

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001712-WC

JENTRY C. SMITH, SR.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-003367

CARDINAL CONSTRUCTION COMPANY;
ROBERT L. WHITAKER, Director of the
Special Fund; LLOYD R. EDENS,
Administrative Law Judge; and,
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: KNOPF, KNOX, AND SCHRODER, JUDGES.

KNOX, JUDGE: This petition for review of a decision of the Workers' Compensation Board (Board) presents the issue of whether the administrative law judge (ALJ) erred in denying Jentry Smith (Smith) benefits for treatment of a cervical condition based upon failure of Smith to give due and timely notice of that condition pursuant to KRS 342.185. Having reviewed the record and applicable law, we affirm.

Smith sustained a work-related back injury on January 7, 1996, when he slipped and fell from the deck of a bulldozer

while in the employ of Cardinal Construction Company (Cardinal). He returned to work for several days under the belief he was merely "stoved up." Smith did report a lower back injury to Cardinal's safety manager, Earl Whitmore; however, this report was in conjunction with a regularly scheduled physical examination with Dr. Paul Craig, a specialist in occupational medicine.

On Friday, January 12, 1996, Smith attended his routine examination. Dr. Craig recommended an emergency MRI and upon the results therefrom, that Smith be hospitalized immediately.¹ However, Smith declined to be admitted at this time due to his wife being snowbound at home, necessitating he go home to shovel snow. Smith returned to the hospital the following Monday, January 15, 1996, and was referred to Dr. J. Scott Powell, a neurosurgeon. That same day Dr. Powell had Smith admitted, and lumbar surgery was performed on January 17, 1996.

Smith saw Dr. Powell for a follow-up appointment on March 13, 1996. Dr. Powell's notes relating to this visit indicated observation of a cervical condition. On March 15, 1996, Dr. Powell performed the first neck surgery on Smith. Again in May 1996, Smith underwent another cervical procedure. Shortly thereafter, in July 1996, Cardinal began denying payment of any medical expenses relating to the cervical surgeries. The basis for denial was the failure of Smith to timely report the neck injury.

¹ Smith's MRI confirmed a large disc ruptured at L3-4 and L4-5.

Following the original hearing on the matter, the ALJ rendered his opinion which, in part, addressed Smith's cervical injury claims. The ALJ noted that although Smith had completed his Form 101, Application for Adjustment of Claims, on March 11, 1996, and filed same on March 13, 1996, the claim was for an injury to his lumbar area. Specifically, the ALJ found:

Plaintiff testified that he began having cervical problems while in the hospital, and the record reflects that he was hospitalized for his low back surgery on January 17, 1996. Plaintiff's claim was filed on March 13, 1996, and contained a claim for injury to the lumbar area. The March 13, 1996, report of Dr. Powell to Dr. Craig indicates that the Plaintiff's numbness and weakness in the upper extremity had increased over the last three day period. The Plaintiff's Form 101 was signed on March 11, 1996, within this three day period and does not indicate a problem with the upper extremities or the cervical area. The Plaintiff did not seek benefits for the cervical condition nor does the record reflect notice to the Defendant/Employer until the August 29, 1996, motion to amend the claim to include cervical disc injury. While the Defendant/Employer received timely notice of the accident and the lumbar injury, notice was not sufficient to apprise the Employer of the existence of the claim for compensation for the cervical injury. In light of the seven month delay between the onset of symptoms of neck pain and notice to the Defendant/Employer, I find notice of the cervical condition was not given as soon as practicable. Reliance Di[e]lcasting Co. v. Freeman, Ky., 471 S.W.2d 311 (1971); T.W. Samuels Distill[e]ry Co. v. Houck, Ky., 176 S.W.2d 890 (1943).

In his order of December 27, 1996, the ALJ dismissed Smith's claim for benefits arising from the cervical injury for failure to provide timely notice of same as required by KRS 342.185(1). Concerning the back injury, the ALJ found that Smith

had not reached maximum medical improvement and, therefore, awarded open-ended temporary total disability (TTD).

Upon Smith attaining maximum medical improvement, the claim was removed from abeyance, further proof taken, and a second opinion finding Smith totally occupationally disabled was rendered on February 23, 1998. Citing Marc Blackburn Brick Co. v. Yates, Ky. 424 S.W.2d 814 (1968), the ALJ reiterated his previous findings that Smith failed to give notice as soon as practicable, and that Smith's written notice by way of the August 1996 claim amendment was untimely. Smith appealed this decision to the Board, which affirmed.

