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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000803-WC

DURAFLAME, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-15-60244

DEBRA HAMPTON; HON. BRENT DYE, ADMINISTRATIVE LAW JUDGE; AND THE WORKERS' COMPENSATION BOARD APPELLEES

AND NO. 2018-CA-000911-WC

DEBRA HAMPTON CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-15-60244

DURAFLAME, INC.; HON. BRENT DYE, ADMINISTRATIVE LAW JUDGE; AND THE WORKERS' COMPENSATION BOARD CROSS-APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, MAZE AND NICKELL, JUDGES.

NICKELL, JUDGE: Duraflame, Inc., petitions and Debra Hampton cross-petitions for review of a Workers' Compensation Board ("Board") opinion vacating in part and remanding the November 30, 2017, opinion on remand, and the January 8, 2018, order on reconsideration entered by Administrative Law Judges (ALJ) Jeanie Owen Miller and Brent Dye, respectively. After careful review, we affirm the Board's opinion except for its application of the 1994 version of KRS[1] 342.730(4), which is reversed and remanded.

On June 20, 2016, Hampton filed an Application for Resolution of Injury Claim (Form 101) under the Workers' Compensation Act (Act)[2] alleging work-related bilateral cumulative trauma to her wrists and low back. At the time she filed her Form 101, Hampton was a fifty-nine-year-old high school graduate who had worked in Duraflame's factory as a "bliss operator" from 2000 through 2015. On May 19, 2016, Dr. Frank Burke performed an Independent Medical Evaluation of Hampton and diagnosed her with progressive bilateral carpal tunnel syndrome (CTS). He assigned Hampton an eleven percent whole person

[1] Kentucky Revised Statutes.

[2] KRS Chapter 342.

impairment rating[3] and did not believe she could return to work. The First Report of Injury filed with the Department of Workers' Claims further reflects: the date of Hampton's injury was September 21, 2015; the date Duraflame had knowledge of injury was September 21, 2015; and the last day Hampton worked for Duraflame was November 16, 2015. Duraflame accepted Hampton's bilateral CTS claim and paid medical and temporary total disability (TTD) benefits.

Hampton was deposed on August 30, 2016, and testified her wrists began hurting shortly after beginning work for Duraflame. Hampton testified she was seen by Dr. Patrick Jenkins in 2000 or 2001 for her wrist pain, which was characterized as tendonitis at that time; however, there are no records of these visits. Hampton testified Dr. Jenkins prescribed wrist braces for her to wear at work and during sleep. She further testified Dr. Jenkins commented on how her work activities contributed to her wrist pain.

Hampton testified she next treated for wrist pain with Nurse Practitioner Robin Goff[4] at Lake Cumberland Medical Associates, beginning in

[3] Utilizing the *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, Linda Cocchiarella & Gunnar B.J. Anderson, American Medical Association (AMA Press, 2000), Dr. Burke assigned three percent upper extremity impairment for Hampton's right wrist and three percent upper extremity impairment for Hampton's left wrist, combining for a total of four percent whole person impairment. Dr. Burke assigned seven percent whole person impairment for Hampton's left radicular pain pattern with low back strain.

[4] In her deposition, Hampton referred to PRN Goff as "Dr. Robin."

2014 or 2015. According to Hampton, PRN Goff advised her to continue wearing braces and wrote a prescription for either Naprosyn or ibuprofen. Hampton subsequently underwent two carpal tunnel release surgeries performed by Dr. Margaret Napolitano on November 17, 2015, and January 19, 2016. Dr. Napolitano restricted Hampton's work activities to light-duty for a limited time during her recovery. Hampton testified there were no light-duty positions at Duraflame.

The November 18, 2016, Benefit Review Conference order and memorandum identified the contested issues as: benefits per KRS 342.730; work-relatedness/causation of low back injury; notice; unpaid or contested medical expenses for low back injury; exclusion for pre-existing disability/impairment for low back injury; TTD; and statute of limitations and notice compliance for low back injury. ALJ Miller granted Duraflame's motion to add statute of limitations and notice compliance for Hampton's bilateral CTS as contested issues at the November 29, 2016, hearing.

