

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 12, 2020

CLAIM NO. 201997677

JASPER LEE MINIX

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

ADVANCE AUTO PARTS, LLC AND
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

BORDERS, Member. Jasper Lee Minix (“Minix”) appeals from the Opinion, Award, and Order rendered on January 16, 2020 and the Order on Reconsideration rendered on February 17, 2020, by the Hon. Chris Davis, Administrative Law Judge (“ALJ”). In the Opinion, Award, and Order, the ALJ determined Minix suffered work-related injuries to his lumbar spine as a result of a motor vehicle accident

(“MVA”) for which he retained an 8% impairment rating, and dismissed Minix’s claim for permanent partial disability (“PPD”) benefits for injuries to his shoulder and cervical spine. The ALJ denied Minix’s request for vocational rehabilitation benefits and further determined Advanced Auto Parts (“Advanced”) was entitled to be subrogated in the amount of \$13,439.45 from the proceeds of the \$25,000.00 settlement Minix reached with the third party responsible for the MVA.

Minix filed a Petition for Reconsideration regarding the ALJ’s denial of vocational rehabilitation benefits arguing he cannot perform any of his prior jobs for which he has training or experience and is therefore entitled to vocational rehabilitation benefits. Minix further argued the ALJ erred in failing to properly allocate the funds from the settlement of his civil claim for pain and suffering, and therefore his calculations regarding the subrogation were erroneous. Advanced filed a Petition for Reconsideration arguing the ALJ erred in subtracting the workers’ compensation attorney fee from their subrogation credit.

The ALJ granted Advanced’s Petition and increased its subrogation credit to \$15,567.00. The ALJ denied Minix’s Petition and reiterated he is not entitled to vocational rehabilitation benefits and that he is not entitled to reconsideration of the subrogation credit to include any exclusion for pain and suffering. The ALJ felt Minix had been “made whole” under the law by a combination of his civil and workers’ compensation claims. This appeal followed.

For reasons set forth herein, we affirm in part, vacate in part and remand.

Minix testified by deposition and at the final hearing. He was 25 years old and employed by Advanced as an automotive parts delivery person at the time of his work injury. On December 11, 2018, he was involved in a MVA when he was rear-ended by a car during the course of his employment. He notified his employer and was seen in the emergency room. He then treated at Paintsville Primary Care which restricted from working. Minix has not returned to work in any capacity due to the lifting, standing, and sitting restrictions while driving required by the job.

As a result of the MVA, Minix pursued a civil action against the driver who hit him and settled the civil case for \$25,000.00. No apportionment of the damages was made.

The ALJ reviewed the evidence and determined Minix suffered a work-related lumbar spine injury as a result of the MVA. The ALJ further determined Minix retained an 8% impairment rating as a result of the injury. He does not retain the physical capacity to return to his former job, and therefore enhanced his PPD benefits by the 3x multiplier contained in KRS 342.730(1)(c)1. The ALJ dismissed Minix's claim for PPD benefits resulting from alleged cervical and shoulder injuries.

Regarding the issues on appeal concerning denial of vocational rehabilitation benefits and determining Advanced's recovery in subrogation, the ALJ found as follows:

IV. Vocational Rehabilitation

The Plaintiff lacks the capacity to return to the type of work done on the date of injury. However, I believe he can return to work as a convenience store employee, fast

food worker or a myriad of other occupations. He is only 25 years old and has a high school education. His desire to work as a motorcycle technician or gunsmith, while perhaps attainable, are not very thoroughly vetted nor do they seem well thought out.

Specifically the Plaintiff, in his Hearing testimony, states he is generally aware of the need for these occupations in his area but he has not actually researched them.

Vocational rehabilitation is denied.

V. Subrogation

The argument that the Defendant makes in its brief regarding the relative amount of subrogation credit it is entitled to under the current version of KRS 342.700(1) is correct. Once the Plaintiff has been made whole from his lost wages and medical expenses, as paid by the Defendant herein, there is no analysis required such as the Plaintiff sets forth in his brief.

Of his \$25,000.00 civil settlement the Plaintiff has already paid attorney fees and costs, relative to the civil settlement, of \$9,433.00. His workers' compensation PPD award is $25.03 \times 425 = 10,637.75$ = a workers' compensation attorney fee of \$2127.55. $9,433.00 + 2,127.55 = 11,560.55$. $25,000.00$ (amount of the civil settlement from KFB) $- 11,560.55$ (attorney's fees and costs from both his civil and workers' compensation claims) = $13,439.45$ as the total amount available for subrogation.

\$13,439.45 therefore represents the entire amount available for subrogation up to the point the Defendant has recouped lost wages and medical expenses. Lost wages already paid in the form of TTD is \$2,907.84. Medical expenses already paid are \$12,281.50. The total amount already paid on behalf of the Plaintiff which can serve as a basis for subrogation is \$15,189.34. This figure exceeds the total amount available for subrogation even before any analysis is done of the effect of the future PPD benefits.

Therefore, the amount the Defendant may recover in subrogation is \$13,439.45.

Both Minix and Advanced filed Petitions for Reconsideration. The ALJ entered the following order concerning the Petitions:

This matter comes before the undersigned on both parties' Petitions for Reconsideration. The Defendant's Petition is SUSTAINED. The Plaintiff's Petition is OVERRULED. The ALJ made an error of law in deducting the Plaintiff's presumed workers' compensation attorney fee from the amount available for subrogation. Therefore the total amount available is \$15,567.00. The ALJ is not persuaded that as a factual matter, given his age, experience and educational background that vocational rehabilitation is necessary to return the Plaintiff to the work force. I feel he can do so now.

