OPINION ENTERED: AUGUST 30, 2012

CLAIM NO. 201101167

RURAL TRANSIT ENTERPRISES COORDINATED, INC. PETITIONER

VS. **APPEAL FROM HON. GRANT ROARK, ADMINISTRATIVE LAW JUDGE**

KAREN MINK
and GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

* * * * * *

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

SMITH, Member. Rural Transit Enterprises Coordinated, Inc. ("Rural Transit") appeals from the March 23, 2012 Opinion, Order and Award rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"), awarding Karen Mink ("Mink") permanent partial disability ("PPD") benefits, temporary total disability ("TTD") benefits, and medical benefits as a result of a cumulative trauma injury to her low back. Rural Transit also appeals from the April 18,

2012 Order overruling its petition for reconsideration. On appeal, Rural Transit argues timely notice was not given and the ALJ erred in finding a work-related injury. Alternatively, Rural Transit challenges the duration of the award of TTD benefits. We disagree and affirm the ALJ's decision.

Mink testified by deposition on October 13, 2011 and at the hearing held January 24, 2012. Mink was employed by Rural Transit as a transit driver, transporting patients to their appointments. In addition to driving, she would push wheelchairs, transfer people from chairs to seats and help them on and off the shuttle bus. Mink began having back pain three or four years before she stopped working in November 2010. She testified that no specific incident occurred. Her back pain "got so bad that I just couldn't handle it, so I called my supervisor up and told her. I said I've got to go. I said there's something bad wrong, I've got to go." Mink stated other drivers and her supervisor knew about her back problem. However, she never told anyone at work she had been hurt on the job.

At the hearing, Mink testified she began to have back pain in 2005 or 2006 which continued to worsen. She described her work as follows:

> I was a transit driver. I did lots of wheelchairs, bending over in awkward positions with no room to get in between the –- the older vans you couldn't get in between the thing so you had to stoop over without touching them, and a lot of lifting. We -– back in the whole -– most of the whole thing we had to transfer -– like group outings at nursing homes transfer them from wheelchair to seat, lift them wheelchairs, put you know back -– and I did a lot of early dialysis which were -– most were heavy people. The ramps, you know, were so hard. When you lift it, it pulled in through gravels.

Mink stated the last minivan she drove had a “regular lift” that she had to lift and fold. Many passengers had been paralyzed from strokes and were unable to help.

Mink acknowledged past treatment with Dr. Maria Hortillosa who gave her cortisone injections. She stopped working when she realized she could no longer physically perform her job. She told her employer “something was the matter, that I didn't know exactly what it was. But something was the matter.” As she had in her deposition, Mink stated she never told anyone at work she had been hurt on the job and she could not remember a specific incident at work where she injured herself. She denied any injury from specific incidents away from her work.

Mink testified Dr. Hoskins was the first doctor to inform her that her back pain was work-related. Mink was questioned as follows:

> Q. Now, Dr. Hoskins' report there is a sentence in there in the second paragraph that says Ms. Mink attributes the onset and deterioration of her lower back condition to her work activities as a driver for rural transit enterprises. Now, did you tell him that?
>
> A. Yes.
>
> Q. Okay – have you told any other Dr. that you attribute the onset and deterioration of your lower back condition to your work activities as a driver?
>
> A. No.
>
> Q. And, when did you make the determination that your low back condition and the onset deterioration was due to your work as a driver for rural transit enterprises?
>
> A. When I knew it was when my discs was blowed out or whatever you call it.
>
> Q. And, that was in December of 2010?
>
> A. Yes.

On re-cross examination, Mink was questioned as follows:

> Q. It's sort of a chicken and egg question. Did you tell him that you attributed your back problems to work before he told you?

> A. No. He told -– he told me how -– you know, he had it in the report how bad it was, so -– which I knew it was bad.

