

OPINION ENTERED: November 2, 2012

CLAIM NO. 200991151

GARY ROBINSON

PETITIONER

VS.

**APPEAL FROM HON. GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE**

NATIONAL ENVELOPE CORPORATION  
and HON. GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

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

\* \* \* \* \*

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

**STIVERS, Member.** Gary Robinson ("Robinson") seeks review of the December 27, 2010, opinion, order, and award of Hon. Grant S. Roark, Administrative Law Judge ("ALJ") awarding income and medical benefits. Robinson filed an appeal asserting the ALJ erred in not determining he was totally and permanently occupationally disabled. After briefs were

filed, National Envelope Corporation ("National Envelope") filed a motion to remand for a decision on a medical fee dispute it had filed. On May 12, 2011, the Board granted the motion to remand. On May 18, 2011, the appeal was ordered placed in abeyance.

In a March 19, 2012, opinion and order, the ALJ resolved the medical fee dispute in favor of National Envelope determining post lateral fusion surgery at L5-S1 and L4-5 performed by Dr. David Rouben was not causally related to the April 21, 2009, work injury. Robinson also appeals from the opinion and order, asserting the ALJ erroneously relied upon Dr. Timir Banerjee's opinions in determining the compensability of the surgery. Because of the procedural anomaly, we will first decide the appeal regarding the ALJ's December 27, 2010, opinion, order, and award.

Robinson's May 5, 2010, deposition was introduced in the record. Robinson testified he began having lower back problems in 2001 and underwent fusion surgery performed by Dr. Mark Myers in 2002 because of a "degenerated disc." His lower back problem was not due to a work injury. Although he had permanent lifting restrictions, Robinson was unable to remember the restrictions. He testified he was pain free for several

years and then developed mid-back pain. He then went to Dr. David Wallace, his family physician, who sent him to Dr. Frank Castro. Robinson was seen by Dr. Castro in 2007 or 2008. Dr. Castro told him his mid-back problems were due to the "lower fusion" and recommended lower back injections. Robinson testified the injection in the lower back hit the sciatic nerve and caused pain in his lower back, left leg, and left groin. Robinson testified he had no lower back symptoms until he received the epidural injection. Dr. Castro recommended surgery and when Robinson declined, Dr. Castro recommended he see Dr. Rouben.

Robinson testified he began having mid-back pain in 2007, which did not radiate beyond that area. Approximately a year and half before his deposition he began going to pain management where he continues to be treated by Dr. Christopher Nelson. Robinson testified his mid-back pain is constant and the more he does "the worse it got." Robinson has no right leg problems. Because of his lower back and mid-back problems, Dr. Nelson prescribed Hydrocodone, a pain medication. When he saw Dr. Rouben for his back problems, Dr. Rouben prescribed injections to be administered at St. Mary's which ended Robinson's lower back pain. Robinson testified he had no lower back pain

before the April 21, 2009, injury. He is still being treated for his mid-back problem and continues to take medication.

Robinson worked as an adjuster on the date of the injury which required him to set up and maintain a machine that makes envelopes. At times he also operated the machine. His job involved constant lifting with the heaviest item weighing approximately fifty pounds. He explained the most strenuous physical activity involved pushing a metal hopper containing waste from one end of the building to the other, a distance of approximately 300 yards.

Robinson's only injury at National Envelope occurred on April 21, 2009, when he felt a stabbing sharp pain in the lower part of his back while putting a window roll in the machine that makes envelopes. He immediately reported the injury to his supervisor and went home. The next day he saw Dr. Wallace. Robinson acknowledged the April 21, 2009, incident injured only his lower back and his mid-back problems have not changed. His lower back symptoms consist of sharp pain above the buttocks extending into his right hip and down his leg to his foot. Robinson also experiences numbness in the right leg.

Prior to the injury, Dr. Rouben and Dr. Christopher Nelson had administered injections for his mid-back problem. Dr. Nelson also monitored his medication. After the injury, in addition to the Hydrocodone, Dr. Nelson prescribed pain patches. Robinson's mid-back symptoms consist of sharp pain and a "real bad burning." Robinson believes his mid-back condition is getting better. Due to his mid-back problems and the problems caused by the failed lower back injections, Dr. Rouben took Robinson off work from August 6, 2008, to October 1, 2008. On October 22, 2008, Dr. Rouben returned him to work on light duty and he remained on light duty until he was injured.

