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TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-000502-WC

UNIVERSITY OF KENTUCKY FAMILY PRACTICE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-01819

LINDA LEACH; HON. A. THOMAS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

JOHNSON, JUDGE: University of Kentucky Family Practice (UKFP) has petitioned this Court for review of an opinion of the Workers' Compensation Board entered on January 27, 2006, which affirmed the Administrative Law Judge's determination that Leach timely filed her worker's compensation claim for medical benefits based upon upper extremity problems.¹ Having concluded the Board has not "overlooked or misconstrued controlling

¹ In her claim, Leach did not seek income benefits.

statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice[,]"² we affirm.

Board Chairman Gardner, in a 2 to 1 opinion, thoroughly set forth the facts of this case as follows:

Leach, born May 19, 1958, has a twelfth grade education and three years of college. She began working for UK in 1991 as a security guard. Subsequently she obtained a position with the Kentucky Clinic as an administrative clerk. Her job duties required her to sort mail by hand.³

Leach admitted that in 1998 she began to experience a burning and cramping sensation in the fingers and thumb of her right hand.⁴ She informed her supervisor of her symptoms and was referred to University Health Services. She then came under the care of Dr. Robert Nickerson at the Kentucky Clinic. Leach testified she continued to have cramping and spasms in her fingers and in her shoulder.⁵ She stated that in October 2001 her condition worsened and she began to

² Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

³ Leach testified that she would sort mail for four to six hours per day and processed thousands of pieces of mail during that time for 30 to 70 departments.

⁴ The ALJ stated in his opinion that Leach had previously filed a claim reporting a September 15, 1998, injury and the current claim involved the recurrence of the same symptoms. Leach had received income benefits from the 1998 claim, but the claim had been abated at the time of the second occurrence and the benefits from the first claim had ceased on December 1, 1998.

⁵ She continued in the mail room for approximately one year and was eventually placed on light-duty work, answering telephone calls only. She then took her current position with UKFP in 1999 as a patient assistant clerk II. In this position she answers over 100 phone calls per day, schedules appointments for patients, takes messages for the doctors and staff, updates information by typing into a computer, and sends out memos and appointment reminders. She testified that when she took this position she did not realize that it entailed so much typing and writing. Further, even though she has a headset, she still has to control and answer the telephone physically. None of her work activities has changed since 1999.

have tingling and burning in her thumb and index finger with spasms and cramps. The condition became particularly bad on March 19, 2002, at which time she could not pick up items or grip for over five minutes. Leach testified she spoke with her supervisor about her increased symptoms and was told to contact workers' compensation. She was informed by workers' compensation personnel that she should consider her condition a new injury. At this time, she received treatment through workers' compensation.⁶

Leach continued to treat with Dr. Nickerson through workers' compensation. Dr. Nickerson prescribed physical therapy and medication consisting of Celebrex and Flexeril.

. . .

Entered into evidence is a letter Leach received informing her that the statute of limitations for her upper extremity problem had expired. The letter stated:

Underwriters' Safety and Claims provides workers compensation administrative services for the University of Kentucky. This letter will provide an update on the status of your claim from March 19, 2002.

The coverage period in Kentucky for injuries that do not involve lost days from work is two years from the date of the injury. Therefore the coverage period for the injury claim from March 19, 2002 has expired on March 19, 2004. This means that UK Workers Care will no longer be responsible

⁶ Leach testified that she did not transfer jobs because she knew most jobs would require repetitive use of her right hand.

for payment of any medical treatment after March 19, 2004.

Leach testified she received this letter dated March 22, 2004 and upon inquiry, was informed by an adjuster that the insurance company was under no obligation to inform her of the statute of limitations. Leach stated she was only seeking her medical treatment co-payments, at a cost of approximately \$100 per month, be paid. She stated she is a single mother who takes home approximately \$621 every two weeks. She continues to work at UKFP in a different position, earning more money.

