RENDERED: FEBRUARY 7, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2001-CA-000816-WC

LOGAN ALUMINUM, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-00479

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

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Logan Aluminum, Inc. ("Logan") appeals from an opinion of the Workers' Compensation Board ("the Board") which affirmed an opinion, award and order of the Administrative Law Judge ("ALJ") finding Gregory Bullard ("Bullard") to have sustained a 15% impairment rating due to a work-related cervical injury. We affirm the opinion of the Board.

Having closely studied the record, the law, and the written arguments, we have concluded that we cannot improve upon

the Board's well-written opinion affirming the ALJ's opinion, award and order. In the interests of judicial economy, we adopt the following portion of the Board's opinion as that of this Court. Board Member Stanley, writing for the Board, stated in relevant part as follows:

> Bullard, born February 11, 1961, has a high school education and at the time of his hearing was enrolled at Western Kentucky University majoring in computer systems. He served in the Marine Corps for ten years working as an air traffic controller. He began working for Logan as a forklift operator/technician in February 1995. His employment with Logan was terminated in April 2000, although he last worked in September 1999 when he underwent a triple level discectomy and fusion surgery of the cervical spine.
>
> Bullard testified that his primary duties with Logan required him to operate a forklift. He wore a seat belt and a majority of his work required him to operate the forklift in reverse, twisting around to look behind him. He further testified he operated the equipment over rough terrain which jarred and bounced him.
>
> According to Bullard, in 1996 he gradually began developing symptoms of neck stiffness, headaches, and numbness in both arms. The symptoms began in 1996. Bullard testified he sought treatment from a chiropractor, Dr. Merrill Patterson, in 1997. He testified that by October 1998, he was having so much pain and numbness in his left arm he thought he was having a heart attack. By April 1999, his headaches were so severe they were causing nausea and sweating. Bullard admitted that as far back as 1996, he knew his stiffness was a result of driving the forklift, but he did not know what was causing damage to his neck.

Bullard acknowledged that in August 1999, Dr. Patterson told him his physical problems were due to his work with Logan. Dr. Patterson gave him a latter dated August 18, 1999 which stated as fellows:

> Mr. Bullard has been diagnosed with C6-C7 cervical disc degeneration deterioration producing left brachial plexus neuritis. There is extensive ostophytes [sic] and fusing of C6-7 vertbral [sic] bodies occurring.
>
> I recommend he permanently refrain from looking back driving a tow motor at work.
>
> I further suggest no lifting over 20 lbs. for two weeks commencing today.

Bullard testified he had delivered the letter to the medical department; to his supervisor, Larry Carlisle; and, to Logan personnel representatives, Carl Knight and Shannon Johnson. He also testified that after Dr. Patterson told him his neck problems were due to his work, he told his three supervisors, Carl Knight, Shannon Johnson, and Brent Mefford, that his neck was bothering him and that Athe fork truck was just killing me.@ He also testified he told the medical department he thought his condition was work-related. He was sent for a second opinion and was told he needed surgery. He then asked the medical department whether he should turn it in on his regular insurance or on workers= compensation.

Bullard was terminated from his employment with Logan on April 12, 2000. His workers= compensation claim was filed on April 26, 2000 and was signed by him on April 18, 2000. He admitted he did not fill out an injury report prior to the filing of his claim. He acknowledged that he had

filled out previous accident reports for previous injuries. He testified he did not work after an MRI was taken on September 8, 1999. He underwent surgery on September 23, 1999. Thereafter, he signed up for short-term disability benefits.

Bullard testified that he was given a physical upon leaving the Marines in 1993. Furthermore, he passed a physical given by Logan prior to beginning his employment in 1995.

Logan presented testimony from numerous employees concerning Bullard=s giving of notice. Johnnie White, safety engineer at Logan, testified at the hearing that it was company policy for an individual to report injuries to the team leader and medical personnel. White testified Bullard received short-term disability benefits and he never requested workers= compensation benefits or that his medical benefits be paid by workers= compensation. He testified that Bullard had a previous knee injury which was correctly reported. All employees were trained in the process and reporting of workers= compensation claims.