At the October 26, 2010, hearing, Robinson testified he was off work three months due to the fusion surgery performed in 2002 by Dr. Myers and he was released with no restrictions. Robinson testified he was not treated again until 2007 when he saw Dr. Wallace for his mid-back problems. Dr. Wallace sent him to Dr. Castro at the end of 2007 or the beginning of 2008. In mid-2008, after the injection prescribed by Dr. Castro caused his lower back pain, Robinson saw Dr. Rouben. Within days after receiving the injections from Dr. Rouben his lower back was "pain free." Dr. Rouben is now treating his lower back symptoms caused by the injury and his mid-back

problems. Concerning the cause of his inability to work, Robinson testified as follows:

Q: Could you go back and do your job at National Envelope?

A: Not at this moment.

Q: What prevents you from doing that?

A: My back.

Q: What problems with your back?

A: Well, with the lower part I can't hardly walk or lift anything and, you know, the upper part's the same. I can't bend, I can't pick up anything.

. . .

Q: Mr. Robinson, is there any job that you could do right now?

A: None that I can think of, no.

Q: And what prevents you from performing any type of job right now?

A: Because of my back injuries.

On cross-examination, Robinson was informed Dr. Myers' January 2003 note indicated he was returned to work with permanent restrictions of no lifting over twenty pounds. Robinson responded his restrictions may have slipped his mind due to the passage of time. He explained that after the surgery he returned to full duty, lifting window rolls weighing over fifty pounds. As far as Robinson knew he did not have any restrictions. He

explained Dr. Myers later dropped the restrictions because National Envelope would not let him return to work with the restrictions. Robinson stated he is pretty sure that the restrictions were dropped at some point because he recalled a conversation with a "Human Resource person" concerning his restrictions. Robinson explained all of his low back problems prior to the injury occurred when the injections prescribed by Dr. Castro went into his sciatic nerve. Robinson does not believe he can return to the job he was performing at the time of the injury.

In the December 27, 2010, opinion, order, and award, the ALJ entered the following analysis, findings of fact, and conclusions regarding causation, work-relatedness, and whether Robinson had a prior active condition:

As a threshold issue, the defendant argues plaintiff's alleged lower back and middle back injuries are not causally related to any incident at work in April, 2009 but, instead, are due to pre-existing conditions that were actively symptomatic and disabling prior to the alleged injury. In support of its position, the defendant relies on the medical records and the opinions of its expert, Dr. Banerjee, who concluded both the mid and lower back conditions were long-standing and not related to the alleged work injury.

Conversely, plaintiff relies on the medical records and the opinions of

its expert, Dr. Roberts, to argue that, although he may have had some portion of prior active impairment to his low back and middle back, the April, 2009 incident caused new and additional impairment to both areas.

Having reviewed the evidence of record, the Administrative Law Judge is first persuaded by the records of Dr. Rouben that plaintiff's mid/thoracic back symptoms and condition is not causally related to any work event on April 21, 2009. As one of the treating physicians, Dr. Rouben's records fully support Dr. Banerjee's conclusion that the middle back condition is not work-related. Dr. Banerjee's opinion in this regard is considered most credible and therefore the mid back portion of plaintiff's claim is not work-related and must be dismissed.

With respect to the lower back condition, the medical records are less than clear. In the years between his 2002 lumbar injury and fusion and the April, 2009 alleged work injury plaintiff treated intermittently for various symptoms in his lower and mid/upper back. From the medical records and diagnostic studies performed during this interval it appears plaintiff's treating physicians were unable to conclude with certainty whether plaintiff's symptoms were emanating from his mid or lower back. Ultimately, the Administrative Law Judge is persuaded in accordance with plaintiff's own testimony that his primary symptoms within the last two years leading up to April, 2009 were due to his mid back condition and that the most significant lower back/radicular symptoms during that time were caused by injections of the lumbar spine which were performed to

alleviate the mid back symptoms and which, instead, inflamed plaintiff's sciatic nerve.

