Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 26, 2021

CLAIM NO. 201962801

SEAN STEWART PETITIONER

VS. **APPEAL FROM HON. CHRISTINA D. HAJJAR, ADMINISTRATIVE LAW JUDGE**

PEPSICO INC. AND
HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING & REMANDING

* * * * * *

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

BORDERS, Member. Sean Stewart ("Stewart") appeals from a November 25, 2020 Opinion and Order and the December 22, 2020 Order on Petition for Reconsideration, rendered by Hon. Christina Hajjar, Administrative Law Judge ("ALJ"). The ALJ determined Stewart suffered a work-related right knee injury and retained a 6% impairment rating, but failed to give due and timely notice, resulting in

the claim being dismissed. On appeal, Stewart argues he met his burden of proving he gave timely notice and the ALJ misunderstood and/or misapplied the law and facts regarding the issue of notice. For reasons set forth herein, we vacate and remand.

Stewart testified by deposition on June 4, 2019, and at the hearing held October 8, 2020. Stewart began working for PepsiCo Inc. ("PepsiCo") as a product merchandiser in June 2018. On the morning of January 5, 2019, Stewart was working at a Kroger store. He was pulling a fully loaded cart when it caught his right foot, causing him to slip and fall. He fell on his left hip, hitting his right knee, and the cart ran over his right knee and right foot. He was able to get up after pushing the cart off his right foot. He completed his work at the store and then worked at two more stores.

Stewart continued to work his normal job from the date of injury until he first sought medical attention on May 15, 2019. Stewart's right knee pain progressively worsened after the work incident, but he testified he did not inform PepsiCo of his injury. Stewart explained that he did not notify PepsiCo because he "didn't think it was a big issue of my knee hurting." He was going to give it time to see if it healed. Stewart was hesitant to report the injury until he knew whether it was serious, explaining:

> I had no plans of filing workmen's comp because I wanted to see if the injury got better and -- and I've seen that when I was working at Pepsi that if I filed workmen's comp that I saw a lot of people that filed workmen's comp were getting fired, so that's initially why I -- I -- you know, I didn't want to file my workmen's comp case, because I didn't want to set a claim, it will get better. Initially that was what was in

> my head, in my mind, but if you've been there less than a year, I've seen a lot of people get injured and they were fired.

Stewart could not recall the specific company policy regarding reporting injuries. He indicated he had been handed a stack of papers when he was hired and was told to sign them.

By late March or early April 2019, his condition was not improving so he contacted his doctor. He saw Dr. Lonnie Douglas who was the first physician to tell him he had a torn meniscus. Stewart initially declined surgery, hoping physical therapy would resolve the problem. On June 14, 2019, the day after seeing Dr. Douglas, Stewart notified PepsiCo of the injury. Stewart filled out an injury report on July 24, 2019, and gave a written statement in August 2019. PepsiCo sent Stewart to Concentra for an examination on July 25, 2020, and he returned every week for four weeks. Stewart underwent right knee arthroscopic surgery on August 26, 2019, and returned to his pre-injury position on October 25, 2019 without restrictions.

Stewart initially presented at U of L Physicians on June 13, 2019. The intake form indicates this is not a workers' compensation accident. Dr. Douglas evaluated Stewart for a right knee medial meniscus tear. Stewart gave a history of increasing knee pain over the past four months. Dr. Douglas noted, "No particular injury." On August 26, 2019, Dr. Douglas performed arthroscopic surgery. He noted Stewart had suffered a twisting and wrenching motion to the right knee in a work injury.

Records from Concentra indicate Stewart received treatment on July 25, 2019. Stewart provided a history that he injured his knee in January 2019 when he fell while pulling a cart. He landed on his knee, which started to swell. He did not report the injury at that time. He applied ice and took over-the-counter medication. His knee felt better until April or May when it started to swell again. He went to his primary care physician who obtained X-rays and an MRI that revealed a large meniscus tear. The assessment was sprain of right knee, unspecified ligament.

