

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000582-WC

HARLAN NURSING HOME

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-01665

KATHY OSBORNE;
HON. LLOYD EDENS, ADMINISTRATIVE
LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: DYCHE, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Harlan Nursing Home (Harlan) appeals from an opinion of the Workers' Compensation Board (the Board) entered February 11, 2000, which affirmed an opinion, order and award of Administrative Law Judge Lloyd R. Edens (the ALJ) dated August 30, 1999, which awarded workers' compensation benefits to Kathy Osborne (Osborne). We affirm.

Osborne testified during the hearing before the ALJ that she began working as a certified nurse's assistant for Harlan in April 1997. She initially worked the third shift where

her duties included turning approximately forty patients four times each night. Osborne later worked the second and then the first shift. According to her testimony, her duties on the first and second shifts were more extensive and required more heavy lifting as these shifts occurred when the patients were awake.

Around October 1997 Osborne began experiencing problems with pain and swelling in her hands and arms. She was off work pursuant to a doctor's order from December 16 through December 22, 1997. Her last day of work with Harlan was December 15, 1997.

Osborne testified that she saw Dr. A. Ahmad on or about December 16, 1997. Suspecting carpal tunnel syndrome, he took her off work and referred her to Dr. Mohammad Bhatti (Dr. Bhatti). Everyone agrees that on or about December 16, 1997, Osborne told Jennifer Howard (Howard), her supervisor at Harlan, that she had been diagnosed with carpal tunnel syndrome. Howard made the following written statement on a payroll status report dated December 29, 1997:

MD put Kathy off from 12-16-97 thru 12-22-97. Kathy states due to carpal tunnel syndrome. Off days were 12-23 & 12-24. I called Kathy 12-24-97 to inquire if MD had released her back to work since she had not notified me on 12-22 or 12-23-97. Kathy stated MD had released her back to work & assured me she would return 12-25-97. She also stated that she was going to quit & would be giving a two week notice. . . .Kathy did not show up for work 12-25-97, 12-26-97, & 12-27-97. Therefore she is terminated.

Osborne underwent a right carpal tunnel release on July 20, 1998.

Osborne filed her claim for workers' compensation benefits on October 21, 1998. The date of injury listed on the

form was December 20, 1997. The cause of injury was "repetitive activities, hands, fingers, wrist, arm."

Osborne submitted medical records from Dr. Richard Stoltzfus (Dr. Stoltzfus), Dr. Fayal Ahmad (Dr. Ahamd),¹ and Dr. James Templin (Dr. Templin). According to office notes from Dr. Stoltzfus dated July 1, 1998, Osborne complained of pain in both arms, with the pain being greater on the right. Dr. Stoltzfus noted Osborne's previously-diagnosed carpal tunnel syndrome and indicated that he was referring her "to Dr. F. Ahmad for further evaluation and treatment." In a letter dated September 1, 1998, Dr. Stoltzfus noted Osborne's continuing problems with her right hand as well as pain in both hands, and stated that "she is unable to work at her usual employment for an indefinite period of time."

Office notes from Dr. Ahmad indicate that she first saw him on July 9, 1998. Dr. Ahmad noted Osborne's complaints of numbness and weakness in both hands with the right being the most problematic. His review of previous nerve conduction studies showed bilateral carpal tunnel syndrome. Dr. Ahmad performed a right carpal tunnel release on July 20, 1998.

Osborne was evaluated by Dr. Templin on September 28, 1998. According to Dr. Templin's Form 107, he diagnosed chronic bilateral carpal tunnel syndrome, and indicated that Osborne's condition was the "result of work-related activities performed

¹This is not the same Dr. Ahmad who saw Osborne in December 1997.

while in the employment of Harlan Nursing Home." He gave an impairment rating of 18%.

Harlan submitted medical records from Dr. Bhatti and Dr. Ronald Burgess (Dr. Burgess). Dr. Bhatti's records indicate that he first saw Osborne on January 15, 1998, for pain in her left arm. In his office notes of that date, he stated that "[p]atient have [sic] exacerbation of these symptoms on lifting heavy objects (part of patient's job is transferring patients, patient works as a CNA)." Dr. Bhatti's impression was:

1. Carpal tunnel syndrome, possibly secondary to impingement on the nerve by arthritic changes in the wrist (compression on the flexor retinaculum).
2. Cervical root compression in the distribution of C6-C7 is less likely since patient does not have any complaints of pain in the neck and shoulder region (patient have [sic] subtle decrease sensation over left deltoid and upper shoulder region).

Dr. Bhatti saw Osborne again on February 17, 1998, after completion of nerve conduction studies. Based on the studies, Dr. Bhatti diagnosed:

Moderate compression of median nerve on the right and mild to moderate compression in the left median nerve consistent with bilateral carpal tunnel, moderate to severe degree.

