

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 10, 2020

CLAIM NO. 200700752 & 199975758

FORD MOTOR COMPANY

PETITIONER/
CROSS-RESPONDENT

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

JENNIFER QUINN SMITH
AND
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENT/
CROSS-PETITIONER

RESPONDENT

**OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING**

* * * * *

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

ALVEY, Chairman. Ford Motor Company (“Ford”) appeals and Jennifer Quinn Smith (“Smith”) cross-appeals from the Opinion, Order and Award rendered April 20, 2018 by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ determined Smith’s low back condition has worsened since December 21, 2007

and she is now permanently totally disabled. The ALJ awarded permanent total disability (“PTD”) and medical benefits. Ford and Smith also appeal from the June 18, 2018 Order ruling on their respective petitions for reconsideration.

On appeal, Ford argues Smith’s motion to reopen was untimely pursuant to KRS 342.125(3), which became effective July 14, 2018. Ford also argues Smith failed to prove her lumbar condition had worsened as required by KRS 342.125. Ford argues the ALJ abused his discretion by failing to dismiss the claim due to Smith’s failure to prosecute. Ford alternatively argues no interest is due based upon Smith’s delay pursuant to KRS 342.040(1), which also became effective July 14, 2018. Ford also argues Smith’s award of PTD benefits should terminate upon her reaching age seventy pursuant to KRS 342.730(4) also effective July 14, 2018. On cross-appeal, Smith argues the recent amendments to KRS 342.730(4), KRS 342.125(3), and any potential retroactivity of the interest provision contained in KRS 342.040(1) are unconstitutional.

We affirm in part, but find the ALJ failed to perform the appropriate analysis regarding whether Smith is now permanently totally disabled pursuant to Ira Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000) and City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015). This claim is remanded for the ALJ to perform the appropriate analysis in accordance with the direction provided by the Kentucky Supreme Court. The ALJ is also directed to conform any award of benefits to KRS 342.730(4) as amended in 2018.

Smith filed a Form 101 on February 27, 2002 alleging she injured her back on June 18, 1999 while working on the assembly line at Ford, and subsequently

developed depression. Smith underwent a decompressive hemilaminotomy, partial facetectomy, and discectomy at left L4-5 on November 4, 1999. She also underwent decompressions on the right at L4-5 and bilaterally at L5-S1 on March 19, 2001. The settlement agreement for her claim was approved on June 5, 2003. The settlement agreement reflects Dr. Warren Bilkey assessed a 23% impairment rating on May 7, 2002 and Dr. Martyn Goldman assessed a 10% impairment rating on July 25, 2002 pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). The settlement agreement reflects Smith returned to work on May 6, 2001. The parties settled the claim for income benefits in lump sum, and Smith retained her right to medical expenses related to her physical and alleged psychological injuries.

Smith filed a motion to reopen on June 5, 2007 alleging her low back condition had worsened since the June 5, 2003 settlement. She argued she sustained cumulative trauma injuries secondary to her return to work after June 5, 2003. She also alleged a new acute low back injury occurring on April 2, 2004. The parties settled the claim inclusive of her new injury and reopening, which was approved on December 21, 2007. The settlement agreement reflects Dr. Bilkey assessed a 26% impairment rating on May 29, 2007. The parties noted the compromised settlement reflected an increased impairment from the June 18, 1999 injury, with no impairment attributable to either the alleged cumulative trauma injury or new injury. The parties settled for a lump sum, again with Smith retaining her right to medical expenses related to her physical and alleged psychological injuries.

On December 21, 2011, Smith filed a motion to reopen her claim from the 1999 work injury, her cumulative trauma injuries, and the April 2, 2004 work injury. Smith alleged her conditions have worsened since the December 21, 2007 settlement and she is now permanently totally disabled. In support of her motion, Smith attached an affidavit and several records from Dr. Bilkey.

Ford objected to Smith's motion to reopen on several grounds. Of relevance to this appeal, Ford asserted the motion to reopen was barred by the statute of limitations contained in KRS 342.125(3) since it was filed more than four years after the original settlement entered on June 5, 2003. In an Order dated August 2, 2012, Hon. Steven G. Bolton, Administrative Law Judge ("ALJ Bolton"), granted Smith's motion to reopen and entered a scheduling order. ALJ Bolton noted the Kentucky Supreme Court held the four-year statute of limitations contained in KRS 342.125(3) is calculated from the date of the last order granting benefits. Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008). The motion to reopen was filed exactly four years after the December 21, 2007 settlement, and was therefore timely. In an Order rendered August 24, 2012, ALJ Bolton denied Ford's Petition for Reconsideration.

Smith testified by deposition on October 17, 2012 and January 4, 2017, and at the final hearing held February 28, 2018. Smith began working at Ford on April 1, 1998. On June 18, 1999, Smith sustained a herniated disc at L4-5 at Ford, which was settled by agreement in June 2003. Smith then slipped at work on April 2, 2004, again injuring her low back, and she also alleged she sustained cumulative trauma injuries while working for Ford. Smith was fired from Ford in

January 2006. Smith filed a motion to reopen her claim in June 2007, which was resolved by settlement in December 2007. Smith moved to Florida in October 2011.