Considering the entirety of evidence, the Administrative Law Judge is therefore most persuaded by the opinion of Dr. Roberts, who concluded plaintiff had a pre-existing active impairment of 20% immediately preceding April 21, 2009 and that the lifting incident on that day caused a new injury which warranted an additional 8% impairment rating. Dr. Roberts' conclusions in this regard are found most consistent with the medical records and plaintiff's own testimony. It is therefore determined that plaintiff suffered a new additional injury to his lumbar spine on April 21, 2009, and that portion of his claim is compensable.

Concerning the extent and duration of Robinson's occupational disability, the ALJ concluded as follows:

The next issues [sic] the extent and duration of plaintiff's impairment/disability. In considering this issue, it is first determined that plaintiff is not permanently and totally disabled as a result of his work injury. Indeed, plaintiff's occupational disability may be as much or more affected by his middle back condition, which has been determined to be unrelated and not compensable. Considering only the effects of the April 21, 2009 injury, it is noted that plaintiff has not undergone any additional surgery and that the majority of his impairment rating preexisted that event and that he had significant restrictions from his treating physician following his fusion in 2002. For these reasons, it is

determined the April 21, 2009 incident has not caused the plaintiff to be permanently and totally disabled.

Instead, it is determined, in accordance with the findings above, that plaintiff has an 8% impairment rating as a result of his April, 2009 lumbar injury based on the opinion of Dr. Roberts. The defendant maintains Dr. Roberts' impairment rating is not reliable as a matter of law because it was formulated incorrectly. However, the Administrative Law Judge does not believe Dr. Roberts' impairment rating is calculated so erroneously as to render it not credible as a matter of law. Moreover, his finding of a 20% prior active impairment and an 8% impairment due to the work injury is found to most accurately take into account plaintiff's prior condition versus the new and additional symptoms he has following the work injury. For these reasons, the Administrative Law Judge relies upon the 8% impairment rating assigned by Dr. Roberts. It is also determined that, based upon plaintiff's testimony and the opinions of Dr. Roberts, plaintiff does not retain the physical ability to return to the kind of work he performed at the time of his injury, thereby entitling him to application of the 3x multiplier contained in KRS 342.730(1)(c)(1). His award of benefits is therefore calculated as follows:

$$\begin{aligned} \$750.27 \times 2/3 &= \$500.18 \times .08 \times .85 \times 3 \\ &= \$102.04 \text{ per week.} \end{aligned}$$

Robinson filed a petition for reconsideration noting the ALJ found he was not permanently and totally disabled and his occupational disability may be much or

more affected by his mid-back condition. Robinson pointed out that prior to the injury he was able to perform "laborious job duties." He requested clarification regarding what medical records the ALJ relied upon in determining he was not permanently totally disabled. Without comment, the ALJ summarily overruled Robinson's petition for consideration.

On appeal, Robinson argues the opinions expressed in Dr. Banerjee's report were based upon records which did not pertain to him. Thus, pursuant to Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), Dr. Banerjee's opinions are not an accurate assessment of Robinson's condition. Robinson maintains he testified he is unable to work due to the work-related low back condition, and Dr. Craig Roberts is the only medical expert to offer an opinion regarding his ability to "return to any type of competitive employment on a regular and sustained basis." Robinson posits Dr. Roberts' opinion is based on an accurate assessment of Robinson's "objective findings and prior medical records." Therefore, the ALJ's findings are not based on substantial medical evidence. Robinson requests the matter be reversed and remanded to the ALJ "to address the issue in a manner set forth by Cepero and is consistent with the law."

Robinson, as the claimant in a workers' compensation claim bears the burden of proving each of the essential elements of the cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since the ALJ determined Robinson did not satisfy his burden of proving total occupational disability, the question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). 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). As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. 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 ALJ, as 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 party's total proof. Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support her decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Because the ALJ did not state which physician's opinion he relied upon in determining Robinson is not totally and permanently disabled, we are unable to follow Robinson's argument regarding the ALJ's reliance on Dr. Banerjee's opinions. In finding Robinson sustained a lower back injury on April 21, 2009, the ALJ obviously rejected Dr. Banerjee's opinions and instead relied upon Dr. Roberts' opinion. In resolving the issue of "extent and duration," the ALJ made no reference to Dr. Banerjee's opinions or the opinions of any other physician.

