

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 18, 2021

CLAIM NO. 201757801

CALLOS RESOURCE, LLC

PETITIONER

VS. **APPEAL FROM HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE**

GREG FARIS and
HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Callos Resource, LLC (“Callos”) appeals from the March 5, 2021 Opinion, Award, and Order rendered by Hon. Christina D. Hajjar, Administrative Law Judge (“ALJ”). The ALJ found Greg Faris (“Faris”) sustained work-related injuries on October 26, 2017 when he fell while trying to climb down a ladder from a roof at a jobsite in Indiana. The ALJ awarded permanent total disability (“PTD”) benefits beginning October 26, 2017, and medical benefits for

Faris' rib injuries for which Callos bore the liability. Faris initially filed the claim against 1st Call Disaster Services ("1st Call"), but Callos was later joined as a party. Callos also appeals from the March 15, 2021 Order denying its Petition for Reconsideration.

On appeal, Callos argues the ALJ erred in concluding the statute of limitations contained in KRS 342.670(2) is not applicable, and does not bar Faris' extra-territorial jurisdiction claim. Callos also argues the ALJ erred in finding Faris is permanently totally disabled due to deconditioning caused by the work accident. We affirm the ALJ's determination that the claim against Callos is not barred by the statute of limitations contained in KRS 342.670(2) based upon her determination there is no evidence that benefits were paid pursuant to another jurisdiction's workers' compensation law. Although Callos was not joined until more than two years after the date of the accident, the claim against 1st Call was initially timely filed. Callos was timely joined as a party within two years after cessation of the payment of temporary total disability ("TTD") benefits. We likewise determine the ALJ properly analyzed the claim pursuant to the direction provided in City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015), and Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Therefore, we affirm.

Faris filed a Form 101 on October 17, 2019 against 1st Call alleging he injured multiple body parts when he fell from a ladder. He specifically alleged he sustained injuries to his ribs, lungs, and head. After the accident, he was flown by helicopter to the University of Cincinnati Medical Center where he received in-

patient care for three days. According to the Form 104 filed in support of the claim, Faris worked as a carpenter from 1975 to 2019.

1st Call filed a Form 111, Notice of Claim Acceptance or Denial, on January 2, 2020, arguing Faris was not its employee on the date of the injury. It asserted Faris was employed by Callos on that date. Ace Insurance also filed a Form 111 on January 2, 2020, arguing Faris was not employed by 1st Call on the date of the injury, and asserting the claim is barred by the statute of limitations. It also argued Faris committed a safety violation pursuant to KRS 342.165(1), although a Form SVE was not subsequently filed. No evidence was submitted supporting a safety violation pursuant to KRS 342.165(1), and it was not listed as an issue at the Benefit Review Conference (“BRC”); therefore, that issue was apparently abandoned. Ace Insurance filed a Special Answer asserting the statute of limitations defense. 1st Call filed a Motion to Dismiss itself as a party on January 13, 2021, arguing Faris was employed by Callos, and was a leased employee. Callos filed a Notice of Representation on January 30, 2020. The ALJ dismissed 1st Call as a party in an Order issued March 19, 2020, and found Faris was employed by Callos on the date of injury.

Faris testified by deposition on May 26, 2020, and at the hearing held January 7, 2021. Faris was born on August 23, 1950, and is a resident of Erlanger, Kentucky. He is a high school graduate. He testified he began working as a carpenter at age 16. Faris testified he had Type II diabetes, Crohn’s disease, and arthritis prior to his work injury. He had previously sustained unrelated work

injuries that no longer affected him at the time of the injury. He also testified he had previously treated with a chiropractor for unrelated low back problems.

Faris began working for 1st Call as a carpenter in July 2017. He was unaware that he was actually employed by Callos. He testified he received instructions from Greg Day (“Day”) at 1st Call. His work included replacing drywall, painting, installing shelves/vanities, and trim work in properties damaged by floods and other disasters. He was working in Indiana on October 26, 2017. He had worked at that site for a couple of days. He had climbed a ladder to determine how best to demolish a roof. As he started to climb down, the ladder slid away, causing him to fall. He fell onto his right side, fracturing several ribs, and the ladder fell on top of him. He testified he was taken down the hill by ambulance, and flown to the hospital by helicopter.

