RENDERED: November 3, 2000; 2:00 p.m.
NOT TO BE PUBLISHED
MODIFIED: November 17, 2000; 2:00 p.m.

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000959-WC

EVITA DERAMUS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-01130

S & S PRODUCE; SPECIAL FUND;
HON. JAMES L. KERR, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Evita Deramus petitions for review of a decision of the Workers' Compensation Board which affirmed the Administrative Law Judge's denial of benefits for carpal tunnel syndrome on the grounds that Evita had not filed the claim within two years of when the injury became manifest. Finding no overlooked or misconstrued controlling statutes or precedent, or any flagrant error in assessing the evidence, we affirm.

Evita Deramus began working for S & S Produce in January of 1995. She alleged an injury date of June 28, 1996,

the first day she missed work as a result of the carpal tunnel syndrome and the date she was first told by a physician that she had a medical condition related to work. She last worked June 23, 1997, and filed a claim on June 24, 1998. Evita worked as a tomato packer which required repetitive use of her upper extremities including lifting boxes. The claim was presented as one developing based upon the repetitive nature of her work. However, some six months prior to June of 1996, she was lifting a pallet and, while jerking it, she felt a tingling sensation in her shoulder. It continued to tingle throughout the day but it did not cause severe pain. Subsequently, there would be days where she had difficulty lifting boxes and also would find an increase in tingling when she raised her hands over her head. Approximately six weeks prior to June of 1996, her supervisor noticed that she was having difficulty using both of her upper extremities and several times thereafter recommended that she go see a physician. However, it was not until shortly before June 28 when she dropped a pot of water at home due to the weakness in her arm that she became sufficiently concerned and finally sought medical treatment.

The issue before the ALJ was when the disabling reality of her injury became manifest, the date she developed symptoms or the date she received medical treatment. The ALJ relied on Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999), for the proposition that the worker's ability to perform his usual occupation is not dispositive of whether he or she has sustained an occupational disability. The ALJ then found:

> In plaintiff's factual situation, she became aware of her work-related injury by experiencing symptoms in December of 1995 or January 1996 which included the inability to use her right arm effectively and the necessity of requesting assistance from co-workers. In fact, plaintiff discussed her situation with her supervisor at least six weeks prior to June 1996. (see page 32 of plaintiff's deposition). Thus, it appears to the undersigned that plaintiff's injury manifested itself by at least April of 1996 and plaintiff's failure to file her workers' compensation claim until June 24, 1998 bars her recovery.

The Court in Huff, 2 S.W.3d at 96, dealt with workers who argued that they were not occupationally disabled until shortly before their claims were filed because they were able to work and because no limitations, restrictions, etc., were imposed by the doctor and they kept working. They acknowledged a hearing loss but argued that they didn't have a claim until the condition became occupationally disabling. The Court cited Randall Co. v. Pendland, Ky. App., 770 S.W.2d 687, 688 (1988), for the proposition that "where the injury is the result of many mini-traumas, the date for giving notice and the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest." Huff, 2 S.W.3d at 101. The Huff Court then stated:

> whether the phrase 'manifestation of disability' 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. We conclude that it refers to the worker's discovery that an injury had been sustained. We arrive at this conclusion for several reasons: 1.) the court's explicit statement that the period of limitations runs from the date of "injury;" 2.) the fact that the definition of "injury"

> contained in KRS 342.0011(1) refers to any work-related harmful change in the human organism, and does not consider whether the change is occupationally disabling; and 3.) the entitlement to workers' compensation benefits begins when a work-related injury is sustained, regardless of whether the injury is occupationally disabling. 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. [footnote omitted]. We also note that a worker's ability to perform his usual occupation is not dispositive of whether he has sustained an occupational disability. Wells v. Bunch, Ky., 692 S.W.2d 806 (1985); Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968). 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 working entirely in order to establish an occupational disability.

Id. at 101.

Under Huff, 2 S.W.3d at 96, the statute of limitations begins to run at the time of "manifestation of disability," an issue of law. Whether a worker discovers a physical injury has been sustained, and knows that it was caused by work, is an issue of fact. The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total

proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977).

In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), our Supreme Court set the standard of review as: "[t]he WCB is suppose to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and compelling a different result." Id. at 687. In further review before the Court of Appeals,

> [t]he WCB is entitled to the same deference for its appellate decisions as we intend when we exercise discretionary review of Kentucky Court of Appeals decisions in cases that originate in circuit court. The function of further review of the WCB in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

Id. at 687-688.

The issue on appeal in this case relates to a finding of fact. In our review of the record, we find no compelling evidence in favor of Evita. This evidence is not so overwhelming as to compel a finding in her favor. Paramount Foods, Inc., 695 S.W.2d at 418. Compelling evidence has been defined as evidence so persuasive that it was clearly unreasonable for the ALJ not to be convinced by it. Hudson v. Owens, Ky., 439 S.W.2d 565 (1969). We must also be mindful that it is not enough for Evita to show that the record contains some evidence which might support a reversal of the ALJ's decision. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). As long as the ALJ's determination is

supported by any evidence of substance, it cannot be said that the evidence compels a different result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

For the foregoing reasons, we opine that neither the Board nor the ALJ overlooked or misconstrued controlling statutes or precedent, and neither made any flagrant errors in assessing the evidence; therefore, we affirm.

BUCKINGHAM, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Wayne C. Daub
Louisville, Kentucky

BRIEF FOR APPELLEE, S & S PRODUCE:

Brian T. Gannon
Louisville, Kentucky

BRIEF FOR APPELLEE, SPECIAL FUND:

Joel D. Zakem
Frankfort, Kentucky