Leach filed an Application for Adjustment of Injury Claim on October 19, 200[4], claiming an injury due to repetitive use of her upper extremities.⁷

Leach relied on medical evidence from Dr. Robert Nickerson, her treating physician. A Form 107 and Dr. Nickerson's treatment notes are filed into the record. Dr. Nickerson examined Leach on December 17, 2004 for evaluation purposes. He stated he initially began treating Leach on November 18, 1998[,] and had seen her approximately thirty times over the subsequent six year period. Dr. Nickerson diagnosed Leach with right chronic myofascial pain syndrome involving the trapezius muscle secondary to chronic repetitive overuse activities of her right upper extremities. He felt Leach's condition was secondary to and exacerbated by work activities. Dr. Nickerson stated there were times Leach needed to be off work for other medical conditions and during that

⁷ On the form, the injury date is indicated as March 19, 2002, "and prior", and a form subsequently filed on October 27, 2004, indicates that Leach's date of disability was March 20, 2002. On this claim form she described her injury as "repetitive usage" and stated that the injury was to her right shoulder, neck, and upper extremity. On January 5, 2005, Leach received notice that her claim was denied because the injury occurred or became disabling before March 19, 2002, and Leach failed to give due and timely notice of the injury.

time, her right upper extremity symptoms improved. Subsequently, when she returned to work, her problems returned secondary to use of the right upper extremity on a frequent and repetitive basis. He noted Leach continued to work under permanent restrictions which included no lifting with the right upper extremity greater than ten pounds, no over [the shoulder] work with her right upper extremity, avoid pushing or pulling with her right upper extremity, no frequent or repetitive pinching or grasping with the right upper extremity, and no frequent or repetitive use of her right upper extremity.⁸

Addressing treatment, Dr. Nickerson explained Leach currently continues to need occasional trigger point injections into the right middle trapezius muscle. The trigger point injections, which she receives one to three times per year, give her symptomatic relief of her discomfort and allow her to be more functional. Current medications consisted of Celebrex, Flexeril, Ambien and Lidoderm. She also needed physical therapy periodically for the right trapezius muscle. Organ function monitoring was necessary because of the medication. Dr. Nickerson also explained that Leach suffered from Raynaud's phenomenon when her pain was more severe.

Dr. Nickerson diagnosed 1) chronic myofascial pain syndrome involving the right middle trapezius muscle secondary to chronic repetitive overuse as a result of work activities; 2) Raynaud's phenomenon secondary to diagnosis number one; and, 3) elevated/persistent sedimentation rate of uncertain etiology. Dr. Nickerson assessed a 6% impairment to the body as a whole for Leach's condition. Dr. Nickerson stated

⁸ The ALJ stated in his opinion that additional permanent restrictions would include avoiding climbing ladders, crawling, and vibration of the right upper extremity.

that 100% of the 6% impairment rating was directly related to the work condition that began in August 1997, and reached maximum medical improvement in March 2000. He noted the term maximum medical improvement did not mean she did not require additional medical treatment or evaluation, and only referred to the fact that the impairment rating was not likely to change greater than 3% over the ensuing twelve months despite medical treatment. Dr. Nickerson opined Leach needed to be in a maintenance program for her condition.

Dr. Timothy Kriss evaluated Leach on March 8, 2005.⁹ Dr. Kriss believed Leach's symptoms were typical of carpal tunnel syndrome. Leach did not complain to Dr. Kriss of any cervical symptoms, shoulder symptoms, or trapezius muscle symptoms even though Dr. Nickerson's medical records revealed multiple evaluations from 2002 to 2004 for "'chronic right trapezius muscle myofascial pain syndrome.'"¹⁰ Dr. Kriss opined that without any symptoms and with a normal physical and neurological examination of the neck, trapezius muscle, and shoulders, Dr. Nickerson's diagnosis no longer applied. Dr. Kriss would not assign any permanent impairment because he believed the carpal tunnel syndrome was treatable with splints, and potentially with surgery. Concerning causation, Dr. Kriss stated Leach had an onset of carpal tunnel syndrome at work beginning in the mailroom in 1998. Dr. Kriss indicated Leach had progressive gradual worsening of the symptoms in association with work activities over the

⁹ Dr. Kriss was hired as an independent medical evaluator by UKFP.

¹⁰ The ALJ stated in his opinion that Leach told Dr. Kriss that she began experiencing numbness, tingling, pain, and burning in her right hand, particularly the right thumb and index finger and that she noticed "a gradual progression of the numbness and tingling in her right thumb and index finger and to a lesser degree the third finger, since approximately October, 2000." "This pain has a tendency to 'radiate up the arm all the way into the right shoulder.'"

years and her work activities, particularly in the mailroom but also as a receptionist, were consistent with a causal role in carpal tunnel syndrome. He noted Leach was right-handed and used her right hand much more than the left and she had no left-sided symptoms. Dr. Kriss concluded Leach's right carpal tunnel syndrome was work-related and dated back to 1998. He did not place any formal restrictions other than optimizing work place ergonomics.

