

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: March 27, 2020

CLAIM NO. 201490651

KELLOGG'S

PETITIONER/  
CROSS-RESPONDENT

VS.

APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

LESLIE LAWRENCE  
and  
HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENT/  
CROSS-PETITIONER  
  
RESPONDENT

OPINION  
AFFIRMING IN PART,  
VACATING IN PART & REMANDING

\* \* \* \* \*

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

**BORDERS, Member.** Kellogg's appeals and Leslie Lawrence ("Lawrence") cross-appeals from the August 24, 2018 Opinion, Award and Order, and the September 10, 2018 Order on petition for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ found Lawrence is permanently totally disabled from a right ankle injury he sustained while working for Kellogg's.

On appeal, Kellogg's argues the ALJ neither properly weighed the evidence nor performed the appropriate legal analysis in finding Lawrence permanently totally disabled. Kellogg's also argues the ALJ erred in his determination regarding Dr. Kevin Harreld's restrictions, and in disregarding Dr. Luca Conte's vocational evaluation. For his cross-appeal, Lawrence argues the 2018 amendment to KRS 342.730(4) and its retroactive application is unconstitutional. Lawrence also argues the ALJ erred in failing to award permanent partial disability ("PPD") benefits during the return to work period. The ALJ's decision is affirmed in part, vacated in part, and remanded for additional determinations.

Lawrence began working for Kellogg's after graduating from high school. The last 17 years he worked in the shipping and receiving department loading trucks and staging orders using a forklift. On March 11, 2014, Lawrence was struck by a forklift, trapping his right foot under its counterweight causing him to fall to the ground. Lawrence underwent surgery that included the placement of hardware and he later returned to work. After a second surgery, Lawrence was off work until May 2014 when he returned to restricted duty. Kellogg's accommodated the restrictions. In September 2014, Lawrence returned to regular duty. He testified that on return to regular duty, his ankle swelled and his back hurt by the end of a workday. Lawrence also began having left knee pain due to an irregular gait while recovering from the right ankle injury. Lawrence noticed one of the plates in his foot caused him pain while walking in his work boots. At the end of the day, he would ice his swollen ankle. Dr. Harreld eventually removed the hardware. Lawrence was restricted from working in January 2016 following surgery. Dr. Harreld released Lawrence to return to regular duty work on March 1, 2016. Lawrence returned to work for two days then used his vacation time before retiring on April 9, 2016. Regarding his reason for retiring, Lawrence

stated, “. . . me and the wife discussed it and decided that it was just too hard to work seven days a week like I had been at that point” and “. . . the feeling that I was going to come home miserable every day just made me decide to go ahead and retire.” Lawrence testified he continues to have pain if he does much walking. His ankle swells causing him to limp and have pain in his knee and back. Lawrence has not returned to work and is receiving Social Security Disability benefits.

Lawrence sought treatment with Dr. Harreld of Bluegrass Orthopedics & Sports Medicine, who diagnosed a right trimalleolar ankle fracture and initially placed the ankle in a cast. Dr. Harreld performed an open reduction and internal fixation (“ORIF”) on April 2, 2014. On November 4, 2014, Dr. Harreld placed Lawrence at maximum medical improvement (“MMI”) for the trimalleolar ankle fracture, post ORIF. He felt Lawrence required no further restrictions, and could continue full duty work. Dr. Harreld prescribed compression stockings and stated Lawrence should use a cane as needed. Dr. Harreld anticipated continued intermittent swelling. Dr. Harreld assigned a 3% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition (“AMA Guides”).

Because Lawrence had pain from the hardware, Dr. Harreld removed it on January 20, 2016. On March 1, 2016, Dr. Harreld noted Lawrence had been working full duty driving a forklift, performing his usual job related duties, and he had right ankle swelling at the end of the day. Dr. Harreld permitted Lawrence to drive and indicated he could return to work with breaks every two hours so he could elevate and ice his right lower extremity.

