OPINION ENTERED: June 21, 2013

CLAIM NO. 201001245

ST. CATHERINE OF SIENA CHURCH PETITIONER

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

DENNIS LOUIS KRAMER
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS, Member.

ALVEY, Chairman. St. Catherine of Siena Church ("St. Catherine") appeals from the February 8, 2013 Opinion, Award and Order rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), and from the March 20, 2013 order denying its petition for reconsideration.

In a medical fee dispute filed by St. Catherine, the ALJ ruled in favor of Dennis Louis Kramer ("Kramer"), finding compensable a recommended arthroscopic knee surgery. On appeal, St. Catherine argues the ALJ improperly relied on a letter/pleading as evidence, incorrectly held it did not argue failure to follow medical advice, misinterpreted the opinion of Dr. Culver, and erroneously determined Kramer had a pre-existing dormant condition. Because the ALJ's findings are supported by substantial evidence, we affirm.

Kramer settled his claim against St. Catherine in a Form 110-I settlement agreement approved October 20, 2010. The agreement indicates Kramer fell from a ladder on April 29, 2008, lodging his leg in the ladder. The agreement lists "Internal derangement of his left knee/knee sprain/patellofemoral disease" as Kramer's diagnoses. Dr. Mark Siegel, whose report was attached to the agreement, assigned a 7% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Kramer retained his right to future medical treatment.

St. Catherine filed a motion to reopen and Form 112 Medical Dispute on April 22, 2011, contesting a diagnostic arthroscopic surgery or any other treatment for

Kramer's left knee recommended by Dr. Forest T. Heis. St. Catherine attached the March 24, 2011 note of Dr. Heis stating Kramer had failed conservative treatment and continued to have significant pain. Therefore, Dr. Heis recommended diagnostic arthroscopy and noted Kramer's symptoms increased gradually as he "worked his way back to full activity" following surgery. Dr. Heis indicated the recommended surgery was related to his initial injury.

St. Catherine submitted the peer review report of Dr. William R. Culver, who opined Kramer did not suffer harm to the physical structure of his knee. Dr. Culver opined Kramer's condition was related to degenerative disease, demonstrated on the MRI, which is an ordinary disease of life not specific to the injury. Dr. Culver stated Kramer had pre-existing degenerative disease and chondromalacia which were not aggravated or exacerbated by the work injury. Dr. Culver indicated all treatment related to the work injury should have concluded in 2009, and any ongoing treatment was unrelated to the work injury, for which no further treatment was reasonable or necessary. He indicated treatment including hyaluronic acid injections, offloading, anti-inflammatory medications and occasional office visits would be reasonable treatment for the degenerative disease.

Both St. Catherine and Kramer submitted medical records from Dr. Heis with Commonwealth Orthopaedic Centers. Kramer initially received conservative treatment with Dr. Grefer who administered a series of injections in her knee.

When conservative measures were unsuccessful, Dr. Heis took over Kramer's care in March 2009. Dr. Heis performed a left knee arthroscopy on August 21, 2008, for a small lateral meniscus tear and chondral injury of the medial femoral chondyle. Kramer was allowed to gradually increase his activity level. On October 23, 2009, Kramer reported his left knee pain returned when he ran, without sustaining any new knee trauma. Kramer reported he was running twenty to twenty-five miles per week. Dr. Heis advised Kramer his knee was not tolerating this increase in activity. Kramer expressed his desire to run in the Turkey Day Race, and Dr. Heis outlined a course of decreased activity, ice, elevation and anti-inflammatories to "calm down" the knee followed by a gradual increase in activity. In a January 15, 2010 note, Dr. Heis indicated Kramer had been able to run the Turkey Day Race and was doing well until "the last couple of weeks" when he developed pain along the medial aspect of his knee. On October 22, 2010, Kramer complained of continued problems with his knee

despite a cortisone injection. Dr. Heis discussed a diagnostic left knee arthroscopy with Kramer.

In an October 13, 2011 report, Dr. Heis stated Kramer failed to respond to conservative treatment during a one and one half year period following knee surgery. Dr. Heis stated:

> He continues to have debilitating pain in his knee without any known traumatic episode to cause this pain except for the original injury that occurred in April 2008 when he fell from a ladder. This directly corresponds to the pain he is having. As such, it is within reasonable medical probability that this is directly related to his original injury.

