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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 21, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 10-12-06 E.W.A. Grant, D.C.

2006-SC-0056-WC

LOGAN ALUMINUM, INC. — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-0980-WC
WORKERS' COMPENSATION NO. 00-00479

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

MEMORANDUM OPINION OF THE COURT

AFFIRMING

KRS 342.185 and KRS 342.190 require notice of a work-related accident and a resulting injury to be "given to the employer as soon as practicable," but KRS 342.200 waives any inaccuracy in complying with the notice requirement "unless it is shown that the employer was in fact misled to his injury thereby." On remand from this court to determine whether the employer was prejudiced insofar as it did not receive notice that the claimant's gradual injury was work-related until he filed a claim, an Administrative Law Judge (ALJ) found no prejudice. The Workers' Compensation Board (Board) and the Court of Appeals affirmed.

Appealing, the employer asserts that prejudice to the employer is relevant only when there is an inaccuracy in giving notice and insists that this case involves a delay in

giving notice. On that basis, it argues that the ALJ erred on remand by excusing an eight-month delay in giving notice because the law of the case was that the claimant failed to give due and timely notice. The employer also argues that the claimant had the burden to prove a lack of prejudice and that he failed to carry that burden. We disagree on both counts and affirm.

The claimant's work required him to drive and operate a forklift in reverse, twisting to look behind him. The very rough terrain over which he worked jarred and bounced him. In 1996, he began to develop a stiff neck, headaches, and numbness in his arms. In August, 1999, a chiropractor gave him a letter, the contents of which we quoted in our opinion of February 19, 2004. The letter stated that the claimant had been diagnosed with cervical disc degeneration producing left brachial plexus neuritis. It recommended that he permanently refrain from looking backwards to drive a tow motor at work and that he limit lifting to 20 pounds temporarily; however it did not state that his condition was due to a work-related injury.

The claimant testified that he thought the work restrictions contained in the letter indicated that his condition was work-related. He stated that he delivered the letter to the employer's medical department, to his supervisor, and to the personnel office and also stated that he informed the medical department that he thought his condition was work-related. After being sent for a second opinion, he was told that he needed surgery. He testified that he asked the medical department whether he should turn the bill in on his regular insurance or workers' compensation. His employer terminated him on April 12, 2000, and he filed a workers' compensation claim on April 26, 2000.

The employer asserted that the claim must be dismissed because the claimant failed to give due and timely notice. The employer, supervisors, and co-workers

testified that he never mentioned to them that his neck problems were work-related. The ALJ found that evidence to be truthful and determined that the employer did not receive actual notice until April 26, 2000. Nonetheless, the ALJ determined that the claimant's failure to give actual notice earlier was excusable under the "mistake or other reasonable cause" provision of KRS 342.200 because he thought that the chiropractor's letter satisfied the notice requirement.

In the previous appeal (Logan Aluminum, Inc. v. Gregory Bullard, 2003-SC-0162-WC), this court affirmed the ALJ's finding that the claimant perceived his chiropractor's letter to mean that his condition was work-related and the finding that the employer did not receive actual notice until April 26, 2000. However, after concluding that "[t]he filing of this claim eight months after [the claimant] first learned that his degenerative condition was work-related did not satisfy the statutory requirement to give notice 'as soon as practicable,'" we directed the ALJ to determine under KRS 342.200 "whether the employer was prejudiced by the failure to receive timely notice." Neither party petitioned for reconsideration or clarification.

Although the employer asserted on remand that it was prejudiced by being forced to defend a civil suit, the ALJ found no correlation between the lack of timely notice and the filing of a separate civil claim. The ALJ reviewed the evidence in light of the purposes of the notice requirement. As set forth in Harlan Fuel Company v. Burkhart, 296 S.W.2d 722 (Ky. 1956), those purposes are: 1.) to enable the employer to minimize the worker's disability and mitigate its own liability by assuring that the worker receives competent medical care; 2.) to permit a prompt investigation of the facts pertaining to the injury; and 3.) to prevent the filing of fictitious claims.