At the hearing, Hampton testified she reported her wrist pain to Duraflame as early as 2000 or 2001, Duraflame instructed her to see a doctor as a result, and she began treatment for tendonitis with Dr. Jenkins. Hampton also testified she was "always getting tendonitis" in her wrists after she began working

for Duraflame, but was able to continue to do her job until her first carpal tunnel release surgery on November 17, 2015.

Following the hearing, the matter was submitted to the ALJ for decision. ALJ Miller's opinion, award, and order entered January 30, 2017, awarded permanent total disability (PTD) for eleven percent impairment and medical benefits to Hampton. ALJ Miller subsequently entered an order denying reconsideration on March 3, 2017.

Duraflame appealed to the Board, asserting the claim should be remanded to compel a different outcome regarding notice and statute of limitations and the ALJ's findings relating to PTD were not supported by substantial evidence. On June 20, 2017, the Board remanded the claim to the ALJ to determine the date of manifestation for Hampton's bilateral CTS, further directing the ALJ, "[i]n addressing the date of manifestation, the ALJ must specifically address Hampton's testimony indicating Dr. Jenkins had informed her in 2000 or 2001 that her bilateral wrist symptoms were caused by her work activities." The Board declined to rule on the issues of notice, statute of limitations, and PTD.

In her opinion on remand, entered November 30, 2017, ALJ Miller found Hampton's work injury of CTS became manifest on November 16, 2015.[5]

[5] ALJ Miller refers inconsistently to November 15 and 16, 2015, as the date of manifestation throughout her opinion on remand. In its opinion on appeal, the Board simply refers to November 16, 2015, as the date identified by ALJ Miller as the date of manifestation.

ALJ Miller also specifically addressed Hampton's testimony of her interactions with Dr. Jenkins and found it did not constitute substantial medical evidence to establish the date of manifestation of Hampton's bilateral CTS claim in 2000 or 2001. The remainder of the opinion, award, and order entered January 30, 2017, remained as rendered.

Both parties filed petitions for reconsideration. The claim was reassigned to ALJ Dye, who entered his order on January 8, 2018, granting Hampton's motion for reconsideration and correcting patent errors contained in ALJ Miller's opinion on remand. ALJ Miller had terminated Hampton's income benefits pursuant to the 1996 version of KRS 342.730(4), which was later found unconstitutional in *Parker v Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017). ALJ Dye determined the tier-down provision of the 1994 version of KRS 342.730(4), which was not deemed unconstitutional in *Parker*, should be applied to Hampton's award of benefits.

ALJ Miller's opinion on remand and ALJ Dye's order on reconsideration were appealed to the Board. The Board affirmed ALJ Miller's finding that Hampton's testimony regarding Dr. Jenkins did not constitute substantial medical evidence. However, the Board called into question ALJ Miller's choice of November 16, 2015, as the date of manifestation observing, "this is merely the day Hampton stopped working at Duraflame and not the day

Hampton discovered she has CTS <u>*caused by work*</u>. *See Alcan Foil Products v. Huff*, 2 S.W.3d 96 (Ky. 1999)." Accordingly, the Board remanded the matter for proper legal analysis regarding the date of manifestation of Hampton's work-related CTS and identification of the appropriate date since it triggers the running of the statute of limitations as well as the obligation to provide notice of the injury. The Board again declined to rule on the issues of notice, statute of limitations, and PTD, stating such issues are moot until a proper date of manifestation is established. The Board affirmed ALJ Dye's application of the 1994 version of KRS 342.730(4)'s tier-down formula to Hampton's PTD benefits. The instant petition and cross-petition for review followed.

