Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 27, 2015

CLAIM NO. 201301089

KOCH FILTERS PETITIONER

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

YARINA GONZALEZ
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Koch Filters seeks review of the October 1, 2014, Opinion, Award, and Order of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") finding Yarina Gonzalez's ("Gonzalez") employment irritated and caused the development of a foot ulcer which resulted in the amputation of her left leg. The ALJ awarded temporary

total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits. Koch Filters also appeals from the October 24, 2014, Order denying its petition for reconsideration.

Gonzalez, born October 10, 1965, lived in Cuba until 1995 when she moved to the United States. She was diagnosed with diabetes when she lived in Cuba and has taken insulin ever since. Before the ALJ and on appeal, the main point of contention is the cause for the need to amputate Gonzalez's third toe on her left foot and subsequently her left leg below-the-knee. The lay evidence consisted of Gonzalez's September 30, 2013, deposition and her testimony at the August 27, 2014, hearing. At both, her testimony was taken through the use of an interpreter.

Koch Filters introduced various treatment records from the Family Health Centers which included records from other medical providers. It also introduced multiple questionnaires completed by Dr. Glenn Lambert, the records of Drs. Thomas Childress and Zachery Ogden, and the report of Dr. Robert Levine with completed questionnaires attached.

Gonzalez introduced the deposition of Dr. Ogden and the independent medical evaluation ("IME") report of Dr. Warren Bilkey.

Gonzalez's testimony reveals she graduated from the 12th grade in Cuba in 1983 and worked in Cuba as a factory worker on an assembly line until she came to the United States in 1995, where she performed manual labor in multiple states. When she moved to Kentucky, she first worked at Koch Filters through a staffing agency and was hired by Koch Filters in 2010. She denied having any previous injuries before working for Koch Filters. At Koch Filters, she worked on the assembly line standing the entire work day.

On May 2, 2012, pursuant to Koch Filters' directive, Gonzalez began wearing special steel-toed shoes which Koch Filters supplied to all of its employees. Gonzalez testified that "pretty quickly" after she put on the boots she began experiencing a burning pain in the bottom of her foot. She told Randy and Kenny, her supervisors, her feet were hurting but nothing was done to alleviate her symptoms.[1] Gonzalez described the progression of her symptoms as follows:[2]

> Q: Was it the same with your left foot as well?
>
> A: In the beginning, whenever I was first having the pain, it was in the same spot on the bottom of my foot,

[1] Gonzalez did not provide the full names of Randy and Kenny.
[2] See page 38 of Gonzalez's deposition.

> and, then, it started to go around to my big toe, and, then, it started to go on to the top of my foot. In the beginning of the pain, it wasn't the same as my right foot, but as time went on, obviously, it got worse and worse.
>
> The top of my foot started –- my toes started getting red and black, and like I explained before, my third toe had to be removed, so it was more of a progression.
>
> It was all a disaster. I mean, it was turning red and black and that whole left side of my foot was turning –- it started to open and got really bad.

Gonzalez worked every day from May 2, 2012, until July 16, 2012, wearing the steel-toed shoes. During that time, her feet continued to hurt and burn, and she was not allowed to wear other shoes.

Gonzalez testified her feet continued to worsen throughout the period she worked in July. On July 16, 2012, because she was having so much pain, she went to the bathroom and took off her shoe. Her sock was full of liquid and there was "a discharge coming from her skin." When she returned to the line and told Kenny of these symptoms, after Kenny talked with Randy, she was not allowed to go home. However, when she took her shoe off

and “showed the sock and how [her] feet were,” she was permitted to go home.[3]

Despite Gonzalez’s complaints to her supervisor, no one documented her problems until her last day of work, July 16, 2012. Gonzalez denied having any problems with her feet or seeing a podiatrist before she began wearing the work shoes.

