

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 15, 2019

CLAIM NO. 201685867

JOSE FELIX RIVAS

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

HUSSUNG MECHANICAL CONTRACTORS
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING IN PART & REMANDING

* * * * *

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

STIVERS, Member. Jose Felix Rivas (“Rivas”) appeals from the July 16, 2018, Opinion and Award and the January 2, 2019, Order denying Rivas’ Petition for Reconsideration of Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”). The ALJ awarded Rivas temporary total disability (“TTD”) benefits, permanent partial disability benefits, and medical benefits for work-related carpal tunnel in both

upper extremities. The ALJ dismissed Rivas' cumulative trauma cervical spine injury claim for failure to provide due and timely notice.

On appeal, Rivas asserts the dismissal of his cervical spine injury claim for failure to provide due and timely notice is an error of law.

The June 20, 2016, Form 101 alleges Rivas sustained injuries to his back and neck, on December 17, 2015, while in the employ of Hussung Mechanical Contractors ("Hussung") in the following manner: "Tightening bolts and hanging valves repetitively all day. Repetitive cumulative trauma." On October 19, 2016, Rivas filed a motion to amend his Form 101 to add a claim for bilateral carpal tunnel syndrome, which was sustained by order dated January 4, 2017.

Rivas was deposed on October 4, 2016. He has worked as a pipefitter since approximately 1997. That type of work involved taking measurements of various types of pipes, along with cutting, hanging, and soldering the pipes. He worked for Hussung from May 2014 through December 31, 2015, when he was laid off.

Rivas testified that he first started experiencing tingling and soreness in his right hand and arm on December 17, 2015, when he was putting bolts in an overhead valve.

Q: Whole hand and arm, okay. When you say your arm, I just want to make sure I understand you. You said your whole arm. Are you talking about from the wrist to the elbow, from the wrist all the way up to the shoulder?

A: Pretty much all the way through.

Q: Okay. So literally the entire arm....

A: Yeah.

Q: ...and all of your fingers, correct?

A: Uh huh, yes.

Rivas sought treatment for his right hand and arm a few days later at the emergency room at Somerset Hospital because he was concerned he was having a heart attack. At that time, he underwent several diagnostic tests, including an MRI of his neck.

Q: Okay. Was it at that time that they told you that maybe your problem was your neck?

A: At that time, they told me that I had a pinched nerve...

Q: Okay.

A: ...and bad discs.

Q: Got it. And at that time, they referred you to a neurosurgeon?

A: Yes.

Q: I forget, was that Dr. El-Naggar or Dr. El-Kalliny?

A: Dr. El-Naggar.

Rivas testified that he was using a hand drill when he started experiencing problems in his left arm, although he does not remember the specific date. Rivas testified he experiences pain from his neck radiating down to the middle of his back. The pain started after his "surgery," but he did not specify to which surgery he is referring.

Rivas was asked when he informed Hussung that he thought his "condition" was work-related:

Q: When did you tell Hussung that you thought that your condition was work-related?

A: That was after I came back to work.

Rivas was asked this same question later in his deposition:

Q: And so when did you tell Hussung that you thought your condition was work-related?

A: I didn't.

Dr. Amr El-Naggar performed surgery on March 23, 2016. Rivas subsequently underwent an EMG/NCV at Cumberland Valley Rehab in July 2016, and Dr. El-Naggar requested approval for bilateral carpal tunnel releases. At the time of his deposition, Rivas was scheduled to undergo surgery on his left arm on November 2, 2016.

Rivas testified extensively concerning the symptoms he was experiencing at the time of his deposition:

A: I'm just in pain.

Q: Alright. Let's start with your neck. Tell me about that.

A: Well, it hurts, it burns, goes down my back, down my arms.

Q: How far, how far down does it go?

A: About middleways.

Q: In between your shoulder blades?

A: Yeah.

Q: Any other problems with your neck?

A: No, no, just the pain and burning.

Q: Okay. What about your arms?

A: They're the same, just pain. A lot of times I can't open a plastic bag because they still, where they hurt. I can't, I ain't [sic] even got the strength to open them up.

