RENDERED: NOVEMBER 8, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000643-WC

JERRY WAYNE WILLIAMS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-56908

MANALAPAN COAL COMPANY, INC.;
HON. J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, MCANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Jerry Wayne Williams petitions for review of an opinion of the Workers' Compensation Board that affirmed an opinion and order of the Administrative Law Judge dismissing Williams' claim against Manalapan Coal Company, Inc., for failure to provide timely notice of an alleged work-related injury to his back. We affirm.

In his petition for review, Williams argues that the ALJ and Board erred in holding that his delay in notifying Manalapan of his work-related injury was not legally justified.

The duty of this Court on review "is to correct the Board only where the . . . Court perceives 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 Hospital v. Kelly, 827 S.W.2d 685, 687-88 (1992). After reviewing the record, the law, and the arguments of counsel, we have concluded that this Court could not improve upon the well-written opinion of the Board. Inasmuch as we believe the Board did not overlook or misconstrue controlling precedent and properly assessed the evidence, we adopt it as our own.

> BEFORE: LOVAN, Chairman, STANLEY and GARDNER, Members.
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> STANLEY, Member. Petitioner, Jerry Wayne Williams ("Williams"), appeals from an opinion and order rendered September 20, 2001, by Hon. J. Landon Overfield, Administrative Law Judge ("ALJ"), dismissing his claim against the respondent, Manalapan Coal Co., Inc. ("Manalapan"), for failure to provide due and timely notice of an alleged work-related injury to his low back. Williams also appeals from an order issued October 23, 2001 by the ALJ overruling his petition for reconsideration.
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> On appeal, Williams contends he had reasonable grounds for not providing due and timely notice and that the evidence compels a finding in his favor. He also contends the ALJ erred in dismissing his claim for cumulative trauma. We disagree, and therefore affirm.
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> As the questions raised on review are narrow in scope, we will limit our discussion of the facts to those that are pertinent to the issues. Williams was born November 29, 1959 and is a resident of Dayhoit, Harlan County, Kentucky. He has a ninth grade education and no other vocational or specialized training. Williams testified that on July 17, 2000, while working as an

underground coal miner for Manalapan, he injured his low back moving rock off a miner and pulling cable. He stated he experienced a sudden sharp pain in his low back that radiated down his left hip into his leg and foot.

Williams testified that he first sought medical treatment for his injury in October 2000. He allegedly did not miss any work as a result of the injury until December 27, 2000. He has not worked since that date.

Williams testified that he did not report his alleged back injury to his supervisor until sometime in November 2000. Thereafter, Williams, through his attorney, sent a letter dated December 8, 2000 to Manalapan advising of his alleged work-related injury. Williams stated in his December 8, 2000 letter that he did not report the injury earlier because he did not want to "knock the entire shift out of the safety bonus." He also stated in the letter that, even though he experienced his initial pain on the job, he did not know his back condition was work-related until December 2000, when Dr. James Bean diagnosed degenerative disc disease.

In support of his claim, Williams submitted the medical testimony of Dr. Jameel A. Butt and Dr. James Bean, a neurosurgeon. Additionally, he submitted lay testimony from David Partin. In response, Manalapan presented lay testimony from Jim Enlow.

Dr. Butt first saw Williams upon self-referral for complaints of back pain on October 10, 2000. At that time, Williams recounted having experienced left hip and groin pain, "going on for three months." Apparently, on that occasion, however, the doctor either did not receive or did not record any history of injury. Thereafter, on October 24, 2000, Dr. Butt interpreted an MRI as showing a moderate left disc protrusion at L5-S1 and mild bulging at L3-4. Based on these findings, Dr. Butt prescribed pain medication and referred Williams to Dr. Bean.

Dr. Bean performed a discectomy on Williams on December 29, 2000. Dr. Bean received a history of pain in the lower back radiating into the left hip and leg of

approximately six months duration that had steadily worsened over time. The doctor further reported that an MRI scan revealed a left-sided herniated disc at L5-S1, and degenerative changes present at L2-3 and L3-4. Consequently, Dr. Bean ordered Williams hospitalized and a lumbar microendoscopic discectomy was performed. Williams was discharged from the hospital the following day.

