

OPINION ENTERED: MAY 3, 2013

CLAIM NO. 201197560

MARIAN HOME

PETITIONER/CROSS-RESPONDENT

VS.

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

MARGARET SMITH,
UNIVERSITY OF LOUISVILLE HOSPITAL
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

RESPONDENT/CROSS-PETITIONER

RESPONDENTS

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

* * * * *

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

ALVEY, Chairman. Marian Home appeals and Margaret Smith ("Smith") cross-appeals from the Opinion and Order rendered August 27, 2012 by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), and from the October 4, 2012 and December 3, 2012 orders ruling on petitions for reconsideration. Marian Home argues the ALJ erred by ordering it responsible for

Smith's past medical expenses after the claim was dismissed with prejudice on the issue of work-relatedness/causation. Smith argues the ALJ erred in finding lack of causation, lack of a permanent injury, and she was not entitled to future medical treatment.

Because we find the ALJ's findings regarding the extent of Smith's injury are supported by substantial evidence, we affirm in part. Because we find the ALJ's orders regarding the compensability of medical expenses are insufficient, we vacate in part and remand.

Smith testified by deposition on August 16, 2011 and at the hearing held June 26, 2012. Smith began working as a Certified Medical Technician ("CMT") at Marian Home in 2007. On June 18, 2009, she went to get a flashlight due to a power outage and tripped at the bottom of the stairs. She fell, hitting her head, and sustained a cut above her eye. Smith indicated her head felt "heavy" and initially could not stand. Smith was taken to Norton's Hospital where x-rays of her face and a CT scan of her head were obtained.

Smith was not scheduled to work the next day, but returned the following day. She continued to work for Marian Home until it merged with Sacred Heart in January 2010. Smith worked one day for Sacred Heart but quit because she was scheduled to work twelve hour shifts.

Smith acknowledged she received no treatment from June 19, 2009 until March 2010, when she experienced two dizzy spells. She stated her left ear began bothering her in late 2009 or early 2010. She saw Dr. Punita Halder but did not mention the fall at work. She sought treatment at East Broadway Health Center when her dizziness returned in June 2010. An MRI of her brain performed at the University of Louisville on July 8, 2010 was interpreted as normal, however she continued to experience dizzy spells. Meniere's disease was suspected, and an ENT at the University of Louisville planned to refer her to a neurologist.

Smith testified she is unable to understand what people are saying and gets confused. She developed gradual buzzing in her ears. She indicates she has trouble hearing people speaking on the phone. Smith's bills for the ambulance, treatment at the emergency room and at the University of Louisville have not been paid. Smith indicated she did not miss any work because of the accident and continued to perform her usual job. She worked briefly for Sacred Heart after the merger with Marian Home and left because she was dissatisfied with the schedule. She then worked for Park Terrace as a CMT until November 2011, when she ceased work for reasons unrelated to her injury.

Records from the Louisville Metro EMS reflect, upon arrival, Smith was seated in a chair at the base of a stairway. She complained of head, left eye and cheek pain and had a small laceration, approximately one-quarter of an inch in length. Smith was transported to Norton Suburban Hospital.

Records from Norton Suburban Hospital indicate Smith sustained injuries to her head and face on June 18, 2009. Smith lacerated her left eyelid. X-rays of her facial bones revealed no evidence of fractures. A CT scan of Smith's head revealed no acute intracranial abnormality. Smith was diagnosed with a head contusion and facial laceration. She was prescribed medication and discharged.

Records from Dr. Halder at Norton Primary Care indicate Smith was seen on March 30, 2010 for complaints of dizziness during the prior week. Smith indicated she felt like the room was spinning, especially when she changed positions. Smith reported she restarted her iron pills which helped her anemia.

Smith treated at Family Health Centers on June 21, 2010 for complaints of dizziness beginning in March 2010 which resolved after two to three episodes. She reported a fall at work in June 2009 and decreased acuity of hearing in the left ear. She reported problems with sound acuity. On July

15, 2010, Smith reporting intermittent dizziness and nausea which stopped in May but later recurred. She reported decreased hearing in the left ear and vertigo with movement.

Smith was seen by a behavioral health consultant at Family Health Centers on November 22, 2010, who noted the diagnoses of Meniere's disease. A December 8, 2010 note reflects Smith was seen by an ENT on November 24, 2010 and was thought to have Meniere's disease. She was scheduled for a hearing test.

