OPINION ENTERED: July 25, 2012

CLAIM NO. 201081256

BAPTIST HEALTHCARE SYSTEMS, INC. PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

LETICIA DOWNS
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

STIVERS, Member. Baptist Healthcare Systems, Inc. ("Baptist") seeks review of the February 16, 2012, opinion and award of Hon. John B. Coleman, Administrative Law Judge ("ALJ") finding Leticia Downs ("Downs") gave due and timely notice of a work-related injury and awarding permanent partial disability ("PPD") benefits and medical benefits.

Baptist does not state it is appealing from the March 23, 2012, order ruling on its petition for reconsideration.

Concerning the issue of notice, the ALJ entered the following analysis and conclusions:

> The first issue to be discussed by the Administrative Law Judge is the issue of notice. 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 and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the Department within two years after the date of the accident...K.R.S. 342.185. Further, when the notice of an accident or injury is given to an employer "as soon as practicable" depends upon the facts and circumstances of each particular case. *Marc Blackburn Brick Company v. Yates*, 424 S.W. 2d 814 (Ky. 1968). In this particular case, the plaintiff sustained a work related low back injury on July 1, 2010. However, she was able to continue working performing her job as her back pain gradually worsened and failed to resolve as it had on prior occasions. After the pain failed to resolve itself for twenty six days the plaintiff sought medical care and informed her supervisor. It is worthy to note that plaintiff did not work alongside her supervisor in a traditional work setting, but instead received daily assignments by phone and would travel to patients' homes to give care. She could go for long periods of time without seeing management. In this particular instance, the plaintiff had a twenty six day delay in giving notice

to the defendant of her injury sustained on July 1, 2010. She explained that she had suffered from occasional bouts of lower back pain since 1992 and felt this episode would resolve itself after a short period of time like it always had before. It is also clear from her testimony that her back pain continued and she sought medical care. It was when the physician took her off work for a three day period that she informed her supervisor. The purpose of the notice requirement of KRS 342.185 is (1) to give the employer an opportunity to place the employee under the care of a competent physician; (2) to enable the employer to investigate promptly the effect of pain to the injury and;(3) to prevent the filing of fictitious claims when lapse of time makes proof of lack of genuineness difficult. *Harlan Fuel Co. v. Burkhart*, 296 S.W.2d 722 (Ky. 1956). In this instance, I do not believe the defendant was prejudiced in any way by the delay in the plaintiff giving notice. First of all, when she did come under the care of a physician after she began to experience radicular symptoms, she was still treated conservatively and was actually able to continue working throughout her experience. She has not undergone any aggressive her controversial treatment. She was able to inform her supervisor exactly where the incident occurred so the employer could investigate her claim. Further, she did not attempt to hide the fact that she had suffered occasional prior bouts of back pain. Therefore, it is clear that should the plaintiff have immediately given notice and come under medical care, the treatment would likely have been the same. Further, I am also convinced the plaintiff did set forth a reasonable reason for the delay in giving notice.

> She experienced prior occasional back pain that had always subsided promptly. However, when it did not do so in this instance, she sought medical care and informed her employer before anything further was done except for the need for her to be off work for a period of three days. Therefore, I do not find notice to be a defense under these particular circumstances.

Baptist filed a petition for reconsideration asserting the ALJ's findings Baptist was not prejudiced and Downs provided a reasonable excuse for not giving notice sooner are insufficient. It asserted since notice was delayed, the burden was on Downs to show it was not practicable to give notice sooner. Baptist argued Downs was fully aware she had a work-related injury, but because she thought or hoped it would improve she decided not to give notice. Baptist argued Downs was not precluded from communicating with her supervisor and providing the requisite statutory notice. Thus, Downs failed to sustain her burden of proving it was not practicable for her to provide notice during the twenty-six days she waited. Baptist requested the ALJ reconsider his opinion and make additional necessary findings.

On March 23, 2012, the ALJ entered an order overruling Baptist's petition for reconsideration stating as follows:

> This matter is before the ALJ on Petition for Reconsideration filed by the defendant. The defendant requests the ALJ reconsider his opinion in regards to the notice defense. I have reviewed the petition, the response and the opinion and note that while I meant to do so, I perhaps did not make it clear enough in the opinion that the notice given to the defendant on or about July 26, 2010 was "as soon as practicable" under the circumstances presented. While the opinion carefully reviewed the circumstances explaining the reasons for the delay and how the slight delay did not affect the defendant's rights, I did failed to make this clear. I further note the plaintiff correctly points out the change in the statute which occurred after the decision cited by the defense. Therefore, the Petition for Reconsideration is **Denied.**

On appeal, Baptist argues the ALJ erred in failing to dismiss Downs' claim because she failed to give notice of her alleged work-injury as soon as practicable. There is no dispute Downs did not inform her employer she sustained a work-related injury until July 27, 2010, twenty-six days after the injury. Baptist argues it had no knowledge of the alleged event until it was reported by Downs. Thus, Baptist maintains the sole question is whether Downs reported the injury as soon as practicable. Since Downs admitted she had an immediate onset of low back and left leg pain which continued for twenty-six days and she continued to work during this time, Baptist argues

Downs could have given notice to her supervisor. Baptist insists notice given twenty-six days after the injury is not as soon as practicable.

