

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: May 20, 2004  
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0382-WC

DATE 6-10-04 E.L.R. GOWAN, D.C.

FORD MOTOR COMPANY

APPELLANT

APPEAL FROM COURT OF APPEALS

2002-CA-0023-WC

V.

WORKERS' COMPENSATION BOARD NO. 00-0705

BETTY C. STEVENSON; RICHARD H.  
CAMPBELL, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant was totally disabled by work-related impairment, that she gave timely notice of her gradual injury, and that her claim was timely filed. The decision was later affirmed by the Workers' Compensation Board (Board) and the Court of Appeals. Both determined that the employer's failure to petition for reconsideration and request specific findings on the question of limitations precluded an appeal of that aspect of the decision. Appealing, the employer maintains that no additional findings were required and that the ALJ's conclusions concerning work-relatedness, limitations, and total disability were not supported by substantial evidence. Although our rationale is different with respect to the question of limitations, we affirm.

The claimant was born in 1952 and had an eleventh-grade education with no specialized or vocational training. Her employment history included production work in

a factory and restaurant work. She began working at the defendant-employer's assembly plant in 1977 and continued to do so until September 29, 1998. She has not worked since that date.

In 1984, the claimant sustained a work-related fracture to her right hand. She underwent surgery for the condition in 1985 and 1986, and the parties agreed at some point to settle the claim for a 6% occupational disability. The claimant continued to work and began to depend more on her left hand and arm. Eventually, she began to experience numbness, loss of strength, and pain in both hands. This led to a third right-hand surgery, in 1989, one of the goals of which was to help alleviate her increasing dependence on her left hand.

The claimant testified that assembly work involved the repetitive use of her hands, lifting and carrying, and walking back and forth. In the early 1990's, she developed a trigger finger for which she received cortisone injections in the fingers of her left hand. Over the years, the pain, numbness, and tingling continued to worsen. Her employer restricted her from using vibratory tools in 1995. Then, in 1997, she was assigned to a job that involved wiping dust off vehicles in preparation for painting. Like her previous work, it required the repetitive use of her hands. She stated that she quit working altogether on September 29, 1998, thinking that her condition would improve. Nonetheless, her carpal and cubital tunnel symptoms persisted, and she sought benefits under the employer's disability retirement plan. She was awarded disability retirement benefits in the summer of 1999, after presenting evidence from Dr. Beilman, her family physician, that she suffered from medical problems including: sinusitis, depression, migraine headaches, hiatal hernia, tarsal tunnel syndrome, and arthritis in her hands. At some point, she was also awarded social security disability benefits. On

June 12, 2000, the claimant filed an application for workers' compensation benefits. As later amended, the application alleged disabling injuries to her arms and feet on September 29, 1998, from the repetitive nature of her work.

Dr. Breidenbach, an orthopedic surgeon, began treating the claimant in 1989. At that time, he performed surgery to remove scar tissue and improve mobility in her right hand. On April 12, 2000, she sought treatment for symptoms including pain, numbness, and weakness in both hands. She indicated that the symptoms had been present for a long time but had worsened in the past two years. Dr. Breidenbach found signs of pinched nerves in both wrists and in the left elbow and diagnosed bilateral carpal tunnel syndrome, which was more evident on the left side. He also diagnosed left cubital tunnel syndrome. Although the results of subsequent nerve conduction studies were normal, he later explained that a normal nerve conduction study together with the claimant's symptoms were classical signs of carpal tunnel nerve compression. He performed left wrist and elbow surgery in August, 2000. A note dated October 18, 2000, indicated that because the claimant had not worked since 1998, her carpal and cubital tunnel problems were not related to her work. Yet, when deposed in February, 2001, Dr. Breidenbach testified that the nature of the claimant's work was a known cause of nerve compression problems and that her years of assembly line work were the probable cause of the symptoms she experienced while working. In a note dated March 8, 2001, he explained that after learning from the claimant on November 22, 2000, that her symptoms began more than two years earlier and progressively worsened, he had concluded that the conditions resulted from her 22 years of doing repetitious work on the employer's assembly line. He assigned a 13% AMA impairment, attributing a 2% impairment to the left arm and an 11% impairment to the right.

Dr. Auerbach, an orthopedic surgeon, examined the claimant on August 28 and November 6, 2000. In the latter report, he indicated that the August 2000, surgery had been successful so far, although additional surgery was planned to correct a Dupuyten's contracture in the left palm. In his opinion, the claimant had a 30% whole-body impairment due to her arm problems and was unemployable. Although he thought that she might be capable of some sedentary work, he found it inconceivable that she would be able to work full time with her various medical problems.

