

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-001478-WC

RAYMOND TUNGETT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
CLAIM NO: WC-14-01672

IRVING MATERIALS, INC.; HON. STEVEN  
G. BOLTON, ADMINISTRATIVE LAW JUDGE;  
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND STUMBO,  
JUDGES.

D. LAMBERT, JUDGE: Raymond Tungett appeals the August 28, 2015 decision of the Workers' Compensation Board (the Board) affirming the decision of Hon. Steven G. Bolton, Administrative Law Judge (ALJ), to dismiss his workers' compensation claim. The ALJ concluded that Tungett failed to adequately notify

his employer, Irving Materials, Inc. (Irving), that he had suffered a work-related injury. For the following reasons, we reverse the Board's decision and remand for the ALJ to enter an award based on findings consistent with this opinion.

## **I. BACKGROUND**

Tungett began driving a concrete truck for Irving in 2011. On Saturday, May 31, 2014, he allegedly experienced a pop in his back while attempting to pry setting concrete loose from the truck's chute with a 2x4. During the workers' compensation claim process, Tungett and Irving's employees, including his immediate supervisor, provided conflicting testimonies as to the events that followed the injury.

According to Tungett's deposition and final hearing testimony, he called his supervisor, Kevin Fernander, after the incident and reported his injury. Tungett further testified that he was off work Sunday, but returned to work the following Monday. That day, he told his co-workers that his back was hurting before cleaning the chutes of his truck. While cleaning the chutes, Tungett also claimed that he felt pain in his low back but did not discuss that incident with anyone. Tungett stated that he missed work on Tuesday and Wednesday and presented to immediate-care facilities on both days for medical treatment. The physician at the immediate-care facility Tungett visited on Tuesday did not see Tungett after learning the injury was work-related. On Wednesday, however, Tungett was able to receive treatment after falsely informing a second immediate-care facility that his condition was not work-related. According to Tungett, he

returned to work on Thursday and aggravated his back when he fell off a truck. Tungett also called the dispatch supervisor and told him he was in “bad shape” and could not work that day. Tungett paid for his medical treatment with private health insurance until his coverage lapsed.

Fernander also testified by deposition and at the final hearing before the ALJ. Fernander stated that he received a call from Tungett on the day of the alleged injury, but the subject of the conversation was the concrete setting in his truck chute. According to Fernander, Tungett did not complain about his back or report any injury during their conversation. Fernander also stated that Tungett did not report an injury during their next conversation, which took place on the following Tuesday when Tungett called to tell Fernander that he would not be reporting to work that day. Fernander did confirm that on the Thursday following the alleged injury, he learned from the plant dispatcher that Tungett had fallen from the truck onto his back.

Irving’s safety manager, Mike Tolin, also testified by deposition and during the hearing. Tolin stated that he first learned of Tungett’s alleged injuries on June 5, 2014, from a human resource representative who had been contacted by a medical provider regarding Tungett’s alleged workplace injury. Tolin further stated that he asked Tungett to meet with him that day to discuss the injury, but Tungett did not meet with him until June 9, 2014. Tolin maintained that Tungett did not explain the specific cause of his injury during the meeting.

Billing statements from two immediate-care facilities indeed indicated that Tungett sought medical treatment on the Tuesday and Wednesday that followed his alleged injury. Tungett sought to have his treatment billed to Irving during the Tuesday visit. However, no mention of Tungett's utilization of a 2x4 to pry concrete loose from the chute occurred until a June 12, 2014 diagnosis from Dr. Christopher Combs. Subsequent independent medical evaluations further revealed that Tungett suffered a back condition.

After hearing the evidence and concluding that Tungett had failed to comply with his statutory obligation to timely notify his employer of his work-related injury, the ALJ denied Tungett's claim. The ALJ also denied Tungett's subsequent motion for reconsideration, finding that the petition was an attempt to re-litigate the merits of the claim. Tungett then appealed to the Board, which affirmed the ALJ's application of the law to its factual findings. This appeal followed.

## **II. STANDARD OF REVIEW**

The role of this Court in reviewing a decision of the Board is to correct the decision only when the Board appears to have overlooked or misconstrued controlling law "or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Pike County Bd. of Educ. v. Mills*, 260 S.W.3d 366, 368 (Ky. App. 2008) (quoting *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687–88 (Ky.1992)). Furthermore, the burden is on the claimant to

prove every element of his claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984).

### III. DISCUSSION

On appeal, Tungett first argues that the ALJ misconstrued relevant provisions of the Kentucky's Workers' Compensation Act. Tungett then argues that the ALJ committed reversible error in finding that he did not timely notify his employer of his workplace injury. In conjunction with these arguments, Tungett asserts that Irving learned of his injury shortly after his accident by the clear evidence contained in the record. For the following reasons, we agree with Tungett's position.

Under Kentucky Revised Statutes (KRS) 342.185(1), an employee must give his employer notice of a work-related injury "as soon as practicable after the happening thereof." The notice must be in writing and provide the time, place, nature and cause of the accident as well as the nature and extent of the injury. See KRS 342.190. This way the employer can (1) provide prompt medical treatment in an attempt to minimize the worker's ultimate disability and the employer's liability, (2) make a prompt investigation of the circumstances of the accident, and (3) prevent the filing of fictitious claims. *Trico County Development & Pipeline v. Smith*, 289 S.W.3d 538, 542 (Ky. 2008). However,

[t]he notice shall not be invalid or insufficient because of any inaccuracy in complying with KRS 342.190 unless it is shown that the employer was in fact misled to his injury thereby. 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.

KRS 342.200. Thus, a delay in giving notice may be excused if the employer, his agent, or representative had knowledge of the injury.

Here, although there was conflicting evidence as to when Tungett provided notice, the employer knew of the work-related injury as early as June 5, 2014, when Tolin learned that Tungett attempted to have Irving pay for his medical treatment. Tolin even called Tungett in for meeting on that day to discuss the accident. Accordingly, Tungett was not required to provide further notice as a matter of law, and the ALJ erred in finding Tungett gave untimely notice. This is so notwithstanding evidence that Irving did not learn the exact circumstances surrounding the accident for another week. The delay had no prejudicial effect for Irving, as Tungett received prompt medical treatment for his non-emergency injury and the uncontested subject matter of Tungett's post-injury conversation with Fernander—namely that concrete was hardening in the truck chute—corroborates Tungett's version of events for any investigative purposes. The Board's decision is thus reversed, and the matter is remanded to the ALJ to fashion a benefit award.

STUMBO, JUDGE, CONCURS.

KRAMER, CHIEF JUDGE, DISSENTS AND WILL NOT FILE A SEPARATE OPINION.

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