RENDERED: JULY 3, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001169-WC

PERDUE FARMS, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-00174

FRED M. MAYES; HON. RICHARD CAMPBELL, ADMINISTRATIVE LAW JUDGE; HON. SHEILA LOWTHER, CHIEF ADMINISTRAIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Perdue Farms, Inc. has petitioned for review of an opinion of the Workers' Compensation Board entered on May 1, 2002, which affirmed the opinion, award and order of the Administrative Law Judge (ALJ), which awarded occupationally-related hearing loss benefits to the appellee, Fred M. Mayes. Having concluded that the Board did not overlook or misconstrue controlling statutes or precedent, or commit an error in

assessing the evidence so flagrant as to cause gross injustice, we affirm.[1]

Mayes began working for Perdue on October 31, 1995.[2] He was employed as an "area supervisor" at Perdue's poultry processing plant in Cromwell, Kentucky. By the time Mayes started working for Perdue he was already experiencing problems with his hearing.[3] Mayes, however, was never informed that his hearing loss might be associated with his exposure to loud noises.[4] On March 6, 2000, Mayes went to see Dr. Uday Dave, an otolaryngologist. Dr. Dave informed Mayes that he had a severe hearing impairment and that his hearing loss was work-related. Although Dr. Dave was not the first physician to evaluate Mayes, he was the first doctor to advise him that his hearing loss was work-related.[5] On June 30, 2000, Mayes terminated his employment with Perdue. Approximately two weeks later he sent a letter

[1] Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

[2] Prior to his employment with Perdue, Mayes worked as a general mine superintendent for Peabody Coal Company for approximately 18 years.

[3] Mayes met with a Dr. Logan in 1990 concerning his hearing loss. Dr. Logan advised Mayes that he had a high pitched hearing loss, but he failed to make any diagnosis as to the cause of the hearing loss.

[4] Throughout his employment with Perdue, Mayes was exposed to loud noises on a regular basis. Although not as frequent, Mayes was also exposed to loud noises while employed with Peabody.

[5] In addition to the evaluation conducted by Dr. Logan, Perdue also conducted audiological testing on Mayes in 1996 and informed him that he had a severe hearing impairment. Perdue, however, never informed Mayes that his hearing loss was work-related.

notifying Perdue of his intent to file a hearing loss claim. The claim was filed on February 5, 2001.

In an opinion, award and order dated December 7, 2001, the ALJ ruled that Mayes was entitled to an award for permanent partial disability as provided for in KRS[6] 342.7305. The ALJ determined the claim was not barred by the statute of limitations as Mayes could not be charged with his knowledge of having suffered a work-related injury prior to his March 6, 2000, evaluation with Dr. Dave.[7] The ALJ also found the hearing loss and impairment disclosed by the May 15, 1996, audiological testing to be "part and parcel" of the present claim. Perdue filed a petition for reconsideration, and on February 5, 2002, the Chief ALJ overruled the petition. Perdue subsequently appealed to the Workers' Compensation Board, and on May 1, 2002, the Board affirmed the ALJ's ruling. This petition for review followed.

Perdue contends the ALJ erred by finding that the

[6] Kentucky Revised Statutes. KRS 342.7305 governs the compensability of claims for occupational hearing loss. We note at the outset that this claim has been treated as a cumulative trauma injury, as opposed to an occupational disease.

[7] Pursuant to KRS 342.185, a claim for benefits must be filed within two years after the date of the accident. When a cumulative trauma injury is alleged, the claim must be filed within two years of the date the disability becomes manifest. A disability becomes manifest once the claimant is made aware that he has sustained a work-related injury. See infra Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503, 507 (2001). The ALJ found that there was insufficient evidence that Mayes was aware that his hearing loss arose from noise exposure within the workplace prior to his March 6, 2000, evaluation by Dr. Dave.

claim was timely filed. Perdue claims the ALJ misconstrued the applicable law and failed to consider relevant evidence. Perdue argues that the ALJ applied the wrong standard in determining that Mayes was not aware that his hearing loss was work-related prior to March 2000. Perdue maintains that the correct standard is not whether Mayes was aware that his hearing loss was work-related, but rather, whether he should have been aware. Perdue also alleges the ALJ erred by finding the impairment established in 1996 was "part and parcel" of the current claim.[8]

Perdue's first argument is premised upon the ALJ's determination that the record lacked "proof" that Mayes was aware prior to March 6, 2000, that his hearing loss arose from noise exposure within the workplace. Perdue argues that there was circumstantial evidence in the record suggesting that in 1996 Mayes was made aware that his hearing loss problems were the result of noise exposure.[9] Perdue argues that this case does not involve a question of whether the ALJ's findings in favor of Mayes's claim were supported by substantial evidence, but rather, that the ALJ completely failed to consider the

[8] Dr. Dave testified that the audiological testing performed in 1996 revealed a functional impairment rating of 9%. Mayes's current level of impairment has been set at 13.6%.