Dr. Kriss noted the earliest medical record from Dr. Nickerson, dated November 3, 2002, indicated a "stress injury" to the right upper extremity due to work-related repetitive activities. In a review of the medical record, Dr. Kriss noted Leach had carpal tunnel syndrome symptoms prior to March 2002 and she was having symptoms establishing the condition as active as opposed to dormant in March 2002.

Dr. Kriss stated "Ms. Leach's symptoms have definitely subjectively worsened since March, 2002. I cannot find any medical evidence confirming objective worsening." Dr. Kriss found Leach to be straightforward and motivated and did not have any evidence of symptom magnification.

The ALJ reviewed the lay and medical testimony in the record in detail . . . [and] determined Leach was entitled to payment of medical benefits reasoning as follows:

The Plaintiff has an injury as defined by the Act in the form of a cumulative trauma. She is not seeking income benefits and argues that the issues of extent and duration and pre-existing active impairment are not applicable. In Special Fund v. Clark, [998 S.W.2d 487, 490 (Ky. 1999)] the court addressed the

statute of limitations period in cumulative trauma claims.

[W]here a claim is not filed until more than two years after the worker's discovery of an injury and the fact that it was caused by work, [KRS 342.185] would operate to prohibit compensation for whatever occupational disability is attributable to trauma incurred more than two years preceding the filing of the claim.

Some of the facts and situations in that case are similar to those in the present case. The court when [sic] on to find the following:

Pursuant to two-year statute of limitations for workers' compensation claims, claimant was entitled to that portion of occupational disability benefits attributable to the manifestation of disability that occurred within two years before claim was filed, based on when claimant knew that work contributed to the development of his gradual knee injury. KRS 342.185 [footnote omitted].

In the present case the ALJ believes the effects of the trauma are still manif[ested] in the Plaintiff's need for ongoing medical treatment. The Plaintiff would not receive compensation for occupational disability attributable to the injury incurred prior to October 19,

2002, but would receive benefits for her injury thereafter. Even though the Plaintiff is seeking no additional impairment, it was important to the ALJ that there be evidence in the record of a progression or deterioration of the Plaintiff's condition after 2002. Dr. Nickerson, her treating physician[,] stated on page 2 of his report that there was a causal relationship between the work activities and her symptomatology. He also explained that her work activities continued to exacerbate her condition, stating that the ". . . time line of exacerbations with work activities in remission when she is not involved in frequent repetitive work activities point toward the causal relationship between work activities and her symptomatology." The Plaintiff testified that her symptoms continued to worsen between the period from October[] 2002 through October 2004. Dr. Kriss, the Defendant's IME[,] indicated in his report that Ms. Leach presented fairly classic symptoms of right carpel [sic] tunnel syndrome. He considered the Plaintiff credible and her subjective history of worsening after 2002 most likely represented medical progression of the condition even without objective confirmatory testing [emphasis added].

Dr. Nickerson has a long time treating relationship with Ms. Leach. The ALJ believes his characterization of her problems to be the most relevant. Dr. Nickerson diagnosed the Plaintiff

as follows: (1) Chronic myofascial pain syndrome involving the right middle trapezius muscle, (2) Raynaud's phenomenon, and (3) elevated/persistent sedimentation rate of uncertain etiology. . . . In regard to causation, Dr. Nickerson has made the following statement about Ms. Leach's condition.

It is within reasonable medical probability that a patient who has performed frequent and repetitive use of her right upper extremity over a period of multiple years did develop right middle trapezius myofascial pain syndrome which requires medication, intermittent physical therapy, intermittent trigger point injections, and permanent restrictions [emphases added].

As a result of the above findings the Plaintiff is entitled to medical treatment for her injury as provided by KRS 342.020(1).

In affirming the ALJ's award, the Board stated that UKFP "contends Leach's claim was not timely and should have been dismissed in its entirety [and that] the ALJ erred in holding Special Fund v. Clark, supra, applicable because Leach did not sustain an increase in impairment within two years of the filing of her claim on October 19, 2004." The Board noted that "UKFP argues that to hold otherwise is tantamount to finding there is

no statute of limitations in cumulative trauma claims as long as the employee continues to work."

