Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 1, 2016

CLAIM NO. 201590088

JOHN BLICKENSTAFF PETITIONER

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

UNITED PARCEL SERVICES INC
HON. JOHN B COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. John Blickenstaff ("Blickenstaff") appeals from the January 15, 2016 Opinion and Order dismissing his claim and the February 12, 2016 Order rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"). On appeal, Blickenstaff argues notice was properly given to his employer. For the reasons set forth herein, we affirm.

Blickenstaff filed his claim on June 1, 2015 alleging an injury to his back on October 1, 2014 as a result of repetitively lifting and moving boxes during the course of his employment with United Parcel Service, Inc. ("UPS"). He began working for UPS as a part time employee in 2000 and became a full time employee in November 2011. His work involved handling and sorting packages weighing up to 150 pounds.

Blickenstaff began to experience low back pain in the summer of 2014. His back pain increased and started radiating into his leg in October 2014. He did not attribute his increase in pain to lifting any particular box.

Blickenstaff stated he gave notice to Jordan, a supervisor, and was able to work through his pain on October 1, 2014. However, at the hearing, he testified the notice was given to Heather, another UPS supervisor. He stated he woke the next morning "crying in pain" and visited Dr. Qi Lisa Feng at the Lexington Clinic. He followed up with Dr. Y. Peter Liu on two occasions in October 2014 and was referred to Dr. James Bean. At his deposition, Blickenstaff was specifically asked which medical provider was the first to tell him his low back

condition was related to his work at UPS. Blickenstaff responded that Dr. Feng had informed him on October 1, 2014. At the hearing, Blickenstaff was questioned as follows:

> Q. Now, you were asked at one point in the deposition if a doctor ever told you it was work related, and you said Dr. Feng. Could you tell us a little bit more about that?
>
> A. When I went to Dr. Feng, I told her that I had hurt my back and that it was very painful, and that I thought that I had done it at work the night before, and she did not disagree with that.
>
> Q. I just want to be careful we don't get into hearsay. So she didn't disagree with the history you took [sic]?
>
> A. Correct.
>
> Q. She never expressly told you it was work related?
>
> A. No.

Heather Helton ("Helton"), a supervisor for UPS, testified by deposition on December 2, 2015. She stated Blickenstaff had been trained regarding the UPS policies regarding giving notice of work place injuries, which requires employees to immediately report injuries to full or part time supervisors. Blickenstaff had not reported any injury or soreness in his back to her during the summer

or fall of 2014. She was aware Blickenstaff went on FMLA leave in October 2014, but she did not know the reason for the leave. Helton first became aware of Blickenstaff's back complaints in March 2015, but was not aware of the workers' compensation claim until a few weeks prior to her deposition. Helton testified Blickenstaff did not work on October 1, 2014. Attendance records indicate he last worked on September 29, 2014 before going on leave.

UPS filed the first report of injury which was completed on March 23, 2015. The form indicates a date of injury of September 27, 2014, and that notice was first given on March 23, 2015. Blickenstaff claimed an injury to his lower back as a result of lifting boxes on September 27, 2014. He claimed no lost time from the injury.

Todd Padgett, a twilight manager for UPS, testified by deposition on December 2, 2015. Padgett confirmed Blickenstaff had reported four prior work injuries, though none were communicated to him in the summer or fall of 2014. He indicated it is his practice to initiate an investigation when informed of any alleged injury. Padgett first learned Blickenstaff was alleging an October 2014 work injury in March 2015 when he inquired about medical bills. Blickenstaff was scheduled to be off

work during the first three weeks of October 2014 on FMLA leave. Records attached to Padgett's deposition indicate Blickenstaff indicated "My Own Medical Condition" as the reason for his leave of absence.

Clay Ramsey, Blickenstaff's supervisor on the night sort job, testified by deposition on December 2, 2015. He stated neither Blickenstaff nor his supervisors reported a low back injury in the summer or fall of 2014. Mr. Ramsey first learned from an attorney approximately three weeks prior to the deposition that Blickenstaff was alleging a work injury.

Blickenstaff submitted treatment records from Drs. Feng and Liu of the Lexington Clinic. On October 1, 2014, Blickenstaff gave a history of chronic low back pain. Dr. Feng noted he works at UPS and "does lots of lifting." Blickenstaff complained of severe low back pain radiating to the right hip for two weeks prior to the visit. A lumbar MRI revealed minimal degenerative changes with minimal to mild neural bilateral foraminal narrowing at L4-5 and L5-S1.

