

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: January 10, 2020

CLAIM NO. 201401920

GREGORY SCOTT CECIL

PETITIONER/  
CROSS-RESPONDENT

VS.

APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

FORD MOTOR COMPANY (LAP) and  
HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS/  
CROSS-PETITIONERS

OPINION  
AFFIRMING IN PART, VACATING IN PART,  
AND REMANDING

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS and RECHTER<sup>1</sup>, Members.

**ALVEY, Chairman.** Gregory Cecil ("Cecil") appeals from the June 24, 2019 Opinion, Award and Order, and the July 11, 2019 Order on reconsideration rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ found

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<sup>1</sup> Although Board Member Rechter's term expired on January 4, 2020, she is permitted to serve until January 22, 2020 pursuant to KRS 342.213(7)(b), and will participate in decisions rendered by this Board through that date.

Cecil's condition has worsened, and awarded an increase in his award of permanent partial disability ("PPD") benefits. The ALJ also awarded a period of temporary total disability ("TTD") benefits. The ALJ additionally found compensable the surgery which Ford Motor Company LAP ("Ford") had contested by filing a medical dispute.

On appeal, Cecil argues the ALJ erred in relying on "old medical evidence" by disregarding or properly considering his subsequent medical history. Cecil further argues the ALJ misinterpreted the medical and lay evidence in determining the extent of disability. Ford cross-appeals, arguing the ALJ erred in finding a 2017 lumbar surgery compensable, relying on the impairment rating assessed by Dr. Gregory Nazar, in awarding TTD benefits prior to the date of Cecil's motion to reopen, and in awarding enhanced interest on TTD benefits. Ford also argues the ALJ should amend the award to clearly state that there is an increase of 13% in the impairment rating to assure Ford receives credit for the 12% previously awarded. We affirm in part, vacate in part, and remand.

Cecil filed his claim on October 20, 2014, alleging an October 28, 2013 injury to his low back and right hip.

Dr. Robert Knetsche treated Cecil for his lumbar disc herniation, low back pain, and lumbar radiculopathy. Dr. Knetsche performed an L4-L5 discectomy on April 27, 2015. On July 15, 2015, Cecil reported no radicular pain or extremity weakness. Dr. Knetsche released Cecil to return to work on July 16, 2015.

Dr. Barefoot evaluated Cecil on October 1, 2015, noting Cecil was status post L4-L5 discectomy in April 2015. Dr. Barefoot diagnosed Cecil as having

broad based disc disease with radicular complaints attributable to repetitive trauma from working at Ford. After a second evaluation on October 1, 2015 following surgery, Dr. Barefoot assigned a 12% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition (“AMA Guides”).

Dr. Joseph Zerga evaluated Cecil on February 9, 2015. Dr. Zerga diagnosed low back pain without a specific injury. Dr. Zerga re-evaluated Cecil on February 11, 2016. Dr. Zerga noted Cecil is status post a lumbar discectomy at L4-L5 on the right with a good result and he has reached maximum medical improvement. Dr. Zerga assessed a 12% impairment rating pursuant to the AMA Guides. He indicated Cecil is able to perform his current job, but should not perform highly repetitive bending.

ALJ Thomas Politics issued an Opinion and Award on April 25, 2016. Relying on Dr. Barefoot’s opinions and to an extent those of Dr. Knetsche, ALJ Polites determined Cecil had a compensable work-related injury at L4-5 resulting in a L4-5 discectomy, and a 12% impairment rating. ALJ Politics determined Cecil had no pre-existing active impairment.

Both parties filed motions to reopen in September 2017. Cecil alleged a change of disability and Ford contested the compensability of a proposed L4-5 fusion surgery.

Cecil testified by deposition on January 24, 2019, and at the hearing held April 24, 2019. Cecil has an eleventh grade education and a GED. He has experience as a welder, forklift operator, fabricator, and factory worker. He began

working for Ford in 2000. He last worked at Ford installing weather stripping on approximately seven hundred doors per shift. In the fall of 2016, he reported problems with his back to Ford medical. Ford medical advised him to see his personal physician. He saw Dr. Knetsche who eventually performed fusion surgery on October 17, 2017. The surgery was paid for through Cecil's health insurance. Cecil initially did well after the surgery, but he was incapable of lifting, holding items, and twisting when he returned to work on January 3, 2018, putting on door panels. Cecil worked only a partial shift and has not returned since. He has had no intervening incidents or specific injuries to his back since his original injury. Cecil does not believe he is able to perform any of his past jobs.

