OPINION ENTERED: April 5, 2013

CLAIM NO. 201000930

BEATRICE COTE PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

DOLLAR GENERAL CORPORATION
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Beatrice Cote ("Cote") seeks review of the decision rendered November 26, 2012 by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, and medical benefits from September 5, 2009 through September 5, 2010, for a temporary exacerbation of her conditions. The ALJ found Cote was not

entitled to an award of permanent partial disability ("PPD") benefits, or future medical benefits for a temporary injury she sustained while working for Dollar General Corporation ("Dollar General"). Cote also appeals from the order entered January 7, 2013 denying her petition for reconsideration.

On appeal, Cote argues the ALJ's decision is not supported by substantial evidence, and must be reversed as a matter of law because the evidence compels a contrary result. We disagree. Because the ALJ's decision is supported by substantial evidence, and a contrary result is not compelled, we affirm.

Cote filed a Form 101 on August 16, 2010 alleging she experienced back, left leg and bladder injuries stemming from pushing and pulling on a cart loaded with dog food on September 5, 2009. She later amended her claim to include an allegation of a psychological injury.

Cote testified by deposition on July 27, 2011, and at the hearing held September 27, 2012. Cote was born on January 30, 1962, and is a resident of Kermit, West Virginia. She completed the tenth grade, and subsequently obtained a GED. She later obtained an associate's degree in government studies. Her work experience consists of working as a cashier, stocker, grounds maintenance, customer

service, bookkeeper and store manager. She began working for Dollar General as a store manager in October 2008, and had worked previously for Wal-Mart for eight years. As a store manager she opened and closed the store, made bank deposits, trained associates, unloaded delivery trucks, placed orders, operated a cash register, cleaned the parking lot, mopped floors, and cleaned the bathroom. Subsequent to the September 5, 2009 accident, she made several attempts to return to work, the last being in January 2010. She was terminated in January 2011 after she had been off work for one year. She has not applied for employment since.

Cote previously sustained a back injury in 2003 while working for Wal-Mart and as a result was off work until 2005. Cote had a prior history of bipolar disorder, for which she was treated with anti-depressants, although she testified she was no longer taking them at the time of her accident. She stated a 13% impairment rating was assessed for the 2003 back injury.

On September 5, 2009, a customer wanted to purchase dog food. Since none was on the shelf, Cote had to unload it from a rolltainer which she described as a large four-wheeled cart with netting. As she attempted to move the cart, she experienced low back pain at the top of her left hip, with eventual numbness in the entire left leg.

She also urinated on herself, requiring her to change clothes. She took a pain pill, and continued to work for two more days before seeking medical treatment. She completed an accident report, and notified her employer of the injury. She primarily treats with Dr. Jose Villa in Columbus, Ohio for her back and with Dr. Krick for her bladder. She continues to complain of constant low back, left leg pain, and urinary incontinence. Cote did not undergo back surgery. She described the 2009 injury as affecting a lower part of her back than the 2003 injury. She admitted she was prescribed Percocet on a monthly basis from December 2003 through August 2009. She admitted her emotional problems began in 1991, and she had problems with frequent urinary infections and retention issues prior to September 2009.

In support of the Form 101, Cote filed the February 2, 2010 report of Dr. David Herr who diagnosed paraspinal degenerative disk disease, congenital spinal stenosis, moderately severe L2-3 disk protrusion producing high-grade spinal stenosis, neurogenic bladder, and left sciatic pain. Dr. Herr assessed an 80% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He stated Cote had reached maximum medical

improvement ("MMI") as of December 5, 2009, and did not retain the physical capacity to return to the type of work she performed at the time of injury. He also recommended she avoid heavy pushing or pulling, no lifting over ten pounds occasionally and no climbing, squatting or crouching.

In a supplemental report dated September 10, 2011, Dr. Herr diagnosed Cote with multi-level degenerative disk disease, L1-L2 bulging disk, L2-L3 disk protrusion, multi-level lumbar facet arthropathy from L1-S1, congenital spinal stenosis, lateral recess stenosis at L2-L3 and L4-L5, and a herniated nucleus pulposus a T10-T11. He attributed all of her conditions to the September 5, 2009 injury, and opined she had reached MMI one year after the date of the accident. He assessed a 38% impairment rating pursuant to the AMA Guides due to a combination of her lumbar and urinary problems.

