

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000980-WC

LOGAN ALUMINUM, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-00-00479

GREGORY BULLARD;  
HON. JOHN B. COLEMAN, ALJ; AND  
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Logan Aluminum, Inc. (Logan), petitions for our review of an opinion of the Workers' Compensation Board affirming an administrative law judge's (ALJ) order on remand from the Kentucky Supreme Court. In an opinion and order dated October 24, 2000, the ALJ awarded Gregory Bullard temporary total disability benefits and permanent partial disability benefits, which included income, medical and vocational rehabilitation benefits. Logan appealed the award to the Board,

which affirmed the ALJ's award. Logan then filed a petition for review with this court, which affirmed the Board's opinion. Thereafter, the Kentucky Supreme Court rendered an opinion affirming in part and remanding the case to the ALJ for a determination of whether Logan was prejudiced by Bullard's unexcused eight-month delay in providing Logan notice of his injury. On remand, the ALJ found that Logan suffered no prejudice. The Board affirmed, and this petition for review by Logan followed.

When this case was initially before the ALJ, Gregory Bullard was 39 years old with a high school education and was pursuing an undergraduate degree at Western Kentucky University. He had previously served in the United States Marine Corps for 10 years as an air traffic controller. Bullard had passed a physical exam upon leaving the military in 1993.

In February 1995, Bullard began working for Logan as a forklift operator. He passed a physical exam administered by Logan that year. His job required him to look over his shoulders while driving a forklift in reverse, often over rough surfaces, which would jar his neck. In 1996 he gradually developed stiffness in his neck, suffered from headaches, and felt numbness in both arms. Bullard sought treatment from Dr. Merrill Patterson, a chiropractor, beginning in 1997. Dr.

Patterson advised Bullard that he had suffered a gradual neck injury that in his opinion was work-related.

On August 18, 1999, Dr. Patterson wrote a letter to Logan, in which he explained Bullard's diagnosis and recommended that Bullard permanently refrain from driving the forklift. Bullard testified that he delivered the letter to Logan's medical department, his supervisor, and to personnel representatives. He also said that he informed his supervisors of the painful condition of his neck and that "the fork truck was just killing me." Bullard testified that he told the medical staff he believed his condition was work-related.

Bullard went to Dr. Richard Berkman, a neurosurgeon, for a second opinion. Dr. Berkman was an approved physician under Logan's insurance carrier. Dr. Berkman performed an MRI on September 8, 1999, which revealed that Bullard's condition was in an advanced stage. Dr. Berkman recommended Bullard undergo surgery to repair his cervical spine, which Dr. Berkman performed successfully on September 23, 1999. Thereafter, Bullard applied for short-term disability benefits.

Logan terminated Bullard's employment on April 12, 2000. Bullard filed the underlying workers' compensation claim on April 26, 2000. He admitted he had properly filed injury

reports for previous injuries, but he did not fill out an injury report prior to filing this claim.

The ALJ heard the testimony of lay witnesses, mostly individuals who worked with Bullard at Logan, as well as expert witness testimony from several physicians. Relying on the opinions of Dr. Berkman, Dr. David Gaw, and Dr. Robert Byrd, the ALJ determined that Bullard's injury was caused by the repetitive neck movements Bullard did on a daily basis at Logan. The ALJ came to that conclusion despite the opinion of Dr. Leon Ensalada. It was Dr. Ensalada's opinion that Bullard's injury was a result of the natural aging process.

The ALJ concluded that the injury was work-related and awarded Bullard permanent benefits based on a 15% impairment rating, as well as temporary benefits from September 8, 1999, through June 5, 2000. Although Bullard apparently believed he had given Logan notice of his injury and Dr. Patterson's belief it was work-related, the ALJ concluded that Bullard did not give actual notice until he filed his claim on April 26, 2000. That constituted an eight-month delay. However, the ALJ concluded that such a delay was excusable in this case because Bullard relied on the letter written to Logan by Dr. Patterson. Additionally, the ALJ held that the statute of limitations did not bar Bullard's claim because he did not discover his

condition was work-related until August of 1999, when Dr. Patterson so informed him. The ALJ also ordered a vocational evaluation to be conducted to determine if Bullard was entitled to vocational rehabilitation benefits. Finally, the ALJ held that Logan was entitled to a credit against short-term benefits if it complied with KRS<sup>1</sup> 342.730.