Barbara Miller, occupational health nurse, testified she was never given notice of a neck injury by Bullard. She testified she had no recollection of any conversations with Bullard concerning the work-relatedness of any neck problems in August 1999.

Ellen Nealy, the head nurse for the medical department at Logan, testified that Bullard never gave notice in August 1999 of a work injury. He saw her numerous times because of pending neck surgery. She testified that Bullard delivered Dr. Patterson=s letter dated August 18, 1999 to her. She testified that instead of turning it in as workers= compensation, Bullard drew short-term disability benefits for six months at full salary.

Larry Carlisle, finishing team leader and part of Bullard=s team, testified he was never notified of any work injury in August 1999 or at any other time. He stated he was present at Bullard=s exit interview and there as no mention of any work-related injury.

Shannon Johnson, operating technician and member of Bullard=s team, testified he never recalled that Bullard said he had a neck condition due to his work. Bullard had told him he had damage to his neck but did not know where it came from. He recalled that Bullard had mentioned he was going to have surgery, but he had no recollection that Bullard told anyone his condition was due to his work.

Dr. Richard Berkman, a neurosurgeon, first saw Bullard on September 1, 1999. He ordered an MRI which showed impressive cervical spondylosis at C4-5, C5-6, and C6-7 with spinal cord compression and foraminal stenosis. Dr. Berkman then performed surgery on September 23, 1999, consisting of microscopic anterior cervical discectomy at C4-5, C5-6, and C6-7 and a bone graft and plating at those cervical levels. In a letter to Bullard dated May 1, 2000, Dr. Berkman stated:

> I am in receipt of your letter dated April 15th, and I am saddened to hear that you were terminated at work. As a thirty-eight year old your imaging studies suggested the disease well out of proportion to a gentleman of your age. This suggests that the type of work that you participated in may have led to accelerated arthritis in your neck.
>
> Of course, there would be no way to know for sure, but certainly the type of work you have been doing did seem to be consistent with accelerating the disease in

> your neck, and again, as I stated above, your imaging studies suggested quite severe disease.

In a letter to Logan=s counsel dated July 5, 2000, Dr. Berkman indicated that Bullard had reached maximum medical improvement and could return to work, but was not sure Bullard would be able to drive a forklift because it required a lot of head turning and was a vibrating machine. He assessed a 12% impairment to the body as a whole according to the AMA Guides for a three-level cervical disc problem surgically treated.

Dr. David Gaw, an orthopedic surgeon, evaluated Bullard on May 23, 2000, at the request of his attorney. He diagnosed (1) post-op cervical spine discectomy with fusion at C4-5, C5-6, and C6-7, and (2) significant loss of movement of the neck secondary to the above. He opined that the type of work Bullard described engaging in at Logan involved jarring on rough terrain and frequent awkward movement of his neck which most likely caused his present condition in that it aggravated pre-existing degenerative cervical disease. He placed restrictions of no lifting more than 25 to 30 pounds occasionally and only 10 to 15 pounds frequently. He felt Bullard should avoid riding on rough terrain, jarring or vibratory activities. He assessed a 27% impairment to the whole person due to loss of motion of the cervical spine, combined with the impairment due to surgery.

Dr. Leon Ensalada evaluated Bullard on June 28, 2000 at the request of Logan. On the issue of causation, Dr. Ensalada opined that within a reasonable degree of medical certainty, there was no probable causal relationship between Bullard=s symptoms and the occupational injury or illness sustained while working for Logan. He felt Bullard=s symptoms were neither caused nor aggravated by any occupational injury or illness due to

his work for Logan. He felt Bullard=s condition requiring a three-level fusion was due to spondylolisis and the natural aging process. He did assess a 15% impairment to the body as a whole for Bullard=s cervical spine condition.

Dr. Robert Byrd examined Bullard on July 21, 2000 at his attorney=s request. He diagnosed (1) s/p C4-5, C5-6, and C6-7 cervical fusion and discectomy secondary to degenerative changes of the cervical spine and (2) loss of range of motion of the cervical spine. He assessed a 36% impairment to the body as a whole and felt that Bullard=s work contributed to his condition. He would limit Bullard to maximum lifting of 25 pounds with no upward, downward or sideways motion of the cervical spine.

