

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 30, 2020

CLAIM NO. 201701439

VIKKI ALLEN

PETITIONER

VS. APPEAL FROM HON. JONATHAN WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

FORD MOTOR CO. AND  
HON. JONATHAN WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING IN PART & REMANDING

\* \* \* \* \*

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

**BORDERS, Member.** Vikki Allen (“Allen”) appeals from the August 22, 2020 Opinion, Award, and Order and the September 10, 2020 Order denying her Petition for Reconsideration rendered by Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”). The ALJ determined Allen suffered a right shoulder injury caused by cumulative trauma, manifesting on March 1, 2013. The ALJ also found the claim was barred by KRS 342.185(1) as it was not filed with the Department of Workers’

Claims until August 17, 2017. The ALJ also determined Allen suffered a work-related left shoulder injury due to overcompensating for the injured right shoulder, for which he awarded permanent partial disability (“PPD”) benefits based on a 6% impairment rating.

Ford Motor Company (“Ford”) filed a Petition for Reconsideration requesting the Opinion be corrected to conform to KRS 342.730(4). The petition was sustained by Order of September 10, 2020. Allen likewise filed a Petition for Reconsideration seeking correction of the Opinion regarding the award calculations, and requested the ALJ to reconsider the dismissal of her claim for the right shoulder in light of the Kentucky Supreme Court’s holding in Consol of Kentucky v. Goodgame, 479 S.W.3d 78 ( Ky. 2015). On September 10, 2020, the ALJ sustained Allen’s petition, in part, correcting the calculations but denying the remainder of her petition. This appeal followed. For reasons set forth herein, we vacate in part and remand for additional findings and analysis.

Allen testified by deposition on January 28, 2018 and June 9, 2020. She began working as an assembler in March 2012. Her work required repetitive and strenuous physical activity including standing for prolonged periods, pushing/pulling, frequent lifting of 15 pounds with each hand, using air guns that torque and recoil, bending at the knees and waist, working above shoulder level, looking up for prolonged periods, continuous extension of the arms, and crawling into vehicles. She performed these activities upon approximately 800 vehicles per shift. Although she alleged injuries to her neck and right shoulder, she stated she developed left shoulder pain due to overcompensation. Allen continues to

experience constant pain in her neck, limited ability to turn her head, and pain with a significant decrease in shoulder mobility. She does not believe she can perform any job at Ford due to her neck and shoulder pain. Allen acknowledged she had received treatment for neck and back symptoms eighteen years prior to her employment at Ford. However, she stated the conditions resolved with treatment, and she was able to perform her work activities without symptoms or limitations until March 24, 2017. She also acknowledged prior treatment for her right shoulder in 2013 when she caught a falling door. The injury resolved with treatment. She resumed working on the assembly line without shoulder symptoms or until March 24, 2017.

Allen and Ford filed medical records from Ford Motor Company Occupational Health and Safety Information System (“OHSIM”). The records reflect Allen was treated for foot and right shoulder injuries in 2013. She was diagnosed with a sprain/strain of the right shoulder. A June 4, 2013 MRI of the right shoulder revealed mild glenohumeral osteoarthritis and multiple delaminating cartilage defects along the superior humeral articular surface. Allen also had mild acromioclavicular osteoarthritis, mild subacromial/subdeltoid bursitis, mild bursal surface fraying of the insertional supraspinatus fibers, diffuse degeneration of the superior labrum, and a small glenohumeral effusion. A cervical MRI revealed C5-6 and C6-7 disc bulges without central canal or foraminal stenosis and minimal anterolisthesis of C4 on C5 and C5 on C6. Allen returned to work without restrictions as of December 19, 2013.

Allen treated for her left thumb on March 10, 2017. She was diagnosed with a sprain and strain. On March 24, 2017, Allen treated for complaints of right shoulder and right neck pain due to reaching overhead to perform her job.

She reported, "I have fibromyalgia and a personal neck condition." She reported having neck pain every day due to her fibromyalgia. She was diagnosed with fibromyalgia and cervical radiculopathy and was restricted from working above chest level from March 22, 2017 through March 28, 2017. An October 10, 2017 note indicated Allen was able to return to work as of October 9, 2017 with the restriction of no activities above shoulder level.

Dr. Ryan Modlinski wrote a note on October 15, 2018 clarifying restrictions placed by Dr. Josh Christensen. Dr. Modlinski stated work restrictions included no repetitive overhead activity, no overhead lifting, and no lifting greater than five pounds away from the body. He noted the restrictions were indefinite.