Dr. Harter was the plant physician through August, 1998, at which time she took an executive position with the company. In 1995, the claimant complained of a loss of strength and of the ability to grip with her right hand. Therefore, Dr. Harter decided to place her on work restrictions and have her reassigned to work that did not require the use of vibratory tools. She indicated that, after 1995, the claimant did not report any problems with either arm. Dr. Harter testified that the work the claimant performed from 1995 to 1998 was not likely to irritate the carpal tunnel problem. She also testified that the primary reason that the claimant sought disability retirement was extreme depression. Company medical records were submitted at Dr. Harter's deposition. They indicated that the claimant received injections in the fingers of her left hand in 1990. In 1991, she had problems with grasping, squeezing, and carrying in both hands. She also experienced some problems with a trigger finger on her left ring finger for which she was placed on temporary restrictions. A March 1, 1996, a note from Dr. Gavin to Dr. Beilman reported that the claimant was having problems with her right elbow. Also, on August 13, 1999, the claimant saw Dr. Beilman, complaining of loss of grip strength and an inability to grip or pull with both hands.

Dr. Corwin examined the claimant on October 31, 2000. On November 6, 2000, he reported that, in his opinion, there was never any evidence the claimant had carpal tunnel or cubital tunnel syndrome. Furthermore, his examination revealed no objective evidence of a neurologic deficit. He acknowledged that there might be underlying arthritis that had not been evaluated and suggested radiographs of the hands and left shoulder. In a March 6, 2001, report, he attributed any right hand impairment to the 1984 fracture. He found no left hand impairment due to carpal tunnel syndrome and indicated that any loss of range of motion in the hand was more likely due to arthritis.

Ms. Bonn, the employer's workers' compensation administrator, testified that she first became aware of an alleged injury to the claimant's left arm when she received a copy of the June, 2000, application for benefits. Her understanding was that the claimant's disability retirement application had been based primarily on depression.

Among other things, the employer asserted that any injury occurred more than two years before the claim was filed and that the claimant failed to give timely notice.

With respect to the question of limitations, the ALJ stated as follows:

I find that the plaintiff's claim for a work related injury on 9/29/98 was made with the department within two (2) years of the date of the accident. Accordingly, I find that the same is not time barred.

Rejecting the testimonies of Ms. Bonn and Dr. Harter, the ALJ determined from the claimant's testimony and the other medical evidence, including the company medical records, that the claimant gave notice of her injury as soon as practicable. Relying upon evidence from Drs. Breidenbach and Auerbach, the ALJ determined that the claimant's cubital tunnel syndrome and bilateral carpal tunnel syndrome were work-related; that she was totally occupationally disabled; that her prior, active disability was 6%; and that she was entitled to benefits for 94% of a total disability.

The sole issue raised in the employer's petition for reconsideration concerned the failure of the ALJ to award an employer credit for the disability retirement benefits as per the stipulation of the parties. Although noting that the award already included such a provision and that the petition was moot, the ALJ amended the award in order to limit the credit to the net amount of disability benefits after deductions for taxes and social security benefits. Appealing to the Board, the employer contested the findings that the carpal and cubital tunnel injuries were work-related; that the claimant gave timely notice of the conditions; that she filed her claim within the applicable period of limitations; and that the carpal and cubital tunnel syndromes, by themselves, were totally disabling. With respect to the limitations argument, the employer asserted: 1.) that although parties stipulated to an "alleged work-related injury(ies) on 9-29-98," it had argued from the outset that the condition was not work-related; 2.) that even if the condition was work-related, it arose no later than March, 1997, and, therefore, was barred by limitations; and 3.) that the ALJ appeared to have relied upon the stipulation and made a " cursory and unsubstantiated conclusion that [the claimant] did suffer a work-related injury on September 29, 1998." It maintained, therefore, that the finding that the claim was timely was not based upon substantial evidence and must be reversed.

Symptoms that occur at work or that an individual associates with work may or may not be due to a work-related injury. For the purpose of notice and limitations, a gradual injury occurs when the worker learns that she has sustained such an injury and is informed by a physician that the condition is work-related. Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503, 507 (2001). The fact that a worker experiences symptoms and thinks they are work-related does not trigger notice and limitations just as it will not prove causation. Id. Special Fund v. Clark, Ky., 998 S.W.2d 487, 490 (1999), explains

that an individual who knows that she has sustained a work-related gradual injury also knows that continuing to perform the same work is likely to cause additional injury. The decision points out, however, that a gradual injury is dynamic and continues to occur for so long as the individual performs the same work. Therefore, even where part of an injury is barred by limitations, the portion that is attributable to work-related trauma incurred in the two years before a claim is filed remains compensable. Id.

