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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2003-CA-001956-WC

JANET SUE PATTON — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-99333

SQUARE D COMPANY; HON. LLOYD R. EDENS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE. Janet Sue Patton petitions for review of an opinion of the Workers' Compensation Board that affirmed a decision by the Administrative Law Judge awarding her permanent partial disability benefits for injuries to her neck and left shoulder based on an 18% functional impairment rating and a permanent occupational disability rating of 27%, but denying any benefits associated with a lower back condition because of the

two-year limitations period under Kentucky Revised Statutes (KRS) 342.185. We affirm.

In her petition for review, Patton argues that the ALJ and Board erred in failing to award her permanent total occupational disability benefits. She contends that she developed cumulative trauma to her lower back that manifested itself at the earliest in 1998 and the statutory limitations period was tolled by the payment of temporary total disability benefits. Alternatively, Patton maintains that the ALJ should have considered her lower back condition as work-related, combined it with her left shoulder and cervical injuries, and found her permanently and totally disabled as a result of the combination of all her injuries.

The duty of this Court is to correct the Board only where it has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992); Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999). After reviewing the record, the law, and the arguments of counsel, we have concluded that this Court could not improve on the well-written opinion of the Board. Inasmuch as we believe the Board adequately addressed the issues, did not overlook or misconstrue

controlling precedent, and properly assessed the evidence, we adopt the Board's opinion as our own.

BEFORE: LOVAN, Chairman, STANLEY and GARDNER, Members.

STANLEY, Member. Janet Sue Patton ("Patton") seeks review from a decision rendered March 6, 2003, by Hon. Lloyd R. Edens, Administrative Law Judge ("ALJ"), awarding her benefits as a result of injuries to her neck and shoulder sustained on September 7, 1999, but dismissing her claim for a low back injury on grounds of limitations. On appeal, Patton argues she is permanently and totally disabled as a result of a low back condition that developed over the course of her 26-year employment with Square D Company ("Square D"), in combination with the shoulder and neck injuries found compensable by the ALJ. Though Patton presents multiple, alternative arguments in her brief before this Board, her appeal essentially revolves around one key point. Patton believes the judicial bodies interpreting the Kentucky Workers' Compensation Act have misinterpreted the provisions put in place by the state Legislature to compensate injured workers for the effects of cumulative trauma in the work place. We find no merit in these various arguments and, accordingly, we affirm.

Patton was born November 15, 1946, and is a resident of Clay City, Powell County, Kentucky. She completed school through the ninth grade. She entered the employ of Square D on May 7, 1973, as a press operator. Patton testified that this was a physically demanding job in which she would operate half-ton and one-ton presses, including setting up the die and hand stacking the massive parts as they came off the press.

On October 13, 1994, Patton reported to the first aid office at Square D that she was experiencing low back pain associated with the physical demands of her work. A Form 113 was completed to allow Patton to receive medical treatment under Square D's workers' compensation coverage. Though she did not have any lost time from work at that point, Patton explained that low back pain limited her productivity by approximately 20%. Patton was sure the low back pain was due to the heavy demands of her work, though she denied seeking any medical treatment at that time.

Patton first sought treatment for her low back pain in 1998 from Dr. C.C. Smith, a chiropractor. Patton saw Dr. Smith frequently in the latter part of 1998, sometimes as often as twice a week. Treatment in Dr. Smith's office consisted of heat application, ultrasound, and trials of various spinal manipulation tables. These modalities provided only temporary relief. Dr. Smith's treatment was covered through Patton's major medical carrier and she was required to make a co-payment with each visit. Patton remained under Dr. Smith's care for approximately three to four months.

Dr. Smith subsequently referred Patton to a neurologist, Dr. Christa Muckenhausen, in Pikeville. Patton first treated with Dr. Muckenhausen on March 24, 1999. Dr. Muckenhausen recorded a host of physical complaints, including neck pain radiating into both shoulders and arms and low back pain radiating into both legs. Patton advised Dr. Muckenhausen that she had a longstanding history of progressive pain, which she apparently associated with her job at Square D. Dr. Muckenhausen recorded the physical demands of Patton's employment in some detail. She also noted that, five to six years before, Patton had been seen at Clark County Hospital in Winchester and advised she had a bulging disc in her back.