That said, the ALJ must set out the basic facts supporting his ultimate conclusion that Robinson is not totally and permanently disabled. In Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440, 444 (Ky. App. 1982) the Court of Appeals held:

The case law dealing with administrative bodies clearly indicates that it is required that basic facts be clearly set out to support the ultimate conclusions. [citations omitted] The Workers' Compensation Board is not exempted from this requirement. It is not the intention of the Court to place an impossible burden on the Workers' Compensation Board but only to point out that the statute and the case law require the Board to support its conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the basis for the decision. As the circuit court said, 'Concededly, it takes more time in writing an Opinion to tailor it to the specific facts in an individual case, however, this Court feels that the litigants are entitled to at least a modicum of attention and consideration to their individual case.'

In the case *sub judice*, regarding extent and duration, the ALJ first stated Robinson was not totally and permanently disabled as a result of his work injury. The next statement that Robinson's occupational disability may be as much or more affected by his mid-back condition which was unrelated and non-compensable, without further explanation, does not provide a sufficient basis for the conclusion Robinson is not totally occupationally disabled. Further, the ALJ did not cite to any evidence in support of this conclusion. Although Robinson testified he was on light duty when injured, he testified he fully performed

his job prior to the injury. Further, there is no medical evidence establishing the extent and severity of his mid-back condition.

The statement Robinson had not undergone additional surgery and the majority of his impairment rating pre-existed the event without further explanation, is not a sufficient basis for the ALJ's decision. We point out in Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003), the Supreme Court addressed the significance of a pre-existing impairment rating in determining whether a worker who sustained a subsequent injury was totally disabled. The Supreme Court explained as follows:

Thus, awards under KRS 342.730(1)(a) continue to be based upon a finding of disability. In contrast, an award of permanent partial disability under KRS 342.730(1)(b) is based solely on a finding that the injury resulted in a particular AMA impairment rating, with the amount of disability being determined by statute. In other words, KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730(1)(b) requires the ALJ to determine the worker's impairment. Impairment and disability are not synonymous. We conclude, therefore, that an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment. For that reason, if an

individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a).

KRS 342.730(1)(a) specifies that nonwork-related impairment "shall not be considered" when determining whether an individual is totally disabled. Here, the ALJ determined that the claimant was totally disabled as a result of his injury. Based upon a finding that 25% of his impairment was due to the natural aging process, the ALJ concluded that the award must be reduced by 25%. Contrary to what the employer would have us believe, the exclusion was based solely upon impairment. Nowhere did the ALJ specifically find that 25% of the claimant's ultimate disability was due to the natural aging process. Furthermore, the finding that the claimant had no pre-existing active disability precluded such an inference. It is apparent, therefore, that the ALJ found work-related impairment, by itself, to be totally disabling. For that reason, an award under KRS 342.730(1)(a) was appropriate without regard to the fact that 25% of the claimant's impairment was attributable to the natural aging process. Furthermore, since none of the claimant's disability was active at the time of his injury, no exclusion for prior, active disability was required.

Id. at 183.

The above language applies here. The fact Robinson had a pre-existing impairment did not *per se*

equate to a pre-existing disability. It is undisputed Robinson underwent low back surgery in 2002. Based on Dr. Robert's assessment in his July 22, 2010, report, the ALJ determined Robinson had a 20% pre-existing impairment.<sup>1</sup> However, Robinson's un rebutted testimony establishes the impairment did not cause him to be disabled in any way nor prevent him from performing his job at National Envelope after he returned from the 2002 surgery until he experienced lower back pain from a failed epidural injection. Robinson testified Dr. Myers lifted his restrictions so he could return to work at National Envelope. Thus, the fact Robinson had an impairment rating which pre-existed the injury without further explanation is not a sufficient basis for finding Robinson is not permanently and totally disabled. Robinson's pre-existing impairment standing alone or considered along with the fact Robinson had mid-back problems, without further explanation, does not constitute sufficient basis for determining Robinson is not totally and occupationally disabled. Robinson's un rebutted testimony establishes even though he developed mid-back problems, he was able to perform his work duties.

