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NOT TO BE PUBLISHED OPINION

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RENDERED: March 22, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-0340-WC

MICHAEL JOHNSON — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-1622-WC
WORKERS' COMPENSATION NO. 03-1462 AND 98-85673

BLUEGRASS COOPERAGE
HON. LAWRENCE F. SMITH
ADMINISTRATIVE LAW JUDGE
AND WORKER COMPENSATION BOARD — APPELLEES

AND

2006-SC-0398-WC

BLUEGRASS COOPERAGE — CROSS-APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-1622-WC
WORKERS' COMPENSATION NO. 03-1462 AND 98-85673

MICHAEL JOHNSON
HON. LAWRENCE F. SMITH
ADMINISTRATIVE LAW JUDGE
AND WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

An Administrative Law Judge (ALJ) dismissed the claimant's 2001 and 2003 applications for benefits after determining that he sustained gradual, bilateral elbow injuries; that the 2003 claim involved the same left elbow injury that was alleged in 2001; and that both applications were barred by the statute of limitations. In a decision that was affirmed by the Court of Appeals, the Workers' Compensation Board (Board) vacated and remanded for further consideration of the date that the right elbow injury became manifest but affirmed otherwise. This appeal and cross-appeal followed.

We affirm in part, reverse in part, and remand for further consideration. In addition to determining the date on which the right elbow injury became manifest, the ALJ must consider the effect of work performed within the two-year period before each claim was filed. In other words, the ALJ must determine whether the claimant sustained repetitive or cumulative trauma from work performed within the two-year period before each application was filed; whether it caused a harmful change in either or both of his elbows; and whether such a change entitled him to any benefits. See Brummitt v. Southeastern Kentucky Rehabilitation Industries, 156 S.W.3d 276, 279 (Ky. 2005); Special Fund v. Clark, 998 S.W.2d 487, 490 (Ky. 1999).

The claimant began working for the defendant employer in 1977. On May 11, 2001, he filed an application for benefits (Claim No. 98-85673) that alleged two types of injuries. First, it alleged that he experienced pain his left elbow while riveting iron on December 5, 1997, and that he "injured or exacerbated the left elbow problem" on November 23, 1999. Second, it alleged that the "repetitive and/or heavy nature" of his work as well as his duties as a riveter, caused him to suffer mini-traumas, repetitive trauma, and/or cumulative trauma had resulted in injuries to both elbows. He first

sought treatment for right elbow problems in June, 1998; had right elbow surgery in September, 1998, and April, 2000; and received temporary total disability (TTD) benefits when off work. He developed subsequent left elbow problems for which he first sought treatment in November, 1998; had left elbow surgery in July, 2000; and received TTD benefits when off work.

Medical records from Caritas indicated that the claimant was treated after experiencing pain in his right elbow while carrying barrel hoops in September, 1996. Dr. Nunnelley noted that the tip of the olecranon was sore and had some swelling. He diagnosed right elbow pain with a spur. Dr. Kincaid saw the claimant on September 26, 1996, and diagnosed a right elbow spur and olecranon neuritis.

Dr. Lehmann saw the claimant on December 18, 1997, noting that Dr. Nunnelley had referred him regarding complaints of left elbow pain following an incident at work on December 1, 1997. Dr. Nunnelley had placed him on light duty with limited use of the left hand and instructed him to avoid repetitive motions. Dr. Lehmann diagnosed left medial epicondylitis.

Dr. Lehmann's associate, Dr. McAllister, assumed treatment. A February 24, 1998, note indicates that the claimant's left elbow had improved but that his right elbow was injected because it was painful. The note states no cause for the pain. During the summer of 1998, Dr. McAllister scheduled surgery to remove the right elbow spur, but left elbow symptoms delayed it until September, 1998. He noted on November 2, 1998, that the claimant still had some right elbow pain and also had a recurrence of medial epicondylitis. On November 25, 1998, he noted that the claimant had medial epicondylitis in the left elbow and lateral epicondylitis in the right elbow. He injected both elbows in December, 1998. In March, 1999, he assigned a 1-2% impairment to

the elbows with no restrictions.

Dr. McAllister continued to treat bilateral elbow pain throughout 1999. On November 24, 1999, the claimant reported a recent incident in which his left elbow had popped while he was working. Dr. McAllister performed a modified Bosworth procedure on the right elbow on April 25, 2000. During left elbow surgery on July 25, 2000, Dr. McAllister discovered a displaced ulnar nerve, which he transposed. His operative report stated that it was primarily responsible for the symptoms of medial epicondylitis. On January 8, 2001, he noted that the claimant was slowly improving. On April 25, 2001, he again assigned a 1-2% impairment to each elbow but no permanent restrictions.

When deposed in December, 2001, the claimant testified that he had left the iron department. He performed different work presently and hoped that his elbows would remain alright.

