

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: February 14, 2020

CLAIM NO. 201769938

POWERS TRANSMISSION

PETITIONER

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

PAUL WILSON and  
HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** Powers Transmission (“Powers”) appeals from the January 28, 2019 Opinion, Award and Order, and the February 19, 2019 order on its petition for reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ awarded Paul Wilson (“Wilson”) temporary total disability benefits, permanent partial disability benefits, and medical benefits for cervical spine and upper extremity injuries. On appeal, Powers argues the ALJ erred

in finding there was not an enforceable settlement, and in failing to perform an adequate analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). We affirm.

Wilson filed his claim on April 4, 2018, alleging he injured his left arm/shoulder and neck on March 23, 2017 when he and three co-workers were lifting an automobile engine block core on a pallet.

Wilson testified by deposition on May 4, 2018, and at the hearing held November 28, 2018. Wilson completed the tenth grade and has no specialized or vocational training. Wilson has worked primarily as a mechanic. He began working as an automotive technician for Powers in November 2015, performing full care car service. Wilson was required to work in a standing position and raise his arms while using power tools, and he performed heavy lifting, pulling, and pushing. He worked approximately ten hours a day with an hour lunch break.

On March 23, 2017, he and three other employees picked up an engine block core on a pallet to move it from the ground to the back of a pickup truck. A co-worker dropped an end of the pallet, and the weight of the block shifted, injuring Wilson's left arm. He finished his shift but woke up in the middle of the night with pain in his left shoulder, bicep, and neck. His pain continued over the weekend, and on Monday, he went to Concentra where x-rays were taken, and muscle relaxers were prescribed. He was restricted to no lifting, pushing, or pulling more than ten pounds up to three hours per day. Wilson later had an MRI which revealed a rotator cuff tear. He declined to have surgery recommended by Dr. Ryan Patrick Donegan.

Wilson experienced pain while continuing to work outside of his restrictions. He worked from March 23, 2017 until May 12, 2017, when Powers fired him.

On July 30, 2017, Wilson began working as a quality inspector for Hitachi through a temporary service. Wilson stated the work was less physically demanding than his job at Powers. However, he continues to have radiating neck pain two to three times per week. He can push with his shoulder but pulling causes numbness in his fingers. He has no strength in his left arm, and pain in his right arm. He does not believe he could return to his prior job duties for Powers which required using both hands. Wilson felt he was able to continue working within his restrictions at Hitachi. Wilson indicated he did not wish to proceed with surgery.

Wilson sought treatment at Concentra Medical Center on March 29, 2017, complaining of neck pain radiating down the left arm. He was diagnosed with a left shoulder strain and was referred to physical therapy.

On May 8, 2017, Wilson returned with left shoulder pain. Dr. Norman Ellingsen diagnosed a left shoulder strain and ruled out a torn labrum and/or subscapularis. An MRI was performed. Wilson reported difficulty raising his arm overhead. On May 30, 2017, Wilson returned for a follow-up appointment and reported the weakness in the left shoulder was worse than the pain. Dr. Ellingsen diagnosed an incomplete full thickness tear of the distal supraspinatus tendon with interstitial and insertional tearing in the infraspinatus tendon. Wilson returned on June 19, 2017 reporting the injection provided no relief.

Medical records of Bluegrass Orthopaedics reflect Wilson was seen for left shoulder pain on June 26, 2017. Dr. Donegan diagnosed a full thickness acute

traumatic rotator cuff tear. Wilson was restricted from using his left upper extremity. Dr. Donegan scheduled surgery for August 22, 2017.

Dr. Anthony McEldowney evaluated Wilson on September 19, 2017. Dr. McEldowney diagnosed a cervical sprain/strain versus disc derangement, and a left shoulder rotator cuff tear. Dr. McEldowney assigned restrictions of no frequent or repetitive activities with the left shoulder, no lifting or carrying left shoulder overhead or in front of the body, and isolated lifting and carrying with the left arm up to 12 pounds, with pushing and pulling up to 30 pounds. Dr. McEldowney stated Wilson had not reached maximum medical improvement (“MMI”) on the date of the evaluation, and does not retain the physical capacity to return to his previous employment. In an October 18, 2017 supplemental report, Dr. McEldowney stated he had reviewed additional correspondence and noted Wilson elected not to undergo surgery. Dr. McEldowney found Wilson at MMI as of September 19, 2017, and assessed a combined 8% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, (“AMA Guides”), consisting of 6% for the cervical spine, and 3% for the upper extremity.