Gonzalez’s family physician, Dr. Elliott Gonzalez, referred her to Dr. Childress, a podiatrist, whom she saw on July 24, 2012. After treating her foot, Dr. Childress admitted her to Norton Hospital on that date where she stayed until August 2, 2012. During that time, Dr. Lambert inserted a stent in her left leg. Gonzalez testified nothing helped her foot and her left foot never healed. Problems with her right foot persisted, but were not as severe. Dr. Childress sent a nurse to her home to try to help, which provided no benefit. Her left foot continued to worsen. Dr. Childress recommended a special shoe which she obtained. However, she could not put on the shoe because of the condition of her left foot. She explained her foot was always bandaged and undergoing constant treatment. In May 2013, another stent was

[3] See page 10 of the hearing transcript and page 16 of Gonzalez’s deposition.

inserted, but after a couple of days without any improvement her third toe was amputated.[4] On May 8, 2013, her leg was amputated below the left knee.[5] She has been fitted with prosthesis. Gonzalez denied being treated for ulcerations on both feet prior to May 2, 2012, even though the records of Family Health Center reveal that on February 7, 2012, and March 20, 2012, she was treated for ulcerations on both feet. She also denied seeing her family doctor for foot problems.

The ALJ entered the following findings of fact and conclusions of law in determining Gonzalez sustained a work-related foot injury which resulted in amputation of her left leg:

> **2. <u>Findings of fact and conclusions of law.</u>**
>
> Gonzalez's injury resulting in amputation of the left lower leg is work related.
>
> **3. <u>Evidentiary basis and analysis</u>.**
>
> This case is complicated not only by Gonzalez's non work related health problems but also by the language barrier. There are many contradictions when comparing her testimony with the medical records which the ALJ believes are due to Gonzalez's lack of understanding rather than intent to mislead. For example, she was asked

[4] Norton Healthcare records reveal Dr. Lambert implanted a stent on May 1, 2013, and Gonzalez's toe was amputated by Dr. Ogden on May 3, 2013.
[5] The surgery was performed by Dr. Lambert.

> repeatedly if she had ever had a prior problem with her feet and testified she had not. It is believed she did not understand this line of questioning. She may have thought the question related more to whether she had suffered as serious a condition with her feet prior to wearing the safety shoes.
>
> This is the impression of the ALJ from being present and watching Gonzalez testify. Simply reading the transcripts gives a much different impression.
>
> After careful review of the facts of the case and considering all options based on the evidence of record, the ALJ is convinced the amputation is work related. Even though Gonzalez has numerous non work related problems and even though the diabetes itself is not caused by work, wearing the required shoes irritated the condition that ultimately led to the amputation.
>
> It is determined herein that the safety shoes issued by Defendant Employer irritated and caused development of the foot ulcer, a work related harmful change in a human organism.

The ALJ determined Gonzalez did not have a pre-existing disability or impairment reasoning as follows:

> **B. Exclusion for pre-existing disability/impairment.**
>
> **1. <u>Principle of law</u>.**
>
> When work-related trauma arouses or exacerbates a pre-existing condition, it has caused a harmful change in the human organism, *i.e.*, an injury as defined by KRS 342.0011(1).

> Although impairment that results is compensable, the type and duration of benefits depends on whether the impairment is permanent or temporary. To the extent that the condition is active immediately before the trauma occurs, it cannot have been aroused by the trauma and, thus, to that extent cannot be compensable. "[T]o be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." *Finley v. DBM Technologies*, 217 S.W. 3d 261 (Ky. App. 2007). The employer bears the burden of proving the existence of a pre-existing, active disability.
>
> **2. <u>Findings of fact and conclusions of law.</u>**
>
> Gonzalez did not have an active impairment preexisting the May 2, 2012 work injury.
>
> **3. <u>Evidentiary basis and analysis</u>.**
>
> Defendant Employer argues Gonzalez's foot condition preexisted wearing the shoes. However, Dr. Bilkey found any earlier condition in Gonzalez's feet had improved prior to May 2, 2012. Even if she had experienced problems with her feet prior to the work injury, the problems did not cause her to miss work and the condition was not impairment ratable prior to wearing the safety shoes issues [sic] on May 2, 2012. Any preexisting condition was at best minor, had improved and was aroused by the trauma of wearing the shoes.

In determining Gonzalez was permanently totally disabled, the ALJ provided the following:

1. <u>Principle of law.</u>

To qualify for an award of permanent partial benefits under KRS 342.730, the claimant is required to prove not only the existence of a harmful change as a result of the work-related traumatic event, he is also required to prove the harmful change resulted in a permanent disability as measured by an AMA impairment. KRS 342.0011(11), (35), and (36). Furthermore, if, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined. KRS 342.730 (1)(c)(1).

