

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 19, 2014

CLAIM NO. 200059621

SCHWAN'S HOME SERVICE, INC.

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE

DAVID DAMRON  
DR. LELA C. JOHNSON  
and HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**STIVERS, Member.** Schwan's Home Service, Inc. ("Schwan's") appeals from the August 5, 2014, Opinion and Order of Hon. John B. Coleman, Administrative Law Judge ("ALJ") resolving a medical fee dispute in favor of David Damron ("Damron"). Based on the medical fee dispute filed by Schwan's, the ALJ determined the prescription medications Advair Diskus

("Advair") and Combivent ARO ("Combivent") are compensable since each is causally related to the treatment of Damron's pulmonary embolism. Schwan's also appeals from the September 5, 2014, Order overruling its petition for reconsideration.

The January 17, 2003, Opinion, Award, and Order of Hon. J. Landon Overfield, Administrative Law Judge ("ALJ Overfield"), determined Damron had three separate impairment ratings, which he combined pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), as a result of injuries sustained on December 4, 2000, and September 9, 2001. ALJ Overfield entered the following findings regarding those injuries:

10. I find that, as a result of his workers compensation injury of December 4, 2000 and September 9, 2001, Plaintiff has a 10% functional impairment to his body as a whole resulting from the injury to his right knee. In making this finding I have relied on the opinions of Dr. Burke. I further find that Plaintiff has a 24% functional impairment to the body as a whole as a result of the injury to his left upper extremity. In making this finding I have relied on the opinions of Dr. Wheeler. I further find that, as a result of the pulmonary embolus, Plaintiff has a 10% functional impairment to the body as a whole. In making this finding I have relied on the opinions of Dr. Baker. Thus

Plaintiff has a combined 39% functional impairment to the body as a whole. I have exercised my discretion in using the combined values chart in the *AMA Guides* to combine the 10% impairments for the right knee and lungs and the 24% impairment for the left arm. These combine to a 39% functional impairment rating.

Income and medical benefits were awarded as follows:

1. Plaintiff, David G. Damron, shall recover of Defendant Employer, Schwan's Sales Enterprises, and/or its insurance carrier, the sum of \$370.13 per week for temporary total occupational disability benefits for the periods from December 5, 2000 through July 4, 2001 and September 10, 2001 through November 21, 2001 and, thereafter, the sum of \$366.43 per week for 3 times a 66.3% permanent partial disability limited by K.R.S. 342.730(1)(d), continuing thereafter for so long as Plaintiff is so disabled but not to exceed 520 weeks, together with interest at the rate of 12% per annum on all past due and unpaid installments of compensation and, Defendant Employer shall take credit for any amounts of compensation heretofore paid.

2. Plaintiff shall further recover of Defendant Employer and/or its insurance carrier for the cure and relief from the effects of his workers compensation injury, such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of his injury and thereafter during disability, except for the medical

expenses related to the care and treatment of the left knee. These awarded medical expenses shall include Plaintiff's travel expenses for traveling to and from doctors' appointments outside of his home county, for all medical care, except the medical care provided for the left knee.

On March 20, 2014, Schwan's filed a motion to reopen, a Form 112, and a motion to join the medical provider, Dr. Cary Twyman, as a party to the proceedings. Relying upon the January 16, 2014, independent medical examination ("IME") report of Dr. William Lester, which it attached to the motion, Schwan's contested the need for Damron to continue taking Advair and Combivent for his alleged pulmonary condition. Schwan's stated Dr. Lester concluded Damron had severe degenerative changes to the right knee and a pulmonary embolism condition which was currently stable. However, if Damron underwent right knee surgery he would be at a higher risk for deep vein thrombosis ("DVT"). Schwan's asserted Dr. Lester expressed the opinion Advair and Combivent were not related to the pulmonary embolism because they were being used to treat "more asthma." Further, Dr. Lester concluded the treatment for asthma could be controlled with generic medications. Schwan's maintained the medications were not related to Damron's work-related pulmonary condition but were

prescribed for non-work-related asthma. Notably, Schwan's represented this medical fee dispute did not relate to the reasonableness and necessity of Advair and Combivent for Damron's asthma, but rather the medications were not being prescribed for his work-related pulmonary condition.

