

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 21, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky
2003-SC-0853-WC

FINAL

DATE 11-11-04 E.A. Gray III, D.C.

PEARL NAPIER

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-1057-WC
WORKERS' COMPENSATION BOARD NO. 02-0922

CONSOL OF KENTUCKY, INC.; HON. J.
LANDON OVERFIELD, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

AND

2003-SC-0855-WC

BILLY NAPIER

APPELLANT

APPEAL FROM COURT OF APPEALS
2003-CA-1056-WC
WORKERS' COMPENSATION BOARD NO. 02-0835

MOUNTAIN COALS CORPORATION; HON. J.
LANDON OVERFIELD, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed gradual injury claims filed by Billy Napier and Pearl Napier on the ground that they were barred by limitations and that the claimants failed to give timely notice. The claimants, who were represented by the same attorney, did not assert that the legal conclusions the ALJ drew from the evidence were erroneous. They

argued, instead, for a reconsideration of the precedents established in Randall v. Pendland, Ky. App., 770 S.W.2d 687 (1989); Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999); and Special Fund v. Clark, Ky., 998 S.W.3d 487 (1999). The Workers' Compensation Board (Board) and the Court of Appeals affirmed, noting that they were obliged to follow Supreme Court precedents. We affirm.

BILLY NAPIER

The claimant was born in 1952 and completed high school as well as two semesters of college. He had mine foreman papers and performed supervisory work but also performed heavy manual labor and operated heavy equipment such as dozers, loaders, trucks, and graders for various surface-mining companies. He worked for the defendant-employer from 1970 through 1974 and from 1980 until October 19, 2000.

The claimant testified that Dr. Goldfarb, a rheumatologist, had treated him for arthritis in his hands and feet since 1984. Asked when he first began noticing problems in his low back, he testified that it began to bother him in 1994 or 1995, explaining that he thought "it was the work and the age and the wear and tear over the years, part of getting old, a lot of miles." He testified that he had injured his back several times while working on the drag lines and shovel and that he experienced low back and/or neck pain at that time. The claimant mentioned three or four specific incidents that occurred between the mid-1990s and September, 2000, in which he experienced an onset of neck and back pain while working. He testified that he reported at least some of the incidents and continued working without any medical treatment.

In 1994, the claimant began treatment with Dr. Dixit for his neck and back conditions. Injections that he received at that time alleviated the discomfort in his neck. His low back became painful sometime between 1994 and 1995, and he thought that Dr. Dixit injected it in 1999. He testified that he had heart attacks in November, 1998; March, 1999; and May, 1999,

and underwent quadruple bypass surgery in June, 1999. The heart condition caused him to miss work from November, 1998, until sometime in March, 2000. When cross-examined at the hearing, the claimant acknowledged that he had consulted an attorney in 1999 about filing a workers' compensation claim but stated that he did not go through with it. He testified that on October 19, 2000, the combination of chest discomfort and back pain led him to discuss the need to quit working in the mines with Dr. Chaney, his family physician. Dr. Chaney advised him to do so.

The claimant quit working and received short-term and long-term disability benefits, presumably from a company plan. He also received social security disability based upon the heart attacks and rheumatoid arthritis. He testified that in March, 2002, Dr. Dixit informed him that his neck and back problems were caused by his work. On March 28, 2002, he notified the employer. He filed a workers' compensation claim on June 7, 2002, in which he alleged injuries to his neck and back. The claimant testified that he experienced pain and stiffness in his neck and low back as well as numbness in his arms and legs. He maintained that the neck and back conditions would have prevented him from working even had he not also suffered from rheumatoid arthritis and a heart condition.

Dr. Dixit completed a Form 107 report. He reported a history of multiple micro and neurotrauma while working and of neck and back pain that had progressed relentlessly over the years. He described the claimant as a "sincere and stoic man with [a] high pain threshold." Dr. Dixit observed spasms in the back, a very limited range of motion, positive nerve tension signs, and multiple joint swelling, and testing revealed various cervical and lumbar abnormalities. He diagnosed cumulative trauma disorder due to repeated work injuries and assigned a 30% AMA impairment. In his opinion, the claimant did not retain the physical capacity to return to the type of work he performed when injured.

