

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-001965-WC

MIKRON INDUSTRIES INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-99-66799

SHARON HOGAN; HON. RONALD  
JOHNSON, ADMINISTRATIVE LAW JUDGE;  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: BAKER, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Mikron Industries, Inc. (Mikron), as an insured of Wausau Business Insurance, petitions for review of an opinion of the Workers' Compensation Board (the Board) affirming an Opinion and Award of an Administrative Law Judge (ALJ), finding Sharon Hogan to have sustained work-related cumulative trauma while working for Mikron, resulting in an 18% impairment pursuant to the AMA Guides. The ALJ attributed the entire impairment to Hogan's employment with Mikron while insured by Wausau. The ALJ further found that Hogan gave due and timely

notice and had timely filed her claim. On appeal Mikron advances two arguments: 1) that the ALJ and Board incorrectly applied legal authority in ruling that this claim was not barred by the statute of limitations; and 2) that the ALJ and Board erred in apportioning the impairment rating to Hogan's post-1999 condition. We affirm.

When reviewing decisions of the Workers' Compensation Board, our function "is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice." Daniel v. Armco Steel Company, L.P., Ky. App., 913 S.W.2d 797, 798 (1995), citing Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

Hogan began working for Mikron in Washington State in April of 1990. She worked on the production line making products produced by the extrusion process. In 1993 Hogan was treated for carpal tunnel syndrome (CTS). That surgery was successful and Hogan continued working for Mikron. In 1995 Hogan received a promotion to supervisor in a new facility in Richmond, Kentucky. Hogan testified that in the new position she acted as a trainer for new employees, which required that she continue working production.

Hogan's arms, elbows, and shoulders began to bother her and in January of 1999, she gave notice to Mikron's safety manager that she was having problems and that she thought it might be work related. However, Hogan continued to work at Mikron. In March of 1999, Hogan went to see her family physician, Dr. Marionneaux. Dr. Marionneaux told Hogan at that time that her injury was work related and referred her to Dr. Garnett Sweeney. The record reflects that this information was related to the safety manager at Mikron and that notice of a work-related injury was given on April 1, 1999. Hogan testified that the first appointment she could get with Dr. Sweeney was in June of 1999.

Dr. Sweeney took Hogan off work from June 1999 until August of 1999. According to Hogan, Mikron denied her problems were work related and she was not paid temporary total disability benefits. Hogan testified that she took sick leave pay. Mikron gave no notice to the Department of Workers' Claims that it had refused to pay temporary total disability during the period of time that Dr. Sweeney had taken Hogan off work.

In November of 1999, Mikron, through its insurer, Wausau, had Hogan undergo an independent medical examination by Dr. Bart Goldman, who concluded that, while she had some mild problems, they were nothing significant. Dr. Goldman stated in his report that work contributed to Hogan's problems but her

physiological condition also related to other things. In November of 1999, Hogan received a letter stating that, based upon Dr. Goldman's report, Wausau was denying her claim for coverage under Kentucky Workers' Compensation because her complaints were "not solely related to" her employment. The letter was sent to Hogan, but there was no indication it was sent to the Department of Workers' Claims.

In January of 2000, according to Hogan's testimony, she resigned under threat of termination. She claimed that no explanation was given for the proposed termination other than she did not meet Mikron's standards. In February of 2000, Hogan returned to see Dr. Sweeney who performed surgery, including a right ulnar nerve release and reconstruction of right tennis elbow in March of 2000, and a debridment and acromioplasty of the right shoulder in November of 2000. Dr. Sweeney also performed a cervical MRI on January 2, 2001, which showed a disc herniation at C5-6. Hogan ultimately underwent disc fusion surgery on May 7, 2001. Dr. Sweeney attributed Hogan's physical condition to "overuse syndrome" related to her work. He stated, "there is no reasonable doubt, in my mind, that her occupation contributed mightily to her disabilities and subsequent surgeries and is the cause of her ongoing disability."

Dr. Sweeney assigned a 15% whole body impairment due to cumulative trauma to the neck in 1995 and 1999, and 4% whole

body impairment for the sensory deficits to her arms. The ALJ found that Hogan had an 18% impairment based upon the whole body impairments assigned by Dr. Sweeney as applied to the combined value chart. The ALJ also found that the injuries were caused by her work for Mikron and that she did not have the physical ability to return to the type of work she was doing at the time of the injury.

Hogan filed her application for adjustment of claim on March 27, 2001. Mikron denied the claim, alleging failure of due and timely notice, failure to timely file the claim, questioning the injury/disability manifestation date, extent and duration, and pre-existing active impairment. Records from the Department of Workers' Claims were introduced that indicate a date of injury and notice of injury date of April 1, 1999.

