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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000880-WC

CLINTWOOD ELKHORN MINING COMPANY APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-05-66207, WC-06-00632 & WC-06-01062

CHESTER E. ANDERSON;
HON. J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND NICKELL, JUDGES.

KELLER, JUDGE: Chester E. Anderson (Anderson) alleged that he suffered a back injury, a psychological injury, and hearing loss as a result of his work for Clintwood Elkhorn Mining Company (Clintwood). The Administrative Law Judge (the ALJ) dismissed Anderson's claims for permanent disability benefits related to

his back and psychological conditions, finding that Anderson failed to prove that he had suffered any permanent work-related injuries as defined by Kentucky Revised Statute (KRS) 342.0011(1). The ALJ also dismissed Anderson's hearing loss claim, finding that Anderson failed to provide due and timely notice to Clintwood of that claim.

A divided Workers' Compensation Board (the Board) affirmed the ALJ's findings regarding Anderson's alleged back and psychological injuries, but reversed the ALJ with regard to Anderson's hearing loss. In doing so, the Board found that Anderson notified Clintwood of his hearing loss as soon as he was advised by a physician that his condition was work-related. It is from the Board's opinion that Clintwood appeals.

In its appeal, Clintwood argues that, despite having no confirming diagnosis by a physician, Anderson had a duty to provide notice of his hearing loss as soon as he realized it was work-related. Anderson argues that the Board correctly applied the facts to the law regarding notice. Because notice as to Anderson's hearing loss claim is the only issue before us, we will limit our review of the facts and law to that issue. Based on that review, we affirm.

FACTS

Anderson is currently 62 years of age. He has a sixth-grade education and has significant difficulty reading. Anderson began working for Clintwood and its predecessor company in 1972, working primarily as an equipment operator. He

last worked on November 5, 2005, and was exposed to loud noise in all of his jobs at Clintwood and its predecessor.

On August 15, 2006, Anderson filed an Application for Adjustment of Hearing Loss Claim. It is undisputed that Anderson filed his claim within three weeks of receiving a report from a physician verifying that he had a work-related hearing loss. Anderson attached to his claim a report from Dr. Hieronymus. In his report, Dr. Hieronymus made a diagnosis of noise-related high frequency hearing loss and assigned Anderson an 11% impairment rating.

Pursuant to KRS 342.315, the Office of Workers' Claims referred Anderson to Dr. Jones for an evaluation. In his report, Dr. Jones noted that Anderson reported a twenty-year history of gradual hearing loss and tinnitus. Following his examination, Dr. Jones made a diagnosis of bilateral sensorineural hearing loss that he attributed to occupational noise exposure. He assigned Anderson a 15% impairment rating based on that hearing loss.

The only other evidence in the record regarding Anderson's hearing loss is his testimony. In his deposition, Anderson testified as follows:

> Q. Okay. Now have you seen anyone for your hearing as far as when did you first find out that you had any hearing loss?
>
> A. I've knowed [sic] it for years, you know, I can't hear good.
>
> Q. Now did you have any idea why you couldn't hear well?
>
> A. I worked around heavy equipment so much.

Q. And who confirmed that you have hearing loss?

A. Well, Trivette. I've had him clean them and tell him I couldn't hear good, you know, and stuff.

Q. Have you seen anyone other than Dr. Trivette for your hearing?

A. Yeah, I went to one down in Prestonsburg there.

Q. Dr. Hieronymus?

A. I guess that was his name

. . .

Q. As far as your hearing loss, have you provided your employer with any notice of that?

Mr. Hunt: We just got the report. We just got the report on July 28th of '06. I'm in the process of mailing out the report and the application, or the notice.

At the hearing, Anderson testified as follows:

Q. Prior to going to Dr. Hieronymus, had any doctor ever told you that you had a hearing loss problem that was caused by your work?

A. No.

Q. And, you had worked, I believe, forty-three years in and around the coal mining industry. Is that correct?

A. Yes.

Q. And, during all of that forty-three years, would you have been exposed to loud noise?

A. Yes

. . .

Q. Okay. When you were asked, in your deposition of August 4th, 2006, when did you first find out that you had any hearing loss, you said, "I've knowed [sic] it for years". Is that correct?

A. Well, I worked around equipment, you know, and so much noise, I figured I'd have it.

Q. And, that's why you figured you couldn't hear very well, is because of working around the equipment?

A. Yes.

Q. Okay. And, when asked who confirmed that you had hearing loss, you answered Dr. Trivet [sic]. Am I saying that correct? Trivet [sic]? Is that correct? Is he the first one that – that thought you had hearing loss or told you that you had hearing loss?

