IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

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RENDERED: August 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0873-WC

FREDRICK ROBERTS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-0107-WC
WORKERS' COMPENSATION BOARD NO. 02-01763

LODESTAR ENERGY, INC., AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's application for benefits after determining that he failed to give due and timely notice of the alleged injury and failed to show a reasonable basis for the delay in doing so. The ALJ noted that although the claimant sought medical treatment on at least five occasions between the date of the alleged injury and the date that he reported it to his employer, the relevant medical records contained no reference to a work-related injury. The Workers' Compensation Board (Board) and the Court of Appeals affirmed. Appealing, the claimant maintains that the ALJ based the decision on misunderstanding of the facts and a misapplication of the law. Smith v. Cardinal Construction Co., 13 S.W.3d 623 (Ky. 2000). We affirm.

The claimant worked as a drill operator in the coal mining industry. His application for benefits alleged work-related back and neck injuries that occurred on June 5, 2002, and a secondary psychological overlay. The claimant continued to work

until June 14, 2002, when he quit due to a non-work-related, pre-existing heart condition. His application stated that he gave notice of the injury on June 21, 2002, and completed an accident report on June 24, 2002.

When deposed, the claimant explained that on June 5, 2002, he slipped while getting off the drill. As he reached up with his right hand to catch himself, he felt "like I jerked a crick in my neck." He testified that he completed his shift and told the two drill operators "[b]oys, I've jerked the awfulest crick in my neck ever was today." He stated that he did not notify one of the foremen at the time because "we get cricks in our necks all the time; that's a regular thing that you do when you run a drill or a heavy piece of equipment" and also that he would have had to contact a foreman by radio. He testified that he continued working for several days but that the pain in his neck became worse rather than better; therefore, he sought treatment at the Pikeville Methodist Hospital emergency room on June 14, 2002, for arm, neck, and chest pain and for numbness in his fingers. He stated that on June 16, 2002, he was x-rayed.

Explaining his failure to give notice until June 21, 2002, the claimant testified that he was not aware that he had been injured in the June 5 incident until after his work-up at the hospital on June 19. He reported the accident after he saw Dr. Scott and learned that he might need surgery. When asked why the June 19 hospital records failed to mention a work-related accident, the claimant stated that he did not give a history of a work-related accident because he did not know he was hurt. He explained that "an accident to me is when you get tore up. . . . when they've got to haul you out there in an ambulance." He stated that he thought that he "had just jerked a crick in my neck."

Records from Pikeville Methodist Hospital indicated that the claimant sought treatment in the emergency room on the morning of June 14, 2002. Dr. Wei's

emergency room notes indicate that the claimant's chief complaints were right chest tightness and shortness of breath. A nitroglycerine drip, intravenous diuretics, and other treatments were initiated, after which the claimant improved somewhat. Later that morning, Dr. Gibson noted that the claimant had experienced right shoulder pain for about one week, that it had worsened the night before, and that he had also experienced nausea and vomiting. The claimant was seen by Dr. Puram, a cardiac specialist, and extensive diagnostic testing was also performed. Dr. Puram noted that the claimant had worked hard the day before and lifted a 4-wheeler. Among other things, the June 15, 2002, discharge diagnosis included acute hypertension and acute congestive heart failure. Nothing in the hospital records suggested that the claimant mentioned a work-related injury, and nothing suggested a cause of the shoulder pain.

At the hearing, the claimant testified that he sought treatment for his neck and arm pain at Pikeville Methodist Hospital on June 16, 2002. He testified that before the alleged injury he had enjoyed doing mechanical work on motorcycles, 4-wheelers, and cars. He stated that he had hydraulic jacks to lift 4-wheelers but admitted that when seeking treatment on June 16, 2002, he gave a history of having lifted a 4-wheeler tire three or four days earlier.

On June 19, 2002, the claimant was again admitted to Pikeville Methodist Hospital, complaining of severe pain that radiated down his right arm and had been present for several days. Testing revealed a herniated nucleus pulposus at C6-7 for which Dr. Scott performed a discectomy and fusion. Hospital records contained nothing to suggest that the condition might be due to a work-related injury, and hospital services were billed to the claimant's health insurance carrier rather than to his employer or its workers' compensation carrier.

