

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: August 28, 2015

CLAIM NO. 201401672

RAYMOND TUNGETT

PETITIONER

VS.

APPEAL FROM HON. STEVEN G BOLTON  
ADMINISTRATIVE LAW JUDGE

IRVING MATERIALS INC  
HON. STEVEN G BOLTON,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**RECHTER, Member.** Raymond Wade Tungett ("Tungett") appeals from the March 31, 2015 Opinion and Order dismissing his claim and the May 6, 2015 Order on Petition for Reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"). Tungett argues the ALJ

erred by concluding timely notice was not provided. For the reasons set forth herein, we affirm.

Tungett testified by deposition on November 11, 2014 and at the hearing held January 28, 2015. He was employed by Irving Materials, Inc. ("Irving") as a cement truck driver. On Saturday, May 31, 2014, he was pouring concrete when there was a delay which caused the concrete to set up in the chute. While using a 2x4 to pry loose the concrete, Tungett felt a pop in his low back and experienced immediate, burning pain into his right leg. He used his cell phone to call his supervisor, Kevin Fernander, and reported the injury to his back.

On Monday, Tungett testified he returned to work but "didn't feel very good" and "couldn't hardly walk." He told the men in the shop what had happened and then went to his truck. While cleaning the chutes, he felt a burning pain in his low back but did not discuss this incident with anyone. He did not work on Tuesday or Wednesday, and attempted to seek medical treatment at Norton Immediate Care Center near Preston Highway. There, he characterized his condition as work-related but was informed he would need to have workers' compensation paperwork completed, which he did not have. He did not request the paperwork from Irving. Instead, the following day, he went to a different

Intermediate Care Center near Fern Creek and reported the condition was not work-related.

Tungett returned to work on Thursday and fell off a truck, causing an increase in his back pain. He indicated he fell because he could not turn his body to get into the truck. Tungett called the dispatcher and told him he was in "bad shape" and could not work that day. He used his private health insurance to pay for his treatment until his coverage lapsed.

Tungett's testimony at the final hearing regarding the May 31, 2014 incident was consistent with his deposition testimony. He denied any prior history of back pain, and stated he had pain all weekend following the initial injury. On the following Monday, he worked a difficult delivery, then spoke with George Nugent, the dispatcher supervisor, and told him he hurt his back again. Tungett asked that he be assigned easier jobs for the rest of the day.

At the final hearing, Tungett admitted he lied to the personnel at the Fern Creek Immediate Care Center, denying any work injury so he could receive treatment. He also reiterated that he fell on Thursday June 5th while coming down the steps on his truck. On this date, Tungett claimed he went inside and told some mechanics his back was

hurting. He radioed the dispatcher and said he had to see a doctor and could not work.

Kevin Fernander ("Fernander") testified by deposition on December 18, 2014 and at the hearing. Fernander was a plant and driver supervisor in May and June of 2014. He has known Tungett since 2011, when he was hired, and considered him to be a good friend. Fernander received a call from Tungett who related the problem with the concrete setting up in the chutes. Tungett did not complain about his back, nor did he report any injury at that time. Fernander saw Tungett at work on Monday June 2<sup>nd</sup>, but did not speak to him. The following day, Tungett called Fernander to say he could not work. Tungett indicated he did not know what he had done to his back and did not report an injury at that time. Fernander was informed by a dispatcher that Tungett had fallen from his truck on June 5<sup>th</sup>. Fernander explained new drivers are instructed to report every injury immediately or before the end of the shift. He indicated Tungett and the other drivers were "good about" reporting even minor injuries.

Mike Tolin, safety manager for Irving, testified by deposition on December 18, 2014 and at the hearing. He learned of the alleged injuries on June 5, 2014 from the human resource representative who had been contacted that

morning by a medical provider. Tungett was asked to return to the plant that day to discuss the situation, but he did not return. Tungett attended a meeting on June 9, 2014. At the meeting, Tungett did not describe the specific mechanism of his injury, but felt his condition was work-related. He was advised to pursue treatment through his health insurance.

Irving filed records from Norton Immediate Care Center. A June 5, 2014 billing form indicates Tungett sought to have his treatment for a work injury billed to Irving. On June 6, 2014, Tungett was treated at Norton Immediate Care Center Fern Creek for a low back ache reported to have begun five days earlier. It was noted he was unable to work the last "couple days" due to pain, but there is no indication of a work injury in the records of that visit.

Dr. Christopher Combs of Family Medicine East saw Tungett on June 12, 2014 and received a history of back pain since May 31, 2014 starting gradually after stirring concrete with a 2x4 and later exacerbated by lifting chutes. Dr. Combs diagnosed lower back pain and prescribed medication.

