

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000249-WC

MARILYN K. EPLEY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC95-35034

FLYNN ENTERPRISES, INC., in its self-insured
capacity; FLYNN ENTERPRISES, INC., as insured
by Cigna; SPECIAL FUND; J. LANDON OVERFIELD,
Administrative Law Judge; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, HUDDLESTON, and KNOPF, Judges.

COMBS, JUDGE: Marilyn K. Epley appeals from a decision of the
Workers' Compensation Board (the Board) that reversed an opinion
and order of the Administrative Law Judge (ALJ). The Board
directed the entry of an order dismissing the claim as barred by
the two-year period of limitations set forth at KRS 342.185. We
affirm the opinion of the Board.

Epley worked as a sewing machine operator for Flynn
Enterprises, Inc. (Flynn). She alleged that she first
experienced work-related disability with respect to her right

hand, thumb, and wrist in 1991. She gave notice of this condition, sought medical treatment, and was taken off work for six (6) weeks. During this time, she received temporary total disability benefits. Upon her recovery, Epley returned to work as a sewing machine operator without impairment and without restriction.

In April 1993, she again experienced pain in her hand. She maintains that this pain was different and much worse than the problems she had experienced in 1991. She gave notice of the condition to her employer and was referred to an orthopedic specialist, Dr. Steve Salyers. Epley was not taken off work as before. Instead, she continued to work at the same job. On April 19, 1994, however, she was reassigned to a supervisory position entailing lighter duty and a pay-cut. Epley filed her Application for Adjustment of Claim on September 5, 1995; she listed April 19, 1994 (the date of her reassignment to lighter duty), as the date of disability.

Upon his review of the evidence, ALJ Overfield found that Epley's disability manifested itself in 1991. Consequently, in an opinion and order entered June 24, 1996, ALJ Overfield dismissed Epley's claim on the ground that it was filed outside the period of limitations. An appeal to the Board followed. The Board reversed and remanded the case to the ALJ, noting as follows:

An individual who experiences a cumulative trauma may, just as one who sustains two separate single identifiable incidents, have pre-existing active disability but still experience compensable occupational disability. We cannot simply presume that

once an individual experiences a disability manifestation that it forever forecloses recovery for additional trauma experienced by the individual. . . .Therefore, even if the ALJ could find an original manifestation date beyond the period of the statute of limitations, he would need to make further findings as to whether mini-traumas caused increased occupational disability within the period of the statute of limitations

(original Board Opinion at 7). An appeal to this court was dismissed as having been taken prematurely from a nonfinal decision.

On remand, ALJ Overfield re-analyzed the evidence and determined that Epley had in fact experienced additional cumulative trauma and that as a result of that additional trauma, she had a second "manifestation of disability date" -- April 1993. Specifically, he found as follows:

Dr. Salyers testified, unequivocally, that plaintiff did have an onset of disability caused by her work-related activity arousing her pre-existing osteoarthritis and did have functional impairment and the need for restrictions as of April 21, 1993.

I find that Plaintiff did not have a work-related injury in 1994 but simply a flare-up or exacerbation of the condition which was manifest in April of 1993. In making this finding I have relied on Dr. Salyers' testimony.

(Opinion and Award on Remand at 4). Although he found that Epley's disability became manifest as of April 21, 1993, the ALJ did not conclude that the claim was barred by the two-year period of limitations set forth at KRS 342.185. Consequently, he awarded Epley benefits for a thirty-one percent (31%) permanent partial occupational disability beginning April 20, 1993.

Flynn and its insurer appealed the ALJ's opinion and award to the Board. In an opinion rendered January 15, 1999, the Board indicated that the ALJ's findings of fact compelled the conclusion that the claim had been filed outside the period of limitations. As a result, the Board reversed the ALJ's opinion and award and remanded the matter for entry of an order dismissing the claim. This appeal followed.

On appeal, Epley contends that the Board erred by concluding that her claim was barred by the period of limitations. She contends that the first "manifestation of disability" occurred in April 1994, when medical restrictions forced her to work in a position less demanding of her hand. We are compelled to follow the Kentucky Supreme Court's recent decision in Alcan Foil Products v. Huff, (98-SC-678-WC, rendered June 17, 1999), which is at odds with her contention and which essentially announces a new rule as to the statute of limitations with respect to discovery of an injury.