A hearing on the claim was held on January 28, 2002. The ALJ entered an Opinion, Order, and Award on April 19, 2002. Both Mikron and Hogan filed petitions for reconsideration. Hogan's petition related to a monetary misstatement of temporary disability. Mikron argued that the ALJ misinterpreted the employer's obligation to notify the Department of Workers' Claims pursuant to Kentucky Revised Statutes (KRS) 342.040 and that the ALJ failed to address the issue of apportionment between Hogan's 1995 employment and her 1999 employment.

In response to Hogan's petition, the ALJ amended the Opinion and Award to reflect the proper monetary award. The ALJ summarily overruled Mikron's petition. Mikron appealed to the Board. The Board affirmed the Opinion and Award in an opinion entered on August 21, 2002. Mikron filed a timely notice of appeal.

Mikron's first argument is that the ALJ erred in finding that Mikron was estopped from relying upon a statute of limitations defense. Mikron based this argument on a belief that the ALJ wrongly relied upon this Court's holding in City of Frankfort v. Rogers, Ky. App., 765 S.W.2d 579 (1988). Mikron argues that the Supreme Court holding in Newberg v. Hudson, Ky., 838 S.W.2d 384 (1992), compels a different result.

KRS 342.185 requires that an application for adjustment of claim be filed within two years of the date of accident. In Rogers, this Court held that an employer who fails to notify the Board that it had stopped paying an injured employee voluntarily is estopped from asserting the statute of limitations as a defense to a workers' compensation claim filed more than two years after the date the employer ceased payment of benefits. Rogers, 765 S.W.2d at 580. In Hudson, the Supreme Court distinguished Rogers and held that:

Whether the statute of limitations will be tolled by the employer's failure to trigger this notification scheme when it has failed

to make payments when due will depend upon the facts and circumstances of each case. In other words, whether the facts in this case compel a similar result as that reached in Rogers depends upon whether the employer blatantly manufactured the limitations defense.

Hudson, 838 S.W.2d at 388.

The ALJ determined that Hogan gave notice of her injury to Mikron at the time she became aware that she had a work-related injury in January of 1999. Mikron argues, therefore, that Hogan's March 27, 2001, claim was outside the two-year statute of limitations. In affirming the award, the Board addressed this issue under two theories: 1) that there was an April 1, 1999, injury manifestation date and the claim was timely filed; and 2) that there was a January of 1999 manifestation date, but that Mikron failed to timely notify the Workers' Compensation Department that it was denying benefits and therefore, Mikron was estopped from using the statute of limitations defense.

The Board first noted that the ALJ failed to make a specific finding of fact regarding the date of manifestation of injury. However, the Board concluded that, because neither party requested a specific finding of fact, this issue could not be raised on appeal. Even so, the Board concluded, "it would be reasonable and probably appropriate for the ALJ to have concluded there was an April 1 disability manifestation date."

The Board based this determination on the fact that, while Hogan was experiencing problems in January of 1999 and thought the problems were work related, she was not required to self-diagnose or self-determine that she had a work-related injury. Hill v. Sextet Mining Co., Ky., 65 S.W.3d 503 (2001). The Board opined that the "injury/manifestation date in cumulative trauma is an illusive determination that must be made on the facts of each individual case." The Board determined that while "she may have provided notice of physical problems to her employer in January in [sic] 1999 does not necessarily establish that to be the injury date." The Board recognized that if this were the case, there would have been no statute of limitations issue. While we agree with the Board's rationale, we can find nothing in the ALJ's opinion to support the Board's interpretation. The ALJ specifically stated that Hogan "gave notice of her injury to the defendant/employer at the point in time that she became aware that she had a work related injury in January 1999." While we agree that based on the facts, the ALJ might have determined the manifestation date to be April 1, 1999, after Dr. Marionneaux told her the injury was work related, the Board may not substitute its finding of fact for that of the ALJ. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

Nonetheless, we believe the Board's analysis of the ALJ's findings regarding the employer notification requirement

is correct. The ALJ concluded that Mikron failed to make payments of temporary total disability benefits and failed to notify the Department. Relying on the holding in Rogers, the ALJ determined that Mikron was estopped from relying upon the statute of limitations as a defense. As it did before the Board, Mikron argues that the holding of Hudson compels a different result. The Board distinguished Hudson on the facts, determining that, unlike the claimant in Hudson, "when Hogan began to miss work, there seems little doubt but that it was understood it was because of the alleged April 1, 1999 injury."

