RENDERED: JULY 11, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001960-WC

I. DENISE BROTHERS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-05-70135

LEXMARK INTERNATIONAL, INC.;
HON. HOWARD E. FRASIER,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

NICKELL, JUDGE: I. Denise Brothers (Brothers) petitions for review of a Workers' Compensation Board (Board) opinion affirming an Administrative Law Judge's (ALJ) dismissal of a claim for temporary total disability, permanent partial disability, and medical benefits based on an alleged workplace injury in September 2004 when Brothers bumped her knee on a metal bracket supporting a computer keyboard. Brothers argues the ALJ erred in finding she did not give her employer, Lexmark International, Inc. (Lexmark), timely notice of her injury and did not prove her injury was job-related. We affirm.

The ALJ devoted forty-one pages to a recitation of the facts. We will spend but a fraction of that space setting the stage since the sole question before us is whether statements contained in Lexmark's first report of injury (FRI) constitute judicial admissions that bind both the employer and the ALJ. This question is not a matter of first impression. Both *Croucher v. Eastern Kentucky University,* 462 S.W.2d 896 (Ky. 1971), and more recently *General Elec. Co. v. Turpen,* 245 S.W.3d 781 (Ky.App. 2006), hold such statements are not judicial admissions.

Brothers worked at Lexmark as an administrative assistant. She claimed that while working on September 8, 2004,[2] she hit her kneecap on a metal bracket that supported her computer keyboard as she attempted to answer the telephone. She immediately felt pain, tingling and a burning sensation. She

[2] On her Form 101, Brothers listed the date of her injury as September 15, 2004. This was actually the date of Brothers' first appointment with her family physician, Dr. Madonna Hall. At the final hearing, Brothers was allowed to amend her claim to reflect an injury date of September 8, 2004.

testified she did not seek immediate medical attention because she doubted such a minor bump could cause any real damage to her knee. Similarly, she did not report the bump to anyone at Lexmark as a workplace injury because she did not believe it was serious and figured it would improve with time. It did not. The pain never subsided and Brothers ultimately underwent knee surgery twice.

This case turns on whether Brothers notified Lexmark of her injury "as soon as practicable" after it occurred as required by Kentucky Revised Statutes (KRS) 342.185(1). There is conflicting testimony as to the date on which Brothers notified Lexmark she was injured at work. Brothers contends she told her supervisor, Sylvia Haller (Haller), about her injury on September 14, 2004, within one week of its occurrence. Haller denies receiving such notice although she does recall discussing treatment with Brothers. Haller thought Brothers injured her knee by falling on a church parking lot or falling down some stairs.

No one saw Brothers hit her knee, but she claimed plenty of Lexmark colleagues knew about her injury including co-worker Robin Harris who supposedly heard a loud noise and came to Brothers' cubicle to see what had happened. Harris was not deposed and she did not testify at the final hearing. Brothers also said she had mentioned her injury to fellow Lexmark employees Ann Goodin, Rhonda Brown and Glenna Betties. None of these women were deposed or called to testify at the hearing.

Brothers testified she told Lexmark nurse Jean Florence (Florence) about her injury on September 22, 2004, and even discussed with her the salary impact of filing a workers' compensation claim. Company medical records from 2003-2005 show Brothers visited the Lexmark medical department often, mostly to monitor her blood pressure. Florence, one of two nurses responsible for receiving workers' compensation claims, made entries regarding Brothers on September 22, 2004; October 14, 2004; November 9, 2004; December 6, 2004; February 7, 2005; February 9, 2005; and February 28, 2005. None of them mentioned a workplace injury or a discussion of workers' compensation. Instead, Florence's notes state only that Brothers was experiencing knee pain, starting physical therapy for her knee, and undergoing knee surgery on December 20, 2004. Nothing in Florence's notes indicated Brothers' pain or knee condition was job-related. Florence, who is now retired, was not deposed nor was she called to testify at the final hearing.

Brothers' company file shows she saw two other members of the Lexmark medical staff after her alleged injury. On December 13, 2004, she requested two ice packs from Dr. Susan Spengler (Dr. Spengler) for a "personal injury." Brothers testified she did not tell Dr. Spengler she injured her knee at work.

On August 3, 2005, nearly a year after Brothers bumped her knee, Brothers met with Nikki Robson (Robson), manager of the Lexmark medical

department, to discuss her many absences from work. Brothers revealed to Robson that her knee had troubled her since 2004 and the only trauma she could recall was bumping her knee on the keyboard tray at work followed by the onset of pain "a couple weeks" later. By this time, Brothers had already undergone knee surgery once and was preparing to undergo a second procedure. Brothers declined when Robson asked whether she wished to file a workers' compensation claim. On August 8, 2005, Brothers called Robson to say her second knee surgery had been scheduled for September 16, 2005. When Robson asked again if she wanted to file a workers' compensation claim, Brothers said, "I may do it because the rehab has a $20 co-pay each time I go." After checking her calendar, Brothers was to tell Robson whether she wished to file a claim.