Mink filed the report of Dr. Robert Hoskins who conducted an evaluation on August 1, 2011. Dr. Hoskins recorded the following history:

> Plaintiff is a 49-year-old white female who presents with complaints of lower back and left lower extremity pain that reportedly manifested several years ago and gradually grew worse with time -– she denies any particular single macro–traumatic event. Ms. Mink attributes the onset and deterioration of her lower back condition to her work activities as a driver for Rural Transit Enterprises.
>
> Ms. Mink initially managed her discomfort via various self–care measures at home such as over–the–counter medications, heat, topical analgesics, and stretching. When the efficacy of such measures eventually decreased, she went to see her family physician around 2005 or 2006. Ms. Mink claims that medication prescribed by her physician along with vocational paraspinal injections allowed her to tolerate her physical job demands and remain productive at work for several years. Unfortunately, the pain about her lower back continued to intensify and reached a point around November 2010 at which she could no longer continue working. She presented to the emergency department at UK Hospital on 12–16–10 and was admitted with diagnoses of intractable back pain and a history of adenocarcinoma. A lumbar MRI study was performed shortly afterwards and demonstrated a L4-5 disc

> herniation to the left. She subsequently had a left L4–5 micro discectomy on 12–22–10. Ms. Mink was discharged home on 12–25–10. She claims that the surgery was somewhat helpful, but failed to entirely resolve her pain.
>
> Unfortunately, Ms. Mink had recurrent lower back and left lower extremity pain in February 2011. She returned to UK Hospital and a lumbar MRI scan demonstrated a recurrent L4–5 disc herniation to the left. She subsequently had a second left L4–5 microdiscectomy on 03–01–11. She was released from the hospital the following day. Ms. Mink was last seen by the neurosurgeon 2–3 months ago and claims that she was released from care. She is now seeing her family physician on a monthly basis and takes Oxycodone 5 mg.

Mink voiced complaints of lower back pain, stiffness and weakness, constant numbness about the second, third and fourth toes on the left foot, intermittent pain down the left lower extremity to the level of the foot, and multiple positional intolerances and limitations with activities of daily living. Dr. Hoskins noted Mink had an 11 year work history with Rural Transit, but she had not worked since her family doctor had placed her off work in November 2010. Dr. Hoskins diagnosed residual left L5 radiculopathy, history of two left L4–5 microdiscectomies, lumbosacral sprain/strain and history of recent abdominal surgery for malignant adenocarcinoma. Dr. Hoskins stated, within

reasonable medical probability, Mink's injury was the cause of her complaints. He provided the following explanation of the causal relationship:

> Ms. Mink's job involved assisting wheelchair–dependent and often–large individuals into transportation vehicles -– some of which lacked mechanical lifts. Such work required pushing wheelchairs up ramps and often picking up individuals in wheelchairs from awkward body postures and maneuvering them in tight quarters. Ms. Mink's lumbar spine was subjected to cumulative trauma over many years in the form of compressive loading and torsion forces during the aforementioned activities that contributed to the development of a left L4–5 disc herniation.

Dr. Hoskins assigned a 24% whole person impairment pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition, ("AMA Guides"). He indicated Mink did not have an active impairment prior to the work injury. Dr. Hoskins stated Mink reached maximum medical improvement ("MMI") as of August 1, 2011. Dr. Hoskins indicated Mink did not retain the physical capacity to return to the type of work she performed at the time of her injury.

Rural Transit filed medical records from Dr. Hortillosa documenting treatment from January 2008 through September 19, 2011. The handwritten notes are, for the

most part, illegible. A November 19, 2010 note refers to back pain. On November 26, 2011, Dr. Hortillosa refers to lower back pain beginning six days earlier. On December 7, 2011, she noted Mink had left lower back pain radiating into the left buttock and thigh. On December 9, 2010, Dr. Hortillosa noted "L/spine – Degenerative disc disease." She noted lower back pain on December 21, 2010 and her March 24, 2011 note contained a diagnosis of lower back pain. Dr. Hortillosa's records also contain a March 24, 2011 request for records from Mink's attorney indicating Mink "sustained injuries to her back after repetitive traumas. Her last day of employment was November 29, 2010."

Rural Transit also filed medical records from the University of Kentucky Medical Center. A discharge report contains the following history:

> Mrs. Mink is a 48-year-old white female with recently found adenocarcinometous cells of sacitic fluid of unknown origin. She has been complaining of back pain, lower back, progressing in severity over the past 4 weeks. It will go to a 9-10 out of 10 continuous, worse with walking and relieved by lying down, radiating down the left thigh, knees and ankles with some weakness on the left lower extremity.

