RENDERED: July 15, 2005; 2:00 p.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-000549-WC

KYLE D. LUNSFORD — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-00131

MANALAPAN MINING COMPANY, INC.;
HOWARD E. FRASIER, JR., ADMINISTRATIVE LAW
JUDGE; AND THE WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Kyle Lunsford petitions from a decision of the Workers' Compensation Board, entered February 11, 2005, denying, on statute of limitations grounds, his claim for disability benefits. Lunsford seeks benefits as compensation for a hearing impairment allegedly resulting from his thirty years' exposure to the hazardous noises of underground coal mining. The

Administrative Law Judge (ALJ), noting Lunsford's long exposure to hazardous noise and accepting the university evaluator's conclusion that he has suffered a hearing loss amounting to a nine-percent whole-person impairment, awarded benefits in accordance with KRS 342.7305. The Board reversed. It ruled that the two-year statute of limitations imposed by KRS 342.185 began to run in February 2001 when Lunsford ceased working and thus ceased to be exposed to hazardous noise. Because Lunsford did not file his hearing-loss claim until January 2004, more than two years later, the Board held that the claim fell outside the limitations period and so was barred. Lunsford contends that the Board erred either because KRS 342.185 does not apply to his claim, or because, if it does, the limitations period did not begin to run until December 2003, when he first discovered his impairment and the fact that it was apt to be work-related. The filing of his claim a month later, he insists, was therefore timely. We agree with this latter contention and therefore must reverse and remand.

Lunsford's first contention, that KRS 342.185 does not apply to his claim, was not presented to the Board and so was not preserved for our review. In similar circumstances, our Supreme Court has approved rulings in which industrial hearing

loss was deemed a gradual injury subject to the two-year statute of limitations.[1]

Under that statute, our Supreme Court has held,

> the obligation to give notice and the period of limitations for a gradual injury are triggered by a worker's knowledge of the harmful change [to his or her body] and its cause rather than by the specific incidents of trauma that caused it.[2]

A gradual injury is a harmful physical change, such as the hearing impairment Lunsford alleges, that results from repeated exposure to the ordinary jars, jolts, and movements occasioned by the work, or to harsh workplace conditions, such as here the loud noises produced by mining equipment. Because the cause of such injuries is often not apparent, our Supreme Court in a number of recent cases has reiterated the discovery rule just quoted, and has held that the limitations period did not begin until the injured worker learned from a physician that the injury was apt to be work-related.[3]

Notwithstanding these cases, the Board ruled, as noted above, that the statute of limitations begins to run against

---

[1] Tanks v. Roark, 104 S.W.3d 753 (Ky. 2003); Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999).

[2] American Printing House for the Blind v. Brown, 142 S.W.3d 145, 148 (Ky. 2004); Alcan Foil Products v. Huff, *supra.*

[3] American Printing House for the Blind v. Brown, *supra;* Brown-Forman Corporation v. Upchurch, 127 S.W.3d 615 (Ky. 2004); Hill v. Sextet Mining Corporation, 65 S.W.3d 503 (Ky. 2001).

gradual injury claims as soon as the injured worker ceases to be exposed to the harmful working condition. This rule does not comport with the discovery rule our Supreme Court has fashioned. First, even supposing that no further injury will develop once exposure ceases, the Supreme Court has held that the limitations period does not commence until the worker knows both that he is injured and that the injury is work-related. There is no reason to presume that this knowledge will coincide with the end of exposure. On the contrary, as just noted, the Court has emphasized that such knowledge sometimes must await professional diagnosis, which could easily not occur until after exposure has ceased. To be sure, there may be cases in which the worker can be found to have known of his claim prior to confirmation by a physician or in which his delay in seeking such confirmation was unreasonable, and claims filed after exposure has ceased may be particularly subject to such findings. But those cases can be addressed individually, as they arise. They do not require the Board's blanket rule departing from Supreme Court precedent.

Second, there may well be gradual injuries that remain latent temporarily or that progress so as to become manifest and disabling after exposure ceases. In such cases, the Board's rule threatens to operate as a rule of repose rather than limitation, extinguishing the claim before it arises. Such rules are harsh by nature and are best left to the General

Assembly with its resources for investigating the relevant facts. In KRS 342.316, for example, the General Assembly has established a five-year period of repose, beginning from the end of exposure, for claims based on occupational disease, but has also created exceptions for certain diseases known to take longer than five years to become manifest and disabling.[4] By contrast, the Board's two-year period of repose is unduly short and there is no indication that it is based on medical knowledge regarding the onset and development of gradual injuries. KRS 342.185, of course, does not contain an express repose provision.[5] The Board's reading such a provision into the statute is unwarranted and, again, does not comport with our Supreme Court's determination that in gradual injury cases that statute establishes a rule of discovery for the commencement of the limitations period.

The ALJ in this case found that Lunsford did not discover his occupational hearing loss until December 2003 when a physician first informed him that his hearing was impaired as

[4] "[T]he right to compensation for any occupational disease shall be forever barred, unless a claim is filed with the commissioner within five (5) years from the last injurious exposure to the occupational hazard, except that, in cases of radiation disease or asbestos-related disease, a claim must be filed within twenty (20) years from the last injurious exposure to the occupational hazard." KRS 342.316(4)(a).

[5] *But see* Alcan Foil Products v. Huff, *supra,* (indicating that the discovery rule does not apply to latent injuries caused by a single traumatic event).

a result of exposure to workplace noise. Substantial evidence supports that finding. Under the discovery rule fashioned by our Supreme Court, the limitations period on Lunsford's claim began to run at that point. The filing of his claim in January 2004 was thus timely. The Board's ruling to the contrary was based on a misconstruction of controlling precedent.[6]

Accordingly, we reverse the Board's February 11, 2005, order and remand for reinstatement of Lunsford's award.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sidney B. Douglass
Harlan, Kentucky

BRIEF FOR APPELLEE:

W. Barry Lewis
Lewis and Lewis Law Offices
Hazard, Kentucky

[6] Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992) ("The function of further review of the W[orkers']C[ompensation]B[oard] in the Court of Appeals is to correct the Board only where the [] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.")