

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 29, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2009-SC-000068-WC

DATE 11/19/09 Kelly Klaber D.C.
APPELLANT

ECKART ALUMINUM

V.
ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-001235-WC
WORKERS' COMPENSATION BOARD NO. 05-96404

DUSTIN CARKUFF;
HONORABLE JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) found the claimant's application for benefits for a 2005 injury to be timely because he filed it within two years after the payment of temporary total disability (TTD) benefits that related to the effects of the 2005 injury rather than an incident that occurred in 2006. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the employer asserts that the ALJ erred by failing to find that a work-related accident occurred in 2006 and that subsequent TTD benefits related to an injury caused by that accident.

We affirm. The evidence did not compel a finding that TTD paid in 2006 related to the effects of a January 5, 2006, accident or injury. Substantial

evidence indicated, instead, that it related to the injury caused by the 2005 accident. Thus, it tolled the period for filing a claim for the 2005 injury.

The claimant began working for the defendant-employer in 2004 as a process operator, work that required him to move 55-gallon drums of aluminum powder. He was injured on January 31, 2005, while attempting to prevent a drum from falling. Although he caught it, he fell to the ground with his legs splayed in opposite directions. He felt immediate pain in the groin and right lower abdomen and sought treatment in the emergency room. Dr. Stephens diagnosed a right inguinal hernia, which she repaired surgically.¹

The claimant received voluntary TTD benefits from February 1, 2005, through June 12, 2005, after which he received a letter from the Office of Workers' Claims informing him that he had two years from June 12, 2005, in which to file a workers' compensation claim. Although he returned to work on June 20, 2005, he testified subsequently that he experienced constant pain in the location of the injury but kept working in order to feed his family and retain medical insurance for a daughter with special needs. He stated that he used all of the pain medication that had been prescribed but sought no additional medical treatment for the injury between May 23, 2005, and January 18, 2006.

On January 5, 2006, the claimant felt a sharp pain "in the exact same spot" as the previous hernia when bending down to load a mill. He reported the incident to his employer and sought medical treatment. Dr. Nunnelley

¹ The claimant underwent surgery to repair a non-work-related right inguinal hernia in 2002. It is not at issue presently.

noted on January 18, 2006, that the claimant complained of pain in his groin, "which was injured on January 31, 2005." He also noted that the claimant felt the pattern of symptoms was worsening; that he had been working regular duty; that the pain was located in the right inguinal region; and that lifting, pushing, or pulling exacerbated the symptoms. Physical examination revealed evidence of edema in the right inguinal area but no evidence of a hernia. Dr. Nunnelley diagnosed a groin strain.

Dr. Stephens noted on February 2, 2006, that the claimant's clinical symptoms were consistent with either a muscle strain or recurrent hernia. After conservative therapy failed to improve his condition, Dr. Stephens performed a diagnostic laparoscopy on February 27, 2006. It revealed no herniation, but Dr. Stephens did find and remove some scar tissue from the previous surgery.

Dr. Peters, a pain management specialist, saw the claimant on referral from Dr. Stephens in April 2006. He diagnosed post-hernia pain with ilioinguinal irritation, which he treated with injections. He also prescribed Cymbalta for the relief of neuropathic pain.

The employer paid TTD benefits from the February 27, 2006, surgery through May 10, 2006, after which the Office of Workers' Claims informed the claimant of the applicable two-year limitations period. The claimant returned to work without restrictions in May 2006. After being placed back on restrictions in July 2006, he quit working and began to receive short-term disability benefits.

KRS 342.185(1) requires a claim for an occupational injury to be filed within two years after the "date of accident" or within two years following the payment of voluntary income benefits, whichever is later. Filed on July 3, 2007, the claimant's application for workers' compensation benefits alleged a January 31, 2005, injury. He argued that he did not suffer a new injury in 2006 and also that TTD paid in 2006 related to the effects of the 2005 injury, tolling the period of limitations that otherwise would have expired on June 20, 2007. The employer argued that the claimant sustained two distinct accidents and injuries, one in 2005 and one in 2006; that he received TTD for each of them; and that the statute of limitations barred a claim for the 2005 injury.

"Accident" and "injury" are legal terms of art as used in Chapter 342. They continue to be distinguishable under the post-1996 Workers' Compensation Act. As used in KRS 342.185[1], a work-related "accident" is a traumatic event that arises out of and in the course of employment. KRS 342.0011(1) defines "injury" as:

[A]ny work-related traumatic event . . . that arises out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. . . .

