**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 043113-04**

| | |
|---|---|
| Alan Hamel | Employee |
| Kidde Fenwal, Inc. | Employer |
| St. Paul Fire and Marine Insurance Co. | Insurer |

**REVIEWING BOARD DECISION**
(Judges Costigan, McCarthy and Horan)

**APPEARANCES**
Richard C. Hyman, Esq., for the employee
Donna Gully-Brown, Esq., for the insurer

**COSTIGAN, J.** The insurer appeals from a decision in which an administrative judge found that the employee had sustained a work-related injury to his left knee, and awarded a closed period of § 34 total incapacity benefits, followed by ongoing § 35 partial incapacity benefits. The insurer argues, *inter alia*, that the employee provided inadequate notice of the injury to it and/or its insured, the employer, and that the judge's findings on notice were conclusory and without evidentiary support. We agree the decision is flawed in that respect, and recommit the case for further findings on whether the insurer was prejudiced by the employee's failure to give timely notice of his injury.

Prior to his alleged work-related left knee injury in 2004, the employee had suffered injuries to that knee while serving in the Navy, and at home. (Dec. 4-5.) The employee claimed that on Friday, July 16, 2004, he twisted his knee while walking at work, and felt a pop. He experienced pain, but continued to work. He did not report the incident to management. He iced his knee at home, and returned to work the following Monday, with his knee still sore. The employee went to see his orthopedist the next day, but did not tell his supervisor that the appointment was for the knee injury he claimed occurred at work the previous Friday. The supervisor knew of the employee's prior, non-work related knee injuries.

Although he claimed to have ongoing knee pain, the employee continued to work. (Dec. 6.) In the following weeks, the employee applied for, but did not receive, a promotion to assistant supervisor. (Dec. 6-7.)

The employee left work in mid-August 2004 due to left knee pain. He applied for short-term disability (STD) benefits from his employer, and began receiving them on August 25, 2004. In his STD application, he did not answer the question as to whether his medical condition was work-related. In support of the application, the employee's treating physician expressly represented that his patient's left knee condition was *not* work-related. On August 31, 2004, the employee underwent surgery to his left knee. He obtained some improvement, but the pain returned with activity. Approximately six months later, the employee's STD benefits were exhausted, and he filed the present claim for workers' compensation benefits. He also filed for and started receiving long-term disability (LTD) benefits. (Dec. 7.) Following a § 10A conference in April 2005, the administrative judge denied the employee's claim, and he appealed.

The employee underwent a § 11A impartial medical examination, but the judge ruled the doctor's opinion inadequate and did not adopt it, as the doctor had improperly based his opinion on his own credibility assessment.[1] See Moynihan v. Wee Folks Nursery, Inc., 17 Mass. Workers' Comp. Rep. 342 (2003). (Dec. 2, 8.) The parties were allowed to submit their own medical evidence, from which the judge adopted various opinions supporting her conclusion that the alleged industrial injury, which she found had occurred, was and remained a major cause

[1] Dr. Thomas P. Goss wrote:

> CAUSAL RELATIONSHIP: Although Mr. Hamel relates his left knee difficulties to an occupational event which allegedly occurred on 7/14/04 [sic], I am unable to support this causal relationship since he, himself, states that he did not report this to anyone nor was a report ever filed and since, in Dr. Kennedy's office note of 7/20/04 (six days after the alleged event), no mention of this occupational injury was recorded.

(Statutory Ex. 1.)

of the employee's disability. G. L. c. 152, § 1(7A). (Dec. 8-10.) The judge further found the employee had been totally incapacitated for a closed period of time, and was partially incapacitated thereafter. (Dec. 11-12.)

On appeal, the insurer challenges the judge's findings on its late notice defense:

> I find that the employee sustained an injury to his left knee that arose out of and in the course of his employment when he twisted his left knee at work on July 16, 2004. Having made that finding, I must next address the issue of improper notice. There is no doubt that the employee failed to notify the employer that he had sustained a work related injury at any time prior to filing his claim for compensation, some six months after the injury occurred. Nonetheless, the employer was aware that the employee was unable to work as a result of a problem with his left knee, and as the short term disability carrier, the employer received medical reports from his doctor and other doctors in regard to his disability and need for treatment. I do not find that the employer has been prejudiced in any way by that late notice.
>
> In light of his filing of an application for a promotion just ten days after the incident, I am persuaded that the employee, although misguided, thought the symptoms would go away. Indeed, I infer that despite his symptomatic left knee, the employee stayed on the job until August 11, 2004 so as not to jeopardize his chances of getting that promotion.

