

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: January 9, 2015

CLAIM NO. 200780884

STEEL CREATIONS,  
BY AND THROUGH KESA, PETITIONER/  
THE KENTUCKY WORKERS' COMPENSATION FUND CROSS-RESPONDENT

VS. APPEAL FROM HON. J. LANDON OVERFIELD,  
CHIEF ADMINISTRATIVE LAW JUDGE

INJURED WORKERS' PHARMACY RESPONDENT/  
AND CROSS-PETITIONER  
KEVIN KERCH;  
HON. DWIGHT T. LOVAN, COMMISSIONER;  
DWC; HON. JACK CONWAY,  
ATTORNEY GENERAL OF KENTUCKY;  
HON. J. LANDON OVERFIELD,  
CHIEF ADMINISTRATIVE LAW JUDGE;  
DEAN COLLIS, M.D.;  
CHED JENNINGS;  
ERIC LAMB RESPONDENTS

AND

**CLAIM NO. 200369871**

PRESTON HIGHWAY METERED CONCRETE,  
BY AND THROUGH KESA,  
THE KENTUCKY WORKERS' COMPENSATION FUND

PETITIONER/  
CROSS-RESPONDENT

VS.

INJURED WORKERS' PHARMACY  
AND  
DONALD GRAMMER;  
HON. DWIGHT T. LOVAN, COMMISSIONER;  
DWC; HON. JACK CONWAY,  
ATTORNEY GENERAL OF KENTUCKY;  
HON. J. LANDON OVERFIELD,  
CHIEF ADMINISTRATIVE LAW JUDGE;  
CHED JENNINGS;  
ERIC LAMB

RESPONDENT/  
CROSS-PETITIONER

RESPONDENTS

**AND**

**CLAIM NO. 200373192**

MURRAY ELECTRONICS, INC.  
BY AND THROUGH KESA,  
THE KENTUCKY WORKERS' COMPENSATION FUND

PETITIONER/  
CROSS-RESPONDENT

VS.

INJURED WORKERS' PHARMACY  
AND  
KEM BARNES;  
HON. DWIGHT T. LOVAN, COMMISSIONER;  
DWC; HON. JACK CONWAY,  
ATTORNEY GENERAL OF KENTUCKY;  
HON. J. LANDON OVERFIELD,  
CHIEF ADMINISTRATIVE LAW JUDGE;  
CHED JENNINGS;  
ERIC LAMB;  
JEFFERY A. ROBERTS

RESPONDENT/  
CROSS-PETITIONER

RESPONDENTS

**AND**

**CLAIM NO. 200402145**

FAMILY ALLERGY & ASTHMA,  
BY AND THROUGH KESA,  
THE KENTUCKY WORKERS' COMPENSATION FUND

PETITIONER/  
CROSS-RESPONDENT

VS.

INJURED WORKERS' PHARMACY  
AND  
RITA MERRICK;  
HON. DWIGHT T. LOVAN, COMMISSIONER;  
DWC; HON. JACK CONWAY,  
ATTORNEY GENERAL OF KENTUCKY;  
HON. J. LANDON OVERFIELD,  
CHIEF ADMINISTRATIVE LAW JUDGE;  
CHED JENNINGS;  
ERIC LAMB;  
MCKINNLEY MORGAN

RESPONDENT/  
CROSS-PETITIONER

RESPONDENTS

**AND**

**CLAIM NO. 200600502**

SAMARITAN ALLIANCE, BY AND THROUGH KESA,  
THE KENTUCKY WORKERS' COMPENSATION FUND

PETITIONER/  
CROSS-RESPONDENT

VS.

