Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 29, 2022

CLAIM NO. 201991504

ROBERT C. WILSON and JOHNNIE L. TURNER — PETITIONER

VS. **APPEAL FROM HON. CHRISTINA D. HAJJAR, ADMINISTRATIVE LAW JUDGE**

AISIN AUTOMOTIVE CASTING INC. and HON. CHRISTINA D. HAJJAR, ADMINISTRATIVE LAW JUDGE — RESPONDENTS

OPINION
AFFIRMING

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

MILLER, Member. Robert C. Wilson ("Wilson") seeks review of the January 5, 2022 Opinion, Award, and Order rendered by Hon. Christina D. Hajjar, Administrative Law Judge ("ALJ") finding he sustained a work-related left arm injury and awarding permanent partial disability ("PPD") benefits, enhanced by the

two-multiplier, and reasonable and necessary medical expenses. The ALJ also determined the safety violation enhancement did not apply.

On appeal, Wilson argues the ALJ erred in finding he is not entitled to the three-multiplier contained in KRS 342.730(1)(c)1 or the safety violation enhancement pursuant to KRS 342.165(1). For the reasons set forth below, we affirm.

BACKGROUND

Wilson worked as a line inspector in the finishing department at Aisin Automotive Casting ("Aisin"). Wilson picked up parts, inspected them, and loaded them into boxes. His job duties also included assisting the operator and various cleaning tasks. Wilson's job involved pulling heavy parts weighing 40 to 60 pounds and often pushing approximately 200 pounds. On February 15, 2019, the assembly line was not running, and Wilson was cleaning lubricant off the floor with a compressed air line. He pulled the hose from the second line because the operator was using Wilson's line, but when he did so, the cable hooked to the line rubbed against a freestanding Kanban rack, which tipped over onto Wilson. He used his left arm to catch the rack as it fell towards him, but it landed on his arm, pulled him sideways, and slid down his shin. Wilson experienced numbness from the inside of his left arm down to his middle and ring finger.

The Kanban racks had been there for over two months. Wilson stated there were plans to bolt them to the floor, but because there was some uncertainty about where they would be permanently placed, another department at Aisin welded small feet to the rack bottoms. The racks were bolted down in the same location on

the same day following Wilson's injury. Tim Owens ("Owens"), a health, safety, and environmental specialist at Aisin at the time of the incident, testified the racks were weighted on the bottom so that they would not fall over under normal use. He also stated he did not expect the placement of an air hose through a Kanban rack.

Aisin referred Wilson to Kentucky Family Medical, where he saw a doctor the same day of the injury. He was then referred to Kentucky Bone and Joint Surgeons and had surgery to repair a left distal bicep rupture. Wilson attended physical therapy from April through June 2019 and then transitioned to a home exercise program.

On July 1, 2019, Dr. Samuel Coy at Kentucky Bone and Joint Surgeons released Wilson to return to work without restrictions. He opined Wilson reached maximum medical improvement ("MMI") on July 31, 2019 and assessed a 0% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Wilson was evaluated by Dr. David Muffly on July 31, 2019. Dr. Muffly noted Wilson still experienced atrophy and weakness of left elbow flexion and supination. He assessed a 5% impairment rating pursuant to the AMA Guides. Dr. Muffly also recommended a permanent restriction of no lifting over 30 pounds.

After surgery, Wilson returned to work at Aisin, but did not return to his old position. He began working in quality control as a function gauge operator. Instead of pushing and pulling heavy parts, Wilson measures small parts, weighing only three or four pounds, to ensure they are made to standard. Prior to his injury, Wilson earned $14.50 per hour and worked 60 to 65 hours per week. Due to

anniversary raises, Wilson now makes $16.50 per hour and works 50 to 55 hours per week as a function gauge operator.

Wilson testified he does not believe he could return to his old job. He stated he has experienced pain when picking up a large box and he is afraid he will reinjure himself. He also stated he still experiences aching and numbness in his left arm sporadically.

After reviewing the evidence of record, the ALJ issued an Opinion, Award, and Order on January 5, 2022, finding Wilson had sustained a work-related injury resulting in permanent impairment as a result. The ALJ found Wilson retained a 5% impairment rating and awarded PPD benefits of $17.34 per week for 425 weeks, enhanced by the two-multiplier when applicable pursuant to KRS 342.730(1)(c)2. In addition, the ALJ awarded reasonable and necessary medical expenses. Though Wilson alleged a safety violation had occurred, the ALJ found the safety violation enhancement contained in KRS 342.165(1) inapplicable. No petition for reconsideration was filed. This appeal followed.

