

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

NO. 2012-CA-001121-WC

CENTRAL SERVICE, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-06-98576

MARY ANN YARBROUGH;  
HONORABLE JEANIE OWEN MILLER,  
ADMINISTRATIVE LAW JUDGE;  
WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING IN PART,  
VACATING IN PART AND REMANDING

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BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Central Service, Inc., has petitioned this Court for review of the opinion of the Workers' Compensation Board ("the Board") affirming in part,

vacating in part, and remanding, the opinion and order of the Administrative Law Judge (“ALJ”) awarding benefits based upon Mary Ann Yarbrough’s claim for benefits due to work-related cumulative trauma to her hands and wrists. Central Service contends that the ALJ erred in finding that Yarbrough gave timely notice, in finding that the statute of limitations had not expired, and in failing to find a date of manifestation. In addition, Central Service contends that the Board substituted its judgment for that of the ALJ when it instructed the ALJ to take into consideration several facts upon remand related to making a specific finding of the manifestation date. Having reviewed the record as well as the parties’ respective briefs, we affirm in part, vacate in part, and remand.

Yarbrough is currently a fifty-seven year old woman with a high school education, but no specialized or vocational training. She worked for Central Service for twenty-seven years until November 2007. During her work for Central Service, Yarbrough performed intricate and repetitive work repairing and maintaining telephones and pay phone handles. While she experienced some aches and pains after work, she testified that her hands and wrists did not become a significant enough problem to interfere with her work until 2005, when she sought treatment from Dr. Burton Stodghill. She underwent a series of surgeries, including carpal tunnel release.

On December 7, 2009, Yarbrough filed an application for resolution of injury claim, claiming an injury to her hands and wrists and listing a date of injury of October 3, 2005. She stated that she notified Central Service of her injury

on October 13, 2005. The parties stipulated to coverage under the Act; that an employment relationship existed; that she sustained an alleged work injury on October 3, 2005; that temporary total disability payments were paid at a rate of \$190.56 per week for various periods of time beginning December 15, 2005, and concluding January 2, 2008, for a total of \$4,330.54; that her average weekly wage was \$285.85; and that her last day of work was in November 2007 on the date of her surgery. Contested issues included the extent and duration of her disability, work-relatedness, and notice and statute of limitations. Central Service maintained that Yarbrough had been aware since 1999 or 2000 that she had carpal tunnel syndrome and that it was related to her work. Following the final hearing, the ALJ entered an opinion, order, and award on December 2, 2011, finding that Yarbrough had sustained a work-related injury on October 3, 2005, due to repetitive or cumulative trauma from her work for which she had sustained a 1% permanent impairment pursuant to the *AMA Guides*, 5<sup>th</sup> Edition. For this 1% impairment, the ALJ awarded Yarbrough \$3.96 per week for 425 weeks beginning on January 3, 2008. The ALJ also awarded Yarbrough temporary total disability benefits and medical expenses. Finally, the ALJ ordered Yarbrough to undergo a vocational rehabilitation evaluation.

Central Service filed a petition for reconsideration regarding the ALJ's findings addressing the statute of limitations and notice defenses, noting that the ALJ rejected these defenses because Yarbrough had sustained cumulative trauma from work performed within the two-year period prior to January 2, 2008.

Central Service stated that Yarbrough had listed the date of notice as October 13, 2005, on her Form 101 and that the ALJ had not determined the date Yarbrough's disability had manifested. It sought a more definite pronouncement of the date her disability manifested. Additionally, Central Service argued that Yarbrough's claim should be dismissed because she had stopped working more than two years before she filed her claim, meaning that she could not have incurred any additional work injuries during the two years prior to the filing of her claim. The ALJ denied Central Service's motion for reconsideration, noting her reliance on the parties' stipulations, including the payment of temporary total disability benefits, which meant that Yarbrough was not required to file her claim until two years past the date she last received benefits, which was December 22, 2007.

