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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002324-WC

SCOTTY SMITH — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-81565

TRICO COUNTY DEVELOPMENT & PIPE LINE; HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE AND WORKERS' COMPENSATION BOARD — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: HOWARD AND WINE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

HOWARD, JUDGE: Scotty Smith (hereinafter Smith) petitions for review of an opinion of the Workers' Compensation Board that affirmed the decision of the Honorable Grant S. Roark, Administrative Law Judge (hereinafter ALJ), dismissing Smith's claim for

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

benefits following an alleged work-related injury. Smith argues that both the ALJ and the Board erred in finding that he did not give timely notice of his injury. We agree and reverse.

Smith was hired by Trico Development & Pipe Line (hereinafter Trico) in May of 2003 to work as a bulldozer operator. Smith testified that he was initially injured when he fell off a bulldozer on May 22, 2003. He did not report that injury to his supervisor because he did not consider it to be significant. Smith continued to work for Trico without missing any time. Three weeks later, on June 12, 2003, Smith was working at the Lizzie Branch Hollow job site in Pike County when he allegedly sustained a more serious injury to his upper back, lower neck, shoulder and right arm while attempting to secure a bulldozer onto a trailer. According to Smith, he immediately informed his co-worker, Kenny Keaton (hereinafter Keaton), that he was injured and also informed Perry Music (hereinafter Music), the owner of Trico, a few minutes later when he came on the site. Both Keaton and Music denied that Smith ever said anything to either of them about being injured. The ALJ found this testimony, from Music and Keaton, to be "more persuasive in this regard . . ."

Smith and Music agreed that Music asked him whether he was going to continue working for Trico or go to another gas company that was working in the area, as claimed by Keaton. Smith testified that he told Music that he had no intentions of going to work for anyone else. Regardless, after this discussion, Music fired Smith from his

job, paid him for the hours he had worked and ordered him from the work site immediately. Smith left without incident.

That night, at 1:12 am, Smith was admitted to the emergency room at Saint Francis Hospital in Charleston, West Virginia with complaints of neck and upper back pain. As a resident of West Virginia, Smith had difficulty finding a physician who would treat him under Kentucky workers' compensation. Smith contacted a representative of Trico's workers' compensation carrier, Kentucky Employers' Mutual Insurance Company (hereinafter KEMI), who advised him to see Dr. Katherine Hoover. On June 13, the day after the alleged injury, Smith prepared a First Report of Injury and, as found by the Board, forwarded that document to KEMI, rather than to Trico. This report was filed by KEMI with the Office of Workers' Claims and electronically recorded there on June 24.

Music testified that he first learned of Smith's claim either when he was notified by KEMI or when he received a medical bill from a doctor in West Virginia. Both occurred, but he did not remember which occurred first, or the date of either. Nonetheless, on July 6, 2003, Trico forwarded to KEMI documents concerning Smith and his termination by the company, providing at least some inference that Trico knew of the claim by this date. On August 11, Smith presented himself for a previously scheduled independent medical examination, requested by KEMI with regard to this claim, at the office of Dr. Jerry Scott.

Finally, on January 8, 2004, Smith filed an "Application for Resolution of Injury Claim" seeking workers' compensation benefits for the injuries. Trico denied the

claim. After a hearing, the ALJ entered an order dismissing Smith's claim. Smith filed a timely appeal with the Board, which affirmed the decision of the ALJ on October 13, 2006, by a 2 to 1 vote. This petition for review followed.

Smith argues that the ALJ erred when he found that Smith failed to give his employer due and timely notice of the work injury pursuant to KRS 342.185. Smith also makes additional arguments, but as we are reversing and remanding on the question of notice, it is not necessary for us to consider these other assertions of error.

KRS 342.185 contains the relevant notice requirement and provides as follows:

> [N]o proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given *to the employer as soon as practicable* after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the office within two (2) years after the date of the accident, or in case of death, within two (2) years after the death, whether or not a claim has been made by the employee himself for compensation. (emphasis added)

The determination of whether notice is due and timely is a mixed question of law and fact. *Harry M. Stevens Co. v. Workmen's Compensation Board*, 553 S.W.2d 852 (Ky.App. 1977). As with all essential elements of a workers' compensation claim, the burden of proof rests with the employee. *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky.App. 1979).