Although she claimed she bumped her knee on September 8, 2004, Brothers did not seek medical attention for a week. On September 15, 2004, she was examined by Dr. Hall whom she told she had bumped her knee at work. Dr. Hall prescribed bed rest and medication, neither of which relieved Brothers' pain. After two visits, Dr. Hall referred her to orthopedic surgeon Dr. Gary Bray (Dr. Bray). He treated her with physical therapy and steroid injections and then performed surgery in December 2004 and again in September 2005. He now recommends a total knee replacement. Dr. Bray's first mention of a work-related injury occurred in a letter to counsel dated October 18, 2005, in which he stated Brothers had a "preexisting dormant knee condition" that became symptomatic

when she hit her knee in August[3] of 2004. Brothers submitted her medical bills to her health insurance provider. Nothing was submitted to Lexmark's workers' compensation carrier.

On August 11, 2006, Dr. Phillip Corbett (Dr. Corbett), a physician specializing in orthopedic surgery, performed an independent medical evaluation at Lexmark's request. He concluded Brothers suffered from degenerative joint disease in her left knee and did not believe bumping her knee caused her current condition. Like Dr. Bray, he believed Brothers' condition was preexisting and any symptoms from bumping her knee should have resolved within six months. Dr. Corbett opined that bumping her knee on a metal bracket would not have caused Brothers' ongoing knee problems or aggravated or aroused a preexisting dormant condition since her pain did not develop until two weeks after she hit her knee.

Entries in Brother's medical file show Lexmark called in a claim to its workers' compensation carrier, Travelers Property Casualty Company of America, on August 18, 2005. The FRI required by KRS 342.038(1) was filed that same day. The actual FRI was not submitted as evidence to the ALJ but a receipt in the file says Brothers sustained an injury at 1:00 p.m. on September 15, 2004, and that injury was reported to Lexmark on September 22, 2004. Brothers' sole contention on appeal is that the statements contained within the FRI are

[3] Brothers claims she bumped her knee in September 2004.

judicial admissions by Lexmark that it received notice of Brothers' knee injury within a week of its occurrence and therefore it cannot argue to the contrary now. For its part, Lexmark has challenged the receipt of timely notice from inception of the claim. A note in Brothers' medical file dated September 13, 2005, stated it was highly likely the claim would be denied due to late reporting. On October 7, 2005, Lexmark received notification from Travelers that the claim had been denied due to Brothers having a preexisting condition.

Brothers filed a Form 101[4] in March 2006 alleging she sustained a workplace injury to her left knee on September 15, 2004. She did not say how or when she notified Lexmark of her injury, only that "[i]mmediate notice was given." In May 2006, Lexmark filed a Form 111[5] denying the claim because Brothers' alleged knee problems resulted from the natural aging process and although the injury allegedly occurred on September 15, 2004, it was not reported to Lexmark until December 2004.

On March 5, 2007, the ALJ issued an exhaustive forty-eight page opinion denying relief because Brothers failed to prove her condition was work-related and she failed to give Lexmark timely notice of her injury. The ALJ wrote in relevant part,

> [t]he first report of injury completed on August 18, 2005, was not an admission by the employer that notice was

[4] Application for Resolution of Injury Claim.

[5] Notice of Claim Denial.

> received on September 22, 2004, only a statement that the employee has claimed that notice was given on that date. However, an examination of the contemporaneous records of September 22, 2004, does not contain ANY reference to an injury at work.

As for causation, the ALJ found Dr. Corbett's testimony was more credible than that provided by Dr. Bray because he placed too much emphasis on the history Brothers had provided.

On March 19, 2007, Brothers filed a petition for reconsideration arguing the FRI filed by Lexmark was a judicial admission and therefore binding upon the ALJ. Specifically, Brothers contended the ALJ could not find she did not give notice until August 18, 2005, since Lexmark stated in the FRI that Brothers notified it of the injury on September 22, 2004. Brothers also argued there was sufficient proof to conclude her current condition was caused by bumping her knee on the keyboard tray.

Lexmark responded to the petition saying it had challenged the receipt of timely notice from the onset of litigation. As for the contents of the FRI, Lexmark stated it was merely filing the statutorily required form based upon the information provided to it by Brothers. Lexmark argued it submitted the mandated form but did not "accept, adopt or admit that an injury occurred on the alleged date, concede that an injury actually occurred, or that notice was provided timely." On the issue of causation, Lexmark argued the ALJ was well within his authority

to believe or disbelieve any of the testimony presented and as such he reasonably found Dr. Corbett's opinion to be more credible than that offered by Dr. Bray.

