# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: July 1, 2016**

CLAIM NO. 200567102

DOLLAR GENERAL CORPORATION PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

CHRISTOPHER MOORE
DR. JAMES FARRAGE, JR.
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**
* * * * * *

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

**STIVERS, Member.** Dollar General Corporation ("Dollar General") appeals from the February 3, 2016, Medical Fee Opinion and Order of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") determining pain management, quarterly office visits, and prescriptions Hydrocodone, Acetaminophen, Tramadol HCL50, and Tramadol

HCL 300 are reasonable and necessary treatment of and related to Christopher Moore's ("Moore") work-related injury. The ALJ also determined Moore had not failed to follow medical advice. Thus, Dollar General remained responsible for the ongoing treatment of Dr. James Farrage. Dollar General also appeals from the March 9, 2016, Order denying its petition for reconsideration.

On December 5, 2005, Hon. Sheila Lowther, Administrative Law Judge ("ALJ Lowther") approved a Form 110 Agreement as to Compensation. The agreement states Moore was injured on November 1, 2004, when a heavy box struck his left knee and Moore underwent left knee arthroscopy debridement of medial plaque and condroplasty of the patella. Dr. Gregg Malmquist assessed a 5% impairment rating. As a result, Moore received $9,000.00 in a lump sum settlement. Moore waived his right to vocational rehabilitation but did not waive his right to future medical benefits.

The record also contains a Form 110 Agreement as to Compensation approved by Hon. J. Landon Overfield, Administrative Law Judge ("ALJ Overfield") on December 20, 2010, providing much of the same information contained in the Form 110 approved by ALJ Lowther. However, it also notes Moore underwent multiple surgeries to his left knee.

Further, in 2010 Dr. Malmquist and Dr. David Gaw assessed 5% impairment ratings. The agreement states the matter was before ALJ Overfield on a motion to reopen for alleged worsening of impairment and temporary total disability ("TTD") benefits, and the parties agreed there was no worsening of impairment. The parties also agreed to the amount of TTD benefits which Dollar General had paid. Dollar General settled for a lump sum of $975.21 of which $109.84 was for interest due on past due TTD benefits and $865.37 in costs. Moore agreed that all costs incurred including Dr. Gaw's independent medical evaluation ("IME") fee and the attorney's fee were either waived or would be his responsibility.

On October 12, 2015, Dollar General filed a motion to reopen. It stated that since 2010, Moore's medical treatment consisted of visits to the doctor's office for evaluation and refill of prescription pain medication. Moore had taken Hydrocodone, Acetaminophen, Tramadol HCL, and Tramadol HCL ER since 2013 in escalating dosages. Dollar General asserted in spite of upward titration of these narcotics, Moore had reported no improvement in his pain. In fact, in 2015, Moore reported an average pain level higher than reported in 2013 when he was first treated by his current physician, Dr. Farrage.

Dollar General asserted it was apparent Moore's ongoing pain management regimen was unproductive, and the evidence suggested an unhealthy dependency on this treatment. Therefore, the treatment was not reasonable and necessary for the cure and/or relief of the work injury and Dollar General requested to be relieved from the liability. Dollar General attached the utilization review ("UR") report of Drs. Jamie Lee Lewis and William Mazzella upholding the original denial by Dr. Heidi Klingbeil.[1]

In addition, Dollar General stated it was contesting liability for ongoing pain management on the grounds of causation, arguing Moore's knee symptoms are more likely due to the significant stresses placed on the knee by his martial arts activities than by the 2004 work-related injury. Dollar General contested liability for ongoing benefits based on Moore's unreasonable failure to follow the medical advice, specifically the restrictions recommended by Dr. Malmquist. Dollar General asserted the martial arts in which Moore engaged were physically demanding and beyond the physical restrictions contemplated by his treating orthopedic surgeon, Dr. Malmquist. Therefore, it submitted it "should not be liable for

[1] The report of Dr. Klingbeil is not a part of the record.

[Moore's] continued use of narcotic medication, including the risks attendant to said treatment over a protracted period of time, to enable such activity."

Dollar General also pointed out that Moore's treating orthopedic surgeon indicated, at the time of discharge, he should be weaned from narcotics, and the first pain management physician Moore saw also expressed reservations about long-term narcotics use. Therefore, Dollar General submitted a weaning program was in Moore's best interest.

Dollar General filed a motion to join Dr. Farrage as a party and a Form 112 medical fee dispute. Attached to the Form 112 is the affidavit of Dollar General's attorney. The affidavit states Moore initiated pain management with an evaluation on June 28, 2011, by Dr. Jeffry Hazlewood who expressed some concern over the long-term use of opioids. The affidavit cites to portions of Dr. Hazlewood's report which was attached. The affidavit notes that due to compliance issues, Dr. Hazlewood advised in August 2011 he was not comfortable with prescribing narcotics. Moore did not return to Dr. Hazlewood but came under the care of Dr. Farrage on July 19, 2012.

