

RENDERED: JANUARY 16, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-001235-WC

ECKART ALUMINUM

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-05-96404

DUSTIN CARKUFF; HON. JAMES L.  
KERR, ADMINISTRATIVE LAW  
JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DIXON AND THOMPSON, JUDGES; LAMBERT,<sup>1</sup> SENIOR  
JUDGE.

LAMBERT, SENIOR JUDGE: The primary issue addressed herein is whether a  
workers' compensation claim was timely filed when the claim was filed more than

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

two years after the initial injury but within two years of the claimant's subsequent injury. Upon review, we agree with the Workers' Compensation Board (Board) that the period of limitations had not expired when Dustin Carkuff filed his claim for benefits. Therefore, we affirm.

In 2004, Carkuff accepted a position with Eckart Aluminum as a process operator, a position that required him to move 55-gallon drums of aluminum powder. On January 31, 2005, Carkuff was injured when he attempted to prevent one of the aluminum powder drums from falling.<sup>2</sup> Carkuff caught the drum but his legs spread in opposite directions. Carkuff immediately felt pain in his groin and lower abdomen and went to the emergency room. Dr. Natalie G. Stephens diagnosed Carkuff with right inguinal hernia and ordered him to remain off work. He followed up with medical treatment and physical therapy. After his condition failed to improve, Dr. Stephens performed surgery to repair Carkuff's hernia.

Following the 2005 injury, Eckart voluntarily paid temporary total disability benefits from February 27, 2005, through June 12, 2005. On June 22, 2005, the Office of Workers' Claims wrote to Carkuff informing him that he had two years from June 12, 2005, in which to file a workers' compensation claim for his injury. Carkuff did not file a claim. Although he later testified that he continued to experience pain from the injury, Carkuff returned to work on June 20,

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<sup>2</sup> The record reflects that Carkuff had hernia repair surgery in 2002 after injuring himself while moving a mattress at home.

2005. Carkuff did not receive medical treatment for his injury between May 23, 2005, and January 18, 2006.

Carkuff was injured again on January 5, 2006, when he bent down to load a mill and felt a sharp pain in his groin. Carkuff sought treatment for the injury. However, physical therapy and pain medication did not improve his condition. Dr. Stephens performed a second surgery on February 27, 2006, and referred Carkuff to Dr. Lawrence Peters for pain management. As a result of his injuries Carkuff received temporary total disability benefits at the rate of \$438.91 from February 27, 2006, through May 10, 2006. On May 15, 2006, Carkuff received another letter from the Office of Workers' Claims informing him that he had two years from May 10, 2006, to file a claim<sup>3</sup>. Carkuff returned to work without restriction in May 2006, but was later placed on restriction in July 2006 by Dr. Peters. Carkuff quit working and began receiving short term disability benefits. Carkuff then filed for disability benefits on July 3, 2007. On July 30, 2007, Eckart Aluminum filed a response and argued that the claim was time-barred. The ALJ disagreed and awarded Carkuff benefits. Eckart Aluminum appealed to the Board, and on May 31, 2008, the Board affirmed the ALJ's decision. This appeal follows.

First, Eckart Aluminum argues that the ALJ erred by finding that "the temporary total disability benefits paid in 2006 relate back to the 2005 injury and that the plaintiff's filing was within the applicable statute of limitations."

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<sup>3</sup> The second letter was marked with a different file number than the first letter.

In his opinion the ALJ clearly articulated the basis for his decision:

Dr. Peters states specifically that Plaintiff was off work from February to May of 2006 as a direct result of his January 2005 work injury. In arriving at this conclusion, the Administrative Law Judge is aware of various arguments in its favor raised by the defendant-employer, including Plaintiff's return to full duty, and the fact that the Plaintiff was loading a mill on January 5, 2006. The Administrative Law Judge is also aware that the Office of Workers' Claims received two separate notices of two different work accidents with different claim numbers. However, the Administrative Law Judge does not believe that how the injuries were reported is relevant. In conclusion, the Administrative Law Judge finds that the temporary total disability benefits paid in 2006 relate back to the 2005 injury and that Plaintiff's filing was within the applicable statute of limitations.

We have duly noted Eckart Aluminum's argument that even Carkuff testified that the January 2006 incident was a separate injury. Further we acknowledge that Eckart Aluminum presented the ALJ with the contradictory medical opinions of Drs. Richard Sheridan and Bert Sparrow, whose examinations of Carkuff led them to believe that his January 2006 injuries were detached from the 2005 injury. Our analysis, however, is strictly limited to a review of the ALJ's factual finding to determine if the decision was based upon probative evidence.

*Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

Evidence credibility determinations are solely left in the hands of the ALJ. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Further, the presence of conflicting evidence is inadequate to require reversal. *Transportation Cabinet v. Poe*, 69 S.W.3d 60 (Ky. 2001). Therefore, although Eckart Aluminum made

several strong factual arguments, it failed to demonstrate a lack of evidentiary basis for the ALJ's conclusion.

Eckart Aluminum also argues that Carkuff submitted his claim after the statute of limitations expired and is thereby barred from recovery. Kentucky law provides claimants a two-year period in which they must file a workers' compensation claim. KRS 342.185. Although the two-year term clearly expired from the date of Carkuff's first injury, the ALJ found that the onset of benefit payments in 2006 that resulted from the 2005 injury tolled the statute of limitations and permitted Carkuff's 2006 filing.

Eckart Aluminum argues that even if the payments were related to the 2005 accident, the statute of limitations still barred Carkuff's claim because it was filed two years after the initial accident. Kentucky's highest Court has clearly acknowledged that the terms "accident" and "injury" are not interchangeable terms. *Fiorella v. Clark*, 298 Ky. 817, 184 S.W.2d 208, 211 (1944). KRS 342.0011 defines "injury" as:

. . . any work –related traumatic even or series of traumatic events, including cumulative trauma, that arises out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidences by objective medical findings. . . .

Quoting *Acme Body Works v. Koepsel*, 204 Wis. 493, 234 N.W. 756, 758 (1931), the Court in *Fiorella* held that if the actual injury does not develop until after the accident the statute of limitation begins from the date of injury. Although Carkuff

suffered an initial injury in 2005, the ALJ found that the 2006 pain was caused by the 2005 accident. Therefore, we agree with the ALJ that Carkuff's claim was timely filed.

The last argument from Eckart Aluminum is that the ALJ's decision is contrary to public policy concerns because the decision could result in a delay of claims and create an unfair burden on employers whose former employees are re-injured while working for a new employer. Those facts are not at issue in this case, and we decline to analyze this hypothetical situation.

Accordingly, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lyn Douglas Powers  
Louisville, Kentucky

BRIEF FOR APPELLEE, DUSTIN  
CARKUFF:

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