Additionally, Baptist maintains Downs' delay in giving notice completely undermined the purpose behind the notice statute, as it was not given the opportunity to minimize the problem or investigate at an earlier time the facts pertaining to the injury. Baptist posits the statutes are no longer interpreted to mean that delay in giving notice is excusable if the employer was not prejudiced. Baptist argues delay is excused only by the employer's actual knowledge of the claim or by mistake or other reasonable cause. Baptist maintains the issue is not whether Downs has a "reasonable reason for the admitted delay" but whether she met her burden of proof of showing that she gave notice as soon as practicable. Baptist acknowledges "on reconsideration" the ALJ applied the correct standard. However, Baptist insists he only provided a generic statement that the notice was given "'as soon as practicable'" under the circumstances and provided no further analysis or explanation as to why Downs could not have given notice sooner. It argues finding Downs had a reasonable explanation for the delay in giving notice "is a far cry from finding that she could not have given notice

sooner."

Downs, the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including notice. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Downs was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ may reject any testimony and believe or

disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving notice. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Downs testified that on July 1, 2010, she was working for Baptist as a home health aide which required her to make visits to patients' homes. On July 1, 2010, Downs was in the process of taking a patient's temperature when she dropped the thermometer. She bent over to get the thermometer and when she straightened up she could barely move. Downs explained her back was really tight and she experienced a sharp pain at the belt line which extended from her left buttocks to her left foot. Although she had prior low back problems, Downs admitted that before this incident she had never experienced pain that extended into her leg and foot. At the December 21, 2011, hearing, concerning what she did after experiencing this pain and why she did not immediately report the injury, Downs testified as follows:

> Q: Okay. After you stood up and you had this pain, what did you do?
>
> A: Well, I – actually I left. I told her – I told her that I was leaving, 'cause I was done. But, then I got in the car, I went to the store and got a patch to put on my back and continued to work.
>
> Q: Did you call your supervisor that day?
>
> A: No.
>
> Q: Did you call your supervisor the next day?

A: No.

Q: Can you tell the Judge why you didn't call your supervisor that day?

A: Because I thought it was going to go away. I just – I just thought it was going to go away.

Q: When did you finally let your supervisor know something had happened?
A: The day I went to the doctor.

Q: Okay. What made you go to the doctor?

A: I couldn't hardly get out of the car. It had gotten worse.

Q: Okay. That was on July 27th, when you were seen. And, who did you go see?

A: Doctor Heimer.

Q: Why would you call Doctor Heimer?

A: She's my doctor.

Q: Okay. And, what type of symptoms were you having on July 27th?

A: The same thing. The same stabbing pain was in my back and it was going down my leg.

Q: Why would you call the doctor then, if it was the same?

A: No. I mean, because it was hurting. You talking about was it worse than the first day?

MS. SCHOTT: Yes.

A: No. It was worse, 'cause I couldn't get out of the car then.

Q: Okay. And, the reason why I'm asking you that is I was looking through Doctor Loeb's report. And, to me, it seems as though you're having difficulty articulating or maybe perhaps Doctor Loeb had difficulty understanding. Doctor Loeb's report, on Page 2 states, and I'm just quoting from it, she states this particular incident did not cause any change in the character of her pain, but has continued to give her discomfort, whereas other episodes of back pain you were having July 1st through July 27, is the same character of pain that you'd had prior to July 1st?

A: No.

Q: Would you explain to the Judge how it's different?

A: Because now, when – I can't do the things that I normally do. Like, when I'm sleeping, I have to lay on pillows. And, I can't – when I go to Penny's [sic] – if I go to Penny's [sic], I don't walk through the mall. I get back in my car and go to the next store, because it hurts, I can't walk that far.

Q: Doctor Loeb's report further states, on the other hand, she continues to work during her normal job duties.

A: Right.

Q: She does normal house work and drives an automobile without any difficulty. Would you consider those words to characterize what the difference is in your back after July 1st, 2010, as prior to July 1st, 2010?

