

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 10, 2021

CLAIM NO. 201854033

CHARLES MOUNTS

PETITIONER

VS. **APPEAL FROM HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE**

EASTERN KY HAULERS LLC
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
VACATING AND REMANDING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS, Member, and VACANT.

STIVERS, Member. Charles Mounts (“Mounts”) seeks review of the July 26, 2021, Opinion and Order of Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”) finding Mounts “failed to satisfy his burden to establish the occurrence of a harmful change in the human organism.” However, the ALJ awarded temporary total disability (“TTD”) benefits for an aggravation of a pre-existing degenerative

condition. TTD benefits and medical benefits were awarded from the date of injury, November 17, 2018, through July 22, 2019.

On appeal, Mounts argues the ALJ erred in relying upon Dr. David Jenkinson's opinions as they were rendered prior to his ankle fusion surgery. Mounts also contends the ALJ cannot rely upon Dr. Jenkinson's impairment ratings since he "failed to lay out his basis for the impairment rating." Next, Mounts argues the ALJ erroneously failed to consider Dr. James Owen's supplemental report providing an explanation for his impairment rating based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Finally, Mounts contends the ALJ's reliance upon Dr. Daniel Primm's opinion that Mounts had a pre-existing condition is misplaced.

BACKGROUND

The Form 101 alleges Mounts was injured on November 17, 2018, while in the employ of Eastern KY Haulers LLC ("EKH") in the following manner: "Was unloading tires from pull trailer, while moving one of the tires the tire exploded knocking his left leg out from under him causing him to fall backwards." Mounts suffered injuries to multiple lower extremities.

Mounts testified at a November 4, 2019, deposition and the May 27, 2021, hearing. Mounts' deposition reveals he worked for EKH from August 2018 until November 17, 2018, as a truck mechanic working on coal trucks. His work primarily entailed performing maintenance. Mounts was injured while moving a trailer containing spare coal truck tires so they could be unloaded. He testified these

big tires were already inflated and ready to be used. Mounts provided the following concerning what he remembered about the tire explosion:

Q: Okay. So you said one exploded. What happened? Did it hit something, or just exploded?

A: Just picked it up and started to roll it, and as I started to roll it, it blew apart.

Q: Is that how you were getting them off the trailer, you were just rolling them off the ends?

A: Oh, yes.

Q: Is that what it was?

A: Yeah, because they're so big you can't -- there's no reaching and trying to get ---

...

Q: Okay. So you were getting ready to roll it and it blew. Did the locking rims come off on it or do you know?

A: I have no idea.

Q: Okay. How many of these did you all have on a truck? I'm sorry, the trailer?

A: The two.

Q: Okay. So this wasn't a big load of them or anything?

A: Huh-uh, no.

Q: Okay.

A: It was just two spares.

Mounts was a foot away from the tire when it exploded. He recounted what he remembered after the tire explosion:

Q: Okay. And it was just on the left leg?

A: Yes.

Q: Okay. You said it took your leg out from under you. Did you fall straight down just like somebody pulled the rug out from under you type thing or ---

A: To be honest, I don't know how I ended up on my back, and I couldn't – I was sort of out of it. I don't know. But I was holding to my leg and McKinnley come running over and asked me if I was okay.

Q: Yeah.

A: And I told him no.

Q: When you said you were on your back, were you on the trailer or on the ground over there?

A: I think I was on the ground but I'm not a hundred percent sure.

He was taken to Pikeville Medical Center in a company truck driven by McKinnley Pack, a co-employee. He thought a side wall of the tire may have hit his left leg as he experienced pain in his left leg from the knee to his ankle. At that time, he was unable to walk. He spent the night in the hospital and was released the next day. Mounts continued to see Dr. Matthew McCammon who had treated him in the emergency room on the night of the accident. He believed Dr. McCammon is a "foot doctor." Dr. McCammon later performed surgery which Mounts characterized as a "scope" to remove bone fragments. He underwent a second surgery to fuse his ankle in August 2019. Mounts provided the following regarding his second surgery:

Q: Did he do another surgery, or somebody else do surgery, or what?

