

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000579-WC

EVA JO LANHAM

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-67705

CITY OF PARIS; HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Eva Lanham petitions for review of an opinion of the Workers' Compensation Board (Board) of February 11, 2005, which affirmed the dismissal of her claim for permanent disability benefits. An Administrative Law Judge (ALJ) found that Lanham's claim was barred by the statute of limitations as to the date that her cumulative neck injury

became manifest for purposes of KRS¹ 342.185. The Board determined that there was sufficient evidence to support the findings of the ALJ. As we have found no error in the Board's application of the law or in its assessment of the evidence, we affirm. See, Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687 (Ky. 1992); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Lanham works as an emergency dispatcher, a job that she has performed since 1990 for the appellee, the city of Paris. Most of her ten-hour shifts involve answering and talking on the telephone. She is frequently required to perform her phone duties while simultaneously typing information into one of two computers near her work station. Because she has not been provided with a headset, she accomplishes her tasks by cradling the telephone between her shoulder and left ear, thereby freeing her hands for entering data into the computer.

In 1999, after falling at work and hurting her back, Lanham began treatment with Dr. Oscar Perez. A few months after the fall, she began having neck pain and daily headaches. At first, she attributed the pain and headaches to the fall. However, Dr. Perez was convinced that her symptoms were not related to the fall but that they were caused by the repetitive effect of the manner in which Lanham held the telephone between her head and shoulder. In late November 2000, Lanham first

¹ Kentucky Revised Statutes.

provided the city of Paris with a report from Dr. Perez which addressed the cumulative nature of her neck injury.

Dr. Perez treated Lanham's symptoms with pain medication and physical therapy. Nevertheless, her headaches continued to worsen, and she missed several weeks of work in the fall of 2002. She received temporary total disability (TTD) during the period from October 9, 2002, through November 10, 2002. After this absence from work, Lanham returned to her duties where she continues to be employed.

On January 9, 2004, Lanham filed an application for workers' compensation benefits based on her neck and shoulder pain. She attached a medical opinion of Dr. James Owen, who reported that Lanham had sustained a 6% permanent impairment attributable to her "persistent pain from muscle spasm associated with chronic neck tilting."

The city of Paris filed a special answer alleging that the claim was time-barred. It also submitted a report by Dr. Timothy Kriss, a neurosurgeon who had examined Lanham and reviewed the medical reports of Dr. Perez and Dr. Owen. Dr. Kriss agreed that Lanham's neck pain was "a direct consequence of her daily work activities as a dispatcher." However, he found "no significant clinical findings with no neurologic impairment and no documented significant alteration in

structural integrity." Dr. Kriss's believed that Lanham had no permanent impairment under the AMA Guides:

This is consistent with the normal x-rays, normal MRI scan, normal physical examination, and normal neurological examination. On the other hand, one could make an argument, as Dr. Owen has, for assigning DRE category 2, on the basis of clinical history and examination compatible with a specific injury. I think this is a valid argument, however, [Lanham] has many documented episodes of becoming completely "symptom free" during respite from work. In my mind this establishes the fact that her symptoms are not permanent, and therefore not worthy of permanent impairment. I think her symptoms will resolve with optimal workplace ergonomics.

Before the ALJ, conflicting evidence was presented as to the actual "manifestation date" of Lanham's injury -- the date on which she was informed by her doctor that her neck pain and headaches were caused by the repetitive nature of her work. The manifestation date is critical to the issue of limitations. Lanham's claim was filed within two years of the termination of the voluntary TTD payments made by her employer. However, the payment of TTD would not toll the two-year statute of limitations if it were commenced more than two years **after** Lanham was advised of the cumulative nature of her neck condition. See, Lawson v. Wal-Mart Stores, Inc., 56 S.W.3d 417 (Ky.App. 2001).

In her application for benefits, Lanham listed July 17, 2000, as the date of her injury. In her deposition, she again indicated that it was in July 2000 that Dr. Perez first expressed his opinion that her neck problems and headaches were attributable to the manner in which she used the telephone rather than to the fall that she had experienced the previous year. At the hearing before the ALJ, Lanham contended that it was in November of 2000 (the date which coincided with her notice to her employer) that Dr. Perez diagnosed her neck problems as arising from a cumulative injury due to the nature of her work.

