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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: OCTOBER 21, 2004
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2003-SC-1060-WC

DATE 11-11-04 Ella Grauth, D.C.

HUSKY COAL COMPANY — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-1301-WC
WORKERS' COMPENSATION BOARD NO. 02-1091

DALE RATLIFF; HON. KEVIN KING
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant knew he had sustained a work-related gradual injury more than two years before he filed an application for benefits and, therefore, that the claim was untimely. Although the Workers' Compensation Board (Board) affirmed, the Court of Appeals concluded that the finding was erroneous as a matter of law, reversed the Board, and remanded the matter to the ALJ for a consideration of the merits. We affirm.

The claimant was born in 1965. He had a twelfth-grade education and vocational training in auto mechanics and mine engineering. He had worked as an automobile mechanic, general laborer, truck driver, and coal miner. In 1995, he began working for the defendant-employer as an outside mechanic and general laborer. He testified that his duties included shoveling the belt line, loading supplies, and servicing equipment. They required extensive use of his hands to push, pull, turn, twist, lift, and carry. While shoveling the belt line, he used a No. 4 coal shovel that weighed approximately 30

pounds. He was often required to load large quantities of 17-pound cinder blocks, sometimes as many as 720 blocks in a day. He also loaded 50-pound bags of rock dust, 180 bags at a time. As a mechanic, he used his arms repetitively, often working overhead and holding up a heavy piece of equipment while bolting or screwing it into place.

Sometime in 1996, the claimant began to experience arm and hand symptoms that worsened gradually over time. In September, 2001, Dr. Webb diagnosed bilateral carpal tunnel syndrome and informed the claimant that it was due to his work. The claimant notified his employer of the diagnosis shortly thereafter. Due to a general layoff and the effects of a non-work-related heart condition, the claimant last worked on January 4, 2002. On July 24, 2002, he filed an application for workers' compensation benefits, alleging bilateral carpal tunnel syndrome due to the repetitive use of his hands on January 4, 2002. He later testified that he did not think he could return to his job because of his weakened grip strength, regardless of his heart condition.

Dr. Templin evaluated the claimant on July 11, 2002, at the request of his attorney, and prepared a report. It indicates that the claimant related a history of arm and hand symptoms since 1996, at which time Dr. King diagnosed carpal tunnel syndrome. The claimant was determined to avoid surgery if possible and continued working. His symptoms worsened slowly but progressively, and eventually he became concerned about the intensity of his symptoms and loss of strength. When he began to drop objects, he sought treatment from Dr. Webb who confirmed the diagnosis of carpal tunnel syndrome. Dr. Templin noted that the claimant still desired to avoid surgery and was taking Celebrex and anti-inflammatory medication. Dr. Templin diagnosed bilateral upper extremity overuse syndrome and carpal tunnel syndrome that accounted for a

16% AMA impairment. He attributed the conditions to the effects of cumulative trauma, imposed extensive restrictions due to the injury, and indicated that the claimant did not retain the physical capacity to return to his previous work.

When deposed, Dr. Templin testified that he did not review any of the claimant's medical records. He stated, however, that it was his understanding that the claimant saw Dr. King and was diagnosed with carpal tunnel syndrome in 1996. It was also his understanding that surgery was discussed at the time, but the claimant wanted to avoid it.

The employer submitted a report from Dr. Kriss, who evaluated the claimant on October 25, 2002, and reviewed medical records from Drs. Templin and Webb as well as records from Dr. Cross, the claimant's cardiologist. Like Dr. Templin, he received a history indicating that the claimant was diagnosed with bilateral carpal tunnel syndrome in 1996. He stated that the claimant had an "unusually physically demanding job" that required extensive repetitive hand motion and noted that his symptoms began in 1996 "in association with use of his hands at work." Dr. Kriss diagnosed severe bilateral carpal tunnel syndrome and assigned a 14% AMA impairment. He apportioned one-third of the impairment to the arousal of pre-existing dormant processes and two-thirds to the claimant's work.

At the hearing, the claimant testified that he began to experience pain and numbness that extended from his hands to his elbows in 1996 and that it gradually worsened. He stated that he did not know what was causing his symptoms until Dr. Webb diagnosed carpal tunnel syndrome in September, 2001, and informed him that it was work-related. He then reported the diagnosis to his employer. When cross-examined, he asserted that he was not diagnosed with carpal tunnel syndrome in 1996

and insisted that he was not treated for hand or wrist symptoms by Dr. King, who was his family physician at the time. Asked again whether he was denying that Dr. King treated his hands in 1996, he replied, "Yes."