INJURED WORKERS' PHARMACY  
AND  
SHAUNA LITTLE (FORMERLY HARDIN);  
HON. DWIGHT T. LOVAN, COMMISSIONER;  
DWC; HON. JACK CONWAY,  
ATTORNEY GENERAL OF KENTUCKY;  
HON. J. LANDON OVERFIELD,  
CHIEF ADMINISTRATIVE LAW JUDGE;  
CHED JENNINGS;  
ERIC LAMB;  
PAUL GUTHRIE

RESPONDENT/  
CROSS-PETITIONER

RESPONDENTS

**OPINION AND ORDER  
AFFIRMING IN PART & REVERSING IN PART**

\* \* \* \* \*

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

**ALVEY, Chairman.** Steel Creations, Murray Electronics, Inc. ("Murray"), Preston Highway Metered Concrete ("Preston"), Family Allergy & Asthma ("Family Allergy") and Samaritan Alliance ("Samaritan") each filed separate appeals by and through their insurer, The Kentucky Employers Safety Association ("KESA"), against Kevin Kerch ("Kerch"), Kem Barnes ("Barnes"), Donald Grammer ("Grammer"), Rita Merrick ("Merrick"), Shauna Little (formerly Hardin) ("Little"), and the Injured Workers Pharmacy ("IWP") on August 2, 2013; August 30, 2013 and January 10, 2014 from the five nearly identical opinions rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") on May 13, 2013, the orders on petitions for reconsideration issued on July 15, 2013 and August 8, 2013, and the orders on remand issued December 13, 2013. Steel Creations filed a separate notice of appeal on January 8, 2014, of the CALJ's decision rendered December 13, 2013 finding certain medications compensable. The claims were consolidated on appeal. A separate decision was entered by this Board in the Steel

Creations v. Kerch appeal on August 14, 2014 then re-entered August 26, 2014, and held in abeyance pending the resolution of this appeal. References to the Opinion and Order, or orders on petitions for reconsideration include those orders issued in all five claims.

IWP filed a notice of cross-appeal in each of the appeals on August 15, 2013. It is noted several constitutional issues have been raised which this Board cannot address. Those issues are acknowledged and preserved for appeal to the Kentucky Court of Appeals. Regarding the issues decided by the CALJ, we affirm, except for the CALJ's assessment of sanctions against KESA pursuant to KRS 342.310 which is **REVERSED**.

Before addressing the issues on appeal, it is necessary to provide a brief summary of each underlying claim.

**I. Kerch v. Steel Creations, 2007-80884**

Kerch sustained a left hand injury on July 31, 2007. A Form 101 was filed on September 17, 2008, and the claim was eventually settled. The Form 110-I was approved by Hon. R. Scott Borders ("ALJ Borders") on February 27, 2009. On June 8, 2009, Steel Creations filed a motion to reopen and a medical dispute regarding treatment for reflex sympathetic dystrophy. On November 19, 2009, Hon. Howard E. Frasier,

Jr. ("ALJ Frasier"), ordered Steel Creations to pay the contested medical bills. On February 2, 2010, Steel Creations filed a motion to amend the medical dispute and join additional parties. On March 22, 2010, KESA, through Steel Creations, filed a Form 112 medical dispute which is the subject of this appeal. In the Form 112 filed with the medical dispute, IWP was listed as a medical provider.

On June 15, 2010, ALJ Frasier issued an order dismissing the medical dispute filed by Steel Creations, without prejudice. Steel Creations then filed a medical dispute on January 24, 2012 which the CALJ decided in Kerch's favor on December 13, 2013. This Board affirmed the CALJ's decision in an opinion entered August 14, 2014, which was held in abeyance pending the outcome of this appeal. Due to an issue relating to appropriate service to the parties, the Board decision was re-entered on August 26, 2014.

## **II. Barnes v. Murray, 2003-73192**

Barnes injured his low back and groin on October 20, 2003 while working for Murray. He filed a Form 101 on July 20, 2006. The claim was eventually settled, and the Form 110-I settlement agreement was approved by Hon. Richard M. Joiner, Administrative Law Judge, on December 6, 2006. KESA, through Murray, filed a medical dispute on March 31,

2010. In the Form 112 filed with the medical dispute, IWP was listed as a medical provider.

On July 10, 2010, Barnes filed a motion to reopen alleging a worsening of condition. The issue of worsening of condition was bifurcated. On April 13, 2011, the CALJ issued an Opinion, Order and Award finding an increase in occupational disability. No appeal was taken from that decision.