Cote also submitted the March 6, 2010 report of Dr. Azeb Ashraf who diagnosed chronic low back pain, degenerative lumbosacral joint disease, and lumbosacral radiculopathy. He also diagnosed bladder incontinence which he related to a neurogenic bladder. He additionally diagnosed hypothyroidism, hypertension and bipolar affective disorder. He recommended restrictions of no climbing, balancing, stooping, crouching, kneeling or crawling. He

also advised against working around heights and moving machinery. He opined she does not retain the ability to perform her previous work.

Cote filed numerous records and office notes of Dr. James Krick, her treating urologist. In a noted dated December 14, 2009, Dr. Krick stated Cote complained of urinary incontinence due to a work-related injury with no previous history of problems. He performed a cystourethroscopy on December 18, 2009. In a note dated October 4, 2010, he noted a history of renal cyst and neurogenic bladder. He diagnosed frequency of urination, neurogenic bladder and an acquired cyst of the kidney. Dr. Krick further stated he could not correlate her condition to her work-related injury.

Cote filed the March 4, 2011 report of Dr. Anbu Nadar, an orthopedic surgeon. Dr. Nadar diagnosed lumbosacral strain with radiculopathy and a neurogenic bladder. He noted Cote had reached MMI and assigned restrictions of no heavy lifting, frequent bending, twisting, turning, prolonged sitting, or standing. He also advised she should not lift over twenty-five pounds occasionally or over ten to fifteen pounds on a more frequent basis. In a Form 107-I report prepared January 18, 2011, Dr. Nadar assessed a 29% impairment rating pursuant to

the AMA Guides of which he apportioned 30% to prior active conditions, and 70% to the injury.

Cote filed numerous records from Kings Daughters Medical Center. The initial filing included treatment records spanning from September 16, 2009 through November 10, 2009, reflecting treatment and testing rendered for the September 5, 2009 incident. Urology records from the facility reflect treatment from October 4, 2010 through April 13, 2011, for a renal cyst. A record dated October 11, 2011 reflects a renal ultrasound was normal. Dollar General filed a note from the facility outlining a November 12, 2003 lumbar MRI describing a herniation at L3-L4 on the right.

Cote filed a January 20, 2010 report of Dr. James Powell, a neurosurgeon who noted her complaints of pain radiating from just above the groin on the left side, emanating from the back which Cote stated occurred as she was obtaining dog food for a customer. He stated she did not need surgery, nor did he find any evidence of a neurogenic bladder. Dr. Powell's previous report dated December 31, 2003 described Cote's right sided low back complaints, and outlined treatment with injections.

Dr. Thomas Smith from Paintsville, Kentucky, provided treatment to Cote on numerous occasions in 2010 and

2011. His office notes covering the period from January 29, 2010 through February 14, 2011, reflect complaints of incontinence and low back pain radiating into the left leg.

Cote also filed numerous treatment records from Dr. Villa, with the South German Village Medical Center in Columbus, Ohio. His records from September 15, 2009 through June 3, 2011 reflect treatment for low back pain, anxiety, depression, thyroid nodule, painful knee joint, and calculus renal. The first note dated September 15, 2009 reflects Cote had undergone a drug screen the previous month. Dr. Villa prescribed Xanax, Zanaflex, Roxicodone and Prozac.

Cote filed the report of Dr. Eric Johnson, Ph.D., who evaluated her on January 18, 2011 for psychological complaints. Dr. Johnson diagnosed bipolar disorder I; R/O personality disorder; and a current global assessment of function of 51. He stated her prognosis is guarded, and she requires psychiatric consultation and counseling. He stated she had not reached MMI, and assessed a 29% impairment rating pursuant to the AMA Guides, 2nd Edition, "of which nine (9) percent is due to exacerbation of symptoms due to the stress of pain and restricted activities." In a subsequent report dated August 17, 2011, Dr. Johnson stated her symptoms had increased due to the stress of the work-related injury.

Finally, Cote filed records from the Mountain Comprehensive Care Center dated September 6, 2011. Those records reflect Cote presented with complaints of depression, hallucinations, sleep disturbances, appetite changes, substance abuse, and prescription medication abuse. She was diagnosed with opioid induced mood disorder, bulimia nervosa, sleepwalking, bipolar, polysubstance dependence, and a personality disorder.

