OPINION ENTERED: OCTOBER 26, 2012

CLAIM NO. 200680534

NORTH POINT SENIOR SERVICES, LLC PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

TERESA ANN HOUSE
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

SMITH, Member. North Point Senior Services, LLC ("North Point"), appeals from the June 11, 2012 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). On reopening, the ALJ determined Teresa Ann House ("House") sustained a worsening of her condition resulting in a permanent total disability ("PTD"). North Point also appeals from the ALJ's July 5, 2012 Opinion and Order on Reconsideration. On appeal, North Point argues the

award of PTD benefits should be reversed. Additionally, North Point argues it is entitled to reimbursement of no-show fees incurred for House's failure to attend scheduled examinations with Dr. Steven Shockey.

House filed her Form 101, Application for Resolution of Injury Claim, on July 16, 2007, alleging she sustained injuries to her left foot and ankle injury on July 22, 2006 and developed reflex sympathetic dystrophy ("RSD") when she slipped and fell while trying to avoid being kicked by a patient.

House's claim was litigated to an Opinion and Award rendered January 9, 2008, by ALJ Howard E. Frasier, Jr. ("ALJ Frasier"). Based upon the opinion of Dr. Helig, ALJ Frasier determined House reached maximum medical improvement ("MMI") on August 22, 2007. He then made the following findings regarding the extent of House's impairment:

> Also confusing is the fact that Dr. Burandt found a full range of motion to the left ankle during his examination on July 27, 2007, and Dr. Primm found no difference in the range of motion of the right and left ankles during his examination on October 16, 2007. Dr. Helig is the only physician who has opined a limited range of motion in the left ankle. The undersigned finds that the opinions of Dr. Burandt and Dr. Primm of no reduced range of motion are more credible than the opinion of Dr. Helig. Consequently, the undersigned declines to adopt the 5% impairment

> found by Dr. Helig for reduced range of motion.
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> Between the remaining 6% impairment by Dr. Helig and the 0% by Dr. Primm, the undersigned finds the opinion of Dr. Helig to be more credible. Although Dr. Primm opined that Ms. House might be in the early stages of RSD, he was uncertain about this diagnosis. If her current treatment does not result in an improvement in her left ankle condition, then the Plaintiff might pursue the recommendation by Dr. Primm for evaluation by a pain management clinic.

The ALJ awarded permanent partial disability ("PPD") benefits based upon a 6% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He also determined House did not retain the physical capacity to return to the type of work she was performing at the time of her injury.

House filed a motion to reopen her claim on November 2, 2011, alleging her condition had worsened to such an extent that she is now permanently totally disabled. House supported her motion with an affidavit of Dr. Robert Johnson, stating House's medical condition had deteriorated since the award. He indicated her pain and restrictions had increased and the worsening of her condition had resulted in a greater occupational disability. Dr. Johnson opined House

was now permanently and totally occupationally disabled from any gainful employment.

House also submitted Dr. Johnson's September 26, 2011 report. Dr. Johnson took a history and reviewed extensive medical records. He noted House did not socialize or go shopping because of her pain and had difficulty ambulating. Dr. Johnson noted her husband did all of the housework including cooking and laundry.

On physical examination, Dr. Johnson asked House to walk without the use of her brace or walker. Dr. Johnson stated "it was somewhat pathetic" although she cooperated, her gait was "sort of hopping with an extremely short stance phase on the left." House indicated she had a "jabbing" pain with spasm. Dr. Johnson noted redness and heat medially on the left side and "blue coldness" and loss of the contour of the lateral malleolus. Dr. Johnson noted weight-bearing caused increased low back pain as well. Dr. Johnson stated sensation was difficult to estimate. There was clearly allodynia (pain caused by normally painless stimuli) around the left foot and ankle causing House to wince and withdraw. Dr. Johnson determined the left foot was warmer than the right.