The determination of a total disability award remains within the broad authority of the ALJ. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). To determine the likelihood that a worker can resume some type of work under normal employment conditions, the ALJ should consider the worker's age, education level, vocational skills, medical restrictions, emotional state and how those factors interact. *Id*. "A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured." *Id.* at 52 (citing *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979)).

2. <u>Findings of fact and conclusions of law.</u>

Gonzalez [sic] injury has left her permanently and totally disabled.

3. <u>Evidentiary basis and analysis</u>.

In so finding, the ALJ relies on Gonzalez's testimony as well as the opinions of Dr. Bilkey who found Gonzalez could not return to her former job and recommended sit down work only. Also relied upon is Dr. Ogden who found Gonzalez could not return to manual labor. The report of Dr. Levine is not relied upon due to its vague nature. As stated above, he gave no explanation of how he arrived at his rating, how much impairment would be attributed to the various conditions or any explanation of "ASPD." Dr. Lambert's opinion that the safety shoes had absolutely nothing to do with Gonzalez's condition is simply not believable. Additionally, as noted above, the answers Dr. Ogden gave on cross examination when presented with somewhat hypothetical styled questions may have produced answers which appear beneficial to Defendant Employer but are not relied upon herein.

i. Age

Gonzalez is 48 years old, and while 48 is not retirement age, she quickly approaches the age where most employers would not be willing to hire her. The age factor weighs somewhat in Gonzalez's favor.

ii. Education and Vocational Skills

Gonzalez has a 12th grade education from Cuba. Still, she has not worked jobs related to what would be equivalent to a high school education in the United States. Her only work experience is in physical, labor intensive positions, far beyond what she has testified she is able to do. She is a convincing witness. She has no skills that would put her in a job

she can handle physically. This factor weighs heavily in favor of Gonzalez's inability to return to the work force.

iii. Restrictions

As noted, Dr. Ogden and Dr. Bilkey have both found Gonzalez does not have the physical capacity to return to her former work or work that requires her to stand all day. This factor weighs heavily in Gonzalez's favor.

iv. Emotional state

Gonzalez's emotional state has not been a subject of this claim and does not appear to be unstable. Her emotional state is not a factor in this determination. If return to work was based on her emotional state, it appears she would be emotionally healthy enough to work.

Gonzalez has no specialized or vocational skills that are in high demand and no education that would put her in a position for jobs within her physical ability. Given her age, limited vocational experience, and significant medical restrictions, it is highly unlikely she will be able to find and continue performing sustained employment.

The parties have stipulated to an average weekly wage of $340.45. Pursuant to KRS 342.730, Gonzalez is entitled to benefits at a rate of $226.97 (66 -2/3% of her average weekly wage) from the date of injury, May 2, 2012, until she reaches Social Security retirement age.

The ALJ awarded TTD benefits based on the following analysis and findings of fact:

E. TTD benefits.

1. <u>Principle of law</u>.

Kentucky Revised Statute 342.0011(11)(a) states that: "'temporary total disability means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." To qualify for TTD benefits the absence from work must be due to a work-related injury. *See, e.g., Aluminum v. Carkuff*, No. 2009-SC-68-WC, 2009 WL 3526558, at *3 (Ky. Oct. 29, 2009) ("Workers' compensation benefits are paid for the effects of work-related injuries.").

With respect to TTD, a claimant is entitled to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the state average weekly wage as determined in KRS 342.740 during that disability.

2. <u>Findings of fact.</u>

Gonzalez is entitled to TTD benefits from July 16, 2012 through November 26, 2013, the date she was found to be at MMI.

3. <u>Evidentiary basis and analysis</u>.

Gonzalez was off work during this period due to what has been determined herein to be a work injury and, therefore, is entitled to TTD although the award of permanent disability will give this determination no effect since she is not entitled to both at the same time.

PTD benefits commenced on May 2, 2012, interrupted by the payment of TTD benefits from July 16, 2012, through November 26, 2013.

Koch Filters filed a petition for reconsideration arguing, as it does on appeal, it was patent error for the ALJ to find the amputation of Gonzalez's toe and left leg is related to her use of steel-toed shoes since the ALJ did not provide the medical basis for her conclusion. Citing to the opinions of Drs. Ogden, Levine, and Lambert, Koch Filters argued Gonzalez's subsequent problems necessitating the amputations were unrelated to her work. Significantly, Koch Filters conceded the ulceration treated by Dr. Childress in July 2012 was caused by the use of steel-toed shoes, but argued there was no medical evidence establishing the amputations of the toe and left leg were related to the work incident.

