

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 23, 2022

CLAIM NO. 202101131

LATOSHA GHOLSTON

PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE**

FORD MOTOR COMPANY and
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Latosha Gholston (“Gholston”) appeals from the Opinion, Award, and Order issued by Hon. Stephanie L. Kinney, Administrative Law Judge, on May 5, 2022. The ALJ found Gholston sustained bilateral wrist injuries while working for Ford Motor Company (“Ford”) for which she underwent injections, and she subsequently had surgical releases performed on both wrists. The ALJ awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”)

benefits, and medical benefits pursuant to KRS 342.020 for her work injuries. The ALJ also awarded 6% interest on all due and unpaid income benefits. The ALJ declined to enhance the interest to 12% on due and unpaid benefits, and further refused to award an attorney fee against Ford pursuant to KRS 342.040(1) & (2). Gholston also appeals from the May 27, 2022 Order denying her Petition for Reconsideration.

On appeal, Gholston argues the ALJ erred by failing to award additional interest and attorney fees to her pursuant to KRS 342.040 (1) & (2). She argues the ALJ's decision in this regard is not supported by substantial evidence and a contrary result is compelled. She argues the ALJ abused her discretion in refusing to award 12% interest rather than 6% interest on past due benefits, and additionally erred by failing to assess additional attorney fees against Ford. We find the ALJ properly exercised her discretion and provided an appropriate explanation for her determination. The ALJ did not abuse the authority granted to her, and a contrary result is not compelled. Therefore, we affirm.

Gholston filed a Form 101 on August 4, 2021 alleging she sustained injuries to both hands on November 12, 2020 caused by repetitive trauma she incurred while working for Ford. Gholston's only employment history has been as a certified nursing assistant ("CNA) and working on the assembly line at Ford. The medical record submitted with the Form 101 indicates Gholston sought treatment with Virginia Anderson, APRN ("Nurse Anderson") of Norton Healthcare on November 12, 2020 for complaints of bilateral hand numbness, bilateral leg pain, and shortness of breath attributable to COVID-19. The record reflects Gholston

worked on an assembly line at Ford and she is right hand dominant. Nurse Anderson diagnosed Gholston with bilateral carpal tunnel syndrome, myalgia unspecified site, chronic fatigue, and dyspnea due to COVID-19. That medical record is silent regarding whether any of those conditions was caused by her work at Ford.

Gholston testified by deposition on October 21, 2021 and at the hearing held March 21, 2022. Gholston resides in Louisville, Kentucky, and she was born on April 15, 1990. She is a high school graduate, has a CNA certification that she keeps current, and obtained an associate degree in respiratory therapy. Gholston described the job duties required as a CNA, and her work tasks at Ford. She specifically testified she was required to push grommets into the beds of diesel trucks, and push wiring harnesses into place on 60 to 75 trucks per hour. Gholston testified she began working at Ford on January 25, 2016, and she continues to work at the same job she was performing prior to her injury, with difficulty. She does not believe she can continue to perform that work for the foreseeable future.

Gholston first sought treatment for her complaints on November 12, 2020 when she saw Nurse Anderson who diagnosed, among other conditions, bilateral carpal tunnel syndrome. Gholston believed her condition was caused by her work. She testified she reported this to her supervisor; however, neither Gholston nor Ford filed any evidence other than her testimony to support this assertion. She further testified the physician at the Ford medical department advised her that the condition is not work-related. However, again, neither Gholston nor Ford filed any evidence from the Ford medical department.

Gholston was eventually referred for treatment with Dr. Michelle Palazzo at Kleinert and Kutz. She initially had physical therapy, then injections, and later nerve conduction studies were performed. She underwent a carpal tunnel release of the left wrist on May 18, 2021, and of the right wrist on June 29, 2021. She returned to her regular job at Ford on August 13, 2021 without any restrictions. The surgeries were paid for through Gholston's health insurance with Ford, and she received Unicare, which is apparently a short-term disability benefits program although that was never fully explained in the record. She testified she continues to experience hand tingling and numbness, as well as sharp pain in both elbows that wakes her up at night. She also complained it is difficult for her to perform activities of daily living.