Dr. Forberg, an orthopedic surgeon, evaluated the claimant and submitted a Form 107 report. He diagnosed lumbalgia, cervicalgia, and radiculopathy that were due to constant and repetitive jarring, vibration, twisting, bending, and lifting that were involved in the claimant's work. He assigned a 26% impairment and indicated that the claimant lacked the physical capacity to return to the type of work he performed when injured.

Dr. Crystal performed a vocational evaluation on the claimant's behalf. In his opinion, the claimant was unable to return to regular employment.

Dr. Snider, a specialist in occupational medicine, testified for the employer. He evaluated the claimant and reviewed medical records from Drs. Goldfarb, Dixit, and Chaney. He received a history that included a specific incident in September, 2000, and three or four previous injuries. The claimant indicated to Dr. Snider that he thought he had reported the incidents to the company safety director but that he did not file a claim, fill out any paperwork, or seek medical treatment. Each time the pain lasted several days or weeks but did not cause him to miss work. Dr. Snider diagnosed rheumatoid arthritis, fibromyalgia, and chronic neck and low back pain. He noted that the claimant had legitimate complaints of joint and musculoskeletal pain but also noted that he had a long history of slowly progressing symptoms that were consistent with polyarthritis. Noting the claimant's failure to document any specific work-related accident and the lack of evidence of specific work-related trauma, Dr. Snider could not rule out efforts toward secondary gain. In his opinion, the claimant was physically capable of employment but might have limitations and require certain accommodations. Dr. Snider imposed various restrictions based upon subjective complaints due to the previously-diagnosed rheumatic arthritis and fibromyalgia. Although he assigned a 16% combined impairment for loss of cervical and lumbar range of motion, he attributed the impairment to non-work-related arthritic changes, rheumatoid arthritis, and fibromyalgia.

Notice and limitations were among the contested issues. The claimant asserted that he notified his employer of the work-related injury shortly after Dr. Dixit informed him. He also asserted that even if the claim were found to have been filed more than two years after he was advised by a physician that the problems with his spine were work-related, disability that arose less than two years before the claim was filed remained compensable. He argued, however, that the entire claim was compensable because there was no evidence that he was disabled before October, 2000.

Asserting that both notice and the claim were untimely, the employer argued that the claimant was treated for many years by Drs. Dixit and Goldfarb and that his diagnosis and treatment have remained unchanged since 1999. Furthermore, he admitted that he thought his problems were due to the wear and tear of his work and that he consulted an attorney in 1999 about filing a claim. The employer argued that Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503 (2001), stands for the principle that a worker who does not suspect his symptoms are work-related is not required to self-diagnose their cause. Whereas, the claimant's testimony established that he suspected his symptoms were due to work-related cumulative trauma as early as 1999. It also established that when he saw Dr. Chaney in October, 2000, complaining of neck and back pain, Dr. Chaney advised him to stop working. Yet, he did not give notice until March, 2002, or file a claim until June, 2002.

Although finding the claimant to be "a very sincere witness," the ALJ determined that he failed to give timely notice of his cumulative trauma injury and that the claim was barred by limitations. The ALJ noted the claimant's testimony that he thought his neck and back conditions were work-related in the 1990s and that he had consulted an attorney in 1999 about filing a workers' compensation claim. Yet, he gave no plausible explanation for failing to inform his employer of the injuries until March, 2002. The ALJ noted that, with skillful questioning, the

claimant had testified that no physician informed him that his neck and back conditions were work-related before March, 2002, but was not persuaded that this absolved him from the responsibility to give notice of a condition that he had believed since the early 1990s to be work-related. The claimant did not petition for reconsideration or request any specific findings.

