

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **March 29, 2019**

CLAIM NOS. 2017-00835 & 2016-99371

FORD MOTOR COMPANY

PETITIONER

VS.

**APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE**

TOMIKO MCDANIEL
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Ford Motor Company (“Ford”) appeals from the January 11, 2018 Opinion, Award and Order; the June 13, 2018 Order on Reconsideration; the January 10, 2018 Order striking Dr. Thomas M. Loeb’s report; the October 2, 2018 Opinion on Remand; and the November 5, 2018 Order on Reconsideration rendered

by Hon. Jane Rice Williams, Administrative Law Judge (“ALJ”). The ALJ awarded Tomiko McDaniel permanent partial disability benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1 for two knee injuries. On appeal, Ford argues McDaniel did not sustain work-related injuries and her conditions resulted from longstanding pre-existing active osteoarthritis. Alternatively, Ford argues the ALJ erred in enhancing McDaniel’s benefits by the three multiplier. Additionally, it argues the ALJ’s Order striking Dr. Loeb’s report was clearly an abuse of discretion. For the reasons set forth herein, we affirm.

McDaniel filed her claims on May 2, 2017, alleging an injury to her right knee on August 19, 2015 and an injury to her left knee on November 16, 2016. The claims were consolidated by order dated June 5, 2017.

McDaniel began her employment with Ford in 1995. She testified she had no knowledge of and received no treatment for osteoarthritis prior to beginning work for Ford. She sought treatment in 1995 or 1996 with Ford Medical for pain in her knees and was prescribed medication. In 2008, she was referred to Dr. Raymond G. Shea for bilateral knee pain. Dr. Shea diagnosed osteoarthritis of the knees, right worse than left. A comparison of MRIs from 2006 and 2008 revealed no tear of the lateral meniscus. Dr. Shea diagnosed advanced arthritis of the medial compartment of the knee with no changes of the patella. He indicated McDaniel was not a surgical candidate. McDaniel returned on January 12, 2009 and reported improvement in her symptoms.

McDaniel denied she had any further symptoms in her knees until 2015, and worked without restrictions. On August 19, 2015, she was installing sway

bars, a job she had performed for ten years. The bars weigh 17 to 18 pounds. She turned to pick up a part and felt a pop in her right knee. She tried to continue working, but her knee popped again.

McDaniel initially sought treatment with Dr. Mark Smith on October 9, 2015. Dr. Smith noted pre-existing arthritis of her knee with a twisting injury, which likely completed an existing partial medial meniscal tear and caused her to decompensate. Dr. Smith noted an MRI performed at Jewish Hospital revealed tri-compartmental arthritis of the right knee with grade 4 chondromalacia along the medial femoral condyle and the medial tibial plateau. There was a large tear of the medial meniscus and some effusion. X-rays revealed a near complete loss of the patellofemoral joint space.

McDaniel was taken off work and paid temporary total disability (“TTD”) benefits from January 5, 2016 through February 16, 2016. She returned to her pre-injury job, and was initially restricted to being on her feet for one to two hours. She wore a brace, but continued to have pain in her knee. On May 20, 2016, she was again taken off work because of pain in her knees. She was paid TTD benefits until September 5, 2016, when she was given a special assignment job. On November 16, 2016, she turned to get a part off a rack and her left knee “jammed”. She was taken off work and was initially paid TTD benefits until placed on UniCare, Ford’s disability plan, after April 16, 2017. She did not return to work after the second injury.

Dr. Andrew L. DeGruccio performed an independent medical evaluation (“IME”) on April 7, 2017. He opined McDaniel had no diagnosis related

to the 2015 incident at work. He did not believe a pre-existing dormant condition was aggravated or brought into disabling reality by a work injury. Rather, Dr. DeGruccio concluded McDaniel has well-established advanced osteoarthritis of the knees, a progressive degenerative condition that was pre-existing and not work-related. Although she may not have been seeking care for the condition prior to the alleged work event, Dr. DeGruccio believed she had an active condition that reached the point of interfering with her ability to work. He stated no impairment rating is attributable to the alleged work injury. Dr. DeGruccio assigned a 36% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”), which he believed pre-existed the work injuries.

Dr. Jules Barefoot performed an IME on June 27, 2017. Dr. Barefoot diagnosed end-stage degenerative arthritis of the knees. He restricted McDaniel to standing occasionally for one hour or less, and noted she would have marked difficulty with any job that required squatting, kneeling, crouching and crawling. She must be allowed to sit and rest intermittently for relief of pain and discomfort in her knees, is not able to climb stairs, work on ladders or scaffolding. She also cannot operate machinery with foot controls. Dr. Barefoot assigned a 20% impairment rating for each knee, resulting in a 36% whole person impairment pursuant to the AMA Guides.

