

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: October 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2002-SC-0826-WC

DATE 11-13-03, ELLA Growitt, DC

RAWL SALES & PROCESSING
COMPANY

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2001-CA-1350-WC
WORKERS' COMPENSATION BOARD NO. 00-00278

ERMAL WOLFORD; HON. RICHARD
M. CAMPBELL, JR., ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In a decision that was affirmed by the Workers' Compensation Board (Board) and the Court of Appeals, the claimant was awarded an enhanced partial disability benefit under KRS 342.730(1)(c)1 based upon physical and psychiatric changes that resulted from a work-related injury. Appealing, the employer maintains that the application of KRS 342.730(1)(c)1 was clearly erroneous and that the psychiatric claim was barred by the claimant's failure to give timely notice of the condition. We affirm.

The claimant was born in 1957 and worked as a laborer and equipment operator in underground coal mines. On March 4, 1998, he suffered trauma to his neck and back when he was thrown against the canopy of the shuttle car that he was operating as it traveled over the "rutted out" floor of the mine. Although he was in some

discomfort, he continued working until March 13, 1998, when he was laid off because the mine shut down. At about that time, he began a course of medical treatment for his neck and back. The claimant testified that despite medication and physical therapy, he continued to experience low back and bilateral leg pain that was exacerbated by prolonged sitting and more than 15 minutes' walking. He indicated that although the neck condition had improved and would not prevent him from working, his back and "nerve" problems would prevent him from doing so. He testified that he received social security disability benefits.

On March 1, 2000, the claimant filed a Form 101, which indicated that the work-related accident caused harm to his back and neck. It also indicated that he reserved the right "to add an emotional component if applicable." The parties were later granted an extension of proof time in order to obtain psychiatric evidence. On June 20, 2000, after receiving Dr. Johnson's report, the claimant moved to amend his Form 101 in order to allege psychiatric harm and to submit Dr. Johnson's report. On July 18, 2000, the employer submitted Dr. Shraberg's report into evidence. The parties eventually stipulated that the claimant gave timely notice of the accident, but the employer maintained that it did not receive timely notice of the psychiatric claim. In contesting the timeliness of notice, the employer argued that the claimant had been treated for depression for a year or more before giving notice of the condition.

Drs. Rapiet, Primm, and Sheridan agreed that the claimant sustained a cervical and lumbar strain. Dr. Sheridan testified that the conditions caused no permanent impairment and warranted no work restrictions. In contrast, Dr. Primm testified that the claimant met the criteria for DRE category II, which equaled a 5% AMA impairment. He thought that the claimant should be restricted from lifting more than 50 pounds, from

lifting more than 20 pounds regularly, and from constant stooping, crouching, or crawling. Dr. Rapier restricted the claimant from occasionally lifting more than 20 pounds; from regularly lifting more than 10 pounds; from frequent or repetitive bending, turning, or twisting; from sitting or standing for prolonged periods without being able to change positions as needed; and from activities involving vibration, jolting, or jarring. He assigned a 10% AMA impairment.

Dr. Johnson, a clinical psychologist, evaluated the claimant on June 12, 2000, at which time he diagnosed major depression and generalized anxiety disorder. He noted that the claimant's family physician had prescribed psychotropic medications and that the claimant had undergone a brief course of psychotherapy about a year before. Although the claimant had benefited from the treatment, Dr. Johnson noted that he continued to have significant symptoms of depression and anxiety. Dr. Johnson attributed the conditions to the work-related injury and testified that, even after proper treatment, the claimant would retain a 20% AMA impairment.

Dr. Shraberg, a psychiatrist, evaluated the claimant on July 5, 2000. He diagnosed adjustment disorder of adult life and symptom magnification with avoidant personality features. In his opinion, the claimant had no permanent psychiatric impairment due to the work-related injury.

Dr. Crystal, a vocational expert, evaluated the claimant and reviewed the various medical reports. In his opinion, the claimant was not totally disabled. Furthermore, he was capable of a wide range of jobs, even when the functional impairments and restrictions imposed by Drs. Rapier and Johnson were taken into account.

Although recognizing that the effects of the claimant's injury produced significant physical and psychiatric impairments and that his physical limitations would prevent him

from returning to the work that he performed when he was injured, the Administrative Law Judge (ALJ) determined that the claimant was capable of less stressful type of work. Thus, based upon a 5% physical impairment and a 20% psychiatric impairment, which translated into a combined impairment of 24%, the claimant received a disability rating of 42%. The resulting award was then enhanced by a factor of 1.5 under KRS 342.730(1)(c)1. Furthermore, noting that the parties stipulated to timely notice of the injury, itself, the ALJ rejected the employer's argument that the claimant failed to give timely notice of the psychiatric condition.

The claimant was injured on March 4, 1998, and continued to work until he was laid off on March 13, 1998. Focusing on the fact that he missed no work due to his injury until he was laid off, the employer maintains that it was unreasonable for the ALJ to determine that he lacked the physical capacity to return to his previous work. We disagree.

The fact that an individual continues to perform his usual work for a period of time after sustaining a work-related injury does not mean that it is medically advisable for him to do so, that a reasonable person would conclude that he was able to do so, or that the individual continues to have the physical capacity to do so at the time the claim is decided. Although the claimant worked in discomfort during the nine days that followed his injury, testimony from Drs. Primm and Rapier established that his condition warranted significant physical restrictions at the time the claim was decided. It was reasonable for the ALJ to conclude that work as a laborer and equipment operator in an underground coal mine exceeded those restrictions. Therefore, the finding in the claimant's favor was properly affirmed on appeal. See Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

Although KRS 342.316 requires notice of a "claim" for occupational disease, KRS 342.185 requires that an employer be given notice of a work-related "accident" as soon as practicable. KRS 342.190 specifies that notice must include a description of the nature and extent of any resulting injury. A defect in complying with the notice requirements does not render notice "invalid or insufficient . . . unless it is shown that the employer was in fact misled to his injury thereby," and a delay in giving notice may be excused if it is due to mistake or other reasonable cause. KRS 342.200. Since the inception of the Act, the courts have determined that where the claim for an occupational injury is meritorious and the employer is not prejudiced by a delay in receiving notice, the claim should not be dismissed easily. See Bates & Rogers Construction Co. v. Allen, 183 Ky. 815, 210 S.W. 467, 472-74 (1919). Furthermore, if an employer has notice of a work-related accident that reasonably might be expected to cause harm, notice of a resulting harm is not required until it develops into a compensable state. Reliance Diecasting v. Freeman, Ky., 471 S.W.2d 311 (1971); See also Proctor and Gamble Manufacturing Co. v. Little, Ky., 357 S.W.2d 866 (1962).

The parties stipulated that the employer had timely notice of the claimant's accident and of the physical harm that resulted. At issue is whether his failure to give notice of a possible psychiatric harm until March 1, 2000, warranted dismissing that portion of his claim. The employer argues that the claimant's family physician treated him for psychological problems for as much as a year before the claimant gave notice of the condition via the filing of his claim. As the Board pointed out, however, the employer had notice of the claimant's work-related physical injury, and psychological problems might reasonably be expected to result from such an injury. From the information that is available in the record, it was not until after the claim was filed, when

Dr. Johnson evaluated the claimant, that causation and a permanent psychiatric impairment were established. There is no indication that the employer was injured or misled by a delay in being notified of the psychiatric condition, and the employer was given an opportunity to introduce evidence in defense of the claim. Under those circumstances, a finding that the claimant gave due and timely notice was reasonable.

The decision of the Court of Appeals is affirmed.

All concur.

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