

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001871-WC

FORD MOTOR COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 13-WC-90836

DEBORAH DUCKWORTH;
HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: ACREE, GOODWINE AND KRAMER, JUDGES.

KRAMER, JUDGE: An Administrative Law Judge ("ALJ") awarded appellee Deborah Duckworth workers' compensation benefits after determining Duckworth sustained two cumulative trauma injuries (one to her neck and the other to her

lower back) in the course and scope of her work for appellant, Ford Motor Company. Ford thereafter appealed to the Workers' Compensation Board (the "Board"), arguing Duckworth's cumulative trauma injury claims should have been dismissed as untimely. Ford also argued that the ALJ, in failing to dismiss Duckworth's claims as untimely, had ignored an uncontested fact – namely, the date that Duckworth's cumulative trauma injuries had "manifested" for limitations purposes. The Board disagreed and affirmed. This appeal followed, and we likewise affirm.

Ford's arguments on appeal are narrowly confined to the ALJ's authority to determine the manifestation date for Duckworth's cumulative trauma injuries. Ford does not challenge the sufficiency of the evidence underlying the ALJ's decision. Accordingly, a detailed recitation of the proof is unnecessary.

Duckworth worked on the assembly line at Ford since 1998. In 2007, she was placed on the wire loom job. She began experiencing neck symptoms in 2007 and first visited Ford Medical on November 8, 2007 to report neck pain. During 2008 and 2009, Duckworth periodically visited Ford Medical for treatment of upper back and neck pain and was treated primarily by Dr. Gregory Ornella. In 2010, she experienced worsening lower back pain and again visited Ford Medical several times for treatment. She was eventually referred to Dr. Rodney Chou.

Duckworth continued to work the wire loom job until February 2011, when she was moved to a position that caused her less neck pain. However, a few weeks later she was returned to a different wire loom job. Her neck and back pain continued, and she treated at Ford Medical repeatedly from 2011 to 2012.

On April 12, 2012, Duckworth was struck on top of her head by a piece of handheld equipment. Her neck symptoms worsened following this incident. On October 2, 2012, she fell at work, which she stated worsened her neck symptoms. On January 7, 2013, a complete spine MRI was taken at Dr. Chou's request. Cervical spine surgery was recommended and performed on April 9, 2013. Lumbar spine surgery was performed on November 29, 2013.

Duckworth filed a Form 101 on May 21, 2013. There, she stated:

[She] suffered work-related cumulative trauma injury to her back and neck in the course of working the wire loom job which manifest [sic] 11/8/07. Plaintiff continued to work and perform the wire loom job and suffer cumulative trauma to her neck and back. Thereafter Plaintiff worked multiple jobs that caused hastened cumulative trauma to her neck and culminating with worsened MRI findings on 1/17/13 and the recommendation for cervical surgery February 2013.

Also, in her Form 101 Duckworth noted her injured body parts were "Back and Neck (11/8/07; 1/7/13)."

Ford responded with a special answer. Emphasizing Duckworth's statement to the effect that her cumulative trauma injuries had manifested on

November 8, 2007, Ford asserted Duckworth's claims based upon those alleged injuries were barred by the applicable statute of limitations.

The ALJ subsequently held a Benefit Review Conference ("BRC") on January 8, 2018, where various issues were identified by the parties as either "contested" or "stipulated." The ALJ's resulting BRC order identified five injury dates as "11/8/07; 8/12/12; 10/2/12; 1/7/13; 9/3/13." But, the BRC order included that the dates of Duckworth's injuries were "at issue." The BRC order also identified "date of injury" and "statute of limitations" as "contested issues."

Duckworth and Ford eventually submitted briefs setting forth their respective arguments. Duckworth, consistent with her Form 101, represented again that she had "suffered work-related cumulative trauma injury to her back and neck in the course of her employment which first manifest [sic] **November 8, 2007.**" She explained her cumulative trauma injuries had manifested on that date because she "presented to Ford Medical November 8, 2007 with neck pain after leaning over the frame to put in the wire loom." She further argued her injuries had continued to worsen over the course of the later dates set forth above.