When she last worked for Ford in January 2006, she was performing a lighter duty job applying striping stickers. She was required to stand and reach overhead throughout her shift. Smith was restricted from repetitive bending and twisting, from lifting over ten pounds, and required the ability to sit or stand as needed. When she settled her claim in December 2007, Smith worked for Heavenly Scent, a house cleaning company, where she was employed for approximately one year. Smith testified at the first deposition that she cleaned a couple of houses on her own afterward until she moved to Florida. At her second deposition, Smith testified she cleaned houses on her own until approximately 2007 or 2008. She stopped cleaning houses because, "I just couldn't do it anymore, it was taking me too long to do it and hurting me so bad." Smith has not looked for work since moving to Florida and has applied for Social Security disability benefits based upon her low back and psychological conditions.

Smith testified she treated with Drs. Nelson and Reasor (first names not provided), both pain management physicians in Kentucky, from 2007 to 2011. Dr. Nelson prescribed narcotic pain medication, radiofrequency lesion injections, and a trial spinal cord stimulator, which ultimately failed. Prior to moving to Florida, Smith also saw Dr. Bilkey on several occasions. Smith began treating with Dr. George Sidhom, a pain management physician, on a monthly basis after moving to Florida. Dr. Sidhom adjusted her medications and implanted a pain pump consisting of Morphine and Dilaudid in January 2014. At her first deposition, Smith

testified Dr. Sidhom prescribed Oxycodone, Methadone, Lyrica, and Lexapro. Smith was prescribed medication intermittently for her psychological condition while she lived in Kentucky. In Florida, Smith treated for her depression with Dr. Alfred Alingu. She currently treats with a nurse practitioner at Dr. Tanveer Chaudhry's office every three months for her depression.

Smith believes her restrictions have increased since January 2006 when she last worked for Ford. Smith similarly believes her limitations and abilities have worsened since December 2007 and she is now unable to perform the job she last held at Ford. Smith also believes she is unable to clean houses, even on a part-time basis, or work in an office setting. Smith testified her ability to sit and stand for prolonged periods have worsened over the years. Smith testified she experienced depression during the period between her work injury and December 2007, which has worsened due to the deterioration of her low back condition, pain, and her limited functionality. Smith acknowledged she received in-patient treatment at Ten Broeck Hospital in 2005 due to cocaine dependency, and depression.

Dennis Devore, a claims adjuster for Ford, testified at the hearing. Ford paid a total of \$50,845.00 in temporary total disability benefits after the 1999 work injury and has paid for all of Smith's medical expenses incurred in Florida.

Voluminous treatment records were filed into the record. Smith began treating with Dr. Sidhom at Hernando Pain Management Center in Florida on January 2, 2012 for chronic low back pain radiating into one or both of her lower extremities. Dr. Sidhom has continued to treat Smith monthly since January 2012. Dr. Sidhom initially prescribed Methadone, Oxycodone, Lyrica and Lexapro. He

also recommended epidural injections and physical therapy. In late 2013, Dr. Sidhom recommended implanting an intrathecal pain pump following a successful trial in January 2014. Smith continued to treat with Dr. Sidhom monthly for pain pump refills and medication management. On January 8, 2018, Smith reported chronic back pain with intermittent exacerbations. Dr. Sidhom diagnosed chronic low back and left lower extremity pain; status post back surgery times two, most recent in 2001; chronic lumbar radiculopathy; failed back surgery syndrome; and history of work-related injury on June 18, 1999. Dr. Sidhom reprogrammed and refilled the pain pump with Morphine Sulfate and Dilaudid and recommended continuing the current medications of Oxycodone, Neurontin, and Amitiza.

Dr. Alingu treated Smith for depression on several occasions in 2014. He diagnosed her with major depression, recurrent episode; generalized anxiety; low back pain; and HNP-lumbar. He recommended conservative treatment and referred Smith to a psychiatrist.

Dr. Chaudhry's records reflect he and his nurse practitioner, Elizabeth Church, APRN ("Nurse Church"), began treating Smith in December 2015 for major depressive disorder and generalized anxiety. Smith sees Nurse Church every three months and is prescribed medication.

The August 1, 2005 record from Ten Broeck Hospital reflects Smith was admitted for inpatient care and recurrent depression, which had significantly worsened due to her cocaine dependency. Smith was diagnosed with cocaine dependency, recurrent major depression, pneumonia, and chronic back pain.

Smith filed multiple records and a series of questionnaires completed by Dr. Bilkey. He performed an independent medical evaluation on May 29, 2007. He noted he had previously evaluated Smith on May 7, 2002, and assessed a 23% impairment rating. He noted the original June 18, 1999 low back injury and two subsequent surgeries. He also noted Smith's treating physician had recommended a fusion surgery, which Smith declined. Dr. Bilkey also noted the new April 2, 2004 work injury. At that time, Smith reported low back pain radiating into the left leg, and depression she attributed to her chronic pain condition. Dr. Bilkey noted Ford fired Smith in January 2006 and she began cleaning houses which aggravated her pain. Dr. Bilkey performed an examination and recorded range of motion measurements.