We agree. The ALJ specifically found that:

In April of 1999, after plaintiff had gone to the doctor, the defendant/employer reported an injury to the Department of Workers' Claims. Subsequently the plaintiff was off work per her doctor for eight weeks and then returned to work. She was not paid TTD because the defendant/employer denied the claim.

Mikron argues that they were not aware that Hogan was claiming a work-related injury until they received the report of Dr. Sweeney in October of 1999, and that they immediately sought an independent medical examination from Dr. Goldman. However, Hogan's testimony was that the safety manager filed the claim in April and at that time, Dr. Sweeney told her that the claim had been denied and submitted the claims through her regular medical insurance. The Department records support her testimony. The

evidence supports the ALJ's finding that Mikron was aware in April of 1999 that Hogan was claiming a work-related injury but failed at that time to notify the Department that it was not paying benefits. As such, the ALJ's reliance on Rogers was not in error. This Court held in Rogers:

[A]n employer cannot blatantly disregard its statutory obligation under KRS 342.040 and thereby manufacture the defense of limitation under KRS 342.185. We can conceive of nothing more repulsive before the eyes of justice than a judicial reward for statutory noncompliance at the expense of an innocent injured worker.

Rogers, 765 S.W.2d at 580.

Mikron also argues that because they did not act in bad faith or attempt to lull Hogan into a false sense of security, based on Hudson, they should not be estopped from relying upon the statute of limitations defense. The Supreme Court rejected this argument in H.E. Neumann Co. v. Lee, Ky., 975 S.W.2d 917 (1998). The Court in H.E. Neumann held that once the employer had notice that the employee had missed more than one day of work as a result of an alleged work-related injury, it had the duty of filing a report of the injury and then had a duty to notify the board that it would not be paying benefits. Id. at 921. The ALJ found that Mikron had notice as of April 1, 1999, and yet failed to notify the board. Therefore, Mikron was estopped from relying on the statute of limitations defense,

whether or not they acted in good faith or whether or not Hogan was lulled into a false sense of security by their actions.

Mikron next argues, as it did before the Board, that the ALJ was required to make specific findings regarding apportionment. The basis for this argument is Dr. Sweeney's assignment of a 15% whole person impairment, "100% due to cumulative trauma to neck in 1995 and 1999, while working at Mikron Industries in Washington State and Richmond, Kentucky." Mikron asserts that this is uncontroverted medical evidence that her 1995 employment had some effect on her current disability. The Board admitted that Dr. Sweeney's report was "a little confusing." The Board, however, determined that the ALJ's conclusion was appropriate, in that "Dr. Sweeney specifically states that in assessing impairment he did not consider or rate her bilateral carpal tunnel syndrome, for which she was treated in Washington State." While we don't believe this completely answers the question of whether Dr. Sweeney believed some of Hogan's disability was related to a 1995 injury, we still believe the ALJ made a proper determination based on the evidence. The ALJ specifically found that "Dr. Sweeney's impairment ratings are based solely on the plaintiff's post 1999 condition." Dr. Sweeney reported that there were "no pre-existing non-disabling conditions contributing to the impairment." He also specifically stated that he was diagnosing

the following conditions, manifesting in 1999 that he believed were work related: "Ulnar-nerve palsy, right arm; ulnar-nerve palsy, left arm, shoulder pain of questionable etiology, cervical-disc protrusion, postoperative." These were the conditions for which the impairment ratings were assigned.

Mikron asserts that Hogan's cervical symptoms were identical to those originally treated by Dr. Cancro in 1995. We agree with Hogan that this is not an accurate assessment of the evidence. While the record establishes that Hogan suffered from some neck problems in 1995, the MRI by Dr. Cancro revealed an extruded disc at C6-7. The MRI done by Dr. Sweeney in January of 2001 revealed a herniation at C5-6. This diagnosis was the reason for Hogan's surgery and the basis for the assignment of the impairment rating. Dr. Sweeney excluded prior disability and attributed 100% of the impairment rating to the 1999 injury. The Board correctly pointed out that:

It is the nature of cumulative traumas that they develop over a lengthy period of time and presumably, had the individual been examined during some of that period, they may have discovered an impairment rating. That however, is mere speculation and goes more to the disability manifestation date than to the propriety of an award of benefits.

As such, the ALJ's finding that the "impairment rating of 18% does not include any pre-existing condition" and

assigning liability to Mikron, as an insured of Wausau, was supported by substantial evidence.

Having determined that the Board has not overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice, we affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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