RENDERED: August 11, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002560-WC

SEXTET MINING CORPORATION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-00173

DAVID ISBELL; HON. ZARING ROBERTSON, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING AND REMANDING, IN PART
** ** ** ** **

BEFORE: BARBER, KNOPF AND EMBERTON, JUDGES.

BARBER, JUDGE: The employer appeals from a RIB (retraining incentive benefits) award in this workers' compensation claim with an April 1995 last exposure and a January 21, 1997 filing date. We are asked to decide: (1) Whether the ALJ erred in determining that notice was timely; (2) Whether the ALJ was required to give presumptive weight to the medical school evaluator's opinion, under KRS 342.315; and (3) Whether the ALJ erred in applying the version KRS 342.732 in effect on the date

of injury, instead of the amended version, effective December 12, 1996. We affirm in part, and reverse in part, and remand.

We will not address the third issue because appellant failed to preserve it for appellate review. It was not listed on the July 15, 1997 Prehearing Order and Memorandum, nor was it argued in the employer's briefs filed with the ALJ and the Board. [We do note the recent decision of Whitaker Coal v. Melton, 2000 Ky. App. LEXIS 43, holding that the 1996 amendment to KRS 342.732(1)(a) does not apply retrospectively.]

In his October 1997 Opinion, the ALJ summarized the evidence and made the following finding and conclusions:

> The plaintiff . . . began working as a coal miner in 1971. . . . [H]e was first diagnosed with pneumoconiosis after having a chest x-ray in March 1994. He was still employed in the mining industry at that time. Either a few weeks or a few months before he ceased working in April 1995, the plaintiff orally notified his face boss, Jerry Hill, and his superintendent, Glen Lutz, of his intention to file a claim.
>
> In lieu of a formal hearing, the defendant-employer has introduced the affidavit of Sam Goodman, a records custodian. This indicates the defendant-employer never received any written notice that the plaintiff was suffering from pneumoconiosis or intended to file a claim. The defendant-employer first became aware of this claim after it was filed, on February 27, 1997.
>
> Dr. William H. Anderson interpreted a chest x-ray. . .taken March 21, 1994 as . . . category ½. . . . Dr. Judah Skolnick interpreted that x-ray as showing category 2/1. He read another film, dated December 5, 1996, as category 1/0, but indicated it was of poor quality.
>
> Dr. Betty Joyce examined the plaintiff at the behest of the Department of Workers Claims, pursuant to KRS 342.315. She obtained a

> chest x-ray. . . on April 9, 1997, and interpreted it as category 0/1, which is negative for pneumoconiosis.
>
> . . .
>
> The defendant-employer argues that the plaintiff's claim of oral notice is not credible. It further contends that, even if true, such notice was still untimely after a diagnosis communicated in March 1994. I disagree on both points. The plaintiff's testimony regarding oral notice in the weeks or months prior to his termination is unrebutted. At best the affidavit of Sam Goodman establishes the lack of written notice only. Under the law, oral notice is sufficient and I find the plaintiff's testimony credible. Regarding the delay in providing notice after being diagnosed in March 1994, case law indicates it is not required so long as a claimant continues to work as a miner. Howell v. Shelcha Coal Company, Ky. App., 834 S.W.2d 693 (1992) and Newberg v. Slone, Ky, 846 S.W.2d 694 (1992). **I therefore conclude that the plaintiff provided timely oral notice of his claim** to the defendant employer in sufficient compliance with statutory and case law. (emphasis added)

The ALJ declined to give Dr. Joyce's opinion presumptive weight under the version of KRS 342.315 effective December 12, 1996, instead following the general rule that the claim is governed by the law in effect on the date of last exposure. The ALJ concluded plaintiff suffers from category ½ CWP and awarded RIB at the rate of $155.98 per week, for 208 weeks. The Board affirmed.

The notice requirements of KRS 342.316 (2)(a) apply to RIB claims. Shelcha, supra. The version of KRS 342.316(2)(a) at issue in Shelcha [the same version in effect on the date of last exposure in the case *sub judicie*] provides:

> [N]otice of claim shall be given to the employer as soon as practicable after the

> employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, or a diagnosis of the disease is first communicated to him, whichever shall first occur.

The notice statute should be liberally construed in favor of the claimant. Id. at 695. Here, appellant contends notice was not given as soon as practicable, because it was not given for thirteen months after the March 1994 chest x-ray. That misstates the evidence. Plaintiff's testimony established that he told his superintendent and his face boss he intended to file a claim, a few weeks *or a few months before* April 1995, when he left work. "[W]hen more than one reasonable inference can be drawn from the evidence, it is for the fact finder to decide." Melton, supra. "In Kentucky, while there is no specific time frame for satisfying the notice requirement in injury or occupational disease cases, we believe the discretion for making the determination of whether it was given 'as soon as practicable' lies properly with the ALJ." Newberg v. Slone, 846 S.W.2d 694, 699 (1992). Although another trier of fact may have decided this case differently, the ALJ's finding of timely notice has a substantial evidentiary foundation which this Court cannot disturb on appeal.

Appellant contends that the ALJ should have given presumptive weight to the university evaluator's opinion in accordance with KRS 342.315, in effect at the time the claim was filed. The issue was recently resolved by the Supreme Court in Magic Coal v. Fox, Ky., 2000 Ky. LEXIS 60.

> In summary, the amendments to KRS 342.315 which became effective on December 12, 1996, apply to all claims pending before the fact-finder on or after that date. KRS 342.315(2) creates a rebuttable presumption which is governed by KRE 301 and, therefore, does not shift the burden of persuasion. Pursuant to KRS 342.315(2), the clinical findings and opinions of the university evaluator constitute substantial evidence of the worker's medical condition which may not be disregarded by the fact-finder unless it is rebutted. Where the clinical findings and opinions of the university evaluator are rebutted, KRS 342.315(2) does not restrict the authority of the fact-finder to weigh the conflicting medical evidence. In instances where a fact-finder chooses to disregard the testimony of the university evaluator, a reasonable basis for doing so must be specifically stated.

Here, Dr. Joyce's opinion was rebutted by other expert medical opinion; therefore, the ALJ was free to weigh the conflicting medical opinion and be persuaded by someone other than Dr. Joyce -- provided there was a reasonable basis for doing so. We reverse only that portion of the Board's Opinion holding that the presumptive weight provision of the 1996 Act does not apply retroactively. We remand the case to the ALJ for further findings, specifically stating why the opinion of the university evaluator was disregarded.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Samuel J. Bach Henderson, Kentucky	Ronald K. Bruce Greenville, Kentucky