

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 1, 2015

CLAIM NO. 201400355 & 201400354

FREDDY SIZEMORE

PETITIONER

VS.

APPEAL FROM HON. J. GREGORY ALLEN,
ADMINISTRATIVE LAW JUDGE

NALLY & HAMILTON ENTERPRISES, INC. and
HON. J. GREGORY ALLEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Freddy Sizemore ("Sizemore") appeals from the Opinion and Order rendered November 17, 2014 by Hon. J. Gregory Allen, Administrative Law Judge ("ALJ") dismissing his claims against Nally & Hamilton Enterprises, Inc. ("Nally") for injuries caused by cumulative trauma and occupational hearing loss. The ALJ found the claims were

barred by the statute of limitations/repose, although Sizemore may have been unaware of the alleged conditions until after he ceased working for Nally. No petition for reconsideration was filed.

On appeal, Sizemore asserts his injury and hearing loss claims were timely filed. Sizemore also advocates the occupational hearing loss claim should be classified as an occupational disease. We disagree and affirm.

On February 12, 2014, Sizemore filed both a Form 101 and a Form 103. In the Form 101, Sizemore alleged injuries to his neck, back, and lower extremities due to cumulative work activities with Nally as a laborer/water truck driver, and identified February 13, 2012 as the date of injury. In the attached Form 104, Sizemore indicated he worked for Nally from 1981 through February 12, 2012.

In support of his claim, Sizemore filed the office record of Dr. Chad Morgan, D.C., who completed a questionnaire dated February 12, 2014, the same date his applications for benefits were filed. In the office record, Dr. Morgan noted Sizemore complained of neck and low back pain radiating into his right shoulder and both knees/legs. Sizemore also complained of left leg numbness, giving way of the right knee, and trouble sleeping. Dr. Morgan noted Sizemore worked sixteen years as a laborer and driver in

strip mining. In the questionnaire, Dr. Morgan indicated Sizemore's knees, neck, and back conditions were caused, either wholly or in part, by his job activities.

Sizemore also attached a November 12, 2013 certified letter sent to Nally by Hon. John Hunt Morgan notifying of his intent to file a claim for coal workers' pneumoconiosis, injuries caused by cumulative trauma, and occupational hearing loss. Sizemore also filed a copy of his paystub, which indicated the check was issued on February 13, 2012.

Likewise, Sizemore filed a Form 103 on February 12, 2014, alleging he sustained or became disabled due to occupational hearing loss causing disability, and again identified the date of injury as February 13, 2012. Sizemore indicated he became aware of his condition on October 31, 2013 and provided written notice to his employer on November 12, 2013. In the employment history section, Sizemore indicated he last worked for Nally on February 12, 2012.

In support of the Form 103, he attached the December 12, 2013 letter from an audiologist at Tri State Hearing Care Center whose signature was illegible. The audiologist stated Sizemore was seen on October 31, 2013. His history of working in the coal mines in excess of ten

years was noted. Audiometric results show a severe to profound hearing loss. The audiologist noted speech discrimination was 40% in the right, 30% in the left, and 40% binaurally, and recommended two high powered hearing aids. Sizemore also attached the same November 12, 2013 certified notification letter and a copy of his paystub to the Form 101. On April 11, 2014, the ALJ consolidated Sizemore's hearing loss and cumulative trauma injury claims.

Nally filed a timely Form 111 and Special Answer on April 7, 2014 alleging in relevant part Sizemore's claims were not timely filed and therefore barred by the statute of limitations. The ALJ noted Nally raised the statute of limitations defense for the hearing loss and injury claims at the July 9, 2014 benefit review conference ("BRC") order. In a second BRC order dated September 22, 2014, the ALJ noted the date Sizemore sustained his alleged injuries was at issue. He also noted Nally had raised the statute of limitations defense for both the injury and hearing loss claims, and Sizemore "raises issue as to manifestation date of conds for notice + SOL issues."

Sizemore testified by deposition on April 3, 2014 and at the hearing held August 22, 2014. At his deposition, Sizemore indicated he first worked for Nally for approximately six months from 1989 to 1990. After working

elsewhere as a mechanic for approximately six years, he returned to Nally in either 1996 or 1997. This testimony conflicts with the information contained in the Form 104 which states Sizemore began working for Nally in 1981. Regardless of the correct date, Sizemore indicated he continued to work for Nally until he was laid off in February 2012. Sizemore performed a variety of jobs for Nally, including cutting trees with a chainsaw; operating a water truck, grease truck and rock truck; hydroseeding; working on the powder crew; and reclamation. The last few years of his employment, Sizemore primarily operated a water truck and worked in blasting.