Damron filed a *pro se* response and an affidavit stating he suffered from a pulmonary embolism following knee surgery which ultimately caused chronic obstructive pulmonary disease ("COPD") from which he continues to suffer. Since he continues to suffer from COPD, Damron maintained the Advair and Combivent are needed.

In an April 14, 2014, Order, the ALJ found Schwan's had made a *prima facie* showing for reopening and sustained the motion to reopen and ordered Dr. Twyman joined as a party to the medical fee dispute. The ALJ also set a date for a telephonic conference with the parties.

Dr. Twyman submitted an April 25, 2014, letter.

Damron filed the letters dated April 11, 2014, and May 14, 2014, of Dr. Lela C. Johnson, the internal medicine specialist who treats him. Thereafter, Schwan's filed a motion to join Dr. Johnson which the ALJ sustained by order dated May 5, 2014.

Schwan's subsequently filed the June 13, 2014, letter from Dr. Lester who indicated his opinions relative

to causation had not changed after reviewing the statements of Dr. Johnson.

The Benefit Review Conference ("BRC") Order of July 1, 2014, reflects Dr. Johnson's treatment was at issue and the sole issue was the work-relatedness of Advair and Combivent. The order indicated the parties had waived a hearing and the matter would stand submitted as of July 15, 2014, with each party to submit a five page memorandum by July 14, 2014. The order specifically states Damron was a "no show."

Schwan's submitted a memorandum and Damron submitted a letter containing his position.

In the Opinion and Order, after discussing ALJ Overfield's findings regarding the "pulmonary embolus" and summarizing the medical evidence introduced on reopening, the ALJ provided the following in support of his decision:

The question before the ALJ is simply whether the need for Advair and Combivent are related to the plaintiff's work related pulmonary embolus. The position of the defendant is that it is not, but is instead related to chronic obstructive bronchitis which Dr. Lester opined would not be related to the plaintiff's pulmonary embolism. On the other hand, the plaintiff's treating physician simply indicated a temporal relationship between his need for the medication and his work injury. If that were the entirety of the evidence,

the ALJ would have no choice but to find for the defendant. However, as there was a prior Opinion and Award, the ALJ is obligated to look at the entirety of the medical evidence including the findings of the original ALJ. As noted above, the original ALJ relied upon the opinion of Dr. Glenn Baker in finding the plaintiff had 10% whole person impairment as result of his pulmonary embolus. A review of the report of Dr. Glenn Baker indicates that he found the plaintiff to have decreased breathing capacity on pulmonary function testing. The testing revealed an FVC of 77% of predicted values and an FEV1 77% of predicted values with the results being interpreted as a mild restrictive ventilatory defect. Dr. Baker opined the cause of the mild restrictive ventilatory defect on pulmonary function testing was the work related injury with subsequent pulmonary embolism. While he recognizes some of the plaintiff's complaints may be secondary to deconditioning or weight gain, he placed causation firmly with the work injury. The assessment of impairment was based upon table 5-12 of the *AMA Guides*. A review of that table indicates impairment as assessed for respiratory disorders using pulmonary function. In other words, Dr. Baker offered the opinion the plaintiff's loss of pulmonary function was indeed related to his work related pulmonary embolism. Therefore, the report of Dr. Johnson regarding the temporal relationship of the treatment for restricted breathing must be viewed in light of the fact the plaintiff's restricted breathing was found to be related to his injury. As such, the contested medical treatment is compensable pursuant to KRS 342.020.

