

OPINION ENTERED: FEBRUARY 8, 2013

CLAIM NO. 200973052

ASTRA ZENECA

PETITIONER/CROSS-RESPONDENT

VS.

**APPEAL FROM HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE**

ANGELA SPADY
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

RESPONDENT/CROSS-PETITIONER
RESPONDENTS

**OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING**

* * * * *

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

SMITH, Member. Astra Zeneca appeals and Angela Spady ("Spady") cross-appeals from the July 14, 2011 Opinion, Award and Order rendered by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ Justice") and the August 30, 2012 Order on Petitions for Reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ Bolton"). Astra Zeneca argues the ALJs erred in

determining Spady sustained a permanent psychiatric injury, in finding her permanently totally disabled, regarding subrogation credit, and by not providing a summary of the evidence presented. On cross-appeal, Spady argues the ALJ incorrectly apportioned \$100,000.00 to past lost wages.

Spady filed a Form 101, Application for Resolution of Injury Claim, on October 20, 2010, alleging she was injured in a November 5, 2009 work-related motor vehicle accident ("MVA"). She also filed a civil action in Pike Circuit Court against the third party tortfeasor. She testified by deposition in the civil action on September 1, 2010. She testified in the workers' compensation case on December 21, 2010 and at the formal hearing held April 20, 2012.

Spady, now age 46, has a Master's degree and a Rank I certification in secondary education. She worked as a teacher prior to entering pharmaceutical sales. Spady worked for Astra Zeneca from April 2009 until the November 2009 MVA. Spady stated she was one of the top sales representatives in the eastern United States prior to her work injury. Her territory covered eastern Kentucky to the Tennessee border. She saw ten to twelve physicians daily, educating them about medications, and catered lunch almost every day. Spady stated the job required her to carry educational models, a laptop computer, and a bag of patient

materials. She stated her base salary with Astra Zeneca was \$82,500.00 per year and she received quarterly bonuses if she met her quota. She testified her bonus in the year of her accident was approximately \$18,000.00.

Spady stated she has constant pain as a result of the November 5, 2009 injury and she can only drive 15 or 20 minutes at a time. Spady testified she assists with an art class two to two and a half hours per week when she is able. Spady stated her pain interferes with her ability to sleep requiring her to take naps during the day. She indicated she is unable to carry pans of food for lunches, cases of pharmaceuticals, her computer or anatomical models. She now has problems concentrating.

Spady acknowledged she had taken medication for depression "off and on" as a result of her previous marriage, and last took Prozac a year before the accident. Spady expressed a desire to return to work. Spady indicated she had no problem doing her job prior to the accident, and had never missed work for psychological reasons. She denied any previous problems with concentration.

Dr. Mitchell Wicker testified by deposition on March 24, 2011. Dr. Wicker treated Spady before and after the accident. Spady primarily complained of neck pain with

radiation through the right triceps when she initially presented following the accident. Dr. Wicker diagnosed complex regional pain syndrome ("CRPS") which began two to three weeks after the accident. Dr. Wicker indicated Spady never had CRPS or any type of pain to her neck, shoulder or arm prior to the MVA.

Dr. Tibbs saw Spady for a neurosurgical evaluation on December 1, 2009 on referral from Dr. Wicker. Dr. Tibbs obtained an MRI scan on December 15, 2009, which revealed a disk osteophyte complex at C6-7 lateralized on left without cord compression and mild degenerative changes at C5-6 without evidence of disc herniation. An MRI of the right shoulder taken the same date showed extensive acromioclavicular ("AC") arthrosis. He referred Spady to Dr. Darren Johnson for a shoulder assessment, to Dr. Robert Nickerson for electromyography and nerve conduction velocity ("EMG/NCV") testing and to Dr. William Witt for pain management.

Dr. Witt first saw Spady in January 2010. He opined Spady sustained an injury to her AC joint and secondarily developed CRPS Type I which spread from the hand and arm to her lower extremity. Dr. Witt testified chronic pain always has an emotional component. He noted CRPS results in depression, sleep disorders, loss of interest in pleasurable

things, difficulties with family life, marriages, jobs, and a sense of uselessness. He stated Spady's CRPS was likely permanent and was precipitated by the AC joint injury caused by the MVA.

Dr. Witt began a series of injections to the AC joint, which completely relieved pain in the shoulder region. He administered a sympathetic nerve block, which enabled him to determine the cause of Spady's CRPS. He stated results of the EMG/NCV studies were normal, as would be expected with CRPS.

Spady reported concentration was increasingly difficult and pain interfered with her sleep, ability to work, relationships and mood. She was increasingly depressed, frustrated, irritated and agitated. Dr. Witt noted Spady walked with a limp and had difficulty bearing weight on her right lower extremity. She had considerable pain over the right AC, as well as in the entire arm, elbow, forearm, wrist and hand. Her right lower extremity showed significant edema, discoloration and a cooler temperature than the left. She also had severe burning pain and tenderness in the entire right lower extremity. Dr. Witt stated Spady likely would have this kind of pain and problems in her arm and leg for the rest of her life. He also noted Spady would have very limited use of the right

upper and lower extremities. He noted her ability to concentrate and focus was severely diminished.

