Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 12, 2014

CLAIM NO. 200694713 & 200573259

LEE ROY NEWSOME PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

KENTUCKY TRANSPORTATION CABINET
PIKEVILLE MEDICAL CENTER
MCDOWELL ARH
DR. DUANE DENSLER
GREATER MEDICAL ADVANCE, INC.
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Lee Roy Newsome ("Newsome") seeks review of the February 10, 2014, Opinion and Order rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ") resolving multiple medical fee disputes in favor of the

Kentucky Transportation Cabinet ("Cabinet") and overruling Newsome's motion to reopen seeking temporary total disability ("TTD") benefits and additional permanent income benefits. Newsome also appeals from the March 19, 2014, Order ruling on his petition for reconsideration.

Newsome sustained a work-related low back injury on August 9, 2005, Claim No. 200573259, and a low back and left knee injury on February 13, 2006, Claim No. 200694713. In a May 30, 2009, Opinion, Award, and Order, Hon. John B. Coleman, Administrative Law Judge ("ALJ Coleman") determined Newsome sustained a 5.5% impairment rating as a result of the 2005 low back injury which pursuant to KRS 342.730(1)(b) translated to a 4.675% permanent partial disability. Newsome's benefits were enhanced by the two multiplier contained in KRS 342.730(1)(c)2 on August 2, 2007, when his work was terminated. ALJ Coleman determined the 2006 injury resulted in a 7.5% impairment rating which pursuant to KRS 342.730 translated to a 6.375% permanent partial disability. Of the 7.5 impairment rating, ALJ Coleman determined the back injury resulted in a 5.5% impairment rating and the knee injury a 2% impairment rating. Newsome's income benefits for this injury were also enhanced by the two multiplier on August 2, 2007. The decision was not appealed.

On April 13, 2010, the Cabinet filed a motion to reopen and motion to join Pikeville Medical Center contesting emergency room treatments Newsome received on January 14, 2010, February 17, 2010, and February 27, 2010. The Cabinet also contested an MRI performed on February 17, 2010, at Pikeville Medical Center. Subsequently, the Cabinet filed another medical fee dispute and Form 112 concerning Greater Medical Advance Inc.'s request for a nerve conduction study.[1] The Cabinet later filed another medical fee dispute and motion to join McDowell Appalachian Regional Hospital ("McDowell ARH") regarding emergency room services rendered on February 21, 2011. It filed another medical fee dispute and motion to join Dr. Duane Densler concerning his request for approval of fusion surgery at L4-5 and L5-S1. Even though the surgery was contested, Newsome underwent surgery performed by Dr. Densler on November 23, 2011.

On May 24, 2012, Newsome filed a motion to reopen seeking TTD benefits and additional permanent income benefits. In support of his motion, Newsome filed his affidavit as well as voluminous medical records. The

[1] All parties agreed this medical dispute became moot since Greater Medical Advance, Inc. closed. Therefore, the facts relating to this dispute will not be discussed further.

Cabinet filed a Form 111 denying Newsome's motion. On June 15, 2012, the Cabinet filed another medical fee dispute regarding Newsome's request for reimbursement of mileage and out-of-pocket expenses for visits to Commonwealth Quality Healthcare, LLC. Voluminous medical records were introduced by both parties and Newsome's September 6, 2013, deposition and Dr. Russell Travis' October 17, 2012, deposition were introduced. Newsome testified at the November 20, 2013, hearing.

Newsome's deposition testimony reveals he last worked in July 2007. He believes the surgery performed by Dr. Densler has worsened his symptoms as his back is stiff and he has difficulty bending over. Newsome has constant back pain and his muscles are "tied up." Occasionally, he has pain shooting down his leg, and he also experiences sharp pain extending into his testicles. Newsome's knee pops, cracks, and locks up. At the time of his deposition, he was undergoing pain management at Elite Healthcare in Nashville, Tennessee. He had previously sought pain management at Greater Medical Advance in Wheelersburg, Ohio, which is approximately a two and half hour drive one way. Newsome explained he went to Ohio because he could not "get in around here." To secure Elite Healthcare Services, Newsome drives five hours one way once a month.

Elite Healthcare Services provides all of his medication. At the time of his deposition, Newsome took Neurontin four times daily, Paxil once a day, Klonopin three times daily, Oxycontin two times daily, and Oxycodone three times daily. This medication is filled by Deal Drug in Tennessee which is located next to the pain management clinic. He is no longer treating with Greater Medical Advance, Inc. because it shut down. His family physician is Dr. Jeremy Parson who administers a testosterone shot every month and prescribes other medications for conditions unrelated to the work injuries. Newsome has not seen Dr. Densler since his surgery. Approximately a year and half prior to his deposition, Newsome returned to the specialist in Lexington who performed the surgery on his knee and was advised there was nothing else to be done for his knee.

Newsome testified Medicare pays for all the medication prescribed by Elite Healthcare Services but he pays for the visits to Elite Healthcare Services. Prior to going to Elite Healthcare Services, Newsome had gone to Kentucky Pain in Prestonsburg for over a year for which he submitted his receipts and mileage.[2] The Cabinet has yet to

[2] It appears the correct name of the facility is Commonwealth Quality Healthcare.

reimburse him for those expenses. He believes he last went to Kentucky Pain in September or October 2012.

