

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 11, 2018

CLAIM NO. 201499262

TOYOTA MOTOR MANUFACTURING KENTUCKY, INC. PETITIONER

VS. APPEAL FROM HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE

LANA OWENS and
HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Toyota Motor Manufacturing Kentucky, Inc. ("Toyota") appeals from the August 16, 2017, Opinion, Order & Award rendered by Hon. Richard E. Neal, Administrative Law Judge ("ALJ"). The ALJ found compensable Lana Owens' ("Owens") right hip injury/condition stemming from repetitive activities while working for Toyota. The ALJ awarded

temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for the right hip condition he determined became disabling in October 2013 while Owens was performing her work duties. The ALJ dismissed Owens' claim for a low back injury. Toyota also appeals from the October 14, 2017 Order denying its petition for reconsideration.

On appeal, Toyota argues the medical evidence relied upon by the ALJ does not constitute substantial evidence supporting the determination Owens sustained a compensable injury to her right hip caused by repetitive trauma at work. Toyota also argues the ALJ erred in awarding interest at the rate of 12% until June 29, 2017. Because we determine substantial evidence supports the ALJ's decision and a contrary result is not compelled, we affirm. We likewise find the ALJ did not err in determining the appropriate interest rate, and that determination is also affirmed.

Owens filed a Form 101 on January 20, 2015 alleging injuries to her right hip and back due to repetitive motion, including excessive bending, twisting, and stepping up and down on uneven surfaces while working for Toyota. She alleged the conditions became disabling on October 11, 2013 when she developed a catch in her right hip. Owens' employment history

includes working in automobile body repair, nursing and as a nursing assistant.

Owens testified by deposition on March 25, 2015, June 7, 2017, and July 13, 2017. She also testified at the hearing held June 20, 2017. Owens was born on August 19, 1966 and she is a resident of Georgetown, Kentucky. She took courses at Prestonsburg Community College and the Kentucky College of Business in Lexington, Kentucky, but did not obtain a degree from either institution. She took courses to become a phlebotomist, but never obtained her certification.

Owens testified she was initially hired at Toyota through a temporary agency. She was hired by Toyota on a permanent basis in June 2002. She was moved to the painting department in 2009 where she prepared new vehicles for painting. She used a hand scraper and a knife. She was supposed to rotate through four different job positions during her shift; however, she only performed two to three different jobs per day. She stated the repair job required her to bend, twist and stoop on a repetitive basis. She began having hip problems in August 2013. On October 11, 2013, her right hip popped and locked up when she was bending over. She was treated onsite and advised to use medication and ice. After a few days, Owens was seen by the Toyota medical

department, placed on restrictions and referred to a facility for an MRI.

Owens underwent surgery on January 7, 2014, and has not returned to work since. She subsequently underwent a right hip arthroplasty in December 2014. She was terminated by Toyota on January 11, 2017 because her medical leave had expired. She testified she continues to experience pain in her right hip and uses a spinal cord stimulator. She treats with Dr. Michael Harned for pain management. Dr. Harned administered some injections, which provided no relief, prior to installing the spinal cord stimulator. She also takes several medications for her condition. Owens stated she uses a cane as needed, and has difficulty performing household chores. She testified her sister assists her with house cleaning. She has difficulty driving long distances, along with sitting or standing for long time periods. She also testified she uses motorized carts while shopping, or takes rest breaks as needed.

In support of her claim, Owens filed Dr. Samuel Carter's November 14, 2013 office note. Dr. Carter noted Owens' complaints of pain, catching and locking in the right hip which had been present for one month. Owens reported she engaged in a lot of repetitive motion on her job. He believed she had an acetabular labrum tear along with early to moderate

arthritic change. He noted she wanted to undergo the arthroscopic surgery he had recommended.

Owens also filed the October 19, 2015 report of Dr. T. Scott Prince with the University of Kentucky Preventive Medicine and Environmental Health. Dr. Prince saw Owens for evaluation only. He noted Owens' right hip locked on October 12, 2013 when she was bending at the waist. He stated she underwent surgery in January 2014 to repair a torn labrum and bone spurs. She recovered from that surgery but developed pain down her right buttock into her leg and foot. She then underwent right hip arthroplasty in December 2014.