The affidavit notes Dr. Farrage changed Moore's medication regimen which was Hydrocodone/Acetaminophen 7.5-

325 per day. Beginning in late 2012, Dr. Farrage prescribed one Hydrocodone/Acetaminophen 7.5-325 per day and four Tramadol HCL 50 mg per day. After five months, Moore's Tramadol HCL 50 mg was increased to six per day. Beginning in March 2014, his Tramadol prescription was changed to two Tramadol HCL 50 mg per day and one Tramadol HCL ER 300 mg per day. The affidavit represented Moore's medication for 2013 through 2015 was as follows:

> **2013:**
> 270 Hydrocodone 7.5-325 tablets
> 73,800 mg Tramadol (total combined dose of Tramadol 50 mg and Tramadol ER 300 mg)
>
> **2014:**
> 340 Hydrocodone 7.5-325 tablets
> 134,500 mg Tramadol (total combined dose of Tramadol 50 mg and Tramadol ER 300 mg)
>
> **2015:**
> 378 Hydrocodone 7.5-325 tablets YTD through 10/9/15
> (489 per year, extrapolating through end of 2015)
> 118,877 mg Tramadol total combined dose YTD through 10/2/15
> (143,247.5 total combined dose per year, extrapolating through end of 2015)

The affidavit asserts Moore took more of both medications in 2014 than he did in 2013 and had already taken more Hydrocodone in 2015 than he took through the end of 2014. Dollar General represented that notwithstanding

this increased dosage of pain medication, Moore reported worse pain on average than he did when he first started treatment with Dr. Farrage. The affidavit asserts the following values were taken from the “Brief Pain Inventory” Moore completed in 2013 through 2015:

| | | | | |
|---|---|---|---|---|
| 12/12/13 | Worst Pain: 6 | Least Pain: 1 | Average Pain: 2 | General Activ. Interference:1 |
| 6/12/14 | Worst Pain: 7 | Least Pain: 2 | Average Pain: 5 | General Activ. Interference:2 |
| 8/28/14 | Worst Pain: 7 | Least Pain: 3 | Average Pain: 5 | General Activ. Interference:5 |
| 4/30/15 | Worst Pain: 5 | Least Pain: 2 | Average Pain: 3 | General Activ. Interference:2 |

The affidavit also asserted a social media search provided evidence indicating Moore is active in martial arts and posted photographs in January 2015 where he was kneeling on the floor and holding a certificate demonstrating his advancement in the program. It represented it was apparent Moore practiced the art of Hapkido. The affidavit provided a Wikipedia description of Hapkido. The affidavit concluded by noting when Moore was released by his orthopedic surgeon, he was assigned permanent restrictions which included no lifting over

thirty pounds, limited climbing on ladders, ramps, and inclined steps, and limited standing.

Also attached to the medical fee dispute is the September 22, 2015, UR report of Drs. Lewis and Mazzalla who were asked to address whether the prescribed Tramadol HCL ER 50 mg and Hydrocodone 7.5 mg were medically necessary and appropriate. Both physicians' answered "no" opining as follows:

> In this case, the most recent evaluation provided is 4-5 months old and thus, it is not indicated what the patient's current benefit (if any) is with use of opioids, including tramadol HCL ER, tramadol HCL and hydrocodone. Additionally, the current functional status is not identified. Lastly, a recent UDS is not provided to identify compliance. It is noted on progress note dated 08/08/11, that the patient's UDS on 06/28/11 was positive for hydrocodone, Fentanyl, and negative for Xanax, which the patient had stated he may have taken some of his wife's and used patches he reports his father gave to him. Ongoing use was not recommended at this time. Thus, ongoing use of opioids is not supported in this case and tramadol HCL ER is non-certified.

Also attached were the May 23, 2010, restrictions from Dr. Malmquist and the New Patient Evaluation dated July 19, 2012, of Dr. Farrage as well as Moore's answers to Brief Pain Inventories dated December 12, 2013, June 12, 2014, August 28, 2014, and April 30, 2015. A document

styled “Claim Transaction History” was attached listing the medications prescribed from April 16, 2010, through August 9, 2015. Dollar General also attached a printout of what Moore posted on social media regarding his martial arts training.

The June 28, 2011, Initial Evaluation of Dr. Hazlewood was also attached. Dr. Hazlewood provided his finding and expressed opinions regarding Moore’s permanent knee problems and the need for continued opioid use. He also suggested a course of pain management. Dr. Hazlewood noted a urine drug screen specimen was obtained. After Moore was sent for the drug screen, he admitted taking his wife’s Xanax tablets. Dr. Hazlewood felt this would not be a good situation, and Moore needed significant counseling on this as well to avoid other people’s medications. Finally, he noted the testing came back for Benzodiazepine and opioids appropriately.

On October 14, 2015, Dollar General filed the June 28, 2011, report of Dr. Hazlewood, the report providing the results of the drug screen, and the August 8, 2011, note of Dr. Hazlewood. In the August 8, 2011, report, Dr. Hazlewood stated he was documenting significant problems with the results of the drug screen again noting Moore told him he had recently taken his wife’s Xanax. Dr.

Hazlewood stated the test came back positive for Hydrocodone, but was also positive for Fentanyl which is the trade name for Duragesic. Dr. Hazlewood stated this was a significantly potent schedule II opioid. The test for Xanax was negative. When he asked Moore about the Fentanyl, Moore stated he had used some patches given to him by his father and was unsure of the name of the patches. Dr. Hazlewood stated this was a significant problem, and in his opinion, he would not be able to justify continued opioids as the risks outweigh the benefits given this type of behavior and lack of subjective reliability in the history taking. Moore denied any addiction problem.

In an Order dated November 16, 2015, the ALJ found Dollar General had made a *prima facie* showing for reopening and sustained the motion to reopen and joined Dr. Farrage as a party.

The November 30, 2015, Scheduling Order reveals the medical dispute concerned the following: prescription medications Hydrocodone/Acetaminophen, Tramadol HCL (50), and Tramadol HCL (300), quarterly office visits, and ongoing pain management. The basis of the challenge was reasonableness/necessity and causation/work-relatedness.