Dr. Bilkey diagnosed Smith with a lumbar disc herniation at L4-5 treated by surgical decompression; lumbar lateral recessed stenosis at L5-S1 and recurrent disc protrusion at L4-5 treated by two level decompressive surgeries; low back pain; and depression related to chronic pain, all attributable to the 1999 work injury. Dr. Bilkey recommended continued medication management and consideration of an intrathecal morphine pump and lumbar fusion procedure. Dr. Bilkey opined Smith's condition had worsened significantly since May 7, 2002 due to the additional April 2, 2004 injury and the severity of her lumbar disc disease worsening over time. Dr. Bilkey restricted Smith from lifting over fifteen pounds only occasionally, and from repetitive bending and twisting, climbing ladders, and prolonged sitting or standing. He noted Smith should not sit or stand for more than thirty minutes continuously. Dr. Bilkey assessed a 14% impairment rating for the

two surgeries, 12% for loss of range of motion, and 3% for chronic pain pursuant to the AMA Guides for a combined 26% impairment rating for Smith's lumbar spine. He opined Smith is no longer able to perform the job she held at Ford at the time of the 1999 work injury and 2003 settlement.

Smith filed Dr. Bilkey's October 27, 2011 clinical note indicating he had last treated her on April 15, 2008. Dr. Bilkey noted Smith had not worked in the past four years and reported low back pain radiating into her legs, as well as sensory loss in her left thigh. Dr. Bilkey performed an examination, and recorded range of motion measurements. Dr. Bilkey provided the same diagnoses and noted the following:

Overall Ms. Smith appears to be slowly worsening over time. She is troubled by chronic low back pain which limits her activities in a severe fashion. She has not been able to work even for practical purposes and a part-time setting cleaning houses occasionally. The depression problem has not been appropriately evaluated and treated. This goes on as well as it would be expected to, in response to her chronic pain.

Dr. Bilkey recommended an evaluation for depression and the continuation of analgesic medication support for pain control.

Dr. Bilkey also completed multiple yes/no questionnaires submitted by counsel for Smith. In an October 27, 2011 questionnaire, Dr. Bilkey answered "yes" to the following questions:

Has [Smith] had a change since 12/19/07 of the condition of her lumbar spine as a result of the worsening and natural progression of her work injuries on 06/18/99 and 04/02/04?

Has the condition of [Smith's] low back caused and brought about by her work injuries on 06/18/99 and 04/02/04 worsened and progressed since 12/19/07?

Dr. Bilkey restricted Smith from lifting over twenty pounds occasionally and ten pounds frequently. Dr. Bilkey stated Smith can work while sitting two to three hours out of an eight-hour day and can sit continuously for forty-five minutes. Smith can work while standing for one hour out of an eight-hour day and can stand continuously for ten minutes. Dr. Bilkey stated Smith is unable to work an eight-hour per day even with a sit/stand option. He opined even a light job would require her to take frequent breaks to lie down and she would miss work frequently and unpredictably. Dr. Bilkey opined the restrictions he recommended are due to the 1999 and 2004 work injuries, and she should continue to treat with her pain management physician. He indicated Smith's change in condition since December 2007 has been a substantial factor in increasing her limitations and restrictions.

In a December 21, 2011 questionnaire, Dr. Bilkey indicated Smith's impairment rating has increased since the December 2007 settlement and she likely warrants an impairment rating pursuant to the Second Edition of the AMA Guides for her psychological condition.

Dr. Bilkey treated Smith on October 18, 2012. Smith reported her condition had progressively worsened. After performing an examination, Dr. Bilkey stated, "Overall Ms. Smith appears to be clinically stable although symptomatically worse. The best options for her I think are to continue with pain management But she will be requiring medications for pain management long term."

In a May 19, 2016 questionnaire, and in his deposition, Dr. Bilkey indicated he had reviewed Dr. Sidhom's treatment records from 2012 through 2015 and Smith continues to have a 26% impairment rating. He also opined Smith's depression is ratable and it has worsened since the 2007 settlement.

In a May 10, 2017 questionnaire, Dr. Bilkey stated he had reviewed the records from Nurse Church and Dr. Sidhom. Using a Beck's depression inventory completed by Smith, Dr. Bilkey opined she has a 5% psychological impairment rating in December 2007 and a 10% psychological impairment rating in December 2011 pursuant to the Second Edition of the AMA Guides. Dr. Bilkey opined Smith's depression currently warrants a 20% psychological impairment rating pursuant to the Second Edition of the AMA Guides.

Dr. Bilkey completed a September 19, 2017 questionnaire. He reviewed descriptions of three jobs Smith performed while working for Ford, and opined she does not retain the physical capacity to perform any of them.

Dr. Bilkey also testified by deposition on January 15, 2013 and June 6, 2017. He first examined Smith in 2002 and then on May 29, 2007 for independent medical evaluations. He then began treating Smith, and saw her on October 27, 2007, four occasions in 2008, October 27, 2011 and October 18, 2012. In comparing the range of motion measurements from May 2007 and October 2011, Dr. Bilkey acknowledged some had improved and some remained the same. Dr. Bilkey noted both back bending at T12 and forward bending at T12-S1 had worsened. Dr. Bilkey acknowledged he had assessed a 12% impairment rating for loss of range of motion in 2007, and an 11% impairment rating for loss of range of motion in 2011 and 2012

pursuant to the AMA Guides. Dr. Bilkey noted he had assessed a combined 26% impairment rating for Smith's lumbar condition in May 2007, and she continued to retain a 26% impairment rating in 2011 and 2012 pursuant to the AMA Guides.

