RENDERED: November 2, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001230-WC

BONNIE CRAWFORD — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-00-00623

GRINDMASTER; JOHN B. COLEMAN, Administrative Law Judge; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, COMBS, and DYCHE, Judges.

COMBS, JUDGE: Bonnie Crawford appeals an opinion of the Workers' Compensation Board (Board) rendered May 9, 2001. Kentucky Revised Statutes (KRS) 342.290. After our review, we affirm.

Crawford began her employment with Grindmaster in 1994. Within months, she began to experience pain and numbness in her upper extremities. Crawford attributed her symptoms to her work and received regular medical treatment for bilateral carpal tunnel syndrome. Her treatment was covered by Grindmaster's workers' compensation carrier until 1997. In May 2000, Crawford sought workers' compensation benefits for two separate work-related injuries, which were alleged to have occurred on specific

dates in January 1998 and December 1999.[1] She also sought benefits for the repetitive motion injury. Following a hearing, the Administrative Law Judge (ALJ) dismissed Crawford's claim for benefits. The ALJ specifically stated as follows:

> 1. The first issue to be discussed is the issue of whether the plaintiff gave due and timely notice of her alleged September 1998 cervical spine injury. When the plaintiff first filed her claim Form 101 she alleged the injury occurred in January 1998. However, during the course of the litigation she remembered the incident occurred toward the end of summer and freely admitted that she was embarrassed over the incident and did not tell her supervisor until about a month after the incident occurred. From the medical records we can ascertain that she did not seek medical treatment for that event until November 1998. The only excuse offered by the plaintiff for failing to give notice was that of her embarrassment. This is so even though she indicated that she immediately began having cervical spine pain, headaches as well as cramping and numbness in her feet. As indicated above, notice must be given as soon as practicable under the circumstances. In this particular instance the plaintiff has failed to offer adequate excuses for failing to give her employer notice for more than a month following the event. In this particular instance, I believe the notice to be inadequate and her claim for a September 1998 cervical spine injury must fail.
>
> 2. The plaintiff also claims a cervical spine injury occurred in December 1999. Dr. Petruska's records clearly indicate that incident was an exacerbation of her already present condition. Exacerbations to active conditions are not compensable as a new injury. There is not medical testimony which would indicate that event in December 1999 was sufficient in and of itself to cause plaintiff's injury. As the plaintiff has the

[1]Crawford later amended her application to indicate that the first injury had occurred on an unspecified date in September 1998 rather than on January 18, 1998.

> burden of proof to prove each and every element of her claim in this particular instance she has failed to prove that the December 1999 event was in any way the proximate cause of her cervical spine condition. Therefore, her claim for benefits for the December 1999 incident must also be dismissed.

Opinion and Order at 6-7. The ALJ concluded that Crawford's claim for the repetitive motion injury was time-barred. Her subsequent petition for reconsideration was rejected.

Crawford appealed the ALJ's dismissal to the Board. The Board affirmed. Crawford asks us to review that decision.

As her sole issue on appeal, Crawford contends that the Board erred by concluding that the ALJ's decision to dismiss her claim for lack of notice was based on substantial evidence of record. According to Crawford:

> [While she] first alleged in her Form 101 that her first injury occurred in January 1998, . . . it was determined that the incident occurred in September 1998. She told her supervisor about one month after the injury, when she became symptomatic. This incident occurred when she hit a wall while driving a forklift.
>
> The second injury occurred, which everyone agrees upon, when she was struck by a dock door in December 1999.
>
> Contrary to the finding of the ALJ, the evidence was not that Bonnie Crawford failed to report the first injury to her supervisor because "she felt embarrassed", but she did not report the injury to her supervisor because she did not begin having symptoms until approximately one month later.
>
> Crawford testified in both her deposition and at her hearing that she was embarrassed in the second incident when she was struck in the head by the dock door.
>
> * * * * *

> It appears that ALJ Coleman simply got confused on the dates of the injuries, the mechanics of each of the two injuries.
>
> It is clear from the evidence that Crawford talked about being "embarrassed" after the second incident, not the first incident. In his findings, ALJ Coleman refers to Crawford's testimony that she was embarrassed after the first injury, and did not report it.

Appellant's brief at 7 - 9.

We begin our analysis with the observation that Crawford's contentions before this court differ somewhat from the argument advanced at the administrative level. In her petition for reconsideration to the ALJ and in her brief to the Board, Crawford never mentioned the ALJ's supposed confusion over when her embarrassment prevented her from providing adequate notice to Grindmaster. Moreover, her assertions are not substantiated by the record before us.

In her deposition of August 11, 2000, Crawford related the following with respect to her September 1998 injury:

> Q. You think that this incident that you described when you hit a wall occurred sometime in September of '98?
>
> * * * *
>
> A. Yes. Because it was hot. . . .
>
> Q. All right. Tell me what happened.
>
> A. I was in the warehouse and usually there is a -- supposed to be one of the guys back there, you know, doing the forklifting. And in this particular day it wasn't. A lot of days when there is nobody back there I had to move things. People asked me.
>
> So this particular day I had gotten on the forklift and I guess not paying attention. . . . and before I knew it, I didn't know I

was that close to the wall and I just hit it with the forks straight on.

Q. And you experienced some type of problems some symptom at that point?

A. At that point when I hit the wall, you know, like I say, I was unaware that I was running into it and it shook me up, you know, it just hit me and then I just -- I guess I got real dizzy like, you know, I didn't faint or fall off of it, but I just sat there, you know, to gather myself.

* * * *

Q. Did you go see a doctor?

A. No, not at that time. You know, I got off like I said. I was sort of feeling embarrassed and silly. And I thought I was okay. It was like a month later when I complained . . . .

Deposition at 18 - 20.

Where the disabling effect of a work-related accident is not immediately apparent, the determination of whether the employer has been given timely notice of an injury involves a two-step process: (1) timely notice of the specific injury which is alleged to have resulted from the accident and (2) timely notification of occurrence of the accident itself. See Reliance Diecasting Co. v. Freeman, Ky., 471 S.W.2d 311 (1971). While Crawford may have given notice of her disabling injury as soon as was practicable, she undeniably failed to give timely notice of the incident of the accident itself because — in her own words — she was "sort of feeling embarrassed and silly." The ALJ was not persuaded that Crawford's feelings of embarrassment justified a significant delay in giving the required notice.

The Board concluded that the ALJ's decision to dismiss the claim was based upon substantial evidence and that it was in accord with the law. We are persuaded that the Board did not overlook or misapply controlling law or commit an error in assessing the evidence so flagrantly as to cause gross injustice. Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685 (1992). Consequently, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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