

RENDERED: October 2, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-003035-WC

CLIFFORD CLARK, JR.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-95-26543

THE LEVINSON STEEL COMPANY;
HON. ROBERT L. WHITTAKER,
ACTING DIRECTOR OF SPECIAL
FUND; HON. ZARING P.
ROBERTSON, ADMINISTRATIVE

APPELLEES

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: GUIDUGLI, JOHNSON and KNOPF, Judges.

JOHNSON, JUDGE: Clifford Clark, Jr. (Clark), petitions for review of an opinion of the Workers' Compensation Board (Board) rendered on October 24, 1997, which affirmed the opinion and award on remand of Hon. Zaring P. Robertson, Administrative Law Judge (ALJ). Specifically, Clark asserts that both the Board and the ALJ erred in determining that the majority of Clark's "wear

and tear" knee injury claim was time barred under Kentucky Revised Statutes (KRS) 342.185 and Randall Company/Randall Division of Textron, Inc. v. Pendland, Ky. App., 770 S.W.2d 687 (1989). Having concluded that the Board erred as a matter of law, we reverse and remand for reinstatement of the ALJ's original award.

Clark's injury claim arose from his employment as a truck driver and warehouse worker for The Levinson Steel Company (Levinson).¹ Clark claimed that he suffered numerous mini-trauma injuries to his knees during the twenty-four years that he performed heavy manual labor while working for Levinson. Clark testified that he had experienced pain in his knees for many years and medical evidence showed that Clark suffered from severe degenerative arthritis in his right knee and he had a total replacement of his left knee.

The medical history related to Clark's knees is somewhat confusing. Clark slipped in oil and fell in 1985 and injured his right knee. Following this accident, he saw a doctor for the first time concerning both of his knees. In April 1987, Clark underwent arthroscopic surgery to his left knee, at which time significant osteoarthritic changes were noted. He also underwent surgery to his right knee in June 1987. Following this surgery, Clark returned to work for Levinson without any

¹ Clark originally filed claims for injuries to his right shoulder, lower back, and both knees. This appeal concerns only the claim for Clark's knee injuries.

restrictions. Clark testified that his knees began to hurt again soon after returning to work in 1987, and continued to gradually worsen until he left work on July 27, 1994, and underwent total replacement surgery on his left knee. He has not returned to work.

On July 3, 1995, Clark filed his workers' compensation claim alleging "wear and tear" injuries to both knees. Citing KRS 342.185 and Pendland, supra, Levinson asserted that the claim was time barred because Clark's disability had become manifest more than two years before Clark filed his claim. "[I]n cases where the injury is the result of many mini-traumas, . . . the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest." Id. at 688. Levinson alleged that Clark's disability had become manifest in 1987 when he underwent surgery to both knees. Clark argued that the disability did not become manifest until his last day of work on July 27, 1994.

Following a hearing, the ALJ rejected Levinson's statute of limitations argument that Clark's injury became manifest following the 1987 surgeries.² Rather, the ALJ concluded that the 1987 surgery [surgeries] was the result of a separate, single traumatic event, slipping in oil and falling in 1985, and that because the accident occurred more than two years before the claim was filed, compensation for disability arising

² The ALJ referred to a singular surgery, but in fact, there were two separate knee surgeries in 1987.

from the 1985 accident was time barred. The ALJ assessed Clark with a prior active disability from the 1985 accident of 30% that was noncompensable and should be carved out of his award. The ALJ also determined that Clark had established a subsequent, cumulative trauma injury to his knees which did not become manifest until July 27, 1994, Clark's last day of work. The ALJ awarded Clark a 75% occupational disability as a result of injuries to both of his knees, with 30% being carved out as prior active disability. The remaining 45% compensable award was apportioned 50/50 between the employer and the Special Fund.

Levinson appealed the ALJ's decision to the Board which reversed and remanded the case to the ALJ because "[a] party is entitled to have his claim decided upon the basis of correct findings of basic facts. Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684, at 689 (1985)." Specifically, the Board stated that there was no evidence to support the ALJ's determination that Clark's 1987 surgeries on both knees was related to the 1985 accident that had injured his right knee only.

On remand, the ALJ acknowledged that he had "overlooked or confused relevant facts" relating to Clark's 1985 fall and subsequent 1987 surgeries, and determined that Clark's 1987 surgeries were not the result of a single traumatic event. The ALJ then stated as follows:

This Administrative Law Judge concludes that the evidence establishes that the plaintiff's work activities as a truck driver for the defendant-employer since 1970 resulted in a cumulative, progressive injury

to his knees. As argued by the defendant-employer, disability from this cumulative trauma first manifested in 1987, when the plaintiff underwent bilateral surgeries. To the extent that the plaintiff became disabled at that time, his claim for such is time-barred.

However, the plaintiff returned to work with some degree of active disability, but continued to experience further trauma, to and including July 27, 1994. This Administrative Law Judge finds from the evidence that the plaintiff's disability progressively increased over this period of time. Thus, each continuing "mini-trauma" effectively constituted a separate injury to the plaintiff; causing further disability, and having a later limitation period. It is therefore the conclusion of this Administrative Law Judge that any of the plaintiff's disability which can be attributed to cumulative trauma which occurred within the two years preceding the filing of his claim is separately compensable from the disability which was pre-existing and active prior to that time. . . . The plaintiff's herein claim was filed on July 3, 1995, and the undersigned Administrative Law Judge concludes that cumulative trauma which occurred between July 4, 1993, and the plaintiff's last day of work, July 27, 1994, is compensable.