In her brief before the ALJ, she also maintained that her cumulative trauma claims were timely even though she had asserted them on May 21, 2013, because:

Following the November 8, 2007 work injury Ms. Duckworth received Temporary Total Disability benefits

at a weekly rate of \$646.47 for August 6, 2010, June 24, 2011, July 22, 2011, July 29, 2011, and August 5, 2011.

Pursuant to KRS 342.185(1), a claimant has two years after the date of the accident or following the suspension of payment of income benefits to file a claim. In cumulative trauma injuries then, a claimant has two years after the manifestation of disability *or* the cessation of temporary total disability (“TTD”) benefits to file a claim for income and medical benefits.

In this case, Ms. Duckworth’s claim was timely filed as the last payment of temporary total disability benefits was August 5, 2011. Two years following the TTD benefit cessation was August 5, 2013, which falls after Ms. Duckworth’s Form 101 was filed on May 30, 2013.

Further . . . in a cumulative trauma claim though otherwise time barred, any disability attributable to a work-related cumulative trauma that occurred within two years of the claim being filed remains compensable. Therefore, Ms. Duckworth’s claim has been timely filed for any disability attributable to repetitive work Ms. Duckworth performed after May 30, 2011.

(Internal quotations and citations omitted.)

Ford, on the other hand, maintained that Duckworth’s claims were untimely because in its view the two-year limitations period applicable to her claims had expired on November 7, 2009. In relevant part, Ford argued:

Alcon [sic] *Foil Products*^[1] continues to state that in summation, for cumulative trauma claims, a Plaintiff has two years after the “manifestation of disability” or the cessation of temporary total disability benefits to file a claim for income or medical benefits. A cumulative

¹ This is a reference to *Alcan Foil Products v. Huff*, 2 S.W.3d 96 (Ky. 1999).

trauma injury manifests when a worker discovers that a physically disabling injury has been sustained and knows it is caused by work. Although a worker is not required to self-diagnose the cause of a harmful change being work related cumulative trauma and a physician must diagnose the condition and work relatedness, this all happened in Plaintiff's case in 2007. Her statute of limitations expired in 2009. See also *Console of Kentucky, Inc. v. Goodgame*, 479 S.W.3d 78 (Ky. 2015).

All credible evidence, and testimony from Plaintiff herself, support a manifestation of injury date of November 8, 2007. When Plaintiff reported her injury to Ford Onsite Medical on November 8, 2007 *she stated that it was related to her work on the wire loom job*. She again reported to Dr. Becherer in 2010 that her pain had been ongoing for several years and was related to work at Ford Motor Company.

Plaintiff was aware she sustained a work-related injury in 2007, and this was relayed to her by two physicians, Dr. Ornella and Dr. Hart as documented in Ford's medical department records. Clearly her manifestation of injury date was 2007.

(Emphasis added.)

In short, Ford's emphasis was upon the fact that as early as November 8, 2007, Duckworth had *reported* to physicians employed at its onsite medical clinic (*i.e.*, Drs. Ornella and Hart) that she had sustained and was suffering from a work-related injury. This, it argued, was why the limitations period had started to run on that date.

But later in its brief – and despite its acknowledgement that “a physician must diagnose the condition and work relatedness” before a cumulative

injury can legally “manifest” for limitations purposes – Ford then clarified it was not conceding that any physician at Ford Medical had ever expressed an opinion to Duckworth – on November 8, 2007, or on any other date thereafter – that she *was* suffering from a work-related, cumulative trauma injury:

The overwhelming objective medical findings do not support a finding that Plaintiff’s work with Defendant-Employer was the proximate cause of the conditions in Plaintiff’s cervical spine and lumbar spine conditions or need for surgeries. *No treating doctor (Ornella, Holt, Hart, Becherer) offered an opinion that the Plaintiff’s work duties caused the current condition and/or necessitated the need for surgery.* Surely if the treating physicians felt this way, Plaintiff could have obtained her/her [sic] opinions and filed those into evidence to support the burden of proving of an injury. This did not occur.

(Emphasis added.)

