

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000788-WC

DEBRA L. COOK

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-00827

FIELD PACKING COMPANY, LLC;
HONORABLE JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,¹ SENIOR JUDGE.

DIXON, JUDGE: Debra Cook seeks review of a decision of the Workers' Compensation Board affirming an administrative law judge's order dismissing in part and denying in part Cook's claims for workers' compensation benefits. We find no error and affirm.

¹ Senior Judge J. William Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Cook, age 52, has a tenth grade education and obtained a GED. She began working at Field Packing Company's Owensboro, Kentucky, meat processing plant in April 1995. Cook suffered a right shoulder injury in March 1997, while lifting a large carton of hot dogs above her head. In January 2002, Cook underwent surgery on her right shoulder for a torn rotator cuff. Cook received TTD benefits for her initial right shoulder injury until June 16, 2003.²

However, prior to her rotator cuff surgery, Cook alleged she further injured her shoulder on October 25, 2001, while lifting a box above her head. Although Cook contends she reported the injury to her supervisor, the alleged injury was not referred to the office of workers' claims until May 6, 2004.

On May 12, 2003, Cook was performing light duty work in the dry storage area of the plant. Cook felt her left shoulder “pop” when she attempted to lift a large roll of labels onto a shelf above her head. Cook sought treatment for her left shoulder pain, and she subsequently filed a Form 101 application for resolution of injury claim on May 26, 2004. In her Form 101, Cook alleged she was entitled to benefits for the right shoulder injury on October 25, 2001, and the left shoulder injury on May 12, 2003.

In September 2004, the claim was held in abeyance at Cook's request. In May 2005, after reaching maximum medical improvement, Cook moved the ALJ to schedule a benefit review conference. The conference was held in May 2006; thereafter, on June 19, Cook moved to amend her Form 101 to include her right shoulder injury of

² Cook received \$15,975.12 in TTD benefits for the 1997 right shoulder injury. Additionally, medical expenses totaling \$28,243.80 were paid for the 1997 injury.

March 1997. Over Field's objection, the ALJ granted Cook's request to amend her Form 101. At the final hearing on August 22, 2006, Cook testified on her own behalf, and both parties introduced medical evidence. In an opinion and order rendered October 20, 2006, the ALJ dismissed Cook's claims relating to the 1997 and 2001 injuries as time-barred, and he denied Cook's claim on the 2003 left shoulder injury for failure to prove causation. Cook appealed to the Board, which affirmed the ALJ's decision. This petition for review followed.

Cook argues the Board erred as a matter of law in affirming the ALJ's dismissal of the 1997 and 2001 right shoulder claims as time-barred. Cook further contends the Board clearly misconstrued the evidence relating to causation of her 2003 left shoulder claim.

On appellate review of the Board's decision, this Court will reverse only if “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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). After reviewing the record and considering the written arguments of the parties, we conclude the Board correctly applied the law and properly affirmed the ALJ's opinion and order. Because we find the Board's analysis well-reasoned, we adopt it herein as our own:

On appeal, Cook argues the ALJ erred in dismissing the claims for benefits for the March 20, 1997 and October 25, 2001 injuries based on the statute of limitations. Cook argues the payment of TTD benefits must be seen as relating to both alleged injury dates. The October 25, 2001 injury claim was filed within two years of the termination of TTD benefits;

therefore, Cook argues the October 25, 2001 claim is not barred by the statute of limitations. Cook argues the 1997 claim would not be barred since she amended her claim to include the 1997 injury date. She contends the amendment relates back to the original filing date of the claim for the 2001 and 2003 injuries. Addressing her claim for a left shoulder injury of May 12, 2003, Cook argues the ALJ erred in finding she failed to meet her burden of proving causation. Cook states her deposition and hearing testimony was undisputed. She argues the evidence shows that although she may have experienced prior problems with her left shoulder, the left shoulder injury of May 12, 2003 was a separate and distinct injury which required extensive medical treatment. She argues it was not until after the May 12, 2003 left shoulder injury that an MRI revealed a left shoulder torn rotator cuff. She argues the torn rotator cuff, which resulted from the May 12, 2003 event, is a harmful change in the human organism evidenced by objective medical findings.

