Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 14, 2020

CLAIM NO. 201900189

LATONYA COVINGTON PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

FORD MOTOR COMPANY/TRUCK PLANT AND
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

* * * * * *

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

ALVEY, Chairman. LaTonya Covington ("Covington") appeals from the April 6, 2020 Opinion & Order rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ") dismissing her claim for upper extremity injuries caused by cumulative trauma she sustained while working for Ford Motor Company/Truck Plant. ("Ford"). The ALJ determined the applicable statute of limitations set forth in KRS

342.185 bars Covington's claim for her left hand and wrist injuries. Covington also appeals from the May 11, 2020 Order denying her Petition for Reconsideration.

On appeal, Covington argues the ALJ erred in dismissing her claim in its entirety based upon the statute of limitations. She argues that Brummitt v. Southeastern Rehab. Industries, 156 S.W.3d 276 (Ky. 2005) establishes that after a gradual injury becomes manifest, additional incidents of workplace trauma may well cause additional harmful changes. She argues the ALJ failed to take into consideration additional incidents of workplace trauma, and erred in dismissing her claim as untimely. We disagree, and affirm. However, we must vacate in part, and remand for a determination regarding Covington's alleged left trigger thumb injury.

Covington filed a Form 101 on February 19, 2019 alleging injuries to her left hand, wrist, and thumb, which became occupationally disabling on February 28, 2017 due to repetitive job duties. In the Form 104 attached to the claim, Covington noted she began working for Ford in 1993. Prior to working for Ford, she was cashier at the Hyatt Regency hotel for two years, and was a buyer for K-Mart for five years prior to that. Ford filed a Special Answer asserting the applicable statute of limitations bars Covington's claim. Ford paid temporary total disability ("TTD") benefits at the rate of $550.66 from March 1, 2017 thru April 13, 2017. We additionally note Ford paid for all of the medical treatment for Covington's alleged injuries.

Covington testified by deposition on August 30, 2019, and at the hearing held on February 5, 2020. Covington was born on September 11, 2014, and is a resident of Louisville, Kentucky. She is right hand dominant. She began

working for Ford on August 9, 1993. She testified at her deposition that she began working as a roll tester in 2010. At the hearing, Covington testified she began performing that job in 2009. Prior to transferring to that position, she used pneumatic tools to install running boards on pick-up trucks.

Covington testified that as a roll inspector she was required to enter a vehicle, drive into a station, plug in a cord, enter a code, and follow directions on a computer screen to test various vehicle functions. After she finished the testing, she disconnected the cord, drove the vehicle to the next station, exited the vehicle, and went to the next vehicle in line to perform the same tasks. She also manually released emergency brakes on vehicles.

Covington has experienced pain, tingling, and numbness in her upper extremities for a number of years. Her right wrist began bothering her in 2004 or 2005. She stated those problems occurred gradually with no acute injury. She underwent a right carpal tunnel release in 2010. She began experiencing problems with her left hand and wrist in 2012, and sought treatment with Dr. Michelle Palazzo on January 21, 2013 for those complaints. Regarding when she was advised that her left hand and wrist conditions are work-related, Covington testified as follows:

> Q. When you treated with Doctor Palazzo at Kleinert & Kutz - -
>
> A. Uh-huh.
>
> Q. - - did she discuss the cause of your carpal tunnel issues with you?
>
> A. Well, I mean they just said, you know, just the repetitious stuff. So …

Q. Related to your work activities?

A. Yet, it just ones with that. I know that.

At the hearing, Covington testified as follows:

Q. So you and the doctor were aware that this was related to your job duties back in 2013?

A. Yes.

Covington continued to treat for her left upper extremity complaints from 2013 until she had surgery on February 28, 2017. She testified that she wanted to have the surgery prior to that date, but instead treated with injections, physical therapy, and occasional light duty. She continued to perform her job as a roll tester during her course of treatment and returned to that job after her surgery. She continues to work as a roll tester, earning more now than she did at the time of her surgery. Subsequent to her left carpal tunnel release, Covington experienced intermittent triggering of her left thumb, which was treated with injections. At the hearing, she testified that for the most part, she does not have any symptoms with her left thumb, but she continues to have some issues with numbness and occasional burning in the left wrist.

In support of her claim, Covington filed the February 23, 2017 note from the Ford medical department indicating she was going to undergo a left carpal tunnel release. The note also indicates she was having problems with both wrists, right thumb, right elbow, and right hand.

