

RENDERED: September 26, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-3284-WC

DONALD LEE SWIFT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
 OF THE WORKERS' COMPENSATION BOARD
 NO WC-91-25978

GATES RUBBER COMPANY;
HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE, AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, DYCHE and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Donald Lee Swift (Swift) appeals from a decision of the Workers' Compensation Board (the Board) rendered on November 8, 1996, affirming an opinion and award entered by the administrative law judge (ALJ) on June 24, 1996. On appeal, Swift argues that both the ALJ and the Board erred in holding that his claim was time-barred by the two-year statute of limitations provided by Kentucky Revised Statutes (KRS) 342.185. We affirm and adopt the Board's well-reasoned opinion as our own.

"Swift, age 46, has been employed by Gates Rubber since March of 1969 primarily as a mill operator in the manufacture of rubber

belts for automobiles. He testified that he initially felt pain in his right elbow at work after picking up a metal skid on October 25, 1990. Swift subsequently came under the care of Dr. Charles Kincaid who diagnosed bilateral carpal tunnel syndrome. Dr. Kincaid performed a right carpal tunnel release on Swift in April of 1991 and a left carpal tunnel release in June of 1991. Swift was off work after his first surgery until he returned to work in September of 1991. Swift testified that his hands were fine for a few weeks after returning to work; however, he then began to have pain in his hands and arms which has kept getting worse. Swift was examined by Dr. Morton Kasdan in March of 1992 but later came under the care of Dr. Tsu Min Tsai in 1992. Swift continues to work for Gates Rubber but complains of loss of strength in his right hand and pain in both hands on a regular basis.

"Kathy Cottner, claims manager for Alexis, Inc., the workers' compensation adjuster for Gates Rubber, testified that an SF-3A was filed with the Department of Workers' Claims on September 16, 1991 showing that Swift had returned to work with Gates Rubber and had been paid temporary total disability ("TTD") benefits from April 5, 1991 through September 15, 1991.

"In support of his claim, Swift introduced into evidence the medical records of Dr. Kincaid, a Form 107 and the records of Dr. Tsai and a Form 107 prepared by his orthopedic expert, Dr. James O. Hurt. The Special Fund introduced a Form 107 prepared by Dr. Valerie Waters. At the pre-hearing conference, the parties identified the contested issues as limitations, causation, extent and duration and apportionment.

"After reviewing the evidence of record, the ALJ decided against Swift on the issue of statute of limitations without reaching a determination on the other contested issues. The ALJ noted that KRS 342.185 requires that a claim be filed within two years after the date of an injury or termination of TTD benefits, whichever shall last occur. In Randall Co. v. Pendland, Ky.App., 770 S.W.2d 687 (1989), the ALJ found that the Court held that in the instance of mini-trauma, the date for determining the statute of limitations begins when the disabling reality of the injury becomes manifest. In Swift's case, the ALJ noted that Swift complained of pain

in his extremities and his hands and had undergone carpal tunnel surgeries in April and June of 1991 and had been paid TTD benefits through September 15, 1991.

"The ALJ noted Swift's argument that the October 25, 1990 accident related solely to the right elbow and that the carpal tunnel condition had continued to worsen over time. However, the ALJ found that the fact remained that in April and June of 1991, Swift had received carpal tunnel surgeries for which he was paid TTD benefits through September 15, 1991. Based on the language in Pendland, it was the ALJ's opinion that Swift's condition manifested itself no later than the date of his two bilateral carpal tunnel surgeries. Payment of TTD benefits following the surgeries extended the limitation period to September 15, 1991; therefore, since Swift's claim was not filed until January 24, 1994, his claim was accordingly barred by KRS 342.185. The ALJ also cited in support of his findings to Brockway v. Rockwell Int'l., Ky.App., 907 S.W.2d 166 (1995).

"On appeal, Swift argues that his case concerns a claim for permanent partial occupational disability benefits resulting from a redevelopment of carpal tunnel syndrome after he had already undergone successful carpal tunnel release surgery and returned to regular duty. Swift contends his claim does not concern the first or original carpal tunnel syndrome and that the ALJ failed to recognize this important fact. Swift points to evidence that in October of 1991 after his return to work at Gates Rubber, an EMG study performed by Dr. Thurman showed no evidence of carpal tunnel syndrome and the fact that Dr. Kincaid had released Swift to return to regular duty without restrictions. Swift then points to evidence that in December of 1993, Swift began treating with Dr. Tsai, at which time an EMG study showed the recurrence of carpal tunnel syndrome bilaterally. In essence, Swift contends that his claim concerns a recurrence of carpal tunnel syndrome in 1993 or a new injury and that considering his application was filed in January 1994, his claim is not time-barred under the terms of KRS 342.185.

