RENDERED: OCTOBER 24, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001973-WC

FORD MOTOR COMPANY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-00239

ANDREA CANTU; HON. LAWRENCE
F. SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART AND
REMANDING IN PART

** ** ** ** **

BEFORE: CLAYTON AND DIXON, JUDGES; GRAVES,[1] SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of a workers' compensation case involving an employer's notification obligations under KRS 342.038, KRS 342.040, and the statute of limitation defense by the employer as stipulated in KRS 342.185.

[1] Senior Judge J. William Graves 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.

FACTUAL SUMMARY

Appellee Andrea Cantu began working at Ford's truck plant in Louisville, Kentucky in May of 1998. Ms. Cantu worked the "tack-off job" at Ford which required her to bend repeatedly as she wiped anywhere from 70-75 trucks per hour over a ten (10) hour shift. On September 3, 1998, Ms. Cantu developed low back pain and pain in her left thigh. She notified Ford's medical department and medical personnel about the pain. Ford's records reflect that Ms. Cantu stated that her back pain was a result of her bending and performing on the tack-off job for the three (3) days prior to notification. Ford's medical records indicated that a diagnosis was made, at this time by Dr. Kenneth Farmer, its physician, and it was for a sprain and strain of the lumbar spine.

Ms. Cantu testified that she told Dr. Farmer the nature of her work and Ford's medical records corroborate this. Dr. Farmer described the tack-off job as one of the jobs in the paint department which would only require the down wiping of the side of a car. He described the job as being a relatively easy job and was certainly a job that would not bother a person's back to any great degree. Dr. Farmer recommended physical therapy to Ms. Cantu and she was referred to Dr. David Petruska for her condition.

Ms. Dana Ballinger testified that she was employed by Ford as their workers' compensation representative. Ms. Ballinger verified that she handled Ms. Cantu's claim and stated that Ford's records reflected that Ms. Cantu reported a back injury on September 3, 1998. She stated that while a few medical bills were

paid, no temporary total disability (TTD) benefits were paid because Ms. Cantu never lost time from work for that injury date. Ms. Ballinger indicated that under the circumstances of this case she was not required to file any forms with the Office of Workers' Claims (OWC) nor did she file any forms for the suspension of benefits.

Ms. Cantu underwent physical therapy and received heat medication and epidurals. She also was moved to the paint department. Ms. Cantu testified that on January 15, 1999, while she was working in the paint department using an orbit type sander that vibrated, she developed pain in her hands. Ms. Cantu further testified that she reported this injury to Ford's medical department and that she was given night splints to wear. Ms. Ballinger noted that she did not have a report of an alleged injury on January 15, 1999, and that no TTD benefits nor medical bills were paid for this alleged injury.

In May of 1999, Ms. Cantu re-injured her back during physical therapy. As a result, Dr. Petruska treated her and recommended additional physical therapy. Ford's records show that on May 12, 1999, Ms. Cantu was treated for a sprain and strain of the lumbar spine. Ms. Cantu was seen by Dr. Farmer and given a Form 5166. She stated that she reported to the medical department that her renewed back injury was the result of being put back on the tack-off job. Ms. Cantu testified that she reported to the medical department that her back started hurting the day before leaving physical therapy. Dr. Farmer testified that at that time he thought Ms. Cantu's back injury was a continuation of

her original 1998 back injury. Ms. Ballinger had a record of an alleged injury that occurred on May 12, 1999. No voluntary payment of TTD benefits was made so she did not make any filings of IA-1s, IA-2s, S1s or any filings with the OWC in regard to this injury.

On May 13, 1999, Ms. Cantu was seen again by Dr. Farmer and he diagnosed once again that she had a sprain and strain of the lumbar spine. On May 18, 1999, Ms. Cantu was treated again at the Ford plant for a sprain and strain of the lumbar spine and an appointment was made for her to see an orthopedic surgeon. On May 25, 1999, Ms. Cantu was seen again at the Ford plant medical facility.

Ms. Ballinger confirmed that on May 27, 1999, Ms. Cantu filled out a Form 113 indicating that Dr. Farmer was to be her designated treating physician. Ford's records further indicate that, during this period of time, Ford paid medical bills to a chiropractor and to Louisville Orthopedic and Health South on behalf of Ms. Cantu. Ford's records reflect that on June 7, 1999, the orthopedic surgeon could not find a problem with Ms. Cantu, and that she wanted to see her private physician but was advised to see Dr. Farmer instead. Ms. Cantu refused to meet with Dr. Farmer and was given a "pass out" to leave work for the day.

On June 8, 1999, Dr. Petruska took Ms. Cantu off work due to her back condition. She continued on this medical leave until January 4, 2000. At this time, Ms. Cantu's claim was denied by the OWC, however, she did not receive notification of the denial. Dr. Farmer stated that he did not feel like Ms. Cantu's

injuries were work related because Ms. Cantu was in poor physical condition and a prior car wreck had left her with neck and back troubles. Dr. Farmer did acknowledge, however, that Mrs. Cantu was off for a sufficient period of time to entitle her to receive TTD benefits had a determination been made that her injuries were work related.