After he was released from the hospital, Faris followed up with multiple physicians. He first noted tinnitus and vertigo a few days after the accident. He was sent to physical therapy and that problem temporarily resolved. He testified he had no ringing in his ears prior to the accident. He also testified he first noticed dizziness after he was released from the hospital, and it has since caused him to fall at home multiple times.

Faris testified he returned to work in March 2018. At his deposition, he testified he had no restrictions, and could perform his job properly. At the hearing, he testified that in hindsight, he was never able to fully return, and had difficulty performing his job. He was eventually let go by 1st Call due to poor work performance. He testified he is unable to perform strenuous work. He currently uses

a cane to walk. He also testified he continues to experience rib pain. In addition to his other health issues, Faris was diagnosed with tongue cancer in July 2020, and he underwent surgery in August 2020.

In support of his claim, Faris filed a hand-written, somewhat illegible Form 107-I, completed by Dr. Ria Santos on May 28, 2019. She noted Faris complained of insomnia, dizziness, shortness of breath, and chest wall pain due at pneumothorax and rib fractures. She diagnosed Faris with multiple rib fractures, a right pneumothorax, vertigo, sensorineural hearing loss, and insomnia. She did not assess an impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”), due to her unfamiliarity with those guidelines. She stated Faris had no active impairment prior to the date of the accident. Dr. Santos determined Faris is unable to return to work due to the October 2017 fall.

Faris also filed records from Dr. James Summer and Elizabeth Rose Linz, CNP (“Nurse Linz”) at the University of Cincinnati Medical Center. On October 26, 2017, Dr. Summers noted Faris fell from a ten feet high ladder, and sustained a pneumothorax and several broken ribs. A CT-scan of the head revealed no intra-cranial fractures. On November 10, 2017, Nurse Linz noted Faris’ past history of arthritis, back pain, Crohn’s disease, diabetes mellitus, high cholesterol, and hypertension. She diagnosed a pneumothorax and closed fractures of multiple ribs.

Dr. Lester Dupechan evaluated Faris on December 10, 2019. In his handwritten, partially illegible Form 107-I, Dr. Dupechan noted the history of Faris

falling from a ladder at work on October 26, 2017. He diagnosed Faris with dizziness/insomnia/vertigo, chronic rib fractures, pneumothorax - resolved, insomnia, sensorineural hearing loss, and chronic pain all caused by the work accident. He assessed a 30% impairment rating pursuant to the AMA Guides, some of which he determined was due to chronic peripheral neuropathic pain. Dr. Dupechan was unsure if Faris' hearing loss was caused by work exposure. He stated Faris does not have the physical capacity to return to the type of work performed on the date of the injury.

Day testified by deposition on March 5, 2020. He is a resident of Boone County, Kentucky, and is the operations manager for 1st Call in Florence, Kentucky. Day testified 1st Call does "insurance work, water mitigation, fire damage, and mold remediation". Day supervised Brian Tuttle who was Faris' supervisor. He noted Faris primarily worked in northern Kentucky, but was tasked to occasional jobs in Indiana and Ohio. The job where Faris was injured consisted of rebuilding a TV room after a house fire. He stated Faris began working as an independent contractor in July 2017, and after ninety days, he was hired by Callos, and leased to 1st Call. This was only a few days prior to the accident. Day stated Faris' work skills were greatly diminished when he returned after the accident. Faris was eventually let go due to a severe decline in his workmanship.

