Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 4, 2015

CLAIM NO. 201474748

LANA LEE PETITIONER

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

LIVINGSTON COUNTY HOSPITAL
KHA SOLUTIONS GROUP
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Lana Lee ("Lee") appeals from the April 27, 2015, Opinion and Order of Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). In the April 27, 2015, Opinion and Order, the ALJ dismissed Lee's claim for temporary total disability ("TTD") and medical benefits determining Lee "did not suffer any temporary or permanent

work-related injury [sic] on July 21, 2014 for which even temporary income or medical benefits are payable." No petition for reconsideration was filed.

On appeal, Lee argues the ALJ's exclusion of the affidavit of Ms. Stephanie Mundy (“Mundy”), ARNP, after the case was taken into submission for a final decision "is blatantly unfair." She asks this Board to reverse the ALJ's dismissal of her claim and remand the claim to the ALJ to either consider the affidavit or reopen proof time in order to allow Lee to take Mundy's deposition.

The Form 101 alleges on July 21, 2014, Lee injured her back while in the employ of Livingston County Hospital ("Livingston") in the following manner: "I injured my back throwing garbage into the dumpster." The Form 101 indicates Lee received only "conservative" medical treatment.

The February 10, 2015, Benefit Review Conference order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; average weekly wage; exclusion for pre-existing disability/impairment; and TTD. Under "other" is the following: "Admissibility of Stephanie Mundy report."

On October 10, 2014, Livingston filed the September 12, 2014, medical records of Mundy.[1] Under "history of present illness" is the following: "Lana Lee is a 54 year old female. Source of patient information was patient. F/u on back pain." Under "assessment" is the following: "neck pain, lower back pain, upper back pain." This record was electronically signed by Mundy. Included in this filing is a September 23, 2014, "Health Insurance Claim Form" which was signed by Dr. Barnes.

On November 18, 2014, Lee filed in the record the November 11, 2014, "Statement of Stephanie Mundy, ARNP" which states as follows:

> I am Stephanie Mundy, ARNP, a duly-licensed Advanced Registered Nurse Practitioner practicing at the Salem Clinic in Salem, Kentucky. As part of my practice, I have had as a patient Ms. Lana Lee of Salem.
>
> Ms. Lee worked as a housekeeper for the Livingston County Hospital. As a part of her job, she also cleaned our offices at the Salem Clinic.
>
> Ms. Lee has a history of chronic back pain. She has degenerative changes in her spine which, over the years, have been aggravated and made disabling by her work for the hospital. Nevertheless, she was able to perform

[1] In its "Notice of Filing," Livingston claims it is filing the "medical records and/or report of Dr. William E. Barnes." However, an inspection of the medical record reveals it was only signed by Mundy. Apparently, Mundy works as an ARNP (Nurse Practitioner) in Dr. Barnes' office.

> her job successfully until July 21, 2014.
>
> I saw Ms. Lee on July 23, 2014. I received the history of her injuring her back when she was lifting a bag of trash to throw it into a dumpster. Therefore, I took her off work and referred her to The Orthopaedic Institute in Paducah for additional treatment. On August 22, 2014, I gave Ms. Lee another off-work slip, taking her off work until further notice. At no time since July 23, 2014 have I released Ms. Lee to return to any work.
>
> Due to the severity of her back condition, I do not expect that Ms. Lee will ever be able to return to the type of work she performed for the Livingston County Hospital.

On November 20, 2014, Livingston filed an "Objection To And Motion To Strike Affidavit Of Stephanie Mundy, ARNP" in which it argued that pursuant to 803 KAR 25:010, Section 10, only the reports of a physician may be filed. It continues as follows:

> 4. As Ms. Mundy is not a physician as recognized by KRS 342.0011, her testimony cannot be simply introduced by report, even if it is an affidavit. Affidavits are not permitted as evidence as they are not subject to cross-examination.
>
> 5. Her testimony can only be admitted by deposition, which would allow for proper cross-examination.

On January 13, 2015, Livingston filed the Independent Medical Evaluation of Dr. Jeana J. Lee. Dr. Lee opined as follows:

> 1. **What is your diagnosis?** Chronic non-organic pain. I am not a pain specialist, but I tend to agree with Dr. Ruxor's determination that Lana Lee has opioid-induced hyperalgesia.
>
> 2. **Within a reasonable degree of medical probability, does this individual exhibit any evidence of having suffered a harmful change in the human organism as established by objective medical evidence?** No.
>
> 3. **Within a reasonable degree of medical probability was the alleged work event the proximate cause of any harmful change in the human organism as established by objective medical evidence, or would any such harmful change have pre-existed the work incident?** I agree wholeheartedly with Dr. Shelly Freimark, that her medical records clearly indicate a very chronic pain condition involving her entire back (cervical, thoracic, and lumbar spine), with symptoms involving both upper and lower extremities established prior to the 7/21/2014 incident. Her symptoms were escalating prior to the 7/21/2014 incident. It is my opinion that all of her complaints are related to a pre-existing and active condition, and that no treatment would be reasonable or necessary or a direct result of a reported injury of 7/21/2014.