Dr. J. Rick Lyon evaluated Wilson on May 31, 2018. Dr. Lyon diagnosed a left rotator cuff tear. He agreed with Dr. Donegan’s recommended surgical repair. Dr. Lyon noted Wilson declined surgery and therefore found he had reached MMI as of June 26, 2017. Dr. Lyon felt Wilson’s neck complaints were an extension from the shoulder and did not result from a specific neck injury. He stated those symptoms are not unusual for someone with a rotator cuff tear. Dr. Lyon

restricted Wilson to working with his left elbow at his side, with no weight restriction. Dr. Lyon assessed a 1% impairment rating pursuant to the AMA Guides. He stated Wilson remains a candidate for rotator cuff repair.

Powers filed a motion to enforce a settlement on September 14, 2018, stating it had offered \$20,000.00 for a full and final buyout of Wilson's rights on September 6, 2018. Wilson's attorney accepted the offer on that date. The ALJ was informed of the settlement, and a hearing was cancelled. The agreement was drafted and an e-mail was sent to claimant's attorney stating:

As we have agreed, this claim has settled for the lump sum of \$20,000.00 in exchange for a complete buyout of Mr. Wilson's indemnity, past and future medical, vocational, and reopening rights.

We have been informed that the DWC is now accepting e-filed 110s. Please review the attached agreement and if acceptable to you, please sign and please have your client sign and date where appropriate. Please then e-file or forward this agreement on to Frankfort for ALJ approval.

In order to expedite settlement, we have requested that the settlement check be drafted and sent to us so that we may disburse it upon receipt of the approved agreement.

Please advise should you wish there to be any changes to the settlement agreement language. Thank you in advance for your attention to this matter.

Wilson's attorney acknowledged by e-mail on September 10, 2018, stating, "I'll have him come in to review and sign."

On September 11, 2018, Wilson's attorney e-mailed the ALJ and counsel for Powers stating:

This claim was scheduled for hearing on September 6, 2018. Prior to the hearing, the client agreed to settlement

terms with the defense attorney. Thereafter, Mr. Wilson has expressed to me that he felt pressured to take the settlement and does not wish to proceed with the settlement. Instead, he would like to have the hearing rescheduled. Both Lyman and myself have discussed the matter in great detail with Mr. Wilson and he has not changed his mind.

I apologize for the inconvenience this causes all involved. Like to have a telephone conference with Mr. Wilson involved please let me know.

On September 28, 2018, the ALJ issued an order denying Powers' motion to compel Wilson to sign the agreement. Enforcement of the agreement was added as a contested issue at the hearing held November 29, 2018.

At the hearing, Wilson testified regarding the settlement as follows:

Q This claim was originally scheduled for a formal hearing on September the 6th of 2018 at the Frankfort hearing site. Do you recall going to the formal hearing on that date?

A Yes.

Q On that date, did you agree to settle your claim for twenty thousand dollars (\$20,000.00) in exchange for waivers of your rights to additional indemnity, past and future medical expenses, vocational rehabilitation and to reopen?

A I did agree with it.

Q Did you instruct your attorney to settle the claim on those terms?

A I agreed with him...

Q And, you later tried to revoke that agreement?

A Yes, later on that night, I called him up and – because I got to thinking about it because there was no medical benefits.

Q As a result of your agreement to settle the claim, the formal hearing on the 6th of September was cancelled and you didn't testify that day, did you?

A No.

The ALJ rendered his decision on January 28, 2019. His findings relevant to this appeal are as follows:

10. The ALJ finds that the Settlement Agreement that was tentatively agreed to in this matter is not enforceable despite the email correspondence that indicates that a preliminary agreement had been reached.

11. The communication that constitutes assent to the agreement references the need for Plaintiff's counsel to have the Plaintiff come in and review it. It cannot be overlooked that the Plaintiff is not a well-educated man and that he declined a surgery that he may ultimately need to have at some point. It is not at all clear whether the Plaintiff had a full understanding of this point and the ALJ therefore finds given the specific facts of this situation that the Plaintiff should not be held to the preliminary agreement assented to by his counsel.

12. The ALJ therefore declines to enforce the Agreement.

**Benefits Per KRS 342.730/MMI Date/  
Post Injury Wage Injury as Defined by the Act/  
Work-Relatedness and Causation (Neck)**

13. The ALJ is compelled to reference that the Plaintiff's testimony was credible and convincing regarding the progression of his injury and his condition prior thereto.

14. The ALJ therefore finds that the Plaintiff's testimony lends credence to the medical opinion of Dr. McEldowney. The ALJ also finds Dr. McEldowney's report is convincing in its description of the Plaintiff's lack of prior symptoms or restrictions and the fact that his work injury was witnessed by three co-workers. Dr.