(Dec. 11.) We assess these findings against the pertinent statutory provisions governing notice -- §§ 41, 42 and 44 of G. L. c. 152.[2]

---

[2] General Laws c. 152, § 41, provides, in pertinent part:

> No proceedings for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof. . . .

General Laws c. 152, § 42, provides, in pertinent part:

> The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury, and shall be signed by the person injured. . . .

There is no dispute that the employee did not give the employer written notice of the time, place and cause of the injury in this case, as required by §§ 41 and 42. The judge's finding that the employer "was aware that the the employee was unable to work as a result of a problem with his left knee," is not dispositive of the notice issue. "When late notice is asserted by the insurer, the burden of proof rests with the employee to show either that the employer or insurer had knowledge of the injury, or that the insurer was not prejudiced by lack of timely notice." Day v. Lumbermen's Mut. Cas. Co., 4 Mass. Workers' Comp. Rep. 313, 317-318 (1990), citing Clifford's Case, 337 Mass. 129 (1958), and Berthiaume's Case, 328 Mass. 186 (1951). "Knowledge of the injury" is used "in the statute in its ordinary sense as meaning actual knowledge, but not absolute certainty." Dugas v. Bristol Cnty. Sheriff's Dept., 17 Mass. Workers' Comp. Rep. 349, 354 (2003), quoting Walkden's Case, 237 Mass. 115, 117 (1921). "Knowledge of the injury" has been interpreted to mean the employer or insurer knew or had reason to know the injury was causally related to the employment. Kangas's Case, 282 Mass. 155 (1933). In the absence of such knowledge, only a showing that the *insurer* was not prejudiced by his failure to give notice will permit the employee to recover benefits. Tassone' s Case, 330 Mass. 545, 549 (1953); Kangas's Case, supra at 157-158.

That Mr. Hamel's employer knew he was out from work due to disabling left knee problems does not equate to knowledge that his disability was allegedly work-related. See Fredyma v. AT&T Network Sys., 11 Mass. Workers' Comp. Rep. 420 (1997). Indeed, the employee's own treating physician had certified it

---

General Laws c. 152, § 44, provides:

> Such notice shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury unless it is shown that it was the intention to mislead and that the insurer was in fact misled thereby. Want 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.

was not,[3] and the judge found, "[t]here is no doubt that the employee failed to notify the employer that he had sustained a work related injury at any time prior to filing his claim for compensation, some six months after the injury occurred." (Dec. 11.)

Although the judge made certain findings about the July 16, 2004 incident, the observations of a co-worker of the employee's, and a discussion the two men had at that time,[4] we are satisfied that the judge did not find the employer had either notice or actual knowledge of the alleged work injury at any time prior to the employee's filing of a workers' compensation claim in February 2005. We so conclude, because the judge went on to address the issue of prejudice.

---

[3] In sixteen office notes spanning the period from July 20, 2004 through March 7, 2005, the employee's treating orthopedic surgeon, Dr. Michael G. Kennedy, made no mention of a work injury as the cause of the employee's left knee complaints or the reason for his August 31, 2004 surgery. In his office note of April 5, 2005, and in a handwritten narrative report of that same date, the doctor for the first time causally related the employee's knee problems to an incident at work on July 16, 2004, and characterized his August 25, 2004 certification of non-work related disability, (Ins. Ex. 3), as "a mistake." (Employee Ex. 2; Ins. Ex. 8(1).)

[4] The judge found:

> On July 16, 2004, while working for the employer, the employee opened the conformal coat machine and was carrying boards to the machine. While doing this task, the employee was walking on a static control mat that was on the floor near his machine, when he twisted to turn and felt a pop in his left knee. The incident happened around mid-shift on a Friday, at approximately 9:00 P.M. The employee experienced pain in his knee but continued to perform his work. A co-worker, Israel Alves Santos, was operating a machine next to the employee's and observed the employee bending over and holding onto his left knee. Mr. Santos came over to the employee and they discussed what had just happened. Mr. Santos observed the employee limping after the incident. Neither Mr. Santos nor the employee reported the incident to management . . . The employee's direct supervisor, Timothy O'Brien . . . had left for the day at the time the incident happened.

