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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000868-WC

CONSOL ENERGY, INC. — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NOS. WC-01-01650 AND WC-01-01649

DANNY M. HALL;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: BAKER, COMBS, AND SCHRODER, JUDGES.

SCHRODER, Judge: Consol Energy Inc. appeals from an opinion of the Workers' Compensation Board ("Board"). The Board affirmed the opinion, award and order of the Administrative Law Judge ("ALJ"), holding that Consol's former employee, Danny M. Hall, provided timely notice to Consol of his coal miners' pneumoconiosis (black lung) and hearing loss claims and that the hearing loss claim was timely filed. Consol argues that the award of income and medical benefits should be overturned because the ALJ

applied the wrong statutory sections in determining whether notice and filing were timely. Because we agree with the Board that, notwithstanding a minor error in citation, the ALJ's analysis was adequate to justify the award of total disability benefits for the pneumoconiosis claim, we affirm that part of the opinion. However, because we adjudge that as a matter of law a factual determination must be made regarding the timeliness of notice as to the hearing loss claim, we remand that issue for further consideration by the ALJ.

Danny M. Hall's primary employment since 1976 has been as an underground coal mine worker. He began working for Consol in that capacity on March 24, 1996. He testified that he had operated a miner for sixteen years, and that the chain on this equipment was noisy and located close to his ear.

In 1992, Hall consulted a specialist in otolaryngology, Dr. Daniel Mongiardo, regarding pain in his ears. Dr. Mongiardo took an audiogram, advised Hall to protect his ears from loud noises and diagnosed a left timpanic membrane perforation, possible noise-induced hearing loss, and rhinitis medicaments. On a subsequent visit about a month later, the doctor upgraded his diagnosis to confirm noise-induced hearing loss.

Then, in March 1995, Hall consulted Dr. Vidya B. Yalamanchi, a cardiologist, about some chest pain he was experiencing. Dr. Yalamanchi recorded the words "black lung" on Hall's chart under a section entitled "Review of Systems." Dr. Yalamanchi signed an affidavit stating that this notation on the chart did not indicate that he had diagnosed Hall with pneumoconiosis; rather, he had listed it as a condition that might be causing Hall's shortness of breath. Dr. Yalamanchi also ordered a lung x-ray which was performed on April 21, 1995. It was negative for pneumoconiosis.

Before beginning work at Consol, Hall was required by the company to undergo a medical examination. This examination included a lung x-ray, the results of which were normal. Hall was also given a hearing test which indicated that he had some hearing loss.

At the direction of Consol, Hall and his co-workers had lung x-rays performed at their job site in August 2000. In a letter dated August 25, 2000, Hall was informed that his x-ray showed that he had contracted coal workers' pneumoconiosis. Hall's attorney filed written notice of the pneumoconiosis claim on October 25, 2000. On the advice of a lung specialist, Dr. Thomas Jarboe, Hall resigned from Consol in September 2001. On October 1, 2001, Hall's attorney filed written notice of the work-related hearing claim.

On December 18 and 19, 2001, Hall filed a series of applications for workers' compensation benefits. On October 11, 2002, following a Benefit Review Conference, Administrative Law Judge R. Scott Borders awarded him permanent total disability benefits for pneumoconiosis and medical benefits for work-related hearing loss.

Consol appealed the decision, arguing that the ALJ had erred in determining (1) that Hall gave timely notice of his pneumoconiosis and hearing claims, and (2) that the hearing loss claim was timely filed. The Workers' Compensation Board upheld the ALJ's decision and this petition for review followed.

