RENDERED: OCTOBER 6, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003095-WC

GAYLE M. HOLBROOK — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-97-68293

LEXMARK INTERNATIONAL GROUP, INC. (AS INSURED BY KEMPER); LEXMARK INTERNATIONAL GROUP, INC. (AS INSURED BY CNA); HON. RON CHRISTOPHER, DIRECTOR OF SPECIAL FUND; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 2000-CA-000089-WC

LEXMARK INTERNATIONAL GROUP, INC. (AS INSURED BY KEMPER INSURANCE COMPANY) — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD WC-97-68293

GAYLE M. HOLBROOK; LEXMARK INTERNATIONAL GROUP, INC. (AS INSURED BY CNA INSURANCE COMPANY); HON. RON CHRISTOPHER, DIRECTOR OF SPECIAL FUND; AND WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This petition for review and cross-petition for review stem from a workers' compensation claim by Gayle Holbrook for carpal tunnel syndrome which became manifest on February 15, 1995, after 31+ years of employment. The ALJ held the last two years of work caused some disability and made a partial award, ruling the statute of limitations barred the rest. The employee appealed and Kemper cross-petitioned for being responsible for the award and for contribution. We opine that the issues are factual and affirm.

Gayle M. Holbrook worked some 31+ years doing assembly line work for IBM/Lexmark. She started working on August 1, 1966, and first experienced symptoms in her hands in 1994. She went to her family doctor who diagnosed possible carpal tunnel syndrome on December 2, 1994, and referred her to an orthopaedic surgeon, Dr. Ritterbusch. On December 6, 1994, Gayle advised Lexmark that she was experiencing pain in both hands, wrists, arms, and elbows. Before seeing Dr. Ritterbusch, Gayle saw Dr. Knox, a neurologist on December 22, 1994, who diagnosed carpal tunnel syndrome. Dr. Ritterbusch saw her on January 18, 1995, February 15, 1995, and March 22, 1995. On the first visit, he discussed the effects of carpal tunnel surgery. However, by the third visit, March 22, after Gayle had been off three weeks due to an unrelated problem, the problems had cleared up somewhat and the doctor no longer recommended carpal tunnel surgery, but permanently restricted work activities, and stated she would have future flare-ups.

Gayle returned to work on April 3, 1995, first on light duty and then to her regular job on the assembly line. She had problems again with her hands and around November, 1995, went back to light duty for three or four months. She returned to her regular assembly line position in early 1996, where she remained until August 17, 1997.

On June 20, 1997, she first saw Dr. Allen concerning her hands. On July 11, 1997, Dr. Allen took her off work and told her she needed the carpal tunnel surgery. Gayle had surgery on her left hand on October 1, 1997, and on the right hand on December 5, 1997. She was off work until April 3, 1998. Instead of returning to work on May 1, 1998, Gayle chose to retire.

While off work from July 11, 1997 to July 28, 1997, and again from August 18, 1997 until April 30, 1998, Gayle received Lexmark Sickness and Accident Disability Benefits, a salary continuation program fully funded by her employer. On June 8, 1998, Gayle filed her workers' compensation claim.

The Administrative Law Judge found that in the case of mini-traumas, the statute of limitations begins to run either on the date the disability becomes manifest or on the last day of work, whichever comes first. The ALJ then found that Gayle began experiencing symptoms in 1994 and received a diagnosis in 1994 along with medical advice to her employer to restrict her from performing certain activities. The ALJ then concluded the statute of limitations started running no later than February 15, 1995. As the claim was filed on June 9, 1998, the ALJ allowed compensation for anything attributable to cumulative trauma

occurring on or after June 10, 1996 (within the last two years). Kemper Insurance provided coverage on August 17, 1997, the last day Gayle worked, so the ALJ found this injury was the sole liability of Kemper, and dismissed the Special Fund and CNA Insurance.