When deposed, one the claimant's co-workers testified that the claimant told him sometime or other that he had slipped on the drill and hurt his neck. He thought that the claimant did so on the day of the accident or the next day. The co-worker stated later, however, that he was not sure when the accident occurred or when the claimant might have told him about it.

Among the contested issues were notice, whether the alleged accident actually occurred, and causation. The claimant's argument regarding notice was that he told a co-worker on the day of the incident, that his supervisor was unavailable, and that he informed his employer when his injury was diagnosed. When summarizing the evidence, the ALJ noted that records from Pikeville Methodist Hospital indicated that the claimant was treated on June 14, 15, 16, 19, and 20 but contained no reference to a work-related injury. The registration form from June 19 indicated specifically that he did not have a work-related accident and that the hospitalization was to be billed to his health insurance carrier. The ALJ noted that there was no record of a back or neck injury except for that of June 16, 2002, when he gave a history of hurting his neck at home while working on a 4-wheeler. Noting that the burden was on the claimant to prove every allegation in his complaint, the ALJ pointed out that the claimant admitted his failure to report the June 5, 2002, incident to his employer until June 21, 2002, when he learned that he would be required to have cervical fusion surgery, and admitted that he did not prepare an accident report until June 24, 2002. Concluding that he had shown no reasonable basis for the delay in giving notice, the ALJ dismissed the claim.

The claimant's petition for reconsideration asserted that the ALJ misunderstood the evidence because the July 14, 2002, hospital record referred to right shoulder pain for about one week and contained no reference to a 4-wheeler accident. The petition

did not assert that the employer suffered no prejudice from the delay in receiving notice of the accident or request specific findings on the matter. It was denied.

KRS 342.0011(1) defines a compensable injury as being a work-related traumatic event that causes a harmful change in the human organism. In Smith v. Cardinal Construction Co., supra at 626, the court pointed out that KRS 342.316(2)(a) requires timely notice of a "claim" for occupational disease but that KRS 342.185 requires notice of a work-related "accident" to be given "as soon as practicable after the happening thereof." Under KRS 342.190, the notice requirement includes, among other things, notice of the time, place, nature, and cause of the accident. It also includes a description of the nature and extent of any resulting injury. KRS 342.200 provides that an inaccuracy in complying with the requirements of KRS 342.190 will not render notice "invalid or insufficient . . . unless it is shown that the employer was in fact misled to his injury thereby." KRS 342.200 also provides that a delay in giving notice is excused if the employer "had knowledge of the injury" or if the delay was due to mistake or other reasonable cause. Notice of a work-related accident and of a resulting injury may be given in the context of filing a claim, but such notice may or may not be timely depending on the circumstances. KRS 342.190; Smith v. Cardinal Construction Co., supra; Peabody Coal Co. v. Powell, 351 S.W.2d 172 (Ky. 1961).

In Bates & Rogers Construction Co. v. Allen, 183 Ky. 815, 210 S.W. 467 (1919), the court explained that notice of a work-related accident must include information regarding the nature and extent of the harm sustained but that a worker was not required to give notice of "the full or exact nature or extent of the injury." Instead, the employer:

> should have such knowledge of its nature and extent as would enable him to take such steps as might be deemed prudent or advisable to provide

> the necessary medical or other attention that the nature or extent of the injury seemed to demand. We say this because it is provided in [KRS 342.200] that the written notice shall not be held invalid or insufficient by reason of any inaccuracy, unless it be shown that the employer was in fact misled to his injury thereby. . . . It is only important that the employer should have notice of the injury as soon as practicable, in order that he may have opportunity to investigate the cause of the injury, as well as the nature and extent of it, and take such action as he may think advisable to protect his interest. . . . [W]here the claim is meritorious and the employer has not been prejudiced by the delay, the want of mistake or reasonable cause that would be sufficient to excuse the giving of the notice sooner should be very convincing, to authorize the rejection of the claim.