Dr. Jeffrey Fadel evaluated Allen on December 18, 2017. Dr. Fadel diagnosed bilateral rotator cuff tendonitis and cervical degenerative disc disease, caused and aroused from the cumulative trauma effect at work on or about March 24, 2017. Dr. Fadel opined Allen reached maximum medical improvement ("MMI") as of June of 2017. Dr. Fadel assigned restrictions of no repetitive overhead activities, no lifting from shoulder level or above of more than 15 pounds, no repetitive pushing or pulling, no repetitive flexion, extension, or rotation of the cervical spine, and no carrying of more than 25 pounds with only lifting 30 pounds from floor to waist. Dr. Fadel assigned a 5% impairment rating for the right shoulder pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. Dr. Fadel noted Allen has moderate left shoulder pain with mild to moderate motion loss. However, he did not rate the left shoulder because treatment had not been initiated. He noted Allen had a pre-

existing dormant right rotator cuff tendon injury from 2013 that resolved. He additionally noted she had degenerative cervical disc disease for which she was actively treating through pain management. Allen also had fibromyalgia, which could cause migratory joint pain. He opined those conditions were exacerbated by repetitive overhead use of the upper extremities.

In a July 9, 2018 supplemental report, Dr. Fadel indicated he had reviewed additional medical records and noted the left shoulder was not rated at the time of the evaluation. He could not rate Allen's cervical condition since it resulted from the right shoulder injury. He also diagnosed bilateral rotator cuff tendinitis. Dr. Fadel disagreed with Dr. Thomas Loeb's diagnosis of osteoarthritis of the right shoulder as the primary symptom source. He noted Allen had some mild osteoarthritis of the right shoulder due to her age in 2013, but she responded to an injection by Dr. Rennirt, suggesting the pathology was within the subacromial space and not the glenohumeral joint space. Dr. Fadel found Allen's symptoms are directly related to the rotator cuff and were aroused by a cumulative trauma effect from work for Ford. He noted Allen substituted use of the right shoulder with her left, arousing symptoms consistent with rotator cuff tendonitis at the time of the December 2017 exam. Dr. Fadel found the cumulative trauma sustained at Ford aroused the bilateral rotator cuff tendinitis of the shoulders. He stated the standard of care for her symptoms consisted of injection therapy followed by surgical treatment if necessary, but those standards had not been met in December.

In a June 17, 2019 supplemental report, Dr. Fadel stated he had reviewed treatment records from Dr. Modlinski and Dr. Christensen and an MRI

revealed moderate inflammatory findings involving the rotator cuff, moderate glenohumeral arthritis, and chondromalacia. Dr. Fadel diagnosed mild to moderate glenohumeral osteoarthritis and moderate rotator cuff tendinitis of the left shoulder aroused by cumulative trauma. Dr. Fadel assessed an 11% impairment rating and determined Allen was at MMI as of the date of his evaluation assuming she had no additional left shoulder treatment. He assessed restrictions including no lifting of more than 10 pounds occasionally with either upper extremity, and no occasional pushing or pulling of more than 40 pounds. He opined this would make it impossible for her to return as a “float worker”, which required the ability to perform numerous tasks including shoulder level and above work. Dr. Fadel found Allen’s overhead work activities aroused the pre-existing dormant osteoarthritis in her left shoulder into medical reality, but did not cause the loose body. Dr. Fadel felt Allen needs surgical treatment for the left shoulder.

Ford introduced records from Bluegrass Orthopedics & Sports Medicine. Allen presented on June 25, 2013 with right shoulder pain since February of 2013 due to a work injury. X-rays of the right shoulder were negative but revealed Type 2 acromion and some mild arthropathic changes in the AC joint. An MRI revealed mild glenohumeral joint arthritis and mild AC joint arthrosis. She had insertional fraying of the rotator cuff with tendonitis in the supraspinatus and infraspinatus. She also had biceps tendinopathy. She was diagnosed with tendonitis in her shoulder. Dr. Rennirt restricted her to no overhead work. Allen presented on August 19, 2013 for a right shoulder follow up. Allen remained restricted through September 3, 2013 and then returned to regular duty.

Ford introduced the June 4, 2013 right shoulder MRI which revealed mild glenohumeral osteoarthritis; several cartilage defects along the superior humeral articular surface; mild acromioclavicular osteoarthritis; mild subacromial/subdeltoid bursitis; mild bursa surface fraying of the insertional supraspinatus fibers; diffuse degeneration of the superior labrum; intra-articular long head biceps tendinopathy with a bicipital tendon sheath effusion; and a small glenohumeral effusion.