Analyzing the first factor, the ALJ noted that the claimant's degenerative disease

was so significant that a three-level fusion was performed almost immediately after the diagnosis by a physician that the employer's insurance carrier approved. The surgery had a good result, and there was no evidence that the quality of the claimant's medical care increased his impairment. Also, rather than complaining of total disability or chronic pain after the employer terminated him, the claimant immediately enrolled in school, full time, so that he could obtain other employment.

Turning to the second factor, the ALJ noted that that none of the relevant facts had changed over time. This was not a case where the claimant alleged an acute onset injury that no one witnessed. He alleged a cumulative trauma injury due to operating a tow motor over rough terrain while looking backward. The chiropractor's letter informed the employer that the claimant should immediately refrain from such activity. Once informed of the claim, the employer conducted an extensive investigation aimed at showing that the activity did not cause the claimant's condition.

Addressing the third factor, the ALJ noted that the relevant facts had been addressed previously. Nothing indicated that the claimant had fabricated an event or that the circumstances were suspicious. In fact, once a physician informed him that his work could be causing his symptoms, he immediately ceased doing that type of work.

The ALJ concluded that the employer suffered no prejudice by its failure to receive notice that the claimant's condition was work-related until he filed a claim. This reinstated the claimant's award, after which the employer appealed again.

As explained in our previous opinion, Hill v. Sextet Mining Corp., 65 S.W.3d 503, 507 (Ky. 2001), and its progeny stand for the principle that KRS 342.185 requires notice to be "given to the employer as soon as practicable" after a worker learns that he has sustained a gradual injury and that it is caused by his work. 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.

KRS 342.200 provides, however, as follows:

> 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).

KRS 342.200 contains two separate provisions. The employer is correct in asserting that a delay in giving notice is not excused by a lack of prejudice to the employer, but this appeal does not involve a delay in giving notice due to mistake or other reasonable cause. The claimant maintained that he gave notice almost immediately after learning that his condition was work-related by telling the medical department and by giving the employer a copy of his chiropractor's letter which he perceived to indicate that his condition was work-related.

In the previous appeal, this court considered all of the relevant statutes, and we specifically affirmed two of the ALJ's findings. The finding that the employer did not receive actual notice until eight months after the claimant knew the cause of his condition formed the basis for our legal conclusion that the claim was not a timely method for giving notice in this case. The finding that the claimant perceived the

chiropractor's letter to give notice (i.e., to comply with the notice requirement) formed the basis for our decision to remand the claim for a consideration of prejudice. Implicit in the decision was a conclusion that the ALJ erred by failing to consider whether the claimant's inaccuracy in complying with KRS 342.190 when using the chiropractor's letter as a means to give notice had prejudiced the employer by causing it not to receive notice until the claim was filed. Therefore, we reject the employer's argument that our finding of a lack of due and timely notice in the previous appeal precluded a finding of prejudice to the employer on remand. For the same reason, we also reject its argument that this is not a case involving an inaccuracy in complying with KRS 342.190.

KRS 342.200 clearly states that notice is not invalid or insufficient "unless it is shown that the employer was in fact misled to his injury thereby." Therefore, prejudice is the showing to be made. Because the claimant gave notice of his condition and work restrictions, the burden was on the employer to show that it was prejudiced by his failure to be explicit in attributing the condition to a work-related injury.

KRS 342.285 vests an ALJ with the authority to consider conflicting evidence and decide whom and what to believe. Only a finding that is unreasonable under the evidence or that is made under an erroneous interpretation of the law may be reversed on appeal. In the present case, the ALJ considered the evidence in light of the purposes of the notice requirement as set forth in Harlan Fuel Company v. Burkhart, supra, criteria and concluded that the employer was not prejudiced by the failure to receive notice until the claim was filed. Although the employer's experts were of the opinion that it was impossible to determine the cause of the claimant's cervical condition due to his surgery, the fact remains that the ALJ was more persuaded by the testimony of the claimant's experts that cumulative trauma in his work caused his

condition. Because the decision was reasonable and made under a correct interpretation of the law, it may not be disturbed on appeal.

The decision of the Court of Appeals is affirmed.

All concur.

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