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# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-001370-WC

QUEBECOR BOOK COMPANY

APPELLANT

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD

v.

ACTION NO. WC-08-00717

LOU MIKLETICH;  
HON. RICHARD M. JOINER,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

### OPINION AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; HENRY,<sup>1</sup> SENIOR  
JUDGE.

COMBS, CHIEF JUDGE: Quebecor Book Company appeals a decision of the  
Workers' Compensation Board that affirmed an administrative law judge's opinion  
and award of benefits to Lou Mikletich for cumulative, work-related hearing loss.

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Quebecor argues that the Board misconstrued controlling law by failing to exclude from the award a portion of Mikletich's impairment attributable to a non-compensable hearing loss. After our review, we affirm.

Mikletich works as a building maintenance technician for Quebecor, a book printing company. He was hired in 1988 by one of Quebecor's predecessor companies. In his claim, Mikletich alleged that he had been exposed to loud industrial noise on a periodic basis throughout his tenure at the plant.

Because its employees are potentially exposed to loud noise during the course of a normal work day, Quebecor has implemented a formal hearing conservation program at Quebecor's facility. It engages HCI, a national mobile health care entity specializing in audiometric testing, to administer the program. Quebecor required Mikletich to participate in the program and to undergo an annual hearing test.

Documents generated in conjunction with Mikletich's participation in the program indicate that he reported a ringing sensation in his ears as early as November 1995. In October 1996, Mikletich was advised in writing that his test results indicated some high-frequency hearing loss. In a questionnaire completed in September 1997, Mikletich again noted a ringing sensation in his ears following work. In October 1997, Mikletich was informed in writing that his test results indicated a moderate high-frequency hearing loss in his left ear. He was advised that an "adverse trend is developing" and that he needed to consult his supervisor to discuss the situation. In a hearing test questionnaire completed by Mikletich in

September 1998, he once again complained of a ringing sensation in his ears following work. Testing conducted in October 1998 indicated that Mikletich suffered moderate high-frequency hearing loss in **both** ears. Mikletich was again warned that this result represents an “adverse trend” and that he should consult with his supervisor.

On the basis of his October 1998 test results, Quebecor arranged for Mikletich to be seen by an audiologist, Dr. William Green, at the University of Kentucky. Mikletich was examined by Dr. Green in December 1998. Dr. Green’s report confirmed a moderate, high-frequency based, noise-induced hearing loss as a result of exposure for a number of years. Dr. Green’s report indicated that his findings would be forwarded to Quebecor’s plant nurse. Dr. Green advised Mikletich to wear hearing protection while at work. Quebecor alleged that Mikletich was told that Quebecor would consult with him directly in an effort to manage his hearing loss in the workplace.

In February 2008, Mikletich met with Cynthia Ann Maynard, Quebecor’s Health and Safety Human Resources Supervisor, to discuss his hearing loss. Mikletich completed an Employee Statement of Injury report on March 3, 2008, and he was sent to Dr. Raleigh Jones for an evaluation. Jones confirmed Mikletich’s noise-induced hearing loss.

In May 2008, Mikletich filed an application for adjustment of his hearing loss claim with the Office of Workers’ Claims. During the course of discovery, Mikletich was seen twice and was evaluated by audiologist Dr. Ian

Windmill. Dr. Windmill diagnosed a mild, high-frequency sensory hearing loss consistent with noise exposure and assessed a twenty-three percent (23%) whole-person impairment rating. Dr. Windmill indicated that Mikletich's annual audiometric test of May 26, 2006, revealed that Mikletich had mild speech-frequency hearing loss and moderate-to-severe high-frequency hearing loss that warranted a six percent (6%) whole-person impairment rating as of that date.

A final hearing was conducted before the ALJ in October 2008.

Relying on the Kentucky Supreme Court's holdings in *Alcan Foil Products v. Huff*, 2 S.W.3d 96 (Ky. 1999), and *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503 (Ky. 2001), Quebecor argued that the six percent (6%) impairment sustained by Mikletich before May 26, 2006 (more than two years before he filed his claim in May 2008) was non-compensable under the provisions of Kentucky Revised Statute(s) (KRS) 342.185, requiring that it be carved out and exempted from the award of benefits.

In November 2008, the ALJ rendered an opinion and award. The ALJ found that Mikletich's hearing impairment was work-related and that he had suffered a one-percent (1%) hearing impairment in 1998; a six-percent (6%) impairment in 2006; and a twenty-three percent (23%) impairment at the time the claim was filed in May 2008. The impairment had progressed to a twenty-four percent (24%) impairment at the time of the evidentiary hearing. He also found clear evidence to support Quebecor's contention that nearly ten years before

Mikletich filed a claim for a work-related hearing loss, he had been adequately informed by Dr. Green of his impairment. Nevertheless, the ALJ concluded that Quebecor probably had more knowledge than Mikletich concerning the nature and extent of his hearing loss and that it had received due and timely notice of the gradual, insidious injury.

