

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: January 19, 2018

CLAIM NO. 201691806

CARNELL SIMS

PETITIONER

VS.

**APPEAL FROM HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE**

HILL TRANSPORTATION SERVICES INC. and
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Carnell Sims ("Sims") appeals from the Opinion, Award, and Order rendered October 9, 2017, by Hon. R. Roland Case, Administrative Law Judge ("ALJ") awarding him temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for left knee

and low back injuries sustained on February 19, 2016. No petition for reconsideration was filed.

On appeal, Sims argues the evidence compels a finding he is entitled to an enhancement of his award of PPD benefits by the three multiplier pursuant to KRS 342.730(1)(c)1. In the alternative, Sims argues he is entitled to have his award enhanced by the two multiplier pursuant to KRS 342.730(1)(c)2 because he has not returned to work making equal or greater pay. Sims argues Hill Transportation Services, Inc. ("Hill Transportation") should be responsible for an outstanding medical bill submitted after the Benefit Review Conference ("BRC") but prior to the hearing since it was not prejudiced by the delayed submission. Because substantial evidence supports the ALJ's determinations and no contrary result is compelled, and because the issue of unpaid or contested medical expenses was not identified as a contested issue at the BRC, we affirm.

Sims filed a Form 101 alleging he injured his left knee and low back on February 19, 2016 when he slipped and fell as he stepped down from his trailer. At the time of the accident, Sims worked as a truck driver for Hill Transportation.

Sims testified by deposition on June 6, 2017 and at the hearing held August 24, 2017. Sims completed the tenth grade and has a commercial driver's license. Sims testified he was involved in a motor vehicle accident in 2010. Prior to the

work injury, he regularly treated for right hip pain, primarily with pain medication, for several years.

Sims began working for Hill Transportation as an over-the-road truck driver hauling steel coils on a flatbed in March 2014. The trailer was loaded or unloaded by a crane. Hill Transportation was responsible for securing his load, which typically contained two or three steel coils. He climbed onto the trailer, strapped each coil down with several chains, and used a winch to tighten them. The chains weighed approximately ten pounds. He then would "chock it with wood" to prevent the coils from rolling. Hill Transportation used one of two tarp systems to protect the load - either a conestoga or covered wagon. A conestoga did not require much physical activity since it automatically covered the load. The covered wagon required him to throw the tarp over the load and secure it with bungee cords. Sims stated he earned \$1,425.00 per week at Hill Transportation.

Sims testified that on February 19, 2016, he fell as he stepped down from the deck of the trailer landing on his hands and knees, while in Canton, Ohio. He sustained a laceration to his left knee, and experienced pain in his low back and left knee. He was taken to the emergency room where x-rays were taken. He eventually treated with Dr. Jonathan Paley, who ordered physical therapy and MRIs of Sims' left knee

and low back. Sims stopped treating with Dr. Paley since he no longer had insurance.

At his deposition, Sims stated he did not return to work for Hill Transportation following his injury. At the hearing, Sims indicated he did not return to work for Hill Transportation except to, "drive the truck back to where I kept the truck at, which was in Vandalia, Ohio. And I never drove it since then." Sometime after the accident, Sims worked approximately one month for Cordell Transportation. This position required him to drop and unhook several times a day, work underneath the truck to "chock" the wheels, and climb on and off the truck. Sims indicated he stopped working for Cordell Transportation because it was too physically demanding in light of his left knee and low back conditions. Sims did not testify as to how much he earned during this month of employment, nor was any wage documentation filed into the record for that time period.

Sims currently works for KES Harris Trucking driving a dump truck. Although the job does not require any bending, loading, or unloading, Sims stated he experiences pain in his left knee and low back when entering and exiting the truck. At his deposition, Sims testified he earns \$16.00 per hour and works thirty to forty hours a week. At the hearing, Sims testified he does not earn as much as he did at Hill

Transportation. He testified, "No. My salary has, I was making like 1,425.00 a week with Hill Transportation. Now I make that probably at two weeks now . . . In the job that I've got now . . . A little bit over, but somewhere around between 14 and 1600 every two weeks now. . . ." Prior to the hearing, Sims filed payroll records from KES Harris Trucking.

Sims is prescribed pain medication for his left knee and low back, and also takes Ibuprofen. At his deposition, Sims testified his low back and left knee symptoms "prevent me from doing physical work, you know, for a certain long time, sitting too long, it stops me, and it's constant." He estimated he can only sit for approximately one hour before he has to stand and stretch his leg. Sims also stated he experiences constant back pain. At the hearing, Sims testified as follows regarding his symptoms:

A: Yeah. It feels the same. Every day I feel my lower lumbar. And my back is just, from bending over and standing too long, it just hurts real bad. A lot of things I'm restricted, you know. I can't do like I used to.

Q: . . . What things make it feel better?

A: Nothing. Nothing.

. . . .

Q: Okay. What things do you avoid now in order to help your back and knee?

A: Well, doing, doing a lot of hard work, a lot of walking and a lot of bending and stooping, you know, stuff. You know, stuff like that. . . .

