RENDERED: JULY 6, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000942-WC

JEFFREY METCALFE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-96004

GENERAL ELECTRIC; SPECIAL FUND;
HONORABLE THOMAS A. NANNEY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING
** ** ** ** **

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

SCHRODER, JUDGE: This is a petition for review from a judgment of the Workers' Compensation Board affirming a decision of the Administrative Law Judge which found that the claimant's cumulative trauma injury manifested after the 1996 amendments and, thus, reduced claimant's award by 50% due to the effects of the natural aging process and a pre-existing condition. Upon review of the record and the applicable law, we affirm in part, vacate in part, and remand.

Appellant, Jeffrey Metcalfe, was 38 years old at the time of the hearing and has a 10th grade education and his GED. He began working for General Electric Company on June 12, 1996 as a refrigerator door hanger, which required that he lift heavy doors with his arms above shoulder level and push heavy carts containing the doors. Metcalfe testified that he first began experiencing pain in his neck on September 12, 1996 and reported it to his team leader at the time. Additionally, he talked with his union steward, Gary Waldridge, in the fall of 1996 about the job and the pain he was having. Waldridge testified that sometime in the fall of 1996 (prior to January 1997), Metcalfe complained to him of problems with the door-hanging job and the pain resulting from those activities. Waldridge further testified that Metcalfe filed a grievance, but nothing was written up by him or was reported to the company other than the grievance filing.

In his deposition, Metcalfe testified that he did not miss any work due to his pain until February of 1997. However, in the hearing, he testified that he missed some days between September of 1996 and February of 1997. Metcalfe first sought treatment for his pain on February 1, 1997 when he was examined by his family physician, Dr. Yancey. Dr. Yancey took him off work, ordered an MRI, and referred Metcalfe to Dr. Hodes, an orthopedic surgeon. On February 3, 1997, Metcalfe first presented to the General Electric Medical Department with pain in his shoulders radiating into his neck and head. The General Electric nurse noted that Metcalfe had pain for 6-7 months while

performing his job. The nurse also reported that Metcalfe stated February 3, 1997 was "so far the only day lost to pain."

Metcalfe was first seen by Dr. Hodes on February 14, 1997, and he diagnosed Metcalfe with cervical spondylosis with spinal compression at C6-7. He attempted to treat him with pain medication and anti-inflammatories and restricted Metcalfe from work until March 17, 1997. Metcalfe was off work from February 1, 1997 to May 5, 1997. In May 1998, Metcalfe returned to Dr. Hodes. Dr. Hodes took Metcalfe off work again and on June 15, 1998, performed an anterior cervical discectomy and fusion at C6-7. As a result of the surgery, Metcalfe was off work from June 15, 1998 to August 24, 1998 when he was released to work by Dr. Hodes with restrictions. Metcalfe continues to work at General Electric at the present time.

It must be noted that Metcalfe was involved in a motor vehicle accident in 1977 or 1978, which resulted in a period of unconsciousness. He also sustained a head injury when he was assaulted in 1986. He sustained yet another head injury in 1989 when he fell off of a chair while working for a construction company.

Dr. Hodes assessed a 7% impairment, which he represented was in accordance with the AMA Guidelines. According to Dr. Hodes, there had been a permanent aggravation of a pre-existing condition and one-half of the 7% impairment was due to the natural aging process. Dr. John Nehil examined Metcalfe and assigned a 12% impairment to the body as a whole. He opined that Metcalfe's condition was related to repetitive trauma. Dr.

Martyn Goldman found evidence of degenerative disc disease at C6-7 and believed it could have been aggravated by Metcalfe's work activities but was not caused by it. Finally, Dr. Robert Keisler also found evidence of degenerative disc disease at C6-7 and assigned a 6% impairment to the body as a whole. He was of the opinion that Metcalfe's work at General Electric could have caused a temporary aggravation of his neck symptoms but did not result in any permanent aggravation of his neck problems. He also indicated that there was evidence of a probable old trauma. Dr. Keisler attributed all of the impairment to the pre-existing degenerative changes with superimposed aging process.

The Administrative Law Judge ("ALJ") relied primarily on the testimony of Dr. Hodes, finding that Metcalfe had sustained a work-related cumulative trauma. He assessed a 7% impairment, but found that only 3½% of the impairment was attributable to work activities, the other 3½% being the result of a pre-existing degenerative cervical condition and the natural aging process. As to manifestation of the injury, the ALJ found that pursuant to Randall Co. v. Pendland, Ky. App., 770 S.W.2d 687 (1989), the disability manifestation date was February of 1997 and, therefore, the 1996 amendments applied. Hence, the Special Fund was dismissed. From the judgment of the Worker's Compensation Board ("Board") affirming the ALJ, this petition for review followed.

Metcalfe first argues that the ALJ erred in determining that the injury manifested in February 1997. Metcalfe asserts that under the facts and law, his injury manifested on

September 12, 1996. Specifically, Metcalfe maintains that Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999) is applicable and that the ALJ misapplied the law in relying on Pendland.

In Pendland, 770 S.W.2d at 688, this Court held 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." In that case, the worker first began experiencing pain in her hand six months before she quit work and gradually worsened until she could no longer work. The Court agreed with the ALJ that the disabling reality of the injury became manifest on the worker's last day of work, not when she first began experiencing pain.

