OPINION ENTERED: DECEMBER 21, 2012

CLAIM NO. 201195141

THOMAS E. BROOKS PETITIONER

VS. **APPEAL FROM HON. OTTO D. WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

TITAN CONSTRUCTION
and HON. OTTO D. WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

SMITH, Member. Thomas E. Brooks, Jr. ("Brooks") appeals from the July 9, 2012 Opinion and Order rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"), and from the August 18, 2012 order denying his petition for reconsideration. The ALJ dismissed the claim finding Brooks failed to give due and timely notice of his injury to his employer, Titan Contracting & Leasing ("Titan"). Brooks argues he satisfied the notice requirements and the ALJ

erred in considering the notice issue before determining whether there had been a work-related injury.

Brooks filed a Form 101, Application for Resolution of Injury Claim, on November 1, 2011, alleging an L5 disc herniation as a result of moving a twelve foot steel pipe on December 20, 2010. He stated notice was given immediately.

Brooks testified by deposition on December 20, 2011 and at the hearing held May 10, 2012. He has been a pipe fitter for 28 years. On December 8, 2010, he was working as a salaried superintendent for Titan in Somerset, Kentucky. He stated his injury occurred when he was working with several other employees attempting to install steel pipe in a silo. He was working in a confined space, wrestling with the pipe, when he felt a pop in his back and pain in both legs. Brooks was able to work the remainder of his shift and then returned to his motel room.

At his deposition, Brooks testified both Benjamin May ("May"), the employer's human resources person and his supervisor, and Dwayne Merritt ("Merritt"), the project superintendent, were aware of the work injury on the day it occurred. He also talked to Jerry Maggard ("Maggard"), the corporate safety manager for Titan. However, when presented with Dr. Kalik's office notes, Brooks responded as follows:

Q. But he says, "Two weeks ago he lifted a heavy pipe at work, which worsened his low back and right leg pain." And he had you there for low back pain and right leg pain. I don't see any mention of left. I'm not saying -- you know. And it says, "He did not file this under workers' comp."

A. That's right.

Q. You did not?

A. No. I sure didn't.

Q. But you told Mr. Ben, the HR man, and your supervisor that it was work-related.

A. Yeah. Oh, yeah.

Q. And then – -

A. I didn't file it under workmen's comp because I was wanting to keep my job, and I figured since I was a salaried superintendent, that I'd just keep -- you know, I'd be all right. That's why when I called Jerry Maggard and told him I didn’t want to, I was scared to. I said, "I got my own insurance card here" when I was at the emergency room. Yes, sir, I did do that.

. . .

Q. All right. No, that's -- okay. And when you called Mr. Maggard, what did you tell him?

A. That I’d give my insurance card to him. I said, "Look, I didn't want to do workmen's comp, Jerry" is what I said. I said, "I was hoping" -- "I’m hoping that we can work this out this way," because I was scared to death. I couldn't lose my job, because my boy is

> a diabetic, and I can't lose the insurance that I had. That's why I was trying to do my damnedest to keep my job.

Brooks later testified he reported the injury as required. In fact, he obtained the telephone number for Zurich American Insurance Company ("Zurich") from the secretary and reported the injury to the carrier himself. Brooks specifically denied telling Maggard he had not had a work-related injury.

Brooks acknowledged he had pre-existing chronic back pain for ten years prior to the alleged work injury. He also indicated he received numerous epidural injections during the four year period prior to the work injury. Brooks stated that, after the work incident, it was "the first time I ever hurt above, up to the middle of my back and down both legs at the same time I have never hurt like that."

Maggard testified by deposition on April 13, 2012 and stated Titan conducts annual training sessions with the superintendents including the subject of reporting injuries. Maggard stated Brooks did not report an injury on December 8, 2010 at the job site. Maggard stated Titan did not have a policy of discouraging salaried employees from reporting injuries. He identified several supervisors who had

reported work injuries. Maggard testified he first learned from the carrier that Brooks was claiming a work injury. Maggard received an e-mail from Zurich indicating that Brooks had reported the injury to the carrier on January 25, 2011. When asked, Merritt stated Brooks had not reported anything to him.

Maggard testified he had worked with Brooks in Wyoming and Brooks was always complaining of back pain. Brooks would leave the job site early and go to different locations to get epidural shots for his back. Maggard stated a job safety analysis is performed at the end of each shift. He reviewed the analysis from December 8, 2010 and noted no accidents or incidents were reported.