After the surgery, Newsome was involved in a motor vehicle accident ("MVA") approximately a year and a half before his deposition. The MVA resulted when Newsome attempted to avoid hitting children on four wheelers. He explained that in the course of jumping out of his car, he was dragged a short distance before the car went approximately 75 or 100 feet down a hill. He was treated by McDowell ARH.

At the November 20, 2013, hearing, Newsome testified he went to the emergency room at Pikeville Medical Center three times because his back was causing him significant pain and his regular doctor's office was not open. Newsome explained he went to the emergency room at McDowell ARH because of the lateness of the hour and he had taken about all he could that day. He explained he could not sit, stand, or lay down. He received a pain shot, muscle relaxers, and an MRI was performed. Because his condition had become so bad and because Dr. Densler said he needed it, Newsome underwent surgery. Regarding the treatment he received from Commonwealth Quality Healthcare, he explained he started treatment in approximately June or

July 2010 pursuant to the recommendation of Dr. Parsons.[3] Newsome believes the surgery has "messed [him] up." The nerves in his arms and legs jerk and he has constant pain in the left side. His knee gives way and locks up. He stated that he cannot drive his racecar or exercise. He explained that prior to the surgery he could work and engage in sports. Newsome believes he cannot perform any work which involves sitting or standing. He testified the doctors who referred him to Dr. Densler knew of his work injuries.

On cross-examination, Newsome acknowledged he had returned to work at the same job two months after his 2006 work injury and worked there for approximately a year and a half until he was fired for shooting at a turkey. Except for Klonopin, he still takes the medication he listed in his deposition. Newsome acknowledged he was involved in another MVA, different from the one he recounted in the deposition, which occurred on the Mountain Parkway when he hit a guardrail. He was unable to explain what happened on that date. He was treated at Pikeville Medical Center.

[3] The Form 114 – Request for Reimbursement submitted by Newsome lists nine doctor visits and the corresponding mileage for each visit which span a period from October 19, 2011, to May 8, 2012.

In the opinion and order, after identifying the contested issues and summarizing the evidence, the ALJ provided the following analysis, findings of fact, and conclusions of law:

> Based on a review of the record of this claim, including the summary and discussion of the evidence as set forth herein, the ALJ does hereby make the following findings of fact and conclusions of law.
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> First, the stipulations made and entered into by and between the parties at the Benefit Review Conference on October 7, 2010, and the Benefit Review conference conducted by video on September 9, 2013, as set forth hereinabove, are approved and incorporated herein by reference as findings of fact.
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> The ALJ will not summarize all of the medical evidence contained in the record of this file, particularly medical evidence submitted prior to Judge Coleman's opinion in 2008. However, the ALJ has reviewed all the medical evidence and will discuss the relevant or pertinent medical evidence contained within the file as it relates to the contested issues.
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> **Duane W. Densler, M.D.** – Dr. Densler acknowledged he was unable to determine if surgery he performed on November 23, 2011, was causally related to the injuries of either August 9, 2005, or February 13, 2006. Dr. Densler diagnosed lumbar degenerative disease and thought a lumbar fusion was reasonable for treatment of that condition. However, it must be remembered that Plaintiff's work

injuries in 2005 and 2006 involved a strain or sprain of the low back on each occasion. An injury to the left knee also occurred at the time of the second accident. After careful examination of the evidence herein, the ALJ finds that the fusion surgery performed by Dr. Densler on November 23, 2011, was not related to the injuries by Plaintiff on either August 9, 2005, or on February 13, 2006. Not only is this finding supported by the evidence by Dr. Densler, but it is also supported by evidence of Dr. Russell Travis, who opined it was not related to the work injury; Dr. Mark Swofford, who opined the Plaintiff's condition is not related to the work injuries; Dr. Wolens; Dr. Sheridan, and even Dr. Nazar, who reported that Plaintiff's condition did not require surgical intervention. The record of this claim contains no substantial evidence that connects the degenerative changes in Plaintiff's low back to the sprain/strain he incurred several years earlier.

Pursuant to KRS 342.125, a plaintiff may reopen a case for 'change of disability as shown by objective medical evidence of worsening … of impairment due to a condition caused by the injury since the date of the Award.' KRS 342.0011(33) defines 'objective medical findings' as information gained through direct observation and testing of the patient applying objective or standardized methods.' Staples v. Konvelski, 56 S.W.3d 412 (Ky. 2001).

In Colwell v. Dresser Instruments, 217 S.W.3d 213, 218 (Ky. 2007) the Kentucky Supreme Court held that if objective medical findings demonstrate an injured worker suffers a greater

loss of use or organ function due to a condition caused by the injury, then the worker has demonstrated a worsening of impairment. Applying this standard to the case herein, the evidence simply does not support a finding that Plaintiff's condition was 'caused by the injury.'

Plaintiff having failed to show work-relatedness/causation of the surgery performed by Dr. Densler, then obviously Plaintiff is not entitled to temporary total disability benefits during his recovery period and he is further not entitled to compensation for any of the negative consequences he incurred as a result of the fusion surgery.

With respect to the medical fee disputes, the Defendant-Employer has filed six MFDs, as set forth above in the Statement of the Case. First, with respect to the Pikeville Medical Center's emergency room visits on 02/17/10 and 02/27/10, Dr. Wolens found neither visit to be reasonable and necessary for treatment of chronic lumbar pain. Plaintiff was already receiving care and medications for the primary condition. Whereas, an MRI was reasonable and necessary in light of Plaintiff's fever in order to rule out spinal infection, there is no substantive evidence that same was related to a lumbar strain that occurred in 2005 or in 2006. Based on this evidence, as well as the opinion of Dr. Travis, the ALJ finds the emergency room visits to be **non-compensable**.