Kim Williams ("Williams"), the HR/Office Manager for 1st Call, testified by deposition on March 5, 2020. Williams stated 1st Call is a mitigation/remediation company that repairs buildings damaged by water, fire, and mold. She handles all of the human resource paperwork. Williams testified Faris was initially

interviewed by Day, and brought in as an independent contractor for a ninety-day period. Faris was then hired by Callos in October 2017, only a few days prior to his accident, and placed at 1st Call. Williams testified that all Callos employees placed there became 1st Call employees on January 1, 2018. When Faris returned to work after his accident, he was a 1st Call employee. Faris returned to work on March 18, 2018, and worked until November 2018, when he was terminated.

Dr. Ellen Ballard evaluated Faris on November 2, 2020 at Callos' request. She noted the history of injury and his attempt to return to work. She outlined Faris' multiple unrelated health issues, including his recent bout of tongue cancer. She diagnosed multiple rib fractures due to the fall, chronic unrelated low back pain, diabetic peripheral neuropathy, oral pharyngeal cancer, hypertension, Crohn's disease, and vertigo/tinnitus. Dr. Ballard found only the rib fractures are work-related. She determined Faris was at maximum medical improvement, and assessed a 5% impairment rating pursuant to the AMA Guides. She stated Faris cannot return to his pre-injury work due to his multiple health conditions.

Callos filed records from multiple providers for various conditions. Physical therapy records from St. Elizabeth Physical Therapy from June 2019 describe intermittent light-headedness and disequilibrium. A May 20, 2018 note from St. Elizabeth-Edgewood reflects Faris fell from a step onto concrete causing rib pain. A brain MRI performed at St. Elizabeth-Edgewood on March 21, 2019 revealed no acute findings. Records from ENT & Allergy Specialists of Fort Thomas from December 12, 2018 outline testing for decreased hearing and tinnitus in both ears. Faris was diagnosed with a binaural hearing loss. On July 17, 2020, Faris was

diagnosed with a tongue mass (possibly a malignant process), benign paroxysmal positional vertigo, sensorineural hearing loss, and tinnitus in both ears. Multiple records from Dr. Greg Worley outline checkups beginning in July 2011 for peripheral neuropathy and diabetic foot checks.

Dr. Stephanie Lynn Dalton, D.O., examined Faris for dizziness on May 29, 2019. Faris reported the dizziness began in October 2017. She diagnosed dizziness, and referred Faris to vestibular rehabilitation. She also diagnosed tinnitus, and referred Faris to follow up with an ENT. She also diagnosed peripheral neuropathy due to diabetes, hallucinations caused by medications, and gait imbalance due to neuropathy and knee pain.

Records from Oxford Physical Therapy for treatment from December 2017 to February 2018 indicate the lung pneumothorax had healed, and Faris reported problems with dizziness. An FCE was attempted on January 9, 2018, but was terminated due to Faris' elevated blood pressure, elevated heart rate, and shortness of breath.

Callos filed notes from Dr. Santos for 11 office visits from January 11, 2017 to January 13, 2020. The notes reflect complaints/reasons for office visits consisted of diabetes, foot tingling, Crohn's disease, knee joint injections, broken ribs, tachycardia, shortness of breath, tinnitus, vertigo, headaches, and syncope.

A BRC was held on December 3, 2020. The issues preserved included statute of limitations, income benefits per KRS 342.730, TTD benefits, ability to return to work, and pre-existing impairment.

The ALJ rendered the Opinion, Award, and Order on March 5, 2021. She acknowledged Callos argued the two-year statute of limitations contained in KRS 342.670(2) bars Faris' claim, but she found no evidence in the record establishing he was paid workers' compensation benefits pursuant to the laws of another jurisdiction. She noted TTD benefits were paid through February 26, 2018, and Callos was joined as a party on January 24, 2020. She found Faris' initial treatment for vertigo was compensable, but that condition resolved with physical therapy. She found any ongoing problems with vertigo, dizziness, or tinnitus are not compensable. The ALJ found the 5% impairment rating assessed by Dr. Ballard was the most credible. Relying upon the factors set forth in City of Ashland v. Stumbo, supra, the ALJ determined Faris is permanently totally disabled. She granted credit for TTD benefits previously paid, and limited the award pursuant to the version of KRS 342.730(4) effective July 14, 2018. The ALJ awarded medical benefits pursuant to KRS 342.020 for any ongoing rib problems.