[9] Perdue claims the audiological testing conducted in 1996 should have made Mayes aware of the fact his hearing loss was work-related.

circumstantial evidence.[10]

Perdue fails to acknowledge the distinction between evidence and proof. When the ALJ determined the record lacked proof that Mayes was aware prior to March 6, 2000, that his hearing loss was related to noise exposure within the workplace, he was merely arriving at the conclusion that the evidence presented was sufficient to prove Mayes's alleged disability onset date of March 6, 2000.

Proof is not evidence, but rather, the result or effect of evidence.[11] Thus, a case may include some evidence in support of a particular claim or defense, but insufficient evidence to establish or prove the claim or defense. In the case sub judice, the ALJ did consider any and all evidence pertaining to whether Mayes was aware in 1996 that his hearing problems were work-related, and he determined that the evidence was sufficient to prove that Perdue's claim manifested in March 2000.[12] We agree with the Board's determination that the ALJ's finding is supported by sufficient evidence in the record.

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[10] Perdue violates CR 76.28(4)(c), which prohibits citation to unpublished cases as authority, by citing Freedom Energy Mining Co. v. Adams, 2001-CA-001231-WC, rendered December 7, 2001, and Tichenor v. St. Joseph Healthcare, Inc., Claim No. 00-00575, rendered June 13, 2001.

[11] See Black's Law Dictionary 1215 (6th ed. 1990).

[12] See Holman Enterprise Tobacco Warehouse v. Carter, Ky., 536 S.W.2d 461 (1976)(citing International Harvester Co. v. Poff, Ky., 331 S.W.2d 712 (1959)).

Perdue further argues that the ALJ misconstrued the applicable law when determining that Mayes was not aware in 1996 that his hearing loss was work-related. According to Perdue, the correct standard is not whether Mayes was aware that his condition was work-related, but rather, whether he should have known his hearing loss was work-related. Perdue cites Alcan Foil Products v. Huff,[13] in support of this proposition.

In Alcan Foil, one of the appellees testified that he was unaware that his hearing loss was work-related until August 1995. The ALJ, however, determined that the injured worker was aware that his condition was work-related as early as 1992.[14] As a result, the ALJ concluded the claim was untimely filed. Thus, Perdue argues that under Alcan Foil, the mere denial by a claimant as to knowledge of an injury does not preclude a finding that the claimant was aware his condition was work-related. Perdue fails to acknowledge, however, that Alcan Foil does not mandate such a finding by the ALJ. Furthermore, we find nothing in the Alcan Foil opinion which suggests the correct standard is whether a claimant should have been aware that his injury was work-related as opposed to whether he was actually aware of the fact. Alcan Foil holds that in work-related cumulative trauma claims, the clocking of the statute of

[13] Ky., 2 S.W.3d 96 (1999).

[14] Id. at 98.

limitations and the requirement that a claimant provide due and timely notice, begin once a worker (1) discovers that a physically disabling injury has been sustained, and (2) becomes aware that his injury is caused by work.[15]

This conclusion is supported by the Supreme Court's decision in Hill, supra, where the injured worker suffered from back problems which had gradually developed over time. He had been treated by several physicians over the years, none of whom, however, attributed his injury to work-related activities. Finally, the injured worker was evaluated by a Dr. Gaw who informed him that his symptoms were in fact, work-related.[16] The Supreme Court held that although the claimant was aware of symptoms long before this evaluation, his claim was nonetheless timely filed because he was not aware that his injury was work-related until he was diagnosed by Dr. Gaw.[17] The following language is helpful to the present analysis:

> Medical causation is a matter for the medical experts and, therefore, the claimant cannot be expected to have self-diagnosed the cause of the harmful change to his cervical spine as being a gradual injury versus a specific traumatic event. He was not required to give notice that he had sustained a work-related gradual injury to

[15] Id. at 99-101.

[16] Hill, 65 S.W.3d at 507.

[17] Id.

> his spine until he was informed of that fact.[18]

Thus, a claimant is not obligated to give notice, nor does the statute of limitations in his case begin to run until he is informed by a physician that his condition is work-related. The ALJ found that Mayes was first informed his hearing loss was work-related when he met with Dr. Dave on March 6, 2000. Once again, we agree with the Board that the record contains substantial evidence to support the ALJ's finding.

