

OPINION ENTERED: DECEMBER 21, 2012

CLAIM NO. 200800094

MARILYN GARDNER

PETITIONER

VS.

**APPEAL FROM HON. RICHARD M. JOINER,  
ADMINISTRATIVE LAW JUDGE**

WESTERN KENTUCKY UNIVERSITY,  
DR. HORACE WATSON, PARTY IN INTEREST  
and HON. RICHARD M. JOINER,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**SMITH, Member.** Marilyn Gardner ("Gardner"), *pro se*, appeals from the April 25, 2012 Opinion, Order and Award rendered by Hon. Richard M. Joiner, Administrative Law Judge ("ALJ"), finding the recommended medical treatment of her lumbar spine was not causally related to her January 24, 2006 injury while in the employment of Western Kentucky University ("WKU"). On appeal, Gardner argues the ALJ erred

in allowing the motion to reopen since WKU did not exhaust the utilization review ("UR") process. Gardner also argues the decision is erroneous on the basis of the reliable, probative and material evidence contained in the record. We disagree and affirm.

Gardner filed a Form 101, Application for Resolution of Injury Claim, on January 23, 2008, describing the work injury as follows:

When exiting the office building, the handicapped exit door closed in on the plaintiff, causing her to fall forward. The temporary surgical rod that was anchoring her second metatarsal in place following an unrelated surgery was snapped in two [sic]. A piece of said rod cannot be removed without invasive surgery as it is lodged in the metatarsal head.

Gardner alleged injuries to her second metatarsal and metatarsal head, as well as a back strain secondary to gait impairment as a result of the January 24, 2006 incident while employed by WKU.

Gardner and WKU executed a Form 110, Agreement as to Compensation and Order Approving Settlement, on February 8, 2011, resolving all issues. The "Medical Information" section revealed Gardner had undergone surgery, the nature which was as follows:

Right second hammertow [sic] correction with revision proximal interphalangeal

(PIP) joint arthrodesis; right second metatarsalsophalangeal joint capsulotomy with extensor tendon lengthening, right second toe flexor-to-extensor transfer (Girdlestone/Taylor) with pinning.

The diagnosis was "Right hammertoe correction, PIP arthrodesis, MTP release and FTE." The agreement did not contain a waiver or buyout of future medical benefits. However, it noted "Defendant/Employer reserves the right to challenge any further claims for income and medical bills on the basis that plaintiff has no permanent impairment related to her work injury."

WKU filed a motion to reopen and a Form 112, Medical Fee Dispute, on May 23, 2011. WKU described the nature of the dispute as follows:

Plaintiff had a non-work related surgery for hammertoe, which was aggravated by an alleged work-related incident. Plaintiff has now been recommended for treatment for her low back. WKU contests this treatment on the basis that the treatment is not reatled [sic] to the temporary aggravation of a non-work related foot condition allegedly caused by an incident at work in 2006.

WKU noted Dr. Horace Watson had ordered a bone mineral density study, vitamin D, and physical therapy, which were denied by UR on May 2, 2011. WKU supported the motion to reopen with the report of Dr. Daniel Wolens, who determined

Gardner's current condition was not associated with the injury of January 24, 2006.

Gardner testified by deposition on September 28, 2011 and at the hearing held March 20, 2012. Born September 22, 1961, she has a Ph.D. in Health Behavior. She stated she was leaving a building through a handicapped exit on January 24, 2006 when a heavy door shut on her, catching the tip of her crutch. To keep from falling, she had to put her foot down and snapped a rod in her foot. Gardner had undergone surgery on her foot earlier in the month to repair a hammertoe. She had a Morton's neuroma in her right foot the previous summer. She testified she had a second workplace injury in late September or early October 2006 when an eight foot long panel fell on her foot, breaking the same bone where the rod was lodged.

Gardner testified her foot was in a cast from the October 2006 event when she "threw her back out" in November 2006, while walking through the Boston airport traveling to a work-related conference. Gardner testified she was either on crutches, in a cast, boot, or surgical shoe for approximately seven months following the first work injury. She stated her foot did not heal properly and continued to swell. She stated the rod was inserted to stabilize the bone as it healed. Because the bone did not stabilize, her

toe "flipped up" and was extraordinarily painful when she walked. Surgery was performed at Vanderbilt Medical Center in 2008, which overcorrected the condition and her toe droops below the level of her other toes.

