Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 16, 2015

CLAIM NO. 201400422

FORD MOTOR COMPANY (LAP) PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

ROSS BURT
AND HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Ford Motor Company (LAP) ("Ford") seeks review of the opinion, award and order rendered September 29, 2014 by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ") awarding Ross Burt ("Burt") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for work-related

injuries which manifested on August 23, 2012. Ford also appeals from the October 31, 2014 order denying its petition for reconsideration.

On appeal, Ford argues the ALJ erred in awarding PPD benefits based upon a 19% impairment rating for Burt's upper extremity injuries. Ford also argues the ALJ erred in finding Burt was entitled to have his PPD benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. Because the ALJ's decision is supported by substantial evidence, and a contrary result is not compelled, we affirm.

Burt filed a Form 101 on February 20, 2014 alleging he injured his bilateral upper extremities, including the hands and elbows, due to cumulative trauma sustained in the course of his job which manifested on August 23, 2012. He stated he notified Ford of his condition on May 2, 2012.

Burt testified by deposition on May 16, 2014, and again on July 23, 2014. He is a resident of Louisville, Kentucky, and was born on May 9, 1972. He is a high school graduate, and completed two years of college. He also completed several courses while working for Ford. Burt began working for Ford in Minnesota in 1995. When that plant closed, he transferred to Louisville in December 2011. During his last years at the Minnesota plant, Burt primarily

worked seated at a desk 99% of the time. When he moved to Louisville, he was placed on the assembly line working on right passenger doors for the Ford Escape.

Burt is right hand dominant. One of the activities required in the door assembly involved installing a plastic cover over a metal piece. To ensure the cover was properly seated, he had to hit it with his hand. He began developing problems with his left index and “pinky” fingers in March or April 2012. He initially took Ibuprofen for the condition because he thought it was part of becoming accustomed to the job. He first sought treatment at the Ford Clinic, a medical facility located in the Ford plant, in May 2012 and an EMG was ordered. He was advised by the Ford Clinic his condition was not work-related. The condition continued to worsen, and he began experiencing difficulties as he tried to sleep at night. He eventually developed problems in the right upper extremity which later bothered him more than the left upper extremity. He was eventually referred to Dr. Christopher Shields who he saw on August 23, 2012. Dr. Shields advised him the condition was due to his employment at Ford. This was the first time a physician had advised him the condition was work-related.

Burt continued to work at the assembly position until July 2012, when he transferred to the final utility

position which involved scanning, inspecting and driving vehicles after the assembly was complete. He continued to perform this job until October 2012 when he underwent surgery on the right upper extremity on October 9, 2012. He was off work until January 15, 2013. Because Ford denied Burt's claim, the medical bills for his surgery were paid by his group health insurer, except for what he paid out of pocket. He also filed for, and received short-term disability benefits while he was off work because of Ford's denial of his claim.

Burt stated he continues to experience numbness in his right "pinky" finger, but it has improved. He continues to have pain in his left hand and wrist. He has had no surgery on the left. The symptoms are worse on the right than the left. He does not believe he can perform the door assembly job. He is able to perform the jobs in final utility, his current assignment, for which he has been trained, however, he stated there were some of the final utility jobs he would be unable to do.

In support of the Form 101, Burt filed the May 2, 2012 record from the Ford Clinic which indicates he reported tingling and numbness in the left small and ring fingers of approximately one month duration due to pushing on a plastic piece. Burt also filed an illegible record from the Norton

Immediate Care Center. Burt additionally filed records from Drs. Shields and Todd Shanks at Norton Healthcare. Dr. Shanks performed the October 2012 surgery. The July 24, 2012 record reflects left ulnar neuropathy with an onset date in February 2012. The August 21 through August 23, 2012 notes discuss carpal tunnel weakness, ulnar neuropathy at the elbow, bilateral neuropathy at the cubital tunnel and neuropathic pain in both hands. Dr. Shields noted the onset of pain in April 2012 with symptoms which gradually became more severe. He noted Burt was significantly disabled due to numbness in the ulnar aspect of the hand with profound weakness. Dr. Shanks diagnosed Burt with right ulnar compression and right ulnar severe sub-muscular transposition.

Burt filed the January 6, 2014 report of Dr. Warren Bilkey who examined him on that date. Dr. Bilkey noted Burt's history of work on the door assembly which required snapping parts into place. He noted Burt's initial complaints of numbness in the left fifth digit and a painful shocking sensation in the entire left upper extremity. He noted the condition worsened and developed on the right. An EMG was positive for an ulnar injury affecting both hands. The surgery performed in October 2012 increased the strength in the right upper extremity, but did not eliminate the

numbness. Burt reported dysesthesias, and loss of feeling and numbness in both hands. Dr. Bilkey diagnosed bilateral ulnar neuropathy injuries at the elbow, with ulnar decompressive surgery on the right, with residual neuropathy of both extremities. He stated all of Burt's symptoms were due to his work injury, none of which was active prior to April 2012. He stated Burt has reached maximum medical improvement ("MMI"), but may require surgery on the left. Dr. Bilkey restricted Burt from repetitive exertional upper extremity work activities. He stated Burt is unable to carry out the full range of his usual work duties. He assessed a 19% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Burt filed the April 20, 2014 addendum to Dr. Bilkey's January 6, 2014 report. Dr. Bilkey stated after reviewing additional medical records his opinions remain unchanged. He later filed Dr. Bilkey's July 20, 2014 supplemental report. Again, Dr. Bilkey stated he reviewed additional medical information which did not change his opinions from the January 6, 2014 report.