Koch Filters also argued the ALJ could not award income benefits without a finding of a functional impairment which the ALJ failed to do. Koch Filters argued Gonzalez was only entitled to TTD benefits from July 24, 2012, to August 14, 2012. It also argued the ALJ erred in

awarding future medical expenses including the medical expenses related to the amputations.[6]

Should the ALJ decline to alter her decision, Koch Filters requested the ALJ enter additional findings of fact setting out the specific medical evidence she relied upon which establishes Gonzalez's ulcerations had not healed by either August 14, 2012, or October 9, 2012, as opined by Dr. Ogden. It also sought additional findings regarding the specific medical evidence the ALJ relied upon in determining the amputations were related to her work activities. Koch Filters requested the ALJ cite the medical evidence she relied upon in finding Gonzalez did not reach maximum medical improvement ("MMI") after August 14, 2012, when Dr. Ogden noted her ulceration had healed. Finally, it requested the ALJ provide the impairment ratings attributable to the foot ulcerations and the amputation, and the medical evidence upon which the ALJ relied in determining those impairment ratings.

Although the ALJ denied the petition for reconsideration, she provided the following:

> On the causation issue, the opinion of Dr. Bilkey was found persuasive, as noted on page 7 of the Opinion:

[6] Koch Filters cited to other errors not germane to this appeal.

> Dr. Bilkey addressed specific documentation in the records supporting the issue of causation. Dr. Choudry confirmed the work relatedness of her injury specifically noting as of April 19, 2012 that there was no concern with respect to the skin of the feet. The evaluation report of Dr. Childress specifically noted the onset occurring with the required use of her new work shoes. The work restrictions specifically noted the "required" shoes having been the source of the foot ulcer. According to the medical history, Gonzalez had been doing well prior to the use of the new work shoes. The Family Health Center records document a foot ulcer on March 20, 2012, although this ulcer appeared to have healed prior to the May 2, 2012 dated work injury.

On appeal, Koch Filters argues the ALJ erred in finding Gonzalez's current condition and need for the amputations are related to the May 2, 2012, work incident. It notes it requested additional findings of fact supporting the ALJ's decision pointing out the treating podiatrist and vascular surgeon, as well as the evaluating podiatrist opined the toe and leg amputation were related to Gonzalez's long-standing non-work-related issues including diabetes, neuropathy, and loss of blood flow. It

maintains that in the order overruling its petition for reconsideration, the ALJ erroneously relied upon Dr. Bilkey in support of a finding regarding causation. Koch Filters contends Dr. Bilkey cannot and does not explain how Gonzalez's ulcerations which had healed by August 14, 2012, as reflected in Dr. Ogden's treatment notes and his deposition, caused the need for multiple amputations.

Koch Filters concedes Gonzalez has severe restrictions and impairment due to the amputation. However, it contends the medical evidence does not demonstrate the effects of the amputation are related to the work-related left foot ulcer under the first metatarsal joints. Koch Filters relies upon Dr. Ogden's statement that Gonzalez's ulcerations had resolved in August 2012 and she had no ulceration at the time of her October 9, 2012, office visit. It observes that in August 2012 when the ulceration had healed, Gonzalez had not been employed with Koch Filters for almost a month. Koch Filters notes Dr. Ogden testified Gonzalez experienced a new ulceration at the first metatarsal head on December 4, 2012, and that it was not medically probable the ulceration occurring on that date was related to her use of the steel-toed shoes.

Koch Filters asserts that on two separate occasions Dr. Lambert noted his treatment including the leg

amputation was caused by non-work-related conditions and did not have any relation to Gonzalez's work activities. Further, Dr. Lambert agreed the gangrene which set up in the third digit of the left toe was not related to her work activities. Koch Filters observes Dr. Levine, like Drs. Ogden and Lambert, agreed both amputations had no relation to the work activities. As such, there is no medical evidence to support the ALJ's finding Gonzalez's treatment after August 14, 2012, is related to her first sub metatarsal ulceration.

