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RENDERED: August 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0944-WC

DATE 9-15-05 ELAGrowth P.C.

DANA CORPORATION — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-1241-WC
WORKERS' COMPENSATION BOARD NO. 01-88960

BEVERLY DIANE LOVE; HON. R. SCOTT BORDERS, 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 and that her application for benefits was timely because it was filed within two years after physicians informed her that her degenerative lumbar condition and neck and upper extremity condition were caused by repetitive trauma in her work. The Workers' Compensation Board (Board) and the Court of Appeals affirmed. Although the employer continues to assert that the lumbar claim was untimely, we affirm.

The claimant was born in 1950 and has a twelfth-grade education. She entered the labor market in 1972 with no specialized or vocational training. Her work history included various jobs that required prolonged sitting or standing and the repetitive use of her arms and hands.

In September, 1992, the claimant began working for the defendant-employer as a riveter, attaching brake pads to brake shoes. She described the work as being very

physically demanding. It required her to lift 45 to 50 pounds about 40 to 50 times per hour. She performed this job for about six years, often working overtime. Her next job was to operate a welding machine to weld brakes. It required her to lift 15-pound parts about 500 times per eight-hour shift. Again, she often worked overtime.

In August, 1999, the claimant began to experience symptoms in her hip and right leg. At about the same time, she bid on and received a job as a de-burr operator. She later admitted that she transferred to the job, thinking that it was less demanding and "would be better for me, physically." Her symptoms persisted, however, so in October, 1999, she sought treatment from Dr. Lessenberry. Initially, he diagnosed a pinched nerve and prescribed anti-inflammatory and pain medication, which helped for a while. The claimant testified that in February, 2000, she discussed her symptoms with Zena Carroll, the company nurse. At that time, Dr. Lessenberry had reviewed the results of an MRI and recommended epidural injections. Also in February, 2000, her family physician, Dr. Reddy, took her off work for six days and placed her in physical therapy. Her condition improved with the therapy, and she returned to work. In September, 2000, she was transferred to the brake assembly line due to layoffs, her symptoms increased, and she began to miss work. In October, 2000, she began to experience symptoms in her neck, which gradually became more severe and affected her shoulders, arms, and hands.

The claimant testified that Dr. Lessenbery was the first physician to inform her that the back condition producing her symptoms was caused by her work and that he did so on March 29, 2001. Until then, she had submitted all of her medical bills to her health insurance carrier. She stated that on April 11, 2001, she saw Dr. Wolff regarding

her neck and arm conditions, at which time he informed her that they were caused by her work. Near the end of her deposition, the following colloquy ensued:

> Q. When Dr. Lessenberry told you that these problems were work related in March of 2001 as to your low back, did you report that to anyone?
>
> A. Yes, Zena Carroll.
>
> Q. When Dr. Wolff told you that the neck and arm problems might be work related in April of 2001, did you re-report?
>
> A. Yes.
>
> Q. Who did you report that to?
>
> A. Zena Carroll.

The claimant quit working in August, 2001. The record indicates that on April 22, 2002, she filed an application for benefits in which she alleged gradual injuries of March 29, 2001, and April 11, 2001.

Testifying to her present condition at the hearing, the claimant stated that her right leg was always numb and that the right side of her back always hurt, some days worse than others. Also, she experienced pain in her neck, between her shoulders, and in her arms every day as well as numbness in her hands. She stated that her condition had improved somewhat since she stopped working.

Dr. Lessenberry's treatment notes indicate that he first saw the claimant on October 14, 1999, at which time she complained of low back pain that radiated down her right leg below the knee. She did not recall a single injury. Dr. Lessenberry attributed the symptoms to lumbar radiculopathy but did not mention causation. In January, 2000, Dr. Lessenberry ordered an MRI. His February 8, 2000, notes indicate that the test revealed a bulging at L4-5 and L5-S1, with facet changes at both levels. He recommended a series of epidural injections, but there is no indication that they

were performed. On March 29, 2001, the claimant returned, complaining of a flare-up of back pain. He noted increased symptoms with straight leg raising, weakness in the ankle reflexes on the right side, and numbness in the lateral border of the left leg. As before, his notes mentioned neither causation nor AMA impairment.

Dr. Reddy began treating the claimant for various conditions in 1996. Although the notes from February 11, 2000, indicate that Dr. Lessenberry had been treating the claimant for a bulging lumbar disc, they do not refer to causation. Nor do they indicate that the condition produced an AMA impairment.

Dr. Wolff's treatment notes indicate that he first saw the claimant on April 11, 2001, for complaints of pain and numbness in both hands and arms. In September, 2001, he diagnosed bilateral thoracic outlet compression. He could not give a specific date of injury but was of the opinion that the condition was work-related.

