

OPINION ENTERED: MARCH 29, 2013

CLAIM NO. 201200156

RICHARD M. DUNN

PETITIONER

VS.

**APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE**

BLEDSON COAL CORP. / JAMES RIVER COAL,
INJURED WORKERS PHARMACY,
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Richard M. Dunn ("Dunn") appeals from the September 27, 2012 Opinion and Order rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ") and from the October 19, 2012 denying his petition for reconsideration.

The ALJ dismissed Dunn's claim for a 2006 injury as barred by the statute of limitations/statute of repose, and

dismissed the claim for a 2011 injury based upon a pre-existing active condition.

Dunn argues the ALJ misapplied case law and erred in dismissing the claim. He argues the statute of limitations did not begin to run until a physician informed him his condition was work-related and therefore his claim was timely. Because the ALJ properly concluded the 2006 claim was barred by the statute of limitations/repose set forth in KRS 342.185, and because the entirety of Dunn's impairment arose in 2006, we affirm.

Dunn filed a Form 101, Application for Resolution of Injury Claim, on February 7, 2012 alleging he sustained a cumulative trauma injury to his cervical spine during his employment with Bledsoe Coal Corporation ("Bledsoe") with a disability onset date of August 24, 2011. He later amended his claim to include an injury date of August 1, 2006.

Dunn testified by deposition on April 12, 2012 and at the hearing held July 31, 2012. He worked thirty-three years in the coal mining industry, primarily in preparation plants. The last twenty years was with Bledsoe/James River, other than a six-month period working for Headwaters Coal ("Headwaters"). He worked as a foreman for Bledsoe from 2005 through 2009, then left to work for Headwaters as a repairman. After approximately six months, he returned to

Bledsoe as a mechanic/welder until he ceased working in 2011. Dunn stated he worked at various surface mining positions performing duties as a welder, repairman /maintenance worker, shift foreman, production foreman, truck driver and equipment operator. He described the work as very heavy, involving frequent lifting while changing screens or baskets. He performed frequent repetitive, unassisted lifting of fifty to sixty pounds, he also worked with his arms stretched overhead while making repairs and he used a sledgehammer on a frequent basis. He often struck his head while working in the preparation plant.

Dunn testified he did not sustain a specific injury to his neck, but began to have a gradual onset of neck pain in 2006 for which he had surgery. He was off work for 118 days after the surgery then returned to his regular job. Dunn began to experience headaches in 2009. He began experiencing gradual neck pain radiating between his shoulder blades and down both arms beginning in approximately 2010. He left his position with Bledsoe on August 24, 2011 due to the pain. Bledsoe indicated Dr. Martha Combs-Woolum first informed him the problem was work-related on August 22, 2011. Dr. Philip Tibbs took him off work on August 25, 2011.

Dunn could not recall discussing the cause of his neck problems with Dr. Tibbs in 2006 and did not recall telling Dr. David Muffly's assistant he had cervical fusion surgery for a work-related injury. Dunn stated his complaints have improved since he stopped working. However, he cannot perform yard work or drive for long distances due to stiffness in his neck and difficulty turning his head to the left.

Dr. Tibbs at the University of Kentucky Medical Center initially evaluated Dunn on July 26, 2006. Dunn provided a history of cervical pain for several years, worsening over the previous year, with pain radiating into the right upper extremity. Dr. Tibbs indicated the injury was not work-related. He reviewed an MRI which revealed osteophyte formation with severe stenosis at C5-6 and C6-7. Dr. Tibbs performed surgery on August 18, 2006 consisting of an anterior cervical micro discectomy with fusion at C5-6 and C6-7. Dr. Tibbs completed a disability form indicating Dunn had symptoms related to severe cervical stenosis at C5-6 and C6-7 as early as 2004, although he did not seek treatment until July 2006.

Dunn returned to Dr. Tibbs on August 25, 2011, reporting increased neck pain and stiffness, headaches, and left arm pain beginning three months earlier which had

progressed to the point Dunn was unable to continue working. Dr. Tibbs reviewed an MRI from June 19, 2011 which revealed postoperative fusion changes at C5-6 and C6-7, left C6 osteophyte and narrowing at C6 with foraminal stenosis. In an October 11, 2011 letter to Dunn's family physician, Dr. Tibbs opined Dunn was not a surgical candidate.

Dr. Combs-Woolum completed a questionnaire on March 10, 2012, stating Dunn's cervical condition was due to thirty years of work in the coal mining industry which aggravated his cervical degenerative joint disease. She opined Dunn would have limitations in pushing, pulling and working with his arms over his head or shoulders.