In determining whether Hall gave timely notice of his pneumoconiosis claim, the ALJ cited KRS 342.316(4)(a), which sets a three-year limitations period for filing an occupational disease claim after last exposure to the occupational hazard or discovery of the disease.[1] The proper section for determining notice, however, is KRS 342.316(2), which requires that an employee give notice "as

[1] KRS 342.316(4)(a) states in part:
The right to compensation under this chapter resulting from an occupational disease shall be forever barred unless a **claim is filed with the commissioner within three (3) years after the last injurious exposure to the occupational hazard or after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, whichever shall last occur**; . . . (emphasis added.)

soon as practicable" after discovery or diagnosis of the disease.[2]

Consol contends that under KRS 342.316(2), Hall should have given notice shortly after his visit to Dr. Yalamanchi in March 1995. Consol has interpreted the medical evidence to indicate that at the time of his visit to Dr. Yalamanchi and the notation of "black lung" on Hall's chart, Hall had either been diagnosed with black lung or he had at that time a reasonable apprehension that he suffered from the disease. Hall did not give notice until October 2000, however, which was more than five years after the consultation with Dr. Yalamanchi. Under the terms of KRS 342.316(2), Consol argues this is not reasonably practicable notice.

We disagree with Consol's analysis. Although the ALJ did not cite the proper section of the statute, he clearly applied the correct standard under KRS 342.316(2) in analyzing the notice issue. The ALJ found as follows:

> [I]t is clear [Hall] did not know he had contracted coal worker's pneumoconiosis until he had an x-ray done on August 25,

[2] KRS 342.316(2) states in part:
The procedure with respect to the **giving of notice** and determination of claims in occupational disease cases and the compensation and medical benefits payable for disability or death due to the disease shall be the same as in cases of accidental injury or death under the general provisions of this chapter, except that **notice of claim shall be given to the employer as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, or a diagnosis of the disease is first communicated to him, whichever shall first occur.** (emphasis added.)

> 2000 at the request of the employer. Upon receiving notice from the results of that x-ray that he had contracted coal worker's pneumoconiosis [Hall] testified he retained an attorney who filed written notice with the Employer on October 25, 2000. The Administrative Law Judge is of the opinion that giving the employer notice two months after discovering he had contracted coal worker's pneumoconiosis is **clearly reasonable notice**. (emphasis added.)

We are in accordance with the opinion of the Board, which stated that:

> It is clear Dr. Yalamanchi did not diagnose black lung nor did he have at his disposal any prior diagnosis of that condition by any physician. Furthermore, according to Hall, he passed Consol's pre-employment physical, which included a chest x-ray. In fact, based on the evidence of record, the ALJ was free to infer that Hall did not become aware of his condition until after he was furnished an x-ray taken at the direction of Consol in late August 2000. The first definitive diagnosis of pneumoconiosis was not until Hall saw Dr. Jarboe. There is nothing contained in Dr. Yalamanchi's reports or testimony that compels a finding of a distinct manifestation of the disease in 1995. Although referring to KRS 342.316(4)(a), it is clear from his summary of the evidence, the ALJ engaged in an appropriate analysis of the issue of notice required by KRS 342.316(2).

This Court will only correct a Board decision when we "perceive[] the Board has . . . committed an error in assessing the evidence so flagrant as to cause gross injustice." See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). A minor error in citation will certainly not be used as a means of justifying the

substitution of Consol's interpretation of the facts for the ALJ's findings of fact.

Consol next challenges the award of medical benefits for Hall's work-related hearing loss claim on the grounds that neither the notice nor the filing of the claim was timely.[3] The resolution of this issue is complicated by the fact that Hall's hearing loss has been characterized by the ALJ and by Consol as an occupational disease for purposes of determining the timeliness of notice and as cumulative trauma for purposes of determining timeliness of filing.

In regard to the issue of notice, the ALJ determined that it was "clearly reasonable" for Hall to give notice (his attorney's letter of October 1, 2001) one month after his last exposure to the noise (his resignation from Consol on September 23, 2001). Although he did not cite a specific statutory section in making this determination, the ALJ clearly relied on KRS 324.316(4)(a), which is used to determine whether claims in occupational disease cases are timely filed. Consol contends that the ALJ should have applied KRS 342.316(2). Under the terms of that section of the statute, Consol claims that Hall should have given notice as soon as was practicable after his consultation with Dr. Mongiardo in 1992, which is when Consol maintains

[3] Hall was awarded only medical benefits for this claim as his 5% permanent functional impairment assessment by Dr. Windmill did not reach the threshold level of 8% set by KRS 342.7305 for the award of income benefits.