Smith was evaluated at University Physician's Associates for complaints of ringing in her ears, vertigo and nervousness which occurred off and on for a year, and was diagnosed with vertigo. An audiogram performed on December 15, 2010 revealed Smith had severe to moderate hearing loss in her left ear, but the right ear was normal. A January 12, 2011 note indicates Smith stated she fell on the left side of her head a year prior. According to the report, a traumatic contusion could not be ruled out.

Dr. Gregory Perri performed an independent medical evaluation ("IME") on July 28, 2011. He noted medical records documented complaints of dizziness beginning in 1990 and the history of papilledema (swelling of the head of the optic nerve) with no definitive abnormalities. He also reviewed medical records subsequent to the fall. He noted

Smith reported being injured on June 18, 2009 when she fell while descending stairs. He noted she did not lose consciousness. A CT scan of the head was negative. Smith reported her dizzy spells began in March 2010, and she began experiencing nausea, vomiting and extreme motion sickness in June 2010. Neuropsychological testing revealed a mild-moderate level of impairment in the area of auditory memory. He noted Smith displayed a significant level of depressive symptoms. He noted Smith's treating physicians had not completely ruled out a diagnosis of Meniere's disease based on her presenting symptomatology. He stated it appeared the primary source of Smith's distress was attributable to either her work-related injury or a separate neurological condition. In the event she was determined to suffer from Meniere's disease, he stated it appeared the source of her current symptoms could be attributed to an interaction between this condition, and consequences associated with her work-related injury.

Using the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") Dr. Perri assessed an 8% impairment rating. He recommended additional treatment to determine whether she sustained a mild traumatic brain injury during her accident and recommended referral to a neurologist.

In an undated letter, Dr. Perri pointed out inaccuracies in Dr. Robert Granacher, Jr.'s findings and assessment. Dr. Perri stated Dr. Granacher was not qualified to administer testing or interpret neuropsychological data.

Dr. Granacher performed a neuropsychiatric examination on September 19, 2011. He received a history of the work injury and noted Smith had a contusion to her head and a laceration to her face. Dr. Granacher reviewed medical records from Norton Suburban Hospital where her superficial wound was closed with adhesive. He noted a CT scan of her head was obtained showing no acute intracranial abnormality and no evidence of bleeding or other acute changes. He further noted an MRI of Smith's brain revealed no abnormal findings. Dr. Granacher noted Smith complained of depression, fuzziness or confusion, intermittent headaches, difficulty falling asleep, and waking frequently throughout the night. He noted Smith had previously experienced issues with anemia, hypertension, and gastrointestinal complaints.

Dr. Granacher stated Smith had no evidence of traumatic brain injury or any cognitive abnormality due to the alleged head injury on June 18, 2009. He also stated there was no evidence of a psychiatric condition on examination or functional impairment. Using the AMA Guides, Second and

Fifth Editions, Dr. Granacher assessed a 0% impairment rating due to the alleged work injury. He stated Smith required no psychiatric restrictions and had the mental capacity to engage in any work for which she had training, education or experience. Dr. Granacher noted Meniere's disease was not a post-traumatic condition.

On October 31, 2011, Dr. Granacher noted he had reviewed medical records from Dr. Perri, Dr. Raleigh Jones, and Jennifer Shinn, Ph.D. He noted Dr. Perri was unable to determine whether Smith had a brain injury due to his lack of neuropsychological skills and recommended referral for a neuropsychological assessment. He did not agree with the 8% impairment rating assessed by Dr. Perri. He noted there was no evidence of Smith having difficulty performing her duties nor was there evidence of impairment in her activities of daily living. He noted without evidence of occupational and daily living impairment, a mental impairment rating could not be assigned.

Dr. Granacher testified by deposition on December 21, 2011, stating Dr. Perri, by his own admission, did not have the skills to measure memory, language, and attention which are important regarding brain injury. He stated a brain injury is always worse at the moment of the injury and a few hours thereafter. An individual would be at his or her

worst soon after the injury and would progressively improve over time. He noted Smith had full faculties and memory. He noted this almost entirely precluded any possibility of a brain injury. He noted there was no objective evidence on physical examination, laboratory testing, or radiology of any form of brain injury. He noted she had a head injury which was not the same as having a brain injury. He noted Smith had a finding of calcium deposits in her brain in the basal ganglia, unrelated to the work injury.