Dr. James Farrage evaluated Gholston at her attorney's request on November 17, 2021. He noted the history of her treatment and complaints. He also noted the history of her two surgeries, and her return to work at Ford. Dr. Farrage diagnosed Gholston as status-post bilateral tunnel releases. He noted her continued complaints of pain, numbness, weakness, and decreased functional capacity. He recommended restrictions of no lifting over 30 pounds occasionally, nor over 15 pounds frequently. He also recommended she avoid repetitive gripping or using pneumatic tools. He assessed a 5% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), of which he attributed 3% to the right hand, and 2% to the left hand. Dr. Farrage found Gholston's condition was caused by her work at

Ford. That is the first evidence in the record causally linking her hand and wrist problems to her employment.

Dr. Michael Nicoson evaluated Gholston at Ford's request on December 16, 2021. He noted her work history, as well as the history of her complaints and treatment. He found she sustained a harmful change to the human organism on November 12, 2020 due to her work at Ford. He stated she needs no additional treatment. He noted she has returned to work, and he advised against using vibratory tools. He assessed a 3% impairment rating pursuant to the AMA Guides.

A Benefit Review Conference was held on February 14, 2022. The issues preserved for determination included whether Gholston sustained a work injury, work-relatedness/causation, TTD benefits, average weekly wage, credit for light duty wages, permanent income benefits, medical benefits, and increased interest for timeliness issue. Ford subsequently provided wage records and withdrew the notice issue.

The ALJ rendered her Opinion, Award, and Order on May 5, 2022. She determined Gholston sustained bilateral hand injuries caused by her work at Ford manifesting on November 12, 2020. She determined the average weekly wage was \$873.48. The ALJ awarded TTD benefits at the rate of \$582.32 from May 18, 2021 through June 13, 2021 and again from June 29, 2021 through August 12, 2021. She awarded PPD benefits beginning November 12, 2020 based upon the 5% impairment rating Dr. Farrage assessed, and she found this award should not be enhanced by the three-multiplier contained in KRS 342.730(1)(c)1. The ALJ also

awarded 6% interest on past due and owing benefits. She explained why she did not award enhanced interest or attorney fees pursuant to KRS 342.040(1) & (2).

Gholston filed a Petition for Reconsideration arguing the ALJ erred by failing to enhance the interest on the past due and owing amounts from 6% to 12%. She also argued the ALJ erred by failing to award an attorney fee against Ford for wrongfully denying the claim. In her Order denying the Petition for Reconsideration issued on May 27, 2022, the ALJ stated as follows:

This matter comes before this Administrative Law Judge upon Plaintiff's petition for reconsideration following an Opinion, Award, and Order issued on May 5, 2022. Plaintiff requested additional findings regarding the ALJ's prior ruling. The ALJ previously concluded additional interest and attorney fees were not warranted in this claim.

KRS 342.040 (1) specifically addresses the timeliness of temporary total disability benefits as well as the penalty of additional interest if a denial, delay, or termination was without a reasonable foundation. Subsection 2 of the statute addresses the proper recourse if temporary total disability benefits are not paid timely after recovery in a proceeding under KRS 342.

Plaintiff's counsel notes the claim was initially denied, which prompted the filing for a Form 101. Plaintiff takes issue with the timeliness in which Defendant submitted wage records. Plaintiff also notes the claim was initially denied based on work-relatedness.

This ALJ considered Plaintiff's arguments but is not persuaded to alter her prior findings or conclusions. The ALJ is not convinced attorney fees or additional interest is warranted in this claim for reasons outlined below.

This claim was initially denied on work-relatedness as noted in the ALJ's opinion. As such, Defendant had a basis to defend the claim and was not obligated to pay temporary total disability benefits prior to the filing of the Form 101.