Next, Koch Filters argues the ALJ erred as a matter of law by awarding PTD benefits due to the amputation of Gonzalez's leg since the ALJ failed to find Gonzalez had a functional impairment. It maintains income benefits cannot be awarded without a finding of a functional impairment.[7] Koch Filters concedes Gonzalez "may very well be permanently and totally disabled" due to the left leg amputation but contends there is no medical evidence to support a finding the amputation is work-related.

Finally, Koch Filters argues the ALJ erred in awarding TTD benefits from July 16, 2012, through November

[7] KRS 342.0011(35)(36).

26, 2013, as the award was based in part on the effects of the amputations. It contends Gonzalez is entitled to TTD benefits from July 16, 2012, when she stopped working until August 14, 2012, when her ulcerations healed.

Gonzalez, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including causation. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Gonzalez was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same

witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority in deciding questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

The ALJ's findings of fact and conclusions of law in her opinion, award, and order do not provide the medical evidence upon which she relied in determining Gonzalez's foot ulceration caused by the steel-toed shoes ultimately resulted in the amputation of her left lower leg and is a part of the work injury. In addition, the ALJ failed to determine the impairment rating attributable to the injury which is a prerequisite to a finding of permanent total disability. *See* KRS 342.0011(11)(c). In the October 24, 2014, Order addressing Koch Filters' petition for reconsideration, the ALJ stated the opinion of Dr. Bilkey was persuasive on the issue of causation citing the summary of his report on page seven of the opinion, award, and order. Significantly, Koch Filters did not file a petition for reconsideration requesting additional findings referencing the specific opinions of Dr. Bilkey which establish the foot ulcerations manifesting after May 2, 2012, ultimately caused the need for the amputation of Gonzalez's left leg below the knee.

That being the case, in light of the contents of Dr. Bilkey's report, the ALJ's statement the opinion of Dr. Bilkey is persuasive regarding causation sufficiently advised Koch Filters of the medical evidence upon which she relied in determining the foot ulcerations resulting from

the use of the steel-toed shoes caused the amputation of Gonzalez's left leg. In his report generated after conducting a records review and physical examination, Dr. Bilkey offers an unequivocal opinion the ulcerations resulting from the use of the steel-toed shoes eventually necessitated the amputation of Gonzalez's toe and lower left leg. Notably, as Dr. Bilkey is fluent in Spanish, the interview and examination was conducted in Spanish. Dr. Bilkey set out Gonzalez's medical history and the results of his examination. He also noted Dr. Childress initially evaluated Gonzalez on July 24, 2012, and documented a first sub-metatarsal bilateral foot ulcer worse on the left. He observed Dr. Childress stated Gonzalez informed him her employer made her wear different shoes and since that time she had two episodes of foot ulcers. Dr. Bilkey noted Gonzalez was admitted to the University of Louisville Medical Center due to the first ulceration and it healed. However, when she returned to work the shoes rubbed and caused the ulceration to reoccur, at which time she had left foot pain and was unable to walk. Dr. Bilkey noted Dr. Childress diagnosed abscess/cellulitis foot, osteomyelitis acute, midfoot heel ulcer, and diabetic neuropathy. Dr. Bilkey summarized the diagnosis set forth in the hospital discharge summary. He also noted that

during her hospital stay Gonzalez consulted with Dr. Lambert regarding the left foot ulceration. Dr. Lambert documented an ulceration on the plantar aspect of the left first metatarsal and noted the wound had been present for approximately three months after wearing different shoes at work. Dr. Lambert diagnosed peripheral artery disease, left lower extremity with non-healing diabetic ulcer.

Dr. Bilkey also noted that on April 19, 2012, Gonzalez had been evaluated by Dr. Choudry regarding her renal status. At that time, Dr. Choudry documented the extremities were negative and there was "no concern regarding skin." Dr. Bilkey's impressions were:

> 1. 5/2/12 dated work injury, bilateral foot ulcers under the 1st MTP joints. These occurred after use of new work shoes.
>
> 2. Left foot persistent ulcer. Ms. Gonzalez had undergone successive limb amputations culminating in left BK amputation.

Dr. Bilkey observed Gonzalez had severe diabetes which had been uncontrolled and apparently is associated with diabetic renal failure, diabetic neuropathy, and peripheral artery disease. Further, Gonzalez appeared to have no problems with her feet up until she was required to wear specific work shoes. Dr. Bilkey stated that while these shoes may have been well tolerated by an otherwise

healthy individual, the fact Gonzalez had pre-existing diabetes made her more vulnerable to injury due to pressure from the shoes.

