RENDERED: December 15, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002934-WC

KENTUCKY EMPLOYERS' SAFETY
ASSOCIATION (KESA) APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-96531

SHELIA MCALLISTER; LIMITED EDITIONS,
INC.; UNINSURED EMPLOYERS' FUND;
LUMBERMEN'S MUTUAL CASUALTY COMPANY;
KENTUCKY EMPLOYERS' MUTUAL INSURANCE
COMPANY (KEMI); JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BARBER, BUCKINGHAM AND MILLER, JUDGES.

BARBER, JUDGE: This is an appeal of an award of workers' compensation benefits to Appellee, Sheila McAllister, (McAllister) in which the Administrative Law Judge found the Appellant, Kentucky Employers' Safety Association (KESA), the insurance carrier at Risk. McAllister developed left lateral epicondylitis due to the repetitive nature of her work at Limited Editions, Inc. The employer, as an insured of KESA, petitions for review and contends that the ALJ erred in determining the

date of McAllister's gradual onset injury. We agree, and reverse and remand for additional findings.

The date of injury is significant in terms of who pays. KEMI had coverage from November 25, 1995 to November 25, 1996. There was an apparent lapse of coverage from November 26, 1996 to January 24, 1997. KESA's coverage became effective January 24, 1997. The record is confusing regarding Lumberman's coverage dates.[1] KEMI, KESA, Lumbermans and the Uninsured Employer's Fund are all parties.

McAllister started working for Limited Editions, Inc. in October 1993. She filed an Application for Resolution of her Workers' Compensation Claim (Form 101) on October 2, 1997, alleging a repetitive injury to her left arm with an injury date of November 2, 1995, continuing through August 21, 1997.

The record reflects that McAllister first saw a doctor on November 2, 1995. She started moving around -- trying not to do as much repetitive work at Limited Editions after she saw the

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[1]The Board stated that Lumbermen's was on the risk until July 18, 1995; however, Lumbermen's Form 111 states that it had coverage from October 8, 1994 through October 8, 1995. A Notice of Policy Change or Termination, Form WCI-2, filed by Lumbermen's reflects that the policy was canceled effected July 18, 1995. The form is date-stamped October 18, 1995. There is another date stamp with the abbreviation AREC; however, the date is not completely legible.

KRS 342.340(2) requires that every insurance carier notify the Commissioner upon the termination of any policy. Further, termination of any policy of insurance shall take effect no greater than ten days prior to receipt of the notification, unless the employer has obtained other insurance and the commissioner is notified of that fact by the insurer assuming the risk. Therefore, Lumbermen's could be liable for an injury sustained after July 18, 1995 depending upon when the Form WCI-2 was received.

doctor. McAllister agreed that after November 2, 1995, the doctor advised her to avoid repetitive activity or to work a lighter job at Limited Editions. For the remainder of 1995 and for all of 1996, McAllister performed jobs of a different nature, not necessarily any lighter, but that involved holding her arms in a different position. McAllister admitted taking medication for her arm every several days from November 1995 until she stopped work in August 1997.

Richard Ouelette is the owner of Limited Editions. He testified that Susie Boyer, his production manager, told him McAllister was having a hard time on the production line, and that she had pain in her arms on approximately October 15, 1995. Ouelette testified that she related her arms were in a lot of pain and that she wasn't sure exactly what was causing it. Ouelette knew one of her arms was giving her a lot of problems. McAllister related it had been bothering her for about three months. They moved her to a different position on approximately October 15, 1995. Ouelette felt personally that pushing down on the V-Nail machine was the problem. Ouelette explained that McAllister had seen the doctor on November 2, 1995, but that the doctor did not relate anything to him. Ouelette was not aware of anything new in production in the summer of 1997 that would have caused McAllister's condition to get worse. He simply took for granted that there was a work-related part of her arm problem.

Ouelette believed that KEMI had paid for the medical bills, initially. He did not receive any information other than a copy of the first bill from the doctor's office. Ouelette

explained that they were never given anything from the doctor or from KEMI to show what was going on. In August 1997, Ouelette learned KEMI denied the claim and was no longer going to pay.

Dr. Eugene Jacob, the treating orthopedic surgeon, first saw McAllister on November 2, 1995. She presented with a three-month complaint of pain. Dr. Jacob diagnosed lateral epicondylitis, or tennis elbow. He prescribed non-steroidal anti-inflammatories, stretching exercises and an elbow band. McAllister returned on November 30, 1995, with no significant improvement. Dr. Jacob injected the elbow with steroids. McAllister canceled her December 22, 1995 appointment, because the injection had helped and she wanted to see how she would do. On May 31, 1996, McAllister stated that her elbow had become symptomatic again. She had classic signs and symptoms for epicondylitis. She had been taking a prescription anti-imflammatory and wearing the elbow band. Dr Jacob re-injected the elbow and re-started exercises. Dr. Jacob took those measures *for the same reasons* he had in November 1995.