After questioning about the range of motion measurements and reported pain intensity in 2007 and 2011, Dr. Bilkey opined Smith's condition has worsened since 2007. He explained as follows:

A: I don't think that she is subjectively better now than she was back in '07. The numbers, the visual analogue scale numbers say yes, but I think it's more complex than that, and I can tell you the general trends that have gone on since that time that weigh on my opinion here.

One trend is there's a huge change in the narcotic pain medication she is taking. Back in '07, she was taking Hydrocodone, and now she's on Methadone. Cancer pain would be less on that than it would be on Hydrocodone, so the raw number on pain intensity given that change in medications, the raw number doesn't mean much.

The second thing is, there was increasing concern between the time of the IME in this last two visits where depression seemed to be a significant issue. . . .

You have in addition to that, medically probably a decline in the amount of radiculopathy, which is why the pins and needles I think was present in '07, not so much now. But along with that, I think is a shift so that the disc itself is a generator of pain, that is the disc is sore, it's cracked up, and has been operated on twice at the L4-5 level. I think that's why Guarnaschelli recommended a fusion as long ago as what I mentioned in '07, but she hasn't had that done, so it's simply a painful disc. Sometimes they auto fuse. That seems not to be the case here, but you have these different trends all happening.

That's why I think it's not such a simple thing to simply look at those raw numbers and say, ah, automatically, we know that she's better or worse. I think it's far more

complex than that Well, you volunteered that she is no worse. I frankly think she is. And I stated that in my last clinical report. I stated that in my opinion, overall, Ms. Smith appears to be clinically stable, although symptomatically worse in the year interim between '12 and '11.

Dr. Bilkey's examination revealed tightness in the hip muscles, weakness of the hip flexors and extensors on the left, and spasm of the back extensors and gluteus maximus on both sides and the quadratus on the right. He noted the spasms and decreased range of motion measurements objectively evidence a worsening of her condition. He reiterated Smith's pain "requires a lot of narcotics at this point," requires restrictions, and limits her physical activity. Dr. Bilkey noted that although Smith's pain is probably no greater than it was in 2007, her overall problem has progressed. Dr. Bilkey testified Smith is unemployable and agreed that in 2007 he had not opined that Smith was unable to work an eight-hour day even with sit/stand options. Dr. Bilkey noted Smith underwent discectomies on two occasions at L4-5 and agreed it is reasonably likely the pain has worsened over time. He also stated that gradual progression is the natural history of degenerative disc disease.

Smith also submitted multiple yes/no questionnaires completed by Dr. Sidhom. In a February 1, 2013 questionnaire, Dr. Sidhom reviewed and agreed with Dr. Bilkey's restrictions addressing her capacity to sit and stand for prolonged periods, and she is unable to work an eight-hour day even with a sit/stand option. On January 10, 2014, Dr. Sidhom indicated Smith's condition had worsened, and he recommended installing a pain pump which was approved. On January 17, 2014, Dr. Sidhom stated Smith had not yet attained maximum medical improvement

("MMI"). On April 18, 2016, Dr. Sidhom indicated Smith's condition had worsened since he began treating her and had reached MMI. Dr. Sidhom stated Smith could perform two to three hours of work while sitting out of an eight-hour workday; two to three hours of work while standing out of an eight-hour workday; sit continuously for up to forty-five minutes, and stand continuously for up to thirty minutes. He recommend she lift no more than ten pounds occasionally, or lift overhead more than ten pounds occasionally. He also recommend she avoid climbing, balancing, stooping, crouching, crawling or bending. Like Dr. Bilkey, Dr. Sidhom agreed Smith is unable to work a full eight hours per day even with a sit or stand option. On May 8, 2017, Dr. Sidhom agreed Smith's pain from her physical injuries enhanced her depressive symptoms.

Ford filed Dr. Michael Best's October 17, 2012 report. He noted the history of the 1999 work injury and two lumbar surgeries. Dr. Best reviewed the medical records and noted Smith ceased working for Ford in January 2006. Dr. Best noted Smith "has an absolutely normal examination." (original emphasis). Smith also underwent a functional capacity evaluation and was able to lift into the medium duty work category. Dr. Best assessed an 11% impairment rating pursuant to the AMA Guides for Smith's previous lumbar surgeries. He opined Smith's "impairment rating has certainly improved, as has her function, as noted by her photographs and the examination that I performed today." He opined Smith is capable of gainful employment, but restricted from lifting no greater than fifty pounds. Dr. Best opined Smith's lumbar condition had not worsened based upon his examination and review of Dr. Sidhom's records.

