

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001345-WC

TREMCO, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKER'S COMPENSATION BOARD  
ACTION NO. WC-97-01587

SPECIAL FUND; HON. DONALD G. SMITH,  
ADMINISTRATIVE LAW JUDGE; WORKERS'  
COMPENSATION BOARD; AND MAXINE HONEYCUTT

APPELLEES

OPINION  
AFFIRMING IN PART AND  
REVERSING AND REMANDING IN PART  
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BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

JOHNSON, JUDGE: Tremco, Inc. petitions this Court to review an opinion of the Kentucky Workers' Compensation Board rendered on May 14, 1999, which affirmed the Administrative Law Judge's award of 100% occupational disability to Maxine Honeycutt. We conclude that there was substantial evidence to support the ALJ's finding that Honeycutt's claim was not barred by the limitations set forth in KRS<sup>1</sup> 342.185 and that Honeycutt's injury was work-

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<sup>1</sup>Kentucky Revised Statutes.

related, and affirm on these issues. However, the ALJ and the Board erred in determining the date of injury and that the law as amended in December 1996 should apply, and we reverse on this issue.

In 1991, Tremco, a manufacture of insulation tape for thermo pane windows, employed Honeycutt as a swiggle operator on its assembly line. In 1994 and 1995, Honeycutt began to experience episodes of lower back and hip pain that radiated to both of her legs. During that time, she sought treatment on a number of occasions from her family practitioner, Dr. W. Scott Black.<sup>2</sup> Dr. Black originally diagnosed Honeycutt with a lumbar strain and reported that her pain frequently subsided with minor treatment. In 1996, however, Honeycutt's lower back pain began to increase and became more constant. Finally, on December 4, 1996, she underwent an MRI. On January 7, 1997, Dr. Black informed Honeycutt that she had a herniated disc and referred her to Dr. Steven P. Kiefer, a board eligible neurosurgeon, for further treatment.

On January 9, 1997, Dr. Kiefer examined Honeycutt and opined that the predominance of her back pain implied that her underlying degenerative disc disease was playing a significant role in her back pain. As a result, Dr. Kiefer recommended physical therapy, muscle relaxants, and anti-inflammatory medication as a means to better control Honeycutt's pain. When Honeycutt's condition continued to worsen, Dr. Kiefer recommended

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<sup>2</sup>Dr. Black's records indicate that he saw Honeycutt on May 23, 1995, October 13, 1995, August 10, 1996, August 17, 1996, and September 5, 1996.

surgery. On March 3, 1997, Honeycutt underwent surgery consisting of a right L5 semi-hemilaminectomy with L5-S1 discectomy. After recuperating from surgery, Honeycutt returned to work with restrictions on August 18, 1997. The return of pain in her hips and legs ultimately forced her to stop working again on September 23, 1997. Honeycutt has not worked since that time.

Meanwhile, on July 15, 1997, Honeycutt filed a workers' compensation claim alleging an injury date of January 27, 1997. Before a formal hearing was held, Honeycutt was examined by Dr. James Templin. After examining Honeycutt and reviewing her medical history, Dr. Templin opined that Honeycutt's disc herniation was present in August 1996. Based on Dr. Templin's opinion, Honeycutt moved the ALJ to amend her application for adjustment of claim to reflect an injury date of August 10, 1996. The ALJ granted Honeycutt's motion to amend. After a hearing, the ALJ determined that (1) Honeycutt's condition was work-related, (2) she did not learn that her condition was work-related until January 1997, (3) due and timely notice was given to Tremco on February 3, 1997, (4) Honeycutt's disc herniation occurred in August 1996, and (5) Honeycutt suffers from a total and permanent occupational disability. After its motion for reconsideration was denied, Tremco appealed the ALJ's determinations to the Board. The Board affirmed the ALJ's opinion and award on May 17, 1999.<sup>3</sup> This petition for review followed.

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<sup>3</sup>Member Lovan dissented as to the date of the injury being August 1996.

In its first argument, Tremco contends that Honeycutt's claim for workers' compensation is barred by the limitations set forth in KRS 342.185. KRS 342.185(1) provides that an injured employee must give "notice of the accident . . . to the employer as soon as practicable after the happening thereof . . . ." In addition, KRS 342.185(2) requires a claimant to file an application for adjustment of claim for compensation within two years after the suspension of voluntary income payments or within two years of the date of the accident, whichever is later. In our efforts to decide the case sub judice, we must follow a line of cases which have struggled to apply the notice and time limitations set forth in KRS 342.185 to employees who suffer injuries as a result of cumulative trauma, that have become known as Haycraft<sup>4</sup> type injuries.

The first case to address the issue was Randall Co. v. Pendland.<sup>5</sup> The employee in the Pendland case was a punch press operator who suffered from degenerative arthritis and experienced pain in her hands for several years before it progressed to a point where she finally had to stop working. In its attempt to apply the two-year limitation in KRS 342.185 to an injury which resulted from a long series of mini-traumas rather than one clear accident, this Court concluded that "the date for giving notice

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<sup>4</sup>Haycraft v. Corhart Refractories Co., Ky., 544 S.W.2d 222 (1976).