St. Catherine filed the August 6, 2010 report of Dr. Mark G. Siegel, who examined Kramer on May 12, 2010. Dr. Siegel indicated an MRI revealed no change and Kramer had reached maximum medical improvement. Dr. Siegel noted Kramer had full range of motion and assigned a 7% impairment rating pursuant to the AMA Guides.

In the February 8, 2013 opinion, the ALJ's analysis and findings relevant to this appeal are as follows:

> In cases like this, where there are diametrically opposed medical opinions from highly qualified physicians, one usually has to look at

the historical record to divine the actual facts.

Here, it is true that the Plaintiff had complaints about pain in the knees from running and his degenerative joint disease probably played a role in causing those complaints. However, the record also reflects that prior to the 4/29/2008 injury he was able to function without restriction.

His own report by letter, which has not been contradicted, is that he was continuously able-bodied until he sustained this injury. Thus, while he likely had degenerative joint disease on April 29, 2009, it was not active until it was aroused into disabling reality by the work-related injury.

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). This is where the law differs from medical orthodoxy.

The Defendant complains about Plaintiff’s running regimen, but does not argue that the Plaintiff failed to follow medical advice. There is no

evidence that the degenerative changes described by Dr. Culver were active and ratable prior to Plaintiff's work related injury.

FINDINGS OF FACT,
AND CONCLUSIONS OF LAW

1. The need for a left knee arthroscopy proposed by Dr. Forest T. Heis is causally related to the work incident of April 29, 2009. In making this finding, I rely on the opinion of Dr. Heis[,] as supported by the letter of the Plaintiff, which I find to be the most persuasive evidence in the record with regard to this issue.

2. The Plaintiff is entitled to temporary total disability benefits if he undergoes surgery for the arthroscopy of his left knee and the attendant post-surgical care necessary to restore him to full function, if that can be accomplished.

3. While the osteoarthritic condition diagnosed by both Drs. Culver and Siegel may have pre-existed the work incident of April 29, 2009, it was aroused into disabling reality by that incident. Thus, Plaintiff's ongoing medical treatment for his left knee is clearly related to the work event of April 29, 2009, based upon the medical opinion of Dr. Heis, upon whose medical opinion the ALJ relies in making these findings.

St. Catherine filed a petition for reconsideration raising essentially the same arguments it now raises on appeal. By order dated March 20, 2013, the

ALJ denied the petition for reconsideration, finding as follows:

> Having reviewed the record, the ALJ's Opinion, Award & Order and related pleadings, it appears to the ALJ, upon a reading of the Defendant's Petition for Reconsideration that the Defendant's argument is fact based in that it disagrees with the ALJ's reliance on some evidence in the record before him, upon which he relied in making an award. The fact that the ALJ chose not to rely on some evidence, or failed to mention whether or not he considered certain evidence, or if he did not believe that some evidence had probative value is not error.
>
> Defendant complains that the ALJ should not have allowed Plaintiff's written statement in as evidence, however the Plaintiff was *pro se* and his statement was as much argument as testimony. As the Defendant failed to depose the Plaintiff and he failed to appear at the formal hearing, there was little else upon which to base a decision. Nevertheless, the ALJ believes that the evidence relied upon was competent.

On appeal, St. Catherine argues the ALJ improperly relied on the letter submitted by Kramer as evidence. St. Catherine contends the letter constitutes a pleading rather than evidence. St. Catherine argues the ALJ erred in stating it did not argue Kramer failed to follow medical advice. St. Catherine notes it argued in its post-hearing brief, "Kramer, despite urging from Dr.

Heis and his own knee pain, refused to stop, or limit, his running schedule." St. Catherine further stated in the brief that Kramer, after Dr. Heis urged a reduction in running mileage, ran the Turkey Day Race. St. Catherine acknowledges it did not explicitly state Kramer "failed to follow medical advice" but the inescapable conclusion, based upon excerpts in its brief, is he failed to follow his doctor's advice.

Next, St. Catherine argues the ALJ misinterpreted the medical opinions in the record. St. Catherine notes the ALJ stated Dr. Culver opined Kramer's current problems are attributed "to pre-existing degenerative disease and chondromalacia, but not related to his pre-existing degenerative disease." St. Catherine notes Dr. Culver stated the current condition is related to Kramer's degenerative disease not resulting from a specific injury. St. Catherine contends it is obvious from the opinions of the three physicians Kramer suffered from fibromyalgia in addition to pre-existing degenerative disease, and his current symptoms are causally related to his degenerative condition.

St. Catherine argues Kramer's condition is unrelated to his work injury, and is due to a degenerative condition coupled with intense running and fibromyalgia.