Ford filed Dr. Chaudhry's April 3, 2017 questionnaire. Pursuant to the Second Edition of the AMA Guides, Dr. Chaudhry assessed a 0% psychiatric impairment rating, noting Smith has no psychiatric disability. Smith filed the February 13, 2018 questionnaire completed by Dr. Chaudhry indicating her lumbar pain is a substantial factor in causing her depression.

Ford also filed Dr. Timothy Allen's August 29, 2017 report. He opined an accurate assessment of psychiatric impairment must include an in-person evaluation accompanied by testing with objective measures, which was not done by Dr. Bilkey.

Ford also filed the November 8, 2007 deposition testimony of Lonnie Corkum, the Senior Labor Relations Representative for Ford. He testified Smith was terminated from Ford on January 12, 2006 due to continuous absenteeism.

The February 28, 2018 Benefit Review Conference Order and Memorandum ("BRC Order") reflects "worsening of condition of the low back and psychological component" as the only issue preserved for decision by the ALJ. In the Opinion, the ALJ first determined any worsening of depression is not causally work-related. The ALJ stated as follows regarding Smith's alleged worsening of her low back condition and entitlement to PTD:

14. The Plaintiff is alleging a worsening of her condition since the effective date of her last settlement, December 21, 2007. The Plaintiff relies upon the opinion of Dr. Bilkey to support this assertion. Dr. Bilkey has diagnosed low back pain secondary to a lumbar disc herniation at L4-5, lumbar lateral recess stenosis at L5-S1 with recurrent disc protrusion at L4-5, and the two-level compressive surgery involving L4-5 and L5-S1.

15. Dr. Bilkey opined that the Plaintiff has experienced a slow worsening of her condition since the time of the settlement and issued significant restrictions. He concluded based upon those restrictions, that even if she were to work a light duty job, she would have to take frequent breaks to lie down. The ALJ finds that the testimony of the Plaintiff was also candid and convincing and further finds that the opinion of Dr. Bilkey best explains the progression of symptoms that the Plaintiff credibly described. The ALJ finds that this lends additional credibility to the opinion of Dr. Bilkey in this matter.

16. 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); *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999).

17. The ALJ finds that the opinion of Dr. Bilkey is convincing and that his opinion regarding the extent of the injury and the worsening of the Plaintiff's condition. The ALJ finds that Dr. Bilkey's opinion outweighs the opinion of Dr. Best to the contrary because Dr. Bilkey treated the Plaintiff for years and has personally witnessed and documented the deterioration in her condition. The ALJ finds that he is best qualified to opine regarding the change of condition and finds that his opinion is credible and convincing.

18. The ALJ is not persuaded by the opinion of Dr. Best who has opined that the Plaintiff's condition has actually improved based upon notes from Dr. Sidhom indicating an increase in the Plaintiff's activities of daily living. The ALJ finds that the opinion of Dr. Best lacks credibility because the increased activity to which he refers appears to have been enabled only by the Plaintiff's taking of pain medication. The ALJ finds that the opinion of Dr. Best therefore is outweighed by that of Dr. Bilkey.

19. 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. *Hill v. Sextet Mining Corporation*, 65 SW3d 503 (KY 2001).

20. “Work” is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. *Ira A. Watson Department Store v. Hamilton*, 34 SW3d 48 (KY 2000). In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker’s age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of “work” under normal employment conditions. *Id.*

21. Dr. Bilkey credibly opined that the Plaintiff could not lift more than 20 pounds on a single occasion, that she could only sit for 2-3 hours per day while working and only 45 minutes at a time. He also said that she could only perform work while standing for 1 hour per day and could only stand for 10 minutes continuously and could not perform an 8 hour per day job even with a sitting and standing option. Dr. Bilkey concluded that if the Plaintiff tried to work even a light duty job, she would have to take frequent breaks to lie down and would miss work unpredictably.

22. The ALJ finds that these significant restrictions would not allow the Plaintiff to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy. The ALJ therefore finds that the Plaintiff is permanently and totally disabled as a result of her physical injuries suffered while employed by the Defendant.

The ALJ dismissed Smith's claim for a worsening of her psychological condition. The ALJ awarded PTD benefits commencing on August 13, 2013, subject to the tier down provision contained in the 1994 version of KRS 342.730(4) and medical benefits for the work-related low back injury.

Ford filed a Petition for Reconsideration alleging multiple errors. It requested the ALJ make additional findings of fact and conclusions of law addressing the credibility of Dr. Bilkey's report; to make threshold findings as to Smith's medical condition, impairment and restrictions in 2007 and cite to objective findings supporting a worsening in 2011 and thereafter; whether the claim should be dismissed for failure to prosecute; whether the ALJ abused his discretion in allowing Smith to file evidence outside of the proof schedule on multiple occasions; whether Dr. Bilkey's reports and questionnaires were properly filed on a Form 107 or pursuant to 803 KAR 25:010 §1 and explain with specificity why he failed to strike those records; why Smith's counsel has not been sanctioned for improper delays; address whether Ford is entitled to costs to be assessed against Smith's counsel and/or 0% interest; retroactivity of House Bill 2; amend the award to reflect Smith is entitled to indemnity benefits until the age of seventy pursuant to the recent amendments of KRS 342.730(4); and whether it is entitled to a credit for benefits previously paid to Smith pursuant to the 2003 and 2007 settlements.