Around that same time, Patton was operating a 1,000-pound press, which she did by herself for four years. Dr. Muckenhausen diagnosed chronic, diffuse osteoarthritis involving the large joints, including the shoulders, hips, and knees. She also suspected rotator cuff impingement syndrome due to "overuse working in heavy industry." Dr. Muckenhausen recommended a neurosurgical consultation and a pain clinic assessment.

Patton began treating with a neurosurgeon, Dr. John Gilbert, on April 19, 1999. Though his office notes were not filed into evidence, Dr. Gilbert completed a Form 107 dated October 8, 2001, indicating he had seen Patton on numerous occasions for complaints of pain in her neck, shoulder and back. Dr. Gilbert made reference to a May 12, 2001, MRI showing disc protrusions at C5-6 and C6-7 and degenerative disc disease at L4-5 and L5-S1. Dr. Gilbert did not perform surgery, however. Dr. Gilbert diagnosed chronic cervical and lumbar strains and nerve root injury, as well as muscle spasm and aggravation of degenerative disc disease. He assessed a 30% permanent impairment rating, though he failed to specify the conditions to which this rating related. He recommended that Patton perform no lifting over 20 pounds and no bending, stooping, crawling, crouching, or operating machinery. He also indicated that Patton was not able to sit, stand, or walk more than 30 minutes at a time.

Patton underwent a pain management assessment by Dr. James Templin on May 11, 1999. Dr. Templin noted complaints of chronic neck pain with radiation into the right shoulder, arm, and hand, together with low back pain with radiation into the right hip and leg. Patton attributed these symptoms to what Dr. Templin described as a "work-related accident." Dr. Templin recorded the following specifics:

At the time of the accident, Ms. Hughes [now Patton] was an employee of Square D where she works as a machine operator. She said she has worked at Square D for some 25 years. Approximately nine years ago, she bid into what was considered a hard manual labor position. She was running a 1000 ton press. Ms. Hughes' husband had died and she was very concerned over her earning ability. She believes positioning herself running this equipment would enhance her earning capabilities. While running the machine, she is required to change the dye [sic] and clamp the dye [sic] into the appropriate position. They would change the dye [sic] approximately three times a day. She is also required to handle each metal box produced, i.e. that is removing the finished product and stacking same. The products weighed anywhere from one pound to 25 pounds. Ms. Hughes said while she was operating this machine, she was pulling on a large bar attempting to clamp the dye [sic] into place when she felt a pulling pain in the lower back. She reported the injury but continued to work. She did not seek medical attention. Ms. Hughes said she was sure if she had seen a physician she would have been taken off work. She wanted to avoid this since lost work was an important element in the company in determining advancement. Ms. Hughes said, 'Unfortunately, this back pain slowly but progressively worsened.' She continued to work until last year at which time the pain had reached the point where she felt she needed to seek medical attention.

Patton also informed Dr. Templin that she was missing approximately one day of work per month due to her pain condition. She expressed uncertainty as to how much longer she would be able to continue working, though she hoped to reach her regular retirement in three years. At the time of Dr. Templin's evaluation, Patton was operating a 500-pound press, producing electrical boxes that weighed between one and 25 pounds each. The machine produced anywhere between 3,000 and 10,000 parts per eight-hour shift, which Patton had to hand stack. She was also required to set up the dies at least three times per shift, which involved utilizing two motor trucks and a large, heavy wrench to bolt the dies into place.

Dr. Templin diagnosed degenerative disc disease, herniations, and chronic pain syndrome in both the cervical and lumbar spines, as well as chronic right shoulder pain syndrome. He recommended EMG/NCV studies to further evaluate the significance of the multiple protrusions and bulges seen on the cervical and lumbar MRI scans. The electrodiagnostic studies performed on June 30, 1999, revealed no evidence of cervical or lumbar radiculopathy. There was evidence of moderate carpal tunnel syndrome on the right side. On August 10, 1999, Dr. Templin released Patton to return as needed. He recommended that she pursue a home exercise program and maintain a diet for weight reduction. He also recommended that she take extra strength Tylenol as needed for pain control. Dr. Templin noted that Patton expressed a continued desire to work until she qualified for her regular retirement benefits.

