

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: June 17, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0610-WC **DATE** 7-8-04 ELLA GROWTT, D.C.

DREMA RENEE CRUM

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-2469-WC
WORKERS' COMPENSATION BOARD NO. 01-01094

SEALMASTER BEARINGS, ET AL.

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that no reasonable cause was shown for the claimant's failure to give notice that her back injury was work-related until she filed a claim nearly two years later. The Workers' Compensation Board (Board) and the Court of Appeals have affirmed. Likewise, we affirm.

The claimant alleged that on July 27, 1999, she suffered a lower back injury while setting up a press. She testified that she told a co-worker and was given over-the-counter pain medication, but she did not inform her supervisor at the time. She testified that she called her supervisor the next morning to tell him that she had hurt her back the previous day and would be unable to work due to back pain. She acknowledged, however, that she did not tell him the injury occurred at work. He advised her to seek medical attention. The claimant later admitted that she knew she was required to report work-related injuries but asserted that her supervisor did not inform her she was required to do any further reporting or paperwork after she told him of her injury.

On August 3, 1999, the claimant executed an application for a leave of absence, indicating that it was for "Personal Illness/Injury." Together with the application was a request for leave under the Family and Medical Leave Act, which indicated that the reason for the request was "Back Problems." She later testified that she did not think the application was completed at the time she signed it. She testified that she continued to have radicular pain and had not been able to return to work after undergoing back surgery in October, 1999.

When deposed, the claimant's supervisor testified that she informed him she was having back problems. She did not indicate that they were work-related, and he did not ask her if they were. He stated that he would have directed her to fill out an accident report if she had told him her problems were work-related.

The employer's human resources manager testified that the claimant did not file a report for a July, 1999, back injury and that she received sickness and accident benefits for a non-work-related injury while on leave. He stated that she knew the procedure for reporting a work-related injury and had done so on previous occasions, the most recent being in May, 1999, for a shoulder injury. He testified that the claimant applied for sickness and accident benefits in August, 1999, and the application indicated that the absence was not work-related. Although he acknowledged that an office worker prepared the actual application, he stated that it was based upon information that the claimant supplied. Appended to his deposition were a copy of the leave application and copies of two injury reports, one of which was from May, 1999.

Dr. Blair began treating the claimant on the day after her injury. He referred her to Dr. Tutt, who first saw her in September, 1999. In September, 2000, Dr. Donnini began to treat her.

Dr. Tutt saw the claimant on referral from Dr. Blair for the purpose of evaluating left hip and leg pain. He took a history of intermittent back pain of about a year's duration that had become more severe over the past six weeks and had caused the claimant to quit working about five weeks ago. X-rays were normal, but MRI revealed some degenerative changes at L5-S1, without bulge or herniation, and a moderately oppressive bulge at L4-5 that appeared to be symptomatic. The disc did not appear to be herniated, so he thought the claimant would probably recover with conservative treatment. He determined later that the L4-5 disc was herniated and performed surgery in October, 1999. He stated that the claimant had not informed him of a traumatic event or injury at work.

In November, 2001, Dr. Donnini completed a Form 107 in which he attributed the claimant's complaints to the alleged work-related injury. He indicated that the claimant had no pain before the incident but severe low back and left leg pain after the incident. Furthermore, he noted that she had been unable to work since the incident.

Dr. Snider evaluated the claimant in January, 2002, on the employer's behalf. She gave a history that included the work-related incident in July, 1999, and reported that she awoke the following day with greater pain. She indicated that although she informed her supervisor that she would be unable to work due to back pain, for some reason she failed to indicate that it was work-related. Dr. Snider noted that when she complained to Dr. Blair of severe lumbar and thoracic pain, there was no indication that it was connected to her work. Furthermore, the claimant had experienced mild back pain that was diagnosed as arthritis in 1997, and Dr. Blair treated her for severe back pain that ran into the neck and shoulder in April, 1999. Dr. Snider noted the one-year history of back pain that she gave to Dr. Tutt and the fact that she failed to mention a

connection between the pain and any incident at work. Finally, he noted that the history she gave Dr. Donnini was the only evidence that her injury was work-related.