Gardner testified she continues to experience problems with her back. She stated physical therapy and back massage had been ordered multiple times by multiple physicians but has been denied by the workers' compensation carrier. She received and personally paid for massage treatments at Bluegrass Outpatient.

WKU introduced the medical report and deposition testimony of Dr. W. Blake Garside, who evaluated Gardner on March 20, 2007. In his deposition taken January 11, 2012, Dr. Gardner opined that the majority of Gardner's foot pain was secondary to her recurrent hammertoe deformity. He indicated this was unrelated to her October 3, 2006 work-related chip fracture of the second metatarsal head which had healed.

Dr. Garside stated Gardner's low back complaints could be secondary to her altered gait from her ongoing metatarsalgia. Her upper back complaints were unrelated to the work injury. Dr. Garside recommended a low back program including abdominal strengthening and postural mechanics. He felt Gardner would benefit from custom orthotics to

normalize her gait as previously prescribed by the Vanderbilt foot clinic. Dr. Garside indicated Gardner had no evidence of ongoing radiculopathy from the October 3, 2006 work injury. He felt the majority of Gardner's symptoms were secondary to her recurrent second hammertoe deformity which predated and was unrelated to her October 3, 2006 work injury. Dr. Garside stated no further diagnostic studies were needed for the low back pain which appeared mechanical in nature and was not associated with radiculopathy.

In a June 1, 2007 letter, Dr. Garside stated Gardner had reached maximum medical improvement ("MMI") from her October 3, 2006 injury as of March 20, 2007. He opined Gardner's ongoing pain was related to her January 24, 2006 injury in which she stepped down and broke the pin. This led to a recurrence of her hammertoe and subsequent metatarsalgia. He felt her low back complaints could be secondary to an altered gait from ongoing metatarsalgia. They could also have been aggravated by the use of a cast for her October 3, 2006 injury. Dr. Garside stated, with regard to her January 24, 2006 injury, Gardner needed custom orthotics. Dr. Garside did not see any relationship between recommended massages and the January 2006 incident.

Dr. A. Brian Thomson examined Gardner on March 1, 2007 for a second opinion. Dr. Thomson stated Gardner would benefit from total contact orthotics with second and third metatarsal relief. He noted Gardner continues to complain of pain over the second and third metatarsal heads, plantar aspects. He also noted she had a residual second hammertoe. Dr. Thomson opined her second hammertoe deformity was clearly related to the failure of fixation post-operatively from the work-related injury in January 2006. He noted she had received orthotics he prescribed for her which improved her pain only mildly. Dr. Thomson's impression was right second and third metatarsalgia after previous forefoot surgery with residual MP hyperextension and retained hardware in the second metatarsal head likely non-intra-articular, status post right hallux valgus correction, right gastrocnemius muscular contracture, and low back pain.

Dr. Daniel Wolens performed a medical records review on May 2, 2011, to determine whether additional physical therapy was necessary in relation to the workers' compensation claim for the January 24, 2006 incident. Dr. Wolens stated Gardner had a pre-existing active condition at the time of the January 24, 2006 event. He noted the second toe was not the only toe that had been problematic. Gardner's condition was aggravated as a result of the

January 24, 2006 event. Dr. Wolens stated any effect of that aggravation was surgically corrected on July 10, 2008. Therefore, he stated any continued gait disturbance as a result of the foot was no longer related to the event of January 24, 2006. He opined Gardner's condition was also complicated by her myasthenia gravis ("MG"), which can cause weakness of all muscle groups and further contribute to gait dysfunction. Dr. Wolens indicated the degree of her symptoms was not altogether clear since he had no records specific to her MG. Dr. Wolens opined nine physical therapy visits, to the exclusion of passive modalities, would be appropriate. However, he indicated they would no longer be causally associated with the January 24, 2006 event.

In a June 6, 2011 letter, Dr. Amanda C. Peltier stated Gardner was her patient at Vanderbilt Medical Center. Dr. Peltier diagnosed MG, which she stated was not responsible for Gardner's gait impairments noted clinically by Dr. Thomson. Dr. Peltier noted Gardner's condition had deteriorated since January 24, 2006. She stated MG can be exacerbated by injury and physical stressors. Dr. Peltier opined Gardner's gait impairment was the result of having a toe on her right foot that did not bend and was painful. Dr. Peltier noted Gardner walks on the outside border of her right foot to avoid pain.