On September 7, 1999, Patton was performing the regular duties of her job and setting up a press when the 2 x 4 she was using broke and caused her to fall backwards. She had an immediate onset of

pain in her left shoulder and upper back and neck areas. Patton was seen by Dr. James Ritterbusch, who noted full and painless range of motion of the cervical spine but limited range of active motion of the left shoulder. Suspecting rotator cuff pathology, Dr. Ritterbusch ordered an MRI. The MRI was conducted on September 27, 1999, and showed a supraspinatus tear on the left side. Dr. Ritterbusch recommended surgery.

Patton returned to work with her left arm in a sling and sought a second opinion from Dr. David Caborn, a sports medicine specialist at the Kentucky Clinic. Dr. Caborn saw Patton on November 3, 1999, and diagnosed questionable AC joint arthritis in addition to the rotator cuff tear seen on MRI. In a follow-up office note of November 29, 1999, Dr. Caborn indicated that the bone scan of Patton's left shoulder showed increased uptake at the AC and glenohumeral joints. He recommended an AC joint resection in addition to a rotator cuff repair of the left shoulder.

Patton took off work on November 29, 1999, and has not returned to her employment at Square D since. She underwent surgery on her left shoulder on December 14, 1999, which provided some limited relief and improved range of motion. Patton continued to have pain with external rotation, however, as well as tenderness in her shoulder, back, and neck.

In January of 2000, Patton was referred to Dr. Paul Brooks for evaluation of her neck and back pain. She was eventually returned to Dr. Gilbert, who apparently recommended cervical epidural blocks and repeat MRI scanning. With a repeat MRI scan showing protrusions at C5-6 and C6-7, Dr. Gilbert recommended surgery. Patton did not submit to surgery on her cervical spine, though she did undergo an arthroscopy of the left shoulder on October

31, 2000, which showed her rotator cuff to be intact.

Following the second surgery, Patton underwent physical therapy, which she testified helped tremendously. Unfortunately, her condition never improved to the point that she was able to return to work. She drew temporary total disability benefits through April 7, 2002. She was denied early retirement benefits from Square D, but applied for and is receiving Social Security disability benefits.

Patton filed an Application for Resolution of Injury Claim with the Department of Workers' Claims on April 15, 2002. At the time of her deposition on August 10, 2002, Patton was still under the care of Dr. Gilbert, who was prescribing her pain medication. In addition to the records and reports of Drs. Muckenhausen, Templin, Gilbert, and Caborn, medical evidence presented for the ALJ's consideration consisted of Forms 107 of Dr. O. M. Patrick, Dr. Gregory Gleis, and Dr. Daniel Primm.

Dr. Patrick evaluated Patton on June 15, 2002, at the request of her attorney. Patton reported to Dr. Patrick that she injured her "neck, lower back and left shoulder" in the work-related accident on September 7, 1999. She advised Dr. Patrick that she had experienced back pain before, but had never been treated for it. Dr. Patrick diagnosed a left rotator cuff tear, shoulder impingement, and AC joint arthritis; a herniated disc at C5-6; and herniated discs at L3-4, L4-5, and L5-S1. It was Dr. Patrick's opinion that Patton had pre-existing degenerative changes that had been aroused and brought into disabling reality by the work injury at issue. He assessed a 4% impairment due to the left shoulder injury, a 10% lumbar impairment due to disc herniations at three levels, and a 6% impairment to the cervical spine for the

herniation at C5-6. Dr. Patrick recommended a broad range of restrictions that would preclude Patton from returning to the type of work performed at the time of injury.

Dr. Gleis evaluated Patton on May 30, 2001, at the request of Square D. Patton complained of constant pain and reduced range of motion in her left shoulder and neck, as well as constant and severe pain in her low back radiating down her right posterior leg to her toes. Dr. Gleis assessed an impairment rating for Patton's left shoulder of 9%, based on loss of range of motion and left distal clavicle resection. He assessed a 9% rating for impairment of Patton's cervical spine, which he diagnosed as degenerative disc disease aroused by the work-related injury of September 7, 1999. He did not recommend surgery for Patton's cervical spine, as he found no evidence on clinical examination of cervical radiculopathy and also noted that Patton reported no improvement with epidural blocks.

With respect to Patton's lumbar spine, Dr. Gleis diagnosed low back pain with degenerative disc disease and right-sided sciatica. He did not feel this condition was in any way work-related and, therefore, assessed no permanent impairment as a result thereof. He recommended restrictions related solely to Patton's neck and shoulder injuries.

