Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 13, 2015

CLAIM NO. 201299345

QUEST CARE, LLC PETITIONER

VS. **APPEAL FROM HON. STEVEN BOLTON, ADMINISTRATIVE LAW JUDGE**

CYNTHIA A. BRANHAM
DR. RACHEL SHORT
KENTUCKY PAIN PHYSICIANS
PIKEVILLE MEDICAL CENTER
RX DEVELOPMENT ASSOCIATES
DOCTORS MEDICAL
INJURED WORKERS' PHARMACY
and HON. STEVEN BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Quest Care, LLC ("Quest Care") seeks review of the June 21, 2013, Opinion, Award, and Order finding Cynthia A. Branham ("Branham") has a 7% impairment

rating as a result of a work-related low back injury occurring on January 3, 2012, while in the employ of Quest Care. The ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1, medical benefits, and vocational rehabilitation benefits. Quest Care also appeals from the July 19, 2013, Order denying its petition for reconsideration.

Additionally, Quest Care appeals from the March 4, 2015, Order on Remand resolving multiple medical fee disputes which it filed during the pendency of the proceedings and the April 27, 2015, Order ruling on its petition for reconsideration. Quest Care's appeal pertains to the ALJ's ruling concerning the compensability of Branham's medication regimen.

Branham's Form 101 alleged a lower back injury occurring on January 3, 2012, and an adjustment disorder resulting from the work injury. Branham sought income benefits as a result of a physical and psychological injury. Branham later amended her Form 101 to include a claim for a December 29, 2011, lower back injury.

Quest Care raises four errors regarding the June 21, 2013, decision. First, it contends the ALJ applied an

incorrect rate in calculating the award of PPD benefits. Second, Quest Care contends the ALJ erred in not apportioning an impairment rating to a pre-existing active condition and not entering findings of fact which correspond with the legal standard for determining whether a pre-existing active condition was present. As a sub-part to its argument, Quest Care maintains the ALJ failed to review all of the evidence of record. Third, Quest Care contends the ALJ erred in relying upon the opinions of Dr. Bruce A. Guberman since his opinions do not constitute substantial evidence. Fourth, Quest Care asserts the ALJ erred in not performing an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Concerning the ALJ's 2015 decision resolving the medical fee disputes, Quest Care asserts the ALJ erred in finding Branham's medication regimen reasonable and necessary treatment of her work injury as his decision is not supported by substantial evidence.

Branham relied primarily upon the report and letter from Dr. Guberman who assessed a 7% impairment rating attributable solely to the January 3, 2012, injury. Quest Care contended throughout the proceedings that any impairment rating was due to a pre-existing active condition. Quest Care relied upon the records of St.

Joseph Hospital - Martin, spanning the period from March 30, 2011, through June 8, 2011; the MRI report of June 1, 2011, from Highlands Regional Medical Center; the records of Dr. Duane Densler, a neurosurgeon, concerning his examination of Branham on June 28, 2010; and the opinions of Drs. William Lester and David Muffly.

Branham's January 8, 2013, and March 6, 2013, depositions were introduced and she testified at the March 26, 2013, hearing. During the hearing, she testified the December 29, 2011, injury occurred when she was serving as a pall bearer at a co-worker's funeral. In the course of unloading the casket at the cemetery, she felt a small twinge which lasted a few days. Branham went to the emergency room at Paul B. Hall Medical Center on January 1, 2012, which she indicated was more for her blood pressure problem than her back problem.

Branham denied experiencing any low back problems prior to the January 3, 2012, injury. Branham testified she had no work restrictions or impairment before the January 2012 injury and any back pain she experienced did not prevent her from working. She was able to carry a medic bag which she estimated weighed fifty pounds. It was not unusual for her to carry several items at once. In the course of working as an EMT, she lifted heavy patients onto

gurneys. On multiple occasions, she and three other co-workers would lift patients weighing as much as 350 pounds. At the time she went to work for Quest Care, she was only taking blood pressure medication. Branham provided the following testimony as to what happened when she was injured on January 3, 2012:

> A: we had gotten the call of a woman having an asthma attack. It was up in MaGoffin [sic] County. And, my partner and I got out there – and, a lot of times if we realize – the cot – the beds themselves weigh two hundred or two hundred and fifty pounds just alone without a patient on them – and, we were trying – usually, we'll try to get the patient to walk out and walk down the steps and get on the – the cots themselves (sic). And, we couldn't – she couldn't do it; she was just too bad, so we put her on the stretcher in the house. And, we had to carry her down the steps. And, my partner was at the feet, he was going down first and I was at the head of the cot, you know, went down last, and when I put my foot down on one of the steps I – there was a patch of ice and I slipped, and when [sic] fell I went straight down and every bit of her weight, which she was – she was about three hundred and fifty, four hundred pounds – every bit of her weight and the cot, you know, went on me. And, I had to, you know, try to keep the, -- I didn't want to hurt her and have the cot, you know, tip over and injure her, so I took all the – all the weight on me, so …
>
> Q: Okay – and, then what hurt?
>
> A: My lower back, very bad.

> Q: Okay – now, how was that pain on January the 3rd? Was it any different than December the 29th or any other back pain that you had had before?
>
> A: Extremely different, extremely worse. It was the worst – worst back pain I've ever had in my life, you know. It was – it was unbearable. It still is unbearable.

Branham was immediately taken to the emergency room at Paul B. Hall Medical Center. When she returned to work she was limited to performing light duty. Because she could no longer sit performing the light duty work, Branham quit work on February 14, 2012. She was referred by her treating physician to physical therapy which was discontinued. She was also referred to Kentucky Pain Physicians for pain management.

At the March 2013 hearing, the parties agreed to bifurcate the proceedings. Consequently, only evidence concerning the injury claims would be introduced and the ALJ's decision would be limited to resolving the compensability of the alleged injuries. It was agreed the ALJ would enter a decision concerning the medical fee disputes at a later date.

The March 12, 2013, Benefit Review Conference Memorandum Order ("BRC") reflects the parties stipulated Quest Care received due and timely notice of the January 3,

2012, injury for which it paid a period of TTD benefits. Significantly, the parties stipulated Branham returned to work on January 4, 2012, and worked until February 14, 2012, at a wage equal to her average weekly wage ("AWW").

