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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001694-WC

DINA WOOD — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-10-84731

METALSA AUTOMOTIVE USA;
DANA CORPORATION;
HON. ROBERT L. SWISHER, FORMER CHIEF ADMINISTRATIVE LAW JUDGE;
HON. DOUGLAS W. GOTT, CHIEF ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

AND

NO. 2017-CA-001732-WC
AND
CROSS-APPEAL NO. 2017-CA-001836-WC

DANA CORPORATION — APPELLANT/CROSS-APPELLEE

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-10-84731

DINA WOOD; METALSA AUTOMOTIVE USA; HON. ROBERT L. SWISHER, FORMER CHIEF ADMINISTRATIVE LAW JUDGE; HON. DOUGLAS GOTT, CHIEF ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KRAMER, J. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Dina Wood petitions (Appeal No. 2017-CA-001694-WC) and Dana Corporation cross-petitions (Cross-Appeal No. 2017-CA-001836-WC) this Court to review a September 29, 2017, Opinion of the Workers' Compensation Board affirming in part, vacating in part, and remanding an opinion of the administrative law judge (ALJ) dismissing Wood's claim for benefits arising from cumulative trauma injuries. Dana Corporation also petitions (Appeal No. 2017-CA-001732-WC) this Court to review the September 29, 2017, Opinion of the Board. We affirm.

Wood began employment with Dana Corporation in 1996 at its plant located in Elizabethtown, Kentucky. On March 8, 2010, Metalsa Automotive USA

purchased the plant, and Wood continued her employment with Metalsa as her employer.

In September 2014 and October 2014, Wood filed applications for workers' compensation benefits. Therein, Wood claimed to have suffered two cumulative trauma injuries to her right arm, left wrist, neck, cervical spine and shoulders allegedly manifesting on December 9, 2008 and October 22, 2012. Both employers, Dana Corporation and Metalsa, disputed Wood's claim of cumulative injuries.

Following a hearing, the ALJ issued an Opinion and Order dismissing Wood's claim as to the alleged December 9, 2008, cumulative injury. The ALJ determined that the statute of limitations set forth in Kentucky Revised Statutes (KRS) 342.185 barred the claim. And, as to the alleged cumulative injury of October 22, 2012, the ALJ concluded that Wood failed to demonstrate that she suffered a distant cumulative trauma injury that manifested on that date.

Wood then petitioned the Board to review the ALJ's Opinion and Order. By Opinion entered September 29, 2017, the Board affirmed in part, vacated in part, and remanded to the ALJ. The Board affirmed the ALJ's decision that Wood failed to prove the October 22, 2012, cumulative injury. However, as to the cumulative trauma injury that allegedly occurred on December 9, 2008, the Board concluded that the statute of limitations was triggered when Wood was

advised by a physician that her cumulative trauma injury was work related. The Board observed that December 9, 2008, was a random date, apparently inferred by the ALJ from the evidence, that bore no relation to the triggering date for the statute of limitations. The Board remanded for the ALJ to make a determination of the manifestation date of December 9, 2008, cumulative trauma injury and whether the statute of limitations barred the claim.

Wood then petitioned this Court to review the Board's Opinion, and Dana Corporation filed a cross-petition and petition. While these petitions were pending in this Court, the statute of limitations (KRS 342.185) was amended in 2018 by the General Assembly. As a result, Dana Corporation filed a motion for consideration of supplemental authority and a motion for leave to file supplemental petitions. By Order entered May 31, 2018, the Court of Appeals granted the motions and ordered the parties to file supplemental briefs. The parties filed supplemental briefs on the narrow issues of whether the 2018 amendments to KRS 342.185 retroactively applied to Wood's cumulative trauma claims and if so, whether the claims were barred under the 2018 amended version of KRS 342.185.

We shall initially address Wood's petition for review (2017-CA-001694-WC) and then simultaneously address Dana Corporation's petition for review (2017-CA-001732-WC) and cross-petition for review (2017-CA-001836-

WC). Lastly, this opinion will address the issues raised in supplemental briefs concerning the retroactivity of the 2018 amendment to KRS 342.185.

Our review of the Board's Opinion is limited to whether "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." *W. Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). In so doing, we must necessarily review the opinion of the ALJ. When the ALJ's opinion is adverse to the claimant, the claimant must demonstrate that the evidence compels a finding in his favor in order to prevail. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). And, the ALJ is the ultimate fact-finder and possesses the sole discretion to judge the credibility of the evidence. *Ingersoll-Rand v. Edwards*, 28 S.W.3d 867, 869 (Ky. App. 2000).

APPEAL NO. 2017-CA-001694-WC

Wood contends that the ALJ erroneously concluded that she failed to "carr[y] her burden in proving that she sustained an injury which became manifest on [October 22, 2012]." Wood's Brief at 18. In her brief, Wood quotes from the ALJ's opinion and then presents the following argument consisting of five sentences:

> The [k]ey here was the date of October 17, 2012. The Claimant's date of injury used was actually October 22, 2012, the date of the surgery. If the ALJ was looking at October 17, 2012, then perhaps his Opinion could be

> correct, although Claimant would dispute that. Clearly, his Opinion as of October 22, 2012[,] is incorrect because a harmful objective change occurred on that date, surgery, and clearly another further manifestation of her injury/disability. Accordingly, the ALJ erred in finding that the Claimant had not sustained an "injury" as a result of her employment with Metalsa.

