

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002681-WC

BARTON BRANDS, LTD. (AS INSURED BY
LIBERTY MUTUAL INSURANCE COMPANY)

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 94-15521

PHYLLIS M. HALL;
BARTON BRANDS, LTD.,
(AS INSURED BY LUMBERMENS/KEMPER);
BARTON BRANDS, LTD.,
(AS INSURED BY ROYAL INSURANCE COMPANY);
DIRECTOR OF THE SPECIAL FUND;
HON. SHEILA LOWTHER,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

AND: CROSS-APPEAL NO. 1998-CA-002783-WC

BARTON BRANDS, LTD.
(AS INSURED BY LUMBERMENS/KEMPER)

CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION
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PHYLLIS M. HALL;
BARTON BRANDS, LTD.
(AS INSURED BY LIBERTY MUTUAL);
BARTON BRANDS, LTD.
(AS INSURED BY ROYAL INSURANCE COMPANY);
HON. ROBERT L. WHITTAKER,

DIRECTOR OF SPECIAL FUND;
HON. SHEILA C. LOWTHER; and
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

AND: CROSS-APPEAL NO. 1998-CA-002805-WC

HON. ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND

CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
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HON. SHEILA C. LOWTHER,
ADMINISTRATIVE LAW JUDGE; and
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CROSS-APPELLEES

OPINION

AFFIRMING ON DIRECT APPEAL NO. 1998-CA-002681-WC;
AFFIRMING ON CROSS-APPEAL NO. 1998-CA-002805-WC;
AND REVERSING AND REMANDING WITH DIRECTIONS
ON CROSS-APPEAL NO. 1998-CA-002783-WC

** ** * * *

BEFORE: JOHNSON, McANULTY, and MILLER, Judges.

MILLER, JUDGE: Barton Brands, Ltd., as insured by Liberty Mutual Insurance Company (Barton/Liberty), asks this court to review an Opinion of the Workers' Compensation Board (board) rendered

September 25, 1998. Barton Brands, as insured by Lumbermens/Kemper (Barton/Lumbermens), and the Special Fund bring these cross-appeals. We affirm on Direct Appeal No. 1998-CA-002681-WC; affirm on Cross-Appeal No. 1998-CA-002805-WC; and, reverse and remand with directions on Cross-Appeal No. 1998-CA-002783-WC.

Phyllis M. Hall began employment with Barton Brands, Ltd. (Barton), in 1967. All of her duties at Barton were in the bottling house and involved repetitive use of her arms. In the late 1980's, Hall began to experience pain in both thumbs. Initially, she was treated with injections and given braces for her thumbs and wrists. In 1988, she underwent surgery on her left hand and missed approximately six months of work. She then returned to work in the bottling house.

In 1991, an accident report was filed indicating that Hall was experiencing discomfort in her hand. Then, in 1993, Hall again sought medical treatment for her hands. In March 1994, she filed a claim for workers' compensation benefits. Ky. Rev. Stat. (KRS) Chapter 342. She continued to work until she underwent surgery on her right hand in August 1994. She has not returned to work since that time.

Liberty Mutual Insurance Company provided workers' compensation coverage for Barton through October 18, 1993; Royal Insurance Company (Royal) provided coverage from October 15, 1993, through March 14, 1994; and Lumbermen's/Kemper provided coverage from March 1994 to the present. The administrative law judge (ALJ) determined, among other things, that Hall was

permanently and totally disabled, that the date of injury (or manifestation thereof) was May 1993, that Hall's claim was not barred by the statute of limitations, and that the Special Fund was liable for 12% of Hall's income benefits. Barton/Liberty and the Special Fund appealed to the board. The board, in turn, determined that the following findings were based on substantial evidence: 1) Hall was totally disabled, 2) Hall's disability manifested itself in May 1993, and 3) the Special Fund was partially liable. In addition, however, the board determined that the ALJ did not decide the issue of limitations based upon a correct understanding of the evidence. Therefore, it remanded Hall's claim to the ALJ for "reconsideration of her findings regarding the date on which the disabling reality of Hall's condition became manifest and the application of the statute of limitations in light of Dr. Kutz' testimony." This appeal followed.