Dr. Bean testified that Williams' back condition was the result of his years of employment involving heavy labor from 1982 to the present. He stated Williams provided him with a history of problems with low back pain that had worsened over time, but Williams did not indicate any specific work-related incident. Dr. Bean assessed a 10% permanent impairment rating.

Williams also submitted the testimony of Mr. David Partin, safety director for Manalapan. Through Mr. Partin's testimony, Williams introduced a written first report of injury dated December 20, 2000 completed by Partin and signed by both Williams and Partin. The report indicates that "at or near July 19, 2000" Williams suffered a work-related injury to his low back when he bent down to remove a rock from under a jack head. The report reflects that Willaims had been initially treated by Dr. Butt at Harlan ARH and then later referred to Dr. Bean. The report records that Williams complained of low back pain radiating into his left leg. A Form SF-1 was also introduced through Partin's testimony which indicated Williams notified Manalapan of the injury on December 12, 2000.

Also submitted as an exhibit to Partin's deposition were wage records spanning May 23, 2000 through December 2000. These records demonstrate that Partin suffered no lost time from work as a result of any injury until December 27, 2000, and in fact document significant amounts of overtime hours on the job. Additionally, a document informing employees that on the job injuries must be reported on the same date as they occur, signed by Williams and dated January 22, 2000, was also introduced.

During the deposition, Partin was asked to explain the safety bonus program at

Manalapan. He stated that if an employee suffers no lost time due to an accident in a quarter, the employee receives a bonus of fifty cents per hour. Partin testified that this bonus related to each individual worker's performance and not his entire shift crew. Partin further indicated that an employee's right to a safety bonus was affected by a lost time accident only and not simply by reporting a work-related injury.

Manalapan introduced the testimony of Jim Enlow, its workers' compensation administrator. Enlow testified that the first notice he received of Williams' injury was the letter from Williams and his attorney dated December 8, 2000. Enlow stated he received that letter on December 11, 2000. Enlow confirmed that only injuries resulting in lost work time would cause an employee to lose his safety bonus.

Upon review of the medical and lay evidence, and after providing a thorough summary of that evidence, the ALJ concluded:

> Plaintiff had a work related injury on July 17, 2000 and that was in the nature of a work related traumatic event which occurred when he lifted a rock from a miner. In making this finding I have relied on Plaintiff's testimony. In making this finding I also specifically find that Plaintiff did not have a cumulative trauma injury as reported by Dr. Bean. I reject Dr. Bean's testimony on that account as it was based on an inaccurate history.
>
> Plaintiff failed to sustain the burden of proving to the satisfaction of the trier of fact that he gave due and timely notice of his claimed work related injury. This failure to give notice defeats Plaintiff's claims for the work related traumatic event and injury that occurred on July 17, 2000 and, since Plaintiff first had a manifestation of significant pain on July 17, 2000, it would also defeat any claim for cumulative trauma. Plaintiff has argued that

> he failed to give due and timely notice in an effort to benefit his co-workers. While this may have been a noble effort, it has resulted in a tragic circumstance for Plaintiff. Pursuant to K.R.S. 342.185 a plaintiff is required to give notice of the accident 'as soon as practicable after the happening thereof.' There are, of course, circumstances which will excuse a plaintiff from giving notice immediately or within a reasonable amount of time. The burden of proof is on the Plaintiff to explain why he did not give notice sooner. Plaintiff's excuse, in this instance, is not an excuse which would have made it not practicable to give notice far closer in time to the incident in question than November or even October after the injury in mid July. Plaintiff has not shown that it was not practicable to give notice at the time of the occurrence of the injury. Thus, plaintiff's claims must fail.
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> The finding . . . above renders all other issues moot.

On appeal, Williams has offered a variety of reasons that his delay in giving notice was excusable. First and foremost is that Williams did not wish to cause the other employees on his shift to lose their safety bonus. Second, Williams contends he did not report the injury because he did not understand the reporting requirements with respect to work injuries. Third, Williams argues he did not know his injury was work-related until diagnosed by Dr. Bean and, therefore, the ALJ erred in dismissing his claim for cumulative trauma. Williams also contends Manalapan was not prejudiced by his delay in providing timely notice.