Dr. Jules Barefoot performed an evaluation on February 4, 2020. Stewart reported he was pulling a cart of products in January 2019 when he slipped and twisted his right knee. His knee pain persisted, eventually prompting him to see his primary care physician. He underwent arthroscopic surgery on August 26, 2019. Dr. Barefoot diagnosed a history of workplace injury to the right knee occurring in January 2019, a May 22, 2019 MRI of the right knee with a medial meniscus tear and degenerative changes in the lateral meniscus, and an August 29, 2019 right knee arthroscopic surgery with a partial medial and lateral meniscectomy. Dr. Barefoot assigned a 6% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"). Dr. Barefoot attributed the entire impairment to the work injury.

Dr. J. Rick Lyon evaluated Stewart on July 23, 2020. Stewart provided a history that he was pulling a cart in January 2019 and fell due to a dip in the floor. The cart then rolled up on his right leg and he experienced leg pain. He believed his knee struck the ground during the fall. He thought his knee would improve on its

own, but he continued to experience increasing pain. He eventually came under the care of Dr. Douglas and had surgery. Dr. Lyon diagnosed medial and lateral meniscus tear, patellofemoral chondromalacia, medial compartment chondromalacia, and post arthroscopic partial medial, lateral meniscectomy, and chondroplasty. Dr. Lyon opined the degenerative changes pre-existed the work event. Dr. Lyon stated the meniscus tear may be a result of the work event based upon Stewart's verbal history. He assigned a 6% impairment rating pursuant to the AMA Guides. Dr. Lyon noted medical science confirms that 80% of individuals with symptomatic knee arthritis have a concurrent meniscus tear. Therefore, the meniscus tears may have pre-existed the work event.

The first report of injury reflects the form was prepared by PepsiCo on July 24, 2019, and contains an entry indicating the accident was reported to Josh Weber, supervisor, on April 1, 2019. A document signed by Stewart indicating he had been instructed on how to report work injuries was also submitted as evidence.

The ALJ entered the following Findings of Facts and Conclusions of Law relative to the issues on appeal, *verbatim*:

> Notice
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> Although the ALJ finds that Stewart sustained an injury, this ALJ finds that Stewart did not give due and timely notice of his injury to his employer. Under KRS 342.185(1), an injured employee is required to give notice of the injury "as soon as practicable after the happening thereof". Whether notice of an accident or injury is given to an employer "as soon as practicable" depends upon the facts and circumstances of each particular case. Marc Blackburn Brick Company v. Yates, 424 S.W.2d 814 (Ky. 1968). Stewart alleged in his application that he gave notice "as soon as it was practicable". Stewart testified he initially had no plans of

filing a workers' compensation claim, as he wanted to see if the injury got better, and he saw that a lot of people that filed workers comp cases were getting fired. He stated that once he understood it was a severe injury, he felt like he needed to inform his employer.

He claims he did not know he was supposed to call JOB HURT within 24 hours. However, he signed paperwork, including an Injury/Accident Reporting Procedures form on June 20, 2018. The form stated that employees are required to call 1-800-JOBHURT within 24 hours to report a work-related injury.

The first report of injury was filed on July 24, 2019, alleging a fall, resulting in right knee inflammation that has not gone away. The date employer was notified was listed as July 24, 2019. However, it also notes that Stewart's supervisor, Josh Weber, was notified on April 1, 2019. Despite this notation on the First Report of Injury, Stewart's testimony indicates he first notified his doctor around the first of April to get an appointment. He admitted he did not tell his supervisors until June 14, 2019, the day after Dr. Douglas discussed his MRI with him, and he became aware of the severity of the injury.