PEARL NAPIER

The claimant was born in 1946 and has a 4th grade education. In 1970, he began working in the coal mining industry as a heavy equipment operator. He had worked for the defendant-employer since 1987, operating bulldozers, end loaders, and rock trucks. The work subjected him to constant bouncing and jarring and required the constant use of his hands and feet to operate the controls. He denied any specific incident in which he was injured. When deposed, he testified that he began to experience back pain in 1996 or 1997 and that it increased over time. In 1997, he was diagnosed with lung cancer and treated by Dr. Eldridge. In 1999, he missed about a week of work due to back pain. Fearing that it was due to the lung cancer, he returned to Dr. Eldridge who prescribed ibuprofen, ordered a bone scan, and ruled out a recurrence of cancer. The claimant denied being informed by Dr. Eldridge that his back pain was work-related, but he acknowledged thinking at that point that the pain was probably due to years of being jarred while operating heavy equipment.

Sometime thereafter, the claimant sought treatment with Dr. Cornett, his family doctor. Asked whether Dr. Cornett told him that his problems were due to his job, the claimant responded, "Yeah, he sent me for an MRI." He also testified that Dr. Cornett advised him to find a different type of work. Asked whether that occurred in 1999, the claimant stated that he did not remember. He testified that Dr. Cornett had since died and that his present physician, Dr. Gilbert, had prescribed pain medication and discussed surgery, but the claimant was undecided. Later, the claimant was asked at two different times whether his doctor had told

him in 1999 that his back pain was work-related, and he responded, "Yes." At the hearing, however, he testified that Dr. Cornett told him his back and neck problems were work-related in 2001. Asked later whether he was certain that he did not see Dr. Cornett concerning his back pain in 1999, he stated that Dr. Cornett was his family doctor and that he did not remember.

The claimant testified that he took early retirement on May 31, 2001, due to continuous and increasingly severe shoulder, back and leg pain. He applied for social security disability in June, 2001, on the basis of his back condition and lung cancer, but his application was denied. On June 26, 2002, he filed a workers' compensation claim in which he alleged cumulative trauma injuries to his back and neck on May 31, 2001.

Dr. Forberg evaluated the claimant and completed a Form 107 report. He obtained a history of neck and back pain that began in 2001 and of subsequent radicular symptoms in the arms. He noted that Dr. Cornett had ordered an MRI, which was performed in November, 2001, and revealed herniated discs at C4-5 and C6-7. Dr. Forberg diagnosed cervicalgia, herniated cervical discs, lumbalgia, radiculopathy, and traumatic osteoarthritis of the spine that were caused by the claimant's work and resulted in a 25% impairment. He stated that the claimant did not retain the physical capacity to return to the type of work he was performing when injured.

Dr. Patrick evaluated the claimant and prepared a Form 107. He noted a history of neck pain that developed over a long period of time and became severely aggravated after 1999. Dr. Patrick indicated that the claimant's chief complaint was of aching pain in the low neck and upper thoracic spine, that he attributed his symptoms to his work, and that he quit working due to the severity of the pain. Dr. Patrick diagnosed longstanding degenerative disc

disease of the cervical spine and two herniations. He attributed the conditions to the claimant's work and assigned an 8% impairment based upon the herniations.

Dr. Primm evaluated the claimant for the defense. Although he reviewed some records from Dr. Gilbert and Dr. Forberg's report, he did not receive the MRI scan or report. Dr. Primm noted a history of no specific neck or back injury but of gradually worsening symptoms over the previous 5-6 years. The physical exam was unremarkable and revealed no significant pathology in the cervical, thoracic, or lumbar spine. There were no signs of muscle spasm or radiculopathy although x-rays revealed signs of degenerative changes. In his opinion, the claimant's work may have aggravated the degenerative changes but did not cause them. Considering the claimant's age and symptoms, Dr. Primm thought that he should avoid heavy manual labor. He assigned a 0% impairment to the thoracic spine and a 0-5% impairment to the cervical spine.

Dr. Travis, a neurosurgeon, also evaluated the claimant for the employer. He examined the claimant and reviewed some records from Dr. Gilbert as well as Dr. Forberg's report and the MRI. Dr. Travis diagnosed neck pain that was non-radicular and of an undetermined etiology, noting that there were no objective findings on neurological examination and that the MRI showed no changes other than spondylosis that was consistent with the claimant's age. He also diagnosed low back pain that was non-radicular and without objective findings. Explaining that the claimant listed no specific injury and denied any prior neck or low back injury, Dr. Travis thought it probable that his work was not the cause of his complaints.