Sizemore testified regarding his last date of work with Nally at both the deposition and the hearing. At his deposition, Sizemore agreed February 13, 2012, the date listed in his application for benefits, was his last date of employment with Nally. However, at the hearing, Sizemore testified as follows:

Q: Okay. Now, I believe you stopped -
- or we have alleged your last date of
work was February 13th of 2012. Does
that sound about right to you?

A: Well, really, the 8th day was the
last day.

Q: The 8th day was the last day you
physically worked?

A: Yeah.

Q: And the February 13, 2012 date came from a check stub; is that right?

A: Right.

Q: Okay. Have you been back to work anywhere since February the 8th?

A: No.

Sizemore testified he continued to work for Nally through February 8, 2012, when he was laid off. He stated he had no restrictions on his activities while working for Nally. Sizemore stated the entire job, known as the Four Mile job site in Bell County, was shut down. Thereafter, Sizemore received unemployment benefits for approximately a year and a half. Sizemore has not worked anywhere since he was laid off by Nally.

At both his deposition and the hearing, Sizemore described his hearing difficulty, as well as the symptoms in his neck, lower back, and lower extremities, all of which he attributed to his job activities with Nally. Sizemore stated he was exposed to loud noises while employed by Nally, and first noticed hearing difficulty five or six years before being laid off. At his deposition, Sizemore testified he has never treated for his hearing difficulty and does not remember when he was told by a physician this condition was caused by his work. Sizemore stated the only

physician he has seen for his hearing loss was the one who examined him on October 31, 2013 at the request of his attorney.

At his deposition, Sizemore indicated he had experienced neck problems for approximately five years, back problems for approximately four years, and left lower extremity problems for approximately five to six years. Sizemore testified he also has right knee symptoms. He indicated he had never previously experienced neck, back or left lower extremity problems or treatment. He was involved in a bicycle accident as a child, injuring his right knee which required surgery. He first sought treatment for his neck and back with Dr. Morgan on February 12, 2014. Dr. Morgan was the first physician to inform him the symptoms were due to his work.

Dee Dee Russell ("Russell") testified by deposition on July 31, 2014. She has been the payroll manager for Nally for twenty years. The weekly time sheet for the period ending on February 11, 2012 for the Four Mile mine site was introduced as an exhibit. It reflects Sizemore worked a total of forty hours on February 3, 6, 7, and 8th. Russell also explained the paystub attached to the Forms 101 and 103, reflects the paycheck was written on February 13, 2012. Russell testified Sizemore was hired by

Nally in 1997 and his last date of employment was February 8, 2012, when he was laid off.

Nally filed the treatment records from Dr. Patrice Beliveau (and her physician's assistant) and the Family Medical Care of Clay County. Sizemore began treating with Dr. Beliveau for knee problems on August 13, 2012, approximately six months after he was laid off by Nally. On that date, Sizemore complained of left knee pain which he had experienced for the past three years. He was diagnosed with left knee osteoarthritis, and was prescribed Mobic and a cortisone infiltration. At the following visit on October 21, 2013, Sizemore complained of bilateral knee pain. Sizemore was diagnosed with left knee osteoarthritis in the medial compartment and a questionable meniscal tear in the right knee. Dr. Beliveau ordered a right knee MRI. The November 12, 2013 right knee MRI demonstrated a grade 3 lateral meniscus tear associated with focal lateral femoral condyle central chondromalacia, as well as edema and joint space effusion.

Sizemore treated with Stacey Smallwood, APRN, with Family Medical Care of Clay County on nine occasions from November 28, 2012 through January 10, 2014 for several unrelated maladies, including hypertension, hypothyroidism, anxiety, GERD, insomnia, and an earache. On November 28,

2012, under the "arthritis" section, Ms. Smallwood noted Sizemore complained of right knee pain starting years ago. Her assessment included left knee pain and osteoarthritis, and she prescribed medication. The remaining records identify "arthritis" as a chronic problem, for which Sizemore was prescribed medication. On November 22, 2013, Sizemore complained of right knee pain beginning a week prior, with no specific injury.

In support of his claim, Sizemore filed the April 26, 2014 report of Dr. Jeffery Uzzle. In turn, Nally filed the April 16, 2014 report and June 17, 2014 addendum prepared by Dr. David Jenkinson, as well as the June 26, 2014 report prepared by Dr. David Muffly. In addition, the May 23, 2014 University Evaluation report and Form 108-HL prepared by Drs. Raleigh Jones and Lindsay Walter were filed, which reflect Sizemore sustained a work-related hearing loss and assessed a 22% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides") 5th Edition.

