

OPINION ENTERED: March 22, 2013

CLAIM NO. 201184222

UNIVERSITY OF LOUISVILLE

PETITIONER

VS.

APPEAL FROM HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RONALD LEONARD  
and HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART,  
VACATING IN PART, AND REMANDING

\* \* \* \* \*

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

**ALVEY, Chairman.** University of Louisville ("U of L") seeks review of a decision rendered November 15, 2012, by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical

benefits to Ronald Leonard ("Leonard") for a left shoulder injury he sustained while loading a box into a van on May 26, 2011. U of L also appeals from the order entered December 19, 2012 denying its petition for reconsideration.

On appeal, U of L argues the ALJ erred in determining Leonard had reached maximum medical improvement ("MMI") while simultaneously finding additional proposed surgery was reasonable and necessary. U of L also argues it was error for the ALJ to enhance Leonard's PPD benefits by the three-multiplier pursuant to KRS 342.730(1)(c)1, and he failed to perform a proper analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). We affirm in part, vacate in part and remand.

Leonard sustained a left shoulder injury on May 26, 2011, as he was loading materials into a van. The load shifted, causing the box to turn and jerk his arm. He experienced immediate pain and was unable to lift his left arm. He filed a Form 101 on June 21, 2012 alleging a left shoulder injury.

Leonard testified by deposition on August 13, 2012, and at the hearing held November 13, 2012. Leonard was born on June 28, 1952, and resides in Louisville, Kentucky. He is a high school graduate, and completed some college coursework. He later completed a carpentry

apprenticeship. His work experience includes working as a quality control inspector, shipping and receiving clerk, machine operator, assembly line worker, overhead crane operator and carpenter. He began working for U of L in 2002 as a renovation carpenter which involves installing ceilings, building walls, hanging doors, assembling cabinets, and patching holes, among other duties.

On May 26, 2011, Leonard traveled to NextGen, a material supplier, to pick up a load of material used in constructing ceilings. The material was loaded into a van owned by U of L, by a NextGen employee who was operating a forklift. As Leonard attempted to guide the material into the van, the load shifted causing it to fall. The fall jerked his left arm causing an immediate onset of pain. Leonard drove back to U of L and reported the accident to his supervisor who directed him to seek hospital treatment. Leonard was treated at Jewish Hospital in Louisville, and followed up with Dr. Thomas Loeb who eventually performed surgery.

Leonard had previously treated with Dr. Loeb in 2006 when he sustained an injury to his left shoulder. Dr. Loeb performed surgery in November 2006, from which Leonard testified he had recovered with no residual complaints. He subsequently returned to his regular job with no

restrictions, and stated he was totally pain free until the May 26, 2011 accident.

Subsequent to the May 26, 2011 injury, Dr. Loeb performed surgery on Leonard's left shoulder for a rotator cuff tear. Although Dr. Loeb allowed him to return to work without restrictions, Leonard self-limits his activities. He stated he now works primarily in the maintenance department of the renovation department. He continues to experience a catch in his left shoulder, and he is not fully capable of doing the type of work he was able to perform prior to the injury. Specifically, he stated he can no longer perform heavy work tasks, hang dry-wall by himself, or perform overhead tasks. Regarding his rate of pay since the accident, Leonard testified as follows:

Q. Now as far as your wages today, you're still making the same wages today that were on the date of injury. I presume you are.

A. Yes.

Leonard testified he desired to undergo additional surgery proposed by Dr. Loeb. He further testified he understands the surgery will not increase his strength or alleviate his pain, but will eliminate the clicking sensation in his shoulder.

In support of the Form 101, Leonard filed Dr. Loeb's May 26, 2011 office note. Dr. Loeb noted he had previously repaired Leonard's left rotator cuff. He noted the onset of pain began as Leonard was moving a box, and the load shifted. Dr. Loeb diagnosed left shoulder pain, ordered an MR arthrogram, and prescribed Hydrocodone.