Dr. Primm evaluated Patton on August 9, 2002, at the request of Square D. Dr. Primm took a history of an onset of neck and left shoulder pain following the work injury of September 7, 1999. Patton advised that, prior to the work injury, she had been treated for chronic low back pain, which she had experienced since 1994. Dr. Primm indicated he did not examine Patton's lumbar spine because she did not relate her chronic low back pain to the work-related injury of

September 7, 1999, which he believed was further confirmed by her medical records. Dr. Primm assessed a 0-5% impairment rating for Patton's cervical spine and a 2% impairment rating due to loss of range of motion of the left shoulder. He recommended that she return to light duty work with regular lifting of no more than 10-15 pounds and occasional maximum lifting of 25 pounds. He also recommended that she avoid constant reaching or working with her arms above shoulder level.

In addition to the medical reports summarized above, the parties presented evidence related to a psychiatric condition alleged by Patton to have arisen out of her work injury. The ALJ was not persuaded that Patton had sustained any permanent psychiatric impairment, however, and dismissed that portion of her claim. The ALJ's determination in that regard is not at issue in this appeal and, therefore, we will forego a summary of the psychiatric proof.

Finally, Patton filed the report of her vocational expert, Dr. Ralph Crystal, who conducted an assessment on July 31, 2002. It was Dr. Crystal's opinion that Patton did not retain the ability to return to the type of work she performed at Square D. He felt that, prior to her work injury, Patton had access to approximately 35% of the jobs in the economy. If limited to sedentary and light duty work, as would be suggested by the restrictions of Drs. Gilbert, Patrick, and Gleis, Patton would qualify for less than 5% of the jobs in the labor market. If he were to take the restrictions recommended by Dr. Prince as accurate, Dr. Crystal would have to conclude that Patton is totally disabled from all work. Dr. Crystal indicated that Patton would have difficulty finding a job without the assistance of a rehabilitation professional. Overall, he provided a rather

bleak outlook for Patton's future employability.

The opinions of Dr. Crystal notwithstanding, it was the ALJ's determination that Patton is not permanently and totally disabled. He issued an award of permanent partial disability benefits based upon an 18% permanent impairment rating, the combined value of a 9% functional impairment related to Patton's cervical spine condition and a 9% functional impairment related to her left shoulder injury. The ALJ did not award benefits for Patton's low back condition. On this issue, the ALJ held as follows:

> The first issue for determination is limitations for the low back condition. KRS 342.185(1) requires that an application for adjustment of claim be filed within two years of the date of accident or suspension of income payments, whichever is later. The Plaintiff has alleged that her low back condition is due to cumulative trauma. In Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999), the Court essentially held that the manifestation date for the purpose of calculating the running of statute of limitations in a cumulative trauma claim is the date upon which the claimant has a physically disabling injury and knows that it is caused by work. In Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999), the Court held that where a claim is not filed until more than two years after the claimant discovers he or she has sustained an injury which is caused by work, '. . . KRS 342.185 would operate to prohibit compensation for whatever

occupational disability is attributable to trauma incurred more than two years preceding the filing of the claim.'

On October 9, 1994, the Plaintiff reported low back pain, which she considered work-related, as set forth in Exhibit 1 to her deposition. Ms. Patton stated that she had continuing back pain following that date. She testified that she ultimately saw Dr. Smith in 1998 and Dr. Muckenhausen in 1999. The Plaintiff reported her injury on October 9, 1994 and identified it as work-related at that time. She continued to experience pain after that date and, therefore, I find the manifestation date was October 9, 1994. Pursuant to the aforementioned statute, it was necessary for the Plaintiff's claim to be filed on or before October 9, 1996. The Plaintiff's claim was filed on April 15, 2002. In accordance with Special Fund v. Clark, id., the Plaintiff would be entitled to benefits for any additional injury attributable to work-related trauma occurring within two years of the filing of the claim. In this instance, the period would be from April 15, 2000 until April 15, 2002; however, the Plaintiff testified that she last worked for the Defendant/Employer on November 29, 1999. Therefore, her claim is barred by KRS 342.185.

