

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 10, 2021

CLAIM NO. 201701865

MS COMPANIES

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

JONATHAN HAWK and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS, Member, and VACANT.

ALVEY, Chairman. MS Companies (“MS”) appeals from the July 26, 2021 Opinion, Award and Order and the August 30, 2021 Order on Petition for Reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge (“ALJ”). The ALJ awarded Jonathan Hawk (“Hawk”) temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits for bilateral cubital and carpal tunnel syndromes occurring on November 15,

2016. On appeal, MS argues the ALJ was precluded from finding it liable for the injury which occurred prior to Hawk working there. For the reasons stated herein, we vacate and remand.

Hawk filed a claim against Express Employment Professionals (“Express”) on November 7, 2017, alleging bilateral hand/wrist/arm injuries from repetitive motion at work manifesting on November 15, 2016. The claim was initially assigned to Hon. Richard E. Neal, Administrative Law Judge (“ALJ Neal”). Express filed a Motion to Dismiss on May 3, 2018 based upon Hawk’s deposition testimony he had returned to work on the assembly line arguing the last employer in cumulative trauma claims is responsible for the entirety of the award. By Order dated July 2, 2018, ALJ Neal noted, after a telephonic status conference, Hawk was to amend the claim to include the current employer. Hawk filed a Motion to Join MS on July 3, 2018 without amending the Form 101 to allege a later injury date. By Order dated July 30, 2018, ALJ Neal passed the Motion to Dismiss to the merits of the claim. ALJ Neal noted the fact Hawk returned to work on the same assembly line with a different temp agency is not dispositive of the issue. ALJ Neal noted Hawk was performing a different job when he returned and indicated he would decide the issue after all proof had been developed.

Express filed a Renewed Motion to Dismiss, Or Alternatively, Motion to Bifurcate Claim on October 11, 2019. Hawk filed a Motion to Join MS, his then-current employer, as a party defendant on July 3, 2018 again without amending the Form 101. MS was joined by Order dated July 26, 2018. Following a telephonic

conference, ALJ Neal dismissed Express as a party by Order dated March 6, 2020. ALJ Neal provided no findings in the Order as to the basis for the dismissal.

A combined benefit review conference and hearing was held on May 27, 2021, at which time contested issues preserved for determination were listed as benefits under KRS 342.730, including multipliers, TTD benefits, and entitlement to past and future medical benefits. MS was not represented at the hearing. On July 16, 2020, the claim was reassigned to Hon. Paul Whalen, Administrative Law Judge. The claim was then reassigned to the ALJ by Order dated April 20, 2021. MS did not participate in this claim until July 22, 2021, when it entered an appearance and filed a brief. In all fairness, it is noted MS was not served with several orders after joinder.

Hawk testified by deposition on April 4, 2018, and at the hearing held May 27, 2021. He stated he began having symptoms in his hand when he worked for Express as a temporary employee at Faurecia in 2016 assembling Ford truck seats. His symptoms worsened over time, eventually resulting in surgeries to both hands. Hawk was terminated in April 2017 for missing work.

Hawk returned to work at Faurecia for MS in February 2018. Hawk worked on the same assembly line, installing a different piece of the seat assembly. At his deposition, Hawk had been working for approximately one and a half months. He alleged no specific injury during that time. Hawk stated the side shield job performed for Express was more strenuous than the “pork chop” job he performed for MS. The side shield job involved more fine manipulation, and more pushing and pulling. Hawk experiences constant pain when performing the “pork chop” job, but not as bad as when he performed the side shield job. Hawk continues to have hand

numbness although he has been released by Dr. Tuna Ozyurekoglu (“Dr. Tuna”) of Kleinert, Kutz & Associates, his treating surgeon. Hawk stated he is unable perform his previous duties due to the lack of hand strength.

Hawk sought treatment at Shelby Family Medicine on June 16, 2017 for complaints of numbness in both hands he had experienced for approximately six months. He stated it began shortly after beginning work at Faurecia, mainly affecting the middle three fingers, worse at night and when carrying items. Hawk was diagnosed with bilateral Carpal Tunnel Syndrome (“CTS”). He was given an HCV injection and bilateral wrist splints to wear at night. Hawk was to return in one month.

Dr. Vasudeva Iyer, in a February 5, 2018 report, stated electrodiagnostic studies revealed median nerve neuropathy at the wrist, consistent with bilateral CTS; conduction abnormalities more prominent on the left side, and ulnar nerve neuropathy at the elbow, consistent with bilateral CTS; and conduction abnormalities more prominent on the left side.