Id., 210 S.W. at 472-74.

The notice requirement has three purposes: to provide prompt medical treatment in order to minimize the worker's ultimate disability and the employer's liability, to enable the employer to make a prompt investigation of the circumstances of the accident, and to prevent the filing of fictitious claims. See Harlan Fuel Co. v. Burkhart, 296 S.W.2d 722 (Ky. 1956). Workers who fail to give timely notice of a work-related accident or of the harm for which compensation is claimed may be penalized for conduct that undermines the purposes of the requirement and is not explained by a reasonable cause. See Whittle v. General Mills, Inc., 252 S.W.2d 55 (Ky. 1952), (worker gave no notice of accident and denied a work-related injury upon quitting employment but alleged an accident and injury five weeks later); T. W. Samuels Distillery v. Houck, 296 Ky. 323, 176 S.W.2d 890 (1943), (medical evidence of causation was controverted and a five-month delay in giving notice of accident thwarted the employer's opportunity to investigate); Buckles v. Kroger Grocery & Baking Co., 280 Ky. 644, 134 S.W.2d 221 (1939), (reason for delay in giving notice that hernia resulted from accident was to avoid medical treatment and to continue working during the lucrative holiday season).

The law does not require the impossible. A worker is not obliged to give notice of a latent harm until the worker becomes aware of it. Turner, Day, and Woolworth Handle Co. v. Morris, 267 Ky. 217, 101 S.W.2d 921 (1937). Likewise, if an employer receives notice of a work-related accident and of what appears to be minor harm, it is excusable

for the worker to fail to give notice of another, more serious harm of which the worker is unaware. Proctor and Gamble Manufacturing Co. v. Little, 357 S.W.2d 866 (Ky. 1962). Similarly, if a worker gives notice of a work-related accident, and a harm resulting from the accident does not become apparent until some time thereafter, further notice is not required until the harm develops into a compensable state. Reliance Diecasting v. Freeman, 471 S.W.2d 311 (Ky. 1971).

The claimant asserts that the ALJ misunderstood the evidence when stating that there was no suggestion of a work-related injury in the hospital records, noting that emergency room records from June 14 clearly indicate that he complained that he had experienced right shoulder pain for about a week. He asserts that such a statement would be consistent with the date of his work-related injury. Yet, he fails to explain how it shows that the pain was due to such an injury. Although one could imply that the ALJ was skeptical that the alleged injury actually occurred, the decision contains no specific finding on the matter. Instead, the ALJ dismissed the claim based on the claimant's failure to give due and timely notice of the June 5, 2002, injury in the absence of any reasonable excuse for his failure to do so.

Contrary to the claimant's assertion, Smith v. Cardinal Construction Co., supra, does not stand for the principle that a delay in giving notice of a traumatic event may be excused without a showing of reasonable cause. In fact, it was undisputed that Smith gave timely notice of the accident. At issue was whether he gave timely notice of each of the harmful changes that resulted, i.e., whether he failed to give timely notice of a cervical injury as well as a lumbar injury. Id. at 628. Resolving the matter in Smith's favor, the court noted that his employer received timely notice of the accident and of the lumbar injury. It also noted that a cervical injury was evident from the medical records at the time but did not require medical treatment until two months later, at which time the employer received notice of the cervical injury with the filing of the claim. Noting that both the lumbar and cervical areas were regions of the back and that the

physicians' initial focus had been entirely on the lumbar injury, the court concluded that the two-month delay in giving notice of the cervical injury "was not so unreasonable that an otherwise meritorious claim should be dismissed." Id. at 629.