On January 4, 2002, Dr. Gleis performed an independent medical evaluation (IME) for the employer. He prepared a report and was deposed after examining the claimant and summarizing the records from Drs. Lehmann and McAllister as well as IME reports from Drs. Ballard and Gabriel. When examined, the claimant complained of left elbow symptoms in the region between the lateral epicondyle and olecranon but of no medial epicondylar pain. In Dr. Gleis's opinion, the right olecranon spur probably was not work-related if there was no history of trauma to the area; however, the bilateral epicondylitis was work-related. He noted that left medial epicondylitis had been present since December, 1997, and that right lateral epicondylitis had been present since February 24, 1998. The right lateral epicondylitis reached maximum medical improvement (MMI) on October 13, 2000, and was a chronic condition that required no

further treatment. The left medial epicondylitis reached MMI on January 8, 2001. Neither condition caused permanent impairment or warranted restrictions. Dr. Gleis concluded that the claimant had subjective complaints of bilateral elbow pain and that there was no sign of symptom magnification.

On March 4, 2002, Dr. Bilkey performed an IME for the claimant. He determined that the only impairment permitted by the AMA guides would be a 3% rating for pain.

The record indicates that the parties engaged in settlement negotiations during 2002 and were able to resolve a back injury claim but were unable to resolve the elbow injuries. On December 13, 2002, the claimant's attorney informed the employer that he had been experiencing significant problems with his left elbow for the past three weeks and would not sign the agreement. On December 18, 2002, Dr. McAllister noted that the claimant complained of bilateral elbow pain due to a rigorous job in which he used his arms all day. On February 12, 2003, he noted that the claimant had experienced persistent left elbow pain, had nerve transposition surgery, and had persistent lateral epicondylitis that had "been refractory to conservative treatment, including physical therapy, anti-inflammatants, injections, etc." His impression was chronic lateral epicondylitis, and he recommended a modified Bosworth procedure. Shortly thereafter, he stated in a letter that the claimant had chronic tendonitis in both elbows, that he had not responded to treatment, and that he "continued with the same problem." He thought that, at a minimum, the condition was aggravated by the claimant's work. In an April 22, 2003, letter to the claimant's attorney, he also stated that the problem with the lateral side of the left elbow was totally unrelated to the previous problems on the medial side. It represented "an entirely new problem."

On July 25, 2003, the claimant filed a second application for a gradual left elbow

injury (Claim No. 03-01462). He stated that due to the "repetitive and/or heavy nature" of his work lifting and stacking boards, he had suffered mini-traumas, repetitive trauma, and/or cumulative trauma. As a result, he had "developed or redeveloped left elbow problems" for which he first sought treatment in December, 2002. He was informed that they were work-related in April, 2003.

Dr. Gleis performed a second IME for the employer on December 16, 2003. He examined the claimant, reviewed the medical evidence since his prior evaluation, and reviewed the claimant's deposition. He noted that the present complaint was left lateral elbow pain that had become worse in December, 2002; that the claimant's symptoms had since improved; and that he did not want to have surgery. He diagnosed left lateral epicondylitis, mild, and noted that the first report of lateral symptoms was at the IME that he performed on January 4, 2002. He stated that left lateral epicondylitis was a different problem from medial epicondylitis and that Dr. McAllister had not treated it before January 4, 2002. It the symptoms became severe enough, the Bosworth procedure that had been successful on the right elbow would be appropriate for the left. He agreed with Dr. Bilkey that the only impairment rating could be based on pain, i.e., tendinopathy, and he thought that 1% per elbow would be reasonable.

At his second deposition, in December, 2003, the claimant stated that for most of the past two years he had worked in the header department, building lids for whiskey barrels. He picked up and stacked boards that weighed two to eight pounds, approximately 5-6,000 times per day. For about two months he had worked as a stave joiner, but his elbow pain had worsened on that job. For the past five to six weeks, he had performed joining in the header department. The claimant acknowledged that Dr. McAllister did not impose restrictions in December, 2002. He stated that that he had

not seen him since February, 2003, and that the insurance company had denied the recommended surgery. He also stated that his elbows were better presently and that he would not pursue surgery. The 2001 and 2003 claims were consolidated and heard together in October, 2004, at which point he continued to work about 42 hours weekly.

After summarizing the lay and medical evidence and the pertinent legal authority, the ALJ determined that the claimant "was made aware that he had bilateral work-related elbow injuries on December 18, 1997." Noting subsequently that the injuries represented a complex fact pattern, the ALJ concluded that "the evidence is more persuasive the plaintiff's elbow problems begin in December of 1997." Finding that the claims filed on May 11, 2001, were barred by the two-year statute of limitations, the ALJ dismissed them. Addressing the 2003 claim, the ALJ determined that the medical records and the claimant's testimony were insufficient to show that the elbow problems alleged therein were any different from those alleged in the 2001 claim. After the claimant's petition for reconsideration was denied, he appealed.