In addition, Dr. Barefoot reviewed Dr. Degruccio’s IME report and disagreed with his conclusions regarding pre-existing active impairment. Because McDaniel had not missed work and was not under restrictions prior to the work

injuries, Dr. Barefoot stated she did not have a ratable impairment prior to the work injuries. Despite treatment more than a decade ago, Dr. Barefoot opined her osteoarthritic condition was dormant and non-ratable. Accordingly, he apportioned 100% of the impairment ratings to the work injuries and concluded McDaniel would be medically disqualified from returning to her pre-injury employment.

In a November 6, 2017 letter to counsel for Ford, Dr. Smith stated McDaniel suffers from significant osteoarthritis of the knees and had two episodes at Ford in which she sprained her knees leading to some aggravation of her arthritis. Dr. Smith opined that, were McDaniel not employed by Ford, there is a very high likelihood, based on the natural history of her severe arthritis, that she would have suffered similar severe knee pain. He agreed with Dr. DeGruccio that treatment for the osteoarthritis is not work-related.

In the January 11, 2018 Opinion, the ALJ relied upon Dr. Barefoot's opinion to determine McDaniel sustained a 20% impairment rating for each knee injury and was entitled to application of the three multiplier. In a subsequent appeal, this Board vacated and remanded, finding the ALJ erred in failing to summarize Dr. Smith's November 6, 2017 letter that casts doubt on the work-relatedness of the knee condition. The Board directed the ALJ to review the letter and determine the appropriate weight, if any, to attribute to it.

The ALJ's findings on remand relevant to this appeal are as follows:

After careful consideration of the medical evidence, it is found that Plaintiff's impairment is due to her work injuries to her bilateral knees. No one disputes she had preexisting osteoarthritis in both knees. However, she worked full time without restrictions for Ford for nearly 20 years. The two events where she injured her knees are

not in question. The opinion of Dr. DeGruccio is compelling but is not relied upon. The opinion of Dr. Smith ultimately found the treatment for osteoarthritis is not work related and that there is a very high likelihood she would have suffered similar severe knee pain whether or not she worked at Ford. This piece of information has been carefully considered. McDaniel presented as credible and sincere. Her testimony regarding her onset of pain is completely believable, leaving the question only of whether this onset of pain would have occurred were she never employed by Ford. The fact is, the onset did occur at Ford, her employer of more than 20 years. Her testimony of the mechanism of her work and her injuries is persuasive that her work at Ford [affected] a preexisting dormant non-disabling condition of osteoarthritis and brought it into disabling reality. Dr. Barefoot agrees this to be the case with both knees.

...

As for the multiplier, although McDaniel attempted to return to her same work and was in fact allowed to return to her preinjury position by Dr. Smith, she did not ever do her job fully. Her preinjury position required her to stand 8 – 10 hours a day. When Dr. Smith returned her to her preinjury job, he had her working to gradually build her stand time beginning with only a few hours a day. Her knee was in pain and she wore a brace. Eventually, she informed her employer she could not do the job. Because she never returned to the same job, the 3x multiplier applies pursuant to KRS 342.730 (1)(c)(1). Following the second injury, she has never returned to her job. KRS 342.730 (1)(c)(1) also applies the 3x multiplier to the second injury.

Ford filed a petition for reconsideration making the same arguments it raises on appeal. The ALJ denied Ford's petition for reconsideration as an impermissible re-argument of the merits.

On appeal, Ford argues the ALJ erred in finding McDaniel's condition is work-related. Ford contends the finding is unreasonable under the evidence, and is

erroneous as a matter of law. Citing Cepero v. Fabricated Metals, 132 S.W.3d 839 (Ky. 2004), Ford argues there is no substantial evidence to support the conclusion that McDaniel's knee condition is work-related because Dr. Barefoot did not receive an accurate history of the pre-injury knee treatment. Most notably, he failed to review medical records from Dr. Shea, who diagnosed osteoarthritis in 2008. Ford contends the opinions from Dr. Smith and Dr. DeGruccio are the only reliable medical evidence regarding work-relatedness and causation. Both agree McDaniel's knee condition is not work-related. Ford contends the ALJ provided no explanation as to why she found McDaniel's condition dormant in light of the history of seeking treatment and actively taking medication for the condition at the time of her injury.

As the claimant in a workers' compensation proceeding, McDaniel had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was successful in that burden, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Contrary to Ford's assertion, we conclude Dr. Barefoot's opinions constitute substantial evidence supporting the ALJ's determination. Ford's reliance on Cepero is misplaced. The case *sub judice* is easily distinguished from Cepero, an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to conceal a significant injury to his knee two and a half years prior to the alleged work-related injury to the same knee. The physician upon whom the ALJ relied was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's knee impairment was not work-related but, instead, was attributable to the previous non-work-related injury. In Cepero, the Supreme Court found a medical opinion erroneously premised on the claimant's egregious omission of directly relevant past medical history was sufficient to mandate reversal based on an insufficient history received by the medical expert. The Court held a "medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable." Id.