A: Yeah, he had to do another surgery afterward.

Q: Okay. What did they do then, do you remember, if you know?

A: Well, with the first surgery he went in there to get the bone fragments out.

Q: Yeah.

A: And by then it had chewed my cartilage up.

Q: Okay.

A: And so then he told me that the only option I had was the shots, or a replacement, or a fusion. They tried the shots.

Q: Okay. So he didn't do a second surgery then?

A: He tried the shots and that ran my blood sugar up, so then they done the fusion.

Q: Okay. So they fused your ankle then?

A: Exactly.

Q: When was that?

A: It was in August.

At his last appointment, Dr. McCammon removed Mounts' cast. At the time of his deposition, Mounts was wearing a fracture boot and had been instructed to place no more than 25% of his weight on the left foot. Mounts ambulated using crutches and was taking Lortab for pain. He provided the following concerning his condition at that time:

Q: ... So how is it feeling now?

A: Well, I'm just now starting to be able to put a little bit of weight on it without it being excruciating pain.

Q: Okay. Can you tell if the pain has gone away any, or is it still the way it was, or is it too early to tell?

A: It's too early to tell.

Q: Okay. Can you move it at all or is it ---

A: No.

Q: -- permanently fixed?

A: No, it's permanently fixed.

Q: Okay. Can you tell just where you don't move it – let me ask you this. Before you had the surgery were you having pain out of it even if you didn't try to stand on it, just pain just because it was there?

A: What do you mean?

Q: Do you know what I mean? Did you have pain in your ankle just – if you were sitting around with your foot up were you still having pain out of that ankle whether you were trying to use it or flex it or stand on it?

A: After the accident?

Q: Yes.

A: And before the surgery?

Q: The surgery, yeah.

A: Oh, yeah.

Q: Okay. Has that surgery helped take some of that away?

A: No.

He denied experiencing prior left leg injuries or reinjuring his left ankle after the injury. At the time of his deposition, Mounts was living with his mother who took care of all the chores and the cooking.

At the hearing, Mounts again testified he injured only his lower left extremity, specifically his ankle. He has not worked since November 17, 2018. Following the injury, he underwent four weeks of physical therapy which did not help. He was unable to walk during that period. Dr. McCammon performed surgery

sometime after the physical therapy. Mounts described the problems he experienced following the first surgery:

Q: And what was going on with your foot, ankle, leg area that led up to the surgery?

A: It was burning and hurting, and that pressure point behind – on the back of my foot down by my ankle, it felt like someone squeezing it all the time, and it was just so hot to the touch. It was constantly stabbing, I mean, I could go on and on.

...

A: Yeah. But it was a lot of pain, I mean, I couldn't walk on it, but I could sit here and move it.

Q: Did you have full range of motion after the first surgery?

A: I wouldn't say – no. I wouldn't have full range of motion because of the pain, you know.

Q: So let me ask you this question: So you didn't – did you regain any range of motion after the first surgery?

A: No.

Q: Were you able to walk without a boot ever after the first surgery?

A: No.

Q: Were you able to go up and down steps without a boot?

A: No, sir.

Q: Were you able to put any weight or pressure on your foot without a boot?

A: No, sir.

The first surgery did not help as he continued to experience the same burning and pain in the left leg, and it was still hot to the touch. Mounts underwent injections following the first surgery which did not help.

Mounts testified the second surgery in August 2019 did not help. He recounted the problems he continues to experience following this surgery:

Q: What problems do you still have?

A: Still the pain and the ability to walk, and I don't have good balance. I have to walk on this cane, which is embarrassing.

Q: Do you have the ability to flex and extend your foot any?

A: No, sir.

Q: What about turning side to side?

A: No, sir.

Q: What about going up, you know, just regular walking, do you have the ability to shove off with your toes?

A: No, sir.

Q: What about put weight on your foot?

A: I try to put a little to none because of the pain.

Q: What about going up and down the steps?

A: I have a lot of trouble going up and down steps on any incline at all.