In support of his claim, Sims filed the December 5, 2016 record of Dr. Paley and the April 10, 2017 report of Dr. Thomas Bender. In the December 5, 2016 record, Dr. Paley noted Sims continues to have low back and left knee pain which is not resolving with simple supportive care. Dr. Paley recommended MRIs of the left knee and lumbar spine.

In his April 10, 2017 report, Dr. Bender outlined the February 19, 2016 work accident, and subsequent treatment by Dr. Paley. He also noted Sims' prior right hip pain. Dr. Bender diagnosed Sims with a lumbar sprain/strain, left knee laceration, left knee sprain/strain and left knee medical meniscus tear due to the February 19, 2016 fall. Dr. Bender assessed a 5% impairment rating to the lumbar region and a 1% impairment rating to the left knee, yielding a combined 6% impairment rating, pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He noted Sims may additionally require an arthroscopic left knee medial meniscectomy.

Dr. Bender noted Sims was released by Hill Transportation in June 2016, and subsequently secured employment with Cordell Transportation in December 2016 for approximately

one month. Dr. Bender stated Sims was released from Cordell Transportation due to failure to pass his DOT examination based upon his medication regimen. Dr. Bender stated Sims was prescribed Norco for his prior, unrelated right hip condition, which was the basis of his failure to pass the drug test. When asked whether Sims could return to work, Dr. Bender stated as follows:

It is my opinion the claimant can return to his previous level of employment that he performed on 2/19/16. This opinion is buttressed by the fact that the claimant was able to do a comparable job for Cordell Transportation in December 2016. The claimant can be in a capacity in which he does drop-and-hook vehicle operation. He should not be required to load or unload freight.

Hill Transportation filed the May 18, 2016 and July 19, 2017 reports of Dr. Gerard Papp. In the May 2016 report, Dr. Papp reviewed medical records predating and following the February 19, 2016 work accident. Dr. Papp opined Sims' alleged injuries were not proximately caused by his employment with Hill Transportation. Rather, Dr. Papp opined Sims' low back and left knee symptoms resulted from a manifestation of a pre-existing deteriorating condition. He noted Sims is morbidly obese, and there is a seven-fold increase in arthritis of the back, hips and knees with an increased BMI. He opined Sims' conditions pre-existed the work accident based upon his initial x-rays.

Dr. Papp declined to recommend additional treatment for either the low back or left knee. Dr. Papp found Sims to be at maximum medical improvement and assigned no formal restrictions on his activities.

Dr. Papp re-evaluated Sims on July 19, 2017 and reviewed additional medical records. Dr. Papp noted Sims now works as a dump truck driver for KES Harris Trucking. After performing an examination, Dr. Papp diagnosed tricompartmental osteoarthritis to the left knee prior to the work injury; degenerative thoracic and lumbar disease most likely with lumbar spondylosis; and degenerative joint disease. Dr. Papp stated Sims' symptoms are due to his arthritis, which was present before his work injury. He opined Sims did not have a significant harmful change in the human organism proximately caused by the February 18, 2016 work-related injury. At most, Sims may have had a temporary sprain/strain of the knee and low back, with no significant exacerbation. Dr. Papp assessed a 0% impairment rating pursuant to the AMA Guides for both the left knee and low back. When asked whether Sims can continue to perform his regular and customary employment, he stated, "I believe he is employed. I believe he has objective medical findings and has limitations where he has to use a cane. Evidently, he is performing truck driving type duties." Dr.

Papp recommended no further treatment related to the alleged work injury.

A BRC was held on August 8, 2017. The parties stipulated Sims sustained an alleged injury on February 19, 2016, and Hill Transportation paid TTD benefits from February 20, 2016 to June 6, 2016, as well as medical expenses. The parties stipulated to an average weekly wage ("AWW") of \$1,239.23, and Sims returned to work for a different employer. Whether Sims retained the physical capacity to return to the type of work performed at the time of his injury remained an issue. The parties identified the following contested issues: benefits per KRS 342.730, injury as defined by the Act, TTD, proper use of the AMA Guides, and suspension of benefits for failure to attend an independent medical evaluation pursuant to KRS 342.205. Subsequent to the BRC and before the hearing, Sims submitted a medical bill from Dayton Outpatient Center in the amount of \$402.50.

In the opinion, the ALJ found Sims sustained a work-related injury and awarded PPD benefits for Sims' left knee and low back condition. He adopted the impairment ratings assessed by Dr. Bender, finding them consistent with the AMA Guides. With regard to the application of multipliers, the ALJ stated as follows:

However, the analysis does not end there as the ALJ must also determine whether the provisions of KRS 342.730(1)(c)1 or 2 apply. Subparagraph one applies when the plaintiff lacks the physical capacity to return to the type of work he was performing at the time of his injury and has not returned to earning same or greater wages. If the plaintiff is earning same or greater wages a determination must be made as to whether the plaintiff will be able to continue doing so for the indefinite future. If employment is found to be not likely then the three multiplier would apply. See *Fawbush vs Gwynn[sic]*, 103 SW3d 5 (KY 2003).