On May 15, 2019, Stewart presented with right knee pain to his primary care doctor. He described that his knee started bothering him in January of this year, and that when it first started hurting, he had a fall. It was described as he was pulling a cart and had a twisting injury. There was swelling that night, but no pop with injury. His pain was mild, and he was limping on his leg, but it was otherwise tolerable. His knee was popping, and would occasionally lock.

Stewart also attached medical records in support of the application. The July 25, 2019 visit from Concentra references an injury on April 2, 2019. The history of the injury was reported as from a right knee injury in January 2019, which Stewart did not report, but in April/May 2019, his knee started to swell again, and he was told he had a large meniscus tear. He stated he was not able to work long hours and his employer wanted him to come to Concentra to be seen.

Stewart first saw Dr. Lonnie Douglas for his knee pain on June 13, 2019. The injury date was listed as "None", and he was listed as unemployed. The

paperwork associated with the visit indicates Stewart selected "other" instead of work-related when asked about his injury. He specifically denied it as being as workers' comp accident.

He reported a four month history of increasing right knee pain, located medially, characterized by effusions, mechanical symptoms, and inability to stand for long period. Dr. Douglas wrote "no particular injury." Dr. Douglas diagnosed an acute meniscal tear in the right knee. The MRI report dated May 22, 2019 indicates he had right knee pain since January 2019 following a fall, and his pain worsened over the past two months. Stewart admitted he did not notify his employer or file a claim, as he "didn't think it was a big issue of my knee hurting. I was going to give it time to see if it healed, if I tweaked something, if something happened, and I didn't think it was a bigger deal to even notify or file a claim or anything."

The purpose of the notice requirement of KRS 342.185 is (1) to give the employer an opportunity to place the employee under the care of a competent physician; (2) to enable the employer to investigate promptly the effect of pain to the injury and; (3) to prevent the filing of fictitious claims when lapse of time makes proof of lack of genuineness difficult. Harlan Fuel Co. v. Burkhart, 296 S.W.2d 722 (Ky. 1956). While inaccuracy in the notice requirements may be excusable due to lack of prejudice, a delay is excused only by the employer's actual knowledge of the claim or by mistake or other reasonable cause. Blue Diamond Coal Company v. Stepp, 445 S.W.2d 866 (Ky. 1969). The employer was prejudiced in this claim, as Dr. Lyon indicated that contemporary medical records would have helped him determine whether the meniscus tear was related to the injury was pre-existing.

Additionally, the Kentucky Supreme Court, in Granger v. Louis Trauth Dairy, 329 S.W.3d 296 (Ky. 2010), explained 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. Granger involved a delay giving notice from an injury occurring on August 15, 2007 through sometime in November of 2007. The injury was initially thought to

be a simple bruise to the shin which the plaintiff sought to self-treat. However an open sore developed and the plaintiff sought treatment with this physician and then a wound care specialist. The court held the ALJ decided the case reasonably when he dismissed the action for failure to give due and timely notice. In doing so the court stated:

> The claimant failed to give notice of his accident and injury until about three months after they occurred. Evidence that what at first appeared to be an insignificant bruise had failed to heal after two months; developed into an open, draining sore; and concerned the claimant sufficiently to cause him to seek medical attention clearly does not compel a finding that he remained mistaken about the seriousness of his injury and acted reasonably by failing to report the accident and injury until sometime thereafter.

Id. at 299.

Stewart's testimony and medical records are clear that he did not report a work injury to his supervisor until June 14, 2019, more than five months after the injury. Stewart knew he sustained a work-related fall. He also knew his knee was not getting better. Rather, it continued to worsen with swelling, pain, popping and catching, even resulting in a limp. He also sought treatment with his doctor one month before reporting the injury. It cannot be said that he was unware that he sustained an injury.

His testimony that he was unaware of the reporting requirement is not convincing, as just seven months prior to his injury, he signed his employment paperwork which notified him that he was required to report injuries within 24 hours. He made a conscious decision not to report the claim, as he was concerned he may be fired, and hoped his condition may get better. His concern of getting fired for reporting an injury was also unfounded.