While, the Plaintiff ultimately received temporary total disability benefits beginning November 28, 1999, the payment began in excess of two

> years following the manifestation and, thus, beyond the statute of limitations. Therefore, it would not toll the statute or extent [sic] it. Lawson v. Walmart Stores, Inc., Ky. App., 56 S.W.3d 417 (2001). Additionally, the proof in the claim would indicate that the Plaintiff received temporary total disability benefits at that time due to her cervical and left shoulder injuries and not her lumbar condition. In view of the aforementioned manifestation date of October 9, 1994, the fact that the Plaintiff stopped working at the Plaintiff's facility in excess of two years prior to the filing of her claim, I find her claim for low back injury is barred by the statute of limitations. Having made that determination, the Plaintiff shall be entitled to benefits based on her left shoulder and cervical injuries.

It is from the above language that Patton now appeals.

On appeal, Patton presents several alternative theories for the compensability of her low back claim, though they each involve the same basic finding of fact and its necessary outcome. Essentially, Patton is displeased with the ALJ's finding that her low back injury became manifest as of October 9, 1994, more than two years prior to the filing of her application. Unfortunately for Patton, there is substantial evidence to support this finding by the ALJ. Moreover, the law, as set out in the statute and applied by this Board and the courts of this Commonwealth, obligate the ALJ to dismiss a claim under this set of facts.

Patton argues first that the evidence establishes she developed degenerative disc disease as a result of her employment and that it was aroused into disabling reality by the work-related incident of September 7, 1999. We find no evidence in the record to support Patton's contention that her work was the cause of her degenerative disc disease. Moreover, while the reports of Drs. Gilbert and Patrick might have supported a finding by the ALJ that a portion of Patton's low back impairment was due to the work-related arousal of a pre-existing, dormant condition on that date, the evidence with regard to that theory was conflicting, and such a finding was not compelled thereby.

As Patton had the burden of proof and risk of nonpersuasion with respect to the threshold issue of causation, the question before us is whether the evidence compelled a result contrary to that reached by the ALJ. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Compelling evidence is defined as evidence so overwhelming that no reasonable person could reach the same conclusion as the ALJ. Reo Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985). It is not sufficient for Patton merely to show there is some evidence that would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). As long as the ALJ's opinion is supported by any evidence of substance, it cannot be said the evidence compels a contrary result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Patton's commendably candid testimony was that she had been experiencing low back pain as early as October of 1994, and that the problem had continued to plague her in the years following that first report. She further conceded that she was sure the problem was work-related from the outset, and described in detail the physical demands

of her work to which she attributed her low back pain. Indeed, Patton had sufficient conviction in the work-relatedness of her condition to report the matter to Square D and secure a Form 113 for purposes of workers' compensation coverage of her medical treatment on October 13, 1994. There is also evidence establishing that Patton sought chiropractic treatment for her low back pain in late 1998; sought the services of a neurologist in March of 1999; was seen on referral by a neurosurgeon in April of 1999; and, was treated by a pain management specialist in May of 1999. It is clear from the office notes generated by these various providers that Patton's complaints were associated with and attributed to her work for Square D at that time. Unfortunately, Patton did not file her application for benefits until April of 2002, well over two years later.

The Supreme Court of Kentucky and the Kentucky Court of Appeals have long recognized the unusual nature of cumulative trauma claims and the complexity such conditions present in resolving the preliminary date for the clocking of the statute of limitations. Prior to 1999, it was held that limitations began to run on a cumulative trauma claim when the disabling reality of the work injury became manifest. Randall Co. v. Pendland, Ky. App., 770 S.W.2d 687 (1989). This longstanding "manifestation of disability" standard was effectively transformed into the seminal Kentucky Supreme Court case of Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999). In Alcan, supra, the court held that the onset of "occupational disability" no longer has any bearing on determining the date from which the period of limitations begins to run or on determining an injured worker's obligation to give notice. In making this determination, the court expressly stated as follows:

In Pendland, the worker became aware of her injury when she experienced disabling symptoms of pain; thus, the manifestation of physical and occupational disability occurred at the same time. The question remains, therefore, 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. 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.

Since Alcan, supra, the law has been that where a worker discovers that a physically disabling injury has been sustained, becomes aware that the injury is caused by work, and fails to file a claim within two years of that date, he will not be protected by the tolling of the statute of limitations. The Supreme Court reaffirmed its position in Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999), holding that the two-year statute of limitations established in KRS 342.185 begins to run in claims involving work-related cumulative trauma when the worker discovers (1) the fact that an injury has occurred, and (2) the fact that it was caused by work.

