RENDERED: JULY 10, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002080-WC

LARRY SIZEMORE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-13-00464

T & T ENERGY;
HONORABLE WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Larry Sizemore seeks review of a Workers' Compensation Board decision reversing an Administrative Law Judge's (ALJ) order on remand and remanding to the ALJ with instructions to dismiss the claim. We affirm.

In March 2013, Sizemore filed an application for workers' compensation benefits alleging he sustained a neck injury on April 2, 2012, while working as a dump truck operator for T&T Energy. T&T contested several issues, including whether Sizemore gave timely notice of the injury. Sizemore asserted that he injured his neck when a large rock was dropped into the bed of his dump truck while he was sitting in the truck's cab. According to Sizemore, his counsel notified T&T of the injury by letter on January 17, 2013; however, T&T denied receiving the letter.

In the ALJ's original opinion and order, Sizemore was awarded Permanent Total Disability (PTD) benefits for the neck injury. T&T appealed to the Board, which affirmed in part, vacated in part and remanded the claim for further findings with respect to the issues of notice and PTD benefits. In that opinion, the Board stated:

> The ALJ found Sizemore 'gave verbal notice of his work injuries to John Gregory, the defendant's safety director, on April 2, 2012, which was the date of his alleged work injuries.' Based on this testimony, the ALJ concluded KRS [Kentucky Revised Statutes] 342.185(1) had been satisfied.
>
> This is a factually inaccurate summary of Sizemore's testimony. During his deposition testimony, Sizemore was asked if he reported 'any injury to the company,' to which he responded 'no.' . . .
>
> Later during the final hearing, when again asked if he provided notice of any injury before he left work on April 11, 2012, Sizemore responded he had not. Also, on re-direct, Sizemore restated he had 'several' conversations with Tony Hamilton, Robbie Combs, and

John Gregory about the rocks being 'dumped' too hard. He did not provide a specific date or time of these conversations.

Thus, the ALJ mischaracterized the evidence by stating Sizemore provided notice to John Gregory of his injury on April 2, 2012. In fact, Sizemore never provided the dates he spoke to Gregory, and his conversations were generally about the force of the dumps into his truck. Sizemore twice denied informing anyone at T&T about his injury after April 2, 2012. Simply put, no reasonable inference can be drawn from Sizemore's testimony that he had a conversation with John Gregory on April 2, 2012, about a specific injury.

Upon review of all relevant portions of the record, we conclude, as a matter of law, Sizemore's testimony does not satisfy the requirements of KRS 342.185 to notify the employer of a specific injury. We recognize no particular form of notice is required to satisfy the statutory directive prescribed in KRS 342.185. Harry M. Steven Co., Inc. v. Workers' Compensation Board, 553 S.W.2d 852 (Ky. App. 1977). Nonetheless, Sizemore testified only as to generic conversations, occurring at unspecified times, with his supervisors about a general concern he harbored. Under no interpretation can these conversations constitute notice of an actual accident or injury 'after the happening thereof.'

In its petition for reconsideration, T&T requested further findings of fact regarding the notice issue. When the ALJ amended his opinion to find an injury as a result of a single incident, it was incumbent upon him to revisit the notice issue. This is because the date on which the obligation to give notice is triggered can be different in cumulative trauma versus single incident trauma. For this reason, we vacate that portion of the ALJ's decision finding Sizemore gave timely notice. The ALJ must revisit the issue of notice on remand. Having concluded Sizemore's testimony is inadequate to establish he notified John Gregory of a work-related injury, the ALJ must determine whether notice was otherwise provided to T&T 'as soon as practicable.'

On remand, the ALJ rendered an opinion with additional factual findings on the issue of timely notice. The ALJ determined that Sizemore thought he had given notice of the injury, but any failure by Sizemore in giving notice was excusable as a mistake or other reasonable cause pursuant to KRS 342.200. The ALJ further concluded that T&T failed to introduce evidence that it was misled or suffered prejudice regarding when it was notified of Sizemore's injury. In the opinion and order on remand, the ALJ again awarded PTD benefits to Sizemore; thereafter, T&T appealed, arguing the ALJ's findings on the issue of notice were erroneous and unsupported by the evidence. The Board reversed the ALJ's order on remand and remanded the claim with instructions to dismiss for lack of timely notice. Sizemore now seeks review in this Court.