(Dec. 6.) Our 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. Thibeault's Case, 341 Mass. 647 (1961); Hatch's Case, 290 Mass. 259 (1935); Dugas, supra.

The administrative judge found that the employer, in its capacity as the STD self-insurer, had access to the employee's medical reports for the six-month period between the alleged work injury and the filing of his workers' compensation claim.[5] The judge therefore concluded, "I do not find that the *employer* has been prejudiced in any way by late notice." (Dec. 11; emphasis added.) Because the judge misapprehended the party against whom prejudice, or lack thereof, is measured, her decision leaves unaddressed the insurer's defense of late notice. Recommittal is therefore necessary.

The judge's findings do not provide adequate answers to the prejudice inquiry. "The usual forms of prejudice are the inability of the insurer to procure evidence at a time remote from the injury, and the failure of the employee to be treated medically promptly after the injury." Fredyma, supra, quoting Tassone's Case, supra at 548. Indeed, this case presents just the opposite of the "failure to be treated" problem. Although the employee's timely receipt of medical treatment for his left knee condition is one criterion in showing a lack of prejudice to the insurer, it is not determinative. "[I]mproper notice effectively can 'destroy[ ] the right of the insurer to a [timely] medical examination [under] G. L. (Ter. Ed.) c. 152, § 45. . . ."[6] Rivera v. Springfield Recycling Facility, 9 Mass. Workers'

---

[5] The insurer argues this finding is unsupported by the evidence. It contends that with the exception of the medical certification that accompanied the employee's short term disability application, "[t]here . . . was no evidence that the employer, though self-insured for the short-term disability payments, had any right to receive continued reports on disability nor was there any evidence that the employer even administered the short-term disability program." (Ins. br. 5.) However, we need not address this challenge, as lack of prejudice to the employer is not the issue here.

[6] General Laws c. 152, § 45, provides, in pertinent part:

> After an employee has received an injury, and from time to time thereafter during the continuance of his disability he shall, if requested by the insurer or insured, submit to an examination by a registered physician, furnished and paid for by the insurer or insured. . . .

Comp. Rep. 821, 823 (1995), quoting Clifford's Case, supra at 130. Because the employee had surgery on his left knee some five months prior to filing his compensation claim, the insurer could not exercise "its statutory right to obtain contemporary expert medical testimony as to whether or not the employee was disabled" due to the alleged work injury, rather than his pre-existing condition. Stover v. Chamberlain Mfg. Corp., 1 Mass. Workers' Comp. Rep. 371, 376 (1988). See also Harris v. Raytheon Co., 4 Mass. Workers' Comp. Rep. 308, 310 (1990). The same scenario afflicts the insurer's ability to determine the reasonableness, necessity and causal relationship of what was an already accomplished left knee surgery. It is too facile to suggest, as the employee does, that the insurer's access to medical and hospital reports contemporaneous to the surgery negates any prejudice to the insurer. When, as here, an insurer is forever deprived of its right under § 45 to have the employee physically examined by its medical expert *before* surgery takes place, a strong argument can be made that prejudice attaches. See Stover, supra.

> If the [administrative judge] had made adequate subsidiary findings on the issue of prejudice, we would be in a position to test whether they in turn would warrant a conclusion of absence of prejudice. We think that the inferences reasonably to be drawn from the evidence very strongly suggest that the absence of notice . . . was prejudicial to the [insurer]. It may be, however, that the [judge] drew from the evidence permissible inferences of absence of prejudice which [s]he has not adequately expressed in subsidiary findings.

Thibeault's Case, supra at 652. Accordingly, we recommit the case for further findings on whether the insurer was prejudiced by the employee's failure to give timely notice of his injury. We summarily affirm the decision before us as to all other issues raised by the insurer.

So ordered.

_____
Patricia A. Costigan
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

_____
Mark D. Horan
Administrative Law Judge

Filed: **May 2, 2007**