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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: FEBRUARY 19, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 3-11-04 ELLA GRAUITT, D.C.

2003-SC-0162-WC

LOGAN ALUMINUM, INC. APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2001-CA-816-WC
WORKERS' COMPENSATION BOARD NO. 2000-WC-00479

GREGORY BULLARD; HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REMANDING

This appeal is from an opinion of the Court of Appeals affirming a decision of the Workers' Compensation Board that had affirmed an opinion and award of the Administrative Law Judge finding Bullard to have sustained a 15% impairment rating due to a work-related cervical injury.

The questions on appeal are whether Bullard gave due and timely notice; whether his claim was barred by the statute of limitations and whether the ALJ misconstrued the medical evidence.

Bullard began working for Logan as a forklift operator in February 1995. The 39-year-old man has a high school education and at the time of the hearing was enrolled at Western Kentucky University majoring in computer systems. He had served in the United States Marine Corps, working as an air traffic controller for ten years. His

employment with Logan was ended in April 2000, although he last worked in September 1999, when he underwent a triple level discectomy and fusion surgery of the cervical spine.

Bullard testified that his primary duties at Logan required him to operate a forklift in reverse, twisting around to look behind him. He also testified that he operated the equipment over very rough terrain that jarred and bounced him. Bullard claimed that in 1996 he gradually began developing symptoms of neck stiffness, headaches and numbness in both arms. He asserted that he sought treatment from a chiropractor in 1997. In August 1999, the chiropractor told him his physical problems were related to his work at Logan. The chiropractor gave him a letter that identified his physical problems and recommended certain work restrictions. Bullard testified that he delivered the letter to the medical department, his supervisor and to personnel representatives. He also stated that he told three of his supervisors that his neck was bothering him and that "the fork truck was just killing me." He further testified that he told the medical department that he thought his condition was work-related. Bullard was then sent for a second opinion and was told that he needed surgery. He asked the medical department whether he should turn it in on his regular insurance or on workers' compensation.

Bullard was terminated on April 12, 2000 and his Workers' Compensation claim was filed on April 26, 2000. He admitted that he had filled out accident reports for previous injuries, but that he did not fill out an injury report prior to the filing of this claim. Bullard stated that he did not work after September 8, 1999 and that he underwent surgery 15 days later. Thereafter, he obtained short-term disability benefits.

He testified that he passed a physical upon leaving the Marines in 1993 and also passed a physical given by the employer prior to beginning his employment in 1995.

The ALJ took both lay and medical testimony on the issue of causation and determined that the physical problem was caused by repetitive motion on a daily basis. He relied on the evidence from Drs. Berkman, Gaw, and Byrd. He acknowledged that Dr. Ensalada gave an opinion that the condition was entirely related to the natural aging process. The ALJ concluded that Bullard sustained a 15% impairment rating due to a work-related cervical injury. The Board affirmed, as did the Court of Appeals by adopting verbatim the decision of the Board, stating that it (the Court of Appeals) had studied the record, the law and the briefs and determined that it could not improve on the opinion of the Board. This appeal followed.

I. Notice

Logan argues that the eight-month delay in giving notice was not excusable as a matter of law, and the decision of the ALJ should be reversed and the case remanded and dismissed. The employer contends that the provisions of the Act require notice of the "accident" to be given as soon as practical after the occurrence thereof. Citing Fiorella v. Clark, Ky., 184 S.W.2d 208 (1944), it asserts that "accident" does not mean the resulting injury, but it is the occurrence itself which causes the injury.

KRS 342.185(1) provides in pertinent part:

> [N]o proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident . . . .

(Emphasis added.)

KRS 342.190 provides:

> The notice and claim shall be in writing. The notice shall contain the name and address of the employee, and shall state in ordinary language the time, place of occurrence, nature and cause of the accident, with names of witnesses, the nature and extent of the injury sustained, and the work or employment in which the employee was at the time engaged, and shall be signed by him or a person on his behalf, or, in case of his death, by any one (1) or more of his dependents or a person on their behalf. The notice may include the claim.

(Emphasis added.)

KRS 342.200 provides:

> 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.

(Emphasis added.)

In a workers' compensation claim premised upon gradual injury by cumulative trauma, the requirement that the worker notify the employer of a work-related injury arises when the worker first learns that he has, in fact, sustained a work-related gradual injury. Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503, 507 (2001) (worker with gradual spine injury not required to notify employer until informed of injury by a medical professional as medical causation is "a matter for medical experts"); Alcan Foil Prods. v. Huff, Ky., 2 S.W.3d 96, 101 n.2 (1999). Bullard admits that he first learned that he had sustained a work-related gradual injury on August 18, 1999, when Dr. Merrill Patterson, his treating chiropractor, informed him of that fact. Dr. Patterson prepared a letter for Bullard to give to his employer that stated the following:

> August 18, 1999
>
> Logan Aluminum
> PO Box 3000

Russellville KY 42276

Re: Gregory Bullard

> Mr. Bullard has been diagnosed with C6-C7 cervical disc degeneration deterioration producing left brachial plexus neuritis. There is extensive osteophytosis and fusing of C6-C7 vertbral [sic] bodies occuring [sic].

I recommend he permanently refrain from looking back driving a tow motor at work.

> I further suggest no lifting over 20 lbs. for two weeks commencing today.

Sincerely,

/s/
Merrill Patterson, D.C.