The Board summarized Leach's arguments, in part, by stating "[s]he argues the reports of Drs. Nickerson and Kriss, as well as her own testimony support a finding of an increase in disability within two years immediately preceding the filing of her claim. She contends the ALJ correctly determined her medical benefits pursuant to KRS 342.020 were compensable based on Special Fund v. Clark."

We agree with the Board's summary of the applicable law and facts in support of the ALJ's award as follows:

KRS 342.185 states that a claimant must file a claim for compensation within two years of the date of injury or the date of last temporary total disability payment, whichever last occurs. In repetitive injury claims, since a claimant is not required to self-diagnose, the statutory period begins to run when the worker is informed by a physician that the physical condition is caused by work. Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001); Alcan Foil Products v. Huff, [2.S.W.3d 96 (Ky. 1999)].

In Special Fund v. Clark, the court held that 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. Leach has conceded, both before the ALJ and this Board, that her claim was not filed within two years of the manifestation of disability, i.e. when she first learned her condition was work-related. Yet Leach argues, and we agree, that her claim was

timely with regard to the effects of cumulative trauma incurred between October 19, 2002 and October 19, 2004. Though UKFP correctly argues there is no increase in impairment attributable to that period, that argument is properly limited to an award of income benefits [emphasis added].

In Caldwell Tanks v. Roark, 104 S.W.3d 753, 756 (Ky. 2003) our supreme court explained:

Although KRS 342.0011(1) requires objective medical findings as evidence of a harmful change, nothing requires an AMA impairment for a finding of an 'injury' and an award of medical benefits. Therefore, if a 'harmful change' resulted from trauma incurred after October 7, 1998, the claimant sustained an injury and was eligible for medical benefits [emphasis original].

Dr. Nickerson stated Leach's 6% impairment was static by March 2000 and Dr. Kriss did not believe impairment could yet be rated. Both, however, were of the opinion that Leach's condition was work-related. Here, Leach continued to work for UKFP after October 19, 2002[,] and performed many of the same repetitive activities that ultimately caused her repetitive injury. According to Dr. Nickerson, these additional incidents of work place trauma, caused exacerbations requiring medications, injections and physical therapy. Furthermore, Dr. Kriss stated:

Ms. Leach's symptoms have definitely subjectively worsened since March, 2002. I cannot find any medical evidence confirming objective worsening. But this lady appears very straightforward

and motivated, without any evidence of symptom magnification, somatization, Waddell signs, or other factitious pain behaviors, and therefore I would consider her subjective history of worsening to most likely represent medical progression of the condition, even without objective confirmatory testing.

Given this evidence, we cannot say that Leach has not undergone additional harmful change in the two years before filing her claim. . . . [W]e simply cannot say the ALJ's finding is so unreasonable under the evidence that it must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, [52](Ky. 2000).

In its petition for review, UKFP makes the same arguments to this Court as it made to the Board. Specifically, UKFP argues that the Board erred in upholding the ALJ's decision that Leach timely filed her application for benefits, as Clark was not applicable, and as there is overwhelming evidence which shows Leach did not sustain an increase in impairment within two years of the filing of her claim on October 19, 2004.¹¹ Further, UKFP argues that "although [Leach] may perceive that her condition has worsened since October 2002, all of the evidence points to the conclusion that her pain level and activity has remained the same since that time," as neither Dr. Nickerson nor Dr. Kriss provided evidence of a change of treatment or

¹¹ UKFP continues to argue that "[t]o hold otherwise is tantamount to a finding there is no statute of limitations in cumulative trauma claims as long as the employee continues to work."

restrictions since October 2002, nor do their records document any increased pain or decreased functional ability since October 2002.

An injury is defined as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings."¹² KRS 342.185 requires the claimant to give notice to the employer of the accident as soon as practicable and to file the claim within two years after the date of the injury.¹³ Leach testified that the second occurrence of pain and numbness in her hands occurred as early as 2001, and that the problem continued to worsen. She further conceded that she thought the problem was work-related from the outset, and she requested and was paid workers' compensation benefits for her medical expenses until March 2004. Leach described in detail the physical demands of her work to which she attributed her hand and wrist pain.

Upon review, this Court will only reverse the Board's decision when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has

¹² KRS 342.0011(1).