McEldowney also credibly described the Plaintiff's symptoms including neck and left arm pain and tingling along with a rotator cuff tear confirmed by MRI findings.

15. The ALJ specifically rejects the paradoxical opinion of Dr. Lyon who relates the neck symptoms to the work-related rotator cuff tear but declines to make a determination of work-relatedness for the neck condition.

16. The credible opinion of Dr. McEldowney has convinced the ALJ and the ALJ thus finds based thereupon that the Plaintiff has sustained an 8% whole person impairment to the cervical spine and left upper extremity as a result of the work injury, that he does not retain the ability to return to the same type of work, and that he reached MMI as of September 19, 2017.

17. The Plaintiff testified that he returned to work for a different employer making greater wages but that the employer is a temporary agency. The Plaintiff further explained that he needed both hands to perform his duties and that he continued to have pain going from his shoulder down to his elbow. The Plaintiff also added that he had no strength in his arm and estimated that his pain could at times reach a seven on a one to ten scale.

18. The ALJ therefore finds that the Plaintiff does not retain the ability to return to the same type of work and that it cannot be determined that he will be able to continue to earn the same or greater wages indefinitely considering the pain that he experiences and his education level. The ALJ therefore finds that the "3" multiplier is applicable per KRS 342.730(1)c(1).

Powers filed a petition for reconsideration seeking a finding that the settlement agreement is enforceable, and requesting additional findings regarding the applicable multiplier and the Fawbush analysis. The ALJ provided as follows on reconsideration:

2. The ALJ reiterates the finding that the Plaintiff returned to work for a different employer making greater

wages but that said employer is a temporary agency. By definition[sic] this does not constitute employment that is to continue indefinitely.

3. The ALJ finds that the Plaintiff further credibly described that his duties at the current job require the use of both hands which has caused him to have pain going from his shoulder down to his elbow. The Plaintiff also credibly testified that he had no strength in his arm and estimated that his pain could at times reach a seven on a one to ten scale.

4. The ALJ therefore finds that based upon the Plaintiff's advanced age of 60, his work history that consists primarily of automotive technician work, and the temporary nature of his current employment, the ALJ finds that the Plaintiff is not likely to be able to continue to earn the same or greater wages for an indefinite period of time.

On appeal, Powers argues the ALJ erred in failing to enforce the settlement. Powers cites Coalfield Telephone Co. v. Thompson, 113 S.W.3d 178 (Ky. 2003) for the proposition that a settlement agreement between the parties to a workers' compensation claim is enforceable where writings "clearly indicate the terms to which they agreed, and there is no assertion that the terms were incomplete." Powers also cites the unpublished decision in Alvey v. Ford Motor Co., 2011-CA-000200-WC rendered May 18, 2012, for the proposition that, when both parties concede the existence of the agreement and neither asserts that the agreement is incomplete, a conclusion is compelled that an agreement exists.

If the agreement is determined to not be enforceable on appeal, Powers argues the ALJ's Fawbush analysis was inadequate. Powers contends the factors identified by the ALJ relate more to a permanent total disability analysis than a Fawbush analysis. The ALJ failed to note Wilson's testimony indicating he was not

working in excess of his restrictions, was not taking narcotic medication, and thought he could perform his current job indefinitely. Powers argues the ALJ's award of the three multiplier should be vacated and the matter remanded for additional findings.

We first address the ALJ's refusal to enforce the terms of the settlement agreement. KRS 342.265, states in pertinent part:

(1) If the employee and employer and special fund or any of them reach an agreement conforming to the provisions of this chapter in regard to compensation, a memorandum of the agreement signed by the parties or their representatives shall be filed with the commissioner, and, if approved by an administrative law judge, shall be enforceable pursuant to KRS 342.305.

KRS 342.265 requires a settlement agreement to be approved by an ALJ, otherwise it is not enforceable. Greene v. Paschall Truck Lines, 239 S.W.3d 94 (Ky. App. 2007). To hold otherwise would render KRS 342.265 meaningless, and defeat its purpose of providing an ALJ the opportunity to protect the interest of the employee. Skaggs v. Wood Mosaic Corp., 428 S.W.2d 617 (Ky. 1968). The obvious policy and purpose of KRS 342.265 is to discourage the making of settlements except under the protective supervision of the ALJ. Kendrick v. Bailey Vault Co., Inc., 944 S.W.2d 147 (Ky. App. 1997). In Commercial Drywall v. Wells, 680 S.W.2d 299 (Ky. App. 1993), the Court of Appeals stated an ALJ "may look behind the settlement when an agreement appears not to be in the interest of the worker, provided there is cause to do so." Accordingly, an ALJ enjoys the authority to reject even signed agreements between the parties.