Dr. Russell Travis examined Dunn on May 8, 2012. Dr. Travis reviewed cervical spine x-rays from September 18, 2006; October 17, 2006; and December 1, 2011. He also reviewed cervical MRIs performed January 24, 2008 and June 3, 2011. Dr. Travis diagnosed complaints of neck and right upper extremity pain with no objective findings on neurological evaluation. He also diagnosed mild residual cervical spondylosis at C5-6 and C6-7 in spite of having a fusion at C5-6 and C6-7. He noted Dunn also had residual neck pain seen as late as October 29, 2009. Dr. Travis could not relate Dunn's current problems to cumulative trauma.

Dr. Travis assigned a 20% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides"), of which 10% was due to loss of range of motion, and 10% due to the surgically treated disc with residual pain and rigidity. Dr. Travis stated the impairment rating would have been applicable on the date Dunn returned to work following surgery. Dr. Travis did not feel Dunn developed any additional impairment after surgery. Dr. Travis noted a 2008 MRI showed significant remaining osteophytes at C5-6 and C6-7 with mild neural foraminal narrowing at both levels. The 2011 MRI confirmed the osteophytes had not progressed although there was some residual neural foraminal narrowing.

Dr. Muffly examined Dunn on December 1, 2011. Dr. Muffly reviewed a June 3, 2011 MRI, as well as cervical x-rays from October 17, 2006 and November 29, 2011. He diagnosed residual cervical pain following the fusion. Dr. Muffly stated Dunn's need for cervical fusion and his impairment were related to cumulative trauma associated with his occupation which required heavy lifting, and frequent head and neck contact in the course of his employment. Dr. Muffly placed Dunn in DRE Category IV and assigned a 25% impairment pursuant to the AMA Guides. In supplemental

reports, Dr. Muffly indicated his review of records from Dr. Brett Scott, a June 8, 2008 right shoulder MRI, and the May 8, 2012 report of Dr. Travis had not changed his opinions. In a June 13, 2012 report, Dr. Muffly opined the return of Dunn's cervical symptoms in 2011 was related to cumulative trauma from his occupation.

Dr. Muffly testified by deposition on May 30, 2012. He noted Dunn gave a history of performing repair work in the preparation plant, often hitting his head on pipes. He engaged in heavy lifting up to 150 pounds on a frequent basis. Dr. Muffly reviewed notes from his independent medical evaluation ("IME") and stated his assistant had made notes in blue ink on the evaluation form, indicating "problem areas low back, neck 2000 and work-related, Dr. Tibbs, returned to work." Dr. Muffly recalled Dunn stated he first learned his problems were work-related after returning to work and continuing to experience the same type of problems.

Dr. Muffly stated evidence of the spinal fusion was the only objective change on the MRI between the time of the surgery and the date of the IME. He noted the fusion had not failed, and there was no current herniated disc warranting additional surgery. Dr. Muffly opined the 25% impairment rating was due to the two-level fusion. Dr.

Muffly determined degenerative changes may be contributing to his symptoms. Dr. Muffly testified comparing the 2006 and 2011 diagnostic studies demonstrated advancing degenerative changes due to the surgery. He felt Dunn's heavy lifting and head contact at work were also causative factors, but he could not determine which was more responsible.

Dr. Muffly testified the June 8, 2006 MRI report indicated a C5-6 left paracentral disk osteophyte complex contacting and deforming the ventral aspect of the spinal cord resulted in a mild degree of central spinal stenosis. He explained the disc at C5-6 encroached up the spinal cord and thecal sac. The report also discussed a herniation at C6-7 extruding disc material contributing to right foraminal narrowing, most likely being the cause of the disc herniation rather than a congenital defect. Dr. Muffly noted improvement at the C5-6 level following the surgery. He further stated the bone spur at C6-7 was an arthritic calcium deposit that could occur without heavy lifting or striking of the head.

Dunn completed an application for short-term disability benefits on August 29, 2011 indicating his condition was related to his occupation which required years of heavy lifting and demanding physical labor. Dunn indicated the

date of injury was unknown, stating it occurred over time. Attached to the application was an October 6, 2011 statement completed by Dr. Combs-Woolum indicating Dunn suffers from a cervical condition beginning August 25, 2011 without any prior similar condition. Additional documentation indicated the short-term disability policy was fully funded by the employer.