Regarding Branham's injury claims, the ALJ entered the following analysis:

> It is accurate to argue, as does the Defendant employer, that Plaintiff has been very forgetful of her prior medical history as it pertains to her back, but the record does not support a finding that she suffered from a prior, active and ratable impairment at the time of the work related injury. Indeed, the mere fact that she was carrying one end of a 300-350 lb. woman on a stretcher that itself weighed approximately 200 lb. when the accident occurred is determinative of the question of her prior alleged disability.
>
> The purpose of this history is to demonstrate that the Plaintiff suffered a work related injury, timely reported same and actively sought relief from her symptoms. A claimant's own testimony is competent and of some probative value. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky., 1977). In this instance, the Defendant/Employer presented no non-medical evidence concerning the actual occurrence, nor was there any attempt to impeach the veracity of the Plaintiff. Thus, the ALJ is constrained to accept Plaintiff's version of the facts as being accurate.
>
> While the Plaintiff subsequently modified her Form 101 to claim a

preceding injury on December 29, 2011, it does not appear from the evidence that the injury was substantial or resulted in anything but a temporary, non-disabling strain. Clearly, the Plaintiff did not think it of enough significance to report to the employer, except as an afterthought to explain why she was in a hospital emergency room describing her low back pain just a few days before the incident of January 3, 2012. I do not believe she had an active and ratable condition in her lower back prior to the incident of January 3, 2012. To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App., 2007). So, when work related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change. Hence, the harmful change comes within the definition of injury. *McNutt Construction v. Scott*, 40 S.W.3d 854 (Ky., 2001).

I have reviewed every piece of medical evidence in the record, I find the medical opinions of Dr. Bruce Guberman and Dr. Robert Granacher to be the most persuasive and compelling medical evidence in the record. It is their opinions upon which I have chosen to rely in reaching my opinion as to the Plaintiff’s claim. In my judgment, the other medical evidence presented in the record is either inconsistent or not characterized by impartiality or otherwise not as compelling as the

> medical evidence upon which I have chosen to rely.
>
> Dr. Guberman assigns to the Plaintiff a 7% WPI as the result of the work related accident of January 3, 2012. He assigns her permanent restrictions that are inconsistent with the job duties of an EMT and has opined that she does not retain the physical capacity to return to the type of work performed at the time of the injury.
>
> Dr. Granacher assigns to the Plaintiff a 0% WPI related to the 1/3/2012 injury using the *Guides to Evaluation of Permanent Impairment, 2nd and 5th Editions*. He affirmed that the Plaintiff does have a 5% psychiatric impairment pre-existing to the 01/03/2012 injury, which was active and ratable, but caused by other non-vocational stressors.

The ALJ concluded Branham was not permanently totally disabled. The ALJ entered, in relevant part, the following findings of fact and conclusions of law:

> . . .
>
> 2. The work related incident of December 29, 2011 did not result in any injury as defined by the Act. KRS 342.00011(1).
>
> 3. There is no argument made as to the accuracy of impairment ratings assigned under the AMA *Guides to the Evaluation of Permanent Impairment*. KRS 342.730(1)(b).
>
> 4. The work related incident of January 3, 2012 did result in an injury as defined by the Act. KRS 342.0011(1).
>
> . . .

6. As the direct and proximate result of the work related accident of January 3, 2012, the Plaintiff sustained a whole person impairment of 7% as assigned by Dr. Bruce Guberman according to the AMA Guides to the Evaluation of Permanent Impairment, whose opinion I find to be the most credible, compelling and persuasive in the record and upon which I rely in making this determination. She did not have a pre-existing active and ratable impairment to her lower back. KRS 342.730(1)(b).

7. The Plaintiff does not retain the physical capacity to return to the type of work performed at the time of the injury. KRS 342.730(1)(c)1.

8. The Plaintiff also suffers from a 5% whole person impairment from a psychological condition. However, that condition was active and ratable prior to the work related accident of January 3, 2012 and was not the direct result of the physical injury sustained therein. Therefore, it is not compensable. KRS 342.0011(1). In making this determination, I rely on the opinion of Dr. Robert Granacher, whose opinion I find to be the most credible, compelling and persuasive in the record and upon which I rely in making this determination.

9. The Plaintiff was entitled to, and did receive, temporary total disability payments (TTD) at the rate of $517.57 per week from January 4, 2012 through January 8, 2012 and February 14, 2012 [sic] August 22, 2012 for a total of $14,491.84.

10. The Plaintiff is entitled to an award of permanent partial disability (PPD) benefits consistent with a 7% WPI rating and a statutory multiplier of 3

> based upon an average weekly wage of $776.31 not to exceed 425 weeks to be calculated as follows: $512.36 (max) x .07% x 0.85 (grid factor) x 3 (multiplier) = $92.38 per week, not to exceed 425 weeks. KRS 342.730.

TTD benefits were awarded at the rate of $517.57 per week from January 4, 2012, through January 8, 2012, and again from February 14, 2012, through August 22, 2012, for a total of $14,491.84. PPD benefits were awarded in the amount of $92.38 per week continuing thereafter for 425 weeks. Although the ALJ found Branham had an active and ratable psychological condition meriting a 5% impairment rating prior to the January 3, 2012, injury, he did not order her psychological injury claim dismissed. As previously noted, the ALJ awarded medical benefits and vocational rehabilitation.

Quest Care filed a petition for reconsideration asserting the ALJ's award of medical benefits needed to be clarified since the ALJ determined Branham had not sustained a compensable psychological injury. It also requested the ALJ to order Branham's psychological injury claim dismissed. Quest Care asserted the ALJ did not review all of the records, specifically the records of St. Joseph Hospital – Martin and requested additional findings regarding its contention Branham had a pre-existing

condition. Quest Care contended the ALJ utilized the wrong standard in determining whether Branham had a pre-existing impairment or disability. It also took issue with the ALJ's reliance upon Dr. Guberman's opinions. Finally, Quest Care noted the ALJ did not conduct an analysis pursuant to Fawbush v. Gwinn, supra, which was necessary since the parties stipulated Branham had returned to work at a wage equal to her pre-injury AWW.

In the July 19, 2013, Order, the ALJ denied Quest Care's petition for reconsideration.

Quest Care filed a notice of appeal. Noting the pending medical fee disputes, this Board concluded Quest Care had appealed from a decision which was not final and appealable and dismissed the appeal.

On remand, Quest Care filed supplemental medical fee disputes and joined additional parties. In a joint motion for submission signed by counsel for both parties, the parties requested the claim be taken under submission by the ALJ for a decision on the pending medical fee disputes. In an order dated April 16, 2014, the ALJ granted the parties thirty days to submit briefs. Upon the filing of the briefs the claim would be taken under submission. No further deposition or hearing testimony was taken.

In the March 4, 2015, Order on Remand, the ALJ provided, in relevant part, the following analysis:

> It is the employer's responsibility to pay for the cure and relief from the effects of an injury or occupational disease, all medical, surgical, hospital treatment, including nursing, medical and surgical supplies and appliances as may be reasonably be required at the time of the injury and thereafter during disability. K.R.S. 342.020.
>
> As to the ER treatment of 6/10/2012, I agree with the medical opinion of Dr. F. Albert Olash, Jr. that Ms. Branham's presentation to the Pikeville Medical Center ER for evaluation and treatment for pain was medically unreasonable and unnecessary. As Dr. Olash pointed out, Ms. Branham's decision was not a good one. Whether she was trying to get refills for her medications, seek a second opinion or get treatment for pain, she was asking medical professionals who deal with emergencies to handle a medical problem for which they had no history other than the patient's complaints. She should have gone back to her primary physician, who was at that time, Dr. Short.
>
> As to the requests for physical therapy, I rely on the medical opinion of Dr. Peter T. Kirsch, which I find to be persuasive. I do not agree with Dr. Kirsch's overall diagnosis, but I do believe that the time for effective results from PT is gone. In making this finding, I also rely on the history related by the Plaintiff that she could not tolerate physical therapy. As that is the case, I cannot fathom that further physical therapy would be either medically reasonable or

necessary.

