Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 20, 2013

CLAIM NO. 201200679

LOIS FUSION PETITIONER

VS. **APPEAL FROM HON.ALLISON E. JONES, ADMINISTRATIVE LAW JUDGE**

THE JOB SHOP STAFFING SERVICES
and HON. ALLISON E. JONES
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: STIVERS and RECHTER, Members.

RECHTER, Member. Lois Fuson ("Fuson") appeals from a February 18, 2013 Opinion and Order entered by Hon. Allison Emerson Jones, Administrative Law Judge ("ALJ") dismissing her claim as barred by the statute of limitations. Fuson's subsequent petition for reconsideration was denied on March 15, 2013, though the ALJ granted the petition to the extent Fuson sought additional findings of fact. For the reasons set forth herein, we affirm.

Fuson initiated this claim against The Job Shop Staffing Services ("The Job Shop"), alleging she injured her neck and right arm on March 17, 2009 while lifting a loaded crate of paper. The Job Shop is a temporary staffing agency that places workers with local employers on a temporary basis or "temp-to-hire" basis. At the time of her injury, Fuson had been placed with Serco, Inc. As a client of The Job Shop, Serco retained the right to dismiss employees in its sole discretion. It was stipulated, however, that Fuson was an employee of The Job Shop.

Nearly two years earlier, in November of 2007, an MRI performed for an unrelated condition revealed that Fuson suffered from a C5-6 disk herniation. The evidence is somewhat contradictory as to whether Fuson suffered any pain as a result of this condition between the time the MRI was performed and March 17, 2009.

While placed at Serco, Fuson's job was to scan documents into a computer. When Fuson lifted the crate on March 17, 2009, she immediately felt a burning pain from her right arm up to her shoulder. She reported her injury and drove herself to a local emergency room. A CT scan revealed the herniated disk at the C5-7 level. Fuson was directed to follow up with her primary care physician.

The following day, Fuson did not return to work. She visited Dr. William Lester. He noted Fuson's chief complaint as neck and right shoulder pain running through her forearm, and diagnosed her with a cervical strain, bicep strain and tricep strain. Dr. Lester's records indicate he recommended physical therapy, but released Fuson to return to work with restrictions.

Fuson visited Dr. Lester the next day, March 19, 2009. She remained on light duty following this visit. A week later, on March 27, 2009, Fuson again returned to Dr. Lester. According to Dr. Lester's notes, Fuson told him that she was "doing better" and that she desired to return to work at full duty. Finding that her muscular strains had resolved, Dr. Lester released Fuson to regular duty.

On April 3, 2009, Fuson again visited Dr. Lester. Fuson reported she was doing well, but had been laid off work four days earlier. Again, Dr. Lester noted that Fuson's condition had resolved and recommended no further medical treatment. Fuson returned to Dr. Lester's office on May 27, 2009, complaining of pain in her right arm that worsened with use. She was seen by a nurse practitioner, but was told to return the following day to be examined by Dr. Lester. When Dr. Lester performed this examination on

May 28, 2009, he noted her complaint of pain in the right elbow but recommended no further treatment.

On June 10, 2009, Fuson was seen by Dr. Ronald Burgess, an orthopedic surgeon, for a second opinion. Dr. Burgess found “no objective changes that would delineate why [Fuson] has discomfort in the area of the brachial artery on the right.” He concluded that she required no further medical treatment and released Fuson to work without restrictions.

For the next eleven months, Fuson was routinely seen by Dr. John Boll, a general practitioner, for various unrelated conditions. In eight visits to Dr. Boll between June and November of 2009, Fuson made no complaints of arm or shoulder pain. In fact, Dr. Boll physically examined Fuson at least five times and, each time, characterized her neck as “supple”. Finally, on March 8, 2010, Fuson reported to Dr. Boll that she was struggling with neck pain. On this visit, Dr. Boll characterized her neck as “very stiff” and her trapezius muscle as “tender”. When Fuson followed-up with Dr. Boll on May 6, 2010, they discussed Fuson’s disk herniation and he referred her to a neurosurgeon.

About two months later, on May 28, 2010, Fuson visited Dr. Karin Swartz, a neurosurgeon. Fuson reported to Dr. Swartz that she had been suffering from neck and right

arm pain for the previous four and a half years. Dr. Swartz' notes further indicate Fuson had experienced a recent exacerbation of this pain as a result of lifting her nephew about two months earlier. Dr. Swartz attributed this pain to Fuson's disk herniation and recommended physical therapy.

