

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002858-WC

MARK MILBY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-00997

RIVER METALS RECYCLING, L.L.C. D/B/A
RIVER CITY SHREDDING AND BALING;
HON. LLOYD R. EDENS, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Mark Milby has filed a petition for review of an opinion of the Workers' Compensation Board affirming the dismissal of his claim for occupational disability benefits. In its opinion, the Board relied on, inter alia, Alcan Foil Products v. Huff,¹ in affirming the order of the Administrative Law Judge which had dismissed Milby's claim based on his failure to provide timely notice and as untimely under the applicable statute of limitations. Having concluded that the Board has not "overlooked

¹Ky., 2 S.W.3d 96 (1999).

or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice,"² we affirm.

Milby began working for River Metals Recycling, L.L.C., d/b/a River City Shredding and Baling (River City) in June 1993, as a laborer in the shredding department. Over the last several years of his employment, he worked as a heavy equipment operator in the baling division, a position in which he remained until March 1999.

On March 15, 1999, Milby was operating an ergonomically designed Hitachi crane. In order that Milby could take a lunch break, his supervisor asked a co-worker to temporarily take over the operation of the crane. The co-worker informed the supervisor that his back was hurting, whereby he was instructed to go to the company doctor and then to go home.³ The crane was shut down until Milby's return. Upon learning that the co-worker was allowed to go home early, Milby asserted that operating the crane had caused his back to hurt constantly. He was instructed to complete an injury report and to go to the company doctor.

Later that day, Milby was seen by Dr. John Rose, an internal medicine specialist. Milby reported that he had suffered from back pain on a daily basis over the last four or five years. He did not express any specific injury or trauma,

²Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

³The co-worker suffered back problems from a prior soccer injury. He never asserted that the crane caused him back pain nor did he file a workers' compensation claim alleging same.

merely stating that he believed his pain was caused by operation of the crane. Dr. Rose diagnosed a lumbar strain and released Milby to return to work.

Instead of returning to work the next day, Milby went to his family physician, Dr. Patrick Murphy. Milby did not report to Dr. Murphy that he had injured his back while operating heavy equipment in the course of his employment, but stated that he had finally decided to do something about his long-time back ailments. Dr. Murphy restricted Milby from work and ordered a CT scan, which revealed a disc protrusion at the L4-5. Milby was then referred to Dr. John Guarnaschelli, a neurologist, who began his treatment on March 25, 1999.

Milby reported to Dr. Guarnaschelli that he had experienced back trouble over the entire course of his employment with River City, attributing the pain to the nature of his work, and describing his pain as chronic and long-standing. Upon the initial interview, Dr. Guarnaschelli noted that Milby was attempting to determine whether "this represented w/c or not." The tests ordered by Dr. Guarnaschelli revealed disc protrusions of the nerve root compression at the L4-5 and L5-S1. Dr. Guarnaschelli performed a laminectomy and foraminotomy at the L4-5 and L5-S1 on July 4, 1999. Milby was released from the doctor's care on August 4, 1999; however, he did not return to work. He filed his claim for occupational disability benefits on August 6, 1999.

Milby was also examined by Dr. Robert Keisler, an orthopedic surgeon, who found degenerative disc disease at L4-5

and L5-S1 with radiculopathy and subsequent surgery. Dr. Keisler opined that disc disease usually occurred as a part of the normal aging process. He further noted that Milby suffered from developmental spinal stenosis which was likely to be congenital in origin. He believed that the nature of Milby's work may have aggravated the symptomatology, but that it was not the cause of his overall condition.

During his deposition, Milby testified that he had experienced low back pain for several years prior to leaving work on March 15, 1999. In fact, Milby admitted that he had missed work in the past due to his back pain. He claimed that his pain was caused by the operation of heavy equipment and that he was treated by Dr. Murphy for these problems prior to March 15, 1999.

River City presented the testimony of four company representatives, all of whom had supervisory authority over Milby. These representatives testified that Milby had never informed them that he was experiencing back pain or any other problems caused by the operation of heavy equipment. They stated that had they been aware of any such problems Milby could have been assigned to a different position.