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<sup>1</sup>Robinson submitted two reports from Dr. Roberts. The first report of June 8, 2010, assessed a completely different impairment.

We also note the ALJ found Robinson's primary symptoms within two years before the injury were due to "his mid back condition and that the most significant lower back/radicular symptoms during that time were caused by injections of the lumbar spine which were performed to alleviate the mid back symptoms and which, instead, inflamed plaintiff's sciatic nerve." Thus, the ALJ believed Robinson's pre-injury symptoms were not primarily due to his mid-back condition.

We believe further explanation is needed. The ALJ relied upon Dr. Roberts' opinions. However, the ALJ did not discuss Dr. Roberts' opinion that Robinson was "not capable of returning to any type of competitive employment on a regular sustained basis." Dr. Roberts stated he disagreed with Dr. Banerjee's opinion Robinson is capable of working. Unfortunately, Dr. Roberts did not state whether his opinion was based solely upon the effects of the work injury.

In his petition for reconsideration, Robinson requested the ALJ to clarify the medical records he relied upon in determining he was not permanently and totally disabled. In summarily overruling the petition for reconsideration, the ALJ declined to identify the evidence he relied upon in deciding Robinson is not permanently and

totally disabled. Thus, we believe this matter must be remanded to the ALJ for additional findings of fact as to whether Robinson is permanently and totally disabled. We are not suggesting the outcome in this case and acknowledge there is substantial evidence in the record which would support a determination either way. However, the ALJ must set forth the specific evidence upon which he relies in resolving the issue of extent and duration.

Regarding the second issue on appeal because Dr. Rouben requested approval for a lumbar fusion at the L5-S1 and L4-5, National Envelope filed a medical fee dispute. The January 27, 2011, letter of Dr. Rouben states as follows:

From an operative standpoint would be posterolateral fusion at L5-S1 to get this L5-S1 level to fuse and then L4-L5 would be a TLIF procedure.

. . .

He would need to have 3 screws on each side and a rod connecting the 3 screws on that side. We would go ahead and take the disk at L4-L5 and put an implant in it to establish a fusion and go ahead and supplement the already existing implant that is at L5-S1 that has not fused and get it to fuse posteriorly. That would be our intent and plan if he wants to.

The parties introduced numerous medical reports and Robinson's January 17, 2012, deposition was introduced

in the record. Robinson testified that two level fusion surgery was performed on July 11, 2011. He explained that after rendition of the ALJ's opinion, order, and award but before the surgery he had pain in his lower back, right leg, and right hip. After the surgery Robinson no longer has right left and hip pain. He still takes the Hydrocodone and uses Fentanyl patches. The pain in his lower back has lessened and although his activities are very limited, Robinson is still functioning better. He continues to see Drs. Rouben and Nelson for his mid-back problems.

In the March 19, 2012, opinion and order, the ALJ entered the following analysis, findings of facts, and conclusions of law:

As a threshold issue in this matter, the employer maintains that plaintiff's current proposed treatment, including additional fusion procedures, is not causally related to the lumbar injury which was the subject of a December, 2010 Opinion, Order & Award. The employer points out that, in that award, it was recognized that plaintiff had a significant history of prior lumbar problems, including a lumbar fusion at L5-S1, going back to 2001 and which were unrelated to the April, 2009 compensable injury. It further points out that, in the Award, it was determined plaintiff had a 28% impairment rating and that all but 8% of that was attributable to the

plaintiff's prior and ongoing lumbar complaints and surgery.

