RENDERED: NOVEMBER 7, 2003; 2:00 P.M.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002050-WC

DAVID ROBINSON — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-01106

MRS. SMITH'S BAKERIES;
HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DYCHE, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: David Robinson has petitioned for review of an opinion of the Workers' Compensation Board entered on September 4, 2002, in which the Board affirmed the Administrative Law Judge's determination that Robinson had failed to provide his employer, Mrs. Smith's Bakeries, with due and timely notice of his work-related cumulative trauma injury as required by KRS[1]

[1] Kentucky Revised Statutes.

342.185. Having concluded that the Board misconstrued controlling statutes or precedent in reaching its decision, we reverse and remand.[2]

Robinson began working for Mrs. Smith's Bakeries on May 2, 1987. Robinson performed a variety of tasks during his tenure with Mrs. Smith's. Initially, Robinson worked on an assembly line at Mrs. Smith's plant in London, Kentucky. In 1988 Robinson was transferred to the shipping department where he was responsible for loading delivery trucks. In 1995 Robinson was reassigned to an assembly line in the Honey Bun department of Mrs. Smith's plant. This position required a great deal of repetitive motion involving the upper extremities. In January 1999 Robinson began to experience pain and numbness in his left hand while working. Robinson, however, did not seek treatment or inform his employer of his symptoms at this time.

On November 9, 1999, Robinson was involved in a motor vehicle accident which left him hospitalized for three days. When he was admitted to the hospital, Robinson complained of pain in his shoulders, right knee, and left hand and he was treated for a fractured patella. He returned to his job at Mrs. Smith's on April 1, 2000. Unfortunately, the pain and numbness in Robinson's left hand continued to cause him discomfort. Consequently, on January 18, 2000, Robinson met with Dr. William

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[2] Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

Durham. Robinson informed Dr. Durham that he was experiencing pain and numbness in his left hand.[3] Dr. Durham referred Robinson to Dr. Gregory Anderson, a neurologist, who had an electromyogram and several nerve condition studies performed on Robinson. On February 8, 2000, Dr. Anderson issued a report in which he opined that Robinson was suffering from a "mild median neuropathy at the wrist, or carpal tunnel syndrome[.]" According to Robinson, Dr. Anderson informed him that his condition "could be" work-related and he provided him with a brace to wear while on the job. Dr. Anderson allowed Robinson to return to work without any restrictions.

Robinson's condition continued to deteriorate and on October 19, 2000, he informed Sandra Carpenter, the plant nurse, that he had been diagnosed with carpal tunnel syndrome. This is the first time Robinson informed his employer of his condition. Carpenter sent Robinson to see Dr. William Lester, a physiatrist, who examined him on October 25, 2000. Although Dr. Lester diagnosed Robinson with carpal tunnel syndrome, the notes from his examination indicate that Dr. Lester was of the opinion that Robinson's condition was preexisting.[4] Robinson's

[3] Robinson also complained of pain in his right knee cap.

[4] In a letter dated November 2, 2001, Dr. Lester opined that Robinson's condition was preexisting based on the motor vehicle accident he had in November 1999. In particular, Dr. Lester noted that "[u]pon returning to work the symptoms may have been exacerbated by the repetitive motion of his work, however, [Robinson] had an active preexisting condition at the time he returned to work."

employment was terminated on October 28, 2000, for reasons unrelated to this appeal.[5]

On March 28, 2001, Robinson met with a Dr. James Templin, who also diagnosed him with carpal tunnel syndrome. Dr. Templin, however, opined that Robinson's condition was work-related and he assigned a 10% functional impairment rating. Robinson filed an application for resolution of injury claim with the Department of Workers' Claims on August 21, 2001.[6]

On April 1, 2002, the ALJ entered an opinion and order dismissing Robinson's claim pursuant to KRS 342.185. The ALJ concluded that Robinson had failed to provide his employer with due and timely notice of his injury as required by the statute. The ALJ's order reads, in relevant part, as follows:

> The first issues for determination are work-relatedness, notice and limitations. KRS 342.185(1) requires that notice of an accident ". . . shall have been given to the employer as soon as practicable after the happening thereof . . . ."
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> . . .
>
> In this instance, [Robinson] testified that he began experiencing symptoms in his hands in the spring or fall of 1999. . . .

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[5] Robinson is currently self-employed.

[6] Robinson initially listed his date of injury as January 2, 1999, however, on December 31, 2001, he filed a motion to amend his application to list his date of injury as "'February 4, 2000', the date [he] was diagnosed with carpal tunnel syndrome or 'October 28, 2000', the date [he] last worked." On January 7, 2002, the ALJ entered an order granting Robinson's motion. Pursuant to the ALJ's order, Robinson's date of injury was listed as February 4, 2000.

