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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: August 26, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0587-WC

DATE 9-16-04 ElaGrowth, D.C.

PERDUE FARMS, INC. — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-1169-WC
WORKERS' COMPENSATION BOARD NO. 01-0174

FRED M. MAYES; HON. RICHARD CAMPBELL, ADMINISTRATIVE LAW JUDGE; HON. SHEILA LOWTHER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant's application for benefits was timely and awarded income benefits based upon a 13.6% AMA impairment due to an occupational hearing loss. KRS 342.730(1)(b); KRS 342.7305. The decision was later affirmed by the Workers' Compensation Board (Board) and the Court of Appeals. Nonetheless, the employer continues to maintain that the decision was erroneous for two reasons. First, it failed to consider whether the claimant should have known as early as 1996 that his hearing loss was work-related and, second, it failed to exclude impairment that existed in 1996 when calculating the claimant's income benefit. We affirm on both issues.

The claimant was born in 1937 and earned both a bachelor's degree in accounting and an associate's degree in mining technology. His work experience

included nearly 20 years of accounting and managerial work at a lighting fixtures factory as well as 19 years of supervisory and managerial work with a company that was involved in underground coal mining. The claimant later testified that he worked underground three to four days weekly and that, at times, he was exposed to some degree of loud noise. He stated that, in 1990, he began to experience difficulty hearing and sought medical attention. Audiological testing revealed a diminished hearing capacity at high pitches, and Dr. Logan recommended hearing aids. The claimant testified that Dr. Logan did not attribute the hearing loss to his work and that he did not have any idea it was caused by his work.

On October 31, 1995, the claimant began working as an area supervisor at the defendant-employer's poultry processing plant, where he spent 90% of his time working on the production floor. Nothing indicated that he underwent a pre-employment physical. There was evidence that the company required all employees to undergo annual hearing tests and that the claimant underwent the first such test on May 15, 1996. At the time, he had rated his own hearing as "fair." He was notified that he had a substantial hearing loss in both ears.

The claimant testified that his hearing continued to deteriorate and that his loss of the ability to discriminate between and among sounds caused him to make "minor mistakes on orders." Eventually, he became unable to conduct telephone conversations or to receive communications accurately unless they were in writing. On March 6, 2000, he saw Dr. Dave, an otolaryngologist, who diagnosed a mild to severe neurosensory hearing loss that probably was due to noise-induced trauma. He recommended both hearing protection and the use of hearing aids. After the visit with Dr. Dave, the claimant informed the company nurse.

The claimant testified that he knew he was losing his hearing in 1990. He stated, however, that he first learned of the connection between his work-related noise exposure and hearing loss from Dr. Dave in March, 2000. He testified that he elected to retire early, on June 30, 2000, due to the impact of the condition on his job performance. On July 14, 2000, he informed his employer that he intended to file a workers' compensation claim and to allege a hearing loss due to noise exposure in the employment. He filed the claim in February, 2001, and underwent the required university evaluation. KRS 342.315(1); KRS 342.7305(3); 803 KAR 25:010E, § 8(1).

In a September 7, 2000, letter to claimant's counsel, Dr. Dave stated that the hearing loss measured in March, 2000, equaled a 12.5% AMA impairment. He advised the claimant to avoid further unprotected exposure to noise rather than risk losing what hearing he had left. When deposed in May, 2001, Dr. Dave attributed the claimant's hearing loss to his exposure to loud noise in both the poultry processing plant and the underground coal mining industry. Presented with the claimant's 1996 hearing test results, Dr. Dave testified that they represented a 9% AMA impairment.

Dr. Windmill, an audiologist, and Dr. Nissen, an otolaryngologist, conducted the university evaluation. Dr. Windmill assigned a 17% AMA impairment, attributing a 13.6% impairment (80% of the total) to hazardous noise exposure in the workplace and a 3.4% impairment (20% of the total) to the natural aging process. In his opinion, the claimant no longer retained the physical capacity to return to the work he last performed. Like Dr. Dave, Dr. Windmill indicated that the claimant's impairment in 1996 would have been 9%. Dr. Nissen reported a bilateral sensorineural hearing loss, worse on the left side. Like Dr. Dave, he attributed the condition to work-related noise

exposure, advised the claimant to avoid further noise exposure, and prescribed hearing aids.

Convinced that the claimant had developed a work-related hearing loss that accounted for at least an 8% whole-body impairment, the ALJ determined that he was entitled to an award as provided by KRS 342.7305. Deeming the condition to be a cumulative trauma injury and noting the absence of any evidence that the claimant knew the condition was due to his work before March 6, 2000, the ALJ determined that the entire claim was timely and that no pre-existing disability need be excluded. Based upon Dr. Windmill's testimony, the ALJ enhanced the award under KRS 342.730(1)(c)1.

The claimant denied knowing that work caused his hearing loss before Dr. Dave informed him in March, 2000. The employer maintains, however, that "there was evidence, albeit circumstantial, that [the claimant] was aware that his problems in 1996 were the result of noise exposure." It asserts that the ALJ erred by stating that there was no evidence that the claimant knew the cause of his condition until March, 2000, and by failing to consider whether he should have known that work-related noise exposure was the cause of his condition in 1996.

