

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

FINAL

2007-SC-000615-WC

DATE 11-13-08 EJA Gravitt, D.C.

DANA CORPORATION

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2007-CA-000579-WC
WORKERS' COMPENSATION BOARD NO. 04-92749

MELINDA ADAMS;
HONORABLE JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) awarded benefits for a repetitive trauma injury to the claimant's right shoulder but dismissed her claim for a simultaneous injury to the left shoulder as being untimely under KRS 342.185. The Workers' Compensation Board reversed in part, holding that temporary total disability (TTD) benefits paid after surgery for the right shoulder condition tolled the limitations period for both conditions because they became manifest on the same date. The Court of Appeals interpreted the ALJ's opinion as finding implicitly that the claimant gave notice of both injuries and affirmed. Appealing, the employer asserts that the ALJ made no implicit finding concerning notice, that the claimant failed to give notice of the left shoulder injury until she filed her claim, and that both notice and the claim were untimely.

We affirm although our reasoning differs from the Court of Appeals'. The ALJ made no clear finding regarding notice of the left shoulder condition, but the evidence compelled a finding in the claimant's favor. No evidence of record refuted her testimony that she gave notice of an injury to her shoulders in January and June 2003. The left shoulder claim was timely because one injury occurs when repetitive trauma produces harmful changes that become manifest to multiple body parts at the same time. TTD paid for the injury's effect on any body part tolls the limitations period for all.

The claimant performed repetitive work for the defendant-employer. She began working in its packing and shipping department and later helped assemble truck axles. The latter job required her reach in an awkward position, use her arms to lift yokes that weighed from five to fifty pounds, place them onto a press along with a mudslinger, and then lower them into a tub. She did this at least 600 times per day.

The claimant testified that she first noticed pain in her shoulders, elbows, and thumbs in January 2003 and informed her supervisor. She saw Nurse Hewitt in late April or early May 2003 and completed an incident report. She was referred to Dr. Christopher, the in-house doctor, in late May. The claimant testified that she experienced pain in her shoulders on June 24, 2003, and reported it to the employer. She prepared another incident report because Nurse Wallemeyer was unable to find the previous one.

The claimant was referred eventually to Dr. Percinel, who began to treat her. She testified that he was the first physician to inform her that her shoulder condition resulted from her work and that she provided the employer with her medical records each time she saw him. He performed right shoulder surgery in March 2004, after

which the employer paid TTD benefits from March 19, 2004, through April 5, 2004. She returned to work thereafter.

On August 31, 2005, the claimant filed an application for benefits in which she alleged a repetitive trauma injury to her shoulders as of June 24, 2003. The parties stipulated that she sustained a work-related right shoulder injury on June 24, 2003, of which the employer had timely notice. Noting evidence that she did not obtain treatment for her left shoulder until September 2004, the employer contested whether she sustained a work-related left shoulder injury, whether she gave timely notice of such an injury, and whether the left shoulder injury claim was timely.

The ALJ awarded income and medical benefits for the right shoulder but analyzed the left shoulder claim as follows:

Pursuant to KRS 342.185, the filing of an application for adjustment of claim with the Department must be within two years following the suspension of payments or within two years of the date of accident, whichever is later. The plaintiff has alleged an injury date to the left shoulder of June 24, 2003. The testimony of the plaintiff was that she began experiencing pain in the left shoulder in January of 2003 and reported this to the defendant/employer. Her testimony also was that on June 24, 2003, she experienced pain in the left shoulder, saw a doctor and reported the condition of the left shoulder to the defendant/employer. The plaintiff has been paid no benefits for the condition of the left shoulder. The instant claim was filed on August 31, 2005. The [ALJ] finds that the claim on the left shoulder was filed more than two years after the date of injury, irregardless [sic] of which injury date is used and the plaintiff was paid no benefits for the condition to the left shoulder. The [ALJ] finds that the plaintiff's claim for benefits related to the injury to the left shoulder must be dismissed pursuant to KRS 342.185.

The analysis contains no explicit finding concerning the notice issue. It concludes that the two-year limitations period barred the claim, regardless of whether

the claimant gave notice in January or June 2003. Thus, it is unclear whether the ALJ intended to imply a finding of timely notice or found it unnecessary to reach the issue because the claim was untimely even if the claimant did give timely notice. In either event, the evidence compelled a finding in the claimant's favor.

Although the employer asserts that the claimant gave notice of only a right shoulder injury, it bases the argument on a document that is not of record. The evidence of record compelled a finding of timely notice because nothing refuted the claimant's testimony that she reported an injury to her shoulders on June 24, 2003.

KRS 342.0011(1) defines an injury as being "any work-related traumatic event or series of traumatic events, including cumulative trauma . . . which is the proximate cause producing a harmful change in the human organism" In other words, it defines an injury in terms of the traumatic event or events rather than in terms of the harm that the trauma causes.¹ Thus, a worker sustains one injury when repetitive trauma produces harmful changes that become manifest to multiple body parts at the same time, and TTD paid for any of the affected parts tolls the limitations period for all.

The ALJ erred by treating the left and right shoulder conditions as being separate injuries rather than as being multiple harmful changes produced by a repetitive trauma injury that became manifest on June 24, 2003. The medical evidence indicated that work-related repetitive trauma harmed both of the claimant's shoulders. Although the right shoulder required medical treatment earlier than the left, nothing refuted the claimant's testimony that she experienced bilateral symptoms from the outset. A gradual injury does not become manifest for the purposes of notice and limitations until

¹ See Lexington-Fayette Urban County Government v. West, 52 S.W.3d 564 (Ky. 2001).

a physician informs the worker that the condition causing disabling symptoms is work-related.² The claimant testified that Dr. Percinel was the first physician to inform her that her shoulder condition resulted from her work, and nothing refutes her testimony or indicates that she saw him before June 24, 2003. Nonetheless, she informed the employer of a work-related injury to her shoulders on June 24, 2003, and the parties agreed to June 24, 2003 as the date of injury. The employer terminated TTD benefits for the effects of the injury on April 5, 2004. Thus, the merits of her claim for harm to the left shoulder must be considered on the remand because she filed it within two years after April 5, 2004.

The decision of the Court of Appeals is affirmed.

Minton, C.J.; Cunningham, Noble, Schroder, Scott and Venters, JJ., concur.

Abramson, J., not sitting.

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² See Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001).