In his decision rendered September 27, 2012, the ALJ made the following findings relevant to appeal:

. . . In this particular case, the plaintiff filed his claim for benefits on February 7, 2012. Medical evidence points that his medical impairment arose when he underwent cervical fusion in 2006. The plaintiff's employment with the defendant ended in 2009 when he left that employment to go work for another employer. In *Manalapan Mining Company Inc. v. Lunsford*, 204 SW3d 601(Ky. 2006), Kentucky's highest court held that the two year period in KRS 342.185(1) operates as both a period of limitations and repose for gradual injuries and acknowledged that such a claim may expire before the worker is aware of injury. Here, the plaintiff's argument is not that he was not aware of his impairment but simply that he was not told by a "physician" that his condition was related to his work until bring [sic] informed by Dr. Martha Combs on August 22, 2011. The claim was then filed on February 7, 2012. Since the plaintiff's employment with the defendant had terminated in 2009 and the claim was not filed until February 7, 2012, his claim for impairment related to an August 2006 injury date is barred

by the statute of repose. The Administrative Law Judge is cognizant of the fact this is a cumulative trauma injury claim rather than a claim for occupational disease or hearing loss claim wherein the statute allows for placing liability on the defendant wherein the plaintiff may have been last injuriously exposed to a harmful substance. Instead, the plaintiff must show that his impairment or disability is causally related to work activities with the defendant. In this particular case, the work activities during the plaintiff's period of employment with the defendant which may have contributed to his cervical fusion and resulting impairment ended in 2009. The statute of repose occurred two years following his employment which was even prior to his being informed that his condition may have been related to his work. Therefore, his allegation and claim for medical and income benefits related to an August 2006 manifestation of disability date must be dismissed.

2011 INJURY ALLEGATION

The plaintiff also alleges that he incurred cumulative trauma injury due to the nature of this work wherein he last worked with the defendant on August 24, 2011. The plaintiff asserts that his claim was filed on February 7, 2012 which is well within the two-year statute of limitations for impairment or disability related to that date of injury. The defendant does not contest this legal point as the defendant concedes that the evidence indicates the plaintiff was first informed by medical opinion that his condition may be work-related by Dr. Martha Combs[-Woolum] on August 22, 2011. However, the defendant argues that the plaintiff's condition is not related to his work and further

argues that the medical proof does not support the plaintiff's condition progressing between 2006 and 2011. In fact, during his deposition testimony, Dr. Muffly conceded that the only change in diagnostic studies from 2006 and 2012 was the evidence that the plaintiff had undergone a spinal fusion. There was no evidence of failed fusion or any recurrent herniated disc that would warrant further surgery. In fact, the 25% impairment awarded to the plaintiff was given in relation to the spinal fusion which occurred in 2006. Plaintiff's employment as a mechanic/welder from 2009/2010 through August of 2011 could not have led to the 25% impairment as it preexisted this period of employment by at least three years. The plaintiff's testimony indicates that he had an onset of gradual neck pain and headaches beginning in 2009 which continued between his shoulder blades and down his arms in approximately 2010. However, it was during this period of time when the plaintiff also worked for another employer and then returned to work for the defendant. Plaintiff testified that since stopping work, his pain has gone from approximately a 7 or 8 on a pain scale of 1 to 10 down to a level of 2 to 3 depending on his activity. In the records of Dr. Tibbs, there is no indication that the plaintiff's 2011/2012 condition is causally related to his continued work. In fact, his review of the MRI from June 19, 2011 revealed post-operative fusion changes with a left C6 osteophyte and narrowing at C6 with foraminal stenosis. While he did opine that it would not be safe for the plaintiff to return to manual labor work, he did not indicate the condition was causally related to the plaintiff's work with the defendant from 2009/2010 through August 24, 2011. Given the fact that he [sic] only

impairment the plaintiff has was already present prior to his last employment with the defendant, it can only be characterized as a prior active impairment. The plaintiff has not shown that his continued employment or his last employment with the defendant has caused any additional impairment. While the plaintiff may have developed some increasing symptoms from his prior fusion, he has not shown any impairment or disability related to his period of employment with the defendant which ended on August 24, 2011. Therefore, the plaintiff's injury allegation of August 24, 2011 must be dismissed as he cannot be compensated for impairment which existed more than two years prior to the filing of his claim. See *Haycraft v. Corhart Refractories*, 544 S.W.2d 222 (Ky. 1976) and *Special Fund v. Clark*, 998 SW2d 487 (Ky. 1999). While I understand the plaintiff's argument regarding the similarities between the facts of this case and the facts in *General Electric Company v. Jameson* (Claim No. 2009-88005), I note that claim involved a continuous period of employment with one defendant wherein the plaintiff made persistent complaints that her job duties were causing her extreme cervical problems. The Administrative Law Judge found that the defendant kept indicating that her condition was not work-related and she had been referred out and directed to turn her treatment in on her private insurance. The facts of this case are different than the facts of that case as there are two distinct periods of employment and no indication that the defendant attempted in any way to direct the plaintiff's treatment. In addition, I note that the claimant herein not only had two separate and distinct periods of employment with the defendant, but also note that the two periods of employment