A December 16, 2010 note indicates Mink had "CLBP" for three to four weeks and was diagnosed with left hip pain

radiating into the thigh, knee, calf and ankle causing numbness in her foot. A December 17, 2010 note indicates Mink was admitted for work-up of abdominal pain and back pain she experienced in the past four weeks. A December 17, 2010 consultation note indicates Mink began having increased abdominal and pelvic pressure, worsening foamy diarrhea, and a "knot" in her back approximately one month earlier. An MRI revealed a disc bulge, likely annular tear, and likely sequestered fragment with compression at L5 and some edematous changes. A December 22, 2010 note indicates Mink had a sequestered disc fragment at L4-L5 causing severe narrowing of the left neural recess and compressing the left L5 nerve roots.

Rural Transit filed the report of Dr. William Lester who evaluated Mink on December 22, 2011. In response to a question as to whether Mink suffered a work-related injury as a result of cumulative trauma, Dr. Lester stated "No reported incident at work. No evidence of cumulative trauma. No work-related event reported." In response to a question regarding Mink's impairment rating, Dr. Lester stated:

> Based on history something happened November/December 2010 that patient had ER visit to suspect acute injury. Based on the AMA Guides 5th Edition, page 404, ROM/2 surgeries,

> 10%+2%+2%+1%+1%+3%=19% PPI rating. Secondary to two back surgeries with disc.

Dr. Lester stated there was evidence of current symptom magnification. He indicated he would restrict Mink to sedentary work based upon her subjective complaints. In response to a question regarding what percentage of Mink's impairment rating would be assigned to a pre-existing active impairment, Dr. Lester stated "I could assign an impairment based on cumulative trauma, patient experienced acute process 2 degrees disc." Based on Mink's subjective complaints, Dr. Lester opined Mink did not retain the physical capacity to return to the type of work she was performing at the time of her injury. However, he concluded her objective findings did not match her subjective complaints.

The ALJ's findings relevant to this appeal are as follows:

Notice

> As a threshold issue, the employer disputes plaintiff provided timely notice of her alleged lower back injury as required by KRS 342.185. In this case, plaintiff alleges her lower back condition developed as a result of cumulative trauma due to the physical requirements of her daily job duties over several years. In such cumulative trauma claims, caused by repetitive trauma rather than a single "accident,"

the Court has determined that a worker is required to give notice of a gradual injury when he knows that he has sustained such an injury and knows that it is due to his work. Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999). As explained subsequently, in Hill v. Sextet Mining Corp., 65 S.W.3[d] 503 (2001), [sic] questions of medical causation are matters for the medical experts. For that reason, workers are not required to self-diagnose the cause of their injuries or to draw inferences of causation from an ambiguous diagnosis. Therefore, the correct standard for triggering the notice requirement is not whether the worker reasonably should know that his condition is work-related. Hill v. Sextet stands for the principle that the notice requirement is triggered when a physician informs the worker that he has sustained a gradual injury and that it is caused by his work.

As applied to the present case, the record establishes that the first physician to give plaintiff an opinion that her low back condition is due to the effects of her job duties over several years was Dr. Hoskins when he examined plaintiff on August 1, 2011. Given that plaintiff had not worked for the employer since November, 2010, and given the time it would take for Dr. Hoskins to produce the report of his examination, the notice provided to the employer by plaintiff's counsel in his letter dated August 24, 2011 is considered timely.

Causation/Work–Relatedness

The more contested issue is simply whether plaintiff’s lower back condition and need for surgery(s) is due to the cumulative effect of her job

duties as plaintiff alleges. For its part, the employer maintains plaintiff had back problems going back to 2005 and relies on the opinions of its expert, Dr. Lester, to argue that her current condition and or need for the two surgeries are not due to her job duties.

Having considered the totality of the evidence, the Administrative Law Judge is ultimately more persuaded by the conclusions of Dr. Hoskins than those of Dr. Lester. Dr. Hoskins considered plaintiff's work activities and other history and concluded her complaints are due to the cumulative effects of her work activities. Dr. Lester concluded plaintiff’s back condition and need for surgeries was due to an acute event in October or November, 2010. However, the record does not indicate plaintiff suffered any single, acute injury to her lower back in those months. Instead, the evidence of record more supports plaintiff’s claim that her back pain grew steadily worse over the last few years of her employment with Rural Transit and that it manifest[ed] into a disabling condition in November, 2010. Accordingly, based on the opinions of Dr. Hoskins and the plaintiff's own testimony, he determined plaintiff’s lower back condition and need for treatment/surgeries are work–related and compensable.

. . . .