Leonard subsequently filed additional records from Dr. Loeb, including the operative report for the surgery performed on July 11, 2011. The post-operative diagnosis was a degenerative labral tear, plus a massive rotator cuff tear with type 2 Acromion. On July 19, 2011, Dr. Loeb noted Leonard had a good passive range of motion. On October 12, 2011, Dr. Loeb indicated Leonard could return to full duty work on October 31, 2011. On November 9, 2011, Dr. Loeb noted mild residual weakness in the left shoulder, and indicated Leonard was making good progress in rehabilitation. On January 12, 2012, Dr. Loeb noted Leonard had reached MMI and was working without restrictions. He recommended an injection to the subdeltoid bursa due to residual subdeltoid bursitis. In a supplemental report dated October 24, 2012, Dr. Loeb expressed his disagreement with the opinions expressed by Dr. Andrew DeGruccio who had evaluated Leonard at U of L's request.

Leonard also filed the report of Dr. Jules Barefoot who evaluated him on April 30, 2012. Dr. Barefoot noted Leonard's history of injury and surgery in 2006, as well as the more recent injury and surgery in 2011. He noted Leonard was working without restrictions prior to the May 2011 injury. Dr. Barefoot diagnosed a massive left rotator cuff tear and assessed an 8% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He further stated Leonard's continued problems with left shoulder mobility and loss of strength limit his use of the left arm at or above shoulder level on a repetitive basis, and interfere with his ability to perform repetitive lifting or carrying.

In a note dated August 14, 2012, Dr. Barefoot criticized and disagreed with Dr. DeGruccio's report noting several deficiencies. He stated he stood by his April 30, 2012 report and assessment of an 8% impairment rating pursuant to the AMA Guides. He further noted Leonard had fully recovered from the 2006 injury and surgery, and had no problems prior to the May 2011 accident.

U of L submitted Dr. DeGruccio's July 19, 2012 report. Dr. DeGruccio noted Leonard complained of left shoulder pain attributed to the May 26, 2011 accident. He

noted Leonard's left shoulder problem stems from his previous injury which resulted in a failed left rotator cuff repair. He stated Leonard sustained a dead shoulder syndrome on May 26, 2011, which has resolved. He assessed a 5% impairment rating pursuant to the AMA Guides for Leonard's previous injury, but attributed none to the May 2011 accident. He further opined Leonard has reached MMI, and the surgery recommended by Dr. Loeb is not reasonable or necessary. He stated Leonard needs no additional treatment due to the May 2011 accident. He also stated Leonard does not retain the capacity to perform his previous work, and restrictions should have been imposed after the 2006 injury of no overhead shoulder activities, no lifting over thirty-five pounds, no use of vibratory tools, and no pushing or pulling over twenty-five pounds.

Dr. DeGruccio subsequently testified by deposition on October 11, 2012. He noted the history of an injury occurring on May 26, 2011. He stated Leonard had fairly longstanding rotator cuff deficiencies in his left shoulder which were active prior to the May 2011 accident. Dr. DeGruccio initially testified Leonard had reached MMI as of October 12, 2011, but later stated MMI was not achieved until January 12, 2012. He reiterated Leonard's impairment is due to his previous injury, and he requires

no additional impairment or restrictions due to the May 2011 accident. Likewise, he reiterated the surgery proposed by Dr. Loeb was not reasonable or necessary.

A Benefit Review Conference ("BRC") was held on October 30, 2012. The BRC order and memorandum notes TTD benefits were paid from May 27, 2011 through October 30, 2011, at the rate of \$355.73 per week. The parties stipulated Leonard's average weekly wage was \$528.78. The parties further agreed Leonard had returned to work for U of L at the same or greater rate of pay. The issues preserved for determination included benefits per KRS 342.730, work-relatedness/causation, injury as defined by the Act, exclusion for pre-existing active disability, overpayment of TTD benefits as to rate, and surgery proposed by Dr. Loeb.

In the opinion and order entered November 15, 2012, the ALJ found as follows:

**A. Injury as defined by the Act and work-relatedness/causation.**

KRS 342.0011(1) defines "injury" as any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines "objective medical findings" as information gained through

direct observation and testing of the patient applying objective or standardized methods.