The ALJ determined that the claim for a September 29, 1998, injury was filed within two years after the date of accident and, therefore, was timely. Yet, the decision failed to provide a factual basis for concluding that September 29, 1998, was the appropriate date for triggering the period of limitations under Special Fund v. Clark, supra. Therefore, it was patent on the face of the award that the ALJ reached a conclusion of law concerning the question of limitations but failed to state the facts that supported it. See Harry Stevens Company v. Workmen's Compensation Board, Ky., 553 S.W.2d 852 (1977). Furthermore, although its reasoning was different, the employer acknowledged that the ALJ had reached an "unsubstantiated conclusion" in its brief to the Board.

KRS 342.285(1) provides that unless a petition for reconsideration is filed, an ALJ's decision is "conclusive and binding as to all questions of fact." As amended effective December 12, 1996, KRS 342.281 permits an ALJ to correct "errors patently appearing on the face of the award" when such errors are raised in a petition for reconsideration. The 1996 amendment deleted a sentence that was enacted effective April 4, 1994, which provided that a failure to file such a petition did not preclude an appeal on any issue and required only that issues must be raised at the administrative level to be preserved for judicial review. 1994 Ky. Acts ch. 181, § 75; See, Smith v.



Dixie Fuel Co., Ky., 900 S.W.2d 609 (1995). Thus, by deleting the sentence, the 1996 amendment restored the statute to essentially the same form that it had when enacted in 1964. See 1964 Ky. Acts ch. 192, § 21.

In Eaton Axle v. Nally, Ky., 688 S.W.2d 334, 337-38 (1985), the court construed KRS 342.285 as requiring findings of fact on all contested issues and pointed out that the decision being appealed contained no finding with respect to notice even though the issue had been hotly contested. After complaining of the number of cases that had to be remanded for additional findings of fact, the court applied the 1964 version of KRS 342.281, explaining that it was the statutory counterpart of CR 52.04 and that the principles of judicial economy required a petition for reconsideration to be filed in order to preserve a patent error or omission of fact for judicial review. Id. At the time of the decision, workers' compensation claims were decided by the Board and were appealed to circuit court. Since 1987, however, claims have been decided by ALJs and are subject to an administrative appeal to the Board before a judicial appeal is permitted. Applying Eaton Axle to the changed procedures, the court determined in Osborne v. Pepsi Cola, Ky., 816 S.W.2d 643 (1991), that a timely petition for reconsideration must be filed before the ALJ in order to preserve a patent error or omission of fact for review by the Board. Since the 1996 amendment restored KRS 342.281 to essentially the same form that the Osborne decision addressed, we conclude that the principles set forth in the decision apply to this claim. See also, Hall's Hardwood Floor Co. v. Stapleton, Ky.App., 16 S.W.3d 327 (2000).

Although KRS 342.281 refers to "errors patently appearing on the face of the award," it does not limit an ALJ to correcting clerical errors. Commonwealth v. Robertson, Ky., 447 S.W.2d 857 (1969). It permits the correction of all patent errors,

both legal and factual. Wells v. Beth-Elkhorn Coal Corp., Ky.App., 708 S.W.2d 104 (1986). Although an ALJ may not reconsider the merits or change the factual findings on reconsideration, correcting an award to conform to the law is not a change of the decision on the merits. Reliance Diecasting v. Freeman, Ky., 471 S.W.2d 311 (1971); Beth-Elkhorn Corp. v. Nash, Ky., 470 S.W.2d 329 (1971).

As interpreted by the court in Osborne v. Pepsi Cola, *supra*, KRS 342.281 and KRS 342.285(1) place upon a party who wishes to appeal an ALJ's decision the burden to request any necessary findings of fact before the appellate process begins. Although an ALJ is not required to provide a detailed legal analysis of a contested issue, an ALJ is required to make sufficient findings of fact to apprise the parties of the basis for the decision and to permit a meaningful appellate review. Big Sandy Community Action Program v. Chaffins, Ky., 502 S.W.2d 526 (1973); Shields v. Pittsburgh & Midway Coal Mining Co., Ky. App., 634 S.W.2d 440 (1982). We conclude, therefore, that the ALJ's failure to state a factual basis for concluding that the date of "accident" was September 29, 1998, and that the claim was filed within the applicable period of limitations constituted an error that was patent on the face of the award. Furthermore, it was a type of error that a petition for reconsideration was designed to correct. We conclude, therefore, that the employer's failure to bring the error to the ALJ's attention and to request specific findings precluded a reversal on the ground that the ALJ failed to make the necessary findings of fact or that the ALJ failed to consider all aspects of its argument concerning the limitations issue. That conclusion does not entirely dispose of the limitations issue, however, because nothing in KRS 342.281 negates the requirement of KRS 342.285(2) that a decision must be based upon substantial evidence. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

