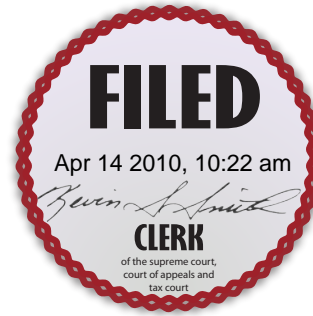


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ELIZABETH HOWELL,

Appellant-Petitioner,

vs.

TISA-TOTAL INTERIOR SYSTEMS
AMERICA, LLC,

Appellee-Respondent.

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No. 93A02-0912-EX-1282

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
Cause No. C-187663

April 14, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Elizabeth Howell appeals the decision of the Indiana Worker's Compensation Board (the Board) denying her claim for worker's compensation following an injury that she received in the course of her employment for appellee-respondent TISA-Total Interior Systems America, LLC (TISA). Howell argues that the Board erred by finding that her claim was untimely filed. Finding no error, we affirm.

FACTS

During the relevant period of time, Howell was an employee of TISA, and part of her job was to inspect seat frames for vehicles. On June 20, 2005, Howell injured her left elbow while on the job. On July 7, 2005, Howell was still receiving treatment for that injury. She lifted a seat frame onto a table, heard a pop, and lost all control of her left arm. Howell was in significant pain and was unable to lift the seat to the table. She immediately reported the injury to her supervisor.

The next morning, Howell sought treatment from Dr. James Butler, TISA's company doctor. Dr. Butler concluded that Howell had exacerbated the already-existing injury to her left elbow. She returned to see Dr. Butler on July 26 and August 10, 2005, at which time Dr. Butler again focused solely on her elbow. During this period of time, Howell complained of intense pain in her left arm and elbow, of a feeling that her fingers were asleep, and numbness in her pinky finger. Dr. Butler sent Howell to physical therapy, and during one of her sessions, the physical therapist mentioned that Howell's problems could be related to an injury in her neck. The physical therapist prepared a

letter to Dr. Butler regarding the possible source of Howell's pain, which Howell delivered at her next appointment.

On August 24, 2005, Howell returned to Dr. Butler and gave him the letter from the physical therapist. Dr. Butler agreed with the physical therapist's diagnosis and stated, for the first time, that he believed that her pain and discomfort were related to her neck. Dr. Butler instructed Howell to contact her family doctor to get an MRI, refusing to treat her elbow further until she had the MRI. Howell decided not to pursue worker's compensation at that time because Dr. Butler told her that there were no jobs at TISA that could cause the type of neck injury she had sustained.

The MRI revealed that Howell had two ruptured discs in her neck. Howell saw a neurosurgeon, who initially administered injections in her neck. The injections provided no relief, however, so the surgeon recommended surgery. On June 8, 2006, Howell underwent surgery, which required the use of a donor bone, a three-inch plate, and six screws. Following surgery, Howell was unable to work for three months. She had requested and received FMLA leave for cervical pain in 2005, and again from June 12, 2006, through September 24, 2006, following her surgery.

On July 13, 2007, Howell filed a claim for worker's compensation, alleging that she had injured her neck in the course of her employment. That was the first notice that Howell provided to TISA that her cervical injury was related to her employment. Following a hearing before a Single Hearing Member, on March 28, 2009, the Single Hearing Member denied Howell's claim, finding that it had been untimely filed:

The Single Hearing Member does not find a basis for overlooking the two-year period for filing her claim. It is undisputed that Plaintiff believed she was injured on July 7, 2005, though the nature of the injury may not have been precisely defined until a later date.

Appellant's App. p. 88. Howell sought review by the full Board, which affirmed the Single Hearing Member's decision on December 2, 2009. Howell now appeals.

DISCUSSION AND DECISION

When reviewing a decision of the Board, we will not disturb the Board's factual determinations unless the evidence is undisputed and leads inescapably to a result contrary to the Board's. Inland Steel Co. v. Pavlinac, 865 N.E.2d 690, 697 (Ind. Ct. App. 2007). Thus, we must disregard all evidence unfavorable to the decision and may consider only the evidence and reasonable inferences drawn therefrom that support the Board's findings. Id. Although we need not defer so significantly to the Board's legal conclusions, we will disturb the Board's conclusions only if it incorrectly interpreted the Worker's Compensation Act. Id.

Pursuant to Indiana Code section 22-3-3-3, an application for worker's compensation benefits must be filed within two years from the occurrence of the accident that resulted in the injuries for which the employee seeks compensation. There is an explicit statutory exception to the two-year rule that applies when the injuries are caused by exposure to radiation, I.C. § 22-3-3-3, and the courts have relaxed the two-year rule when the claim is one for repetitive trauma such that the precise date of the injury is difficult to discern, Inland, 865 N.E.2d at 700.

Howell asks that we create a new exception to the two-year statute of limitations “to include cases of mis-diagnosis, especially when the mis-diagnosis is by the company doctor.” Reply Br. p. 2. She argues that Dr. Butler erred by assuming that her July 7 injury was an exacerbation of her previously-sustained injury to her left elbow. It was not until August 24 that he correctly diagnosed her as having sustained an injury to her neck, and it was not until she got an MRI scan that she was diagnosed with ruptured discs in her neck.

That is all true. The existing exceptions to the statute of limitations, however, apply to situations in which the precise date of injury is difficult or impossible to pinpoint. Specifically, when an employee is exposed to radiation in the course of her employment, or when an employee sustains repetitive trauma as part of her job, it is nearly impossible to discern the date of the injury with great specificity. Moreover, the injuries may reveal themselves very slowly under both of those sets of circumstances.

Here, in contrast, Howell always knew that she had sustained an injury on July 7, 2005. Yes, it appears that Dr. Butler originally misdiagnosed the injury as an elbow injury rather than a neck injury. But there was never any doubt about the date on which Howell was injured, the way in which she was injured,¹ or the fact that she had, indeed, sustained an injury. Howell had every opportunity to file her worker’s compensation

¹ Although Howell makes much of the fact that Dr. Butler told her that he did not believe she sustained the neck injuries in the course of her employment, she has always stated that on July 7, she heard a pop and immediately began experiencing severe pain and numbness in her left arm. The discomfort in her arm was caused by the ruptured discs in her neck; thus, she should have realized, or at least suspected, that the moment in which she heard the pop and first began to experience pain—while on the job—was the moment of injury.

claim within two years following July 7, 2005: she received the correct diagnosis in August 2005 and she had surgery to ameliorate her injuries in June 2006. Howell elected, however, to wait until July 13, 2007, to file her claim, and provided no notice to TISA before that time that she believed that her injuries were sustained in the course of her employment. There is no exception to the statute of limitations that would toll it under these circumstances, and we decline Howell's invitation to create a new one. We do not find that the Board erred by denying Howell's claim as untimely filed.

The judgment of the Board is affirmed.

DARDEN, J., and CRONE, J., concur.