Dr. Prince diagnosed Owens with an injury and degenerative changes to the right hip for which she underwent two surgeries. He noted she had experienced continued pain and difficulty with functioning since the October 2013 injury. He assessed a 20% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He also determined Owens is unable to return to the job she was performing at the time of the injury. He restricted Owens from standing/sitting/walking for more than thirty minutes at a time, or over forty minutes per hour. He also stated she cannot squat, kneel, crawl, or climb ladders, and can only rarely climb stairs.

Owens filed a supplemental note from Dr. Prince dated February 29, 2016. He stated that based upon Dr. Phillip Corbett's findings from his February 15, 2016 evaluation, her condition appeared to have worsened. He deferred to Dr. Corbett's assessment of increased impairment.

Dr. Jeff Selby, an orthopedic surgeon at the University of Kentucky, testified by deposition on June 3, 2016. Dr. Selby performed the right hip arthroplasty in December 2014. He testified Owens reported she had a repetitive labor type job which required bending, twisting and stooping which could have contributed to her condition. He stated that if she had no other history of injury, the repetitive nature of her job was probably related to her surgery. He noted that at the time he last saw Owens she was doing better than she had been prior to the surgery, but had not fully recovered. He stated bending and twisting could cause a labral tear, but she could have been predisposed to this condition due to a hip impingement.

Dr. Harned testified by deposition on March 31, 2017. He works at the Interventional Pain Associates Clinic at the University of Kentucky. He began treating Owens upon referral by Dr. Selby due to her persistent pain and limited function after hip replacement surgery. He noted she continues to have right hip pain and dysfunction. He noted

she has undergone several therapies including medication, both for her physical condition as well as anxiety/depression, injections and a successful trial spinal cord stimulator. His plan was to permanently implant the spinal cord stimulator. He stated the treatment he administered was due to her work-related hip injury. He permanently restricted Owens from sitting or standing greater than thirty to forty-five minutes at a time. He also stated she is unable to lift, bend or twist, will need to change positions frequently, and probably will have poor sleep quality.

Dr. Corbett, an orthopedic surgeon, evaluated Owens on October 7, 2014, August 25, 2015 and on February 15, 2016. Owens reported her right hip began bothering her due to twisting, standing and stooping. She took Ibuprofen and used ice. Her hip pain improved, but did not go away. On October 13, 2013, she experienced a locking sensation, but there was no history of traumatic injury. An MRI revealed two tears in the acetabular labrum. He stated that such a tear is caused by trauma, which could include doing the splits, childbirth or falling, and can be idiopathic. He noted the January 2014 surgery performed by Dr. Carter to debride and repair the labral tear. He also noted the right hip replacement performed by Dr. Selby after physical therapy and injections did not resolve her problems. He found no indication her

problems were caused by her work. Dr. Corbett stated he believed Owens' hip replacement was due to long-term wear and tear of the hip. In a report dated October 7, 2014, Dr. Corbett assessed an 8% impairment rating pursuant to the AMA Guides, however he did not state this was due to a work-related injury. In his February 15, 2016 report, Dr. Corbett assessed a 30% impairment rating pursuant to the AMA Guides, which again he did not state was due to a work-related injury.

A Benefit Review Conference ("BRC") was held on June 12, 2017. The parties noted the issues included an alleged injury of October 11, 2013, benefits per KRS 342.730, work-relatedness/causation, notice, unpaid or contested medical expenses, injury as defined by the ACT, and TTD. The BRC Order and Memorandum also reflects Owens' claim for a low back condition was waived.

In his decision rendered August 16, 2017, the ALJ determined Owens sustained a compensable work-related injury due, in part, to her repetitive activities at work, and, in part, due to the arousal of a pre-existing right hip condition into disabling reality. He awarded TTD benefits from January 8, 2014 through December 20, 2015, based upon Dr. Corbett's opinion concerning the date Owens reached maximum medical improvement. The ALJ awarded PPD benefits based upon the 30% impairment rating assessed by Dr. Corbett, enhanced by the

three multiplier contained in KRS 342.730(1)(c)1. He also awarded medical benefits pursuant to KRS 342.020. The ALJ also awarded interest at the rate of 12% per annum on all due and unpaid sums through June 28, 2017, and 6% interest on unpaid installments thereafter.