Regarding Spady's ability to be gainfully employed, Dr. Witt stated "I don't really see in what capacity that would be. I would have to say I don't think so."

Dr. Nickerson first saw Spady on January 11, 2010, on referral from Dr. Tibbs. He diagnosed CRPS Type I and a right AC injury. He stated these conditions were permanent, painful, and would require future medical treatment for the rest of her life. He also noted the CRPS and right AC joint injury were caused by the work accident and she had no symptoms of these conditions prior to the November 5, 2009 accident. Dr. Nickerson opined Spady was no longer capable of performing gainful employment.

Dr. Nickerson diagnosed CRPS Type I right upper extremity, pre-existing dormant and non-disabling right AC joint arthrosis, brought into disabling reality as a result of the accident, and probable extension of CRPS to the distal right leg and foot.

Dr. Nickerson indicated the work injury was the cause of Spady's complaints. He assessed a 9% impairment for the upper extremity injury and 2% for the right lower extremity for a combined 11% functional impairment rating pursuant to the American Medical Association, Guides to the Evaluation

of Permanent Impairment, 5th Edition ("AMA Guides"). He stated Spady had no active impairment prior to her injury and could not return to her former employment. He imposed restrictions of avoiding lifting with the right upper extremity above shoulder level, no lifting greater than 10 pounds with the right upper extremity from any position, and avoiding climbing, crawling, pushing or pulling with the right upper extremity. He noted she would need to be able to change positions every 15 to 20 minutes, as needed for pain control.

Dr. Scott Mair, an orthopedic surgeon at the University of Kentucky, saw Spady on June 15, 2010. Dr. Mair opined Spady has CRPS in her right upper extremity and severe right shoulder AC joint arthrosis related to her injury. On March 3, 2011, he noted Spady was still having difficulty with Reflex Sympathetic Dystrophy ("RSD") which had spread into her foot. He also noted her AC joint pain had recurred. Dr. Mair diagnosed right arm and foot RSD or CRPS¹ and right shoulder AC arthrosis. He indicated the problems were caused by her accident and she had no prior problems. Dr. Mair indicated the CRPS was more likely than not a permanent condition. He noted her AC joint injury caused pain when she moved her arm and, in concert with RSD, her symptoms

were significant to the point she had pain with virtually any use of her arm. Dr. Mair indicated Spady was not currently employable.

Dr. Anita Cornett, Spady's current primary care physician, testified by deposition in the civil case. She began treating Spady in March 2008. Dr. Cornett testified Spady's pain started after the MVA and she had no problems doing her job before the accident. Dr. Cornett noted Spady was a very active, ambitious, motivated, happy and very competitive woman. Dr. Cornett did not believe Spady was capable of being gainfully employed.

Dr. Mark Etscheidt, PhD., a clinical psychologist at the University of Kentucky, first saw Spady on January 27, 2010. He diagnosed a reactive depression because of disruption of life, and depression with post-traumatic stress disorder from the trauma of the accident. He noted she was anxious when in vehicles and had chronic pain. He noted Spady was concerned about the uncertain future as a result of CRPS and the shoulder problem, and preoccupied with returning to work. Dr. Etscheidt concluded the depression, anxiety and post-traumatic stress were either caused or made worse by the accident on November 5, 2009. He opined Spady was not currently employable.

¹ The parties use the terms RSD and CRPS interchangeably to refer to the same diagnosis.

Dr. Robert Granacher, Jr., a psychiatrist, performed an independent medical evaluation at Astra Zeneca's request on December 7, 2011. He diagnosed major depression and pain disorder due to the right shoulder injury, pre-existing tendency to anxiety, and CRPS. He stated the neuropathic pain syndrome, dropped shoulder, allodynia to light touch and evidence of mottled skin were all consistent with CRPS. He noted there was some slight evidence of possible symptom magnification, but believed the testing was more consistent with quite remarkable pain in the right upper extremity. He stated she had a tendency to pre-existing anxiety; however, he did not believe it was playing a significant role in her current symptoms. He noted Spady was functioning quite well as a pharmaceutical sales person and was now unemployed, had a dropped shoulder, and had chronic pain in the right upper extremity. He stated it was probably not safe for her to drive on mountain roads with one arm, but he would defer to Dr. Witt regarding restrictions. He assigned a 10% whole body psychiatric impairment, but felt Spady needed additional treatment.