The emergency room visits to McDowell ARH on 01/14/10 and 02/21/11 involved a history of fever and low back pain. The Plaintiff was diagnosed

with pneumonia, Dr. Daniel Wolens performed a Utilization Review on the issue of compensability. Dr. Wolens opined that treatment at the emergency room was for the pneumonia and associated body pains. Any increase in the Plaintiff's mechanical low back pain (resulting from the work injuries) would not have necessitated emergency treatment. Dr. Travis also found the emergency room visits to be neither reasonable nor necessary. Based on this evidence, the ALJ finds these two emergency room visits to be **non-compensable**.

Plaintiff was treating at Greater Medical Advance when nerve conduction studies were requested by Dr. Georgescu. Dr. Travis reviewed the request and opined there was 'no indication whatsoever' for nerve conduction studies. The Plaintiff is no longer treating with Greater Medical Advance because the facility has been closed. Elite Health, Plaintiff's new pain management, has not requested nerve conduction studies. Thus, this issue is **moot**.

Plaintiff's request for lumbar fusion at L4-L5 – L5-S1 by Dr. Densler has already been discussed. The ALJ has found above that a lumbar fusion was not causally connected to or related to the low back strains/sprains incurred by Plaintiff in 2005 and 2006. Accordingly, since there is no causative relationship, the said treatment is **non-compensable**. The Plaintiff has the burden of proof on all questions of causation, even though the Defendant-Employer has the burden of proving a procedure is unreasonable and/or unnecessary. National Pizza Company v. Curry, 802 S.W.2d 949 (Ky. App. 1991).

The MRI performed during Plaintiff's visit to the Pikeville Medical Center's emergency room on 02/17/10 has already been discussed above. Whereas, the MRI was reasonable because of the fever from which Plaintiff was suffering, it was not related to the original work injuries. As noted above, this finding is supported by both Dr. Wolens and Dr. Travis. Again, the ALJ finds this emergency room visit and the MRI to be **non-compensable**.

Finally, the question of mileage and out-of-pocket expenses incurred by the Plaintiff relative to nine visits at Commonwealth Quality Healthcare on the dates set forth above are hereby found to be **non-compensable**. The Claimant no longer has a need for pain management relating to his injuries of 2005 and 2006, and it is unreasonable and unnecessary in the opinion of Dr. Travis. Plaintiff is taking a substantial amount of narcotics and has been doing so for many years. Even Dr. Nazar states, 'I am uncomfortable with the amount of medications that he is currently taking.' Plaintiff has reported losing his medications on multiple occasions and he has developed an apparent drug dependency. The Defendant-Employer questions the reasonableness and necessity of his continued use of narcotic drugs and further objects to the untimely request for reimbursement. In any event, the ALJ find [sic] the treatments rendered by Commonwealth Quality Healthcare on the dates set forth above to be unreasonable and unnecessary, and therefore the out-of-pocket travel expenses are **non-compensable**.

The ALJ has carefully read and considered the Opinion, Award & Order

rendered by ALJ John B. Coleman on May 30, 2008. The purpose of this close review is to ascertain Judge Coleman's findings as to the extent of the Claimant's complaints and impairments resulting from the work-related injuries of August 9, 2005, and February 13, 2006, thereby forming a basis for comparison of Judge Coleman's findings and decision, which are *res judicata*, with the Plaintiff's current complaints and impairments. It is significant to note that Judge Coleman found that Plaintiff returned to work after each of his two work incidents and continued working until August 2, 2007, when Mr. Newsome was terminated for reasons unrelated to his work injuries. The ALJ also notes that Dr. Baltrip had already performed surgery on the Plaintiff's left knee in February of 2007 and that Plaintiff had already testified prior to the Opinion of Judge Coleman as to the continuing difficulties and symptoms he has [sic] having with his knee. He complained that his knee stayed sore and swollen. He complained that it pops and cracks and gives out on him. He complained of a constant aching pain in his lower back. In comparing his symptoms prior to Judge Coleman's decision with Plaintiff's symptoms and complaints that he now expresses, the ALJ notes there is a remarkable similarity in the complaints. Judge Coleman found that Plaintiff was released to return to 'normal work activities' on April 26, 2006. Judge Coleman summarized the medical evidence as it existed in 2008, including the opinion of Dr. Chris Stephens that he felt the August 2005 and February 2006 episodes represented nothing more than mere exacerbations of chronic ongoing low back symptoms. Dr. Stephens noted the Plaintiff had been taking narcotics chronically for many

years for musculoskeletal conditions, including his low back.

Judge Coleman also noted in his Opinion that the defendant-employer had submitted the Plaintiff's job description, which was significant because it indicated essential elements of the Plaintiff's job, including lifting heavy objects and working in uncomfortable positions for extended periods of time. Despite having noted the nature of the Plaintiff's job requirements, ALJ Coleman found that Plaintiff retained the physical capacity to return to the work he was performing at the time of his injuries. In fact, he did return to his work and performed all his job requirements. He was able to return to his usual employment following each of his injuries, but he was terminated for unrelated reasons on August 2, 2007. ALJ Coleman stated in his Opinion, 'There is nothing in the record to indicate that the Plaintiff would not be continuing to work earning same or greater pay had it not been for his termination for other grounds.'