After filing their respective briefs, the parties submitted this matter for the ALJ’s consideration. And, on June 11, 2018, the ALJ found Duckworth’s cumulative trauma injuries compensable and awarded benefits. Resolving the limitations issue in Duckworth’s favor, the ALJ explained:

In Consol of Kentucky, Inc. v. Goodgame, 479 S.W.3d 78 (Ky. 2015), the Court held that for cumulative trauma injuries, the date of accident is the date a claimant is advised by a physician that he has a work related condition. Therefore, the obligation to provide notice and the statute of limitations (and statute of repose) begins to run at that time. A worker is not required to self-diagnose the cause of a harmful change as being a work-related gradual injury for the purpose of giving

notice. American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004).

Defendant argues in this case that it is documented that Ms. Duckworth and Dr. Ornella discussed, and she had an understanding, that her work caused her neck and back condition. The ALJ does not agree with this statement. The Ford Medical records are very clear that Ms. Duckworth consistently told the nurses, and apparently Dr. Ornella, that she believed her job was causing her neck and back problems. However, these records are equally clear that Ford repeatedly listed her neck condition as an “illness,” not an injury, or repetitive injury, until March 27, 2013. On that date, Ford listed her neck as an “injury.” On October 10, 2011, Ford listed her condition as an “injury” for the first time. The Ford Motor records establish that she was told that her low back was work related on October 10, 2011, and on March 27, 2013, that her neck condition was work related.

On March 22, 2010, Dr. Chou states in his records that her low back condition was due to repetitive injury. This does not appear as a history taken from Ms. Duckworth, but, more of a statement as to the cause of her condition.

The law does not require Ms. Duckworth to self-diagnose her condition. It is clear from the records that she told every doctor she encountered that she believed her neck and low back problems were caused by her repetitive work. However, current law holds that does not trigger her notice or manifestation date. On November 8, 2007, the records are clear that she did not report an acute injury. She told the nurses at Ford that she thought her neck and back problems were caused by the wire loom job. The ALJ relies on the Ford Medical records to find that manifestation did not occur on November 8, 2007.

The ALJ relies on the records of Dr. Chou to find that her date of discovery, for purposes of notice and

manifestation of her cumulative trauma neck injuries, occurred on March 22, 2010, as indicated in his office record. The ALJ relies on the Ford Motor records to find that her date of discovery of her cumulative trauma low back injuries, for purposes of notice and manifestation occurred on October 10, 2011. Ms. Duckworth was required to file her claim for benefits within two years of each respective date, unless TTD was paid.

The parties stipulated that Defendant began paying TTD on August 6, 2010. The last TTD payment was on August 5, 2011. Ms. Duckworth filed her Application for Benefits Form 101 on June 10, 2013. The ALJ finds that she filed her claim within two years of the date of the last TTD payment. “If payments of income benefits have been made, the filing of an application for adjustment of claim with the department within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments of within two (2) years of the date of the accident, whichever is later.” KRS 342.185(1).

Thereafter, Ford petitioned for reconsideration. With respect to the ALJ’s determination regarding limitations, Ford did not contend that Drs. Ornella, Hart, or any other physician at Ford Medical had ever informed Duckworth that she had sustained any kind of work-related injury. Instead, it re-emphasized its position that the limitations period should have started running on November 8, 2007, because that was the date Duckworth began *reporting* and *complaining* of what *she believed* was a work-related injury. In relevant part, Ford argued:

2. The Administrative Law Judge entered an Opinion and Award on June 11, 2018, wherein he determined that regardless of the fact that Ms. Duckworth continued to *complain* to Ford Motor Company since 2007 of pain due

to her job, that her manifestation of injury date for the cervical spine was not until March 22, 2010 (Administrative Law Judge Decision Page 31). The ALJ lists a 2012 manifestation of injury of the lumbar spine. However, both conditions began prior to or in 2007 and *were reported to Ford Medical in 2007 as work related* (OSHM records). The initial *complaints* in November 8, 2007 were entered into Ford’s coding system as “occupational” injuries and continued to coded [sic] as such during the following relevant years. The Employer requests that the ALJ make additional findings of fact that the medical visits were continually coded as “Occupational”.^[2]

.....

