

RENDERED: September 6, 1996; 10:00 a.m.  
NOT TO BE PUBLISHED  
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NO. 96-CA-0824-WC

CURTIS GRUBB

APPELLANT

V. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-94-07701

G & M OIL; WILLIAM O.  
WINDCHY, ACTING DIRECTOR OF  
SPECIAL FUND; RONALD W. MAY,  
ADMINISTRATIVE LAW JUDGE; DONNA  
TERRY, CHIEF ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

\* \* \* \* \*

BEFORE: DYCHE, HOWERTON and SCHRODER, Judges.

SCHRODER, JUDGE. In this petition for review of a decision of the Workers' Compensation Board, the claimant contends he gave the employer due and timely notice to the employer's general manager and controller, and thus it was error for the Administrative Law Judge to dismiss his claim for failing to give due and timely notice pursuant to KRS 342.185.

The claimant, Curtis Grubb, allegedly injured his back on December 6, 1993, while at work. Claimant testified at his hearing that he notified the general manager of his injury the next day at work, and again that evening when he informed the

general manager that he would be unable to work the next day due to the injury. That Sunday, claimant was supposed to have gone to the emergency room where he was x-rayed and prescribed medication for back pain due to the injury. Claimant returned to work on Tuesday and worked to December 31, 1993, but has not worked since. At the hearing, claimant appeared with a cane which he testified was prescribed by Dr. McAllister. Later he testified that a neighbor saw him using the cane and referred him to Dr. McAllister.

On the other hand, the general manager testified that he did not learn of the injury for several weeks, and then only from a medical provider seeking payment. The controller of the employer testified that he handles insurance matters and did not learn of a possible injury until January 5, 1994, when he received a call from a clinic regarding coverage on the claimant. After a second call the next day, he called the claimant in to fill out a claim form. Dr. McAllister, an orthopedic specialist, reported first seeing the claimant on March 3, 1994. A Dr. Zerga, neurologist, examined the claimant on August 29, 1994. Claimant did not present evidence of the emergency room records.

The Administrative Law Judge dismissed the claim for failure to give due and timely notice, and the Board affirmed.

When a fact finder is faced with contradicting testimony, he/she has the sole authority to judge the weight, credibility, substance and inference to be drawn from the evidence. See Paramount Foods, Inc. v. Burkhardt, Ky., 695

S.W.2d 418 (1985). Furthermore, the ALJ may choose to believe part of the evidence and disbelieve other portions of the evidence, whether the evidence came from the same witness or from the same party's total proof. See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977); Brockway v. Rockwell Internat'l, Ky. App., 907 S.W.2d 166 (1995).

The claimant in a workers' compensation claim has the burden of proof and risk of persuasion, and if unsuccessful, the question on appeal is whether the evidence is so overwhelming upon consideration of the record as a whole as to compel a finding in claimant's favor. See Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979); Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Compelling evidence is that which is so overwhelming that no reasonable person could reach the same conclusion reached by the finder of fact. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985). If the ALJ's decision is supported by substantive evidence of record, it must be upheld. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

KRS 342.185 requires notice as soon as practicable, and when there is a delay in giving notice, the burden is upon the injured person to show that it was not practical to have given notice sooner. T. W. Samuels Distillery v. Houck, Ky., 176 S.W.2d 890 (1943). Also, KRS 342.200 recognizes that a delay is not always fatal to a claim. The arguments in the case sub judice deal with whether or not adequate notice was given, and not whether it was timely under the circumstances.

The ALJ's decision is supported by substantive evidence of record and we find the evidence in the record does not compel a different result, therefore we affirm the Board's decision.

ALL CONCUR.

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