Moore submitted Dr. Farrage's answers to a questionnaire in which he indicated he had reviewed the medical fee dispute. In response to the question: "Is the subject treatment recommended by you reasonable, medically necessary and related to 11/1/204 work injury," Dr. Farrage answered "yes." Additionally, Dr. Farrage was asked to list the medications and treatment he expected to be necessary for Moore's injuries with the understanding modifications may be needed as his condition changes. Dr. Farrage responded as follows:

> Mr. Christopher Moore is currently on a medication regimen consisting of tramadol ER with availability of tramadol and lortab for breakthrough pain. This is in addition to conservative measures including orthosis use, tailored HEP, thermal modalities and desensitization techniques. Efforts have been successful in reducing the previously required high (6X/d) dose hydrocodone use significantly as recommended with transition to a non-opioid derived centrally acting analgesic agent. There have been no issues with patient compliance, evidence of addiction, or diversion. He has been gainfully employed on a full-time basis and is able to enjoy some avocational activities once again. There are no plans for additional surgical intervention at this time. He is followed regularly in the clinic for adjustments to his regimen with goal of further reducing reliance upon scheduled medications. Prescription monitoring process and urine drug

> screens are also accomplished regularly. The current care plan has been effective in substantially improving the patients [sic] quality of life and is considered medically necessary with regards to management of the reported work injury on 11/1/2004.

Dollar General introduced the IME report of Dr. Calvin R. Dyer generated as a result of an examination on November 16, 2015. Based on the history of Moore's problems, his review of the x-rays he obtained, and his physical examination, Dr. Dyer stated Moore's anterior knee pain did not require pain management or opioid medication. He believed the medications were somewhat counter-productive because without full feeling and no appropriate sensation in his knee, Moore may engage in activities which can aggravate his knee. An exercise program may be warranted to continue strengthening of the quadriceps muscle. Because of Moore's subjective complaints and inconsistent movement abnormalities of the knee, Dr. Dyer could not offer a rating related to the range of motion of the left knee. He noted chondral changes in the patellofemoral joint remain mild because there is still excellent joint space preserved more than eleven years after the injury. Moore did not have an effusion which would suggest any type of acute abnormalities.

Dr. Dyer believed Moore may require a medically supervised decrease of his pain medication. Based on his medical records review, he believed Moore had an addictive complication on top of his routine pain management. Dr. Dyer did not believe Moore's knee warranted further treatment; however, he acknowledged he did not have a good handle on Moore's function because his subjective complaints and examination were unusual for this type of condition.

Dr. Dyer believed the pain management practices of Dr. Farrage did not appear to be standard care. Although Tramadol and Hydrocodone may allow Moore to function at a higher level, it may cause further damage because of his body's inability to perceive pain accurately while on these medications. Significantly, Dr. Dyer stated he did not have any reason to suggest any of Moore's ongoing problems or dysfunction in the left knee are related to martial arts activities. He believed Moore had minimal dysfunction of the left knee related to his injury. Dr. Dyer suggested non-steroidal anti-inflammatories for intermittent pain, light exercises, and general fitness.

Dollar General filed information obtained from the National Institutes of Health/U.S. National Library of Medicine regarding Tramadol and Hydrocodone.

Dollar General filed the December 31, 2015, medical records review report of Dr. Hazlewood. That report reflects Dr. Hazlewood reviewed the records of Dollar General's attorney, his records dated June 28, 2011, and August 8, 2011, the report of Dr. Dyer, records from Dr. Farrage, the UR report of Dr. Klingbeil, records from Dr. Spindler, records from Dr. Malmquist, and the Functional Capacity Evaluation ("FCE") report of April 13, 2010. Dr. Hazlewood's impression was:

> 1. Chronic left knee pain with histories of multiple surgeries.
>
> 2. Chronic opioid dependency with multiple aberrant behaviors documented.

Dr. Hazlewood again referenced the fact Moore had taken Xanax provided by his wife and a Fentanyl patch. He noted Moore later admitted to Dr. Farrage he had taken a co-worker's prescription medication after running out of his own. He concluded there were multiple aberrant behaviors present and a strong suggestion of the possibly of addiction to chronic opioids; at a minimum, there was a definite misuse and abuse of medications as well as illegally taking other person's prescription medications on several occasions.

As to whether Moore's current medication regimen was reasonable and necessary treatment for the cure and

relief of his 2004 work injury, Dr. Hazlewood stated the "subjective symptoms in this case far outweigh objective findings per the orthopedic surgeon as well as other evaluations in the past." He stated Moore appeared to be much more functional than he was willing to state and was able to do much more with his pain than he admits in light of the social media information. He did not believe the medications Moore was taking would "deaden the pain enough" to allow him to perform martial arts activities. Therefore, he believed Moore's subjective reports of pain far outweigh what appears to be painful based on objective information. Dr. Hazlewood stated there are no well-done studies supporting long term usage of chronic opioids for non-malignant pain.

Dr. Hazlewood stated Dr. Farrage incorrectly stated Tramadol is not an opioid, as it is a synthetic opioid and has been scheduled for over a year or two by the DEA as a potentially addictive opioid medication/controlled substance. He believed the notes of Dr. Farrage indicate Moore's pain is gradually increasing despite his use of opioids.[2] Dr. Hazlewood was most concerned by Moore illegally obtaining controlled substances from other

[2] Dr. Hazlewood compared Moore's rating of his pain in 2013 and 2014.

persons and eluded to the three occasions concerning the receipt of Xanax from his wife, the Fentanyl patch received from his father, and his statement to Dr. Farrage that he took a co-worker's pain medication since he had run out. He believed Moore had a high risk of being found either unconscious or dead secondary to misuse or abuse of opioids. He stated Moore's risk for unintentional death was extremely high given his aberrant behavior as previously outlined. Dr. Hazlewood stated there was no way he could agree with the continued opioid management; however, basic anti-inflammatory use is indicated with maybe an occasional steroid injection for significant pain flare ups.