Maggard recalled receiving a call from Brooks in mid-December stating he was at the emergency room with back problems. Brooks stated the hospital wanted to turn the bill in as work-related but Brooks advised them it was not. Brooks denied having had a work injury and stated he would not turn it in as work-related.

May testified by deposition on April 13, 2012. He stated Brooks was assisting Merritt at a worksite on December 8, 2010. He testified Brooks had worked as a supervisor and had been trained in reporting work-related injuries. May recalled receiving a call from Merritt

advising Brooks had left the site complaining of a sore back. May noted Brooks had experienced previous problems with his back, and had received injections.

May stated he called Brooks, who stated his back was hurting, but did not indicate whether it was due to a work injury. May spoke with Brooks periodically after December 8, 2010, but Brooks never informed him of a work injury. If Brooks had informed him of a work injury, May stated he would have referred him to Maggard.

May stated Brooks was continued on full salary for approximately eight weeks. May contacted Brooks in mid-to-late January 2011 about applying for short-term disability. After May informed Brooks short-term disability would pay approximately 60% of his salary, Brooks first mentioned he had hurt himself on the job.

In the Opinion and Order, the ALJ provided the following discussion and determinations:

> KRS 342.185(1) provides that notice of a work-related accident must be given as soon as practicable after the happening of the accident. The purpose of requiring an injured employee to give notice to the employer is threefold: to enable the employer to provide prompt medical treatment and to minimize the worker's ultimate disability and the employer's liability; to enable the employer to make a prompt investigation of the circumstances of the alleged accident; and to prevent the filing of

fictitious claims, when a lapse of time makes proof of lack of genuineness difficult. Trico County Development & Pipeline v. Smith, 289 S.W.3d 538 (Ky. 2009). The lack of employer prejudice does not waive a delay in giving notice.

The facts and circumstances of each particular case must be considered in determining whether notice was given as soon as practicable. The strict application of the notice requirement can be avoided if Plaintiff is able to give a valid and reasonable explanation for the delay. Defendant [sic] has not presented a valid, reasonable explanation for his delay.

Plaintiff had no reason not to give Defendant quick and prompt notification of his belief he sustained a low back work injury on December 8, 2010. It is obvious Plaintiff was toying with several ideas immediately after his incident and during the following days. His testimony and the records confirm he was aware that he had a work injury, but was attempting to characterize it as non-work related. That he was aware he sustained the work injury but was attempting to portray it as non-work related, is confirmed by Dr. Egger's office note of December 21, 2010. In his Progress Note Dr. Eggers documented Plaintiff was aware he had a work injury, he wrote “two weeks ago. He lifted heavy pipe at work, which worsened his LB and R leg pain. He did not file this with workers’ comp.” If Plaintiff knew he had a work injury, he should have promptly notified Defendant.

Plaintiff's testimony is also questionable when he represented that on the day following his injury he received a call from Mr. May and he told Mr. May he hurt his back on the job. He also

testified he told his on–site supervisor, Dwayne Merritt on December 8, 2010 that he hurt himself on the job. Plaintiff testified he also made Mr. Maggard aware he experienced a work-related back injury.

He testified he had a work injury, but did not want to file a workers' compensation claim because he feared being fired. The question has to be asked why he told his on–site supervisor, Defendants [sic] HR Manager and Defendant's Safety Manager about his injury, but thought he could get away with not filing a workers compensation claim. He apparently thought he could get Defendant's upper management to participate in a scheme and he would avoid being fired.

It is also significant that when Plaintiff did decide to present a claim, the First Report of Injury was done by him when he directly contacted the insurance company, it is unclear why he did not bother to inform Defendant of his injury and then proceed through normal channels and let Defendant contact the carrier. Plaintiff's account of the whole situation stinks and shows a course of inconsistencies.

The persuasive proof on the notice issue comes from Mr. May and Mr. Maggard. Their testimony indicates Defendant was not made aware of Plaintiff's work injury until January 25, 2011 when Zürich first informed Defendant of Plaintiff's allegations of having sustained a work–related injury. Their testimony is convincing and logical. There was testimony that Defendant's employees and supervisors, including Plaintiff, knew how to give notice of a work–related injury. Their review of company records failed to

reveal Plaintiff gave timely notice to Defendant. Their testimony that Plaintiff told them his back problems were not work–related is consistent.