> [Robinson] was seen by Dr. Durham on January 18, 2000 and [his] symptoms included left hand pain and weakness, especially when grasping objects. On January 27, 2000, he was again seen by Dr. Durham . . . . [Robinson] was referred to Dr. Anderson on February 4, 2000 for EMG/NCV studies. The studies were interpreted by Dr. Anderson as demonstrating mild median neuropathy at the wrist or carpal tunnel syndrome bilaterally. . . . [ ] Robinson testified that while at Dr. Anderson's office he was told that his condition could be due to work activity. [Robinson] testified that he did not notify his employer of the work-related condition until October of 2000 because he was still able to do his job.
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> . . .
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> In view of [Robinson's] being informed of the diagnosed carpal tunnel syndrome and its relation to his work activity in February of 2000[,] I find that the condition manifested itself at that time in accordance with the decision in [Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999)]. [Robinson] testified that he did not inform [Mrs. Smith's] of his condition until October 19, 2000, some eight months later. Thus, the question becomes, whether [Robinson's] notice to [Mrs. Smith's] was timely in accordance with the provisions of KRS 342.185(1). In light of [Robinson's] testimony that he was diagnosed with carpal tunnel syndrome in February 2000 and told the condition could be related to his work activity, I find that notice given some eight months later was not timely. Buckles v. Kroger Grocery and Baking Co., Ky., 134 S.W.2d 221 (1939).[7]

[7] The ALJ went on to conclude that Robinson's "stated reason for the delay in giving notice . . . was not sufficient to negate the requirements of the statute under KRS 342.200." KRS 342.200 provides, in relevant part, as follows:

Robinson filed a petition for reconsideration with the ALJ on April 5, 2002. Robinson's petition was subsequently denied, and on May 30, 2002, he filed a notice of appeal with the Board.

On September 4, 2002, the Board entered an opinion affirming the ALJ's opinion and order in its entirety. The Board's opinion reads, in relevant part, as follows:

> Here it is undisputed that Robinson performed constant repetitive work at Mrs. Smith's using both hands on a regular basis beginning in 1995. He first developed symptoms while on the job that persisted when performing certain repetitive work activities sometime in late 1999 or early 2000. He originally sought medical treatment because of these complaints in January 2000. Following an EMG in February 2000, he was instructed by his treating physician that his diagnosis was either mild median neuropathy or carpal tunnel syndrome. Robinson was also informed that his condition "could be" work-related. Thereafter, he continued to perform the same constant repetitive motions at work, continued to experience disabling symptoms, and became increasingly disabled over time until finally in October 2000, he felt compelled to inform the plant nurse that he was suffering from a work-related gradual injury in order to obtain additional medical treatment. Under these circumstances, we find no error in the ALJ's determination. The fact that a work-related accident probably had occurred should have been apparent even to Robinson as a lay person by

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> Want of notice or delay in giving notice shall not be a bar to proceedings under this chapter if it is shown that . . . the delay or failure to give notice was occasioned by mistake or other reasonable cause.

> February 2000 and there is sufficient evidence to support the ALJ's inference that [Robinson] was most likely aware of that reality.
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> . . .
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> We find more than ample evidence to support the determination of the ALJ that Robinson knew or reasonably should have known that a work-related accident had occurred as early as February 2000.[8]

This appeal followed.

In his petition for review, Robinson argues that the Board erred in concluding that he failed to provide his employer with due and timely notice of his work-related cumulative trauma injury. In sum, Robinson contends that Dr. Anderson's diagnosis in February of 2000 was insufficient to trigger the notice provision of KRS 342.185. We agree.

The function of this Court in reviewing the Board "is to correct the Board only where the [ ] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."[9] Whether Robinson provided his employer with due and timely notice presents a

[8] The Board relied upon an unpublished Supreme Court case, Evita Deramus v. S & S Produce, et al., 2000-SC-1051-WC, rendered September 27, 2001, in reaching its decision.

[9] Western Baptist, 827 S.W.2d at 687-88.

mixed question of fact and law.[10] "When considering questions of law or mixed questions of fact and law, the reviewing Court has greater latitude in determining whether the findings were supported by evidence of probative value than when only a question of fact is at issue" [citation omitted].[11]

As to the factual portion of our analysis, we cannot conclude that the ALJ erred in his determination that Robinson first notified his employer of his condition in October 2000. This determination is clearly supported by substantial evidence in the record, and, as such, may not be disturbed on appeal.[12]

However, the question of whether the notice provided by Robinson was due and timely presents a far more vexing issue. KRS 342.185(1) provides that notice of an accident shall be given to the employer "as soon as practicable after the happening thereof." Given the inherent ambiguity contained in this language, courts have a certain degree of latitude in construing the phrase "as soon as practicable."[13] The Supreme

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[10] See, e.g., Kentland Elkhorn Coal Corp. v. Yates, Ky.App., 743 S.W.2d 47, 49 (1988); and Harry M. Stevens Co., Inc. v. Workmen's Compensation Board, Ky.App., 553 S.W.2d 852 (1977).

[11] Purchase Transportation Services v. Estate of Wilson, Ky., 39 S.W.3d 816, 817-18 (2001).

[12] Special Fund v. Francis, Ky., 708 S.W.2d 641, 643-44 (1986).