Smith raises the same issues to this Court as were before the Board, arguing the ALJ's application of KRS 342.185(1) and case law interpreting that statute was erroneous and contrary to the dictates of Newberg v. Sleets, Ky. App., 899 S.W.2d 495 (1995). Further, although Smith concedes he failed to formally notify Cardinal, in writing, of his cervical injury, he indicates Cardinal's employees, injury investigators and the like "were certainly aware of the neck injury within a few months of the injury." Since Smith has provided no substantive proof, legal argument, nor pointed to where this allegation can be substantiated in the record, we decline to undertake discussion of this issue on appeal. CR 76.12; Elwell v. Stone, Ky. App., 799 S.W.2d 46 (1990).

On appeal, our duty is to determine whether "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, Ky., 827 S.W.2d 685, 687-88 (1992). After thoroughly reviewing the record, applicable authorities, and opinion of the Board, we adjudge that Smith has failed to meet the requirements of Kelly. As the Board concluded:

A determination of whether notice is due and timely is a mixed question of law and fact. Harry M. Stevens Co. v. Work[men's] Compensation Board, Ky. App., 553 S.W.2d 852 (1977). As with all essential elements of a workers' compensation claim, the burden of proof rests with Smith. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Therefore, we must review the record to determine whether it compelled a contrary result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

KRS 342.185 provides that notice be given as soon as is practicable under the circumstances. Exceptions to the notice requirement exist in KRS 342.200 which authorizes the fact-finder to conclude notice is timely when there is actual notice of an injury or that the failure to give notice was occasioned by mistake or reasonable cause.

In Newberg v. Sleets, Ky. App., 899 S.W.2d 495 (1995), as cited by Smith, the Court reiterated a principle set forth previously by the Court in Marc Blackburn Brick Co. v. Yates, *supra*, that [""]KRS 342.200 affords claimants some degree of liberty in fulfilling the notice requirement [']to effectuate the beneficent purposes of the compensation Act.[']" [Sleets, 899 S.W.2d at 497. (Citation omitted).] And while not retreating from the provisions of KRS 342.185 requiring notice of an injury as soon as practicable, the Court in Sleets, *supra*, reminded us of the statement in Yates that, "[t]he nature of the injury is important on the question of notice insofar as it relates to the knowledge of the injured person of the extent of his injury."

In this case, Smith sustained the injury in January 1996. He had severe cervical problems by March of that year and underwent

surgery. He did not move to amend his claim until August 1996. The ALJ found that the seven month delay between the onset of symptoms of neck pain and notice to Cardinal was not given as soon as practicable. The Board, having reviewed the record, the ALJ's decision, and arguments by counsel, finds the ALJ did not err in finding due and timely notice was not given. While the ALJ could have drawn other inferences from the record concerning the giving of notice, the evidence is not so overwhelming as to compel a finding in Smith's favor. There is nothing in the record to show that the medical expenses for Smith's cervical condition were being claimed as compensable until Smith moved to amend his claim.

We believe the Board's analysis accurately interprets the law with respect to the notice requirement under KRS 342.185. Moreover, it is our opinion the dictates of Reliance Diecasting and Sleets are consistent. In both instances, the Court has held that late notice is sufficient to satisfy the statutory requirement when given at the time claimant "first received a positive diagnosis of a [specific injury]." Reliance Diecasting Co., 471 S.W.2d at 313. As Sleets points out, the exact nature of the injury becomes important with respect to the claimant's "knowledge" of the extent of his injury. Sleets, 899 S.W.2d at 497. It follows that upon first receiving knowledge of an original, additional or extended injury, the claimant is under a duty to notify his employer of the exact nature and extent of the injury, or by extension, the scope of his claim.

It is without question that Smith had knowledge of his cervical injury no later than March 1996 when he underwent surgery for that condition. It was incumbent upon him to notify Cardinal of the extent of the injury, for which he would be

seeking benefits, upon first receiving a positive diagnosis of the cervical condition. Providing notice in August 1996, vis à vis an amendment to his claim, was untimely. Had the cervical condition not been detected until August 1996, Smith may have fallen within the excusable delay parameters of Reliance Diecasting and Sleets. However, such is not the case and, accordingly, we agree with the Board's decision and affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jack W. Richendollar
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BRIEF FOR CARDINAL
CONSTRUCTION COMPANY:

R. Craig Reinhardt
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BRIEF FOR SPECIAL FUND:

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