RENDERED: JULY 29, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000514-WC

AK STEEL CORPORATION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-00643

RONALD MURRAY;
JOHN B. COLEMAN, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: AK Steel petitions for a review of a decision of the Workers' Compensation Board which affirmed the decision of the Administrative Law Judge who approved a claim of occupational hearing loss in employee Ronald L. Murray. The employer, AK Steel appeals to our Court contending that the claim should have been barred due to the statute of limitations for failure to give timely notice. The record reveals that

Murray filed his claim the day after he quit working and within weeks from when a doctor first informed him that his hearing loss was work-related. Hence, we affirm.

Ronald L. Murray was employed by AK Steel for thirty-eight years. During this time span, he was exposed to continuous loud industrial noise. AK Steel had annual hearing tests performed on Murray; and in a notice dated April 21, 1995, notified Murray that he had a significant loss of hearing. Murray signed a written accident report on May 16, 1995, acknowledging his audiogram showed a 28 db hearing loss in his left ear and that he had problems hearing in crowds, that he has not seen anyone for his hearing loss, and that it was not due to an accident at work, but that patient does allege the condition is work-related. On June 8, 2000, Murray signed another notice which disclosed yet another shift in his hearing loss and he requested he be seen by a company physician. There was no follow-up. On or about March 13, 2003, a Dr. Hieronymus informed Murray that his growing hearing loss was work-related. Murray quit work on March 31, 2003, and filed his claim on April 1, 2003, for an occupational disease. The ALJ found sufficient notice and awarded an 8.5% permanent partial disability benefit. AK Steel filed a petition for reconsideration, stating that the claim should have been barred by the statute of limitations. Upon review of the Board, an order was issued vacating and

remanding the opinion of the ALJ, directing the ALJ to determine the date when Murray's disability manifested itself. On remand, the ALJ acknowledged Murray had been told of his significant hearing loss but found that:

> While the plaintiff may have thought that his work may have been contributing to a hearing loss, the evidence does seem clear that the first time he was advised by a physician that his hearing loss was attributable to his work was on March 13, 2003.

The ALJ had applied the "discovery rule":

> [I]n Hill v. Sextet Mining Corporation, Ky., 65 S.W.3d 503 (2001), the Court went on to note that in gradual trauma claims, an injured worker is not required to self-diagnose the cause of his condition and therefore, cannot be required to give notice that he has sustained a work related gradual injury until he is informed of that fact by a physician. In other words, simply because the plaintiff has symptoms, which could or could not be related to his work, does not require him to give notice to his employer and will not begin the clocking of the statute of limitations because the date when disability becomes manifest is the date the plaintiff discovers that he has symptoms or disability caused from his work.

The ALJ declined to hold that the claim was barred by the statute of limitations. The Board affirmed, holding:

> The Board believed further findings were required based on the Kentucky Supreme Court's holdings in Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999); Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999); and Hill v. Sextet Mining Corporation, Ky., 65 S.W.3d 503 (2001), which more accurately

> defined "manifestation of disability" in claims for cumulative trauma as the date an injured worker first discovers his condition is work-related.

And

> In an unbroken line of cases, both published and unpublished, from Hill v. Sextet, supra, forward, our appellate courts have determined that in claims involving cumulative trauma, a worker is not required to give notice nor does the statute of limitations begin to clock until he is first informed by a physician that his condition is work-related. While AK Steel is able to recite evidence which compels a finding that Murray knew he had a hearing loss in 1995, the record is devoid of any evidence that he was diagnosed with a work-related hearing loss until he saw Dr. Hieronymus on March 13, 2004. The fact that Murray may have subjectively believed his condition was work-related does not lend itself to a contrary result. Even though the law may continue to evolve in this arena, at this point the statute of limitations is not triggered until a physician informs the worker he has sustained a gradual injury and it is caused by his work. Hill v. Sextet, supra.

AK Steel petitioned this Court contending the Board erred by failing to dismiss Murray's claim as barred by the statute of limitations. We disagree. Hearing impairment caused by exposure to hazardous noise in the workplace is, according to KRS 342.7305(4), "an injury covered by this chapter." Murray's claim is a "proceeding for compensation for an injury" and is therefore governed by the two-year statute of limitations in KRS

342.185.[1] Hill v. Sextet Mining Corporation, 65 S.W.3d 503, 507 (Ky. 2001) dealt with a cumulative trauma case and created the "discovery rule", that in cumulative trauma cases, the claimant is not required to self-diagnose the cause of his pain which creates his disability, that until a physician tells him it is work-related, the statute of limitations does not begin to run.[2] Murray was diagnosed with a "work-related hearing loss" on March 13, 2003, and filed his claim on April 1, 2003, which was timely. Even though Murray suspected the hearing loss was work-related, there was no follow-up by either Murray or AK Steel.

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed.

BARBER, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Christopher A. Dawson
Ashland, Kentucky

BRIEF FOR APPELLEE:

George C. Perry III
Paintsville, Kentucky

Robert G. Miller, Jr.
Paintsville, Kentucky

[1] Not an occupational disease under KRS 342.316(4)(a). See Caldwell 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 (Ky. 2004), can be distinguished because therein, the claimant "gave a history of being diagnosed with carpal tunnel syndrome 15 years earlier . . . ." Id. at 147.