The next declaration on the limitations issue of significant weight in the case sub judice was the Supreme Court's holding in Hill v. Sextet Mining, Ky., 65 S.W.3d 503 (2001). In Hill, supra, the Court assigned special importance to the date on which a claimant first acquires knowledge that his work-related cumulative trauma injury is permanent. Hill, supra, involved a cumulative trauma injury claim where the injured worker held a personal belief for several years that a cervical condition that had gradually developed over time was in fact work-related. With regard to notice and limitations, the Court held as follows:

Implicit in the finding of a gradual injury was a finding that no one instance of workplace trauma, including those specifically alleged and those of which the employer was notified, caused an injury of appreciable proportion. Instead, the ALJ concluded that the harmful change that gave rise to the claimant's permanent disability occurred gradually and resulted, at least to a significant extent, from the effect of work-related wear and tear during the course of his coal mine employment. 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 his spine until he was informed of that fact. See Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999); Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999).

It is clear that the claimant was aware of symptoms in his cervical spine and associated the periodic flare-up of symptoms with his work long before being evaluated by Dr. Gaw, and he also sought medical treatment after some specific incidents of cervical trauma. Furthermore, it is clear that the physicians who treated the claimant's symptoms over the years had encouraged him to quit working in the mines and had told him that the work was too

> stressful. Nonetheless, there is no indication that any of them ever informed him of his work-related gradual injury, i.e., that his work was gradually causing harmful changes to his spine that were permanent. Under those circumstances, we are not persuaded that the claimant was required to self-diagnose the cause of the cervical pain that contributed to his inability to work after February 11, 1998, as being such an injury.

Hill, supra, at 5-6.

Although we believe Hill, supra, as an extension of Alcan, supra, comprises the general directive regarding how a claimant typically must learn of the work-related nature of a gradual injury before the clock begins to run on notice and limitations, we do not believe Hill, supra, is intended as an absolute bright line rule for each and every situation. Rather, depending on the facts of an individual claim, there can be exceptions. We believe the Supreme Court's decision in Evita Deramus v. S & S Produce, et al., 2000-SC-1051-WC (rendered September 27, 2001 and ordered not to be published), is representative of one such exception.

In Deramus, supra, the claimant began experiencing symptoms due to repetitive trauma at work in December 1995 or January 1996. Sometime in April 1996, she complained to her supervisor of her symptoms, but did not relate those problems to her activities at work. Nevertheless, her supervisor repeatedly advised her to seek medical treatment. The claimant failed to do so until June 1996, at which time a physician first informed her that her problems were caused by work. When cross-examined at the final hearing, the claimant admitted she had attributed her symptoms to

her work activities all along. Based upon these facts, the Supreme Court determined that the claimant's "manifestation of disability" occurred earlier than the date her personal credence regarding the work-related cause of her condition was medically confirmed. In so ruling, the Supreme Court specifically stated as follows:

> As the finder of fact, the ALJ is authorized to determine from the facts of a particular case the date upon which the manifestation of disability occurred. We have never determined, as a matter of law, that the manifestation of disability must occur when a worker first seeks medical treatment for symptoms of a gradual injury. Likewise, we have not required a worker to self-diagnose a work-related repetitive motion injury as being the cause of disabling symptoms simply because the symptoms occur at work. Nonetheless, where: 1.) work requires constant repetitive motions; 2.) while working, the worker begins to experience disabling symptoms in the portions of her body that perform those motions; 3.) the symptoms continue even after she goes home for the day; and 4.) they become increasingly disabling over time, it becomes apparent, even to a lay person, that the work is likely to have caused the injury.

Slip opinion at pp. 6-7.

At first glance, the divergence of the holdings in Hill, supra, and Deramus, supra, may appear conflicting, given the similarities in the facts of each case. We do not think so. Rather, we believe these two cases, when read together, specify a

design by the Supreme Court to assign wide-ranging discretion to the ALJ, as the fact-finder in cumulative trauma cases, in determining the appropriate manifestation of disability date given the facts of the individual case, both as a matter of law and equity. In the case sub judice, the ALJ determined that Patton was aware that her symptoms were associated with the strenuous and repetitive nature of her work activities at Square D as early as October of 1994 and that her symptoms were ongoing and gradually worsening over time, findings that would support a dismissal under a Deramus analysis.