¹³ There are no temporary total disability payments to consider in this case.

caused gross injustice.¹⁴ To properly review the Board's decision, this Court must ultimately review the ALJ's underlying decision, as KRS 342.285 designates the ALJ as the finder of fact.¹⁵ The claimant in a workers' compensation action has the burden of proving every element in his or her claim.¹⁶ Where the ALJ has found in favor of the employee, who had the burden of proof, this Court must determine whether the ALJ's findings were supported by substantial evidence.¹⁷ Substantial evidence is defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable [people,]"¹⁸ and is "evidence which would permit a fact-finder to reasonably find as it did" [citations omitted].¹⁹ The ALJ, as the fact-finder, not this Court and not the Board, "has the sole discretion to determine the quality, character, and substance of the evidence[.]"²⁰ The ALJ may also choose to believe or disbelieve any part of the evidence, regardless of

¹⁴ Western Baptist Hospital, 827 S.W.2d at 687-88.

¹⁵ See Hamilton, 34 S.W.3d at 52.

¹⁶ Snawder v. Stice, 576 S.W.2d 276, 279 (Ky.App. 1979). See also Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 928 (Ky. 2002).

¹⁷ Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). See also Wolf Creek Collieries, 673 S.W.2d at 736.

¹⁸ Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971).

¹⁹ Francis, 708 S.W.2d at 643.

²⁰ Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999) (citing Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985)). See also Snawder, 576 S.W.2d at 279.

its source,²¹ and “regardless of whether it comes from the same witness or the same adversary party’s total proof[.]”²² Simply showing evidence contrary to the ALJ’s decision will not be a basis to require a reversal on appeal.²³

The Supreme Court of Kentucky and the Kentucky Court of Appeals have long recognized the complexity in marking the beginning date when clocking the statute of limitations for cumulative trauma claims. “Despite the number of gradual injury claims and the difficulties encountered in attempting to apply KRS 342.185 to those claims, the legislature has not chosen to create special rules to govern the period of limitations for claims for gradual injury[.]”²⁴ Prior to 1999, it was held that limitations began to run on a cumulative trauma claim “when the disabling reality of the [work] injuries becomes manifest.”²⁵ This longstanding “manifestation of disability” standard was clarified in the notable Supreme Court case of Alcan Foil Products. In Alcan Foil Products, the Supreme Court held that the onset of “occupational disability” no longer has any bearing

²¹ Whittaker, 998 S.W.2d at 481 (citing Caudill v. Maloney’s Discount Stores, 560 S.W.2d 15, 16 (Ky.1977)).

²² Burton, 72 S.W.3d at 929 (citing Caudill, supra at 16).

²³ Whittaker, 998 S.W.2d 482 (citing McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974)).

²⁴ Alcan Foil Products, 2 S.W.3d at 100.

²⁵ Randall Co./Randall Division of Textron, Inc. v. Pendland, 770 S.W.2d 687, 688 (Ky.App. 1989).

on determining the date from which the period of limitations begins to run or in determining an injured worker's obligation to give notice.²⁶ In making this determination, the Court expressly stated as follows:

In Pendland, the worker became aware of her injury when she experienced disabling symptoms of pain; thus, the manifestation of physical and occupational disability occurred at the same time. The question remains, therefore, whether the phrase "manifestation of disability" refers to the physical disability or symptoms which cause a worker to discover that an injury has been sustained or whether it refers to the occupational disability due to the injury. We conclude that it refers to the worker's discovery that an injury had been sustained. We arrive at this conclusion for several reasons: 1.) the court's explicit statement that the period of limitations runs from the date of "injury;" 2.) the fact that the definition of "injury" contained in KRS 342.0011(1) refers to any work-related harmful change in the human organism, and does not consider whether the change is occupationally disabling; and 3.) the entitlement to worker's compensation benefits begins when a work-related injury is sustained, regardless of whether the injury is occupationally disabling [emphasis added].²⁷

Since Alcan Foil Products, the law has been that "where a worker discovers that a physically disabling injury has been sustained, knows it is caused by work, and fails to file a claim until more than two years thereafter simply because he is

²⁶ Alcan Foil Products, 2 S.W.3d at 101.

²⁷ Id.

able to continue performing the same work,"²⁸ his claim will be barred by the statute of limitations. The Supreme Court reaffirmed its position in Clark,²⁹ holding that the two-year statute of limitations established in KRS 342.185 begins to run in claims involving work-related cumulative trauma when the worker discovers (1) the fact that an injury has occurred, and (2) the fact that it was caused by work.