It was the claimant's burden to convince the ALJ that he gave notice of the accident and of the resulting harm "as soon as practicable." Otherwise, it was his burden to show that any delay in giving notice was attributable to mistake or other reasonable cause or that the delay caused no prejudice to the employer. Having failed to do either, his burden on appeal is to show that the evidence in his favor was so overwhelming that the ALJ's decision was unreasonable and, therefore, erroneous as a matter of law. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

It is undisputed that the claimant did not seek medical treatment for shoulder pain until June 14, 2002, nine days after the alleged accident. Neither the hospital records from that date nor those from the subsequent visits mentioned a work-related accident. Records from June 19, 2002, indicated that the claimant denied a work-related accident. Furthermore, Dr. Puram's notes from June 14 and the notes from a subsequent visit on June 16, refer to his having lifted a 4-wheeler or 4-wheeler tire. Although the claimant alleged a June 5, 2002, accident, and admitted that he experienced immediate symptoms, he failed to inform his employer of either the accident or the resulting harm until June 21, 2002, after he learned that he needed surgery. His sole explanation for the delay and for denying a work-related accident on June 19 was that he thought that he "had just jerked a crick in my neck." Under the circumstances, he has failed to show that the ALJ's decision was unreasonable or otherwise erroneous as a matter of law. Although he asserts that a lack of prejudice may excuse a delay in giving notice, he failed to raise the argument before the ALJ or to request any specific findings on the matter in his petition for reconsideration. Therefore, it is not preserved for our review.

The decision of the Court of Appeals is affirmed.

All concur.

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Supreme Court of Kentucky

2004-SC-0944-WC

DANA CORPORATION — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-1241-WC
WORKERS' COMPENSATION BOARD NO. 01-88960

BEVERLY DIANE LOVE; HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant was totally disabled and that her application for benefits was timely because it was filed within two years after physicians informed her that her degenerative lumbar condition and neck and upper extremity condition were caused by repetitive trauma in her work. The Workers' Compensation Board (Board) and the Court of Appeals affirmed. Although the employer continues to assert that the lumbar claim was untimely, we affirm.

The claimant was born in 1950 and has a twelfth-grade education. She entered the labor market in 1972 with no specialized or vocational training. Her work history included various jobs that required prolonged sitting or standing and the repetitive use of her arms and hands.

In September, 1992, the claimant began working for the defendant-employer as a riveter, attaching brake pads to brake shoes. She described the work as being very

physically demanding. It required her to lift 45 to 50 pounds about 40 to 50 times per hour. She performed this job for about six years, often working overtime. Her next job was to operate a welding machine to weld brakes. It required her to lift 15-pound parts about 500 times per eight-hour shift. Again, she often worked overtime.

In August, 1999, the claimant began to experience symptoms in her hip and right leg. At about the same time, she bid on and received a job as a de-burr operator. She later admitted that she transferred to the job, thinking that it was less demanding and "would be better for me, physically." Her symptoms persisted, however, so in October, 1999, she sought treatment from Dr. Lessenberry. Initially, he diagnosed a pinched nerve and prescribed anti-inflammatory and pain medication, which helped for a while. The claimant testified that in February, 2000, she discussed her symptoms with Zena Carroll, the company nurse. At that time, Dr. Lessenberry had reviewed the results of an MRI and recommended epidural injections. Also in February, 2000, her family physician, Dr. Reddy, took her off work for six days and placed her in physical therapy. Her condition improved with the therapy, and she returned to work. In September, 2000, she was transferred to the brake assembly line due to layoffs, her symptoms increased, and she began to miss work. In October, 2000, she began to experience symptoms in her neck, which gradually became more severe and affected her shoulders, arms, and hands.

The claimant testified that Dr. Lessenbery was the first physician to inform her that the back condition producing her symptoms was caused by her work and that he did so on March 29, 2001. Until then, she had submitted all of her medical bills to her health insurance carrier. She stated that on April 11, 2001, she saw Dr. Wolff regarding

her neck and arm conditions, at which time he informed her that they were caused by her work. Near the end of her deposition, the following colloquy ensued:

> Q. When Dr. Lessenberry told you that these problems were work related in March of 2001 as to your low back, did you report that to anyone?
>
> A. Yes, Zena Carroll.
>
> Q. When Dr. Wolff told you that the neck and arm problems might be work related in April of 2001, did you re-report?
>
> A. Yes.
>
> Q. Who did you report that to?
>
> A. Zena Carroll.

