

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

NO. 2013-CA-000745-WC

RICHARD DUNN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-12-00156

BLEDSON COAL CORPORATION/JAMES  
RIVER COAL; INJURED WORKERS  
PHARMACY; HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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

TAYLOR, JUDGE: Richard Dunn petitions this Court to review an Opinion of the Workers' Compensation Board (Board) entered March 29, 2013, affirming the Administrative Law Judge's (ALJ) dismissal of Dunn's claim for workers' compensation benefits. We affirm.

Dunn filed a claim for workers' compensation benefits alleging that he sustained two distinct injuries on August 1, 2006, and August 24, 2011, from cumulative traumas to his cervical spine while employed by Bledsoe Coal Corporation (Bledsoe Coal).

Dunn was employed by Bledsoe Coal for some twenty years starting in 1978. In 2006, Dunn experienced a gradual onset of neck pain and eventually underwent a cervical fusion performed by Dr. Philip Tibbs on August 18, 2006. Dunn was absent from work for 118 days, received full salary from Bledsoe Coal while recuperating, but filed no claim for workers' compensation benefits.

In 2009, Dunn left the employment of Bledsoe Coal and then was employed by Headwater Coal Company starting in November. He only worked for Headwater Coal for some six months; thereafter, he was again hired by Bledsoe Coal.

In 2009, Dunn stated that he began experiencing headaches and, then in 2010, experienced gradual neck pain radiating between his shoulder blades and down both arms. Dunn related that Dr. Martha Combs-Woolum informed Dunn for the first time that his cervical condition was work related on August 22, 2011. Because of worsened pain, Dunn was unable to continue working for Bledsoe Coal effective August 24, 2011.

In an Opinion and Order, the ALJ dismissed Dunn's claim for workers' compensation benefits as barred by the statute of repose set forth in KRS 345.185(1). As to the August 1, 2006, cumulative injury, the ALJ determined:

[T]he evidence indicates that [Dunn] was working for the defendant James River Coal Corporation as a foreman at a preparation plant when he suffered a gradual onset of neck pain in 2006. He sought treatment with Dr. Phillip Tibbs who performed surgery consisting of a cervical fusion after which [Dunn] returned to work after being off for a period of 118 days. . . . The medical evidence points that his medical impairment arose when he underwent cervical fusion in 2006. [Dunn's] employment with [Bledsoe Coal] ended in 2009 when he left that employment to go work for another employer. In *Manalapan Mining Company, Inc. v. Lunsford*, 204 S.W.3d 601 (Ky. 2006), Kentucky's highest court held that the two year period in KRS 342.185(1) operates as both a period of limitations and repose for gradual injuries and acknowledged that such a claim may expire before the worker is aware of the injury. Here, [Dunn's] argument is not that he was not aware of his impairment but simply that he was not told by a "physician" that his condition was related to his work until bring [sic] informed by Dr. Martha Combs[-Woolum] on August 22, 2011. The claim was then filed on February 7, 2012. Since [Dunn's] employment with [Bledsoe Coal] had terminated in 2009 and the claim was not filed until February 7, 2012, his claim for impairment related to an August 2006 injury date is barred by the statute of repose. . . . In this particular case, the work activities during [Dunn's] period of employment with [Bledsoe Coal] which may have contributed to his cervical fusion and resulting impairment ended in 2009. The statute of repose occurred two years following his employment which was even prior to his being informed that his condition may have been related to his work. Therefore, his allegation and claim for medical and income benefits related to an August 2006 manifestation of disability dated must be dismissed.

Opinion and Order at 14-16. As to the August 24, 2011, cumulative injury, the ALJ concluded:

[Dunn] also alleges that he incurred cumulative trauma injury due to the nature of his work wherein he

last worked with [Bledsoe Coal] on August 24, 2011. [Dunn] asserts that his claim was filed on February 7, 2012[,] which is well within the two-year statute of limitations for impairment or disability related to that date of injury. . . . [Dunn's] testimony indicates that he had an onset of gradual neck pain and headaches beginning in 2009 which continued between his shoulder blades and down his arms in approximately 2010. However, it was during this period of time when [Dunn] also worked for another employer and then returned to work for [Bledsoe Coal]. [Dunn] testified that since stopping work, his pain has gone from approximately a 7 or 8 on a pain scale of 1 to 10 down to a level of 2 or 3 depending on his activity. In the records of Dr. Tibbs, there is no indication that [Dunn's] 2011/2012 condition is causally related to his continued work. In fact, his review of the MRI from June 19, 2011[,] revealed post-operative fusion changes with a left C6 osteophyte and narrowing at C6 with foraminal stenosis. While he did opine that it would not be safe for [Dunn] to return to manual labor work, he did not indicate the condition was causally related to [Dunn's] work with [Bledsoe Coal] from 2009/2010 through August 24, 2011. Given the fact that the only impairment [Dunn] has [sic] was already present prior to his last employment with [Bledsoe Coal], it can only be characterized as a prior active impairment. [Dunn] has not shown that his continued employment or his last employment with [Bledsoe Coal] has caused any additional impairment. While [Dunn] may have developed some increasing symptoms from his prior fusion, he has not shown any impairment or disability related to his period of employment with [Bledsoe Coal] which ended on August 24, 2011. Therefore, [Dunn's] injury allegation of August 24, 2011[,] must be dismissed as he cannot be compensated for impairment which existed more than two years prior to the filing of his claim.