On October 3, 2014, Dr. Liu saw Blickenstaff for follow-up. Dr. Liu noted Blickenstaff had been seen for low back pain without any injury. Dr. Liu's assessment was

low back pain with right leg pain and paresthesia, likely from lumbar strain, and bulging disc and radiculopathy. Lexington Clinic's billing was submitted to his health insurance carrier rather than the workers' compensation carrier.

Blickenstaff submitted records from Dr. Michael Pugh, D.C. concerning treatment from November 25, 2014 through November 16, 2015. Blickenstaff cited chronic pain as the reason for his visit, but he provided no explanation for the cause or date of onset for the condition.

Dr. Joseph Zerga evaluated Blickenstaff on November 3, 2014. He noted Blickenstaff "has always had occasional back pain" but nothing that required medical attention prior to September 22, 2014. Blickenstaff said he was lifting a box when he experienced pain in his back, running down the side of his left leg. He continued to work and did not report a work injury.

UPS filed an October 30, 2015 letter from Dr. Zerga. He indicated Blickenstaff gave a history of some pre-existing back pain with a significant aggravation in late September when he was lifting a box. Dr. Zerga diagnosed low back pain with non-verifiable radicular complaints. The proximate cause of Blickenstaff's symptoms

is the incident occurring on or about September 22, 2014. Dr. Zerga did not feel Blickenstaff had a permanent harmful change to the human organism as a result of that incident. He would have reached maximum medical improvement in November 2014. Dr. Zerga assigned a 5% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, ("AMA Guides") attributing 25% of that rating to pre-existing symptoms.

Dr. Frank Burke performed an independent medical evaluation on September 10, 2015. Blickenstaff reported an acute work injury at work on October 1, 2014. He was loading and pushing boxes and "developed a strain" in his low back. He awoke the next day with acute severe spasm in his back with radiation into his left buttock and into his leg. Dr. Burke concluded, "This patient sustained an acute onset of a lumbosacral strain with associated left L5 radicular pain pattern on 10/1/2014 at work." He noted this was consistent with the October 2, 2014 MRI findings, his history, and physical examination. Dr. Burke assigned a 5% impairment rating pursuant to the AMA Guides.

In the January 15, 2016 decision, the ALJ found:

> This is an interesting claim that the plaintiff is alleging a cumulative

trauma injury and the defendant denying the receipt of due and timely notice. A review of the entirety of the evidence, not only as summarized above, but as contained in the entire record convinced me the plaintiff suffered a specific traumatic injury in the course and scope of his employment with the defendant on September 22, 2014. This comes from the detailed history given by the plaintiff to Dr. Zerga in November 2014. Dr. Zerga specifically indicated the plaintiff's impairment and condition was the result of that specific traumatic event. This is important given the fact the notice requirement is different for specific traumatic injuries as opposed to cumulative trauma injury.

The plaintiff alleges he gave due and timely notice by reporting work related back pain to his supervisor, Heather Smith, on October 1, 2014. The defendant denies receipt of that notice and argues that notice was not received until reported by the plaintiff on March 28, 2015. The evidence leads me to believe the defendant's version of events. Additionally, I note the plaintiff's current testimony in regards to giving notice in October 2014 is directly contradicted by the history he gave to Dr. Zerga on November 3, 2014. I find no reasonable explanation for Dr. Zerga to include in his medical record the statement, "He did not report a work incident." Additionally, the plaintiff is not new to the procedures of the defendant in reporting workers' compensation claims. The evidence indicates the plaintiff had completed first reports of injury on three prior occasions and had, in fact, received temporary total disability following a left elbow

injury in 2006. The fact the plaintiff was familiar with reporting injuries and entitlement to temporary total disability following a work injury is important, especially in light of the fact that on this occasion, the plaintiff applied for FMLA which he noted to be for his "own medical condition." The testimony of the lay witnesses for the defendant was consistent that the plaintiff had not reported a work related low back injury to them and that the first notice the plaintiff was alleging a work related low back injury was on March 28, 2015.

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 SW2d 722 (Ky. 1956). Whether 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 SW2d 814 (Ky., 1968).

