Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 26, 2016

CLAIM NO. 201460001

HILDI L. KORSE PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

BAPTIST HEALTH LEXINGTON
HON STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Hildi L. Korse ("Korse") appeals from the March 25, 2016 Opinion and Order and the May 6, 2016 Order on Petition for Reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ") dismissing her claim against Baptist Health Lexington ("Baptist Health") for failure to give due and timely notice. On appeal, Korse argues the ALJ erred in dismissing the claim because

she gave notice to an agent of Baptist Health on the day of the injury. Alternatively, Korse argues that if there was a delay, it was excusable because the employer was not prejudiced, an agent had knowledge of the injury, and/or Korse made a reasonable mistake. Finally, Korse argues the ALJ ignored the beneficent purpose of the Act. For the reasons set forth herein, we affirm.

Korse testified by deposition on August 6, 2015 and at the hearing held January 27, 2016. She was employed by Baptist Health as a registered nurse. She testified she injured her back on November 3, 2014 when she was assisting a technician in moving a patient. She reported the injury to Lee Ann Cunningham, the technician, when the injury occurred.

Korse had soreness in her back, but was able to finish her shift. However, she awoke the next morning unable to get out of bed. Korse believed she only had a muscle strain and fatigue. She sought treatment with Dr. Stan Sizemore, but did not report her injury to Baptist Health until November 17, 2014, when she notified the HR department. She was taken off work for two weeks. Korse admitted that, from the date of injury until November 17, 2014, when she called the employer’s staffing office to

inform them she was not able to work, she reported she was missing work due to migraines and she was using her FMLA time. Korse never returned to work at Baptist Health.

Korse was involved in a motor vehicle accident in 2007. At that time her body "ached all over" but she did not seek medical treatment. Korse admitted she had numerous health problems prior to the alleged work injury, including a prior back injury, a rotator cuff tear, fibromyalgia in her thoracic spine, neck and shoulders, sleep issues, restless leg syndrome, anxiety and post-traumatic stress disorder. She has treated for migraines since 2010. Prior to 2014, Korse was taking muscle relaxers due to the diagnosis of fibromyalgia. Her fibromyalgia primarily affected her mid back, neck and shoulders. Korse denied telling anyone at work that she had back pain prior to the alleged work injury. She acknowledged she had intermittent sciatic pain beginning in 1996 after a pregnancy, but the problem became chronic after the November 2014 incident.

Tara Bucher ("Bucher"), director of Building 5 North for Baptist Health, testified by deposition on September 15, 2015. She supervised the employees in the building, including Korse. During orientation, the

employees were instructed to notify her, the clinical house supervisor, or employee health of any work injuries. Bucher confirmed she was working on November 3, 2014. Korse did not report a work injury on that date. Bucher first became aware Korse was claiming a work injury from Human Resources two or three weeks after the date of the alleged injury. Prior to November 2014, Korse had used FMLA time for migraines and fibromyalgia not attributable to any work incident. Bucher did not recall Korse ever making a specific complaint of back pain.

Lee Ann Cunningham, a patient care technician for Baptist Health, testified by deposition on September 15, 2015. Cunningham asked Korse to assist in moving a patient on November 3, 2014. Korse helped boost the patient up in bed through the use of a draw sheet. The process took five seconds. Cunningham stated this was the only time Korse assisted in moving the patient on that occasion. Korse did not indicate she had injured her back, nor did she make any complaint of soreness in her back. Prior to that day, Korse had declined to assist moving patients due to soreness in her back and numbness in her arm, which she never related to her work activities.