Q: So inclines and steps are difficult?

A: Very.

Q: Have they done any injections since the surgery?

A: No, sir.

Q: Why are inclines and steps very difficult?

A: Because – well, it hurts to begin with, and then I don't have the mobility in my foot. For some reason, I can't balance myself. I fall.

Q: What do you mean you have balance issues and fall?

A: Well, I can't balance myself with that foot, and that's what keeps you in balance is your foot, the ball of your foot and your toes.

Q: Do you have any numbness or tingling in your foot?

A: Yeah.

Q: And how long have you had that numbness and tingling in your foot?

A: Since they done the second surgery.

Q: So you didn't have any of the numbness or tingling in your foot before the first surgery – I mean, after the first surgery?

A: Well, yeah. It's just been awhile. I ain't going to lie to anybody, I'm sorry if I'm messing anybody up there.

Q: Has it gotten worse since the second surgery?

A: I'd say, yeah, a little bit, I mean, not major, nothing major. It's the same surgery, you know, I healed up from it, and then ...

Mounts props up his ankle with an ice pack attached because he continues to experience a burning sensation. He now sees Dr. Nelson, a podiatrist, who is fitting him for a brace extending from his foot to his knee because his left foot is turning in.¹ Mounts believes he is unable to perform any of his previous work and desires to receive vocational rehabilitation.

¹ Dr. Nelson's first name is not contained in the record.

The February 9, 2021, Benefit Review Conference (“BRC”) Order and Memorandum reflects the parties stipulated Mounts sustained a November 17, 2018, work-related injury and EKH received due and timely notice of the injury. TTD benefits were paid from November 18, 2018, through August 1, 2019. EKH paid medical expenses of \$6,802.81. The contested issues were benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, exclusion for pre-existing disability/impairment, and TTD. Under the heading “Other” is “proper rating per the guides; subsequent intervening injury.”

Concerning the left ankle injury, Mounts introduced the records of Pikeville Medical Center spanning the period from November 17, 2018, through June 25, 2019, and Dr. Owen’s January 9, 2020, Independent Medical Evaluation (“IME”) report and February 10, 2021, supplemental report.² Pertaining to the ankle injury, EKH introduced the November 17, 2020, report of Dr. Primm and the July 23, 2019, IME report of Dr. Jenkinson.

In determining the extent of Mounts’ work injury, the ALJ furnished the following findings of fact and conclusions of law:

13. The ALJ in this matter is most persuaded by the opinions of Drs. Primm and Jenkinson and specifically the criticism leveled by Dr. Primm at the opinions of Dr. Owen. Dr. Primm convincingly stated that Dr. Owen failed to rely upon the correct table and page relating to the tibiotalar ankle fusions within the AMA Guides.

14. The ALJ finds based upon the foregoing that the opinion of Dr. Owen lacks credibility in this matter.

15. Dr. Jenkinson assessed a 0% impairment pursuant to the Guides and added that the Plaintiff would be capable

² Other medical records were introduced which do not relate to the ankle injury.

of returning to his prior employment. Dr. Jenkinson found no evidence that the Plaintiff had suffered a change in condition due to the work event and opined that the Plaintiff's condition was consistent with pre-existing degenerative arthritis.

16. Dr. Primm likewise found that the Plaintiff had pre-existing, degenerative, arthritis of the left ankle and a left ankle sprain superimposed on pre-existing degenerative changes.

17. The ALJ finds that the opinions of Drs. Primm and Jenkinson are credible and convincing. The ALJ finds based thereupon that the Plaintiff has failed to satisfy his burden to establish the occurrence of a harmful change to the human organism in the face of such credible evidence.

The ALJ awarded TTD benefits reasoning as follows:

19. The ALJ further finds based upon the opinion of Dr. Jenkinson that that the Plaintiff suffered an aggravation of his pre-existing degenerative condition and reached maximum medical improvement on July 23, 2019.

Mounts was awarded TTD benefits and medical benefits from November 17, 2018, through July 23, 2019.