Opinion and Order at 16-18.

Being dissatisfied with the ALJ's Opinion and Order, Dunn sought review with the Workers' Compensation Board. By Opinion entered March 29, 2013, the

Board affirmed the ALJ's dismissal of Dunn's claim for workers' compensation benefits. Our review follows.

Dunn contends that the Board erred by affirming the ALJ's dismissal of his claim for workers' compensation benefits. For the following reasons, we cannot agree that the Board or ALJ committed error.

When reviewing an Opinion of the Board, we will "correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in accessing the evidence so flagrant as to cause gross injustice." *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). And, as fact-finder, the ALJ has sole authority to assess and weigh the credibility of evidence. As Dunn was unsuccessful before the ALJ, he must demonstrate that the evidence compels a finding in his favor in order to prevail. *See Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984).

Specifically, Dunn maintains that his claim for workers' compensation benefits was not barred by the statute of repose set forth in KRS 342.185(1). Dunn argues that he was continuously exposed to cumulative trauma at the job with Bledsoe Coal until his last day of employment on August 24, 2011. As he filed the claim for workers' compensation on February 7, 2012, the time requirements of KRS 342.185(1) were satisfied, and his claim was timely filed. Additionally, Dunn points out:

Dunn did not know the condition was work related until he was so informed in August of 2011. Even though the impairment arose in 2006 resulting from surgical fusion,

there is no case that holds the presence of an impairment absent notice it is work related clocks the statute of limitations.

Dunn's Brief at 10. Dunn argues that his claim cannot be barred by the two-year statute of repose because he was only informed by a physician that his cervical injury was work related on August 22, 2011.

As to cumulative injury claims, KRS 342.185(1) sets forth both a two-year statute of limitations and a two-year statute of repose. *Manalapan Mining Company, Inc. v. Lunsford*, 204 S.W.3d 601 (Ky. 2006). As to the statute of repose, KRS 342.185(1) bars a cumulative injury claim if such claim is not filed within two years from the last work-place injurious exposure. And, our Supreme Court has "acknowledge[d] that such a claim may expire before the worker is aware of the injury." *Id.* at 605.

In this case, the ALJ found that Dunn may have suffered a work-related cumulative injury to his cervical spine with a manifestation date on August 1, 2006. However, the ALJ pointed out that Dunn quit his employment with Bledsoe Coal in 2009 for six months. Thus, the ALJ reasoned that Dunn's last injurious exposure was 2009. As Dunn filed his claim for the August 1, 2006, injury on February 7, 2013, the claim was clearly filed well beyond the two-year statute of repose set forth in KRS 342.185(1) and was time barred. Upon review of the law and facts, we do not believe the ALJ improperly applied the law or that the evidence compels a finding in favor of Dunn. Again, as noted by our Supreme Court, the application of the statute of repose in KRS 342.185(1) is not dependent

upon the worker's knowledge of the work-related injury. *See Lunsford*, 204 S.W.3d 601.

As to Dunn's cumulative injury of August 24, 2011, the ALJ found that he suffered no additional impairment from the time of his reemployment with Bledsoe Coal in 2009 until his cessation of employment on August 24, 2011. Upon this issue, the Board specifically pointed out:

Nothing indicates Dunn's impairment rating changed after he reached maximum medical improvement following the 2006 surgery. While there may be some evidence of advancing degenerative changes, including a spur at C6-7, no physician has opined Dunn had an increase in his impairment rating as a result of trauma resulting from the most recent period of employment.

Upon the whole, we cannot conclude that the evidence compels a finding in favor of Dunn. In sum, we hold that the Board properly affirmed the ALJ's dismissal of Dunn's claim for workers' compensation benefits arising from the August 24, 2011, cumulative injury.

For the foregoing reasons, the Opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,  
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