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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 22, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000492-WC

CINCINNATI CONCESSION CO., INC. — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2006-CA-002202-WC
WORKERS' COMPENSATION BOARD NO. 05-01137

THELMA R. WADE;
HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant gave due and timely notice of her work-related injury and awarded benefits. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the employer asserts that the finding of due and timely notice was erroneous as a matter of law and that collusion between the claimant and her sister prevented it from receiving notice until eight months after the accident. We affirm because the finding was reasonable under the evidence.

The claimant was born in 1958, has a ninth-grade education, and limited work experience. She began working as a stocker in a retail store in October 2000. In May 2001 she was hired on a part time, seasonal basis by a catering company that provided

food service for a golf course. Her sister, Wanda Warner, was a manager for the company.

The claimant alleged that she injured her back on September 7, 2003, while bending over a sink and reaching for a large tray of silverware. She testified that she informed her immediate supervisor, Chari Combs, and that Ms. Combs stated that she would notify her own supervisor, Ms. Warner. The claimant stated that she completed her shift and saw her family physician, Dr. Reutman, the next day.[1] She was present when Ms. Combs informed Ms. Warner a few days later and knew that Ms. Warner failed to inform the employer.

The claimant did not consider the injury to be serious at the time and worked until the end of the season. Her symptoms failed to resolve; thus, she returned to Dr. Reutman in December 2003. When she reported severe back and leg pain as well as numbness in her foot in January 2004, Dr. Reutman ordered an MRI. She underwent a lumbar laminectomy in March 2004. Although she attributed her problems to the work-related injury, she presented all of her medical bills to her health insurance carrier. Her attorney reported the injury to the employer's central office on her behalf in May 2004. The employer denied her application for benefits.

Lia Schute, the employer's bookkeeper and human resource manager, testified that the letter from the claimant's attorney first informed her of the injury. A subsequent letter stated that the claimant was alleging a low back injury. Ms. Schute testified that the proper procedure for giving notice would have been for the claimant to notify her immediate supervisor, who would then inform Ms. Warner. Then, Ms. Warner should

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1 A February 2004 note from Dr. Reutman's office indicates that the claimant was seen on September 8, 2003, for hip and back pain that she attributed to her work.

have told her supervisor, Brad Beal, who would have informed Ms. Schute. Ms. Schute admitted that the company had no written policy on how to report work-related injuries and did not train employees or supervisors about how to handle claims. She stated that Brad Beale was supposed to explain the procedure to supervisors, but she was not present and could not say when he did so. She also stated that she had spoken with Ms. Combs since learning of the injury but did not think to ask her about it.

Ms. Combs testified that the claimant was a childhood friend. They were working together when the claimant lifted a tray of silverware off the sink and turned to place it on a nearby table. She testified that she could tell from the claimant's facial expression and the way she moved the rest of the day that she was in pain. Ms. Combs stated that she informed Ms. Warner of the incident two days later, and she indicated that she would take care of the matter.

Ms. Warner testified that she was the primary manager at the golf course. She acknowledged that the claimant and Ms. Combs informed her of the injury a day or two after it occurred but stated that she did not think it was serious at the time. She stated that the claimant did not urge her to report the incident to the employer because she wanted to continue working and thought that it would resolve. She noticed that the claimant worked more slowly and could not lift heavier items after the incident and eventually asked her to obtain a doctor's note. Ms. Warner testified that the employer did not instruct her concerning how to report injuries and that she failed do so because she was leaving the employment and feared that a report might somehow jeopardize her ability to withdraw the funds from her 401K account.

The ALJ acknowledged having "severe reservations about the credibility of the

witnesses" but noted that uncontroverted testimony established that the claimant informed her immediate supervisor and Ms. Warner of the injury. Moreover, although the claimant knew and acquiesced to the failure to inform the employer, it was Ms. Warner who withheld the information. The ALJ concluded that the claimant complied adequately with KRS 342.185 and awarded income, medical, and vocational benefits.

The employer acknowledges that the claimant notified Ms. Combs and Ms. Warner of the injury. It asserts, however, that she thwarted the purpose of the notice requirement by colluding with Ms. Warner to prevent the employer from receiving notice of the injury. Thus, the Court of Appeals erred by affirming the finding of timely notice but failing to consider the legal sufficiency of the notice that she gave.

KRS 342.185 requires a worker to give notice of a work-related accident "as soon as practicable after the happening thereof." KRS 342.190 indicates that the notice requirement includes, among other things, notice of the time, place, nature, and cause of the accident as well as a description of the nature and extent of a resulting injury. KRS 342.200 provides that an inaccuracy in complying with 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," and it excuses a delay in giving notice that is due to mistake or other reasonable cause. Harlan Fuel Co. v. Burkhart, 296 S.W.2d 722 (Ky. 1956), explains that the purposes of the notice requirement are to assure prompt medical treatment in order to minimize disability, to enable the employer to investigate the accident promptly, and to prevent the filing of fictitious claims. A worker who fails to give timely notice of an accident or resulting injury may be penalized for conduct that undermines the purpose of the requirement and is not explained by a reasonable

cause.[2] The court emphasized, however, in Smith v. Cardinal Construction Co., 13 S.W.3d 623, 629 (Ky. 2000), that the requirement's purpose is not to create a technical barrier to meritorious claims.

The evidence in this case did not compel a legal conclusion that favored the employer. The evidence indicated that the claimant did not delay in giving notice of the accident and resulting injury to her immediate supervisor, Ms. Combs, and that she was in obvious discomfort the rest of the day. Dr. Reutman's records indicate that she sought treatment for a work-related back injury the next day and returned when her symptoms failed to resolve. As the ALJ noted, it was Ms. Warner, not the claimant, who withheld notice from the employer. Although the employer asserts that the claimant "colluded" in Ms. Warner's conduct and failed to assure that it would receive notice, Ms. Schute admitted that the employer had no written policy on reporting injuries and could not testify with certainty that the claimant received any instructions on the matter. Considering Ms. Schute's admission that she spoke with Ms. Combs more than once after receiving the attorney's notice letter but failed to ask about the injury, the evidence clearly did not compel a finding that the employer would have investigated promptly had it known of the accident earlier. Finally, nothing indicated that that the claim was fictitious or that different or additional medical treatment would have altered the outcome. Absent a showing of any clear prejudice to the employer, the ALJ

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2 See Whittle v. General Mills, Inc., 252 S.W.2d 55 (Ky. 1952) (worker failed to give notice of accident and denied a work-related injury when quitting the employment but alleged a work-related injury five weeks later); T. W. Samuels Distillery Co. v. Houck, 296 Ky. 323, 176 S.W.2d 890 (1943) (medical evidence regarding causation was controverted, and a five-month delay in giving notice of accident thwarted employer's opportunity to investigate); Buckles v. Kroger Grocery & Baking Co., 280 Ky. 644, 134 S.W.2d 221 (1939) (delay in giving notice that accident caused hernia due to desire to avoid medical treatment and continue working through lucrative holiday season).

determined reasonably that the claimant satisfied the notice requirement. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986), explains that a finding that is reasonable must be affirmed on appeal.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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