

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002202-WC

CINCINNATI CONCESSION CO., INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-01137

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

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

BUCKINGHAM, SENIOR JUDGE: Cincinnati Concession Co., Inc. petitions for the review of an opinion of the Workers' Compensation Board ("Board") that affirmed the decision of an administrative law judge ("ALJ") awarding Thelma R. Wade benefits for

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

a work-related injury. Cincinnati Concession argues that the ALJ erred in finding that Wade gave it timely notice of her injury. We affirm.

Wade was hired by Cincinnati Concession in 2003 to work the grill at a golf course in northern Kentucky. She was working at the golf course on September 7, 2003, when she allegedly sustained a low back injury while moving a tray of silverware. Wade denied having any back problems prior to the date of the injury. She informed her supervisor, Chari² Combs, that she had injured her back.³ Wade was treated the next day by her family physician, Dr. Reutman⁴. That same day, Wade informed her sister, Wanda Warner, also a Cincinnati Concession employee and manager, that she had been injured. Warner indicated that she would take care of it, but she failed to inform Cincinnati Concession about the injury.

In February 2004, Wade gave Warner documentation from her doctor regarding the injury, but Warner again did not tell Cincinnati Concession. Throughout this time, Wade continued to work, although performing only light duty tasks.

Meanwhile, in January 2004, Wade returned to Dr. Reutman complaining of terrible pain in her back and leg and numbness in her foot. In March 2004, Dr. Steven Bailey performed a lumbar laminectomy on Wade. Wade did not forward bills her medical expenses to Cincinnati Concession, but she instead used her group health insurance to pay the bills.

² Also spelled “Cheri” in the record.

³ Combs was apparently present when Wade injured her back.

⁴ The record does not indicate Dr. Reutman's first name.

Wade did not make a written report of the injury to Cincinnati Concession's central office until May 2004. She did so by way of a letter from her attorney. Prior to that time, Wade allegedly had periodic discussions with Warner regarding the injury and whether workers' compensation benefits would be forthcoming. Warner stated that she did not inform Cincinnati Concession about the injury because she thought it might interfere with getting her (Warner's) 401(k) benefits transferred during an upcoming job change and also because she thought Wade's back problems would improve.

On July 26, 2005, Wade filed an "Application for Resolution of Injury Claim" seeking workers' compensation benefits for the injury. Cincinnati Concession denied the claim. After a hearing, the ALJ entered an award in favor of Wade. Cincinnati Concession filed a petition for reconsideration that was denied. Following the denial, Cincinnati Concession filed a timely appeal with the Board. On September 22, 2006, the Board affirmed the decision of the ALJ. This petition for review followed.

Cincinnati Concession's only argument to this court is that the ALJ erred when he found that Wade gave the employer due and timely notice of the work injury pursuant to Kentucky Revised Statute (KRS) 342.185.

KRS 342.185, in pertinent part, provides that "no proceeding for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof." Cincinnati Concession contends that although Wade informed both of her supervisors (Combs and Warner) of the accident, she nevertheless did not comply with the notice provisions of KRS 342.185.

Cincinnati Concession further alleges that Wade knew Warner failed to inform it of the accident, yet she took no action. Cincinnati Concession argues that Wade and Warner “colluded to prevent notice from being received” by it, and thus Wade did not comply with the KRS 342.185 as a matter of law.

The determination of whether notice is due and timely is a mixed question of law and fact. *Harry M. Stevens Co. v. Workmen's Compensation Board*, 553 S.W.2d 852 (Ky.App. 1977). Whether notice is timely depends on the facts and circumstances of each case. *Mark Blackburn Brick Co. v. Yates*, 424 S.W.2d 814, 816 (Ky. 1968). The question of whether notice was given “as soon as practicable” is a factual determination and lies properly within the discretion of the ALJ. *Buckles v. Kroger Grocery & Baking Co.*, 280 Ky. 644, 134 S.W.2d 221, 223 (1939). As with all essential elements of a workers' compensation claim, the burden of proof rests with the employee. *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky.App. 1979).

Here, the Board reviewed the testimony in the record and on the issue of notice concluded that

[a]lthough [he] had severe reservations about the credibility of the witnesses, the fact remains that the uncontroverted testimony from both [Wade] and Ms. Warner indicate that [Wade] timely advised Ms. Warner of her work injury on September 7, 2003. That testimony indicates also that Ms. Warner decided to withhold that information from her superiors. She did so with [Wade's] full knowledge and acquiescence. They were sisters. In addition, [Ms. Warner] was leaving the company presumably to seek work elsewhere. The testimony being what it is, I find that [Wade] provided notice to her immediate supervisor, and, therefore, the employer as soon as practicable within the meaning of KRS

342.185. It was the supervisor who withheld this information from her superiors at the company.

Additionally, the ALJ also heard the testimony of Cincinnati Concession's bookkeeper and human resource manager, Lia Schute, that it was entirely proper for Wade to also give notice of the injury to Combs. We agree with the Board's determination that

[t]he ALJ was persuaded that Wade told her immediate supervisor, Combs, she had injured herself immediately after the incident. Combs then informed her supervisor, Warner, that Wade had been injured two or three days earlier. Though [Cincinnati Concession] employees working as supervisors might not have performed ill (sic) defined duties with regard to informing management, there remains substantial evidence that Wade gave due and timely notice of her work injury.

Though a different fact finder might have been persuaded that Wade and her sister/ supervisor somehow colluded to effectuate a delay in notice or fabricate an injury, the actual trier of fact deciding the matter found in Wade's favor. . . .

Much of Cincinnati Concession's argument is based on its statement in its brief that the Board overlooked the fact that “the ALJ in fact found that Wade and her sister colluded to withhold information regarding the alleged injury from the employer.” Webster's Dictionary has defined “collusion” as “a secret agreement between two or more persons for a fraudulent or deceitful purpose.” Although the ALJ stated that he “had severe reservations about the credibility of the witnesses” and that Warner failed to report the injury to her employer “with the plaintiff's full knowledge and acquiescence”, we do not conclude the ALJ also found that the purpose of those actions was to deceive Cincinnati Concession.

It is well settled that “the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record.” *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). Based on the testimony that Wade gave prompt notice of her injury to Combs and Warner, we believe the ALJ had substantial evidence to conclude that Wade complied with the statute and gave Cincinnati Concession due and timely notice of her injury. Because there is substantial evidence to support the ALJ’s findings, we must affirm the Board’s decision.

The Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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