Callos filed a Petition for Reconsideration on March 15, 2021, arguing it is undisputed that the accident occurred in Indiana. It argued the evidence does not support an award of permanent total disability benefits. It also pointed to a typographical error of the wrong name referenced on page 16 of the ALJ's decision. The ALJ issued an Order on March 30, 2021 correcting the typographical error, and denying the remainder of Callos' Petition for Reconsideration. She noted she relied on Dr. Santos in determining Faris' deconditioned condition is due to his work injuries.

We initially note that KRS 342.670(2) states as follows:

(2) The payment or award of benefits under the workers' compensation law of another state, territory, province, or foreign nation to an employee or his or her dependents otherwise entitled on account of such injury or death to the benefits of this chapter shall not be a bar to a claim for benefits under this chapter, if a claim under this chapter is filed within two (2) years after that injury or death. If compensation is paid or awarded under this chapter:

(a) The medical and related benefits furnished or paid for by the employer under another jurisdiction's workers' compensation law on account of such injury or death shall be credited against the medical and related benefits to which the employee would have been entitled under this chapter had claim been made solely under this chapter;

(b) The total amount of all income benefits paid or awarded the employee under another jurisdiction's workers' compensation law shall be credited against the total amount of income benefits which would have been due the employee under this chapter, had claim been made solely under this chapter; and

(c) The total amount of death benefits paid or awarded under another jurisdiction's workers' compensation law shall be credited against the total amount of death benefits due under this chapter.

As an affirmative defense, Callos had the burden to prove the application of the statute of limitations. Lizdo v. Gentec Equipment, 74 S.W.3d 703, 705 (Ky. 2002). Since Callos was unsuccessful in its 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). The function

of the Board in reviewing the ALJ's decision is limited to a determination of whether her findings are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, *supra*.

Callos filed a special answer asserting the statute of limitations defense without filing any supporting documentation as evidence. While it is unquestioned that Faris sustained his injuries while working at a jobsite in Indiana, there is no evidence in the record demonstrating the benefits he received were paid pursuant to the laws of another jurisdiction. While we do not cite previous decisions from this Board as authority, we reference them for consistency and guidance. In Mercer Transportation v. Wellington W. Butler, WCB Nos. 1993-29262 & 1992-50553 (Rendered March 8, 1996), this Board held, "[t]he two year bar contained in that subsection clearly only applies when benefits have been awarded or paid under the law of another state."

It was incumbent on Callos, who bore the burden of establishing its defense, to demonstrate its insurer paid benefits pursuant to the law of another jurisdiction. There is no evidence Faris applied for or was paid/awarded benefits pursuant to the workers' compensation laws of another state. Absent such evidence, we find the ALJ did not err in determining the claim was timely filed, and Callos was joined within two years of the termination of TTD benefits.

We additionally note that Faris timely filed his claim within two years from the date of injury as required by KRS 342.185, albeit against 1st Call. In the recent holding by the Kentucky Supreme Court in JSE, Inc. d/b/a Perma Staff II, v. Patricia Ahart, et al., 2020-SC-0154-WC (April 29, 2021)(Designated Not to be

Published)(referenced for guidance, not authority), the Court held the claim was timely filed pursuant to the two-year statute of limitations contained in KRS 342.185, although some parties were not joined until after that two-year period. The Court specifically held as follows:

However, the plain language of KRS 342.185(1) states that an application for claim benefits must be filed within two years of the date of the accident, which Ahart did by timely filing a Form 101 on September 5, 2013. KRS 342.185(1) further provides that “a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof[.]” 803 KAR 25:010 Section 2(3)(b) likewise reads “[j]oinder shall be sought by motion as soon as practicable after legal grounds for joinder are known.” As noted by the Board, Perma Staff does not argue that Ahart failed to provide notice as soon as practicable; rather, it argues that Ahart sought to amend her claim after the two-year statute of limitations had run on September 25, 2013. Yet, KRS 342.185(1) only requires the filing of the application, and does not require a claimant to name all adverse parties within the two-year statute of limitations. 803 KAR 25:010 Section 2(3)(b) additionally allows a party to seek joinder by motion “as soon as practicable after legal grounds for joinder are known.” Thus, we agree with the conclusions of the tribunals below that Ahart’s joinder of Perma Staff as a defendant was not time-barred.