Moreover, the evidence establishes that Patton sought medical treatment and was advised by Dr. Muckenhausen of the work-related nature of her condition no later than March of 1999, and then was so advised again by Dr. Templin in May 1999. These findings would equally support a dismissal under Hill, supra.

While we appreciate Patton's disappointment, we would remind the parties that this Board is not empowered to rewrite the laws enacted by the Legislature and interpreted by the Courts of Justice. In recent years, and specifically during the 2000 regular session, the General Assembly had before it a provision to modify the Kentucky Revised Statutes that would have begun the clocking of the statute of limitations in cumulative trauma claims in a manner similar to the clocking that now exists in occupational disease claims. However, that provision did not become law. Moreover, we note that, even had the ALJ determined that Patton's disability did not become manifest until she ceased working for Square D on November 29, 1999, she still did not file her application until more than two years beyond that date.

The payment of temporary total disability ("TTD") benefits also does not serve to salvage Patton's claim in this instance. As noted by the ALJ, TTD benefits were not initiated until more than two years after the 1994 date of manifestation and, therefore, those payments would not serve to toll the running of the statute. Lawson v. Wal-Mart Stores, Inc., Ky. App., 56 S.W.3d 417 (2001).

Moreover, the ALJ found that the TTD benefits initiated on November 28, 1999, were paid in reference to Patton's work-related injury of September 7, 1999, a finding supported by Patton's testimony and the medical records in evidence. Because the ALJ determined that the work-related injury on that date involved Patton's left shoulder and neck only, the benefits paid as a result of that injury would not serve to extend the time for Patton's filing of a low back claim.

Finally, Patton argues that, although her low back claim is time-barred, it should nonetheless have been considered in the ALJ's determination of extent and duration. She submits that the evidence presents a compelling case for permanent total disability when her low back condition is considered in combination with her cervical and shoulder injuries.

In support of this argument, Patton relies on Kern's Bakery v. Tackett, Ky. App., 964 S.W.2d 815 (1998) and Teledyne-Wirz v. Willhite, Ky. App., 710 S.W.2d 858 (1986).

In Teledyne-Wirz, supra, the Court of Appeals affirmed the Workers' Compensation Board's conclusion that Willhite was 100% occupationally disabled, 50% of which was the result of a prior, non-compensable occupational disability. The employer and the Special Fund were determined to be

liable for one-half of a lifetime award and the remaining one-half of the disability that existed prior to the injury went uncompensated. On appeal, the Special Fund and the employer argued that benefits should be limited to 425 weeks since the injury in question only resulted in a partial disability. The Court ultimately determined that the prior injury, though non-compensable, should nonetheless be considered in the fact-finder's determination of whether the employee is totally disabled, for purposes of computing the duration of any award. The key factor, of course, is whether the employee is found to be totally disabled or only partially disabled. Id. at 859. The holding in Teledyne-Wirz, supra, is not applicable in those instances where the fact-finder determines that the claimant is only partially disabled.

The Legislature statutorily overruled Teledyne-Wirz, supra, as part of the 1994 amendments to the Act to the extent the holding therein permitted the fact-finder to consider pre-existing disability from non work-related causes in determining the extent and duration of the claimant's disability. With respect to disability attributable to prior work-related causes, however, Teledyne-Wirz, supra, remains viable to this day. This is true even where the prior work-related disability is non-compensable. Kern's Bakery v. Tackett, supra.

In the instant case, the ALJ properly analyzed the evidence according to the factors set out in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968) and Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48 (2000), and determined that Patton remains capable of performing some type of work on a regular and sustained basis. In this analysis, the ALJ relied in part on the report of Dr. Ralph Crystal, Patton's

vocational expert. Dr. Crystal's opinions reflect the totality of Patton's complaints and the medical restrictions placed on her, including those related to her low back condition. Although the overall tenor of Dr. Crystal's report is that he considers Patton's chances of re-employment to be modest, he nonetheless was able to identify several jobs that she is mentally and physically capable of performing in her current state. While vocational expert testimony does not take precedence over other testimony of record, it nonetheless constitutes substantial evidence. See Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985). As the determination of the ALJ that Patton is only partially disabled is supported by substantial evidence, we are compelled to affirm the decision of the ALJ. Special Fund v. Francis, Ky. 708 S.W.2d 641 (1986).

Accordingly, decision rendered March 6, 2003, by Hon. Lloyd R. Edens, Administrative Law Judge, is hereby AFFIRMED.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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