In the present case, there is no question regarding the *timeliness* of the notice. Rather, the issue involves *to whom* the notice was given. Smith argues that

giving notice to Trico's insurance carrier, KEMI, is sufficient under KRS 342.185. Specifically, Smith contends that Trico, through KEMI, had constructive notice of his injury at least by June 24, 2003, as the electronic database maintained by the Office of Workers' Claims reflects that KEMI reported Smith's injuries on this date. He also notes that Mr. Music acknowledged that he received actual notice of the injury from KEMI, although he was unsure of the date.

It is well settled that "the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record." *Miller v. East Kentucky Beverage/Pepsico*, *Inc*., 951 S.W.2d 329, 331 (Ky. 1997). In this case, the ALJ made a specific finding of fact that Smith did not notify Trico, through Mr. Music or Mr. Keaton, of his injury on June 12, the day it allegedly occurred. We are bound to accept his finding in this regard and we do so. However, his conclusion that there was therefore no notice which complied with KRS 342.185 is a conclusion of law, and properly subject to appellate review.

In our view, the majority opinion of the Board properly identified the legal question when it stated,

> The language of KRS 342.185 is clear and unambiguous in its requirement that notice of the accident shall be provided by the injured employee to the employer. Smith has provided no authority, nor can we find any, for the proposition that notice by an injured worker to the employer's insurer constitutes actual notice to the employer.

The dissenting opinion of Board Member Cowden identified the same issue but argued contrary, citing the record to the various instances of notice to KEMI which are set out above and stating,

> I believe the employer did have constructive timely notice of the accident in question and would reverse the ALJ's decision on the issue of notice.

Neither the majority of the Board nor the dissent cited any authority for their views on whether notice to the insurer constitutes notice to the employer. Neither do either of the parties in their briefs presented to this Court. The reason is obvious – there is little such authority to be found. There are no reported cases directly on point in Kentucky. The closest cases are those holding that notice to an in-house company doctor is sufficient, *Rowe v. Semet-Solvey Division, Allied Chemical & Dye Corp.,* 268 S.W.2d 416 (Ky. 1954); *Black Mountain Coal Co. v. Vickers,* 171 S.W.2d 442 (Ky. 1943) and *Atlas Coal Co. v. Nick,* 159 S.W.2d 48 (Ky. 1942) and one case, now 80 years old, holding that notice to the Workers' Compensation Board is sufficient, *Black Mountain Corp. v. Murphy,* 218 Ky 40, 290 S.W. 1036 (1927). All of these cases involve previous versions of the statute, but containing the same language as in this case, "notice . . . given to the employer."

There is authority that the Workers' Compensation Act is to be afforded "liberal construction," but,

> . . . liberal construction does not mean total disregard for the Statute or the repeal of it under the guise of construction. *Deal v. United States Steel Corp.,* 296 S.W.2d 724, 726 (Ky. 1956).

Where the question is delay in giving notice, the rule is that the question of whether notice was given "as soon as practicable" depends on the facts and circumstances of each case. Buckles v. Kroger Grocery and Baking Co., 280 Ky. 644, 134 S.W.2d 221 (1939); Mark Blackburn Brick Co. v. Yates, 424 S.W.2d 814, 816 (Ky. 1968). It has been held that a delay in giving notice is excused when it is caused by "mistake or other reasonable cause," Hay v. Swiss Oil Co., 249 Ky. 165, 60 S.W.2d 385 (1933), or if it is not an "unreasonable delay," Mengel Co. v. Axley, 311 Ky. 631, 224 S.W.2d 921 (1949), overruled on other grounds by Blue Diamond Coal Co. v. Stepp, 445 S.W.2d 866 (Ky. 1969). While Kentucky has declined to follow the rule adopted in some jurisdictions that a lack of notice is waved if there is no resulting prejudice to the employer, Blue Diamond Coal Co. v. Stepp, supra, we have sometimes recognized the lack of such prejudice as a factor in determining whether or not notice is deemed to have been given "as soon as practicable." Buckles v. Kroger Grocery & Baking Co., supra; Hay v. Swiss Oil Co., supra. Frankly, none of these cases directly apply here, although they may be helpful by analogy.