As to the requests for a neural scan, and lower extremity needle EMG and VNG, I note that these diagnostic tests have all been administered since the date of Plaintiff's injury and have been used and reviewed by several physicians. I see no reason why Kentucky Pain Physicians cannot do the same and I find no basis expressed in any pre-authorization request that explains why a more recent test would be clinically necessary. So, I find the requests for a neural scan, and lower extremity needle EMG and VNG to be medically unnecessary and unreasonable.

The remaining medical (fee) disputes can be distilled into the issues of the efficacy of ongoing treatment by Kentucky Pain Physicians and the pharmacology prescribed by their medical professionals/employees. I must determine whether the treatment herein is productive and the type of treatment generally accepted by the medical profession as reasonable and compensable. This finding must be made by the Administrative Law Judge based upon the facts and circumstances surrounding each case. Square D Company v. Tipton, 862 S.W.2d 308 (Ky.1993).

In this claim, the Defendant/Employer contests monthly office visits requested by Kentucky Pain Physicians, arguing that the visits and the medication prescribed are not compensable. Ms. Melton, APRN/Dr. Vaio opined that their treatment is reasonable and necessary for the Plaintiff's low back pain and that this treatment includes medication that is a controlled medication in Kentucky and therefore requires close monitoring for efficacy and aide-effects and for this reason the Plaintiff needs frequent

observation and monitoring for side-effects and complications.

The other medical fee disputes filed in this case were based upon Dr. Bart Olash's Physician Review report dated 3-20-13, of which I do not have a copy. By report, Dr. Olash concluded in part as follows, "All data indicates that the work injury resulted in a minor muscular strain/sprain/contusion. There is no documentation that it resulted in any more significant pathology... Hence, there is no need for further evaluation or treatment by providers at Kentucky Physicians..."

I rely on the medical opinion of Dr. Bruce Guberman, which I find to be the most complete, compelling and persuasive medical evidence in the record as it pertains to the causation of Plaintiff's injuries and Dr. Guberman’s diagnosis of acute and chronic lumbosacral strain, post-traumatic which resulted in a 7% permanent impairment rating. I am further persuaded by Dr. Guberman’s opinion that the plaintiff requires maintenance medication for her work related injuries. Therefore, Defendant/Employer and its insurance carrier must be ordered to pay for the monthly office visits to Kentucky Pain Physicians as well as a reasonable and necessary medication regimen prescribed by its physicians as they are compensable treatment for the relief of the Plaintiff s injuries that arose out of the work injury of 01/03/12.

. . .

Pain management is an area of medical practice recognized by the Kentucky Medical Association. The medical professionals who work for

> Kentucky Pain Physicians are licensed and regulated by the Kentucky Medical Association The Plaintiff has been treating with Kentucky Pain Physicians as early as 6/20/12 and continues to treat with them. The treatment being rendered by Dr. Windsor now is consistent with the treatment that has been rendered continuously.
>
> Plaintiff has provided sufficient evidence in support of her claim, per the opinions of Dr. (s) Short, Reddy, Vaio, and Ms. Melton APRN, as well as Dr. Guberman to provide that the Plaintiff does require future medical treatment for the relief of her injuries. It is significant that Dr. Guberman stated the following, "the recommended injections may alleviate symptoms, but they will not affect her overall prognosis, and that she will not improve significantly with any planned treatment, but that the Plaintiff should have the injections and maintenance medication treatment."
>
> Therefore, Defendant/Employer and its insurance carrier shall be ordered to pay for the monthly office visits provided by Kentucky Pain Physicians as well as the medication regimen prescribed.

The ALJ entered, in relevant part, the following findings of fact and conclusions of law:

> . . .
>
> 4. As to the ER treatment of 6/10/2012, I agree with the medical opinion of Dr. F. Albert Olash, Jr. that Ms. Branham's presentation to the Pikeville Medical Center ER for evaluation and treatment for pain was medically unreasonable and unnecessary. Ms. Branham, as the

claimant, failed to prove that the disputed treatment is compensable. R.J. Corman R.R. Const. v. Haddix, 864 S.W.2d 915 (Ky. 1993); See KRS 342.735(3); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. 1997); KRS 342.020.

5. As to the requests for physical therapy, I rely on the medical opinion of Dr. Peter T. Kirsch, and the history by Plaintiff that she could not tolerate physical therapy, which I find to be persuasive. I therefore find that further physical therapy for this claimant is medically unreasonable and unnecessary. Ms. Branham, as the claimant, failed to prove that the disputed treatment is compensable. R.J. Corman R.R. Const. v. Haddix, 864 S.W.2d 915 (Ky. 1993); See KRS 342.735(3); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. 1997); KRS 342.020.

6. As to the requests for a neural scan, and lower extremity needle EMG and VNG, I note that these diagnostic tests have all been administered since the date of Plaintiff's injury and have been used and reviewed by several physicians. I see no reason why Kentucky Pain Physicians cannot do the same and I find no basis expressed in any pre-authorization request that explains why a more recent test would be clinically necessary. So, I find the requests for a neural scan, and lower extremity needle EMG and VNG to be medically unnecessary and unreasonable. Ms. Branham, as the claimant, failed to prove that the disputed treatment is compensable. R.J. Corman R.R. Const. v. Haddix, 864 S.W.2d 915 (Ky. 1993); See KRS 342.735(3); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. 1997); KRS 342.020.

7. I am persuaded by the medical opinion of Dr. Guberman that the Plaintiff will require "maintenance treatment in order to control her symptoms and maintain her current level of functioning…" which would include …"medication, physician visits and possible injections as recommended by her treating physicians" as well as the medical statements from providers at Kentucky Pain Physicians that the treatment they are providing to the Plaintiff is medically reasonable and necessary for the cure and relief from the effects of her injury. KRS 342.020.

8. I am also persuaded by the testimony of the Plaintiff, which I find to be credible. A claimant's own testimony is competent and of some probative value. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky., 1977). 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. *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979). I am persuaded by the Plaintiff's testimony that she suffers from significant and severe pain and that she requires relief from that pain in order to function. KRS 342.020.

9. Thus, I find that the claimant has met her burden of proof to show that the prescribing of Lortab (Hydrocodone-Acetaminophen) 10, Zanaflex, Therymine, Gabbadone, Neurontin, Prozac, Medrox (ointment & patch), Diazepam, Mobic, Celebrex, Lyrica, Valium and LESI's is medically necessary and reasonable, and therefore compensable. R.J. Corman R.R. Const. v. Haddix, 864 S.W.2d 915 (Ky. 1993); See KRS 342.735(3); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. 1997); KRS 342.020.