No Petition for Reconsideration was filed.

On appeal, Mounts argues the ALJ erred in relying upon Dr. Jenkinson's impairment rating since he failed to list the pages, tables, and charts of the AMA Guides used in formulating his opinion. Therefore, his impairment rating is not in conformity with the AMA Guides and cannot be relied upon. He also complains Dr. Jenkinson's opinions are erroneous since they were rendered prior to the fusion surgery.

Mounts complains the ALJ erred in not relying upon Dr. Owen's supplemental report explaining why he did not rely upon certain portions of the

AMA Guides relating to tibiotalar ankle fusion. According to Mounts, Dr. Owen's supplemental report establishes the AMA Guides contain contradictory provisions and his report sets forth the portions of the AMA Guides upon which he chose to rely as opposed to those relied upon by Dr. Primm. In Mounts' view, had the ALJ reviewed Dr. Owen's supplemental report his decision would have been different.

Finally, Mounts argues the ALJ's reliance upon Dr. Primm's opinion that Mounts had a pre-existing condition is in error since he did not have a pre-existing ankle condition prior to the date of injury. He notes all diagnostic tests performed on his ankle occurred post-injury. For reasons not espoused by Mounts, we vacate the ALJ's findings of fact and the award.

ANALYSIS

As an initial matter, we note the parties stipulated Mounts sustained a work-related injury on November 17, 2018, and EKH did not seek to be relieved of the stipulation pursuant to 803 KAR 25:010 §16(2). Thus, the ALJ was tasked with determining the extent of Mounts' injury and was not permitted to find he failed to satisfy his burden of establishing the occurrence of a harmful change in the human organism.

The opinions of Drs. Jenkinson and Primm in concert cannot be relied upon as support for a finding Mounts did not sustain an injury as defined by the Act. Notably, the ALJ stated he was most persuaded by Drs. Primm and Jenkinson and specifically Dr. Primm's criticism of Dr. Owen's opinions. The ALJ found Dr. Primm had convincingly demonstrated Dr. Owen failed to rely upon the correct table and page number relating to the ankle fusion. The ALJ emphasized Dr. Jenkinson

assessed no impairment rating and found no evidence of a change in condition due to the work event, and Dr. Primm found “pre-existing, degenerative, arthritis of the left ankle and a left ankle sprain superimposed on pre-existing degenerative changes.” Relying on the “credible and convincing” opinions of Drs. Primm and Jenkinson, the ALJ found Mounts had not satisfied his burden of establishing a harmful change in the human organism.

In his report under the heading “Summary and Opinion,” Dr. Jenkinson noted there was no indication Mounts received a direct blow to the ankle but had “reported a twisting injury because his foot was ‘trapped.’” The X-ray and CT scan demonstrated pre-existing osteoarthritis with intra-articular loose bodies but revealed “no evidence establishing Mounts had an acute structural injury to the left foot or ankle.” Dr. Jenkinson believed Mounts’ left ankle symptoms were “out of proportion to objective abnormality and the physical examination was characterized by inappropriate pain behaviors.” Dr. Jenkinson concluded there is no evidence Mounts suffered a significant injury “apart from a possible sprain/strain or contusion of the left ankle.” He also concluded there is no evidence Mounts suffered a structural injury to the left ankle due to the November 17, 2018, work injury. Dr. Jenkinson ultimately diagnosed a “possible sprain/strain or contusion of the left ankle,” even though he found no objective findings supporting a diagnosis of a sprain/strain or contusion. According to Dr. Jenkinson, all of the other reported abnormalities are consistent with pre-existing osteoarthritis of the left ankle. Consequently, he found no evidence Mounts suffered any change in condition due to the work event. Similarly, he found no evidence Mounts suffered a structural injury

as all of the abnormalities reported in the left ankle are consistent with pre-existing degenerative arthritis. He assessed no impairment rating pursuant to the AMA Guides. With regard to the possible sprain/strain, Dr. Jenkinson found Mounts reached maximum medical improvement (“MMI”) as of July 23, 2019, the date of his examination.