Finally, it is noted that Judge Coleman stated in his Opinion, 'I am most convinced by the opinion of Dr. Shraberg that the Plaintiff's psychiatric condition is not causally related to his work-related injuries.' These findings and opinions of Judge Coleman cannot be modified or altered at this time. The question before the ALJ is whether the Claimant's condition has changed, or worsened as he alleges, as a result of the work-related injuries, and whether Plaintiff is entitled or not to a reopening of his claim and an increase in his impairment/disability award.

The Claimant has been on narcotic medications for many years, even prior to either of the work-related incidents mentioned herein. He has changed treating physicians numerous times as he sought to continue to obtain prescriptions for pain medications. He is now regularly making a ten-hour round-trip to Tennessee, where he sees a physician who does nothing more than prescribe pain medications. The Plaintiff stated that he could not get into an office in Kentucky soon enough to be seen and that other doctors' offices where he had tried to make appointments took too long or would not see him. The Claimant testified, and it is documented above in the discussion of the evidence, as to the large amount of pain medications he takes.

The critical issue in this case is whether the low back fusion performed in November of 2011 was compensable or not. The Workers' Compensation Insurance carrier did not approve the surgery, and argued then as it argues now that the fusion surgery was neither reasonable nor necessary, nor was it causally related to or necessitated by either of the two work injuries. The surgery was challenged both on the basis of causation/work-relatedness and the basis of reasonableness and necessity.

The surgery was performed by Dr. Duane W. Densler, neurosurgeon. The ALJ needs to look only to the opinions of Dr. Densler, the treating physician, to answer the critical question involved concerning the compensability of the spinal fusion surgery. In the event the spinal fusion was work-related and was reasonable and necessary, then it would now be compensable as a consequence of the work injury, and would constitute

> evidence on which the ALJ would have to determine whether it constitutes an increase in the impairment/disability of the Claimant, thereby resolving the question of worsening of condition in favor of the Plaintiff. On the other hand, if the ALJ finds the spinal fusion was not work-related, then the increase in the impairment rating under the AMA Guides, 5th Edition, could not and would not be considered in reaching the decision on the issue of worsening of condition.
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> Dr. Densler having acknowledged he was unable to determine if the surgery he performed on November 23, 2011, was causally related to the injuries of either August 9, 2005, or February 13, 2006, and the ALJ having found according to the opinion of Dr. Densler, which opinion was supported by most of the medical evidence contained in the file, the issue as to a worsening of condition must be decided in favor of the Defendant-Employer. The medical expenses challenged in all the medical fee disputes also having been found to be unreasonable and/or unnecessary, these disputes must also be determined in favor of the Defendant-Employer.
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> Having found the low back fusion to be unrelated to the initial work injuries, the issue as to the Plaintiff's entitlement to temporary total disability benefits post-surgery must also be decided in favor of the Defendant-Employer.

Newsome filed a petition for reconsideration alleging the ALJ erred by not addressing his claim of a worsened left knee condition and denying his claim for

additional benefits due to the worsening of that condition. In support of this argument, Newsome cited to ALJ Coleman's award and noted Dr. Herr assessed a 7% impairment rating and Dr. Sheridan assessed a 4% impairment rating based on a diagnosis of tears of the medial and lateral menisci. Since ALJ Coleman awarded income benefits based on a 2% impairment rating and both Drs. Herr and Sheridan assessed impairment ratings greater than the 2% impairment, Newsome asserted the ALJ erred in not awarding additional benefits for the worsening of his left knee.

Newsome also argued the ALJ erred in not awarding additional permanent partial disability ("PPD") benefits due to the worsening of his low back condition. Newsome cited to the medical and vocational evidence supporting his position. He also contended the ALJ erred by not finding the Cabinet responsible for the negative consequences of the surgical procedure performed by Dr. Densler citing to Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986). Finally, he argued the ALJ erred in resolving all the medical fee disputes in favor of the Cabinet. Newsome did not request additional findings of fact concerning the issues he raised in the petition for consideration.

In the March 19, 2014, Order, the ALJ did not specifically deny the petition for reconsideration but

stated Newsome did not raise an issue which had not been considered and determined previously. The ALJ concluded Newsome's arguments were a rehash of the same arguments and positions already considered by the ALJ and therefore he believed the opinion and order fully and sufficiently set forth the basis for each finding and his conclusions.

On appeal, Newsome challenges the decision on three grounds. First, Newsome asserts the ALJ's denial of additional benefits for a worsening of his back and left knee condition is not supported by substantial evidence. Concerning his claim of a worsened back condition, Newsome argues the opinions of Dr. Herr and Mr. Dwight McMillion, the vocational expert, clearly refute the erroneous opinions of Drs. Wolens, Densler, Nazar, and Travis. Newsome contends the opinions of Drs. Densler, Nazar, and Travis are without merit.

Newsome also argues the ALJ erred by not addressing his worsened left knee condition. As he did in his petition for reconsideration, Newsome notes ALJ Coleman awarded benefits for the left knee condition based on a 2% impairment rating and the opinions of Drs. Herr and Sheridan establish his impairment rating has increased. Consequently, Newsome asserts the ALJ erred by not awarding additional benefits for the worsening of his left knee.