On August 4, 2017, Dr. Knetsche noted Cecil returned for follow-up for low back pain and bilateral leg pain worsening during the past four to five months. Conservative measures such as medication, time off work, and injections did not help. Based upon an MRI and Cecil's symptoms, Dr. Knetsche felt the L4-L5 disc was not structurally stable. Dr. Knetsche requested authorization for the surgery on August 21, 2017. Cecil had a non-antalgic gait, abnormal pain to palpation in the lumbar spine, and limited lumbar range of motion due to pain. Dr. Knetsche noted Cecil had low back pain, lumbar radiculopathy, a degenerative lumbar disc, lumbar arthritis, and opioid dependence. Dr. Knetsche eventually performed lumbar surgery on October 17, 2017. Dr. Knetsche released Cecil to return to work without restrictions on January 1, 2018. On January 19, 2019, Dr. Knetsche assigned a restriction of no lifting greater than fifty pounds.

Dr. H. Leon Brooks performed a peer review and a medical records review on September 7, 2017 regarding the request for an L4-L5 fusion. Dr. Brooks noted there was no clinical evidence of instability. Dr. Brooks concluded the requested surgery is due to a normal disease of life rather than the October 28, 2013 injury.

Dr. Ryan Gocke performed a utilization review on September 27, 2017, for the requested fusion surgery. The June 19, 2017 MRI demonstrated disc desiccation at the L4-L5 level. Dr. Gocke's review of the medical records found no significant imaging findings consistent with instability necessitating a lumbar fusion. Dr. Gocke recommended non-certification of the surgery.

Dr. Nazar performed an IME on July 10, 2018. Dr. Nazar diagnosed chronic low back pain with non-radicular leg pain initially precipitated by a work injury in October 2013, re-aggravated by an additional work injury occurring through repetitive motion when he returned to work after the 2015 surgery and re-aggravated by a third work injury occurring on January 3, 2018. Dr. Nazar stated Cecil's back pain is directly related to these work injuries that are a progression of the original work injury, subsequent treatments, and surgery. Dr. Nazar assessed a 23% impairment rating and stated Cecil did not have pre-existing low back pain prior to the initial injury. He stated Cecil should not lift or carry over ten pounds, nor should he bend, lift, stoop, or twist his back. Dr. Nazar stated Cecil could not return to the work performed at the time of his injury. In a March 11, 2019 addendum, Dr. Nazar noted Cecil continues to have significant pain and is disabled from his occupation with Ford. Dr. Nazar diagnosed Cecil with a failed laminectomy. Dr. Nazar

assigned an additional 2% impairment rating giving him a 25% impairment rating. Dr. Nazar restricted Cecil to sedentary work.

Dr. James Montgomery, a pain management specialist, saw Cecil on October 26, 2018. Dr. Montgomery assessed Cecil with failed back syndrome and status post dorsal column nerve stimulator placement on October 22, 2018.

Dr. Robert Sexton evaluated Cecil on January 22, 2019. Dr. Sexton diagnosed Cecil as status post posterior spinal fusion L4-L5 and insertion of biomechanical disc L4-L5, status post spinal cord stimulator with open draining sinus, and no objective evidence of lumbar radiculopathy. Dr. Sexton stated Cecil had a 12% impairment rating prior to the October 2017 surgery. Cecil has an additional 7% impairment rating due to the unwarranted surgery in October 2017. These ratings combine to give Cecil an 18% impairment rating. Dr. Sexton did not believe the additional impairment rating was work-related. He opined that Cecil may return to the work he performed on October 28, 2013. In an April 22, 2019 letter, Dr. Sexton noted Cecil has markedly excessive subjective symptoms over objective findings. Dr. Sexton believed there is evidence of malingering and Cecil has a somatic symptom disorder for secondary gain. He stated Cecil is physically capable of returning to work with Ford.