Dr. Bhatti recommended surgical evaluation for possible decompression.

Osborne was evaluated by Dr. Burgess on March 18, 1999. Although Dr. Burgess indicated in his report that he suspected symptom magnification, he diagnosed "left moderate carpal tunnel syndrome and a Grade III sensory deficit of the right median

nerve following right carpal tunnel release," and gave an impairment rating of 17%. Dr. Burgess also stated:

The patient's activities at the Nursing Home which were intermittent use of the hands are not considered a normal repetitive motion job associated with entrapment neuropathies.

In an opinion, award and order dated August 30, 1999, the ALJ awarded Osborne benefits based on a 17% functional impairment rating. In regard to the issues of causation and notice, the ALJ stated:

The Petitioner testified concerning the onset of symptoms associated with her work. Her history is reflected in the report of Dr. Bhatti . . . and in the opinion of Dr. Templin. I am, therefore, persuaded by the Petitioner's description of her work, as well as the opinion of these physicians, that the Petitioner's injury was the result of work-related traumatic events, which arose out of and in the course of her employment. Accordingly, I find her carpal tunnel syndrome was an injury as determined by the aforementioned statute.

The Petitioner testified that she informed Ms. Howard of her [diagnosis] by Dr. Ahmad. Ms. Howard testified that she became aware of the Petitioner's condition when she was informed on December 15, 1997. I am, therefore, persuaded by the testimony of the Petitioner that the Respondent/Employer received timely notice of the Petitioner's work-related injury.

In an order on petition for reconsideration dated October 5, 1999, the ALJ stated:

The basis for reconsideration is the position of the Employer that the decision does not reflect that it had notice that the Petitioner's carpal tunnel syndrome was work-related The December 29, 1997 status

report completed by Ms. Howard states that the Petitioner's physician had taken her off work due to carpal tunnel syndrome. I am of the opinion this was sufficient notice to apprise the Employer of a potential work-related claim.

On appeal to the Board, Harlan argued that the evidence conclusively showed that Osborne failed to give notice that she was claiming her carpal tunnel syndrom was work-related. In an opinion entered February 11, 2000, the Board affirmed the ALJ, stating:

We believe that there is substantial evidence supporting the ALJ's finding of due and timely notice. We note that Osborne testified that she spoke with Howard on two occasions regarding her condition. Neither Osborne, nor Howard, were asked specifically about the content of these communications, but Osborne did state that she notified Howard about the problems with her hands. Certainly, more probing questions could have been asked regarding what Osborne actually told Howard about her condition. We believe, however, that it was not unreasonable for the ALJ to infer from Osborne's testimony that she had informed Howard of Dr. Ahmad's opinion that her carpal tunnel syndrome was work-related.²

This appeal followed.

The sole question before us is whether Osborne met her burden of showing that she gave due and timely notice that she had sustained a work-related injury. Harlan claims that Osborne failed to satisfy her burden of proof because she failed to inform Harlan that her carpal tunnel syndrome was work-related

²It is obvious that the Board erred in stating that Dr. Ahamd's opinion was that Osborne's carpal tunnel syndrome was work-related as he never offered an opinion in regard to causation. However, that mistake, in and of itself, does not require reversal

until she filed her Form 101 some eleven months after her last day of work. We disagree.

"[C]laims for a gradual occupational injury due to cumulative trauma . . . are subject to the [notice] requirements of KRS 342.185." Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96, 100 (1999). Pursuant to that statute, a claimant must give "notice of the accident" to her employer "as soon as practicable after the happening thereof." KRS 342.185(1). Under KRS 342.200, "[w]ant . . . or delay in giving notice shall not be a bar to proceedings under this chapter if it is shown that . . . the delay or failure to give notice was occasioned by mistake or other reasonable cause." The question was to whether notice has been given "as soon as practicable" is to be made based on the facts of the particular case. Newburg v. Sleets, Ky. App., 899 S.W.2d 495, 497 (1995).

It is undisputed that Osborne told Howard she had been diagnosed with carpal tunnel syndrome in December 1997. A review of the medical evidence presented shows that no doctor attributed Osborne's carpal tunnel syndrome to her work activities until Dr. Templin did so in his Form 107 dated September 28, 1998. Osborne filed her Form 101 on October 21, 1998, less than one month after Dr. Templin issued his opinion. Based on the foregoing, we find that Osborne's delay in giving notice of the work-relatedness of her condition was reasonable. We are at a loss to explain how Harlan expected Osborne to tell Howard that her condition was work-related, much less produce evidence of work-relatedness in

December 1997, when the medical opinion of Dr. Templin establishing causation was not given until September 1998.

Having considered the parties' argument on appeal, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, KATHY
OSBORNE:

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