

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 21, 2014

CLAIM NO. 201300464

T & T ENERGY

PETITIONER

VS.

APPEAL FROM HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

LARRY SIZEMORE AND  
HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
REVERSING AND REMANDING

\* \* \* \* \*

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

**RECHTER, Member.** T&T Energy ("T&T") appeals from the May 19, 2014 Amended Opinion and Order on Remand and the June 30, 2014 Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). On remand, the ALJ again determined Larry Sizemore ("Sizemore") provided timely notice of his injury and awarded permanent

total disability benefits and medical benefits. For the reasons set forth herein, we reverse and remand.

The ALJ originally issued an August 30, 2013 Opinion and Order and a October 17, 2013 Opinion and Order on Reconsideration, in which he awarded Sizemore permanent total disability ("PTD") benefits for a neck injury during the course of his employment as a dump truck driver. On appeal, T&T challenged the sufficiency of the evidence supporting the findings Sizemore suffered an injury, gave timely notice of the injury, and is permanently totally disabled as a result of the injury. This Board affirmed in part and vacated in part. The claim was remanded to the ALJ for further findings of fact with respect to the issues of notice and PTD benefits. In our original opinion, we summarized the facts as follows:

Sizemore is a 64-year old man who completed the eleventh grade and later earned his GED. He holds a surface mining license and a commercial driver's license. He has primarily worked as a truck driver his adult life, and exclusively so since 2003. From September 2011 to April 2012, he worked for T&T as a dump truck operator. This position required him to sit in the truck while a loader filled the bed with fifty to sixty tons of earth and rock, then dump the load in another area of the mining site. He repeated this process dozens of time during his typical ten-hour shift. Due to the "violent" shaking and jarring that

occurred when the bed of his truck was being filled by the loader, he described feeling "pretty beat up" after a day's work.

Sizemore recalled waking up one morning in late March 2012 with a "crick" in his neck. The pain did not resolve itself as he anticipated, but consistently worsened over the next four days. He visited Dr. Dustin Chaney, with whom he had been treating for lower back pain since his employment with T&T began in 2011. On April 2, 2012, Dr. Chaney's office note indicates Sizemore "was at work [when] they dropped a large rock into his rock truck and he thought he stretched his neck out then." Dr. Chaney noted a diminished range of motion of the cervical spine, and recommended physical therapy. Sizemore reported some relief from physical therapy, but continued to experience pain from the base of his skull through his left shoulder area. Despite the pain, he returned to work. However, he testified it was difficult to use his left hand to steer the truck while operating the right-hand gear shift.

Due to company-wide lay-offs, Sizemore's employment with T&T was terminated on April 11, 2012. Because his benefits ceased on April 30, 2012, he no longer attended physical therapy and thereafter treated his condition with over-the-counter pain medication and a home exercise program. When asked whether he provided notice of his injury prior to his layoff, Sizemore twice testified that he had not. Written notice of the injury was given to T&T on January 17, 2013.

Sizemore underwent two independent medical evaluations. Dr. Arthur Hughes evaluated Sizemore on May 22, 2013. His

report indicates he reviewed Dr. Chaney's treatment records for neck and shoulder pain from April 2, 2012 through October 11, 2012. However, the only record from Dr. Chaney contained in the record before this Board is the April 2, 2012 office note. Also according to Dr. Hughes' report, Dr. Chaney ordered an x-ray and MRI of the cervical spine on April 2, 2012. The x-ray showed "some straightening of the cervical spine consistent with muscle spasm", and the MRI revealed a lumbar disc bulge and degenerative disc disease in the cervical spine.

Upon physical examination, Dr. Hughes diagnosed neck pain and probable mild left carpal tunnel syndrome. He attributed the neck pain to "a large rock [] dropped into the bed of his rock truck causing the truck to vibrate." Referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition ("AMA Guides"), Dr. Hughes assigned a 5% whole person impairment rating. He recommended Sizemore avoid situations requiring repetitive twisting and extension of the cervical spine, but opined he retains the physical capacity to return to his pre-injury work.