Ralph Crystal, Ph.D., performed a vocational evaluation on February 18, 2019. He noted Cecil scored in the average range on the Kaufman Intelligence Test. Cecil scored in the 11.9 grade equivalent in reading, 11.3 grade equivalent in sentence comprehension, 6.8 grade equivalent in spelling/writing, and an 8.0 grade equivalent for arithmetic. He has transferable skills such as using good judgement

and decision making, multi-tasking, coordination, planning and organizing, and problem solving. Based on Dr. Knetsche's medical records, he determined Cecil is qualified to return to his past and related work without a loss of employability or earning capacity. Dr. Nazar's restrictions limit Cecil to jobs performed at a desk, bench, table, or workstation. Based on Dr. Sexton's medical records, Cecil does not have a loss of employability or earning capacity. Dr. Crystal concluded Cecil is not disabled from employment.

Citing the *res judicata* the effect of the previous Opinion, the totality of the opinions of Dr. Knetsche and the opinions of Dr. Nazar, the ALJ found the L4-5 fusion by Dr. Knetsche is work-related, reasonable and necessary. The ALJ also noted Cecil's credible testimony regarding the onset of symptoms and the lack of any intervening injury. The ALJ determined Cecil now has a 25% impairment rating, retains the capacity to return to the type of work performed on the date of injury, and is statutorily entitled to the enhancement of PPD benefits per KRS 342.730(1)(c)2. The ALJ determined Cecil's work-related impairment rating has increased by 13%, with application of KRS 342.730(1)(c)2, but he is not permanently totally disabled. The ALJ awarded TTD benefits from August 28, 2017 through March 2, 2018, noting Cecil continued to work until August 27, 2017, and that pursuant to Dr. Knetsche's records, Cecil could return to work as of March 2, 2018. The ALJ awarded increased interest on a portion of the past due benefits finding as follows:

The Plaintiff's TTD benefits are initiated on August 28, 2017. A valid UR opinion, from Dr. Gocke, was not done until September 27, 2017. In addition prior to that the Defendant continued, without medical or legal support, to simply dismiss the Plaintiff's allegations. None of this has been explained and I cannot divine,

infer or otherwise come up with an adequate explanation. As such interest shall be charged at a rate of 12% on any past due benefits due between August 28, 2017 and September 27, 2017.

Ford filed a petition for reconsideration making essentially the same arguments it raises on appeal. The ALJ provided the following findings in his order on reconsideration:

This matter comes before the undersigned on both parties Petitions for Reconsideration. I acknowledged the opinions of Dr. Montgomery and disregarded them in favor of the opinions of Dr. Knetsche, the treating surgeon. Dr. Montgomery is not the Plaintiff's surgeon and has only provided him pain management, i.e. palliative care. The Plaintiff was at MMI, and therefore we are able to ascertain return to work ability, prior to the "failed low back syndrome" diagnosis by Dr. Montgomery. The Plaintiff's Petition is OVERRULED. The Defendant takes issue with my use of the doctrine of *res judicata* and whether or not they[sic] argued that it did not apply. It is clear from my Opinion that my analysis of *res judicata* was only the start of my analysis. I also cited to Drs. Knetsche and Nazar and the fact the Plaintiff had no intervening injuries. The finding of the work-relatedness of the L4-5 fusion is supported by substantial evidence and that portion of the Petition is OVERRULED. As to whether or not the Defendant argued the Plaintiff never had a work injury they[sic] certainly filed evidence to that effect. Dr. Sexton's report clearly and repeatedly states that none of the Plaintiff's lumbar diagnoses are work-related, once even including a clerical error that the date of injury was "11-28-13." He states Judge Politics only "inferred" causation of the original injury. The notion, under these facts, that the Plaintiff's lumbar condition is due to the "diseases of life" is non-credible even if admissible. The entire award is supported by the evidence. Dr. Nazar's opinions on impairment rating are substantial evidence. The 30 days of increased interest was explained and si[sic] supported. The Petition is OVERRULED. Any reference to the right thumb is replaced by the low back at L4-5.

On appeal, Cecil argues the ALJ erred in relying on “old medical evidence” from Dr. Knetsche and disregarded or failed to appropriately consider the subsequent medical history. Cecil further argues the ALJ misinterpreted the medical and lay evidence in determining the extent of disability. Cecil argues the ALJ did not offer any analysis of his actual job duties or his capacity to perform those duties. Cecil contends he qualifies for permanent total disability or permanent partial disability benefits enhanced by the three multiplier based upon his failed back syndrome.