Dr. David Shraberg conducted a psychiatric evaluation on December 7, 2010. He noted Spady had been diagnosed with adult ADHD, generalized anxiety disorder, depression, and mood disorder at various times in the past. He noted Spady

had been prescribed Geodon, an anti-psychotic medication, prior to the work incident. Dr. Shraberg noted Spady's neurological exam was consistent with an extraordinary hyper-alert, intense, and extremely anxious woman who was extraordinarily suggestible. He concluded Spady's present complaints were unrelated to the MVA. He stated "Ms. Spady has unconsciously chosen to disable herself from this accident." He recommended her medications be discontinued with the exception of an antidepressant which was indicated for her postmenopausal symptoms. Dr. Shraberg issued a supplemental report opining Spady had a 5% pre-existing active psychiatric impairment at the time of the MVA.

Dr. Steven Spady, Spady's husband, testified by deposition on February 22, 2011. He indicated he began prescribing medications for his wife shortly after they were married in 2001 for moodiness, anxiety, and depression "pretty much" since they were married. He stated he prescribed Geodon, an antipsychotic medication to address escalating anxiety. He noted medication did not alleviate her symptoms so she was switched back to Prozac. He stated there was always a question in his mind whether Spady had bipolar disorder because of fluctuation of her depression and anxiety.

Dr. Lloyd Saberski evaluated Spady on February 4, 2011. He determined Spady did not have CRPS but rather had a pre-existing mental health condition that could have increased due to the MVA. He stated numerous examinations did not fulfill the International Association for the Study of Pain criteria. He stated Spady did not have an appreciable injury of or disability from the right shoulder or body related to the November 5, 2009 accident.

Linda Jones, a vocational expert, performed an assessment on October 14, 2010. After reviewing extensive medical records and meeting with Spady, Ms. Jones concluded Spady was unable to perform substantial gainful work activity due to a combination of impairments and severe distracting pain and was therefore 100% occupationally disabled. Jones stated Spady experienced a loss of earning capacity of \$2,207,746.00 as a result of the MVA.

Dr. Ralph Crystal evaluated Spady on July 1, 2011. Dr. Crystal noted Spady had extensive education, including a Rank I teaching certification. After reviewing medical records and reports, Dr. Crystal opined Spady was not totally disabled. He stated she was capable of at least performing sedentary work and according to Drs. Saberski and Shraberg, she was capable of resuming her pre-injury employment.

Spady settled the civil action as acknowledged by ALJ Justice. In his July 14, 2011 opinion, ALJ Justice made the following findings:

The ALJ finds that Plaintiff had a work-related injury to her right shoulder, from which she developed CRPS Type I, which is now affecting the right upper and lower extremities. The ALJ was primarily persuaded by the report and opinions of Dr. Nickerson, buttressed by the opinions of Drs. Witt, Mair, Tibbs and Wicker. Defendant has complained that Dr. Nickerson agreed with the characterization that he was an advocate for Plaintiff. Plaintiff has contended Dr. Saberski was an advocate for the defendant in the civil case, citing his fee of over \$38,000 for an examination and report as in of [sic] her contention. The ALJ responds that it would be his expectation that a doctor convinced of his diagnosis in the treatment of his patient would be an advocate for her. It may be possible that an obviously well trained expert in Connecticut, in making an examination and a voluminous report for which he charged a large sum of money would be expected to make a report favorable to the requesting party, but the ALJ is not prepared to make a finding on that basis.

Dr. Saberski is an anesthesiologist and pain specialist. There is no basis in questioning his credentials. The most damaging part of his report as to Plaintiff having CRPS is contained on pages 9-13. Dr. Saberski, near the end of his report sates [sic] Plaintiff does not have CRPS, "but if the examinee did have CRPS we would be unable to determine

causation of the CRPS since other than the examinee's statements of an associated etiology we have no scientific methodology to associate the alleged trivial injury to the evolving complaints given her history of so many medical and psychiatric variables. This is because we do not understand the patho-physiology of CRPS." This is where Dr. Saberski sounds more like an advocate to the ALJ. If he had said Plaintiff does not have CRPS and ended his report, the ALJ would have had to consider his report more persuasive, but the doctor goes on to try to tie up the defendant's case in the civil action by the contents of his report under "Causation" on pages 48-50.

The ALJ is aware that Plaintiff's treating physicians and those that found she had CRPS did not itemize eight of the eleven criteria for the diagnosis of CRPS. They were treating physicians, rather than IME physicians. They observed Plaintiff over many visits rather than an IME examination just for impairment purposes. They were never specifically asked about satisfying eight of the AMA Guidelines criteria. The questioning was for the civil action. In any event, the ALJ is satisfied that the reports satisfy the holding in the case of *Tokico v. Kelly*, 281 S.W.3d 771 (2009).

The ALJ was persuaded by the report of Dr. Granacher that Plaintiff has a work-related psychiatric impairment; that the present impairment is 10%, 5% of which pre-existed the work injury and was active even though non-disabling. Plaintiff did not give Dr. Granacher her full psychiatric history. He was persuaded by Dr. Shraberg as to the prior active impairment.