were separated with the plaintiff's work for a third-party doing similar type of work. In addition, the plaintiff's return to employment with the defendant was not the same position as he performed at the time of his cervical fusion. Therefore, the *Jameson* case has a clear distinction which led to a different result. Having found that the 2006 injury date is barred by the statute of repose found that KRS 342.185(1) and that the 2011 allegation must also be dismissed as the impairment is not related to that employment, the remaining issues are rendered moot.

Dunn filed a petition for reconsideration on October 8, 2012, raising essentially the same issues raised on appeal.

The ALJ issued his order on reconsideration on October 19, 2012 providing the following additional findings:

Without making a finding that the August 1, 2006 surgery was related to cumulative trauma, but assuming for purposes of the statute of limitations/statute of repose that it was, it is clear that the plaintiff left the employment with the defendant in 2009 based upon his own testimony. At that time the statute of repose began to run and did so even prior to the plaintiff learning from a physician that he had possibly developed a cumulative trauma injury due to his work. The court noted that possibility in *Lunsford v. Manalapan Mining Company, Inc.*, 204 S.W.3d 601 (Ky. 2006). While that decision did involve a claim for hearing loss benefits, it clearly indicated that in a cumulative trauma claim, KRS 342.185 acts as a statute of repose as well as the statute of limitations. It must be noted that hearing loss allegations under KRS 342.7305 are

awarded against the employer with whom the last injurious exposure occurred. That is not necessarily the case in a cumulative trauma injury claim although they are both controlled by the same statute of limitations law. Therefore, the question presented is whether the plaintiff's subsequent reemployment at a different job with the defendant revived his statute. Generally speaking, when a statute has run it has run. For instance, a subsequent period of temporary total disability benefits after the limitation period does not revive the statute of limitations in a specific trauma claim. What if the plaintiff's fusion surgery had occurred 20 years earlier? Would the plaintiff expect to revive his statute by subsequently being reemployed by the defendant with whom he was employed at the time of his surgery? He probably would not. Therefore, I remain convinced that the plaintiff's allegation of an August 1, 2006 cumulative trauma injury is barred by the statute of repose found at KRS 342.185 as interpreted in *Lunsford v. Manalapan Mining Company, Inc., id.*

The 2011 injury allegation was dismissed as the ALJ was not convinced that his second period of employment with the defendant from 2009 or 2010 through August of 2011 led to his impairment. The evidence proved that the plaintiff clearly brought his impairment with him to that last period of employment. The ALJ points out that *Lunsford* involved a hearing loss allegation in which KRS 342.7305 places full liability on the last employer where there was injurious exposure. However, this is not a hearing loss or occupational disease claim. In this claim plaintiff alleges that he had a cumulative trauma injury manifesting

itself in August of 2011. However, the only impairment he has been able to show existed prior to his period of employment. What if the plaintiff had not subsequently been reemployed by this particular defendant? He surely could not have been successful in placing the blame for the 25% impairment on a different employer as the evidence clearly showed the plaintiff's 25% impairment resulted from the 2006 cervical fusion. Therefore, the allegation of a 2011 cumulative trauma injury is also properly dismissed.

Given the fact that specific reasons are given for the dismissal of the plaintiff's two injury allegations, the remaining issues are moot. The ALJ believes that no additional findings of fact are necessary for the reasons stated above. Therefore, after reviewing the particular facts of this claim, the Petition for Reconsideration filed by the plaintiff is **DENIED**.

On appeal, Dunn argues the ALJ misapplied case law and erred in finding the 2006 claim was barred by the statute of limitations and statute of repose. Dunn notes the ALJ primarily relied on Manalapan Mining Company, Inc. v. Lunsford, 204 S.W.3d 601 (Ky. 2006), a hearing loss case in which the claimant filed his claim more than two years after his last injurious exposure to noise at work. Dunn notes a claim was barred in Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999) where the hearing loss was in existence more than two years before the claim was filed and had not changed in more than two years before the date of filing. Dunn

distinguishes the case, noting he knew he had impairment in 2006, but was unaware the impairment was related to his work activities until he was so informed in August 2011.