Next, Newsome asserts the ALJ should have concluded the Cabinet was liable for the negative consequences of the surgery performed by Dr. Densler. Newsome argues the evidence in this case unequivocally shows he suffered additional damage as a result of Dr. Densler's actions. Newsome again cites to Elizabethtown Sportswear v. Stice, supra, arguing the Cabinet is liable for the negative consequences of the surgery performed by Dr. Densler as the surgery was reasonable, necessary, and work-related.

Finally, Newsome argues the ALJ's decision regarding the medical fee disputes was not based upon substantial evidence. He cites to the Kentucky Supreme Court decision in C & T of Hazard v. Stollings, Claim No. 2012-SC-00834-WC, rendered October 24, 2013, Designated Not To Be Published, for the proposition the Cabinet had the burden of establishing the treatment in question was not reasonable and necessary or causally related to the work injury. Newsome's argument is at best scant. He asserts the mileage and out-of-pocket expenses relative to the treatment for Commonwealth Quality Healthcare are reasonable and necessary stating the statute does not provide a limitation on the distance he travels to a medical provider. He also cites to his testimony he was

unable to obtain medical services in the area. Therefore, he should not be punished for having to travel to receive the appropriate treatment for his injuries. Newsome maintains Dr. Herr's opinions and his testimony which establishes the surgery performed by Dr. Densler is reasonable and necessary for the cure and relief of his work injuries. Newsome provides no argument in support of his contention the ALJ's decision concerning the medical services provided by Pikeville Medical Center and McDowell ARH is erroneous. Newsome requests the opinion and order ruling on the petition for reconsideration should be reversed and the claim remanded.

In a post-award medical fee dispute, the burden of proof and risk of non-persuasion with respect to the reasonableness and necessity of medical treatment falls on the employer. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). However, the burden remains with the claimant concerning questions of work-relatedness or causation of the condition. Id. *See* Addington Resources, Inc. vs. Perkins, 947 S.W.2d 421 (Ky. App. 1997). We are mindful of the Supreme Court's recent holding in C & T of Hazard v. Stollings, supra, cited by Newsome wherein the Supreme Court stated the employer had the burden of proof to show the employee's treatment was unreasonable and not

work-related. Thus, on appeal, our review will be based on the Cabinet having both the burden of establishing the reasonableness and necessity as well as the work-relatedness of all the contested medical treatment. Since the Cabinet had the burden of proof and met 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).

As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight to be accorded the evidence and the inferences to be drawn therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The fact-finder may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary parties' total proof. Magic Coal Co. v. Fox, 19

S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

However, in a reopening seeking additional income benefits, Newsome had the burden of proving his condition had worsened sufficient to warrant an award of income benefits. Griffith v. Blair, 430 S.W. 2d 337 (Ky. 1968); Jude v. Cubbage, 251 S.W.2d 584 (Ky. 1952). Since Newsome was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ 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). We find no merit in Newsome's argument the denial of additional income benefits for a worsened low back condition or impairment is not supported by substantial evidence. Further, the evidence does not compel a different result.

The October 17, 2012, deposition of Dr. Travis reveals he examined Newsome on August 17, 2011, and on August 24, 2012. Dr. Travis expressed the opinion the surgery was unnecessary and inappropriate noting the February 17, 2010, MRI showed no changes when compared to the November 26, 2007, MRI. He believed the MRI performed on February 27, 2010, without contrast, revealed nothing except a slight decrease in disc space height at L4-5 which is to be anticipated. Another MRI performed on August 2, 2011, showed very little change when compared to the lumbar MRIs performed in February 2010 and November 2007. He concluded the findings on the MRIs did not relate to the injuries in 2005 and 2006. Therefore, he believed the surgery was not reasonable, necessary, or appropriate.

Dr. Travis did not believe Newsome was a candidate for fusion surgery, especially at two levels. He noted there was no nerve root compromise, fracture, instability, herniation or subluxation. Even assuming the surgery was reasonable and necessary, Dr. Travis believed it would not be related to the work injuries of 2005 and 2006. He explained the surgery was performed due to degenerative disc disease and one does not "get degenerative changes from a lumbar strain and sprain." Similarly, there was no objective evidence of a worsening

of condition which would warrant surgery. He concluded there was no worsening of Newsome's condition since entry of ALJ Coleman's 2008 opinion. Consequently, prior to the surgery there would be no increase in impairment rating. However, pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), due solely to the surgery, Newsome now has a 24% impairment rating.

Dr. Travis felt Newsome had serious depression, anxiety problems, and an opioid addiction which affected his ability to respond to simple strain and sprain. He noted the urine screens in 2011 and 2012 identified unanticipated drugs in his system. In addition, he believed the treatment received at the pain clinic was not reasonable or necessary. With respect to the condition of Newsome's left knee, he noted the knee was fully extended and flexed and there was no swelling or fusion. There was no discomfort or loss of motion. Thus, he would assign no impairment rating to Newsome's left knee condition. He noted no other physician agreed with Dr. Densler's interpretation of the pre-surgery MRIs.

In a report dated October 4, 2011, Dr. Travis noted Newsome had degenerative changes at L4-5 and L5-S1, which were not related to the 2005 injury. He opined

Newsome exhibited “natural aging processes” in the lumbar spine with no instability and no indication whatsoever for lumbar fusion. The three MRIs he re-reviewed revealed no instability. He believed the only change that occurred was in the hyper-intensity zone of the L4-5 annulus which had resolved by August 2, 2011. Further, the degenerative annular bulge had not significantly changed. Consequently, there was no instability and no indication for lumbar fusion particularly in a man who shows only age related mild degenerative changes in the lumbar spine.