10. The Defendant-Employer respectfully requests that this Administrative Law Judge reconsider the date of manifestation of injury as *she first reported her complaints* of neck and back pain to Ford Medical,

² It is unclear why Ford made a “request” in its petition that “the ALJ make additional findings of fact that [Duckworth’s] medical visits [at Ford Medical] were continually coded as ‘Occupational.’” This is because later in its petition Ford proceeded to contend that how Ford Medical coded its medical documentation – and its use of terms such as “illness,” “injury,” “*occupational*,” or “personal” on its documentation – had no legal significance in the context of workers’ compensation. Specifically, Ford stated:

13. Further, the Administrative Law Judge relies heavily upon Ford’s OHSIM records that state her condition is due to injury versus illness. The Defendant-Employer submits that this type of coding language is certainly not legally dispositive as to whether Ms. Duckworth sustained an injury as defined by the Act or was aware that she had an injury as defined by the Act. Most of Ford’s OHSIM records are actually coded for different reasons due to billing, placement issues, etc., and there is no evidence that this language has any legal significance with regard to workers compensation. In fact, her OHSIM records state at the very top coding area that the visits are “occupational”. *Again, this is type [sic] of coding but if the medical staff puts a visit as “occupational”, it understood [sic] that it is treated as such for compliance purposes and other internal reasons not related to KRS 342.0011 Injury [sic] as Defined by the Act.* However, because the ALJ based his entire Award upon Ford’s OHSIM records, it is significant to point out the analysis would actually be the opposite, as the coding for her visits were all listed as “occupational” as opposed to “personal”. The Employer requests that the ALJ find as such.

(Emphasis added.)

claiming it was a result of her work duties on November 8, 2007. There is no doubt that *she understood her cervical and lumbar complaints were due to the wire loom job*, no other etiology of injury was records [sic] and she was treated for many years in Ford Medical for *what was presumed by Plaintiff as a work related Injury*. There is no other documentation as to cause [sic] of these complaints and the Employer requests Reconsideration of the date of manifestation of cervical and lumbar injures and relies upon arguments set forth in the Brief to the ALJ.

(Emphasis added.)

In a subsequent order, the ALJ overruled Ford's petition. Once again, the ALJ acknowledged the evidence demonstrated Duckworth had told Ford Medical personnel that she believed her neck and back pain were work related. But, the ALJ reiterated that November 8, 2007, was *not* the manifestation date of Duckworth's injuries because no physician on that date had informed Duckworth that her neck and back pain were work-related.

Ford then appealed to the Board, and its appeal focused exclusively upon the manifestation date of Duckworth's injuries. Again, Ford did not contend that any physician had informed Duckworth, prior to the dates specified by the ALJ, that her neck and back pain were work related. Nor did Ford contend that a *worker's belief* (as opposed to a *physician's opinion*) regarding the work-relatedness of a given condition determined the applicable manifestation date of a cumulative trauma injury or triggered the statute of limitations.

Instead, and for the first time, Ford argued the ALJ's prior BRC order – and principles of procedural due process – had effectively prohibited the ALJ from finding that Duckworth's cumulative trauma injuries manifested on March 22, 2010, October 10, 2011, *or any date other than November 8, 2007*. Ford's argument was in relevant part as follows:³

1. . . . [T]he dates of injury listed on the BRC Order and Memorandum are: 11/8/2007; 8/12/2012; 10/2/2012; 1/7/2013; and 9/3/2013. The injury manifestation dates determined *sua sponte* by ALJ McCracken of March 22, 2010 and October 10, 2011, for [Duckworth's] cumulative trauma neck and back injuries were not injury dates ever discussed by [Ford] or [Duckworth]. They were not dates of injury at issue in any way.

2. The Board will further note that neither [Ford] nor [Duckworth] argued to ALJ McCracken that the manifestation date for [Duckworth's] cumulative trauma neck and back injuries was any date other than November 8, 2007, as alleged by [Duckworth] in her Form 101, her Motion to Supplement Form 101, her Stipulations and Witness List, and her Brief to the ALJ. Merely checking a box on the BRC Order and Memorandum that dates of injuries were at issue should not be interpreted to suggest that March 22, 2010, and October 10, 2011, were ever potential manifestation dates for [Duckworth's] injuries. Rather, the dates of the injury at issue were those specifically delineated in the BRC Order and Memorandum.

