

# RHODE ISLAND Lawyers Weekly

## Worker's failure to report injury doesn't doom claim

By: Pat Murphy January 8, 2015



Workers' compensation attorneys might be inclined to turn down cases in which the employee fails to report his injury until months after it occurs.

But Providence attorney Stephen J. Dennis recently earned a \$4,000 fee by beating the odds and winning workers' comp benefits for a school custodian, Joseph J. Adamczyk, who waited two months before telling his employer that he had suffered a shoulder injury while lifting a heavy garbage bin.

Dennis said he knew Adamczyk's case would be tough to win going in.

"There was the problem with notice and also causation. But I took it at face value, and he seemed very credible," Dennis said.

Workers' compensation attorneys agree that an employee's failure to report an injury at the time it occurs often can be an insurmountable hurdle to obtaining an award of benefits.

"It calls into question the employee's credibility," said John M. Harnett, a lawyer at Lovett, Schefrin, Harnett in Providence.

### Unreported shoulder injury

Credibility and corroboration were the keys to Dennis' win in Workers' Compensation Court last month in *Adamczyk v. Town of North Providence*.

Employed by the town of North Providence, Adamczyk hurt his right shoulder while working at Wayland Elementary School on Aug. 21, 2013. Adamczyk said the injury occurred when he attempted to empty a heavy recycling bin containing old books into a dumpster. Claiming that he initially thought the injury to be minor, he did not report it to his supervisors at the time.

Adding to his reluctance to report the injury was the fact that he had previously hurt his right shoulder at work in February 2011 while shoveling snow. He required surgery and ultimately was awarded workers' compensation benefits, which he received before returning to work on full duty.

After the Aug. 21, incident, Adamczyk tried to continue to work, but the pain in his shoulder increased. He would later testify that he called his supervisor in mid-October and told him about the Aug. 21 incident, and also filed an incident report with his employer at that time.

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The town of North Providence contested Adamczyk's claim for workers' compensation benefits.

The defendant highlighted the employee's testimony at trial that he failed to report any shoulder pain when he saw a physician's assistant for an annual physical in September 2013, and evidence that he also did not complain about a shoulder injury when he had another annual physical — one required by his employer — early in November 2013.

After a trial in the Workers' Compensation Court, Judge Dianne M. Connor ordered North Providence to pay partial and total disability benefits from Nov. 19, 2013, forward. In addition, the judge ordered the town to pay Dennis \$4,000 in attorneys' fees.

In her decision awarding benefits, Connor found Adamczyk's testimony regarding his shoulder injury to be credible.

"The Court accepts the employee's explanation for not reporting this injury, in particular, that he did not think that the injury was serious," Connor wrote. "The employee, in addition, had just returned from a work-related injury absence and did not want to pursue another workers' compensation claim against this employer."

Dennis said it was important that the judge understood it was reasonable in that sense for Adamczyk not to report his injury.

"He was hoping he could tough it out," Dennis said. "He works at a very good job, and he didn't want to miss any more time."

Harnett said that the type of simple explanation offered by Adamczyk can often be convincing.

"It's a common reaction for people to say, 'I already had an injury; I didn't want them to know I had another one,'" Harnett said. "That rings true to judges who sit on the bench every day and who have heard that a lot."

In accepting Adamczyk's testimony as truthful, the judge also found that the medical evidence was consistent with the claimant's account of his injury. Connor concluded that Adamczyk's orthopedic surgeon "appropriately relied on the employee's medical history in finding, to a reasonable degree of medical certainty, that there is a cause and effect between the employee's right shoulder labral tear and the incident that occurred on August 21, 2013."

Although Connor did not cite it as a factor in her decision, Dennis considered it critical to his case that a school custodian who worked with Adamczyk during the summer of 2013 testified that Adamczyk had told him about injuring his right shoulder.

### **Statutory hurdles**

Rhode Island's workers' compensation statute includes notice provisions that can be significant barriers to recovery for claimants who fail to report their injuries in a timely manner.

Under G.L. §28-33-30, employees are required to provide notice to their employers within 30 days "after the happening or manifestation of the injury." Section 28-33-31 requires that the notice be in writing.

But attorneys say the statutory notice requirements are softened by other provisions in the law, as well as case law.

For example, G.L. §28-33-33(2) provides that a court can decide if good cause exists for failure to give notice in a timely manner.

Dennis believes Connor implicitly found that Adamczyk met the "good cause" standard.

"I think the judge implicitly realized that he was a person without medical knowledge who couldn't make a determination of causation," he said.

Dennis also pointed out that the state's courts require an employer to establish prejudice before denying a claim on

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## Credibility, credibility, credibility

Dennis said the credibility of the claimant is “paramount” in cases in which there is a significant gap in time between the injury and the notice provided to the employer.

“You can’t win without it,” Dennis said, adding that, as a matter of course, he interviews clients for their veracity to determine whether a case is winnable.

Harnett said he likewise carefully evaluates the client when considering whether to take a case with a notice problem.

“As a lawyer, you want to believe him, you want to help him, and you want the case,” Harnett said. “But I’ve learned over the years that, rather than viewing the case in terms of what I think of this person, I need to view the case in terms of what the judge will think of this person.”

Warwick attorney Joseph J. Ranone said it was evident from the decision that Adamczyk impressed Connor with his truthfulness on the stand.

However, Ranone said Adamczyk’s apparent credibility might not have been enough without the corroborating testimony of his co-worker.

“In my view, the key was that co-worker,” Ranone said.

Even if a claimant is believable, it is natural for workers’ compensation judges to be skeptical of claims brought by workers who did not report their injuries in a timely manner, Ranone said.

“The biggest red flag goes up if something isn’t reported immediately,” he said. “How does the employer know that [Adamczyk] didn’t really injure his right shoulder sometime between August and the first time he reported it? But the fact that his co-worker said, ‘Yeah, I was with him, he did hurt himself, and he did tell me.’ I think that’s probably what put it over the top for the judge.”

But Ranone also pointed out that finding a co-worker to testify in support of an employee’s workers’ comp claim can be a tricky proposition at best.

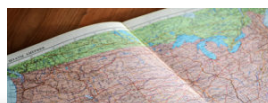
“The vast majority of times those people who you think are going to be witnesses for you won’t be because they don’t want to screw their jobs up by getting on the bad side of the employer,” he said. “They’re not going to risk their job for you.”

There are some other unfortunate truths that lawyers and their clients must come to grips with when bringing a claim involving a lack of timely notice, Ranone said. For instance, because the employer perceives a basic weakness in your case, the chances of settlement become remote. Perhaps even more unlikely: an award of benefits without a trial.

“If this was my case, I would have definitely told the guy you’re not going to win at the pre-trial stage, especially in front of Connor. No way — not with that kind of issue,” Ranone said.

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