Q: Okay. Now the pain that you have in your arms, is that your hands, is that your whole arms? What is it?

A: It goes from my arm. They don't tingle all the time, just sometimes, but when it does it goes all the way down.

Q: And so you indicated – keep in mind when you point, that's not going to show up on the transcript.

A: Yeah.

Q: But you were indicating from your shoulder down towards your arm?

A: Yes.

Q: Whole arm, part of the arm, front of the arm, back of the arm?

A: Whole arm.

Q: Okay. Some of the fingers, all of the fingers?

A: Sometimes some of the fingers.

Q: Okay. When it's not all of the fingers, which ones, which fingers are they?

A: I'm going to say these three (3) here, I, I don't even know what they are.

Q: Okay. Point at them again for me. Alright. So you're indicating your index finger, your long finger, and your ring finger?

A: Yeah.

Q: Got it. The same on both hands?

A: Yeah.

Q: Alright. You said that was in regards to the tingling. What about the pain, is that located in the same place as the tingling?

A: More from my neck down to my elbow, the pain.

Q: Any numbness?

A: Yes.

Q: Where is that?

A: That's in my hand.

Q: The whole hand and all fingers or just some of them?

A: Just the whole hand. I can't...

Q: Okay. Do you have a brace to put on your wrist when you sleep?

A: No.

Q: Do you wake up with your arms numb and tingly?

A: Sometimes.

Q: Your hands as well?

A: Yes.

Rivas also testified at the May 17, 2018, Hearing. He testified regarding portions of his job duties as a pipefitter at Hussung:

Q: Now, what did you do in that job, if you could tell me? What kind of duties was [sic] required of you?

A: We – depends on the job. We hung pipe, done [sic] jackhammering, use hammer – hammer drills, impacts, drills.

Q: And why would you use that kind of equipment, for example?

A: Sometimes, we had to bust up concrete to redo the job. The hammer drill, we had to drill holes through stuff to get our bolts and stuff through. Hanger handlers.

Q: Okay. Did this job require you to do any lifting overhead?

A: Yes.

Q: And what kind of – what – how- what would you have to do from time to time doing that?

A: We would have to hang valves – put valves overhead, hang pipe overhead. We put up hangers.

Q: How much would those weights weigh that you were working with overhead?

A: The valves, depending on the size of them, sometimes, they're 30 to 40 pounds. The piping would be hard telling, because some of them is [sic] longer than others. Some is 10-foot long, some shorter. It just depends.

Q: Have you ever put up pipe that required the lifting of two people?

A: Yes.

Q: And was that because it was really heavy?

A: Yes.

Rivas again testified concerning the events of December 17, 2016, and reiterated that he was referred to Dr. El-Naggar after his treatment in the Somerset Hospital emergency room. Concerning when he informed Hussung that his “condition” was work-related, Rivas testified:

Q: And did you meet with his – one of him [sic]- with his office staff concerning that MRI?

A: Yes, I did.

Q: And when would that have been, approximately?

A: That would have been January 4th, I believe.

Q: Okay. And did – and at that time, did they tell you that it was work related?

A: Yes.

...

Q: Okay. Now, do you remember when Mr. Brown came and took your deposition at my office?

A: Yes.

Q: That was on October the 4th, 2016. Have you read that deposition?

A: Yes.

Q: Now, on Page 30 of the deposition, Mr. Brown asked you, 'When did you tell Hussung that you thought your condition was work-related?' Answer: 'That was after I came back to work.'

A: Yes.

Q: Now, was that at – what do you mean by that, when you came back to work? Was that the two days?

A: Yes. The two days I went back to work, my foreman asked me and I told him that they said it was work related.

...

Q: Now, in that same deposition – that was on Page 30, when you told him – you told him when he came back to work. Two pages later he said – Mr. Brown asked you: 'So when did you tell Hussung that you thought your condition was work related?' Your answer: 'I didn't.' Now, what do you mean by that?

A: Well, I thought he was talking about the higher ups in the company, like the superintendent and stuff like that.

Q: And you didn't tell them?

A: I didn't tell them. I just told my foreman.

