Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 31, 2014

CLAIM NO. 201080558

FIRE EQUIPMENT SERVICE CO., INC. PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

JAMES SCROGHAM,
NORTON LEATHERMAN SPINE CENTER,
NORTON HOSPITAL DOWNTOWN, AND
HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Fire Equipment Service Co., Inc. ("FESCO") seeks review of the Opinion, Award and Order rendered June 4, 2014, by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability

("PPD") benefits, and medical benefits to James Scrogham ("Scrogham") for a low back injury he sustained on August 12, 2010 while assisting in lifting a manlift onto a sidewalk. The ALJ also found compensable contested treatment for a cardiac condition, and medical testing. The ALJ awarded 18% interest on past due benefits pursuant to KRS 342.040. FESCO also appeals from the order issued July 21, 2014, denying its petition for reconsideration.

On appeal, FESCO argues the ALJ committed reversible error in awarding TTD benefits at the rate of $386.76 per week, and in awarding 18% interest on past due benefits. FESCO also argues there is insufficient evidence to support a finding the disputed cardiac treatment was related to the effects of the work-related low back injury. Because the ALJ's determinations are supported by substantial evidence, we affirm.

Scrogham filed a Form 101 on November 18, 2011, alleging he injured his low back on August 12, 2010 when he and co-workers were moving a manlift. As they attempted to lift it onto a walkway, one of the co-workers lost his grip causing the manlift to fall, and Scrogham bore the brunt of the weight. At the time of the accident, Scrogham was assisting with the inspection of a factory as part of his duties with FESCO. Scrogham's employment history includes

work as a fire alarm technician, meter reader for a utility company, assembler, and as a salesman at Lowe's. He has vocational training in drafting.

Voluminous evidence was introduced by both Scrogham and FESCO which was meticulously reviewed by the ALJ in the Interlocutory Opinion, Award and Order rendered August 22, 2012, and in the decision rendered June 4, 2014. It is noted, although reviewed, not all medical information will be summarized or referenced herein.

In the interlocutory decision, the ALJ, relying upon the opinion of Dr. Charles Crawford, found Scrogham's lumbar complaints were directly and causally related to the August 12, 2010 work injury. He found the proposed lumbar fusion surgery compensable, and awarded TTD benefits. The ALJ incorrectly ordered TTD benefits to be paid at the rate of $400.00 per week. The ALJ also found FESCO was entitled to credit for unemployment benefits received by Scrogham. FESCO filed a petition for reconsideration noting the TTD rate should be $386.76 per week. In an order dated September 25, 2012, the ALJ revised the award of TTD benefits to $354.99 per week, although there was no explanation as to how he arrived at that amount. No petition for reconsideration was filed from that determination.

After exhausting conservative measures including physical therapy, medication and epidural steroid injections, Scrogham underwent a fusion surgery performed by Dr. Crawford at Norton Hospital on October 30, 2012. Scrogham stated his groin pain subsequently improved, but he continued to experience pain in his low back and both legs, right greater than left. After he was released from the hospital, Scrogham developed a methicillin resistant staph aureus ("MRSA") infection at the site of the wound. He was later hospitalized, and another surgery was performed to treat the infection. He was also prescribed various medications to treat MRSA, including Vancomycin. Subsequent to his release from the hospital for treatment of the infection, Scrogham developed atrial fibrillation. Dr. Julio Melo, an infectious disease specialist, opined the atrial fibrillation or tachycardia resulted from a systemic reaction to the Vancomycin which was prescribed to treat the spine MRSA infection. Specifically, in a note dated November 23, 2013, Dr. Melo stated as follows:

> … his [Scrogham's] fever and tachycardia as well as other symptoms were due to a systemic Vancomycin drug reaction, which was being given to treat his spine wound MRSA infection …

Based upon a report from Dr. Robert Sexton, who evaluated Scrogham at FESCO's request on August 22, 2013, a

motion to remove the claim from abeyance and to terminate TTD benefits was filed on September 3, 2013. On September 23, 2013, the ALJ entered an order removing the claim from abeyance, and issued a proof schedule.

Scrogham testified by deposition on January 8, 2012, and November 5, 2013. He also testified at the hearings held July 18, 2012 and March 26, 2014. Scrogham was born on June 22, 1959 and resides in Louisville, Kentucky. He is a high school graduate, has specialized vocational training in drafting, and had a certification for fire inspections while working at FESCO.