Smith filed a Petition for Reconsideration asserting she is entitled to benefits throughout the lifetime of her disability, that she is entitled reimbursement for medical expenses related to her psychological condition despite the finding her

depression has not worsened, and that her award of PTD benefits should commence on December 21, 2011.

In the June 18, 2018 Order, the ALJ amended the award of PTD benefits to commence on December 21, 2011. In all other respects, the ALJ denied Smith's petition. The ALJ denied Ford's petition in its entirety. He reiterated that he found Smith's testimony credible and "was a key factor underscoring the reliance upon the opinion of Dr. Bilkey..." He found the deterioration of Smith's condition well documented and convincing. The ALJ also reiterated he found Dr. Bilkey's opinions outweighed those expressed by Dr. Best. The ALJ awarded PTD benefits commencing on December 11, 2011, subject to the tier-down provision of the 1994 version of KRS 342.730(4), and medical expenses for the work-related low back injury and resulting depression.

On appeal, Ford argues the December 11, 2011 motion to reopen was untimely pursuant to the most recent amendment to KRS 342.125(3) effective July 14, 2018, and should be dismissed. Ford argues this provision is retroactive and constitutional, and applies to claims reopened prior to July 14, 2018. In support of its argument, Ford points to KRS 342.125(8) and the Legislative Research Commission Note. It also argues KRS 342.125(6) has no effect upon the procedural requirements for filing a motion to reopen pursuant to KRS 342.125(3) and (8). Therefore, Ford asserts Smith's time to reopen her claim for worsening of condition expired on June 5, 2007, four years following the date of the original settlement. Ford argues Smith failed to prove a change in condition as required by KRS 342.125. Ford emphasizes Dr. Bilkey's deposition testimony where he acknowledged Smith's

range of motion impairment decreased from 12% in 2007 to 11% in 2011. Ford also asserts the ALJ failed to determine what Smith's condition was in 2007 and compare it to her condition in 2011. According to Ford, either her condition improved, or remained the same.

Ford argues the ALJ abused his discretion in failing to dismiss the claim due to failure of Smith's counsel to prosecute. Ford notes the ALJ allowed the case to continue for nearly six years at Smith's request, and constitutes an abuse of discretion. In the alternative, Ford argues no interest should be awarded pursuant to KRS 342.040(1) effective July 14, 2018. Ford argues the award of PTD benefits should terminate at age seventy based upon the recent amendments to KRS 342.730(4) effective July 14, 2018, and Holcim v. James Swinford, 581 S.W.3d 37 (Ky. 2019).

On cross-appeal, Smith filed two notices of constitutional challenge asserting the tier down provision pursuant to the 1994 version of KRS 342.730(4), KRS 342.730(4) effective July 14, 2018, and KRS 342.125 effective July 14, 2018, and KRS 342.040(1) addressing interest, effective July 14, 2018 all violate the United States and Kentucky constitutions. Smith argues she is entitled to lifetime PTD benefits.

We note multiple issues were raised on appeal to this Board, which were not preserved in the February 28, 2018 BRC Order. As we noted previously, the only issue preserved in that order was "worsening of condition of the low back and psychological component." 803 KAR 25:010(12) specifically states, "[o]nly contested issues shall be the subject of further proceedings."

The timeliness of Smith's motion to reopen was not properly preserved as an issue for appeal since it was not identified as a contested issue in the BRC order. Even if it had been properly preserved, we determine the recent changes in KRS 342.125(3), as reflected in House Bill 2 and effective July 14, 2018, are not applicable to this claim. Those changes reflect as follows:

... no claim shall be reopened more than four (4) four years following the date of the original award or original order granting or denying benefits, when such an award or order becomes final and nonappealable, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party. Orders granting or denying benefits that are entered subsequent to an original final award or order granting or denying benefits shall not be considered to be an original order granting or denying benefits under this subsection and shall not extend the time to reopen a claim beyond four (4) years following the date of the final, nonappealable original award or original order.

However, this motion to reopen was filed on December 21, 2011. The ALJ ultimately rendered an Opinion on April 20, 2018 and an Order on the petitions for reconsideration on June 18, 2018. Approximately one month later, House Bill 2 became effective while the claim was pending on appeal to this Board. We do not believe the restrictions set forth in KRS 342.125(3) effective July 14, 2018 are applicable. This claim was already reopened at the time the statutory changes became effective, and in fact, the ALJ had already issued his decision. We do not believe the statutory changes are applicable to those cases already reopened and being actively litigated at the time of its enactment.

Pursuant to the 1996 version of KRS 342.125(3) and the holding in Hall v. Hospitality Resources, Inc., *supra*, we find ALJ Bolton did not err in

reopening the claim in his August 2, 2012 Order. The earlier version provided, “no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits.” However, the Kentucky Supreme Court in Hall v. Hospitality Resources, Inc., 276 S.W.3d at 785, held that “the reference in KRS 342.125(3) to the ‘the original award or order granting or denying benefits,’ must necessarily refer not only to the original award, but to any subsequent order granting or denying benefits.” Here, a subsequent settlement agreement was approved on December 21, 2007. Exactly four years later on December 21, 2011, Smith filed the motion to reopen subject to this appeal. Therefore, we find Smith’s motion to reopen was timely filed pursuant to the 1996 version of KRS 342.125(3) and Hall v. Hospitality Resources, Inc., *supra*, and therefore affirm on this issue.

