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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: September 23, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0738-WC DATE 10-14-04 ELIAGrow, D.C.

WANDA WILSON APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-0786-WC
WORKERS' COMPENSATION BOARD NO. 00-61594

THE ANTHEM COMPANIES, INC.; HON. LLOYD R. EDENS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In its initial consideration of this matter, the Workers' Compensation Board (Board), determined as a matter of law that the claimant's ignorance of the notice requirement together with the employer's failure to comply with KRS 342.610(6) would not excuse her failure to give notice of the work-related accident as soon as practicable. Reversing an Administrative Law Judge's (ALJ's) decision to the contrary, the Board remanded the claim for further consideration. On remand, the ALJ determined that there was no reasonable excuse for the delay in giving notice of the accident and dismissed the claim. The Board affirmed the decision and refused to reconsider its previous legal conclusion, citing the law of the case doctrine. Affirming, the Court of Appeals explained that the claimant's failure to appeal the Board's initial decision prevented her from raising the issue again after the remand. Furthermore, the Court found no error in the decision that would warrant disturbing it. We affirm.

The claimant worked as a sales representative at the defendant-employer's satellite office in Pikeville. Her job included state-wide travel to meet with clients, office duties, and customer service. She testified that her injury occurred on August 20, 1999, when the telephone rang while she was attempting to open a file cabinet drawer that often malfunctioned. As she twisted to answer the phone, she experienced pain in her back, right hip, and leg. At the time, she thought her symptoms would go away. She testified that approximately two months later, she had difficulty sitting and standing and mentioned the August, 1999, incident to Sharon Justice, a co-worker. Five to six months after the incident, she was still in pain and having difficulty walking up the steps to her office. At that point, in January or February of 2000, she phoned her supervisor, Mr. Paul Anderson, who worked in the Lexington office. She informed him of her hip and leg pain and of the August, 1999, incident. She testified that, at the time, she was not certain her symptoms were work-related because she had a history of cervical cancer and feared that it might have returned. She testified that she did not know she was required to report a work-related injury immediately.

The claimant did not seek medical treatment until about March 23, 2000, after which she underwent multiple tests and referrals to specialists to rule out everything from a reoccurrence of the cancer to lupus. She testified that she referred the expenses to her major medical insurance carrier for payment. When she sought to pre-certify an MRI, the carrier asked her if her symptoms could be associated with her work. At that point, she mentioned the work-related incident and was instructed to contact the employer's human resources department, which she did. On May 7, 2001, Dr. King diagnosed a soft tissue injury of the lower back and S-1 joint as well as the arousal of degenerative disc disease. He took the claimant off work, and she did not work again.

Ms. Robyn Clark was team leader of the employer's human resources department and worked in Louisville. She testified that the claimant notified the department of the work-related incident and her symptoms in March, 2000. She stated that all employees received a handbook that explained benefits, including workers' compensation. Page 45 of the February, 1997, edition of the handbook informed workers that they must report the details of a work-related illness or injury to management or human resources immediately. Ms. Clark testified that Paul Anderson was a member of management and that the staff of the satellite office included only a couple of sales associates and an administrative support person. She stated that human resources provided a workers' compensation poster to each of the company's offices, but she did not know whether the Pikeville office's copy was posted in August, 1999.

In an affidavit that was filed by agreement of the parties, the claimant stated that the employee handbook contained several hundred pages. She stated that she also received other information and numerous other handbooks from the employer. Finally, she stated that a workers' compensation poster was not displayed in the Pikeville office.

Noting that KRS 342.610(6) required the employer to post a notice stating, among other things, that an employee is obliged to give notice of accidents, the ALJ determined that the defendant-employer failed to do so. Furthermore, the ALJ was persuaded by the claimant's testimony that, despite receiving an employee handbook, she was unaware of the requirement that an injury be reported immediately. On that basis, the ALJ determined that a reasonable cause existed for the claimant's delay in giving notice. The claimant received an award of income benefits for both temporary total and permanent partial disability, after which the employer appealed.

The Board determined as a matter of law that the claimant's professed ignorance of the notice requirement was not an excuse for her failure to provide notice of the work-related accident as soon as practicable. Likewise, noting that 803 KAR 25:240, § 3(2) considered a violation of KRS 342.610(6) to be no more than an unfair claims settlement practice, the Board was not convinced that the legislature intended for a violation of the statute to create an estoppel defense for a worker's failure to provide timely notice. Concluding that the basis for excusing the delay in giving notice was erroneous as a matter of law, the Board reversed, in part, and remanded for further consideration of the evidence. No appeal was taken from the decision.

On remand, the ALJ noted the claimant's testimony that she suspected her symptoms were due to the work-related incident from the outset. The ALJ also noted her testimony that her condition worsened about two months later, at which time she told a co-worker that she had injured herself. On that basis, the ALJ concluded that notice given to Mr. Anderson "approximately 5 to 6 months following the accident was not 'as soon as practicable' as required by KRS 342.185(1)." Concluding that the delay in giving notice was not occasioned by mistake or other reasonable cause, the ALJ dismissed the claim.