On April 10, 2018, Dr. Loeb evaluated Allen, and reviewed medical records and diagnostic studies. He found Allen's right shoulder pain dated back to 2013 when osteoarthritic changes were noted. He observed no specific injury was noted on March 24, 2017. He felt Allen was experiencing the results of the progressive natural course of the underlying arthritic condition in the right and left shoulder. He stated the bilateral shoulder condition was following a natural course, and that any symptoms around March 24, 2017 were transient exacerbations of resolved pain. Any further symptoms were due to the longstanding, pre-existing nature of the osteoarthritic condition. He opined Allen may have had a transient left thumb strain or contusion which had become asymptomatic, and Allen's right toe pain was transient and had not caused longstanding permanent damage. He stated Allen had only an exacerbation of an underlying condition of the right shoulder, and any soft tissue strain would have healed in 6-8 weeks. Dr. Loeb assessed a 0% impairment rating for the shoulder, thumb, and toe and assessed a 16% whole person impairment rating for the bilateral shoulders, apportioned entirely to the pre-existing condition. In an August 23, 2018 addendum, Dr. Loeb again stated Allen's shoulder

pain was osteoarthritic and a pre-existing condition rather than from overuse. He found no work-relatedness involving either shoulder.

Dr. Loeb performed a second evaluation on December 17, 2019. Dr. Loeb diagnosed progressive degenerative osteoarthritis of both shoulders, left worse than right. He found Allen was at MMI for the original work injury. Dr. Loeb assessed a 9% impairment rating and noted his original opinion remained unchanged. He reiterated she had ongoing progressive osteoarthritic changes in both shoulders, with onset in 2013, unaffected by any workplace condition other than transient aggravation and strain from time to time. He concluded there was no evidence of a structural alteration of the underlying anatomy due to exposure to various jobs at the worksite. Dr. Loeb noted Allen had genetic idiopathic onset of bilateral shoulder arthritis, causally unrelated to any condition at work.

Dr. Loeb testified by deposition on January 15, 2019 and April 14, 2020. Dr. Loeb testified Allen gave a history of problems with her right shoulder dating back to 2013 when she was diagnosed with bursitis, which improved with treatment. An MRI revealed early arthritic changes in her right shoulder. Allen reported her job involved shifting in multiple positions in different jobs. She became a floater in December 2016. The demanding nature of the work caused cumulative stress and overuse to her shoulders. Dr. Loeb found the arthritic changes predated her employment for Ford. Dr. Loeb performed a second examination in December 2019. The MMI date was from his original examination because her progressive osteoarthritic changes were worsening. He stated the impairment rating for the left shoulder was based on range of motion obtained in the physical exam. Allen denied

any traumatic injury to either shoulder. Dr. Loeb stated he had never seen arthritic changes caused by repetitive motion injuries. He opined an arthritic shoulder usually develops as a genetic inheritance and is typically bilateral, slowly progressing over years. He did not believe repetitive job duties accelerated Allen's osteoarthritis. Likewise, he did not believe work activities without a traumatic event could play any role in the progression of the disease.

A Benefit Review Conference was held on October 8, 2018 and this claim was submitted on the record for a decision on June 24, 2020. The parties stipulated the following issues were to be determined by the ALJ: "injury" as defined by the Act, work-relatedness and causation, statute of limitations, notice, average weekly wage, temporary total disability, Benefits per KRS 342.730, pre-existing active disability or impairment, and unpaid or contested medical expenses.

The ALJ summarized the evidence in the record and made the following Findings of Facts and Conclusions of Law, relevant to this appeal, *verbatim*:

#### **Notice and Statute of Limitations**

11. No proceeding 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...KRS 342.185

12. No proceeding for compensation for an injury or death shall be maintained unless... an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years ...KRS 342.185

13. KRS 342.185(1) acts as both a statute of limitations and a statute of repose. *Consol of Kentucky v. Goodgame* 479 S.W.3d 78 (Ky. 2015). For cumulative

trauma injuries, the running of both periods begins on the date the injured employee is advised that he has suffered a work-related cumulative trauma injury. *Id at 82.*

14. The Plaintiff filed this claim on August 17, 2017, listing repetitive motion injuries to multiple body parts and specifically described the injury to involve repetitive work duties causing injury to the right shoulder and neck. The records from OSHIM indicate that she appeared on March 1, 2013, complaining of right shoulder pain from performing her work duties.

15. The Plaintiff also began treating with Dr. Rennirt for the work-related shoulder injury who continued her restrictions until September of 2013. The ALJ finds based upon the objective evidence cited herein, that the Plaintiff's right shoulder injury became manifest on March 1, 2013, when she presented to OHSIM and was diagnosed with a repetitive motion injury to the right shoulder.

