Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 12, 2016

CLAIM NO. 201074438

DONELLA YOUNG PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

SAVE-A-LOT
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Donella Young ("Young") seeks review of the March 14, 2016, Opinion and Order of Hon. R. Scott Borders, Administrative Law Judge ("ALJ") resolving a post-award medical dispute in favor of Save-A-Lot. Based on the medical dispute filed by Save-A-Lot, the ALJ determined the L4-L5 surgery recommended by Dr. Thad Jackson is non-

compensable. Young also appeals from the April 15, 2016, Order overruling her petition for reconsideration.

On appeal, Young challenges the ALJ's reliance upon the opinions of Dr. Mark Gladstein in determining the surgery is not causally related treatment of her work injury.

On April 8, 2013, Young filed a claim alleging an October 5, 2010, injury to her back while working for Save-A-Lot. On November 5, 2013, a Form 110 Agreement as to Compensation was approved. The agreement reflects Young injured her low back lifting a 50 pound box of produce and underwent laminectomy surgery performed by Dr. Jackson. The agreement states the diagnosis was post-laminectomy syndrome with residual left lumbar radiculopathy, degenerative disk disease at L4-5/L5-S1. Dr. Jackson was designated as Young's physician. Young received a lump sum settlement based on a 12% impairment rating. She did not waive any rights granted by statute.

On January 17, 2014, the ALJ entered an order determining Young's right lower extremity and L5-S1 disk problems were not related to the October 2010 work injury. Therefore, she was not entitled to "epidural steroid injections and additional medical treatment for the lower right extremity."

On June 10, 2015, Save-A-Lot filed a motion to reopen and a Form 112 medical dispute contesting its responsibility for L4-5 discectomy surgery recommended by Dr. Jackson. Save-A-Lot also filed a motion to join Dr. Jackson as a party. Save-A-Lot asserted the surgery was not causally related to or reasonable and necessary treatment of the October 2010 injury. In support of its medical fee dispute, Save-A-Lot attached the May 26, 2015, Utilization Review Report of Dr. Daniel Gutierrez. Dr. Gutierrez opined that given the findings identified on the previous MRI and taking into account no information was submitted regarding Young's more recent conservative treatment, including physical therapy and injections, and the lack of information regarding Young's current neurological deficits it did not appear the proposed surgery is medically necessary and appropriate for the October 5, 2010, work injury.

Young filed a response indicating she had previously undergone a left L4-5 discectomy performed by Dr. Jackson in March 2011 as a result of her October 2010 work-related low back injury. Young asserted the matter should be reopened and an order entered setting a proof schedule to determine the reasonableness and necessity of the surgery recommended by Dr. Jackson.

Save-A-Lot filed the records of Hardin Memorial Hospital concerning Young's treatment at its emergency room for low back pain on April 15, 2010, and the June 26, 2015, report of Dr. Gladstein generated as a result of an independent medical evaluation. Save-A-Lot also filed Young's October 27, 2015, deposition.

Young submitted Dr. Jackson's records of April 20, 2015, and May 5, 2015, and his October 22, 2015, answers to three questions contained in a "Medical Questionnaire." Young also filed the report concerning the MRI of the lumbar spine performed on April 30, 2015.

The January 29, 2016, Benefit Review Conference ("BRC") Order reflects Dr. Jackson was the medical provider whose treatment was at issue, and the contested issue was the work-relatedness of the L4-5 lumbar surgery proposed by Dr. Jackson. The BRC Order reflects the parties waived a hearing, and the matter stood submitted as of January 29, 2016.

During her deposition, Young testified that after sustaining her low back injury she returned to work at Save-A-Lot where she worked until the store burned down. Young denied experiencing any additional injuries. She indicated she underwent surgery in March 2011. She began working at Kroger on April 20, 2011. Her job entails

cutting fruit, placing vegetables and salads out in the store for sale, and working as a cashier. The heaviest item she lifts at Kroger is ten to fifteen pounds. She is required to lift from waist level to chest level. Her job at Kroger does not entail as much lifting as her job at Save-A-Lot.