Ms. Cantu was put on medical leave with the leave being marked as "personal" beginning June 8, 1999. Dr. Farmer testified that Ford listed Ms. Cantu's leave as "personal." Ms. Ballinger testified that when a person went on leave, she was notified by the medical department and/or by the employee that the person was going out on "occupational" medical leave. If it were recorded as "occupational" then she would see it, however if it were characterized as "personal," she would not. As a result, Mrs. Ballinger did not get a request from anyone to pay Ms. Cantu TTD benefits for her leave.

Ford's records reflect that on December 21, 1999, Dr. Farmer received a Form 1566 from Dr. Ragland and records from Dr. Petruska diagnosing Ms. Cantu with a herniated disc. These medical records further noted that Ms. Cantu could return to work on December 22, 1999, with restrictions placed on her of no lifting over 25 pounds and no repetitive bending or twisting at the waist with no prolonged standing or sitting. There was also a 7% impairment rating contained in this report. On January 4, 2000, Ms. Cantu came back to work. Dr. Farmer testified that records reflected that prior to this time Ms. Cantu was off work for about six (6) months with a back problem. Dr. Farmer testified that Ms. Cantu's

back condition started out as being treated as an "occupational" claim but was later changed to "personal." Dr. Farmer further testified that contrary to Dr. Petruska's findings, Ms. Cantu's jobs while at Ford would not have caused a significant amount of degenerative disc disease.

After a hearing, the Administrative Law Judge (ALJ) found that Ms. Cantu refused Dr. Farmer's treatment and that she listed her medical leave as "personal" in June of 1999; thus, Ford was removed from having the obligation to file a First Report of Injury with the OWC as required by KRS 342.038 and from the obligation of filing a notice of benefit suspension as required by KRS 342.040. With this ruling, Ms. Cantu's claim for back injury would be barred, as provided under KRS 342.185, since her claim was filed after the two (2) year statutory period. Ms. Cantu appealed this decision to the Workers' Compensation Board (Board) which overturned this judgment by finding that it was Ford that noted Ms. Cantu's leave as "personal." The Board further found that Ford had neglected its duty to file a first report with the OWC and to file a notice of benefit suspension; therefore, the statute of limitations was tolled. Ford now appeals the Board's decision.

STANDARD OF REVIEW

The standard of review for overturning a finding of fact from the ALJ is "clearly erroneous." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). The Kentucky Supreme Court has ruled that "[a] finding which is unreasonable

under the evidence presented is 'clearly erroneous' and, perforce, would 'compel' a different finding." *Id.*

The fact finder, "and not the reviewing court, has the authority to determine the quality, character and substance of the evidence presented to the Board." *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418-19 (Ky. 1985). As correctly noted by the Board , the ALJ may choose whom and what to believe. *Pruitt v. Bugg Brothers*, 547 S.W.2d 123 (Ky. 1977). *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984) the Court noted that "[t]he claimant bears the burden of proof and risk of persuasion" before the initial court. "[I]f the claimant is unsuccessful before the [initial court], and he himself appeals to the [appellate court], the question before the [appellate] [c]ourt is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor." *Id*. With this standard in mind, we will review the Board's decision.

DISCUSSION

"KRS 342.038 requires an employer to notify the Workers' Compensation Board …of a work-related injury. KRS 342.040 requires the employer to notify the Board of the employer's termination of compensation payments or of the failure to make payments when due. KRS 342.040 also places a duty upon the Board to then notify an employee of his or her right to prosecute a claim." *Newberg v. Hudson*, 838 S.W.2d 384-85 (Ky. 1992). In the event that an employer does not comply with these provisions, the employer may be precluded

from raising the two (2) year statute of limitation defense found in KRS 342.185 which provides:

> [N]o 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 office within two (2) years after the date of the accident[.]

There is nothing in the record that indicates that Ms. Cantu listed her medical leave as "personal." In fact, the record clearly indicates that it was Ford who marked Ms. Cantu's leave as "personal." As set forth above, Ms. Ballinger, indicated in her testimony that when a person went on leave, she would be notified by the medical department and/or by the employee that the person was going on "occupational" medical leave. Dr. Farmer stated in his deposition that when he saw Ms. Cantu on May 12, 1999, he considered Ms. Cantu's low back pain to be a continuation of Ms. Cantu's previous low back complaints and not a new injury. When Dr. Farmer was deposed on June 5 , 2006, he was specifically asked, "So you-all made the decision to put [the notation] personal versus workers' comp?" (Deposition June 5, 2006 p. 592). Dr. Farmer replied in the affirmative. *Id.*

On May 13, 1999, less than a month before Ms. Cantu went on leave, Dr. Farmer diagnosed her with a sprain and strain of the lumbar spine. On June 7, 1999, Ms. Cantu decided to see her private physician, which is permissible by KRS 342.020. At this point, Dr. Farmer stated that based on his assumption that the

tack-off job was relatively minor, the fact that Ms. Cantu was in poor physical condition, and the fact that she had been involved in a car wreck with neck and back troubles prior to notification of her injuries, he attributed the low back problems to be non work-related. From the testimony of Dr. Farmer, it is implicit that he decided to make a contradictory diagnosis of Ms. Cantu once she decided to seek private care.

