

OPINION ENTERED: June 28, 2013

CLAIM NO. 200801391

MCKESSON CORPORATION

PETITIONER

VS.

APPEAL FROM HON. EDWARD D. HAYS,  
ADMINISTRATIVE LAW JUDGE

PHYLLIS D. HALE  
and HON. EDWARD D. HAYS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: ALVEY, Chairman, and STIVERS, Member.

**STIVERS, Member.** McKesson Corporation ("McKesson") appeals from the March 12, 2013, Amended Opinion on Remand rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), finding Phyllis D. Hale ("Hale") gave due and timely notice of an alleged neck injury. On appeal, McKesson argues the ALJ's finding is not supported by substantial evidence. As

the record contains substantial evidence supporting the ALJ's finding, we affirm.

Hale testified by deposition on January 22, 2009, and at the hearing held March 29, 2012. Hale was injured on March 31, 2008, when her "chair shot out from under me, I went airborne and down onto my left side, left shoulder, left side." Hale testified she does not remember feeling any pain at that time, but she notified her supervisor within five minutes after the incident. She completed her shift and drove home. Later that night, Hale experienced stabbing pain in her left shoulder and eventually developed low back pain. Hale continued her employment with McKesson for approximately two more weeks.

Hale testified she first sought medical attention on April 2, 2008, from Dr. Jackie D. Maxey, her family physician. He prescribed Lortab and muscle relaxers, referred her to physical therapy and ordered left shoulder and lower back MRIs. Hale sought a second opinion from Dr. Ronald S. Dubin. She was also referred to Drs. Daniel D. Primm and William J. Lester. Hale testified she treated with Drs. John Balthrop and Gregory D'Angelo for her left shoulder. Dr. D'Angelo performed shoulder surgery on February 16, 2009, which helped somewhat; however, she continues to experience pain daily. Hale testified she has

seen Drs. William H. Brooks and Dubin for her low back. She continues to experience pain. She did not reference any neck problems during her deposition.

At the hearing, Hale testified she has seen Dr. Brooks, Dr. G. Christopher Stephens and Dr. Amr O. El-Naggar for cervical spine problems. Dr. El-Naggar performed a cervical fusion surgery on June 29, 2010. On cross-examination, Hale admitted she did not complain of neck problems until May 15, 2009. Hale testified she has had no prior neck or shoulder injuries.

Hale introduced Dr. Maxey's records. On April 2, 2008, he noted complaints of low back and left shoulder pain following a work-related fall on March 13, 2008. On April 9, 2008, Hale complained of spastic pain in her left trapezius region and low back pain with bilateral radicular symptoms. Dr. Maxey diagnosed trapezius spurs, back spurs, and low back pain. On April 23, 2008, Dr. Maxey noted "neck/trapezius pain" and diagnosed neck spurs, trapezius spurs, and low back pain.

Hale attached Dr. Dubin's October 24, 2008, medical record to her Form 101. Dr. Dubin noted complaints of back pain radiating down her left lower extremity. His examination revealed "her neck is normal." Dr. Dubin diagnosed left shoulder partial rotator cuff tear and low

back pain with sciatica symptoms. Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition ("AMA Guides"), Dr. Dubin assessed an 8% impairment rating for her lumbar spine injury and a 9% impairment rating for her shoulder, yielding a combined 17% impairment rating.

Hale submitted the January 29, 2009, record of Dr. Brooks, who saw Hale for back pain radiating into her lower extremities. Dr. Brooks diagnosed degenerative disc disease and musculoligamentous strain.

Hale submitted the medical records of Drs. Balthrop and D'Angelo with Bluegrass Orthopaedics & Hand Care who treated Hale's left shoulder. On November 12, 2008, Dr. Balthrop diagnosed an incomplete rotator cuff tendon tear and bursitis, and administered a cortisone injection. Dr. D'Angelo performed shoulder arthroscopy on February 16, 2009, and diagnosed left shoulder chronic impingement, acromioclavicular joint arthritis and supraspinatus rotator cuff tear. In a September 13, 2010, medical report, Dr. D'Angelo noted Hale continued to have left arm symptoms following shoulder surgery and requested a cervical MRI. Dr. D'Angelo referred Hale to a neurosurgeon to address her left arm complaints.