By order dated December 16, 2014, the ALJ denied Livingston's Motion to Strike.

On January 15, 2015, Livingston filed a "Notice Of Filing As If Upon Cross-Examination" in which it filed several medical records spanning October 1, 2013, through June 20, 2014, electronically signed either by Dr. Barnes or Mundy or both.

In the April 27, 2015, Opinion and Order, the ALJ provided the following analysis, findings of fact, and conclusions of law:

> **Causation/Work-Relatedness**
>
> As a threshold issue, the employer disputes that plaintiff's back complaints since July 21, 2014 are due to any work injury. In support of its position, the employer points to treatment records prior to the alleged work injury. In addition, it relies upon the opinions of its expert, Dr. Lee. Dr. Lee reviewed plaintiff's records and performed her own examination. She noted plaintiff reported she had been on Lortab for at least 3 years. Dr. Lee's review of Stephanie Mundy's records showed a history of chronic lower back pain for which she received escalating treatment in the months prior to July 21, 2014. Dr. Lee concluded plaintiff's complaints are due to her pre-existing condition which was present and active prior to July 21, 2014. Dr. Lee therefore concluded the alleged July 21, 2014 incident caused no temporary or permanent injury.

For her part, plaintiff argues she has been unable to work since July 21, 2014 and that the events of that day aroused her prior back condition into a state of total disability.

Having reviewed the evidence of record, the Administrative Law Judge is not persuaded plaintiff has carried her burden of proving a work-related injury. In reaching this conclusion, plaintiff's treatment records immediately prior to July 21, 2014 are most persuasive. They demonstrate plaintiff was actively treating for the same symptoms even just one week before the alleged injury. Moreover, the June 18, 2014 MRI showed lumbar changes and there is nothing to indicate an acute change in those lumbar conditions after July 21, 2014. For these reasons, Dr. Lee's opinions are considered most persuasive.

At this point, the defendant's continuing objection to plaintiff's filing of Stephanie Mundy's opinions is reviewed and granted. This filing was initially admitted over the defendant's objection as it was initially believed plaintiff's filing represented an ordinary business record of Stephanie Mundy in her professional capacity as an APRN in her work with Dr. Barnes. However, another review of that filing and a review of other actual treatment records in evidence authored by Mundy lead the ALJ to conclude the plaintiff's filing was not an actual treatment record but, instead, a statement provided to plaintiff in support of her claim. It was not submitted by deposition and was not part of any actual treatment records. As such, it should be excluded and same is hereby stricken from the record.

> For these reasons, it is determined plaintiff did not suffer any temporary or permanent work-related injury on July 21, 2014 for which even temporary income or medical benefits are payable. Her claim must therefore be dismissed.

Livingston's motion to strike, dated November 18, 2014, was filed in a timely manner two days after Lee filed Mundy's affidavit. *See* 803 KAR 25:010, Section 10(6)(b). The ALJ, via an untimely order dated December 16, 2014, denied Livingston's motion to strike. *See* 803 KAR 25:010, Section (10)(d). The record further reveals that after taking the claim under submission, the ALJ ordered Mundy's affidavit struck from the record in the April 27, 2015, Opinion and Order. In striking the Mundy affidavit after taking Lee's case under submission for a decision, the ALJ may have prohibited Lee from offering any additional proof in the form of medical testimony. However, 803 KAR 25:010 Section 8, only addresses medical reports by physicians. Thus, the ALJ correctly excluded the nurse’s affidavit.

However, a close review of the April 27, 2015, Opinion and Order reveals the ALJ was persuaded by the pre-injury medical records filed by Livingston and the report of Dr. Lee. As the ALJ stated in the April 27, 2015, Opinion and Order, the pre-injury medical records "demonstrate plaintiff was actively treating for the same

symptoms even just one week before the alleged injury." Thus, had the ALJ not struck the Mundy affidavit, it is clear from the language of the April 27, 2015, Opinion and Order that the ALJ would have still relied upon the pre-injury medical records and the medical opinions of Dr. Lee.

Accordingly, the April 27, 2015, Opinion and Order is **AFFIRMED**.

ALL CONCUR.

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