In other words, a work-related accident that proximately causes a harmful change in the human organism is an injury. Except when a gradual injury is

involved, the limitations period for an injury claim runs for two years from the date of accident or the termination of TTD, whichever occurs last.²

Workers' compensation benefits are paid for the effects of work-related injuries. Whether an accident occurred on January 5, 2006, is immaterial unless it caused an injury and also accounted for the TTD benefits paid in 2006. As the ALJ recognized, this claim turns on the issue of medical causation, *i.e.*, whether the effects of the 2005 accident or of bending over at work on January 5, 2006, proximately caused the period of TTD following the February 2006 surgery. Three physicians offered opinions regarding causation.

Dr. Peters attributed the claimant's ongoing symptoms to a nerve problem that originated with the 2005 injury. He addressed causation in a November 1, 2007, report stating as follows:

I understand there is a problem with the timeline with regards to this patient's injuries. This patient had an injury at work in 2005. He had an attempt at treating that pain with a repair of an inguinal hernia. An inguinal hernia was repaired but did not improve his pain. He subsequently did strain the same area again in early 2006, but it was the same problem that he had beforehand. The surgical area was re-explored. There was re-sectioned some scar tissue but no new hernia was identified. I believe all of this patient's problems started with his injury in 2005. The subsequent injuries and re-explorations were a continuation of that single identical problem.

² See Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999); Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999); Coslow v. General Electric Company, 877 S.W.2d 611 (Ky. 1994).

In a supplemental report dated November 14, 2007, Dr. Peters stated:
"This patient was off work between February and May 2006 as a direct result of his January 2005 work injury."

Dr. Sparrow evaluated the claimant in September 2007. He received a history of the January 2005 injury and subsequent hernia repair. Although he noted that the severe pain continued and that Dr. Stephens performed a second laparoscopy in 2006, he failed to mention the January 2006 incident at work. He opined that the claimant's pain did not relate to the hernia but to nerve damage that occurred in the 2005 accident.

Dr. Sheridan, an orthopedic surgeon, evaluated the claimant in January 2007 for the employer. He noted a history of the January 2005 injury and surgery for a right inguinal hernia, as well as a history of severe right groin pain at work on January 5, 2006, and the subsequent laparoscopic surgery. In his opinion, a work-related injury on January 5, 2006, aggravated the previously-repaired hernia. The claimant reached maximum medical improvement on July 1, 2006, and required no further medical treatment.

KRS 342.285 designates the ALJ as the finder of fact in workers' compensation claims, which gives an ALJ the sole discretion to determine the quality, character, and substance of evidence; to weigh conflicting evidence; and to pick and choose the parts of the evidence to rely upon.³ The claimant offered prima facie evidence that TTD paid in 2006 related to the effects of the

³ Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977).

2005 accident. As the party raising a limitations defense, the employer had the burden to prove that TTD paid in 2006 related to the effects of a January 5, 2006, accident and resulting injury. Having failed to meet that burden, its burden on appeal is to show that the favorable evidence was so overwhelming as to compel a favorable finding.⁴ The record contains no such evidence.

Met with substantial contrary evidence, the mere fact that symptoms occurred while bending over at work on January 5, 2006, did not compel a finding that subsequently-paid TTD compensated the effects of an injury that occurred on that date. Nor did Dr. Sheridan's testimony attributing the claimant's symptoms in 2006 to a work-related aggravation of the previously-repaired hernia, Dr. Nunnelley's diagnosis of a groin strain in January 2006, or selected portions of Dr. Peters' testimony compel such a finding.

The claimant testified that he continued to experience severe groin pain after returning to work in 2005 and that his co-workers performed heavy lifting for him thereafter. He related his symptoms to the 2005 injury when seeking treatment from Dr. Nunnelley shortly after the 2006 incident. Drs. Peters and Sparrow attributed the pain to nerve damage produced by the 2005 accident. The diagnostic laparoscopy that Dr. Stephens performed on February 27, 2006, revealed no hernia but did reveal scar tissue from the 2005 procedure, some of which she removed. The claimant received TTD while recovering from the surgery. Although Dr. Peters did not see the claimant until April 2006, he had knowledge of the other physicians' findings when stating that the claimant

⁴ Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

missed work from February 27, 2006, through May 10, 2006, as a direct result of the 2005 injury. Thus, nothing required the ALJ to disregard the opinion.

The ALJ did not err by failing to dismiss this claim. Even if bending at work on January 5, 2006, aggravated the claimant's symptoms temporarily, substantial evidence indicated that TTD he received after the February 27, 2006, surgery related to the effects of the 2005 accident and resulting injury. Thus, it tolled the period of limitations for filing a claim for the injury. The claimant's application for benefits was timely because he filed it within two years after the final TTD payment.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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