**III. Grammer v. Preston, 2003-69871**

Grammer injured his neck and right shoulder on June 13, 2003 while working for Preston. He filed a Form 101 on June 10, 2005. On March 7, 2006, Hon. Lawrence F. Smith, Administrative Law Judge, issued a decision awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits. This Board affirmed the decision in an opinion entered September 22, 2006. On March 31, 2010, KESA, through Preston, filed the medical dispute which is the subject of this appeal. In the Form 112 filed with the medical dispute, IWP was listed as a medical provider.

**IV. Merrick v. Family Allergy, 2004-02145**

Merrick injured her low back, and developed a neuroma of her right foot on December 10, 2003. She filed a Form 101 on December 13, 2004. On December 20, 2006, ALJ

Borders issued a decision awarding TTD benefits, PPD benefits and medical benefits. This Board entered an order dismissing the appeal from ALJ Borders' decision on May 16, 2007. On August 5, 2008, Hon. Donna H. Terry, then Chief Administrative Law Judge, issued an order reopening the claim regarding a dispute over the compensability of a trial spinal cord stimulator and an MRI. On March 30, 2009, Hon. Grant S. Roark ("ALJ Roark") rendered a decision finding the trial spinal cord stimulator and MRI were neither reasonable nor necessary, and therefore not compensable. ALJ Roark also determined Merrick had not sustained a worsening of condition to merit an increase in occupational disability benefits. On March 31, 2010, KESA, through Family Allergy, filed the medical dispute which is the subject of this appeal. In the Form 112 filed with the medical dispute, IWP was listed as a medical provider.

**V. Little v. Samaritan, 2006-00502**

Little sustained a cervical injury on February 22, 2006 while working for Samaritan. Little filed a Form 101 on April 17, 2006. On August 8, 2007, Hon. Andrew Manno, Administrative Law Judge, issued a decision awarding TTD benefits, PPD benefits and medical benefits. The decision was not appealed. On February 4, 2008, Hon. Sheila C. Lowther, then Chief Administrative Law Judge, issued an

order reopening the claim. On March 26, 2008, Hon. Thomas Davis, Administrative Law Judge, issued an order dismissing the reopening. On March 18, 2010, KESA, through Samaritan, filed the medical dispute which is the subject of this appeal. In the Form 112 filed with the medical dispute, IWP was listed as a medical provider.

**VI. The Opinion and Order rendered  
May 13, 2013**

In the Opinion and Order rendered May 13, 2013, the CALJ provided an adequate analysis of the evidence presented, which will not be further detailed here. The CALJ addressed six issues which include: 1. Whether a pharmacy is a "medical provider" pursuant to the statutes and regulations; 2. Whether an injured worker may choose which pharmacy to fill his or her prescriptions for a work-related injury; 3. Whether an employer or its medical payment obligor has the right to designate from which pharmacies the injured worker must have his prescriptions filled for the work-related injuries; 4. Whether IWP is entitled to interest on unpaid or overdue balances; 5. Whether any party is entitled to sanctions pursuant to KRS 342.310; and 6. The correct interpretation of 803 KAR 25:092 §1 & 2.

Notwithstanding the opinion rendered by the Kentucky Attorney General, OAG 09-011, issued December 18, 2009, the CALJ determined a pharmacy is a medical provider pursuant to KRS Chapter 342, and, "the regulations promulgated thereunder." The CALJ reasoned as follows:

The term "medical provider" is not specifically defined by the statute, the regulations or the appellate bodies. There is no statutory or regulatory provision or appellate court holding which defines a "pharmacy" as a "medical provider". However, there is no statutory or appellate court holding which indicates a "pharmacy" is NOT a "medical provider".

A review by the CALJ of the statutory provisions concerning medical services to be provided to an injured worker as the result of an injury covered by the ACT leads the CALJ to the legal conclusion that a pharmacy is a medical provider for purposes of workers compensation matters in the Commonwealth of Kentucky and the injured worker is entitled to his/her choice of pharmacy.

The CALJ further stated KRS 342.020(1) states the employer is responsible for paying medical expenses which are required as a result of a work injury pursuant to KRS 342.020(1), specifically noting the employer, or its obligor, is responsible for payment of the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances as may be

reasonably required at the time of the injury and thereafter during disability. The CALJ also noted as follows:

The same subsection provides that "In the absence of designation of a managed health care system by the employer, the employee may select medical providers to treat his injury or occupational disease. Id.