16. Because KRS 342.185(1) acts as a statute of repose, a claim for work related right shoulder injury is barred if not filed within two years of the date of manifestation. The ALJ therefore finds that the Plaintiff's right shoulder claim must be **DISMISSED**.

Allen filed a Petition for Reconsideration arguing the ALJ erred in finding her cumulative trauma claim for injuries to her right shoulder manifested on March 1, 2013 and was therefore barred by KRS 342.185 as not being filed within the statute of repose, or within two (2) years of the manifestation date. The ALJ overruled the Petition for Reconsideration.

As the claimant in a workers' compensation proceeding, Allen had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Allen was unsuccessful in his burden, 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 that is 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).

In rendering a decision, 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). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). If the ALJ’s rulings are reasonable under the evidence, they may not be disturbed on appeal.

On appeal, Allen argues the ALJ misapplied KRS Chapter 342 in dismissing her claim and erred in finding the right shoulder condition manifested on March 1, 2013. Allen argues the determination was erroneous as the evidence reflected while she experienced right shoulder symptoms in March 2013, the symptoms completely resolved without sequela and she returned to work at Ford, without restrictions or limitations, until March 24, 2017, when she argues her right shoulder condition actually manifested. Allen argues the record is devoid of evidence indicating she was experiencing any symptoms or limitations with her right shoulder immediately prior to the March 24, 2017 injury.

KRS 342.185(1) provides notice of an accident shall be given "as soon as practicable" and that the claim for benefits to a resulting injury must be filed within two years "after the date of accident" or following the suspension of payment of income benefits, whichever is later. The Kentucky Court of Appeals, in Randall Co. v. Pendland, 770 S.W.2d 687 (Ky. App. 1989), adopted a rule of discovery with regard to injuries caused by cumulative trauma, holding the date of injury is when the disabling reality of the injuries becomes manifest. See also Consol of Kentucky, Inc. v. Goodgame, *supra*.

Therefore, in injury claims caused by cumulative trauma, the date for giving notice and for clocking the statute of limitations is triggered by the date of manifestation. Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999). An injury caused by cumulative trauma manifests when a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, 2 S.W.3d 96,101 (Ky. 1999). Consequently, "for cumulative trauma injuries,

the obligation to provide notice arises and the statute of limitations does not begin to run until a claimant is advised by a physician that he has a work-related condition.” Consol of Kentucky, supra. A worker is not required to self-diagnose the cause of a harmful change as being a work-related trauma injury. See American Printing House for the Blind v. Brown, 142 S.W. 3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and its work-relatedness.

However, the date of manifestation is a term of art and is not to be confused with the date the cumulative trauma arises or becomes disabling as defined in American Printing House for the Blind ex rel. Mutual Ins. Corp. of America v. Brown, supra. In cumulative trauma claims, the date symptoms arise may not be the same as the date the condition becomes disabling or impairment ratable. Likewise, the date symptoms arise may differ from the date of manifestation for notice and statute of limitations purposes. In American Printing House for the Blind ex rel. Mutual Ins. Corp. of America v. Brown, the Court noted the following:

In *Alcan Foil Products v. Huff, supra* at 99 and 101, we noted that “the entitlement to workers’ compensation benefits stems from the fact that an occupational injury has been sustained” and that it “begins when a work-related injury is sustained, regardless of whether it is occupationally disabling.” Nonetheless, because gradual injuries often occur imperceptibly, we reaffirmed the principle that a rule of discovery governs the notice and limitations requirements for such injuries. We determined that the obligation to give notice and the period of limitations for a gradual injury are triggered by a worker’s knowledge of the harmful change and its cause rather than by the specific incidents of trauma that caused it. Nothing in *Alcan* indicated that liability for an injury begins when the notice and limitations requirements are triggered.

....

It is undisputed that the claimant sustained work-related trauma and that harmful changes from the trauma were symptomatic on June 5, 2000. Therefore, she sustained an injury as defined by KRS 342.0011(1) although Chapter 342's notice and limitations provisions were not triggered until she received a medical diagnosis in January, 2001. See *Hill v. Sextet Mining Corp.*, *supra*.

.....

Furthermore, the ALJ determined that the claimant's work caused her to sustain a disabling injury that became manifest on June 5, 2000, and there was substantial evidence in the record to support such a finding. Therefore, the Board and the Court of Appeals did not err in refusing to disturb it.