The employer has asserted from the outset that all or at least part of the claim was untimely. Nonetheless, it has pointed to no evidence that indicates a physician informed the claimant that she had sustained a work-related gradual injury before she quit working. The fact that a worker experiences symptoms and thinks they are work-related does not, by itself, trigger notice and limitations. See Hill v. Sextet Mining Co., supra. Likewise, a company physician's imposition of work restrictions or reassignment of the worker to other duties does not trigger the period of limitations unless the physician also communicates to the worker the fact that she has sustained a work-related injury.

The surgeries to the claimant's right hand during the 1980's and the claim that was later settled arose from a fracture to that hand, not a gradual injury. Regardless of when symptoms of the gradual injury began, we are aware of no evidence that a physician informed the claimant that she had sustained a work-related gradual injury to her hands and arms until Dr. Breidenbach did, after she quit working. Furthermore, despite the employer's assertions to the contrary, the claimant's description of her duties together with Dr. Breidenbach's testimony permitted a reasonable conclusion that the claimant's entire tenure on the assembly line contributed to her injury. At this point, it is impossible to determine if the basis upon which the ALJ determined that the claim was timely was correct, and we have already determined that the employer's failure to request specific findings on the matter precludes a remand for that purpose. Nonetheless, because there was substantial evidence to support a conclusion that the claim was filed within two years after any trauma that contributed to the gradual injury, the decision was properly affirmed. Special Fund v. Francis, supra.

We are persuaded that the findings of fact with respect to notice, work-relatedness, and extent and duration of disability were adequate to apprise the parties of the basis for the ALJ's decision and to permit a meaningful appellate review. Big Sandy Community Action Program v. Chaffins, supra; Shields v. Pittsburg & Midway Coal Mining Co., supra. Concluding that the employer received timely notice, the ALJ found the claimant's testimony and the other medical evidence, including that in the company medical records, to be more persuasive than that of Ms. Bonn and Dr. Harter. As the Board and the Court of Appeals pointed out, the claimant may not have given formal written notice, but this was not a case where the employer was unaware of her condition until she filed a claim. Not only were the employer and company physician aware of her condition, they provided accommodations. Although the claimant suspected that her symptoms were work-related, Dr. Breidenbach did not diagnose the carpal and cubital tunnel conditions or determine that they were work-related until after she quit working. Under the circumstances, the employer has failed to show that the finding of timely notice was unreasonable.

As was his prerogative, the ALJ relied upon the testimonies of Drs. Breidenbach and Auerbach as medical evidence that the claimant's carpal and cubital tunnel syndromes were work-related. Furthermore, the claimant's and Dr. Breidenbach's testimony constituted substantial evidence from which the ALJ could reasonably determine that the claimant's entire tenure on the assembly line contributed to causing the injury. Under the circumstances, the finding of causation was reasonable.

The employer points to the claimant's numerous medical problems and asserts that the carpal and cubital tunnel syndromes, alone, were not totally disabling. KRS 342.730(1)(a) requires a finding of total disability to be based solely upon work-related

impairment. Nonetheless, even under the 1996 Act, many of the factors in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), remain relevant to the determination. Ira A. Watson Department Stores v. Hamilton, Ky., 34 S.W.3d 48 (2000). Furthermore, the testimony of the injured worker remains relevant. Id. In concluding that the effects of the claimant's 1984 and 1998 work-related injuries, by themselves, were totally disabling, the ALJ chose to rely upon the testimonies of the claimant, Dr. Breidenbach and Dr. Auerbach. In view of the claimant's age, education, and previous work experience, we conclude that it was reasonable for the ALJ to determine that the work-related conditions, by themselves, would have prevented the claimant from being able to work for another for remuneration on a regular and sustained basis in a competitive economy.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Wesley G. Gatlin  
Earl Lipscomb Martin, III  
Boehl Stopher & Graves  
Capital Holding Center, Ste. 2300  
400 West Market  
Louisville, KY 40202

COUNSEL FOR APPELLEE:

Charles Ched Jennings  
Haydon Dockter & Jennings  
412 Kentucky Home Life Building  
239 S. Fifth Street  
Louisville, KY 40202