On appellate review of the Board's decision, this Court will reverse only if "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." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Pursuant to KRS 342.185(1), an employee must notify the employer of an accident "as soon as practicable after the happening thereof . . . ." The notice provided to the employer must include the "time, place of occurrence, nature and cause of the accident . . . ." KRS 342.190. The notice "provision is mandatory, and if there is a delay in giving notice the burden is upon the injured person to show that it was not practicable to give the notice sooner." *T. W. Samuels*

Distillery Co. v. Houck, 176 S.W.2d 890, 891 (Ky. 1943). KRS 342.200 states, in part, "Want of notice or delay in giving notice shall not be a bar to proceedings under this chapter if it is shown that the employer, his agent or representative had knowledge of the injury or that the delay or failure to give notice was occasioned by mistake or other reasonable cause." We note, however, that "lack of employer prejudice does not waive a delay in giving notice." *Trico County Development & Pipeline v. Smith*, 289 S.W.3d 538, 542 (Ky. 2008).

In his petition for review, Sizemore asserts the Board erred by reversing the ALJ and remanding the claim for dismissal. Sizemore contends the ALJ acted within his discretion by concluding that Sizemore thought he had given timely notice of his injury and that any delay in providing actual notice did not prejudice T&T.

After reviewing the record, we conclude the Board was correct in its assessment of the evidence and application of the law; accordingly, the Board's decision to reverse the ALJ's order and remand the claim for dismissal was proper. Because we find the Board's analysis well-reasoned, we adopt it herein as our own. The Board stated, in relevant part:

> In our prior opinion, we stated Sizemore's testimony was insufficient, as a matter of law, to establish that he provided notice of his injury to John Gregory, T&T's safety director. In the Amended Opinion and Order, the ALJ determined Sizemore's conversations with Gregory and other T&T supervisors occurred *after* April 2, 2012. This factual conclusion is not supported by the evidence. Sizemore testified only to general conversations he had about his concerns. He provided no dates of these

conversations. Even if he were unable to provide specific dates, Sizemore gave no indication these conversations occurred *after* his injury. Moreover, he specifically denied, at both the deposition and the final hearing, ever telling any supervisor about his injury prior to being laid off. We have again thoroughly reviewed the record, and Sizemore's testimony. We again conclude there is no evidence upon which to base the conclusion these conversations occurred after April 2, 2012. Therefore, we conclude the ALJ's factual conclusion that these conversations occurred 'after April 2, 2012,' is unsupported by the evidence.

Furthermore, there is no evidence to support the ALJ's conclusion Sizemore 'thought' he provided notice to his supervisors of a specific injury. Once again, Sizemore provided no indication he had any conversations with his supervisors after he began experiencing symptoms or after his visit to Dr. Chaney. In fact, when asked if he informed a supervisor of the specific injury, he *twice* testified he had not. The record is devoid of any proof upon which to base this factual conclusion.

This Board is cognizant it lies within the exclusive province of the ALJ to enter findings of fact. While we will not usurp this role, this Board has the duty to confirm that the ALJ's decision is supported by substantial evidence. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). 'Substantial evidence' is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Substantial evidence is more than mere speculation or assumption. Here, the conclusion Sizemore's conversations with his supervisors occurred after he was injured is conjecture. In fact, he flatly denied telling his supervisors before he was laid off about a specific injury.

Sizemore provided notice of his injury to T&T in January 2013, eight months following his alleged injury. He was aware the injury was work related as of his April

> 2, 2012, visit to Dr. Chaney. He submitted no proof demonstrating he informed his employer of his injury at the time it occurred, nor did he submit any proof indicating the January 2013 notice letter was provided 'as soon as practicable.' Therefore, Sizemore's claim is barred for lack of timely notice.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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