Dr. Hazlewood could not determine whether pill counts were being performed, and believed there was no objective documentation of significant pathology on examinations or documentation of significant functional improvement with the medications. It also appeared Dr. Farrage had rarely obtained urine drug screens. Dr. Hazlewood concluded Dr. Farrage was not following the best pain management practices.

In light of Moore's surprisingly high level of physical functioning, as indicated in his social media post, Dr. Hazlewood believed Moore should be weaned from

"opioids and opioid agonist" over a four week period. Dr. Hazlewood felt it was very unusual for someone to be on two different short-acting opioids. Further, there was no reason to be on these two opioids and one long-acting opioid. Dr. Hazlewood did not recommend any pain management or other type of medical treatment related to the injury. He would only recommend over-the-counter Advil, Motrin, or Tylenol as needed and a self-directed home exercise program.

The January 5, 2016, "BRC Order in Medical Fee Dispute," reflects the contested issues were the same as set out in the Scheduling Order.

In her February 3, 2015, decision resolving the medical fee dispute in favor of Moore and Dr. Farrage, the ALJ provided the following findings of fact and conclusions of law:

> . . .
>
> Defendant Employer introduced the June 28, 2011 report of Jeffrey E. Hazlewood, M.D., who conducted an independent medical evaluation (IME) by taking a history from Plaintiff, reviewing medical records and conducting a physical examination. Dr. Hazlewood noted the history of Plaintiff's fall at work while lifting. He struck his left kneecap and has had ongoing pain. Since the injury, he had undergone three different surgeries and Plaintiff thought he may need knee

replacement at some point. At the time of IME, he was treating with his physician every four months. Dr. Hazlewood's assessment was chronic left knee pain with three different surgeries, continued pain, as there is legitimate, and possible development of osteoarthritis in the knee joint. He also noted knee dysfunction related to this diagnosis and chronic opioid dependency with low risk for addiction. He did not see signs of misuse or abuse. Dr. Hazlewood did not find Plaintiff to be a surgical candidate, but was concerned with his opioid use and wanted to help him maintain a low dose. He recommended random urine drug screens with a signed narcotic agreement and consideration for use of Lidoderm patches. On the day of his evaluation, the urine drug screen was positive for Hydrocodone and Fentanyl.

Dr. Hazelwood reviewed additional records which he discussed in a December 31, 2015 report. Again he noted Moore is not a surgical candidate and the risk of opioid abuse outweighs the benefit. He disagrees with continued opioid use and believes Moore should be weaned from his medication. He noted illegal activity and the high risk of continued use. He could benefit from injections but only if they provided relief. He should take only over-the-counter medications such as Advil and continue a home exercise program.

Defendant Employer introduced a September 22, 2015 medical records review and determination by Jamie L Lewis, M.D., and William Mazzella, M.D. The records indicated continued complaints of pain in the left knee. The review determination found Tramadol HCL ER and Tramadol HCL (50), should

not be approved for use, as the records did not adequately document benefit from use of these drugs. Furthermore, the record indicated some possible, occasional use of medications prescribed to a family member. Hydrocodone was also not recommended for certification based on the same analysis.

Defendant employer introduced drug profiles from the Internet published by the US National Institutes of Health and Drug Importunate Agencies.

Defendant Employer introduced the November 16, 2015 report of Calvin R. Dyer, M.D., who conducted an IME by taking a history from Plaintiff, reviewing medical records and conducting a physical examination. He found Plaintiff ambulating without assistance. He did not have records of the initial fracture and he did not believe further surgical intervention would be warranted. Because of subjective complaints and movement abnormalities of the knee which Dr. Dyer found inconsistent, he could not provide an impairment rating. However, Dr. Dyer recommended decreasing the opioid intake in a supervised manner. The current medication regimen he did not find to be reasonable, necessary or related to the work injury 2004. He found the practice of Dr. Farrage to continue prescribing narcotics was not standard practice and he also noted Plaintiff's involvement in martial arts, but did not have any reason to suggest that any of his ongoing problems or dysfunction would be related to those activities. Dr. Dyer recommended nonsteroidal anti-inflammatory's for intermittent pain, light exercise and general fitness.

Plaintiff introduced a December 17, 2015 letter from Dr. Farrage, where he checked the box indicating that the contested treatment was medically reasonable and necessary and related to the 2004 work injury. He further noted the ongoing practices in place including a reduction in medication:

> Mr. Christopher Moore is currently on a medication regimen consisting of Tramadol ER, with availability of Tramadol and Lortab for breakthrough pain. This is in addition to conservative measures including orthosis use, tailored HEP, thermal modalities and desensitization techniques. Efforts have been successful in reducing the previously required high (6X/day) dose hydrocodone use significantly as recommended with transition to a non-opioid derived centrally acting analgesic agent. There have been no issues with patient compliance, evidence of addiction or diversion. He has been gainfully employed on a full-time basis and is able to enjoy some vocational activities once again. There are no plans for additional surgical intervention at this time. He is followed regularly in the clinic for adjustments to his regimen with goals of further reducing reliance upon scheduled medications. Prescription monitoring process and urine drug screens are also accomplished

> regularly. The current care plan has been effective in substantially improving the patient's quality of life and is considered medically necessary with regards to management of the reported work injury on November 1, 2004.
>
> . . .