Dr. Ronald Burgess evaluated Hawk on March 12, 2018. Dr. Burgess diagnosed findings consistent with CTS. He noted Hawk has positive Tinel’s bilaterally. Dr. Burgess noted the evidence against CTS is the failure of cortisone injection and splints to have any effect on Hawk’s symptomology, negative carpal tunnel compression bilaterally, and the statement the problem causes bruising under his nails. Dr. Burgess noted there was no objective evidence Hawk’s complaints are related to his five-month history of employment with Express. He could not say within medical probability Hawk has bilateral CTS. Dr. Burgess noted Hawk would

be a candidate for electrodiagnostic studies of both upper extremities for carpal tunnel as a non-work-related condition.

In an April 6, 2018 report, Dr. Burgess noted he had reviewed Dr. Iyer's nerve conduction studies. He reported they were consistent with bilateral CTS, more prominent on the left, and bilateral cubital tunnel syndrome, also more prominent on the left. Dr. Burgess stated Hawk's employment period with Express prior to the onset of symptoms was insufficient for him to develop carpal tunnel or cubital tunnel syndromes. Dr. Burgess felt the condition was pre-existing. Hawk's job activities may have produced symptoms, but Dr. Burgess felt the work did not aggravate or increase the severity of his condition. He felt the failure of the injections may indicate Hawk is no longer significantly symptomatic.

Dr. James Owen evaluated Hawk on March 9, 2021. Dr. Owen diagnosed status post carpal and cubital tunnel surgeries with persistent numbness in Hawk's hands and bilateral weakness to grip. Dr. Owen attributed the symptoms to Hawk's work activities. Dr. Owen assigned restrictions of lifting, handling, and carrying object less than 25 pounds, and avoidance of activities requiring fine or recurrent strength or fine manipulation. He noted Hawk is unable to perform his previous work. Dr. Owen assigned a 19% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. He stated Hawk did not have an active impairment prior to the injury.

Dr. Tuna saw Hawk on September 25, 2017 and diagnosed bilateral CTS beginning November 15, 2016. Hawk complained of dropping things, trouble

with grip, pain, numbness, and weakness. He noted Hawk had been off work since April 7, 2017 due to pain. On May 22, 2018, Hawk reported an injection did not help. He was scheduled for left carpal tunnel and left cubital tunnel releases with a scope test to be completed on August 15, 2018. In a January 22, 2020 report, Dr. Tuna reported Hawk underwent right carpal and cubital tunnel releases on September 5, 2019, and left carpal and cubital tunnel releases on August 15, 2018. Dr. Tuna stated Hawk reached maximum medical improvement as of January 22, 2020. He assigned a 0% impairment rating and reported Hawk has the capacity to return to his prior work activities with no restrictions.

The ALJ's findings relevant to this appeal are as follows *verbatim*:

For the first time, on July 22, 2021, legal counsel entered an appearance on behalf of the defendant employer, MS Companies. At the same time, counsel filed a posthearing brief. In its brief, the defendant attempts to argue plaintiff's alleged injuries are not work-related. However, this defendant never filed a form 111, Notice of Claim Denial or Acceptance, and as such, all allegations alleged in plaintiff's form 101, including those as amended, were deemed admitted. 803 KAR 25:010 Sec. 5 (2)(b). Moreover, causation and work relatedness were not listed as a contested issue at the benefit review conference conducted on May 27, 2021 at the beginning of the final hearing. Similarly, whether plaintiff was an employee of the defendant, MS Companies the date of injury was also not listed as a contested issue so, again, the defendant is precluded from making that argument at this time. For these reasons, the defendant is precluded from arguing causation which is now presumed as a matter of law.

The ALJ awarded PPD benefits beginning November 15, 2016.