Toyota filed a petition for reconsideration arguing there is no substantial evidence supporting the ALJ's determination Owens' work activities caused her condition. It requested additional findings of fact regarding this determination. Toyota also argued it was improper to award interest at 12% at any time.

The ALJ issued an order denying the petition for reconsideration on October 4, 2017. The ALJ explained the basis for his reliance upon Dr. Selby in determining Owens sustained a work-related repetitive trauma injury to her right hip. He specifically stated as follows:

Certainly a physician, especially a treating physician, can usually be give more detailed information regarding the exact and precise nature of a patient's job duties (e.g. a video of a person performing the job task, a detailed job description, and rotation schedules) when rendering an opinion on causation. In this case, the Plaintiff simply told Dr. Selby of her job duties. The ALJ finds that Dr. Selby had a more than adequate understanding of the Plaintiff' job duties, and that his understanding enabled him to render a reliable opinion on causation. Further, the ALJ finds

that Dr. Selby did not have a material misunderstanding of the Plaintiff's job duties that made his opinion on causation unpersuasive.

The Defendant, in arguing their[sic] position that Dr. Selby's opinion on causation does not constitute substantial evidence, singles out their[sic] interpretation of Dr. Selby's testimony that the job activities that would cause the Plaintiff's problems involved twisting, and that the "Plaintiff did not testify that the job she was doing required that activity." However, there is other evidence in the record that showed that the Plaintiff's job required twisting. The medical records from Dr. Carter, the Plaintiff's treating physician, document that the Plaintiff had to "twist the hip" and performed repetitive motion at her job. Further, the Defendant's own IME physician noted that the Plaintiff's job "involves a lot of twisting and stooping with a pivot on her right lower extremity." As such, while the Plaintiff may not have used the exact word during her testimony, her job clearly required twisting.

. . .

... However, Dr. Corbett's opinion that the Plaintiff's hip condition is not work related was unpersuasive in the ALJ's estimation because it does not adequately correlate with how the courts have defined causation in this type of claim. Again, given the totality of the evidence, Dr. Selby's opinion on causation was based on a more than acceptable understanding of the claim, was consistent with the Plaintiff's testimony, was consistent with the medical records, and was consistent with the legal definition of injury. As such,

the Defendant's petition is denied on this issue.

Regarding Toyota's petition for reconsideration on the interest issue, the ALJ found as follows:

The ALJ interprets the changes in statute and case law as requiring 12% interest on past due unpaid installments of compensation through June 28, 2017, followed by 6% interest on all past due unpaid installments of compensation on or after June 29, 2017. See *Stovall v. Couch*, 658 S.W.2d 437 (Ky. App. 1983).

We will first address Toyota's argument that the ALJ's decision regarding causation and work-relatedness is not supported by substantial evidence. 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 discretion to determine 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). 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). 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 afforded to the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). 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, 708 S.W.2d 641, 643 (Ky. 1986).

In this instance, the ALJ clearly provided the basis and reasoning for his decision. His determination is supported by Dr. Selby's opinions, which constitute substantial evidence upon which he could rely. Because the ALJ's determination is in accordance with the law and is supported by substantial evidence, it will not be disturbed.

Regarding Toyota's argument the award of 12% interest on unpaid benefits through June 28, 2017, and 6% thereafter is inappropriate, we likewise affirm. The ALJ's determination is consistent with the holding by the Kentucky Supreme Court in Stovall v. Couch, 658 S.W.2d 437 (Ky. 1983).

The applicable statute is KRS 342.040. Prior to June 29, 2017, that provision of the statute read, in relevant part, as follows:

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 twelve percent (12%) per annum on each installment from the time it is due until paid, . . .

Effective June 29, 2017, the Kentucky legislature amended KRS 342.040 to read, in relevant part, as follows:

All income benefits shall be payable on the 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 a denial, . . .