In the dispute herein, Defendant Employer has challenged work relatedness, reasonableness and necessity of ongoing pain management, quarterly office visits, prescriptions for Hydrocodone/Acetaminophen, Tramadol HCL (50) and Tramadol HCL (300), as well as failure to follow medical advice. After review of the medical evidence, the ALJ is persuaded that the ongoing treatment with Dr. Farrage is reasonable, necessary and work related. Regarding medications, as counsel will recall from the telephone conference, the ALJ does not have a medical or pharmaceutical degree and chooses to rely on medical opinions rather than medication printouts. Dr. Farrage has cut down the dosage and Plaintiff is being weaned to a lesser amount. The ultimate decision on just how much medication and which medications to prescribe will be left up to Dr. Farrage, as long as the guidelines for prescribing and drug testing are followed. The claim of failure to follow medical advice appears to be related to Plaintiff’s active lifestyle. Normally, carriers complain of inactivity. Here, Plaintiff continues to work and participate in martial arts. Defendant Employer’s IME physician specifically stated this activity was not a problem for Plaintiff.

> Certainly Plaintiff's ultimate goals should include being drug free. This does not always happen. At this point, while there are active efforts to decrease medications, the ALJ is persuaded that the ongoing treatment by Dr. Farrage is work related, reasonable and necessary and therefore, compensable.

Dollar General filed a petition for reconsideration asserting the ALJ's finding Dr. Farrage reduced the dosage and Moore is being weaned to a smaller dosage with active efforts to decrease medications was presumably based upon Dr. Farrage's letter. However, it contended this finding is contrary to Dr. Farrage's actual medical chart and Moore's prescription transaction history which were not referenced in the ALJ's opinion.

In the March 9, 2016, Order overruling the petition for reconsideration, the ALJ stated as follows:

> After review of Defendant Employer's argument, review of the opinion and a review of the record, the ALJ's opinion is based on reliance on the most recent statement of Dr. Farrage in the record, dated December 17, 2015, where he states Plaintiff is compliant and doing well on the current regimen, a reduction from a prior dosage. Nothing in this review leads to a change in the opinion.

On appeal, Dollar General posits: "[i]s Kentucky willing to do something about the opiate epidemic plaguing our state?" and "[w]hat is the purpose of this 'pain

management agreement' Dr. Farrage had Mr. Moore sign?" It notes, as reflected in Dr. Hazlewood's December 31, 2015, report, the state of Tennessee has mandated termination of opiates whenever the patient has violated the opioid agreement more than once. Dollar General also asks: "[i]s there no accountability for the patient who deceives the provider for purposes of securing controlled substances or for the physician who turns a blind eye to the patient's deceptions?"

Counsel for Dollar General makes highly inappropriate assertions alluding to a conversation she had with an Administrative Law Judge not currently serving on the Medical Fee Dispute docket. We will not consider these assertions and admonish counsel that she shall refrain from citing to any conversations with Administrative Law Judges in her brief and referring to anything not in evidence. Further, counsel shall refrain from framing an argument based on purported extraneous conversation.

First, Dollar General asserts the ALJ's reliance upon Dr. Farrage's December 17, 2015, note is erroneous as it does not constitute substantial evidence. Citing to Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), it argues that while Cepero involved the reliability of a causation opinion rendered by physicians who were

grossly misinformed regarding the claimant's past medical history, the fundamental principle is relevant in the present appeal. Dollar General contends Dr. Farrage's statement regarding Moore's history relevant to the issues of patient compliance, evidence of addiction, or diversion, is factually incorrect and misleading with respect to the nature and dosage of Moore's current prescription regimen. It contends it is not true there has been no evidence of addiction or diversion as Dr. Farrage's record documents Moore took a co-worker's opiates and Dr. Hazlewood's records document Moore's admission he took his wife's Xanax and his father's Fentanyl.

Second, Dollar General argues Dr. Farrage's description of Tramadol as a non-opioid derived medication seems to be designed to suggest the medication is not an opioid and therefore somehow less harmful. However, Dr. Hazlewood explained Tramadol is a highly potent and addictive synthetic opiate included in the FDA's list of Schedule II controlled substances. It suggests Dr. Farrage's statement had the intended effect as the ALJ found Moore is "compliant and doing well on the current regimen, a reduction from a prior dosage."

Third, Dollar General asserts it is untrue Moore's prescription of Hydrocodone has decreased under Dr.

Farrage's care. Moreover, it maintains this assertion completely glosses over the addition by Dr. Farrage of Tramadol to Moore's prescription regimen. It contends this medication was clearly not added by Dr. Farrage in the independent exercise of medical judgment. Rather, it contends it is apparent from Dr. Farrage's New Patient Evaluation that he initiated the prescription of Tramadol based on Moore's misrepresentation he had already been taking that medication when he came under the care of Dr. Farrage.

Fourth, Dollar General argues whether Dr. Farrage's statement is the product of affirmative misrepresentations by Moore or a result of Dr. Farrage's negligence or willful ignorance of the facts is irrelevant. It asserts the conclusions set forth in Dr. Farrage's December 17, 2015, statement are so materially flawed they cannot constitute substantial evidence as a matter of law. Thus, the ALJ erred in relying upon Dr. Farrage's statement.

Fifth, Dollar General notes the ALJ dismissed Moore's martial arts activities as not being problematic. However, Dr. Hazlewood believed the significance of Moore's participation in a martial art which is very physical in nature bears on his subjective complaints of pain. It

notes over the past three years Moore has reported to Dr. Farrage increasing levels of pain despite escalating dosages of narcotics. It maintains if Moore's engagement in a physically strenuous martial art is causing his increasing levels of pain, it is not responsible for the narcotic pain medication used to address this problem. Dollar General notes this was the basis of its assertion of unreasonable failure to follow medical advice.