MS filed a Petition for Reconsideration making the same arguments it raises on appeal. The ALJ overruled the Petition for Reconsideration by Order dated August 30, 2021, providing as follows *verbatim*:

Having reviewed the defendant's petition and being otherwise sufficiently advised, the ALJ is not persuaded it points out any patent errors to justify the remedies it seeks. In reaching this conclusion, there may be some merit to the fact that no order was issued which would specifically require a Form 111. However, in an order dated May 6, 2021, it was noted that a Benefit Review Conference and formal hearing would both be held on May 27, 2021. The defendant did not appear at either of those and did not otherwise enter any appearance prior to the hearing or the opinion rendered on July 26, 2021. At the benefit review conference on May 27, 2021, the stipulations and contested issues were entered. A stipulated date of injury was November 15, 2016. The only contested issues listed were benefits under KRS 342.730, application of any multipliers, and compensability of past and future medical expenses. Regardless whether it was ever required to file a form 111, only contested issues listed at the benefit review conference remain to be determined by the ALJ. Issues not listed are waived. 03 KAR 25:010 §13(12). Therefore, the defendant's failure to ever contest whether plaintiff suffered a work-related injury on November 15, 2016, or whether such allegation met the definition of an "injury" within the meaning of KRS 342.0011(1), prevents it from contesting the matter now after the July 26, 2021 Opinion, Order & Award. Accordingly, the defendant's petition for reconsideration is overruled.

On appeal, MS argues the ALJ erred in finding it liable for an injury occurring before it employed Hawk. MS concedes it first filed pleadings in this matter on July 22, 2021, nearly three and one-half years after Hawk filed his Form 101, alleging he sustained an injury while working for Express. As a result of this delay, MS acknowledges they were deemed to have admitted "all allegations of the

application” pursuant to 803 KAR 25:010 §7 (1)(f)(2)(b). These allegations include Express was the employer and the injury occurred on November 15, 2016. MS argues that after it was joined, a Form 111 was unnecessary as it continued to admit an injury was sustained on November 15, 2016. MS argues the fact a Form 111 was never filed does not make it liable for an injury that all parties agree occurred when Hawk was working for Express.

MS notes the only contested issue for the ALJ to decide was whether Hawk sustained an injury on November 15, 2016, and the extent thereof. With Hawk acknowledging he was working for Express on November 15, 2016, the ALJ was precluded from finding MS liable. MS acknowledges additional trauma could have been sustained while under its employment; however, that was never formally alleged. Therefore, this was not an issue for the ALJ to decide. The ALJ was required to use November 15, 2016 as the injury date when Express was the employer. MS contends its failure to file a Form 111 is immaterial because the ALJ’s Order joining it as a party did not require the filing of a Form 111. While Hawk’s Motion brought MS into this case, Hawk failed to amend his application to allege a different injury date. Upon joinder, MS continued to admit that Hawk was injured on November 15, 2016 and continued to admit that Express was the employer at that time. As a result, and with no ALJ Order requiring it, a Form 111 was never needed or required to be filed as there were no issues being contested by MS. MS argues the 45-day requirement to file a Form 111 does not apply in cases of joinder, unless explicitly required by an ALJ Order. KRS 342.270 (2) contains no requirement to file a Notice of Claim Denial or Acceptance when a party is joined to an action. Hawk

never alleged an injury occurring during his employment with MS. As a result, MS was not required to defend a claim raising no allegations against them.

We agree that an award against MS cannot be based upon a November 15, 2016 injury date. Liability of MS necessarily depends on exposure to cumulative trauma occurring during its employment period. During litigation of this claim, no ALJ made an explicit finding of fact that Hawk was exposed to cumulative trauma while employed by MS. Certainly, Express raised an issue concerning the last employer at which Hawk was exposed to cumulative trauma in its Motions to Dismiss and its proposed stipulations and contested issues. However, ALJ Neal's March 6, 2020 Order dismissing Express as a party made no specific finding that employment with MS produced a cumulative trauma injury. MS is correct in noting Hawk never moved to amend his claim to include an allegation of a cumulative trauma injury during his employment with MS or to allege a later injury date. ALJ Neal's July 2, 2018 Order states a telephonic status conference was held on that date and indicates Hawk would amend the claim to include the current employer. Hawk's Motion to Join MS was silent as to the reason for joinder.

On remand, the ALJ must determine whether Hawk ever amended the Form 101 to include his employment period with MS. If no such amendment was made, MS must be dismissed. It cannot be held liable for any injury occurring prior to employing Hawk.

We additionally acknowledge MS filed a request for oral argument. However, based upon the foregoing, we find the request is moot and unnecessary. Therefore, the request for oral argument is hereby **DENIED**.

Accordingly, the July 26, 2021 Opinion, Award and Order and the August 30, 2021 Order on Petition for Reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge, are hereby **VACATED**. This claim is **REMANDED** for additional findings consistent with the views expressed herein.

STIVERS, MEMBER, CONCURS.

/s/ Michael W. Alvey
MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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