

RENDERED: NOVEMBER 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000543-WC

NORTH AMERICAN STAINLESS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-16-72008

KEVIN CLARK; HON. JONATHAN R.
WEATHERBY, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND NICKELL, JUDGES.

NICKELL, JUDGE: North American Stainless (NAS) appeals an opinion and order entered by the Workers' Compensation Board vacating and remanding a decision of Administrative Law Judge (ALJ) Jonathan R. Weatherby. That

decision dismissed Kevin Clark’s claim for occupational disability benefits because Clark did not give notice of a cumulative trauma injury to NAS, his employer, “as soon as practicable” as required by KRS¹ 342.185(1). The ALJ found notice should have been given five months earlier when Clark—according to physician notes from his annual physical—mentioned to Dr. Laura Nutter aches and pains associated with his shoulder which he personally attributed to more than two decades of work at NAS. The Board found Dr. Nutter’s notes documented information Clark provided to his doctor but did not reveal a physician’s diagnosis of Clark having a cumulative work-related shoulder injury. Because a worker need not self-diagnose his own malady, *Hill v. Sextet Min. Corp.*, 65 S.W.3d 503, 507 (Ky. 2001), the Board remanded the matter to the ALJ to specifically find the date on which “Clark was informed by a physician that he sustained a work-related injury.” Once that date is established, the ALJ is to determine whether Clark gave NAS the required notice “as soon as practicable.” *Consol of Kentucky, Inc. v. Goodgame*, 479 S.W.3d 78, 82 (Ky. 2015). Arguing the Board substituted its judgment for that of the ALJ, NAS urges this Court to reverse the Board and affirm the ALJ. On review of the record, briefs and law, we reject NAS’ position and affirm the Board.

¹ Kentucky Revised Statutes.

FACTS

We briefly summarize relevant facts. Clark has worked at NAS in various capacities since March 1993. Dr. Nutter has been his primary care physician since 2003.

On March 9, 2016, Dr. Nutter conducted Clark's annual physical. Results of the physical are reflected in a four-page typed document the ALJ found triggered Clark's obligation to report a cumulative shoulder injury to NAS. Clark did not report such an injury to NAS until August 22, 2016.

Salient notes from Clark's physical reveal a past medical history including "low back pain of over 3 months duration." His Review of Symptoms (ROS) stated, "Musculoskeletal aches and pains as noted previously" but gave no specifics. The following entry appeared under "History of Present Illness."

52 yo WM here for annual review and physical.
His primary complaint is multiple aches and pains. **He knows** it comes from age and 24 years at NAS. **He honestly wonders** how much longer he can do this kind of physical work.
At NAS his job involves standing on concrete all day long, twisting pulling and pushing.
His most tender joint is the anterior right shoulder. **He reports there is a catch at it.**
He also wakes up with stiffness in the neck, shoulders and the lower back. His chiropractor treatments^[2] temporarily ease these kinds of pains.

² Although referenced, there is no explanation of the frequency of chiropractor visits, the nature of chiropractic treatments, nor when or why such visits began.

He is right-hand dominant.
Celebrex was initially effective but then too pricey.
Meloxicam did not help. Robaxin doesn't help with his
pains.

(Emphasis added). The "EXAM" portion of the file does not mention Clark's shoulder, but notes "Neck is supple. No abnormal masses or asymmetry[.]" His "Assessment/Plan" lists "Strain of right shoulder, initial encounter" and "Primary osteoarthritis involving multiple joints[.]" Dr. Nutter was not called to testify or asked to explain the comments she recorded in Clark's file. The words "diagnosis" and "work-related" appear nowhere in Dr. Nutter's notes.

Dr. Nutter's handwritten notes from Clark's 2014 annual physical noted joint pain and stiffness "↑̄ winter ↑̄ work," with the words "and they'll always be there" written in quotation marks underneath. Handwritten notes from Clark's 2008 annual exam list his "Present Illness" as "Ⓜ elbow and Ⓛ shoulder twinge" with no specifics.