On direct appeal, Barton/Liberty asserts that the ALJ erred in its determination that Hall's disability became manifest in May 1993. It argues that the correct date of manifestation should have been in August 1994, as Hall continued working until then. We believe the ALJ's determination that Hall's disability manifested itself in May 1993 is based on substantial evidence. See Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Although Hall underwent surgery on one thumb in 1988, she worked continuously from February 1989 until 1994. With the exception of one visit to the doctor in 1992, further medical treatment was unnecessary until May 1993, when Hall's condition

was sufficient to affect her work. She resumed treatment with Dr. Kutz at that point and told him that she had to leave work because of the pain in her hands. Soon thereafter she began to demonstrate signs of nerve compression. Contrary to Barton/Liberty's allegation, we find no authority requiring the disability manifestation date to coincide with employment cessation date. Hence, we find no error in the ALJ's determination that Hall's disability manifested in May 1993.

In the alternative, Barton/Liberty urges us to adopt a "last exposure rule" wherein "the insurance carrier covering the risk at the time of the most recent injury or exposure" would be liable for benefits. We reject this argument outright, as it is well settled that in cumulative trauma cases, the "date of injury," for purposes of liability, is the date the disability manifests itself. Coslow v. General Electric Company, Ky., 877 S.W.2d 611 (1994). We are bound to follow such precedent as established by our supreme court. SCR 1.030(8).

Barton/Liberty next contends that the ALJ's finding of total occupational disability was not based on substantial evidence. Specifically, it contends that Hall's inability to work resulted from her prior active hypertension. The board specifically found that:

[t]he functional capacity evaluation relied upon by Dr. Kutz indicated that Hall could lift no more than ten pounds maximum or five pounds frequently and should avoid repetitive work with her arms, overhead work, and the use of vibratory tools. Dr. DuBou felt that Hall could return to light work but only if it was non-repetitive in nature. Sharon Lane, the vocational evaluator, stated that taking into account Hall's low academic

ability and her age, she would be totally occupationally disabled. Hall herself testified that she could not continue to perform the sort of work that she had done in the past for Barton. She also denied there was any light duty at Barton that she could perform. This is substantial evidence supporting the ALJ's finding of total occupational disability. Although we concede that another fact finder may have given more weight to the testimony of the lay witnesses regarding the existence of light duty work at Barton's plant and found Hall capable of doing some work, there is ample evidence supporting the conclusion reached by this ALJ.

We agree with the board and believe the ALJ's determination of total occupational disability was supported by substantial evidence.

On cross-appeal, Barton/Lumbermens complains that the board erred in remanding Hall's claim for a reconsideration of the manifestation date of Hall's disability and how it affects the limitations issue. In regard to limitations, the ALJ noted that Hall's 1988 medical problems were separate and distinct from her 1993/1994 medical problems. The board held that the ALJ misconstrued the evidence in that Dr. Kutz had diagnosed Hall with degenerative arthritis in both hands in 1988 and 1993. The board, therefore, remanded the cause for a reconsideration of the disability manifestation date and its effect on the limitations issue based on a correct understanding of the evidence.¹ Having reviewed the record, we believe that although the ALJ may have

¹We are baffled by the board holding, on one hand, that the disability manifestation date set by the administrative law judge (ALJ) was based on substantial evidence, yet, on the other hand, remanding the cause to the ALJ for further consideration of that date and its application to the statute of limitations.

misstated Dr. Kutz's testimony, such error was immaterial as she had already referred to ample independent evidence supporting the May 1993 disability manifestation date. The board specifically held that the assignment of such date was based on substantial evidence. We agree. We, therefore, adopt the following excerpt from Hon. Dwight Lovan's dissent:

While the parties are entitled to an accurate understanding of the evidence in accord with Cook v. Paducah Recapping Service, Ky. 694 S.W.2d 684 (1985), if such a misunderstanding will not materially alter what the ALJ has decided, reversal . . . is unnecessary and inappropriate.

We believe the board erred in reversing Hall's claim and in remanding it for the ALJ's reconsideration.

On cross-appeal, the Special Fund argues that the ALJ's determination of the Fund's liability is not based on substantial evidence. We disagree. Dr. DuBou reported that Hall was 16% functionally disabled. He stated further that 2% of such disability resulted from the arousal of preexisting arthritis. The apportionment of 12% liability to the Special Fund is proportional to Dr. DuBou's findings. Hence, we believe there was substantial evidence to support the ALJ's apportionment.

Having considered the appeal and cross-appeals herein, we find no error other than the board's remand to the ALJ for reconsideration of the evidence relating to the manifestation date of injury and its impact on the statute of limitations. We, therefore, vacate that portion of the board's opinion and remand same with directions to enter an order affirming the ALJ's decision.

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed on Direct Appeal No. 1998-CA-002681-WC; affirmed on Cross-Appeal No. 1998-CA-002805-WC; and reversed and remanded with directions on Cross-Appeal No. 1998-CA-002783-WC.

ALL CONCUR.

BRIEF FOR BARTON/LIBERTY:

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