A. I guess. I'd say.

Q. Did he think it was from your job as well?

A. He didn't really say, you know. He just cleaned them out and stuff for me

. . .

Q. When you went to Dr. Trivet [sic] for your hearing, your ears, okay, what would he do for you?

A. He'd clean them out for me.

Q. What – when you say clean them out, what was he trying to clean out?

A. The coal dust and the wax.

Q. And, was [sic] your ears stopping up?

A. Yes.

Q. Did Dr. Trivet [sic] ever perform a hearing test on you like Dr. Hieronymus did, or like Dr. Jones did down at U.K.?

A. No.

In his Opinion, the ALJ summarized Anderson's deposition testimony as follows:

> Plaintiff was asked if he had seen anyone for his hearing problems and specifically asked when he first found out that he had a hearing loss. His answer was "I've known for years, you know, I can't hear good." (Plaintiff's depo., p. 20) He was then asked if he had any idea why he did not hear well and he responded "I worked around heavy equipment so much." (Id.) He was asked who confirmed that he had hearing loss and he responded "Well, Trivette". (Id.)

The ALJ summarized Anderson's hearing testimony as follows:

> On direct examination he testified that, prior to seeing Dr. Hieronymus, no doctor had ever told him that he had hearing loss which was caused by work. He was exposed to loud noise at work for 43 years. He noted that his counsel had informed Defendant Employer of his hearing loss claim in two letters, one dated July 29, 2006 and the other August 4, 2006.
>
> On cross-examination . . . [h]e conceded that he had known for years that he had hearing loss because he worked around equipment in the coal mines. He knew that that was why he had hearing loss and that had been confirmed by Dr. Trivette.

Based on the preceding summary, the ALJ found as follows:

> Defendant Employer has denied notice of Plaintiff's hearing loss claim. Plaintiff's own testimony

> indicates that he did not give them due and timely notice of his hearing loss claim. Plaintiff testified that he had known "for years" that he had hearing loss and that his hearing loss was caused by his exposure to noise in the workplace. More importantly, he testified that Dr. Trivette had confirmed that his hearing loss was work related.
>
> . . .
>
> Plaintiff has failed to sustain the burden of proving to the satisfaction of the trier [of] fact that he gave due and timely notice of his occupational hearing loss. This finding is based on Plaintiff's admissions that he has known for years that he had occupational hearing loss and gave no notice of that fact until July of 2006.

Anderson appealed the ALJ's opinion to the Board arguing, in pertinent part, that he had given due and timely notice of his hearing loss to Clintwood. After summarizing the evidence, the majority of the Board stated that:

> the ALJ was convinced and specifically found that Anderson had known about the condition for years and his family physician, Dr. Trivette, confirmed the hearing loss was work-related. We believe this finding is not supported by the evidence, nor does the evidence provide a basis to reasonably infer that Dr. Trivette either diagnosed work-related hearing loss or informed Anderson of this condition.

After citing Anderson's deposition testimony, the Board found that

> [t]his testimony does not, as found by the ALJ, establish that Dr. Trivette told Anderson his hearing loss was work-related. At the final hearing, Anderson testified that the first physician to inform him his hearing loss was work-related was Dr. Hieronymus, who evaluated Anderson on July 24, 2006. Furthermore, when Dr. Trivette was deposed, he was never asked about Anderson's loss of hearing. Though it might have been reasonable to conclude Dr. Trivette and Anderson

> discussed this condition, Dr. Trivette's medical records are silent as to complaints of hearing loss in general, and do not contain any diagnosis of hearing loss, work-related or otherwise.
>
> In Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001), the Kentucky Supreme Court explained that causation is a medical question and must be proved by expert medical testimony. An injured worker is neither required nor expected to self diagnose the cause of a harmful change as being the result of gradual injury or repetitive trauma experienced at work as a prelude of the obligations required by KRS 342.185. The fact that Anderson believed his hearing loss was caused by his exposure to noise at work does not qualify as expert medical testimony. It was not until late July 2006 that Dr. Hieronymus diagnosed work-related hearing loss and so informed Anderson. Following this July 2006 medical report, written notice to Elkhorn Mining was almost immediate, rendering Anderson's claim for gradual injury timely. Compare Brown Forman Corp. v. Upchurch, 127 S.W.3d 615 (Ky. 2004); see also Mrs. Smith's Bakeries v. Robinson, 2003-SC-1030-WC (rendered September 23, 2004 and designated not to be published) (holding that workers are not required to self diagnose the cause of their injuries or to draw inferences of causation from an ambiguous diagnosis.) The ALJ's finding that Dr. Trivette informed Anderson his hearing loss was work-related is an erroneous finding unsupported by the evidence.