<sup>5</sup>Ky.App., 770 S.W.2d 687 (1989).

and the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest."<sup>6</sup>

As the Supreme Court of Kentucky recognized, this Court in Pendland effectively adopted a rule of discovery to govern the applicability of the notice and filing limitations for Haycraft type injuries.<sup>7</sup> In Coslow, the Supreme Court declined to adopt a discovery rule for single trauma cases, explaining that in "[j]urisdictions that follow the discovery rule do so on the basis of language contained in their statutes of limitation requiring a worker to file a claim within a certain period of time from the 'date of injury.'"<sup>8</sup> In Kentucky, however, KRS 342.185 refers to the "date of the accident," not the "date of injury." Thus, to adopt such a rule for single trauma cases would require the Court to ignore the plain language of the statute and the Court's own precedent set in Fiorella v. Clark<sup>9</sup>, and Goode v. Fleischmann Distilling Corp.<sup>10</sup> In refusing to do so, the Supreme Court also recognized that the Pendland case, which departed from the "date of the accident" language in KRS 342.185, was a necessary exception because there was no single accident from which to start the statute of limitations.<sup>11</sup>

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<sup>6</sup>Id. at 688.

<sup>7</sup>Coslow v. General Electric Co., Ky., 877 S.W.2d 611, 613 (1994).

<sup>8</sup>Id. at 613.

<sup>9</sup>298 Ky. 817, 184 S.W.2d 208 (1944).

<sup>10</sup>Ky., 275 S.W.2d 903 (1955).

<sup>11</sup>Id.

With the need for the Pendland exception established, the next question the Supreme Court faced concerned the determination of when the "manifestation of disability" occurred. This issue was raised in Alcan Foil Products v. Huff<sup>12</sup>, and then again in Special Fund v. Clark.<sup>13</sup> The Supreme Court concluded that the "manifestation of disability" referred "to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained."<sup>14</sup> In other words, the disabling reality of the worker's injury becomes manifest and the clock begins to run for purposes of the notice and time limitations set forth in KRS 342.185 when the worker discovers both that an injury has been sustained and that the injury is work-related.

Returning to the case sub judice, the record establishes that Honeycutt was treated several times in 1994 and 1995 by Dr. Black for back and hip pain. However, Honeycutt's symptoms seemed to subside with minor treatment and she continued to work without restrictions. When Honeycutt's pain grew increasingly worse in 1996, she underwent a MRI on her lower back and was informed on January 7, 1997, by Dr. Black that she had a herniated disc. Dr. Black also advised Honeycutt at that time that her condition was caused by her work activities. Based on the following, it is clear that the disabling reality of Honeycutt's injury did not become manifest until January 7,

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<sup>12</sup>Ky., 2 S.W.3d 96 (1999).

<sup>13</sup>Ky., 998 S.W.2d 487 (1999).

<sup>14</sup>Id. at 490.

1997.<sup>15</sup> Therefore, Honeycutt gave due and timely notice of her injury to Tremco and her claim was timely filed within the two year statute of limitations.<sup>16</sup>

Next, we turn to the issue of what law should be applied to Honeycutt's claim. We begin with the general proposition that the date of injury determines the law which governs the rights of the claimant.<sup>17</sup> The ALJ in the case sub judice relied on Dr. Templin's opinion in determining that Honeycutt's herniated disc occurred in August 1996. Based on this determination, the ALJ applied the version of the Kentucky Workers' Compensation Act prior to the December 1996 amendments to Honeycutt's claim.

While the MRI taken of Honeycutt on December 4, 1996, clearly shows that she actually suffered from a herniated disc prior to December 12, 1996, the effective date of the amendments to the Act, the fact remains that she did not know of her injury and she continued to work until January 1997. As this Court in Pendland concluded, there is no definite single time before a disability has manifested itself at which the fact-finder could determine that a compensable injury has occurred.<sup>18</sup> Until the disability manifested itself, Honeycutt had no claim for disability benefits. Having determined that the disabling

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<sup>15</sup>Pendland, supra.

<sup>16</sup>KRS 342.185.

<sup>17</sup>See Maggard v. International Harvester Co., Ky., 508 S.W.2d 777 (1974).

<sup>18</sup>Pendland, supra at 688.

reality of Honeycutt's injury did not manifest itself until January 1997, we conclude that Honeycutt's claim is governed by the new version of the Act, and the ALJ erred as a matter of law in applying the prior version of the Act.<sup>19</sup>

Accordingly, the opinion of the Board affirming the award made by the ALJ is affirmed in part and reversed in part, and this matter is remanded to the ALJ for a determination of Honeycutt's benefits based upon the Act, as amended on December 12, 1996.

ALL CONCUR.

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BRIEF FOR APPELLEE, MAXINE  
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BRIEF FOR SPECIAL FUND:

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<sup>19</sup>Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).