During litigation, Defendant submitted Dr. Michael Nicoson's report following an evaluation. Defendant continued to preserve causation at the Benefit Review Conference, but that issue was withdrawn prior to the hearing and before the parties submitted briefs on the matter. Thus, Plaintiff became entitled to temporary total disability benefits based upon Dr. Nicoson's causation opinion.

The parties were unable to reach an average weekly wage stipulation in this claim. An agreed upon average weekly wage is essential before the rate of temporary total disability benefits can be calculated. It is clear from the hearing testimony, which thoroughly addressed Plaintiff's bonuses, as well as the parties' briefs that average weekly wage was a highly argued issue in the claim. Thus, temporary total disability benefits were warranted, but the appropriate rate was not clear until average weekly wage was decided.

Plaintiff indicates she has not received any benefits in this claim. However, 803 KAR 25:010 Section 25 (2) indicates benefits are payable within 21 days following the finality of an opinion. This ALJ's opinion has not yet become final, and remains appealable.

The sole issue on appeal concerns whether the ALJ erred by failing to enhance the interest on past due and owing benefits from 6% to 12%, and whether attorney fees should be assessed against Ford. KRS 342.040 states as follows:

- (1) Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury or disability resulting from an occupational disease, with interest at the rate of six percent (6%) per annum on each installment from the time it is due until paid, except that if the administrative law judge determines that the delay was caused by the employee, then no interest shall be due, or

determines that a denial, delay, or termination in the payment of income benefits was without reasonable foundation, then the rate of interest shall be twelve percent (12%) per annum. In no event shall income benefits be instituted later than the fifteenth day after the employer has knowledge of the disability or death. Income benefits shall be due and payable not less often than semimonthly. If the employer's insurance carrier or other party responsible for the payment of workers' compensation benefits should terminate or fail to make payments when due, that party shall notify the commissioner of the termination or failure to make payments and the commissioner shall, in writing, advise the employee or known dependent of right to prosecute a claim under this chapter.

(2) If overdue temporary total disability income benefits are recovered in a proceeding brought under this chapter by an attorney for an employee, or paid by the employer after receipt of notice of the attorney's representation, a reasonable attorney's fee for these services may be awarded. The award of attorney's fees shall be paid by the employer if the administrative law judge determines that the denial or delay was without reasonable foundation. No part of the fee for representing the employee in connection with the recovery of overdue temporary total disability benefits withheld without reasonable foundation shall be charged against or deducted from benefits otherwise due the employee.

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). An ALJ is vested with broad authority in determining 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).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

As the claimant in a workers' compensation proceeding, Gholston had the burden of proving each of the essential elements of her claim. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). The ALJ determined Gholston sustained work injuries to both of her hands and wrists, and awarded TTD benefits, PPD benefits, and medical benefits accordingly.

The ALJ specifically determined the fact Ford did not initiate TTD benefits, nor pay medical benefits prior to her finding, did not rise to the level of egregious conduct contemplated by KRS 342.040 (1) & (2). Although Gholston testified she provided notice of a work injury to Ford that her hands and wrists were bothering her due to her work at some point prior to seeking medical treatment on November 12, 2020, this is not corroborated by the filing of any additional evidence

in the record. Likewise, the medical documentation filed in support of the Form 101 fails to link Gholston's work injury to her employment at Ford as required by 803 KAR 25:010 Section 7(1)(d)2. The first indication in the record of Gholston's claim of a work injury was the filing of the Form 101. The first medical documentation indicating her condition is work-related was the filing of Dr. Farrage's report on December 13, 2021, long after the claim was filed, and only after the ALJ granted an extension of time allowing Gholston to file her evidence.

The record simply does not establish a basis for reversing the ALJ's determination. The ALJ provided an analysis in both her decision and in the Order denying Gholston's Petition for Reconsideration. The ALJ properly exercised the discretion afforded to her, and a contrary result is not compelled. Therefore, the ALJ's determination regarding the application of 6% interest on past due and owing benefits, and her finding that Ford is not responsible for an attorney fee pursuant to KRS 342.040(2) will not be disturbed.

Accordingly, the May 5, 2022 Opinion, Award, and Order, and the May 27, 2022 Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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