Dr. Granacher noted Smith's vertigo was due to an inner ear, not a brain condition, which did not correlate with her injury. He noted the first documentation of vertigo was thirteen months after the original injury. He noted Dr. Jones indicated trauma could cause central neural hearing loss, but it would be apparent immediately after the accident. There was no evidence Smith had any hearing loss complaints in the first nine months following the accident. He noted Dr. Jones indicated Smith had a hearing loss, but did not think it could be related to the fall. He noted Dr. Alt, a board certified neurologist, stated the neurological exam was normal and noted Smith had a mild head injury. Dr. Alt further stated Smith could benefit with assessment by a cognitive rehabilitation center. He stated the cognitive examination he administered did not show a cognitive

deficit. He also reviewed Smith's CT and MRI images and stated she did not have a brain injury.

Drs. Jones and Shinn, performed a university evaluation on September 23, 2011. Smith reported a history of falling down steps and hitting her head on the door or wall. Comprehensive audiometry and tympanometry/reflex tests were performed. Dr. Jones opined Smith had no hearing loss compatible with hazardous noise exposure, nor did she have hearing loss due to a single incident of trauma. Using the AMA Guides, Dr. Jones assessed a 4% whole person functional impairment rating, unrelated to her accident. Dr. Jones noted trauma can cause a sensorineural hearing loss, but it would be apparent immediately after the accident and would not develop six months later and gradually worsen. He believed Smith had definite hearing loss, unrelated to her fall.

Michael G. Alt, D.O., evaluated Smith on November 3, 2011. He noted a history of a fall at work with Smith hitting her head. Smith reported swelling in her scalp and a laceration to her left eye that required an emergency room evaluation. He diagnosed mild head injury with possible cognitive impairment. He noted Smith seemed to be doing fairly well. Dr. Alt opined Smith would benefit from

assessment by a cognitive rehabilitation center to determine if she could benefit from further therapy.

Dr. Walter Olson and Dr. Jignash Shah, with Neurology at the University of Louisville Health Care, saw Smith on January 12, 2012. Smith gave a history of dizziness, headache and confusion after she fell. The doctors' assessment was vertigo and chronic post-traumatic headache. Smith was scheduled for a vestibular evaluation and advised to take ginger every day. On April 12, 2012, they noted ginger tablets had helped Smith. They opined Smith seemed to have psychogenic reasons for her symptoms.

Smith filed the neuropsychological assessment summary prepared for Dr. Granacher by Amy Frazier, M.S. and Dr. Martha Wetter, Ph.D., A.B.A.P. Dr. Wetter found Smith exhibited severely impaired naming ability. Verbal knowledge and conceptualization abilities and immediate memory functions were borderline impaired. Verbal association, non-dominant sensory perceptual ability and overall sensory perceptual ability were mildly impaired. All other areas of cognitive ability varied from below average to above average range. Smith's cognitive effort tests indicated the assessment may be regarded as an accurate representation of her current cognitive functioning.

Smith filed documents concerning unpaid medical expenses including a statement related to a July 8, 2010 MRI of the brain. She also filed a number of Form 114's concerning treatment, prescriptions and mileage from March 2010 through November 2011.

The ALJ found Smith sustained a contusion and a laceration to her eyelid as a result of the work accident. The ALJ noted Smith did not lose consciousness. A CT scan of her brain performed at the emergency room was entirely normal. The ALJ further noted Smith had no complaints of headache at that time and no symptoms for the next nine months. Relying on Dr. Jones' opinion, the ALJ dismissed the hearing loss claim.

In the August 27, 2012 Opinion and Order, the ALJ made the following findings relevant to this appeal:

The next question to be considered is the plaintiff's claim for a head injury and resulting psychological /depression sequela. The Plaintiff presented testimony from Dr. Perri, a psychologist, and Dr. Alt, a neurologist. Dr. Alt found a perfectly normal neurological exam, but said Ms. Smith could benefit from an assessment by a cognitive rehabilitation center. Dr. Granacher, a neuropsychiatrist, working in conjunction with Martha Wetter, psychologist, performed neuropsychological testing which, according to Dr. Granacher, did not show any cognitive deficit. Dr. Granacher opined that Ms. Smith is as good now as

she was prior to the trauma sustained on June 18, 2009. Although defendant [sic] criticizes Dr. Granacher for excluding from his report some conclusions reached by Dr. Wetter, the ALJ would note that Dr. Granacher is the most eminently qualified who provided evidence on the subject of a traumatic brain injury, and that Dr. Wetter was working for and under Dr. Granacher. The ALJ finds no basis on which to disregard Dr. Granacher's findings and conclusions. Accordingly, the ALJ can find no evidence of traumatic brain injury or cognitive abnormality due to the incident which occurred on June 18, 2009.

