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RENDERED: August 26, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0745-WC

DATE 9-16-04 ELLA G. GRAY, D.C.

MID-SOUTH ELECTRONICS, INC.

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2003-CA-0150-WC
WORKERS' COMPENSATION BOARD NO. 01-0740

WILMA LEE COMBS; HON. ROGER D. RIGGS,
ADMINISTRATIVE LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Reversing a decision of the Workers' Compensation Board (Board), the Court of Appeals determined that the Administrative Law Judge (ALJ) applied the correct legal standard when finding the date upon which the claimant's cervical injury became manifest. Noting that she filed her claim within two years after she was informed of a work-related cervical injury, the Court concluded that regardless of whether the claim for right arm and shoulder injuries was largely time-barred, the entire claim for the cervical injury was timely. We affirm.

On March 18, 1993, the claimant began working on the employer's assembly line. She testified that the work required repetitive bending, lifting, stooping, and twisting, and the company's human resources director acknowledged as much. The claimant testified that she had no difficulties with her arms or shoulders before 1993, when she began working with vibratory tools, including a screwdriver. In 1993, she

developed tendonitis in her right wrist and shoulder, which she attributed to her use of a screwdriver while working. She testified that her physician put her on light duty work and told her that the condition was work-related. The claimant described an incident that occurred in June, 1998, when she felt that her right arm “was going out” while using a paint gun. Like the tendonitis, she attributed the incident to the constant use of her shoulder in her work.

In June, 2000, the claimant developed severe headaches and pain in her neck in addition to the ongoing right arm and shoulder pain. The employer acknowledged that she missed no significant amount of work from any of her conditions until June 26, 2000, at which point her physician took her off work and kept her off work until October 6, 2000. The claimant testified that on October 8, 2000, her conditions were aggravated while she was working with her left hand while her right arm was in a sling. She last worked on October 11, 2000. On June 6, 2001, she filed a claim in which she alleged repetitive trauma injuries to her back, neck, and right shoulder and arm. She listed October 8, 2000, as the date of injury.

Dr. Downey began treating the claimant on October 1, 1998, for chronic right shoulder pain. When deposed, he testified that he diagnosed work-related bursitis but didn't remember whether he informed the claimant that the condition was work-related. He testified that although there was evidence of diffuse tenderness in neck, the claimant did not complain of neck pain at that time. She saw Dr. Downey and his partner, Dr. Hays, on numerous occasions over the next two years for complaints of right shoulder pain. The pain eventually extended to the arm and wrist and began to include bicep pain. Over time, there were signs of an increasingly severe impingement in the right shoulder, and Dr. Downey continued to attribute the arm and shoulder problems to

bursitis that was aggravated by the claimant's work, a diagnosis that remained unchanged as of his 2001 deposition. Treatment notes indicate that on June 9, 2000, the claimant complained of severe headaches, with nausea, vomiting, and neck pain as well as a worsening of the ongoing arm and shoulder difficulties. On June 13, 2000, she returned with a severe shoulder impingement and also with severe pain that involved her neck and the back of her head. She was taken off work. A subsequent MRI revealed spurring of the cervical spine, leading to additional diagnoses of arthritis and cervical strain on August 2, 2000. On October 11, 2000, the claimant continued to complain of pain and stiffness in the neck and right arm. Convinced that the arthritis and bursitis were aggravated by the claimant's work, Dr. Hays recommended light-duty work that was not on an assembly line.

Dr. Gilbert, a neurosurgeon, saw the claimant on referral from Dr. Downey on April 18 and May 21, 2001. He examined the claimant and reviewed both her history and the results of the August, 2000, MRI before diagnosing cervical strain, aggravation of cervical kyphosis, cervical nerve root injury syndrome, cervical muscle spasms, numbness, tingling, and neck pain. Dr. Gilbert attributed the conditions entirely to her work. He assigned a 22% AMA impairment to the cervical conditions and restricted the claimant from lifting more than 10-20 pounds; from bending, stooping, crawling, or crouching; from standing or sitting for more than 30 minutes; and from operating machinery. In his opinion, she did not retain the physical capacity to return to the work that she performed at the time of injury.

Dr. Goldman evaluated the claimant on September 4, 2001. In his opinion, she had a full range of motion with normal reflexes and motor functioning of the cervical spine. Furthermore, MRI revealed no remarkable basis for her symptoms. Dr.