We likewise determine Smith’s alleged failure to prosecute was not properly preserved for appeal since it was not identified as a contested issue in the BRC order. Even if it had been properly preserved, we determine the ALJ did not abuse his discretion in denying Ford’s motion to dismiss for failure to prosecute. Ford asserts the ALJ permitted this claim to languish for six years without explanation as to why Smith was granted enormous amounts of time for which to submit proof. A review of the record reveals the circumstances are not as simple as Ford asserts.

Our review of the alleged failure to prosecute the claim is based on the standard of whether the ALJ’s decision constituted an abuse of discretion. Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which “implies arbitrary action or capricious disposition under the circumstances, at

least an unreasonable and unfair decision.” Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945).

Upon filing the motion to reopen in December 2011, counsel for Smith and Ford actively participated in the litigation in 2011, 2012 and most of 2013. However, the claim was placed in abeyance on November 20, 2013 upon counsel for Smith’s motion explaining he had sustained injuries on September 23, 2013, limiting his ability to work on her claim. Smith filed multiple status reports thereafter indicating she underwent surgery in January 2014 to implant a pain pump, approved by Ford, and she had not yet reached MMI. Counsel for Smith also identified several personal health issues requiring surgery and hospitalizations in 2014 and 2015, for which he requested the claim remain in abeyance. ALJ Bolton removed the claim from abeyance and set a proof schedule on February 25, 2016. Thereafter, Smith submitted records from Drs. Sidhom and Bilkey. The claim was re-assigned to the ALJ in September 2016. The ALJ allowed additional proof time on several occasions in 2016 and 2017. In May 2017, Smith filed records from Dr. Sidhom, Dr. Bilkey, and Nurse Church. Ford filed a motion to dismiss Smith’s claim for failure to prosecute on May 22, 2017, which was denied by the ALJ on June 21, 2017.

The ALJ as trier of fact is the gatekeeper and arbiter of the record both procedurally and substantively. For purposes of KRS Chapter 342, it has long been accepted that the ALJ has the authority to control the taking and presentation of proof in a workers’ compensation proceeding. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005); Yocum v. Butcher, 551 S.W.2d 841 (Ky. App. 1977); Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991); Searcy v. Three Point

Coal Co., 134 S.W.2d 228, 231 (Ky. 1939). The ALJ is empowered under KRS 342.230(3) to, “make rulings affecting the competency, relevancy, and materiality of the evidence about to be presented and upon motions presented during the taking of evidence as will expedite the preparation of the case.” Based upon the above unique circumstances, we find the ALJ did not abuse his discretion in denying Ford’s motion to dismiss for Smith’s failure to prosecute.

We also reject Ford’s alternative argument that no interest is due because of Smith’s alleged delay pursuant to KRS 342.040(1). Again, interest assessed against Ford was not properly preserved as an issue for appeal since it was not identified as a contested issue at the BRC. Even it had been properly preserved, KRS 342.040(1) effective July 14, 2018 is not applicable. KRS 342.040(1), effective July 14, 2018, provides, “. . . if the [ALJ] determines that the delay was caused by the employee, then no interest shall be due . . .” KRS 342.040 provides no express language of retroactivity. The Legislative Research Committee Note states, “This statute was amended in Section 3 of 2018 KY. Acts ch. 40. Subsection (1) of Section 20 of that Act reads, ‘Sections 1, 3, and 12 of this Act shall apply to any claim arising from an injury . . . occurring on or after the effective date of this Act.’” Smith’s injury occurred well before the effective date of the Act. Therefore, KRS 342.040(1), effective July 14, 2018 does not apply. The pre-2018 version of KRS 342.040(1) does not contain a similar provision of allowing no award of interest due to a delay caused by an employee. Therefore, we find no merit in Ford’s argument it is entitled to award subject to no interest.

We next determine the ALJ performed an adequate analysis addressing whether Smith sustained a worsening of her lumbar condition since December 2007 and find substantial evidence supports his determination. The burden of proof in a motion to reopen based on a worsening condition falls on the party seeking to increase the award. Griffith v. Blair, 430 S.W.2d 337 (Ky. 1968); Jude v. Cabbage, 251 S.W.2d 584 (Ky. 1952). Since Smith was successful before the ALJ in sustaining her burden, the sole issue is whether substantial evidence supported the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). Although a party may note evidence supporting a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46, 47 (Ky. 1974).

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 sole authority to judge 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). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, supra. 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp an 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 could otherwise have been drawn from the record. Whittaker v. Rowland, supra. As 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, supra.

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, supra. 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., supra; and 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., supra.