The next issue that the ALJ must address is the extent of Plaintiff's impairment. Plaintiff is claiming permanent and total disability. Dr. Saberski said Plaintiff's activities indicate she "has at least the capability of functioning in a sedentary capacity even given her current state of abilities that are exaggeratedly reduced because of conversion symptom magnification.["] The ALJ agrees that there has been some symptom magnification and probably conversion. Her complaints belie her activities of travelling to the doctors in Lexington, teaching at the school, and taking trips to New York with the school group. The ALJ is aware that her former job was of a sedentary nature, except for loading and unloading and carrying a sample case to each doctor's office that she visited.

The ALJ was persuaded by the restriction imposed by Dr. Nickerson, supported by Drs. Witt and Wicker as to the capacity of Plaintiff to return to the type that she did. The ALJ found Plaintiff credible concerning her restrictions, albeit with some magnification. The ALJ is persuaded and convinced that Plaintiff may perform her job at times or part time, but could not perform any sedentary job on a full time basis, because, if she could, she would return to the job in which she was making \$136,000.00 per year.

The ALJ finds that Plaintiff is permanently totally disabled.

Subrogation Credit.

The final issue before the ALJ involves the proper apportionment of

Plaintiff's personal injury settlement and the appropriate credit to which the Defendant is entitled. The uncontested facts before the ALJ are that the Plaintiff received a total settlement of \$840,000.00, incurring a total attorney's fee of \$280,000.00 with expenses of \$40,360.49. The settlement executed by the parties thereto made no allocation for pain and suffering or any other element of damages claimed by Plaintiff. Although these figures were not substantiated by accompanying documentation, Defendant has failed to perform any discovery or otherwise present any counter-proposals or evidence for the ALJ's consideration. As such, the ALJ must rely on the facts and figures as reported by Plaintiff.

Pursuant to Mastin v. Liberal Markets, 674 S.W.2d 7 (1984) and Whittaker v. Hardin, 32 S.W.3d 487 (Ky. 2000), the parties are entitled to have an independent and impartial trier of fact allocate elements of damages among the consideration received by Plaintiff as a result of its third-party settlement. As the settlement did not allocate said damages, it is within the jurisdiction of the ALJ to allocate the proceeds among the various elements of damages. Id. at 499; KRS 342.325. Although the ALJ has ultimately found that this exercise is unnecessary, it is nevertheless a right to which the parties are entitled.

KRS 342.700 authorizes an employer to assert a credit against all elements recovered by way of a third-party settlement or claim that duplicate workers' compensation benefits paid and payable. As pain and suffering is not duplicative of workers' compensation benefits, Defendant has "no right against that recovery at all." Hillman

v. American Mut. Liability Ins. Co.,
632 S.W.2d 848, 850 (Ky. 1982).
Therefore, the ALJ must first determine
what portion of the total award
represents pain and suffering before
subtracting Plaintiff's legal expenses
and costs.

Plaintiff has asserted that it
would be "manifest injustice" for the
ALJ to find that less than 50% of the
total settlement proceeds represent
pain and suffering. However, the ALJ
is mindful that this particular
claimant was an extremely high wage
earner at the time of her injury.
Having found this 43 year-old claimant
to be totally disabled, and
acknowledging a work-life of at least
an additional 24-27 years, the ALJ
finds that the amount of lost future
wages must represent a greater portion
of the settlement proceeds than that
advocated by Plaintiff. Considering
Plaintiff's permanent and painful
condition, the ALJ finds the following
apportionment [of] the total settlement
proceeds to be a fair and adequate
allocation:

\$336,000.00 - Pain and Suffering
\$29,854.90 - Past Medical Expenses
\$100,000.00 - Past Lost Wages
\$350,000.00 - Future Lost Wages
\$24,145.00 - Future Medical
Expenses

\$804,000.00 [sic]

According to AIK Selective Self
Insurance Fund v. Bush, 74 S.W.3d 251
(Ky. 2002) and AIK Selective Self
Insurance Fund v. Minton, 192 S.W.3d 415
(Ky. 2006), "the employee's entire legal
expense, not just a pro rata share, must
be deducted from the employer's or
insurer's portion of any recovery." In

other words, an insurer's subrogation claim must be reduced dollar for dollar by the amount of the injured worker's total attorney's fees and costs. In this case, the total legal expense was \$320,360.49. As Plaintiff's legal expenses grossly exceed Defendant's total subrogation claim of \$73,525.05, Defendant's claim is "wiped out" and it is not entitled to a credit against future indemnity or medical benefits. Minton at 417.

Spady and Astra Zeneca filed petitions for reconsideration. Spady argued the settlement should be reduced by \$36,686.40 for reimbursement of a lien for long term disability ("LTD") benefits. She argued the ALJ apportioned too little of the settlement proceeds to pain and suffering and too much to future lost wages. She also argued the ALJ erred in finding Astra Zeneca entitled to an offset for employer funded disability benefits pursuant to KRS 342.730(6). Astra Zeneca raised essentially the same arguments in its petition as it now raises on appeal.