There were numerous issues presented to the ALJ; however, he dismissed Milby's claim as follows:

The first issues for determination are notice and statute of limitations. Mr. Milby testified that he experience back pain for approximately six years prior to March 15, 1999, which would correspond with the totality of his employment with the Respondent. Additionally, in his March 15, 1999 workers['] compensation history completed for Dr. Rose, he stated that he first noted symptoms for four to five years

ago and almost every day since then [sic]. The June 29, 1995 record of Dr. Murphy reflects that Mr. Milby was seen with complaints of low back pain and stated that pain would radiate down his right leg. He further stated that he performed heavy lifting and felt that this might be contributing to the pain in his back.

KRS 342.185 requires that notice be given ". . . as soon as practicable after the happening of (the accident)" Additionally, the statute provides the claim must be filed within two years after the date of accident [sic].

Recently, in Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999), the Court held that in cumulative trauma claims, the triggering mechanism for determining notice and limitations was not when the injury became occupationally disabling, but when an individual is aware that he or she has sustained an injury and that it is caused by work. The medical record of Dr. Murphy indicates that Mr. Milby was seen on June 29, 1995 due to back pain and pain radiating into the right leg, which he attributed to heavy lifting at work. His testimony and the information which he provided to Drs. Rose and Guarnaschelli would further indicate that he had experienced continuing back problems over the six year period that he was employed by the Respondent.

I am persuaded by the records of Dr. Murphy, as well as the Petitioner's testimony that, at least by June 29, 1995, he was aware that he had a back problem and that he related it to his work. In light of that determination and the fact that notice of a work-related injury was not given to the Respondent until March 15, 1999 and the claim was not filed until August 6, 1999, I find that timely notice was not given to the Respondent nor was the claim filed within two years as required by KRS 342.185.

Milby appealed this decision to the Board which affirmed the ALJ's order on November 8, 2000. This petition for review followed.

"The function of further review of the WCB in the Court of Appeals is to correct the Board only where the the [sic] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent or committed an error in assessing the evidence so flagrant as to cause gross injustice."⁴

In affirming the ALJ's finding that Milby had failed to provide proper notice to River City, the Board recognized that one of the primary purposes of the notice requirement is to give the employer an opportunity to place the employee under the care of a competent physician, thereby possibly minimizing the employee's disability as well as the employer's subsequent liability.⁵ As the Board noted, Milby suffered from back troubles from the onset of his employment with River City and, according to the testimony of Dr. Keisler, he suffered from congenital spinal stenosis. If Milby had notified his employer of his condition, there would have existed an opportunity for the employer to address Milby's physiological condition, both vocationally and medically, long before he reached the 1999 level of impairment.

Moreover, the Board aptly recognized that in Alcan Foil, supra, our Supreme Court held that it is at the time a worker becomes aware that he has a work-related injury that his obligation to notify his employer arises and the statute of limitations commences to run. It matters not whether the injury

⁴Western Baptist, supra at 687-88.

⁵Buckles v. Kroger Grocery & Baking Co., 280 Ky. 644, 134 S.W.2d 221, 223 (1939).

is occupationally disabling at the time of its occurrence or if it is the result of cumulative trauma.⁶

For Milby to succeed on appeal, he must demonstrate that the evidence presented to the ALJ compelled a finding in his favor.⁷ The ALJ has the authority to draw all reasonable inferences from the evidence.⁸ We hold that the Board did not err in its assessment of the evidence or in its application of the law.

Accordingly, the opinion of the Workers' Compensation Board is affirmed

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward A. Mayer
Louisville, KY

BRIEF FOR RIVER METALS
RECYCLING, L.L.C. d/b/a RIVER
CITY SHREDDING AND BALING:

Judson F. Devlin
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⁶Alcan Foil, supra at 101.

⁷Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

⁸Jackson. General Refractories Co., Ky., 581 S.W.2d 10 (1979).