The Board affirmed the ALJ, finding:

> While not a frequent occurrence, we have previously concluded, as did the ALJ in the instant action, that in dealing with a cumulative trauma claim, there may be two distinct disability manifestation dates. Here, the ALJ found based upon the evidence presented that Holbrook had experienced disability manifestation as early as February or March of 1995. At that time, Holbrook was aware that her condition was work-related, she sought medical treatment which was paid through workers' compensation and, therefore, is a workers' claim benefit, and, as a result of the condition, experienced at least two periods of the alteration of her work activities. This finding, we believe, is a purely factual finding on the part of the ALJ and, in order for Holbrook to prevail, she must show that the evidence compelled a contrary result. Special Fund vs. Francis, Ky., 708 SW2d 641 (1986). Compelling evidence is evidence that is so overwhelming that no reasonable person could fail to be persuaded by it. REO Mechanical vs. Barnes, Ky. App., 691 SW2d 224 (1985).

As to the last two years being covered, the Board found:

> The ALJ then went on to conclude that because Holbrook eventually returned to her identical working activities and that there was significant medical support from Drs. Templin, Ritterbusch and several others that this ongoing work increased her impairment and constituted additional cumulative trauma that there was a second disability manifestation date, that being when she finally ceased working.

On appeal to this Court, Gayle first argues that the last time her treating physician, Dr. Ritterbusch, saw her (March 22, 1995), he allowed her to return to work without the surgery and he would have assessed a 0% impairment rating under the AMA Guidelines. Therefore, Gayle contends the ALJ abused her discretion in finding that the disabling reality of the injury manifested itself on February 15, 1995. In this case, when the carpal tunnel syndrome became manifest was an issue of fact for the ALJ. The function of this Court is not to re-assess the evidence which has been reviewed by the Administrative Law Judge and re-reviewed by the Workers' Compensation Board. This Court can correct the Board only where the Board has overlooked or misconstrued controlling statutes or precedent, or committed a flagrant error in assessing the evidence. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992). In this case, the Board has evaluated the medical evidence and the law applicable to the issues raised and has determined that there was no compelling evidence to reverse the ALJ. We agree. After reviewing the record, we opine that the Board has not overlooked or misconstrued controlling statutes or precedent or committed error in assessing the evidence so flagrant as to cause this Court to overrule the Board's decision.

Next, Gayle argues that the ALJ misconstrued KRS 342.185(1) by reading in a requirement that income benefits must begin within two years of the date of injury before they will serve to extend the statute of limitations. Gayle conveniently ignores the Board's opinion and finding of fact that: "Because

of the accommodations by Lexmark, she was able to continue working and did not miss any time directly attributable to the carpal tunnel condition until some two years later when she finally elected to undergo the bilateral surgical releases." And after reviewing the evidence, "[i]t appears that Holbrook did receive salary continuation benefits up to April 30, 1998 for time off due to various physical problems. While she contends that the salary continuation from July 11, 1997 to July 28, 1997, and from August 25, 1997 to April 30, 1998 were in lieu of temporary total disability benefits, these payments occurred after the two year period had expired and cannot be utilized to revive the period of limitations." The Board did not misconstrue the statute; rather, Gayle misconstrued the findings of fact. Under Western Baptist Hospital, 827 S.W.2d at 685, we see no compelling evidence to disturb those findings.

Finally, Gayle contends that KRS 342.040(1), which requires the commissioner to send a notice to prosecute letter to only certain injured workers before their right to file a claim is barred, is unconstitutionally arbitrary.[1] Gayle had not been sent a notice because she was in the class that was not required to be given a notice. If a notice was required, the absence of such a notice would have the effect of tolling the statute of

[1]CR 24.03 and KRS 418.075 require the party questioning the constitutionality of a statute to serve the Attorney General with a copy of the pleading so that it may intervene if it so desires. Maney v. Mary Chiles Hosp., Ky., 785 S.W.2d 480 (1990). The appellant's brief is certified to show the petition was served on the Attorney General, but there is no response in the record by the Attorney General, nor did any of the appellees address the constitutional issue.

limitations. Gayle contends that since the purpose of the notice is to protect workers, all workers should get the notice.