On August 30, 2012, ALJ Bolton issued an order denying Spady's petition for reconsideration relative to apportionment. He also corrected the amount of past medical expenses paid to reflect \$43,940.15. ALJ Bolton further corrected the award by removing the reference to a credit for LTD benefits pursuant to KRS 342.730(6).

ALJ Bolton denied Astra Zeneca's petition for reconsideration. ALJ Bolton noted ALJ Justice had explained Dr. Granacher was not given a full psychiatric history, but had been persuaded by Dr. Shraberg regarding prior active impairment. ALJ Bolton further noted it was his impression ALJ Justice awarded a permanent total disability ("PTD") benefits based on the physical limitations resulting from the physical injuries. Finally, ALJ Bolton observed ALJ Justice cited evidence or testimony upon which he relied and was not obligated to explain why he chose to rely on some evidence and not on other evidence.

On appeal, Astra Zeneca asserts four arguments. First, Astra Zeneca argues the ALJ erred by relying upon Dr. Shraberg's opinion in determining Spady sustained a permanent psychiatric injury as a result of the November 2009 MVA. It contends Dr. Steven Spady's testimony, and medical records it submitted establish Spady had a "longstanding history of treatment for mental health issues prior to the work injury." It asserts the ALJ erred by failing to issue a specific finding regarding whether Spady sustained a work-related psychiatric injury. Astra Zeneca also asserts the opinion of Dr. Granacher does not constitute substantial evidence pursuant to Cepero v.

Fabricated Metals Corp., 132 S.W.3d 839 (2004) since Spady provided an inaccurate and incomplete psychiatric history.

Second, Astra Zeneca argues the ALJ erred in concluding Spady was permanently totally disabled. Astra Zeneca asserts the ALJ's erroneous determination Spady sustained a permanent psychiatric impairment should not be considered in determining whether she is permanently and totally disabled. Alternatively, Astra Zeneca argues the ALJ erred in failing to identify what role, if any, Spady's preexisting psychological issues played in his determination and further asserts he failed to address whether it was entitled to a carve out for such pre-existing condition. Astra Zeneca also asserts the ALJ nonetheless erred in determining Spady was permanently and totally disabled as a result of the MVA.

Third, Astra Zeneca argues the ALJ erred by failing to provide any summary of the evidence presented.

Finally, Astra Zeneca argues the ALJ erred in calculating the amount of subrogation credit it is entitled to against Spady's civil recovery. It asserts the total civil settlement amount is \$850,000.00, rather than \$840,000.00 as stated by the ALJ, arguing the \$10,000.00 Spady received in PIP benefits should not be eliminated based upon speculation she may have to repay this amount.

It also argues the ALJ erred in further reducing the total settlement amount in the order on reconsideration by \$36,686.40 for a lien reimbursement because the issue was never raised, the ALJ failed to identify the evidence upon which he relied and the documentation submitted by Spady did not constitute substantial evidence. Astra Zeneca also asserts the ALJ erroneously shifted the burden of proof regarding credit to it when he stated ". . . Petitioner has failed to perform any discovery or otherwise present any counter-proposals or evidence . . . As such, the ALJ must rely on the facts and figures as reported by Claimant." It also argues the ALJ erred in determining the amount of civil recovery apportioned to future lost wages. It argues the ALJ erred in determining Spady's legal expenses exceed Astra Zeneca's total subrogation claim of \$73,525.05, thus wiping out its subrogation claim and further finding it not entitled to a credit against future indemnity or medical benefits.

On cross-appeal, Spady argues the ALJ incorrectly calculated the credit but not in the manner alleged by Astra Zeneca. Spady argues the ALJ erred in apportioning \$100,000.00 to past lost wages since she had only been paid \$29,854.90 in past temporary total disability ("TTD") benefits. She contends the apportionment of \$100,000.00

creates an improper windfall of \$70,145.10 from which Astra Zeneca could potentially claim a credit. Spady further argues the ALJ failed to apportion a proper amount of the civil recovery to her pain and suffering.

We will first address Astra Zeneca's argument regarding the award of permanent total disability benefits. Authority has long acknowledged an ALJ has wide ranging discretion in making a determination granting or denying an award of PTD. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). Likewise, KRS 342.285 designates the ALJ as the finder of fact; therefore, the ALJ has the sole discretion to determine the quality, character, and substance of the evidence. See Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ as fact-finder may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

In the case *sub judice*, despite Astra Zeneca's assertions to the contrary, the ALJ made sufficient findings supporting his conclusion Spady is permanently totally

disabled, and this determination is supported by substantial evidence in the record. The ALJ's decision must adequately communicate the evidence upon which he draws his ultimate conclusions so the parties may discern the basis of his decision. However, he is not required to engage in a detailed "discussion and analysis of either the evidence or the law." Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526, 531 (Ky. 1973).