A determination of whether notice is due and timely is a mixed question of law and fact. Harry M. Stevens Co. v. Workman's Compensation Board, Ky. App., 553 S.W.2d 852 (1977). KRS 342.185 provides that notice of an "accident" shall be given "as soon as practicable." Notice must be given within a

reasonable time under the circumstances of the particular case. Harlan Fuel Co. v. Burkhardt, Ky., 296 S.W.2d 722 (1956); Turnstall v. Blue Diamond Coal Co., Ky., 359 S.W.2d 614 (1962). Whether notice has been given as "soon as practicable" depends upon all the circumstances of the particular case. Marc Blackburn Brick Co. v. Yates, Ky., 424 S.W.2d 814 (1968). Want of notice or delay in giving notice shall not be a bar to proceedings under the Act 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. Id. at 816. Broadly construed, a delay in providing notice to an employer is excusable where the worker could not have reasonably been expected to know he had a claim against his employer. Rowe v. Semet-Solvay Division of Allied Chemical & Dye Corp., Ky., 268 S.W.2d 416 (1954). If there is a delay in giving notice, the burden is upon the claimant to establish it was not practicable to provide notice sooner. T.W. Samuels Distillery Co. v. Houck, 296 Ky. 323, 176 S.W.2d 890, (1943). Discretion for making the determination of whether notice was given "as soon as practicable" is a factual determination and lies properly with the ALJ. Buckles v. Kroger Grocery & Baking Co., 280 Ky. 644, 134 S.W.2d 221 (1939).

In the case on review, we believe the ALJ properly applied the above standards in rejecting Williams' excuse that he was only trying to protect the pecuniary interests of his friends at work. That excuse is simply not legally viable. Williams, no doubt, was aware in July 2000 that he had sustained a work-related injury to his back. This was demonstrated by the fact that in November and December 2000, he readily related the event to his supervisors and ultimately completed a first report of injury on December 20, 2000, some five months after the accident occurred. In light of this information, we believe it was reasonable for the ALJ to conclude that Williams knew early on that he potentially had a claim against Manalapan. Where an employee knows he has an injury following an episode at work, i.e., lifting a rock at work, as a matter of law, the fact that he does not wish to report that incident in order to achieve a no time lost bonus for

himself and his co-workers can never amount to a reasonable excuse for failing to give due and timely notice.

Furthermore, the ALJ was not bound to believe Williams' testimony that he did not understand the requirements for reporting his injury. The evidence reflects that this is not Williams' first work-related accident. Williams testified that he received an injury to his upper back while working for another coal company in 1996. As a result, he apparently reported the injury and received a period of temporary total disability benefits, as well as payment of medical benefits pursuant to KRS 342.020. Moreover, at Manalapan, he signed a policy statement indicating that all work-related injuries were to be immediately reported. Additionally, Williams' indicated he had seen signs posted at Manalapan advising employees that all accidents must be reported before the end of the shift on the day they occur. This evidence was sufficient, in our opinion, to allow the ALJ to reject Williams' claim of ignorance with regard to proper procedures for giving notice. So long as any evidence of substance supports the ALJ's decision, this Board may not reverse. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Williams also claims he did not report the injury earlier because he did not know his condition was work-related until diagnosed by Dr. Bean in December 2000. This contention is obviously directed at Williams' claim for cumulative trauma. However, it is contradictory to his testimony that he sustained a specific traumatic injury on July 17, 2000. Consequently, we find no error in the ALJ's rejection of Dr. Bean's history to the contrary and Williams' own contentions that his injury is the result of work-related wear and tear to his back over many years. It is well established that the ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores , Ky., 560 S.W.2d 15 (1977). What's more, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Magic Coal v. Fox, Ky., 19 S.W.3d 88 (2000); Whittaker v. Rowland, Ky., 998 S.W.2d 479

(1999); Hall's Hardwood Floor Co. v. Stapleton, Ky.App., 16 S.W.3d 327 (2000).