Dr. Johnson diagnosed chronic pain as defined in section 13.8, Page 343 of the AMA Guides, loss of mobility

in the left ankle, lack of 12° of reaching neutral or dorsiflexion and ankylosis of the left ankle. Dr. Johnson assessed a 55% impairment rating pursuant to the AMA Guides. That impairment rating consisted of 50% for chronic pain/RSD/posttraumatic neuralgia, 6% for loss of 12° of reaching neutral position from a dorsiflexed position in the left ankle and 4% for ankylosis of the subtalar joint. Dr. Johnson noted House would rather crawl than try to walk because of the pain in her left foot and ankle at times. He stated she was totally incapable of any substantial, gainful activity on a permanent basis.

In the reopening, House testified by deposition on February 20, 2012 and at the hearing held June 5, 2012. House, who was born August 27, 1955, completed the eighth grade then obtained a GED. She had a year of training in nursing and received her certification. House testified she was injured on July 22, 2006 when a patient kicked at her causing her to twist her ankle and fall. She was off work until November 2006. She worked from that time until May 2007. She received extensive conservative treatment but did not improve. She stated physical therapy worsened her pain. House indicated she had not worked since 2008. Her medication had been increased from the time of her injury until 2008. It has remained the same since 2008 with the

exception of the dosage for the Fentanyl patches which have increased over the last four years.

House testified her pain and problems with mobility in her ankle and foot have also increased since 2008. Her pain is constant, requiring her to take Lortab every six hours, supplemental with Percocet. She takes Flexeril every eight hours and Plavix to prevent the formation of a blood clot due to circulatory changes in her left foot. House stated she was totally unable to work and she has been receiving Social Security Disability benefits since 2007. She stated she was not able to go shopping or socializing, and she only sees her friends when they come to her house. She indicated her husband does her shopping and household chores. House indicated she has difficulty walking due to pain and must use a walker. She is bedridden most of the day only getting up to go to the bathroom or to bathe. Standing up to take a shower and putting weight on her foot causes it to swell. The problem with her foot has led to problems with her knee, a new condition that began after 2008.

North Point submitted the medical report of Dr. Daniel Primm, Jr., who evaluated House on January 17, 2012. He had previously evaluated House on October 16, 2007. His impression after the first examination was left ankle sprain

with possible mild early RSD. Dr. Primm had recommended a series of sympathetic blocks to determine if House had RSD.

In the most recent examination, House reported she did not feel any of her treatment had helped. House had not been seen at a pain clinic and had not undergone the series of sympathetic blocks since that plan of treatment was not approved by the carrier. House told Dr. Primm she alternates between sitting and lying down most of the day. She reported constant aching and swelling in her ankle and foot.

Dr. Primm noted on physical examination, the range of motion of the left ankle actively showed she lacked 10° of dorsiflexion on the left compared to the right. However, passively her dorsiflexion was the same as the right side. Plantar flexion was equal both actively and passively. Dr. Primm found no ankylosis in the subtalar joints as Dr. Johnson had reported. Dr. Primm's impressions were left ankle sprain and no objective signs now to suggest RSD or complex regional pain syndrome. Dr. Primm stated, based on his examination, there was no evidence now of a sympathetic dystrophy or chronic regional pain syndrome since her objective findings were basically normal. He opined her condition had actually improved and objectively her examination now appeared to have returned to a normal state.

Based upon the 5th Edition of the AMA Guides, he assessed a 1% impairment rating on the basis of slightly diminished active dorsiflexion of the left ankle compared to the right. Dr. Primm could not explain from a physiologic standpoint why House could not return to her regular work as an LPN.

North Point submitted the medical report and April 6, 2012 deposition of Dr. James Shockey, who evaluated House on February 17, 2012. Dr. Shockey's impression was left ankle sprain substantiated by MRI reports, indicating partial injury to the lateral ligamentous complex. He found no objective evidence of significant posterior tibialis tendon involvement, any hind foot involvement and no evidence of significant trauma to the ankle joint proper. He noted her medication list indicates she is being treated to a maximum degree with narcotics and is having difficulty performing activities of daily living.

Dr. Shockey was also unable to substantially document the degree of stiffness, atrophic changes, hair distribution changes, or x-ray changes, which should be objective findings associated with a ratable pain syndrome. Dr. Shockey stated he could not identify a ratable syndrome. He stated he would consider her permanent impairment rating to be 4% whole person based upon a 3% impairment for her pain complaints with 1% impairment for stiffness in inversion and

eversion of the ankle. Dr. Shockey was unable to identify any significant change of disability from an objective orthopedic standpoint since the decision in January 2008 although House described increasing levels of pain.