In Alcan, the Supreme Court considered whether an ALJ properly determined that each of three workers' claims arose when each worker became aware that he had sustained a significant hearing loss caused by work and consequently that each claim was barred by the two-year period of limitations. In reaching its decision to affirm the ALJ, the court re-visited the reasoning of Randall Co. v. Pendland, Ky. App., 770 S.W.2d 687 (1989).

The Pendland Court recognized that an injury resulting from the cumulative effect of minitrauma develops gradually and that a worker does not become aware that a work-related injury

has been sustained until the injury manifests itself in the form of physically and/or occupationally disabling symptoms. Thus, the Pendland court defined a rule of discovery for the purposes of notice and the statute of limitations.

In Alcan, the Kentucky Supreme Court noted that the worker in Pendland "discovered" her injury when she experienced disabling symptoms of pain. The worker's manifestation of physical and occupational disability (and the activation of the running of the period of limitations) had coincided temporally. However, because the facts surrounding the Alcan workers' claims indicated that the workers "discovered" their physical disabilities more than two years before their claims were filed, the Supreme Court re-focused on the phrase "manifestation of disability" as used in Pendland. In construing anew the definition of "manifestation of disability," the Supreme Court scrutinized whether it refers "to the physical disability or symptoms which cause a worker to discover that an injury has been sustained or whether it refers to the occupational disability due to the injury." Alcan at 10. The court concluded that the phrase should pertain to the worker's initial awareness or discovery that an injury had been sustained, expressly stating:

Nothing in Pendland indicates that the period of limitations should be tolled in instances where a worker discovers that a physically disabling injury has been sustained, knows it is caused by work, and fails to file a claim until more than two years thereafter simply because he is able to continue performing the same work. We also note that a worker's ability to perform his usual occupation is not dispositive of whether he has sustained an occupational disability. Contrary to the view expressed by the Board and the Court of

Appeals, a worker is not required to undertake less demanding work responsibilities or to quit work entirely in order to establish an occupational disability.

Alcan at 11. (Footnote and citations omitted).

In evaluating the ALJ's determination that the workers' claims were barred by the period of limitations, the Supreme Court noted that the workers had been aware of their work-related disability for many years before their claims were filed. It noted that the medical evidence established that the level of impairment had been in existence for more than two years before the claims were filed and had not changed since that time. Finally, the court noted that the work restrictions which had been imposed at the time of litigation would have been imposed more than two years before the claims were filed if the workers had sought medical advice at that time. As a result, the ALJ's dismissal of the workers' claims was affirmed.

Turning to the facts before us, we note that ALJ Overfield specifically found that the manifestation of Epley's disability occurred in April 1993 -- more than two years before her claim was filed. Relying on Dr. Salyers's testimony, ALJ Overfield found that the level of impairment upon which the claim of occupational disability was based was in existence more than two years before the claim was filed and that it had not changed in more than two years before that date. In point of fact, the diagnosis of Dr. Salyers in May 1995 was exactly the same as it had been in April 1993. Thus, the ALJ's determination parallels the holding in Alcan.

The Board's found that the evidence presented supported ALJ Overfield's determination that no appreciable worsening of Epley's condition had occurred within two years of the filing of her claim. Epley's condition in April 1994 constituted a "flare-up or exacerbation of the condition which was manifest in April of 1993." (Opinion and Award on Remand at 4). ALJ Overfield concluded that the work restrictions imposed in April 1994 were the same as those that would have been imposed in April 1993. In light of Alcan and given the ALJ's findings of fact, we have no choice but to affirm the Board and to hold that Epley's claim is indeed barred by the period of limitations. SCR 1.030(8)(a) provides as follows: "The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court...."

Epley argues in the alternative that the parties stipulated April 19, 1994, as the date of injury. The Board held, however, that a stipulation contained in the settlement agreement between Epley and the Special Fund had no binding force as to the parties to the litigation that ensued and consequently to this appeal.

Finally, we agree with the Board that the employer's special answer, filed following the original application for adjustment of claim and alleging that the claim was barred by the period of limitations, inures to the benefit of the employer's insurer, Cigna. As a result, we cannot conclude that the insurer waived this defense to Epley's claim.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE FLYNN
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