It is undisputed that Faris filed his claim within two years of the date of the accident. Although Callos was not joined until later, based upon the foregoing, even if the two-year limitations pursuant KRS 342.670(2) was deemed applicable, Callos was timely joined. Therefore, we find the ALJ did not err in determining this claim was timely filed.

We also noted that as the claimant in a workers’ compensation proceeding, Faris had the burden of proving each of the essential elements of his

claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Faris was successful, we must determine whether substantial evidence of record supports the ALJ's determination he is permanently totally disabled. 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).

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 function of the Board in reviewing an ALJ's decision is limited to a determination of 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, supra. 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 in Callos' argument the ALJ erred in finding Faris is permanently totally disabled due to his work injuries. We note the ALJ found there is no evidence of record establishing Faris was ever released to unrestricted work. Despite Faris' attempt to return to work in March 2018, Day testified his work was unsatisfactory, leading to his ultimate termination. Although Faris first disputed his termination at his deposition, at the hearing, he testified that in hindsight he was indeed unable to perform the full gamut of his work. Notably, Dr. Ballard's report establishes Faris does not have the physical capacity to return to his previous work, which by his testimony he began performing at the age of sixteen. There is no evidence of record establishing Faris ever retained the ability to return to his pre-injury work.

Regarding her determination that Faris is permanently totally disabled, the ALJ found *verbatim* as follows:

Permanent total disability is defined in KRS 342.0011(11)c as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. Work is defined as meaning providing service to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In *City of Ashland v. Stumbo*, 461 SW3d 392 (Ky. 2015) the Kentucky Supreme Court laid out a five-step analysis which the ALJ must utilize in determining entitlement to permanent total disability. Initially, the ALJ must determine if the claimant suffered a work related injury. Next, the ALJ must determine what, if any, impairment

rating the claimant has. Third, the ALJ must determine what permanent disability rating the claimant has. Then the ALJ must make a determination that the claimant is unable to perform any type of work. (In making this determination the ALJ must state with some specificity the factors which were utilized in making the conclusion the claimant is permanently and totally disabled). Finally, the ALJ must determine that the total disability is the result of the work injury.

Hammond has a 5% impairment rating and a 3.25% disability rating. Although he has a low impairment rating, this ALJ finds that the significant time he was sedentary after the injury has caused him to be deconditioned to the point he is unable to return to any work, including his prior work as a carpenter. His only prior work has been working in construction as a carpenter. Due to his age of 70, his lack of education beyond high school, and his only work experience was working as a carpenter, this ALJ finds it is very unlikely he could be retrained or return to any work of which he has prior experience. He also had an unsuccessful return to work attempt, which resulted in his termination because of his inability to perform his work as a carpenter. Thus, Faris is permanently and totally disabled. This ALJ specifically only considered his deconditioning (and not his other medical conditions), in concluding he is permanently totally disabled.

We note the reference to Hammond, rather than Faris above, but that was corrected in the Order on Petition for Reconsideration. We determine the ALJ performed the appropriate analysis pursuant to the direction provided in City of Ashland v. Stumbo, supra, and in Ira A. Watson Department Store v. Hamilton, supra, in finding Faris is permanently totally disabled, and this determination will not be disturbed.

Accordingly, the Opinion, Award, and Order rendered on March 5, 2021, and the Order denying Callos' Petition for Reconsideration rendered March

15, 2021 by Hon. Christina D. Hajjar, Administrative Law Judge, are hereby
AFFIRMED.

ALL CONCUR.

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