RENDERED: November 3, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000623-WC

DARRELL KASSON — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-76906

HARSCO CORPORATION/HECKETT MULTISERV;
HON. RONALD W. MAY, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Darrell Kasson petitions for review of a decision of the Workers' Compensation Board which affirmed the Administrative Law Judge's dismissal of a claim for failure to give timely notice of the injury. We opine the notice was timely, vacate the dismissal and remand for further consideration.

On September 22, 1997, Kasson allegedly injured his back at work. He testified that within 10 to 15 minutes of the incident, he verbally told his supervisor. The supervisor disputed the date, contending he was first notified by Kasson on

October 3, 1997, some 11 days after the alleged injury. After a claim was filed, the Administrative Law Judge ("ALJ") found that notice was not given until October 3, 1997, and that the notice was untimely, dismissing the case. The Board affirmed, finding the question of a timely notice to be a mixed question of law and fact, and noted that the late notice didn't cause Harsco any prejudice. As to the October 3, 1997 notice being considered "as soon as practicable," after the injury, the Workers' Compensation Board ("Board") said it was a factual issue. We disagree.

There was conflicting evidence as to whether Kasson verbally gave notice to his supervisor on September 22, 1997. This is an issue of fact for the ALJ. When presented with conflicting evidence, the ALJ decides the competency and credibility of the evidence as well as the believability of the evidence, and a reviewing court may not substitute its judgment. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977); KRS 342.285. The ALJ concluded Kasson did not give notice on the date of injury, but on October 3, 1997, some 11 days after the alleged injury.

The next question is whether the notice on October 3, 1997 is "notice of the accident to the employer as soon as practical . . . ." KRS 342.185. Under Harry M. Stevens Co. v. Workmen's Compensation Board, Ky. App., 553 S.W.2d 852 (1977), the date of notice is an issue of fact (here October 3, 1997), but whether or not it is timely is an issue of law, depending on the factual findings of the totality of the surrounding

circumstances. In the case sub judice, the ALJ discusses the medical evidence in great detail and infers the September 22, 1997 injury is not the cause of Kasson's disability. Then the ALJ gives two reasons for the timely notice requirement of KRS 342.200: first, for immediate treatment of the worker to avoid increased costs and disability - which doesn't apply here because Kasson was promptly treated at his own expense. The Board even acknowledges the 11-day delay caused no prejudice to the employer. The second, and applicable reason for this case, is that:

> some misguided individuals might later attempt to take advantage of a non-work injury by remaining silent about the non-work injury and then give an employer notice of and make claim of a work related injury on a date that preceded the date of the non-work injury. The later or more remotely that notice is given from the date of injury increases the difficulty the employer has of verifying that a work related injury did occur. Although the great majority of claimants are honest in the reports and claims of injury, the acts of the few dishonest claimants has [sic] created the notice burden for all claimants.

The ALJ's reasoning is valid,[1] but the application is incorrect in Kasson's case. Harsco stipulated an injury on September 22, 1997, and the ALJ acknowledged such in paragraph two of his findings of fact. The ALJ determined the issues to be decided were "notice, causation, entitlement to temporary total disability, and extent and duration of disability." The ALJ's review of the facts makes it clear to us that he is questioning

[1] Harlan Fuel Co. v. Burkhardt, Ky., 296 S.W.2d 722 (1956) gave a third reason: to enable the employer to promptly investigate the circumstances.

causation, but calling it notice. Procedurally, Kasson has the burden of giving timely notice. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). What is a timely notice is not dependent upon a specific number of days from the incident to the notice. Marc Blackburn Brick Co. v. Yates, Ky., 424 S.W.2d 814 (1968). But the ALJ must look at the totality of the surrounding circumstances to see if notice was timely. Stevens, 553 S.W.2d at 852. Only if the notice is determined to be untimely does Kasson need to show failure to give timely notice was occasioned by mistake or other reasonable cause. KRS 342.200. In this case, we opine as a matter of law, that the October 3, 1997 notice of the September 22, 1997 incident at work was timely based on consideration of the ALJ's findings on the surrounding circumstances. One of the circumstances which leads us to this conclusion is the short time period (11 days) in light of all of the medical evidence on causation. In reviewing the ALJ's evaluation, it appears that he doesn't think the September 22, 1997 incident was the causation of any disability. That may or may not be true, but that is not a notice issue. Also, Kasson received timely medical treatment as needed, much of it after the October 3, 1997 notice, and without an increase in disability. With the stipulation of a work injury on September 11, 1997, there is not an allegation of fraud, lying, or an increased difficulty in verifying that a work-related injury did occur. Also, the incident of September 22, 1997 did not appear to be serious at the time. It was not disabling in that Kasson continued working. If he left immediately or missed work before

the notice was given, we would expect a more prompt notice. Again this overlaps with proof of causation, which was not decided by the ALJ.

For the foregoing reasons, we reverse the Board's conclusion that notice was untimely and remand for the ALJ to consider causation, entitlement to temporary total disability, and the extent and duration of disability, if any.

GUDGEL, CHIEF JUDGE, AND JOHNSON, JUDGE, CONCUR IN RESULT ONLY.

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