ANALYSIS

As the claimant in a workers' compensation proceeding, Wilson 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 Wilson was unsuccessful in his burden regarding the applicability of the three multiplier and the safety violation enhancement, 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.

Wilson did not file a petition for reconsideration from the January 5, 2022 Award, Opinion, and Order. In the absence of a petition for reconsideration, on questions of fact, the Board is constrained to a determination of whether substantial evidence in the record supports the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if substantial evidence supports the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Thus, on appeal, we must determine whether substantial evidence supports the ALJ's decision.

First, Wilson argues the ALJ erred in applying the two-multiplier instead of the three-multiplier pursuant to KRS 342.730(1)(c), which states, in relevant part, as follows:

> If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit shall be multiplied (3) times the amount otherwise determined under paragraph (b) of this subsection.

KRS 342.730(1)(c)2 further provides:

> If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for

> permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection.

The ALJ found Wilson met the criteria under both KRS 342.730(1)(c)1 and (c)2. When a claimant satisfies the criteria of both (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 v. Gwinn, 103 S.W.3d 5, 12 (Ky. 2003). 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 that equals or exceeds his or her wage at the time of the injury, the three-multiplier pursuant to KRS 342.730(1)(c)1 is applicable.

The Court in Fawbush also articulated several factors an ALJ can 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 he or she performed at the time of injury, whether the post-injury work is done 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. Id. at 12. As the Court in Adkins v. Pike County Bd. of Educ., supra, stated, it is not enough to determine whether an injured employee is able to continue in his or her current job. 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.

Id. at 30.

Wilson does not argue the ALJ improperly or inadequately performed the Fawbush analysis, but rather, the ALJ erred in failing to apply the three-multiplier pursuant to Tractor Supply Co. v. Wells, No. 2021-CA-0296-WC (Ky. App. June 25, 2021). In Tractor Supply, the Court of Appeals stated that, because the plaintiff could not perform her pre-injury job, she was entitled to the three-multiplier. Id. at 4. The plaintiff in Tractor Supply, however, was terminated and did not return to work; thus, a Fawbush analysis was not required. Therefore, the instant facts are distinguishable from those in Tractor Supply.

In the instant claim, the ALJ determined that Wilson could not go back to work pushing and pulling up to 200 pounds, as he did at times prior to the injury so the three-multiplier was applicable. *See* Ford v. Forman, 142 S.W.3d 141, 145 (Ky. 2004).

As for the two-multiplier, Wilson continued to work for Aisin and the parties stipulated that he earned wages equal to or greater than his pre-injury wage, satisfying KRS 342.730(1)(c)2. Because either multiplier was applicable, the ALJ was required to perform the Fawbush analysis.

The ALJ performed the requisite analysis and found there was no evidence that Wilson could not continue to perform his current job into the indefinite future. The treating physician, Dr. Coy, assigned no restrictions and opined Wilson could return to full-duty work. Wilson was working full duty in his current position 50-plus hours per week at a higher wage than he was earning at the time of the injury. While the ALJ determined Wilson could not return to the specific job performed at the time of his injury, she found Wilson could perform similar work or his current job. Because the ALJ performed the necessary analysis in determining which provision under KRS 342.730(1)(c) was most appropriate, and explained her reasoning based on the evidence, we find no error in her award of the two-multiplier.

Wilson also argues the ALJ erred in finding the safety violation enhancement inapplicable.

KRS 342.165(1) provides in pertinent part as follows:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

Wilson alleges Aisin violated its general duty to provide a workplace free from recognizable hazards contained in KRS 338.031(1)(a).