Having already determined the plaintiff to be 75% occupationally disabled as the result of his knee condition, it is my amended conclusion on remand that such disability is related to the plaintiff's entire career with the defendant-employer, which began on an unspecified date in March 1970. Assuming, for purposes of this award, that the plaintiff began in the middle of that month, March 15, 1970, his entire career spanned 1,266.71 weeks. Of this, the final 55 weeks is within the two year statutory limitation period. I therefore conclude that 4.34% of the plaintiff's knee condition is compensable, and he is entitled to an award based upon 3.3% disability.

Clark and the Special Fund appealed the ALJ's award on remand to the Board.³ In its opinion affirming the ALJ, the Board stated as follows:

Although Randall Co. v. Pendland, supra, stands for the proposition that in cumulative trauma claims the clocking of the statute of limitations begins when the disabling reality of the injury becomes manifest, that case does not address the question of how to deal with additional trauma sustained after that date since in Pendland, the last date of work was the date disability became manifest, and the Court therefore was not required to address additional trauma. In the context of a cumulative trauma injury, the term injury actually refers to numerous mini-traumas which occur over a period of time. It is dynamic and distinguishable from the worsening of a workers' [sic] condition over time after a single traumatic event. In this case, the ALJ recognized that and determined that a portion of the overall injury had occurred within two years of the date the claim was filed and had resulted in a portion of the claimant's overall occupational disability. In view of the nature of Clark's injury, we are not persuaded that the ALJ's approach was incorrect.

In his appeal, Clark contends that the ALJ's original finding of a 40 [45] percent compensable occupational disability should not have been reduced since he continued to work and perform his job duties after his 1985 injury until the date his injuries became disabling in July 1994. He contends that under Randall v. Pendland, supra, since Clark continued to work full time with no restrictions, through June 26, 1994, [sic] from and after his 1987 surgeries, all disability that developed after those surgeries should be compensable since the ALJ

³ The Board held the appeal in abeyance pending a final decision by our Supreme Court in Spurlin v. Crick (96-SC-703-WC, rendered June 19, 1997, not to be published; and 94-CA-0716-WC, rendered May 10, 1996, to be published).

had determined he established a subsequent gradual injury which under Randall, supra, did not become disabling until his last day of work.

However, in reality the ALJ determined that the evidence established Clark's work activities as a truck driver since 1970 had resulted in a cumulative progressive injury to his knees for which he had initially awarded Clark a 40 [45] percent compensable occupational disability. He, furthermore, determined on remand that that cumulative trauma first manifested itself in 1987 when Clark underwent bilateral knee surgeries, and to the extent Clark was disabled at that time, his claim for such disability was time barred. The ALJ then determined that Clark, after returning to work with some degree of active disability attributable to his knee condition, continued to experience further trauma up through his last date of work with each continuing mini-trauma constituting a separate injury to Clark and his disability progressively increasing over the period of time from his knee surgeries until his last date of work. The ALJ then determined that the disability attributable to the cumulative trauma that occurred two years immediately prior to the filing of his claim was not time barred and was therefore compensable. In determining the degree of occupational disability attributable to that period, the ALJ apportioned Clark's disability based upon his entire career with Levinson with that disability attributable to the period that fell within the two years of the filing of his claim being deemed compensable. That methodology has been sanctioned as an appropriate method of determining Special Fund liability in claims where the disability is attributable to multiple years of service involving multiple employers. Southern Ky. Concrete & Contractors v. Campbell, Ky.App., 662 S.W.2d 221 (1983); and O.K. Precision Tool & Die Co. v. Wells, Ky., 678 S.W.2d 397 (1984). In our opinion, it is equally appropriate for determining the percentage of disability not time barred in a claim such as this where the evidences establishes that the claimant's disability from cumulative trauma

progressively increased over the period of his entire work career, and the disability first manifested itself more than two years before the last day of work.

We disagree with the ALJ's legal conclusion, that was affirmed by the Board, that since "each continuing 'mini-trauma' effectively constituted a separate injury to the plaintiff; causing further disability, and having a later limitation period[,] " only the "disability which can be attributed to cumulative trauma which occurred within the two years preceding the filing of his claim is separately compensable[.]" This conclusion is inconsistent with the ALJ's and Board's conclusion that the disability from the earlier cumulative traumas manifested on one date in 1987, and with the holding in Pendland, that "where the injury is the result of many mini-traumas, . . . the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest." 770 S.W.2d at 688. The ALJ's and Board's conclusion that Clark's continuing mini-traumas, following the 1987 surgeries, constituted separate injuries with later limitation dates is contrary to the definition of a cumulative trauma injury as set out in Pendland, supra. Simply stated, the concept of a cumulative injury does not include separate identifiable injuries. The ALJ's and Board's conclusion leads to the absurd result that a claimant suffering subsequent mini-traumas would be forced to file separate claims for each mini-trauma and the employer would be forced to defend the separate claims.

This case involves two separate series of mini-traumas. Each series had its own individual manifestation date. After the first series manifested in 1987, Clark underwent surgery on both knees and returned to work with a 30% active disability. Griffin v. Booth Memorial Hospital, Ky., 467 S.W.2d 789, 790 (1971). Some seven years later, after many more mini-traumas to both of his knees, Clark had a second manifestation of an injury to both knees. This second injury manifested on July 27, 1994, his last day of work. Since his claim for the second injury was filed on July 3, 1995, it was timely and he is entitled to be compensated for the second injury which the ALJ has already determined to be a disability of 45%.

Accordingly, the opinion of the Board is reversed and this case is remanded to reinstate the ALJ's 45% disability award to be apportioned 50/50 between the employer and the Special Fund.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Thresa N. Taylor
Madisonville, KY

BRIEF FOR APPELLEE, LEVINSON:

Hon. W. Russell Duty
Owensboro, KY

BRIEF FOR APPELLEE, SPECIAL
FUND:

Hon. Benjamin C. Johnson
Louisville, KY