With respect to the issue on appeal, the ALJ ordered as follows:

> As to the continuing and regular monthly treatment by Kentucky Pain Physicians, their ordinary and regular screening procedures such as urine screens and blood pressure tests, and their prescriptions for Lortab (Hydrocodone-Acetaminophen) 10, Zanaflex, Therymine, Gabbadone, Neurontin, Prozac, Medrox (ointment & patch), Diazepam, Mobic, Celebrex, Lyrica, Valium and LESI's as provided and dispensed by **DOCTORS MEDICAL, INJURED WORKERS PHARMACY, RX DEVELOPMENT ASSOCIATION, and MILLENIUM LABORATORIES, INC.,** the Defendant/Employers Medical (Fee) Disputes are hereby **DENIED** and **DISMISSED**. All past due and owing charges shall be paid by the Defendant/Employer and shall bear an interest rate of 12%.

Quest Care filed a petition for reconsideration alleging the ALJ had incorrectly stated in his decision that he did not have a copy of Dr. Bart Olash's report in the record. It cited Dr. Olash's opinions regarding the various treatment modalities and medications. Quest Care argued the ALJ erred in relying upon Dr. Guberman and the brief statements of the treating physicians as neither constituted substantial evidence. It contended the finding the entire medication regimen is reasonable and necessary is unsupported by medical evidence because neither Dr. Guberman nor the treating physicians specifically addressed

each of the contested medications. It noted Dr. Guberman merely indicated Branham would require maintenance treatment which did not address the contested medications. Further, it noted Drs. Frank Parker and Olash were the only ones to specifically address each medication. Quest Care also cited Branham's testimony which established many of the medications offered no benefit. Therefore, it argued that based on the medical evidence from Drs. Parker and Olash, the medication should be discontinued.

In the April 27, 2015, Order ruling on the petition for reconsideration, the ALJ noted he had erroneously stated Dr. Olash's report of March 20, 2013, was not in the record. The ALJ amended his decision deleting any reference to the fact he did not have a copy of Dr. Olash's report. However, the ALJ overruled Quest Care's petition for reconsideration reasoning as follows:

> Regarding the pharmacology prescribed by Kentucky Pain Physicians for the Plaintiff, I chose to rely on the medical opinion of Dr. Bruce Guberman, M.D. that the Plaintiff requires ongoing medication maintenance treatment due to her work-related injuries. He is not a pain management physician, and one would not expect him to be specific as to that regime.
>
> Drs. Sandeep Vaio, M.D., Dr. H.K Reddy, M.D. and Janessa Melton, APRN of Kentucky Pain Clinic, who are managing the Plaintiff's pain medication on a

month to month basis. As defense counsel has stated, those recommendations have changed over time, but one would expect them to. They have certified that the medications prescribed by them are reasonable and necessary for the cure and relief of the Plaintiff's symptoms. They have not testified as to each medication by name and function, while Dr. Olash has.

I have the medical reports of three medically licensed medical professionals regularly involved in the practice of pain management. I choose to rely on the medical professionals who see, evaluate and treat these people every day.

As to the prescribing of medications the record as a whole must meet the standard required by Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993) which requires that the Defendant/Employer must prove that the Plaintiffs medical treatment is unproductive or outside the type of treatment generally accepted in the medical community. See Crawford and Company v. Wright, 284 S.W.3d 136 (Ky. 2009) and Mitee Enterprises v. Yates, 865 S.W.2d 654 (Ky. 1993). Dr. Olash's_ opinion does not meet this standard and given Ms. Branham's history, I do not find the prescribing for her of Diazepam, Celebrex, Hydrocodone/APAP, Lyrica, Endocet, Medrox External Ointment, Medrox Patch ER,, Theramine Oil Cap and Gabadone to be medically unreasonable or unnecessary.

Defendant Employer's allegation of error patently appearing on the face of the Order on Remand is a disagreement with my interpretation of the medical evidence in the record, which is not within the scope of my review under the provisions of KRS 342.281. *Francis v.*

> *Glenmore Distilleries*, 718 S.W.2d 953 (Ky. App. 1986).
>
> For all of the foregoing reasons, I fail to find error appearing patently on the face of the Order on Remand, except as set out herein above.

Quest Care's first argument is the ALJ erroneously calculated the PPD award. It contends that based on the $512.36 figure used by the ALJ in calculating the PPD award, the weekly award should be $91.45 as opposed to $92.38. Quest Care notes the award of $92.38 appears to be based upon a base figure of $517.57 which is 2/3 of Branham's AWW of $776.36.

Next, Quest Care contends the ALJ applied the wrong standard in analyzing whether Branham had a pre-existing impairment or disability. It contends the ALJ relied solely upon the fact Branham was capable of carrying a 300 to 350 pound woman on a stretcher which weighed approximately 200 pounds when she fell as determinative of whether she had a prior disability. Quest Care asserts the ALJ did not address whether Branham had an active ratable condition with respect to her low back prior to January 3, 2012. It asserts the ALJ provides no other findings except for stating his belief Branham did not have an active ratable low back condition prior to January 3, 2012.

Further, Quest Care contends the ALJ provided no discussion of Branham's prior treatment other than to state she was very forgetful of her previous treatment. Quest Care insists even though the ALJ cited to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), his findings do not conform to the standard enunciated therein. Quest Care cites to various medical records which indicate Branham began treatment for low back pain complaints in March 2011 which ultimately necessitated an evaluation by Dr. Densler approximately six months prior to the subject work injury. It observes on June 28, 2012, Dr. Densler noted Branham had been having pain for a year prior to his evaluation.

Quest Care notes that during her March 6, 2013, deposition, Branham testified she did not treat with Michael Williams, a physician's assistant, for anything other than colds. However, the records from the St. Joseph Hospital – Martin where Branham was treated by Michael Williams demonstrate she had low back pain and right hip pain in March, April, and June 2011. Quest Care relies upon the results of the June 1, 2011, MRI performed at Highlands Regional Medical Center which reveals the same

findings as the MRI performed after the work injury.[1] Quest Care notes Drs. Lester and Muffly opined Branham had a 5% pre-existing active impairment and therefore at least 5% of her impairment should be considered pre-existing active as it was symptomatic and impairment ratable immediately before the injury. It contends the ALJ's decision on this issue should be reversed and the claim remanded for additional findings as to whether Branham's condition was symptomatic and impairment ratable prior to the work injury.