Dr. Shockey agreed House did not retain the physical capacity to return to her previous employment. However, he stated he could not identify any objective findings upon which to find her totally disabled. Dr. Shockey concluded as follows:

> Any increase in her disabilities at this point, at least from an objective standpoint, would be manifested by the level of narcotic and pain medication that she requires, which in and of itself may make it quite difficult for her to be active in the workplace.

During his deposition testimony, Dr. Shockey stated there were a number of characteristics of RSD and three out of six were necessary to reach the diagnosis. He stated House exhibited two characteristics. She had complaints of pain beyond what would be expected from her history and a minimal amount of skin thinning over the area. He stated the remainder of the findings were objectively unremarkable. Dr. Shockey reviewed the report of Dr. Johnson prior to performing his own evaluation which did not produce the same findings. Dr. Shockey again indicated he could not objectively document a worsening of House's condition since

January 9, 2008. He stated House's restrictions would not be increased over those assessed by Dr. Helig and adopted by the ALJ in 2008.

North Point submitted the report of Dr. Ralph Crystal who conducted a vocational evaluation on April 16, 2012. House reported constant pain with variable levels of discomfort. She reported she could not drive due to vision problems as well as pain. She stated she had to elevate her leg to relieve her pain, but doing so increased her low back pain. Dr. Crystal opined House was able to perform a wide variety of light duty jobs including clerical/cashier, security, any factory, and service jobs. In the medical field, she had transferable nursing vocational skills that would allow her to work in jobs such as medical file reviewer, admissions clerk, nurse consultant, utilization review nurse, nurse administrator, quality assurance nurse and scheduler. Dr. Crystal stated that, with or without education or training, there were jobs House was qualified to perform physically and she was not disabled from all employment. He did not believe there had been a change in House's ability to access jobs and perform work activities since the opinion and award.

After reviewing the evidence, the ALJ, in an opinion rendered June 11, 2012, found the opinion of Dr. Johnson

persuasive and determined House's condition had worsened from the original 6% impairment rating to a 55% rating. The ALJ then found as follows:

> "Permanent total disability" means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . . Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,
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> > "the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."
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> *Id*. at 52. (Internal citations omitted.) Also, a worker's testimony is competent evidence of his physical condition and of her ability to perform various activities both before and after being injured. Id; see also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).
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> In the present case the ALJ considers the plaintiff's testimony and

> the opinion of Dr. Johnson, specifically that at times she finds crawling preferable to walking.
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> The ALJ considers the plaintiff's work history, level of education and training, and level of activity. She cannot drive and rarely leaves her home. The plaintiff has maintained her nursing license, but still has been unable to work. She stated that if she could work, she would; the ALJ finds this statement credible. Based on all the evidence, I further find that the plaintiff has become permanently totally disabled as a result of the effects of the 2006 work injury.

North Point filed a petition for reconsideration on June 20, 2012, arguing the ALJ erred in awarding PTD benefits. North Point contended House testified to the same limitations as those presented in the original litigation. North Point noted Dr. Johnson did not evaluate House in the original case and observed that Dr. Primm was the only physician to evaluate her in the original claim and on reopening.

The ALJ issued his order on reconsideration on July 5, 2012 providing the following additional findings:

> 6. The record shows that back on January 9, 2008 Judge Frasier ruled that the plaintiff was entitled to recover permanent partial disability benefits based on her left lower extremity injury and that it was the Judge's interpretation that Dr. Helig's permanent impairment rating was 6%.

7. In this reopening proceeding, the plaintiff testified that her treating physician has increased her dosage of prescription pain medication over the last four years. She testified that the pain and loss of range of motion has increased since 2008 and that he is totally unable to work. Her pain is constant. She takes Lortab every six hours and Percocet in between. She wears a Fentanyl patch constantly. She takes Flexeril every eight hours. She has been receiving Social Security total disability benefits. She cannot go out of her house for shopping or social activities. She only sees her friends when they come to her house. Her husband does all of the shopping and household chores. She has difficulty walking due to pain and must use a walker.