Dr. John J. Guarnaschelli performed an independent medical evaluation (“IME”) on September 7, 2016. Dr. Guarnaschelli diagnosed a right trimalleolar ankle

fracture with deformity following the traumatic work-related event. Dr. Guarnaschelli agreed with the impairment rating assigned by Dr. Kevin Dew (21% for right ankle, foot, exacerbation of the low back, central and peripheral nervous system and mental system). Dr. Guarnaschelli believed Lawrence would have difficulty returning to full time work without significant ability to sit, rest, and take frequent breaks. Persistent standing or walking would exacerbate the ongoing healing process of the right ankle fracture.

Dr. Craig S. Roberts performed an IME on February 14, 2018. Dr. Roberts indicated Lawrence reached MMI on October 11, 2014. Dr. Roberts assigned an 8% impairment rating for the right ankle pursuant to the AMA Guides. Dr. Roberts noted Lawrence may require removal of implants and a right ankle fusion. Dr. Roberts did not feel Lawrence was capable of returning to any competitive employment on a regular and sustained basis.

Dr. John Larkin performed an IME on April 4, 2018. Dr. Larkin assigned an 8% impairment pursuant to the AMA Guides due to loss of range of motion of the right ankle. He felt Lawrence reached MMI on March 2, 2016, and can return to the type of work done at the time of his injury.

Robert Tiell, M.A. conducted a vocational evaluation on December 17, 2016. He noted Lawrence is an older adult, a significant deterrent for employability. Lawrence worked for Kellogg's from 1977 through April 2016. His work was semi-skilled in nature and entailed at least medium exertional requirements. Medical records indicate Lawrence was restricted from driving and limited to seated modified work with breaks to elevate and ice his right lower extremity. Dr. Tiell felt Lawrence had a one hundred percent occupational loss

due to the work injury. He opined Lawrence does not have skills transferable to other jobs such as clerical work.

Dr. Conte conducted a vocational evaluation on April 12, 2018. He noted Lawrence's scores in the Wide Range Achievement Test reading subtest and math subtest were above high school level, indicating the capacity to perform a variety of occupations in the semi-skilled and unskilled labor market. Lawrence has the capacity to acquire additional vocational skills. Based on his review of the medical records and his interview, Dr. Conte felt Lawrence could perform sedentary, light, and medium exertion occupations. If not for the non-work-related back and left knee complaints, he believed Lawrence could return to work as a forklift operator with breaks every two hours.

Rick Pounds performed a functional capacity evaluation on April 17, 2018. Pounds felt testing revealed the ability to do the maximum requirements of a lift truck operator. Lawrence could do most of the requirements for heavy exertion occupations.

The ALJ's findings relevant to this appeal are as follows:

I have the FCE from Rick Pounds, which states the Plaintiff can work as a lift truck operator. I have the restrictions from Dr. Larkin, which are that the Plaintiff can work in medium duty seated position with some weight bearing and ambulation. These would seem to indicate that the Plaintiff could find jobs within in[sic] abilities, maybe even return to the type of work done on the date of injury. However, I do not adopt these restrictions.

Rather I adopt the restrictions assigned by the treating physician and surgeon, Dr. Harreld. When Dr. Harreld did finally discharge the Plaintiff after a long course of treatment, including two surgeries, he said that the Plaintiff would need to ice and elevate his right ankle periodically throughout the day.

This restriction alone would render most people totally disabled. Much less a man who has spent his entire professional life, almost 40 years, in factories and shipping departments. It is doubtful that many employers would tolerate this for an

extended period. The Plaintiff's high school education does not create sufficient opportunities to overcome this severe restriction nor does his work experience.

While some may seek a more detailed explanation, I doubt many people could envision hiring, on a permanent basis, a 58-year-old man with factor[sic] and shipping experience, and a high school education, who had to elevate and ice his ankle every so often.

Lawrence filed a petition for reconsideration arguing he should receive PPD benefits during his return to work. Kellogg's filed a petition for reconsideration raising the same arguments it makes on appeal.

The ALJ provided as follows in his order on reconsideration:

For what it is worth I find Dr. Conte's opinions in this matter entirely uncredible. While I understand the Plaintiff was working with some pain I do not believe he was solely out of necessity. It was light duty, but not made up work. He was paid equal or greater wages. He hoped to make a full recovery. His actual disability began as outlined in the Opinion. The Opinion and Award stands.