Perdue argues in the alternative that even if the ALJ applied the correct standard in deciding this claim, the award of benefits should still be overturned. This argument is premised upon the testimony of Mayes that prior to March 6, 2000, he was not aware his hearing condition was work-related. According to Perdue, this testimony is not competent and, therefore, could not be relied upon by the ALJ in awarding benefits.

Perdue cites Couch v. Holland,[19] in support of this argument. Couch, however, is factually distinguishable from the present case. Couch involved a negligence action in which the former Court of Appeals overturned a jury verdict because the appellee's testimony did not support the finding that she was

[18] Id. at 507 (citing Alcan Foil, supra and Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999)).

[19] Ky., 385 S.W.2d 204 (1964).

entitled to a jury award. The appellee in Couch testified that she looked both ways before crossing a busy highway and that she did not see the automobile that struck her. She also testified that her vision was unobstructed for approximately 600 feet in the direction of the appellant's car. The Court was troubled by this testimony and posed the question: "[w]hy did she not see?" The Court went on to conclude that it would have been impossible for her to have looked and not to have seen the automobile approaching.[20] Perdue would have this Court apply the same reasoning to the present analysis. In fact, it even paraphrases the former Court of Appeals, "[h]ow could [Mayes] not have known that his condition was work-related?"

Perdue's argument, however, lacks merit and is easily rejected. Mayes did not know his condition was work-related because he was never informed of such. Had he been informed by a physician that his condition was work-related, then Couch would apply as it would have been impossible for him not to have known. The ALJ, however, determined that Mayes had not been informed that his condition was work-related until March 6, 2000. Moreover, his testimony on the issue was competent and of sufficient probative value to justify the ALJ's determination.[21]

[20] Id. at 207.

[21] See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977); and Johnson v. Skilton Construction Co., Ky., 467 S.W.2d 785, 788 (1971).

Once again, we cannot disturb any factual findings made by the ALJ so long as there is sufficient evidence of probative value justifying the decision.[22]

Perdue's second claim of error is premised upon the ALJ's finding that the impairment established in 1996 was "part and parcel" of the current claim. As noted above, Perdue conducted audiological testing on Mayes in 1996. Dr. Dave subsequently reviewed the result of the audiogram performed on May 15, 1996. Dr. Dave testified that the audiogram revealed a hearing loss consistent with an impairment rating of 9%.[23] Thus, Perdue claims it is not liable for the 9% impairment rating that existed in 1996. According to Perdue, the proper method for assessing the level of functional impairment is to consider the current level of impairment and to carve out or subtract the preexisting level of impairment. As a result, Perdue argues that Mayes is only entitled to compensation based upon a 4.6% impairment rating.

Our analysis turns upon an interpretation of KRS 342.7305(4), which reads as follows:

> When audiograms and other testing reveal a pattern of hearing loss compatible with that caused by hazardous noise exposure

[22] Holman, 536 S.W.2d at 465.

[23] Dr. Dave did not review the results of the May 1996 audiogram until May 14, 2001. Thus, the 9% impairment rating was not actually established until several years after the 1996 tests were conducted.

> and the employee demonstrates repetitive exposure to hazardous noise in the workplace, there shall be a rebuttable presumption that the hearing impairment in an injury covered by this chapter, and the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits.

We begin by noting the interpretation to be given a statute is a matter of law, and we are not required to give deference to the decision of the Board.[24] We must, however, adhere to the general rule that the workers' compensation statutes will be liberally construed to affect their humane and beneficent purposes.[25] When read in conjunction with the rest of the statute, the term "exclusively" suggests that it does not matter whether Mayes developed his hearing condition while working for other employers prior to being hired by Perdue.

Since Perdue is the last employer with whom Mayes was injuriously exposed, it is exclusively liable for all benefits due and payable as a result of his work-related hearing loss. As previously discussed, Mayes was not aware that his hearing loss was work-related until March 2000. Thus, none of Mayes's hearing impairment leading up to the work-relatedness determination made in March 2000 can be excluded from his

[24] Wilson v. SKW Alloys, Ky.App., 893 S.W.2d 800, 801-02 (1995)(citing Newberg v. Thomas Industries, Ky.App., 852 S.W.2d 339, 340 (1993)).

[25] Id. at 802 (citing Oaks v. Beth-Elkhorn Corp., Ky., 438 S.W.2d 482, 484 (1969)).

overall disability. If we were to accept Perdue's argument, then utilizing the date the injury began to manifest itself would nonetheless result in many cumulative trauma disability claims having little value, since all pre-existing disability would be carved out of the total amount of disability, leaving as compensable only that part of the disability which occurred within the two-year statute of limitations.

Accordingly, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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