

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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RENDERED: June 17, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0413-WC

DATE 7-8-04 EJA/Gro-H, DC

WALTER MCKELLERY

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2002-CA-1548-WC
WORKERS' COMPENSATION BOARD NO. 98-0923

DISNEY TIRE COMPANY, AS INSURED
BY TRAVELERS INSURANCE COMPANY;
HON. SHEILA C. LOWTHER, CHIEF ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION FUNDS;
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant's application for benefits was barred by limitations. The decision was based upon two grounds: 1.) that the claimant's gradual injury became manifest more than two years before he filed an application for benefits, and 2.) that there was insufficient evidence to link a portion of his disability to trauma incurred within two years before the application was filed. The Workers' Compensation Board (Board) and the Court of Appeals affirmed, and we affirm.

The claimant was born in 1937 and worked for the defendant-employer for 23 years. His job in the warehouse required him to load and unload tractor-trailers containing between 1,600 and 1,900 tires. The claimant testified that he used his left hand to steer a standup forklift while moving pallets of tires and that he used his right

hand to control the reach of the forklift and to pick up odd lots of tires. He worked about 9 ½ hours per day, five days per week, frequently without a lunch break.

In January, 1994, the claimant saw his family physician, Dr. Zukof, and complained of numbness in his left arm and hand. No treatment was rendered, although nerve conduction studies suggested bilateral carpal tunnel syndrome, moderately severe, worse on the left side. The claimant admitted that he was informed at the time that his work caused the condition and that it would become worse if he continued to perform the same work. Dr. Zukof's notes indicated that eventually surgery would be required to relieve it. The claimant continued performing his regular duties without restrictions. At his annual checkup in August, 1994, he reported that his symptoms had improved, and Dr. Zukof advised him to return if he had any further problems.

In April, 1995, the employer referred the claimant to Occupational Physician Services for complaints of continuous pain in the left wrist while operating a forklift. He indicated on the intake form that the problem was due to his work and had been symptomatic for about eight months. He was diagnosed with possible carpal tunnel syndrome and referred for a nerve conduction study. No treatment was recommended at that time, and Dr. Diamond indicated that the claimant could continue to perform his regular duties without restrictions. Dr. Weston reported that a May 3, 1995, nerve conduction study revealed severe carpal tunnel syndrome on the left side.

The claimant testified that beginning in 1995 or 1996, the work became more intense. At that time, his symptoms became much worse and began to affect the right wrist as well as the left. Dr. Weston referred him to Dr. Wolf, a hand specialist. On May 22, 1996, the claimant related to Dr. Wolff a three-year history of numbness, tingling,

weakness, and clumsiness in his hands, worse in the left. Dr. Wolff diagnosed bilateral carpal tunnel syndrome and began a course of treatment for the condition. Initially, he recommended vitamin B complex and bilateral wrist splints. In 1997-98, the claimant began to experience pain in the evenings and to have difficulty sleeping. He testified that Dr. Wolff recommended work restrictions, but the medical records that are in evidence do not support the assertion. They do indicate that, on April 6, 1998, Dr. Wolf noticed a complete atrophy in the opponens muscle of the left hand and some weakness on the right, and he recommended surgery.

On May 20, 1998, the claimant filed an application for benefits. He alleged that he had developed bilateral carpal tunnel syndrome and that the condition was work-related. Three days later, Dr. Wolff performed a left carpal tunnel release. After a brief absence, the claimant was released to return to his usual work on a full-time basis.

Three insurance carriers provided coverage during the relevant periods. The parties stipulated that Travelers Insurance Co. provided coverage to December 31, 1995, and that AIK provided coverage from January 1, 1996, to January 1, 1998. Claredon National Insurance Co. provided coverage thereafter.

When the claim was heard, the employer was represented as insured by Travelers and by AIK. A number of issues were contested, including: limitations, the date when the disabling reality of the condition became manifest, work-relatedness, the claimant's entitlement to temporary total disability (TTD) and medical benefits, the extent and duration of permanent disability, and apportionment. Furthermore, the claimant testified at the hearing that Dr. Wolff had recommended a right carpal tunnel release and that he wished to undergo the procedure.