Before this Court, Duraflame argues: (1) the ALJ improperly ignored Hampton's testimony regarding Dr. Jenkins, (2) case law does not require the date of manifestation be proven by expert evidence, (3) the ALJ should have applied KRE[6] 1007's "best evidence rule" to Hampton's testimony concerning her treatment with Dr. Jenkins, and (4) the Board improperly imposed additional requirements regarding date of manifestation. We disagree with Duraflame and affirm on all four issues. In contrast, Hampton argues: (1) the ALJ's finding of November 16, 2015, as the date of manifestation constitutes harmless error; (2) the ALJ's findings regarding PTD were supported by substantial evidence and should

[6] Kentucky Rules of Evidence.

have been affirmed; and (3) application of the 1994 version of KRS 342.730(4) runs afoul of *Parker* and no tier-down provision should be applied to Hampton's award of PTD benefits. We disagree with Hampton and affirm the Board on the first two issues; however, we reverse application of the 1994 version of KRS 342.730(4).

The appropriate standard of review for workers' compensation claims was summarized in *Bowerman v. Black Equipment Company*, 297 S.W.3d 858, 866-67 (Ky. App. 2009).

> Appellate review of any workers' compensation decision is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Our standard of review differs in regard to appeals of an ALJ's decision concerning a question of law or a mixed question of law and fact *vis-à-vis* an ALJ's decision regarding a question of fact.
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> The first instance concerns questions of law or mixed questions of law and fact. As a reviewing court, we are bound neither by an ALJ's decisions on questions of law or an ALJ's interpretation and application of the law to the facts. In either case, our standard of review is *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001); *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). *De novo* review allows appellate courts greater latitude in reviewing an ALJ's decision. *Purchase Transportation Services v. Estate of Wilson*, 39 S.W.3d 816, 817-18 (Ky. 2001); *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991).

The second instance concerns questions of fact. KRS 342.285 designates the ALJ as finder of fact, and has been construed to mean that the factfinder has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *McCloud v. Beth-Elkhorn Corporation*, 514 S.W.2d 46, 47 (Ky. 1974). Moreover, an ALJ has sole discretion to decide whom and what to believe, and 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. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

KRS 342.285 also establishes a "clearly erroneous" standard of review for appeals concerning factual findings rendered by an ALJ, and is determined based on reasonableness. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Although an ALJ must recite sufficient facts to permit meaningful appellate review, 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[.]" *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 441 (Ky. App. 1982). In short, appellate courts may not second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion. *Medley v. Board of Education, Shelby County*, 168 S.W.3d 398, 406 (Ky. App. 2004). Discretion is abused only when an ALJ's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

. . . .

> Generally, "arbitrariness" arises when an ALJ renders a decision on less than substantial evidence, fails to afford procedural due process to an affected party, or exceeds her statutory authority. *K & P Grocery, Inc. v. Commonwealth, Cabinet for Health Services*, 103 S.W.3d 701, 703 (Ky. App. 2002).

"Substantial evidence is 'that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.'" *Wasson v. Kentucky State Police*, 542 S.W.3d 300, 304 (Ky. App. 2018) (quoting *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994)). Our standard of review requires us to show considerable deference to the ALJ and the Board.

Duraflame's first argument is the ALJ improperly ignored Hampton's testimony regarding her medical treatment with Dr. Jenkins, erroneously finding it insufficient to conclude Hampton was informed by Dr. Jenkins of a work-related diagnosis of CTS for the purpose of establishing the date of manifestation of Hampton's CTS in 2000 or 2001, and thereby triggering the requirements for Hampton to provide notice to Duraflame of a work-related CTS diagnosis and the applicable statute of limitations to file her work-related CTS claims. The ALJ specifically found Hampton's testimony did not constitute substantial evidence that Hampton was diagnosed with work-related CTS in 2000 or 2001. The ALJ found Hampton's testimony at most only demonstrated Dr. Jenkins diagnosed her with tendonitis. Hampton testified Dr. Jenkins never told her she had CTS. The ALJ

further noted Hampton continued to work without restrictions until 2015. The ALJ's rejection of Duraflame's contention Hampton's date of manifestation was in 2000 or 2001 based on Hampton's testimony concerning her treatment with Dr. Jenkins was based on substantial evidence and is, therefore, affirmed.

