RENDERED: DECEMBER 12, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000958-WC

RUDD EQUIPMENT COMPANY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-06-92410

EDWIN K. FLETCHER;
HONORABLE ANDREW F. MANNO,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Rudd Equipment Company ("Rudd") seeks review of a decision of the Workers' Compensation Board affirming an Administrative Law Judge's

award of disability benefits to Rudd's former employee, Edwin Fletcher, for a cumulative trauma injury. We affirm.

Fletcher was born May 10, 1967, and he is a high school graduate. Fletcher worked for Rudd from 1994 until October 2005, as a heavy equipment mechanic. In December 2006, Fletcher filed an application for resolution of hearing loss claim and an application for resolution of injury claim with the Office of Workers' Claims. In addition to hearing loss, Fletcher alleged cumulative trauma to his cervical spine, shoulders, buttocks, and low back, carpel tunnel, and an emotional component.

Fletcher testified at a hearing before the ALJ on July 17, 2007. The ALJ rendered an opinion and award finding Fletcher suffered a cumulative trauma injury to his cervical spine, but denying Fletcher's remaining claims. Rudd filed a petition for reconsideration, which was denied by the ALJ. Rudd thereafter appealed to the Board alleging the ALJ erred in finding Fletcher gave Rudd due and timely notice of his cumulative cervical injury. The Board affirmed the ALJ's opinion, and this petition for review followed.

Specifically at issue here is whether the ALJ correctly found that Fletcher gave Rudd timely notice of his cumulative injury on October 24, 2005. Rudd argues that Fletcher's testimony conclusively proved he was aware that he suffered a work-related gradual injury at least two years prior to October 2005.

Kentucky Revised Statutes (KRS) 342.185(1) requires a worker to give his employer notice of an injury "as soon as practicable." For cumulative

trauma injuries, the "rule of discovery" controls, and the employee must give notice when he discovers "that an injury ha[s] been sustained." *Alcan Foil Products v. Huff*, 2 S.W.3d 96, 101 (Ky. 1999). In *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503, 507 (Ky. 2001), the Kentucky Supreme Court explained:

> 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. [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.

In the case at bar, the ALJ cited *Hill*, *supra*, in reaching his conclusion that Fletcher had given Rudd timely notice. The ALJ stated:

> Mr. Fletcher testified he first started noticing symptoms two years before October 24, 2005. Mr. Fletcher testified he first treated with Dr. Adams. He testified that every doctor he has seen, including Dr. Adams, told him his problems were related to work. He indicated Dr. Hyden took him off work on October 24, 2005. At that point, he stated he told [Rudd] why he was leaving work.
>
> However, there is no specific evidence that Mr. Fletcher was aware of his work-related cervical injury prior to October of 2005, when Dr. Adams and Dr. Hyden informed him of the cause of his cervical condition. Therefore, this ALJ finds that Mr. Fletcher's cervical condition manifest[ed] as of October 24, 2005. This ALJ finds that Mr. Fletcher gave timely notice to [Rudd] upon notification of his work related condition by his physician.

Rudd opines the ALJ clearly failed to rely on Fletcher's unrebutted testimony that he had been told his symptoms were related to his work in 2003. In

our review, we are mindful that the ALJ's decision favored Fletcher; consequently, "his only burden on appeal is to show that there was some evidence of substance to support the finding[.]" *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Despite Rudd's argument to the contrary, the record in this case reveals evidence sufficient to support the ALJ's decision. Accordingly, the Board properly affirmed the opinion and award of the ALJ.

In his deposition, Fletcher acknowledged that two years before giving notice to Rudd, he saw his family physician, Dr. James Adams, with complaints of pain all over his body. He admitted that, after explaining his job duties, the doctor attributed Fletcher's complaints to his work and wrote him a prescription for pain medication. None of Dr. Adams's medical records was introduced into evidence as he had retired from practice by the time Fletcher began litigating this claim.

Rudd claims Fletcher's testimony is conclusive on the issue of notice. We disagree. A review of Fletcher's testimony does not reveal that Dr. Adams diagnosed a gradual injury. Rather, Fletcher's testimony implies that he knew his job exacerbated his pain, but he was unaware he suffered from an actual injury.

In support of its argument, Rudd expands the holding of *Alcan*, *supra*, and its progeny, to apply where a physician informs a worker that his bodily aches and pains are work-related. While a doctor need not use the technical language "cumulative trauma injury" to inform the worker of a harmful change, *Brummitt v. Southeastern Kentucky Rehabilitation Industries*, 156 S.W.3d 276, 279 (Ky. 2005), *Alcan*, *supra*, still holds that the worker's disability manifests when he learns that

an **injury** has been sustained. *Alcan Foil Products*, 2 S.W.3d at 101 (emphasis added). Here, although Fletcher acknowledged that Dr. Adams attributed his complaints to his employment, Fletcher was "not required to self-diagnose the cause of a harmful change as being a work-related gradual injury for the purpose of giving notice." *American Printing House for the Blind v. Brown*, 142 S.W.3d 145, 148 (Ky. 2004) (*citing Hill*, 65 S.W.3d at 507).

Rudd also complains that, while the ALJ failed to rely on Fletcher's testimony regarding his treatment with Dr. Adams, the ALJ arbitrarily relied on Fletcher's testimony as to the manifestation date of the injury. Fletcher testified that Dr. Alan Hyden took him off work on October 24, 2005, and Fletcher then gave Rudd notice that he had suffered a work-related injury. We are not persuaded that the ALJ erred.

The ALJ "has the authority to determine the quality, character and substance of the evidence[,]" *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985), and he is free "to believe part of the evidence and disbelieve other parts of the evidence . . . [.]" *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Here, was within the ALJ's discretion to conclude that, when Fletcher treated with Dr. Adams, he did not know he had sustained a "work-related gradual injury; i.e., that his work was gradually causing harmful changes to his spine that were permanent." *Hill*, 65 S.W.3d at 507. Despite Rudd's argument to the contrary, the ALJ was free to conclude Fletcher was not apprised of his injury until Dr. Hyden took him off work in October 2005, thereby making

Fletcher's notice to Rudd timely. Consequently, the Board correctly affirmed the opinion and award of the ALJ.

For the reasons stated herein, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sarah K. McGuire
Jeffrey Damron
Pikeville, Kentucky

BRIEF FOR APPELLEE:

John Earl Hunt
Stanville, Kentucky