Dr. Daniel Primm evaluated Sizemore on June 14, 2013. He found no evidence of a permanent work-related injury, either "as a result of a specific strain-type injury or from any type of cumulative standpoint." He found no impairment pursuant to the AMA Guides, and opined Sizemore is physically capable of returning to work as a truck driver.

The ALJ relied upon Sizemore's testimony to conclude he had informed John Gregory, T&T's safety

director, of his work injury, which constituted due and timely notice as required by KRS 342.185. The ALJ ultimately determined Sizemore suffered a date-specific injury. He relied upon Dr. Hughes' opinion for this conclusion.

In an opinion dated March 7, 2014, this Board addressed whether due and timely notice had been provided:

The ALJ found Sizemore "gave verbal notice of his work injuries to John Gregory, the defendant's safety director, on April 2, 2012, which was the date of his alleged work injuries." Based on this testimony, the ALJ concluded KRS 342.185(1) had been satisfied.

This is a factually inaccurate summary of Sizemore's testimony. During his deposition testimony, Sizemore was asked if he reported "any injury to the company", to which he responded "no". He then elaborated:

- Q: Who was your supervisor at the time?
- A: Robbie Collins. Now I reported often times that the loader people were not padding the bed of the truck with dirt before the (sic) threw in the big rocks, so.
- Q: Do you know the last time you may have reported that?
- A: Times that I can verify, I would have to get my phone out to do that.
- Q: Okay. And who would you have reported that to?
- A: Robbie Collins and Tony Hamilton.

On cross-examination, Sizemore reiterated he "reported often times that the loader man was hurting me."

At the final hearing, the notice issue was revisited:

Q: Did you ever talk to any of your bosses about them dumping those rocks on you?

A: Several times, and even the safety man.

Q: And, what was the safety man's name?

A: John Gregory.

Later during the final hearing, when again asked if he provided notice of any injury before he left work on April 11, 2011, Sizemore responded he had not. Also, on re-direct, Sizemore restated he had "several" conversations with Tony Hamilton, Robbie Combs, and John Gregory about the rocks being "dumped" too hard. He did not provide a specific date or time of these conversations.

Thus, the ALJ mischaracterized the evidence by stating Sizemore provided notice to John Gregory of his injury on April 2, 2012. In fact, Sizemore never provided the dates he spoke to Gregory, and his conversations were generally about the force of the dumps into his truck. Sizemore twice denied informing anyone at T&T about his injury after April 2, 2012. Simply put, no reasonable inference can be drawn from Sizemore's testimony that he had a conversation with John Gregory, on April 2, 2012, about a specific injury.

Upon review of all relevant portions of the record, we conclude, as a matter of law, Sizemore's testimony does not satisfy the requirements of KRS 342.185 to notify the employer of a

specific injury. We recognize no particular form of notice is required to satisfy the statutory directive prescribed in KRS 342.185. Harry M. Steven Co., Inc. v. Workers' Compensation Board, 553 S.W.2d 852 (Ky. App. 1977). Nonetheless, Sizemore testified only as to generic conversations, occurring at unspecified times, with his supervisors about a general concern he harbored. Under no interpretation can these conversations constitute notice of an actual accident or injury "after the happening thereof".

In its petition for reconsideration, T&T requested further findings of fact regarding the notice issue. When the ALJ amended his opinion to find an injury as a result of a single incident, it was incumbent upon him to revisit the notice issue. This is because the date on which the obligation to give notice is triggered can be different in cumulative trauma versus single incident trauma. For this reason, we vacate that portion of the ALJ's decision finding Sizemore gave timely notice. The ALJ must revisit the issue of notice on remand. Having concluded Sizemore's testimony is inadequate to establish he notified John Gregory of a work-related injury, the ALJ must determine whether notice was otherwise provided to T&T "as soon as practicable".