On January 9, 1987, McAllister returned and was seen by Dr. Dripchak, Dr. Jacob's partner. Exam revealed epicondylitis and tendinitis of the rotator cuff (shoulder). With regard to the shoulder, Dr. Dripchak put restrictions on overhead work. On August 14, 1997, a bone scan was ordered and on August 25, 1997, surgery was recommended. The surgery was ultimately performed in May 1998. McAllister was released to return to work on October 7, 1998.

Dr. Jacob was asked about a letter he wrote stating that as of August 25, 1997, McAllister was disabled and unable to work without restrictions. When asked if McAllister was able to work prior to that date with restrictions, Dr. Jacob initially responded, no. He then explained that he was not making any statement or restrictions regarding her work prior to that. She had been working, although with pain. Dr. Jacob had no quarrel with placing restrictions as of January 1997. Dr. Jacob agreed that at least by January 9, 1997, McAllister was having trouble working due to her condition, and had complained of pain and discomfort with certain work activities.

Dr. Jacob testified that when he saw McAllister in November 1995, she'd had symptoms for three months. "I would think at that point it was being manifested at work. I don't think at that time it was preventing her from working, but she was having pain at that time. When asked when he first discussed with McAllister the interaction of work and her elbow problem, Dr. Jacob responded:

> Probably after for something like this, usually after the third or fourth visit maybe. I mean, when she fails to respond to the initial treatment, which was the band, the medication and the stretching, and then we give her the injection and that helps and then she comes back and it's bothering her again it's somewhere along that point that that discussion may have been made.

The ALJ found:

> [P]laintiff began to experience some pain and difficulties as early as 1995. However, she was able to continue working earning the same or greater wage with only an occasional visit to a physician. Although her employer graciously provided her less repetitive work

> . . . as early as October . . . 1995, . . .[there were no] permanent restrictions placed upon the plaintiff by a physician. . . . [On] August 25, 1997 . . . her treating physician, Dr. Jacob placed her off work and recommended . . . surgery. Therefore, it is the finding of the Administrative Law Judge that the plaintiff's cumulative trauma injury became manifest on August 25, 1997.

The ALJ found McAllister had a 13% functional impairment rating. He awarded temporary total disability benefits from August 25, 1997 through October 7, 1998 to be followed by 16.25% permanent partial disability reduced by half, because McAllister had returned to work at the same or greater wage. KRS 342.730(1)(c)(2).

KESA appealed to the Workers' Compensation Board, contending that the ALJ erred, as a matter of law, in determining the date of McAllister's injury. The Board affirmed, and explained that:

> [T]he ALJ was persuaded by the evidence that in 1995, though Limited moved [McAllister]. . . to other work functions in an effort to accommodate her elbow condition, it was not done under any recommendation from any physician, and McAllister, at that time, was not under any medically imposed permanent restrictions. Further, at that time, McAllister was not sure what was causing her discomfort. The ALJ believed these to be crucial factors in deciding the date when manifestation of disability arose. Permanent restrictions did not occur until August of 1997 when Dr. Jacob recommended surgery and further recommended that McAllister not perform further functions at work which would worsen her condition.
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> . . . .
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> The evidence before the ALJ in McAllister's case is clear. There was no physician recommendation to the employer or to McAllister as did occur in . . . Brockaway v.

> Rockwell International, Ky. App., 907 S.W.2d 166 (1995), that the employer should provide modified work duties. Nor was there a physician recommendation to the patient that she should change her job. **Of course, McAllister did not diagnose her own condition. She did not know what was causing her condition. Those findings were critical** . . . in Brockway as to the proper period of limitations under KRS 342.185. (emphasis added).

The Board concluded that KESA had failed to demonstrate that the ALJ's opinion was not supported by substantial evidence.

Alcan Foil Prods. v. Huff, Ky., 2 S.W.3d 96 (1999), relied upon by KESA, involved three consolidated claims for hearing loss, each filed in 1995 with a last exposure in 1993. Each worker testified that his hearing loss had developed gradually, over the years, but had grown worse in the last couple of years. The employer had begun conducting annual audiological exams in 1967. The ALJ found that all three claims were time-barred.

