

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 7, 2020

CLAIM NO. 201484038

RONNIE BEAN

PETITIONER

VS. **APPEAL FROM HON. JOHN H. McCracken,
ADMINISTRATIVE LAW JUDGE**

COLLIER ELECTRICAL SERVICE, INC. and
HON. JOHN H. McCracken,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Ronnie Bean (“Bean”) appeals from the Opinion, Award, and Order rendered September 21, 2018, and the October 15, 2018 order on his petition for reconsideration issued by Hon. John H. McCracken, Administrative Law Judge (“ALJ”). The ALJ awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits for a left shoulder injury Bean sustained while working for Collier Electrical Service, Inc. (“Collier”).

On appeal, Bean initially argues the ALJ's decision is not supported by substantial evidence. Bean next argues the amended version of KRS 342.730(4) effective July 14, 2018, is unconstitutional and he should receive PPD benefits for 425 weeks. We note Bean did not properly notify or serve a copy of his brief upon the Kentucky Attorney General as required by KRS 418.075. We further note the ALJ properly determined that changes to KRS 342.730(4) effective July 14, 2018, are applicable in accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019). Therefore, we affirm. We also note Bean argues that the ALJ improperly calculated his average weekly wage ("AWW"); however, this issue was not raised in a petition for reconsideration. We find the ALJ's decision is supported by substantial evidence, the constitutionality issue was not perfected, and the issue regarding the AWW calculation was not properly preserved. Therefore, we affirm.

Bean filed a Form 101 alleging he sustained a shoulder injury while working for Collier at a jobsite in Blandville, Kentucky on February 20, 2014. Although not specifically listed in the Form 101, the medical documentation filed in support of the claim establishes Bean injured his left shoulder while working for Collier.

Bean testified by deposition on April 27, 2018, and at the hearing held July 25, 2018. At the time of his deposition, Bean was 72 years old, and resided in Bardwell, Kentucky. He is a high school graduate, and he had four years of electrical training with the IBEW in Paducah, Kentucky to become a journeyman electrician. He worked as an electrician for over 45 years. Bean is right hand dominant. He reported that he had previously sustained work-related injuries to his

low back and right shoulder, but never experienced an injury or problem with his left shoulder. Bean testified that all of his job assignments came through the union hall. He did not accept every job offered, and was selective in the ones he took. He had worked for Collier multiple times in the past. He tended to accept short calls, or short-term job assignments.

The left shoulder injury occurred on the last date of Bean's work with Collier. He and a co-worker were installing a cable tray at the time of the accident. He reported the accident to his supervisor, and he sought treatment with Dr. Zetter (no first name provided), his family physician. He then sought treatment with Dr. Jed Kuhn, an orthopedic surgeon at the Vanderbilt University Medical Center in Nashville, Tennessee. Dr. Kuhn had previously treated Bean for his unrelated right shoulder injury.

Dr. Kuhn performed left shoulder surgeries on Bean on October 28, 2014, and again on November 17, 2015. He stated the second surgery helped him briefly. Bean stated physical therapy did not help. He has no appointments scheduled with Dr. Kuhn. Bean stated that sometimes he has a catch in his left shoulder. He also stated he is unable to pick anything up with his left arm due to his shoulder injury. He does not believe he is able to work as an electrician due to his restrictions, and testified he is unable to drive a heavy commercial truck due to his injury.

Bean filed records from Dr. Kuhn in support of his claim. On July 6, 2014, Dr. Kuhn noted Bean had sustained a work-related left shoulder injury. He noted Bean had undergone a left clavicle resection in 2005. Dr. Kuhn diagnosed

Bean with an acute partial thickness rotator cuff tear, and possibly a full thickness tear. He noted Bean had some subacromial bursitis. He ordered physical therapy, and stated that if the problems persisted, he would order injections.

Dr. Kuhn performed surgery on Bean's shoulder in October 2014. He initially believed Bean had reached maximum medical improvement ("MMI") by March 2015. At that time, 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"), and released Bean to return to work with no restrictions. Bean continued to have problems with his left shoulder. Dr. Kuhn performed a second left shoulder surgery on November 17, 2015. On March 14, 2016, Dr. Kuhn noted Bean was doing well after the second surgery, with good strength, although he had slight discomfort with arm raising. He again noted Bean had reached MMI for his left shoulder, and has a 5% impairment rating based upon the AMA Guides. Dr. Kuhn noted Bean sustained a stroke after the second surgery. He stated the stroke was unrelated to the surgery. He opined any limitations Bean may have are related to the stroke. He noted it would be difficult for Bean to return to work due to right hand dysfunction related to the stroke.

Collier also filed records from Dr. Kuhn. On March 11, 2015, Dr. Kuhn, as noted above, assessed the 5% impairment rating, found Bean had reached MMI from the first surgery, and released him to return to work with no restrictions. He also noted Bean continued to have unrelated right shoulder problems.

Millie Dotson ("Dotson"), Collier's general manager, testified by deposition on June 14, 2018. Collier is located in Calvert City, Kentucky. Dotson

testified that Bean was a journeyman electrician who had worked for Collier multiple times over the years. On the date of his injury, Dotson was working for Collier at a paper mill in Wickliffe, Kentucky. She testified Bean worked eight hours per day during his short call period with Collier. Dotson supplied wage records from several short call workers supplied through the union. Those records reflect varying pay rates and hours worked.