Dollar General also filed numerous medical records and reports. In a report dated January 25, 2011, Dr. Russell Travis, a neurosurgeon, diagnosed Cote with longstanding depression and bipolar disorder secondary to a history of child abuse. He also noted complaints of low back pain into the left lower extremity of undetermined etiology. He noted no objective findings, however he noted symptom magnification. He stated she does not have a neurogenic bladder. He also noted she has complaints consistent with meralgia paresthetica of which symptoms consist of numbness, tingling and pain in the anterolateral thigh, for which the most common cause is obesity. Dr. Travis also noted she was already taking Percocet at the time of her alleged injury. He assessed a 0% impairment rating, and noted she had an “inapplicable” prior impairment. He found no objective reason to impose

restrictions due to the work-related injury, and opined she needed no additional treatment.

Dr. Henry Tutt, a neurosurgeon, evaluated Cote on July 1, 2010. He diagnosed a possible lumbar sprain, with resolved strain. He noted inexplicable persistent symptoms ungrounded in physiological principles. He found Cote had reached MMI, and required no additional treatment. He assessed a 0% impairment rating, and stated Cote could return to work with no restrictions.

Dollar General filed the January 4, 2011 report of Dr. Trevor Soergel, a urologist who noted Cote complained of urinary frequency, urgency and urge incontinence due to a September 5, 2009 work injury. Urodynamic testing was performed which provided no objective evidence of neurogenic bladder. Dr. Soergel stated, “There is no urologic evidence of a neurologic etiology from spinal compression.” He opined Cote’s urologic problems were not caused by the alleged September 5, 2009 injury. He stated she had not reached MMI, but assessed a 0% impairment rating, and imposed no restrictions.

Dollar General filed generally illegible records dating from 1996 from the Williamson Appalachian Regional Hospital. The legible records included in the packet reflect treatment for low back pain and urinary retention.

Dollar General filed as evidence an undated report prepared by Dr. Jason Rice, submitted in Cote's previous workers' compensation claim on April 26, 2004. Dr. Rice diagnosed a lumbar disk herniation and lumbar radiculopathy. He assessed a 13% impairment rating pursuant to the AMA Guides for her lumbar spine. Dr. Rice recommended restrictions on lifting, bending, walking, standing, sitting, climbing, reaching, grasping, operating machinery, and indicated she did not retain the capacity to return to the type of work she was performing at the time of her 2003 injury.

In an office note dated November 6, 2003, Dr. Robert Love noted Cote's complaints of low back pain radiating into her right leg. He stated he suspected a herniated disc at L4-L5.

Dr. Douglas Ruth, a psychiatrist, evaluated Cote on May 17, 2011. He noted Cote had treated with anti-depressants previously and she was still taking Seroquel at the time of her work accident. He noted she had a history of bipolar disorder of several years duration. He diagnosed bipolar disorder, post-traumatic stress disorder, history of polysubstance abuse, and R/O anti-social personality disorder. He believed she is temporarily incapable of employment, however he opined her psychological condition

arises from her employment. In a June 6, 2011 letter, Dr. Ruth stated as follows:

> She may be susceptible to loss of impulse control resulting in unpredictable behavior. Therefore unless her treatment is adjusted and unless she responds to that treatment, it would be advisable to take precautions and safety measures at the time of the hearing.

In a note dated September 26, 2012, Dr. Ruth stated Cote's exacerbation of her bipolar condition is not due to the work injury, but to the cessation of medication prior to the injury.

Finally, Dollar General filed Dr. Ralph Crystal's April 12, 2011 vocational report. He believed Cote is not disabled from employment. He opined she is able to perform her past, related, comparable, and other work based on her low back and urologic condition. He stated she does not have a loss of employability or earning capacity.

A Benefit Review Conference ("BRC") was held on June 12, 2012. The BRC order and memorandum reflects TTD benefits were paid from September 30, 2009 through October 13, 2009, and again from October 21, 2009 through August 11, 2010. The parties also stipulated Cote's average weekly wage was $770.39 (this was verified at the hearing). The issues preserved for determination were benefits pursuant to

KRS 342.730, work-relatedness/causation, TTD benefits (both duration and rate), exclusion for pre-existing disability/ impairment, permanent total disability, future medical expenses, and post-injury wages. At the hearing, the parties also agreed to include credit for overpayment of TTD benefits as a contested issue.