It is noted that Ms. Smith missed no time off from work following the fall on June 18, 2009. She was scheduled to be off work the day following, but on the next day she returned to work and continued to work regularly until January, 2010, when Marian Home merged with Sacred Heart and ceased to exist. Ms. Smith then worked for Sacred Heart for one day, but quit that job because she did not like the 12-hour shifts. She promptly obtained a job as a CMT at Park Terrace in February, 2010 and worked for at least a month or more before she started complaining of dizzy spells.

Plaintiff has the burden of proof and risk of persuasion as to every element of the claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). In the instant case, the plaintiff has proven neither a compensable hearing loss nor a compensable brain injury. The most persuasive and compelling evidence in this claim supports the defendant's position. The Plaintiff's claim for indemnity benefits and for medical treatment is denied.

. . . .

The only evidence of injury was the small laceration to the eyelid and a bruise. The Plaintiff received adequate medical treatment for same. There is no indication and no evidence of any medical treatment which would be required in the future.

On September 13, 2012, Smith filed a petition for reconsideration arguing she was entitled to reasonable and necessary medical treatment for the stipulated work-related injury. She noted medical expenses were listed as a contested issue at the benefit review conference, but were not addressed by the ALJ. Smith requested a finding regarding the employer's liability for medical expenses and treatment rendered "immediately following the undisputed work injury." Smith identified various findings by Dr. Wetter, which she asserted were not adequately addressed in Dr. Granacher's report. Smith requested additional findings regarding the qualifications of Dr. Perri and Dr. Wetter for neuropsychological evaluation and interpretation as compared to Dr. Granacher's qualifications. Smith argued Dr. Wetter's testing revealed a decline in her abilities following the work injury.

The ALJ issued the order on reconsideration on October 4, 2012 correcting a typographical error and amending the opinion to include the following:

Ms. Smith shall recover from the defendant-employer and/or its insurance carrier for the medical treatment which has been rendered to her in the past, including reimbursement for unpaid out-of-pocket related expenses and mileage reimbursement.

On October 15, 2012, Marian Home filed a petition for reconsideration of the October 4, 2012 order. Marian Home noted the ALJ, in the opinion and order, dismissed the claims for hearing loss, traumatic brain injury, and psychological sequela, finding only a small laceration and bruise resulted from the accident. Marian Home argued no further order was necessary regarding medical benefits since it had already paid for the treatment rendered following the accident for the laceration and bruise. Marian Home further argued the ALJ's order went well beyond the relief requested by Smith in her petition for reconsideration since she only requested an award of treatment rendered "immediately following the undisputed work injury." Marian Home noted the order could be construed as requiring it to pay for treatment by Dr. Halder, the University of Louisville, Dr. Olson and Dr. Alt rendered six months or more following the work injury.

In his December 3, 2012 order, the ALJ denied Marian Home's petition for reconsideration. After repeating the amendment made in the previous order, the ALJ's order provided as follows:

This four line addition to the Opinion and Order means what it says. The Defendant's filing of a second motion for reconsideration, attempting to limit the meaning of the four line additional paragraph, is misplaced and without basis. First, as noted above, the regulation limits and precludes the filing of multiple motions for reconsideration. Thus, the ALJ no longer has jurisdiction of this claim and no longer has authority to make amendments to or changes in the decision. However, the ALJ would simply comment that in cases where an obvious injurious event occurred (the falling down steps and laceration of an eyelid), the statute, KRS 342.020, requires the defendant-employer to pay all reasonable and necessary medical expenses. Diagnostic testing to determine if a head injury occurred would be an includable expense. The Defendant cannot argue that an appropriate diagnostic test is non-compensable simply because it yields negative results!