After reviewing the evidence of record, the ALJ applied the appropriate legal standard for determining permanent total disability in accordance with the Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The ALJ accepted the restrictions imposed by Dr. Nickerson which would limit Spady to less than a full range of sedentary jobs. Dr. Nickerson stated unequivocally Spady was no longer capable of performing gainful employment. Ms. Jones also opined Spady was unable to perform substantial gainful work activity and was totally occupationally disabled. Spady had significant restrictions on the use of her dominant right upper extremity. Further, Dr. Witt documented problems with her right lower extremity. The ALJ considered Spady's education and past work experience, in conjunction with her post-injury physical status, and was persuaded she is permanently totally

disabled due to the effects of the work-related injury. Based upon the restrictions assessed by the physicians, and Spady's credible testimony regarding the effects of her injury, the ALJ determined Spady was permanently totally disabled. ALJ Justice acknowledged "there has been some symptom magnification and probably conversion" but otherwise found Spady credible concerning her restrictions.

Although Spady may have had a pre-existing impairment related to her psychological condition, ALJ Justice specifically found it was not disabling prior to the accident. In Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003), the court explained that since December 12, 1996, disability and impairment are not synonymous. Since the psychological condition was not occupationally disabling prior to the work injury, there is no carve out. Further, as noted by ALJ Bolton on reconsideration, it is readily apparent from ALJ Justice's decision he considered Spady totally disabled as a result of the physical injuries. Accordingly, no carve-out is proper.

Although Astra Zeneca noted Spady worked a few hours per week teaching art, that is of little probative value in determining her ability to work full time and the ALJ was well within his role as fact-finder in granting little or no

weight to that evidence. When the ALJ weighed the evidence concerning Spady's post-injury physical status and continuing symptoms, he was persuaded Spady could not perform any sedentary job on a full time basis. The ALJ was well within his role as fact-finder in making that determination.

We find no error in the ALJ's reliance on Dr. Granacher's rating of 10% for the current psychological condition. Dr. Granacher noted Spady had a tendency to pre-existing anxiety but did not feel it was playing a significant role in her current symptomatology. Cepero, supra involved not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury, has no application to the facts in this case.

We find the ALJ did not err in failing to provide a separate summary of the evidence. ALJ Justice identified substantial evidence supporting his conclusions. Further, although he did not discuss all the evidence filed in the claim, he stated he had read and considered it. As long as the ALJ's conclusions are based on substantial evidence, we may not reverse. The ALJ acted within his discretion in rendering his decision. We cannot say the decision regarding PTSD was clearly erroneous or so unreasonable that

it must be reversed as a matter of law. Therefore, we must affirm.

Based upon the totality of the evidence, we cannot say the ALJ'S allocation of the settlement proceeds was clearly erroneous. Testimony of various physicians indicated CRPS is a very painful condition and is likely to remain so for the individual's lifetime. Spady, who was 45 years old at the time of the initial decision, has a life expectancy of approximately thirty-five more years. It is also true that Spady's future lost income is considerably larger than the entire settlement proceeds. Also, because she is a high wage earner, her past lost earnings at the time the civil settlement was entered greatly exceeded the amount she could receive in workers' compensation for that element of damages. The ALJ's allocation appears to be fair.

KRS 342.700(1) provides as follows:

Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil action against the other person to recover damages, or proceed both against the employer for compensation and the other person to recover damages, but he shall not collect from both. If the injured employee elects to proceed at law by civil action against the other person to

recover damages, he shall give due and timely notice to the employer and the special fund of the filing of the action. If compensation is awarded under this chapter, the employer, his insurance carrier, the special fund, and the uninsured employer's fund, or any of them, having paid the compensation or having become liable therefor, may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employee, less the employee's legal fees and expense. The notice of civil action shall conform in all respects to the requirements of KRS 411.188(2).

KRS 342.730(1) authorizes an injured worker to pursue both a workers' compensation claim and a civil action against a third party tortfeasor for tort damages. Where the worker is successful in recovering damages in tort, KRS 342.700(1) gives subrogation rights to an employer who has paid workers' compensation benefits resulting from the same injury and prevents the worker from receiving a double recovery.

The Supreme Court in Wine v. Globe American Casualty Co., 917 S.W.2d 558 (Ky. 1996), explained the purpose of the doctrine of subrogation prevents double recovery by the plaintiff and prevents a windfall to the tortfeasor by benefiting from the payment of the insurance carrier

without ultimately bearing at least some of the cost. Id.
at 562. The Court further instructed that:

"[u]nder general principles of equity, in the absence of statutory law or valid contractual obligations to the contrary, an insured must be fully compensated for injuries or losses sustained (made whole) before the subrogation rights of an insurance carrier arise." Id.