The ALJ resolved the conflicting dates by reference to Dr. Perez's medical reports. Relying on the reports associated with Lanham's visits on September 7, 2000, and September 20, 2000, the ALJ found "that both [Lanham] and her physician were adequately apprised of the fact that her symptoms were caused by her work" well before October 9, 2000. (ALJ's Opinion and Order of September 27, 2004, at p. 10.) Thus, as payment of TTD was first made on October 9, 2002, it commenced more than two years after Lanham knew of her injury -- a fact which prevented the tolling of the statute of limitations. The ALJ dismissed Lanham's claim, rendering moot the issues of extent and duration of disability; nevertheless, he noted that he found Dr. Kriss more persuasive as to the issue of impairment.

The Board agreed with the ALJ and concluded that Dr. Perez's medical reports constituted substantial evidence that Lanham's condition became manifest more than two years prior to the payment of TTD. This appeal followed.

Lanham correctly cites Hill v. Sextet Mining, 65 S.W.3d 503 (Ky. 2001), as holding that a limitations period does not commence to run until a claimant is diagnosed with a gradual injury.

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.

Id., at p. 507. However, Lanham argues that the evidence was confusing and conflicting as to when Dr. Perez first communicated his diagnoses to her; therefore, the ALJ "should have taken into consideration when [she] filed the First Report of Injury and the fact that it was based on the November 20, 2000, medical report." (Appellant's brief at p. 6.)

The ALJ is the sole judge of the facts where the evidence is conflicting. Square D. Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ could have found from the evidence that Lanham was apprised of the cause of her neck pain

in November 2000. However, as the Board concluded, Dr. Perez's medical records constitute substantial evidence to support the ALJ's finding that the doctor had informed Lanham of the cause of her injury no later than September 20, 2000, signifying that TTD payments would have had to commence within two years of that date (*i.e.*, no later than September 20, 2002), in order to toll the running of the statute of limitations. TTD payments commenced later -- on October 9, 2002, thus failing to toll the statute of limitations. The following portions of the doctor's records are consistent with the ALJ's findings:

Mrs. Lanham comes in today, very upset about the report made in regard to her complaints of back pain for her workman's compensation. She is upset that her neck pain was not addressed whatsoever. . . . In all fairness, Mrs. Lanham has not had her neck looked at by me previously and her only complaints had been of her back.

Clearly, she states that 7-8 months ago, when she fell at work, she did hit her head on the left side and wonders if that may have "trigger[ed]" her current symptoms of chronic daily muscle tension, headache, neck pain and shoulder pain. She does state that it has grown worse during this time frame. She has worked at the Paris Police Department for 10 years as a dispatcher. [She] does state that sitting for prolonged periods makes her neck pain and back pain worse. She reports that she has requested a head set before answering phone as [sic] many times of the city, but they have chosen to ignore her request. She does answer phone all day long with her left shoulder while she types on the computer so she holds the hand piece to her ear by elevating the

left shoulder and pinning the handpiece between the two. As a result, she constantly complains of left shoulder pain, left-sided pain and muscle tension headache symptoms.

. . . .

I did give her stretching exercises for the neck and shoulders, specifically designed for desk and computer work. She also may follow-up with me for OMT so that I can show her some exercises such as isometric stretching that she can perform not only while at work but at home in order to manage and minimize the myofacial pain which she has been experiencing. I clearly believe that her muscle tension headaches are due to these myofacial tissue texture changes.

Clearly her work, and particularly the sedentary work as well as elevating her left shoulder in order to hold the hand piece of the phone to her ear, is exacerbating this and she needs to change these habits at work in order to help minimize exacerbations.

(Dr. Perez's medical notes dated September 7, 2000.) (Emphasis added.)

Mrs. Lanham comes in today for OMT, as discussed and outlined on previous dictation from 9/7/00. In review, over the last 8-9 months, Mrs. Lanham has suffered from daily headaches which she states start on the left base of her skull posteriorly, and throughout the day radiate over the top of her head and into her forehead by the end of her work shift. She works 8-10 hours as a dispatcher/operator/secretary for the Paris Police Department and states that because they have chosen not to purchase head phones for helping answer the phone, she spends a great deal of time answering the phone and holding the receiver to her left ear by raising her left shoulder which has exacerbated this problem.

. . . .

[T]here is no question that her work situation is exacerbating this problem. Her daily headaches are due to chronic muscle tension cephalgia brought on by bad ergonomics at work. (Dr. Perez's notes following Lanham's visit on September 20, 2000.) (Emphasis added.)

The Board correctly found this evidence sufficient to support the ALJ's finding that Lanham was aware of her symptoms and the cause of those symptoms for more than two years prior to her receipt of TTD in October 2002. Thus, the statute of limitations was not tolled, and her claim was filed too late.

We affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Ann F. Batterton
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BRIEF FOR APPELLEE:

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