RENDERED: APRIL 25, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-001548-WC

WALTER McKELLERY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-00923

DISNEY TIRE COMPANY;
WORKERS' COMPENSATION FUNDS;
HON. SHELIA LOWTHER,
CHIEF ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BAKER, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Walter McKellery ("McKellery") appeals from an opinion of the Workers' Compensation Board ("the Board") which affirmed a decision of the Administrative Law Judge ("ALJ") dismissing his claim against Disney Tire Company ("Disney") as barred by the statute of limitations. We affirm.

McKellery was employed at Disney for approximately 23 years ending in 1999. Through most of the 1990s, he operated a

forklift and engaged in other activities including manually moving heavy truck tires. These and other activities required extensive use of his upper extremities. On May 20, 1998, McKellery filed an application for adjustment of claim alleging that these repetitive work activities resulted in physical impairment resulting from carpal tunnel syndrome.

The petition was first examined by an arbitrator, who determined that the claim was barred by the statute of limitations. The matter then proceeded before the ALJ, who rendered an opinion and order on June 16, 1999, awarding compensation for a proposed right carpal tunnel release (i.e., corrective surgery) and temporary total disability benefits ("TTD"). The claim was then held in abeyance pending the issuance of a supplemental opinion on other issues.

Thereafter, the Kentucky Supreme Court rendered opinions in Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999) and Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999). Both cases dealt with notice and statute of limitation issues in cumulative trauma proceedings.

On July 10, 2001, the ALJ rendered a supplemental opinion and order which revised the June 16, 1999, opinion and award. The record indicates that during the intervening period, the claim was amended to allege a second manifestation

date of May, 1998, and a question arose as to which of Disney's insurance carriers would be liable.

Upon taking proof, the ALJ determined that pursuant to Huff, supra, McKellery's petition was barred by operation of the statute of limitations. As a basis for this conclusion, she found that McKellery's carpal tunnel syndrome was diagnosed in 1994 and that McKellery was aware at that time of its work-relatedness. Relying on Clark, supra, she went on to note that while McKellery testified that his symptoms worsened between 1996 and 1999, there was nothing in the record to suggest whether any occupational disability was attributable to this timeframe.

McKellery appealed to the Board, arguing that he did not learn that his condition was permanent until May, 1996. He also maintained that the uncontroverted evidence demonstrated that much, if not all, of his disability arose within the two-year period immediately preceding his claim.

Without entering into a protracted recitation of the Board's reasoning, it concluded in relevant part that Huff, supra, requires the statute of limitations (KRS 342.185) in cumulative trauma cases to commence when the claimant first recognizes that he has a work-related injury. Having found that McKellery clearly knew he had a work-related injury in 1994, the

statute of limitations began to run in 1994 and his 1998 claim therefore was time-barred.

The Board went on to address the question of whether McKellery developed additional disability during the two years immediately preceding his application for benefits. Clark, supra, provides that even when a worker has what may be deemed a date of injury, occupational disability which develops during the two years preceding the claim is compensable. In examining this issue, the Board determined that while evidence existed in the record that McKellery experienced additional disability during this period, it affirmed the ALJ's conclusion that no such increased disability existed. The Board dismissed McKellery's appeal of the ALJ's opinion and order. This appeal followed.

McKellery first argues that the ALJ erred in concluding that his claim for benefits regarding his right hand carpal tunnel syndrome was barred by the statute of limitations. He maintains that the record contain no evidence that he suffered any injury or disability to his right hand prior to May, 1996, and that the ALJ erred in failing to so find. He argues that he could not have pursued a claim for compensation for an impairment or occupational disability for a condition which did not cause him symptoms in 1994 or 1995.

In a related argument, McKellery claims that the Board erred in concluding that the evidence did not compel a finding that he suffered compensable cumulative trauma which manifested and became symptomatic after May, 1996. He argues that the ALJ erroneously found that there was nothing in the record to suggest whether any functional impairment was attributable to his employment after May, 1996, and points to evidence in the record stemming from 1998 that he experienced atrophy, pain, weakness, numbness, and inability to work.

On the issue of whether the Board properly concluded that the ALJ correctly dismissed McKellery's petition as filed outside the statute of limitations, we find no error. The record contains evidence that McKellery's treating physician, Dr. Walter Zukof ("Zukof"), conducted testing in 1994 which showed bilateral carpal tunnel syndrome. The evidence further shows that Zukof informed McKellery that the condition was work-related at that time. Given that the record contains clear evidence that McKellery was aware of a work-related condition or injury as early as 1994, we cannot conclude that the Board erred in affirming the ALJ on this issue.

Similarly, we agree with the Board's conclusion that Huff, supra, equates "manifestation of disability" with "manifestation of injury." That is to say, though "manifestation of disability" is the statutory trigger for

beginning the running of the statute of limitation, the court in Huff clearly looks to the date of injury. ("We conclude that it [manifestation of disability] refers to the worker's discovery that an injury had been sustained." Huff, 2 S.W.3d at 101).

We find very compelling the dissenting opinion of Board Member Stanley in the matter at bar. It is uncontroverted that McKellery received a work-related, permanent disability, and the clear purpose of KRS Chapter 342 is to compensate injured and/or disabled workers precisely like McKellery. Nevertheless, the Huff opinion operates to bar this statutory entitlement, and affects most severely the dedicated employee like McKellery who continues to function for years with a work-related disability rather than to litigate at the first twinge of pain. Furthermore, it cannot be said that any useful purpose is served in the matter at bar by equating the onset of injury with the onset of disability for purposes of triggering the statute of limitations. Given the totality of the circumstances, and considering those circumstances in light of the underlying purpose of KRS Chapter 342, we would reverse on this issue were it not for our mandate to follow Huff.

On McKellery's final argument, i.e., that the Board erred in concluding that the evidence did not compel a finding that he suffered compensable cumulative trauma which manifested and became symptomatic after May, 1996, we again are bound to

affirm. While common sense would dictate that the physical activity which brought about disability prior to May, 1996, did not magically lose its injurious effect after that date, it is also true that no medical evidence exists in the record to support McKellery's claim on this issue. This fact, taken alone, is a sufficient basis upon which we must affirm the Board's opinion on this issue.

For the foregoing reasons, we reluctantly affirm the opinion of the Workers' Compensation Board.

SCHRODER, JUDGE, CONCURS.

BAKER, JUDGE, CONCURS IN RESULT ONLY.

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