8. In her reopening proceedings, Dr. Johnson stated in his comprehensive medical report that Ms. House stated that she has constant pain and that she crawls around in her home because that is less painful than walking with her walker. On examination, Dr. Johnson found edema, allodynia, atrophy, joint stiffness and equivocally dry skin of the left lower extremity. He palpated Ms. House's left foot and noticed that it was noticeably warmer than her right foot. He noted that the soles of her feet were extremely soft and baby–like, substantiating her statement that she rarely walks. He asked Ms. House to try to walk without her brace and her walker. He observed that her gait was sort of a hopping with extremely short stance phase on the left. Dr. Johnson opined that the plaintiff now has a 55% permanent whole person impairment, which represents a significant worsening of her physical condition. Dr. Johnson stated that Ms. House is totally and

> permanently incapable of any substantial gainful activities.
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> 9. I saw and heard Ms. House testify at the hearing on June 5, 2012. She was a credible and convincing witness. Based upon the credible and convincing evidence from Ms. House and Dr. Johnson, I made the factual determination that her physical condition has greatly deteriorated since Judge Frasier's January 9, 2008 Opinion and Award and that Ms. House is now permanently and totally disabled based upon the evidence in the case and the decision of the Kentucky Supreme Court in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). I made the further factual determination that Ms. House has become permanently and totally disabled as a result of the worsening of her 2006 work injury and the substantial deterioration of her physical condition since the previous Opinion and Award on January 9, 2008.

On appeal, North Point argues it is entitled to reimbursement of no-show fees assessed by Dr. Shockey for examinations scheduled for December 16, 2011 and January 13, 2012. North Point contends 803 KAR 25:010, section 11(6) allows for the assessment of the no-show fee to the claimant if there is an unjustified failure by the claimant to attend a scheduled medical examination. North Point rejects House’s response to its motion for costs and notes House never testified regarding the reason she did not attend the examinations. North Point further observes the ALJ failed to make any finding as to whether the failure to attend was

justified and the ALJ failed to make reference to 803 KAR 25:010.

North Point again argues the award of PTD benefits should be reversed. North Point contends House failed to meet the legal standard for proving a worsening of impairment by objective medical findings. North Point contends the ALJ's reliance on House's subjective complaints "and the report of Dr. Hoskins [sic] wherein he acknowledges his dramatically increased rating is based on 'chronic pain' is inappropriate and cause for reversal as a matter of law." North Point states House argued she was permanently totally disabled in the original claim and she never returned to work following ALJ Frasier's decision. North Point maintains the only difference in House's condition is her subjective complaints of increased pain which is not substantiated by the medical evidence. North Point notes Dr. Primm evaluated House in the original litigation and on reopening and found her condition had actually improved. North Point asserts House retains the same ability to return to work as she did in 2008 when her claim was originally decided.

House, as the claimant in a workers' compensation proceeding, had the burden on reopening of proving a change of disability as shown by objective medical evidence of a

worsening of impairment due to a condition caused by the injury since the date of the award. *See* KRS 342.125(1)(d); Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since House was successful in her burden, the question on appeal is whether the ALJ's finding is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

After reviewing the evidence, the ALJ cited to the appropriate legal standard for determining permanent total disability in accordance with the Supreme Court’s holding in Ira A. Watson Department Store v. Hamilton, 34 SW 3d 48 (Ky. 2000). Taking into account House’s age, education, and past work experience, in conjunction with her post-injury physical and psychological status due to the effects of her work-related injury, the ALJ was persuaded House had a worsening of her condition, an increase in her functional impairment rating, and was now permanently totally disabled.