In Stovall v. Couch, supra, the Court of Appeals resolved the very issue raised by Toyota on appeal. Couch was found totally occupationally disabled due to coal workers' pneumoconiosis ("CWP"). The issue on appeal was whether the Board erred in awarding interest at the rate of 12% on all past due benefits. On the date of last injurious exposure to CWP, the statute allowed 6% interest on unpaid benefits. However, the statute was subsequently amended effective July 15, 1982, increasing the interest rate to 12%

per annum on each installment from the time it is due until paid. In determining the employer owed 6% interest on all past due installments through July 14, 1982, and 12% on all unpaid installments thereafter, the Court of Appeals concluded as follows:

On this appeal, appellants contend that KRS 342.040, governing the rate of interest on past due installments, was misapplied. On the date of last injurious exposure, that statute allowed 6% interest on such benefits. However, the provision was amended, effective July 15, 1982, increasing the rate of interest to 12% per annum on each installment *from the time it is due* until paid. To uphold the Board's award would amount to retroactive application of the amendment, appellants contend.

As this particular application of KRS 342.040 has yet to be the topic of an appellate decision, both sides in this controversy look for analogy to the case of Ridge v. Ridge, Ky., 572 S.W.2d 859 (1978). *Ridge* dealt with the application of an amendment to the statute governing the legal rate of interest on judgments. The Kentucky Supreme Court decided:

... to adopt the position that the rate of interest on judgments is a statutory rather than a contractual matter. We therefore hold that the increase of the legal interest rate applies prospectively to prior unsatisfied judgments, the new rate beginning with the effective date of the amendment. Id. at 861.

Appellants assert that, employing the logic of *Ridge*, the 12% rate of interest should begin on the effective date of the statutory amendment, July 15, 1982, and that prior to that date, interest should be 6% as per the old statute. Appellee Couch looks to the language in *Ridge*, namely that the new rate of interest "applies prospectively to prior unsatisfied judgments," thus concluding that the rate of interest is controlled by the date of judgment and not the date of accrual of the cause of action, and that the 12% rate in effect upon the date of judgment is applicable.

In *Campbell v. Young, Ky., 478 S.W.2d 712, 713 (1972)*, the then Court of Appeals discussed the question of when interest was to begin accruing on unpaid compensation benefits. That court held that interest was due from the date *the claim for compensation was filed*. In the instant case, when Couch filed his claim, the interest rate in effect was 6% per annum. In our opinion, the plain wording of KRS 342.040 dictates that appellants may only be assessed interest on unpaid benefits at 6% prior to July 15, 1982, and at 12% thereafter. Consequently, the Board's award to the contrary and the lower court's affirmation thereof was in error.

Id. at 437-438.

The same logic applies here. Owens' entitlement to PPD benefits vested at the time of her injury. Therefore, as of the date of injury through June 28, 2017, Owens is entitled to 12% interest on all past due benefits. Owens is entitled to 6% interest on income benefits accrued from and after June 29, 2017.

In Hamilton v. Desperado Fuels, Inc., 868 S.W.2d

95, 97 (Ky. 1993), the Supreme Court instructed:

Accordingly, we believe that what constitutes an authorized attorney's fee for prosecuting a claim for those particular benefits also should be determined by the law in effect on the date of the injury. A contract that provides otherwise is void. KRS 342.320(2).

KRS 446.080(1) provides that statutes are to be liberally construed in order to promote their objectives and the legislative intent, and KRS 446.080(3) provides that no statute is to be applied retroactively absent an express legislative directive. In Peach v. 21 Brands Distillery, Ky. App., 580 S.W.2d 235 (1979), the court emphasized that the rule against the retroactive application of statutes should be strictly construed. Particularly where a statute creates new rights or duties, it should be presumed that the legislature intended for the statute's application to be prospective only. The 1990 amendment to KRS 342.320(1) exposes injured workers to liability for substantially greater attorney's fees in relation to the size of their awards than was authorized at the time the maximum amount of the award was fixed. We find no indication, whatever, that the legislature intended for the 1990 amendment to KRS 342.320 to apply retrospectively to awards of attorney's fees relative to injuries which occurred before its effective date.

Contrary to Toyota's assertion, we find no indication, express or implied, that the legislature desired the recent amendment to have retroactive effect. Therefore,

we affirm the ALJ's decision regarding the applicable interest rate.

Accordingly, the Opinion, Order and Award rendered by Hon. Richard E. Neal, Administrative Law Judge, on August 16, 2017, and the order denying Toyota's petition for reconsideration on October 14, 2017, are hereby **AFFIRMED**.

ALL CONCUR.

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