Duraflame's second argument contends case law does not require the date of manifestation be proven by expert evidence. The Supreme Court of Kentucky held in *Hill v. Sextet Mining Corp*., 65 S.W.3d 503 (Ky. 2001), "a claimant does not have to self-diagnose and is not required to give notice of a work-related cumulative trauma injury **until a medical professional tells the claimant a condition is work-related**." *Consol of Kentucky, Inc. v. Goodgame*, 479 S.W.3d 78, 82 (Ky. 2015) (emphasis added). "Thus, for 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." *Id.* Here, neither the ALJ nor the Board required expert evidence to prove the date of manifestation. Both simply found Hampton's testimony of her interactions with Dr. Jenkins did not demonstrate Dr. Jenkins advised Hampton she had sustained a work-related condition. We agree and discern no error.

Duraflame next asserts the ALJ should have applied the "best evidence rule" to Hampton's testimony concerning her treatment with Dr. Jenkins. This argument was soundly rejected by the Board. We adopt its findings and

> reject Duraflame's assertion in reliance upon KRE 1007 that the "best evidence rule" is applicable and "Dr. Jenkins' medical conclusions should be admissible through Ms. Hampton's testimony." In Hampton's testimony at the November 29, 2016, hearing, there is no indication Dr. Jenkins diagnosed Hampton with CTS much less work-related CTS. In fact, as Hampton testified at the hearing, her wrist pain at that point in time was being characterized as "tendonitis," not CTS.
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> As stated by ALJ Miller, "[s]eeking medical treatment, one time for tendinitis [sic], sometime 14 or 15 years prior to a claim for carpal tunnel, at the direction of your employer, does not equate to a manifestation of a cumulative trauma injury." Also of significance is Hampton's hearing testimony that she was able to work full-duty "[a]ll the way up to the day before surgery" which occurred on November 17, 2015. Thus, ALJ Miller was not obligated to accept Hampton's testimony as evidence of a 2000 or 2001 date of manifestation for her work-related CTS as she alone has the discretion to determine the evidence upon which to rely, and this discretion will not be disturbed by us.

Duraflame's final argument is the Board improperly imposed additional requirements regarding the date of manifestation. Duraflame alleges the Board "created a new requirement that the *Hill* analysis be about a specific condition rather than a set of complaints, body parts, or generic problems to

describe a continuum of progressively worsening symptoms." We disagree with Duraflame's assessment of the Board's opinion.

Hill held a workers' compensation claimant is not required to give notice to her employer she has sustained a work-related gradual injury until she has been informed of that fact by a medical provider. *Hill*, 65 S.W.3d at 507 (citing *Alcan Foil Products*, 2 S.W.3d 96; *Special Fund v. Clark*, 998 S.W.2d 487 (Ky. 1999)). While Hill sought treatment for flare-ups and acute symptoms of spinal pain over the course of his years of employment, there was no indication a medical care provider had ever informed Hill of a work-related gradual injury—that work was gradually causing harmful changes to his spine that were permanent. Here, there was "no indication Dr. Jenkins diagnosed Hampton with CTS much less work-related CTS." The distinction between diagnoses of tendonitis and CTS is like the distinction drawn in *Hill* between episodic spinal pain and the eventual resultant work-related gradual injury. The Board did not impose any additional requirements, it merely followed *Hill*.

Hampton's first counter-argument is the ALJ's finding of November 16, 2015, as the date of manifestation constitutes harmless error. The Supreme Court of Kentucky held in *Goodgame*, 479 S.W.3d at 82:

> As the Board noted, the ALJ in this case did not make a factual determination concerning when Goodgame was advised he had a work-related condition. Rather, she simply chose the last day he worked in Kentucky as the

> date of accident and calculated the running of the statute of limitations from that date. Thus we agree with the Board that the ALJ must, on remand, make that determination.

Given such precedent, we must agree with the Board's decision to remand this matter to the ALJ for proper determination of the date of manifestation of Hampton's bilateral CTS claim.