Significantly, Dr. Bilkey noted there is a history of ulcerations having occurred prior to use of the shoes. However, the ulcerations quickly resolved with conservative treatment. He concluded the use of these work shoes caused the ulceration on the left foot to be persistent. He noted there was an initial attempt at treatment with hospitalization to improve circulation of the lower limb with a stent placement. This failed and gangrene developed. Gonzalez had further treatment which resulted in her below-the-knee amputation. Therefore, his diagnoses were due to the May 2, 2012, work injury. He opined the evaluation and treatment procedures that had been carried out appear to have been reasonable, medically necessary, and work-related. Further, it did not appear that prior to May 2, 2012, Gonzalez had an active impairment affecting her feet.

With respect to causation, Dr. Bilkey concluded as follows:

> With respect to causation, there is certainly mixed causation here. The diabetes mellitus was severe and there were complications from this. This caused Ms. Gonzalez to be very

vulnerable to with respect to a pressure sore then occurring on the left foot. What appears to have been the last straw was the required use of new work shoes. This was too hard on her vulnerable feet and a skin sore occurred which would not heal. The effect of the shoes was physical pressure on a vulnerable but asymptomatic foot. The vulnerability had to do with the arterial/vascular integrity of the foot, compromised by her diabetes. However were it not for the use of the new shoes, the ulceration would likely not have occurred for a significantly additional period of time. One cannot say when ulceration of the feet would have occurred with normal activity. Were it not for the peripheral vascular disease due to the diabetes, the ulceration would not have persisted.

With respect to causation, I think it is pertinent to point out as well that there is specific documentation in the records supporting this issue of causation. Confirming the work injury relatedness of her problem are the records of Dr. Choudry which specifically notes as of 4/19/12 that there was no concern with respect to the skin of the feet. The evaluation report of Dr. Childress specifically notes the onset occurring with the required use of her new work shoes. The work restrictions note referred to above specifically notes the 'required' shoes having been the source of the foot ulcer. Finally according to the medical history, Ms. Gonzalez had been doing well prior to the use of these new work shoes. The Family Health Center records document a foot ulcer 3/20/12. This appears to have healed prior to the 5/2/12 darted work injury.

In a questionnaire attached to his report, Dr. Bilkey provided the following diagnosis: "[b]ilateral foot ulcers. Right resolved. Left persisted and culminated in Below Knee Amputation." Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Bilkey assessed a 28% impairment rating.

The above findings and opinions of Dr. Bilkey, summarized herein, and Gonzalez's testimony that the condition of her left foot continued to worsen after the ulceration caused by the steel-toed shoes qualifies as substantial evidence sufficient to support the ALJ's finding the amputations were caused by and are part of the work injury. While the contrary opinions pertaining to causation expressed by Drs. Levine and Lambert may well have supported a different decision, their opinions represented nothing more than conflicting evidence compelling no particular outcome. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003).

Contrary to Koch Filters' assertion, Dr. Bilkey explained how Gonzalez's ulcerations which were treated in August 2012 caused the need for the amputation of her third toe and ultimately her left leg. He also addressed the significance of Gonzalez's foot ulcerations prior to the

use of the steel-toed shoes explaining they quickly resolved with conservative treatment. Dr. Bilkey opined the use of the shoes caused the ulcerations to be persistent. He noted hospitalization to improve circulation in the lower limb and stent placement was a part of the initial treatment. However, this failed and gangrene developed. Dr. Bilkey stated that even though Gonzalez underwent further treatment, amputation was necessary. Dr. Bilkey opined the steel-toed shoes applied physical pressure on a vulnerable but asymptomatic foot.

Dr. Bilkey's report provides the necessary information in order for the ALJ to rely upon his findings and conclusions in concluding the ulcerations caused by the work shoes ultimately necessitated amputation of the third toe and later the left leg. More importantly, Koch Filters does not argue the ALJ's statement she relied on Dr. Bilkey's report in resolving causation is insufficient fact-finding and does not apprise the basis for her decision on this issue. Thus, we find no error in the ALJ's reliance upon Dr. Bilkey's opinions.