We find no error in the ALJ's dismissal of the right shoulder claims based upon the statute of limitations. In the absence of a petition for reconsideration, on questions of fact the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Inadequate, incomplete, or even inaccurate findings of fact on the part of the ALJ will not justify reversal on appeal if there is identifiable evidence in the record that supports the ultimate conclusion. *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334 (Ky. 1985).

Here, the ALJ found that TTD benefits were paid for the 1997 injury and no TTD payments were made for the 2001 injury. Since TTD benefits were terminated as of June 12, 2002, it was necessary for Cook to assert her claim for the 1997 injury on or before June 12, 2004. Cook filed her Form 101 on May 6, 2004 and nothing further was filed until after June 12, 2004. She did not attempt to amend her claim until June 2006. Clearly the 1997 claim was not asserted until more than two years following the last payment of TTD benefits. See KRS 342.185.

We find no legal support for Cook's argument that the amendment of the claim for the 2001 and 2003 injuries to include the 1997 injury would relate back to the date of filing her original claim. Cook's reliance on *Hodge v.*

Ford Motor Co., 124 S.W.3d 460 (Ky. App. 2003), is misplaced. In *Hodge*, the employee filed a claim for a 1998 injury and thereafter sustained an additional injury in 2000. Hodge introduced evidence concerning her 2000 injury and included the alleged date of the 2000 injury in her proposed stipulations. The court held that although Hodge did not amend her claim to include the 2000 injury, the parties tried the issue by implied consent of the parties. Ford failed to object to introduction of evidence concerning the 2000 injury and actively defended the claim that the 2000 injury was work-related. Here, the 1997 injury was not tried by consent of the parties prior to the running of the statute of limitations. Further, when Cook asserted her 1997 claim by seeking to amend the Form 101 to include that injury, Field Packing promptly asserted its statute of limitations defense.

Since the ALJ determined no TTD benefits were paid for the October 25, 2001 right shoulder injury, it was necessary for Cook to have filed her claim on or before October 25, 2003. Her original Form 101 was not filed until May 6, 2004, which is more than two years following the date of injury. Thus the ALJ correctly determined the 2001 injury was barred by the statute of limitations.

We believe the ALJ's finding regarding the alleged 2003 left shoulder injury is supported by substantial evidence and we therefore affirm. The claimant in a workers' compensation claim bears the burden of proof and risk of persuasion and if unsuccessful before the ALJ, the question on appeal is whether the evidence is so overwhelming upon consideration of the record as a whole as to compel a finding in his favor. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984).

This Board is not free to substitute its view of the evidence for that of the ALJ and the mere presence of some evidence that would support a contrary conclusion does not compel a finding in Cook's favor. We must determine whether the finding made by the ALJ is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

Cook argued, and continues to argue, she sustained a distinct trauma to her left shoulder on May 12,

2003, while placing a heavy roll of labels on a shelf above her head. She has argued the trauma on that date produced the left rotator cuff tear. We believe the evidence falls far short of compelling such a conclusion. As noted by the ALJ, Dr. Perry indicated Cook had ongoing problems related to her left shoulder dating back to April 2000. Although Cook attempts to minimize the seriousness of her left shoulder problem prior to the alleged 2003 injury, Dr. Johnson's records indicate he intended to schedule Cook for a left shoulder arthroscopy, subacromial decompression, and distal clavicle excision in October 2002. It was suspected that Cook had sustained a tear prior to the event of May 12, 2003. As noted above, Dr. Perry opined Cook's left shoulder injury was a cumulative injury and the trauma of May 12, 2003 could possibly have served as an aggravating factor, but was clearly not the underlying cause of her problem. The evidence simply does not compel a finding that the alleged trauma on May 12, 2003 caused the left rotator cuff tear.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles S. Wible
Owensboro, Kentucky

BRIEFS FOR APPELLEE:

John H. Helmers
Owensboro, Kentucky

Laurie Goetz Kemp
Louisville, Kentucky