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**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2006-CA-000127-WC

STANLEY MILLER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-01458

MILLER BROTHERS COAL COMPANY;  
HON. IRENE STEEN, ADMINISTRATIVE  
LAW JUDGE; and WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ABRAMSON AND VANMETER, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR  
JUDGE.

VANMETER, JUDGE: Stanley Miller petitions for the review of an  
opinion of the Workers' Compensation Board, which affirmed the  
decision of an Administrative Law Judge (ALJ) dismissing his  
claim for failure to file within the time period required by KRS  
342.185. Miller argues that the Board erred both procedurally

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of  
the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution  
and KRS 21.580.

and substantively in affirming the ALJ's dismissal of his claim. For the reasons hereinafter stated, we affirm.

Miller was a rock truck driver for Miller Brothers Coal Company. In March 2001, he went to see Dr. Ott, a chiropractor, for back problems which Miller believed were caused by his work. After receiving no relief from Dr. Ott and other medical providers, Miller quit his job in March 2002. He filed a claim for workers compensation benefits in July 2003.

Miller Brothers responded by claiming in part that the injuries were not work-related and that Miller had failed to comply with the applicable statute of limitations.<sup>2</sup> The ALJ dismissed the claim after finding that Dr. Timothy Kriss had found that Miller's low back and leg complaints were related to diabetes, and not to work. The ALJ made no factual findings as to the limitations issue, as she held that her determination of the work-relatedness issue resolved the case and rendered the other issues moot.

On appeal to the Board, the parties only addressed the issue of the work-relatedness of Miller's injury. After determining that the ALJ had either misunderstood or misinterpreted Dr. Kriss's findings, the Board vacated the ALJ's determination and directed the ALJ on remand "to once more review the whole record with specific focus on the medical

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<sup>2</sup> KRS 342.185(1).

opinions and AMA assessment of Dr. Kriss. Thereafter, the ALJ shall issue a new decision on the merits."

On remand, the ALJ again determined that Miller's complaints were not work-related. In addition, the ALJ addressed the statute of limitations issue raised by Miller Brothers at the original benefit review conference, finding as follows:

The Defendant points out that the Plaintiff had been seen for and complained of back and leg pains for several years prior to his ceasing work, the latest occurring in March 2001, and the claim was not filed until July 2003. There was no evidence regarding any apportionment of Plaintiff's impairment rating that could have been attributed to the last two years of Plaintiff's work and I do find that Plaintiff had been of the frame of mind that it was his work that caused his back pain, yet he never notified or filed a claim in a timely fashion. Thus, on this issue alone, Plaintiff's claim would be dismissed as well.

Miller again appealed the ALJ's decision to the Board, which affirmed based on the statute of limitations issue. This petition for review followed.

Miller's first argument is that the ALJ's consideration of the limitations issue exceeded the scope of the Board's mandate on remand. We disagree.

The mandate rule requires a lower court to be bound by the scope of the remand issued by a higher court.<sup>3</sup> As the Sixth Circuit has explained, “[t]he scope of a remand is determined by examining the entire order or opinion, to determine whether and how the [higher court] intended to limit a remand.”<sup>4</sup> Further,

when a case is remanded, events often occur that were not considered at all by the appellate court or addressed by the remand instructions. To name just a few examples of such events, parties die; claims become moot; amended pleadings create new issues and transform old issues. And, as happened here, parties change litigation strategy and bring before the court new options for resolution of the case. When the district court deals with such events, it does not necessarily act in violation of the court of appeals’ instructions or exceed the scope of the remand.<sup>5</sup>

As set forth above, the Board vacated the ALJ’s original determination and directed the ALJ on remand “to once more review the whole record with specific focus on the medical opinions and AMA assessment of Dr. Kriss. Thereafter, the ALJ shall issue a new decision on the merits.” Despite Miller’s contention, the Board’s mandate did not require the ALJ to overlook any procedural issues and simply address the

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<sup>3</sup> See *Scott v. Churchill*, 377 F.3d 565, 570 (6th Cir. 2004) (“basic tenet of the mandate rule is that a district court is bound to the scope of the remand issued by the court of appeals”). See also *Buckley v. Wilson*, 177 S.W.3d 778, 781 (Ky. 2005).

<sup>4</sup> *Scott*, 377 F.3d at 570.

<sup>5</sup> *Giles v. Schotten*, 449 F.3d 698, 703 (6th Cir. 2006).

substantive issues in the case. Rather, the Board's mandate directed the ALJ to reconsider the entire record, including the medical evidence, before issuing a new opinion. Thus, we cannot say that the ALJ exceeded the scope of the Board's remand by reconsidering all issues including the contested statute of limitations issue.

Next, Miller argues that the Board erred by affirming the ALJ's decision that his claim was barred by the statute of limitations as there was no finding, in accordance with *Hill v. Sextet Mining Corp.*,<sup>6</sup> that a medical provider had informed Miller of his work-related injury more than two years before he filed his claim. We disagree.

An employer asserting the statute of limitations as a defense has the burden of proving the elements of the defense.<sup>7</sup> As Miller Brothers successfully proved this defense below, the question now before us is whether substantial evidence in the record supported the decision.<sup>8</sup>

The Kentucky Supreme Court has addressed the calculation of time in a gradual injury case, such as the one now before us, as follows:

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<sup>6</sup> 65 S.W.3d 503 (Ky. 2001).

<sup>7</sup> *Lizdo v. Gentec Equip.*, 74 S.W.3d 703, 705 (Ky. 2002).

<sup>8</sup> *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984).

[W]here a claim is not filed until more than two years after the worker's discovery of an injury and the fact that it was 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.<sup>9</sup>

Here, it is undisputed that Miller saw a chiropractor in March 2001 for back problems which he believed were caused by his work. As Miller was aware of the work-related nature of his injury at that time, and he does not argue that he suffered any additional work-related trauma,<sup>10</sup> substantial evidence supports the ALJ's finding that the two-year limitations period began to run in March 2001, so that Miller's July 2003 claim was untimely.

Miller's reliance upon *Hill v. Sextet Mining Corp.*<sup>11</sup> is misplaced. First, *Hill* dealt with whether the claimant had given timely notice to his employer of his work-related gradual injury as required by KRS 342.185. By contrast, the issue here is whether Miller's claim for benefits was timely filed.

Second, while the claimant in *Hill* "was aware of symptoms in his cervical spine and associated the periodic flare-up of symptoms with his work[,] " he was not aware that he

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<sup>9</sup> *Special Fund v. Clark*, 998 S.W.2d 487, 490 (Ky. 1999).

<sup>10</sup> See *Holbrook v. Lexmark Int'l Group, Inc.*, 65 S.W.3d 908, 911 (Ky. 2001).

<sup>11</sup> 65 S.W.3d 503 (Ky. 2001).

had a work-related gradual injury until he was informed of that fact by one of his doctors.<sup>12</sup> Accordingly, 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 that fact."<sup>13</sup> Here, by contrast, Miller testified that he believed in March 2001 that his back problems were work-related. Thus, substantial evidence supported the ALJ's finding that the statute of limitations began to run at that time and expired before Miller filed his claim in July 2003.

The Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Patrick E. O'Neill  
Jackson, Kentucky

BRIEF FOR APPELLEE MILLER  
BROTHERS COAL COMPANY:

Kamp T. Purdy  
Lexington, Kentucky

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<sup>12</sup> *Id.* at 507.

<sup>13</sup> *Id.*