Schwan's filed a petition for reconsideration asserting the ALJ's opinion contained two patent errors. First, the ALJ erroneously relied, in part, upon Dr. Glen Baker's report which had not been designated as evidence pursuant to 801 KAR 25:010 Section 4(6)(b). Schwan's maintained neither it nor Damron designated as evidence Dr. Baker's report contained in the original record, and no order in the file designated Dr. Baker's report as evidence. Even though Schwan's cited to the Court of Appeal's opinion in St. Joseph Hospital v. Littleton-Goodan, 2007-CA-000633-WC, rendered August 10, 2007, Designated Not To Be Published, it did not specifically address its relevance. Schwan's contended the parties were not on notice the ALJ would be relying upon the medical opinion of Dr. Baker and the parties did not have the opportunity to cross-examine Dr. Baker. Therefore, it was prejudiced due to the lack of notice and was denied procedural due process by not being afforded the opportunity to cross-examine Dr. Baker.

Next, it asserted the medications in question have been prescribed for ten years since the work injuries for Damron's non-work-related chronic obstructive bronchitis/asthma. It argued the work-related pulmonary embolism is a different condition than the condition for

which the medications are currently prescribed. Therefore, it requested a finding the prescriptions were not work-related nor reasonable and necessary.

In the Order overruling Schwan's petition for reconsideration, the ALJ stated the issue is whether Damron's breathing impairment is related to his work condition which he concluded had been decided by ALJ Overfield. The ALJ stated he noted in the opinion and order the evidence which ALJ Overfield relied upon in determining Damron's decreased pulmonary function was directly related to this pulmonary embolism. The ALJ stated that since ALJ Overfield's decision is *res judicata* regarding the cause of Damron's decreased pulmonary function and the treatment was only contested on the basis of being work-related, the petition for reconsideration was denied.

On appeal, Schwan's asserts Damron has the burden of proof with respect to medical causation. Therefore, Damron must establish through competent and substantial medical evidence that the contested medications are related to his 2000 and 2001 work injuries. It argues the report of Dr. Johnson is "not strong on the issue of causation/work-relatedness." It contends Dr. Johnson's statements are "more temporal" and she "never actually

concluded that the medications prescribed are work-related."

Relying on the ALJ's statement that if the medical opinions of Drs. Lester and Johnson were the entire evidence, he would have no choice but to find for Schwan's, it argues Damron has failed to satisfy his burden and prove the medications are related to his work injuries. Schwan's maintains the ALJ concluded the medications are work-related based upon the findings in ALJ Overfield's decision that Damron had a work-related pulmonary embolism. However, it asserts the medications in dispute are not related to the pulmonary condition but are related to Damron's non-work-related asthma. Schwan's argues the pulmonary embolism and asthma or chronic obstructive bronchitis are separate and distinct medical conditions. Therefore, it was patent error for the ALJ to conclude a prior work-related pulmonary embolism condition and the current asthma or chronic obstructive bronchitis are the same medical condition, as Dr. Lester stated asthma and pulmonary embolism are not the same conditions.

Schwan's also argues ALJ Overfield never addressed the medications needed for the cure and relief of the pulmonary embolism. It argues the ALJ misconstrued the evidence in finding the medications are reasonable,

necessary, and work-related. Therefore, there is no medical evidence establishing a causal relationship between the medications in question and Damron's work-related pulmonary condition, and the medications are being prescribed for his non-work-related asthma.

Significantly, Schwan's does not reiterate on appeal its argument the ALJ erroneously relied upon the report of Dr. Baker contained in the original record. In its statement of the case, Schwan's contends the parties were not on notice the ALJ would be relying upon Dr. Baker's opinion and it did not have the opportunity to cross-examine Dr. Baker. Schwan's states it was prejudiced by this lack of notice and was denied due process because it was unable to cross examine Dr. Baker. However, there is no such assertion made in the argument portion of Schwan's brief.

