

RENDERED: AUGUST 27, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000379-WC

BEECHFORK PROCESSING, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-01469

JOHN M. FLETCHER; HON. JAMES L.
KERR, ADMINISTRATIVE LAW
JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: MOORE AND WINE, JUDGES; HARRIS,¹ SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Beechfork Processing, Inc. (Beechfork) appeals from
a Workers' Compensation Board (Board) opinion affirming the Administrative

¹ Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Law Judge's (ALJ) award of medical expenses to John Fletcher. Following a careful review of the record, briefs, and authorities, we conclude that the ALJ erred by failing to make a finding as to whether the hearing loss which Fletcher has incurred while working for the Beechfork occurred within two years of the filing of his claim. Thus, we reverse the Board's opinion and remand this case to the ALJ for further proceedings.

John Fletcher is 53 years old and has an 8th grade education. For more than twenty-eight years, Fletcher has worked in the coal mining industry and has been exposed to loud noises.² On February 6, 1996, Fletcher filed a hearing loss claim against his former employer, Wolf Creek Collieries. The 1996 claim was based upon diagnoses that he received from Dr. Charles Hieronymus and Dr. Charles Arnett.

On November 27, 1995, Dr. Hieronymus performed audiometric testing on Fletcher. After the testing, Dr. Hieronymus diagnosed Fletcher as having work related hearing loss, tinnitus, and impaired speech discrimination. Under the 4th Edition of the American Medical Association (AMA) Guidelines, he assessed Fletcher as having a 5% whole person impairment. On January 3, 1996, Dr. Arnett conducted audiometric testing. Based upon the tests, he diagnosed Fletcher with high frequency hearing loss as a result of occupational noise. Dr. Arnett assessed Fletcher's condition and assessed him as having a 4% whole person impairment based upon the 4th Edition AMA Guidelines. On October 16,

² As of March 19, 2009, when he testified by deposition, Fletcher was still employed by Beechfork and was still exposed to loud noises at work.

1996, Fletcher and Wolf Creek Collieries submitted a settlement agreement, which was approved by an ALJ on December 18, 1996.

In 2001, Fletcher was hired by Beechfork. On January 29, 2001, Dr. Robert Manning performed a pre-employment hearing loss evaluation. He found moderate high frequency nerve impairment hearing loss beyond 2000 Hz. Nonetheless, Fletcher was assessed a 0% hearing impairment under the 5th Edition of the AMA Guidelines.

On October 14, 2008, Dr. Manning diagnosed Fletcher with bilateral hearing loss associated with long term noise exposure. He recommended the use of hearing protection and hearing aids. Dr. Manning assigned a 3% whole person impairment under the 5th Edition of the AMA Guidelines.

On November 14, 2008, Fletcher filed a cumulative injury hearing loss claim against Beechfork. In this claim, Fletcher designated October 14, 2008, as a manifestation date for occupational related hearing loss.

On January 23, 2009, Dr. Raleigh Jones, an otolaryngologist, and Dr. Jennifer B. Shinn, an audiologist, performed an evaluation on Fletcher at the University of Kentucky Medical Center. They assigned a 3% whole person impairment rating and found that there was work-related hearing loss. Dr. Johns found that the loss was the result of occupational noise exposure and recommended hearing aids.

On March 12, 2009, Dr. Daniel R. Schumaier, an audiologist, performed a comprehensive review of Fletcher's medical records. His review indicated:

When the pre-employment audiogram is compared to the audiogram that was performed on January 23, 2009 by Dr. Jones, it appears that there has been a slight change in this gentleman's hearing. Utilizing the latest AMA guidelines for the evaluation of permanent hearing impairment and the January 23, 2009 audiogram, Mr. Fletcher has a 5.6% hearing impairment in his right ear, a 20.6% impairment in his left ear with a binaural hearing impairment of 8.1%. When this is compared to the whole person, it is a 3% impairment.

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Subtracting the pre-employment hearing loss threshold levels from his most current audiogram performed on January 23, 2009 by Dr. Jones and then utilizing the latest AMA guidelines for the difference, Mr. Fletcher shows 0% hearing impairment in his left ear, 0% hearing impairment in his right ear with a binaural hearing impairment of course of 0% with no impairment to the body as a whole.

Therefore, the pre-existing hearing loss on the pre-employment audiogram, once subtracted from his current audiogram, shows no percentage of hearing deterioration with respect to the AMA guidelines for the evaluation of permanent hearing impairment.

On June 3, 2009, the ALJ awarded Fletcher medical benefits³ based upon the hearing loss discovered on October 14, 2008. On January 29, 2010, the Board affirmed the award. This appeal follows.

³ The ALJ denied Fletcher income benefits pursuant to KRS 342.7305(2) because Fletcher's 3% whole person impairment was less than the minimum 8% required to support an award of income benefits for hearing loss. Fletcher has not appealed from that ruling.