We would be remiss in not addressing the medical questionnaires completed by Dr. Lambert which contain no explanation for his opinions. Each of the three questionnaires completed by Dr. Lambert on November 21,

2012, contains three questions which he answered by checking yes or no. One of the questions in each questionnaire asks whether his answers and opinions are based on a reasonable degree of medical probability. The same holds true for the four questionnaires Dr. Lambert completed on March 31, 2014. Of the four questionnaires, one contained four questions, one had three questions, and two had two questions each. Significantly, one of the four questions posed to Dr. Lambert regarding causation reads as follows:

> 3. Do you continue to believe the plaintiff's problems involving her lower extremities and feet is not related to her work activities or one day use of aluminum toed shoes as previously indicated in your previous November 21, 2013 medical questionnaires?
>
> Yes __X___ No ____

The above question and the question in the November 21, 2013, questionnaire alluded to above are factually inaccurate and totally misleading as there is no dispute Gonzalez wore the shoe from May 2, 2012, through July 16, 2012. Thus, the ALJ, within her discretion, could disregard Dr. Lambert's answers.

In his November 26, 2013, two-page report, Dr. Levine provided his findings upon examination and his

impairment rating assessed pursuant to the AMA Guides. With respect to whether the impairment is work-related, Dr. Levine stated "non-work-related to work environment." There is no further discussion by Dr. Levine regarding causation. Attached to this two-page report are three questionnaires completed by Dr. Levine which he answered by checking yes or no. One of the questionnaires relates to the impairment rating he assessed and Gonzalez's physical and work restrictions. In another questionnaire, Dr. Levine expressed the opinion future treatment would constitute treatment of a non-work-related condition. The other questionnaire relates to causation and contains the following questions:

> 5. Do you believe the third digit amputation at the level of the metatarsophalangeal joint of the left foot performed by Dr. Zachary Ogden on May 3, 2013 was proximately caused by her work activities as a laborer beginning on August 16, 2010 culminating on or around May 2, 2012 including the wearing of steel-toed shoes with the employer?
>
> Yes _____ No __X___
>
> 6. Do you believe the left below-the-knee amputation performed [sic] Dr. Glenn Lambert on May 8, 2013 was proximately caused by her work activities as a laborer beginning on August 16, 2010 culminating on or around May 2, 2012, including the

wearing of steel-toed shoes with the employer?

Yes _____ No ___X___

As with the questions to Dr. Lambert, both questions are factually inaccurate as neither question references Gonzalez's use of steel-toed shoes after May 2, 2012. Thus, it can hardly be maintained the opinions of Drs. Lambert or Levine are overwhelming and compelling.

The credibility afforded the opinions of Drs. Lambert and Levine was a matter to be decided exclusively by the fact-finder. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Here, it appears the ALJ believed Dr. Bilkey's report was much more in depth and provided the basis for his opinion regarding causation.

In addition, we take issue with Koch Filters' assertion that Dr. Ogden, like Drs. Lambert and Levine, agreed the May 3, 2013 third digit amputation and May 8, 2013, left below-the-knee amputation had no relation to her work activities. A review of Dr. Ogden's March 5, 2014, deposition reveals that on August 14, 2012, he noted the ulceration was closed and had healed. He also noted that on October 9, 2012, the ulceration on both feet had healed and she was doing well except for some callus. Dr. Ogden observed that on December 4, 2012, Gonzalez had a new

ulceration at the first metatarsal head. In response to Koch Filters' question, Dr. Ogden testified as follows:

> Q: Would this have been caused by wearing one day a shoe six months ago? Can you state within –
>
> A: I ––
>
> Q: -- a reasonable degree of medical probability ––
>
> A: Likely not.

The obvious factual inaccuracy contained in this question, like the questions posed to Drs. Lambert and Levine, is that Gonzalez wore the steel-toed shoes from May 2, 2012, through July 16, 2012. Thus, the answer of "likely not" was in response to a question which has no factual basis.[8]

Dr. Ogden addressed what caused the need for the amputations testifying as follows:

> Q: Was that what caused the need for the amputation - -
>
> A: She –
>
> Q: -- or was it the infection?
>
> A: I mean, it was more of – it was a combination of both lack of viable tissue remaining due to infection and what – gangrene is an infection due, you know, to certain organisms. And so she had wet gangrene and it – nonviable tissue was not enough to salvage the foot.