The claimant quit working in August, 2001. The record indicates that on April 22, 2002, she filed an application for benefits in which she alleged gradual injuries of March 29, 2001, and April 11, 2001.

Testifying to her present condition at the hearing, the claimant stated that her right leg was always numb and that the right side of her back always hurt, some days worse than others. Also, she experienced pain in her neck, between her shoulders, and in her arms every day as well as numbness in her hands. She stated that her condition had improved somewhat since she stopped working.

Dr. Lessenberry's treatment notes indicate that he first saw the claimant on October 14, 1999, at which time she complained of low back pain that radiated down her right leg below the knee. She did not recall a single injury. Dr. Lessenberry attributed the symptoms to lumbar radiculopathy but did not mention causation. In January, 2000, Dr. Lessenberry ordered an MRI. His February 8, 2000, notes indicate that the test revealed a bulging at L4-5 and L5-S1, with facet changes at both levels. He recommended a series of epidural injections, but there is no indication that they

were performed. On March 29, 2001, the claimant returned, complaining of a flare-up of back pain. He noted increased symptoms with straight leg raising, weakness in the ankle reflexes on the right side, and numbness in the lateral border of the left leg. As before, his notes mentioned neither causation nor AMA impairment.

Dr. Reddy began treating the claimant for various conditions in 1996. Although the notes from February 11, 2000, indicate that Dr. Lessenberry had been treating the claimant for a bulging lumbar disc, they do not refer to causation. Nor do they indicate that the condition produced an AMA impairment.

Dr. Wolff's treatment notes indicate that he first saw the claimant on April 11, 2001, for complaints of pain and numbness in both hands and arms. In September, 2001, he diagnosed bilateral thoracic outlet compression. He could not give a specific date of injury but was of the opinion that the condition was work-related.

Dr. Majd first saw the claimant on July 13, 2001, on referral from Dr. Reddy and began treating her for intractable neck and shoulder pain. Likewise, Drs. Best and Bilkey performed their evaluations after the alleged dates of injury. Testifying for the employer, Dr. Best stated that the cervical and lumbar conditions were present before March 29, 2001, and April 11, 2001, and that there was no causal relationship between the conditions and the alleged injuries. Dr. Bilkey testified that the conditions developed gradually and were associated with performing work that was heavy in relation to the claimant's relatively small build. He assigned an 8% impairment, recommended that the claimant avoid more than light-duty work, and imposed a number of other restrictions.

Addressing the question of limitations, the ALJ determined that Dr. Wolff's testimony and the claimant's credible testimony made it clear that she was not diagnosed with work-related cervical and upper extremity problems until April, 2001.

She then informed her employer. Regarding the lumbar injury, the ALJ noted that the claimant began to notice symptoms in August, 1999, and suspected that they were work-related. Although she discussed her symptoms with the nurse in February, 2000, Dr. Lessenberry did not inform her that a work-related injury was the cause of her symptoms until March, 2001. The ALJ determined that the claimant informed her employer of her conditions once she was advised that they were work-related and also determined that the claims were timely because they were filed on April 22, 2002, which was well within two years of March and April of 2001.

After determining that the claimant had an 8% impairment and noting that Drs. Bilkey and Wolff imposed significant restrictions, the ALJ determined not only that the claimant was incapable of returning to factory work but also that she was "very limited in her intellectual, academic, and vocational abilities." On that basis, the ALJ concluded that she was totally occupationally disabled. Rejecting Dr. Best's testimony and relying on Dr. Bilkey's, the ALJ determined that the claimant had no pre-existing active disability and that all of her disability arose from the work-related cumulative trauma injuries to her back, neck, and upper extremities.

The employer's petition for reconsideration asserted, among other things, that the claimant clearly knew of her lumbar injury and knew that it was caused by her work as early as August, 1999. Thus, it was denied as being no more than a reargument of the merits. Appealing, the employer asserted to the Board that the evidence compelled a finding that the applicable date of the lumbar injury was February, 2000, when a physician first imposed restrictions and when the claimant first informed the company nurse that she was experiencing low back symptoms. On that basis, the employer maintained the lumbar injury claim was untimely because it was not filed until more than

two years later, on April 22, 2002. It has since abandoned its other argument, that the claimant was not totally disabled.