In a June 6, 2011 letter, Dr. Watson stated he prescribed physical therapy for Gardner. He stated the treatment was medically necessary and reasonable for her continued back pain and was directly related to her 2006 work injury.

In his April 25, 2012 Opinion, Order and Award, the ALJ found as follows:

When there is an injury, the employer is charged with providing necessary medical care. The medical care must first be treatment for the effects of the injury. The burden of establishing that the treatment is for the effects of the injury remains on the plaintiff/employee throughout the proceedings. The burden of establishing that the treatment is not reasonable for the plaintiff/employee's condition is on the employer after an award.

It is Ms. Gardener's [sic] obligation to establish that her back condition is a result of the subject injury of January 24, 2006. I am not satisfied that she has. I find the review of records by Dr. Wolens reasoned and persuasive. Based on that report, I conclude that the current problems with Ms. Gardner's low back have no relationship to the incident of January 24, 2006. Although some treatment was appropriate for a gait disturbance resulting from the effects of the injury of January 24, 2006, the underlying problem has been corrected. I find no reason for an ongoing treatment for the low back as it relates to the claim of injury on January 24, 2006.

Gardner filed a petition for reconsideration on May 24, 2012, stating she had not received the Opinion, Order and Award until May 22, 2012. She took issue with Dr. Wolens' conclusions and the ALJ's reliance on his report.

Gardner also filed her notice of appeal on May 24, 2012. By order dated June 19, 2012, the Board placed the appeal in abeyance and remanded this matter to the ALJ for ruling on Gardner's petition for reconsideration.

The ALJ issued an order denying Gardner's petition for reconsideration on June 22, 2012. The ALJ indicated he found no patent errors appearing on the face of the Opinion, Order and Award and Gardner was seeking a re-weighing of the evidence.

On appeal, Gardner argues the ALJ erred in allowing the motion to reopen since WKU did not exhaust the UR process. Gardner notes the UR process is designed for review of compensable treatments for a determination of whether the treatment is reasonable and necessary. WKU initiated the process and, after the initial determination, did not complete the UR process. Rather, it used the UR report of Dr. Wolens to deny compensability.

Gardner notes the records she presented and her testimony provide ample reliable, probative and material evidence that she continues to retain a portion of the

broken surgical pin in her second metatarsal head, has valgus deviation, limited range of motion, and continues to suffer ongoing metatarsalgia. She concedes that technically her hammertoe has been corrected. However, she contends her foot remains deformed as a result of the January 2006 injury despite surgical intervention on July 10, 2008.

Gardner contends the ALJ erred by basing his decision on the initial UR denial that was written from incomplete records, included conjecture, and did not provide evidence of substantial probative value to support the ALJ's decision. Further, Gardner contends the ALJ acted without or in excess of his powers by denying "compelling live evidence" of her deformity. She states no reasonable person who saw her foot could conclude the underlying problem had been corrected. She notes Dr. Wolens stated gait disturbances can cause mechanical low back pain. Gardner also argues the ALJ's decision was clearly erroneous on the basis of the reliable, probative, and material evidence by failing to apply the regulations regarding time limits for proof taking, failing to rule on a motion to extend proof taking but then allowing WKU to extend proof taking, failing to rule on any of her motions, and failing to provide a scheduling order. Gardner contends this gave an unfair advantage to WKU.

Gardner asserts as the movant, WKU bore the burden of proof on reopening. She objects to the ALJ's statement that it was her obligation to establish her back condition was the result of the January 24, 2006 injury. Gardner notes the settlement agreement clearly identified back pain secondary to gait impairment as an injury related to the January 2006 injury. Gardner asserts WKU provided conjecture but no proof of alternative causes other than the initial UR decision that deprived her of due process. Gardner contends the ALJ's Opinion, Order and Award essentially overturned the entire settlement agreement, even though the foot impairment was not opposed by WKU. She notes the ALJ determined her foot was corrected and thus it cannot be permanently impaired as a result of the January 2006 workplace injury as noted in the settlement agreement. Gardner states logic dictates a foot cannot be both corrected and permanently impaired. She states this point could have been addressed in a UR appeal.