Since the time of the December, 2010 Award, additional medical records have been submitted. From these and prior records, the Administrative Law Judge is persuaded that plaintiff's need for additional surgery, including possible fusions at L5-S1 and/or L4-L5 are not due to the April, 2009 work injury. In reaching this conclusion, it is noted that a failed fusion at L5-S1 was suspected in several records, including those of Dr. Castro, the treating surgeon, prior to April, 2009. Moreover, Dr. Castro also previously indicated a suspicion that plaintiff's ongoing pain before April, 2009 may be due to pathology at L4-5 which may require fusion. This is furthered by Dr. Banerjee's and Dr. Rouben's testimony and agreement that the previous fusion at L5-S1 often puts strain on the adjacent vertebral levels, which often requires additional fusion surgeries without any intervening or subsequent injuries.

Based on plaintiff's extensive prior medical history and previous lumbar surgery and complaints thereafter and the opinions of Dr. Banerjee, it is determined plaintiff's current lumbar complaints and need for additional surgery are not causally related to the April 2009 work injury which, by comparison, is found to be less significant and less likely to require extensive medical treatment compared to plaintiff's lumbar condition as it existed prior to April, 2009.

Accordingly, the medical fee disputes are resolved in favor of the employer and it shall not be

responsible for the disputed surgeries, hospital stays or mileage or other associated expenses. The plaintiff is also not entitled to additional temporary, total disability benefits during any recovery period following surgery. Plaintiff is not entitled to any other additional income benefits at this time.

Robinson filed a petition for reconsideration again arguing pursuant to Cepero v. Fabricated Metals Corp., supra, the medical opinions expressed by Dr. Banerjee in his January 4, 2012, report are flawed. Robinson insisted Dr. Banerjee's opinions are based on the premise he did not sustain a work-related low back injury in spite of the ALJ's finding to the contrary. Robinson asserted Dr. Banerjee ignored the ALJ's findings of fact and relied upon inaccurate and incomplete information in forming his opinion. Thus, Dr. Banerjee's opinions are not credible, and the ALJ erred by relying upon his opinions in finding the fusion surgery was unrelated to the work injury. Accordingly, Robinson argued the ALJ should enter an order finding his fusion to be compensable. By order dated May 12, 2012, the ALJ summarily overruled Robinson's petition for reconsideration.

On appeal, Robinson makes the same assertions contained in his petition for reconsideration. Robinson argues he sustained a work-related back injury and is

entitled to reasonable and necessary medical treatment. Robinson argues the ALJ cannot rely upon Dr. Banerjee's medical opinions in determining the compensability of the medical treatment to which he is entitled. Robinson asserts the decision of the ALJ should be reversed and remanded with directions for the ALJ "to address the issue in a manner set forth by Cepero and consistent with the law."

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 v. 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. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997). Here, the ALJ determined the fusion surgery performed by Dr. Rouben was not causally related to the work injury. Thus, Robinson failed in his burden on this issue. Since Robinson was unsuccessful before the ALJ in proving the need for the surgery is causally related to the work injury, the issue in this appeal is whether the evidence compels a different conclusion. In Wolf Creek Collieries v. Crum, supra, the Court of Appeals instructed:

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.

Attached to the medical fee dispute is Dr. Banerjee's March 18, 2011, report. Dr. Banerjee stated he had reviewed numerous records of Drs. Rouben, Wallace, Castro, Nelson, Zhou, Berg, and Roberts. Dr. Banerjee stated he read the ALJ's opinion and Dr. Rouben's January 27, 2011, report requesting approval of the fusion at L5-S1 and L4-L5. Dr. Banerjee also discussed Dr. Rouben's records generated both before and after the work injury. He concluded as follows:

The statement that 'option from a non surgical stand point is chronic pain' is incorrect and implies surgery means freedom from pain. I do not believe that surgery on his back or lumbar area for posterolateral and or TLIF is medical necessary and not reasonable (Please read the whole history of the patient) and not related to the injury of April 21, 2009. Please see the note by Dr. Rouben December 20, 2005.

Dr. Banerjee went on to point out as follows:

We must understand that old injury, fusion, Scheurmann's disease, smoking disk degeneration etc are catching up with him. He had SI strain and has old scar on right iliac crest from the donor site for previous fusion. Scheurmann's disease can cause stiffness of low back and Schmorl's nodes can be mistaken for fracture (It was in his case, Dr. Wallace).