Dr. Conte, a vocational expert, testified that the claimant had many available job opportunities.

Notice and limitations were among the contested issues. The employer asserted that the claimant's own testimony showed that he knew he had sustained a work-related injury in

1999. Yet, although the claimant's brief to the ALJ acknowledged that notice and limitations were contested, it failed to address either issue. After reviewing the evidence, the ALJ determined that the claimant failed to sustain his burden of proving that he gave timely notice. Although noting that the claimant "tried to hedge" at the hearing, the ALJ determined that he knew his neck and back problems were work-related in 1999 and that notice given in 2001 was untimely. On that basis, the ALJ dismissed the claim. The claimant did not petition for reconsideration or request a specific finding concerning the date when a physician informed him that he had sustained a work-related gradual injury.

ANALYSIS

These workers filed virtually identical briefs to the Board. They did not assert that the unfavorable findings with respect to notice were erroneous under existing law. Their argument was that although Chapter 342 applies to gradual injuries caused by workplace trauma, judicial decisions had rendered its provisions "absolutely worthless" and deprived workers who sustained such injuries of a remedy. Asserting that the medical community commonly refers to such conditions as syndromes, disorders, or diseases rather than injuries, they argued that gradual injury claims should be treated like claims for occupational disease. Having failed to convince the Board or the Court of Appeals, they now assert that the decisions in Randall v. Pendland, *supra*; Alcan Foil Products v. Huff, *supra*; and Special Fund v. Clark, *supra*, have "written cumulative/repetitive trauma injuries out of the workers' compensation law," a state of affairs that is unconscionable. They maintain that the cases effectively require a worker to give notice every day that he works, to file numerous claims, and to self-diagnose such an injury. They also argue that a worker should not be required to give notice until he has been advised by a physician that he has suffered an injury that is caused by work and that more damage will

occur if he continues to perform the same work, but they failed to raise this particular argument to the ALJ or the Board.

As effective December 12, 1996, KRS 342.0011(1) defines the term “injury” as including “any work-related traumatic event or series of traumatic events, including cumulative trauma.” Chapter 325 requires that notice of an “accident” be given “as soon as practicable,” that notice includes information concerning the nature of an injury caused by an accident, and that a delay in giving notice may be excused by mistake or other reasonable cause. KRS 342.185; KRS 342.190; KRS 342.200. Furthermore, the period of limitations for a traumatic injury runs for two years from the date of accident. KRS 342.185. In Alcan Foil Products v. Huff, *supra* at 101, we acknowledged both the purpose of the notice requirement and the difficulty of applying KRS 342.185 in gradual injury cases, and we reaffirmed the principle of Randall Co. v. Pendland, *supra*, that a rule of discovery must be applied. *Id.* We explained, however, that although the Pendland court referred to the “manifestation of disability,” it was more accurate to view the event that triggered the notice and limitations requirements as being the worker’s discovery that he had sustained a work-related injury. *Id.* In a subsequent case, where the worker failed to file a claim within two years of discovering a work-related gradual injury and continued to perform the same work after discovering it, we determined that only disability attributable to trauma incurred within two years before the claim was filed remained compensable. Special Fund v. Clark, *supra*. In yet another case, we determined that if notice of specific work-related accidents was given, notice that a gradual injury had resulted was not required until a physician diagnosed the injury and informed the worker of its cause. Hill v. Sextet Mining Corp., *supra*.

We are not persuaded by the argument that our decisions have effectively deprived workers of a remedy for gradual injury. Contrary to the argument, they do not require a worker

to give notice daily or to file numerous claims in order to comply with the judicial interpretation of the statutes. Nor do they require a worker to self-diagnose the cause of a gradual or repetitive trauma injury. Furthermore, we view the legislature's subsequent failure to amend the relevant statutes to change the impact of the decisions as an indication that they comply with the legislative intent.

The decision of the Court of Appeals is affirmed.

All concur.

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