Diametrically opposed to Dr. Jenkinson’s opinions, Dr. Primm’s report lists the following impressions: 1) Pre-existing degenerative arthritis, left ankle; 2) left ankle sprain superimposed on pre-existing degenerative changes; 3) status post left ankle fusion with a clinically good result. In response to question two posed to him by EKH, Dr. Primm provided the following:

What impairment rating, if any, does the Plaintiff warrant under the 5th Edition of the AMA Guides as it relates to the November 17, 2018, alleged incident? If you disagree with Dr. Owen’s impairment rating, please advise.

Page 541 of the *Guides to the Evaluation of Permanent Impairment, Fifth Edition*, states ‘Ankylosis of the ankle in the neutral position is a 4% whole-person impairment, a 10% lower extremity impairment, and a 14% foot impairment.’ Therefore, I feel this is the appropriate rating, and I note Dr. Owen’s assessment was not correct, since he did not utilize the specific table and page relating to tibiotalar ankle fusions.

Dr. Primm also responded to the following question:

Did the Plaintiff’s described accident require the surgery performed by Dr. McCammon? Is any portion of the surgery due to other non-work-related conditions?

Yes, I agree the arthroscopy probably was reasonable following a sprain superimposed on the preexisting degenerative changes, including multiple loose bodies. However, regarding his fusion, I feel that 50% was due to his preexisting ankle arthritis with associated loose bodies. I also attribute 50% of his total impairment

rating to the preexisting degenerative changes in that ankle.

Since Dr. Primm unequivocally concluded Mounts sustained a work injury generating a 14% impairment rating pursuant to the AMA Guides, the opinions of Drs. Primm and Jenkinson are contradictory. Thus, the ALJ's findings of fact and conclusions of law contain irreconcilable inconsistencies. Consequently, the ALJ cannot rely upon the opinions of Drs. Primm and Jenkinson in finding Mounts did not sustain a permanent injury and a harmful change in the human organism did not occur. Dr. Primm diagnosed a left ankle sprain superimposed on pre-existing degenerative changes for which he assessed a 14% impairment rating as a result of the work injury. On the other hand, Dr. Jenkinson did not believe an injury occurred. For this reason alone, the ALJ's findings of fact and the award must be vacated.

Moreover, due to the parties' stipulation, the ALJ could not rely upon Dr. Jenkinson's opinion that there was only a possible sprain/strain. The Kentucky Supreme Court's holding in Sowder v. CBS Corporation, 2020-SC-0446-WC, rendered September 30, 2021, Designated Not To Be Published, is instructive. There, the ALJ relied upon the opinions of Dr. Rolando Puno who stated "the successful spinal fusion achieved for the treatment of the burse fracture could have contributed to early development of degenerative disc disease at L4-5 and L5 for which additional intervention surgery had been performed." This Board reversed and concluded Dr. Puno's letter, standing alone, did not constitute substantial evidence supporting the ALJ's determination the 2019 surgery is causally related to the April 2006 work injury. The Board reasoned Dr. Puno's opinion was not founded on

probability but rather on possibility. The claim was remanded to the ALJ for re-examination of the medical evidence. The Kentucky Court of Appeals affirmed. The Supreme Court affirmed the Court of Appeals holding as follows:

In workers' compensation claims "[m]edical causation must be proved to a reasonable medical probability with expert medical testimony" *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004). The ALJ was required to determine whether Sowder's 2019 surgery was causally related to the 2006 work injury. In support of the medical fee dispute, CBS presented Dr. Gundanna's report and Dr. Travis's report. Sowder submitted his medical records from Dr. Puno, but those records only included notations from three visits on September 11, 2017, July 18, 2018 and August 27, 2018. Sowder also filed a notice of disclosure stating he relied on prior testimony and evidence previously presented in the underlying workers' compensation claim. The ALJ reviewed the 2008 settlement agreement and Dr. Puno's April 16, 2019 letter containing the "could have contributed" language. Plainly, Dr. Puno's opinion does not constitute proof "to a reasonable medical probability" that the 2019 surgery was related to the 2006 work injury. *Id.*