Dr. Banerjee's September 30, 2011, report discussed Dr. Rouben's reports of July 7, 2011, and July 9, 2011, as well as the July 11, 2011, operative note. Dr. Banerjee also discussed the July 27, 2011, letter of Dr. Rouben to Robinson's attorney. Dr. Banerjee noted on July 23, 2010, Dr. Rouben stated the MRI shows solid fusion at L5-S1. He again concluded the surgery performed by Dr. Rouben is not related to the work injury.

Dr. Banerjee's January 4, 2012, report generated as a result of an examination conducted on the same date was also introduced. That report discussed in depth the various medical records he reviewed. Dr. Banerjee stated:

I have sent numerous references from the literature in the past as to the reason why the operation of fusion of the L4-L5 and L5-S1 levels were not medically necessary and certainly not related to the injury at work. The records are clear that even in August 2010 Dr. Rouben wasn't sure about the causation of lumbar pain.

After an examination of the record, we conclude Cepero, supra, is inapplicable in the case *sub judice*. 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*.

Although Dr. Banerjee reviewed records which the parties stipulated were not Robinson's medical records, he clearly had all the relevant records from Drs. Rouben, Wallace, and Nelson in order to form an opinion as to whether the surgery was causally related to the injury. Consequently, his opinions on this issue constitute substantial evidence supporting the ALJ's decision.

In addition, we point out Dr. Rouben's initial evaluation report dated May 8, 2008, reflects as follows: "Dr. Castro who saw him recently told him that the fusion was not solid and that could have been the cause of his pain." That notation clearly supports the ALJ's determination the need for fusion surgery was not due to the April 21, 2009, injury. In addition, we note Dr. Rouben's July 23, 2010, report referenced by Dr. Banerjee stated: "Radiographic examination of his lumbar spine shows what appears to be a solid fusion with maintenance of lordosis." This also supports the ALJ's conclusion that the fusion surgery in question is not related to the injury since Dr. Rouben concluded, post-injury, the fusion was still solid.

Finally, we point out the March 28, 2011, letter of Dr. Charles Barlow, an orthopedic surgeon, generated after conducting a records review reflects the following:

The surgery, quite possibly, could be medically indicated. This would be decided by the treating physician and the client, Mr. Robinson. However, it is unrelated to the April 20, 2009 injury. Several months following injury on July 9, 2009, Dr. Rouben dictated that there was a solid fusion at L5-S with normal hydration at L2-3, L3-4, and L4-5 with only facet arthropathy with no neural compromise noted on MRI. His examination on that date revealed a negative bilateral

straight-leg raising with no centric or motor deficits.

Even though Dr. Banerjee may have had some records which were not Robinson's medical records and expressed displeasure with the ALJ's decision, those facts merely go to the weight to be afforded his opinions expressed in the reports and not the admissibility of the reports. Further, although Dr. Rouben's opinions could have been relied upon by the ALJ to support a different outcome in Robinson's favor, in light of the remaining record, the views articulated by Dr. Rouben represent nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003). Consequently, we find no error in the ALJ's reliance upon Dr. Banerjee's opinions in light of Dr. Barlow's opinions and Dr. Rouben's opinions expressed herein. Given the medical evidence the record does not compel the result Robinson now seeks on appeal. Wolf Creek Collieries v. Crum, supra.

Accordingly, that portion of the December 27, 2010, opinion, order, and award determining Robinson is not permanently and totally disabled and awarding permanent partial disability benefits and the January 31, 2011, order overruling the petition for reconsideration are **VACATED** and

this matter is **REMANDED** to the ALJ for entry of an amended opinion, order, and award in accordance with the views expressed herein.

The March 19, 2012, opinion and order resolving the medical fee dispute in favor of National Envelope and the May 30, 2012, order overruling the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

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1102 REPUBLIC BUILDING  
LOUISVILLE KY 40202

**COUNSEL FOR RESPONDENT:**

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**RESPONDENT:**

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**ADMINISTRATIVE LAW JUDGE:**

HON GRANT S ROARK  
410 WEST CHESTNUT ST  
SEVENTH FLOOR  
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