The Board affirmed the ALJ's opinion and award on March 21, 2001. This court affirmed the opinion of the Board on February 7, 2003, and adopted a large portion of the opinion as our own. On February 19, 2004, the Kentucky Supreme Court affirmed in part but remanded the case to the ALJ. See 2003-SC-1062-WC, rendered February 19, 2004 (not to be published). The supreme court held that the eight-month delay violated the notice requirement in KRS 342.185(1), which requires notice of an injury to be given to the employer "as soon as practicable[.]" Likening Bullard's case to the facts in Northeast Coal Co. v. Castle, 202 Ky. 505, 260 S.W.2d 336 (1924), where the injured worker thought he had given notice but actually had not, the supreme court disagreed with the ALJ that Bullard's delayed notice was excusable under the "mistake or other reasonable cause" provision of KRS 342.200.<sup>2</sup> The court

---

<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> KRS 342.200 states:

held that the ALJ's reasoning could result in the practical nullification of the notice requirement. Thus, the court remanded the case to the ALJ to determine whether Logan was prejudiced under that statute by Bullard's untimely notice.

On remand, the ALJ reviewed additional evidence submitted by Logan. Logan filed the medical report of Dr. Gene Wilson, a medical evaluation by Dr. Patrick Bray, and a partial transcript of evidence from a separate jury trial involving Logan and Bullard. Dr. Wilson is the plant physician for Logan, and he indicated in his report that Logan had an established procedure in place for evaluating work-related injuries. He testified that normally an employee triggers those procedures by suffering an injury or claiming that a gradual injury is work-related. He claimed that the process in this case was not begun until after Bullard underwent surgery, and thus no investigation into the cause of the injury or preventive measures could have been taken.

---

The notice shall not be invalid or insufficient because of any inaccuracy in complying with KRS 342.190 unless it is shown that the employer was in fact misled to his injury thereby. 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.

Dr. Bray similarly opined that Logan's ability to determine the work-relatedness of Bullard's injury was irretrievably lost after the surgery. Dr. Bray came to this conclusion by examining Bullard's medical evidence as well as the ergonomic report of Bullard's job, which was conducted December 13, 2000. Based on medical reports from Bullard's service in the Marine Corps, Dr. Bray concluded that Bullard had a pre-existing degenerative cervical spine disease at a relatively early age and prior to his employment at Logan. He opined that Bullard suffered no specific cervical injury at Logan and that Dr. Berkman's findings during the September 1999 surgery indicated a degenerative condition, rather than a traumatic one. Dr. Bray's conclusion was that any determination of work-relatedness of Bullard's gradual injury became impossible after Bullard underwent surgery by Dr. Berkman.

Analyzing the evidence presented during the first hearing and the new evidence presented on remand, and taking into account the purposes behind the notice requirement, the ALJ found that Logan had not been prejudiced by Bullard's untimely notice.

On appeal, the Board affirmed the ALJ, observing that the opinions of the Logan's new expert witnesses were somewhat disingenuous. It reasoned that it is not uncommon for medical experts to examine a claimant after surgery or treatment. In

addition, the Board noted that the experts gave no reason why Bullard's job duties could not be examined by placing another forklift driver in Bullard's place and by using that evidence in combination with the MRI and the surgeon's report to determine causation. The Board acknowledged that Bullard's cervical anatomy has been permanently altered after the surgery, but it found that fact to be only superficial support for Logan's assertion that the difficult question of causation was rendered impossible to determine because of the surgery. The Board characterized the issue of causation as one of conflicting medical evidence, which was strictly within purview of the ALJ to decide. Reasoning that the applicable principle in this case placed the burden on Logan to prove prejudice and that it had failed to do so, the Board affirmed. This petition for review by Logan followed.

In its February 19, 2004 opinion, the Kentucky Supreme Court, after finding Logan did not have actual notice of the injury and that Bullard's eight-month delay was inexcusable as mistake or other reasonable cause, remanded this case to the ALJ for a determination of whether or not Logan was prejudiced.