In this particular case, the plaintiff has not returned to work at equal or greater wages. The issue is whether or not the plaintiff retains the physical capacity to return to the type of work performed at the time of the plaintiff's injuries. Both Dr. Bender and Dr. Papp felt the plaintiff could return to his customary occupation.

In this particular case the ALJ is persuaded that the plaintiff does have the physical capacity to return to the work being performing at the time of the injuries. The plaintiff will therefore only be entitled to a one factor.

The ALJ found Sims entitled to TTD benefits as already paid, and declined to suspend benefits pursuant to KRS 342.205. The ALJ awarded medical benefits. He also found, "the issue of any outstanding medical bills was not preserved at the [BRC] and there is insufficient evidence in the record for the undersigned ALJ to rule on the same."

Neither party filed a petition for reconsideration. On appeal, Sims argues he is entitled to the application of the three multiplier since, "the only evidence at the hearing was that he could not return to his former work and that he was working a lighter lower paying job since his work injury." Sims argues the ALJ mistakenly relied on Dr. Bender's opinion in finding he could return to his former job since his report, "makes it clear he thinks his former job is merely drop and hook," which is inconsistent with his testimony. Sims states Dr. Papp's opinion does not address the issue of his ability to return to his former job. Therefore, "Since Dr. Bender has stated that Mr. Sims can return to a job that is lighter than his former job and Mr. Sims has testified that he can't do his former job, this undisputed proof should entitle Mr. Sims to a 3 multiplier."

In the alternative, Sims argues he is entitled to the two multiplier because, "he has not returned to work at a job making equal or greater pay." Sims also argues Hill Transportation should be responsible for the medical bill submitted after the BRC but prior to the hearing since it experienced no prejudice by the delay.

As the claimant in a workers' compensation proceeding, Sims had the burden of proving each of the essential elements of his cause of action, including entitlement to either the two

or three multiplier contained in KRS 342.730(1)(c) 1 and 2, and unpaid medical expenses. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Sims was unsuccessful in that 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).

We note no petition for reconsideration was filed. Pursuant to KRS 342.285, the absence of a petition for reconsideration means the ALJ's order "shall be conclusive and binding as to all questions of fact," as long as substantial evidence exists in the record supporting the ALJ's conclusion. As the Supreme Court of Kentucky instructed in Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985), if the ALJ's conclusions are supported by substantial evidence in the record, even a "failure to make findings of an essential fact" cannot be reversed and remanded to the ALJ unless that failure was first brought to the attention of the ALJ. Id. at 338.

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 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 this Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that 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 the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (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).

Substantial evidence supports the ALJ's determination Sims is not entitled to the three multiplier pursuant to KRS 342.730(1)(c)1, which permits enhanced PPD benefits when a claimant lacks the physical capacity to return to the work he was performing at the time of the injury. Dr. Bender opined Sims is able to return to his previous level of employment that he performed on February 19, 2016, noting he was able to do a comparable job for Cordell Transportation. He restricted Sims from loading and unloading freight, which he was not required to do at Hill Transportation. We acknowledge Dr. Papp did not specifically opine Sims is able to return to the work he was performing at the time of his injury. Rather, when asked whether Sims can continue to perform his regular and customary employment, he stated, "I believe he is employed. I believe he has objective medical findings and has limitations where he has to use a cane. Evidently, he is performing truck driving type duties." In addition, Dr. Papp declined to assign any formal restrictions on Sims' activities based upon his work-related injuries.

Sims provided testimony regarding his current symptoms and limitations, and his belief he could not return to his subsequent employment with Cordell Transportation. However, he did not specifically address whether he believed he is

physically capable of returning to his former job with Hill Transportation.

In light of the absence of a petition for reconsideration, and because the opinions of Drs. Bender and Papp constitute substantial evidence supporting the ALJ's determination regarding the applicability of the three multiplier, and no contrary result is compelled, we affirm.

We also disagree with Sims that he is alternatively entitled to an enhancement of his award of PPD benefits by the two multiplier contained in KRS 342.730(1)(c)2. Sims maintains he did not return to work earning the same or greater wages after his work injury, and the record supports this conclusion. In order for the two multiplier to apply, the claimant has to return "to work at a weekly wage equal to or greater than the average weekly wage at the time of injury" and experience a cessation of that employment. Sims did not earn a wage equal to or greater than the stipulated AWW of \$1,239.23 after his work injury. Therefore, the two multiplier pursuant to KRS 342.730(1)(c)2 is not currently implicated.

Finally, we find the ALJ did not err in finding Hill Transportation responsible for the outstanding medical bill. As stated by the ALJ, the issue of unpaid or contested medical expenses was not preserved as a contested issue at the BRC. 803 KAR 25:010 §13(12) provides, "Only contested issues shall be

the subject of further proceedings." Therefore, the issue of the outstanding medical bill was not properly preserved as an issue for appeal. Because the ALJ awarded medical benefits related to the work injury, any future medical dispute may be resolved through the procedures set forth in 803 KAR 25:012.

Therefore, the October 9, 2017, Opinion, Award, and Order rendered by Hon. R. Roland Case, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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