In a supplement dated March 6, 2012, Dr. Travis stated he was surprised to learn surgery had occurred. He had no idea why Dr. Densler subjected Newsome to a lumbar fusion at L4-5 and L5-S1. Dr. Travis stated the MRIs he interpreted did not indicate any need for surgical procedure especially a two level fusion. He explained why he believed the fusion was not necessary.

In a subsequent report dated August 24, 2012, Dr. Travis stated the surgery performed was not reasonable, necessary, or work-related to the injury of 2005 or 2006. Dr. Travis referenced his previous reports and again concluded there was no indication for lumbar fusion. He reiterated that prior to the surgery, Newsome had no objective evidence of a worsening of condition since ALJ

Coleman's 2008 decision. Thus, Newsome would not have an increased impairment rating prior to the surgery. The surgery performed by Dr. Densler is the sole reason for the increased impairment rating. Further, he noted Newsome was not a candidate for continuing opioids and should have been treated with conditioning, work hardening, and weaned from opioids. But for the surgery, Dr. Travis believed Newsome would have been able to return to work and continue to work for the indefinite future.

Dr. Travis concluded Newsome did not have an impairment rating for the knee simply because he had a meniscal repair. Since Newsome had full range of flexion and extension, Dr. Travis would not assess an impairment rating for the knee.

In a May 17, 2011, letter, with respect to the proposed surgery, Dr. Wolens stated that after reviewing the February 17, 2010, lumbar MRI, he concurred with the radiologist's interpretation of disc degeneration at L4-5 and at L5-S1 with slight narrowing at L4-5, with good preservation of height at L5-S1. He noted at the L4-5 and L5-S1 levels there continued to be visibility of the nuclear cleft although there was overall darkening of the discs compared with the above or upper level. There was also a slight narrowing at L4-5. There was also no disc

space narrowing. There were no modic changes or spondylolisthesis. As noted by the radiologist, he believed these findings were also stable, when compared to the November 2007 lumbar MRI. He concluded by stating:

> I respectfully recommend against performance of the lumbar fusion, given the minor degenerative changes at L4-5 and L5-S1 level in the absence of frank instability or modic changes and relative stability to an MRI conducted approximately two and half years previously.

Dr. Mark Swofford, identified by Dr. Herr and Dr. Travis as a urologist, stated in a December 10, 2012, letter that Newsome's physical examination and symptoms following the back surgery "do not go along with an injury from surgery."[4] They are consistent with low testosterone which is not related to the previous back injuries.

Dr. Richard Sheridan's October 31, 2012, report was introduced relative to Newsome's left knee condition. However, Dr. Sheridan also provided a report dated November 20, 2012, in which he stated he had previously diagnosed injuries in 2005 and 2006 as lumbar strains and that is still his opinion. Dr. Sheridan stated he reviewed Dr. Densler's reports of May 31, 2012, and June 28, 2012, as

[4]Dr. Swofford's reports do not indicate he has a specific medical specialty.

well as the MRI report of the lumbar spine dated June 28, 2012. Dr. Sheridan noted Dr. Densler's records indicate Newsome had some recent pain complaints in his low back secondary to jumping out of a car in May. He believed Newsome's presentation in May 2012 was compounded by his previous low back injuries and the recent injury from jumping out of a car. Dr. Sheridan believed the lumbar fusion was performed due to degenerative changes and was unrelated to the 2005 and 2006 work injuries.

Newsome introduced a questionnaire completed by Dr. Gregory Nazar on June 28, 2012. Dr. Nazar indicated he had evaluated Newsome on that same date due to the work injuries he previously sustained while working for the Cabinet. He diagnosed low back pain which relates to the injuries sustained on those dates. Dr. Nazar assessed a 7% impairment rating. Dr. Nazar specifically stated he did not believe Newsome required surgical intervention and was uncomfortable with the amount of medication he is currently taking.

Newsome introduced the Form 107 completed by Dr. Densler dated December 4, 2012. Dr. Densler indicated the history of Newsome's injury and complaints is unknown. He also stated the degree of injury is unknown. He noted Newsome had severe lumbar pain on flexion. He also stated

whether Newsome's injury is the cause of his complaints is unknown. Similarly, when asked to explain how the work-related injury caused the harmful change in the human organism, Dr. Densler wrote unknown. With respect to the impairment rating, Dr. Densler indicated unknown.

The opinions of Drs. Travis, Wolens, Swafford, Sheridan, and Nazar, relied upon by the ALJ, constitute substantial evidence supporting the ALJ's determination the surgery was not work-related. In addition, the statements of Dr. Densler specifically declining to provide an opinion regarding whether the surgery was due to the effects of the work injury support the ALJ's decision the surgery was not reasonable, necessary, and causally related to the previous work injuries.[5] Similarly, the opinions of Drs. Travis and Wolens establish the surgery was not reasonable and necessary treatment of Newsome's 2005 and 2006 low back injuries.

The above-cited evidence also constitutes substantial evidence supporting the ALJ's decision Newsome did not sustain a worsening of his work-related condition and was not entitled to an award of increased income

[5] Since the ALJ stated on page 25 of the opinion and order the medical expenses challenged in all the medical fee disputes also have been found to be unreasonable and/or necessary, we deem this to include the medical fee dispute pertaining to the surgery recommended and performed by Dr. Densler.

benefits due to a worsened condition resulting from the surgery. Consequently, the evidence does not compel a different result. Significantly, Dr. Travis testified Newsome's increased impairment and worsened condition were due to the surgery performed by Dr. Densler which was unnecessary and unrelated to the work injuries. He specifically stated there was no objective evidence of a worsened condition since ALJ Coleman's decision. Thus, the medical evidence amply supports denial of Newsome's claim for additional income benefits due to a worsened low back condition and/or an increased impairment rating.

