

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-001067-WC

TRI-STATE ROOFING AND SHEET METAL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO.02-WC-00402

STEVEN HENSLEY;
HONORABLE ROGER D. RIGGS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

AND:

NO. 2003-CA-001216-WC

STEPHEN HENSLEY

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 02-WC-00402

TRI-STATE ROOFING AND SHEET METAL;
HON. ROGER D. RIGGS, ALJ; AND
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** **

BEFORE: BAKER, KNOPF AND TACKETT, JUDGES.

TACKETT, JUDGE: Tri-State Roofing and Sheet Metal (Tri-State)
petitions for review of a decision of the Workers' Compensation

Board (the Board), entered April 23, 2003, that affirmed an Administrative Law Judge's (ALJ) determination that Steven Hensley (Hensley) sustained work-related cumulative trauma injuries to his left shoulder, hips and back while employed by Tri-State. The Board also held that the ALJ correctly found that Hensley's disability manifested on March 29, 2000. Hensley has cross-petitioned, arguing that the ALJ and the Board erred by failing to strike Tri-State's special answer asserting a statute of limitations defense as untimely. We affirm.

Hensley was employed by Tri-State from 1986 until 1991 and from 1998 until March 28, 2000, as a sheet metal roofer¹. The roofs that Hensley installed were made primarily from copper panels that weighed between 40 to 50 pounds. Hensley's job as a roofer entailed climbing a scaffold or a ladder to access a building's roof, pulling the panels onto the roof, laying and seaming the panels together and screwing cleats into the panels. The cleats were screwed in every eighteen inches, requiring Hensley to bend and stoop frequently. Hensley testified during his deposition that Tri-State installed roofs on large commercial contract jobs, such as Lexington area shopping malls, the Lexington Green Shopping Center and a Pier One store.

During the summer of 1998, Hensley began experiencing back pain. Hensley sought medical treatment from his family

¹ From 1991 until his return to Tri-State in 1998, Hensley worked for an auction company that oversaw the closure and liquidation of businesses.

physician, Dr. Joseph Gerhardstein, for his back pain, which he assumed to be "normal work pain." Dr. Gerhardstein's medical records from January 8, 1999, indicated that Hensley complained of lower back and bilateral hip pain, with the left hip hurting for a year, as well as numbness in the legs. Dr. Gerhardstein ordered x-rays of the lumbar spine and pelvis, which revealed some degenerative disc disease at L3-4, and prescribed Motrin. During a follow-up visit on January 29, 1999, Dr. Gerhardstein noted that the Motrin had helped Hensley's shoulder but not his hips. Moreover, Hensley was still experiencing pain while walking. On February 19, 1999, an MRI of the lumbar spine showed desiccation of the disc at L5-S1 and bulging from L3 to S1. Thereafter, on March 5, 1999, Dr. Gerhardstein prescribed Ibuprofen and back exercises. The record shows no further treatment of Hensley until January 2000.

On January 18, 2000, Hensley suffered an acute episode of back pain that required emergency room treatment. The next day, Hensley saw Dr. Gerhardstein and complained that his back pain had been increasing for over a month. Dr. Gerhardstein examined Hensley and noted that Hensley had a bent stance, antalgic gait, and was walking with the aid of crutches. Hensley was unable to engage in range of motion testing. Based upon his examination, Dr. Gerhardstein diagnosed Hensley with right-sided sciatica and referred Hensley to physical therapy.

During an office visit on February 7, 2000, Dr. Gerhardstein noted that the physical therapy improved Hensley's physical impairments. Dr. Gerhardstein recommended that Hensley continue attending physical therapy sessions. Hensley indicated to his physician that he had been able to rest and attend physical therapy because he had been temporarily laid off by Tri-State.² However, Hensley informed Dr. Gerhardstein that he was concerned about being ready to return to work once the layoff was over. Hensley, assuming that his pain was related to the physical demands of his employment, also expressed his desire that his medical condition and treatment be covered under workers' compensation. At this point, Dr. Gerhardstein asked Hensley if he had been involved in an accident at work, to which Hensley responded negatively. Dr. Gerhardstein noted that "[S]ince we have no definite injury that [a workers' compensation claim] is hard to do." At this point, Dr. Gerhardstein excused Hensley from work for one month to continue physical therapy. Even with physical therapy, Hensley continued to experience pain while walking. Dr. Gerhardstein referred Hensley to an orthopedic surgeon, Dr. John Allen.

Hensley first saw Dr. Allen on March 15, 2000. Dr. Allen diagnosed greater trochanteric bursitis, with the left side being worse than the right side, and injected Hensley's hip

² At this time, Tri-State had laid-off Hensley and several other employees due to a lack of work.

with pain medication. On March 29, 2000, Dr. Allen noted that the shots had temporarily relieved Hensley's pain, but provided no dramatic improvement. During this visit, Dr. Allen noted that Hensley was employed in a physically demanding job that was likely contributing to his persistent back and hip pain. Dr. Allen advised Hensley not to work for a couple of weeks to see if rest would improve his medical condition. Moreover, Dr. Allen's treatment note from this office visit reads:

"He is working rather hard and I think between his back and the hip problem and his work related strain he is not getting any better. . . .I hope he can be off without too much difficulty as I do think that his problems are work related at this point."