On April 22, 1999, an order was rendered with respect to all contested issues except the extent and duration of disability and apportionment, as did a corrected opinion and order of June 16, 1999. The parties stipulated that the employer received due and timely notice, and they agreed that the period of limitations began when the disabling reality of the claimant's injury became manifest. Rockway v. Rockwell International, Ky. App., 907 S.W.2d 166 (1995); Randall Co. v. Pendland, Ky., Ky. App., 770 S.W.2d 687 (1988). Pointing to evidence that the claimant began to experience symptoms, that he was diagnosed with carpal tunnel syndrome early in 1994, and that surgery was recommended at that time, the employer asserted that the period of limitations began to run in 1994. The ALJ determined, however, that the manifestation of disability occurred no earlier than May 22, 1996, when the claimant came under the care of Dr. Wolff, and that the condition was work-related. The ALJ also determined that the proposed surgery was reasonable and necessary and ordered counsel to notify the other parties and ALJ when a date for the procedure was set. Ordering the employer, as insured by AIK, to pay TTD benefits from the date that the claimant was hospitalized for surgery until the entry of a further order, the ALJ noted that any party could move for the termination of TTD when the claimant reached maximum medical improvement (MMI) or returned to work or upon a showing of other good cause. On the ALJ's own motion, the questions concerning the extent and duration of disability and Special Fund apportionment were placed in abeyance until the claimant reached MMI.

Despite his symptoms, the claimant continued working until May 12, 1999, when he elected to retire at age 62. He underwent a right carpal tunnel release on July 9, 1999, and was released to return to regular duty on July 26, 1999. AIK paid TTD and medical benefits during that period.

After the ALJ entered the initial decision, that the manifestation of disability occurred no earlier than May 22, 1996, this Court rendered decisions in Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999), and Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999). In Alcan Foil Products v. Huff, we determined that it is the manifestation of a work-related injury that triggers the notice obligation and period of limitations. We explained in Special Fund v. Clark that if a claim was not filed within the applicable two-year period, only disability due to trauma incurred within two years before the filing of a claim remained compensable.

On January 10, 2000, the ALJ removed the claim from abeyance and scheduled the taking of further proof. On March 31, 2000, the claimant moved to amend his Form 101 to allege a second manifestation date of May, 1998, and to join Claredon as a defendant. He was permitted to do so, and the parties were given additional time for taking proof. The res judicata effect of the previous decision, the apportionment of disability between the two alleged injuries, and liability for future medical expenses were among the contested issues.

The ALJ rendered a supplemental opinion and order on July 10, 2001, and determined that CR 54.02 permitted a revision of the previous conclusions of law. Noting the claimant's testimony that he was informed his condition was work-related in 1994, the ALJ determined that the original claim was barred by limitations under Alcan Foil Products v. Huff, supra. The ALJ noted the claimant's credible testimony that his symptoms worsened between 1996 and 1999. Nonetheless, absent evidence that a portion of his impairment was attributable to the final period of employment or evidence of a change in his work activities or restrictions, the ALJ concluded that there was no

basis to determine that part of his disability remained compensable under Special Fund v. Clark, supra.

Among other things, the claimant's petition for reconsideration noted that the interlocutory order directed AIK to pay TTD benefits relative to the surgery to his right arm but that the supplemental opinion and order did not award those benefits. Hence, he requested such an award. AIK objected to the petition on the ground that the claim was barred by limitations and requested an order directing the claimant to repay not only the TTD benefits but the medical benefits as well. The petition was overruled.