Although the parties may have reached a verbal understanding, an agreement was never signed by Wilson. Although Wilson was not inclined to

undergo shoulder surgery at the time, Drs. Donegan and Lyon agreed he remains a surgical candidate. An ALJ could reasonably conclude the proposed agreement was not in the claimant's interest where the medical consensus establishes surgery is warranted and the proposed settlement contains a buyout of future medical benefits.

The record contains substantial evidence supporting the ALJ's determination that only a tentative understanding had been reached. The e-mail from Powers' counsel stating, "Please review the attached agreement and if acceptable to you, please sign and please have your client sign and date where appropriate" is evidence of the tentative nature of the agreement. Clearly, the review and signature were contemplated as the final act of acceptance. Additionally, the e-mail from Wilson's counsel to opposing counsel and the ALJ indicated Wilson felt pressured. The ALJ could therefore reasonably conclude there was no meeting of the minds. KRS 342.285 grants the ALJ, as fact-finder, the sole discretion to determine the quality of the evidence and draw reasonable conclusions therefrom. Under the circumstances of the case, we conclude the ALJ acted within his authority in declining to enforce the proposed agreement.

Having addressed whether the agreement is enforceable, we next turn to the ALJ's determination regarding the appropriate multiplier. As the claimant in a workers' compensation proceeding, Wilson had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in proving entitlement to the three multiplier, the question on appeal is whether substantial evidence supports the ALJ's determination. 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). 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 that 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 function of the Board in reviewing an ALJ’s decision is limited to determining whether the findings made 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). 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).

Wilson's lack of physical capacity to return to the work performed at the time of the injury and his return to work at the same or greater wage are not at issue on appeal. Powers challenges the ALJ's finding only as it relates to the third prong of the Fawbush analysis. Fawbush directs that when a claimant meets the criteria of both KRS 342.730(1)(c)1 and (c)2, "the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision." Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003). As a part of this analysis, the ALJ must determine whether "a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Fawbush at 12. In other words, is the injured worker faced with a "permanent alteration in the ...ability to earn money due to his injury." Id. "That determination is required by the Fawbush case." Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004). If the ALJ determines the worker is unlikely to continue earning a wage equaling or exceeding his or her wage at the time of the injury, the three multiplier under KRS 342.730(1)(c)1 is applicable.

The Fawbush Court articulated several factors an ALJ may consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. Those factors include the claimant's lack of physical capacity to return to the type of work that he or she performed, whether the post-injury work is performed out of necessity, whether the

post-injury work is performed outside of medical restrictions, and if the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Fawbush at 12. The Court in Adkins, supra, directed a determination of whether an injured employee is able to continue in his or her current job constitutes an insufficient analysis. The Court stated:

Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job.

Adkins at 390.

Fawbush does not contain an exhaustive list of factors an ALJ may consider in making the determination of whether a worker is likely to continue earning the same or greater wage. Rather, the ALJ's determination is fact-specific and individualized. There is necessarily some overlap between the considerations involved with determining whether a worker retains the physical capacity to return to the previous employment, whether there is a permanent total disability, and whether the worker has the ability to earn the same or greater wage for the indefinite future.

The ALJ considered Wilson's need to use both hands to perform his duties, continued pain going from his shoulder down to his elbow, the lack of strength in his arm, and the surgery he may ultimately need as factors weighing in favor of finding the three multiplier contained in KRS 342.730(1)(c)1 is appropriate. The ALJ also considered Wilson's age, education level, employment history consisting primarily of automotive technician work, and the temporary nature of his current employment as weighing in favor of finding Wilson is unlikely to be able to continue to earn the same or greater wage for the indefinite future. Substantial

evidence exists supporting the determination Wilson has a permanent alteration in the ability to earn money due to his injury.

Although Powers has identified substantial evidence regarding factors supporting its position, it is not the function of this Board to re-weigh the proof. Based on the evidence enumerated above, the ALJ could reasonably conclude Wilson's pain and physical restrictions adversely impact his ability to find alternative work at the same wage level. The ALJ conducted the analysis required by Fawbush, and substantial evidence supports the conclusion that the three multiplier is appropriate in this instance. The ALJ acted within his discretion in determining which evidence to rely upon, and it cannot be said his conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the January 28, 2019 Opinion, Award and Order, and the February 19, 2019 Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

**DISTRIBUTION:**

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