While neither the use of particular "magic words" nor specific objective medical findings is required, "the quality and substance of a physician's testimony ... determines whether it rises to the level of reasonable medical probability, i.e., to the level necessary to prove a particular medical fact." *Id.* (citing *Turner v. Commonwealth*, 5 S.W.3d 119, 122-23 (Ky. 1999)). Dr. Puno's opinion on medical causation was two sentences long and he opined that the 2006 work injury and successful fusion "could have contributed" to degenerative disc disease at L4-L5 and L5-S1, necessitating surgical intervention. He provided no further explanation for this very attenuated opinion.

As our predecessor court stated, "medical-opinion evidence [must] be founded on probability and not on mere possibility or speculation" *Young v. L.A. Davidson, Inc.*, 463 S.W.2d 924, 926 (Ky. 1971). While he was not required to use the phrase "in terms of

reasonable medical probability” more was required by law. Dr. Puno's opinion was founded on the mere possibility that the 2019 surgery was related to the 2006 work injury and that's simply not in accord with Kentucky law.

The ALJ cited Dr. Puno's letter and nothing more to support a finding of compensability. Notably, the parties waived a hearing as to the medical fee dispute. The only new evidence produced by the parties was Dr. Puno's letter and the opinions of Dr. Gundanna and Dr. Travis. Since Dr. Puno's opinion was not couched in terms of reasonable medical probability, the only remaining evidence in the record consists of the opinions of Dr. Travis, who believed that the 2019 surgery was not necessary, reasonable or causally related to the 2006 work injury, and Dr. Gundanna, who expressed a similar opinion.

Slip Op. at 3-4.

Since Dr. Jenkinson opined Mounts sustained a possible sprain/strain or contusion to the left ankle, the ALJ could not rely upon that diagnosis as it is not couched in terms of reasonable medical probability as required by law. The parties' stipulation Mounts sustained a work injury prohibited the ALJ from relying upon Dr. Jenkinson's diagnosis in determining the nature and extent of Mounts' work injury. More importantly, the ALJ cannot rely upon Dr. Primm's opinions as support for a finding that Mounts failed to establish the occurrence of a harmful change to the human organism as his opinions unequivocally establish Mounts sustained a permanent injury meriting an award of future income and medical benefits. We emphasize the parties' stipulation controls the extent of the ALJ's findings in the case *sub judice* as he was not permitted to find Mounts did not sustain a work injury. Therefore, the ALJ's findings of fact, conclusions of law, and award must be vacated.

Moreover, the ALJ cannot base an award of TTD benefits upon Dr. Jenkinson's opinion since he found the existence of only a possible sprain/strain or contusion of the left ankle. Our review of his report reveals Dr. Jenkinson did not diagnose an aggravation of a pre-existing degenerative condition. Rather, he diagnosed "possible sprain/strain or contusion of the left ankle." Consequently, the award of TTD benefits must also be vacated.

All parties to a workers' compensation dispute are entitled to findings of fact based upon a correct understanding of the evidence submitted during adjudication of the claim. Where it is demonstrated, as in the case *sub judice*, the fact-finder held an erroneous understanding of relevant evidence in reaching a decision, the Courts have authorized remand to the ALJ for further findings. See Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Company, 788 S.W.2d 269 (Ky. 1990).

On remand, since the parties' stipulated Mounts sustained a work injury, the ALJ may not rely upon Dr. Jenkinson's diagnosis of a possible sprain/strain of the left ankle since his opinion was not based on reasonable medical probability. Thus, the ALJ must rely upon either Dr. Primm's opinions or Dr. Owen's opinions in determining the extent and duration of Mounts' work-related injury.

