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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: November 1, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 11-26-07 ElnAGravitt, D.C.

2006-SC-000883-WC

TRANSIT AUTHORITY OF RIVER CITY — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2006-CA-000593-WC
WORKERS' COMPENSATION NO. 04-00252

JAMES B. STEINHAUER, HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) found that the claimant's occupational hearing loss claim was timely because he filed it within two years after a physician informed him that the condition was caused by his work. The Workers' Compensation Board held that the decision was supported by substantial evidence and affirmed. The Court of Appeals also affirmed. Relying upon Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601, 605 (Ky. 2006), which was rendered while its appeal was pending before the Court of Appeals, the employer asserts for the first time that KRS 342.185(1) operates as a statute of repose for hearing loss claims. Because the employer failed to raise such an argument before the ALJ and preserve it, we affirm.

The claimant worked for the defendant-employer from 1979 until his retirement in 2001. On January 30, 2004, he filed an application for benefits based on an

occupational hearing loss. He testified subsequently that he began to have difficulty hearing in 1985, so he insisted on wearing hearing protection at work and provided it himself. He stated that he was prescribed hearing aids in 1988 but was unable to wear them at work because they made the loud noises even louder. He also stated that his employer sent him for hearing tests in 1992 and purchased hearing protection for him. Nonetheless, his hearing difficulties continued to worsen. He acknowledged that he associated his hearing loss with his work because it was "generally a loud environment and sometimes very loud." But when questioned in his depositions and at the hearing, he was not asked to state precisely when a physician informed him that his hearing loss was due to a work-related injury.

The parties stipulated that the claimant was exposed to noise at work for 23 years. The contested issues included: 1.) whether the condition was pre-existing and/or exacerbated by non-work-related activities; 2.) whether the claim for benefits was barred by the statute of limitations and failure to give timely notice; and 3.) the extent and duration of the claimant's impairment. The parties submitted medical reports from Drs. Jensen and McMurry. Dr. Windmill was the university evaluator.

Addressing the statute of limitations and notice, the ALJ stated as follows:

> An employee is not required to self-diagnose the cause of his condition. The requirement to give timely notice accrues and the statu[t]e of limitations begins to run when the employee is made aware of the harmful change and that the condition is work-related. Hill v. Sextet Mining Corporation, Ky., 65 S.W.3d 503 (2001). I find that Dr. Windmill, even though he saw him after the claim was filed, was the first physician to inform plaintiff that his hearing loss was work-related so as to trigger the requirements for notice and filing. Physicians had earlier suggested to plaintiff that he wear hearing protection at work. However, I find that this is not sufficient to trigger these requirements. I therefore find that plaintiff's claim was timely filed and that he gave timely

notice.

The employer's petition for reconsideration argued that the ALJ erred by failing to follow Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999), and dismiss the claim on the ground that the statute of limitations had elapsed. It emphasized that the claimant had acknowledged having hearing difficulties and reporting them as early as 1988. It also cited statements from Dr. McMurry concerning his long history of treating the claimant's hearing problems. The ALJ denied the petition, and the employer appealed.

At no time before appealing to this court did the employer assert that KRS 342.185 operated as a statute of repose in gradual injury claims. The stipulation to a contested issue regarding the statute of limitations may reasonably be viewed as being sufficient to preserve such an argument before the ALJ. But neither the employer's brief nor its petition for reconsideration argued that the claim was barred by the claimant's failure to file it within two years after his work-related exposure to hazardous noise ceased. The employer acknowledges that Manalapan Mining Co., Inc. v. Lunsford, supra, was decided while its appeal was pending in the Court of Appeals.

KRS 342.285 designates the ALJ as fact-finder and, in essence, limits the scope of the Board's review to determining whether the ALJ's decision was erroneous as a matter of law. Likewise, KRS 342.290 limits the scope of review by the courts to matters subject to review by the Board and errors of law arising before the Board. Until Manalapan Mining Co., Inc. v. Lunsford, supra, was decided, Hill v. Sextet Mining Corp., supra, was the standard for applying the statute of limitations to a gradual injury claim. The law was unsettled regarding whether KRS 342.185(1) operated as a statute of repose for gradual injury claims. Thus, a party who wished to make such an argument

must have raised the issue before the ALJ. If the ALJ failed to dismiss the claim, the party must then have preserved the alleged error of law on appeal. See Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984). This employer failed to do so. Therefore, because the ALJ did not err in applying the law as it existed at the time of the decision and was not asked to consider the question of repose, the decision was properly affirmed.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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