Q: Okay. So was it your understanding that you [sic] only supposed to have told your foreman?

A: Yes.

Q: Now, do you – did you ever attend safety meetings and things like that when you were on the job?

A: Yes.

Q: And what did you learn in those safety injury meetings, if you had an injury, you had to report – who were you supposed to report it to?

A: You were supposed to report it to your foreman.

Q: And did you do that?

A: Yes, I did.

...

Q: And did Mr. Gentry have you to fill out any paperwork, like a report of injury or anything of that nature? Have you signed anything?

A: No.

Q: Did he tell you that he was going to or anything of that nature, or did he just not name it?

A: Just didn't say nothing [sic].

Rivas described the pain he experienced both before and after his March

23, 2016, fusion surgery:

Q: Now, you had the surgery on 6/23 [sic] of 2016. Before you had the surgery, what kind of problems were you having?

A: I was having pain in my arms, my hands, my shoulders, my neck and my back.

Q: Okay. And how bad was the pain on a scale of one to ten, with one being little or no pain, and ten being the type of pain you would have to be screaming about?

A: Just varies on the days, but it run [sic] about eight. Sometimes a little bit higher; sometimes a little bit less.

Q: Okay. Now, you had the surgery?

A: Yes.

Q: What did the surgery do for you as far as – did it take all of the pain away? Obviously, it didn't; did it?

A: No.

Q: Where were you still having pain?

A: Still having pain in my neck, my arms, my hands.

Q: And you had an actual fusion; am I correct?

A: Yes.

Rivas underwent testing for carpal tunnel after the fusion surgery in order to determine why he was still experiencing pain:

Q: Okay. And at that point in time, did Dr. El-Naggar want to do surgery on your hands?

A: Yes.

Q: Now, was approval requested by him to do that, the carpal tunnel surgery?

A: Yes.

At the time of the hearing, Rivas was still experiencing pain in both hands.

Q: Where does the pain start in your right hand and where does it run?

A: It starts all the way up my shoulder blade and runs down my arms down to my hands and fingers.

Q: Now, does that just occur if you have to use the hand or can you just be sitting there and it happen?

A: I can just be sitting there.

...

Q: Okay. Now, let's talk about your left hand. Do you have pain and numbness in the left hand?

A: Yes.

Q: Where is your numbness and pins and needles feelings in your left hand?

A: It's down my neck, my shoulder, my hand and my fingers.

Rivas still experiences neck pain, including headaches, daily.

Several medical records and reports were filed in the record by both parties. Only the most pertinent records pertaining to the alleged cervical spine cumulative trauma injury will be discussed.

Rivas filed Dr. El-Naggar's March 23, 2016, report concerning the C5-6 and C6-7 anterior cervical discectomy and fusion surgery. Rivas also filed the June 2, 2016, "Questionnaire" completed by Dr. El-Naggar in which he answered in the affirmative to several questions, including but not limited to the following: "Is it your opinion that his current condition and injuries to his neck, were brought on by his work related activities which required repetitive cumulative use of his neck on a daily basis?" and "Do you agree that his case is a clear case of repetitive cumulative trauma?"

Rivas also filed Dr. Bruce Guberman's October 13, 2016 report. After performing an examination and medical records review, Dr. Guberman diagnosed the following:

1. Advanced degenerative disc disease at C5-C6 and C6-C7 due to cumulative trauma of work
 - a. s/p C5-C6 and C6-C7 anterior cervical discectomy and fusion on March 23, 2016
2. Chronic post-traumatic strain of the thoracic spine due to cumulative trauma of work
3. Bilateral carpal tunnel syndrome due to cumulative trauma of work

He further opined as follows:

In summary, the claimant is a middle aged male who developed numbness and tingling in his hands and arms with neck pain in December 2015. That began without a

specific injury, but the claimant does relate that to the type of work he performed for many years as a pipefitter, and that is described above. He was found to have significant disc disease at the C5-C6 and C6-C7 levels. He underwent anterior cervical discectomy and fusion at those levels on March 23, 2016 followed by physical therapy. However, the symptoms improved, but only partially. He continues to have pain, tenderness and range of motion abnormalities on examination of the cervical spine. He also continues to have reflex abnormalities consistent with radiculopathy.