Additionally, we must consider the Supreme Court's holding in Hill,³⁰ which was rendered following Alcan Foil Products and Clark. In Hill, the Court assigned special importance to the date on which a claimant first acquires knowledge that a work-related cumulative trauma injury is permanent. Hill involved a cumulative trauma claim where the injured worker held a personal belief for several years that a cervical condition that had gradually developed over time was in fact work-related. With regard to notice and limitations, the Supreme Court stated as follows:

Implicit in the finding of a gradual injury was a finding that no one instance of workplace trauma, including those specifically alleged and those of which the employer was notified, caused an injury of appreciable proportion. Instead, the ALJ concluded that the harmful change that gave

²⁸ Alcan Foil Products, 2 S.W.3d at 101.

²⁹ 998 S.W.2d at 490.

³⁰ 65 S.W.3d at 503.

rise to the claimant's permanent disability occurred gradually and resulted, at least to a significant extent, from the effect of work-related wear and tear during the course of his coal mine employment. Medical causation is a matter for the medical experts and, therefore, the claimant cannot be expected to have self-diagnosed the cause of the harmful change to his cervical spine as being a gradual injury versus a specific traumatic event. He was not required to give notice that he had sustained a work-related gradual injury to his spine until he was informed of the fact [emphasis added] [citations omitted].

It is clear that the claimant was aware of symptoms in his cervical spine and associated the periodic flare-up of symptoms with his work long before being evaluated . . . and he also sought medical treatment after some specific incidents of cervical trauma. Furthermore, it is clear that the physicians who treated the claimant's symptoms over the years had encouraged him to quit working in the mines and told him that the work was too stressful. Nonetheless, there is no indication that any of them ever informed him of his work-related gradual injury, i.e., that his work was gradually causing harmful changes to his spine that were permanent. Under those circumstances, we are not persuaded that the claimant was required to self-diagnose the cause of the cervical pain that contributed to his inability to work after February 11, 1998, as being such an injury [emphasis added].³¹

Since the ALJ determined that Leach satisfied her burden of proof, the issue here is whether substantial evidence

³¹ Hill, 65 S.W.3d at 507.

supported the ALJ's decision.³² "Medical causation must be proved to a reasonable medical probability with expert medical testimony but KRS 342.0011(1) does not require it to be proved with objective medical findings. . . . It is the quality and substance of a physician's testimony, not the use of particular 'magic words,' that determines whether it rises to the level of reasonable medical probability, i.e., to the level necessary to prove a particular medical fact" [citation omitted].³³ Further, "[a] worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."³⁴ "It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability."³⁵ "Where there is conflicting medical testimony concerning the cause of a harmful change, it is for the ALJ to weigh the evidence and decide which opinion is the most credible and reliable."³⁶ UKFP did not challenge Dr. Nickerson's nor Dr. Kriss's credibility, nor at any time did it present an alternate theory of causation. While conflicting as

³² Hamilton, 34 S.W.3d at 52 (citing American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Commission, 379 S.W.2d 450, 457 (Ky. 1964)).

³³ Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004).

³⁴ Hamilton, 34 S.W.3d at 52 (citing Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979)).

³⁵ Id. at 52.

³⁶ Brown-Forman Corp., 127 S.W.3d at 621.

to their diagnosis, the testimony from both Dr. Nickerson and Dr. Kriss provided the ALJ a basis for the determination that Leach's work-related condition worsened over the two years prior to Leach's filing of a work-related injury claim. As stated previously, the ALJ may choose which evidence to believe,³⁷ and the ALJ, in this case, chose to believe Dr. Nickerson's opinion. In reviewing the record, we conclude that Dr. Nickerson's opinion that Leach's condition was continuously deteriorating was reasonable and was well documented. Accordingly, the ALJ's finding that Leach's work-related injury was timely reported was supported by substantial evidence.

The Board's reasoning that the statute of limitations on Leach's injury had not expired was correctly based on current Kentucky law as it was determined that Leach had undergone "additional harmful change" between October 19, 2002, and October 19, 2004. It is irrelevant that Leach's injury is the same one she had in 1998, that she knew that it had flared up in October 2001, and that she had continued to perform the same job since 1999, with the same duties and functions, and that she had been encouraged by her treating physician to change jobs. Leach testified to the change in her symptoms between 2002 and 2004 and stated that she had difficulty cooking and cleaning as a result of her increased symptoms. Further, the medical evidence

³⁷ Caudill, 560 S.W.2d at 16.

the ALJ relied upon supported this continued worsening of her condition. Therefore, we hold that the Board used the correct law to uphold the ALJ's decision.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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