Scrogham stated he was hired as a fire technician by FESCO. This included installing smoke detectors, smoke alarms and fire extinguishers. His job required crawling, climbing ladders, using small hand tools, and using hydraulic lifts. He worked with rolls of wire which weighed up to one hundred pounds. He later assisted with inspections. On the date of the accident, he was assisting two inspectors with the inspection of a facility. He stated he was in the process of being promoted to inspector at the time of the accident.

Scrogham stated he had no back problems prior to the date of the accident. He injured his left knee in 1979 while working for another employer, but that problem had

resolved. He experienced respiratory problems in 1991 while working as a firefighter, which had resolved. In 2005, Scrogham had a cardiac stent emplaced, but had no treatment or medications afterward. Scrogham stated he was taking anti-anxiety medication at the time of the accident due to a pending divorce, but otherwise was taking no medication.

Subsequent to the August 12, 2010 accident, Scrogham experienced pain, burning, tingling and numbness in his back, legs and feet. The groin pain was relieved by the fusion surgery. He discussed the MRSA and treatment he received for that condition. He also discussed the cardiac condition he developed after the treatment for MRSA. In addition to his other health issues, Scrogham developed diabetes after the accident. Scrogham stated he continues to take pain medication and muscle relaxers prescribed by his treating physician. He stated he is unable to perform the physical aspects of the job he performed at FESCO. He stated he had lost in excess of sixty pounds since the accident in attempt to alleviate his symptoms.

Scrogham introduced multiple records from Dr. Crawford, most of which will not be summarized here. In notes dated April 19, 2013; June 3, 2013; and July 29, 2013, Dr. Crawford noted continued complaints of low back and left leg pain. He stated Scrogham was slow to recover after

surgery due to his post-op infection. He recommended an additional MRI.

Dr. Anthony McEldowney examined Scrogham on November 7, 2013. Dr. McEldowney stated Scrogham had sustained a work-related injury on August 12, 2010 which was caused by the lifting incident. He stated the incident also exacerbated lumbar spondylosis, degeneration with stenosis, mechanical disc collapse and foraminal stenosis. He stated all treatment Scrogham had received had been reasonable and necessary. He stated Scrogham was unable to return to work, and imposed restrictions of lifting no greater than twenty pounds occasionally, or over ten pounds frequently. He stated Scrogham could stand or walk up to two hours during an eight hour work day. He stated Scrogham could sit for three to four hours during an eight hour work day. He additionally stated Scrogham should be allowed to sit or stand as necessary to relieve his pain. Dr. McEldowney assessed a 22% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

FESCO had Scrogham evaluated by both Dr. Sexton and Dr. Robert Jacob. Dr. Sexton testified by deposition on December 16, 2013. He stated there was no objective basis for the spinal fusion surgery. He stated the surgery was

technically successful because the fusion was intact and stable. He also noted Scrogham developed MRSA in the incision. He opined the heart issue was unrelated to the injury or surgery. He stated Scrogham is at maximum medical improvement ("MMI"), and assessed a 20% impairment rating pursuant to the AMA Guides. He stated Scrogham's medications are inappropriate, and he should only treat with non-narcotic analgesics. He recommended restrictions of no lifting greater than fifty pounds occasionally, or over forty pounds repetitively.

Dr. Jacob testified by deposition on April 4, 2012 concerning Scrogham's injury, and the recommended fusion surgery. He disagreed with the recommended surgery, or the need for restrictions. He stated Scrogham had reached MMI in October 2010, and could return to work with no restrictions. He assessed a 0% impairment rating pursuant to the AMA Guides.

Scrogham has treated with Dr. Thomas J. Kelley, a pain management physician with Norton Physician Services. In his note of July 8, 2013, Dr. Kelly stated Scrogham had achieved a twenty five percent improvement with surgery. He ordered physical therapy, and medications including Cymbalta and Norco. He also advised Scrogham to take Melatonin. In his note dated November 6, 2013, Dr. Kelly stated Scrogham

has chronic back pain. He noted complaints of pain radiating from the back down both legs, right greater than left. He noted Scrogham's weight loss, and treatment with Cymbalta, Norco and Flexeril. He stated Scrogham was in the process of weaning himself from his pain medication. He encouraged Scrogham to continue with walking and stretching exercises.

FESCO filed multiple medical disputes challenging the surgery, cardiac treatment, additional CT-scan, and an additional MRI performed August 19, 2013. In support of those disputes, FESCO filed reports of Dr. Shelley Freimark who performed a records review on January 16, 2013. She opined the cardiac treatment was unrelated to Scrogham's lumbar condition. On September 12, 2013, Dr. Freimark opined a requested CT-scan was medically inappropriate. On October 2, 2013, Dr. Freimark stated the MRI performed August 19, 2013 was inappropriate.