Under most validly explained situations, and [sic] month's delay in giving notice of a work injury is not fatal to a claim, but here it is obvious Plaintiff knew of the work injury and made a conscious effort to twist the facts so as to work out to his advantage. This conduct was misleading and defeated the reasons why timely notice is required. The facts and circumstances of each case must be considered when determining whether notice was given as soon as practicable. Marc Blackburn Brick Co. v. Yates, 424 S.W.2d 814 (Ky. 1968). Notice of an accident and the resulting harm is inadequate where the worker's conduct thwarts the purposes of the requirement. Whittle v. Gen. Mills, Inc., 252 S.W.2d 55 (Ky. 1952).

Plaintiff's failure to give timely notice defeated the purposes of requiring a worker to notify the employer of an injury and resulting injury as soon as practicable. Defendant was denied an opportunity to provide prompt medical treatment so as to minimize Plaintiff's ultimate disability and Defendant's liability. Due to Plaintiff's failure to give timely notice, despite being fully aware of his predicament, Defendant was denied the opportunity to make a prompt investigation of the circumstances of the accident. Defendant's failure to get timely notice denied Defendant the opportunity to prevent the filing of fictitious claims now or in the future. An employer is not required to show prejudice due to an employee's failure

> to give timely notice. Trico County Development & Pipeline v. Smith, supra.
>
> Based upon the particular facts of this case, and the lack of persuasive proof from Plaintiff, it is determined Plaintiff failed to give timely notice to Defendant of his alleged work injury and, therefore, Plaintiff's claim shall be dismissed.

Brooks filed a petition for reconsideration on July 24, 2012, arguing his testimony that he gave notice to Merritt was uncontroverted and therefore the ALJ should have concluded due and timely notice was given.

In an August 18, 2012 order, the ALJ denied Brooks' petition for reconsideration, noting the record contained conflicting evidence on the notice issue. The ALJ again found Brooks had failed to give due and timely notice.

On appeal, Brooks argues his testimony is unrefuted that he gave notice to Merritt, the supervisor on the job. Brooks further notes the human resources director acknowledged Merritt called him around December 9, 2010 to report Brooks left work due to back pain. Brooks contends once he testified he gave notice to his supervisor, the burden of proof shifted to Titan to provide contradictory evidence. Although Titan presented testimony from May and Maggard, Merritt was not deposed or called as a witness at the hearing. Thus, Brooks argues there is no substantial

evidence to refute his testimony that he gave notice to his supervisor.

Brooks argues the purposes of the notice requirement were accomplished under the circumstances. Brooks contends Maggard knew by at least mid-December there was a possibility of a claim and yet he undertook no investigation. Maggard further testified he received a call from Owensboro–Mercy Health System questioning Titan's liability after Brooks informed the hospital he had a work-related injury. Brooks contends this prompted Maggard to investigate.

Brooks further argues notice of the injury was accomplished through his report to Zurich on January 25, 2011. It then notified Titan on January 26, 2011. Brooks observes notice is not required to be given on the date of the event or even a few days later. Brooks contends, given the fact he, Merritt, May, and Maggard remained Titan employees well after the event, the purpose of the notice requirement is satisfied since there was still a reasonable opportunity to investigate. Thus, he argues it was error for the ALJ to dismiss the claim on the notice issue as notice was given no later than January 25, 2011.

Finally, Brooks argues the ALJ erred in considering the notice issue first. He contends the ALJ first should have

determined whether Brooks sustained a work-related injury. He notes Titan refused to concede Brooks sustained an injury as defined by KRS 342.0011(1) and the issue was preserved at the benefit review conference.

We note the ALJ, as set forth above, properly stated the law regarding notice. The ALJ was presented with conflicting testimony regarding when Brooks first informed Titan of the alleged work injury. Brooks maintained that he informed Merritt, May and Maggard of the injury on the date of the incident or the next day. While Merritt did not testify, both Maggard and May indicated they were not informed of a work injury at that time. Maggard testified Brooks unequivocally stated in a call from the emergency room that he had not had a work injury. Brooks produced no witness to corroborate his version of the incident. Thus, his position on the issue rests solely on his own credibility. Given the totality of the evidence, the ALJ was well within his authority as fact-finder in concluding Brooks' testimony was not credible on the notice issue. The ALJ could reasonably conclude notice was not given until Brooks reported an injury to Zurich on January 25, 2011 and any delay was not excused.

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality,

character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 200). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999). Based upon the record as a whole, we cannot say the ALJ's findings were clearly erroneous and we are without authority to reverse.

Accordingly, the July 9, 2012, Opinion and Order rendered by Hon. Otto Daniel Wolff, IV, Administrative Law

Judge, and August 18, 2012, order denying Brooks' petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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