The Board then reversed and remanded this matter to the ALJ for a decision on the merits of Anderson's hearing loss claim.

In its brief, Clintwood cited extensively to the opinion of dissenting Board Member Stivers. In his opinion, Board Member Stivers agreed with the majority's opinion that Anderson testified that no physician had advised him his hearing loss was work-related before Dr. Hieronymus did. Furthermore, Board

Member Stivers agreed with the majority that *Hill v. Sextet* stands for the proposition that an employee who suffers a repetitive trauma injury need not self-diagnose. However, Board Member Stivers found that this case differs from *Hill v. Sextet* because Anderson knew his hearing loss was work-related for a number of years before he reported it. For the reasons set forth below, we agree with the majority of the Board and affirm.

STANDARD OF REVIEW

When reviewing one of the Board's decisions, this Court will only reverse the Board when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). In order to review the Board's decision, we must review the ALJ's decision because the ALJ, as fact finder, has the sole authority to judge the weight, credibility, substance and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). While we defer to the ALJ on such issues, when we are presented with a question of law, our review is *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001); *see also A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999); *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 518-19 (Ky. App. 1998); and *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

ANALYSIS

Clintwood argues that the ALJ correctly determined that Anderson did not provide due and timely notice of his hearing loss claim. KRS 342.185 provides that an injured employee must give notice of "the accident . . . as soon as practicable after the happening thereof. . . ." Because Anderson's hearing loss appears to be the result of repetitive trauma rather than as the result of a single incident, we must determine when he became obligated to notify Clintwood of his condition. Clintwood argues that Anderson's obligation to give notice arose as soon as he realized that his hearing loss was related to work. Anderson argues that his obligation to give notice did not arise until Dr. Hieronymus advised him of the work-relatedness of his hearing loss.

It is clear from the facts that Anderson knew that he had a work-related hearing loss for a number of years before he reported it to Clintwood. Although Clintwood has argued that Dr. Trivette told Anderson that his hearing loss was work-related, the evidence does not support that position. Anderson testified that Dr. Trivette confirmed that he had a hearing loss; however, he specifically stated that Dr. Trivette did not tell him that his hearing loss was work-related. Therefore, the question on appeal is whether an injured worker's knowledge that he has suffered work-related hearing loss, absent affirmation by a physician, is sufficient to trigger his obligation to notify his employer of that condition.

As noted by the Board,

> [m]edical 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 . . . 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 . . . 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).

Hill v. Sextet Mining Corp., 65 S.W.3d 503, 507 (Ky. 2001).

Clintwood and Board Member Stivers argue that this case is distinguishable from *Hill v. Sextet Mining* because Anderson testified that he knew his hearing loss was work-related. We disagree. As the Supreme Court of Kentucky noted, Hill "was aware of symptoms in his cervical spine and associated the periodic flare-up of symptoms with his work long before" he was advised that he had suffered cumulative trauma injuries. Furthermore, Hill "sought medical treatment after some specific incidents of cervical trauma," and was advised by his physicians "to quit working in the mines" and "that the work was too stressful." *Id.* at 507. Based on these facts, Hill had at least as much knowledge as Anderson that his condition was related to work. Therefore, rather than being distinguishable, *Hill* is on point with this claim.

Additionally, we note the Supreme Court's Opinion in *American Printing House for the Blind v. Brown*, 142 S.W.3d 145 (Ky. 2004). While working for American Printing House for the Blind, Brown began to experience symptoms of carpal tunnel syndrome. Because she had previously suffered from that condition, she recognized the significance of her symptoms and reported her

injury to her employer prior to receiving a definitive diagnosis from a physician. With regard to the duty to give notice, the Supreme Court held that nothing in the law prohibits a claimant from reporting an injury before she receives a definitive diagnosis. However, she is not required to do so until she receives that diagnosis. *Id*. at 148-49.

Anderson, like Brown, could have notified his employer of his hearing loss claim prior to receiving Dr. Hieronymus's report. However, like Brown, he was not required to do so.

CONCLUSION

Based on the above, we hold that Anderson's belief that his hearing loss was work-related was not sufficient to trigger the notice requirement of KRS 342.185. Pursuant to *Hill v. Sextet* and *American Printing House for the Blind v. Brown*, Anderson's obligation to provide notice under KRS 342.185 did not arise until he received a diagnosis consistent with his belief from Dr. Hieronymus. Therefore, we affirm the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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