Burt also filed records from Dr. Shanks from October 2, 2012 through August 18, 2013. Those records outline Burt's pre-operative treatment, including surgery,

and his post-operative treatment. On January 15, 2013, Dr. Shanks stated Burt could return to work with no lifting greater than twenty-five pounds for one month. On May 16, 2013, Dr. Shanks noted Burt experienced a sudden onset of left elbow pain while attempting to open a jug of milk at home. Burt also complained of aching in both hands while driving trucks at work. On August 8, 2013, Dr. Shanks noted Burt's strength had returned in the right hand, and the left was getting better. Burt complained of right elbow pain, but there were no signs of instability. He also had complaints on the left, although he indicated this was getting better.

Burt also filed the report of the EMG/NCV testing performed by Dr. Vasudeva Iyer on August 16, 2012. Dr. Iyer reported the testing was abnormal and was suggestive of severe ulnar neuropathy at the elbow on both sides with evidence of focal demyelination. The testing represents compression and entrapment at the elbow.

Burt also filed the May 8, 2012 EMG report of Dr. James McKiernan. He noted the testing was consistent with left ulnar neuropathy, mild, located at the left elbow.

Ford filed multiple medical records from various maladies complained of by Burt while he worked for Ford in Minnesota. The records from August 5, 1995 through February

16, 2004 reflect treatment with Dr. Richard Hirt, Fairview University Medical Center, Dr. Nina Kostraba with the St. Joseph's Hospital Healthcare East, HCI Workcare, Dr. Daniel Buss/University of Minnesota Physicians, Hudson Physicians/ Dr. G. W. Lyda, Jr., and the Ford Medical facilities in Minnesota. The treatment rendered and referenced in those records was for treatment of a right shoulder condition, laceration and fracture of the left index finger, right rotator cuff, and shoulder tendinitis. In October and November 2002, Burt treated for a right hand sprain/strain/ tendinitis which apparently resolved.

Ford also filed records from its medical facility in Louisville. The May 2, 2012 record reflects complaints of numbness and tingling in the left small and ring fingers.

Ford filed the June 19, 2014 report of Dr. Richard Dubou who evaluated Burt at its request. Dr. Dubou related Burt's symptoms to using a cell phone at work instead of vehicle assembly. He diagnosed Burt as status post ulnar nerve release and sub muscular transposition, and left cubital tunnel syndrome – severe electrically, mild on clinical examination. He stated Burt had no specific work injury. Dr. Dubou stated cubital tunnel syndrome is not a work-related condition. He stated August 23, 2012 was not an injury date but was when the condition was reported. He

stated Burt would have no impairment rating due to a work-related condition.

Ford later filed Dr. Dubou's supplemental report dated July 10, 2014. Dr. Dubou stated he was still of the opinion Burt's condition was not caused by his work, but he assessed a 5% impairment rating pursuant to the AMA Guides for the unrelated conditions.

Both parties submitted both pre-injury and post-injury wage records.

A Benefit Review Conference ("BRC") was held on July 10, 2014. The BRC Order and Memorandum reflects the parties stipulated Burt's average weekly wage ("AWW") at the time of the accident was $1,733.19. The issues preserved were benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the Act, TTD, exclusion for pre-existing disability/ impairment, extent and duration and appropriate multiplier.

The ALJ rendered his decision on September 29, 2014. The ALJ determined Burt had sustained a work-related injury. He found August 23, 2012 was the appropriate manifestation date, because it was when Dr. Shields first advised Burt the condition was work-related. Dr. Shields was the first health care professional to advise Burt his condition was work-related. The ALJ found Dr. Bilkey's

reports more persuasive than those of Dr. Dubou, and found the 19% impairment rating more appropriate. Based upon his review of the wage records, the ALJ determined Burt's post-injury wage was $1,4688.02, several hundred dollars less than his stipulated pre-injury wages of $1,733.19. He also determined, based upon Dr. Bilkey's opinions, Burt is unable to carry out the full scope of the job duties he was able to perform prior to April 2012. He assessed the three multiplier pursuant to KRS 342.730(1)(c)1 and noted an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) was not required. He noted KRS 342.730(1)(c)2 was not triggered because Burt never returned to the same or higher rate of pay.