Hale also submitted the medical records of Dr. El-Naggar, a neurologist, who performed cervical fusion surgery at C5-C6 on June 29, 2010. In a July 12, 2010, follow-up note, Hale reported improvement in her left arm. On August 16, 2010, Dr. El-Naggar noted improvement to her neck and left upper extremity, but with some remaining left arm pain. Dr. El-Naggar diagnosed "HNP cervical," cervical spondylosis, neck pain and cervical radiculitis. He placed Hale at maximum medical improvement ("MMI") and assessed a 25% impairment rating pursuant to the AMA Guides.

Hale submitted the report of Dr. Stephens who evaluated Hale on July 24, 2009, at McKesson's request. He noted complaints of neck pain radiating into the left arm and low back pain radiating into the left leg. He diagnosed right carpal tunnel syndrome, non-work-related; cervical disk herniation producing left C6 radiculopathy; and low back pain with some radiation into the left leg. Dr. Stephens believed her neck, arm and low back complaints were related to the March 13, 2008, accident. Regarding her cervical spine, Dr. Stephens opined Hale is a candidate for surgery and assessed a 5 to 25% impairment rating, depending on the type of treatment chosen. On March 23, 2010, Dr. Stephens opined cervical surgery would provide a reasonable

chance of improvement or relief of her cervical radiculopathy.

McKesson submitted Dr. Primm's January 20, 2009, report. Dr. Primm diagnosed morbid obesity, lumbar strain superimposed on history of chronic low back pain symptoms, and left shoulder strain. Dr. Primm opined Hale did not sustain a permanent injury due to the March 2008 accident and declined to recommend restrictions. However, he noted her chronic active lower back condition may have been aggravated, at least temporarily, by the March 2008 accident.

McKesson filed the July 21, 2011, medical report of Dr. Martin Schiller who opined the March 13, 2008, fall should have caused, at most, a contusion to her left shoulder and buttock. He also opined Hale suffered from a psychiatric disease. He opined Hale's rotator cuff tear did not result from landing on the lateral aspect of the shoulder. Rather, the cuff tear is a pre-existing, degenerative finding not related to an injury. He found Hale has long standing, pre-existing degenerative disc disease in the lumbar and cervical spine, and further noted her cervical surgery was done because of the degenerative changes. He believed Hale exhibited several Waddell findings and engaged in symptom magnification.

In the initial decision dated June 1, 2012, the ALJ found Hale sustained injuries to her left shoulder, low back and neck as a result of the work accident and awarded permanent total disability benefits based upon those conditions. Despite a petition for reconsideration seeking further findings of fact regarding notice of the cervical injury, the ALJ provided no further findings in his July 9, 2012, order denying McKesson's petition for reconsideration.

McKesson appealed, arguing the alleged cervical injury claim should be barred pursuant to KRS 342.270(1) since Hale failed to amend her Form 101, Application for Resolution of Injury Claim, to include her alleged cervical injury. McKesson also argued it did not stipulate due and timely notice of the neck injury, and contended the medical evidence established Hale did not voice any neck complaints until almost one and a half years after the March 13, 2008, fall.

In an October 19, 2012, opinion, this Board held the cervical injury was tried by consent, but remanded the claim for further findings of fact, directing the ALJ to determine whether Hale provided due and timely notice of the cervical injury. The Board directed no particular finding on the issue.

On remand, the ALJ found as follows:

With respect to the Defendant-Employer receiving notice of the specific injuries claimed by Ms. Hale, it is noted that the incident occurred on March 13, 2008. Ms. Hale continued to work for a couple of weeks after the incident. She first sought medical treatment from her family physician, Dr. Jackie Maxey, on April 2, 2008. Claimant saw Dr. Maxey on April 23, 2008. The notes of Dr. Maxey indicate Ms. Hale was complaining of "neck/trapezius pain" and assessed neck spurs, trapezius spurs and low back pain. These notes were attached to the Form 101 that was filed on November 5, 2008.