On appeal, Kellogg's argues the ALJ neither properly weighed the evidence nor adequately set forth his reasons for a permanent total disability ("PTD") award. Kellogg's contends the ALJ disregarded the substantial evidence, specifically Dr. Harreld's release to full duty and Lawrence's return to his full duty position. Lawrence testified Kellogg's accommodated his restrictions and he returned to his position before deciding to use his vacation time before retiring. Kellogg's notes multiple physicians released Lawrence to return to work. Kellogg's asserts Lawrence's single restriction of resting his ankle every few hours is not sufficient to support a PTD award. Kellogg's notes the ALJ found Dr. Harreld's restrictions would render Lawrence totally disabled and it is doubtful an employer

would accommodate the restrictions. Kellogg's argues this finding is outside the scope of a workers' compensation claim. Whether a future employer may provide a reasonable accommodation for Lawrence's disability is better left to a proceeding under the Americans with Disabilities Act or Kentucky employment law. Kellogg's notes Lawrence has faced no adverse employment actions, and it has always accommodated his restrictions or paid temporary total disability ("TTD") benefits. Secondly, even if the ALJ had authority to make such a broad ruling, it was erroneous because Lawrence's restrictions are objectively reasonable, only requiring a break every two hours. Lawrence would still be able to operate a forklift or perform several other jobs.

Kellogg's argues the ALJ erred by disregarding Dr. Conte's vocational evaluation. Dr. Conte's report shows Lawrence has the physical ability to perform several jobs in a competitive market. Dr. Conte performed a variety of tests, examined Lawrence's abilities, and provided several potential jobs for Lawrence. Dr. Conte's analysis included Dr. Harreld's restriction of allowing a break every two hours. Lawrence demonstrated the physical capacity to return to his prior job at Kellogg's, performing his full duty position, with one accommodation, until he retired. His ability to return to work precludes a PTD award. Because Dr. Harreld did not examine Lawrence from a vocational standpoint, his opinions should not be used to grant a PTD award.

As the claimant in a workers' compensation proceeding, Lawrence had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in that burden, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant

consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

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). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). If the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal.

Permanent total disability is 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 the injury. KRS 342.0011(11)(c). While consideration of a total disability award depends on many factors, it remains within the ALJ's discretion to translate an impairment rating into either partial or total disability. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Ira A. Watson Department Store v. Hamilton,

34 S.W.3d 48 (Ky. 2000); City of Ashland v Stumbo, 461 S.W.3d 392 (2015). In City of Ashland, supra, The Kentucky Supreme Court set forth as follows:

Thus an ALJ is required to undertake a five-step analysis to determine whether a claimant is totally disabled. Initially, the ALJ must determine if the claimant suffered a work related injury....Next the ALJ must determine what, if any, impairment rating the claimant has...Next the ALJ must determine what permanent disability claimant has...Next the ALJ is required to determine that the claimant is unable to perform any type work ... Finally, an ALJ must determine that the total disability is the result of the work injury.

The Court additionally stated:

An ALJ cannot simply state that he has reviewed the evidence and concluded that a claimant lacks the capacity to perform any type of work. The ALJ must set forth, with some specificity, what factors he considered and how those factors led to the conclusion that the claimant is totally and permanently disabled.

In this instance, the ALJ failed to perform the requisite analysis in determining Lawrence was permanently and totally disabled. He merely stated he adopts the restrictions assigned by Dr. Harreld who opined Lawrence would need to ice and elevate his right ankle periodically throughout the day. Thereafter, the ALJ concluded:

This restriction alone would render most people totally disabled. Much less a man who has spent his entire professional life, almost 40 years, in factories and shipping departments. It is doubtful that many employers would tolerate this for an extended period. The Plaintiff's high school education does not create sufficient opportunities to overcome this severe restriction nor does his work experience... While some may seek a more detailed explanation, I doubt many people would envision hiring, on a permanent basis, a 58- year- old man with factor(y) and shipping experience, and a high school education, who had to elevate and ice his ankle every so often.