Hensley immediately took his medical excuse to his supervisor. In response to Dr. Allen's off-work slip, Tri-State terminated Hensley's employment. Hensley has not worked in any capacity since having his employment terminated by Tri-State.

Following the termination of his employment, Hensley applied for Social Security disability benefits. In the course of being evaluated for that claim, Hensley was diagnosed with severe peripheral vascular disease, which severely reduced the circulation of blood in his legs. Sometimes, Hensley felt no pulse in either leg. The pain and numbness Hensley felt in his legs, as well as the difficulties he had walking, were attributed to the vascular disease.

Meanwhile, an MRI ordered by Dr. Gerhardstein revealed tendonitis, arthritis, and degeneration of Hensley's left shoulder. On July 31, 2001, Dr. Allen read the MRI to show chronic rotator cuff tendonitis and some arthritis in that area as well as in the acromioclavicular joint. Hensley eventually underwent surgery on his left shoulder to repair an underlying chronic rotator cuff tear.

On March 26, 2002, Hensley filed an Application for Resolution of Injury Claim against Tri-State, alleging March 29, 2000, as the manifestation date of his back and hip injuries.³ In support of Hensley's claim, Dr. Allen diagnosed Hensley with, degenerative osteoarthritis of the lumbar spine, hips, and left AC joint, trochanteric bursitis of the hips and rotator cuff tendonitis/partial tear. Dr. Allen opined that these medical conditions were caused by "chronic overuse from heavy labor" and assigned a 5% impairment rating Hensley's lumbar spine condition⁴. According to Dr. Allen, Hensley would be restricted in lifting, bending, walking, standing, sitting and climbing. Accordingly, Hensley was unable to work as a roofer.

At Tri-State's request, Dr. Daniel Primm evaluated Hensley on July 27, 2002. As a result of his examination, Dr.

³ Hensley later amended his workers' compensation claim to include injuries sustained to his left shoulder. Hensley's peripheral vascular disease was not included in his claim.

⁴ Dr. Allen also noted, however, that the AMA Guides did not adequately deal with the condition found in the left shoulder.

Primm diagnosed Hensley with advanced peripheral vascular disease with chronic claudication, which affected Hensley's legs and lower back. Dr. Primm found that Hensley's employment in manual labor aggravated the degenerative disc disease in the lumbar spine and produced one-half of the 5% permanent impairment rating. Further, Dr. Primm opined that Hensley's peripheral vascular disease was totally occupationally disabling, but in the absence of that condition, Hensley's back injury would only limit him from lifting no more than 20 to 25 pounds with occasional lifting of up to 75 pounds. Dr. Primm also advised Hensley to avoid repetitive bending and regular or frequent climbing. While acknowledging Hensley's shoulder injury and operation, Dr. Primm offered no opinion as to causation, impairments or restrictions relative to that injury.

The ALJ reviewed the lay and medical testimony contained within the record and concluded that Hensley was permanently and totally disabled as a result of the back, leg and shoulder conditions caused by the cumulative trauma from Hensley's employment. The ALJ further determined that Hensley's disability became manifest on March 29, 2000, noting that this date represented the first indication from a medical professional that Hensley's physical conditions were work-related. On appeal, the Board affirmed the ALJ's findings and award of benefits. This petition and cross-petition followed.

At this point, we must first address the threshold issue Hensley presents in his cross-petition. In his cross-petition, Hensley argues that the Board and the ALJ erred in not striking Tri-State's special answer, in which Tri-State argued that Hensley's claim was not filed with the Department of Workers' Claims within two years of the date of his injury as required by KRS 342.185, as untimely. We find this argument to be without merit.

803 KAR 25:010E § 5(d)(2) provides as follows:

A "special answer shall be filed within:

- a. Forty-five (45) days of the scheduling order; or
- b. Ten (10) days after discovery of facts supporting the defense if discovery could not have been had earlier in the exercise of due diligence.

Here, Tri-State filed its special answer on June 18, 2002, approximately four days after Hensley testified at his deposition. During the deposition, Hensley testified that he assumed as early as 1999 that his physical impairments were related to his employment. Review of the record indicates that Tri-State acted with due diligence in filing its special answer because it first discovered the possibility of a statute of limitations defense during this deposition. The initial description of Hensley's injury in his application for benefits did not make this defense obvious to Tri-State. Moreover, Tri-

State had no prior notice of Hensley's injury, nor did it possess the opportunity to investigate Hensley's alleged injury, nor did it pay Hensley any temporary total disability payments or medical expenses. The medical records contained in the record also failed to indicate the viability of a statute of limitations defense. Under these circumstances, it is clear that 803 KAR 25:010E § 5(d)(2) did not require Tri-State to file its special answer until it discovered that a statute of limitations defense was viable. Because Tri-State filed its special answer four days after taking Hensley's deposition, we find this employer timely filed its special answer and properly preserved this issue for review.