In conclusion, Dollar General asserts:

> Dr. Farrage's medical chart and Mr. Moore's prescription transaction history unequivocally establish Dr. Farrage has prescribed more hydrocodone from 2013 to 2014 to 2015, and also added a second opiate to the mix. This is compelling evidence and the ALJ's finding to the contrary is clearly erroneous. Moreover, Dr. Farrage charts an increase in Mr. Moore's average pain level and increase in pain interference with general activities *despite* the escalating morphine equivalent dosage prescribed. In light of these facts, the ALJ's determination should be reversed and this matter should be remanded for entry of an Order directing the weaning of Mr. Moore from this destructive opiate regimen.

In a post-award medical fee dispute, the burden of proof and risk of non-persuasion with respect to the reasonableness of medical treatment falls on the employer. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). However, the burden remains with the claimant

concerning questions of work-relatedness or causation of the condition. Id; *see also* Addington Resources, Inc. vs. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

Further, we are mindful of the Kentucky Supreme Court's holding in C & T of Hazard v. Stollings, 2012-SC-000834-WC, rendered October 24, 2013, Designated Not To Be Published, that the burden is placed on the party moving to reopen because it is that party who is attempting to overturn a final award of workers' compensation and must present facts and reasons to support that party's position:

> The party responsible for paying post-award medical expenses has the burden of contesting a particular expense by filing a timely motion to reopen and proving it to be non-compensable. *Crawford & Co. v. Wright,* 284 S.W.3d 136, 140 (Ky. 2009) (citing *Mitee Enterprises v. Yates,* 865 S.W.2d 654 (Ky. 1993) (holding that the burden of contesting a post-award medical expense in a timely manner and proving that it is non-compensable is on the employer)). As stated in *Larson's Workers' Compensation Law,* § 131.03[3][c], "the burden of proof of showing a change in condition is normally on the party, whether claimant or employer, asserting the change ...." The burden is placed on the party moving to reopen because it is that party who is attempting to overturn a final award of workers' compensation and thus must present facts and reasons to support that party's position. It is not the responsibility of the party who is defending the original award to make the case for the party attacking it.

> Instead, the party who is defending the original award must only present evidence to rebut the other party's arguments.
>
> . . .
>
> Thus, C & T had the burden of proof to show that Stolling's treatment was unreasonable and not work-related.

Slip Op. at 4-5.

Since Dollar General was unsuccessful before the ALJ, the sole issue in this appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

> The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the board, and he himself appeals to the circuit court, the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

Wolf Creek Collieries at 735.

Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). In other words, an unsuccessful claimant on appeal must prove that the ALJ's

findings are unreasonable and, thus, clearly erroneous, in light of the evidence in the record. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For an unsuccessful claimant, this is a great hurdle to overcome. In Special Fund v. Francis, supra, the Supreme Court said:

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Id. at 643.

As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight to be accorded the evidence and the inferences to be drawn therefrom. Miller v. East Kentucky

Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The fact-finder may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary parties' total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

The opinions of Dr. Farrage set forth in his December 17, 2015, letter constitute substantial evidence supporting the ALJ's decision. Dr. Farrage indicated Moore is currently on the prescription medication regimen of Hydrocodone with the availability of Tramadol and Lortab for break-through pain. He listed the conservative measures being employed. He had successfully reduced the previous required high dosage of Hydrocodone with transition to a non-opioid derived centrally acting analgesic agent. Finally, he concluded there was no issue with compliance or evidence of addiction or diversion.

Dr. Farrage's statement that prescription monitoring and urine drug screens were also conducted regularly is not contradicted by any medical record. Dr. Hazlewood stated he "didn't see that pill counts are being

performed" and it "appeared drug screens were rarely obtained." However, Dr. Hazlewood did not conclusively state prescription monitoring and drug screens were not regularly conducted.

Concerning Dollar General's assertion Dr. Farrage did not have a complete history of Moore's activities and medical history, we note Dr. Farrage stated Moore was gainfully employed and enjoys some vocational activities once again. Based on that statement, we believe the ALJ could reasonably conclude Dr. Farrage was aware of Moore's martial arts activities since he indicated he had reviewed Dollar General's medical fee dispute dated on October 8, 2015. The Form 112 contains the social media attachments relating Moore's martial arts activities.

Further, the report of Drs. Lewis and Mazzella, Dr. Hazlewood's initial evaluation of June 28, 2011, and the claim transaction history, listing the prescriptions written from April 16, 2010, through September 9, 2015, were attached to the Form 112. The representations he had reviewed the medical fee dispute strongly implies Dr. Farrage was aware Moore had taken his wife's Xanax and received a Fentanyl patch from his father in 2011. Thus, the ALJ could reasonably conclude Dr. Farrage had a complete and accurate medical history including the

episodes outlined by Drs. Lewis, Mazzella, and Hazlewood at the time he drafted his response of December 17, 2015.

Based on the above, we find no merit in Dollar General's argument the December 2015 note of Dr. Farrage does not constitute substantial evidence. Cepero, supra, was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. We find nothing akin to Cepero in the case *sub judice*. The ALJ could reasonably infer the opinions expressed by Dr. Farrage on December 17, 2015, were based on a complete understanding of Moore's medical history and social activities as he indicated he had reviewed the information set forth in Dollar General's medical fee dispute.