In a post-award medical fee dispute, the burden of proof and risk of non-persuasion with respect to the reasonableness and necessity of medical treatment falls on the employer. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). However, the burden remains with the claimant concerning questions of work-relatedness or causation of the condition. Id; See also Addington

Resources, Inc. vs. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

That said, we are mindful of the Kentucky Supreme Court's decision in C & T of Hazard v. Stollings, 2012-SC-000834-WC, rendered October 24, 2013, Designated Not To Be Published, wherein the Supreme Court stated as follows:

"The party responsible for paying post-award medical expenses has the burden of contesting a particular expense by filing a timely motion to reopen and proving it to be non-compensable." *Crawford & Co. v. Wright*, 284 S.W.3d 136, 140 (Ky. 2009) (citing *Mitee Enterprises v. Yates*, 865 S.W.2d 654 (Ky.1993) (holding that the burden of contesting a post-award medical expense in a timely manner and proving that it is non-compensable is on the employer)). As stated in *Larson's Workers' Compensation Law*, §131.03[3][c], "the burden of proof of showing a change in condition is normally on the party, whether claimant or employer, asserting the change...". The burden is placed on the party moving to reopen because it is that party who is attempting to overturn a final award of workers' compensation and thus must present facts and reasons to support that party's position. It is not the responsibility of the party who is defending the original award to make the case for the party attacking it. Instead, the party who is defending the original award must only present evidence to rebut the other party's arguments.

The Board in finding that Stollings had the burden to prove that the medical expenses were work-related

cited to *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky. App. 1997). However, the only reference to the burden of proof in *Perkins* was the following sentence: "Since the fact-finder found in favor of Perkins who had the burden of proof, the standard of review on appeal is whether there was substantial evidence to support such a finding. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984)." We believe that this sentence did not indicate the claimant had the burden to prove that his treatment is work-related on a motion to reopen but instead was a recitation of the well-established standard of review as set forth in *Wolf Creek Collieries*. C & T also presents several unpublished opinions which indicate that the burden of proof is upon the claimant to show the medical expenses were work-related. However, we decline to consider those cases as persuasive. CR 76.28(4)(c). Thus, C & T had the burden of proof to show that Stolling's treatment was unreasonable and not work-related.

The ALJ's decision finding the medications in question to be causally related to Damron's pulmonary embolism is supported by substantial evidence. In his initial report of January 16, 2014, Dr. Lester expressed the opinion Damron's right knee and pulmonary embolism conditions were related to the work injuries of 2000 and 2001. Dr. Lester's report contains the following:

4. Are the two medications, Advair Diskus and Combivent Aro, for Damron's pulmonary embolism condition reasonable and necessary and work related for the pulmonary condition that occurred over

twelve years ago? **Patient's Advair and Combivent treatments aren't related to pulmonary embolism but are used to treat more asthma which he has related to wheezing he describes and not related to a pulmonary embolism.**

However, Dr. Lester provided the following response to question five:

5. Do you believe that generic version of Advair Diskus and/or Combivent Aro, would be just as effective for the treatment of Damron's pulmonary condition? Please explain. **Yes, his treatment for asthma can be controlled with generic medication.**

In that response, Dr. Lester specifically connected the medications in question, albeit in a generic version, to the treatment of Damron's pulmonary condition. He also added Damron's treatment for asthma can be controlled with generic medications. Dr. Lester's responses are conflicting. However, his answer to question five supports the ALJ's decision.

In an April 11, 2014, letter, Dr. Johnson stated as follows:

David Damron is my patient whom I have prescribed Advair Diskus 500-50 mcg and Combivent Respimat 20-100 mcg for obstructive chronic bronchitis. This was initially prescribed to Mr. Damron in 2001 following a blood clot of his lung which occurred after his compensable knee surgery. This medication had not been prescribed for him prior to his injury.

Mr. Damron has never been diagnosed with asthma.