> Stewart has cited to case law suggesting that "soon as practicable" should be given liberal construction so as not to defeat a meritorious claim. However, Bates & Rogers Const. co. v. Allen, 210 S2.467 (Ky. App. 1919), was issued more than 100 years ago. Stewart also argues Marc Blackburn Brick Co. v. Yates, 424 S.W.2d 914 (Ky. 1968) suggests that the nature of the injury is important on the issue of notice as it relates to the knowledge of the injured person of the extent of the injury. Stewart also suggests working men would know the meaning of the symptoms, and should not trouble their employer with complaints without reasonable grounds for doing so, citing Hay v. Swiss Oil Co., 60 S.W. 2d 385 (Ky. App. 1933). However, the Granger case cited above is directly on point and makes it clear that Stewart's lack of notice for more than five months is insufficient notice in light of the fact that he knew he sustained a fall, he had immediate and continued pain which continued to worsen, and he sought treatment, all without notifying his employer. For this reason, this ALJ finds that Stewart did not give notice "as soon as practicable" and his claim for income and medical expenses is dismissed.

Stewart filed a Petition for Reconsideration requesting additional findings of fact regarding whether the purpose of giving notice requirement was sufficiently met. Stewart argued his June 14, 2019 notice satisfied the three purposes for giving notice. In response to this petition, the ALJ rendered the following Order, *verbatim*:

> This matter is before the undersigned Administrative Law Judge for consideration of Plaintiff's petition for reconsideration of the Opinion and Order of November 25, 2020.
>
> Therein, Plaintiff requests that the undersigned make additional findings of fact and conclusions of law as to the date of injury, when Stewart provided notice to his employer, and whether the purpose of the notice requirement was sufficiently met by Stewart's notice on June 14, 2019.

KRS 342.281 provides that an administrative law judge is limited on review on petition for reconsideration to the correction of errors patently appearing upon the face of the award, order or decision. The ALJ may not reweigh the evidence and change findings of facts on petition for reconsideration. *Garrett Mining Co. v. Nye,* 122 S.W.3d 513 (Ky. 2003). Having reviewed Plaintiff's petition for reconsideration, the undersigned notes that it is simply an impermissible re-argument of the merits of the claim, and the petition for reconsideration is, therefore, OVERRULED in part, and sustained in part.

To the extent that the ALJ did not make a finding concerning the specific date of injury, this ALJ clarifies that the date of the injury occurred on January 5, 2019, and notice was given on June 14, 2019. However, this ALJ points out that she made this finding since there were no contemporaneous medical records suggesting any other date of injury or cause. Defendant was prejudiced by the lack of notice, as noted by Dr. Lyon in his report. Dr. Lyon stated that contemporary medical records would have helped him determine whether the meniscus tear was related to the injury or pre-existing.

Stewart's notice to the employer more than five months later did not further the purpose of the notice requirement. Stewart did not give the employer an opportunity to place him under the care of a competent physician until nearly six months after the injury. The lack of notice prevented the employer from fully investigating the claim at the time of the injury, or in the months thereafter. It is unknown whether the claim is fictitious, as Defendant was deprived of investigating the injury soon after it occurred. The ALJ found Stewart to be a credible witness regarding his pain based upon the lack of evidence to the contrary, but does not find his testimony concerning the reporting of the work injury to be credible.