A Benefit Review Conference was held on July 11, 2018. The issues preserved for determination included the correct calculation of Bean's AWW, whether Bean retains the physical capacity to return to the type of work performed on the date of his injury, TTD rate, application of KRS 342.730(4), and HB 2.

The ALJ rendered his decision on September 21, 2018. He determined Collier sustained a work-related left shoulder injury while working for Collier on February 20, 2014. The ALJ also acknowledged Dr. Kuhn performed two left shoulder surgeries. The ALJ noted Dr. Kuhn found Bean had reached MMI as of March 11, 2015, and assessed a 5% impairment rating based upon the AMA Guides. The ALJ also noted Dr. Kuhn found Bean's limitations expressed in his March 14, 2016 record regarding his ability to return to work were "more related to the stroke he suffered that was not work related." The ALJ acknowledged Dr. Kuhn's doubts that Bean would be able to return to work due to the effects of his stroke. Relying upon Dr. Kuhn, the ALJ found Bean retains the physical capacity to return to the type of work performed on February 20, 2014, "as a result of the left shoulder injury." The ALJ determined Bean's AWW was \$332.06. He found this rate was

greater than it would have been if he had relied upon the wages of the co-workers whose pay records were submitted as evidence.

The ALJ awarded TTD benefits from March 18, 2014 to March 11, 2015, and from November 17, 2015 to March 14, 2016 at the rate of \$221.37 per week. He noted Collier had previously paid TTD during those periods at the rate of \$258.80 per week, and was entitled to credit for the overpayment. The ALJ also determined the version of KRS 342.730(4) effective July 14, 2018, is applicable to Bean's claim, and his benefits are limited in accordance with that statute.

Both Bean and Collier filed petitions for reconsideration. Bean argued the version of KRS 342.730(4) effective July 14, 2018, is unconstitutional, and he requested additional findings regarding the ALJ's determination of that amended statute. Bean also requested additional findings regarding why the ALJ determined the enhancements contained in KRS 342.730(1)(c)1 are not applicable, and why he determined Bean is not permanently totally disabled. Significantly, Bean did not challenge or request reconsideration of the ALJ's calculation of his AWW. Collier argued the ALJ erred in his calculation of the award of PPD benefits, and this determination should be amended.

On October 15, 2018, the ALJ issued his decision regarding the petitions for reconsideration. The ALJ amended the award of PPD benefits. He admitted he made the calculation in his award based upon the AWW he determined, not the compensation rate. The ALJ denied Bean's request for him to provide additional findings regarding the constitutionality of the version of KRS 342.730(4) effective July 14, 2018. The ALJ reiterated his findings regarding why he determined

Bean was not entitled to an enhancement of his award of PPD benefits pursuant to KRS 342.730(1)(c)1, and why he did not believe Bean is permanently totally disabled due to his work-related left shoulder injury. The ALJ therefore denied Bean's request.

We initially note that 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, 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 Kentucky Attorney General was never notified of the constitutional challenge of the amended version of KRS 342.730(4), nor was he provided a copy of Bean's brief, we affirm. Even if we deemed that 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 also note House Bill 2, effective July 14, 2018, KRS 342.730(4) mandates 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 age seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In Holcim v. Swinford, supra, the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has retroactive applicability. Because the Kentucky Supreme Court has determined the newly enacted amendment applies retroactively, we affirm the ALJ's decision.

Regarding Bean's argument that substantial evidence does not support the ALJ's determination that he can return to work at the time of the injury, we also affirm. Dr. Kuhn found that any restrictions Bean may have, or inability to return to work, are due to his unrelated stroke, not the left shoulder injury. The ALJ correctly noted Dr. Kuhn imposed no restrictions upon Bean's activities due to his work-related left shoulder injuries and subsequent surgeries.

As the claimant in a workers' compensation proceeding, Bean 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 Bean was unsuccessful in his burden, regarding the application of the enhancements contained in KRS 342.730 (1)(c)1, or in finding he is permanently totally disabled, 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 with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra. We determine the ALJ's

findings are supported by substantial evidence, and a contrary result is not compelled.

Finally, Bean argues the ALJ erred in calculating his average weekly wage. However, he failed to challenge this determination in his petition for reconsideration, thereby depriving the ALJ of the opportunity to make any modification or alteration of his determination. Pursuant to KRS 342.285, the absence of a petition for reconsideration means the ALJ's order "shall be conclusive and binding as to all questions of fact" as long as substantial evidence exists in the record supporting his 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, our sole task on appeal is to determine whether substantial evidence supports the ALJ's decision. We conclude it does. If the ALJ's conclusions are supported by substantial evidence in the record, even a "failure to make findings of an essential fact" cannot be reversed and remanded to the ALJ unless that failure was first brought to the attention of the ALJ. Eaton Axle Corp. v. Nally, 688 S.W.2d, at 338.

Accordingly, the Opinion, Award, and Order rendered September 21, 2018, and the October 15, 2018 order on the petitions for reconsideration issued by Hon. John H. McCracken, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON GEORDIE GARATT
PO BOX 1196
PADUCAH, KY 42002

COUNSEL FOR RESPONDENT:

LMS

HON R BRENT VASSEUR
PO BOX 1265
PADUCAH, KY 42002

ADMINISTRATIVE LAW JUDGE:

LMS

HON JOHN H McCRACKEN
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601