Dr. Johnson authored a May 14, 2014, letter in which she stated:

David Damron is my patient whom I have prescribed Advair Diskus 500-50 mcg and Combivent Respimat 20-100 mcg for obstructive chronic bronchitis. This was initially prescribed for him in 2001 following a blood clot of his lung which occurred after his compensable knee surgery.

The above listed medicines had not been prescribed for Mr. Damron prior to his injury and I continue to prescribe them for him because he has less shortness of breath and has had no exacerbations of breathing since being on them.

In a letter dated April 25, 2014, Dr. Twyman stated, in relevant part, as follows:

As has been noted in many previous requests Mr. Damron is seen by me approximately every six months, and is on medication resulting from the accident in question.

In light of the above medical evidence, we disagree with the ALJ's conclusion that based on the medical evidence filed in the record upon reopening, he would have had no choice but to find for Schwan's. Dr. Lester's response to question five, Dr. Johnson's letters, and Dr. Twyman's letter when considered as a whole clearly constitute substantial evidence which supports the conclusion the medications in question are related to the

treatment of Damron's work-related pulmonary embolism. In fact, the letters of Drs. Johnson and Twyman firmly link the need for the medication in question to the pulmonary embolism which ALJ Overfield found to be work-related. In Dr. Johnson's letters, she emphasizes three points: 1) she prescribed Advair and Combivent for chronic obstructive bronchitis; 2) the medication was initially prescribed in 2001 following a blood clot in Damron's lung occurring after his compensable knee surgery; and 3) the medications were not prescribed prior to Damron's injury. Notably, Dr. Johnson's April 11, 2014, letter also states Damron has never been diagnosed with asthma and her May 14, 2014, letter states she continues to prescribe the medications because Damron has less shortness of breath and he has had no exacerbations of breathing. In stating the medications Damron takes resulted from the accident, Dr. Twyman cures any possible deficiencies regarding causation in Dr. Johnson's letters. Thus, without considering Dr. Baker's report, the medical evidence introduced upon reopening firmly supports the ALJ's decision.

That said, in resolving the issue before him, the ALJ is permitted to consult ALJ Overfield's opinion. On pages twelve and thirteen of his opinion, ALJ Overfield provided the following explanation for his reliance upon

Dr. Baker's opinions in finding Damron had a work-related pulmonary embolism:

However, I find the most credible and convincing evidence in the record concerning Plaintiff's lung condition resulting from the pulmonary embolus is submitted by Plaintiff in the nature of the Form 107-I of Glen Ray Baker, Jr., M.D. Dr. Baker noted that Plaintiff developed chest pain and was found to have a pulmonary embolism and was transferred from Pikeville Methodist Hospital to Central Baptist Hospital. He was medicated with Heparin for pulmonary embolism and deep venous thrombophlebitis. The pulmonary function studies performed on April 12, 2002 revealed a mild restrictive ventilator defect. Dr. Baker diagnosed status post deep venous thrombophlebitis, status post pulmonary embolism, on chronic anticoagulation and a mild restrictive ventilator defect based on pulmonary function testing. It was his opinion that the injury (pulmonary embolus) did cause Plaintiff's lung condition but also recognized that some of Plaintiff's complaints **may** be secondary to deconditioning and weight gain which had occurred since his injury because of decreased level of activity.

The language in ALJ Overfield's opinion establishes Damron developed a lung condition as a result of the pulmonary embolism. The letters of Drs. Twyman and Johnson read in conjunction with the findings of ALJ Overfield are sufficient and constitute substantial evidence which support the ALJ's decision that the

medications in question are causally related to Damron's work-related condition. Therefore, in this instance we believe it was reasonable for the ALJ to infer from the totality of the circumstances that Advair and Combivent were causally related to the treatment of Damron's work-related injuries in 2000 and 2001.

The ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co., v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Searce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969). Reasonable inferences regarding causation are fundamental to an ALJ's role as fact-finder. Jackson v. General Refractories Co., Ky., 581 S.W.2d 10 (1979). In light of the whole record, we find that determination to be supported by substantial evidence. So long as the ALJ's determination is supported by substantial evidence, it may not and will not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Finally, even though Schwan's does not make the argument it put forth in its petition for reconsideration regarding the ALJ's improper reliance upon Dr. Baker's report, we choose to address that issue in light of

Schwan's citation to the holding by the Court of Appeals in St. Joseph Hospital v. Littleton-Goodan, supra. There, the Court of Appeals noted the Board's decision was on appeal because the ALJ considered a Form 107 medical report filed in the record in the original proceeding but not specifically designated as part of the reopening record following St. Joseph's motion to reopen. The Court of Appeals noted that before the Board, St. Joseph had argued the ALJ had erred in characterizing a doctor's report "as supportive testimony of causation" and had also erroneously relied on the Form 107 of another doctor since the Form 107 had "never been properly designated into the record." It noted the Board concluded the Form 107 in question was properly before the ALJ, but the ALJ had misunderstood the report of another doctor and remanded for a decision based upon a correct understanding of the report. St. Joseph then petitioned for review by the Court of Appeals solely on the issue of whether the doctor's Form 107 was properly designated into the record upon reopening for consideration by the ALJ. The argument made by St. Joseph is substantially the same argument Schwan's asserted in its petition for reconsideration but not herein. Rejecting St. Joseph's argument, the Court of Appeals affirmed stating as follows:

The foregoing regulations plainly contemplate that the movant in a reopening case will sift through the record and, in good faith, designate those portions relevant to the issues raised upon rehearing. If causation is an issue, and a particular item of evidence in the original record relates to causation, including a Form 107 introduced into the original record by the nonmoving party, the duty is upon the movant to detect the evidence and designate it into the rehearing record. St. Joseph appears to suggest that it was entitled to pick and choose the evidence it wished placed into the reopening record, and then shift the burden to Littleton-Goodan to do her independent review and designate the evidence she wanted placed before the ALJ. We believe that interpretation is contrary to the plain language, and intent, of the regulations.

In any event, in determining whether an award should be reopened, the ALJ may look to the record made at a former hearing or hearings had before it with reference to same accident. [citation omitted]. The Form 107 was in the record of the original proceedings, and, it follows, the ALJ properly looked to this relevant item of evidence in reaching its decision.

St. Joseph, however, suggests that it was, in effect, blind-sided by the ALJ's reliance upon the Form 107. However, as previously noted, St. Joseph had a duty to have examined the complete original record itself in connection with refiling its reopening motion, and compliance with this duty would have disclosed the form. Moreover, it was a party to the original proceedings and, as such, would be charged with at least

constructive notice of the contents of the original litigation file. In short, with minimum diligence, St. Joseph could have made itself aware of the Form 107, and if it disagreed with the conclusions contained therein, it could have preemptively challenged the evidence, thereby assuring that its position on the verity of the report was placed before the ALJ.

Slip Op. at 8 and 9.

We think the above logic applies to Schwan's argument in its petition for reconsideration. Here, since ALJ Overfield relied upon Dr. Baker's report in determining Damron had a work-related pulmonary embolism and quoted fairly extensively from Dr. Baker's report, the ALJ was permitted to review not only ALJ Overfield's opinion but the report of Dr. Baker in resolving the issue before him.

Accordingly, the decision of the ALJ on this issue is **AFFIRMED**.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON NATALIE LASZKOWSKI  
1315 HERR LANE STE 210  
LOUISVILLE KY 40222

**RESPONDENTS:**

DAVID DAMRON  
242 STRAIGHT FORK  
PIKEVILLE KY 41501

LELA C JOHNSON MD  
P O BOX 2288  
PIKEVILLE KY 41502

**ADMINISTRATIVE LAW JUDGE:**

HON JOHN B COLEMAN  
107 COAL HOLLOW RD STE 100  
PIKEVILLE KY 41501