KRS 342.125(1)(d) permits an award to be reopened upon evidence of a post-award "change of disability as shown by objective medical evidence of

worsening or improvement of impairment” The Kentucky Supreme Court determined that although a greater permanent impairment rating is objective medical evidence of a worsening of impairment, it is not the only evidence by which the statute permits a worsening of impairment to be shown. A claimant is not required to prove a greater permanent impairment rating in order to receive permanent total disability benefits at reopening. Colwell v. Dress Instrument Div., 217 S.W.3d 213, 214-218 (Ky. 2006).

The ALJ clearly relied upon Dr. Bilkey’s opinions and Smith’s testimony in concluding her lumbar condition has worsened since the December 2007 settlement. Dr. Bilkey examined her on May 7, 2002 and May 29, 2007. He became Smith’s treating physician, and saw her on multiple occasions between October 27, 2007 and October 18, 2012. In his October 27, 2011 report, Dr. Bilkey opined Smith’s condition has slowly worsened over time, noting her chronic low back condition severely limits her activities and she is unable to work even a part-time job cleaning houses. In a contemporaneous questionnaire, Dr. Bilkey indicated Smith’s low back condition had worsened and progressed since December 2007, assigned restrictions, and opined she is unable to perform an eight-hour day even with a sit/stand option.

On October 28, 2012, Dr. Bilkey noted Smith was clinically stable although symptomatically worse. At his January 15, 2013 deposition, Dr. Bilkey compared his range of motion measurements from May 2007 and October 2011. While some of her range of motion had improved or remained the same, Dr. Bilkey noted both back bending at T12 and forward bending at T12-S1 had worsened. He

noted he assessed a combined 26% impairment rating in May 2007, and she continued to retain a 26% impairment rating in 2011 and 2012 pursuant to the AMA Guides. Dr. Bilkey provided extensive testimony explaining why he believed her condition has worsened since 2007. He also noted his examination revealed tightness in the hip muscles, weakness of the hip flexors and extensors on the left, and spasm of the back extensors and gluteus maximus on both sides and the quadratus on the right. He noted the spasms and decreased range of motion objectively evidence a worsening of her condition. Dr. Bilkey noted Smith underwent discectomies on two occasions at L4-5 and agreed it is reasonably likely the source of her disc pain has worsened over time.

In the January 10, 2014 questionnaire, Dr. Sidhom indicated Smith's condition had worsened, and he recommended installing a pain pump. In an April 18, 2016 questionnaire, Dr. Sidhom indicated Smith's condition had worsened since he began treating her and he assigned restrictions. This constitutes substantial evidence Smith has sustained a worsening of condition since the December 11, 2007 settlement, and we affirm on this issue.

We acknowledge that in its petition for reconsideration, Ford requested the ALJ to provide additional findings regarding his determination that Smith's condition worsened, and she is now permanently totally disabled. Whether a worsening of impairment rises to the level of greater compensability is determined under KRS 342.730(1) and KRS 342.0011(11). KRS 342.730(1)(a) and KRS 342.0011(11)(c) require a worker who was partially disabled at the time of the initial award and totally disabled at reopening to show only that a worsening of impairment

due to the injury is permanent and causes the worker to be totally disabled. Colwell v. Dress Instrument Div., *supra*. Permanent total disability is defined 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. KRS 342.0011(11)(c). “Work” is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34).

In determining whether an injured worker is entitled to a finding of permanent total disability, the ALJ is required to perform an analysis pursuant to the direction provided in Ashland v. Stumbo, *supra*, and Ira A. Watson Department Store v. Hamilton, *supra*. The ALJ failed to perform the requisite analysis in determining Smith is now permanently totally disabled. The ALJ only considered the restrictions assigned by Dr. Bilkey in making his determination. On remand, the ALJ is directed to perform the correct analysis in accordance with the direction of the Kentucky Supreme Court in City of Ashland v. Stumbo, *supra*, and Ira A. Watson Department Store v. Hamilton, *supra*.

Ford also argues the ALJ erroneously determined the tier down provision contained in the 1994 amendment of KRS 342.730(4) is erroneous. We agree, and vacate and remand. The current version of KRS 342.730(4) became effective July 14, 2018, while this claim was pending on appeal. Section 13 of House Bill 2 states as follows:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee’s injury or last exposure, whichever last

occurs. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate as of the date upon which the employee would have reached age seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has retroactive applicability. We therefore vacate that portion of the Opinion and the Order on reconsideration, and remand this claim to the ALJ for application of the current version of KRS 342.730(4).

Finally, we note Smith has challenged the constitutionality of the revised version of KRS 342.730(4), KRS 342.125(3) and KRS 342.040(1), effective July 14, 2018. This Board, as an administrative tribunal, cannot determine the constitutionality of a statute. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945); *See also* Vision Mining, Inc. v. Gardner, 364 S.W.3d 455 (Ky. 2011); Abel Verdon Const. v. Rivera, 348 S.W.3d 749, 752 (Ky. 2011). Because this Board has no authority or jurisdiction to reverse rulings of the Kentucky courts, we can render no determination on this issue, and we are compelled to affirm.

Accordingly, the April 20, 2018 Opinion, Order and Award and the June 18, 2018 Order on petition for reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED IN PART and VACATED IN PART**. This claim is hereby **REMANDED** for entry of an Opinion in conformity with the direction set forth above.

ALL CONCUR.

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