RENDERED: August 21, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-1301-WC

PATRICIA TYREE — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD WC-96-005515

PATTIE A. CLAY HOSPITAL; SPECIAL FUND; DONALD G. SMITH, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

* * *

BEFORE: GUIDUGLI, KNOX, AND MILLER, JUDGES.

KNOX, JUDGE: Appellant takes this appeal from the decision of the Workers' Compensation Board (Board) denying appellant's claim for benefits. The Board, with one member dissenting, affirmed the decision of the Administrative Law Judge (ALJ) that appellant's claim was not filed within the two-year limitations period provided by KRS 342.185.

Appellant began work as a licensed practical nurse with Pattie A. Clay Hospital in 1964. She worked at the hospital for thirty-three (33) years until her retirement in 1997.

The ALJ found that, in 1964 or early 1965, while lifting a patient, appellant suffered a herniated disk. The ALJ found that appellant reported her injury to her supervisor, but did not file a workers' compensation claim. She sought treatment, and was placed on bed rest for two (2) weeks. During her years of employment with the hospital, she continued to experience back pain with radiation into her legs.

In September 1990, appellant sought treatment from Dr. William Brooks and Dr. Richard Motara. Dr. Brooks performed diagnostic studies and determined that appellant had a herniated disk, as well as other spinal abnormalities. However, he imposed no job restrictions and recommended no job change at that time, nor did he notify appellant's employer to change her work duties. Appellant continued working until February 1996, when Dr. Brooks recommended that she seek medical retirement. At that time, Dr. Brooks restricted appellant from repetitive lifting, bending, stooping, climbing, and squatting, and advised appellant not to sit, stand, or walk for more than twenty (20) minutes without changing position.

Dr. Joseph Zerga and Dr. Donald Primm performed independent medical evaluations on appellant in late 1996. Both physicians testified that the plaintiff had an active and/or arousal of a pre-existing back condition due to her work. Both

physicians testified that they believed appellant's condition was the same in 1990 and 1991 as it was in 1996.

The ALJ found that plaintiff had proven the work-relatedness of her back problems and that, based upon her testimony that she notified her superiors when she injured her back in 1964, she had given timely notice to her employer.

However, the ALJ concluded that, based upon the testimony of Dr. Brooks, Dr. Zerga, and Dr. Primm that appellant had similar diagnoses and would have had similar restrictions in 1990 to 1991 as would have been imposed in 1996,[1] her condition manifested itself into disabling reality in 1990 or 1991, and her claim was therefore barred by the statute of limitations. In so ruling, the ALJ relied upon Brockway v. Rockwell Int'l, Ky. App., 907 S.W.2d 166 (1995) and Randall Co./ Randall Div. of Textron, Inc. v. Pendland, Ky. App., 770 S.W.2d 687 (1989).

In affirming the ALJ's decision, the Board appears to have differed to the extent that the ALJ relied upon "cumulative trauma" cases. Rather, the Board relied upon Coslow v. General Elec. Co., Ky., 877 S.W.2d 611 (1994) in concluding that the statute of limitations began to run from the date of her initial injury in 1964 or 1965. Thus, the Board took the position that appellant's claim was a "date of the accident" claim, rather than a manifestation into disabling reality claim. Even so, the Board ruled that, even if appellant's claim was a "cumulative trauma"

[1]We note that while Dr. Brooks testified as such, the fact remains that he placed appellant on no restrictions whatsoever in 1990-91.

claim, the ALJ's conclusion that the disability manifestation date would have been no later than 1991 was supported by the evidence, particularly in view of Dr. Brooks's, Dr. Zerga's, and Dr. Primm's testimony that the same restrictions would have been imposed upon appellant in 1990 and 1991 as were imposed in 1996.

Appellant argues that the statute of limitations for filing her claim did not begin to run until February 1996, when Dr. Brooks recommended that she seek medical retirement. She argues that, since Dr. Brooks's medical records contain no reference that "disabling reality had manifested itself" any earlier, contrary to the ALJ and the Board's conclusion, she would not have had notice to file her claim as early as 1991. Appellant, embracing the "cumulative trauma" theory, and relying upon Dr. Brooks's testimony, takes the position that her condition manifested itself into disabling reality in 1996, when Dr. Brooks first recommended that she take medical retirement.

The claimant in a workers' compensation claim has the burden of proof and risk of persuasion, and if unsuccessful, the question on appeal is whether the evidence is so overwhelming upon consideration of the record as a whole as to compel a finding in claimant's favor. See Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984); Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Compelling evidence is that which is so overwhelming that no reasonable person could reach the same conclusion reached by the finder of fact. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985). If the ALJ's decision

is supported by substantial evidence of record, it must be upheld. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Here, we believe that the evidence in this case compels a conclusion that this is a "cumulative trauma" case, and that appellant's condition did not manifest itself into disabling reality until 1996, when Dr. Brooks recommended that appellant take medical retirement. As stated in Randall Co./Randall Div. of Textron, Inc. v. Pendland, Ky. App., 770 S.W.2d 687, 688 (1989):

> Although Pendland began experiencing significant pain possibly six months prior to quitting work on January 14, 1983, there was no definite disability as a result of her mini-traumas until that date. If we held that in an injury case of this type the claim had to be made within two years of the initial trauma, we might be considering the first time she performed her thumb maneuver 26 years ago, or it might be the first time she aggravated her degenerative arthritis, but in neither case would we know that a compensable injury had occurred. We therefore conclude that in cases where the injury is the result of many mini-traumas, the date for giving notice and the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest.

The record reflects evidence that appellant indeed initially hurt her back in 1964. However, she continued to work in her employment for a period in excess of thirty (30) years from that date. The medical testimony reflects that over the period of her employment, her back condition grew progressively worse as she exercised her duties, which involved lifting and other kinds of physical exertion. We believe that the ALJ

correctly perceived this case as a "cumulative trauma" case. However, we also believe that the evidence compels a conclusion that appellant's condition did not manifest itself into disabling reality until Dr. Brooks recommended that she take medical retirement. While the ALJ relied upon the testimonies of Dr. Brooks, Dr. Zerga, and Dr. Primm that the same restrictions would have been placed upon appellant in 1990 and 1991 when she sought Dr. Brooks's advice, we believe that the fact that she was not then placed on restrictions, but rather, experienced a momentary absence from work, is not a sufficient basis upon which to conclude that her condition manifested itself into disabling reality in 1990 or 1991. Rather, we believe that the evidence compels a conclusion that, since she was not placed upon restrictions and continued to work until she saw Dr. Brooks in 1996, her condition did not manifest itself into disabling reality until Dr. Brooks placed her on restrictions and recommended her retirement.

For the foregoing reasons, we reverse the decision of the Board, and remand this matter to the ALJ for findings on the merits of appellant's claim.

MILLER, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, DISSENTING. I respectfully dissent. Although I believe there is evidence which supports the conclusion of the majority, I also believe there is sufficient evidence to support the conclusion of the Administrative Law

Judge (ALJ) and the majority of the Workers' Compensation Board. As such, I fear that the majority is substituting its opinion for that of the ALJ in this matter. Although I am sympathetic to the arguments of appellant, I believe there was a sufficient basis upon which the ALJ concluded that her condition manifested itself into disabling reality in 1990 or 1991, and would thus affirm.

BRIEF FOR APPELLANT:

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