, 71.) The fact that officer Raposa saw the employee fall backwards, without more, does not constitute knowledge of a work-

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[5] Section 44 excuses the employee's failure to give proper notice if the insurer "had knowledge of the injury." The statute does not excuse such failure if the insurer "should have known of the injury."

The judge also found that "the employee did not act unreasonably with reference to his injury of 1997, within the meaning of the Statute." (Dec. 30.) This finding suggests an inapplicable standard on the issue of notice. The following sentence was deleted from G. L. c. 152, § 49, by St. 1985, c. 572, § 53: "Failure to make a claim within the time fixed by section forty-one shall not bar proceedings under this chapter if it is found that it was occasioned by mistake or other *reasonable cause*, or if it is found that the insurer was not prejudiced by the delay." (Emphasis added.) Not only is this section no longer in effect, but it was applicable to the filing of a claim, not to the giving of notice.

[6] The judge had earlier found that Mr. Dugas fell while trying to get up from a kneeling position. (Dec. 10, 13.)

related injury:

> [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) (emphasis added). Here, there were no symptoms to observe, as the employee testified that he felt "okay" after the incident, and none of the officers whose testimony the judge credited testified that the employee appeared to have been injured.

In Rich's Case, 301 Mass. 545 (1938), the court distinguished the situation where the insurer had exact knowledge of the bodily injury sustained by the employee within a few hours of his death as well as an opinion of the employee's surgeon that his death was probably work-related, from those situations where the insurer or the employer are ignorant of the happening of an accident or where the information possessed is insufficient to indicate that an injury has been sustained. The court cited Kangas's Case, 282 Mass. 155, 157-158 (1933), which held that even if knowledge of the "second boss" could be found to be that of the insured, he had knowledge only that the claimant hemorrhaged after exertion at work, which was a common incident of her tuberculosis; thus, a finding of knowledge of a work-related injury by the employer could not be supported. Similarly, even where a supervisor learned that an employee was taken ill while working the previous day, but was not told the employee had a heart attack at work, the court has held that such information was insufficient to put the employer on notice that the employee had a work-related injury. Thibeault's Case, supra at 650-651. Thus, even where the employee becomes ill at work, unless there is indication that his illness was caused by an incident at work, the court has not found actual knowledge.

In the present case, the employee's eye did not bother him the day of the fall; and, in fact, he completed his firearms training. However, his vision deteriorated over the next few days. (Dec. 11.) In a similar case, this board stated in dicta that actual knowledge was "unlikely." In Botti v. General Elec. Co. Sedgwick, 10 Mass. Workers' Comp. Rep.

782 (1996), the employee alleged that he suffered a heart attack at home as a result of receiving a letter from the employer reneging on a promised pay increase. The board observed that:

> Though the employer was aware of the employee's consternation about the pay increase turnabout and knew that the employee experienced cardiac discomfort on the day of the unfortunate announcement which compelled him to see the company nurse, it is highly doubtful the employer could be found to *actually* know that the facts surrounding the employee's heart attack at home would eventuate in a workers' compensation claim.

Id. at 784 (emphasis in original). Here, there was no evidence to warrant a finding that the employer knew that a fall producing no symptoms would result in an eye injury.

Thus, in light of the absence of testimony that officer Raposa observed any symptoms or that the employee complained of an injury to him, the mere fact that he saw the employee fall but not strike his head and suffer injury does not constitute notice to the employer that the employee suffered an injury to his eye. The situation in Sullivan's Case, 241 Mass. 36 (1922), is in sharp contrast to the present case. There, the court based its holding of lack of prejudice to the insurer in part on the employer's knowledge of the injury. Unlike Mr. Dugas, Mr. Sullivan did not know of his detached retina or connect it with the strain of lifting at work until several weeks after the incident.[7] The court found that the employer was not prevented from investigating the incident because it knew, within a short time of the employee stopping work, that he had trouble with his eye and that it was caused in some way by his employment. Not only did the claimant's wife file a written notice fewer than two months after the accident, but the foreman and supervisor visited the employee at home, were told he was having eye problems, and also called the employee's physician. Id. at 38-39. By contrast, in the present case there was no such evidence that the employer took any action which would have indicated knowledge. The employee collected sick pay while he was out of work and never filled out an accident

[7] The employee in the present case had surgery for a detached retina four days after the incident, and made the call to his doctor in Ms. Rose's presence prior to that. (Dec. 11, 21.)

report or filed a claim because he was getting a full paycheck and he "didn't care where it came from." (Dec. 11.) Not until approximately four years later did he allege that his detached retina was causally related to an incident at work. We hold that, as a matter of law, the evidence and the judge's findings do not support her conclusion that the employer or self-insurer had actual knowledge of an injury to the employee.

This holding does not end the inquiry, however. An employee may still maintain his claim even where the employer or insurer did not have knowledge of the injury if he can prove that the insurer was not prejudiced by his failure to give prompt notice. Prejudice usually takes the forms of the inability of the insurer to procure evidence long after the injury, and of the failure of the employee to receive proper medical treatment. Kangas's Case, supra at 158-159; Tassone's Case, 330 Mass. 545, 548 (1953). The judge here made no findings on whether the self-insurer was prejudiced by lack of notice. On recommittal, she must do so.

Accordingly, we reverse the decision on notice 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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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Filed: **July 8, 2003**