RENDERED: April 30, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002616-WC

CAROLYN YVONNE MCCARTY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 96-06725

KINGSLEY ENTERPRISES, INC.; SPECIAL FUND; HON. DONNA H. TERRY, CHIEF ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: Carolyn Yvonne McCarty (McCarty) asks us to review a September 18, 1998, opinion of the Workers' Compensation Board (board). Ky. Rev. Stat. (KRS) 342.290. We affirm.

McCarty allegedly injured her back on May 25, 1995, while in the employ of Kingsley Enterprises, Inc. (Kingsley). Thereafter, she sought income benefits under the Kentucky Workers' Compensation Act. KRS Chapter 342. Kingsley is a retail meat market owned and operated by two brothers, Jeff and Gary Fisher. McCarty, a former clerk, claims the injury occurred as she was carrying a 40-pound box of chicken. Pursuant to a

benefit review determination dated August 27, 1997, an arbitrator found that McCarty failed to prove her injury was work-related. He dismissed her claim. Thereafter, McCarty sought a *de novo* review before an administrative law judge. KRS 342.275. In an opinion dated February 4, 1998, the chief administrative law judge (CALJ) dismissed McCarty's claim. The CALJ held that McCarty failed to prove 1) that she gave Kingsley due and timely notice of the alleged injury and 2) that she suffered an occupational disability. McCarty appealed to the board, which, in turn, affirmed the CALJ's decision. This appeal followed.

McCarty first maintains that the CALJ erred in holding that she did not give Kingsley due and timely notice of her injury. We disagree. KRS 342.185 provides that notice of an accident must be "given to the employer as soon as practicable after the happening thereof . . . ." Due and timely notice being mandatory, if there is a delay in giving notice, the burden is upon the claimant to show that it was not practicable to give notice sooner. T.W. Samuels Distillery Company v. Houck, 296 Ky. 323, 176 S.W.2d 890 (1943). Since McCarty was unsuccessful before the CALJ, the question before the board was whether the evidence was so overwhelming as to compel a finding in her favor. See Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Compelling evidence is that which is so overwhelming that no reasonable person could reach the same conclusion as reached by the fact-finder. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985).

McCarty testified that she reported her injury to supervisor Gary Fisher on the day she was injured. Jeff Fisher testified at the hearing, however, that he, not Gary, worked with McCarty on the day in question and that she did not advise him of an injury.[1] On May 29, 1996, May 31, 1996, and June 4, 1996, McCarty sought treatment from Dr. Jack Allen for her injury. She did not tell Dr. Allen her injury was work related until the June 4 visit. After that appointment, McCarty called Jeff Fisher concerning workers' compensation insurance. When Jeff asked whether she was going to make a claim, she responded only that her doctor wanted the information. On June 18, Jeff called McCarty to ask whether she believed she had been injured at work. Only then did she inform him of the May 25 incident.

Based on the evidence as a whole, we agree with the board: the evidence did not compel a finding that McCarty gave due and timely notice of her alleged injury to Kingsley. See Id.

McCarty next contends that the CALJ erred by finding that she suffered no occupational disability. She argues that the CALJ should not have disregarded the medical evidence. It is well-settled, however, that the CALJ may choose to believe portions of the evidence and disbelieve others. See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977).

Dr. Michael Best, an orthopedic surgeon, on behalf of Kingsley, indicated that his examination of McCarty revealed "symptom magnification and possible frank malingering." He

[1]Jeff testified at the hearing that Gary could not attend the hearing as he was hospitalized.

assessed a 5% permanent functional impairment to her body as a whole and recommended that McCarty return to work performing light duty for approximately four to six weeks until she was reconditioned.

Kingsley introduced photographs of McCarty actively washing her car. The pictures of her bending, climbing, and stooping were taken ten days after she advised Dr. Best of pain so severe that she was unable to return to any type of gainful employment.

In sum, we do not believe the evidence compels a finding that McCarty suffered an occupational disability. See REO Mechanical, 691 S.W.2d 224.

Kingsley moves this court for costs and sanctions pursuant to KRS 342.310. Although we rule in Kingsley's favor, we cannot say this appeal was taken in bad faith. We, therefore, deny said motion. See Roberts v. Estep, Ky., 845 S.W.2d 544 (1993).

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed.

EMBERTON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FURNISHES SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur with the portion of the majority's opinion in that the evidence does not compel a finding that appellant suffered a work-related injury and that sanctions are not appropriate. However, I respectfully dissent as to the issue of

due and timely notice. I believe that the June 4, 1996, telephone conversation concerning whether the employer had workers' compensation insurance adequately and properly placed the employer on notice of appellant's claim.

BRIEF FOR APPELLANT:

Bernard G. Watts
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BRIEF FOR APPELLEE/KINGSLEY:

Laurie Goetz Kemp
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