Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 4, 2016

CLAIM NO. 201500075

DONNIE HAMLIN PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

ALPHA NATURAL RESOURCES
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
VACATING AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. The parties have filed a joint motion to remand the above-styled claim to the Administrative Law Judge. The parties note that on appeal the Petitioner, Donnie Hamlin ("Hamlin") seeks to overturn the August 11, 2015, Opinion and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") dismissing his claim because it is barred by the statutes of limitations and repose. Hamlin

previously filed a motion to place the appeal in abeyance pending the outcome of Ronnie Hale v. CDR Operations, Inc., et al, (2014-SC-00062-WC) pending in the Supreme Court. In addition, one or both of the parties asserted Consol of Kentucky, Inc. v. Goodgame, et al, --- S.W.3d ---, 2015 WL 5654854, then pending before the Supreme Court, may affect Hamlin's appeal.

The parties state they have reached an agreement partially resolving the claim to the extent they settled Hamlin's claim for indemnity benefits, right to vocational rehabilitation, and right to reopen. The parties agree the claim should be remanded to the ALJ for a determination of causation and by extension his entitlement to past and future medical benefits pursuant to KRS 342.020.

In the August 11, 2015, Opinion and Order, the ALJ provided, in relevant part, the following findings of fact and conclusions of law:

> It is also clear, and not argued or disputed by the parties, that the Plaintiff was first informed his condition maybe work-related, by a physician, on December 2, 2014, by Dr. Williams.
>
> The Department of Workers' Claims records show that this claim was filed on January 22, 2015. (DWC Acknowledgement of Form 101 filing).

The question then becomes: does KRS 342.185 and *Lunsford v. Manalapan Mining Company, Inc.*, 204 S.W.3d 601 (Ky. 2006) operate to bar this claim as untimely.

I will first note that while *Manalapan Mining* specifically concerned a hearing loss claim and that at times reference is made parts of the Act dealing only with hearing loss that the case itself more often than not refers to these issues as those concerning all gradual injuries, or what is also known as cumulative trauma.

I can find nothing in this claim that would lead me to factually distinguish its analysis from that in *Manalapan Mining*.

The Plaintiff ceased working in the underground coal mining industry, and for this employer, almost thirty full months before he was notified that his cumulative trauma condition was work-related. He did not file his claim for over thirty-one months, January 22, 2015, after he last worked.

These gaps are understandable from his viewpoint inasmuch as he did not know, until December 2, 2014, that his claim was work-related. Nonetheless the plain language of *Manalapan Mining* requires a dismissal of this claim. "We conclude, therefore that the two-year period in KRS 342.185(1) operates as both a period of limitations and repose for gradual injuries and acknowledge that such a claim may expire before the work [sic] is aware of the injury." *Lunsford v. Manalapan Mining, Inc.*, 204 S.W.3d 601, 605.

In addition to the above the Supreme Court discussed a long line of case law from *Haycraft v. Corhart*

> *Refractories Co.*, 544 S.W.2d 222 (Ky. 1976) through *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503 (Ky. 2001). Clearly the Court considered the various intricacies and complexities and interplay of the ostensibly conflicting case law when creating this rule.
>
> I do not feel the need to address the Defendant's argument of whether or not it is just to dismiss the claim of a man who worked in the coal mines because he did not file a claim when he did not know he had a claim. The case law speaks for itself.
>
> This claim is dismissed under the statute of repose and because the Plaintiff waited more than two years from his last date of exposure to the gradual injury to file his claim.

The ALJ entered the following order dismissing the claim:

> This claim is dismissed, in its entirety, under the statute of repose, for failure to file the claim within two years of the last injurious exposure to the gradual injury.

In Consol of Kentucky, Inc. v. Goodgame, et al, supra, the Supreme Court, in relevant part, held as follows:

> Unlike KRS 342.316(4)(a), KRS 342.185(1), the injury statute of limitations, does not contain statute of repose language. This Court first addressed the issue of repose in injury claims in *Coslow* wherein two claimants sought to extend the discovery rule for cumulative trauma cases from *Huff* to single-traumatic-event injury claims.

This Court specifically rejected application of the discovery rule to such claims absent an "accompanying outer time limit or statute of repose." *Coslow,* 877 S.W.2d at 614. In doing so, this Court noted that the legislature had not changed the "date of accident" language in KRS 342.185(1), despite having numerous opportunities to do so. *Id.* Thus, this Court refused to read the statute as encompassing a "date of discovery" rule for single-traumatic-event injury claims. While this Court addressed the difference between a statute of limitations and a statute of repose, it did not specifically hold that KRS 342.185(1) is both. Nevertheless, the net effect of the *Coslow* opinion has been that KRS 342.185(1) acts as both in single-traumatic-event injury claims.