In a statement dated February 19, 2014, Dr. Crawford disputed Dr. Freimark's opinions, and stated all of the treatment requested which had been challenged was reasonable and necessary.

FESCO also filed the December 30, 2013 report of Dr. Luca Conte who conducted a vocational evaluation of Scrogham. Dr. Conte stated based upon restrictions imposed

by Dr. Sexton, Scrogham could engage in sedentary, light and medium work. Based upon the restrictions imposed by Dr. McEldowney, he opined Scrogham could engage in sedentary and light work.

A benefit review conference ("BRC") was held on March 12, 2014. The BRC order and memorandum reflects the contested issues were benefits per KRS 342.730; unpaid or contested medical expenses (compensability of diagnostic studies, and the hospitalization for the cardiac issues); and, TTD (underpayment as to rate). At the hearing held March 26, 2014, entitlement to vocational rehabilitation was added as a contested issue. It is noted at the previous hearing held on July 18, 2012, the parties had stipulated the correct average weekly wage was $580.14.

In the opinion rendered June 4, 2014, the ALJ relied upon Dr. McEldowney, and awarded PPD benefits based upon a 22% impairment rating. He enhanced the award by 3.2% pursuant to KRS 342.730(1)(c)1. The additional .2 was included due to Scrogham's age on the date of the injury. The ALJ determined the contested CT-scan and MRI were compensable. Regarding the hospitalization for the cardiac condition, the ALJ found as follows:

> The ALJ finds, therefore, in reliance upon the report of Dr. Melo, that plaintiff's hospital admission and

> treatment from December 11, through December 16, 2013, was directly and causally related to the effects of his work injury in that his symptoms were induced by a reaction to Vancomycin, a medication he was prescribed to treat a MRSA infection which was, itself, clearly work-related as a result of the infection of his surgical wound. This issue is resolved in favor of plaintiff, therefore.

Finally, pertinent to this appeal, the ALJ found the appropriate TTD rate was $386.76. In assessing interest on past due TTD benefits at 18% pursuant to KRS 342.040, the ALJ stated as follows:

> **Has TTD been underpaid as to rate?**
>
> The parties stipulated that TTD benefits were paid at the rate of $354.99 per week from August 6, 2010, through September 23, 2013, for a total of $40,618.74. The parties had previously stipulated that plaintiff's average weekly wage was $580.14. At the time that the Interlocutory Opinion, Award and Order was entered on August 22, 2012, the undersigned erroneously awarded TTD benefits at the rate of $400 per week (the same actually having been the weekly unemployment insurance benefit stipulated by the parties). The defendant/employer subsequently filed a petition for reconsideration in which it pointed out this error and noted,
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>> Per the stipulations, plaintiff's average weekly wage was determined to be $580.14, **which would provide for an appropriate TTD rate of $386.76 as opposed to the $400 awarded by the Administrative Law Judge.** (Emphasis added).

Attached to its petition for reconsideration the defendant/employer tendered an order reflecting that the appropriate rate of TTD was $386.76. Plaintiff likewise filed a petition for reconsideration to correct errors appearing in the Interlocutory Award and Order of August 22, 2012, and in an order dated September 25, 2012, the undersigned sustained both petitions. In so doing, however, the undersigned inadvertently perpetuated the incorrect TTD rate of $354.99 per week (the amount the parties had previously stipulated as having been paid). Neither party filed a petition for reconsideration nor pointed this patent error out to the Administrative Law Judge, however. In its brief at this stage in the proceedings, the defendant/employer essentially argues that the rate awarded, which was clearly the inappropriate rate, has become the "appropriate rate of TTD benefits owed to Scrogham" in light of plaintiff's failure to file a petition for reconsideration with respect to the prior order on the parties' petitions for reconsideration. The defendant/ employer notes that the insurance carrier "complied with this order and has proceeded to pay Scrogham TTD benefits consistent with the order" which it claims is now final and that plaintiff "cannot retroactively challenge the amount awarded."

The defendant/employer's argument is erroneous. The award of temporary total disability benefits was interlocutory and plaintiff was precluded from appealing the erroneous order. Regardless, however, KRS 342.125(1)(c) provides legal basis for the undersigned reopening and correcting the order on petition for reconsideration given the

obvious mistake appearing on the face of the order. That plaintiff did not file a petition for reconsideration with respect to the interlocutory award of temporary total disability benefits neither precludes plaintiff from now requesting that such benefits be paid at the appropriate rate nor, more importantly, prevents the undersigned from correcting the original error. In light of the absence of any argument that temporary total disability benefits have been underpaid as to duration, the ALJ finds that plaintiff is entitled to an award of temporary total disability benefits at the weekly rate of $386.76 per week from August 6, 2010 through September 23, 2013.