The ALJ made the following findings relevant to this appeal:

> Here, it is clear that the Plaintiff did not give prompt notice of her alleged 11/3/2014 injury, pursuant to the requirements of KRS 342.185(1). She admits that the first notice she gave to Defendant/Employer was on 11/17/2014, approximately two weeks after the alleged incident occurred.
>
> Instead of informing Ms. Tara Butcher [sic], who was her supervisor, on the day of the incident, or the day after when she alleges that she could not get out of bed, Ms. Korse waited until 11/17/2014 to notify Human Resources, which is not the appropriate procedure for employees to give notice of their work-related injuries.
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> However, even more bizarre is that Ms. Korse did inform her employer when her doctor ordered her off work for two weeks, but not only failed to mention the alleged work injury, but told whoever she contacted that she was off due to her fibromyalgia (migraines) and asked to be carried on Family Medical Leave Act status.
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> The testimony of Ms. Butcher [sic] and the aide who worked with Plaintiff on 11/3/2014, Ms. Cunningham, indicates that the Plaintiff never reported or made any complaints to them of any alleged back injury. Plaintiff's supervisor did not find out about the alleged 11/3/2014 incident until several weeks after its alleged occurrence, from HR. Even if Ms. Korse' notification to HR were

considered proper procedure, it was still two weeks after the alleged occurrence and thus not timely pursuant to KRS 342.185(1).

Ms. Korse's testimony indicates that she knew right away that she hurt her back, and that she "could not get out of bed" the next day, yet she indicated to the staffing office of Defendant/Employer that her migraines were the reason that she was missing work.

If in fact, by 11/4/2014, Ms. Korse could not even get out of bed due to her back pain, it was practicable for her to notify Defendant/Employer of her alleged work-related injury. She failed to do so and she has not produced any valid reason as to why it was not practicable for her to give notice of her alleged back injury at that time.

. . . .

Here, however, Ms. Korse ignored several opportunities to give the employer due and timely notice of her alleged injury, but simply failed to do so for no sufficient reason. In fact, if one believes her testimony, she actually lied to the employer as to the reason for her absence, although she articulated no reason as to why she would do so.

Due to the lack of timely notice and the inexcusable and unreasonable delay in reporting the alleged incident on the part of Korse, her employer was unfairly prejudiced through loss of the ability to conduct a prompt investigation of Plaintiff's alleged work-related injury. As such, I conclude that the issue of failure to give due and timely notice of her

> alleged injury is sufficient reason alone to dismiss Ms. Korse's claim pursuant to KRS 342.185(1).

Korse filed a petition for reconsideration making essentially the same arguments she raises on appeal. In his May 6, 2016 Order on Petition for Reconsideration, the ALJ indicated he had considered all of the evidence and made the factual determination that Korse ignored several opportunities to provide prompt notice, and provided no sufficient reason for such failure. The ALJ further noted Korse lied to the employer regarding the reason she was missing work for the two weeks following the alleged injury. The ALJ noted he felt the employer was unfairly prejudiced through the loss of the ability to conduct a prompt investigation of the alleged work-related injury. The ALJ denied the petition for reconsideration as an impermissible re-argument of the merits of the claim.

On appeal, Korse argues the ALJ erred in finding notice was not given promptly because she gave notice to an agent of the employer on the date of injury. She contends she informed Ms. Cunningham, the tech she was assisting at the time of the injury. Alternatively, she argues the notice given on November 17, 2014 was timely. She contends that notice two weeks after the injury would be sufficient

to enable the employer to provide prompt medical treatment and would have allowed the employer to investigate the incident. If it is determined there was a delay of two weeks in giving notice, Korse argues the delay was excusable because Baptist Health was not prejudiced by the delay. Korse again asserts Baptist Health had knowledge of the injury through its agent, Ms. Cunningham. Additionally, she contends Baptist Health had knowledge that something was wrong when she failed to show up for work. Korse states she told the employer she was not feeling well. She notes she is not a doctor and does not have the ability to diagnose an occupational injury. She told the staffing office she was sick. She contends she was mistaken as to the reason she was off work and could reasonably believe her fibromyalgia was the reason she was feeling sick. Finally, she argues the ALJ failed to consider the beneficent purpose of the Act and did not liberally construe the term "as soon as practicable".