Dunn argues the ALJ erred in dismissing the 2011 injury claim based upon a finding the impairment was pre-existing and active. Dunn notes the 2011 MRI reveals a large spur which had not been present on an earlier MRI. Dunn further notes Dr. Muffly felt the change was related to the surgery and the altered forces on Dunn's neck as he continued to work.

Dunn argues the ALJ erred in his analysis of General Electric Company v. Jameson, Claim number 2009-88005, (December 29, 2011), noting the employer in that case continually indicated the claimant's condition was not work-related and directed her to turn her treatment in to her private insurance. However, Dunn contends there was no indication the Board's decision turned on that circumstance. Dunn asserts the ALJ "seized on" the six month period with Headwaters Coal before his return to work for Bledsoe. Dunn contends there is nothing in the case law which would indicate this period of work, sandwiched within a twenty plus year employment with Bledsoe, would have led to a different result.

Dunn's claim for a cumulative trauma injury is governed by the statute of limitations contained in KRS 342.185, as interpreted by the Kentucky Supreme Court in Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999) and its progeny.

In Randall Co. v. Pendland, 770 S.W.2d 687, 688 (Ky. App. 1989), the Kentucky Court of Appeals adopted a rule of discovery in cumulative trauma injuries and held the date of injury is "when the disabling reality of the injuries becomes manifest." In Alcan Foil Products v. Huff, *supra*, the Kentucky Supreme Court refined that rule, holding a compensable cumulative trauma injury manifests itself "where a worker discovers that a *physically disabling injury* has been sustained [and] knows it is caused by work." (Emphasis added), *Id.* at 101. The Court in Alcan concluded the date for clocking the statute of limitations for the purpose of cumulative trauma injuries under KRS 342.185(1) begins as of the date of the manifestation of the worker's disability. See also Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001) and Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999).

In Manalapan Mining Company, Inc. v. Lunsford, 204 S.W. 3d 601 (Ky. 2006), 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 in Lunsford did not file a

claim earlier because he was not diagnosed and informed by a physician his hearing loss was occupationally-related until thirty-three months after quitting work. The Supreme Court concluded in such circumstances the two-year period for filing workers' compensation claims established under KRS 342.185(1) operates as both a period of limitation and repose for gradual injuries. 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.

In this case, Dunn had surgery in 2006, resulting in a permanent impairment rating pursuant to the AMA Guides. Dunn ceased his employment with Bledsoe in 2009. He worked for a different employer for six months then returned to Bledsoe, last working there on August 24, 2011. The ALJ rightly concluded Dunn filed his claim outside the applicable two year statutory period as set forth in KRS 342.185. Although the date Dr. Combs-Woolum informed Dunn his condition was work-related may be relevant to the triggering of when notice should be given, it is irrelevant as to the determination of when Dunn's workers' compensation claim would expire. Dunn's permanent impairment arose in 2006 and was not a latent condition. Dunn's claim expired no later than two years following the first cessation of

employment with Bledsoe, since that employment was the proximate cause of the impairment.

Dunn's case is distinguishable from Jameson because the employer in the claim *sub judice* did nothing to control or direct Dunn's medical care. Whereas the employer's actions in Jameson clearly discouraged the worker from pursuing a claim, here there is no proof of such action on the part of Bledsoe.

Nothing indicates Dunn's impairment rating changed after he reached maximum medical improvement following the 2006 surgery. While there may be some evidence of advancing degenerative changes, including a spur at C6-7, no physician has opined Dunn had an increase in his impairment rating as a result of trauma resulting from the most recent period of employment. The ALJ correctly determined the entirety of Dunn's impairment was pre-existing active impairment. The cervical condition was unquestionably symptomatic and impairment ratable prior to employment with Headwaters and the most recent employment with Bledsoe. As noted by the ALJ on reconsideration, liability in cumulative trauma claims is not automatically placed upon the last employer where the claimant is last injuriously exposed to trauma. The ALJ properly dismissed Dunn's claim for an alleged 2011

injury date since none of his impairments arose within the two years prior to the filing of his claim.

Accordingly, the September 27, 2012 Opinion and Order rendered by Hon. John B. Coleman, Administrative Law Judge and the October 19, 2012 order on reconsideration are **AFFIRMED.**

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

SMITH, MEMBER, NOT SITTING.

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