With respect to T&T's challenge to the award of PTD benefits, we concluded the ALJ had provided insufficient analysis to support the award. Upon remand, the ALJ was requested to enter additional findings of fact and to

conduct an individualized determination concerning the extent of disability.

The ALJ issued an Amended Opinion and Order on Remand on May 19, 2014. With respect to the notice issue, the ALJ made the factual determination Sizemore "thought that he gave due and timely notice of his work injuries to his supervisors and that if he failed to give actual notice to his supervisors, this was excusable under the mistake or other reasonable cause provision of KRS 342.200." Additionally, citing KRS 342.200, the ALJ found "the defendant-employer waived any inaccuracy by the plaintiff in complying with the notice requirement, in that the defendant-employer did not introduce any evidence showing that it was misled as to the plaintiff's injury or that there was any prejudice to the defendant-employer." With respect to the extent of disability, the ALJ again found Sizemore permanently totally disabled.

Following denial of its petition for reconsideration, T&T again appealed. It argues the ALJ inaccurately applied the law to the issue of notice, and that the ALJ's determinations are not supported by substantial evidence. With respect to the award of PTD benefits, T&T argues the ALJ failed to provide sufficient

explanation and the award is not supported by substantial evidence. We first address the issue of notice.

Sizemore alleged an injury date of April 2, 2012. In Dr. Chaney's April 2, 2012 office note, Sizemore reported being injured when a large rock was dropped into the bed of his truck. He was laid off on April 11, 2012. According to Sizemore, counsel provided written notice of his injury to T&T on January 17, 2013, though a copy of that correspondence is not contained in the record and defense counsel denied receipt of same. Sizemore filed his Form 101 on March 28, 2013.

Thus, at best, T&T received written notice of the injury on January 17, 2013, eight months after the alleged injury. Though he was expressly directed to do so in this Board's prior opinion, the ALJ made no finding as to whether Sizemore provided notice "as soon as practicable." Instead, the ALJ focused primarily on KRS 342.200. Implicit in any analysis pursuant to KRS 342.200, is the finding that notice was untimely or inaccurate. In the Amended Opinion and Order on Remand, the ALJ entered the following findings of fact:

I make the factual determination that after Mr. Sizemore's work-related accident and neck injuries on April 2, 2012, he told his supervisors, Robbie Collins and Tony Hamilton, that the

loader employees were not padding the bed of his rock truck with dirt before they threw in the big rocks. I make the further factual determination that after his work-related injuries on April 2, 2012 Mr. Sizemore reported often times to his supervisors that the loader man was hurting him. I make the further factual determination that after his work-related injuries on April 2, 2012, Mr. Sizemore told defendant's safety man, John Gregory, that other employees were dumping those rocks on him. I make the factual determination that Mr. Sizemore's sworn testimony is strongly supported by the medical evidence from his treating physician, Dr. Chaney, who stated in his April 11, 2012 medical report that Mr. Sizemore came to him for neck pain and that when he was at work they dropped a large rock into his rock truck and he thought he stretched his neck out then, and that he felt like he had a crick in his neck, which had been going on for a couple of weeks.

I make the factual determination that Mr. Sizemore thought that he gave due and timely notice of his work injuries to his supervisors and that if he failed to give actual notice to his supervisors, this was excusable under the mistake or other reasonable cause provision of KRS 342.200. I note that the defendant did not introduce any live witnesses, either by deposition or at the Final Hearing, regarding any failure of notice on the part of Mr. Sizemore. I make the factual determination that any inaccuracy by the plaintiff in complying with the notice requirement was not shown by any evidence on the part of the employer to indicate that it was misled or that it incurred any prejudice. I make the factual determination that it is very telling that the defendant-employer did not take

the depositions of any of those individuals as live witnesses at the Final Hearing. In other words, Mr. Sizemore's testimony as to notice is absolutely uncontradicted. In other words, I make the factual determination that the plaintiff gave due and timely notice of his work injuries to his employer as soon as practical after the happening thereof, as per KRS 342.185 and KRS 342.190, and that pursuant to KRS 342.200 that the defendant-employer waived any inaccuracy by the plaintiff in complying with the notice requirement, in that the defendant-employer did not introduce any evidence showing that it was misled as to the plaintiff's injury or that there was any prejudice to the defendant-employer.