While it is true Dr. Bean's testimony may have supported Williams' cumulative trauma claim, as a matter of law, the ALJ was well within his authority to reject Dr. Bean's testimony in this regard based on an erroneous history. Although, Dr. Bean reported that Williams provided him with a long history of low back pain and stated the pain had increased gradually over time, he also indicated that at no time did Williams inform him of the July 2000 incident. By contrast, Williams was certainly aware of the incident because, within a matter of days after first seeing Dr. Bean in December 2000, he allegedly reported the July 17, 2000 episode to his supervisors and completed a written first report of injury detailing the incident.

Kentucky authority clearly holds that in such instances where a physician receives an inaccurate history, his opinions regarding causation which are based on that history may be disregarded by the ALJ. Osborne v. Pepsi Cola, Ky., 816 S.W.2d 643 (1991). If the history given to a physician is sufficiently impeached, an ALJ need not follow that doctor's medical opinion even if uncontradicted. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992). Given the contradictory information in this action regarding the true nature of Williams' alleged condition and, based on the fact that Williams failed to relate all of these conflicting facts to Dr. Bean, in our opinion, the ALJ acted well within his authority as fact-finder in discarding that particular theory of events. We remind Williams that the ALJ has the sole authority to determine the weight and inferences to be drawn from such evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., Ky., 951 S.W.2d 329 (1997); Luttrell v. Cardinal Aluminum Co., Ky.App., 909 S.W.2d 334 (1995).

Finally, we turn to Williams' argument that Manalapan was not prejudiced by his failure to provide due and timely notice. The Court, in Harlan Fuel Co. v. Burkhardt, supra, stated

> [N]otice must be given as soon as practicable after the occurrence of the accident and we have, with some strictness, held claimants to its requirement under the theory that its purpose is (1) to give the employer an opportunity to place the employee under the care of competent physicians in order to minimize his disability and the employer's subsequent liability; (2) to enable the employer to investigate at an early time the facts pertaining to the injury; and (3) to prevent the filing of fictitious claims when lapse of time makes proof of lack of genuineness difficult.

Id. at 723.

As a general rule, the mere lack of prejudice to an employer is not sufficient to excuse delay in giving notice of a potential worker's compensation claim. Blue Diamond Coal Co. v Blair, Ky., 445 S.W.2d 869 (1969). However, even if it were, given the circumstances of this case, we cannot say that the ALJ erred in finding the existence of prejudice to Manalapan as a result of Williams' delay in providing due and timely notice. Reliance Die Casting v. Freeman, Ky., 471 S.W.2d 311 (1971) and Blue Diamond Coal Co. v. Stepp, Ky., 445 S.W.2d 866 (1969).

In Whittle v. General Mills, Ky., 252 S.W.2d 55 (1952) the Kentucky Court of Appeals [now the Kentucky Supreme Court], rejected outright a claimant's argument that his employer suffered no prejudice due to his delay in giving notice following a work-related injury that produced a herniated disc. In that instance, the claimant also did not give notice for some five months after sustaining his work-related injury. The Court, in Whittle, concluded that, "We are not prepared to say that a herniated disc is such an injury that no prejudice would result to the employer from delay in giving notice." Id. at 57. The Court, in making this determination, reminded the parties that the purpose of the notice requirement of the statute is obvious. The employer is entitled to an early opportunity to ascertain by examination the nature and extent of any

> claimed injury. It is entitled to an opportunity to ascertain whether or not any given injury arises from an accident suffered in the course of the employment and if such an injury is found, to minimize the disabling effects by early treatment. Id. at 57. Thus, as did ALJ Overfield, we find no merit in Williams's argument that the evidence in this case compels a finding that respondent suffered no harm as a result of his unwarranted lag in notifying them of the events of July 2000. More precisely, under the circumstances of this case, we, too, are unprepared to say that Williams' herniated disc is such an injury that no prejudice resulted to Manalapan from the petitioner's unreasonable delay.
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> Accordingly, the opinion and order rendered September 20, 2001 by Hon. J. Landon Overfield, Administrative Law Judge is hereby **AFFIRMED** and this appeal is **DISMISSED**.
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> ALL CONCUR.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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