After summarizing the evidence, the ALJ addressed whether Sizemore filed his injury and hearing loss claims within the applicable statute of limitations. After quoting

the controlling statute, KRS 342.185, the ALJ stated as follows:

In the case at bar, the plaintiff has alleged both a physical cumulative trauma condition and a hearing loss claim due to "repetitive exposure to loud noise on the job." Both claims do not allege a specific date of injury, but are claims in which the alleged complained of conditions arouse [sic] over a period of time to a point of manifestation of disability requiring notice to be given and beginning the clocking of time in which to file a claim. Therefore, in order to determine the "clocking period" for statute of limitations the ALJ must first determine when the conditions manifested themselves.

A cumulative trauma injury must be distinguished from an acute trauma injury where a single traumatic event causes the injury. In Randall Co./Randall Div. of Textron, Inc. v. Pendland, 770 S.W.2d 687, 688 (Ky. App. 1989), the Kentucky Court of Appeals adopted a rule of discovery with regard to cumulative trauma injury holding the date of injury is "when the disabling reality of the injuries becomes manifest." (emphasis added). In Special Fund v. Clark, 998 S.W.2d 487, 490 (Ky. 1999), the Supreme Court of Kentucky defined "manifestation" in a cumulative trauma injury claim as follows:

In view of the foregoing, we construed the meaning of the term 'manifestation of disability,' as it was used in Randall Co. v. Pendland, as referring to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.

In other words, a cumulative trauma injury manifests when "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). A worker is not required to self-diagnose the cause of a harmful change as being a work-related cumulative trauma injury. See American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and its work-relatedness.

Thus, it is the date of manifestation of disability that controls the starting date for liability in work-related cumulative trauma situations. American Printing House for the Blind v. Brown, supra.

However, the holdings in Pendland and Alcan, supra, are tempered by the holding of Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601, 605 (Ky. 2006) in which the Kentucky Supreme Court determined the two-year period in KRS 342.185(1) operates as both a period of limitations and repose for gradual injuries and "such a claim may expire before the worker is aware of the injury."

In Manalapan Mining Co., Inc. v. Lunsford, supra, the claimant was first informed by a physician he had work-related hearing loss more than two years after his exposure to hazardous noise had ceased. The claimant subsequently filed a workers' compensation claim, which the Supreme Court determined was barred under KRS 342.185. In so ruling, the court instructed that the two year period for filing an injury claim set out in KRS

342.185(1) operates as both a period of limitations that begins when a worker has knowledge of a gradual injury and its cause, and as a period of repose for discovery of the gradual injury. Id. at 604. The court acknowledged that a worker's right to bring a cumulative trauma claim under the Act may expire before the worker is aware of the existence and cause of his work-related injury. Id.

In the case at bar, both the plaintiff's physical cumulative trauma and hearing loss claims were docketed as being filed with Department of Workers' Claims on February 12, 2014 with both alleging last work, and exposure to either repetitive loud noise or physical exertion, with the defendant on February 13, 2012. The plaintiff testified at his deposition that this date "sound(ed) about right" as far as last employment.

However, the defendant took the deposition of Dee Dee Russell, payroll manager for the defendant, on July 31, 2014. Attached to her deposition was a time sheet for the defendant for the day shift at the Four Mile mine for the week ending February 11, 2012. The time sheet indicated the plaintiff last worked for the defendant to the extent he performed any exertional labor or was exposed to loud noises on February 8, 2012. The plaintiff confirmed that his last actual date of work with the defendant was on February 8, 2012.

Thus, for the purposes of clocking the plaintiff's statute of limitation or statute of repose for filing his claims, the date of February 8, 2012 must be used. Here, it is undeniable that plaintiff's claims were not filed with the Department of Workers' Claims

until February 12, 2014 or two years and four days after plaintiff's last work and accompanying exposure to either physical, exertional stresses or loud noises with the defendant.

Thus, even though plaintiff may not have been advised of the existence of a work-related cumulative trauma or hearing loss until well after he ceased working for the defendant, the statute of repose, as part of the overall statute of limitations as dictated in Manalapan, acts as a complete bar to both plaintiff's claims even though he may have been unaware of the existence and causation of those alleged conditions.