3. In light of the foregoing, [Ford] requests the Board reverse ALJ McCracken's findings on pages 31 and 32 of his Opinion, Award, and Order that [Duckworth's]

³ Ford summarized its argument in the manner set forth above in a reply brief it filed before the Board.

cumulative trauma neck injury manifested on March 22, 2010, and cumulative trauma back injuries manifested on October 10, 2011, and his further finding that both such injuries were timely filed given the payment of temporary total disability benefits between August 6, 2010, and August 5, 2011. [Ford] requests the Board find that said injury claims having manifested on November 8, 2007, are barred by the applicable statute of limitations expressed in KRS §§ 342.185 and 342.270.

Upon review, the Board disagreed and affirmed. In its analysis, the Board observed that injury manifestation dates can be stipulated in a BRC order and thus binding upon litigants and an ALJ. *See, e.g., Hale v. CDR Operations, Inc.*, 474 S.W.3d 129 (Ky. 2015). But, clarifying that no such stipulation had occurred in this matter, the Board pointed out that “[t]he parties had twice identified the ‘dates of injury’ as ‘at issue’. Nowhere on the BRC Order do the parties stipulate dates of injury, or do the parties stipulate a date of manifestation for notice and statute of limitations purposes.”

The Board further concluded that because no such stipulation had occurred below, the ALJ was ultimately required to determine the manifestation date of Duckworth’s injuries according to the law and the evidence presented, rather than according to the litigants’ understanding of the legal term “manifestation.” To that end, the Board explained:

In her Form 101 and subsequent pleadings, Duckworth stated her neck and back injuries “manifested” on November 8, 2007. This date corresponds to her first visit to Ford Medical. In cumulative trauma injury

claims, the term “manifestation” can have dual meanings. The date an injury manifests might refer to the day when symptoms or disability arise, and may constitute the starting date for liability. American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2005). This meaning differs from the manifestation date for purposes of notice and statute of limitations. As the ALJ correctly noted, the date for triggering the running of the limitations period and for giving notice in a cumulative trauma claim is when the worker has knowledge that a harmful change has occurred and is informed by a physician that it is work-related. Hill v. Sextet Mining, 65 S.W.3d 503 (Ky. 2011).

.....

[W]e disagree with Ford that the ALJ was bound to select one of the identified injury dates in determining manifestation for purposes of notice and statute of limitations. A cumulative trauma injury was alleged in this claim. Implicit in the adjudication of any cumulative trauma injury claim is the necessary determination of the manifestation date. The parties identified dates of injury, but listed them as “at issue.” The ALJ is vested with the discretion to weigh the proof and adjudicate the claim. He is not bound to determine whether a claim has been timely filed based upon dates of injury which were not stipulated by the parties.

As to Ford’s additional argument that it had been denied due process, the Board likewise disagreed, explaining:

Procedural due process requires a party to enjoy the opportunity to be heard at a reasonable time and in a reasonable manner. Matthews v. Eldridge, 424 U.S. 319 (1976). At the commencement of litigation, Ford filed a special answer arguing Duckworth’s claim was time-barred. In cannot now argue it was deprived the opportunity to be timely heard on the issue of when

Duckworth's cumulative trauma injuries manifested, when it specifically raised this precise argument in its special answer.

Ford now appeals before this Court. In its brief, it summarizes why it takes umbrage with the ALJ's and Board's respective decisions:

Throughout the entirety of this case [Ford] approached its defense based upon [Duckworth's] alleged November 8, 2007, cumulative trauma injuries manifestation stated date on her Form 101, listed in the BRC Order, asserted by [Duckworth's] testimony at the final hearing, and argued in [Duckworth's] brief to the ALJ. There can be no doubt that [Duckworth] and [Ford] were of accord that *if [Duckworth] suffered cumulative trauma injuries to her neck and back, the manifestation date for the injuries was that alleged by [Duckworth], November 8, 2007.*

(Ford's emphasis.)