"[KRS 342.200] makes lack of prejudice a controlling consideration only in relation to an inaccuracy in compliance with the notice requirements [in KRS 342.190]; delay is excused only by the employer's actual knowledge of the claim or by



mistake or other reasonable cause." Blue Diamond Coal Co. v. Stepp, 445 S.W.2d 866, 868 (Ky. 1969). "If there is a delay in giving notice, the burden is on the claimant to show that it was not practicable to give notice sooner." Newberg v. Slone, 846 S.W.2d 694, 700 (Ky. 1992).

Here, our supreme court did not address any inaccuracy by Bullard in complying with KRS 342.190. Instead, the court found that Bullard's delay violated KRS 342.185 and remanded the case to the ALJ for a determination of whether or not Logan was prejudiced by the delay. According to the statutes and case law cited by the Board in its opinion, if there was no inaccuracy and no actual knowledge, mistake, or other reasonable cause, Bullard's claim should be barred. See Coslow v. General Elec. Co., 877 S.W.2d 611, 614 n.1, and Blue Diamond Coal Co., supra. Nevertheless, the Board analyzed the prejudice issue, noting that the supreme court's opinion became binding under the "law of the case" doctrine.

"The 'law of the case' rule is that parties on a second appeal may not relitigate matters affecting the subject of the litigation that could have been introduced in support of the contention of the parties on the first appeal." Hutchings v. Louisville Trust Co., 276 S.W.2d 461, 466 (Ky. 1955). In

addition, SCR<sup>3</sup> 1.030(8)(a), states, “[t]he Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court.”

Logan argues that the burden to prove lack of prejudice should have been on Bullard, not on Logan as held by the Board. The Board noted that KRS 342.200 provides that “[t]he notice shall not be invalid or insufficient because of any inaccuracy in complying with KRS 342.190 unless it is shown that the employer was in fact misled to his injury thereby.” [Emphasis added.] We agree with the Board that the statute requires the burden to be placed on the employer, not the employee.

Logan’s second argument is that the ALJ and the Board erred in determining that Logan suffered no prejudice due to the eight-month delay in receiving notice of the injury. Logan presented new expert testimony before the ALJ on the issue of prejudice. The ALJ reviewed that new evidence and the evidence from the prior hearing. He analyzed Logan’s claim of prejudice under the standard set forth in Harlan Fuel Co. v. Burkhart, 296 S.W.2d 722, 723 (Ky. 1956). That standard states the reasons for the notice requirement are: (1) to give the employer an opportunity to place the employee under the care of competent

---

<sup>3</sup> Kentucky Rules of the Supreme Court.

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.

With respect to the first element of the standard, the ALJ noted that Logan sent Bullard to Dr. Berkman, a physician approved by Logan's insurance company, for immediate treatment. The results of that treatment were successful, and they undoubtedly minimized Logan's liability for ongoing treatment.

Under the second element, the ALJ noted and the Board agreed that the facts pertaining to the injury did not change. Logan conducted an extensive investigation of the working environment, and its experts had full access to Bullard's relevant medical records. The Board reasoned that the fact this investigation occurred after Bullard's surgery is of little consequence. It stated that an investigation as to the cause of an injury frequently occurs after the claimant has undergone therapy or treatment. The Board considered Logan's experts to be somewhat disingenuous by giving the opinion that Logan's ability to investigate was irreparably damaged by Bullard's successful surgery.

As to the third element, the ALJ did not find any indication that Bullard presented a fictitious claim or that his injury occurred under suspicious circumstances. Bullard had a pre-existing condition, but he brought his new injury and its work-relatedness to his supervisors' attention after being so advised by his chiropractor.

Since the burden of proof was on Logan to prove prejudice and it was unsuccessful before the ALJ, the question now is whether the evidence compelled a finding in Logan's favor. See Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984). The ALJ analyzed the issue of prejudice by reviewing the reasons for the notice requirement as stated in the Harlan Fuel Co. case. We have stated the ALJ's analysis above, and we conclude that the evidence does not compel a contrary result. We will correct the ALJ and the Board only where we perceive they have "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." See Western Baptist Hosp. v. Kelly, 827 S.W.2d 687-88 (Ky. 1992). Such is not the case herein.

The Board's opinion is affirmed.

BARBER, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS WITH RESULT ONLY.

BRIEF FOR APPELLANT:

Charles E. Lowther  
Lexington, Kentucky

BRIEF FOR APPELLEE, GREGORY  
BULLARD:

William J. Rudloff  
Bowling Green, Kentucky