TTD Benefits

Plaintiff seeks an award of TTD benefits from the date of her injury, when she last worked, through August 1, 2011 when her expert, Dr. Hoskins, placed her at maximum medical

> improvement (MMI). The employer argues, at most, plaintiff is only entitled to TTD benefits for a period not to include the eight week period following plaintiff's unrelated abdominal surgery on June 6, 2011. However, the only expert opinion to address when plaintiff reached MMI for her back injury comes from Dr. Hoskins. The Administrative Law Judge finds nothing to indicate plaintiff reached MMI for her back condition and surgeries prior to August 1, 2011 and nothing to indicate she would have reached MMI for her back at any point prior to the 8 week recovery period following her unrelated abdominal surgery. The fact that plaintiff's recovery period for the two unrelated conditions ran concurrently at the end does not mitigate the recovery period for the back condition alone. Accordingly, it is determined plaintiff reached MMI for her back condition on August 1, 2011 and that she was not able to return to work before then. Plaintiff is therefore entitled to TTD benefits from November 30, 2010 through July 31, 2011, along with interest on all such outstanding benefits.

Rural Transit filed a petition for reconsideration seeking reversal of the ALJ's findings that notice was timely and that Mink suffered a work-related injury. By order dated April 18, 2012, the ALJ overruled Rural Transit's petition without additional findings.

On appeal, Rural Transit argues notice was not given as soon as practicable. Rural Transit notes there is no evidence Mink gave notice prior to the August 24, 2011

letter from her attorney. Rural Transit argues Mink's testimony establishes she attributed her condition to her work in December 2011 for which she failed to give notice for nine months. Rural Transit argues it was prejudiced during that time since it never had the opportunity to dispute the surgeries or submit entitlement to the surgeries to peer review.

Rural Transit next argues no work-related injury occurred. Rural Transit notes the only medical opinion in the record referring to an injury at work is the report of Dr. Hoskins, Mink's evaluating physician. Rural Transit notes, based upon his review of records, Dr. Lester opined there was an acute injury. Further, Rural Transit contends none of Mink's medical records reflect any evidence of a cumulative trauma injury. Therefore, based upon Dr. Lester's opinion, Mink's award should be reversed.

Finally, Rural Transit argues the ALJ awarded TTD benefits for an incorrect period. It notes Mink testified she returned to her pre-abdominal surgery status six to eight weeks after surgery. Rural Transit argues it is entitled to at least relief from its obligation to pay TTD benefits for the eight week period after the abdominal surgery in June 2011.

We find no error in the ALJ's determinations that Mink sustained a work-related cumulative trauma injury and that she gave timely notice. In Hill v. Sextet Mining Corp., supra, the Supreme Court noted as follows:

> In concluding that the claimant sustained a gradual injury, the ALJ chose to rely upon an independent medical evaluation that was conducted by Dr. Gaw. Dr. Gaw examined the claimant on August 13, 1998, and reviewed the MRIs, x-rays, and notes of Drs. Bowles and Coladonato. Among other conditions, he diagnosed degenerative cervical and lumbar disc disease and grade 1 or 2 spondylolisthesis and L5 with left radiculopathy. He testified that the degenerative condition was present as early as 1992 but that because the claimant always returned to an asymptomatic state after periodic flare-ups, had missed work for no more than a few weeks in the past 7-8 years, and was able to run long distances, he did not consider the condition to be active or disabling until after the February 11, 1998, incident. In his opinion, the repetitive insults to the claimant's neck and back from his work as a coal miner had caused a cumulative trauma injury to his spine, aggravating and accelerating both his degenerative problems and the spondylolisthesis.
>
> Dr. Gaw indicated that the spondylolisthesis was the claimant's "biggest problem" and that it had existed as early as 1995. As a preventative measure, he would have recommended at that time that the claimant not lift more than 40-50 pounds and would have advised him to do work that allowed him to change

> positions frequently. Noting that the claimant was working and active up until February, 1998, Dr. Gaw viewed the previous episodes of back pain as being no more than temporary exacerbations of symptoms of the ongoing spondylolisthesis and degenerative disc disease, and he characterized the conditions as being dormant and nondisabling before that time. Whereas, after February, 1998, the conditions were active and disabling.

Id. at 506.