As it did below, however, Ford acknowledges the "manifestation date" of a cumulative trauma injury for limitations purposes relates to the date a worker is informed by a physician that an injury or condition is work related. *See Goodgame*, 479 S.W.3d at 82. Ford does not assert the ALJ's findings that Duckworth's respective cumulative trauma injuries manifested on March 22, 2010 and October 10, 2011, were unsupported by substantial evidence. Moreover, despite insinuating that it and Duckworth were "of accord," Ford does not contend that the manifestation date of Duckworth's injuries was *stipulated* in the ALJ's BRC order.

Rather, in support of its position, Ford repeats throughout the remainder of its brief what it argued before the Board; namely, that in its view: (1) the ALJ was not authorized to determine Duckworth's injuries manifested on any date besides November 8, 2007, because that date was never contested; and (2) the ALJ's decision to look beyond Duckworth's understanding of the word "manifestation" in order to analyze when Duckworth's claim accrued was a violation of its procedural due process rights.

As indicated at the beginning of this opinion, both of Ford's arguments involve the scope of the ALJ's authority, which presents an issue of law that we review *de novo*. See *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009). With that said, we agree with and incorporate the reasoning of both the ALJ and Board set forth above.

To the extent that more needs to be said, we add that the source of Ford's contentions arises from the following sections of 803 Kentucky Administrative Regulation (KAR) 25:010 § 13:

(11) If at the conclusion of the BRC the parties have not reached agreement on all the issues, the administrative law judge shall:

- (a) Prepare a final BRC memorandum and order including stipulations and identification of all issues, which shall be signed by all parties or if represented, their counsel, and the administrative law judge; and
- (b) Schedule a final hearing.

(12) Only contested issues shall be the subject of further proceedings.

Thus, to preserve an issue for appeal, the issue must be listed as a contested issue in the BRC order.

But, Ford offers no law supporting that an ALJ lacks the authority to determine the manifestation date of cumulative trauma injuries according to the law and the evidence presented, rather than according to the litigants' understanding of the legal term "manifestation," where – as here – the BRC order never stipulated the manifestation date and instead listed it as "at issue" and "contested." To the contrary, this type of situation falls squarely within the following rule:

ALJ's, workers' compensation board members, judges and justices are presumed to know the law and are charged with its proper application.

There are two schools of thought as to what policy an appellate court should follow in such instances—which are, we might add, not at all rare. One view is that when a party fails to argue a theory on which he is entitled to win he should simply lose, the courts having enough to do without practicing lawyers' cases. On the other hand, much bad law will go into the books (more, that is, than is there already) if courts confine their analyses of cases to the theories presented in the briefs. It is probable that in well over 50% of the cases coming before it an appellate court will size up the dispositive logic of a controversy

differently from the way in which the opposing parties have conceived it. For the sake of the litigants, who have some right, it seems to us, to expect the courts to assume a full share of responsibility for seeing that the controversy is correctly determined, we are of the opinion that insofar as the pleadings, the evidence, the rules of procedure and the principles of law permit, an appellate court should resolve cases on their merits, aided by but not necessarily restricted to the arguments of counsel.

First Nat'l Bank of Louisville v. Progressive Cas. Ins. Co., Ky., 517 S.W.2d 226, 230 (1974). In other words, applicable legal authority is not evidence and can be resorted to at any stage of the proceedings whether cited by the litigants or simply applied, *sua sponte*, by the adjudicator(s). Nor is legal research a matter of judicial notice, for the issue is one of law, not evidence.

Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 930 (Ky. 2002).

Ford's contention that it and Duckworth were "of accord" regarding the manifestation date of her cumulative trauma injuries is also disingenuous. As indicated, Ford has always acknowledged that "manifestation" in this context relates to the date a worker is informed by a physician that an injury or condition is work related. And, it is difficult to conceive how Ford could have been "of accord" with Duckworth that her cumulative trauma injuries "manifested" on November 8, 2007, when, as Ford *itself* argued and emphasized in its brief before the ALJ, no physician expressed an opinion to Duckworth on November 8, 2007, that she was suffering from a work-related, cumulative trauma injury.

Accordingly, we AFFIRM.

ALL CONCUR.

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