Under the version of KRS 342.0011(1) that pertains to this claim, an injury is a work-related traumatic event that causes a harmful change in the human organism. KRS 342.185 provides a period of limitations for a work-related injury that runs for two years after the date of the accident that causes it. In Alcan Foil Products v. Huff, 2 S.W.3d 96, 99, 101 (Ky. 1999), the court noted that "the entitlement to workers' compensation benefits stems from the fact that an occupational injury has been sustained" and "begins when a work-related injury is sustained, regardless of whether it is occupationally disabling." Nonetheless, because gradual injuries often occur imperceptibly, the court reaffirmed the principle that a rule of discovery governs the notice and limitations requirements for such injuries. The court determined that the obligation to give notice and the period of limitations for a gradual injury are triggered by a worker's knowledge of the harmful change and its cause, regardless of whether the individual continues to work.

In Alcan, the workers knew of their hearing loss, and it was undisputed that they knew it was work-related more than two years before they filed their claims. Although they continued to work and to be exposed to harmful noise thereafter, there was no evidence that part of their disability was attributable to trauma incurred within two years before their claims were filed. The court concluded, therefore, that the claims were entirely barred by limitations. The principles that Alcan addressed were refined in a number of subsequent cases.

In Holbrook v. Lexmark International Group, Inc., 65 S.W.3d 908 (Ky. 2001), the court determined that notice and limitations are triggered by the requisite knowledge

even if the worker's symptoms later subside. Earlier, in Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999), the court determined that if a worker's injury becomes manifest more than two years before a claim is filed, the worker is entitled to benefits for harmful changes due to trauma incurred within the two-year period before a claim is filed. In Toyota Motor Manufacturing, Kentucky, Inc. v. Czarnecki, 41 S.W.3d 868 (Ky. App. 2001), the court determined that a worker is entitled to rely on the judgment of medical experts regarding the cause and status of a condition. Finally, in Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001), the court determined that causation is a matter to be proved by expert testimony; therefore, a worker is not required to self-diagnose the cause of a harmful change as being a work-related gradual injury for the purpose of KRS 342.185. Hill concerned a worker who gave timely notice of specific incidents of trauma, became disabled, but did not give notice of the resulting gradual injury until after he received the diagnosis. Nonetheless, the principle for which it stands is not confined to those facts.

Based on the claimant's uncontradicted testimony, the ALJ determined that the date of her gradual lumbar injury was March 29, 2001, when she first learned from Dr. Lessenberry that her symptoms were caused by a work-related gradual injury. Although the finding has twice been affirmed, the employer continues to assert that the claimant informed the company nurse of lumbar symptoms in February, 2000, and knew they were work-related at that time; therefore, the evidence compelled a finding that the date of injury was February, 2000. We disagree.

Although the claimant may have associated her symptoms with her work or suspected that they were due to a work-related condition when she discussed them with the company nurse in February, 2000, she was not an expert in medical causation. Her

opinion would not have proved that the condition producing her symptoms was a work-related gradual injury. The claimant testified that Dr. Lessenberry was the first physician to inform her that the degenerative condition producing her lumbar symptoms was caused by her work and that he did so on March 29, 2001. There was no evidence to the contrary. Under the circumstances, substantial evidence supported the finding that March 29, 2001, was the applicable date of injury. It may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The employer asserts that the claimant cannot "have it both ways" by relying on February, 2000, as the date she gave notice but on March 29, 2001, as the date of her lumbar injury. We note, however, that the claimant testified to discussing her condition with the company nurse both in February, 2000, and again in March, 2001, after Dr. Lessenberry told her that her lumbar condition was caused by her work. Absent evidence to the contrary, her testimony provided substantial evidence from which the ALJ could properly conclude that "the Plaintiff, once being advised that her conditions were work related, gave notice to the Employer."

The decision of the Court of Appeals is affirmed.

All concur.

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