The purpose of KRS 342.165(1) is to reduce the frequency of industrial accidents by penalizing those who intentionally failed to comply with known safety regulations. Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996). The burden

is on the claimant to demonstrate an employer's intentional violation of a safety statute or regulation. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997). The application of the safety penalty requires proof of two elements. Apex Mining v. Blankenship, supra. First, the record must contain evidence of the existence of a violation of a specific safety provision, whether state or federal. Second, evidence of "intent" to violate a specific safety provision must be present. Enhanced benefits do not automatically flow from a showing of a violation of a specific safety regulation followed by a compensable injury. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). The worker has the burden to demonstrate the employer intentionally failed to comply with a specific statute or lawful regulation. Intent to violate a regulation can be inferred from an employer's failure to comply with a specific statute or regulation because employers are presumed to know what state and federal regulations require. The Kentucky Supreme Court in Chaney v. Dags Branch Coal Co., 244 S.W.3d 101 (Ky. 2008), held as follows:

> Absent unusual circumstances such as those found in Gibbs Automatic Moulding Co. v. Bullock, 438 S.W.2d 793 (Ky. 1969), an employer is presumed to know what specific state and federal statutes and regulations concerning workplace safety require. Thus, its intent is inferred from the failure to comply with a specific statute of regulation. If the violation "in any degree" causes a work-related accident, KRS 342.165(1) applies. AIG/AIU Insurance Co. v. South Akers Mining Co., LLC, 192 S.W.3d 687 (Ky. 2006), explains that KRS 342.165(1) is not penal in nature, although the party that pays more or receives less may well view it as such. Instead, KRS 342.165(1) gives employers and workers a financial incentive to follow safety rules without thwarting the purposes of the Act by removing them from its coverage. It serves to compensate the party that

> receives more or pays less for being subjected to the effects of the opponent's "intentional failure" to comply with a safety statute or regulation.

Violation of the "general duty" clause set out in KRS 338.031(1)(a) may well constitute grounds for assessment of a safety penalty in the absence of a specific regulation or statute addressing the matter. Apex Mining v. Blankenship, supra; Brusman v. Newport Steel Corp., 17 S.W.3d 514 (Ky. 2000). KRS 338.031(1)(a) requires the employer "to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm" to employees. In Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky. App. 2000), the Kentucky Court of Appeals applied a four-part test to determine whether a violation of KRS 338.031(1)(a) had occurred. A violation of the general duty provision occurs when: "(1) [a] condition or activity in the workplace presented a hazard to employees; (2) [t]he cited employer or employer's industry recognized the hazard; (3) [t]he hazard was likely to cause death or serious physical harm; and (4) [a] feasible means existed to eliminate or materially reduce the hazard." Id. at 599.

A violation of the general duty clause set out in KRS 338.031(1)(a) can satisfy the requirement set out in KRS 342.165 that a "specific statute" was intentionally ignored. Not all violations of KRS 338.031(1)(a) automatically rise to a violation egregious enough to justify granting an enhancement under KRS 342.165. Cabinet for Workforce Development v. Cummins, supra. *See* Apex Mining v. Blankenship, supra. In order for a violation of the general duty provision to warrant enhancement pursuant to KRS 342.165(1), the employer must be found to have

intentionally disregarded a safety hazard that even a lay person would obviously recognize as likely to cause death or serious physical harm. Hornback v. Hardin Memorial Hospital, 411 S.W.3d 220, 226 (Ky. 2013).

Here, the ALJ weighed the testimony of the parties. Wilson believed the racks should have been bolted because they had holes to do so. Further, the racks were bolted down in the same location shortly after the injury.

Aisin maintains the racks were not permanently located and that is why they were not bolted to the floor. Additionally, the racks were weighed down to prevent them from falling over and Aisin did not expect an air hose to be used by running it through the rack.

Wilson contends the remedial measure proves culpability; however, subsequent remedial measures cannot be used as evidence to prove culpable conduct. KRE 407. Statements made by Aisin in settlement negotiations are, likewise, not admissible. KRE 408.

The ALJ must provide a sufficient basis to support his or her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining, Co., 634 S.W.2d 440 (Ky. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his or her reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so

the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

The ALJ relied on Owens' testimony, who stated the racks were weighed down so they would not fall under normal use. He would not expect an air hose to be run through the racks. In contrast, Wilson believed the racks should have been bolted to the floor though he was not aware of any Company policy requiring the racks be bolted down.

While another trier of fact may have weighed the evidence differently, the evidence does not compel a different result. Thus, the ALJ did not err in finding the safety violation enhancement did not apply.

Accordingly, the January 5, 2022 Opinion, Award, and Order rendered by Hon. Christina Hajjar is hereby **AFFIRMED.**

ALL CONCUR.

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