Concerning Quest Care's third argument that Dr. Guberman's opinions regarding Branham's impairment rating and restrictions do not constitute substantial evidence, it contends Dr. Guberman did not have the opportunity to review the prior medical records from St. Joseph Hospital – Martin, Our Lady of the Way Hospital, Dr. Densler, and the results of the Highlands Regional Medical Center MRI dated June 1, 2011. Citing Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), it argues Dr. Guberman's opinion relative to causation is corrupt since he did not have an accurate history of Branham's prior low back condition. Even though Dr. Guberman issued a supplemental report of

[1] The MRI was performed after Branham experienced low back pain while serving as a pall bearer on December 29, 2011.

March 11, 2013, noting he reviewed additional medical records, Quest Care contends there is no indication the records reviewed were those generated before the work injury of June 3, 2012. Quest Care maintains Dr. Guberman noted he agreed with Dr. Lester's impairment rating. However, it points out Dr. Guberman did not have the opportunity to review Dr. Lester's March 19, 2013, supplemental report in which Dr. Lester changed his opinions after reviewing the prior medical records, opining the 5% impairment rating he previously assessed relates to pre-existing problems.

Quest Care contends the records of Dr. Densler and the MRI of June 1, 2011, establish Branham was having the very same low back problems six months prior to the alleged work injury. It maintains Drs. Muffly and Lester were the only doctors who reviewed all of the relevant medical records. Therefore, the ALJ's reliance upon Dr. Guberman's opinions was not appropriate, and Branham's claim should either be dismissed or remanded for a finding Branham had a 5% impairment rating for a pre-existing active condition. Alternatively, it requests the claim be remanded to the ALJ for additional findings as to how Dr. Guberman's report serves as substantial evidence.

Quest Care's fourth argument pertains to the ALJ's failure to perform an analysis pursuant to Fawbush v. Gwinn, supra. Quest Care points out the parties stipulated Branham returned to employment with the same employer at an equal wage for a little over a month after the injury. Further, Branham testified her hourly rate actually increased from $12.00 an hour to $13.00 an hour after the injury. Since there was no analysis pursuant to Fawbush v. Gwinn, supra, Quest Care requests the claim be remanded for such an analysis and a determination the two multiplier set forth in KRS 342.730(1)(c)2 is applicable.

Quest Care's final argument is that the ALJ's determination Branham's medical regimen is reasonable and necessary is not supported by substantial evidence. It notes neither the opinions of Dr. Guberman nor those of the treating physicians, Drs. Rachel Short, H.K. Reddy, Sandeep Vaio, and Janessa Melton ("Melton") APRN, the nurse practitioner, can be deemed substantial evidence supporting a determination the entire medical regimen of Diazepam, Celebrex, Hydrocodone/APAP, Lyrica, Zanaflex, Endocet, Medrox External Ointment, Medrox Patch ER, Theramine Oral Cap and Gabadone is medically necessary. Quest Care maintains these physicians did not specifically address each of the contested medications or provide sufficient

reasoning for their need. Quest Care notes Dr. Guberman merely indicated Branham would require maintenance medication treatment and injection which does not address the contested medications. Similarly, the statements from Dr. Short dated October 23, 2013, did not address the medication regimen or provide any rationale for taking the medications. Likewise, the statements of Melton, the nurse practitioner, failed to address the current medical regimen with specificity.

Conversely, Quest Care asserts only its physicians, Drs. Parker and Olash, addressed each of these medications and provided a rationale as to the need for each. In addition, it notes Branham's testimony establishes many of the medications are not helpful. Quest Care requests remand for a finding that the medication regimen is not reasonable or necessary based on the opinions of Drs. Parker and Olash.

Because the ALJ's calculation of the award is erroneous, we vacate the award of PPD benefits and remand for additional findings. The parties stipulated Branham's AWW was $776.31, 66 2/3 of which is $517.54.[2] The ALJ awarded TTD benefits at the rate of $517.57. However, in

[2] This figure is arrived at by dividing the stipulated AWW by 3 and multiplying by 2.

calculating the PPD rate the ALJ utilized a figure of "$512.36 (max)." Thus, the award of TTD benefits cannot be reconciled with the ALJ's calculation of PPD benefits.

KRS 342.730(1)(b) directs as follows:

> For permanent partial disability, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by the permanent impairment rating caused by the injury or occupational disease as determined by the "Guides to the Evaluation of Permanent Impairment," times the factor set forth in the table that follows:

AMA Impairment	Factor
0 to 5%	0.65
6 to 10%	0.85
11 to 15%	1.00
16 to 20%	1.00
21 to 25%	1.15
26 to 30%	1.35
31 to 35%	1.50
36% and above	1.70

Pursuant to the above statute, since 66 2/3 of Branham's AWW did not exceed 75% of the state AWW which is $552.13, the base figure to be utilized should have been $517.54. Multiplying the 5.85 factor by the 7% impairment yields a net 5.95% impairment rating. $517.54 multiplied by 5.95% yields weekly benefits of $30.84. This figure is

obtained prior to a determination of whether any multipliers are applicable.

Since Quest Care's second and third arguments are interrelated, we will address them together. However, we will first address Quest Care's assertion the opinions expressed in Dr. Guberman's report and letter cannot constitute substantial evidence.

Branham, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including causation. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Branham was successful in 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of 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). In that regard, 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 that would have supported a different outcome than that 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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made 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). 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).

In the case *sub judice*, Dr. Guberman's opinions constitute substantial evidence. Further, after an examination of the record, we conclude Cepero, supra, is inapplicable in the case *sub judice*. Cepero, supra, was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. We find nothing akin to Cepero in the case *sub judice*.

Dr. Guberman's Form 107 completed on October 3, 2012, reflects he reviewed a number of medical records. We acknowledge Dr. Guberman did not specifically reference the

medical records from St. Joseph Hospital – Martin; Dr. Densler's record generated as a result of his examination on June 28, 2010; and the MRI performed on June 1, 2011, at Highlands Regional Medical Center. In assessing the 7% impairment rating, Dr. Guberman noted Branham fell within Lumbar DRE Category II. He placed Branham in the upper end of the category since she had significant persistent symptoms which interfered with her activities of daily living. Notably, Dr. Guberman did not place Branham in the very upper end of the category since she had a prior history of lower back injuries and degenerative changes as noted on imaging studies of her lumbar spine. This statement clearly evidences an awareness of Branham's prior low back problems. He went on to state there was no evidence Branham would have had an impairment rating in regard to the lumbar spine if not for the injury of January 3, 2012. Dr. Guberman specifically stated Branham did not have an active impairment prior to the injury. Attached to the Form 107 were the calculations performed pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

In a March 11, 2013, letter, Dr. Guberman stated he reviewed the "enclosed medical reports from Dr. Densler, Highlands Regional Medical Center, Pike Medical Center, Dr.

William Lester and Dr. David Muffly." He also indicated he had reviewed his own independent medical evaluation. He stated, he was aware Branham experienced prior low back conditions and injuries and these were also described in his report. Dr. Guberman stated he was also aware of degenerative changes noted on imaging studies which were mentioned in his report. He opined the work injury of January 3, 2012, is the most significant injury based on Branham's history and his review of records. Dr. Guberman stated as follows:

> As discussed in my report, I apportioned the entire 7 (seven) percent impairment of the whole person for her lumbar spine to the January 3, 2012 injury and 0 (zero) percent impairment of the whole person to the pain she experienced while functioning as a pallbearer in December 2011.