Young denied experiencing back problems or an injury while working at Kroger. Young testified that almost every day after work she soaks in the bathtub because of the pain she experiences. Her job at Kroger requires her to stand the entire eight hour shift except when she takes breaks. Although standing aggravates her back pain, Young denied doing anything at work which further aggravated it.

Young acknowledged being treated at the emergency room of Hardin Memorial Hospital on April 15, 2015, for complaints of back pain which began several weeks earlier. She went to the hospital because she could not get out of bed that morning and was experiencing “bad sharp pain.” She explained the sharp pain was new. Young estimated that in 2014 through April 14, 2015, her pain was ten on a scale of one to ten. Between March 2011 and April 2015, Young acknowledged she had always had sharp pain, but the pain

she experienced on April 15, 2015, was so bad it made her scream.

Young testified that shortly after the surgery performed by Dr. Jackson, she stopped using prescription pain medication and was not using it when she went to the emergency room. She has used and continues to use Ibuprofen and Tylenol approximately three times a day.

Approximately twice a month, Young leaves Kroger a couple of hours before her shift ends because of pain. Young testified she has problems with pain and weakness below her left knee; however, she denied falling or coming close to falling.

Young believes her current back problems relate to the 2010 work injury because her symptoms from that injury never completely resolved, and the pain continued to increase in the years following surgery. After surgery, her pain was a three out of ten, but by the end of 2011, Young estimated her pain was an eight. By December 14, 2014, it was a ten. Up until April 15, 2015, Young experienced good and bad days. She estimated she would have two good days a week when her pain would be a seven. Since April 2015, she has never had a good day, as her pain remains constant at ten. Her current pain is sharp and extends down her left leg into her foot.

After summarizing Young's testimony and the medical evidence, the ALJ concluded as follows:

> The Defendant/Employer has moved to re-open this claim to assert a Medical Fee Dispute challenging the work-relatedness/causation of a proposed lumbar surgery. The Defendant/Employer has submitted proof from Dr. Gladstein, who opines that the Plaintiff may in fact need the lumbar surgery being recommended by Dr. Jackson, but opines that the same is not causally related to the October 5, 2010, work-related accident. Dr. Gladstein notes that the radiculopathy being evidenced now on the left with previous radiculopathy for which the previous surgery was performed was on the right and is of the opinion that this left radiculopathy is a new problem that is related to her present employment at Kroger's and not her previous appointment at Save-A-Lot.
>
> The Plaintiff has responded to this Medical Fee Dispute by submitting a very short report from Dr. Jackson that indicates the patients with a previous disc herniation's has a 10% risk of recurrence over their life and that the Plaintiff's previous disc herniation put her at a much higher risk than the average person for recurrent disc herniation. Dr. Jackson notes the Plaintiff has what appears to be a recurrent disc herniation at L4 – L5. However, Dr. Jackson, while alluding to the fact that the Plaintiff's previous disc herniation and surgery increased her chances for recurrence of disc herniation, does not specifically state that in this specific instance the Plaintiff suffered a recurrent disc herniation that is causally connected to the October 5, 2010, work-related injury.

> In this specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge finds persuasive and relies upon the opinion of Dr. Gladstein in finding that the Plaintiff has not met her burden of proving that the need for recurrent surgery at L4 – L5 is causally related to the October 5, 2010, work-related incident.
>
> In so finding the Administrative Law Judge notes that Dr. Gladstein is concise in his opinion that the Plaintiff's left leg radiculopathy has nothing to do with her October 5, 2010, work-related injury that caused right leg radiculopathy. Dr. Gladstein therefore surmised that if there was an injury that caused the herniation, it must've occurred while she was working at Kroger's and does not relate back to her old injury while working at Save-A-Lot. In addition, the Administrative Law Judge did not find the opinion of Dr. Jackson to be persuasive. As Dr. Jackson simply alludes to the fact that people that have previous disc herniations are more susceptible to recurrent disc herniation's which is what must have occurred here. However, Dr. Jackson does not set forth any reasoning in his opinion as to why he is making this connection in this specific case.
>
> Therefore, the Administrative Law Judge finds that the proposed surgery at the L4 – L5 level is not causally related treatment for the Plaintiff's October 5, 2010, work-related injuries and is therefore found to be non-compensable.