There is little more assistance from other jurisdictions. Two older Michigan cases, *Sweet v. Gale Manufacturing Co.,* 289 Mich 711, 289 N.W 111 (1939), and *Keller v. Anderson Sand & Gravel Co.,* 292 Mich 625, 291 N.W. 32 (1940), hold explicitly that notice to the insurer is not sufficient, under the Michigan statute in effect at that time. Two more recent cases, one from Nebraska and the other from Oklahoma, appear to hold otherwise, although both are factually distinguishable from this case. In

Snowden v. Helget Gas Products, Inc., 721 N.W.2d 362 (Neb. App. 2006), the Nebraska Court stated,

> In any event, we hold that for notice or knowledge purposes under § 48-133, the employer equates to the insurer, and vice versa. *Snowden,* 721 N.W.2d at 369.

Similarly, in *Maryland Casualty Co. v. Hankins,* 532 P.2d 426 (Ok. 1975), the Oklahoma Supreme Court held that where it can be shown that either the employer or the insurer had knowledge of the injury, the lack of written notice, as required under their statute, is not fatal to the claim.

This is therefore a question of first impression, at least in Kentucky. Can otherwise prompt notice of an accident or injury, given to the employer's workers' compensation insurer rather than directly to the employer, be considered notice to the employer so as to satisfy the requirements of KRS 342.185? We hold, at least in circumstances such as those presented in this case, that it can.

It appears that Smith first contacted KEMI because he was having trouble finding a doctor in West Virginia who would treat him. Having once made contact with them, he continued to deal with them, having already been fired from Trico. He prepared his First Notice of Injury the very next day after his alleged injury, and promptly forwarded it to KEMI, who filed it with the Office of Workers' Claims on June 24, only 12 days after the accident. KEMI also notified Trico, apparently by July 6, 24 days after the injury. Smith continued to co-operate with KEMI, including submitting to an IME at their request.

Looking to the factors cited by the older Kentucky cases dealing with the timeliness of notice, we believe Smith's actions, as set out above, seem reasonable. Furthermore, there has been no suggestion that Trico was prejudiced in any way by the notice being given first to KEMI, and then communicated from KEMI to them. We believe that reading the statute to allow notice to the employer's insurer, while it may be a "liberal interpretation" of the statutory language, does not "total[ly] disregard" or "repeal" that language. We have often noted that the purpose of the notice requirement of KRS 342.185 is to give an employer an early opportunity to investigate a claim, *Whittle v. General Mills,* 252 S.W.2d 255 (Ky. 1952); *T. W. Samuels Distillery Co. v. Houck,* 296 Ky. 323, 176 S.W.2d 890 (Ky. 1943). In the present environment,where much of the investigation in cases such as this is conducted by the insurance carrier, we find the rule adopted by the Nebraska and Oklahoma courts more reasonable than that set out in the older cases from Michigan.

Therefore, under these circumstances, we hold that Smith complied with the notice requirements of KRS 342.185 by giving prompt notice to his employer's insurer, KEMI, and his claim should not have been dismissed for failure to give such notice. We note that the ALJ made no finding as to whether Smith suffered a work-related injury at all, or whether any such injury is otherwise compensable under the Workers' Compensation Act. This matter is remanded to the ALJ for further proceedings consistent with this Opinion, including all such findings as may be appropriate.

WINE, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS.

BUCKINGHAM, SENIOR JUDGE: Because I believe that we are bound by the clear language of the statute, I would affirm the Board's opinion despite the harsh result that would occur. Thus, I respectfully dissent.

BRIEF FOR APPELLANT:

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Inez, Kentucky

BRIEF FOR APPELLEE:

W. Barry Lewis
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