RENDERED: JULY 18, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-002469-WC

DREMA CRUM — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-01-01094

SEALMASTER BEARING[1]; HON. ROGER D. RIGGS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY, AND PAISLEY, JUDGES.

McANULTY, JUDGE. Drema Crum petitions for review of an opinion of the Workers' Compensation Board that affirmed the decision of the Administrative Law Judge (ALJ) dismissing her claim for failure to give sufficient notice of a work-related injury to her employer, Sealmaster Bearings. We affirm.

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[1] Appellant's petition for review erroneously refers to her employer's name in the singular, rather than the plural, form. The correct name is Sealmaster Bearings.

Drema Crum, who was born in 1959, has an eighth grade education and a GED with a work history as a seamstress and restaurant cook/waitress. In January 1994, she became employed by Sealmaster Bearings as an assembly-line worker. On July 27, 1999, while working as an equipment set-up operator, Crum felt a severe pain in her back when she was placed in an awkward position reaching around the back of a machine to press two buttons with her hands while balancing on her right leg. One of her co-workers gave her some pain medication but because it was near the end of her shift, Crum did not immediately report the incident. The next morning Crum was still experiencing severe back pain, so she went to her family physician, Dr. Donald Blair, who ordered an MRI. Earlier that same morning, Crum telephoned Sealmaster and told her supervisor, Dan Ackerman, that she was not able to come to work because she had hurt her back the day before. On August 3, 1999, Crum signed a leave of absence request form indicating the request was for personal illness or injury. After reviewing the MRI, Dr. Blair referred Crum to Dr. Henry Tutt, a neurosurgeon.

On September 9, 1999, Dr. Tutt examined Crum and recommended conservative treatment with physical therapy in part because while the MRI indicated disk protrusion at the L4-L5 level of the lumbar spine, the quality of the film was poor. After Crum did not respond to the conservative treatment, Dr.

Tutt performed a left L4-L5 discectomy with decompression of the cauda equina on October 11, 1999. Following the surgery, Crum continued to complain of back and left leg pain. A subsequent MRI indicated no new herniation or disk protrusion and Dr. Tutt was unable to determine a cause for Crum's complaints. He opined that Crum had reached maximum medical improvement, could return to work, and released her back to Dr. Blair.

Dr. Blair then referred Crum to Dr. Aleksander Mogilevski, a neurosurgeon. Dr. Mogilevski treated her with several epidural steroid injections and oral prednisone between March and May 2000, which provided only temporary relief. In September 2000, Crum began treatment with Dr. Richard Donnini, an osteopath and pain management specialist, who has placed her on a regiment of physical therapy, pain medication, and periodic epidural injections. Crum has not returned to any type of work since the July 1999 incident and was eventually terminated from her employment with Sealmaster.

On July 27, 2001, Crum filed an Application for Resolution of Injury Claim seeking workers' compensation benefits related to her July 27, 1999, injury. Sealmaster denied the claim based on lack of notice and causation, and statute of limitations. Crum filed a Form 107 medical report prepared by Dr. Donnini in which he diagnosed her as suffering from lumbar radiculopathy and post laminectomy syndrome of the

lumbar. He opined that the July 1999 incident caused her complaints and he assessed a permanent 29% functional impairment rating under the American Medical Association Guides to Evaluation of Permanent Impairment.

In January 2002, Dan Ackerman and Kevin Carpenter, Sealmaster's human resource manager, were deposed. Ackerman testified that Crum telephoned him on July 28, 1999, and said she could not come to work because she was having severe back problems. He said that he did not inquire further and would have had her fill out an accident report if she had indicated she had a work-related injury. Ackerman also stated that Crum's description of how she injured herself was not consistent with the characteristics of the machinery at the plant. Carpenter testified that the company had posted notices throughout the plant telling employees to report all injuries, and that Crum had filled out work-related injury reports involving two other incidents in July 1998 and May 1999. He stated Crum had signed a personal injury leave of absence form for the July 27, 1999 incident, and had received benefits under the company's sickness and accident coverage, which included a total of $11,400 for salary compensation representing 50% of her normal salary and payment of her medical expenses.

On January 2, 2002, Dr. Gregory Snider, an occupational medicine specialist, evaluated Crum at Sealmaster's

request. In his report, Dr. Snider noted the absence of documentation in the medical records, other than Dr. Donnini's report, attributing Crum's injury to a work-related incident, and referred to records indicating she had been treated for back pain in 1997 and April 1999. He diagnosed her status as post L4-L5 discectomy with chronic low back pain and assessed a 13% permanent functional impairment rating, but indicated Crum could return to work with some restrictions.

Following a hearing at which Crum testified, the ALJ issued an opinion dismissing her claim for lack of reasonable notice to her employer of a work-related injury. He stated:

> The plaintiff is required to prove each and every allegation of her claim. Unfortunately for the plaintiff, the entire record strongly supports the conclusion that the plaintiff did not give reasonable notice of a work-related injury of July 29, 1999 [sic]. The records of Cave Run Clinic indicated Ms. Crum has suffered from chronic low back problems for several years. Ms. Crum, herself, has testified that she did not tell her supervisor specifically that she suffered an injury at work. Her supervisor has testified specifically that she did not report a work-related injury. Records from the employer indicate that Ms. Crum was aware of the requirement of filing a notice of a work injury as she had done so in the past, the latest occasion being two months prior to the alleged work injury herein. An application for sickness and accident benefits for a nonwork-related injury was signed by Ms. Crum indicating that her ailments and complaints were not work-related. The only treating physician whose evidence has been presented herein, Dr. Henry Tutt, indicated that Ms. Crum did

> not report a work injury but had reported long term, chronic low back problems. This overwhelming evidence leads to the conclusion that the plaintiff has failed to give reasonable notice of a work-related injury of July 27, 1999.