The claimant also reports having thoracic spine pain over the same period of time. That often radiates from his neck. The thoracic spine pain does not radiate across his back or into his chest. There is no evidence of thoracic radiculopathy.

The claimant also has been found to have bilateral carpal tunnel syndrome by electrophysiologic studies. He does have positive Tinel's signs and awakens from sleep every night with numbness, tingling and pain in his hands. He is scheduled to have left carpal tunnel syndrome release on November 2, 2016.

In my opinion, the above diagnoses are directly causally related to the cumulative trauma of work. Because of the work activities described above, in my opinion, the claimant has significantly more severe degenerative joint disease and degenerative disc disease of the cervical spine than would be expected for a man of his age. Furthermore, in my opinion, the type of work he performed for many years as a pipefitter described above is the cause of his bilateral carpal tunnel syndrome.

Dr. Guberman opined Rivas had reached maximum medical improvement ("MMI") with respect to his cervical spine condition and assessed a 28% whole person impairment rating.

Rivas filed several supplemental reports from Dr. Guberman. In the June 8, 2017, supplemental report, Dr. Guberman opined Rivas has reached MMI

with respect to his bilateral carpal tunnel syndrome and assessed a 7% whole person impairment rating for bilateral carpal tunnel syndrome.¹

The May 15, 2018, Benefit Review Conference Order lists the following contested issues: benefits per KRS 3432.730, work-relatedness/causation (cervical); notice; injury as defined by the ACT (cervical); credit for short term disability; and TTD. Under “other” is the following: “Failure to comply with the AMA Guides (Guberman); PTD; MFD Cervical Spine (R&N and Work Relatedness).”

On May 17, 2018, Rivas filed a “Motion to Amend BRC Order” and attached two letters, dated September 19, 2016, and October 19, 2016, addressed to Hussung providing notice of his bilateral carpal tunnel syndrome due to cumulative repetitive trauma.

In the July 16, 2018, Opinion and Award, the ALJ, concluded as follows regarding notice of Rivas’ alleged cervical spine injury:

12. The giving of notice for the alleged injury to the cervical spine is more complicated and the testimony regarding the giving of said notice is not consistent to be kind.

13. The Plaintiff, in his deposition, admitted that he never told his employer that the cervical spine injury was work-related. While he made contradictory statements at the final hearing, the ALJ finds that he has failed in his burden to establish that notice was given as soon as practicable for the cervical spine.

14. The ALJ therefore finds based upon the deposition testimony of the Plaintiff, that notice was not properly given and that the cervical spine injury is therefore hereby DISMISSED.

¹ Dr. Guberman modified his impairment rating for Rivas’ left hand carpal tunnel syndrome in his March 15, 2018, supplemental report to reflect a 6%.

Both parties filed petitions for reconsideration.² Rivas requested the ALJ to enter additional findings on the issue of notice of his alleged cervical spine injury claim. In the January 2, 2019, Order, the ALJ stated, in relevant part, as follows:

1. An employee has the burden of proof and the risk of non-persuasion to convince the trier of fact of every element of his worker's compensation claim. *Snawder v. Stice*, 576 SW2d 276 (Ky. App. 1979).
2. The ALJ finds that the contradictory testimony given by the Plaintiff at the final hearing regarding the alleged giving of notice for the cervical spine injury was not credible because it was not consistent with his earlier deposition testimony.
3. As a result of the finding that this testimony is not credible, the ALJ finds that the Plaintiff has failed to put forth evidence sufficient to satisfy his burden to establish that notice was given as soon as practicable for the alleged cervical spine injury. The ALJ therefore declines to disturb the result.

Rivas asserts the ALJ's dismissal of his alleged cumulative trauma cervical spine injury for failure to provide timely notice is erroneous. We vacate the ALJ's dismissal of the alleged cumulative trauma cervical spine injury claim and remand for additional findings.