In Alcan, the workers suffered gradual hearing loss due to their jobs for years and became aware of their hearing loss as an occupational disability more than two years prior to filing their claim, although they continued to work during this time. The Court held that the "manifestation of disability" under Pendland occurs when the worker discovers that a work-related injury has been sustained, not when the worker is first occupationally disabled. Alcan, 2 S.W.3d at 101. The Court held that the workers' claims were barred because they were aware of their work-related injuries more than two years before filing their claims. Id. at 102. With each of these claimants, the court noted that their conditions had not worsened in the two years before their claims were filed.

Metcalfe argues that under Alcan, the date of manifestation should be September 12, 1996 because that is when he first began having pain and, thus, discovered his injury. General Electric argues that according to Pendland, his injury manifested on February 1, 1997 because that was the first date he missed work as a result of the injury. We note that Alcan specifically recognized that a period of limitations will not be tolled because the worker continues to work, even though he is aware of his occupational disability. Id. at 101. We further note that the Pendland Court specifically allowed that "a date earlier than the last work day may be proven to be applicable in some situations, such as by a period of temporary or partial disability." Pendland, 770 S.W.2d at 688. However, Metcalfe did not suffer a period of temporary or partial disability in September of 1996. Rather the evidence was undisputed that Metcalfe's pain started in September of 1996 and gradually worsened until he had to quit work in February of 1997. Simply because he began having pain does not mean he was aware of a work-related injury at that time, especially given his previous injuries. Accordingly, we believe the facts are more akin to Pendland. We believe that Alcan is distinguishable on the facts because the Court's ruling turned on the fact that the workers' conditions had not worsened in the last two years. Essentially, the claimants were aware of their injuries and said injuries had peaked more than two years prior to the filing of the claim. It is noteworthy that the Court in Alcan did not state exactly when the claimants' injuries did manifest. Moreover, the Court in

Alcan did not overrule Pendland; rather, it attempted to follow and reconcile its decision with Pendland. Accordingly, we believe the ALJ's reliance on Pendland was not in error.

Nor can we say that the ALJ erred in his finding of fact incident to the above ruling, that Metcalfe did not miss any work as a result of his injury until February of 1997. The ALJ, as fact finder, has the sole authority to judge the weight, credibility, substance, and inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). The ALJ chose to believe Metcalfe's testimony in his deposition wherein he stated that he did not miss work due to his injury until February of 1997, and that was his prerogative. See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977).

Given our ruling that the 1996 amendments were applicable in this case, Metcalfe's argument that the Special Fund was improperly dismissed is moot.

Metcalfe next argues that the ALJ's reliance on Dr. Hodes's assessed impairment was improper because the impairment rating could not have been made pursuant to the AMA Guidelines.

The doctor testified that his impairment ratings were in accordance with the AMA Guidelines. This presents an interesting question, but we believe the Board's analysis was correct when it said:

> [N]either we, the ALJ nor the parties may offer our interpretation of the AMA Guidelines as indicating an inappropriate use of those guidelines. This is particularly true in assessing the amount of impairment. We would agree with Metcalfe to the extent that it is obvious Dr. Hodes did not use the DRE Model, since they are in multiples of

> five. However, while the DRE Model is to be used in most spine-related injuries, there are exceptions. The AMA Guidelines emphasize that they are to be used and interpreted by physicians in conjunction with the physician's experience and examination. The percentage of impairment assessed pursuant to the Guidelines is an issue relating to the weight and credibility to be afforded to a physician's testimony. Weight and credibility are for the ALJ and are solely within his discretion. Smyzer vs. B.F. Goodrich Chemical Co., Ky., 474 SW2d 367 (1971). While there was evidence to the contrary, there was no specific challenge to the assessment made by Dr. Hodes.

Finally, Metcalfe complains that the reduction of 50% of his award due to the effects of the natural aging process was in error. After this case was submitted, our Supreme Court decided the cases of McNutt Construction v. Scott, Ky., 40 S.W.3d 854 (2001) and Commonwealth, Transportation Cabinet v. Guffey, Ky., 42 S.W.3d 618 (2001), which held that the disability which results from the arousal of a prior, dormant condition by a work-related injury remains compensable under the 1996 act. In McNutt, 40 S.W.3d 859, n. 1, the Court recognized that cumulative trauma under Haycraft v. Corhart Refractories Co., Ky., 544 S.W.2d 222, 225 (1976), still constituted an injury under the new law of 1996. Therefore, it appears that the ALJ should have considered whether the disability caused by the natural aging process was the result of an arousal of a prior dormant condition into disabling reality by a work-related injury. If so, the claimant's entire disability remains compensable under the 1996 act.

Therefore, the opinion of the Workers' Compensation Board which affirmed the Administrative Law Judge's findings is

affirmed in part, vacated in part, and remanded for further consideration.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tamara Todd Cotton
Louisville, Kentucky

BRIEF FOR APPELLEE, GENERAL ELECTRIC:

Judson F. Devlin
Louisville, Kentucky

BRIEF FOR APPELLEE, SPECIAL FUND:

David R. Allen
Frankfort, Kentucky