In AIK Selective Self-Insurance Fund v. Bush, 74 S.W.3d 251 (Ky. 2002), the Supreme Court held KRS 342.700(1) "requires that the employee's entire legal expense, not just a pro rata share, be deducted from the employer's or insurer's portion of any recovery." Id. at 257. The Court in Bush set out in detail how calculations for subrogation should be made. The Court concluded under KRS 342.700(1), a workers' compensation claimant was not allowed a double recovery in a third party civil claim that duplicated damages received in the workers' compensation claim. In making the calculations, the Court provided the total amount of attorney's fees and costs should be deducted from the amount available for credit to the compensation carrier.

Concerning application of the "made whole" doctrine, the Court in Bush further provided:

The trial court and the Court of Appeals both held that, despite the statutory policy against double recovery expressed in KRS 342.700(1), the common law 'made whole' rule described in Wine v. Globe American Casualty Co., supra, entitled Bush to keep the entire amount of the judgment against Dixon. Bush claims that he has not received a double recovery, because he has not yet been fully compensated for his actual damages. . . . Thus, the only issue is whether the 'made whole' rule precludes AIK from recovering 25% of the judgment for those elements of damages.

Wine, supra, noted that '*in the absence of relevant statutory law or contractual obligations between the parties, the answer to when the right of subrogation arises is rooted in equity.*' 917 S.W.2d at 561 (emphasis added). Citing Couch on Insurance 2d § 61:64 (Rev.ed.1983), Wine then held that under the common law doctrine of subrogation, 'no subrogation rights exist (or the right does not arise) until the insured has first recovered the full amount of loss sustained,' 917 S.W.2d at 562, and that 'under general principles of equity, in the absence of statutory law or valid contractual obligations to the contrary, an insured must be fully compensated for injuries or loss sustained (made whole) before the subrogation rights of an insurance carrier arise.' Id. (emphasis added). Wine involved subrogation claims by uninsured motorist insurance carriers brought pursuant to KRS 304.20-020(4). In Great American Insurance Cos. v. Witt, Ky. App., 964 S.W.2d 428 (1998), the Court of Appeals extended the 'made whole' rule to a workers' compensation

subrogation claim brought pursuant to KRS 342.700(1).

. . . .

However, with only one exception, that being our Court of Appeals' decision in Great American Insurance Cos. v. Witt, supra, no jurisdiction with a 'normal' third-party statute has allowed the injured worker to recover both workers' compensation benefits and tort damages and 'keep both recoveries.' 6 Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law § 110.02, at 110-4 and -5 (Matthew Bender 1999) (emphasis in original).

. . . .

KRS 342.700(1) does not merely provide for a right of subrogation, which, of course, the employer or insurer would be entitled to under common law principles, Wine, supra, at 561-62, but specifies that the employee 'shall not collect from both' the employer and the third-party tortfeasor and that the employer or insurer can recover damages in its own name, not to exceed the compensation paid or payable to the injured employee, less the employee's legal fees and expense. Clearly, this is not a mere codification of the broad common law right of subrogation defined in Wine. KRS 342.700(1) specifies the rights and limitations of both the subrogor and the subrogee and tailors those rights and limitations to the peculiar nature of workers' compensation. It also requires that the employee's entire legal expense, not just a pro rata share, be deducted from the employer's or insurer's portion of any recovery. Unlike the uninsured motorists statute interpreted in Wine, KRS 342.700(1)

expresses a legislative purpose that the employer or insurer is entitled to recoup from the third-party tortfeasor the workers' compensation benefits it paid to the injured worker; thus, the common law 'made whole' rule cannot be applied to preclude that recovery. Wine, supra, at 562. To the extent that Great American Insurance Companies v. Witt, supra, holds otherwise, it is overruled.

Id. at 255-256.

The Supreme Court revisited the subrogation issue under KRS 342.700(1) in AIK Selective Self Ins. Fund v. Minton, 192 S.W.3d 415 (Ky. 2006). In Minton, the court again emphasized the sum total of an injured worker's attorney fees and costs incurred as the result of a third party action must be first deducted from the insurer's subrogation credit in the corresponding workers' compensation case. Additionally, the court clarified that when the worker's legal fees and expenses from an associated third party civil action exceed the total amount of the employer's workers' compensation liability, the workers' compensation insurer is entitled to no subrogation recovery pursuant to KRS 342.700(1). Concerning the "made whole" rule, the Court in Minton further stated:

Under the common law, subrogees had no right to subrogation until the injured party was 'made whole.' Wine v. Globe American Casualty Co., 917

S.W.2d 558, 561-62 (Ky.1996). In other words, the injured party must be fully compensated for all of his or her injuries before the subrogee is entitled to reimbursement. Id. This doctrine recognized the basic premise that the right of the injured party to receive full recovery for his or her injuries is superior to the right of the subrogee to receive a credit for benefits previously paid on behalf of the injured party.