Dr. Guberman also expressed his disagreement with Dr. Muffly's statement in his February 22, 2013, report that the January 3, 2012, work injury resulted in a temporary lumbar strain which did not result in any harmful change to the human organism. Rather, he believed the detailed history reported at the time of his examination and his review of the medical records indicates Branham's injury was not temporary. Branham's low back pain has been worsening since the work injury. Dr. Guberman stated

Branham has persistent range of motion abnormalities of the lumbar spine as indicated in his report. Therefore, it was his opinion the injury occurring on January 3, 2012, resulted in permanent impairment as well as permanent symptoms and range of motion abnormalities. Dr. Guberman stated he agreed with Dr. Lester's February 14, 2013, note in which he indicated Branham fell within DRE Lumbar Spine Category II from Table 15-3 of the AMA Guides. He stated that based upon his review of the documents described above, he continued to remain in agreement with the conclusions, findings, recommendations, and impairment rating expressed in his report of October 3, 2012.

Dr. Guberman's report and subsequent letter sufficiently establishes he reviewed the medical records evidencing Branham's pre-existing low back problems. Furthermore, assuming *arguendo*, Dr. Guberman did not have all the prior relevant medical records as alleged by Quest Care, that fact merely went to the weight to be given his opinions. The ALJ is the sole judge of the credibility and weight to be afforded the evidence, and we have no authority to invade his discretion. Here, we conclude the opinions expressed in Dr. Guberman's October 3, 2012, Form 107 and his March 11, 2013, letter qualify as substantial evidence sufficient to support the ALJ's finding regarding

work-related causation and the applicable impairment rating. Further, the contrary opinions pertaining to causation expressed by Drs. Lester and Muffly are nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003).

Finally, we believe Dr. Guberman's March 11, 2013, letter sufficiently rebuts Quest Care's contention Dr. Guberman did not have all the medical records it contends establish Branham had a pre-existing active condition. As previously noted, the fact Dr. Guberman may not have had a complete medical history merely went to the weight and credibility to be afforded his testimony which is a matter to be decided exclusively within the ALJ's province as fact-finder. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Hence, we find no error in the ALJ's reliance upon Dr. Guberman's opinions that Branham sustained a work-related low back injury on January 3, 2012, which merited a 7% impairment rating.

We reject Quest Care's second argument the ALJ did not apply the analysis required by Finley v. DBM Technologies, supra. In Finley v. DBM Technologies, supra, the Court of Appeals stated as follows:

> In its opinion, the Board correctly and succinctly set forth the law upon

> compensability of a pre-existing dormant condition:
>
> What then is necessary to sustain a determination that a pre-existing condition is dormant or active, or that the arousal of an underlying pre-existing disease or condition is temporary or permanent? To be characterized as active, an underlying pre-existing condition must be symptomatic *and* impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work-related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).

Id. at 265.

The ALJ noted Branham was very forgetful regarding her prior history. However, that fact did not preclude the ALJ from finding the record did not support a finding she suffered from a prior active ratable impairment at the time of the work injury. The ALJ concluded the fact Branham "was carrying one end of a 300-350 [pound] woman on a stretcher that itself weighed approximately 200 [pounds] when the accident occurred" is determinative of whether she had a prior disability. This is not an unreasonable conclusion.

The ALJ also noted Branham's testimony is competent and is somewhat probative. He also found Quest

Care had neither presented any non-medical evidence concerning the actual occurrence nor attempted to impeach Branham's veracity. Consequently, he was constrained to accept Branham's version of the facts as accurate. Although the ALJ did not go into great detail as to the portions of Branham's testimony to which he was referring, we conclude he was referring to her testimony that she had no pre-existing low back problems which prevented her from performing her job with Quest Care. Consistent with that finding, we note there are no medical records indicating that after Branham was seen by Dr. Densler in June 2011, she continued to have low back problems. In fact, Branham explained that sometime after June 2011 she successfully sought employment at Quest Care as an EMT. Thus, we believe the ALJ's finding that Branham did not have a pre-existing active low back condition was not unreasonable.

The ALJ stated he had reviewed all of the medical evidence and concluded the opinions of Drs. Guberman and Granacher were the most persuasive and compelling medical evidence in the record; consequently, he relied upon their opinions in reaching his decision relative to Branham's physical and psychological injury respectively. The ALJ concluded the other medical evidence presented was either inconsistent, not characterized by impartiality, or

otherwise not as compelling as the medical evidence he had chosen to rely upon. These statements firmly establish the ALJ accepted in total the opinions of Drs. Guberman and Granacher in resolving Branham's injury claims.

Although Quest Care asserts by not referencing the St. Joseph Hospital - Martin records in his opinion, the ALJ did not consider this evidence, we refuse to contradict the ALJ's statement that he reviewed every piece of medical evidence in the record.

More importantly, the ALJ's reliance upon Dr. Guberman's opinions conclusively establishes Branham did not have a pre-existing active impairment prior to January 3, 2012. Even though Branham may have had a pre-existing symptomatic condition, the ALJ's reliance upon Dr. Guberman's opinion that "the entire 7% impairment rating" is attributable to the January 3, 2012, work injury defeats Quest Care's assertion Branham had an impairment ratable condition prior to the January 3, 2012, injury. Stated another way, the complete reliance upon the opinions of Dr. Guberman obviated the need for any further analysis pursuant to Finley v. DBM Technologies, supra, since his opinion establishes Branham did not have an impairment ratable condition prior to January 3, 2012. Therefore, the ALJ's determination Branham did not have a pre-existing

active condition, and she has a 7% impairment rating as a result of the injury must be affirmed.

That said, we agree the award enhanced by the three multiplier must be vacated as the ALJ failed to perform an analysis pursuant to Fawbush v. Gwinn, supra.

Quest Care does not argue the ALJ erroneously determined the three multiplier was not applicable. Rather, it contends since the parties stipulated and Branham testified she returned to work earning the same or greater wages after the injury, a finding the two multiplier is also applicable was compelled. Because the parties stipulated Branham returned to work earning equal wages after the injury, an analysis pursuant to Fawbush v. Gwinn, supra, was mandated. The ALJ and the parties are bound by the stipulation and the ALJ's failure to conduct such an analysis was clear error.

In Fawbush v. Gwinn, supra, the Kentucky Supreme Court directed that when both KRS 342.730(1)(c)1 and (1)(c)2 are applicable, the ALJ must determine which provision is more appropriate based on the facts. Thus, in the case *sub judice*, the ALJ should have found the two multiplier applicable and determined whether Branham was unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the

indefinite future. On remand, the ALJ shall determine whether Branham was unlikely to be able to continue earning a wage that equals or exceeds her wages at the time of the injury for the indefinite future.

