

RENDERED: October 29, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2004-CA-001081-WC

AK STEEL CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-00264

JOHN H. NEAL; KEVIN KING,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: In February 2003, appellee John Neal filed a Workers' Compensation claim alleging hearing loss due to work-related cumulative trauma incurred during his employment with AK Steel Corporation (AK Steel). After a hearing the Administrative Law Judge (ALJ) determined Neal was barred from receiving compensation for hearing loss that occurred before the two years prior to his filing of the claim. On appeal the Workers' Compensation Board (Board) reversed and remanded the

ALJ's decision, finding that Neal had no knowledge of the cause of his hearing loss, and therefore the statute of limitations was tolled until such knowledge was obtained. We affirm the Board's decision.

Neal, a resident of Wurtland, Kentucky, was born on February 28, 1949. Following completion of high school he received an associate's degree in business communications. He began working for AK Steel as a heavy equipment operator in September 1967, at which time testing indicated that his hearing was normal. During the course of his employment with AK Steel, Neal underwent numerous hearing tests. Neal indicated that he first became aware of hearing loss during an in-house hearing test in the late 1980s. Neal subsequently obtained hearing aids and began to wear hearing protection on the job. On several occasions, AK Steel required Neal to sign a "Standard Threshold Shift Notice", which stated:

This is to inform you that you have a standard threshold shift. This is a significant loss of hearing as detected by a comparison of today's test results with your original hearing test.

Also, you have been counseled [sic] regarding the need for proper use of hearing protection. You are advised to see an ear, nose and throat doctor of your choice.

While Neal sought treatment with at least two ear clinics, he testified that the first physician to inform him that he had

work-related hearing loss was Dr. Charles Hieronymus, who saw him in November 2002. Dr. Hieronymus assigned him a percentage of functional impairment. Due to his extreme loss of hearing, Neal subsequently left the employment of AK Steel, with his last exposure to the harmful conditions of his work place being January 31, 2003. Neal then filed the underlying claim.

The ALJ dismissed Neal's claim, noting:

KRS 342.185 states that a claimant must file his claim within two years of the date of injury or the date of the last temporary total disability benefit payment, whichever last occurs. In cumulative trauma claims, as this hearing loss claim is, the statutory period begins to run when a claimant becomes aware that he has a work related injury. See *Alcan Foil Products v. Huff*, Ky., 2 S.W.3d 96 (1999). However, a claimant is not required to self diagnose as to either cause or permanency. See *Hill v. Sextet Mining*, Ky., 65 S.W.3d 503 (2001). Furthermore, any worsening of Neal's condition in the 2 year period prior to the expiration of the statute of limitations is compensable. See *Clark v. Special Fund*, Ky., 98 S.W.3d 486 (2000).

Finding that Neal's testimony was not credible, insofar as he asserted that not until November 2002 did a physician ever inform him that his hearing loss was work-related, the ALJ concluded the "portion of Neal's hearing loss that occurred more than two years before the filing of his claim is barred by the statute of limitations. However, any worsening of Neal's condition in that two-year period is compensable. See *Clark v.*

Special Fund, Ky., 98 S.W.3d 486 (2000).” The ALJ found that because Neal’s hearing impairment only increased by three percent between 2001 and 2003, he was disqualified for income benefits under KRS 342.7305(2). However, AK Steel was held liable for any medical expenses associated with the hearing loss. The ALJ denied Neal’s Petition for Reconsideration. On appeal the Board reversed and remanded the ALJ’s decision, concluding that the evidence did not support the ALJ’s finding that Neal’s knowledge of the cause of his hearing loss predated his claim by more than two years. The Board stated, “while AK Steel may have submitted an extensive number of audiometric test results and other medical and treatment records demonstrating Neal’s progressive affliction with hearing loss in the 1980’s and 1990’s, nothing in those records definitively characterizes his condition as work-related.” The Board further noted, “the ALJ lacked the discretion to disregard the unrebutted evidence that Dr. Hieronymus’ report of November 22, 2002, is the first to express an unequivocal medical opinion of work-related causation.” Citing the cases of *Alcan Foil Products v. Huff*, Ky., 2 S.W.3d 96 (1999), *Hill v. Sextet Mining Corp.*, Ky., 65 S.W.3d 503 (2001), and *Special Fund v. Clark*, Ky., 998 S.W.2d 487 (1999), the Board found that Neal’s manifestation of disability date occurred when he consulted Dr. Hieronymus, and

that his claim was filed within the period prescribed by statute. This petition for review followed.

AK Steel contends that the Board erred by concluding that the evidence did not support the ALJ's finding that the claim was not timely filed. We disagree.

In the case of *Hill v. Sextet Mining Corp.*, Ky., 65 S.W.3d 503 (2001), a miner sustained gradual work-related injuries to his back and cervical spine. The ALJ's award of income benefit payments was reversed by the Board, which found the claimant failed to timely notify the employer "after the disabling reality of his injury became manifest. . . ." *Id.* at 505. This court affirmed in part, and vacated and remanded in part for further findings. The Supreme Court reversed, holding that the claimant "was not required to give notice that he had sustained a work-related gradual injury to his spine until he was informed of the 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)." 65 S.W.3d at 507. The Supreme Court noted that although the claimant was treated for various incidents and was even told to quit his mining job, none of his physicians directly attributed his condition and the gradual worsening of that condition to his job. The court found that because "[m]edical causation is a matter for the medical experts and, therefore, the claimant cannot be expected to self-diagnose," a

claimant is responsible for providing timely notice only after being informed of the work-relatedness of his injury. *Id.* at 507.

Here, as in *Hill*, Neal was treated for his hearing loss but he was never notified that such loss was caused by his work conditions. The applicable statute of limitations begins to run only after a claimant both realizes the injury has occurred and is informed that the injury is work-related. *Special Fund v. Clark, Ky.*, 998 S.W.2d 487 (1999). Utilizing the statutory time limits set forth in KRS 342.185 the record shows that Neal filed his claim within two year of the date on which Dr. Hieronymus informed him that the injury was work-related; the Board correctly found that the claim was timely.

The Board's decision is affirmed.

ALL CONCUR.

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