The Form 101 listed the injured body parts as "left shoulder, hip and back." The claimant has argued in her brief that the "back" includes the cervical, thoracic, and low back areas. In any event, the examination by Dr. Maxey at which the Claimant complained of neck pain occurred just forty-one (41) days after the date of the accident. The Defendant-Employer introduced an independent medical evaluation by Dr. Mark Schiller dated July 21, 2011. In reviewing the medical records, Dr. Schiller commented that "Dr. Maxey noted that she (Ms. Hale) was having neck and low back pain and saw her on 06/11/08, 08/12/08, 09/09/08 and 10/22/08." Dr. Schiller's report also states, "Dr. Maxey noted on 04/09/08 immediately after the injury that she was complaining of left neck pain and radicular bilateral upper extremity pain and had trapezius spasms." Dr. Schiller then discussed the cervical spine injury in his report.

During testimony given by Ms. Hale at the Formal Hearing conducted on March 29, 2012, Ms. Hale testified that a

caseworker by the name of Jeanne Fulmer was assigned to her case and accompanied her at her medical examinations. Claimant also stated that Ms. Fulmer was given information regarding her cervical condition (transcript of hearing, p. 37-38). This testimony by the Plaintiff was not refuted or rebutted by anyone.

Dr. William Brooks submitted a report dated January 29, 2009, opining that Ms. Hale's symptoms were worsened by the March 13, 2008, accident, albeit a pre-existing condition. Dr. Greg D'Angelo requested a cervical MRI in September of 2010. Dr. Amr El-Naggar performed a cervical fusion surgery at C5-C6 on June 29, 2010. Dr. El-Naggar diagnosed "HNP cervical," cervical spondylosis, neck pain, and cervical radiculitis. Dr. Christopher Stevens [sic] evaluated Ms. Hale on July 24, 2009, at the request of the Defendant-Employer. He noted complaints of neck pain radiating into claimant's left arm and low back pain radiating into her left leg. He diagnosed a cervical disc herniation producing a left C6 radiculopathy, among other things. Dr. Stevens [sic] opined that Ms. Hale's neck, arm, and low back complaints all related to the March 13, 2008, accident.

KRS 342.185(1) provides in part "... No proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been provided to the employer as soon as practicable after the happening thereof..."

Based on the evidence set forth above, the ALJ finds that due and timely notice was given to the Defendant-Employer as soon as practicable. Within five minutes after the incident occurred that produced the injuries, Ms. Hale

reported the matter to her supervisor. Within days (less than a month) Ms. Hale was complaining to her family physician, Dr. Maxey, of neck and trapezius pain. The Defendant-Employer assigned a case manager to accompany Ms. Hale on her medical visits and information was given to the case manager, according to the un rebutted testimony of the Claimant. It cannot be said that Defendant was unaware of the neck injury of which the Plaintiff complains. The case manager was present with Ms. Hale throughout her cervical MRIs, the cervical surgery, and her subsequent treatment. The physicians who evaluated Ms. Hale at the request of the Defendant-Employer were aware of her complaints of cervical pain and their opinions of the cervical injury are part of the record. These reports were submitted by the Defendant as a part of its medical evidence. The ALJ finds that the Defendant-Employer, McKesson, received due and timely notice of Ms. Hale's alleged neck injury.

On appeal, McKesson argues the ALJ's finding Hale gave due and timely notice of the cervical condition is not supported by substantial evidence. McKesson contends references to neck complaints in the medical records shortly after the work incident and the fact a case worker was assigned to her are not sufficient evidence to establish it was on notice of a work-related cervical condition or injury. McKesson contends there is no evidence the case worker was apprised of the elements of the work injury, or that she actually sat in on any of the medical appointments.

McKesson again argues Hale failed to join her claim for the cervical injury as required by KRS 342.270(1). McKesson contends it was not aware of the additional injury and was prejudiced by Hale's failure to give due and timely notice.

It is well-established a claimant in a workers' compensation claim bears the burden of proving each of the essential elements of her cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Hale was successful in her burden of proof regarding the issue of notice, the question on appeal is whether the ALJ's determination is supported by substantial evidence. 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).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). As fact-finder, the 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). 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). To reverse, 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).