On appeal, Marian Home argues the ALJ erred in ordering it to pay Smith's past medical expenses after dismissing the claim with prejudice on the issue of causation/work-relatedness. Marian Home concedes Smith is entitled to treatment rendered immediately after the work injury. However, it notes the work injury was determined to have

produced only a minor laceration, Smith was able to function without difficulty, and there were no symptoms until nine months following the accident. Marian Home asserts it paid \$2,414.82 for treatment at the emergency room for the laceration and bruise and therefore an order directing payment of any other medical expenses is unnecessary and inappropriate. Marian Home argues the amendment regarding medical expenses is contrary to the ALJ's determination in the opinion that Smith had already received adequate treatment for the effects of the work injury. Marian Home again argues the amended provision regarding medical expenses goes beyond Smith's request in the petition for reconsideration.

For her cross-appeal, Smith argues the ALJ erred in finding the cognitive impairment and associated depression were not work-related. She argues the ALJ erred in relying on the opinion of Dr. Granacher, which she contends was based on inaccuracies and does not constitute substantial evidence. Smith again identifies portions of Dr. Wetter's testing which demonstrate continued cognitive sequela following the injury. She contends the evidence compels a finding she sustained a permanent impairment due to her work-related injury.

Smith also argues the evidence compels a finding she is entitled to future medical treatment. She notes Drs. Alt and Olson diagnosed a post-traumatic head injury and Dr. Olson diagnosed post-traumatic headaches. She further notes Dr. Alt, Olson and Perri all recommended additional medical treatment and testing.

As the claimant in a workers' compensation proceeding, Smith had the burden of proving each of the essential elements of her cause of action, including causation/work-relatedness. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Smith was unsuccessful in her 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 they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the

evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence supporting a different outcome than 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).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by

substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We find the evidence does not compel a finding Smith sustained any injury beyond the laceration to her eyelid and bruise. Smith's arguments on appeal are essentially an attempt to have the Board re-weigh the evidence and substitute its opinion for that of the ALJ. We may not do so. The ALJ, as was his prerogative, found Dr. Granacher most persuasive regarding whether the work accident produced a traumatic brain injury. Dr. Granacher stated he could find no evidence of a traumatic brain injury or cognitive abnormality related to the work incident. He explained a traumatic brain injury is always worse at the moment of injury and would produce symptoms within days of the injury. Further, he stated vertigo is an inner ear condition and not a brain condition, and it did not correlate with her injury. Although Dr. Granacher may not have discussed all of Dr. Wetter's findings, as noted by the ALJ, he reviewed testing performed at his request. Dr. Granacher reviewed Dr. Wetter's report in preparing his own report.

With regard to the hearing loss claim, Dr. Jones stated Smith's hearing loss was not attributable to the work injury. He observed trauma could cause central neural

hearing loss, but only if it appeared immediately after the accident. His report alone constitutes sufficient evidence to support dismissal of the hearing loss claim.

We conclude it was reasonable for the ALJ to find Smith sustained only a laceration and bruise, and the ALJ properly dismissed the claims for hearing loss, traumatic brain injury and any psychological condition resulting from the work injury. Since the ALJ's finding Smith's injury was limited to the laceration and bruise is supported by substantial evidence, the ALJ did not err in finding she was not entitled to future medical benefits for the alleged brain injury and psychological condition. There is no evidence indicating Smith has an ongoing need for treatment related to the laceration and bruise.

We therefore find it necessary to vacate and remand for additional findings regarding Marian Home's liability for medical expenses. The ALJ's orders on reconsideration are not sufficient to advise the parties of the specific expenses for which Marian Home is responsible. Although the ALJ stated diagnostic testing to determine if a head injury occurred would be an includable expense, he did not specify which testing he found compensable. While the CT scan at the emergency room would be reasonable, it is not readily apparent an MRI in July 2010, more than a year following the

injury, is causally connected to or reasonable testing related to treatment of the injury. Additionally, much of the requested reimbursement is related to treatment rendered well after the diagnostic testing was performed. On remand, the ALJ shall make specific findings regarding the contested medical expenses.

Accordingly, the Opinion and Order rendered August 27, 2012 by Hon. Edward D. Hays, Administrative Law Judge, and the October 4, 2012 and December 3, 2012 orders ruling on petitions for reconsideration are **AFFIRMED IN PART, VACATED IN PART** and this matter is **REMANDED** for additional findings regarding the compensability of the disputed medical expenses.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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