In summary, because the findings of fact and conclusions of law contain internal inconsistencies which cannot be reconciled with the ALJ's ultimate decision, we are compelled to vacate the decision and remand for entry of an amended opinion and award. The ALJ erroneously relied upon Dr. Jenkinson's

opinions since his diagnosis is not couched in terms of reasonable medical probability but merely a possibility. Since the parties' stipulated Mounds sustained a work-related injury, only the opinions of Dr. Primm and Dr. Owen are relevant to the inquiry of the nature and extent of Mounds' injury as their opinions are expressed in terms of reasonable medical probability.

Finally, we are compelled to address the fact Mounds did not file a Petition for Reconsideration. Mounds' failure to file a Petition for Reconsideration is not fatal to his appeal nor is this Board prohibited from reaching issues not raised by Mounds on appeal as the Board is charged with ensuring the ALJ's decision is based on a thorough understanding of the medical evidence. The Supreme Court in Wilkerson v. Kimball International, Inc., 585 S.W.3d 231, 236-237 (Ky. 2019) is on point.

Prior to reaching the merits of Wilkerson's claims to this Court, we must first address Kimball's assertion that Wilkerson's appeal should be dismissed based on his failure to file a petition for reconsideration with the ALJ. KRS 342.281 provides that

any party may file a petition for reconsideration of the award, order, or decision of the administrative law judge. The petition for reconsideration shall clearly set out the errors relied upon with the reasons and argument for reconsideration of the pending award, order, or decision The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision.

In arguing for dismissal, Kimball relies on KRS 342.285(1) which states:

An award or order of the administrative law judge as provided in KRS 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, but either party may in accordance with administrative regulations promulgated by the commissioner appeal to the Workers' Compensation Board for the review of the order or award.

Kimbell further relies on this Court's previous decision in *Eaton Axle Corp. v. Nally* to support his argument for dismissal. 688 S.W.2d 334 (Ky. 1985). In *Eaton Axle*, however, we merely stated that "no award, order or decision of the [ALJ] shall be reversed or remanded on appeal to any court because of failure of said [ALJ] to make findings of an essential fact unless said failure is brought to the attention of the [ALJ] by Petition for Rehearing pursuant to KRS 342.281." *Id.* at 338. This Court's concern was with the "multitude of cases annually [being] remanded ... for Findings of Fact on issues essential to the Opinion and Order." *Id.* at 337. To address this concern, we held that "before beginning the appellate process which utilizes the court system, the claimant, employer or any other party involved in the case ... seeks an appeal on errors which are patent upon the face of the award, order or decision, he *must* first file a Petition for Reconsideration pursuant to KRS 342.281." *Id.* at 338.

While the plain language of KRS 342.285(1) refers only to an ALJ's findings of fact, KRS 342.285(2) sets forth the questions of law that a reviewing court may consider. As we explained in *Abel Verdon Construction v. Rivera*,

KRS 342.285(2) and KRS 342.290 limit administrative and judicial review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers;" whether the decision "was procured by fraud;" or whether the decision was erroneous as a matter of law. Legal errors would include whether the ALJ misapplied Chapter 342 to the facts;

made a clearly erroneous finding of fact;
rendered an arbitrary or capricious
decision; or committed an abuse of
discretion.

348 S.W.3d 749, 753-54 (Ky. 2011) (footnotes omitted).
In reading KRS 342.285(1) with our statement in *Abel
Verdon Construction*, this Court can still review whether
the ALJ “rendered an arbitrary or capricious decision[]
or committed an abuse of discretion” using the above
defined standard of review. *Id.* The issues of whether
substantial evidence supported the ALJ’s findings and
whether the evidence would compel a different result are
questions of law that this Court can, and must, address.

Accordingly, the findings of fact, conclusions of law, and award
contained in the July 26, 2021, Opinion and Order are **VACATED**. This claim is
REMANDED to the ALJ for entry of an opinion in accordance with the views
expressed herein.

ALVEY, CHAIRMAN, CONCURS.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON GLENN HAMMOND
P O BOX 1109
PIKEVILLE KY 41502

LMS

COUNSEL FOR RESPONDENT:

HON J GREGORY ALLEN
P O BOX 1139
PIKEVILLE KY 41502

LMS

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN WEATHERBY
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601

LMS