The ALJ received the lay and medical testimony in the record and on the issue of work-relatedness/causation, concluded that Bullard=s degree of degenerative arthritis was caused by the repetitive motion to which he was exposed every day at work. He further concluded that Bullard=s severe degenerative disc disease in his cervical spine and subsequent triple level discectomy and fusion were proximately caused by the repetitive nature of his work with Logan. In doing so, he relied on the evidence from Drs. Berkman, Gaw, and Byrd. He also acknowledged that Dr. Ensalada opined that Berkman=s condition was entirely related to the natural aging process.

On the issue of notice, the ALJ recognized that Dr. Patterson=s letter was perceived differently by Bullard and his employer. Bullard testified that the first time he understood his condition was not simply aggravated but caused by work, was when he received the August 1999 letter from Dr. Patterson. He took this letter to his employer. The ALJ indicated that prior to that time, Bullard was aware that his work

was aggravating his cervical spine, but did not think his work caused his cervical spine condition. The ALJ also indicated that Logan perceived the letter as only indicating a nonwork-related condition that was requiring work restrictions for Bullard. The ALJ believed that the first evidence with regard to Bullard having a work-related cervical spine disease was Dr. Berkman=s unambiguous letter dated May 1, 2000. Since Bullard had already filed his claim on April 26, 2000, notice was found to be timely, citing Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999). The ALJ stated:

> In this particular case, the plaintiff believed that he gave notice in August of 1999 when he perceived that he had been informed that he had a work-related cervical condition. Actual notice to the defendant-employer occurred with the filing of the Form 101 on April 26, 2000. If a worker demonstrates a reasonable cause for delay in giving notice, then such a delay is excusable. Here, the plaintiff clearly thought he gave notice in August of 1999 by giving his employer the letter from Dr. Patterson which he perceived to indicate a work-related condition. This mistaken belief led to a delay in actual notice, as perceived by the defendant-employer. I find that such delay is excusable under these particular circumstances and therefore I do not find that notice operates to bar the plaintiff=s claim.

The ALJ next found that Bullard filed his claim within the two year statute of limitations provided for in KRS 342.185. Again, he cited Dr. Patterson=s August 1999 letter as the first time Bullard had any

indication that his condition was caused by work. Since his claim was filed on April 26, 2000, it was well within the two year statute of limitations. The ALJ then relied on Dr. Ensalada=s impairment rating of 15% upon which to base Bullard=s award.

On appeal, Logan raises arguments concerning notice, statute of limitations, and causation. It contends that Bullard did not give due and timely notice pursuant to KRS 342.158 and Alcan Foil Products v. Huff, supra, and his failure to give notice is not excusable as a matter of law.

Cumulative trauma claims continue to present a never ending variety of vexatious patterns dealing with the statute of limitations and the giving of notice. As is evident from the ALJ=s opinion and his struggle with the facts presented before him, this case presents yet another difficult scenario. The application of the statute of limitations and the giving of notice in cumulative trauma claims have recently been considered by the Supreme Court in Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999) and Alcan Foil Products v. Huff, supra,. In Alcan, the Court clearly held that the requirement to give notice and the clocking of the statute of limitations begins to run on the date a claimant becomes aware of his Awork-related@ condition and not the date that disability becomes manifest. The Court therefore construed the meaning of the term Amanifestation of disability,@ as used in Randall Co. v. Pendland, Ky. App., 770 S.W.2d 687 (1989), as referring to physically and/or occupationally disabling symptoms that lead the worker to discover that a work-related injury has been sustained.

KRS 342.185 provides that notice of an accident must be Agiven to the employer as soon as practicable after the happening thereof.@ The question of adequate notice must be determined by the factual situation

in each claim. Kirkwood v. John Darnell Coal Co., Ky., 602 S.W.2d 107 (1980) and Columbus Mining Co. v. Childers, Ky., 265 S.W.2d 443 (1954). The purpose of the requirement of notice of an accident or injury is twofold. First, notice of an injury enables the employer to provide immediate medical diagnosis and treatment with a view to minimize the seriousness of the injury. Second, notice facilitates the earliest possible investigation of the facts surrounding the injury. A. Larson, Larson=s, Workers= Compensation, (Desk Edition 1997), '78.10 at 15-5.