Dr. Jules J. Barefoot performed an Independent Medical evaluation ("IME") on November 10, 2014. He noted a

history of the May 31, 2014 injury with persistent, worsening pain thereafter, and diagnosed degenerative disc disease of the lumbar spine with non-verifiable radicular complaints. Dr. Barefoot assigned an 8% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition entirely attributable to the May 31, 2014 injury. Dr. Barefoot stated Tungett may have had degenerative disc disease in his lumbar spine prior to the work injury, but it was asymptomatic, dormant and non-disabling.

Dr. Thomas M. Loeb performed an IME on January 6, 2015. He noted a history of the May 31, 2014 injury and a subsequent strain at work on June 2, 2014. Dr. Loeb diagnosed multilevel degenerative disc disease with a possible herniated disc at L5-S1 with absent ankle jerk to the right side and possible spinal stenosis or foraminal stenosis. Based upon the history provided by Tungett of the May 31 and June 2, 2014 injuries, Dr. Loeb apportioned 10% of Tungett's current condition to the work incidents and 90% to the longstanding, pre-existing degenerative condition of his back.

The ALJ first discussed the issue of notice, and provided the following analysis:

It would appear that while it is not exactly on point, the case of *Granger v. Louis Trauth Dairy*, 329 S.W.3d 296 (Ky. 2010) is applicable. Granger failed to give notice of a work-related accident until months after it transpired because he felt it was not serious. Neither did he seek medical help for what he took to be a minor bruise.

The Supreme Court upheld the dismissal of Granger's claim and noted he had the burden of proof to show that he gave notice of his accident and resultant injury "as soon as practicable". Where notice was clearly non-compliant with the standard, the court noted the savings clause in KRS 342.200 in cases where it must be proved that the employer was in fact misled to its injury thereby, or the employer had actual knowledge of the injury or that the delay or failure to give notice was based on a mistake or "other reasonable cause".

Here, KRS 342.200 is inapplicable. The employee had ample opportunity to report an injury to his low back. He failed to do so, and in fact denied any injury to company officials. He worked without complaint or apparent restriction for an additional week, then apparently abandoned his job with the defendant. He shortly attempted to regain the same job with another employer that unbeknownst to him had been bought by the defendant herein. He failed to report any injury to a physician examining him for his lower back.

Clearly, the employer was misled to its injury. Not having any notice of injury, it was unable to procure possible treatment for its (former) employee, nor was it able to obtain

contemporary medical diagnoses as to the seriousness and source of the claimed injury until well after the fact.

Plaintiff does dispute that the employer had no actual notice of the claimed injury. He claims it was given to several people at the defendant's place of business. However, he introduced no probative evidence to support that proposition.

For these reasons, we need go no further than the lack of notice, which under these circumstances deprives the Board [sic] of jurisdiction to make an award of benefits to the Plaintiff.

Tungett filed a petition for reconsideration challenging the ALJ's finding that notice was not timely provided. In the May 6, 2015 Order on Petition for Reconsideration, the ALJ denied the petition as a re-argument of the merits of the claim.

On appeal, Tungett complains the ALJ erred in finding sufficient notice was not given. He argues applicable case law requires that a substantial amount of time must have passed between the injury and notice, and that the employer be prejudiced by the delay. Tungett emphasizes that, even if the ALJ chose to disbelieve he reported the injury by phone to Fernander, Irving undeniably had notice of the incident involving the fall from the truck on June 5, 2014, and from a medical provider within a week

of the initial incident. Tungett argues the employer could not be prejudiced within such a short time.

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), that 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.

Tungett had the burden of proving each of the essential elements of his cause of action, including the fact he provided due and timely of his work-related injury to Irving. 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). As the fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from 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).

Tungett did not have a latent injury. Rather, he consistently testified to a specific incident and obvious cause. He testified he had no prior back problems and experienced a distinct pop in his back on May 31, 2014 with immediate pain that persisted. "The nature of the injury is important on the question of notice insofar as it relates to the knowledge of the injured person of the extent of his injury." Marc Blackburn Brick Co. v. Yates, 424 S.W.2d 814, 816 (Ky. 1968).

There was conflicting testimony regarding when Tungett provided notice. The ALJ was well within his role as fact-finder in choosing to rely on the testimony of Mr. Fernander that notice was not given in the May 31, 2014 cell phone conversation and that Tungett specifically stated in a subsequent call that he did not know how he had injured his back. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

Because Tungett was clearly aware of the acute injury on the date it occurred, he has not shown a mistake as the reason for the delay in giving notice. There was no witness to the May 31, 2014 event, so actual knowledge of the injury has not been shown. Tungett has offered no explanation that constitutes "other reasonable cause" for the delay.

Contrary to Tungett's assertions on appeal, 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). The evidence does not compel a finding notice was given prior to June 5, 2014. Based upon the totality of the evidence, we cannot say the ALJ's finding that notice was not given "as soon as practicable" was unreasonable or clearly erroneous. 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). The evidence falls far short of compelling a finding notice was given in a timely manner.

Accordingly, the March 31, 2015 Opinion and Order and the May 6, 2015 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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