KRS 342.0011(13) defines "medical and related benefits" to mean payments made for medical, hospital, burial, and other services as provided in this chapter, other than income benefits." KRS 342.0011(15) defines "medical services" to mean "medical, surgical, dental, hospital, nursing, and medical rehabilitation services, medications, and fittings for artificial or prosthetic devices". (Emphasis added)

. . .

The CALJ takes judicial notice that there are only three sources from which a person may legally have prescription medication *provided*: a pharmacy, a physician's office or a hospital. "Medications" are defined by the Act as "medical services". It does not require a quantum leap to conclude that medical services are covered by KRS 342.020.

P. 45

The CALJ then cited to Larry Sills Builders, Petitioner v. Paul Coyle and Hon. Donna H. Terry, Respondents, WCB No. 1987-35615 (rendered September 27, 1996), where this Board held a pharmacy is a medical provider. The CALJ noted Hon. Dwight T. Lovan, Commissioner

of the Kentucky Department of Workers' Claims (Commissioner Lovan), testified regarding this Board decision in his deposition taken September 20, 2012. Based upon the foregoing, the CALJ concluded prescription medications are medical benefits to be provided by the employer pursuant to the Kentucky Workers' Compensation Act, and a pharmacy is therefore a medical provider. The CALJ further concluded an injured worker is afforded the right to choose the pharmacy to provide the prescription medication required due to a work injury.

The CALJ stated KESA argued it should be allowed to choose the pharmacy from which an injured worker can obtain medications pursuant to KRS 342.020(7). The CALJ disagreed, and stated KESA does not have such right merely because the pharmacy chosen by the injured worker, although within the pharmacy fee schedule, may be at a price higher than one chosen by KESA.

The CALJ next determined IWP is not entitled to interest on unpaid invoices or balances. The CALJ noted, "There is no mention of interest for past due and unpaid medical expense benefits either in that statute (KRS 342.040), or in KRS 342.020." Therefore he determined IWP is not entitled to interest on the balances KESA may owe.

The next issue decided by the CALJ is whether any party is entitled to sanctions pursuant to KRS 342.310, which provides a party is entitled to costs of unreasonable proceedings, including court costs, travel expenses, deposition costs, physician expenses for attending fees at depositions, attorney fees and all other out-of-pocket expenses. The CALJ opined as follows:

The CALJ is of the opinion that, initiating the medical dispute *sub judice*, KESA did so without reasonable ground, without reasonable medical foundation and without factual foundation. Read in its entirety, OAG 09-011 gives an opinion that the term medical provider in KRS 342.020 does not include a pharmacy for purposes of employee choice and, therefore, "the right to select medical providers does not limit and [sic] employer's or insurer's ability to make arrangements with pharmacies for reimbursement below the fee schedule" (emphasis added). The opinion continues with a caveat that such agreements can bind only pharmacies that are parties to the agreements. Nowhere in the opinion KESA cites as its entire basis for the medical disputes is there authority stating KESA has the right to direct the pharmacy from which Barnes must obtain his prescription medication nor the right to prohibit Barnes from obtaining his prescription medication from IWP.

P.49

The CALJ specifically cited to the letter sent to Barnes<sup>1</sup> by KESA on February 18, 2010, as follows:

A recent Opinion from the Attorney General's office has *given us the right to send you to a pharmacy of our choice that is convenient to you in the area in which you live.*

Although we will honor this most recent pharmacy bill [from IWP], I must advise that we will not do so if you fail to use the pharmacy card we have provided in the future.

We have made an arrangement with the pharmacy that is convenient to you and *failure to use the card we have provided will force us to pursue a judicial determination in our favor. This may result in a delay for you to obtain your necessary medication.*

The CALJ stated nothing in OAG 09-011 granted KESA the legal authority it claimed in the motion to reopen and Form 112. The CALJ stated KESA's February 18, 2010 letter to Barnes, and the initiation of a medical dispute, "to be almost Machiavellian". He noted while it is understandable KESA desires to pay as little as possible to provide prescription medication, its methods appear to be "quite unreasonable". The CALJ determined IWP and Barnes are entitled to sanctions against KESA pursuant to KRS 342.310 and 803 KAR 25:012 §2(1)(a).