KRS 342.185(1) provides notice of an accident shall be given "as soon as practicable" and that the claim for benefits to a resulting injury must be filed within two years "after the date of accident" or following the suspension of payment of income benefits, whichever is later. While notice is mandatory, the Kentucky Court of

² In the September 4, 2018, Order ruling on Hussung's Petition for Reconsideration, the ALJ amended the July 16, 2018, Opinion and Award by correcting the stipulation regarding the occurrence of a cervical spine injury and the application of KRS 342.730(4).

Appeals has indicated, “the statute should be liberally construed in favor of the employee to effectuate the beneficent purposes of the Compensation Act.” Marc Blackburn Brick Co. v. Yates, 424 S.W.2d 814, 816 (Ky. 1968). Whether notice has been given as “soon as practicable” depends upon the circumstances of the particular case. Id. Notice to an employer of a physical injury carries with it notice of all conditions that may reasonably be anticipated to result from that injury. *See* Dawkins Lumbar Co v. Hale, 299 S.W. 991 (Ky. 1927). *See also* Reliance Die Casting v. Freeman, 471 S.W.2d 311 (Ky. 1971).

The Kentucky Court of Appeals, in Randall Co. v. Pendland, 770 S.W.2d 687(Ky. App. 1989), adopted a rule of discovery with regard to injuries caused by cumulative trauma, holding the date of injury is when the disabling reality of the injuries becomes manifest. *See* Consol of Kentucky, Inc. v. Goodgame, 479 S.W.3d 78 (Ky. 2015). Therefore, in injury claims allegedly caused by cumulative trauma, the date for giving notice and for clocking the statute of limitations is triggered by the date of manifestation. Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999). An injury caused by cumulative trauma manifests when “a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work.” Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). Consequently, “for cumulative trauma injuries, the obligation to provide notice arises and the statute of limitations does not begin to run until a claimant is advised by a physician that he has a work-related condition.” Consol of Kentucky at 82.

We emphasize, particularly within the context of this case and the ALJ’s findings of fact, that a worker is not required to self-diagnose the cause of a harmful

change as being a work-related cumulative trauma injury. See American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and its work-relatedness.

In the July 16, 2018, Opinion and Award, the ALJ determined Rivas “never told his employer that the cervical spine was work-related.” Subsequently, in the January 2, 2019, Order denying Rivas’ Petition for Reconsideration, the ALJ determined Rivas’ testimony regarding notice of the alleged cervical spine injury was inconsistent and, consequently, not credible. However, as illustrated by the above-cited recitation of the requisite analysis in cumulative trauma injury claims, these are incomplete findings. The ALJ erred by failing to first determine the date of manifestation which is the point in time Rivas was then required to provide notice of a cumulative trauma work injury. Moreover, nothing prevented Rivas from giving notice of his cumulative trauma work injury prior to the date of manifestation.

In the context of cumulative trauma injury claims, an analysis of whether notice was given “as soon as practicable” begins with an initial determination of the date of manifestation as defined above. Therefore, on remand, the ALJ, utilizing the medical evidence in the record, must make a determination as to if and when Rivas was informed by a physician he has sustained a cervical spine injury and that it is work-related. *Both conditions must be met before the obligation to provide notice arises.* Stated differently, Rivas was not required to notify Hussung of his alleged cumulative trauma cervical spine injury at any point before the date of manifestation of this alleged injury. Once the date of manifestation has been determined as defined herein, the ALJ must then undertake an analysis of whether Rivas provided notice of this alleged injury “as

soon as practicable” pursuant to the mandate of KRS 342.185(1) and provide appropriate findings of fact and conclusions of law sufficient to apprise all parties of the basis for his ultimate decision. Should the ALJ determine notice of the cumulative trauma cervical injury was timely given, he shall then resolve Rivas’ cumulative trauma cervical injury claim on the merits.

Accordingly, the dismissal of Rivas’ alleged cumulative trauma cervical spine injury for failure to provide timely notice set forth in the July 16, 2018, Opinion and Award and the January 2, 2019, Order is **VACATED**. This claim is **REMANDED** to the ALJ for additional findings consistent with the views set forth herein.

ALL CONCUR.

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