Goldman assigned a 0% impairment, noting that she had a full range of motion in the shoulder and no quantifiable loss of strength. In his opinion, she was magnifying her symptoms and could return to light-duty work with lifting of 20-25 pounds and repetitive activity involving 10-15 pounds. He thought that she could return to her regular duties in two to four weeks.

When the claim was heard, notice and limitations, causation, and extent and duration of disability were among the contested issues. Noting that the employer was aware from the outset that the claimant's work contributed to her symptoms, the ALJ concluded that the employer received timely notice and that the claim was timely filed. As corrected on reconsideration, the ALJ awarded temporary total disability benefits from June 26 to October 6, 2000. This was followed by an award of permanent partial disability that relied upon Dr. Gilbert in finding that the claimant had a 22% impairment and was unable to return to the work she performed at the time of injury.

Appealing, the employer maintained that the claimant knew of her injury in 1993 and knew it was work-related; therefore, the injury became manifest in 1993 and was time-barred. The Board reversed on the ground that the ALJ failed to specify the date of injury and remanded the claim for further consideration. On remand, the ALJ summarized the course of treatment that Dr. Downey provided for arm and shoulder pain that he attributed to bursitis. The ALJ emphasized, however, that the claimant experienced new symptoms in June, 2000. The presence of a new work-related injury manifested on August 2, 2000, when cervical spurring was confirmed by MRI, and the claimant was diagnosed with cervical strain and arthritis. She eventually quit work due to those conditions. Again, the employer appealed.

Concluding that the ALJ erred by using the standard set forth in Randall Co. v. Pendland, Ky. App., 770 S.W.2d 687 (1989), rather than in Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999), and its progeny, the Board reversed and remanded again. Appealing, the claimant conceded that the arm and shoulder claim were barred by limitations. She asserted, however, that the cervical injury and arthritis did not manifest until June 2000, and that her claim was timely with respect to those conditions. Convinced that the ALJ applied the correct legal standard and that the findings under that standard were supported by substantial evidence, the Court of Appeals directed the Board to reinstate the award. This appeal by the employer followed.

The employer continues to maintain that the ALJ failed to consider evidence that the claimant knew of her neck injury and knew that it was work-related long before August, 2000. Contrary to the employer's assertion, the ALJ noted on remand that the claimant's October 1, 1998, complaints to Dr. Downey included some tenderness in her neck. Dr. Downey testified, however, that she sought treatment for right shoulder pain and did not complain of neck pain. His treatment notes indicated that it was not until the summer of 2000 that she began to complain of neck pain and was diagnosed with a cervical strain and arthritis.

According to the employer, the claimant's deposition indicates that she was asked, "And the problems that you're telling us about, the right shoulder, neck, back, and so forth, they basically have been continuous since 1993, is that correct?" She responded, "Correct." The employer also notes the claimant's testimony that she was placed on certain work restrictions in 1993 and her testimony that she knew her condition was work-related in 1993. Based on that testimony, the employer asserts that "these judicial admissions establish that the manifestation of disability was in 1993.

Nolin Production Credit Association v. Canmer Deposit Bank, Ky. App., 726 S.W.2d 693 (1986).” We note, however, that the employer has failed to take into account the medical evidence, including Dr. Downey’s testimony and treatment notes concerning the claimant’s cervical condition. Having done so, we are not persuaded that the testimony on which the employer relies is of such a nature as to compel a finding that the claimant’s cervical injury became manifest before August, 2000. Sutherland v. Davis, Ky., 286 Ky. 743, 151 S.W.2d 1021, 1024 (1941), citing Harlow v. Leclair, 82 N.H. 506, 136 A. 128, 131 (1927); see also Robert G. Lawson, Kentucky Evidence Law Handbook § 8.15 (2003).

As noted by the Court of Appeals, the ALJ explained, correctly, that the manifestation of a gradual injury occurs when the worker becomes aware of the injury and knows that it is caused by work. The medical evidence indicated that the claimant’s only work-related diagnosis before August 2, 2000, was chronic bursitis in her right arm and shoulder. On August 2, 2000, she was diagnosed with a work-related cervical strain and arthritis following an MRI. Although the claimant’s bursitis and her cervical spine injury were due to work-related repetitive trauma, the ALJ determined that the cervical condition represented a separate injury that became manifest in August, 2000. Under the circumstances, substantial evidence supported the conclusion that none of the claim for the cervical injury was barred by limitations.

The decision of the Court of Appeals is affirmed.

All concur.

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