As the claimant in a workers' compensation proceeding, Korse had the burden of proving each of the essential elements of her cause of action, including the fact she provided due and timely of her work-related injury to Baptist Health. Snawder v. Stice, 576 S.W.2d 276 (Ky.

App. 1979). Because she was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

KRS 342.185 requires notice of a work-related accident be given to the employer "as soon as practicable after the happening thereof." KRS 342.190 requires notice be provided in writing, and must include the time, place, nature and cause of the accident as well as the nature and extent of injury. KRS 342.200, however, provides:

> 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.

Thus, a delay in giving notice can be excused if the employer, his agent, or representative had knowledge of the injury. Additionally, a delay in giving notice may be excused due to mistake or other reasonable cause.

The Kentucky Supreme Court held in Granger v. Louis Trauth Dairy, 329 S.W.3d 296 (Ky. 2010), the ALJ was correct in dismissing a claim based upon inadequate notice, and affirmed the ALJ's refusal to find an excusable delay in reporting the injury pursuant to KRS 342.200. The Court noted the purpose of the notice requirement is threefold: to enable an employer to provide prompt medical treatment in an attempt to minimize the worker's ultimate disability and the employer's liability; to enable the employer to investigate the circumstances of the accident promptly; and to prevent the filing of fictitious claims. The Court further noted that although a lack of prejudice to the employer excuses an *inaccuracy* in complying with KRS 342.190, it does not excuse a *delay* in giving notice. Having failed to convince the ALJ that he gave notice of the accident and resulting injury "as soon as practicable", his burden on appeal was to show the decision to be unreasonable under the circumstances because overwhelming evidence compelled a favorable finding.

While Korse has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. Testimony was conflicting as to whether Korse informed Ms. Cunningham of the alleged injury. The ALJ found Ms. Cunningham's testimony more persuasive and determined Korse did not provide notice on the date of the accident. He acted well within his discretion in doing so. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

Korse admits she did not tell the staffing office in the two weeks following the alleged injury that she had sustained a work injury. The evidence does not compel a finding notice was given prior to November 17, 2014 or that the employer had knowledge of a work injury prior to that date. The ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

There is no specific timeframe for satisfying the notice requirement and the ALJ has discretion in making the determination of whether notice was given "as soon as practicable" based on the specific circumstances of the

case. Newberg v. Slone, 846 S.W.2d 694 (Ky. 1992). As the ALJ noted, Korse testified she knew she had sustained a work injury on November 3, 2014. Substantial evidence supports the ALJ's conclusion it was practicable for Korse to give notice of the injury by November 4, 2014 when she could not get out of bed because of her back condition. The ALJ determined notice two weeks after the incident is not "as soon as practicable" and substantial evidence supports that finding. Therefore Korse had the burden of showing the delay was in some way excusable.

The ALJ determined Korse offered no valid explanation as to why she did not report the injury sooner than November 17, 2014. She never argued to the ALJ, as she does on appeal, that she was mistaken as to the reason she was taken off work following the incident. Again, it is important to note Korse testified she knew immediately she had hurt herself at work. She admitted she told the staffing office that she was off for migraines and she was using FMLA time.

The ALJ concluded Korse's delay in giving notice unfairly prejudiced the employer through loss of the ability to promptly investigate the alleged injury. Korse is essentially asking the Board to re-weigh the evidence

and substitute our view for that of the ALJ on the factual determination of whether the delay prejudiced the employer. We may not do so. The evidence falls far short of compelling a finding notice was given in a timely manner or that any delay in providing notice was excusable.

Finally, we note the ALJ was well aware of precedent stating the statute is to be construed liberally in favor of the employee to effectuate the beneficent purposes of the Act. In fact, the ALJ expressly stated as much and cited Marc Blackburn Brick Co. v. Yates, 424 S.W.2d 814 (Ky. 1968) for that proposition.

Accordingly, the March 25, 2016 Opinion and Order and the May 6, 2016 Order on Petition for Reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, NOT SITTING.

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