The Board affirmed regarding the left elbow claim but was convinced that the ALJ might have misunderstood the evidence regarding the right elbow claim. Although the employer asserts that the Board specifically found "from [its] own review of the evidence that Johnson's right elbow injury manifested on February 24, 1998," the Board's opinion contains no such statement. Among other things, the Board pointed out that Dr. Lehmann had reported only left medial epicondylitis on December 18, 1997, and that perhaps the ALJ had confused his testimony with a December 18, 2002, office note from Dr. McAllister regarding bilateral elbow problems. It also pointed out that the claimant did not testify that his right elbow problems began in December, 1997, as the employer had asserted. "[U]nable to locate support in the record for a finding that

Johnson's *right* elbow problems began in December of 1997 or that Johnson was made aware of a *right* elbow injury in December of 1997," the Board vacated the dismissal of that portion of the claim and remanded for further consideration of the evidence.

The employer's cross-appeal asserts that the Board and the Court of Appeals erred in vacating and remanding the decision regarding the right elbow injury. It also asserts that the ALJ's error, if any, was harmless. We disagree.

No medical evidence linked a gradual, work-related right elbow injury to December, 1997, and the ALJ expressed no rationale for concluding that the injury became manifest at that time. Contrary to what the employer would have us believe, the ALJ did not indicate that the injury became manifest in September, 1996. Mindful that KRS 342.285 designates the ALJ as the fact-finder, we find no error in the Court of Appeals' decision to affirm and refuse to speculate regarding what date(s) may or may not be reasonable.

The claimant's direct appeal emphasizes that his injuries resulted from repetitive or cumulative trauma rather than a single traumatic event; that he continued to work when his claims were heard; and that he continued to experience aggravations or exacerbations of his injuries. He asserts that a left elbow claim is not barred by the statute of limitations and also that the 2003 application alleged a new and distinct injury from that found to be present in December, 1997.

KRS 342.0011(1) includes cumulative trauma within the definition of "injury;" therefore, KRS 342.185 provides the applicable statute of limitations. It requires a claim to be filed within two years of the "date of accident" but tolls the two-year period for any intervening period in which the employer pays voluntary TTD benefits. However, voluntary TTD benefits will not revive an expired period of limitations.

American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004).

As explained in Brummitt v. Southeastern Kentucky Rehabilitation Industries, supra, gradual injuries often occur imperceptibly, from numerous instances of minor workplace trauma or minitrauma; therefore, the courts have applied a rule of discovery to establish a date of accident/injury for the purposes of notice and limitations. Under the rule, a gradual injury becomes manifest when a physician diagnoses a harmful change and informs the individual that work has caused it. It is immaterial whether the harmful change is given a general or specific name. The court pointed out in Brummett that where an individual continues to perform repetitive work activities after a gradual injury is manifest, subsequent workplace trauma may cause subsequent harmful changes, i.e., subsequent gradual injury.

In Special Fund v. Clark, supra at 490, we determined that the statute of limitations is no longer tolled when a worker discovers a work-related gradual injury and its cause. If a claim is not filed until more than two years after a gradual injury has become manifest, KRS 342.185 bars compensation for harmful changes due to trauma incurred more than two years before a claim is filed. As the ALJ in Special Fund v. Clark recognized, harmful changes due to trauma incurred within the two-year period remain compensable. Id. at 489.

The claimant's May 11, 2001, application alleged two different types of left elbow injuries, one due to specific incidents of workplace trauma in 1997 and 1999, and another due to repetitive and/or cumulative trauma that became manifest in November, 1998. At the time, he worked in the iron shop as a riveter. His July 25, 2003, application alleged a subsequent left elbow injury due to repetitive and/or cumulative trauma. His testimony indicated that he moved to the header department in December,

2001, and that he continued to work there when his claim was heard. The ALJ determined that the claimant sustained a gradual injury and that it became manifest on December 18, 1997, when Dr. Lehmann diagnosed work-related left medial epicondylitis. Substantial evidence supported the finding, and we agree with the Court of Appeals that no overwhelming evidence in this case compelled the ALJ to view the incidents that occurred in 1997 and 1999 as being separate from the repetitive or cumulative trauma that the claimant's work entailed. However, we reverse in part and remand because the ALJ misapplied Special Fund v. Clark, supra, and failed to address the significance of the fact that the claimant continued to work after December 17, 1997, when dismissing both applications in their entirety.

Despite the employer's assertion to the contrary, the ALJ's opinion does not contain a finding that the claimant's work caused no cumulative trauma "after the original onset." Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), explains that when work-related trauma aggravates a pre-existing, non-compensable condition and causes it to symptomatic, an injury has occurred. The nature and extent of the resulting harm determines what benefits the injury warrants. To the extent that the claimant experienced a harmful change in the human organism due to work-related trauma that he incurred within two years before either claim was filed, he sustained an "injury." Regardless of whether such trauma resulted in a permanent impairment rating or warranted income benefits, it may have necessitated medical treatment.

The decision of the Court of Appeals is affirmed in part and reversed in part, and this matter is remanded to the ALJ for further consideration.

Lambert, C.J., and Cunningham, McAnulty, Noble, Schroder, and Scott, JJ., concur. Minton, J., not sitting.

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