Quebecor contended that the six-percent (6%) impairment sustained by Mikletich more than two years before he filed his claim in May 2008 was non-compensable. The ALJ rejected this claim. He based his conclusion on the fact that Mikletich would not have qualified for an award of income benefits under the provisions of KRS 342.7305 even if he had filed his claim on May 26, 2006 (the date of his annual audiological test) because the statute imposes an eight-percent (8%) whole person impairment threshold for the payment of income benefits based on hearing impairment. The ALJ believed that a carve-out of benefits was required only where benefits had been **actually payable** for an occupational disability. Consequently, the ALJ awarded income benefits based on Mikletich's twenty-four percent (24%) permanent partial disability and ordered Quebecor to provide for any reasonably necessary medical appliances.

Quebecor appealed the ALJ's decision to the Workers' Compensation Board. The Board affirmed the opinion and award on June 26, 2009. This petition for review followed.

Quebecor argues that the Board misconstrued controlling law by failing to exclude from the award of benefits the demonstrated six-percent (6%)

impairment that existed more than two years before Mikletich filed his claim. Because Mikletich's hearing loss claim became viable under the Workers' Compensation Act at least ten years before he filed his application, Quebecor contends that he is entitled to recover only for that degree of disability which can be attributed to the two-year period immediately preceding the filing of his application.

Under the unique situation involving the statutory percentages as to hearing loss, we conclude that the Board ruled correctly in this case. KRS 342.0011(1) defines *injury* for purposes of the Act as follows:

any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.

Mikletich's occupational hearing loss is a cumulative trauma injury within this definition. Recovery for the injury is governed by a two-year period of limitation that commences upon the employee's discovery that he has sustained a work-related hearing loss. KRS 342.185(1); *Alcan Foil Products v. Huff*, 2 S.W.3d 96 (Ky.1999). However, the limitation period clearly prohibits compensation for whatever impairment is attributable to an injury that was incurred **more than two years preceding** the filing of the claim. *Special Fund v. Clark*, 998 S.W.2d 487 (Ky.1999).

The ALJ determined that Mikletich became aware that his hearing loss was work-related by 1998 and that Quebecor had due and timely notice of the

injury. The claim was filed on May 28, 2008. Consequently, it was timely with respect only to the degree of the impairment incurred after May 28, 2006 (the date commencing the running of the two-year period immediately preceding the filing of the claim. *See Caldwell Tanks v. Roark*, 104 S.W.3d 753 (Ky.2003).

The Board did not apply this statutory limitation analysis. It reasoned that the limitation period operates differently with respect to occupational hearing loss claims because **hearing loss claims are not compensated like other claims**. The Board concluded that the statutory limitation analysis was inapplicable in this case since Mikletich would not have been eligible to receive income benefits based on the hearing loss even if he had filed his application at any time before May 26, 2006 – the date his annual audiometric test supported a six-percent (6%) whole body impairment rating.

Compensation of occupational hearing loss claims is directly and specifically governed by the provisions of KRS 342.7305(2). The statute imposes an eight-percent (8%) whole person impairment threshold for the payment of income benefits based on hearing impairment. The statute provides as follows:

Income benefits payable for occupational hearing loss shall be as provided in KRS 342.730, except **income benefits shall not be payable** where the binaural hearing impairment converted to impairment of the whole person results in impairment of less than eight percent (8%).  
(Emphasis added.)

The Board reasoned that the threshold provision reflected the General Assembly's belief that work-related hearing loss did not become occupationally

disabling **unless and until** an eight-percent (8%) whole person impairment became manifest. We are not persuaded that the threshold requirement is at odds with the generalized two-year period of limitation codified at KRS 342.185 and construed by *Alcan Foil Products v. Huff*, 2 S.W.3d 96 (Ky.1999).

The limitation provision of KRS 342.185 requires that an application for adjustment of claim for compensation be filed within two (2) years of an “injury.” The principal reasoning for the two-year limitation period is to give timely notice to an employer for liability that it is likely to sustain regarding an injury to its employee. The definition of *injury* contained in KRS 342.0011(1) refers to any work-related harmful change in the human organism.

This case is indeed unique. There is no doubt that Quebecor had full knowledge and notice of the injury that unequivocally satisfied the statutory definition of injury. There is also no doubt that Mikletich did not meet the eight-percent requirement to be deemed “occupationally disabled” for a hearing loss. Thus, any filing that he would have made prior to reaching eight-percent disability would have essentially been an exercise in futility.

While it is true that a filing at six-percent disability would have entitled him to medical benefits, it is also true that his refraining from seeking medical benefits ironically resulted in a bit of a windfall to Quebecor. Quebecor did not incur **any expense** for this long, previous period of disability until it at long last attained the eight-percent threshold for compensability. Again, there is no dispute that any portion of Mikletich’s injury occurred other than as a result of his

employment with Quebecor. There was no element of unfair surprise as to Quebecor flowing from the timing of the filing. Therefore, there is no legal or equitable basis to carve out from the final award that portion attributable to the earlier onset of his injury.

Accordingly, we affirm the opinion and award of the Workers' Compensation Board.

ALL CONCUR.

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