The Courts have consistently held that the requirement to give due and timely notice is not based upon a specific timeframe. Courts have long struggled with what constitutes as soon as practicable and have stated that such determination may not simply be computed based upon the number of days from the incident to the notice. See, Marc Blackburn Brick Company v. Yates, Ky., 424 S.W.2d 814 (1968). In reaching such a conclusion, the ALJ must not only consider KRS 342.185, but also KRS 342.200 to determine whether the delay was reasonable or whether there was evidence of record which would lead to a reasonable explanation for the delay. In Newberg v. Sleets, Ky., 899 S.W.2d 495 (1995) the Court reiterated a principle set forth previous in Marc Blackburn Brick Company v. Yates, that KRS 342.200 affords claimants some degree of liberty in fulfilling the notice requirement Ato effectuate the beneficent purposes of the compensation Act.@ While not retreating from the provision in KRS 342.185 requiring notice of an injury as soon as practicable, the Court in Sleets reminded us of the statement in Marc Blackburn that A[t]he nature of the injury is important on the question of notice insofar as it relates to the knowledge of the injured person of the extent of his injury.@

Notice is a mixed question of law and fact. Harry M. Stevens Co. v. Workers= Compensation Board, Ky. App., 553 S.W.2d 852 (1977). A finding pursuant to KRS 342.200 we believe, however, is a factual finding and so long as there is evidence that supports the ALJ=s conclusion, the decision may not be disturbed on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). We find that the evidence relied upon by the ALJ does constitute substantial evidence of probative value and therefore, his finding that due and timely notice was given may not be disturbed. Furthermore, contrary to Logan=s argument, the filing of a claim is sufficient notice under the Act and is specifically provided for in KRS 342.190.

Having reviewed the facts sub judice, the ALJ=s decision, arguments of counsel, and applicable law, we find the ALJ did not commit error in finding that Bullard gave due and timely noticed. As found by the ALJ, Bullard understood his condition to be work-related upon receipt of the August 18, 1999 letter from Dr. Patterson. He delivered this letter to his employer shortly thereafter, believing he had given notice of his injury. As found by the ALJ, the employer did not perceive the letter as indicating work-relatedness of Bullard=s cervical condition. It was not until the filing of Bullard=s claim in April 2000 that Logan perceived actual notice of a work-related condition. Due to the confusing nature of giving of notice in cumulative trauma claims, as is evidence from the fact pattern herein, we find ourselves in agreement with the ALJ that Bullard gave due and timely notice of the work-relatedness of his cervical condition.

Logan also argues that Bullard=s claim should have been barred by the statute of limitations in that he became aware of the work-relatedness of his cervical condition in 1996 or 1997. The ALJ relied on Bullard=s testimony that he did not understand the

> work-relatedness of his condition until he received Dr. Patterson=s August 18, 1999 letter. Bullard testified that while he knew driving the forklift made his neck still, he did not connect the work-relatedness of his condition until he received Dr. Patterson=s letter. As with the issue of notice, this issue concerns when Bullard was aware of the manifestation of his disability. Inasmuch as the ALJ determined the manifestation of disability to be in August 1999 and Bullard=s claim was filed in April 2000, it was timely filed within the two year statute of limitations of KRS 342.185. The ALJ=s decision is supported by substantial evidence in the record and we are without authority to find otherwise. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).
>
> Lastly, Logan argues the ALJ misconstrued the testimony of Dr. Berkman on causation. The ALJ relied on the testimony of Dr. Berkman, Dr. Gaw, and Dr. Byrd to find work causation of Bullard=s cervical condition. Contrary to Logan=s arguments, we believe these three physicians clearly establish the probability that Bullard=s condition was caused by his work at Logan. See, Pierce v. Kentucky Galvanizing Co., Inc., Ky. App., 606 S.W.2d 165 (1960). Again, the ALJ=s decision is supported by substantial evidence in the record and we are without authority to find otherwise.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Charles E. Lowther Lexington, KY	William J. Rudloff Bowling Green, KY