Wood's Brief at 21. Wood failed to cite this Court to any statutory law or common law to support this argument. And, she otherwise failed to advance a legally cogent argument regarding this issue. The date of October 22, 2012, was simply the date of Wood's upper extremity surgery. Consequently, Wood has not set forth a persuasive argument and has not demonstrated that the ALJ and the Board erred.

Wood next maintains that "payment of TTD [temporary total disability] benefits and medical benefits for the period from October 22, 2012[,] to July 9, 2013[,] acts as a bar to the statute of limitations." Wood's Brief at 21. Wood's argument comprises a mere two sentences in the brief. In the very next sentence, Wood "acknowledges that this position is contrary to current case law." Wood's Brief at 21. As an intermediate appellate court, we are bound to follow Kentucky Supreme Court precedent. Rules of the Supreme Court 1.030(8)(a). The Supreme Court has held that an injury claim cannot be revived by a payment of benefits after the limitation period expired. *Holbrook v. Lexmark Int'l Group, Inc.*, 65 S.W.3d 908, 913-14 (Ky. 2001). We, thus, conclude that no error occurred.

Dana Corporation initially maintains that the Board erroneously vacated and remanded the ALJ's conclusion that the statute of limitations set forth in KRS 342.185(1) barred Wood's cumulative injury claim that allegedly manifested on December 9, 2008. Dana Corporation contends that the ALJ properly inferred from the evidence that Wood was advised by a physician concerning the work-relatedness of her cumulative trauma injury in 2006. Additionally, Dana Corporation argues that substantial evidence supports the ALJ's finding that Wood's injury became "manifest" on December 9, 2008. As a result, Dana Corporation asserts that the statute of limitations was plainly triggered by at least December 9, 2008, and expired on December 9, 2010. Dana Corporation believes the Board erred by vacating the ALJ's opinion so concluding.

KRS 342.185(1)[1] provides for a two-year period of limitations that begins to run upon the date of the work-related accident causing the injury. As to a cumulative trauma injury, the Kentucky Supreme Court recognizes that these are "gradual injuries [that] often occur imperceptibly" over a period of time. *American*

[1] In Appeal No. 2017-CA-001732-WC and Cross-Appeal No. 2017-CA-001836-WC, we are concerned with the pre-amended version of Kentucky Revised Statutes (KRS) 342.185. We shall address the retroactivity of the 2018 amended version of KRS 342.185 subsequently in this Opinion.

Printing House for the Blind v. Brown, 142 S.W.3d 145, 148 (Ky. 2004). As a gradual injury, the date of such injury for notice and for statute of limitations purposes is when the claimant was informed by a medical professional that she suffered from a work-related cumulative injury. *Id.*; *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503, 507 (Ky. 2001).

In vacating the ALJ based upon the statute of limitations, the Board reasoned:

> In the March 30, 2017, Opinion and Order, CALJ [Chief Administrative Law Judge] Swisher determined that despite "almost no evidence" addressing the date of manifestation for Wood's alleged cumulative trauma injury claim of December 9, 2008, he inferred Wood was informed her alleged December 9, 2008, cumulative trauma injuries were work-related "no later than 2006" when she treated with Drs. [Thomas] Harter and [Thad] Jackson. Later in the Opinion and Order, CALJ Swisher reiterates Wood "has known since at least 2006 that her symptoms are work-related." This determination is inconsistent with the law pertaining to a claimant's obligation to provide notice and the clocking of the statute of limitations in cumulative trauma injury claims. In cumulative trauma injuries, "the obligation to provide notice arises and the statute of limitations does not begin to run until a claimant is *advised by a physician* that he has a work-related condition." *Consol of Kentucky* [*v. Goodgame*, 479 S.W.3d 78 (Ky. 2015)] at 82. ([E]mphasis added[.]) In other words, CALJ Swisher cannot infer Wood was informed her alleged December 9, 2008, cumulative trauma injury is work-related "no later than 2006" without evidentiary support.
>
> Further, a worker is not required to self-diagnose the cause of a harmful change as being a work-related

> cumulative trauma injury. *See American Printing House for the Blind v. Brown*, 142 S.W.3d 145 (Ky. 2004); *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503 (Ky. 2001). The fact that, Wood "answered in the affirmative to the question 'is this a work-related injury?'" when she was seen at Workwell on December 19, 2008, is irrelevant to an analysis regarding the date of manifestation of a cumulative trauma injury. The fact that Wood was receiving treatment for her injuries did not create an obligation to notify her employer of a work-related injury and file a Workers' Compensation claim. Rather, a physician must diagnose the condition and its work-relatedness before the requirement to provide due and timely notice and the statute of limitations are triggered.