On April 5, 2007, the ALJ entered an order denying the petition for reconsideration. The ALJ reiterated the FRI filed by Lexmark was not a judicial admission of the receipt of timely notice since Lexmark had consistently denied receiving timely notice.

Brothers appealed to the Board and on August 31, 2007, the Board affirmed the ALJ's opinion. The Board rejected each of Brothers' arguments on the issue of notice because: 1) judicial admissions are specifically excluded from Workers' Compensation administrative proceedings; 2) the FRI filed by employers is not a legal pleading but rather is an administrative form completed before litigation begins; 3) the FRI is an internal document between an employer and its insurance carrier and becomes public only if filed as evidence in a case; 4) as the finder of fact, the ALJ must evaluate the information contained in the FRI and determine its weight and credibility; 5) while Brothers testified she gave notice of her workplace injury to Haller and Florence in September 2004, there was substantial evidence notice was not provided until eleven months later; 6) Brothers claimed several Lexmark employees, including Florence, knew about the accident shortly after it happened but they were not called as witnesses; and, 7) the first mention of a workplace injury in Brothers' company medical file was dated August 3, 2005. The Board found there was substantial evidence Brothers

unreasonably delayed notifying Lexmark of her injury for eleven months. Brothers appealed to us. We now affirm.

The single question raised by Brothers on appeal is whether statements by an employer in the FRI are judicial admissions and therefore binding on both the employer and the ALJ. Based upon *Croucher, supra,* the answer is no. Croucher, a cafeteria worker, claimed she hurt her back while carrying dishes but three co-workers denied there was any accident. Croucher's evidence was inconsistent and there was proof she had really hurt her back by falling into a ditch before her alleged workplace accident. A unanimous panel wrote,

> the statements in the 'Report of Injury' were simply a repetition of Mrs. Croucher's version of an alleged accident; they did not purport to be an independent, binding representation by the employer, to the board, of the facts of the case. In the second place, the report as required by the statute appears to have only the purpose of supplying the board with statistical information, because the requirement of making the report is not related to the filing or prosecution of a claim for compensation. In the third place, a judicial admission is a formal act done in the course of a judicial proceeding. *Arnett v. Thompson,* Ky., 433 S.W.2d 109. Probably a workmen's compensation claim proceeding can be considered a judicial proceeding for the purpose of the judicial admission rule, but the report in question was not made in the course of the claim proceeding, wherefore it could not be a judicial admission.

Croucher, supra, 462 S.W.2d at 897-898. As recently as 2006, *Turpen, supra,* 245 S.W.3d at 784 reiterated that:

> [a]lthough the Workers' Compensation Board has adopted certain of the Kentucky Rules of Civil Procedure, Rule 36 entitled "Requests for Admission" is specifically excluded. *See* 803 KAR 25:010; *Wadlington v. Sextet Mining Co.,* 878 S.W.2d 814 (Ky.App. 1994). Instead, when facts are undisputed the parties are required to enter into agreed stipulations. 803 KAR 25:010.

In light of *Croucher* and *Turpen,* statements contained in an FRI are not judicial admissions. Furthermore, we do not read *Patrick v. Christopher East Health Care*, 142 S.W.3d 149 (Ky. 2004), cited by Brothers, as requiring reversal. *Patrick* merely establishes that once the FRI is filed, an employer cannot argue it was not notified of an alleged workplace injury. However, an employer must still be given the opportunity to explore and, if warranted, challenge the timeliness of the employee's notice. To hold otherwise would place the employer in the untenable position of vouching for the correctness of information provided to it by the employee when such information could, by design or mistake, be inaccurate. We are unwilling to put that onus on employers.

As an appellate court, we will correct the Board only if it overlooks or misconstrues the law or so grossly errs in evaluating the evidence that it results in gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-688 (Ky. 1992). Here, there was substantial evidence Brothers knew she bumped her knee as early as September 8, 2004, but did not relay this fact to her employer until August 3, 2005, some eleven months later. It was Brothers' burden to prove every essential element of her claim including that she provided timely notice of

her injury to her employer. *Caudill v. Maloney's Discount Store,* 560 S.W.2d 15, 16 (Ky. 1977). She did not sustain her burden. Thus, the Board correctly applied the law and assessed the evidence. In the absence of evidence compelling a finding in Brother's favor, *Special Fund v. Francis,* 708 S.W.2d 641, 643 (Ky. 1986), we have no basis on which to reverse. Because Brothers did not give timely notice of her injury to her employer, we need not address the issue of job-relatedness.

For the foregoing reasons, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

David R. Marshall
Lexington, Kentucky

BRIEF FOR APPELLEES:

Jo Alice Van Nagell
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