While the 'made whole' doctrine may not be employed to trump or undermine the statutory subrogation scheme set forth in workers' compensation cases, see Bush, supra, at 255-56, its underlying principles remain relevant when explicating the statute's primary functions. Paying workers' compensation benefits is an obligation derived by contract. In exchange for agreeing to pay benefits, employer-subrogees receive revenues and profits from the labor of its employees, as does the insurer-subrogee consequently receive its revenue and profits from the premiums paid by the employer. Thus, in order for the injured worker to receive the full benefit of his bargain, his right to receive a maximum recovery under the statute must take priority over the right of the employer/insurer to receive reimbursement for the benefits which it was already obligated to pay by contract. See Wine, supra. The conditional right to subrogation authorized under KRS 342.700(1) merely recognizes and codifies this underlying principle of the "made whole" doctrine.

Id. at 418-419. Concerning the above language, the court further explained in footnote 2 of the opinion that: "KRS

342.700(1) also permits injured workers to seek full recovery for their injuries by allowing such workers to receive compensation from both the employer and a third-party tortfeasor so long as the injured worker does not receive double recovery for the injuries. Bush, supra, at 254." Minton at 419.

We believe, pursuant to the Court's instructions in AIK Selective Self Ins. Fund v. Bush, supra, and AIK Selective Self Ins. Fund v. Minton, supra, the ALJ's calculation of Astra Zeneca's subrogation credit is in error. ALJ Justice allocated \$336,000.00 to damages for pain and suffering which is not subject to subrogation under KRS 342.700(1). The ALJ allocated \$100,000.00 to past lost wages. The evidence establishes Spady, as a high wage earner, had lost wages greatly in excess of the compensation provided by the Act through TTD benefits and PTD benefits payable through the date of the settlement agreement. A total of eighty-two and five-sevenths weeks elapsed from the beginning of Spady's award until the signing of the settlement agreement in the civil action. That number of weeks multiplied by \$694.30, Spady's weekly benefit, produces a total of \$57,428.53 payable as of the date of the civil agreement. To the extent the \$100,000.00 apportioned to past lost

income exceeds the employer's liability under the Act, the \$42,571.48 excess is not duplicative and must therefore be deducted from the settlement proceeds. Thus, the employer does not receive a windfall for the amount the \$100,000.00 exceeds its liability for benefits paid and payable prior to the date of the settlement agreement.

We believe the ALJ properly excluded the \$10,000.00 amount for PIP reimbursement. Spady paid for PIP coverage and is entitled to the benefit of the payment from the collateral source and she did not directly receive this amount when the settlement proceeds were disbursed. Also, we believe ALJ Bolton, on reconsideration, properly deducted the \$36,686.40 representing the lien for LTD benefits, which had to be repaid. On September 26, 2011, Spady filed the June 13, 2011 personal injury settlement distribution from the civil action. The document indicates Spady is responsible for a lien for the above amount due to Met Life for LTD reimbursement. We believe the documentation is substantial evidence supporting the exclusion of this amount from the funds available for subrogation.

The proper calculation of the credit is as follows:

\$850,000.00 Total Settlement Proceeds

- 10,000.00 PIP

- 36,686.40 LTD lien
- 336,000.00 Pain and Suffering
- 42,571.48 Non-duplicative past lost income
- 280,000.00 Attorney fees
- 40,360.49 Expenses

\$104,381.63 Subrogation Credit.

On remand, the ALJ is instructed to issue an amended opinion and award reflecting that Astra Zeneca and its workers' compensation carrier shall receive no credit for the \$104,381.63 in residual subrogation interest until such time as the amount of workers' compensation benefits paid, indemnity and medical combined, equals or exceeds \$320,360.49, representing the amount of the attorney's fee and expenses paid as the result of Spady's third party settlement with Astra Zeneca. See AIK Selective Self Ins. Fund v. Bush at 258. Astra Zeneca shall receive credit against this amount for past benefits voluntarily paid. Once the requisite threshold amount has been achieved, Astra Zeneca's liability for payment of indemnity and medical benefits shall cease until such time as it has recovered its residual subrogation interest through a combination of the sum of all sources of workers' compensation benefits payable under the award yet available. Once Astra Zeneca's residual subrogation lien

has been satisfied, it shall reinstitute payment of all remaining workers' compensation benefits due and payable to Spady for the duration of the award. All other aspects of the ALJ's decision are affirmed.

Accordingly, the July 14, 2011 Opinion, Award and Order rendered by Hon. Joseph W. Justice, Administrative Law Judge, and the August 30, 2012 order on petitions for reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge are hereby **AFFIRMED IN PART, VACATED IN PART** and **REMANDED** for entry of an amended Opinion, Award and Order in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS BUT FILES A SEPARATE OPINION.

CHAIRMAN ALVEY. I agree the opinion should be remanded to the Administrative Law Judge for further findings. Regarding subrogation credit, I would further direct the ALJ follow the procedure set forth in our previous decision of James Quillen v. Tru-check, Inc., WCB #2008-99276 (March 27, 2009), as affirmed by the Kentucky Court of Appeals in James Quillen v. Tru-check, Inc., 2009-CA-000747-WC (October 16, 2009).

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