[13] Coslow v. General Electric Co., Ky., 877 S.W.2d 611, 614 (1994). See also Alcan Foil, 2 S.W.3d at 100. "It has been left to the courts to fashion a solution for applying the 'date of accident' language of KRS 342.185 to questions regarding notice and limitations in gradual injury claims" [footnote omitted].

Court of Kentucky and this Court have long recognized the unusual nature of cumulative trauma claims and the complexity such conditions present when dealing with the issue of due and timely notice.

The question of how to apply KRS 342.185 to a claim for gradual injury first arose in Randall Co. v. Pendland,[14] in which this Court held that "in cases where the injury is the result of many mini-traumas, the date for giving notice and the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest."[15] More recently, in Alcan Foil, supra, the Supreme Court concluded that the phrase "manifestation of disability" refers to the "worker's discovery that an injury has been sustained."[16] The Court went on to note that "the entitlement to workers' compensation benefits begins when a work-related injury is sustained, regardless of whether the injury is occupationally disabling."[17] Shortly thereafter, the Supreme Court revisited the issue in Special Fund v. Clark,[18] wherein the Court pointed out that once a worker becomes aware of the existence of a work-related

[14] Ky.App., 770 S.W.2d 687 (1989).

[15] Id. at 688.

[16] Alcan Foil, 2 S.W.3d at 101.

[17] Id.

[18] Ky., 998 S.W.2d 487, 490 (1999).

gradual injury and its cause, the period of limitations begins to run for whatever occupational disability attributable to trauma incurred before that date. Most recently, in Hill v. Sextet Mining Corp.,[19] the Supreme Court went a step further and held that an injured worker suffering from a work-related cumulative trauma condition is not required to give notice that he has sustained a work-related gradual injury until he is informed of that fact by a medical expert. In particular, the Court stated that:

> Medical causation is a matter for the medical experts and, therefore, [a] claimant cannot be expected to [ ] self-diagnose[ ] the cause of [a] harmful change [in the human organism] as being a gradual injury versus a specific traumatic event. [An injured worker is] not required to give notice that he [has] sustained a work-related gradual injury . . . until he [is] informed of that fact [citations omitted].[20]

As previously discussed, Dr. Anderson opined in a report dated February 8, 2000, that Robinson was suffering from a "mild median neuropathy at the wrist, or carpal tunnel syndrome[.]" At this time, Dr. Anderson informed Robinson that his condition "could be" work-related. The Board concluded that Dr. Anderson's diagnosis as to causation was sufficient to support the ALJ's determination that "Robinson knew or

[19] Ky., 65 S.W.3d 503, 507 (2001).

[20] Id.

reasonably should have known that a work-related accident had occurred as early as February 2000."

We conclude that the Board misconstrued controlling precedent in arriving at this conclusion. The Supreme Court's holding in Hill is unequivocal. "Medical causation is a matter for the medical experts."[21] Dr. Anderson never informed Robinson that his condition was work-related; he simply opined that it "could be." Pursuant to Hill, a claimant is not required to self-diagnose the cause of his symptoms, nor is he required to draw inferences from an ambiguous diagnosis. The controlling case law does not support the Board's holding that the correct standard is whether a claimant "reasonably should have known that a work-related accident [ ] occurred."

The Board reasoned that "in certain situations, evidence may support a fact-finding that a claimant's manifestation of disability date occurs earlier than the rendering of a clear-cut, unambiguous medical opinion regarding causation and diagnosis."[22] We conclude that this reasoning is contrary to the Supreme Court's holding in Hill.

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[21] Id.

[22] The Board cited an unpublished Supreme Court case in support of this proposition. While the Board is free to cite unpublished case law as authority, we are precluded from doing so pursuant to Kentucky Civil Rule (CR) 76.28(4)(c), which states: "Opinions that are not to be published shall not be cited or used as authority in any other case in any court of this state."

Given that Robinson was not informed of the fact that his condition was work-related until he met with Dr. Templin in March 2001,[23] he clearly provided his employer with due and timely notice as required by KRS 342.185. Our holding is in line with the general rule that "workers' compensation statutes [are to] be liberally construed to effect their humane and beneficent purposes."[24]

Based upon the foregoing reasons, the opinion of the Workers' Compensation Board entered on September 4, 2002, is reversed and this matter is remanded to the ALJ for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
John E. Anderson Barbourville, Kentucky	Guillermo A. Carlos Penny L. Hines Lexington, Kentucky

[23] Although Dr. Lester diagnosed Robinson with carpal tunnel syndrome in October 2000, he never informed Robinson that his condition was work-related. In fact, Dr. Lester opined that Robinson's condition was preexisting based on the motor vehicle accident he had in November 1999.

[24] Wilson v. SKW Alloys, Inc., Ky.App., 893 S.W.2d 800, 802 (1995) (citing Oaks v. Beth-Elkhorn Corp., Ky., 438 S.W.2d 482, 484 (1969)). See also Marc Blackburn Brick Co. v. Yates, Ky., 424 S.W.2d 814, 816 (1968). "The provisions of the statute are mandatory that notice be given, but this court has uniformly said that the statute should be liberally construed in favor of the employee to effectuate the beneficent purposes of the Compensation Act" [citation omitted].