Young filed a petition for reconsideration requesting additional findings of fact based upon the ALJ's

review of the evidence. She cited to Dr. Jackson's testimony and argued Dr. Gladstein did not address the fact, as noted by Dr. Jackson, that she was "more susceptible to recurrence" due to the change in her spine caused by the work injury and resulting surgery. Young also filed a supplemental petition for reconsideration again taking issue with the ALJ's reliance upon Dr. Gladstein. The ALJ summarily overruled the petition for reconsideration.

On appeal, Young argues there is no lay or medical evidence supporting Dr. Gladstein's opinion she suffered an injury while working for Kroger. She cites to her deposition testimony that she did not experience an injury while working for Kroger, and Dr. Gladstein's acknowledgement that the exact date of her recent injury is not well-documented in the medical records. Young contends without lay or medical evidence to support his opinion, Dr. Gladstein opined her work at Kroger caused the recurrence of the left L4-5 disc herniation. Young maintains the only history Dr. Gladstein possessed regarding her work at Kroger was that she worked in the produce department for three years. Young argues Dr. Gladstein's opinion cannot comprise substantial evidence when it is not based on any lay or medical evidence establishing she injured her back while

working for Kroger. Young submits the ALJ's reliance upon Dr. Gladstein's opinion is improper.

Young also asserts the ALJ appeared to misunderstand the evidence regarding her prior surgery, as the ALJ concluded the prior surgery was for right side radiculopathy and her left side symptoms were new. Young asserts that in his answers to the questionnaire, Dr. Jackson explained why the April 30, 2015, MRI findings were related to her work injury. He also explained the recommended surgery was not for degenerative disc disease but for the recurrent L4-5 herniation at the same level of her original work-related surgery. Young argues the totality of the medical evidence compels a finding the recurrent L4-5 disc herniation at the site of her initial work injury and the proposed surgery is related to the work injury of October 5, 2010. Young seeks reversal of the ALJ's decision.

In his June 26, 2015, report, Dr. Gladstein noted he had previously evaluated Young on July 15, 2013. In the course of this examination, Young advised that following her surgery in 2011 her back symptoms diminished but never completely resolved. Dr. Gladstein noted that on April 15, 2015, Young presented to the emergency room at Hardin Memorial Hospital complaining of back pain which she

indicated developed several weeks prior. Young had no radicular symptoms and the neurological evaluation was normal. She was diagnosed with recurrent back pain. Hospital personnel suggested Young return to the physician who previously operated on her back.

Dr. Gladstein observed that on April 20, 2015, Young was seen by Dr. Jackson who ordered a new MRI which showed a new protrusion at L4-5 which was assumed to be irritating the L5 root. Dr. Jackson suggested a microdiscectomy which had been denied. The MRI of April 30, 2015, revealed degenerative changes at L3-4, L4-5, and L5-S1 levels. At the L3-4 level there was a mild disc bulge with facet hypertrophy. At the L4-5 level there were post-surgical changes and a new left paracentral disc protrusion not previously noted. There was also mild facet hypertrophy. At L5-S1 there was a mild disc bulge and mild osteophyte formation. Dr. Gladstein concluded the facet changes and osteophytes were pre-existing degenerative conditions. Dr. Gladstein observed that on May 5, 2013, Dr. Jackson noted Young had had left leg pain for a month and her BMI was 41.6. According to Young, Dr. Jackson believed surgery would give her the best chance of relief.

Dr. Gladstein stated Young is morbidly obese as her height is 5’8” and her weight is 260 pounds. After

providing the results of his examination, Dr. Gladstein diagnosed recurrent left lumbar radiculopathy, secondary to congenital stenosis and recent recurrent lumbar disc, and morbid obesity. Dr. Gladstein's evaluation is as follows:

> This patient's present diagnosis of recurrent left lumbar radiculopathy has nothing to do with her injury of October 2012. It has nothing to do with her employment at Houchen's Save-A-Lot. The proposed surgery appears to be medical indicated, although I feel she will probably exhibit some ongoing low back discomfort because of her other degenerative changes. It appears that her left radiculopathy is a new problem related to her present employment at Kroger's and not to her previous employment.
>
> It is my belief that this patient diligently needs to work on weight reduction and should also be instructed in a home exercise program to help strengthen her core musculature and thereby relieve the ongoing mechanical stresses on her low back.
>
> The exact date of her recent injury is not well-documented in the medical records; however, she first sought treatment in the Emergency Room on April 15, 2015, stating that her back had been bothering her for several weeks.