Finally, we agree the ALJ's decision regarding the compensability of Branham's medication regimen must also be vacated. Quest Care's medical fee dispute filed January 7, 2013, specifically contested the compensability of Branham's medical regimen including Diazepam, Celebrex, Hydrocodone, Lyrica, and Endocet with Tizanidine on an as needed basis.[3] In contesting the medications, Quest Care relied upon the report of Dr. Parker, who noted the use of Benzodiazepines and opiates had offered very little relief and no return of function. Thus, they should be terminated as they have the highest risk of side effects. Dr. Parker also discussed the use of Tizanidine, Diazepam, Celebrex, Hydrocodone/APAP, Lyrica, and Endocet, concluding all but "PRN Tizanidine" were not reasonable and necessary treatment.

In a medical fee dispute filed March 26, 2013, Quest Care also contested the medical regimen consisting of

[3] In that same medical fee dispute, Quest Care also contested the continued physical therapy, the ER visit to Pikeville Medical Center on June 10, 2012, and the treatment with Dr. Short and Kentucky Pain Physicians.

Medrox Patch ER, external ointment, Therymine Oral Cap, and GABAdone.[4] Quest Care relied upon Dr. Olash who opined none of the above were necessary or reasonable.

A review of the record reveals Drs. Guberman, Short, Reddy, Vaio, and Melton, the nurse practitioner, did not specifically address the need for the contested medications. Conversely, the reports of Drs. Parker and Olash specifically set out the basis for their opinions concerning the reasonableness and necessity for the medication in question.

We agree with Quest Care that the ALJ did not provide the requisite analysis regarding reasonableness and necessity of the medications in question. In paragraph eight of his findings of fact in the March 4, 2015, decision, the ALJ stated he was persuaded by Branham's testimony she suffers from significant and severe pain and requires relief from that pain. Consequently, he found in paragraph nine of his findings of fact that Branham met her burden of proof to show certain medications were medically reasonable and necessary.

[4] In this medical fee dispute, Quest Care also identified the request for lumbar LESIs, neural scan, lower extremity, needle EMG and VNG, as well as follow-ups with Kentucky Pain Physicians.

In his April 27, 2015, Order ruling on the petition for reconsideration, the ALJ indicated he also relied upon the medical opinions of Drs. Guberman, Vaio, Reddy, and Melton, the nurse practitioner. In doing so, he indicated these individuals had certified the medications prescribed were reasonable and necessary for the cure and relief of Branham's symptoms. However, the ALJ noted that neither the physicians nor Melton testified as to each medication by name and function. The ALJ went on to note only Dr. Olash had done this. The ALJ failed to note Dr. Olash only offered an opinion relative to some of the medications. He did not note Dr. Parker had specifically discussed the need for other medications.

In reviewing the record, we are unable to find any specific statement from Drs. Vaio, Reddy, Guberman, or Melton relating to the medication regimen and particularly the specific medications identified by Quest Care in its medical dispute and discussed by Drs. Olash and Parker. Rather, the doctors and Melton provided generic statements their treatment of Branham's work injury was reasonable and necessary. Consequently, the blanket reference to the doctors does not identify the specific medical opinions by these doctors upon which the ALJ relied. The reference to these doctors without identifying a specific opinion as to

the reasonableness and necessity of specific medication does not provide the Board and the parties with the basis for his decision regarding the disputed medications. We point out Quest Care has not appealed the ALJ's decision regarding the lumbar LESIs. Thus, the ALJ's decision regarding the lumbar LESIs will not be altered.

The ALJ's statement in the March 2015 decision that he relied upon Branham's testimony in determining the Lortab, (Hydrocodone – Acetaminophen) 10, Zanaflex, Therymine, Gabbadone, Neurontin, Prozac, Medrox (ointment and patch), Diazepam, Mobic, Celebrex, Lyrica, and Valium are reasonable and necessary cannot be reconciled with Branham's March 26, 2013, hearing testimony. The following is Branham's hearing testimony relative to the effect and benefit of the drugs prescribed:

> Q: Okay – now, the medications that you were on at Kentucky Pain Physicians – what did they prescribe for you?
>
> A: They took me off the Percocet, put me on Lortab – Lortab, Zanaflex to sleep – gosh there's so many of them. Lortab, Zanaflex, Lyrica – I can't think of the other ones, So, I knew I couldn't – I could never get the Lyrica filled. I think I got it filled maybe once or twice because Comp wouldn't pay for it.
>
> Q: Okay.

A: But I can’t remember the other medications.

Q: Who prescribed Tizanadine [sic] for you?

A: Dr. Short originally prescribed and then the Pain Clinic ended up taking over and they started prescribing it for me.

Q: What does that do for you?

A: That’s – she put that – put me on that to try to help me sleep because I don’t sleep because of the pain I can’t lay down, I can’t get comfortable, or anything like that. And, she was hoping that if I would take two at bedtime that I could at least, you know, relax and – and sleep but I can’t.

Q: The Lortab ...

A: Uh-huh.

Q: What strength is that?

A: 10/500 – it’s Lorcet 10.

Q: Okay.

A: Lortab 10, the strongest.

Q: Now, what does that do for you?

A: Right now, nothing. It’s not doing anything. When they first put me on it, it helped. Somewhat, it would relieve the pain but I think – it’s like I told the doctor I think I’ve just – they’ve had me on it for so long I think I just built up a tolerance to it because it’s – it’s not doing anything for the pain.

Q: Okay – are you taking anything now that helps the pain?

A: Nothing helps the pain, now – nothing. No, they've put me on Therymine (sic) is suppose [sic] to enhance the Lortab but it – it – I can't tell any difference.

Q: Does it provide any relief ...

A: No.

Q: For you?

A: No, no.

Q: What about the – Therymine?

A: That was the Therymine.

Q: That was the ...

A: Yeah.

Q: The Therymine?

A: Yeah.

Q: What about the Gabbadone?

A: The Gabbadone? No, I couldn't tell I was – I take it – no.

Q: Okay – and, I think you [sic] also been prescribed Medrox ointment and patch.

A: Yes.

Q: Does that provide ...

A: No.

Q: Relief?

A: No – none.

Q: Now, you were prescribed Diazepam.

A: Yes, Dr. Short.

Q: Why was that prescribed?

A: Anxiety. I was – the longer this went on the – the more depressed I was getting and my anxiety was just extremely over – overwhelming, especially when Comp stopped paying me my benefits – just all of a sudden just up and stopped paying me, and ...

Q: When did that depression or anxiety start?

A: It started around August, September of last year.

Q: Have you had any depression or anxiety prior to January 3rd, 2012?

A: The only time I ever had any depression before was postpartum depression with my first child, which he's twenty years old. You know, that was it and that didn't last very long at all.

Q: Okay – how long did it last? What's a period (sic) of not very long?

A: They had put on Prozac and, honestly, I don't even think it was a full month 'til it, you know ...