The three workers appealed, contending the ALJ had misapplied Randall v. Pendland, Ky. App., 770 S.W.2d 687 (1989), because they were not occupationally disabled until shortly before their claims were filed. The three had worked without limitation, until restrictions were imposed by a physician in the summer of 1995. The Supreme Court addressed the difficulties in applying KRS 342.185 to gradual injuries:

> With regard to those injuries which develop gradually from the cumulative effect of wear and tear or minitrauma . . . much of the trauma giving rise to the ultimate injury commonly occurs more than two years before the onset of symptoms make the worker aware than an injury has been sustained. In

> addition, if the nature of the work remains unchanged, the worker is continuously subjected to accidents for as long as the same employment continues. Despite the number of gradual injury claims and the difficulties encountered in attempting to apply KRS 342.185 to those claims, the legislature has not chosen to create special rules to govern the period of limitations as exist for occupational disease. It has been left to the courts to fashion a solution for applying the date of accident language of KRS 342.185 to questions regarding notice and limitations.

Alcan, at p. 100.

The Court explained that Pendland effectively adopted a rule of discovery for purposes of notice and limitations where an injury is the result of the cumulative effect of minitrauma. In Pendland, the worker became aware of her injury when she experienced *disabling symptoms* of pain the manifestation of physical and occupational disability were simultaneous. The question remains, therefore, whether the phrase manifestation of disability refers to . . . symptoms which cause a worker to discover an injury has been sustained or whether it refers to the occupational disability due to the injury. Alcan, at p. 101. The Court concluded that the phrase manifestation of disability refers to the worker's discovery that **an injury** has been sustained. The Court arrived at this conclusion for several reasons: (1) the statement that the period of limitations runs from the date of injury; (2) the definition of injury refers to any work-related harmful change in the human organism; (3) the entitlement to workers compensation benefits runs from the date of injury, regardless of whether the injury is occupationally disabling. The Court noted that a worker is not required to

undertake less demanding work or cease work to establish occupational disability (at least not in injury claims).

In Alcan, restrictions imposed at the time the case was litigated were the same as would have been imposed more than two years before the claims were filed, had the workers sought medical attention at that time. Further, there was audiometric evidence of the impairment, upon which the claims were based, more than two years before the claims were filed. Under those circumstances, the Supreme Court held that the claims were properly dismissed as time-barred.

In Special Fund v. Clark, Ky., 998 S.W.2d 487, 490 (1999), the Supreme Court discussed its holding in Alcan:

> [W]e construed the meaning of the term "manifestation of disability," as it was used in Randall Co. v. Pendland, as referring to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.
>
> Once a worker is aware of the existence of a disabling condition **and the fact that it is caused by work**, the worker would also be aware that continuing to perform the same or similar duties was likely to cause additional injury. (emphasis added).

Clark was remanded for additional findings concerning when claimant became aware that work contributed to the development of the degenerative condition in his knees. Id.

We agree with KESA that the analysis in Alcan, supra, applies to the facts of this case. It is uncontroverted that McAllister suffered symptoms as early as 1995, when she first consulted a physician, received medical treatment, and switched jobs from the V-Nailer. McAllister testified that after her

first visit to the doctor he advised her to try not to do as much repetitious work at work. Under Alcan, the inquiry is when did McAllister discover that her symptoms constituted an injury that they were attributable to a work-related harmful change in the human organism. KRS 342.0011(1).[2]

We believe that question is one properly within the province of medical experts. Although causation or work-relatedness of injury *caused by accident* may be readily apparent, the same is not true with gradual injury. In the case of gradual injury, there is no way to tell an injury has been sustained until symptoms occur; however, the symptoms are not the injury. Not all symptoms which occur with work activity are causally attributable to work. The *underlying condition* from which the symptoms emanate must be causally attributable to work for the employer to be liable. Sowders v. Mason & Dixon Lines, Inc., Ky. App., 579 S.W.2d 380 (1979). American Bakeries v. Hatzell, Ky., 771 S.W.2d 333 (1989). A layperson cannot make that determination. In the context of occupational disease, proof that a particular exposure is injurious requires competent medical evidence. Dupree v. Kentucky Dept. of Mines & Minerals, Ky., 835 S.W.2d 887 (1992). As the Board noted, McAllister did

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KRS 342.0011(1) effective December 12, 1996 provides: (1) "Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. The prior version in effect in 1995 provided: (1) "Injury" means any work-related harmful change in the human organism, arising out of and in the course of employment, . . .

not diagnose her own condition. She did not know what was causing her condition. McAllister could not know, until a doctor told her, because she is not qualified to make that determination.

We vacate and remand the claim to the ALJ to find from the evidence when McAllister became aware that work caused her elbow problem. If the date of injury is determined to be prior to December 12, 1996, the ALJ, upon remand, must also determine McAllister's **occupational disability** under the appropriate version of KRS 342.730, based upon a 13% functional impairment.[3]

Hence, we vacate the opinion of the Workers' Compensation Board and remand this case to the ALJ for further findings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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[3]The finding of 13% functional impairment was not challenged on appeal and is the law of the case on remand.

Frankfort, Kentucky