In the opinion, award and order issued November 26, 2012, the ALJ found as follows:

> This voluminous record has been thoroughly reviewed by the ALJ. The claim presents many complicating features. Of most significance in the opinion of this ALJ is the inconsistency in the claimant's testimony. This is a claim where the medical evidence is highly conflicting at best.
>
> The stipulations made and entered into by and between the parties at the Benefit Review Conference conducted on July 12, 2012 are adopted, approved, and incorporated herein by reference as findings of fact.
>
> The real issue in this claim is whether or not Beatrice Cote sustained a work-related injury to her lower back on September 5, 2009, while trying to secure or lift a bag of dog food. Did she sustain an injury as defined by the Act? Did she sustain any permanent harmful change in her human organism and, if so, what permanent impairment does she have as a result thereof. It is significant that despite a variety of diagnoses resulting from many medical examinations and evaluations, no one has performed any surgery on Ms.

Cote's low back and no one has even recommended a surgical procedure. Permanent impairment ratings have ranged from 0% to 80%! The Plaintiff complains of low back pain, urinary incontinence, and depression. Despite the claims and the many medical examinations done, it is difficult, if not impossible, to find reliable and substantial medical evidence of the existence of any harmful change which occurred to the human organism of Beatrice Cote on the date and at the time in question. The Plaintiff bears the burden of proof on every significant element of her claim and she runs the risk of non-persuasion Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

In analyzing this claim, the ALJ has read and considered the briefs filed by counsel for both parties and has reviewed all of the evidence. Each counsel has professionally and competently placed his client's position in the best possible light. No stone has gone unturned. In the end, however, the decision in this claim comes down to whether or not the claimant has been candid with her medical examiners, both counsel of record, the ALJ, and everyone who has been involved relative to the claim. In analyzing the evidence to which Ms. Cote has testified, the ALJ will break down the testimony into a few areas. First, the plaintiff states that her immediate pain at the time of the subject injury on September 5, 2009 was a sharp, stabbing type of pain in her low back. When cross-examined at the final hearing as to how this pain compared with her symptoms in 2003, at which time the plaintiff sustained a work-related back injury while working at Walmart, the claimant responded that

in 2003 the injury was to her mid back or the thoracic area and that in 2009 the injury was to her low back. However, when examining the medical evidence in this case, the ALJ finds that in 2003 the injury was at the L3-L4 and/or L4-L5 levels, depending on which evidence is being examined, but in either event, the injury in 2003 was definitely to the “low back”.

Secondly, the plaintiff claims that within twenty (20) minutes after her injury of September 5, 2009, she urinated all over herself. At first, she testified that she had never experienced a problem with incontinence previously. However, under relentless cross-examination at the time of the hearing, Ms. Cote acknowledged that she had been having urinary problems and incontinence issues for many years.

Thirdly, the plaintiff amended her application for benefits so as to allege a psychological component. She claims that she is very depressed over the fact that she is not working. Upon cross-examination and review of the record of this claim, one finds a series of sociological and psychological stressors present in the life of Ms. Cote for many, many years. These stressors include a stint in prison, observation of the death of her first husband, substance abuse, physical abuse, and family history of mental illness. Ms. Cote has been diagnosed and treated for a bipolar disorder for at least ten (10) years and has been taking Prozac, Seroquel, and other medications.

The Plaintiff is now receiving Social Security disability benefits. She is not likely to ever return to gainful employment. Any incentive for

her to return has probably been removed. The ALJ is not stating or finding that plaintiff sustained absolutely no injurious event on September 5, 2009. However, in light of the plaintiff's complaints and the nature of those complaints, the credibility of the claimant is of paramount importance. This is even more true when one considers the disparity of evidence received from the physicians and other experts who have offered evidence in this claim. Based upon the claimant's denial of any previous low back problems prior to 2009, her denial of any urinary incontinence problems prior to 2009, and her claim of a direct relationship between the injury and her depression and/or other psychological problems, all of which claims have been clearly refuted in the record of this claim, the ALJ must conclude that Ms. Cote has been less than forthright. The ALJ has serious questions as to her credibility. The ALJ finds that plaintiff did sustain an injurious event on the date in question, but does not find that she sustained any "injury" as defined by the Act or that she retains any permanent impairment as a result of the events of that day. The Plaintiff is entitled to temporary total disability benefits at the rate of $513.59 (2/3 of average weekly wage of $770.39) for any and all periods that she was off from work from September 5, 2009 until September 5, 2010, a period of one (1) year, based on the opinion of Dr. David Herr. The ALJ finds that plaintiff has failed to sustain her burden of proving an "injury" as defined by the Act and/or that she has sustained any harmful change in her human organism. The ALJ does not find that any future medical treatment is necessary or required