The employer introduced records from the Cave Run Clinic, which indicated that the claimant was seen in May, 1997, and complained of back pain for the past year and of left thigh pain of an unknown duration. On May 30, 1997, she reported that the pain had not improved. Physical therapy notes indicated persistent back pain as of June 3, 1997.

When the claim was heard, notice and work-relatedness were among the contested issues. The employer maintained that it first learned of the alleged work-related back injury when it received a copy of the claim. After reviewing the evidence, the ALJ noted that it was the claimant's burden to prove every element of her claim, including that she gave timely notice. The ALJ then noted the claimant's admitted failure to notify her supervisor that her back pain was work-related as well as her failure to file an injury report despite having filed one for another injury two months before, her longstanding history of chronic back pain, her application for sickness and accident benefits, and her failure to tell Dr. Tutt of the alleged injury. Based upon those factors, the ALJ concluded that there was "overwhelming evidence" the claimant failed to give reasonable notice of a July 27, 1999, work-related injury.

Chapter 342 places on an injured worker the obligation to notify the employer of a work-related accident and any resulting injury. It also places on the employer an obligation to keep a record of all work-related injuries and to notify the Department of Workers' Claims of an injury that causes a worker to miss more than one day's work. Among other things, these requirements protect workers from a subsequent allegation that an injury is not work-related, and they enable employers to make a prompt

investigation of work-related accidents and protect themselves from fictitious claims.

Smith v. Cardinal Construction Co., Ky., 13 S.W.3d 623, 627 (2000).

With respect to the worker's obligation, KRS 342.185 requires that notice of the accident must be given "as soon as practicable" after it occurs. KRS 342.190 provides that the notice requirement includes, among other things, notice of the time, place, nature, and cause of the accident and a description of the resulting injury. It also requires that notice be given in writing. KRS 342.200 excuses an inaccuracy in complying with KRS 342.190 if there is no showing that the employer was misled to its prejudice, but it does not excuse a delay in notifying the employer of the underlying accident unless the employer had actual knowledge of the work-related injury or unless the delay was due to mistake or other reasonable cause.

The ALJ determined that the claimant failed to prove that she gave reasonable notice; therefore, her burden is to show that the favorable evidence was overwhelming and compelled a finding that the delay in giving notice was reasonable under the circumstances. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). The thrust of the claimant's argument is to shift to her employer the responsibility for determining that her injury was work-related. She asserts the employer had a duty to ask whether the injury was work-related and to investigate the matter when it was informed she had hurt her back. She also asserts that her supervisor was obliged by company policy "to complete the paper work" when given verbal notice of an injury, overlooking the fact that an injury report is not required unless the injury is work-related. Although she has cited a number of judicial decisions concerning the notice requirement, she has cited no authority that requires an employer to inquire about an injury that it has not been informed is work-related. Likewise, she has cited no authority that would absolve her

from showing a mistake or other reasonable cause for failing to give notice until she filed her claim on July 27, 2001.

As noted by the ALJ, the claimant admitted that she failed to report the accident at the time it occurred. Although she had prepared reports for previous injuries, including one that occurred only two months earlier, she failed to do so for the injury she alleged in July, 1999. She acknowledged that she told her supervisor on the day after the incident that she could not work because she had injured her back, but she also admitted that she failed to inform him the injury was work-related. Her sole explanation for her failure to notify her employer that the injury was work-related until it received her claim is her testimony that she thought she was required to do no more than she did. Under the circumstances, her testimony was not such evidence as to compel a favorable finding.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Robert W. Miller
302 E. Fifth Street
P.O. Box 357
Grayson, KY 41143

COUNSEL FOR APPELLEE:

Ronald J. Pohl
Picklesimer Pohl & Kiser, P.S.C.
167 W. Main Street, Ste. 1500
Lexington, KY 40507