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 the 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.

Assuming, *arguendo*, Save-A-Lot, not Young, had the burden of proof regarding causation, Save-A-Lot satisfied its burden through the opinions of Dr. Gladstein.

Further, we believe the ALJ had a correct understanding of Dr. Jackson's response to the questionnaire. Dr. Jackson was asked the following questions and his handwritten responses are as follows:

> 1. Please explain for the Administrative Law Judge who will be deciding Ms. Young's claim why the April 30, 2015 MRI findings are related to Ms. Young's original injury of October 5, 2010. Please include an explanation of Ms. Young's prior injury and surgery making her more susceptible and at a much greater risk of incidence of recurrence of disc herniation. Please advise whether within reasonable medical probability, but for Ms. Young's October 5, 2010 work-related injury, she would not have a recurrent disc herniation at L4-5 for which surgery is being recommended.
>
> **Patients with previous disc herniation have a 10% risk of recurrence over their life. Her previous disc**

> **herniation puts her at a much higher risk than the average person.**
>
> 2. Please explain the condition for which you are recommending left L4-5 discectomy for recurrent disc herniation. Please address the Utilization Review physician's indication the MRI findings are of degenerative disc disease.
>
> **She has what appears to be a recurrent disc herniation at L4-5. She does have findings of degenerative disc discectomy. Surgery is not for this. Surgery would only be expected to help leg pain, not back pain.**
>
> 3. Please explain why conservative treatment was not recommended for Ms. Young.
>
> **She tried epidural in the past. Likely not to help. Could consider [illegible] if desired.**

Dr. Jackson's response to the first question does not unequivocally link the need for surgery to the October 5, 2010, injury. Rather, his response is generic in nature, indicating individuals with previous discectomies have a 10% risk of recurrence over their life and Young was at a much higher risk than the average person. That ambiguous statement does not establish the recommended surgery is causally related to the October 2010 injury. Rather, Dr. Jackson's response skirted the ultimate issue to be resolved by the ALJ.

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).

We find no merit in Young's assertion there is no medical evidence to support Dr. Gladstein's opinion her current back problems are related to her work at Kroger. In his report, Dr. Gladstein noted Young's back had been bothering her for several weeks when she first sought treatment on April 15, 2015, at the Hardin Memorial Hospital emergency room. Even though he acknowledged her injury was not well-documented, Dr. Gladstein could reasonably conclude Young's work activities at Kroger

caused a recent injury resulting in her April 15, 2015, visit to the Hardin Memorial Hospital emergency room. Therefore, medical evidence supports Dr. Gladstein's opinion Young developed further lumbar symptoms caused solely by her work at Kroger. Even though Young denied experiencing an injury at Kroger, the ALJ was free to reject her testimony and rely upon Dr. Gladstein's opinion.

That said, the fact Dr. Gladstein could not identify a specific recent lumbar injury in support of his opinion Young's work at Kroger caused a recurrence of left lumbar radiculopathy does not render his opinion to be less than substantial. Rather, such information went to the weight to be assigned Dr. Gladstein's testimony, which was a question solely to be decided by the ALJ in his role as fact-finder. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995).

Here, however, there is medical evidence in the form of the records from Hardin Memorial Hospital indicating Young developed additional problems after working almost four years at Kroger. Thus, it was not unreasonable for Dr. Gladstein and the ALJ to conclude the problems for which Young sought treatment at Hardin Memorial Hospital related to her work at Kroger rather than a work injury four and a half years prior. Since the

medical records of Hardin Memorial Hospital support Dr. Gladstein's opinion, the ALJ did not err in relying upon his opinions in concluding the proposed surgery is not causally related to the October 2010 injury sustained at Save-A-Lot.

Accordingly, the March 14, 2016, Opinion and Order and the April 15, 2016, Order overruling the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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