As the claimant in a workers’ compensation proceeding, Cecil had the burden of proving each of the essential elements of his cause of action, including the extent of his disability/impairment. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in proving a greater impairment rating or disability, 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the

same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence supporting a different outcome than reached by an ALJ, this is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We are convinced the evidence does not compel a finding of a greater disability than awarded by the ALJ. Although Dr. Montgomery, a pain management specialist, diagnosed failed back syndrome, the ALJ believed Dr. Knetsche was in a better position to judge the state of Cecil's back condition. The ALJ found Dr. Knetsche more persuasive regarding Cecil's retained capabilities. Dr. Knetsche's statement on January 19, 2019, given after Dr. Montgomery's diagnosis of failed back syndrome, assigned a restriction of no lifting greater than fifty pounds. Based on Dr. Knetsche's medical records, Dr. Crystal stated Cecil is qualified to do his past and related work without a loss of employability or earning capacity. Dr. Sexton also stated Cecil is capable of returning to the work he performed at the time of his injury. Substantial evidence supports a finding that Cecil retains the physical capacity to return to the type of work he performed at the time of the injury. Because the ALJ determined Cecil retains the physical capacity to return to his past

work, he cannot be permanently totally disabled and no further analysis was required.

The ultimate goal of an ALJ is to assess an individual's condition as best as possible at the time of the entry of an award. In doing so, however, it is not incumbent upon the ALJ as fact-finder to rely upon the most recent medical testimony. The date of a given examination and the elements of that examination, as well as the relative qualifications of the physicians involved, are all issues addressing the weight accorded to the evidence, and analyzing the weight of the evidence falls uniquely within the discretion of the fact-finder. KRS 342.285; Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). Again, we note Dr. Knetsche assigned his restriction after Dr. Montgomery diagnosed failed back syndrome, and Dr. Sexton performed his examination after Dr. Montgomery's diagnosis. Dr. Sexton opined Cecil is physically capable of returning to work with Ford.

While Cecil has identified evidence supporting a different conclusion, substantial evidence was presented to the contrary. The ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

For its cross-appeal, Ford argues the ALJ erred in finding the 2017 lumbar fusion surgery compensable. Ford notes Dr. Brooks stated there is no evidence-based support for disc desiccation as a known result of prior discectomy. Ford contends the current request for surgery relates to a normal disease of life rather than the work injury. Ford notes Dr. Gocke stated there is no documented

significant imaging findings consistent with instability as recommended by guidelines for lumbar fusion. Ford maintains the surgery was not medically necessary. Dr. Knetsche indicated the condition was not work-related on a Unicare Certificate of Disability and later checked the condition was work-related “per the patient.” Ford argues the doctrine of *res judicata* is not decisive on the issue of compensability of the lumbar fusion.

We note the ALJ did not engage in a blanket application of *res judicata*. Rather, he held it is *res judicata* that Cecil did not have a prior active impairment or disability, that the work produced an injury at L4-5, and that injury required a laminectomy. The ALJ’s determination was based upon the prior holding, the totality of the opinions of Dr. Knetsche and Dr. Nazar, and Cecil’s credible testimony regarding his onset of symptoms and lack of any intervening injury. Although Dr. Knetsche indicated the condition was not work-related on a Unicare Certificate of Disability, the statement was made after Ford had taken the position that Cecil’s current problem with back pain was personal and not work-related. The record is devoid of any evidence of a subsequent event involving Cecil’s back. Cecil testified he has had no intervening incidents or specific injuries to his back. Based upon the totality of the evidence, the ALJ could reasonably conclude the need for Cecil’s fusion surgery is related to the work injury.

Ford next argues the ALJ erred in relying on Dr. Nazar’s impairment rating. Ford notes Dr. Nazar’s report references three injuries, but Cecil never filed additional claims for injuries in 2015 or 2018. Dr. Nazar did not address a worsening of the 2013 injury.

Dr. Nazar refers to Cecil's post-award condition as being exacerbated and re-aggravated at work. He characterizes the attempted return to work for a portion of a shift on January 3, 2018 as an injury. However, Cecil did not testify he sustained any injury on that date. Rather, he merely indicates an inability to perform the job because of his pain. Dr. Nazar attributed the current condition to a progression of the original work injury and subsequent treatment and surgery. Dr. Nazar's opinions, when considered in the context of the totality of the opinions of Dr. Knetsche and Cecil's testimony regarding the onset of symptoms and the lack of any intervening injury can reasonably be interpreted as relating the entire low back condition to the work injury. Regardless of the cause, Dr. Nazar and Dr. Sexton assigned their impairment ratings based upon the fusion surgery. Dr. Sexton specifically stated the increase in impairment rating occurred because of the fusion surgery. The evidence clearly supports a change in impairment rating on reopening based upon the surgery, which the ALJ found related to the work injury.