Pursuant to KRS 342.040, if an administrative law judge determines that a denial, delay or termination of payment of income benefits was without reasonable foundation, the rate of interest shall be 18% per annum. Under the circumstances presented, the ALJ finds that the defendant/employer knew or should have known that it was underpaying temporary total disability benefits to the extent of $31.77 per week. In so finding, the ALJ notes that the defendant/employer itself pled that the correct TTD rate was $386.76 but instead of paying the appropriate rate (the <u>only</u> TTD rate in light of the stipulated average weekly wage of $580.14), the defendant/employer knowingly underpaid benefits. In short, the defendant/employer knew what the correct TTD rate was, knew or should have known that the order on reconsideration contained an error with respect to the weekly benefit rate, and paid temporary total disability benefits, post-Interlocutory Opinion and Award, at the incorrect rate. Under the circumstances, the ALJ finds that the

> defendant/employer underpaid temporary total disability benefits following the Interlocutory Opinion and Award without a reasonable basis in law or fact. Accordingly, plaintiff shall recover interest on past due and underpaid temporary total disability benefits at the rate of 18% per annum for the period beginning August 6, 2010 through September 23, 2013.

FESCO filed a petition for reconsideration arguing, as it does on appeal, the ALJ erred in awarding 18% interest on past due TTD benefits, and in finding the hospitalization for the cardiac condition compensable. The ALJ entered an order on July 21, 2014 denying the petition for reconsideration.

Scrogham, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including the causation, work-relatedness, and extent of any disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was successful, 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).

The crux of this appeal concerns whether the ALJ erred in assessing 18% interest on past due TTD, and in finding the hospitalization for the cardiac condition is compensable. 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). Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than reached by an ALJ, such 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 function of the Board in reviewing an ALJ's decision is limited to determining whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We find no merit to the argument the ALJ's decision is not supported by substantial evidence. The opinions expressed by Drs. Melo, Crawford, and McEldowney, as well as Scrogham's own testimony, clearly establish the complications he sustained were due to his fusion surgery. Subsequent to the fusion surgery performed by Dr. Crawford, Scrogham developed MRSA at the surgical site. He was hospitalized for treatment, including additional surgery to clean the wound. This was not contested by FESCO. Dr. Melo's statement supports the ALJ's determination the subsequent hospitalization for cardiac conditions was necessitated by the treatment he received for the infection. We therefore determine the ALJ's finding

regarding the compensability of the hospitalization is supported by substantial evidence and will not be disturbed. *See* KRS 342.285; Special Fund v. Francis, supra.

An ALJ's decision must effectively set forth adequate findings of fact from the evidence upon which his or her ultimate conclusions are drawn so the parties are reasonably apprised of the basis of the decision. However, he or she is not required to engage in a detailed explanation of the minutia of his or her reasoning in reaching a particular result. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburg and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). Here, the ALJ provided a detailed analysis which clearly and adequately supported determinations. While FESCO points to evidence which could have supported a finding in its favor, such is insufficient to require reversal on appeal.

Regarding the assessment of 18% interest pursuant to KRS 342.040, again, this is within the ALJ's discretion. The ALJ set forth the factors he considered in assessing the interest. Both in his decision and the order on reconsideration, the ALJ set forth his reasoning and the basis for his decision. We find no error in the

calculation of the correct TTD benefit rate being $386.76 since this is based upon the average weekly wage of $580.14 stipulated to by the parties at the hearing held July 18, 2012. Likewise, we note FESCO, in its petition for reconsideration of the interlocutory order, argued the correct TTD rate was $386.76. Despite the obvious mistake in the interlocutory order entered August 22, 2012, and in the subsequent order entered September 25, 2012, FESCO should have been well aware of the correct TTD rate, and made no effort at further correction. We therefore determine the ALJ did not err in assessing interest at the rate on unpaid TTD benefits. Although not reflected in the ALJ's final opinion, he had previously awarded credit for unemployment benefits paid pursuant to KRS 342.730(5).

Accordingly, the decision rendered June 4, 2014 by Hon. Robert L. Swisher, Administrative Law Judge, and the order for reconsideration issued July 21, 2014, are hereby **AFFIRMED.**

ALL CONCUR.

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