A: Are you asking me is it a difference?

MS. SCHOTT: Yes.

A: Yeah. This is a difference.

Q: Are you able to do your job?

A: Yeah. I still do it, but I'm in pain, but I do it.

Q: Why?

A: Because I have to work.

Downs testified that after she went to the doctor on July 27, 2010, she told her supervisor she had been to the doctor and hurt her back and the doctor gave her "three days off." Downs testified she had a second conversation with her supervisor during which she told her supervisor she did not hurt her back that day, July 27, 2010, but had hurt it a couple of weeks before. Downs provided her supervisor with the name of the patient she was caring for at the time she was injured. Downs testified that on July 28, 2010, she contacted workers' compensation and was told she needed to fill out some papers. The document Downs filled out is attached to her deposition as Exhibit 2.

On cross-examination, Downs again explained why she decided to wait four weeks before she sought medical treatment testifying as follows:

A: 'Cause [sic] I just thought it was going to go away, like the other ones did.

> Q: But, the other ones you hadn't had pain down your leg?
>
> A: No.
>
> Q: So, is it a situation where you were hoping it was going away?
>
> A: Yes. I thought it was – I just thought it was, because, like I said, the other one did go away.

KRS 342.185(1) reads, in relevant part, as follows:

> Except as provided in subsection (2) of this section, no proceeding under this chapter 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. . .

KRS 342.200 reads, in relevant part, 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.

Case law firmly supports the premise an employee is not required to report every "minor accident" to his or her employer. Turner, Day & Woolworth Handle Co. v.

Morris, 101 S.W.2d 921, 924 (Ky. App. 1937). When a condition produced by an accident is a "latent one" and the effects of the accident are not immediately serious, an employee's duty to provide notice to his or her employer pursuant to KRS 342.185 is not yet triggered. Id. Only when it becomes "reasonably apparent that a compensable injury has been sustained" is the duty to provide notice triggered. Id.

In the case *sub judice*, we believe the ALJ could reasonably conclude Downs did not believe she had sustained an injury; but had merely aggravated a previous back condition which would eventually get better. Thus, we believe the record supports the ALJ's finding Downs' belief her low back problems would soon resolve constituted a reasonable basis for the delay in giving notice.

We find the case of Hay v. Swiss Oil Co., 60 S.W.2d 385 (Ky. App. 1933) to be persuasive. In Hay v. Swiss Oil Co., supra, Hay's job involved operating the engine of a drilling machine. On April 13, 1921, Hay had difficulty starting the engine and was forced to pull hard on it to get it started. Hay "felt a pain and turned sick and blind. He had to walk off and sit down; was sick at the stomach; felt a sharp burning pain and broke out in a sweat. After he rested a while, the sickness wore off and

he went back to work." Hay at 385. Hay worked the next day, and felt the pain again when he started the engine. "This continued, when he started the engine, from day to day for about a month, when a knot appeared on his side. He then went to see his foreman about this problem. This was May 13th." Id. Hay continued to work until August 24th when he went to the doctor and was diagnosed with a hernia. Hay had surgery the next day. In referring to the statutory duty to provide timely notice, the former Court of Appeals, predecessor to the Supreme Court, stated as follows:

> It is the well-settled rule that the statute must be liberally construed to effectuate its purposes. It does not appear that appellee was in any way prejudiced by the delay in giving notice. Working men are not expected to know the meaning of the symptoms they may have. They should not trouble their employer with complaints without reasonable grounds for doing so. Appellant in good faith continued at work and gave notice to the foreman when the knot appeared, and, when he treated it lightly, went on with his work until the knot troubled him, then went to the mine doctor and for the first time knew of the hernia from him. There was no such delay here in giving notice as affected appellant's rights under the statute. The delay was occasioned by a reasonable cause. The employer's principal representative had knowledge that the employee had received the injury when the knot appeared and he was so notified.

Id. at 386-387.

Also persuasive is the case of Bartley v. Bartley, 274 S.W.2d 48 (Ky. 1954). In that case the claimant, Bartley, sustained an injury to his back and lower spine on November 8, 1952, while working in a coal mine. "He made no complaint about being injured to a fellow employee who was working near him, nor to any of the mining officials. He said that he was unable to continue working that day, and as he left the mine he told one of the owners of the mine that he was sick." Bartley at 49. Bartley entered St. Joseph Hospital due to his continued back pain on January 18, 1953, and was operated on January 27, 1953, for a ruptured disc. On the issue of timely notice, the former Court of Appeals, now Supreme Court, stated as follows:

> The evidence introduced in behalf of the appellee coal company shows conclusively that it received no notice of appellant's alleged accident and injury until December 22, 1952. Several witnesses, who were employed at the mine on November 8, 1952, and who saw the appellant leave the mine that day, testified that appellant said nothing to them about being injured, but did hear him tell Dora Blevins, one of the owners of the mine, that he was sick.
>
> The question of whether or not there was reasonable cause shown for the delay in giving notice of the injury to the appellee coal company must be first determined. In cases of this character we have said that KRS 342.185 should be liberally construed in favor of the employee to effectuate the beneficent

> purposes of the Compensation Act. Turner, Day & Woolworth Handle Co. v. Morris, 267 Ky. 217, 101 S.W. 2d 921; Bates & Rogers Construction Co. v. Allen, 183 Ky. 815, 210 S.W. 467. In view of the nature of the alleged injury suffered by the appellant and the known fact that herniated discs often appear gradually and are disabling in proportion to the degree of progress of the herniation, we conclude as a matter of law the notice was adequate and was given as soon as practicable.

Id. at 49.

In the case of Bates & Rogers Const. Co. v. Allen, 210 S.W. 467 (Ky. App. 1919), the Court of Appeals, now Supreme Court, declared that the statutory requirement of providing notice "as soon as practicable" should be given a liberal construction so as not to defeat a meritorious claim. The Court stated as follows:

> The words "as soon as practicable" should be given a liberal construction, so as not to defeat, without just cause, the compensation to which a meritorious claimant is entitled, and when a claimant, acting in good faith, attempts to give the notice very shortly after he learns the nature and extent of his injury, and within the year, he should not be denied compensation, unless it appears that the employer "was in fact misled to his injury" by the failure to receive earlier notice, and there is no fact or circumstance in this record conducing to show that the delay in giving the notice prejudiced in any manner the rights of the Bates & Rogers Construction Company.

Where notice is not given “as soon as practicable,” but the failure to give it “as soon as practicable” is caused by “mistake or other reasonable cause,” this excuses the failure to give the notice “as soon as practicable,” and therefore, in considering the question whether a notice was given “as soon as practicable,” and an excuse is offered for this failure, it becomes important to inquire into the sufficiency of the excuse, so that it may be determined whether or not the failure to give the notice “as soon as practicable” was occasioned by “mistake or other reasonable cause,” and also whether the employer was prejudiced by the delay.

Where the employer is not prejudiced by the failure to give the notice at as early a date as it might have been or should have been given, and where the failure to give it sooner was occasioned by an honest mistake on the part of the employé, we do not think a fair consideration of the statute warrants the rejection of the employé's claim for compensation solely on account of the delay in giving notice. It is only important that the employer should have notice of the injury as soon as practicable, in order that he may have opportunity to investigate the cause of the injury, as well as the nature and extent of it, and take such action as he may think advisable to protect his interest; and if it was made to appear that the employer's rights were prejudiced by the failure to give the notice at an earlier date than it was given, it would require stronger evidence to support the excuse for the failure or delay in giving it than should be required when the delay did not occasion any injury to the employer, or in any manner prejudice his interest.

Id. at 473-474.

In Bates & Rogers Const. Co., supra, the Court held as follows:

> The law was primarily intended for the protection and benefit of employés, and its beneficent purpose should not be defeated by a strict or technical construction that would deprive the employé of the compensation to which he would clearly be entitled without contest if he had prosecuted his claim with diligence.

Id. at 474.

As articulated by the Supreme Court of Kentucky in Autozone, Inc. v. Brewer, 127 S.W. 653, 655 (Ky. 2004), "the goal when construing a statute is to determine and effectuate the legislature's intent."

In the case *sub judice*, the record reveals Downs was not engaged in strenuous activities when she experienced pain in her lower back. Further, the pain Downs experienced did not prevent her from finishing her shift. There is no dispute Downs continued to work over a twenty-six day period without missing any work. Downs' testimony establishes it was only after her condition continued to worsen that she saw her doctor. After Downs saw her doctor, she provided notice to her employer of the injury on that same day explaining she was not injured on that day but a couple of weeks earlier. We believe Downs'

testimony explaining why she did not give Baptist notice until July 27, 2010, the day she first saw a doctor, constitutes substantial evidence supporting the ALJ's determination that Downs provided notice to Baptist "'as soon as practicable' under the circumstances presented," and reasonable cause existed for not giving notice of Downs' injury until July 27, 2010.

Accordingly, the February 16, 2012, opinion and award and the March 23, 2012, order denying Baptist's petition for reconsideration by Hon. John B. Coleman, Administrative Law Judge, is **AFFIRMED**.

ALL CONCUR.

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