As for the amount of the subrogation credit the ALJ freely admits that when analyzing the subrogation credit some bit of leeway exists. However, it is worth pointing out that in this matter the Plaintiff has been made whole, under the law, by a combination of his civil and workers' compensation claims. All lost wages and lost earning potential have been remedied and he is entitled to medical benefits under the Act. As such I believe the calculations of the subrogation credit reflect a fair and accurate amount and that the amount is supported by substantial evidence.

Minix has now appealed arguing the ALJ erred in failing to award vocational rehabilitation benefits.

KRS 342.710 (3) states in pertinent part:

When as the result of an injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.

As the claimant in a workers' compensation proceeding, Minix had the burden of proving each of the essential elements of his claim, including entitlement to vocational rehabilitation benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Minix was unsuccessful in his burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

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). 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 inadequate 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 the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, *supra*. As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, *supra*.

Minix argues the ALJ erroneously denied vocational rehabilitation benefits. Minix cites Dairy Queen of Frankfort, Inc v. Surrutt, 2010 WL 2471871 (Ky. June 17, 2010) as supporting his entitlement to vocational rehabilitation benefits as he has proved he is unable to return to the job he was performing at the time of his accident. However, the above case is clearly distinguishable as Surrutt's job with Dairy Queen was his first and only job. In the case at bar, Minix had previously worked as a fast food worker, a convenience store worker, and for a temporary service. Therefore, the ALJ performed the proper analysis in determining Minix was not entitled to vocational rehabilitation benefits. His opinion is supported by substantial evidence and will not be disturbed on appeal. We therefore affirm the ALJ in this regard.

Minix next argues the ALJ erred in failing to perform the proper analysis and to exclude any damages from the civil case attributable to pain and suffering. The record is clear that Minix settled the third party tort claim with the tortfeasor for the \$25,000.00 policy limits. It is likewise undisputed that the tort

settlement was achieved prior to litigation and was silent as to how the damages are to be allocated.

KRS 342.700 states in pertinent part:

Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil action against the other person to recover damages, or proceed both against the employer for compensation and the other person to recover damages, but shall not collect from both.....If compensation is awarded or paid under this chapter, the employer, his insurance carrier, the special fund, the Kentucky coal workers pneumoconiosis fund, the uninsured employers fund, or any of them, having paid the compensation or having become liable therefor, may, recover in its own name or that of the injured employee from the other person in whom legal liability for damages exists, not to exceed the indemnity and medical expenses paid and payable to or on behalf of the injured employee, less a pro rata share of the employee's legal expenses.

In Whitaker v Hardin, 32 S.W.3d 497 (Ky. 2000), the Supreme Court held the employee is entitled to have an independent and impartial trier of fact allocate elements of damages when there has been a prior settlement with no allocation of the settlement proceeds. In Greene v. Paschall Truck Lines, 239 S.W.3d 94 (Ky. 2007), the court held it was the ALJ's duty to apportion the civil damages as the ALJ is charged with the duty to resolve all undecided issues in a case that falls under the purview of KRS chapter 342. The issue of subrogation clearly falls within that category.

In Mastin v. Liberal Markets, 674 S.W.2d 7 (Ky. 1984), the Supreme Court held the employer is only subrogated to the amounts of the settlement

proceeds that are duplicative of the workers' compensation award. In Hillman v. American Mutual Liability Insurance Company, 631 S.W.2d 848 (Ky. 1982), the Supreme Court held the damages in a civil case allocated for pain and suffering are not subject to any claim of subrogation by the employer.

In his Opinion, Award, and Order, the ALJ stated, "once the Plaintiff is made whole from his lost wages and medical expenses, as paid by the Defendant herein, there is no analysis required such as Plaintiff sets forth in its brief." Thereafter, the ALJ set forth his calculations and determined of the \$25,000.00 settlement proceeds, all that would be deducted as not recoverable in subrogation would be Minix's attorney fees of \$11,560.55, later amended to \$9,433.00, leaving Advanced subrogated in the amount of \$15,567.00. However, the ALJ did not address what portion, if any, of the civil settlement compensated Minix for the pain and suffering he endured, and would have been compensated for in the civil action, and therefore not subject to subrogation. *See, Quillen v. Tru-Check, Inc.*, 2009-CA-000747-WC; 2009 WL 3337239 (Ky. App. 2009).

We do not believe the ALJ performed the proper analysis. As can be seen from the above case law, the ALJ is charged with the duty to review the civil settlement as an independent and impartial trier of fact and set forth the proper allocation of damages attributable not only to wage loss and medicals, but shall also consider what amount of the settlement proceeds, if any, are attributable to pain and suffering. The ALJ must address the issue with sufficient clarity for meaningful review.

Accordingly, the Opinion, Award, and Order of Hon. Chris Davis, ALJ, rendered on January 16, 2020, and the Order on Reconsideration rendered on February 17, 2020 are **AFFIRMED IN PART** and **VACATED IN PART**. This claim is **REMANDED** for entry of an amended opinion consistent with the views expressed herein.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON JOHN COLLINS
P. O. BOX 475
SALYERSVILLE, KY 41465

COUNSEL FOR RESPONDENT:

LMS

HON SHANE BRANHAM
2452 SIR BARTON WAY, STE 101
LEXINGTON, KY 40509

ADMINISTRATIVE LAW JUDGE:

LMS

HON CHRIS DAVIS
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601