Dr. Jules Barefoot evaluated Covington on September 5, 2019. He noted she had undergone a right carpal tunnel release in October 2010 and a left carpal tunnel release on February 28, 2017. She also underwent right rotator cuff repair in 2014. He noted Covington had a long history of upper extremity problems dating back to 2002 for which she received numerous injections. Dr. Barefoot diagnosed her with left carpal tunnel syndrome (with release surgery performed on February 28, 2017), intermittent left trigger thumb problems, and a right carpal tunnel release in 2010. Dr. Barefoot opined Covington had reached maximum medical improvement ("MMI"), and assessed an 11% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), of which he assessed 8% to her left carpal tunnel syndrome and 3% to her left thumb triggering. Dr. Barefoot stated all of Covington's problems are work-related. He recommended that she refrain from lifting or carrying greater then twenty-five pounds occasionally or greater than ten pounds frequently. He also indicated she would have difficulty with repetitive lifting, grasping, or carrying with her left upper extremity.

Covington also filed Dr. Palazzo's June 21, 2018 note. Dr. Palazzo administered a Kenalog injection for left thumb triggering. She released Covington to return to work with no restrictions.

Ford filed Dr. Palazzo's January 12, 2013 note. Dr. Palazzo noted Covington's complaints of left hand burning, and pain woke her up at night. Dr. Palazzo diagnosed Covington with left carpal tunnel syndrome and administered a Kenalog injection into the left wrist, stating surgery was a consideration. She

advised Covington to avoid repetitive use of her hands or using pneumatic tools. She also advised Covington to use a brace on her left wrist.

Dr. Ronald Burgess evaluated Covington at Ford's request on September 9, 2019. Dr. Burgess noted Covington began working for Ford in 1993, and underwent right carpal tunnel release in October 2010. She also had injections for triggering in the right thumb on July 20, 2011. He noted Covington was diagnosed with left carpal tunnel syndrome on January 21, 2013, at which time she complained of left hand burning and bilateral thumb pain. Dr. Burgess noted Covington exhibited full active left thumb range of motion. He diagnosed her with previous left trigger thumb, which resolved with injections. He found Covington was asymptomatic at the time of the evaluation, and assessed a 0% impairment rating based upon the AMA Guides. He opined she had reached MMI, and recommended no restrictions.

A Benefit Review Conference ("BRC") was held on January 10, 2020. The BRC memorandum noted the issues remaining for determination included whether Covington sustained a work-related injury on February 28, 2017, and whether she retains the capacity to return to the type of work performed on the date of her injury. Other issues included benefits per KRS 342.730, work-relatedness/ causation, notice, TTD, average weekly wage, return to work wages, statute of limitations, and exclusion for prior active disability.

The ALJ rendered the Opinion & Order dismissing Covington's claim on April 6, 2020. The ALJ thoroughly reviewed the evidence. The ALJ noted that all claims must be filed within two years from the date of the injury. He noted Alcan

Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999), establishes that in cumulative trauma claims, the two-year statute of limitations begins to run when the claimant discovers she has a physically disabling injury, and that it was caused by her work activities.

The ALJ acknowledged that according to Brummitt v. Southeastern Rehab. Industries, supra, "when a worker continues performing the same repetitive activity after a gradual injury becomes manifest, additional incidents of workplace trauma ***may*** well cause additional harmful changes." (emphasis added). However, the ALJ acknowledged that it was his duty to determine whether Covington sustained a repetitive/cumulative trauma within the two-year period prior to the filing of the claim, whether any such repetitive/cumulative trauma caused a harmful change, and whether any such harmful change entitles her to benefits. The ALJ determined there is "no expert medical opinion establishing that any of plaintiff's current carpal tunnel condition or impairment is due to occupational repetitive trauma in the two years from February 19, 2017 up to February 19, 2019." He noted that Dr. Barefoot only opined that Covington's condition is work-related, and provides no analysis regarding whether she sustained any cumulative trauma injury within the two years prior the filing of her claim.

Covington filed a Petition for Reconsideration on April 20, 2020, arguing the ALJ erred in his analysis regarding the ongoing nature of her repetitive trauma, and that her claim was timely filed. Covington also argued the ALJ failed to address her complaints of left trigger thumb problems. In an Order dated May 11, 2020, the ALJ denied Covington's petition as nothing more than a re-argument of the merits of the claim.

On appeal, Covington argues that, "Against the overwhelming weight of the evidence presented, and by erring as a matter of law, ALJ Roark commits reversible error by dismissing the Petitioner's claim in its entirety on the issue of statute of limitations." She also argued the ALJ erred in failing to address her left trigger thumb problem.

We initially note that as the claimant in a workers' compensation proceeding, Covington had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was unsuccessful, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) (superseded by statute on other grounds as stated in Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001)).