Stewart testified he knew something happened to his knee, but waited to notify his employer because he thought it would get better on his own, and because he was afraid he would be fired. However, the ALJ finds that neither argument is supported by the evidence or

> provides Stewart with a reasonable excuse for failing to provide notice.
>
> Stewart knew the onset of his pain was due to the fall. He knew he needed medical attention at least by the last of March or first of April when he contacted his doctor to schedule an appointment. However, he waited another two months after knowing his condition was severe enough to go to the doctor before notifying his employer.
>
> Although Stewart claims he did not know he was supposed to call JOB HURT within 24 hours, he signed the paperwork less than one year before the injury in which he acknowledged his duties to report a work accident. There was no evidence supporting his claim that reporting a work injury would cause him to be fired.
>
> Stewart's failure to provide notice was also a conscious decision, as his June 13, 2019 paperwork indicated he stated "other" when asked whether this was an injury, and denied it was a work injury. He further noted several times that he did not initially want to have his initial treatment covered by workers' compensation.
>
> For these reasons, this ALJ does not change her decision that Stewart failed to provide due and timely notice.

As the claimant in a workers' compensation proceeding, Stewart had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Stewart was not successful in his 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).

KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An 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). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Stewart argues he met his burden of proving he gave notice "as soon as practicable" given the situation. He also argues the ALJ misunderstood and/or misapplied the law and facts regarding the issues of notice. We do not believe the

ALJ's Opinion and Order on Petition for Reconsideration adequately addressed all the facts surrounding the issue of notice in this claim. Therefore, we vacate and remand.

The ALJ determined Stewart suffered a traumatic work injury to his right knee as a result of the January 5, 2019 accident. She also determined Stewart did not provide notice of the injury until June 14, 2019, and that PepsiCo did not prepare and submit the first repot of injury to the Department of Workers' Compensation until July 25, 2019. However, on the first report of injury was a notation indicating Stewart's supervisor Josh Weber was given notice of the work incident on April 1, 2019. The ALJ made the following findings, specifically regarding the first report of injury:

> The first report of injury was filed on July 24, 2019, alleging a fall, resulting in right knee inflammation that has not gone away. The date employer was notified was listed as July 24, 2019. However, it also notes that Stewart's supervisor, Josh Weber, was notified on April 1, 2019. Despite this notation on the First Report of Injury, Stewart's testimony indicates he first notified his doctor around the first of April to get an appointment. He admitted he did not tell his supervisors until June 14, 2019, the day after Dr. Douglas discussed his MRI with him, and he became aware of the severity of the injury.

As this finding indicates, the first report of injury clearly shows PepsiCo was aware of Stewart's work injury as early as April 1, 2019. The ALJ appears to disregard this admission from PepsiCo in a filing it is required to make with the Department of Workers' Compensation. The ALJ appears to have made this determination based solely on Stewart's testimony that he did not advise PepsiCo of his accident until June 14, 2019. We do not feel this is a proper

understanding of the evidence, and the ALJ's determination that notice was given on June 14, 2019 was clearly in error as the first report of injury, prepared and submitted by PepsiCo reflects otherwise. The notation included in the first report of injury was clearly made by a supervisor at PepsiCo, and cannot be simply explained away by relying on the equivocal testimony of Stewart who believed he provided notice on June 14, 2019. We believe that as a matter of law, PepsiCo had notice of the work incident on April 1, 2019 as reflected in the first report of injury prepared by them.

Because PepsiCo acknowledged notice of the work incident on April 1, 2019 as reflected in the first report of injury, we must vacate the ALJ's determination that notice was not provided until June 14, 2019. We remand to the ALJ to issue a determination reflecting notice was provided on April 1, 2019, and the impact such notice may have on this claim. We direct no particular result, and the ALJ may make any determination based upon the evidence, including a dismissal if she determines notice on that date was inadequate.

Accordingly, the Opinion and Order dated November 25, 2020 as well as the December 22, 2020 Order on Petition for Reconsideration are **VACATED**. This claim is **REMANDED** to the ALJ for an Opinion in conformity with this Opinion. We do not direct any particular outcome. The ALJ is instructed to reconsider the issue of notice with April 1, 2019 being the date notice was actually given to PepsiCo, and the ALJ is instructed to perform the appropriate analysis regarding the impact of notice being given at that time.

ALL CONCUR.

DISTRIBUTION:

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