Dr. Majd first saw the claimant on July 13, 2001, on referral from Dr. Reddy and began treating her for intractable neck and shoulder pain. Likewise, Drs. Best and Bilkey performed their evaluations after the alleged dates of injury. Testifying for the employer, Dr. Best stated that the cervical and lumbar conditions were present before March 29, 2001, and April 11, 2001, and that there was no causal relationship between the conditions and the alleged injuries. Dr. Bilkey testified that the conditions developed gradually and were associated with performing work that was heavy in relation to the claimant's relatively small build. He assigned an 8% impairment, recommended that the claimant avoid more than light-duty work, and imposed a number of other restrictions.

Addressing the question of limitations, the ALJ determined that Dr. Wolff's testimony and the claimant's credible testimony made it clear that she was not diagnosed with work-related cervical and upper extremity problems until April, 2001.

She then informed her employer. Regarding the lumbar injury, the ALJ noted that the claimant began to notice symptoms in August, 1999, and suspected that they were work-related. Although she discussed her symptoms with the nurse in February, 2000, Dr. Lessenberry did not inform her that a work-related injury was the cause of her symptoms until March, 2001. The ALJ determined that the claimant informed her employer of her conditions once she was advised that they were work-related and also determined that the claims were timely because they were filed on April 22, 2002, which was well within two years of March and April of 2001.

After determining that the claimant had an 8% impairment and noting that Drs. Bilkey and Wolff imposed significant restrictions, the ALJ determined not only that the claimant was incapable of returning to factory work but also that she was "very limited in her intellectual, academic, and vocational abilities." On that basis, the ALJ concluded that she was totally occupationally disabled. Rejecting Dr. Best's testimony and relying on Dr. Bilkey's, the ALJ determined that the claimant had no pre-existing active disability and that all of her disability arose from the work-related cumulative trauma injuries to her back, neck, and upper extremities.

The employer's petition for reconsideration asserted, among other things, that the claimant clearly knew of her lumbar injury and knew that it was caused by her work as early as August, 1999. Thus, it was denied as being no more than a reargument of the merits. Appealing, the employer asserted to the Board that the evidence compelled a finding that the applicable date of the lumbar injury was February, 2000, when a physician first imposed restrictions and when the claimant first informed the company nurse that she was experiencing low back symptoms. On that basis, the employer maintained the lumbar injury claim was untimely because it was not filed until more than

two years later, on April 22, 2002. It has since abandoned its other argument, that the claimant was not totally disabled.

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, 2 S.W.3d 96, 99, 101 (Ky. 1999), the court 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, the court reaffirmed the principle that a rule of discovery governs the notice and limitations requirements for such injuries. The court 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 it was undisputed that they 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. The court 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., 65 S.W.3d 908 (Ky. 2001), the court determined that notice and limitations are triggered by the requisite knowledge

even if the worker's symptoms later subside. Earlier, in Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999), the court determined that if a worker's injury becomes manifest more than two years before a claim is filed, the worker is entitled to benefits for harmful changes due to trauma incurred within the two-year period before a claim is filed. In Toyota Motor Manufacturing, Kentucky, Inc. v. Czarnecki, 41 S.W.3d 868 (Ky. App. 2001), the court determined that a worker is entitled to rely on the judgment of medical experts regarding the cause and status of a condition. Finally, in Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001), the court determined that causation is a matter to be proved by expert testimony; therefore, a worker is 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. Hill concerned a worker who gave timely notice of specific incidents of trauma, became disabled, but did not give notice of the resulting gradual injury until after he received the diagnosis. Nonetheless, the principle for which it stands is not confined to those facts.

Based on the claimant's uncontradicted testimony, the ALJ determined that the date of her gradual lumbar injury was March 29, 2001, when she first learned from Dr. Lessenberry that her symptoms were caused by a work-related gradual injury. Although the finding has twice been affirmed, the employer continues to assert that the claimant informed the company nurse of lumbar symptoms in February, 2000, and knew they were work-related at that time; therefore, the evidence compelled a finding that the date of injury was February, 2000. We disagree.

Although the claimant may have associated her symptoms with her work or suspected that they were due to a work-related condition when she discussed them with the company nurse in February, 2000, she was not an expert in medical causation. Her

opinion would not have proved that the condition producing her symptoms was a work-related gradual injury. The claimant testified that Dr. Lessenberry was the first physician to inform her that the degenerative condition producing her lumbar symptoms was caused by her work and that he did so on March 29, 2001. There was no evidence to the contrary. Under the circumstances, substantial evidence supported the finding that March 29, 2001, was the applicable date of injury. It may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The employer asserts that the claimant cannot "have it both ways" by relying on February, 2000, as the date she gave notice but on March 29, 2001, as the date of her lumbar injury. We note, however, that the claimant testified to discussing her condition with the company nurse both in February, 2000, and again in March, 2001, after Dr. Lessenberry told her that her lumbar condition was caused by her work. Absent evidence to the contrary, her testimony provided substantial evidence from which the ALJ could properly conclude that "the Plaintiff, once being advised that her conditions were work related, gave notice to the Employer."

The decision of the Court of Appeals is affirmed.

All concur.

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