As fact-finder, 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 10 (Ky. 1979). (Emphasis added). 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 inadequate 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, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Regarding the ALJ's dismissal based upon Covington's failure to timely file her claim, KRS 342.185(1) states as follows:

> Except as provided in subsection (2) of this section, no 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, or in case of death, within two (2) years after the death, whether or not the claim had been made by the employee himself for compensation. The notice and claim may be given or made by any person claiming to be entitled to compensation or by someone in his behalf. If payments of income benefits have been made, the filing of an application for adjustment of claim with the office within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later.

KRS 342.038(1) and (3) state as follows:

(1) Every employer subject to this chapter shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within one (1) week after the occurrence and knowledge, as provided in KRS 342.185 to 342.200, of an injury to an employee causing his absence from work for more than one (1) day, a report thereof shall be made to the office in the manner directed by the executive director through administrative regulations. An employer's insurance carrier or other party responsible for the payment of workers' compensation benefits shall be responsible for making the report to the Department of Workers' Claims within one week of receiving the notification referred to in subsection (3) of this section.

...

(3) Every employer subject to this chapter shall report to his workers' compensation insurance carrier or the party responsible for the payment of workers' compensation benefits any work-related injury or disease or alleged work-related injury or disease within three (3) working days of receiving notification of the incident or alleged incident.

KRS 342.040(1) states, in relevant part, as follows:

(1) Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability.... In no event shall income benefits be instituted later than the 15th day after the employer has knowledge of the disability or death. Income benefits shall be due and payable not less often than semimonthly. If the employer should terminate, or fail to make payments when due, the employer shall notify the board of such termination or failure to make payments and the board shall, in writing, advise the employee or known dependent of right to prosecute a claim under this chapter.

Covington testified Dr. Palazzo advised her the left carpal tunnel

condition was caused by her repetitive/cumulative work in January 2013, although the claim was not filed until February 2019. As set forth by the ALJ, he was required to determine whether Covington sustained any injuries caused by repetitive/ cumulative trauma within the two-year period prior to the filing of the claim, whether any such repetitive/cumulative trauma caused a harmful change, and whether any such harmful change entitles her to benefits. The ALJ performed the correct analysis based upon the evidence presented. Although Covington points to Dr. Barefoot's report in support of her claim, that report only establishes her condition may be work-related, not when it occurred. As noted by the ALJ, there is absolutely no evidence in the record establishing Covington sustained a work-related left wrist injury within the two years prior to the filing of her claim. We additionally note that Ford paid TTD benefits subsequent to her February 28, 2017 surgery; however, payment of benefits more than two years after an injury does not revive a claim. *See* Holbrook v. Lexmark International Group, Inc., 65 S.W.3d 908 (Ky. 2001).

Because we find the ALJ did not err in determining Covington failed to prove she sustained a left hand or wrist injury within the two years prior to the filing of her claim, we affirm his decision dismissing that portion of her claim as untimely filed. However, we note Covington also included a claim for a left thumb injury in the Form 101 she filed on February 19, 2019. Although she alleged the injury date as February 28, 2017, Covington has testified her left thumb problem did not arise until a few weeks after her left carpal tunnel release surgery.

Dr. Barefoot noted Covington sustained a work-related left thumb injury for which he assessed a 3% impairment rating pursuant to the AMA Guides. Dr. Burgess alternatively found that although Covington had successive complaints of left thumb triggering for which injections were administered, she currently has no symptoms and can work without restrictions. Dr. Burgess assessed a 0% impairment rating for Covington's left thumb pursuant to the AMA Guides. The ALJ's decision does not address the left thumb injury. Therefore, we must remand for a determination on that issue. The ALJ should first determine whether the thumb condition was occasioned by Covington's left hand and wrist conditions. If so, the left thumb condition must also be dismissed. If not, the ALJ must determine whether indeed Covington has a compensable left thumb injury, and if so whether it merits an award of benefits, as well as the extent of any such award. We do not direct any particular result, and the ALJ may reach any decision based upon the evidence of record.

Accordingly, the April 6, 2020 Opinion & Order, and May 11, 2020 Order denying Covington's Petition for Reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED IN PART and VACATED IN PART**. This claim is **REMANDED** for additional determinations regarding Covington's alleged left trigger thumb injury.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER: **LMS**

HON NICHOLAS W MURPHY
401 WEST MAIN ST, STE 1910
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT: **LMS**

HON JOSHUA W DAVIS
HON PRISCILLA C PAGE
401 SOUTH FOURTH ST, STE 2200
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE: **LMS**

HON GRANT S ROARK
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601