Newsome's argument the Cabinet should have been adjudged liable for the negative consequences of the surgery performed by Dr. Densler is flawed. In this case, all doctors except Drs. Herr and Densler stated the surgery was unnecessary. As the ALJ found the surgery was not reasonable and necessary treatment of and causally related to the work injuries, the Cabinet was not responsible for the consequences of the surgery. In Elizabethtown Sportswear v. Stice, 720 S.W.2d 732, 734 (Ky. App. 1986), in discussing KRS 342.020(3) the Court of Appeals stated:

> This statute has been interpreted to mean that a civil action cannot be brought against the employer for damages caused by a physician's malpractice or improper treatment, not

> that a claim for worker's compensation benefits cannot be brought by the employee to recover for additional disability resulting from treatment which aggravates a work-related injury. [citation omitted]
>
> . . .
>
> She had a right to submit herself to what is usually a routine diagnostic procedure recommended by her physician. If she had not done so, Appellee could claim that compensation should be denied for her failure to follow competent medical advice. [citations omitted] [But at least she would still be alive.]

In Elizabethtown Sportswear v. Stice, supra, there was no dispute the surgery was reasonable and necessary treatment of the work injury. Thus, the adverse consequence of the surgery was compensable. Here, the ALJ determined the surgery was not reasonable and necessary treatment of and causally related to the low back injuries. Thus, the Cabinet was not responsible for the consequence of a failed surgery which was not reasonable, necessary, and unrelated to the 2005 and 2006 work injuries. Elizabethtown Sportswear v. Stice, supra, is inapplicable.

That said, in the opinion and order and the order ruling on the petition for reconsideration, the ALJ failed to address Newsome’s claim for additional income benefits due to a worsened left knee condition. On reopening, Dr.

Herr assessed a 7% impairment rating and Dr. Sheridan assessed a 4% impairment rating. However, in doing so, Dr. Sheridan stated as follows: "The Plaintiff's diagnosis as it relates to the left knee incident is tears of the medial and lateral meniscal." Dr. Sheridan stated this merited a 4% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), none of which is attributable to a pre-existing active condition. Notably, Dr. Sheridan's opinions relate to a left knee injury and tears to the medial and lateral meniscal. There is no statement by Dr. Sheridan as to what caused the medial and lateral meniscal tears. Thus, the report of Dr. Sheridan does not *per se* establish an increase in impairment due to a worsened condition which would mandate a finding the increase in impairment rating is due to a worsened condition as opposed to a specific injury occurring after rendition of ALJ's Coleman's opinion. Conversely, Dr. Travis stated he would assess no impairment for the knee as Newsome had full range of extension/flexion without evidence of a fusion or other problems. Thus, this matter must be remanded to the ALJ for a determination as to whether there has been a worsening of Newsome's left

knee condition caused by the 2006 work injury sufficient to justify an award of increased income benefits.

Finally, we find no merit in Newsome's argument the ALJ's decision concerning the medical fee disputes is not supported by substantial evidence. Again, as the Cabinet had the burden of establishing the contested medical treatment was not reasonable, necessary, and causally related to the work injuries, we conclude substantial evidence supports the ALJ's determination regarding the medical treatment in question and Newsome's entitlement to reimbursement for mileage and out-of-pocket expenses.

Dr. Travis' opinions expressed in his deposition and various reports constitute substantial evidence in support of the ALJ's decision relative to the emergency room visits to Pikeville Medical Center. In Dr. Travis' August 17, 2011, report, he indicates when Newsome appeared at the emergency room on January 14, 2010, he presented with a history of fever and the same chronic low back pain. At that time, his chest x-ray revealed pneumonia. Newsome was being followed for back pain on a regular basis and there was no indication for an emergency room visit. His fever was secondary to pneumonia; thus, the emergency room visit had no relationship to his low back problems.

With respect to the February 17, 2010, visit, Dr. Travis noted Newsome had been under the established care of a physician for which he had been prescribed multiple drugs. The MRI on that same date revealed no change from the previous MRI as it showed mild degenerative bulges at L4-5 and L5-S1 when compared with the November 26, 2007, MRI. There was no history of bowel or bladder dysfunction and no evidence of *cauda equina* syndrome. Therefore, he concluded nothing would appear to be of an emergent nature that would require a visit to the emergency room since Newsome was being maintained on significant opioids by a physician. Thus, he opined there was no indication anything had changed to require an emergency room visit.

Concerning the February 27, 2010, visit to Pikeville Medical Center, Dr. Travis noted there was no evidence of bowel or bladder dysfunction. Although Newsome claimed to have a fever of 105.2 degrees, his temperature at the emergency room was 100.3 degrees. He stated the emergency room physician had no way of knowing whether an accurate temperature was taken at home. Although it was appropriate to obtain an MRI with a history of a 105 degree temperature to rule out discitis and epidural abscess, he noted the MRI was normal. Further, even if discitis or an epidural abscess had been found, the MRI had no

relationship to the 2005 and 2006 injuries. Therefore, the visit was not reasonable, necessary, and related to the previous lumbar sprain and strain.

