FILED
OCT 25 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-316 / 93-1818

JANICE HABERKORN,

Petitioner-Appellant,

vs.

FOODS INC., d/b/a DAHL'S FOODS, and EMPLOYERS MUTUAL COMPANIES,

Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Linda R. Reade, Judge.

Former employee appeals from a district court order affirming the industrial commissioner's denial of workers' compensation benefits for failure of the employee to give the employer proper notice. **AFFIRMED.**

Phillip Vonderhaar of Hedberg, Ward, Owens & Vonderhaar, Des Moines, for appellant.

Cecil L. Goettsch of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellees.

Heard by Sackett, P.J., and Habhab and Cady, JJ.

PER CURIAM

Petitioner-appellant Janice Haberkorn, a former employee of repondent-appellee Foods, Inc., d/b/a/ Dahl's Foods, appeals from a district court decision affirming the Industrial Commissioner's denial of workers' compensation benefits after finding Haberkorn had not followed the statute required for employer notification.

On appeal, Haberkorn contends Dahl's had knowledge of the possibility of a claim, the Commissioner did not apply the correct legal standard and the Commissioner's finding of the cause of Haberkorn's surgery was not supported by substantial evidence. We affirm.

Janice Haberkorn began working for Dahl's grocery store as a cake decorator in February 1977. The last day Haberkorn worked was January 9, 1989. She left that day because of pain in her back and right leg. Haberkorn had surgery on February 1, 1989 and November 30, 1990. Dahl's terminated Haberkorn's employment in July 1989. Haberkorn has subsequently been determined for social security disability purposes to be permanently and totally disabled.

On February 27, 1990, Haberkorn filed a petition for workers' compensation benefits and Dahl's learned for the first time Haberkorn considered her back problems to be a cumulative injury arising from her employment at Dahl's.

The case was tried to a Deputy Industrial Commissioner who awarded Haberkorn benefits, finding Dahl's had actual knowledge of a possibility of a claim on January 9, 1989,

Haberkorn's last day of work. Dahl's appealed to the Industrial Commissioner. The Commissioner determined Haberkorn was not entitled to benefits because she failed to comply with Iowa Code section 85.23 (1993), which provides:

> Unless the employer or his representative shall have actual knowledge of the occurrence of an injury received with ninety days from the date of the occurrence of the injury, or unless the employee or someone on his behalf or a dependent or someone on his behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

The Commissioner specifically found Haberkorn had a prior back condition known to Dahl's. Haberkorn made a statement to her supervisor she would be absent from work and would have back surgery but this did not put Dahl's on notice her condition was the result of a work-related injury. The Commissioner determined this, coupled with her denying she had a work-related injury when questioned by her supervisor, were not sufficient for notice. The Commissioner also found Dahl's did not have actual knowledge of a work-related injury.

Haberkorn contends her failure to give notice was excused because Dahl's had actual knowledge. Haberkorn advances her injury occurred on January 9, 1989, the day she could not work because of back and leg pain. She had two surgeries, and there was a diagnosis that chronic standing required by her job as a cake decorator necessitated the surgery.

The scope of appellate review is on error. Dowell v. Wagler, 509 N.W.2d 134, 136 (Iowa App. 1993).

The workers' compensation law should be liberally construed to accomplish the object and purpose of the legislation: to benefit the worker and his dependants. Dillinger v. City of Sioux City, 368 N.W.2d 176, 180 (Iowa 1985); Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 17 (Iowa 1993).

Section 85.23 requires the employee to give the employer notice within ninety days after the occurrence of the injury "unless the employer or his representative shall have actual knowledge of the occurrence of an injury." Dillinger, 368 N.W.2d at 179. "[A]n employee who fails to give a timely notice may still avoid the sanction of section 85.23 if the employer had 'actual knowledge'" . . . Id.; see also Doerfer Div. of CCA v. Nicol, 359 N.W.2d 428, 435 (Iowa 1984).

Haberkorn testified at the hearing that from and after January 9, 1989, she believed her back difficulties were the result of activity in the work environment. However, Haberkorn also admitted she never gave notice to Dahl's she believed her back injury was the result of work activity and, therefore, compensable under the Workers' Compensation Act.

From the record we find:

1. Haberkorn never filed a report of an injury.
2. Haberkorn never requested workers' compensation benefits until she filed her petition on February 27, 1990.

3. Haberkorn made application for benefits under a long-term disability policy with CNA Insurance Company and she received benefits of $832. The policy was available to Dahl's employees for non-work related disabilities. In applying for the insurance, when asked whether the condition was due to an injury or sickness arising out of employment, she answered, yes, probably.
4. Haberkorn's medical expenses for her surgeries were paid by her private health insurance carrier.
5. Prior to the filing of the petition, there was no request on the workers' compensation carrier for payment of any medical bills.
6. Haberkorn selected her own physician and chose her own medical providers.
7. Haberkorn never reported she believed her back condition was the result of activity performed at Dahl's and never put Dahl's on notice of her intention to claim workers' compensation benefits.

The standard for review in this case is limited to an inquiry into whether there is substantial evidence in the record as a whole to support the agency's decision. Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n, 394 N.W.2d 375, 379 (Iowa 1986). In making a determination as to whether an agency decision was supported by substantial evidence, the reviewing court will apply the law and determine whether its conclusions are the same as the lower court's. Ray v. Iowa Dep't of Job Serv., 398 N.W.2d 191, 193-94 (Iowa App. 1986). There is substantial evidence supporting the Commissioner's decision notice was not given under Iowa Code section 85.23, and Dahl's did not have actual notice. We affirm.

AFFIRMED.