Based upon the totality of the evidence, including the clear and credible testimony of the plaintiff, the medical records of Dr. Loeb and the medical reports of Dr. Barefoot, I make the factual determination that as a result of the plaintiff's work incident on May 26, 2011 he sustained objective medical findings that establish a harmful change in the human organism and suffered a work-related injury due to that incident.

**B. Exclusion for pre-existing disability/impairment.**

The correct standard regarding a carve-out for a pre-existing active condition is set forth by the Court of Appeals in *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007). In *Finley, supra*, the Court instructed in order for a pre-existing condition to be characterized as active, it must be both *symptomatic* and *impairment ratable* pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. The burden of proving the existence of a pre-existing active condition is on the employer. *Finley v. DBM Technologies, supra*.

Based on the totality of the evidence, including the plaintiff's testimony and the medical reports of Dr. Barefoot, I make the factual determination that Mr. Leonard underwent left shoulder surgery by Dr. Loeb on December 28, 2006 and another left shoulder surgery by Dr. Loeb on July 11, 2011. Mr. Leonard testified that before his work injury in May, 2011 he was not working with any type

of work restrictions and did not have complaints of chronic left shoulder pain or weakness. According to Dr. Barefoot, Mr. Leonard had recovered from his 2006 shoulder surgery and did not sustain any pre-existing, active impairment before his subsequent work injury on May 26, 2011, and I so find.

**C. TTD - overpayment as to rate.**

KRS 342.0011(11) defines "temporary total disability" to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

The parties stipulated that the plaintiff's present average weekly wage was \$528.78. Under the statute, the appropriate temporary total disability benefits per week were, therefore, \$352.52.

**D. Relatedness and reasonableness of surgery proposed by Dr. Loeb.**

KRS 342.020 requires the employer to pay for the cure and relief from the effects of an injury or occupational disease, the medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease.

Based upon the totality of the evidence, including the plaintiff's testimony and the medical records of Dr. Loeb, as well as the medical reports of Dr. Barefoot, I make the factual determination that the

additional surgery proposed by Dr. Loeb for Mr. Leonard constitutes reasonable and necessary medical treatment for Mr. Leonard's work injury on May 26, 2011.

**E. Benefits per KRS 342.730.**

*Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), and its progeny require an Administrative Law Judge to make three essential findings of fact. First, the ALJ must determine whether a claimant can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work at an AWW equal to or greater than his pre-injury wage and then ceases that employment. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future.

Based upon the totality of the evidence, including the plaintiff's testimony and Dr. Barefoot's medical report which states that Mr. Leonard will have continued problems with limited mobility and loss of strength in his left shoulder, which will limit his ability to use his left arm at or above shoulder level on a repetitive basis and that he will have difficulty with repetitive heavy lifting and carrying and also will have difficulty operating machinery or equipment at or above shoulder level, I make the factual determination that Mr. Leonard cannot return to the type of work which he performed at the time of his May 26, 2011 work injury and is entitled to enhanced permanent partial disability benefits as per KRS 342.730(1)(c)1.

**SECTION VI - ORDER AND AWARD**

In light of the above findings of fact and conclusions of law, IT IS ORDERED AND ADJUDGED as follows:

A. Plaintiff shall recover temporary total disability benefits at the rate of \$352.52 per week from 5-27-11 - 10-30-11.

B. Plaintiff shall recover enhanced permanent partial disability benefits based upon an 8% permanent impairment in accordance with KRS 342.730(1)(c)1 in effect on the date of injury.

C. Pursuant to the provisions of KRS 342.730(1)(c)1, plaintiff is entitled to recover the amount of \$81.50 per week, beginning on May 26, 2011 and continuing thereafter for a total of 425 weeks from and after said date. Pursuant to KRS 342.730 (4) all income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old age Social Security Retirement Benefits under the United States Social Security Act.