[8] See page 19 and 20 of Dr. Ogden's deposition.

> So I can't say blood flow versus infection. I mean, it was a combination of both.

The above response of Dr. Ogden does not establish the need for the amputation was unrelated to the ulcerations which developed after May 2, 2012. Dr. Ogden specifically stated the need for the amputation was due in part to the lack of viable tissue remaining due to infection. Thus, we find Koch Filters' representation regarding Dr. Ogden's opinions as to causation to be rather disingenuous.

We find no merit in Koch Filters' argument the ALJ erred as a matter of law by awarding PTD benefits, because the medical evidence does not support her finding that amputation of the left leg is work-related. However, we agree the ALJ erred in awarding PTD benefits since she made no finding Gonzalez has an impairment rating as a result of her work-related injury.

KRS 342.0011(11)(c) reads as follows:

> (11)(c) "Permanent total disability" means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury...

The statute mandates a finding of permanent total disability must be supported by a finding of a

permanent disability rating. Thus, the ALJ erred in awarding PTD benefits without first determining whether Gonzalez had an impairment rating due to the foot ulcerations ultimately leading to the amputation of her left leg. Therefore, the award of PTD benefits must be vacated and the claim remanded to the ALJ for a determination of whether Gonzalez's work-related injury merited a permanent impairment rating. On remand, should the ALJ determine Gonzalez has an impairment rating as a result of the work-related injury she must then determine the extent of Gonzalez's occupational disability.

Concerning Koch Filters' argument the award of TTD benefits is erroneous, we first note the award of TTD benefits in a claim where PTD benefits have been awarded is unnecessary. That fact aside, we find the ALJ's analysis regarding entitlement to TTD benefits to be incomplete. In the opinion, award, and order, the ALJ stated Gonzalez was entitled to TTD benefits from July 16, 2012, through November 26, 2013, "the date she was found to be at MMI." The ALJ then stated Gonzalez was off work during this period "due to what had been determined herein to be a work injury" and is entitled to TTD benefits.

KRS 342.0011(11)(a) defines temporary total disability as follows:

> ‘Temporary total disability’ means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202 (Ky. App. 1993), wherein the Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Id. at 205.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court further explained that “[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury.” Id. at 659. In other words, where a claimant has not reached MMI, TTD

benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The court in Magellan Behavioral Health v. Helms, supra, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
>
> . . .
>
> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), with regard to the standard for awarding TTD, the Supreme Court elaborated as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an 'all or nothing' argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform 'any type of work.' *See* KRS 342.0011(11)(c).
>
> . . .
>
> Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

In the case *sub judice*, the ALJ awarded TTD benefits based upon the assessment of MMI. What is not clear is why the ALJ initiated the award of TTD benefits on July 16, 2012, the last day Gonzalez worked. The ALJ did

not explain why Gonzalez was entitled to TTD benefits after she quit working for Koch Filters through November 26, 2013. The ALJ did not outline the law concerning entitlement to TTD benefits in detail in either the October 1, 2014, Opinion, Award, and Order or the October 24, 2014, Order ruling on the petition for reconsideration. The ALJ merely discussed the dates Gonzalez was at MMI and the fact she was off work due to a work injury which is an insufficient analysis supporting an award of TTD benefits. The ALJ must provide adequate findings of fact based on the evidence in order to advise the parties and this Board of the basis for her decision. Shields v. Pittsburgh and Midway Coal Min. Co., supra; Big Sandy Cmty. Action Program v. Chaffins, supra.

On remand, should the ALJ determine Gonzalez is entitled to PPD benefits, the ALJ must engage in the two prong analysis outlined herein in determining any period during which Gonzalez is entitled to TTD benefits. The ALJ must also determine the appropriate start date for the payment of PPD benefits. However, if the ALJ again determines Gonzalez is totally disabled, an award of TTD benefits is unnecessary.

Accordingly, the October 1, 2014, Opinion, Award, and Order and the October 24, 2014, Order ruling on the

petition for reconsideration finding Gonzalez sustained a work-related injury to her foot which ultimately caused the amputation of her left leg is **AFFIRMED**. However, the determination Gonzalez is permanently totally disabled and the awards of PTD benefits and TTD benefits are **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion in conformity with the views expressed herein.

ALL CONCUR.

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