Ford argues the ALJ erred in awarding TTD benefits prior to the motion to reopen, citing the unpublished case of Batsis v. Krispy Kreme 2000-SC-0564-WC (March 22, 2001). We agree. Since March 2001, the Board has accepted the reasoning of the Supreme Court in Batsis. There, the Kentucky Supreme Court addressed the issue of whether TTD benefits may be ordered to commence prior to the date a motion to reopen is filed. The Court held that an award of TTD prior to the filing of the motion to reopen was not authorized. The Court stated:

Contrary to the view expressed by the claimant, even settled awards of workers' compensation benefits are subject to the principles of the finality of judgments and establish the limits of a defendant's liability. In other

words, where reopening is premised upon a change of occupational disability since the award, the claimant is entitled to any benefits paid before the employer files a motion to reopen in order to reduce the award. Likewise, an employer is not required to pay additional benefits for periods before the claimant files a motion to increase the award.

The Court, relying on KRS 342.125(4), further stated:

It is undisputed that, prior to that time, KRS 342.125(1) was also construed to mean that changes in the amount of income benefits at reopening would be ordered only from the date of the motion to reopen. It is clear that an award of TTD was not authorized on these facts. We note, however, that nothing would have prevented the claimant from filing a motion which indicated that surgery was anticipated, requested an award of TTD benefits following the surgery, and requested that the matter be held in abeyance until the duration of TTD could be determined.

While the above authority is unpublished, we believe the reasoning employed by the Kentucky Supreme Court is appropriate.

Additionally, in the unpublished decision in Earl Harris v. Stephens Disposal, 2004-SC-0092-WC (August 25, 2005), the Supreme Court reaffirmed that an order of TTD benefits at reopening is a change in the amount of compensation previously awarded and, therefore, KRS 342.125(4) requires it to be prospective. On remand, the ALJ is directed to amend the award to reflect TTD benefits begin on September 21, 2017, the date Cecil filed his motion to reopen.

Ford argues the ALJ erred in awarding enhanced interest on TTD benefits for the period beginning August 28, 2017 through September 27, 2017. Although UR was not performed until September 27, 2017, Ford obtained a peer

review/medical records review on September 7, 2017. Ford maintains it denied benefits in good faith based upon medical evidence.

We conclude the ALJ's statement that, prior to the utilization review opinion, "the Defendant continued, without medical or legal support, to simply dismiss the Plaintiff's allegations. None of this has been explained and I cannot divine, infer or otherwise come up with an adequate explanation" is inadequate to support the award of increased interest. The ALJ's analysis fails to address the fact Ford obtained a medical opinion from Dr. Brooks on September 7, 2017, that the surgery did not relate to the work injury. Although the ALJ ultimately concluded the surgery relates to the work injury, that does not mandate a finding that Ford did not have a good faith basis to contest the compensability of the proposed surgery. On remand, the ALJ must provide an additional analysis and findings concerning whether interest from September 21, 2017 through September 27, 2017 should be enhanced. We do not direct any particular result.

Finally, Ford argues the award portion of the ALJ's decision should be amended to reflect Cecil has a 13% increase in impairment and it is entitled to a credit for the 12% impairment previously awarded. The ALJ noted ALJ Polites previously determined Cecil had a 12% impairment rating, and he now "has a 25% impairment rating, retains the capacity to return to the type of work done on the date of injury but is statutorily entitled to the enhancement of the PPD benefits per KRS 342.730(1)(c)2." Regarding the credit issue, the ALJ provided, "The change in the Award will, hopefully, be done within the correct legal guidelines and math." Any increase in benefits awarded on reopening is operative from the date of the filing of

the motion to reopen. The ALJ's award specifically provided for PPD benefits of \$324.60 a week, from September 21, 2017, for 425 weeks, from October 28, 2013, and excluding any periods of TTD benefits. In this case, no additional language is required as the award correctly states the amount of benefits accruing from September 21, 2017, the date Cecil filed his motion to reopen.

Accordingly, the June 24, 2019 Opinion, Award and Order, and the July 11, 2019 Order rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED IN PART and VACATED IN PART**. This claim is **REMANDED** for entry of an award in accordance with the views expressed herein.

ALL CONCUR.

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