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<sup>1</sup> This is the same or similar letter sent to Kerch and Grammer.

The sixth issue decided by the CALJ concerned the correct interpretation of 803 KAR 25:092 §1 & 2. The CALJ analyzed the testimony of Commissioner Lovan and Dr. Peter Rost. Both Dr. Rost and Commissioner Lovan testified regarding the regulatory language contained in 803 KAR 25:092 §1(6) which states, "wholesale price means the average wholesale price charged by wholesalers at a given time". The CALJ opined the correct interpretation of "wholesale price" is as follows:

. . . is that the wholesale price is the average price charged by wholesalers for the pharmaceuticals they sell to those who provide prescription medications on a retail basis. Wholesale price, therefore, is the price drugstores(or any other pharmaceutical providers) pay to wholesalers when purchasing pharmaceuticals for distribution in filling prescriptions for customers.

. . .

As noted by Commissioner Lovan, the wholesale price as defined by the regulation is not necessarily the price published as the average wholesale price in the several national publications which are used for pricing pharmaceuticals. However, the CALJ is of the opinion that the average wholesale price may not necessarily *NOT* be the price published as the average wholesale price in the national publications which are used for pricing pharmaceuticals. The CALJ is left with the inescapable conclusion that the correct interpretation of 803 KAR 25:092§1.(6) is that "wholesale price"

is the average price charged by wholesalers for the pharmaceuticals they sell to those who provide prescription medications on a retail basis.

The CALJ is of the opinion that the other relevant section to be interpreted is also reasonably simple. According to 803 KAR 25:092§2.(2), a pharmacist filling prescriptions required by a workers compensation injury is entitled to be reimbursed in an amount equal to the wholesale price the pharmacist paid for the lowest priced drug which is therapeutically equivalent to the drug use[d] to fill the prescription which the pharmacist has in his establishment at the time he feels[sic] the prescription, plus a \$5 dispensing fee plus any applicable federal or state tax or assessment. ...

P. 53, 54

#### **VII. Petitions for Reconsideration**

KESA, through its insureds, filed petitions for reconsideration in each decision asserting the CALJ committed numerous errors, and requested multiple additional findings of fact. Specifically, KESA argued IWP charges far in excess of what it pays to wholesalers when purchasing pharmaceuticals for distribution in filling prescriptions, and therefore its motion to reopen should be granted. KESA argued it has already paid the contested pharmaceutical bills in an amount believed to be in excess of the wholesale price as interpreted by the CALJ. KESA argued it should be awarded the entire costs against IWP which it incurred in

the litigation of the medical disputes. The CALJ was requested to make a specific finding regarding whether the pharmacy bills submitted to KESA reflect the price IWP paid to wholesalers for the lowest priced drug that is therapeutically equivalent to the drug used to fill the prescription which it had in stock at the time filled including the cost of the prescription plus a five dollar dispensing fee and any applicable federal or state tax assessment or the average wholesale price published in one or more national sources. The CALJ was requested to make a specific finding regarding whether IWP paid to wholesalers the average wholesale price ("AWP")<sup>2</sup> reflected in the contested bills submitted to KESA or a lesser amount reflecting negotiated rates and rebates. The CALJ was next requested to consider an apportionment of the costs assessed between the employee selection of pharmacy issue versus the issue concerning the proper interpretation of 803 KAR 25:092. The CALJ was next requested to make a determination of whether the charges by IWP were "fair and reasonable for similar treatment of injured persons in the same community for like services", per KRS 342.035. The CALJ was also

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<sup>2</sup> Throughout the evidence and pleadings, the parties refer to awp as a generic reference to average wholesale price, and AWP as a reference to the average wholesale price derived from a national publication.

requested to find IWP charges as much as "3000%" more than M. Joseph for certain pharmaceuticals. The CALJ was requested to make a specific finding the price list attached to Dr. Rost's deposition constitutes un rebutted *prima facie* evidence that IWP overcharges for the medication it provides.