Board's Opinion at 27-29. We agree with the Board's erudite analysis. Our Supreme Court has observed that a claimant may give notice to the employer of a suspected cumulative trauma injury caused by work; nevertheless, the statute of limitations is not triggered until a physician informs claimant that the cumulative trauma injury was work related:

> It is undisputed that the claimant sustained work-related trauma and that harmful changes from the trauma were symptomatic on June 5, 2000. Therefore, she sustained an injury as defined by KRS 342.0011(1) although Chapter 342's notice and limitations provisions were not triggered until she received a medical diagnosis in January, 2001. *See Hill v. Sextet Mining Corp., supra.* As the Court of Appeals noted, nothing prohibits a worker who thinks she has sustained a work-related gradual injury from reporting it to her employer before the law requires her to do so, and nothing prevents her from reporting an injury that she thinks is work-related before a physician confirms her suspicion. Once informed that a work-related injury is alleged, an employer has certain obligations under KRS

> 342.038 and KRS 342.040. Likewise, notice of an allegation that a compensable injury occurred on a particular date gives rise to certain contractual obligations on the part of the carrier who covered the employer's liability on that date. If the allegation is contested, it is the worker's burden to pursue and prove a claim.

Brown, 142 S.W.3d at 148-49. Therefore, we do not believe the Board erred in vacating and remanding for a determination of the manifestation date of the December 9, 2008, injury and application of the statute of limitations.

We view any remaining contentions of error to be moot or without merit.[2]

2018 Amendment to KRS 342.185

In its supplemental brief, Dana Corporation argues that the 2018 amendment to KRS 342.185 should be retroactively applied to this case. If retroactively applied, Dana Corporation points out that KRS 342.185(3) contains a five-year statute of repose in a cumulative trauma injury claim and requires the claimant to file a claim within five years of the date of her last injurious exposure. Dana Corporation maintains that December 9, 2008, was Wood's last injurious date of exposure; however, Wood failed to file her claim within five years of such

[2] Dana Corporation filed a protective cross-appeal (2018-CA-001836-WC). As we affirmed Appeal No. 2017-CA-001694-WC, the issue raised in the protective cross-appeal is rendered moot.

date. For this reason, Dana Corporation asserts that Wood's cumulative injury claim is barred by the 2018 amended version of KRS 342.185.

As amended in 2018, KRS 342.185 provides, in relevant part:

> (3) The right to compensation under this chapter resulting from work-related exposure to cumulative trauma injury shall be barred unless notice of the cumulative trauma injury is given within two (2) years from the date the employee is told by a physician that the cumulative trauma injury is work-related. An application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the employee is told by a physician that the cumulative trauma injury is work-related. However, the right to compensation for any cumulative trauma injury shall be forever barred, unless an application for adjustment of claim is filed with the commissioner within five (5) years after the last injurious exposure to the cumulative trauma.

As to the retroactive application of KRS 342.185(3), the Legislative Research Commission (LRC) included Notes to KRS 342.185. The Notes quoted legislative language that KRS 342.185(3) is "remedial and shall apply to all claims irrespective of the date of injury or last exposure, provided that, as applied to any fully and finally adjudicated claim, the amount of indemnity ordered or awarded shall not be reduced and the duration of medical benefits shall not be limited in any way." KRS 342.185 LRC Notes.

In this case, Wood filed her claims for workers' compensation benefits in September 2014 and October 2014. And, the ALJ rendered his opinion

on March 30, 2017. The Board's Opinion affirming in part, vacating in part, and remanding was entered on September 29, 2017. KRS 342.185 was amended effective July 14, 2018, while these appeals were pending before the Court of Appeals.

The LRC Notes appendage to KRS 342.185 reflect the intent of the General Assembly that the 2018 statutory amendment of KRS 342.185 be retroactively applied in some cases. Although ambiguous, the legislature stated, as reflected in the Notes, that the 2018 amendment:

> [S]hall apply to all claims irrespective of the date of injury or last exposure, provided that, as applied to any fully and finally adjudicated claim, the amount of indemnity ordered or awarded shall not be reduced and the duration of medical benefits shall not be limited in any way.

Based on our review of the statute, it appears that the legislature did not define the term "fully and finally adjudicated claim." It is, however, clear that the General Assembly did not intend to reduce or limit the amount of indemnity or medical benefits awarded to a claimant. As the "primary purpose of the Workers' Compensation Act is to aid injured or deceased workers," any ambiguous language in the statute must be interpreted consistently with such "beneficent purpose." *Ky. Uninsured Employers' Fund v. Hoskins*, 449 S.W.3d 753, 762 (Ky. 2014) (citations omitted). Therefore, we do not view the retroactivity language contained

in the LRC Notes to KRS 342.185 so broadly as to mandate that KRS 342.185 be retroactively applied to this case.

We view any remaining contentions as moot.

In sum, we cannot conclude that the Board misconstrued the law or erred in assessing the evidence as concerns either appeal.

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

ALL CONCUR.

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