In a January 30, 2012, letter, Dr. Travis again confirmed that after reviewing extensive medical records, it was his opinion the three emergency room visits in January and February were neither reasonable nor necessary. Newsome had no objective findings and upon review of the MRIs, Dr. Travis found no evidence of neural foramen or nerve root compromise on the left which one could incriminate as the cause of either low back or left lower extremity pain. He believed Newsome exhibited significant symptom magnification. Dr. Travis also addressed the emergency room visit to McDowell ARH on February 21, 2011. He indicated although the records from that specific emergency room visit were not sent, he assumed they were for the same complaints of low back pain for which Newsome had made previous emergency room visits which were unnecessary. He concluded there was no indication for further emergency room visits as it relates to the low back injuries of 2005 and 2006.

In his February 26, 2010, letter, Dr. Wolens stated on January 14, 2010, Newsome presented with a several-day history of fever and low back pain. However,

the examination revealed the presence of bibasilar rales. Newsome was given parenteral opioids for low back pain and parenteral antibiotics for his pneumonia. Dr. Wolens did not consider the emergency room evaluation to be the result of low back pain but instead due to pneumonia. He stated individuals with febrile infectious disease develop musculoskeletal pain which was very common in individuals who have influenza. For individuals who have a pre-existing musculoskeletal complaint, a febrile infectious disease will worsen that complaint. However, worsening of a mechanical low back pain would not require emergency department management.

In a March 4, 2010, letter, Dr. Wolens addressed Newsome's February 17, 2010, visit to the Pikeville Medical Center. Dr. Wolens stated he did not consider the emergency room the appropriate point of contact for chronic lumbar pain. Newsome was already being treated with potent opioids and under established physician care. Thus, there was no qualitative change in Newsome's condition to warrant emergency management.

In Dr. Wolen's March 26, 2010, letter, he discussed Newsome's visit to the emergency room on February 27, 2010, and the February 17, 2010, MRI. After discussing the contents of the February 27, 2010, records, Dr. Wolens

stated the emergency department evaluation was not necessarily for the treatment of Newsome's chronic low back pain as the emergency room was not an appropriate point of care for his condition. Furthermore, it was not clear whether the low back pain is truly what brought Newsome to the emergency department. He noted the history given by Newsome was that he experienced fever at home. Dr. Wolens also noted it was reported that Newsome was experiencing jerking motions although it was not reported where the motions were located. Even if the motions were in the lower extremity, they would have no association with a lumbar strain as Newsome has never had any evidence of neurological pathology. Further, the lumbar radiculopathy would not manifest as recurring episodes of jerking.

Regarding the February 17, 2010, MRI in question, Dr. Wolens indicated the MRI was indicated in order to deal with potential spinal infection, but it was inappropriate to consider Newsome to have a potential spinal infection. However, the spinal infection would have no relationship to the lumbar strain of 2006. Therefore, although clinically appropriate, the MRI was not related to the event of February 13, 2006. The ALJ relied upon the opinions of Drs. Wolens and Travis in resolving the medical fee disputes concerning the four emergency room visits and the

February 17, 2010, MRI. Since their opinions constitute substantial evidence, the ALJ's decision regarding these medical disputes must be affirmed.

Finally, the ALJ's denial of reimbursement for mileage and out-of-pocket expenses incurred for nine visits to the Commonwealth Quality Healthcare is supported by substantial evidence. In his deposition, Dr. Travis stated the treatment Newsome received at the pain clinic was not reasonable and necessary. Dr. Travis expressed concern over the extensive medication Newsome was receiving. As noted by the ALJ, his opinion is reinforced by Newsome's physician, Dr. Nazar who indicated he was uncomfortable with the amount of medication Newsome was currently taking. Consequently, we believe the testimony of Dr. Travis and the opinions expressed in his reports regarding the need for further treatment as well as Dr. Nazar's statement constitute substantial evidence supporting the ALJ's decision that the treatment at Commonwealth Quality Healthcare was not reasonable and necessary. Therefore, Newsome is not entitled to mileage and his out-of-pocket expenses relating to the pain management treatment received from Commonwealth Quality Healthcare.

Accordingly, those portions of the February 10, 2014, Opinion and Order and the March 19, 2014, Order

ruling on the petition for reconsideration finding the surgery performed by Dr. Densler is not reasonable, necessary, or causally related to the 2005 and 2006 work injury are **AFFIRMED**. Similarly, the ALJ's determination Newsome did not have an increase in occupational disability due to a worsening low back condition and that the Cabinet is not responsible for the adverse effects of the surgery performed by Dr. Densler and any additional impairment rating attributable to that surgery is also **AFFIRMED**. The ALJ's determination the three visits to the emergency room at Pikeville Medical Center, the one visit to the emergency room at McDowell ARH, and the MRI of February 17, 2010, performed at Pikeville Medical Center are not reasonable and necessary treatment of the 2005 and 2006 work injury is **AFFIRMED**. However, those portions of the February 10, 2014, Opinion and Order and the March 19, 2014, Order ruling on the petition for reconsideration denying Newsome's claim for additional benefits due to a worsened left knee condition are **VACATED**. This claim is **REMANDED** to the ALJ as designated by the Chief Administrative Law Judge for entry of an amended opinion determining whether Newsome's work-related left knee condition has worsened and whether Newsome is entitled to increased permanent income benefits.

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