Dollar General asserts Dr. Farrage's statement that Moore has been compliant and there is no evidence of addiction or diversion is factually incorrect. It notes Dr. Farrage's records document Moore had taken a co-worker's opiates and Dr. Hazlewood's records document Moore's admission he took his wife's Xanax and his father's Fentanyl. With regard to that assertion, Dr. Hazlewood's June 2011 record indicates Moore advised him he had taken his wife's Xanax, but the drug screen did not show the presence of Xanax. Further, when he questioned Moore, Dr. Hazlewood was told Moore had received his father's Fentanyl patch. Significantly, this all occurred prior to the institution of any type of pain management as Dr. Hazlewood's June 28, 2011, report was generated as a result of Moore's initial visit. Dr. Hazlewood's records do not demonstrate he saw Moore after that occasion. Moreover, except for the one occasion Moore received a tablet from a co-worker, the record is devoid of evidence Moore engaged in any similar conduct while undergoing formal pain management. Thus, within her discretion, it appears the ALJ concluded that except for taking "a co-worker's prescription medication after running out of his own," Moore had been compliant with Dr. Farrage's pain management plan.

We note the assertion Dr. Farrage's record documents Moore was taking a co-worker's opiates is contained in Dr. Hazlewood's December 31, 2015, record review report. In summarizing Dr. Farrage's records, Dr. Hazlewood does not reference any record indicating Moore had told him of consumption of a co-worker's opiates. However, in summarizing the records provided by Dollar General's counsel, Dr. Hazlewood cited to a record of Dr. Farrage dated September 9, 2013, in which Moore informed Dr. Farrage he had taken a co-worker's Hydrocodone after he ran out. The September 9, 2013, record of Dr. Farrage in the possession of Dollar General was not filed in evidence. Except for the July 19, 2012, New Patient Evaluation and the four Brief Pain Inventories, none of Dr. Farrage's records are in evidence. It appears from Dr. Hazlewood's recitation that Moore volunteered this information to Dr. Farrage in September 2013. Further, even though the September 9, 2013, record is not in evidence, it appears the incident referenced in September 2013 did not involve Moore taking medication other than the type prescribed by Dr. Farrage. Thus, Dr. Farrage's statement there were no issues with compliance or evidence of addiction or diversion, other than the one event alluded to by Dr. Hazlewood in his report, does not *per se* constitute a misrepresentation. More

importantly, the ALJ was aware of this allegation and attributed no weight to it.

With respect to Dr. Farrage's statement he discontinued the Hydrocodone and used a non-opioid derived centrally acting analgesic agent, Dollar General contends this statement demonstrates Dr. Farrage considers Tramadol a non-opioid. Although the information purportedly from the National Institutes of Health/U.S. National Library of Medicine filed in the record indicates Tramadol is an opioid, it also indicates it is a synthetic opioid. The significance of the difference between Dr. Hazlewood's opinion concerning the nature of Tramadol in comparison to Dr. Farrage's opinion merely goes to the weight to be given these opinions which is to be resolved by the ALJ.

In a companion argument, Dollar General contends Dr. Farrage's statement Moore's prescriptions of Hydrocodone have been decreased is false. It argues Dr. Farrage's use of Tramadol has resulted in an increase in the dosage of opioids. We have reviewed the claim transaction history which is a list of prescriptions written from April 16, 2010, through January 19, 2015. Although there is no evidence in the record as to the effects of Tramadol versus the effects of Hydrocodone, it is clear from that document, that during this period over 4,000 7.5-325 tablets of

Hydrocodone/Acetaminophen were prescribed for Moore by Dr. Hall.[3] That same record reflects that between July 19, 2012, and September 9, 2015, Dr. Farrage prescribed 1,020 7.5-325 tablets of Hydrocodone/Acetaminophen. These records clearly indicate there was a substantial reduction in the quantity of Hydrocodone/Acetaminophen prescribed during the period of Dr. Farrage's pain management. We emphasize the record is devoid of any evidence comparing and contrasting the relative potency and effects of Tramadol to Hydrocodone. Thus, without such medical evidence it was impossible for the ALJ to determine whether Tramadol had equal or greater potency than Hydrocodone.

Significantly, in his 2011 report, Dr. Hazlewood indicated opioid prescriptions were appropriate; however, he expressed concern as to the amount. Dr. Hazlewood offered no opinion as to whether the prescriptions written by Drs. Malmquist and Hall were inappropriate. Even though general information from the National Institutes of Health/U.S. National Library of Medicine regarding Hydrocodone and Tramadol was filed in the record, there is no evidence in the record comparing and contrasting Hydrocodone and Tramadol; i.e. whether one has greater potency and has

[3] We are presuming Linda Stovall, an ARNP, held a position with Dr. Hall's office.

greater or less side effects. It appears from Dr. Hazlewood's report of December 31, 2015, that Tramadol HCL ER and Tramadol HCL are short-acting opioids and Hydrocodone is a long-acting opioid. That being the case, Dr. Farrage had reduced the number of long-acting opioids and employed short-acting opioids. Even though Drs. Hazlewood and Dyer opined opioid therapy was inappropriate, neither expressed the opinion that if opioid treatment was appropriate the dosages prescribed were excessive.

Dollar General also argues Dr. Farrage's report of July 19, 2012, indicates Moore represented he had taken Tramadol prior to seeing Dr. Farrage. In his report, Dr. Farrage indicated Moore's current medications were Hydrocodone and Tramadol. In his plan, Dr. Farrage noted Moore has attempted to self-taper off Hydrocodone and was interested in continued use of Tramadol. He noted the KASPER system was "queried" and Moore had been prescribed Pennsaid. He stated Moore has been prescribed "Tramadol 50 mg one po qid #120" and a J-brace for his left knee. These notations do not establish Moore had taken or had informed Dr. Farrage he had taken Tramadol prior to July 19, 2012. The Claim Transaction History depicting the prescriptions written by various doctors indicates on July 19, 2012, Dr. Farrage wrote a prescription for Tramadol HCL. Further, Dr.