McKesson's arguments on appeal regarding notice are essentially an attempt to have the Board re-weigh the evidence and substitute its opinion for the ALJ's. Additionally, the question of whether Hale's claim for the neck injury was properly before the ALJ was previously litigated in the first appeal in which the Board determined the issue was tried by consent. McKesson did not appeal the Board's prior decision. In Inman v. Inman, 648 S.W. 2d 847 (Ky. 1982) the Supreme Court said:

The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions of law and not questions of fact. "As the term 'law of the case' is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an

appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term 'law of the case' is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court." [citation omitted]

Id. at 849.

Therefore, our holding that the cervical injury claim was tried by consent and our direction to the ALJ are the law of the case, and on remand, the ALJ was only required to determine if due and timely notice of Hale's cervical condition or injury was provided.

KRS 342.185 provides notice of an accident must be "given to the employer as soon as practicable after the happening thereof." The question of adequate notice must be determined by the factual situation in each claim. Kirkwood v. John Darnell Coal Co., 620 S.W.2d 170 (Ky. 1980); Columbus Mining Co. v. Childers, 265 S.W.2d 443 (Ky.

1954). Notice has two components - the first being notice of the accident or incident, and the second being notice of the injury. In light of KRS 342.190, KRS 342.185 has been construed to mean notice of "accident" means notice of "injury" which must be given as soon as practicable. Proctor & Gamble Mfg. Co. v. Little, 357 S.W.2d 866 (Ky. 1962).

However, the courts have long held that if the employer has notice of the incident or accident which reasonably might be expected to cause an injury, the employer is then held to be reasonably apprised of the probability of injury so no further notice is necessary until the injury gradually progresses into a compensable state which is diagnosed. See Reliance Diecasting Co. v. Freeman, 471 S.W.2d 311 (Ky. 1971); Roe v. Semet-Solvay Division Allied Chemical and Die Corp., 268 S.W.2d 416 (Ky. 1954).

There are no strict procedural requirements for giving notice. Although KRS 342.190 specifies notice is to be in writing, this requirement is merely directory, not mandatory. Clover Fork Coal Co. v. Washington, 247 Ky. 848, 57 S.W.2d 994 (Ky. App. 1933). Any verbal information, for example, communicated to the employer is sufficient where it brings knowledge of the work-related

injury or condition. See Carr v. Wheeler, 265 S.W.2d 490 (Ky. 1954); Newberg v. Slone, 846 S.W.2d 694 (Ky. 1992).

In the present case, due and timely notice of the accident on March 13, 2008, was given by Hale to her employer that same day. The Board has held, on a number of occasions, that requiring an injured worker to not only provide due and timely notice of her injury but also to notify the employer each time a new diagnosis is made by a physician during the course of medical treatment is a burden not required by KRS 342.185 or KRS 342.190. Hale was treated for her left shoulder injury. When the treatment to relieve her symptoms failed, attention turned to her cervical condition. After shoulder surgery failed to relieve her symptoms, Dr. D'Angelo requested a cervical MRI.

A reasonable inference that can be drawn from the evidence is that although Hale had some cervical complaints shortly after the incident, the true nature of her condition was not apparent until the shoulder surgery failed to relieve her symptoms. Dr. El-Naggar performed cervical fusion surgery on June 29, 2010, which was approved by McKesson's workers' compensation carrier. As noted by the ALJ, Hale's testimony her medical records were supplied to the case worker is unrebutted. Dr. Stephens,

who evaluated Hale at the request of McKesson, also had access to the pertinent medical records. He opined the cervical condition was the result of the work injury and his report was provided to McKesson. Thus, McKesson had notice of the work-relatedness of the cervical condition at that time. McKesson was informed of the cervical condition on numerous occasions and had ample opportunity to defend the claim regarding that condition. The record contains substantial evidence supporting the ALJ's finding McKesson received due and timely notice of the cervical condition or injury. Based upon the evidence in the record, we are unable to hold the ALJ's finding was clearly erroneous or so unreasonable it must be reversed as a matter of law.

The ALJ followed the Board's instructions on remand and concluded Hale provided due and timely notice. This determination will not be disturbed, as it is supported by substantial evidence.

Accordingly, the March 12, 2013, Amended Opinion on Remand rendered by Hon. Edward D. Hays, Administrative Law Judge is **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

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