Central Service appealed to the Board, which entered an opinion affirming in part, reversing in part, and remanding. The Board affirmed the portion of the ALJ's decision related to the statute of limitations defense, but vacated on the issue of notice and the award of income and medical benefits. It then remanded the case to the ALJ for additional findings of fact and a determination regarding the manifestation date of Yarbrough's injury and whether she provided timely notice. On remand, the Board specifically directed the ALJ to consider several facts it deemed relevant, including:

- 1) Yarbrough first saw Dr. Stodghill on October 12, 2005;
- 2) Yarbrough alleges in her Form 101 she gave notice to Central Service on October 13, 2005, which it appears Central Service does not dispute;
- 3) the first medical record establishing a diagnosis of a work-injury

contained in the record is dated April 10, 2010; and 4) as pointed out in *Clint Elkhorn Mining Company, supra*, nothing prohibits the claimant from providing notice prior to receiving a definitive diagnosis of a work-related injury from a physician.

This petition for review followed.<sup>1</sup>

On appeal, Central Service contends that the ALJ erred in finding that Yarbrough had provided timely notice, that the statute of limitations had not expired, and in not stating the date on which the injury manifested. Additionally, Central Service argues that the Board went too far in directing the ALJ to consider specific evidence on remand, thereby substituting its judgment for that of the ALJ.

In *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992), the Supreme Court addressed its role and that of the Court of Appeals in reviewing decisions in workers' compensation actions. "The function of further review of the WCB in the Court of Appeals is to correct the Board only where the [ ] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Id.*, at 687-88.

Because the issues before us relate to notice and statute of limitations, we shall confine our review of the ALJ's order to those topics. After setting out the applicable law, the ALJ described her charge as determining: "(1) whether the claimant sustained repetitive or cumulative trauma from work performed within

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<sup>1</sup> The record reflects that the ALJ entered an amended opinion, order, and award on June 11, 2012, addressing the issues as ordered by the Board in its opinion. The ALJ, *sua sponte*, set aside the amended opinion shortly thereafter. For purposes of this opinion, we have only considered the original opinion, order, and award entered December 2, 2011.

the two-year period before the application was filed; (2) and whether it caused a harmful change in her wrists and hands and (3) whether such a change entitled her to any benefits.” The ALJ then made the following findings based upon the medical proof:

The Defendant/employer argues that the statute of limitations had expired because Plaintiff knew she suffered from carpal tunnel as early as 1999 when Dr. Grubbs conducted a NVC [sic] and EMG and informed her of the diagnosis. He also prescribed night splits [sic] for her use. However, the Plaintiff stated Dr. Grubbs was treating her for migraine headaches and that the carpal tunnel diagnosis was inconsequential to her treatment by Dr. Grubbs. Dr. Grubbs’ records seem to corroborate Plaintiff’s version of events. The Plaintiff apparently missed no work for carpal tunnel and received no medical treatment for that condition until she began treating with Dr. Stodghill in October 2005.

The Plaintiff’s treatment for bi-lateral carpal tunnel and trigger fingers/thumb was aggressive and involved a series of six surgeries. This surgical and medical treatment lasted from 2005 until 2008. Indeed, when Dr. Stodghill last saw Plaintiff in August of 2008, she was still suffering from “locking” of her middle left finger for which he suggested another surgery. Plaintiff and her “second opinion” doctor, Dr. Patel, together determined she had had enough surgeries and declined additional surgery. Plaintiff last worked in November of 2007 (at the time of her last surgery) and then was laid off by the Defendant/employer in January 2008. Almost ten months after her last surgery, her treating surgeon wanted to perform yet another surgery on her.

After considering all of the evidence, I find that: (1) the Plaintiff sustained repetitive or cumulative trauma from work performed within the two-year period before the cessation of voluntary payments of temporary total disability for this condition – that being stipulated as January 2, 2008 – (with her application being filed on

December 7, 2008); (2) that it caused a harmful change in her bilateral wrists and hands, including her fingers and thumbs; and (3) that the harmful change entitles her to benefits. For these findings I rely upon the stipulations, the testimony of the Plaintiff, [and] the medical evidence including the opinion of Dr. Stodghill.