Statutes carry a strong presumption of constitutionality and courts must begin here when deciding whether an act is unconstitutional. Gurnee v. Lexington-Fayette Urban County Government, Ky. App., 6 S.W.3d 852 (1999). The one seeking to have a statute declared unconstitutional bears the burden of dispelling any conceivable basis which might justify the legislation in order to overcome the strong presumption in favor of the statute's constitutionality. Buford v. Commonwealth, Ky. App., 942 S.W.2d 909 (1997). KRS 342.040(1) contains a requirement that the employer or insurance carrier notify the commissioner, who in turn notifies the injured worker or his/her dependent, of the right to prosecute a claim as a result of the aforementioned injury. The notice is required to be given to all injured workers that have been off work at least seven days and are therefore due TTD benefits, whereas all injured workers not off at least seven days and therefore not entitled to TTD benefits are not required to be given a notice. Appellant argues this classification of injured workers is arbitrary and unconstitutional. In Leeco, Inc. v. Caudill, Ky. App., 920 S.W.2d 88 (1996), our Court held that a classification is not arbitrary if it is founded upon any substantial distinction which suggests the necessity or propriety of such legislation. And in Commonwealth v. Howard, Ky., 969 S.W.2d 700 (1998), our Supreme Court held that a legislative classification that does not infringe on a fundamental right or impact

negatively on a suspect class is not subject to a courtroom fact-finding process. Underinclusiveness in a statute classification alone does not make the legislative classification invalid. First Bank & Trust Co. v. Board of Governors of Federal Reserve System, 605 F. Supp. 555 (E.D. Ky. 1984). To determine the validity of a statute regarding an economic matter, which does not involve a fundamental right, we use the "rational basis" test, not a "strict scrutiny" test which is used when a statute affects a fundamental right. Vaughn v. Commonwealth, Transportation Cabinet, Division of Driver's Licensing, Ky. App., 870 S.W.2d 231 (1993); Earthgrains v. Cranz, Ky. App., 999 S.W.2d 218 (1999). Under the "rational basis" test, a classification must be upheld if there is any reasonable conceivable state of facts that could provide a rational basis for the classification. Earthgrains, 999 S.W.2d at 218.

The statute in question requires that injured workers be given a notice of their statute of limitations if their injury was serious enough to be off work at least seven days. That appears to be a worthy cause and legitimate requirement considering the purpose of the worker's compensation statutes. Not including less seriously injured workers, or deciding whether seven days, two days, or ten days, etc. equates to less serious injuries, is a legislative decision which has some rational basis. Therefore, we adjudge this statute constitutional.

In its cross-petition, Lexmark International Group, Inc., as insured by Kemper, contends the ALJ erred in her determination that Kemper is the responsible carrier and that the

ALJ should have prorated Gayle's occupational disability over her work life. Kemper agrees that Gayle worked for Lexmark for 54 days after Kemper came on the risk. Since Kemper was the carrier on the risk at the time of the second manifestation, or last day of employment (both August 17, 1997), Kemper is responsible for the award per KRS 342.340(1). Kemper's request for contribution has two flaws. First, it gives no legal authority for prorating liability in the case of cumulative trauma, and secondly, it ignores the findings of the ALJ that there was a second manifestation or injury. Applying the statute of limitations to the first manifestation (or injury) barred recovery for anything attributable to cumulative trauma occurring on or before June 19, 1996. It would also have barred contribution for that period.

Kemper's argument that Gayle suffered no additional injury during the 54 days Kemper insured Lexmark also ignores the conflicting medical evidence and the finding that between June 19, 1996, and June 9, 1998, Gayle suffered an increased impairment, and awarded benefits for the increase in impairment only. Again, this is a re-argument of the facts and under Western Baptist Hospital, 827 S.W.2d at 685, we see no compelling reason to reverse the ALJ.

For the foregoing reasons, we affirm the decision of the Workers' Compensation Board on the petition and cross-petition for review.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE, GAYLE M. HOLBROOK:

Diana L. Beard
Lexington, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT, LEXMARK INTERNATIONAL GROUP, INC., AS INSURED BY KEMPER INSURANCE COMPANY:

Jo Alice Van Nagell
Lexington, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLEE, LEXMARK INTERNATIONAL GROUP, INC., AS INSURED BY CNA INSURANCE:

Steven R. Armstrong
P. Kevin Moore
Lexington, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLEE, SPECIAL FUND:

Joel D. Zakem
Frankfort, Kentucky