U of L filed a petition for reconsideration on November 30, 2012, arguing the ALJ failed to provide essential findings of fact, erred in both authorizing the surgery proposed by Dr. Loeb and finding Leonard had reached MMI, and failed to complete the analysis pursuant to Fawbush, supra.

In his order entered December 19, 2012 denying U of L's petition, the ALJ stated the following:

The Opinion and Order in this case dated November 15, 2012 carefully discussed all of the contested issues raised by the parties and that Opinion and Order is hereby reaffirmed.

WHEREFORE, in light of the above findings of fact and conclusions of law, defendant's Petition for Reconsideration is hereby overruled and denied.

Since Leonard was successful before the ALJ, the question on appeal is whether the ALJ's determination is supported by substantial evidence. 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 the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). 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, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than that reached by the ALJ, such evidence 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Despite U of L's argument to the contrary, the ALJ's award of PPD benefits and approval of the surgery are not inconsistent. Drs. Loeb, Barefoot, and DeGruccio all agree Leonard has reached MMI from the May 26, 2011 injury and surgery. As argued by U of L, once MMI is achieved, an assessment regarding permanent impairment may be made. The

ALJ chose to rely upon the impairment rating assessed by Dr. Barefoot which is within his discretion.

Both Drs. Loeb and Barefoot further determined Leonard may benefit from additional surgery. If Leonard chooses to undergo the recommended surgery, he may have a change of impairment, but such assessment at this time is speculative, and outside the purview of this appeal. The ALJ did not err either in basing the award of PPD benefits upon the impairment rating assessed by Dr. Barefoot, or finding in Leonard's favor regarding the surgery proposed by Dr. Loeb. The ALJ's determination is supported by substantial evidence and will not be disturbed.

We next turn to U of L's argument the ALJ failed to properly perform an analysis pursuant to Fawbush, supra, in applying the three multiplier pursuant to KRS 342.730(1)(c)1. Leonard returned to work for U of L at the same greater wage after Dr. Loeb assessed he had reached MMI in October 2011, although he testified he no longer engages in some of the work duties he was able to perform prior to his injury.

In Fawbush, supra, the Kentucky Supreme Court concluded in those instances in which both KRS 342.730(1)(c)1 and (c)2 apply, an ALJ is authorized to determine which provision is more appropriate based upon

the facts of the individual claim. Id. at 12. In Fawbush, the claimant, due to the effects of the work injury, no longer retained the physical capacity to perform the type of work he had been performing at the time of the injury. The claimant, however, had returned to work at a lighter job earning an average weekly wage equal to or exceeding his average weekly wage at the time of the injury.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Court remanded a claim for a determination of the claimant's average weekly wage following his return to work. The Court instructed if the ALJ determined the claimant earned the same or greater wage as he had at the time of his injury:

The ALJ must then apply the standard that was set forth in Fawbush v. Gwinn, supra, to determine from the evidence whether he is likely to be able to continue earning such a wage for the indefinite future and whether the application of paragraph (c)1 or 2 is more appropriate on the facts. Id. at 211;

In Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004), the Court held the Fawbush analysis includes a "broad range of factors", only one of which is the ability of the injured worker to perform his pre-injury job.

Hence, where both the 3 multiplier and the 2 multiplier potentially apply under the given facts of a claim, the principles enunciated in Fawbush, supra, and its progeny, require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, that a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future.

In this instance, the ALJ determined Leonard could not return to her pre-injury employment, but failed to perform the necessary second and third steps. Because his analysis stops short of that required by Fawbush, supra, on remand, the ALJ must perform a complete analysis to determine whether KRS 342.730(1)(c)1 is applicable in this instance. In remanding, we are not requiring any particular result. All findings of fact lay within the discretion of the ALJ.

Accordingly, the decision rendered November 15, 2012, and the order denying the petition for

reconsideration rendered December 19, 2012, by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART, AND REMANDED** to the ALJ for entry of an amended opinion, order and award in conformity with the views expressed herein.

**STIVERS, MEMBER, CONCURS.**

**SMITH, MEMBER, NOT SITTING.**

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