An injured worker bears the burden to prove every element of a claim, including timely notice. KRS 342.185 requires notice of a work-related accident be given to the employer "as soon as practicable after the happening thereof." (emphasis added). KRS 342.190 requires notice be given 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.

By its plain terms, KRS 342.200 permits three reasons a worker may raise to excuse an irregularity in complying with the notice requirement. First, a lack of employer prejudice can excuse a worker's inaccuracy in complying with KRS 342.190. A delay in giving notice can be excused if the employer, his agent, or representative had knowledge of the injury. Finally, a delay in giving notice may also be excused due to mistake or other reasonable cause.

The ALJ concluded T&T was not prejudiced by any delay in notification. Despite the insufficiency of the analysis supporting this conclusion, we will accept it *arguendo*. Nonetheless, a lack of employer prejudice may excuse an inaccuracy in complying with KRS 342.190, but "does not waive a delay in giving notice." Trico County Development & Pipeline v. Smith, 289 S.W.3d 538, 542 (Ky. 2008). See also Granger v. Louis Trauth Dairy, 329 S.W.3d 296 (Ky. 2010). Thus, the ALJ's lack-of-prejudice finding is only pertinent if it is first determined Sizemore provided timely, though invalid, notice pursuant to KRS 342.190.

In our prior opinion, we stated Sizemore's testimony was insufficient, as a matter of law, to establish that he provided notice of his injury to John Gregory, T&T's safety director. In the Amended Opinion and Order, the ALJ determined Sizemore's conversations with Gregory and other T&T supervisors occurred *after* April 2, 2012. This factual conclusion is not supported by the evidence. Sizemore testified only to general conversations he had about his concerns. He provided no dates of these conversations. Even if he were unable to provide specific dates, Sizemore gave no indication these conversations occurred *after* his injury. Moreover, he specifically denied, at both the deposition and the final hearing, ever telling any supervisor about his injury prior to being laid off. We have again thoroughly reviewed the record, and Sizemore's testimony. We again conclude there is no evidence upon which to base the conclusion these conversations occurred after April 2, 2012. Therefore, we conclude the ALJ's factual conclusion that these conversations occurred "after April 2, 2012" is unsupported by the evidence.

Furthermore, there is no evidence to support the ALJ's conclusion Sizemore "thought" he provided notice to his supervisors of a specific injury. Once again, Sizemore provided no indication he had any conversations with his

supervisors after he began experiencing symptoms or after his visit to Dr. Chaney. In fact, when asked if he informed a supervisor of the specific injury, he *twice* testified he had not. The record is devoid of any proof upon which to base this factual conclusion.

This Board is cognizant it lies within the exclusive province of the ALJ to enter findings of fact. While we will not usurp this role, this Board has the duty to confirm that the ALJ's decision is supported by substantial evidence. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). "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). Substantial evidence is more than mere speculation or assumption. Here, the conclusion Sizemore's conversations with his supervisors occurred after he was injured is conjecture. In fact, he flatly denied telling his supervisors before he was laid off about a specific injury.

Sizemore provided notice of his injury to T&T in January, 2013, eight months following his alleged injury. He was aware the injury was work related as of his April 2, 2012 visit to Dr. Chaney. He submitted no proof

demonstrating he informed his employer of his injury at the time it occurred, nor did he submit any proof indicating the January, 2013 notice letter was provided "as soon as practicable." Therefore, Sizemore's claim is barred for lack of timely notice.

For the reasons set forth herein, the May 19, 2014 Amended Opinion and Order on Remand and the June 30, 2014 Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge are hereby **REVERSED**. This matter is **REMANDED** to the Administrative Law Judge with directions to dismiss the claim.

ALL CONCUR.

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