In *Sweasy v. Wal-Mart Stores, Inc.*, 295 S.W.3d 835, 839-840 (Ky.

2009), the Supreme Court held:

Neither the Court of Appeals nor the employer points to a reasonable basis for an ALJ to commence benefits on a date other than the date that the permanent impairment or disability arises. Perceiving there to be no reasonable basis, we turn to the question of when permanent impairment or disability arises for the purpose of commencing partial disability benefits.

A condition “arises” when it comes into being, begins, or originates. [footnote omitted] Thus, impairment arises for the purposes of Chapter 342 when work-related trauma produces a harmful change in the human organism. That usually occurs with the trauma but sometimes occurs after a latency period. In either circumstance the authors of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* consider the amount of impairment that *remains* at MMI to be “permanent.” The fact that they direct physicians to wait until MMI to assign a permanent impairment rating does not alter the fact that the permanent impairment being measured actually originated with the harmful change. **We conclude, therefore, that the compensable period for partial disability begins on the date that impairment and disability arise, without regard to the date of MMI,**

**the worker's disability rating, or the compensable period's duration. (Emphasis added).**

Allen filed her Form 101 on March 24, 2017. She supported her claim with medical evidence from Dr. Fadel establishing she suffered a cumulative trauma injury to her right shoulder as a result of repetitive job duties working for Ford. Ford countered this proof with medical evidence from Dr. Loeb opining Allen did not suffer from cumulative trauma injuries to her shoulder and her problems were due to pre-existing arthritis.

In her testimony, Allen admitted to a prior specific trauma injury to her left shoulder in March 2013 for which she received conservative medical treatment at OHSIM and from Dr. Rennirt. According to the medical evidence and Allen's testimony, this condition completely resolved by December 2013, and she returned to work at Ford without restrictions and worked in this capacity until March 24, 2017.

In the Opinion, Award, and Order, the ALJ stated as follows in determining the right shoulder condition manifested on March 1, 2013:

The Plaintiff filed this claim on August 17, 2017, listing repetitive motion injuries to multiple body parts and specifically described the injury to involve repetitive work duties causing injury to the right shoulder and neck. The records from OSHIM indicate that she appeared on March 1, 2013, complaining of right shoulder pain from performing her work duties.

The Plaintiff also began treating with Dr. Rennirt for the work-related shoulder injury who continued her restrictions until September of 2013. The ALJ finds based upon the objective evidence cited herein, that the Plaintiff's right shoulder injury became manifest on March 1, 2013, when she presented to OHSIM and was

diagnosed with a repetitive motion injury to the right shoulder.

Because KRS 342.185(1) acts as a statute of repose, a claim for work related right shoulder injury is barred if not filed within two years of the date of manifestation. The ALJ therefore finds that the Plaintiff's right shoulder claim must be **DISMISSED**.

The above findings set forth by the ALJ explaining his reasoning for determining Allen's right shoulder condition manifested on March 1, 2013 are insufficient. Furthermore, the above demonstrates and improper analysis was performed in reaching this determination.

The law concerning when a cumulative trauma injury manifests is clear. An injury caused by cumulative trauma manifests when a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, *supra*. In this claim, it is clear that the second part of the above test was never conducted to determine when Allen was advised by a medical professional that her right shoulder condition resulted from cumulative trauma. *See also* Consol of Kentucky v Goodgame, *supra*. In this claim, the record is simply devoid of any substantive evidence indicating Allen was aware, after having been advised by a physician, that her condition was work-related in 2013. On remand, the ALJ must set forth adequate evidence in the record indicating Allen was advised in 2013, if in fact she was, that she was suffering from a cumulative trauma injury to her right shoulder. We direct no specific result.

If, on remand, the ALJ determines the right shoulder cumulative trauma injury manifested in 2013, it is incumbent upon him to determine when the impairment rating for the right shoulder arose. Allen testified her condition related

to the 2013 injury resolved and she experienced continuing cumulative trauma from 2013 until 2017. She testified she was able to perform her work activities without symptoms or limitations until March 24, 2017. In Special Fund v. Clark, the court explained that KRS 342.185 only operates to prohibit compensation for whatever occupational disability is attributable to trauma incurred more than two years preceding the filing of the claim. That portion of disability, if any, that results from additional cumulative trauma within the two years leading up to and including the date that a claim is filed, and thereafter, may remain compensable.

Accordingly, the Opinion, Award, and Order of August 22, 2020 and the September 10, 2020 Order on Petition for Reconsideration are **VACATED**. This claim is **REMANDED** for a decision consistent with the mandates set forth herein.

ALL CONCUR

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