Here, McDaniel provided to Dr. Barefoot a history of some prior complaints and treatment for her knees. Further, Dr. Barefoot reviewed Dr. DeGruccio's report which included a history of knee problems beginning in 1995 or 1996. Dr. DeGruccio also noted she had periodically complained of continued knee arthritis from 2004 through 2006 and was referred to Dr. Shea who confirmed the

arthritis and prescribed Arthrotec, which she “continued to take ever since.” Thus, Dr. Barefoot was apprised of the history of McDaniel’s prior condition by the medical records he reviewed in preparing his report. Given that prior history, he did not consider McDaniel’s condition as impairment ratable immediately prior to the work injury. The record falls short of compelling a finding of a pre-existing active impairment rating. Dr. Shea indicated a comparison of MRIs from 2006 and 2008 showed McDaniel did not have a meniscal tear at the time she treated for her knee condition in December 2008. Dr. Smith in his October 9, 2015 treatment note indicated an MRI at Jewish Hospital on August 19, 2015, revealed McDaniel has a large tear of the medial meniscus. Dr. Smith concluded McDaniel had a pre-existing arthritis of her knee but then suffered a twisting injury, which likely completed a medial meniscal tear and caused her to decompensate.

The record contained some evidence that the work incident produced a harmful change in the human organism. There is simply conflicting evidence as to the effect of the work incident. While Ford has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. The ALJ weighed the evidence and found the opinion of Dr. Barefoot more persuasive. As such, the ALJ acted within her discretion to determine which evidence to rely upon, and it cannot be said the ALJ’s conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Ford argues the ALJ erred in applying the three multiplier to the right knee injury as the evidence establishes McDaniel returned to her pre-injury job

earning the same or greater wages. Ford asserts the two multiplier is more appropriate for the right knee injury because McDaniel did eventually cease her pre-injury job.

Although McDaniel briefly returned to her pre-injury job following the 2015 injury, the ALJ noted she did not fully perform that job, and eventually informed Ford of her inability to continue to perform it. McDaniel testified that pain in both knees caused her to cease working in 2016. In its brief to the ALJ, Ford did not seriously challenge the potential application of the three multiplier, acknowledging McDaniel has now been restricted from “essentially anything other than sedentary up-and-down type work. Ford Motor Company has approximately 13,000 different jobs available. Given who is available to work on any given day, McDaniel may or may not find work in the future that will be able to fit her restrictions on an ongoing and permanent basis.” Further, Ford conceded, “the Fawbush elements would tend towards the application of the 3; but, as stated in the paragraph above, all of this is not work related and therefore renders the Fawbush analysis moot.”

Ford’s wage certification form filed on July 5, 2017 indicates a highest post-injury AWW of \$821.15 and bears a notation of “no RTW same no 2X.” In its brief to the ALJ, Ford stated “Ms. McDaniel’s pre-injury AWW was maximum and the party stipulated that she was a maximum wage earner. She returned to work post-injury earning the same maximum wages. Therefore, now that she no longer earns those same wages, she could be entitled to KRS 342.730(1)(c)(2) benefits.” Ford fails to identify any evidence that McDaniel is likely to be able to continue to earn the

same or greater wages for the indefinite future. To the contrary, Ford obtained a vocational evaluation by Ralph M. Crystal, Ph.D., who identified alternative employment with beginning salaries of \$9.00 to \$15.00 per hour, well below the \$28.00 per hour McDaniel earned at Ford.

In a separate brief filed to the Board on July 2, 2018 (after the ALJ's Order on Reconsideration regarding the striking of Dr. Loeb's report, but prior to ALJ's October 2, 2018 Opinion on Remand), Ford argued the ALJ's Order striking Dr. Loeb's report was clearly an abuse of discretion. Ford asserts all parties knew of Dr. Loeb's report and Ford believed the report had been filed prior to its attempt to file it at the hearing. Ford argues there was no prejudice to McDaniel for the late inclusion of the report as it was not an opinion that she would need to address because it was not different from the opinion of McDaniel's treating physician, Dr. Smith, or the opinion of Dr. DeGruccio. According to Ford, if any prejudice to McDaniel existed, it could have been resolved by allowing her additional rebuttal time.

As fact-finder, the ALJ enjoys the discretion to control the taking and presentation of evidence. New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004). Thus, as a general proposition, any purported error by the fact-finder must be reviewed under the abuse of discretion standard. Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Commission, ex rel. Comm.,

v. Russell, 191 S.W.2d 214 (Ky. 1945); Bullock v. Goodwill Coal Co., 214 S.W.3d 890 (Ky. 2007).

Here, Dr. Loeb's report is essentially cumulative evidence. Ford had already filed evidence from Dr. DeGruccio and Dr. Smith in support of its position that the arthritic condition was pre-existing and active prior to the alleged injuries. We find no abuse of discretion in the ALJ's decision to strike Dr. Loeb's report.

Accordingly, the January 11, 2018 Opinion, Award and Order, the June 13, 2018 Order denying Reconsideration, the January 10, 2018 Order striking Dr. Thomas M. Loeb's report, the October 2, 2018 Opinion on Remand, and the November 5, 2018 Order denying Ford's petition for reconsideration rendered by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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