Beechfork claims that Fletcher's 2008 worker's compensation claim violated the two-year statute of limitations on work-related injuries. KRS 342.185 provides:

(1) Except as provided in subsection (2) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the office within two (2) years after the date of the accident, or in case of death, within two (2) years after the death, whether or not a claim has been made by the employee himself for compensation. The notice and the claim may be given or made by any person claiming to be entitled to compensation or by someone in his behalf. If payments of income benefits have been made, the filing of an application for adjustment of claim with the office within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later.

KRS 342.185(1).

Fletcher's 2008 claim for benefits was based upon his exposure to loud noise while employed by Beechfork. The Board's opinion stated:

In this instance, we believe the outcome selected by ALJ Kerr is both supported by the evidence and in conformity with the law governing cumulative trauma injuries under KRS Chapter 342. There is no question that Fletcher was aware he suffered occupationally-related deterioration affecting his hearing prior to going to work for Beechfork in February 2001. Given the information provided in Dr. Manning's report from January 2001, compiled as part of Fletcher's pre-employment physical on behalf of Beechfork, it is apparent Beechfork was also aware of

this information from the outset of Fletcher's employment with that Company.

.....

As noted by ALJ Kerr, Dr. Shumaier plainly testified that, according to the results of the audiometric testing performed by Dr. Manning on January 29, 2001, Fletcher exhibited no measurable impairment pursuant to the AMA Guides at that time. Fletcher's own testimony constituted substantial evidence that he continued to be exposed to harmful occupational noise at Beechfork after 2001. Moreover, the opinions expressed Dr. Jones, Shinn, and Manning substantiated the ALJ's conclusion that by 2008 Fletcher had developed work related harmful changes resulting in a 3% whole body impairment under the AMA Guides as a consequence of his continued noise exposure.

“Consistent with the mechanism by which repetitive exposure to hazardous noise destroys the membranes of the inner ear, KRS 342.7305(4) characterizes hearing loss caused by such exposure as being an ‘injury.’”

Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601, 602 (Ky. 2006). Unlike injuries with specific accident dates, occupational hearing loss occurs slowly over a period of time. In gradual injury cases, the two-year statute of limitations found in KRS 342.185 does not run from the date of an accident. *Id.* at 603-05. Instead, the claimant must file for benefits within two-years from the date that the claimant learned of his injury and learned that the injury was caused by work. *Id.*; *Special Fund v. Clark*, 998 S.W.2d 487, 490 (Ky. 1999).

Beechfork asserts that the two-year period should have run from 1996, when Fletcher first learned of his work related injury. When Fletcher accepted

employment at Beechfork, he knew that continued exposure to noise would likely increase his hearing loss. Continued employment and exposure to occupational hazards do not toll the two-year statute. *Alcan Foil Products v. Huff*, 2 S.W.3d 96 (Ky. 1999). However, Fletcher's claim for benefits was based upon the additional hearing loss that he sustained while working at Beechfork.

In his current claim, Fletcher listed his injury date as October 14, 2008, the date that Dr. Manning diagnosed him with bilateral hearing loss associated with long term noise. Based upon Fletcher's knowledge of his pre-existing condition, this diagnosis should have been foreseen.

When a worker is aware of the existence of a work-related injury, he should also be aware that continuing to perform a similar job would cause additional injury. *Clark*, 998 S.W.2d at 490.

[W]here a claim is not filed until more than two years after the worker's discovery of an injury and the fact that it was caused by work, KRS 342.185 would operate to prohibit compensation for whatever occupational disability is attributable to trauma incurred more than two years preceding the filing of the claim.

Id.

Because the ALJ's award in this case is limited to medical expenses, and because we are satisfied that substantial evidence supports the ALJ's finding that Fletcher sustained work-related hearing loss during his employment with Beechfork, we believe *Caldwell Tanks v. Roark*, 104 S.W.3d 753 (Ky. 2003), is controlling. In *Caldwell Tanks*, the claimant filed his hearing loss claim on October 7, 2000. The Supreme Court described his claim as "timely with regard to

the effects of trauma incurred after October 7, 1998[,]” and held that “if a ‘harmful change’ resulted from trauma incurred after October 7, 1998, the claimant sustained an injury and was eligible for medical benefits.” *Id.* at 756. The claim was remanded to the ALJ for further proceedings.

Similarly, in the present case the ALJ made no finding as to whether the hearing loss which Fletcher sustained while in Beechfork’s employment occurred before or after November 14, 2006 (two years prior to the filing of the claim). Such a finding is essential for a determination of the limitations issue with respect to Beechfork’s liability for medical expenses under the holding of Caldwell Trucks. Remand to the ALJ is thus required.

Accordingly, we reverse the opinion of the Board and remand this claim to the ALJ for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Barry Lewis
Hazard, Kentucky

BRIEF FOR APPELLEE, JOHN M.
FLETCHER:

Jeffrey Hinkle
Inez, Kentucky