We now turn our attention to the merits of Tri-State's petition for review. Tri-State asserts that the ALJ and the Board incorrectly applied the standard for determining when the statute of limitations begins to run in a cumulative trauma claim. Specifically, Tri-State argues that in cumulative trauma cases, the claimant's obligation to file a timely claim is not diminished even if the treating physician fails to specifically diagnose the claimant's medical condition as being work-related. Hence, according to Tri-State, even though Hensley was not given specific notice of a cumulative trauma injury until seeing Dr. Allen on March 29, 2000, the statute of limitations on Hensley's workers' compensation claim commenced when Hensley, prior to

seeking treatment from his family physician, believed that his back, leg, and shoulder pain was related to his employment. Simply put, Tri-State's position is without merit.

The Kentucky Supreme Court has clearly defined our function in reviewing matters from the Workers' Compensation Board. In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992), the Court stated:

The function of further review of the WCB in the Court of Appeals is to correct the Board only where the the Court perceives the Board has overlooked or misconstrued controlling statute or precedent, or committed an error in assessing evidence so flagrant as to cause great injustice.

A claimant in a workers' compensation action bears the burden of proving every essential element of his cause of action. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Since Hensley was successful before the ALJ, the question on review is whether substantial evidence supports the ALJ's conclusion. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence is evidence which, when taken alone or in light of all the evidence, has probative value to induce conviction in the mind of a reasonable person. Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409 (1994), citing Kentucky State Racing Comm'n v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

As the finder of fact, the ALJ has the sole authority to assess and to evaluate the quality, character, and substance of the evidence. Square D Co. v. Tipton, Ky., 862 S.W.2d 308 (1993). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Hall's Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999). To reverse the ALJ's decision, it must be shown that no substantial evidence supports that decision. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

KRS 342.0011(1) defines a compensable injury as being a traumatic event or series of events, including cumulative trauma, that proximately causes a harmful change in the human organism. When a cumulative trauma injury is alleged, the claim must be filed within two years of the date the disability becomes manifest. KRS 342.185; Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999). In Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999), the Kentucky Supreme Court held that an injury or disability manifests when the claimant discovers that a physically disabling injury has been sustained and becomes aware that the cause of this injury was work-related. The entitlement

to workers' compensation benefits arises with that work-related injury, even if that injury does not result in a permanent functional impairment or permanent disability. Holbrook v. Lexmark International Group, Inc., Ky., 65 S.W.3d 908, 911 (2002). Clearly, the notice and limitations provisions of Kentucky's workers' compensation law are triggered when the claimant becomes aware of an injury and knows that the injury was caused by work, regardless of whether the symptoms that led to the discovery of the injury later subside. Id. The worker, however, must reasonably be apprised of the work-relatedness of his condition. See Toyota Motor Manufacturing, Kentucky, Inc., v. Czarnecki, Ky. App., 41 S.W.3d 868 (2001). It is unreasonable for a claimant to self-diagnose the cause of the harmful changes to his body since medical causation is a matter for the medical experts. Hill v. Sextet Mining Corporation, Ky., 65 S.W.3d 503, 507 (2001). As such, Kentucky law mandates that a claimant cannot be required to give an employer notice that he has sustained a work-related gradual injury until actually becoming informed of that fact. See Alcan Foil, supra; Clark, supra.

In the case sub judice, the record clearly reveals that Hensley was aware of his physical impairments and associated these impairments with his employment long before being evaluated by Dr. Gerhardstein or Dr. Allen. Furthermore,

the record shows that, while seeking treatment from Dr. Gerhardstein from January 1999 to March 15, 2000, Hensley was led to believe that his condition was not an appropriate subject of a workers' compensation claim. The medical records from Hensley's first visit with Dr. Allen on March 15, 2000 provide no indication that Dr. Allen diagnosed Hensley's medical condition as being work-related. Under these circumstances, we are not persuaded that Hensley's personal assumption that his aches and pains were attributable to his work rise to the level of knowledge contemplated by Alcan Foil, Clark or Hill. Moreover, medical records dated March 29, 2000, conclusively demonstrate that Dr. Allen became the first physician to determine that Hensley's employment with Tri-State had accelerated the development of the degenerative condition in Hensley's back, hips and legs. On March 26, 2002, Hensley filed his workers' compensation claim based upon Dr. Allen's medical diagnosis and conclusions of March 29, 2000. Since Hensley provided the employer with notice of his medical condition within two years of Dr. Allen's diagnosis, we conclude that substantial evidence supported the ALJ's finding that Hensley timely filed his claim for workers' compensation benefits.

For the aforementioned reasons, the judgment of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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