Regarding entitlement to TTD benefits and credit for benefits paid pursuant to the short term disability plan, the ALJ found as follows:

> As to the issue of TTD, Plaintiff was off work from the date of his surgery of October 9, 2012 until January 16, 2013. Thus, Plaintiff is owed TTD for these time periods at the rate of $736.19. Ford withdrew its claim for any credit against the TTD for unemployment insurance benefits (see p. 6 of 7/23/2014 Transcript of Hearing) but claims credit for payments of STD/LTD or "Unicare" benefits.
>
> Pursuant to KRS 342.730(6), the employer only gets a credit if the STD/LTD benefits are exclusively funded by the

> employer and if the policy itself does not contain an internal offset provision for workers compensation benefits. In this case, Ford did not offer any proof as to whether the STD and LTD plans were exclusively employer funded or whether they contained an internal offset provision. Ford bore the burden of proving an entitlement to a credit for STD and LTD benefits received by Plaintiff against its obligation to pay workers' compensation income benefits. *See Dravo Lime Co. v. Eakins*, 156 S.W. 3d 283 (Ky. 2005). Ford did not meet its burden and is not entitled to any credit or offset for LTD/STD benefits paid to Plaintiff. Plaintiff should receive an award of past-due TTD at the maximum rate allowed for all time he missed from work as a result of this injury.

Ford filed a petition for reconsideration arguing the ALJ erred by awarding PPD benefits for 425 weeks, to expire when Burt reaches normal old age Social Security retirement benefits. It further noted the ALJ did not suspend PPD benefits during the period TTD benefits were awarded. Ford asked the ALJ to reconsider the application of the three multiplier. Ford next argued the ALJ erred in his analysis of the return to work wages. Ford next argued the ALJ erred in relying upon Dr. Bilkey's opinions because he improperly utilized the AMA Guides. Ford argued the ALJ should have relied upon the 5% impairment rating assessed by Dr. Dubou. Finally, Ford requested the ALJ reconsider his findings regarding causation.

On October 31, 2014, the ALJ entered an order denying Ford's petition for reconsideration. Regarding the normal old age Social Security retirement benefits, the ALJ stated this was standard "boiler plate" language used in all of his decisions and did not affect the award. The ALJ noted his opinion indeed reflected a suspension of PPD benefits during the period TTD benefits was awarded. The ALJ found the remainder of the petition for reconsideration consisted merely of re-arguments of the merits of the claim, and was therefore denied.

On appeal, Ford argues the ALJ erred in awarding PPD benefits based upon a 19% impairment rating for Burt's upper extremity injuries. Ford also argues the ALJ erred in finding Burt was entitled to have his PPD benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1.

As the claimant in a workers' compensation proceeding, Burt had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Burt was successful in his burden, the question on appeal is whether substantial evidence existed in the record supporting 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).

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 discretion to determine 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). 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). Although a party may note evidence supporting a different outcome than that 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).

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 (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). So 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, 708 S.W.2d 641, 643 (Ky. 1986).

The ALJ could reasonably rely upon the impairment rating assessed by Dr. Bilkey. Dr. Bilkey set forth the basis of his opinion and his analysis in arriving at the 19% impairment rating. It is noted Dr. Bilkey was not cross-examined regarding the impairment rating he assessed or his use of the AMA Guides. The ALJ's decision to rely on the impairment rating falls squarely within the discretion afforded to him and will not be disturbed. We note the 5% impairment rating assessed by Dr. Dubou was, in his opinion, not due to a work-related condition. Because the ALJ could reasonably rely upon the impairment rating assessed by Dr. Bilkey, his decision will not be disturbed.

Regarding the application of the multipliers contained in KRS 342.730(1)(c)1, the ALJ's determination shall likewise be undisturbed. The ALJ determined an

analysis pursuant to Fawbush, supra was not required because Burt is unable to perform this pre-injury work, and has not earned the same or higher rate of pay post-injury.

In Ball v. Big Elk Creek Coal Co., Inc., 25 S.W.3d 115, 117-118 (Ky. 2000), the Kentucky Supreme Court explained, for purposes of KRS 342.730(1)(c)2, an employee's post-injury AWW is subject to calculation under KRS 342.140, using the same method employed to determine a claimant's pre-injury AWW. Therefore, the analysis must focus on the worker's AWW, not simply his hourly pay rate. Id. at 117. This reaffirms the previous holding in Whittaker v. Robinson, 981 S.W.2d 118 (Ky. 1998), where the Court "rejected the argument that the worker's pre-injury and post-injury hourly pay rate should be compared and concluded that the legislature intended for a comparison of the pre- and post-injury average weekly wage." Id.

Therefore, for an employee who is paid hourly, as Burt, his post-injury AWW must be calculated pursuant to KRS 342.140(1)(d) to determine whether there has been a return to work at a higher wage. This calculation requires an analysis of Burt's earnings over a fifty-two week period, and identification of his "best" quarter. We are satisfied the ALJ conducted the appropriate analysis required by Ball, supra and reached a result supported by substantial evidence

in determining Burt had not returned to the same or higher wages. Therefore, the ALJ's application of the three multiplier will not be disturbed.

Accordingly, the opinion, award and order rendered September 29, 2014 and the October 31, 2014 order on reconsideration by Hon. Steven G. Bolton, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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