Hall discovered or was diagnosed with work-related hearing loss.

The ALJ also found that on the basis of Hall's testimony, the hearing loss did not manifest itself until 2001 and therefore Hall's application for benefits was timely filed. For this analysis, the ALJ's opinion relied on Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999), a cumulative trauma case. In Alcan, the Kentucky Supreme Court elaborated on the application of KRS 342.185, the limitations statute governing work-related accidents, to cumulative trauma cases, holding that the two-year limitations period for filing begins to run when the injury manifests itself (generally when the employee discovers that a work-related injury has been sustained). See id. at 101.

Consol also departed from the occupational disease analysis it had applied in discussing notice and cited Alcan to support its argument that Hall had filed his claim beyond the two-year statutory limit, on the grounds that the condition manifested itself in 1992 when Hall consulted Dr. Mongiardo.[4]

The Board in its review was troubled by the inconsistency in the treatment of filing and notice, and

[4] This inconsistency on Consol's part (in characterizing the hearing loss claim as an occupational disease for purposes of notice and subsequently as cumulative trauma for purposes of filing) is perhaps explained by the fact that, under the more liberal provisions of the occupational disease statute, filing is permitted up to three years after the last injurious exposure to the occupational hazard. See KRS 342.316(4)(a).

also found that the ALJ's determination that the hearing loss did not manifest itself until 2001 was not sufficiently supported. As the Board stated in its opinion,

> [t]he dispositive question is what Hall knew and when he knew it. The ALJ apparently accepted Hall's testimony that he did not recall Dr. Mongiardo diagnosing a work-related condition and from that it might reasonably be assumed that counsel advised Hall of his work-related condition once he received Dr. Mongiardo's report. This, however, was not stated by the ALJ.

Nonetheless, the Board approved the award of medical benefits based on the holding in Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999), which states that even though a cumulative trauma claim is filed outside the limitations period, a claimant is nonetheless entitled to recover benefits for the amount of impairment attributable to the two years (the statutory limitations period under KRS 342.185) before the claim was filed. The Board acknowledged that the evidence in Hall's case did not establish precisely what portion of the impairment was attributable to the last two years of exposure, but noted that under Caldwell Tanks v. Roark, Ky., 104 S.W.3d 753 (2003), Hall was entitled to medical benefits if any portion of the hearing loss could be assigned to the two years prior to filing. The Board held that on the basis of Hall's own testimony and Dr. Windmill's attribution of the hearing loss to Hall's entire history of exposure to work-related noise, Hall had indeed suffered some portion of the hearing loss during the final two years

of his employment. The Board therefore upheld the award of medical benefits.

Although the holdings in Clark and Caldwell Tanks permit a limited recovery notwithstanding untimely filing, the requirement of notice must also be met.

Under both the cumulative trauma and occupational disease statutes, notice of a potential claim must be given to the employer as soon as practicable. "[O]ne of the purposes of the notice requirement is to give the employer an opportunity to take measures to minimize the worker's impairment and, hence, its liability." Clark, 998 S.W.2d at 490.

We therefore remand the hearing loss claim to the ALJ for further clarification regarding whether this is an occupational disease or cumulative trauma claim. This determination is a question of fact for the ALJ. O.K. Precision Tool & Die Co. v. Wells, Ky., 678 S.W.2d 397, 400 (1984). Furthermore, the ALJ must make a more explicit finding as to the timeliness of notice pursuant to the applicable statute.

BAKER, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING. I would affirm in full. Consol was aware of hearing loss suffered by Hall at the time of his employment by virtue of the hearing test which it ordered. It was fully enabled to mitigate damages for exacerbation of the hearing problem. I believe that the

Board carefully considered all the confusion inherent in this issue and properly resolved it.

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