Q: So, you got over that?

A: Oh, I got over that, you know, real quick, you know, yeah.

Q: Okay – what about now?

A: I can't – they've put me – they've – they've got me on Prozac now and they had me on the lowest does of twenty milligrams, and they've increased it to forty milligrams, but it's – I can tell a very slight difference but I'm just – it – it doesn't do much.

Q: What problems does the depression or anxiety cause you?

A: I had really bad suicidal thoughts and – I’m sorry, I don’t mean to cry but it’s just so hard to talk about, but I’ve had a lot of really just horrible thoughts of, you know, just killing myself because I feel like I’m such a burden to everybody.

Q: Is that because of the ...

A: Because of the injury.

Q: Pain?

A: Yeah.

Q: How often do you have the pain?

A: The pain never goes away.

Q: What kind of pain is it? Is it dull pain, sharp pain ...

A: Sharp.

Q: And, how often is it?

A: Constant, it never stops.

Q: Does the pain cause you any problems in concentration or . . .

A: Yeah, it – you know, like I can sit on the couch and try and help my son do his homework – my youngest son, and I can’t even – I can’t concentrate at all. You know, I just – I have a hard time concentrating.

Q: Now, who prescribed Celebrex for you?

A: That was another one the Pain Clinic prescribed and then Comp quit paying for it. They wouldn’t pay for it anymore.

Q: Did it help?

A: It helped a little but [sic]. It helped more than the Neurontin they put me on.

Q: Okay.

A: The Celebrex helped.

Q: Okay – what – what relief did it give you?

A: I could function just a little bit more but not much, but it just – it just eased it up a little but it wasn't – it wasn't a lot, you know, a lot of relief but more than I'm getting now.

Q: Who prescribed the Lyrica for you?

A: the Pain – Kentucky Pain Physicians.

Q: Did it provide any relief for you?

A: No, they finally quit writing it because Comp wouldn't pay for it.

Q: How, are you taking Naproxen or Gabbapentin (sic) – either one of those?

A: Gabbapentin – I don't think I'm taking either – either one of them. No, I don't think so. They got that Gabbapentin mixed up with that Gabbadone. I'm not ...

[text omitted]

JUDGE BOLTON: Before you start, Ms. Banks – Ms. Branham, I just want to clear up one thing in my own mind before Ms. Banks gets into her examination of you. Mr. Thacker took you through a long list of medications that you – and asked you what they did for you and …

A: Uh-huh.

JUDGE BOLTON: To my recollection, there wasn't any one single one that you said really helped you. Is there any medication that you're on that you feel does give you some relief from your pain?

A: The – the Lortab will give me very little relief. I can tolerate it – the pain, but it's just like one of those things, it doesn't last very long.

JUDGE BOLTON: Uh-huh. So, you haven't gotten any relief from any other of the medications that you've been placed on except for the Lortab. Is that what you're saying?

A: Well, yeah pretty much – yeah. I just – I feel like I take a pharmacy, you know, and I mean, it's just ridiculous.

JUDGE BOLTON: So, are you currently still taking all these medications ...

A: Unfortunately.

JUDGE BOLTON: That don't give you any relief or ...

A: Unfortunately, yeah. They keep prescribing them, and I – you know, so …

JUDGE BOLTON: Have you asked them to try anything different or ...

A: Yeah, actually I have.

JUDGE BOLTON: To try [sic] get any relief?

A: Yeah, I have asked them – I told them about the Lortab not helping that much and the doctor told me unless I have surgery they can't prescribe anything stronger. And, let's see, he

took me off the – took me off the Celebrex and put me on – I think it was Neurontin. I – and, Mobic is another one. I mean, I can't even tell I'm – I mean, I take them but I can't tell any – it's doing anything – nothing at all.

[text omitted]

REDIRECT

Q: Okay – what medications are you current taking?

A: If I can remember I'll tell you. The Lortab, the Therymine, Gabbadone, Zanaflex, Mobic, Neurontin, Valium, Lorpressor, and Norvasc (sic) and Prozac. I believe that's it.

Q: Okay – and you were testifying that the Therymine and the Gabbadone …

A: Uh-huh.

Q: Don't provide any relief?

A: I – I can't tell any difference, no.

Q: Okay – and, how about the Mobic?

A: I can't ...

Q: Do you have any relief from the Mobic?

A: I can't tell anything with it.

Q: Do you still take Endocet?

A: No, I haven't taken that since June of last year.

Q: And, I believe the Zanaflex is the same as the Tizanidine.

A: Yeah, that's what it is – yeah.

> Q: Do you have any relief from the Zanaflex?
>
> A: The only thing with that is it helps me relax to try and go to sleep but I don't – I never do actually sleep now because I just can't get comfortable.

We emphasize this is the last testimony offered by Branham during these proceedings since the parties waived a hearing for the medical fee disputes. The above testimony from Branham conclusively establishes many of the medications the ALJ found to be reasonable and necessary treatment either provided no relief/benefit or were prescribed for her psychological condition which the ALJ determined was a pre-existing <u>and</u> non-compensable condition. In light of Branham's testimony and the fact the doctors upon whom the ALJ relied did not offer a specific opinion as to the reasonableness and necessity of any of the medications in question, the ALJ's decision finding these medications medically necessary and reasonable must be vacated.

On remand, the ALJ must make an individualized determination as to what medications, if any, constitute reasonable and necessary treatment of Branham's work injury and cite the supportive evidence.

Accordingly, those portions of the ALJ's July 19, 2013, Order relating to the ALJ's determination Branham has

a 7% impairment rating as a result of the work injury and has no pre-existing active condition is **AFFIRMED**. The award of PPD benefits is **VACATED**. On remand, the ALJ shall determine whether Branham's award of PPD benefits shall be enhanced pursuant to KRS 342.730(1)(c)1 or (1)(c)2. The ALJ shall also enter an amended award of PPD benefits in conformity with the views expressed herein.

Those portions of the March 4, 2015, Order on Remand and the April 27, 2015, Order ruling on the petition for reconsideration relating to the ALJ's determination numerous medications are reasonable and necessary treatment and therefore compensable are **VACATED**. The matter is **REMANDED** to the ALJ for entry of a decision regarding the compensability of the medications in question in conformity with the opinions expressed herein.

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KENTUCKY PAIN PHYSICIANS
286 US HWY 23 NORTH
PRESTONSBURG KY 41653

PIKEVILLE MEDICAL CENTER
911 BYPASS ROAD
PIKEVILLE KY 41501

RX DEVELOPMENT ASSOCIATES
P O BOX 844624
DALLAS TX 75284

DOCTORS MEDICAL
P O BOX 844624
DALLAS TX 75284

INJURED WORKERS' PHARMACY
P O BOX 338
METHUEN MA 01844

ADMINISTRATIVE LAW JUDGE:

HON STEVEN BOLTON
657 CHAMBERLIN AVE
FRANKFORT KY 40601