Gardner concludes that if UR had proceeded, it is unlikely the case would have been reopened. She contends that, in the absence of substantive evidence of an alternative cause of her back pain, there was no logical basis for the ALJ to deny the probability that her back pain was secondary to the gait impairment caused by her

permanently impaired foot. She states allowing the ALJ's decision to stand will jeopardize her ability to receive reasonable and necessary medical expenses for the cure and relief from the effects of her injury to her foot as well as her back. Thus, she asks the Board to reverse the ALJ's decision.

In a post-award medical fee dispute, the burden of proof to demonstrate the medical treatment is unreasonable or unnecessary is with the employer while the burden remains with the claimant concerning questions pertaining to work-relatedness or causation of the condition. See KRS 342.020; Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993); National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). Since Gardner was unsuccessful in demonstrating the need for the contested medical care for her current back pain is a result of her work-related injury, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as the fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993), Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

It is important to note no statement in a settlement agreement is binding in future actions. Beale v. Faultless Hardware, 837 S.W.2d 893 (Ky. 1992). The claimant did not litigate her initial claim to completion and the ALJ had not made a judicial determination in this matter on any issue including whether the injury was temporary or permanent. As such, the settlement agreement did not bind the parties on the issue of whether the January 24, 2006 work event produced a permanent impairment rating, thereby producing a permanent disability rating and a corresponding award for future medical benefits. See KRS 342.020(1); Max & Erma's v. Lane, 290 S.W.3d 695 (Ky. App. 2009). A settlement award is the product of a compromise. Therefore, the disability

or permanent impairment rating contained in the agreement may or may not be accurate. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999), Beale v. Faultless Hardware, *supra*, and Newberg v. Davis, 841 S.W.2d 164 (Ky. 1992), explain that the parties to a settlement are entitled to the benefit of their bargain and that KRS 342.125(7) prohibits any statement contained in a settlement agreement from being considered as an admission against interest if the claim is reopened. Additionally, the settlement agreement in this claim explicitly stated the agreement was made in compromise of a doubtful and disputed claim and the employer reserves the right to challenge any further claims for income or medical bills on the basis that Gardner had no permanent impairment related to her work injury.

803 KAR 25:010, Section 13(14) provides as follows regarding Benefit Review Conferences ("BRC"): "Only contested issues shall be the subject of further proceedings." The March 5, 2012 BRC order and memorandum only listed, and therefore properly preserved for the Board's review, an issue regarding whether the low back condition was the result of the January 24, 2006 injury and, if so, the extent. Although Gardner, on January 17, 2012, had filed a motion to continue the deposition of Dr. Garside at the employer's expense, she did not preserve any issue

concerning that deposition at the BRC. The ALJ addressed the issue properly preserved at the BRC. To the extent Gardner expresses concerns about matters other than the contested treatment for her low back condition, it is important to remember the ALJ's ruling is limited to the specific low back treatment that was the subject of the reopening.

Gardner had an opportunity to present evidence in support of her position and did submit evidence that could have supported a finding in her favor. However, we conclude the ALJ was well within his discretion in finding persuasive Dr. Wolens' opinion. The record contained conflicting medical opinions. The ALJ was free to choose which medical opinions he found more persuasive and merely pointing to other evidence in the record supporting a different outcome will not result in reversal on appeal. Unquestionably, Gardner suffered from metatarsalgia immediately prior to the work injury. Surgery had been performed to correct the hammertoe deformity on January 10, 2006, two weeks prior to the alleged work injury. Dr. Wolens opined a pre-existing condition was aggravated as a result of the event on January 24, 2006 but unequivocally stated any effect of the aggravation was surgically corrected on July 10, 2008. He clearly stated any gait disturbance that continues as a

result of the foot was no longer related to the event of January 24, 2006. Additionally, Dr. Garside testified the ongoing treatment for the low back condition was unrelated to the work injury. Dr. Wolens' and Dr. Garside's opinions are substantial evidence supporting the ALJ's finding that the contested medical expenses were unrelated to the January 24, 2006 work injury. Since the ALJ's determination is supported by substantial evidence, it cannot be said the evidence compels a finding in Gardner's favor.

Accordingly, the Opinion, Order and Award rendered April 25, 2012, by Hon. Richard M. Joiner, Administrative Law Judge, and the June 22, 2012 order denying Gardner's petition for reconsideration, are hereby **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, NOT SITTING.

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