Fuson made two additional visits to Dr. Swartz. On a visit on August 2, 2010, Fuson's chief complaint was right arm pain. Dr. Swartz identified Fuson as a candidate for surgical intervention, but informed her she needed to cease smoking first. At a third and final visit to Dr. Swartz on February 21, 2011, Fuson mentioned the March 17, 2009 work-related injury as the cause of her neck and arm pain. This was the first time she mentioned this work-related injury to Dr. Swartz. Dr. Swartz scheduled Fuson for surgery on March 8, 2011, though it was never conducted.

Fuson initiated her claim against The Job Shop on May 22, 2012, seeking income benefits. Following a final hearing, the ALJ ultimately concluded Fuson's claim was time barred. On appeal, Fuson presents several arguments as to why the claim should not be dismissed as time barred.

In doing so, she challenges both the ALJ's findings of fact and her conclusions of law. With respect to the ALJ's findings of fact, we reiterate the ALJ has the

sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support the decision. Special Fund v. Francis, *supra*.

Fuson essentially concedes that she has not satisfied the filing requirements found in KRS 342.185(1) and KRS 342.270(1) because she filed her claim more than two years after the alleged work injury. However, she argues The Job Shop is estopped from asserting a statute of limitations defense because it failed to comply with the

notification obligation found at KRS 342.040(1). That provision states, in part:

> If the employer's insurance carrier or other party responsible for the payment of workers' compensation benefits should terminate or fail to make payments when due, that party shall notify the executive director of the termination or failure to make payments and the executive director shall, in writing, advise the employee or known dependent of right to prosecute a claim under this chapter.

In J&V Coal Co. v. Hall, the Kentucky Supreme Court recognized that an employer who "fails to comply with KRS 342.040(1) is not permitted to raise a limitations defense because its action effectively prevents the commissioner from complying with its duty … to notify the worker of his right to prosecute a claim…" 62 S.W.3d 392, 395 (Ky. 2001). However, under the particular circumstances of J&V Coal, the employer was not estopped from raising a statute of limitations defense because the employee did not miss work for the requisite seven days, and no voluntary income benefits were paid. Thus, the employer's failure to report the injury as required by KRS 342.038(1) did not bar it from asserting a statute of limitations defense.

Here, Fuson went to the emergency room following her injury. The next day she visited Dr. Lester, who released her to work with restrictions. She missed one day

of work before returning to work a full day on March 19, 2009. By March 27, 2009, Dr. Lester had released Fuson to work full duty without restrictions. The Job Shop's employment records indicate Fuson worked full-time between March 17, 2009 and March 31, 2009, when she was terminated by Serco for unsatisfactory work.

Because no temporary total disability benefits were paid, the statute of limitations began to run on March 17, 2009, the date of Fuson's injury. As Fuson only missed one day of work, the notice requirement contained in KRS 342.038(1) was never triggered. Furthermore, no income benefits were due pursuant to KRS 342.040(1) because, again, Fuson missed only one day of work as a result of this injury.

In response, Fuson argues she *was* entitled to temporary total disability ("TTD") benefits. If true, the statute of limitations would be equitably tolled. However, the evidence does not support the conclusion Fuson was entitled to TTD benefits.

KRS 342.0011(11)(a) defines TTD as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." The ALJ concluded that Fuson was not entitled to TTD benefits

because she was authorized to return to work the day after the injury, albeit with restrictions. Regardless, Dr. Lester released Fuson to *full-duty* work on March 27, 2009 and again on April 3, 2009, May 27, 2009, and May 28, 2009. Dr. Burgess released her to full-duty on June 10, 2009.

Thus, contrary to Fuson's assertions on appeal, the date at which she reached maximum medical improvement is not relevant. This is because she had reached a level of improvement allowing a return to work without restrictions as early as March 27, 2009. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004)(emphasizing that both provisions of KRS 342.0011(11)(a) must be satisfied to entitle employee to TTD benefits). For the same reason, we need not determine whether the restrictions placed on Fuson's work between March 18 and March 27, 2009 prevented a "return to employment" within the meaning of KRS 342.0011(11)(a). *See e.g.* Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000)("It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury."). Fuson was released to work without restriction ten days after the injury and therefore, she was not entitled to TTD benefits pursuant to KRS 342.040(1).

Insofar as the ALJ's decision rests on factual findings, we conclude these findings are based on substantial evidence in the record. The fact that Fuson has presented conflicting evidence does not compel a different result. Further, as the ALJ likewise concluded, our thorough review of the record reveals no evidence that The Job Shop has attempted to "manufacture its own statutory limitation defense", as argued by Fuson on appeal. Finally, for the reasons stated herein, the legal conclusions drawn from these factual findings are correct.

Accordingly, the Opinion and Order entered February 18, 2013 by Hon. Allison Emerson Jones, Administrative Law Judge, and the Order dated March 15, 2013, are hereby **AFFIRMED**.

ALL CONCUR.

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