On August 22, 2016, Clark was working in the NAS roll grinding department. His shoulder was bothersome when he began the workday and his pain intensified as the day continued. Clark told his shift leader he was in pain and would need to see the company doctor the next day. He completed a first report of injury on August 22, 2016.

Clark returned to work on August 23, 2016. He was in pain and worked a short time before seeing Dr. Sherrell Nunnelley, the company doctor, who listed the purpose of the visit as “new injury.” On August 26, 2016, Dr. Nunnelley diagnosed Clark as having a strained elbow and shoulder—“consistent with work injury”—for which he was allowed to return to work with no medical restrictions. After seeing Clark again on January 30, 2017, he diagnosed “internal derangement (R) shoulder” and marked the box for “consistent with work injury.” Dr. Nunnelley allowed Clark to return to work, but imposed lifting restrictions and prohibited repetitive use of Clark’s right arm. On February 6, 2017, Dr. Nunnelley diagnosed Clark as having a “labral tear” and a “SLAP tear” and again marked the box for “consistent with work injury.” Clark was allowed to return to work with the same restrictions and was referred to Dr. Travis Clegg who, on March 3, 2017, performed shoulder arthroscopy to fix the SLAP tear and the rotator cuff tear.

During his deposition, Clark was asked about “a catch in your right shoulder,” as reflected in Dr. Nutter’s History of Present Illness prompting this exchange between counsel and Clark.

- Q. Okay. In Dr. Nutter’s records, there was a note on March 9, 2016, about a catch in your right shoulder. Do you recall talking to her about that, or somebody from her office about that?
- A. I can’t recall that specifically, but she always asked about aches and pains.

Q. There was a reference in there too about stiffness in your shoulder upon waking. Do you recall that discussion?

A. No, I don't recall that.

Q. There was a note in that same day's records as well about your multiple aches and pains and attributing that to your age and working the time period that you had at NAS.

Do you remember discussing that with her?

A. Roughly discussing aches and pains, yes.

Q. Do you know if you and Dr. Nutter had had that kind of conversation about it being related to your years at NAS, before March 9, 2016?

A. That, I can't remember if we ever discussed.

As the deposition continued, Clark testified the first time he had severe pain in his shoulder and elbow was August of 2016.

In his testimony during a hearing on August 28, 2018, Clark testified his pain became intolerable on August 22, 2016, and Dr. Nunnelley—whom he saw shortly thereafter—was the first doctor to advise him his shoulder issues were work-related. When asked about conversations he had with Dr. Nutter about his shoulder and aches and pains in March of 2016, Clark had no recollection but went on to say if she stated such conversations occurred, “I would not dispute her.”

ANALYSIS

Against the foregoing backdrop we reach the very limited question of whether Clark provided timely notice of a cumulative injury to NAS. The ALJ believes the triggering point was the annual physical Dr. Nutter performed in March of 2016. Clark gave notice based on the diagnosis given to him by Dr. Nunnelley in August of 2016. The Board determined Dr. Nutter's notes reflected Clark's own view of his condition—not a physician's diagnosis of a work-related cumulative condition.

Under KRS 342.185, the date of injury in a cumulative trauma claim is when a medical professional tells the claimant a condition is work-related. “Thus, for cumulative trauma injuries, the obligation to provide notice arises and the statute of limitations does not begin to run until a claimant is advised by a physician that he has a work-related condition.” *Goodgame*, 479 S.W.3d at 82; *see also Hill*, 65 S.W.3d at 507. Close review of Dr. Nutter's file shows she recorded information provided to her by Clark. The record provided to the Board—which we have reviewed—does not show Dr. Nutter ever confirmed Clark had an identifiable condition, diagnosed him as having a cumulative claim, or advised him his aches and pains were work-related. Dr. Nutter simply recorded observations conveyed to her by her patient.

Contrary to NAS' claim, the Board did not substitute its opinion for that of the ALJ. Rather, the Board reviewed the record to confirm the ALJ's conclusions were supported by the record and found they were not. The ALJ read Dr. Nutter's notes as triggering Clark's duty to report a claim when those notes did not contain the information required to satisfy KRS 342.185. *Goodgame and Hill*.

For that reason, we AFFIRM the Board's result.

ALL CONCUR.

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