

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000579-WC

DANA CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-92749

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

APPELLEES

OPINION AFFIRMING

** ** *

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Dana Corporation petitions for review of an opinion of the Workers' Compensation Board which reversed in part and remanded an opinion of the Administrative Law Judge. We affirm.

In 2003, Melinda Adams was employed in the assembly area of Dana Corporation, where she was required to lift parts weighing five to fifty pounds on a

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

shoulder yoke about six hundred times per day. She began to notice pain in her shoulders, elbows, and thumbs in January, 2003. Adams testified that she notified her supervisor of her symptoms at that time, although he did not fill out an incident report. Adams made further reports of shoulder pain to the company nurses in May, and consulted with two physicians. Ultimately, she had surgery on her right shoulder in March, 2004.

Adams filed a claim against Dana on August 31, 2005, alleging that she had sustained work-related injuries to both her shoulders on June 24, 2003.

KRS 342.185 provides that an employee must file a claim within two years of giving notice of an injury to the employer. KRS 342.185 also contains a tolling provision, however, which allows the two year limitations period to begin running after the suspension of the payment of income benefits. The right shoulder surgery was performed on March 19, 2004. Dana paid total temporary disability (TTD) benefits to Adams from the date of the surgery until April 5, 2004. Dana does not dispute that the payment of TTD benefits tolled the limitations period for the right shoulder. The issue is whether the payment of the TTD benefits following the surgery on Adams's right shoulder also tolled the limitations period for the injury to her left shoulder.

The preliminary question that must be addressed is whether Adams gave notice of an injury to **both** shoulders on June 24, 2003. Dana does not dispute that she gave notice of a work-related injury to her **right** shoulder on June 24, 2003. The ALJ found as follows:

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 to the left shoulder. The instant claim was filed on August 31, 2005. The Administrative Law Judge finds that the claim on the left shoulder was filed more than two years after the date of the injury, irregardless of which injury date is used and the plaintiff was paid no benefits for the condition to the left shoulder. The Administrative Law Judge finds that the plaintiff's claim for benefits related to the injury to the left shoulder must be dismissed, pursuant to KRS 342.185.

In other words, the ALJ concluded that Adams had reported the left shoulder injury in January or June, 2003, but that the precise date was not significant because the limitations period for her left shoulder injury was not tolled by the payment of TTD benefits following the right shoulder surgery.

It is Dana's position that it had no notice of any left shoulder injury until the filing of Adams's claim in August 31, 2005, and that consequently the payment of TTD benefits following the surgery could not possibly have tolled the two-year limitations period for the left shoulder.

In its review of the ALJ's opinion, the Board stated that

[t]he ALJ **implicitly concluded** that the left and right shoulder conditions became manifest at the same time in January, 2003 or June, 2003. **The ALJ's finding regarding the date of manifestation is not at issue on appeal.** Adams testified that Dr. Percinel told her she had work related problems with both shoulders when she first saw him in 2003. Adams' testimony is sufficient to support a finding of a

manifestation for purposes of notice and the beginning of the statute of limitations period.

(Emphasis supplied.)

We agree with the Board that the ALJ made an implicit finding that Adams had given notice of an injury to both shoulders in either January or June, 2003. Had the ALJ not made such a finding, it would not have been necessary for him even to consider whether the TTD benefits paid following the right shoulder surgery had tolled the limitations period for the left shoulder. Dana nonetheless maintains that it had notice only of a right shoulder injury on June 24, 2003, and that an official First Report of Injury to that effect was completed on July 1, 2003. This document is not in the record before us. “It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.” *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

We next consider whether the payment of TTD benefits following the right-shoulder surgery tolled the limitations period for both shoulders. The Board held that it did.

It is apparent the ALJ found the TTD payment was based on surgery being performed on the right shoulder. The period of voluntary TTD payments commenced with the date of surgery and continued until Adams’ return to work. Thus, the ALJ took a narrow view that the payment of TTD benefits was confined to the right shoulder and only tolled the statute of limitations as to the right shoulder only. We believe KRS 342.0011(11)(a) and 342.185 can not be read so narrowly. **Where the same cumulative trauma produces disability to multiple body parts manifesting at the same time, we believe payment of TTD benefits for any of the affected**

body parts tolls the statute of limitations for the entirety of the affected body parts. Thus, the ALJ erred in finding the claim as it related to the left shoulder was barred by the statute of limitations. To hold otherwise would require the claimant to split his cause of action. Nothing in the statute indicates a legislative intent to require the claimant to split his cause of action. To the contrary, it is evident the legislative intent under the Act is to encourage less litigation rather than more. . . . The position adopted by the ALJ promotes additional litigation.

(Emphasis supplied.)

We “correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). We find that the Board has neither overlooked nor misconstrued controlling statutes. Indeed, its approach is consonant with the purpose of the tolling provision, which is to protect injured workers.

It has long been recognized that KRS 342.185 operates together with KRS 342.040(1) and tolls the period of limitations until after the payment of voluntary income benefits ceases in order to protect injured workers from being lulled into a false sense of security by receiving such payments and, therefore, failing to actively pursue a claim.

J & V Coal Co. v. Hall, 62 S.W.3d 392, 395 (Ky. 2001).

For the foregoing reasons, the opinion of the Workers’ Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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