Substantial evidence exists to support the ALJ’s conclusions. The ALJ found House’s testimony credible regarding the residual effects of the injury and her desire

to work were she is able. House testified her pain had increased and required increased dosage of her pain medication. Further, Dr. Shockey acknowledged her current level of medication would impact her ability to function. The law is well settled that a claimant's own testimony concerning her ability to labor, both pre-injury and post-injury, constitutes probative evidence. Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

The ALJ also indicated he found the opinion of Dr. Johnson credible. As set forth above, ALJ Frasier in the original decision determined House did not have a loss of motion in her ankle. Dr. Johnson did find a loss of range of motion. Thus, the record supports a finding of a progression of the condition. Dr. Johnson clearly assessed a greater impairment rating on reopening than that found by ALJ Frasier. We cannot say the ALJ's finding that House was entitled to an award of PTD benefits is so unreasonable under the evidence the decision must be reversed as a matter of law.

803 KAR 25:010 Section 11 is inapplicable since that provision is applicable only to the failure to attend a KRS 342.315 evaluation. The only statute applicable to this situation is KRS 342.205 which reads, in relevant part, as follows:

> (1) After an injury and so long as compensation is claimed, the employee, if requested by a party or by the administrative law judge, shall submit himself to examination, at a reasonable time and place, to a duly-qualified physician or surgeon designated and paid by the requesting party. The employee shall have the right to have a duly-qualified physician or surgeon designated and paid by himself present at the examination, but this right shall not deny the requesting party's physician or surgeon the right to examine the injured employee at all reasonable times and under all reasonable conditions.
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> . . .
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> (3) If an employee refuses to submit himself to or in any way obstructs the examination, his right to take or prosecute any proceedings under this chapter shall be suspended until the refusal or obstruction ceases. No compensation shall be payable for the period during which the refusal or obstruction continues.

Therefore, we believe the ALJ properly concluded the no-show fee was not permitted as a sanction. The following language in B.L. Radden & Sons, Inc. v. Copley, 891 S.W.2d 84 (Ky. App. 1995) is directly on point:

> We have no hesitation to hold that the board correctly concluded that the penalty for failing to appear for a scheduled medical exam is not dismissal of one's claim. KRS 342.205(3) specifically provides the following penalty under these circumstances:

> If an employee refuses to submit himself to or in any way obstructs such examination his right to take or prosecute any proceedings under this chapter shall be suspended until the refusal or obstruction ceases. No compensation shall be payable for the period during which the refusal or obstruction continues.
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> Certainly placing the case in abeyance and ordering the cessation of temporary benefits, if any, are the only appropriate sanctions available to the ALJ for a claimant's failure to appear at a scheduled medical exam.

Id. at 85. (emphasis ours).

This principle was reaffirmed by the Court of Appeals in Piedmont Airlines v. Brown, 2010-CA-001300-WC, rendered February 14, 2011, Designated Not to be Published. There, the ALJ dismissed Brown's claim for his failure to attend three independent medical evaluations despite being ordered to do so and failing to attend the hearing. This Board reversed, stating pursuant to KRS 342.205(3), the ALJ was required to place the claim in abeyance after Brown failed to attend the first medical evaluation. The Court of Appeals affirmed this Board's determination KRS 342.205 was the sanction available to the ALJ for Brown's failure to attend the IME, stating as follows:

> Thus, we believe the Board acted appropriately in vacating the order and remanding this matter back to the ALJ.

> Certainly, on remand, the ALJ may sanction Brown for his failure to attend the IMEs pursuant to KRS 342.305 [sic] until such time as he complies, and may also issue other sanctions for failure to attend the final hearing, short of an actual dismissal.

Slip op. at 13.

In the case *sub judice*, there is no administrative regulation dealing with an employee's failure to attend an IME. Rather, the requirement an employee must attend a requested IME and the sanction for the employee's failure to attend the IME is specifically dealt with in KRS 342.205. Therefore, the ALJ cannot assess a no-show fee pursuant to KRS 342.310 because House failed to attend the IME with Dr. Shockey.

KRS 342.205(3) specifically deals with the employee's failure to appear at a scheduled examination. KRS 342.205 alone controls the facts in the case *sub judice*. To hold any other statute or regulation also applies it would be permitting sanctions in addition to the sanctions set out in KRS 342.205(3) which is contrary to the holding in B.L. Radden & Sons, Inc. v. Copley, supra.

Accordingly, the June 11, 2012 Opinion and Order and the July 5, 2012 Opinion and Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

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