In support of the argument, the employer relies on its April 10, 2001, deposition of the claimant. At that time, he testified that the employer conducted hearing tests "about every year." Asked why that was done, he testified that "they have equipment, and they know they have high noise problems in the plant." He testified that employees were told at orientation that the equipment "generated noises up to, I think, 9.6 decibels or ninety-six, whatever that--however that is." Asked what he was told after the 1996 test, he stated, "They didn't do much telling." He explained that he received a postcard or similar notice that he had a substantial hearing loss but was not called in to discuss

the test results. The claimant testified that the plant was extremely noisy at all times, that hearing protection was both provided and required, and that workers who failed to use it were disciplined.

In Alcan Foil Products v. Huff, 2 S.W.3d 96 (1999), we determined that the period of limitations with respect to a claim for the harmful effects of repetitive trauma begins to run when the worker knows that he has sustained a work-related injury even though he is able to continue working thereafter. In Alcan, the workers knew of their noise-induced hearing loss and knew that it was work-related more than two years before they filed their claims. They continued working for a number of years after acquiring that knowledge, and there was no evidence that their condition worsened in the two-year period before they filed their claims. We concluded, therefore, that KRS 342.185 barred their entire claims.

Shortly thereafter, in Special Fund v. Clark, Ky., 998 S.W.2d 487, 490 (1999), we explained that if an individual continued to work after discovering the existence of a work-related gradual injury, KRS 342.185 barred compensation for disability that was attributable to trauma incurred more than two years before a claim was filed. Although it was apparent that the worker experienced disabling symptoms many years before he filed his claim, it was unclear when he became aware that work contributed to the development of the degenerative condition in his knees. For that reason, we remanded the matter for further consideration and a finding on the matter.

In Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503 (2001), we determined that the worker was not required to self-diagnose the cause of his symptoms as being a gradual, work-related injury as opposed to a single traumatic event. We concluded, therefore, that he was not required to give notice of a work-related gradual injury until he was

informed by a physician that he had sustained such an injury. The employer distinguishes Hill on the ground that it concerned the notice requirement rather than limitations. Although acknowledging that Dr. Dave did not inform the claimant of the cause of his symptoms until March, 2000, it maintains that he "should have known" the cause of his hearing loss in 1996 and, therefore, that the period of limitations for the effects of previous trauma began to run at that time. Couch v. Holland, Ky. App., 385 S.W.2d 204 (1964). We disagree.

As Dr. Windmill's testimony in this case demonstrates, age and factors other than a repetitive exposure to loud noise may cause a hearing loss. Although the claimant testified that the plant was always noisy, he also testified that the employer required workers to wear hearing protection, and there was no evidence that he failed to comply with that requirement. Under the circumstances, we are not persuaded that it would be obvious to a layperson that his exposure to workplace noise was the cause of his hearing loss. The claimant testified that Dr. Dave was the first physician to inform him that his hearing loss was work-related and that he did not know the cause of his condition until then. The ALJ believed him and determined that the injury became manifest at that time. Having reviewed the evidence, we are not persuaded that the ALJ misconstrued the applicable law or that the evidence compelled a different finding.

The claimant began working for the defendant-employer on October 31, 1995. No pre-employment testing established his AMA impairment at that time, but in May, 1996, testing revealed a hearing loss that equated to a 9% AMA impairment. No evidence established whether all or only part of that percentage was work-related. In 2000, after four years' additional exposure, Dr. Windmill assigned a 17% impairment, 80% of which (i.e., a 13.6% impairment) was work-related. The employer argues that

the 9% impairment that existed in May, 1996, represented a pre-existing, active disability. It complains that it is being held responsible for pre-existing disability and "for losses that occurred outside the statute of limitations." Therefore, a 9% impairment must be deducted when calculating the claimant's partial disability award. Again, we disagree.

KRS 342.7305(2) provides that income benefits are not payable until the worker's AMA impairment is at least 8%, and KRS 342.7305(4) imposes liability for income benefits on "the employer with whom the employee was last injuriously exposed to hazardous noise." It is apparent, therefore, that an employer may be held liable for impairment due to trauma incurred in a previous employment. The claimant's work-related injury did not become manifest until March 6, 2000, at which point a claim arose for whatever hearing loss was due to previous, work-related trauma. For that reason, regardless of whether a work-related impairment was present in 1996, no portion of the impairment represented a noncompensable, pre-existing disability. Even if a portion of the work-related impairment had been shown to be attributable to the previous employment, the defendant-employer was properly held liable for the entire claim because the last injurious exposure occurred while in its employ. Furthermore, because the claim was filed within two years after March 6, 2000, no portion of it was barred by limitations. All of the work-related impairment was properly considered when calculating the award.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

John C. Morton
Samuel J. Bach
Allison Bowers Rust
Morton & Bach
P.O. Box 883
Henderson, KY 42419-0883

COUNSEL FOR APPELLEE:

Ronald K. Bruce
111 O'Bryan Street
Greenville, KY 42345