Farrage's review of the KASPER system did not indicate the use of Tramadol. Dr. Farrage's July 2012 report does not conclusively establish Moore was taking Tramadol prior to July 19, 2012.

Dollar General also takes issue with the ALJ's finding Moore's martial arts activities were not a problem. It cites to Dr. Hazlewood's opinions regarding the significance of Moore's participation in martial arts. However, there is nothing in the record spelling out the physical activities required by the martial arts program. Dollar General introduced pictures of Moore evidently posted on social media. However, none of the pictures depict any physical activity. Similarly, the social media posts do not contain a description of the activities in which Moore engaged. The only evidence offered detailing the physical activities required by Hapkido is contained in the affidavit of Dollar General's counsel in which he relates Wikipedia's description of Hapkido. This information is not in evidence; rather, it is merely counsel's representation of Wikipedia's description of the activities Hapkido entails.[4] More importantly, the ALJ's statement that martial arts activities were not a problem is supported by Dollar

[4] The ALJ was not required to give any weight to Dollar General's counsel's representation as to how Wikipedia describes Hapkido.

General's medical expert, Dr. Dyer, who opined he had no reason to suggest any of Moore's ongoing problems or dysfunction in his left knee is related to his martial arts activities. Thus, Dollar General's assertion Moore's martial arts activities constitute an unreasonable failure to follow medical advice is without merit.

Significantly, Dr. Hazlewood's June 28, 2011, report reflects his opinion Moore's pain complaints appear to be "very much mechanical and intrinsic type knee pain" and were very legitimate. He also stated there was chronic opioid dependency with low risk of addiction based on his interaction. Dr. Hazlewood opined he expected Moore to wear out the medial joint fairly quickly based on his gait pattern. He noted Moore had significant genuvalgous angle when he stands asymmetrically and his gait is placing a lot of stress on the knee. Dr. Hazlewood indicated he had no recommendations regarding the type of orthotics which could help Moore. At that time, his goal was to maintain Moore on opiates on as low a dose as possible. Notably, at that time he believed Moore was taking an acceptable dosage. In summarizing the situation, he indicated he hated to see an individual of Moore's age on chronic opiates; however, there were not many options left. Although he suggested Voltaren gel and a TENS unit, Dr. Hazlewood stated he would decrease

the Lortab to three tablets per day and see if Moore could manage. He did not recommend discontinuing opioids at that time.

We have reviewed Dr. Farrage's charts completed by Moore and summarized in the affidavit of Dollar General's counsel. Dollar General contends those charts contradict Dr. Farrage's representation the medications Moore takes have lessened his pain. Moore completed a Brief Pain Inventory in June and August of 2014. On both occasions he indicated his worst pain was seven and his least pain was two and three, respectively. On both occasions, Moore's average pain was five. In 2015, he indicated his worst pain was five, his least pain was two, and his average pain was three. The summary of Moore's representations in the Brief Pain Inventory, as prepared by Dollar General's counsel, contradict Dollar General's argument that Moore's pain had increased in 2015. In 2015, Moore's worst pain had decreased by two, his least pain was still two, and his average pain had decreased by two.

In her February 3, 2016, decision, the ALJ specifically noted she does not have a medical or pharmaceutical degree and chose to rely upon the medical opinions rather than medication printouts. The ALJ also noted Moore was being weaned to a lesser dosage. Thus, the

ultimate decision as to the amount of medication would be left up to Dr. Farrage as long as the guidelines for prescribing and drug testing were followed. Dollar General has offered no evidence demonstrating that in prescribing Hydrocodone/Acetaminophen, Tramadol HCL, and Tramadol HC ER, Dr. Farrage had not followed the appropriate guidelines or has not conducted the appropriate drug testing. The ALJ's finding pain management was appropriate is not only supported by the opinions of Dr. Farrage but also by the opinions of Dr. Hazlewood expressed in his June 28, 2011, report. Similarly, the use of opioids is supported by Dr. Farrage's December report and by Dr. Hazlewood's June 28, 2011, report.

Finally, the ALJ's refusal to find Moore had failed to follow medical advice is supported by Dr. Dyer, Dollar General's evaluating physician.

Accordingly, since the ALJ's decision is supported by substantial evidence and the evidence does not compel a different conclusion, the February 3, 2016, Medical Fee Opinion and Order and the March 9, 2016, Order overruling the petition for reconsideration are **AFFIRMED**.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS AND FILES A SEPARATE OPINION.

**ALVEY, CHAIRMAN.** While I agree with the result reached by the majority, I would go further. I believe we should remand this claim to the Administrative Law Judge to consider imposition of sanctions pursuant to 342.310 for the blatant hearsay and allegations asserted by counsel for Dollar General. Additionally, the references to Wikipedia and Facebook appear to have been made without any foundation. These assertions on the part of counsel for Dollar General border on the necessity of referral to the Kentucky Bar Association for consideration of violations of SCR 3.130(3.1) and SCR 3.130(3.3). Again, counsel for Dollar General is admonished from making such assertions or attempting to submit such evidence without foundation in the future.

**COUNSEL FOR PETITIONER:**

HON STEPHANIE D ROSS
250 GRANDVIEW DR STE 550
FT MITCHELL KY 41017

**COUNSEL FOR RESPONDENT:**

HON MICHAEL D LINDSEY
1830 DESTINY LN STE 111
B0WLING GREEN KY 42104

**RESPONDENT:**

DR JAMES FARRAGE JR
1725 MCINTOSH ST
BOWLING GREEN KY 42104

**ADMINISTRATIVE LAW JUDGE:**

HON JANE RICE WILLIAMS
217 S MAIN ST STE 10
LONDON KY 40741