In its petition for reconsideration, IWP asserted the CALJ made patent errors by failing to include the word average in references and definitions of wholesale price. IWP also asserted sanctions should have been awarded in the Kerch and Grammer cases. Finally IWP asked the CALJ to revisit his decision regarding pre-judgment interest on the contested bills.

**VII. Order on Reconsideration issued  
July 5, 2013**

In the order on reconsideration issued on July 5, 2013, the CALJ amended the language in the opinion to include the word "average". The ALJ also amended the opinion to include an award of costs assessed against KESA in the Kerch and Grammer claims, in addition to those previously assessed in the Barnes claim. The CALJ denied the request for interest on the contested bills. Regarding KESA's petition for reconsideration, the CALJ denied the first two issues raised. He found the remaining issues

either moot, or concerned issues not preserved, and therefore denied.

**IX. KESA's second Petition for Reconsideration**

KESA filed a second petition for reconsideration on July 9, 2013 alleging the CALJ's order on reconsideration, in part, reflects a reconsideration on the merits of the claim which is prohibited. KESA requested the CALJ require IWP to provide various documentation involved with setting its prices. Next KESA argued the CALJ erred in stating it raised issues not preserved at the benefit review conference ("BRC"). KESA requested the CALJ specifically enumerate which issues were not preserved at the BRC or tried by consent of the parties. The CALJ issued a decision denying the second petition for reconsideration on August 8, 2013. However, KESA had already filed a notice of appeal on August 2, 2013. This Board issued an order on November 8, 2013 partially remanding the claims to the CALJ to enter the orders on reconsideration, and to decide the unrelated Kerch medical dispute. The CALJ issued orders denying the petitions for reconsideration on December 13, 2013, and entered a decision in the separate Kerch claim regarding compensability of certain medical treatment on the same date.

## **X. Issues raised on Appeal**

On appeal, KESA raises the following issues:

I. Kentucky law requires worker's compensation pharmaceutical charges to be "fair, current and reasonable."

A. KRS 342 requires pharmacy charges to be "fair, current and reasonable."

B. The administrative regulations establish a pharmacy fee schedule based on actual average wholesale price ("awp") and not published average wholesale price ("AWP")

C. The Commissioner testified the DWC's interpretation of the administrative regulations does not utilize published AWP.

D. The Chief Administrative Law Judge's interpretation of the administrative regulations does not utilize published AWP.

II. IWP's charges are unlawful because they are not "fair, current and reasonable" and not in accord with the administrative regulations as interpreted by the Chief Administrative Law Judge and the DWC.

A. IWP charges published AWP plus a \$5 dispensing fee.

B. Published AWP is not fair, current and reasonable.

1. The Kentucky Court of Appeals held in 2012 in a published opinion that commercially published AWP prices have been so widely known to be significantly in excess of the average

prices retailers actually pay to wholesalers that Kentucky Medicaid could not recover the excess charges from its suppliers.

2. Unrebutted expert testimony established the published AWP figures significantly exceed what retailers actually pay to wholesalers on average.

3. Other testimony confirms IWP's prices are significantly higher than the prices KESA pays through the M. Joseph Medical System it normally uses.

4. Even AWP publishers admit their figures do not reflect the average of what retailers pay to wholesalers, and a third has discontinued publishing AWP figures.

III. KESA has paid "fair, current and reasonable" charges.

IV. The CALJ's opinion conflicts with Kentucky Law and with his own interpretation of 803 KAR 25:092.

A. The opinion is internally inconsistent.

B. The CALJ's statements concerning preservation and determination of certain issues are incomplete and inaccurate.

C. KESA cannot assess compliance with the CALJ's order unless IWP produces documentation of the price it paid to wholesalers for the pharmaceuticals in question.

V. The current regulations are in violation of the enabling statutes and constitutional requirements.

A. 803 KAR 25:092 fails to set forth a pharmacy fee schedule as required by KRS 342.035 and is therefore in violation of the enabling statute.