In this instance, the plaintiff was under the care of competent physicians as he sought treatment with Dr. James Bean and Dr. Joseph Zerga. However, the plaintiff's near six-month delay in giving notice was not explained. Instead, the plaintiff ignores the admission to Dr. Zerga as well as Dr. Zerga's opinion on causation and argues that his condition is cumulative trauma. The third and

> perhaps, most important, reason for the notice requirement is to prevent the filing of the claims when the lapse of time makes proof of lack of genuineness difficult. In this instance, the plaintiff has had difficulty pinpointing the day of his work related injury as he initially alleged October 1, 2014 only to discover that he did not work that day. He subsequently amended his claim to allege the date of injury of September 29, 2015 [sic]. However, when he sought treatment in October of 2014, he informed his physicians that his condition had been present for a couple of weeks. In November of 2013 [sic], he gave Dr. Zerga a specific date of September 22, 2014, but also admitted to having prior back pain. This scenario makes the ability of the defendant to examine the genuineness of the plaintiff's claim very difficult. While I sympathize with the plaintiff in that he does have an injury with impairment, I am compelled by the law to find the notice was not given as soon as practicable under the circumstances and there was no excuse for the delay. The plaintiff's claim for medical and income benefits for a low back injury occurring in September or October, 2014 must be and is DISMISSED.

Blickenstaff filed a petition for reconsideration, arguing notice was timely given because he had sustained a gradual work injury. By order dated February 12, 2016, the ALJ denied the petition as a re-argument of the merits and stated the Opinion and Order contained sufficient findings of fact and analysis to

support dismissal of the claim for failure to give notice as required by KRS 342.185.

On appeal, Blickenstaff asserts the ALJ erred in finding notice was not timely because the injury is a gradual injury rather than a specific trauma injury. He contends notice was not required before Dr. Burke issued his report following the September 10, 2015 evaluation. UPS admits it received notice of a work injury in March 2015. Blickenstaff argues it was error for the ALJ to view this as a specific trauma claim because it was filed as a cumulative trauma claim. Further, he contends the evidence establishes his work at UPS was very physically demanding. Finally, Blickenstaff contends UPS was not prejudiced by any delay in giving notice.

As the claimant in a workers' compensation proceeding, Blickenstaff had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he 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).

The record contained substantial evidence supporting the ALJ's conclusion that Blickenstaff sustained a specific trauma injury rather than a cumulative trauma injury. In his October 30, 2015 report, Dr. Zerga refers to a history of some pre-existing back pain with "a significant aggravation" in late September 2014 when he lifted a box. Although Dr. Burke noted a history that Blickenstaff performed tasks including loading and pushing heavy boxes for fifteen years, he expressly stated the symptoms were the result of a specific acute trauma on October 1, 2014 producing a low back strain. Dr. Burke did not believe Blickenstaff sustained a cumulative trauma injury and his report is silent regarding the cause of any prior low back symptoms. In fact, no physician of record indicated cumulative trauma caused either the underlying condition or the increase in symptoms experienced in September or October 2014.

The ALJ correctly analyzed the notice requirements relating to specific trauma injuries. There

was conflicting testimony regarding when Blickenstaff provided notice. The ALJ was well within his role as fact-finder in choosing to rely on the testimony of Ramsey, Padgett and Helton. These witnesses testifed notice was not given prior to March 2015, approximately six months after the date of the alleged injury. Additionally, Dr. Zerga specifically noted Blickenstaff had not reported a work injury to his employer.

KRS 342.185 requires notice of an injury be provided to the employer "as soon as practicable" after the happening thereof. As noted by the ALJ, 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 ALJ addressed each of these considerations in his analysis set forth above. The Kentucky Supreme Court, in Granger v. Louis Trauth Dairy, 329 S.W.3d 296 (Ky. 2010), explained 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", Blickenstaff's burden on appeal is to show the decision to be unreasonable under the circumstances because overwhelming evidence compelled a favorable finding.

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). If the injury results from an acute trauma, as the ALJ determined, the sufficiency of notice is measured from the date of the episode. Marc Blackburn Brick Co. v. Yates, 424 S.W.2d 814 (Ky. 1968). Here, the evidence does not compel a finding notice was given prior to March 23, 2015. Based upon the totality of the evidence, we cannot find unreasonable or clearly erroneous the ALJ's finding that notice approximately six months after the alleged trauma was not given "as soon as practicable". Because the ALJ's finding is supported by substantial evidence, we may not conclude otherwise. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the January 15, 2016 Opinion and Order and the February 12, 2016 Order rendered by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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