The ALJ acknowledges the plaintiff's argument that the plaintiff's hearing loss claim is akin to that of an occupational disease as opposed to an accumulation of "mini traumas." While plaintiff makes passionate arguments for such a seemingly reasonable proposition, the ALJ is bound by *stare decisis* and the holdings of appellate courts that have determined noise induced hearing loss is a form of cumulative trauma injury as defined by KRS 342.0011(1). Caldwell Tanks v. Roark, 104 S.W.3d 753 (Ky. 2003); Quebecor Book Co. v. Mikletich, 322 S.W.3d 38 (Ky. 2010).

Likewise, the ALJ is cognizant of and acknowledges the Court of Appeals decision in Consol of Kentucky, Inc. v. Goodgame, 2013-CA-00281-WC, 2013-CA-00281-WC (Ky. App. 2014) wherein the majority of the court seemingly disregards the holding in Manalapan as to the statute of repose language. While this decision may have significant ramifications on the plaintiff's claim herein, the ALJ does believe it is

binding at this time as the determination is issued by a court lower than the Supreme Court in Manalapan and the decision in Goodgame is currently on appeal and is, therefore, not final as citable precedent pursuant to CR 76.28(4)(a)&(c).

The ALJ dismissed Sizemore's claims for his injuries and hearing loss since they were not timely filed. Sizemore did not file a petition for reconsideration.

On appeal, Sizemore first states the date of his injury is also the last day of his work and the manifestation date for his cumulative trauma and hearing loss claims. Sizemore notes the statute of limitations begins to run once his injuries became manifest. Sizemore later stated his cumulative trauma injuries became manifest on February 12, 2014, the date he was examined by Dr. Morgan and informed he suffered from work-related cumulative trauma injuries. Therefore, Sizemore argues his claim was timely filed. Sizemore does not address the ALJ's findings or conclusions regarding the statute of repose.

Sizemore also argues hearing loss should be classified as an occupational disease, and not an injury. Sizemore asserts the provisions controlling hearing loss claims in KRS 342.7305 are "much like that of an occupational disability," and cites to the Louisiana case of Becker, et al. v. Murphy Oil Corporation, 70 So.3d 885 (La.

App. 4 Cir. 2011), in support of his position.

The claimant in a workers' compensation proceeding has the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.3d 276 (Ky. App. 1979). However, the employer bears the burden of proof for any affirmative defense raised. Whittaker v. Hardin, 32 S.W.3d 497 (Ky. 2000). Therefore, Nally bore the burden of proof regarding the statute of limitations. In order to sustain that burden, the employer must go forward with substantial evidence sufficient to convince reasonable people. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Sizemore filed no petition for reconsideration. When no petition for reconsideration is filed, the ALJ's award or order is conclusive and binding as to all questions of fact. KRS 342.285(1). Absent a petition for reconsideration, the issue is narrowed to whether the ALJ's decision is supported by substantial evidence in the record. Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

KRS 342.185(1), provides as follows:

Except as provided in subsection (2) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been

given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident, or in case of death, within two (2) years after the death, whether or not a claim has been made by the employee himself or herself for compensation. The notice and the claim may be given or made by any person claiming to be entitled to compensation or by someone in his or her behalf. If payments of income benefits have been made, the filing of an application for adjustment of claim with the department within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later.

Pursuant to KRS 342.185(1), a claimant has two years "after the date of accident" or following the suspension of payment of income benefits to file a claim. In this instance, Sizemore clearly alleged injuries to his neck, back and lower extremities caused by cumulative trauma, as well as a hearing loss claim. As noted by the ALJ, in injury claims caused by cumulative trauma, including hearing loss, the date for giving notice and for clocking the statute of limitations is triggered by the date of manifestation. Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999). In Randall Co. v. Pendland, 770 S.W.2d 687, 688

(Ky. App. 1989), the Kentucky Court of Appeals adopted a rule of discovery with regard to injuries caused by cumulative trauma, holding the date of injury is "when the disabling reality of the injuries becomes manifest." In Special Fund v. Clark, 998 S.W.2d 487, 490 (Ky. 1999), the Supreme Court of Kentucky defined "manifestation" in a cumulative trauma injury claim as follows:

In view of the foregoing, we construed the meaning of the term 'manifestation of disability,' as it was used in Randall Co. v. Pendland, as referring to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.

An injury caused by cumulative trauma manifests when "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). A worker is not required to self-diagnose the cause of a harmful change as being a work-related cumulative trauma injury. See American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and its work-relatedness.

The ALJ also correctly noted the holding of Randall Co. v. Pendland, supra, is tempered by the holding of Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601,

605 (Ky. 2006). There, the Kentucky Supreme Court determined the two-year period in KRS 342.185(1) operates as both a period of limitations and repose for gradual injuries.