We do not believe this is a sufficient analysis as mandated by City of Ashland v Stumbo, supra. The ALJ's opinion does not sufficiently set forth a detailed analysis, properly weighing

the evidence of record in determining whether Lawrence will be able to earn income by providing services on a regular and sustained basis in a competitive economy. On remand, the ALJ is directed to perform the correct analysis in accordance with City of Ashland v Stumbo, supra, and Ira Watson Department Store v Hamilton, supra. We make no determination regarding whether Lawrence is permanently totally disabled, and the ALJ is free to make any determination based upon the evidence.

Lawrence filed a brief on December 21, 2018, arguing the 2018 changes to KRS 342.730(4) are unconstitutional. Kellogg's argues this issue was not properly preserved since it was never raised until Lawrence's brief. Our review of the records does not reveal the constitutionality of the version of KRS 342.730(4), effective July 14, 2018, was ever raised or preserved. We note Lawrence served a copy of her brief on Hon. Daniel Cameron, Kentucky Attorney General. However, the Kentucky Attorney General was never properly notified of the action as required by KRS 418.075; therefore, we determine that issue was not properly preserved.

We note CR 24.03 states: "When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney General." This was also noted in Delahanty v. Commonwealth of Kentucky, 558 S.W.3d 489 (Ky. App. 2018), where the Kentucky Court of Appeals stated: "Strict compliance with the notification provisions of KRS 418.075 is mandatory."

Because we determine the constitutionality of the amended version of KRS 342.730(4) was never previously raised, and the Kentucky Attorney General was not properly notified, we affirm. Even if we deemed the Kentucky Attorney General had been properly

notified of the constitutionality of this statute, this Board, as an administrative tribunal, has no jurisdiction to make a determination on this issue. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945), and we would therefore be compelled to affirm.

We note House Bill 2 became effective July 14, 2018. Section 13 of that bill amended KRS 342.730(4) to provide 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 as seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), we affirm the ALJ's application of KRS 342.730(4) as amended in 2018. In that case, 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 find Lawrence's award is governed by the limitations set forth in the amended statute.

Lawrence argues, on cross-appeal, the ALJ erred in failing to award PPD benefits during the return to work period. Citing Sweasy v. Wal-Mart, 295 S.W.3d 835 (Ky. 2009), Lawrence argues the impairment deemed to be permanent at MMI arises when a harmful change in the human organism occurs. Lawrence argues he is entitled to an award of PPD benefits beginning on the date of injury when he fractured his ankle interrupted by his periods of TTD. He also requests additional findings regarding entitlement to enhanced PPD benefits during his return to work.

Workers' compensation law is a statutory creation. As enacted by the legislature, KRS 342.730(1) authorizes income benefits for TTD, but it does not provide benefits for temporary partial disability. Citing Underwood v. Pella Windows DEPE PLLC, Claim No. 2016-CA-001424-WC, rendered March 31, 2017, (Designated Not To Be Published), Lawrence acknowledges he cannot receive PTD benefits while working full duty. Lawrence has not cited to any authority authorizing an award of PPD prior to the award of PTD. Sweasy deals with the date an impairment or disability arises in permanent partial disability cases. Sweasy did not address the award of PPD benefits prior to a claimant becoming permanently and totally disabled.

Here, Dr. Harreld placed Lawrence at MMI from the ORIF and assigned an impairment rating. However, Lawrence's condition remained symptomatic. The hardware implanted in the first surgery caused ongoing pain and swelling, eventually necessitating surgery for hardware removal. As subsequent events revealed, it is clear Lawrence reached MMI from the first surgery, but his condition was not at MMI until after his recovery from the second surgery for hardware removal. Lawrence received TTD benefits, or earned equal or greater wages until he recovered from his second surgery. Because the condition was not at MMI during his return to work, Lawrence would not be entitled to PTD benefits while earning full wages. We find no error in the ALJ's refusal to grant PPD benefits during the return to work.

Accordingly, the August 24, 2018 Opinion, Award and Order, and the September 10, 2018 Order on petition for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED IN PART AND VACATED IN PART**. This claim is **REMANDED** for additional analysis as set forth above.

ALL CONCUR.

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