Crum's subsequent petition for reconsideration was summarily denied. On November 6, 2000, the Workers' Compensation Board affirmed the ALJ's opinion and Crum petitioned for review by this Court.

Crum challenges the ALJ's determination that she did not provide sufficient notice to support her claim. Under KRS 342.185(1), no proceeding for workers' compensation for an injury shall be maintained "unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof . . .." KRS 342.190 requires the notice to include "the time, place of occurrence, nature and cause of the accident . . . and the work or employment in which the employee was at the time engaged . . . ." KRS 342.200 further states, "Want of notice or delay in giving notice shall not be a bar to proceedings under this chapter 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." The purposes of the notice requirement are threefold: (1) to provide prompt medical treatment in an attempt to minimize the worker's

ultimate disability and the employer's liability; (2) to enable the employer to make a prompt investigation of the circumstances of the accident; and (3) to prevent the filing of fictitious claims because of the lapse of time. Smith v. Cardinal Const. Co., Ky., 13 S.W.3d 623, 627 (2000); Harlan Fuel Co. v. Burkhart, Ky., 296 S.W.2d 722, 723 (1956).

The employee bears the burden of proof on the notice requirement as an initial matter, as well as any claim of justifiable delay. See, e.g., Newberg v. Slone, Ky., 846 S.W.2d 694 (1992); Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986); Buckles v. Kroger Grocery & Baking Co., 280 Ky. 644, 134 S.W.2d 221 (1939). Mere lack of prejudice to an employer alone is not sufficient to excuse a delay in providing notice. See Blue Diamond Coal Co. v. Stepp, Ky., 445 S.W.2d 866 (1969). Whether a claimant gave timely and adequate notice is ultimately a legal question, but the notice issue also involves factual findings making it a mixed question of law and fact. See, e.g., Harry M. Stevens Co. v. Workmen's Compensation Board, Ky. App., 553 S.W.2d 852 (1977); Blackburn v. Lost Creek Mining, Ky., 31 S.W.3d 921, 925 (2000). As the fact-finder, an ALJ's findings on factual issues are conclusive if supported by substantial evidence, but when legal questions or mixed questions of law and fact are involved, the reviewing court has greater latitude to determine whether the decision below is supported by evidence of

probative value. Purchase Transportation Services v. Estate of Wilson, Ky., 39 S.W.3d 816, 817-18 (2001); Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991). Where an ALJ's decision is adverse to a party with the burden of proof, his factual findings are erroneous as a matter of law and may be disturbed on appeal only if they are so unreasonable under the evidence that a contrary finding is compelled. See Special Fund v. Francis, 708 S.W.2d at 643; Purchase Transportation Services, 39 S.W.3d at 817.

In the current case, most of the facts are undisputed. The first time that Crum explicitly told Sealmaster that she was seeking workers' compensation benefits for her July 1999 injury was when she filed her application in July 2001. Prior to that time, she requested and received benefits under the employer's sickness and accident insurance policy. In support of her position, Crum relies on her telephone conversation with her supervisor, Dan Ackerman, the morning after the July 1999 incident. In that conversation, Crum told Ackerman that she was in severe pain from a back injury she sustained "yesterday." Crum vehemently argues this information was sufficient to place Sealmaster on notice that she had sustained a compensable work-related injury and that Sealmaster had a duty to make further inquiries and investigate the circumstances of her injury. Crum asserts that Sealmaster stuck its head in the sand, took a "hear

no evil, see no evil" approach, and ignored her attempt at notice. Crum's argument, however, is contrary to the statutory dictates, which require the claimant to provide information on the time, place, nature, and cause of the accident resulting in a work-related injury. Crum's attempt to shift the burden to Sealmaster to investigate the circumstances of her injury when she gave no indication it was work-related other than it occurred at some unspecified time on a workday is not supported by the law. The cases she cites are distinguishable because in those cases the employer either had actual knowledge that the injury occurred at work or was specifically informed of that fact, or there was a reasonable excuse for a delay in notice. While case law establishes that the notice statutes should be liberally construed, "liberal construction does not mean total disregard for the statute, or repeal of it under the guise of construction." Whittle v. General Mills, Inc., Ky., 252 S.W.2d 55, 57 (1952)(quoting Buckles v. Kroger Grocery & Baking Co., 280 Ky. 644, 134 S.W.2d 221, 223 (1939)).

Crum contends that she made a good faith effort to notify Sealmaster as soon as practicable and Sealmaster was not misled by any inaccuracy in the notice. The record indicates that Crum did not identify her injury as work-related to her treating physicians (prior to Dr. Donnini) and signed several documents related to receipt of benefits and requests for leave

attributing her disability to a personal injury. The company had notices prominently displayed at the workplace encouraging employees to report any work-related accidents or injuries. Crum was aware of this policy and had reported and filled out forms associated with two prior incidents, one of which occurred only two months before the July 1999 incident.

We hold that Crum did not provide sufficient notice to satisfy the statutory requirements. The ALJ's factual findings are supported by substantial evidence. His legal conclusion that Crum did not give due and timely notice or provide a reasonable excuse for failure to do so is supported by evidence of probative value and is not unreasonable.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert W. Miller
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BRIEF FOR APPELLEE:

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