Swift further points to Dr. Hurt's report as clearly showing a recurrence of carpal tunnel syndrome in 1993 and the doctor's opinion that the repetitive work activity Swift performed after returning to Gates Rubber contributed to this recurrence. Under these facts, Swift argues that Brockway and Pendland show his claim is not barred by the statute of limitations.

"Since Swift had the burden of proof on the limitations issue and was unsuccessful in persuading the ALJ that his claim for benefits was timely filed, the question on appeal is whether the evidence on the limitations issue was so overwhelming as to compel a finding in Swift's favor. Paramount Foods, Inc. v. Burkhardt. Ky., 695 S.W.2d 418 (1985). In order to succeed on appeal, Swift must show that the evidence was so persuasive that it was clearly unreasonable for the ALJ to find his claim was barred by the statute of limitations. REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985).

"A review of all of the evidence of record shows that there was evidence of substance to support the ALJ's determination on the limitations issue and that the evidence as a whole did not compel a finding that Swift's claim was timely filed. Swift's initial Application for Adjustment of Claim alleged an injury to his right and left arms, hands and elbows due to a gradual onset beginning in October of 1990 continuing to the present. Although Swift alleges that he returned to work without restrictions and did not suffer a recurrence of symptoms until 1993, the records of Dr. Kincaid reveal that when returning to work in September of 1991, Swift continued to complain of problems in his hands and Dr. Kincaid recommended return to work with restrictions.¹ Swift's own testimony shows a change in his work duties when he returned to work to accommodate his condition.

¹ In fact, our review of the record in this case shows that Swift returned to work on September 16, 1991. Dr. Kincaid noted in his records on October 10, 1991, that Swift was continuing to have problems.

"Furthermore, although Swift claims that Dr. Hurt specifically gave the opinion that he had suffered a recurrence or new injury to his hands, a review of Dr. Hurt's report does not lead to this conclusion. To the contrary, Dr. Hurt took a history of Swift undergoing therapy after his bilateral carpal tunnel surgeries and Hurt's advising that this therapy had not helped him, and that he had returned to work with restrictions with continuing problems in both his hands and his arms. Dr. Hurt's report also refers to a report by Dr. Kasdan in March of 1992 at which time Dr. Kasdan felt Swift was at maximum medical improvement and was suffering from permanent impairment due to residual prolonged nerve conduction latencies in his right hand.

"Swift's case is very similar to that of the claimant in Brockway v. Rockwell Intern., supra. In that case, the claimant argued that the date the statute of limitations should have begun to run was the date of her last day at work. The Court of Appeals upheld the Board's affirmation of the ALJ's decision that the claimant's claim was barred by the statute of limitations because there was credible proof establishing physiological disability had manifested more than two years prior to the date of filing her claim. Credible proof included the claimant's own testimony and the testimony of two physicians who both treated her and examined her and placed restrictions on her more than two years before. Although there was evidence to believe that claimant's continued working at Rockwell may have added to her physiological condition, the evidence in the Court's opinion did not support that conclusion.

"Taken as a whole, the evidence in Swift's claim leads to the reasonable conclusion that his bilateral carpal tunnel syndrome was the result of an initial work-related event in October of 1990 for which he received TTD benefits up to September 15, 1991, and that he thereafter suffered no new injury or recurrence of his condition. When more than one reasonable inference can be drawn from the evidence, the ALJ is free to choose which inference to draw and this Board has no

authority to second-guess his decision.
Jackson v. General Refractories Co., Ky., 581
S.W.2d 10 (1979).

"Accordingly, the Opinion and Award rendered
by Hon. Lloyd R. Edens, Administrative Law
Judge, is hereby **AFFIRMED**, and the appeal by
Donald L. Swift is hereby **DISMISSED**.

For the foregoing reasons, the opinion of the Board
entered on November 8, 1996, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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