Bullard delivered this letter to his employer and claims that he thus satisfied the statutory notice requirement set forth in KRS 342.185(1), supra. He subsequently underwent surgery and never returned to work. He was officially terminated from his employment in April 2000 and filed his Form 101, Application for Resolution of Claim, KRS 342.270(1), on April 26, 2000.

Dr. Patterson's letter did not attribute Bullard's condition to a work-related injury but only described a degenerative condition and established work restrictions incompatible with operating a forklift truck. Bullard's employer, supervisors, and co-workers testified that Bullard never claimed to them that his neck problems were caused by a work-related injury, and the ALJ specifically found all of that testimony to be truthful. However, the ALJ found that Bullard's failure to give notice was excusable under the "mistake or other reasonable cause" provision of KRS 342.200 because Bullard testified that he thought Dr. Patterson's letter satisfied the statutory notice requirement.

"The notice provisions have remained substantially the same since the inception of the Kentucky Workers' Compensation Act." Smith v. Cardinal Constr. Co., Ky., 13 S.W.3d 623, 627 (2000). In Northeast Coal Co. v. Castle, 202 Ky. 505, 260 S.W. 336 (1924), the injury occurred on December 28, 1919. The worker admitted that he did not report the accident to his employer and none of the company's employees were aware that it had occurred. The employer did not receive actual notice of the accident until the following April, more than three months later. The worker testified that he had asked his brother to notify his employer of the accident but that his brother had forgotten to do so. In other words, as here, the worker thought he had given notice though, in fact, he had not done so. In denying the claim, our predecessor court held, "Should these circumstances be deemed sufficient to show that the failure to give notice was occasioned by mistake or other reasonable cause, it would result in a practical nullification of the statute." Id. at 338.

As noted by the ALJ in this case:

> The plaintiff clearly states that the first time that he understood that his condition was simply not aggravated by his work, but instead caused by his work was when his chiropractor, Dr. Patterson, gave him a letter in August 1999 indicating that he permanently should not be looking backward while operating a tow motor at work. . . . The plaintiff perceived this to mean that his condition was caused by his work operating a tow motor.

Bullard v. Logan Aluminum, Inc., Case No. 00-000479 (Oct. 24, 2000). And with respect to notice, the ALJ found:

> Actual notice to the defendant-employer occurred with the filing of the Form 101 on April 26, 2000.

Id. These findings of fact were supported by substantial evidence and are, thus, conclusive. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

If the mere filing of a claim could per se satisfy the requirement of timely notice, the filing of a claim on the last day of the two-year period of limitations would suffice, thus nullifying KRS 342.185, KRS 342.190, and KRS 342.200, because, obviously, the notice issue does not arise unless and until a claim has been filed. KRS 342.190 does not say that the filing of the claim satisfies the notice requirement but that the "notice may include the claim." (Emphasis added.) The fact that the claim may be filed at the time notice is given does not eliminate the requirement that notice be given "as soon as practicable." "Notice of a work-related injury may be given in the context of filing a claim, but such notice may or may not be timely, depending on the circumstances." Hill, supra, at 507 (notice sufficient where there was a delay of only one month between date worker first learned he had sustained gradual work-related injury and date he gave notice by filing Form 101) (citations omitted); see also Peabody Coal Co. v. Powell, Ky., 351 S.W.2d 172, 173 (1961) (filing of claim two weeks after worker first learned he had silicosis was sufficient notice); cf. Smith, supra, at 628 (where employer received timely notice of accident and lumbar injury, filing of Form 101 two months later indicating worker had also suffered cervical injury in same accident was sufficient notice of cervical injury).

The filing of this claim eight months after Bullard first learned that his degenerative condition was work-related did not satisfy the statutory requirement to give notice "as soon as practicable." Thus, we remand this case to the ALJ for a determination of whether the employer "was misled to his injury thereby," KRS 342.200, supra, i.e., was prejudiced by the failure to receive timely notice.

II. Statute of Limitations

The employer argues that testimony from Bullard establishes that he was aware

in 1996 or 1997 that his condition was caused by his work. It asserts that the finding by the ALJ that there was no evidence of a causal connection between his work and the injury until August 1999 was clearly erroneous and is contrary to the testimony of the employee. It maintains that the claim should be dismissed because it was not timely filed, and the finding by the ALJ was clearly erroneous. We disagree.

The ALJ determined that the first real evidence of a work injury was given by Dr. Berkman on May 1, 2000. Nevertheless, the ALJ found that Bullard's perceptions indicated that he gained knowledge in August 1999. Thus, the ALJ concluded that the claim was timely because it was filed within the two-year statute of limitations of KRS 342.185. The decision of the ALJ is supported by substantial evidence in the record and should not be disturbed. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

III. Medical Testimony

Logan argues that the opinion expressed by Dr. Berkman was in terms of possibilities rather than probabilities and thus the case should be reversed. We disagree.

The ALJ did not misconstrue the testimony of Drs. Berkman, Gaw and Byrd in determining the work causation of the injury. The testimony of the three physicians establishes the probability that the condition was caused by his work. See Pierce v. Kentucky v. Galvanizing Co., Inc., Ky.App., 606 S.W.2d 165 (1980). The decision is supported by substantial evidence.

Therefore, we affirm the Court of Appeals on the issues concerning the statute of limitations and medical testimony, but we remand this case to the ALJ for a determination of whether the employer was prejudiced by the failure to receive timely notice.

All concur.

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