Whether the claim was filed within the applicable period of limitations remained at issue when the claim was decided. Thus, the ALJ noted that the primary issue to be resolved was the date of injury. The ALJ's analysis of the issue was as follows:

> This claim boils down to the question of when Ratliff knew he had suffered a work-related injury. Ratliff argues that occurred, at the earliest, when Dr. Webb made the diagnosis of carpal tunnel syndrome and informed Ratliff that the condition was work related in September of 2001. On the other hand, Husky argues that occurred in 1996 when Ratliff began to experience symptoms and when, at least according to Dr. Templin, Dr. King made a diagnosis of bilateral carpal tunnel syndrome.
>
> Unfortunately for Ratliff, the [ALJ] believes that the date of injury was sometime in 1996. In doing so, the [ALJ] notes that, although Ratliff denied receiving a diagnosis of carpal tunnel syndrome from Dr. King, Dr. Templin's history reflects such a diagnosis. If Dr. Templin did not obtain that information from Ratliff, where did he get it? Furthermore, the [ALJ] notes that Ratliff testified that he began to experience symptoms while working in 1996 and that those symptoms progressively worsened. Clearly, this should have [led] Ratliff to conclude that his condition was related to work activity. While the [ALJ] recognizes that Ratliff is not a physician and that Ratliff is not required to self-diagnose, Ratliff has some responsibility to be aware of his physical condition.
>
> Finally, the [ALJ] notes Ratliff's argument that Husky stipulated to notice. The [ALJ] finds that Husky stipulated that, if the injury occurred on January 4, 2002, Ratliff gave timely notice. However, whether Ratliff gave due and timely notice of a 1996 injury is irrelevant in light of Ratliff's failure to file his claim within 2 years of the date of injury. Therefore, Ratliff's claim must be dismissed.[1]

[1] There was no evidence that a specific portion of the impairment was due to trauma incurred in the two-year period before the claim was filed, and the claimant raised no argument under Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999), that at least a portion of the claim remained compensable.

Under the version of KRS 342.0011(1) that pertains to this claim, an injury is a work-related traumatic event that causes a harmful change in the human organism. KRS 342.185 provides a period of limitations for a work-related injury that runs for two years after the date of the accident that causes it. In Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96, 99, 101 (1999), we noted that "the entitlement to workers' compensation benefits stems from the fact that an occupational injury has been sustained" and "begins when a work-related injury is sustained, regardless of whether it is occupationally disabling." Nonetheless, because gradual injuries often occur imperceptibly, we reaffirmed the principle that a rule of discovery governs the notice and limitations requirements for such injuries. We determined that the obligation to give notice and the period of limitations for a gradual injury are triggered by a worker's knowledge of the harmful change and its cause, regardless of whether the individual continues to work.

In Alcan, the workers knew of their hearing loss and knew it was work-related more than two years before they filed their claims. Although they continued to work and to be exposed to harmful noise thereafter, there was no evidence that part of their disability was attributable to trauma incurred within two years before their claims were filed. We concluded, therefore, that the claims were entirely barred by limitations. The principles that Alcan addressed were refined in a number of subsequent cases.

In Holbrook v. Lexmark International Group, Inc., Ky., 65 S.W.3d 908 (2001), we determined that notice and limitations were triggered by the requisite knowledge even if the worker's symptoms later subsided. In Special Fund v. Clark, supra, we determined that if a worker's injury became manifest more than two years before a claim was filed, the worker was entitled to benefits for harmful changes due to trauma incurred within the two-year period before the claim was filed. In Hill v. Sextet Mining Corp., Ky., 65

S.W.3d 503 (2001), we determined that causation was a matter to be proved by expert medical testimony; therefore, the worker was not required to self-diagnose the cause of a harmful change as being a work-related gradual injury for the purpose of KRS 342.185. Although Hill concerned whether a worker who gave timely notice of specific incidents of trauma gave timely notice of the gradual injury that resulted, the principle for which it stands is not confined to those facts.

Although the claimant acknowledged that his symptoms began in 1996 while he was working and worsened thereafter, he denied seeking treatment from Dr. King or being diagnosed with carpal tunnel syndrome at that time. He was adamant that he did not receive a diagnosis or learn that his symptoms were work-related until Dr. Webb told him in 2001. Dr. King's medical records were not introduced, and Dr. Templin did not review them. He testified, however, that the claimant related a history including a diagnosis of carpal tunnel syndrome by Dr. King in 1996. Nothing in his report or deposition indicates that the claimant was informed before 2001 that the condition was caused by his work.

As the finder of fact, the ALJ weighed the conflicting evidence, drew reasonable inferences from it, assessed the credibility of witnesses, and reasonably concluded that the claimant was diagnosed with bilateral carpal tunnel syndrome in 1996 despite his testimony to the contrary. But a diagnosis, by itself, does not trigger the notice and limitations requirements nor does the date when the worker reasonably should have known the cause of his symptoms. Under Hill, supra, a work-related gradual injury becomes manifest for the purpose of KRS 342.185 when a physician informs the worker that he has sustained such an injury.

The claimant testified that Dr. Webb informed him his symptoms were due to a work-related injury in September, 2001, and that she was the first physician to do so. The record contains no evidence to the contrary. Under the circumstances, the evidence compelled a finding that the claim, which was filed on July 23, 2002, was timely.

The decision of the Court of Appeals is affirmed, and the claim is remanded to the ALJ for a consideration of the merits.

All concur.

COUNSEL FOR APPELLANT:

Kamp T. Purdy
Ferreri & Fogle
300 East Main, Ste. 500
Lexington, KY 40507

COUNSEL FOR APPELLEE:

Robert J. Greene
Kelsey E. Friend Law Firm
Pauley Building, 2nd Floor
P.O. Box 512
Pikeville, KY 41502