In *Manalapan Mining Co. v. Lunsford,* 204 S.W.3d 601, 605 (Ky. 2006), *as corrected* (Oct. 18, 2006), *as corrected* (Nov. 6, 2006), a hearing loss claim, this Court specifically held that KRS 342.185(1) acts as both a statute of limitations and a statute of repose in cumulative trauma claims. Lunsford, who last worked in 2001, testified he had been exposed to hazardous occupational noise for 37 years. *Id.* at 602. In late 2003, Lunsford underwent a hearing exam and, in early 2004, a physician advised him that he had a noise-related hearing loss. *Id.* He filed his claim for benefits related to that hearing loss shortly thereafter. *Id.* This Court held that the logic expressed in *Coslow* of not applying the discovery rule to a single-traumatic-event injury, absent a statute of repose, applied to cumulative trauma claims. *Id.* at 605. Therefore, the Court held that Lunsford's claim was barred because he

did not file it within two years of his last exposure to hazardous occupational noise. *Id.*

While we agree that KRS 342.185(1) acts as both a statute of limitations and a statute of repose, we now disagree with the holding in *Lunsford* that the repose aspect of that statute is triggered by the date of last exposure for three reasons. First, the specific statutory repose periods in KRS 342 all begin to run when their related statutes of limitations begin to run. In occupational disease claims, the date of last exposure triggers the running of both periods. KRS 342.316(4)(a). In HIV claims, the date of injurious exposure triggers the running of both periods. KRS 342.185(2). Therefore, there is a clear legislative intent that the same date should trigger both limiting provisions.

In cumulative trauma claims, this Court has determined that, for statute of limitations purposes, the date of accident, which triggers the running of the statute of limitations, is the date a claimant is informed of a work-related cumulative trauma injury. To be consistent with the legislative intent as directly expressed in KRS 342.316(4)(a) and KRS 342.185(2), the repose aspect of KRS 342.185(1) must also begin to run on the date the statute of limitations begins to run—the date a claimant is informed of a work-related cumulative trauma injury.

Second, in *Lunsford,* the majority tied the limitations and repose periods to the last date worked or the date of last exposure to the trauma. We have long held that "[w]orkers' compensation is a creature of statute, and the

remedies and procedures described therein are exclusive." *Williams v. E. Coal Corp.,* 952 S.W.2d 696, 698 (Ky. 1997). There is no "date of last exposure" or "date last worked" language in KRS 342.185(1). As the majority noted in *Coslow,* the legislature has amended KRS 342 numerous times. *Id.* at 614. However, it has not added the aforementioned language to KRS 342.185(1).

Finally, KRS 446.080 states that "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature...." We have long held that KRS Chapter 342 should be construed so as to effectuate its beneficent purposes, *i.e.* to compensate injured workers for the effects of their injuries. *See Bartley v. Bartley,* 274 S.W.2d 48, 49 (Ky. 1954). The majority opinion in *Lunsford* does exactly the opposite by setting a different method for determining the triggering date for the statute of limitations and the period of repose.

In summary, KRS 342.185(1) acts as both a statute of limitations and a statute of repose. For single traumatic event injuries the running of both periods begins on the date of accident. For cumulative trauma injuries the running of both periods begins on the date the injured employee is advised that he has suffered a work-related cumulative trauma injury. Therefore, this claim must be remanded to the ALJ so that she can determine when Goodgame was advised that he suffers from a work-related cumulative trauma injury. She must then determine if Goodgame filed his claim within two years of that date. To the extent *Lunsford* holds

> to the contrary, it is hereby overruled.

Id. at 3-4.

The Supreme Court's ruling in Consol of Kentucky, Inc. v. Goodgame, supra, has changed the law regarding the statute of limitations and repose. Based on the ALJ's finding Hamlin was first informed his condition may be work-related by Dr. Williams on December 2, 2014, in light of the Supreme Court's decision in Consol of Kentucky, Inc. v. Goodgame, supra, the ALJ erroneously dismissed Hamlin's claim.

The parties agree the August 11, 2015, Opinion and Order of the ALJ shall be vacated as Hamlin's claim was dismissed based on a perceived violation of the statute of repose pursuant to KRS 342.185(1). Subsequent to the ALJ's opinion and order being issued, the Kentucky Supreme Court rendered its decision in Consol of Kentucky, Inc. v. Goodgame, supra, and the Court found the statute of repose does not begin to run until the date of diagnosis of a cumulative trauma injury versus date of last exposure as was the previous law pursuant to Manalapan Mining v. Lunsford, 204 S.W.3d 601 (Ky. 2006). Pursuant to Consol v. Goodgame, supra, the parties agree Hamlin's claim would not

be barred by any statute of limitations and/or repose pursuant to KRS 342.185(1).

Additionally, the parties have reached a settlement of the indemnity aspect of this claim, including Hamlin's right to reopen the claim and right to vocational rehabilitation. Based on Consol of Kentucky, Inc. v. Goodgame, supra, the parties' joint motion to remand has merit. The August 11, 2015, Opinion and Order shall be vacated and this claim remanded to the ALJ for consideration of the parties' agreement settling Hamlin's entitlement to income benefits, right to vocational rehabilitation, and right to reopen in the future. Further, pursuant to the settlement agreement, on remand the ALJ shall render a decision determining whether Hamlin sustained a work-related injury and his entitlement to past and future medical benefits pursuant to KRS 342.020.

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED that the August 11, 2015, Opinion and Order is **VACATED**. This claim is **REMANDED** to the ALJ for consideration of the settlement agreement and, if appropriate, entry of an opinion pursuant to the settlement agreement regarding causation, whether Hamlin sustained a work-related injury, and his entitlement to past and future medical benefits.

ALL CONCUR.

FRANKLIN A. STIVERS, MEMBER
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