The Supreme Court held as follows:

> Implicit in the finding of a gradual injury was a finding that no one instance of workplace trauma, including those specifically alleged and those of which the employer was notified, caused an injury of appreciable proportion.
>
> . . .
>
> Medical causation is a matter for the medical experts and, therefore, the claimant cannot be expected to have self-diagnosed the cause of the harmful change to his cervical spine as being a gradual injury versus a specific traumatic event. He was not required to give notice that he had sustained a work-related gradual injury to his spine until he was informed of that fact. [Citations omitted]
>
> It is clear that the claimant was aware of symptoms in his cervical spine and associated the periodic flare-up of symptoms with his work long before evaluated by Dr. Gaw, and he also sought medical treatment after some specific incidents of cervical trauma. Furthermore, it is clear that the

> physicians who treated the claimant's symptoms over the years had encouraged him to quit working in the mines and had told him that the work was too stressful. Nonetheless, there is no indication that any of them ever informed him of his work-related gradual injury, i.e., that his work was gradually causing harmful changes to his spine that were permanent. Under those circumstances, we are not persuaded that the claimant was required to self-diagnose the cause of the cervical pain that contributed to his inability to work after February 11, 1998, as being such an injury. On August 13, 1998, Dr. Gaw became the first physician to determine that the claimant's work over the years had accelerated the development of the degenerative condition in his cervical and lumbar spine and had aroused the preexisting spondylolisthesis into disabling reality. This was the first time that a physician had diagnosed a gradual work-related injury. It is not clear whether the claimant was informed of that fact on the date of the exam or later, but he notified the employer of the gradual injury when his claim was filed one month later. We conclude, therefore, that substantial evidence supported the finding that the claimant gave timely notice of the gradual injury to his cervical spine. For that reason and although the ALJ's reasoning was different from our own, the finding should not have been reversed on appeal.

Id. at 507-508.

We believe the above language clearly controls the outcome in the case *sub judice*. Mink's testimony reflects that, although she received treatment for her low back from

Dr. Hortillosa prior to the alleged injury date, she was not told she had a gradual work-related injury. Dr. Hoskins' August 4, 2011 report is the only medical evidence in the record reflecting Mink sustained a gradual work-related injury. Mink sent a letter providing notice to Rural Transit of her work-related injury on August 24, 2011.

As pointed out in Hill v. Sextet Mining Corp., supra, Mink is not required to self-diagnose the cause of the pain and reoccurring symptoms in her back. Further, until informed of the diagnosis by Dr. Hoskins, Mink did not have an obligation to notify her employer of a gradual work-related injury and file a workers' compensation claim. Mink testified no doctor advised her she had a gradual work-related injury prior to August 2011. Likewise, the medical records do not reflect a diagnosis of a gradual work-related injury or that Mink was ever advised she had sustained a gradual work-related injury prior to the time Mink was seen by Dr. Hoskins.

Rural Transit relies upon certain portions of Mink's testimony which establish she was having back problems prior to the alleged injury date and that she attributed her condition to her work in December 2010. This testimony does not establish a doctor had advised she had a gradual

work-related injury at that time. The obligation to notify Rural Transit of an injury was not triggered until after Mink was seen by Dr. Hoskins on August 1, 2011.

Mink's testimony and the opinions of Dr. Hoskins constitute substantial evidence supporting the ALJ's determination Mink was first advised she had a gradual work-related injury after Dr. Hoskins diagnosed a cumulative trauma injury. The ALJ could reasonably conclude notice given on August 24, 2011 was timely. Since the decision of the ALJ concerning the issue of whether Mink gave due and timely notice is supported by substantial evidence, we are without authority to disturb his decision on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Dr. Hoskins' opinion also constitutes substantial evidence supporting the ALJ's finding Mink sustained a work-related cumulative trauma injury. Rural Transit merely identifies conflicting evidence in the record that could have supported a finding in its favor. Rural Transit's arguments are essentially an attempt to have the Board re-weigh the evidence and reach a conclusion contrary to that reached by the ALJ. We are without authority to do so. Special Fund v. Francis, *supra*. The ALJ was well within

his role as fact-finder in choosing the opinion of Dr. Hoskins over that of Dr. Lester.

Finally, we find no error in the ALJ's award of TTD benefits. As noted by the ALJ, Dr. Hoskins was the only physician expressing an opinion as to the date Mink reached MMI. The ALJ further noted there was no evidence indicating Mink would have reached MMI prior to the abdominal surgery. Based upon the evidence, the ALJ properly determined Mink reached MMI on August 1, 2011.

Accordingly, the March 23, 2012 Opinion, Order and Award and the April 18, 2012 Order overruling Rural Transit's petition for reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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