St. Catherine contends Kramer's conditions were active rather than dormant prior to the work injury. St. Catherine cites references to fibromyalgia in Dr. Heis' record of March 13, 2009, July 9, 2010, and September 10, 2010 supporting its argument the condition is the cause of Kramer's complaints. St. Catherine asserts Dr. Heis' opinion regarding causation expressed in the October 13, 2011 report does not constitute substantial evidence in light of his prior records and the opinions of Drs. Siegel and Culver.

In a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving the contested treatment or expenses are unreasonable or unnecessary. National Pizza Company v. Curry, 802 S.W.2d 949 (Ky. App. 1991); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The claimant, however, bears the burden of proving work-relatedness. *See* Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as fact-finder, determines the quality, character, and

substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, supra; Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He or she may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

This appeal is primarily an impermissible attempt to have the Board substitute its judgment for that of the ALJ. The question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, as to compel a finding in St. Catherine's favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The ALJ may choose whom or what to believe. Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

As noted by the ALJ, St. Catherine had the burden of proof on the issue of pre-existing active disability. St. Catherine identifies evidence demonstrating Kramer had

a pre-existing condition. However, as noted by the ALJ, the issue is whether the condition was both *symptomatic and impairment ratable* immediately prior to the work injury. *See* Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). No physician opined Kramer qualified for an impairment rating for degenerative disease immediately prior to the work injury. Nothing in the record indicates any pre-existing condition interfered with Kramer's ability to perform his work prior to his work injury. The evidence falls far short of compelling a finding Kramer had a pre-existing active condition as defined by Finley v. DBM Technologies, supra.

Much of St. Catherine's argument on appeal is the result of misreading the ALJ's opinion. In his first finding of fact set forth above, the phrase "which I find to be the most persuasive evidence in the record" obviously refers to the opinion of Dr. Heis and not to Kramer's letter.

In his October 13, 2011 report, Dr. Heis, within reasonable medical probability, related Kramer's condition to the work-related injury. Despite St. Catherine's arguments to the contrary, Dr. Heis' opinion constitutes substantial evidence. The ALJ acted within the scope of

his role as fact-finder in choosing to rely on Dr. Heis' opinion expressed in that report regarding causation.

We are convinced the ALJ properly understood the evidence before him, upon which he based his conclusions. The ALJ correctly noted at page two of his Opinion, Award and Order that Dr. Culver found Kramer's complaints are related to his "pre-existing, ordinary disease of life, degenerative disease" and no further treatment was reasonable or necessary for the reported injury.

Finally, St. Catherine's argument Kramer failed to follow medical advice was not properly preserved. 803 KAR 25:010 § 13(14) provides only those issues preserved at the BRC for determination by the ALJ "shall be the subject of further proceedings." In the case *sub judice*, the issue of failure to follow medical advice was not an issue raised at the BRC, nor was it listed as a contested issue in the formal hearing order issued on November 13, 2012.

If the issue had been properly preserved, St. Catherine would have also had the burden of proof on the affirmative defense of unreasonable failure to follow medical advice. Teague vs. South Central Bell, 585 S.W.2d 425 (1979). St. Catherine's burden on appeal would be to show the evidence compelled a finding in its favor. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App.

1995). The evidence does not compel a finding Kramer unreasonably failed to follow medical advice. In the August 28, 2009 note, Dr. Heis advised Kramer he could perform increased activity as tolerated. Dr. Heis' October 23, 2009 note indicates he informed Kramer he was not tolerating his level of activity. Dr. Heis noted Kramer was "very much hoping to get to the Turkey Day Race. So, I outlined a course of decreased activity, ice, elevation and anti-inflammatories to get it calmed down, then a gradual increase in activity." (Emphasis added). Thus, it is clear Dr. Heis allowed Kramer to run in the Turkey Day Race if the outlined measures sufficiently "calmed down" Kramer's condition. Dr. Heis did not prohibit Kramer from running in the race. Further, it does not appear Kramer had any ill effects from the race since his complaints documented in the January 15, 2010 note arose in "the last couple of weeks."

The ALJ's determination regarding the compensability of the contested treatment is supported by substantial evidence and is not so unreasonable under the evidence that it must be reversed as a matter of law. Ira Watson Department Store vs. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the decision rendered February 8, 2013 by Hon. Steven G. Bolton, Administrative Law Judge and the March 20, 2013 order denying St. Catherine's petition for reconsideration are **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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