Appealing, the claimant argued that the delay in giving notice was excusable because she was unaware of the legal requirement to give notice "as soon as practicable;" because the employer failed to comply with KRS 342.610(6); and because she was unsure of the cause of her symptoms. She also asserted that the ALJ failed to comply with the order of remand. The Board determined, however, that the law of the case doctrine barred further consideration of the first two arguments. Furthermore, it reaffirmed its previous decision. With respect to the third and fourth arguments, the

Board noted that the ALJ considered and rejected the argument that the claimant delayed in giving notice because she sought to confirm that her symptoms were not due to a reoccurrence of cancer. Furthermore, the Board determined that there was an adequate factual basis to support the ALJ's conclusion that the delay in giving notice was not occasioned by mistake or other reasonable cause.

Although the Court of Appeals affirmed, the claimant continues to maintain that the ALJ's decision on remand was erroneous and failed to take into account all of the evidence. She also asserts that Court of Appeals has misconstrued KRS 342.610(6); that the law of the case doctrine did not bar further review of matters decided in the initial appeal to the Board; and that the Board erred in relying upon the doctrine because the employer did not raise its applicability.

KRS 342.0011(1) defines an "injury" as a work-related traumatic event that causes a harmful change in the human organism. KRS 342.185(1) requires that notice of an "accident" be given to an employer "as soon as practicable after the happening thereof." KRS 342.190 indicates that the notice requirement includes, among other things, a description of the "nature and cause of the accident" as well as the "nature and extent of the injury sustained." Hence, the worker must give timely notice not only of the traumatic event or "accident" but also of any harmful changes that result from it. See Smith v. Cardinal Construction Co., Ky., 13 S.W.3d 623, 627-28 (2000). KRS 342.200 excuses a delay in giving notice if the employer has actual knowledge of the injury or if the delay is due to mistake or other reasonable cause.

In its initial consideration of this claim, the Board determined as a matter of law that a lack of awareness of the notice requirement together with an employer's failure to comply with KRS 342.610(6) did not constitute a mistake or reasonable cause for failing

to give timely notice. Hence the Board reversed the ALJ's decision to the contrary and remanded the claim, directing the ALJ to consider the remaining evidence and to determine whether the claimant's delay in giving notice was excused by mistake or other reasonable cause. The Board's decision was final and appealable because it divested the claimant of a decision in her favor and authorized the entry of a different decision on remand. Whittaker v. Morgan, Ky., 52 S.W.3d 567 (2001); Davis v. Island Creek Coal Co., Ky., 969 S.W.2d 712, 714 (1998). For that reason, the claimant's failure to appeal the decision caused it to become the law of the case. Id. As such, the decision was controlling at all subsequent stages of the litigation, and the questions to be considered following the remand were limited to whether the ALJ properly construed and applied the Board's mandate. Inman v. Inman, Ky., 648 S.W.2d 847, 849 (1982). As the claimant points out, The Union Light Heat & Power Co. v. Blackwell's Administrator, Ky., 291 S.W.2d 539 (1956), and subsequent authority indicate that an appellate tribunal has the power to change its previous decision of law following a retrial upon the same evidence if it finds the decision to have been clearly and palpably erroneous. The fact remains, however, that what an appellate tribunal may do in exceptional circumstances and what it must do are two separate matters. See Inman v. Inman, supra; Newman v. Newman, Ky., 451 S.W.2d 417, 420 (1970).

Contrary to the claimant's argument that the employer was required to raise the law of the case as an affirmative defense on remand, this was not a case where the Board permitted additional arguments or evidence. The matter was simply remanded for the ALJ to reconsider the same evidence under what the Board determined was a correct interpretation of the law, and the ALJ did so. In responding to the claimant's arguments on the second appeal, the employer noted the Board's previous decision and

explained why it considered the decision to be correct. In any event, the Board's authority to refuse to address matters that were finally decided in the first appeal was not subject to the actions or the arguments of the parties. When considering the second appeal, the Board remained convinced that a violation of KRS 342.610(6) constituted no more than an unfair claims settlement practice and refused to reconsider the matter, citing the law of the case doctrine. Inman v. Inman, supra, at 850-52. Under the circumstances, whether the claimant's lack of knowledge of the notice requirement together with the employer's failure to comply with KRS 342.610(6) constituted a reasonable cause for her delay in giving notice of the accident is not a question that is properly before this Court.

Relying on a non-final decision of the Court of Appeals concerning notice of a gradual injury, the claimant argues that she did not receive a medical diagnosis linking her symptoms to the August, 1999, incident until several months after she informed Mr. Anderson. She complains that the ALJ failed to consider that fact. We find no merit in the argument because even if non-final authority were properly relied upon, the claimant alleged an injury that was due to a single traumatic event in August, 1999. Authority concerning notice of a gradual injury is inapplicable to such a claim. The claimant was required to give notice of both the August, 1999, accident and the harmful changes that it caused "as soon as practicable."

There was substantial evidence to support the finding that the claimant failed to give notice of the accident as soon as practicable. When determining that the claimant failed to do so, the ALJ relied upon the claimant's own testimony, including her testimony that she had symptoms from the outset; "complained to everybody;" told a co-worker of the incident when her symptoms worsened about two months after it

occurred; and informed her supervisor of the accident and possible injury in January or February, 2000. Under the circumstances, evidence that she had not yet sought medical treatment or obtained a diagnosis of the cause of her symptoms could not reasonably be viewed as excusing her delay in reporting the accident. The finding that she failed to give timely notice was properly affirmed on appeal.

The decision of the Court of Appeals is affirmed.

All concur.

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