In *Brummitt v. Southeastern Kentucky Rehabilitation Industries*, 156 S.W.3d 276, 279 (Ky. 2005), the Supreme Court of Kentucky provided a general definition of gradual injury claims:

A gradual injury generally arises imperceptibly, from the physical strain of numerous instances of minor workplace trauma, also referred to as minitrauma. For that reason, the courts have applied a rule of discovery for establishing the date of injury. Hence, a gradual injury becomes manifest for the purpose of notice and limitations with the worker's knowledge of the harmful change and the fact that it is caused by the work. *Special Fund v. Clark*, Ky., 998 S.W.2d 487 (1999); *Alcan Foil Products v. Huff*, Ky., 2 S.W.3d 96 (1999).

As the fact-finder, the ALJ must determine when a gradual injury becomes manifest in order to determine whether the employee provided timely notice and timely filed his or her claim.

We shall first address the Board's holding regarding notice. After determining that Yarbrough was not required to give notice of a gradual work-related injury in 2000 because she had not been told her condition was related to her work, the Board remanded the matter to the ALJ for a specific finding as to the date Yarbrough's gradual injury manifested, and, in turn, whether she provided timely notice to Central Service in October 2005. The Board provided the ALJ with several factors to take into consideration when making this finding. Central

Service contends that the Board exceeded its authority in listing factors for the ALJ to consider when making findings related to the date of manifestation, and in making any finding as to the date of manifestation. While we disagree that the Board exceeded its authority in listing factors for the ALJ to consider, we agree with Central Service that the Board did exceed its authority in making any finding as to the date of manifestation.

The law is settled in Kentucky that the ALJ, as the fact-finder, has the sole discretion to weigh the evidence presented in a workers' compensation action and that the Board may not substitute its judgment for that of the ALJ:

KRS 342.285 provides that an ALJ's decision is "conclusive and binding as to all questions of fact" and that the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." KRS 342.290 limits the scope of review by the Court of Appeals to that of the Board and also to errors of law arising before the Board. Thus, the court explained in *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985), and *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977), that an ALJ has the sole discretion to determine the quality, character, and substance of evidence and that an ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof.

*FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 316 (Ky. 2007).

Based upon this statement of the law, we must agree with Central Service that the Board exceeded its authority when it made the finding that Yarbrough was not required to give notice in 2000, that her injury became manifest when she saw



Dr. Stodghill, and that Dr. Stodghill's records establish April 21, 2010, as the earliest date of manifestation. These pronouncements all constitute fact finding by the Board, which is strictly prohibited. Accordingly, we hold that the Board properly remanded the matter to the ALJ to find the date of manifestation and whether timely notice was provided, but exceeded its authority in making other findings related to these determinations. However, with respect to the instructions the Board provided to the ALJ, we hold that in doing so the Board merely provided the ALJ with guidance as to the legal analysis of "gradual injury" and its manifestation for purposes of notice as set forth in *Brummitt, supra*. Accordingly, on remand, the ALJ is directed to make the required findings regarding the manifestation of the gradual injury and determine whether Yarbrough's notice to Central Service of her work-related injury on October 13, 2005, was timely, relying on the facts of record she, as the fact-finder, deems relevant and appropriate in conjunction with the directions the Board provided.

Turning to the statute of limitations issue, we must also vacate the Board's holding that Yarbrough did not violate the two-year statute of limitations when she filed her Form 101 on December 16, 2009, because this holding of the Board is also based upon the date the gradual injury became manifest. The Board held that Yarbrough did not violate the limitations period based upon Central Service's payment of temporary total disability benefits, on and off, from December 15, 2005, through January 2, 2008. However, as with the previous analysis, this holding assumes a date of manifestation, which the ALJ must find based upon the

evidence. Once the ALJ determines the date of manifestation based upon substantial evidence introduced in the record, the decision may then be reached as to whether Yarbrough timely filed her claim on December 16, 2009, based upon the date of manifestation and, if necessary, the dates on which she received temporary total disability benefits.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed in part and vacated in part, and this matter is remanded to the ALJ to make specific findings regarding the date Yarbrough's gradual injury manifested, whether she provided timely notice to Central Service, and whether she timely filed her workers' compensation claim. If necessary, the ALJ shall then consider the remainder of the Board's pronouncements regarding the award of permanent partial disability benefits and future medical benefits.

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel J. Bach  
Henderson, Kentucky

BRIEF FOR APPELLEE, MARY  
ANN YARBROUGH:

Chuck Tveite  
Paducah, Kentucky