The claimant asserts that the ALJ erred by finding that the initial claim was barred by limitations. He argues that although the physicians at Occupational Physician Services diagnosed carpal tunnel syndrome on the left side, Dr. Diamond imposed no work restrictions and recommended no treatment. Furthermore, although the employer knew of his diagnosis, it did nothing to minimize further trauma. He concludes, therefore, that under Toyota Motor Manufacturing, Kentucky, Inc. v. Czarnecki, Ky. App., 41 S.W.3d 868, 872 (2001), the employer was barred from asserting a limitations defense. We note, however, that this was not a case where the worker was informed by the employer's health department that work was not causing injury and that any condition had resolved and was not progressing. Id. at 871-72. Even if we were to equate the referral to Occupational Physician Services to Toyota's requirement that employees see its Industrial Health Services Department for all occupational health problems, there is no indication that either Dr. Weston or Dr. Diamond led the claimant to believe that his carpal tunnel syndrome was not work-related, that it had resolved, or that it was not progressing. Furthermore, the records from Dr. Wolff that are in evidence specifically indicate that he permitted the claimant to perform regular work up

until the initial surgery. He restricted the claimant for a brief period thereafter but then released him to regular duty. We conclude, therefore, that the claimant has pointed to nothing to require tolling the period of limitations under Czarnecki.

The claimant asserts that because the right arm condition did not become symptomatic before May, 1996, the manifestation of that portion of his injury could not have occurred in 1994. He also argues that because the condition was not symptomatic and did not require medical treatment in 1994, it would not have been compensable at that time. Therefore, there was no basis to file a claim before May, 1996.

As we explained in Alcan Foil Products v. Huff, supra, KRS 342.185 runs the period of limitations for a work-related injury for two years after the date of accident. Yet, when an injury results from the effect of multiple incidents of mini-trauma, the harmful change occurs so gradually that it is the onset of disabling symptoms that leads a worker to discover that he has sustained such an injury. Applying a rule of discovery, we concluded that the period of limitations for a gradual injury began to run when the worker was informed that he sustained a work-related injury. Although the claimant sought treatment in 1994 for numbness in his left arm and hand, testing performed at that time indicated that he suffered from moderately severe bilateral carpal tunnel syndrome that was worse on the left side. The claimant admitted that Dr. Zukof informed him of his diagnosis and its cause, and he has not denied being told that both arms were affected. Furthermore, in May, 1996, he gave Dr. Wolff a history of bilateral numbness and tingling for the previous three years. Under those circumstances, the evidence did not compel a finding that the period of limitations for the right arm injury began in 1996, rather than 1994.

The claimant also maintains that because the employer had notice of his condition from the outset and failed to take action to minimize further harm, it was not prejudiced by his failure to file a claim before he did. He asserts that the employer should not benefit from the delay at his expense but cites no authority for the proposition that an employer's failure to take action to mitigate further injury warrants tolling the period of limitations. We do not find this argument to be convincing.

In instances where the period of limitations has run with respect to an initial claim for a gradual injury, Special Fund v. Clark, supra, permits compensation for whatever portion of the worker's disability is due to trauma incurred no more than two years before a claim is filed. The claimant continued to perform his usual work until nearly a year after he filed his claim. Asserting that there was no evidence of symptoms in his right arm and hand before May, 1996, he maintains that the evidence compelled a finding that at least a portion of his disability was due to trauma incurred no more than two years before his claim was filed, i.e., to trauma incurred after May 20, 1996. In support of this assertion, he points to evidence, beginning in May, 1996, of constant pain, weakness, an inability to sleep, atrophy, the need for surgery in 1998 and 1999, and the assignment of an AMA impairment following the surgeries. He maintains that, in any event, he was entitled to an award of medical benefits for the treatment of harmful changes due to trauma incurred after May 20, 1996.

It was the claimant's burden to prove that part of his disability was due to trauma incurred after May 20, 1996. Although noting the evidence of increased symptoms between 1996 and 1999, the ALJ pointed out that there was no evidence a portion of the claimant's impairment was attributable to the final period of employment and no evidence of a change in his work activities or restrictions. Thus, the ALJ found no basis

to determine that part of his disability remained compensable. Although a worsening of the claimant's symptoms was some evidence that part of his ultimate disability was due to trauma incurred after May 20, 1996, we are not persuaded that it compelled such a finding under the circumstances.

The supplemental opinion and order did not address whether trauma incurred after May 20, 1996, caused harmful changes that contributed to the need for medical treatment. Yet, the claimant's petition for reconsideration requested only an award of TTD benefits. Therefore, questions concerning his entitlement to medical benefits are not preserved for review.

The decision of the Court of Appeals is affirmed.

All concur.

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