In Manalapan Mining Company, Inc. v. Lunsford, the Supreme Court was confronted with a situation wherein a hearing loss claim had been filed more than two years after the Claimant's exposure to hazardous noise had ceased. The Claimant had been exposed to noise for thirty-seven years while working in underground and surface mining. He quit working in February 2001. Thereafter, he underwent an audiological examination in December 2003, and the physician reported on January 5, 2004, the Claimant sustained a 26% impairment due to noise-induced hearing loss. This was the first time the Claimant had been diagnosed and informed by a physician his hearing loss was occupationally-related.

The Claimant filed an application for benefits on January 15, 2004, thirty-three months after he quit working. Id. at 602. The Supreme Court concluded in such circumstances the two-year period for filing workers' compensation claims established pursuant to KRS 342.185(1) operates as both a period of limitation and repose for gradual injuries. Id. at 605. The Court determined the claim for exposure to occupational noise had, therefore, expired before the claimant became aware he had suffered a

work-related injury. Id. See also Bobby Bishop v. Teco Coal Corporation, 2014 CA-001137, (Ky. App. April 3, 2015)(designated not to be published). There, the Court of Appeals stated as follows:

Finally, we are compelled to comment that even if the issue of the statute of repose had been preserved, the applicable provision, KRS 342.185, has been interpreted as both a statute of limitations and a statute of repose," . . . the implications of which were astutely explained by the ALJ.

Applying Manalapan to the case at bar, the ALJ ultimately concluded Sizemore's claims for injuries caused by cumulative trauma and hearing loss were completely barred by the statute of repose, even though he may have been unaware of the existence and causation of the alleged conditions. After reviewing the record, we find the ALJ identified the appropriate standards and provided a sufficient basis for his determination the statute of repose bars Sizemore's claims.

The ALJ noted Sizemore initially alleged in his Form 101 and 103 his last date of employment with Nally was February 13, 2012. He also alleged this date to be the manifestation date of his cumulative trauma injury and the date he became disabled due to occupational hearing loss. However, Sizemore later clarified at the hearing the last

day he actually worked for Nally was February 8, 2012. Russell additionally testified Sizemore's last date of employment with Nally was February 8, 2012, when he was laid off, and attached as an exhibit the time sheets indicating the same. Therefore, the testimony of Sizemore and Russell constitute substantial evidence supporting the ALJ's determination that February 8, 2012 was Sizemore's last day of work with Nally.

It is undisputed Sizemore has not returned to any work since he was laid off on February 8, 2012. Additionally, Sizemore does not contest the ALJ's finding his claims were not filed with the Department of Workers' Claims until February 12, 2014, "two years and four days after plaintiff's last work and accompanying exposure to either physical, exertional stresses or loud noises with the defendant." Therefore, pursuant to the holding in Manalapan Mining Co., Inc. v. Lunsford, supra, the ALJ correctly found the statute of repose barred Sizemore's claims even though it appears from the record he was not informed by a physician of his work-related cumulative trauma injuries until February 12, 2014 or his occupational hearing loss until either October 31, 2013 or December 12, 2013.

We reject Sizemore's argument occupational hearing loss should be classified as an occupational disease. We assume Sizemore advocates this position because KRS 342.316(4)(a) permits an occupational disease claim to be filed within three years of the last injurious exposure or knowledge of the work-related condition; however, a claim may not be filed more than five years after the last exposure to an occupational hazard except in cases of radiation or asbestos. Thus, if Sizemore's alleged hearing loss was to be considered an occupational disease, his claim would have been timely filed.

Sizemore's argument has been addressed by the Kentucky Court of Appeals and the Kentucky Supreme Court. In Quebecor Book Co. V. Mikletich, 322 S.W.3d 38 (Ky. App. 2010), the Court of Appeals unequivocally stated, "noise-induced hearing loss is a form of cumulative trauma injury as defined by KRS 342.0011(1)," and further discussed the manifestation rule regarding the statute of limitations pursuant to KRS 342.185(1). See also Caldwell Tanks v. Roark, 104 S.W.3d 753 (Ky. 2003); Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d at 602 ("Consistent with the mechanism by which repetitive exposure to hazardous noise destroys the membranes of the inner ear, KRS 342.7305(4)

characterizes hearing loss cause by such exposure as being an 'injury.'")

Accordingly, the November 17, 2014 Opinion and Order rendered by Hon. J. Gregory Allen, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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