We find that the ALJ's finding of fact which stipulated that Ms. Cantu listed her leave as "personal" was clearly erroneous. Since there was not any evidence proffered to indicate that Ms. Cantu listed her leave as "personal," but there was sufficient evidence to the contrary that Dr. Farmer or someone from Ford's personnel listed the leave as "personal," the Board's decision to reverse the ALJ on this issue was not erroneous.

Next, Ford asserts that it was unaware of Ms. Cantu's leave as a work related injury because she did not go back to see Dr. Farmer as advised and her leave was marked "personal;" thus, they were relieved of their duty to file an acceptance or denial form with the OWC. Ford relies on *Newberg,* supra, to support its assertion.

In *Newberg*, the employer gave the employee a form to fill out. The employee failed to specify on the forms provided by the employer that his injury was work-related. *Id.* As a result, the employer did not comply with KRS 342.038 because it did not have adequate notice that the claimant was going on leave for a work related injury. The court ruled that the employer could use the statute of

limitations defense. The *Newberg* court noted that "where there is no evidence that the employer's noncompliance with the notice provisions was in bad faith and there is evidence of a good-faith attempt to ascertain the reason behind an employee's absence from work," equitable estoppel will not be applied. *Id.*

In this case, Ms. Cantu had followed the policies of Ford. She had undergone physical therapy under Ford's direction for over a year. Ms. Cantu had met with Dr. Farmer at least three (3) times before she decided to see her private physician. It is stipulated in the record that when Ms. Cantu was seen by Ford's orthopedic surgeon on June 7, 1999, and he could not find a problem with her back, she was "advised" to seek further treatment from Dr. Farmer, Ford's physician. Ms. Cantu then decided to seek the opinion of her private physician which, as set forth above, was within her rights pursuant to KRS 342.020.

Once Ford decided that it was not going to make payments for Ms. Cantu's back injury, it had a duty to notify the commissioner pursuant to KRS 342.040(1). While Ford asserts that it was "innocently unaware" of Ms. Cantu's leave as a work related injury, there is no record of Ford attempting to ascertain the reason behind Ms. Cantu's absence from work. With Ms. Cantu's history of checkups and physical therapy with Ford medical personnel for over a year, it is unreasonable to find that Ford was innocently unaware of her injury being work-related.

In *Newberg*, the court noted that an employer will not be equitably estopped from asserting a statute of limitations defense when it refrains from

acting in bad faith and when "there is evidence of a good-faith attempt to ascertain the reason behind an employee's absence from work[.]" *Id*. In this case, there has not been any evidence or testimony presented to indicate that Ford made a good faith effort to determine the reasoning behind Ms. Cantu's absence.

Kentucky's Supreme Court has noted that "fairness dictates that the employer's noncompliance will preclude its reliance upon the statute of limitations so that the protection that is intended to benefit the employee is not thwarted by the employer for the employer's own benefit." *Id* at 388. Since Ford did not comply with the statute or make a good faith effort to ascertain the reason behind Ms. Cantu's absence from work, it is barred from asserting a statute of limitations defense on this injury.

Ford's next issue on appeal is that the Board went outside its scope of review to decide on the issue of causation of Ms. Cantu's lower back injury. From a review of the Board's opinion, it is apparent that the appellant misconstrued the interpretation of the opinion by the Board. The Board reversed and remanded the issue of Ms. Cantu's 1998 work-related back injury as being barred by the statute of limitations "to the ALJ for consideration of an award of TTD, PPD and medical benefits arising from the low back injury." (R. 33). The Board did not make a finding of fact on this issue, but simply remanded this issue to be "considered" by the ALJ, since the ALJ did not make any findings of fact initially on this issue. The Board's ruling on this issue is affirmed.

Ford's third issue on appeal is that any entitlement to TTD for the carpel tunnel injury of Ms. Cantu must be limited to the dates of June 8, 2000, through July 20, 2000. We shall not delve into this issue because it is not ripe for review. There have not been any factual findings made regarding the appropriate period of TTD. The Board correctly remanded this issue back to the ALJ for their determination on those facts. "The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton,* 862 S.W.2d 308-09 (Ky. 1993). Since the evidence about Ms. Cantu's carpel tunnel has not been evaluated by the ALJ, it cannot be reviewed at this time.

For the above stated reasons, we affirm the decision of the Board and this order is remanded to the ALJ for actions consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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