Hampton's second argument is the ALJ's findings regarding PTD were supported by substantial evidence and should have been affirmed. Once again, we must follow the guidance of the Supreme Court of Kentucky.

> KRS 342.185(1) acts as both a statute of limitations and a statute of repose. For single traumatic event injuries the running of both periods begins on the date of accident. For cumulative trauma injuries the running of both periods begins on the date the injured employee is advised that he has suffered a work-related cumulative trauma injury. Therefore, this claim must be remanded to the ALJ so that she can determine when Goodgame was advised that he suffers from a work-related cumulative trauma injury. She must then determine if Goodgame filed his claim within two years of that date.

Id. at 84. Likewise, as the Board ordered, this claim must be remanded to the ALJ, so he can determine when Hampton was advised she suffers from a work-related cumulative trauma injury. The ALJ must then determine if Hampton filed her claim within two years of that date.

Hampton's final argument is application of the 1994 version of KRS 342.730(4) is not permitted by *Parker*, and further, no tier-down provision should

be applied to her PTD benefits. However, during the pendency of this appeal, KRS 342.730(4) was amended on July 14, 2018. Pursuant to the 2018 amendment, all benefits "shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last occurs." KRS 342.730(4).

It is well-settled, "[n]o statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080(3). Retroactive application of statutes will be approved only where we can be certain the General Assembly intended the statute to operate retroactively. *See Commonwealth Dep't of Agriculture v. Vinson*, 30 S.W.3d 162, 168 (Ky. 2000). No specific language or "magic words" are necessary to make a statute retroactive. "What is required is that the enactment make it apparent that retroactivity was the intended result." *Baker v. Fletcher*, 204 S.W.3d 589, 597 (Ky. 2006). Recently, in *Holcim v. Swinford*, 581 S.W.3d 37 (Ky. 2019), our Supreme Court undertook a detailed analysis of whether the provisions of the 2018 amendment to KRS 342.730(4) should be applied retroactively. It answered that question in the affirmative.

The amendment at issue is contained in Section 13, subsection 4 of Kentucky House Bill 2 (Kentucky 2018 Regular Session). House Bill 2 was signed by the Speaker of the House, President of the Senate, and Governor. It was then filed with the Kentucky Secretary of State on March 30, 2018, and became

effective July 14, 2018. In addition to its many codified sections, House Bill 2 contains two non-codified provisions, Sections 19 and 20, which the Supreme Court concluded contained a declaration by the legislature concerning retroactivity. *Holcim*, 581 S.W.3d at 44. Section 20, subsection 3 of House Bill 2 provides:

> Subsection (4) of Section 13 of this Act shall apply prospectively and retroactively to all claims:
>
> (a) For which the date of injury or date of last exposure occurred on or after December 12, 1996; and
>
> (b) That have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal has not lapsed, as of the effective date of this Act.

In the instant case, Hampton's date of injury or date of last exposure occurred after December 12, 1996, and her claim was in the appellate process as of the effective date of the amendment. Hampton's claim falls within the period of retroactivity expressly designated by the General Assembly. As such, the amended version of KRS 342.730(4) applies to her claim. The award in this case should order Hampton's PTD benefits to "terminate as of the date upon which [Hampton] reaches the age of seventy (70), or four (4) years after [Hampton's] injury or last exposure, whichever last occurs." KRS 342.730(4). Accordingly, we must reverse the ALJ's award with respect to duration. On remand, the ALJ shall enter a new award conforming to the amended version of KRS 342.730(4) now in effect.

For the foregoing reasons, the opinion of the Workers' Compensation Board is AFFIRMED except for application of the 1994 version of KRS 342.730(4), which is REVERSED and REMANDED with instructions to enter an opinion and order consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT/ CROSS-APPELLEE:	BRIEF FOR APPELLEE/CROSS-APPELLANT DEBRA HAMPTON:
Steven L. Kimbler Lexington, Kentucky	Jackson W. Watts Versailles, Kentucky