under KRS 342.020. The ALJ is concerned that Ms. Cote was traveling three hours from her home to see Dr. Villa in Columbus, Ohio, on a monthly basis to obtain pain medications from December 3, 2007 until August 13, 2009, and even continuing after the subject alleged injury. She was receiving prescriptions for narcotic pain medications. Evidence presented by the defendant is indicative that Dr. Villa has now lost his medical license. In any event, it is apparent that plaintiff was regularly taking Percocet, Soma, and Xanax for low back pain and anxiety long before September 5, 2009, despite her earlier protestations that she had no low back pain and no depression prior to the alleged work injury. Under cross-examination, the plaintiff finally acknowledged she had been treated for depression, medication abuse, and addictions long prior to the alleged work-related incident. After considering all of these factors, the ALJ is simply unpersuaded that anything occurred on September 5, 2009, which permanently altered the claimant's human organism. Any injuries which she received on that date were temporary and transitory. Medical and/or psychological treatment which she has received since September 5, 2009 have restored her to at least the same level she was at immediately prior to September 5, 2009. No future medical treatment is reasonable or necessary. The findings of the ALJ are supported by not only the plaintiff's own admissions under cross-examination, but also by evidence from Dr. Russell L. Travis, Dr. Henry P. Tutt, Dr. Trevor M. Soergel, Dr. Douglas D. Ruth, Dr. Ralph M. Crystal, and Dr. James S. Powell. The ALJ realizes that in arriving at this opinion, he has had to

> pick and choose from portions of evidence provided by many different physicians and witnesses. This is the prerogative of the ALJ, the exercise of which has been essential in a resolution of the issues presented herein.
>
> ***AWARD AND ORDER***
>
> Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED AND ADJUDGED** as follows:
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> 1. Plaintiff, Beatrice Cote, shall recover of the Defendant, Dollar General Store, and/or its insurance carrier, the sum of $513.59 per week for temporary total disability that extended from September 5, 2009 until September 5, 2010, for any and all periods of time that she was off from work; together with interest at the rate of 12% per annum on any amounts past due and unpaid, and the Defendant shall take credit for any and all payments of TTD previously paid herein.
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> 2. Plaintiff, Beatrice Cote, shall recover of the Defendant, Dollar General Store, and/or its insurance carrier, for such medical and hospital treatment including nursing, medical, and surgical supplies and appliances, as have been received from and after September 5, 2009 for a period of one (1) year thereafter, but the defendant-employer shall have no financial responsibility for any medical treatment rendered to plaintiff after September 5, 2010.

Cote filed a petition for reconsideration on December 13, 2012, raising fifteen points, asserting the ALJ

abused his discretion and will not be further outlined here. The ALJ denied the petition by order dated January 7, 2013, and stated he was, "simply unpersuaded that the injurious event on the date in question resulted in any permanent change in the plaintiff's human organism."

As the claimant in a workers' compensation proceeding, Cote had the burden of proving each of the essential elements of her cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Cote was unsuccessful before the ALJ, the question on appeal is whether the evidence compels a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence 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).

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). The 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 (Ky. 1977). 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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 79 (Ky. 1999).

Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail in the burden of proving a permanent harmful change to the human organism for which permanent benefits are authorized. In Robertson, the ALJ determined the claimant failed to prove more than a temporary

exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

> Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident.
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> Id. at 286.

In this instance, the ALJ specifically found Cote sustained only a temporary lumbar injury, and provided his reasoning for doing so, based upon the evidence. We find no error in the ALJ's award of TTD benefits and temporary medical benefits for the temporary exacerbation of her ongoing conditions consistent with Robertson, supra, and FEI Installation Inc. vs. Williams, 214 S.W.3d 313 (Ky. 2007). A contrary result is not compelled, and the ALJ's determination will not be disturbed.

Accordingly, the decision rendered November 26, 2012, by Hon. Edward D. Hays, Administrative Law Judge, and the January 7, 2013 order denying Cote's petition for reconsideration are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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