B. 803 KAR 25:092 is so vague as to constitute a violation of due process.

VI. The CALJ's assessment of costs against KESA was clearly erroneous and an abuse of discretion.

A. KESA acted reasonably in filing the subject medical fee disputes.

B. The 1996 worker's compensation Board opinion in Larry Sills Builders v. Paul Coyle, No. 87-35615, is not public and available and is not a precedent binding the Board.

C. KESA had a reasonable basis for taking the position a pharmacy is not a "medical provider" within the meaning of KRS 342.020(1) and KESA adheres to that position in this appeal.

D. IWP should be charged with the cost of these proceedings based on its unreasonable defense of the medical fee dispute, pursuant to KRS 342.310.

On appeal, IWP argues the following:

I. The Workers' Compensation fee schedule is fair, current and reasonable in all respects required by the Workers' Compensation statute.

II. The charges of IWP are not unlawful.

III. KESA's contention that only the prices it has paid are fair, current and reasonable.

IV. CALJ[sic] opinion does not conflict with Kentucky Law and is not self-contradictory.

V. 803 KAR 25:092 does not violate the enabling statute.

VI. CALJ[sic] award of sanctions should not be reversed.

VII. IWP is entitled to interest on unpaid and overdue balance.

In its combined response and reply brief, KESA argues the following:

I. IWP's pharmaceutical charges violate KRS 342.035(1) and 803 KAR 25:092, according to the plain language of the regulation as interpreted by the Commissioner and the CALJ, and KESA cannot be required to pay those inflated amounts.

A. IWP's argument that KESA did not raise and consistently assert the illegality of IWP's excessive charges is wrong and misleading.

B. IWP has failed to deal with the Court of Appeals' holding in SANDOZ that published AWP figures are substantially higher than actual average whole prices.

C. IWP's testimony and arguments regarding what other states allow is unconvincing and ultimately irrelevant.

D. IWP's allegation the Commissioner supports IWP's

interpretation of 802 KAR 25:092 is wrong and misleading.

E. IWP's repeated assertion that the Kentucky fee schedule incorporates the published AWP figures is wrong.

F. IWP's allegation the CALJ supports IWP's interpretation of 803 KAR 25:092 is wrong.

G. IWP's argument that 803 KAR 25:092 incorporates published AWP is contrary to KRS Chapter 13 A and has no merit for that reason alone.

H. IWP's allegation that KESA has failed to prove the difference between (a) what IWP charges, (b) the amount it pays to its administrator M. Joseph Medical, or (c) the amounts received by pharmacies under the M. Joseph program is false.

II. IWP's argument that a ruling in KESA's favor would lead to chaos and would affect physician charges, and other non-drug charges is without merit.

III. IWP misrepresents KESA's position on employee choice under KRS 342.020(1) and IWP's argument KESA acted unreasonably in arguing a pharmacy is not a medical provider under the employee choice rule is wrong.

IV. IWP's assertions concerning KESA's motives and business practices are false and misleading.

V. IWP's response to KESA[sic] arguments against the CALJ's sanction is based on a misreading of the Supreme Court of Kentucky decision IWP cites and is otherwise without merit.

VI. Even if IWP were permitted to charge inflated AWP prices, it would not be entitled to interest on the past due amounts.

VII. The \$5 dispensing fee provided by 803 KAR 25:092 Section 2(2) is otherwise interpreted correctly.

VIII. Comment regarding constitutional issues.

In its reply brief, IWP argues KESA failed to establish the CALJ was compelled to find in its favor in the underlying proceeding.

We note this appeal involves many issues, some of which this Board lacks jurisdiction to determine, and some of which were not properly preserved. As noted above, the ALJ's decisions of May 13, 2013, and the orders on reconsideration issued July 5, 2013 and December 13, 2013 are hereby **AFFIRMED**, except for the assessment of sanctions pursuant to KRS 342.310 which is **REVERSED**.

While some of the issues raised are rather complex, others are not. Excessive documentation filed by the parties, and evidence introduced has served to obfuscate rather than illuminate. The base issues decided by the CALJ dealt with whether a pharmacy is a medical provider, whether an injured worker can choose which pharmacy to use, whether an insurer can direct which pharmacy an injured worker chooses, whether sanctions are

applicable, pre-judgment interest and the interpretation of the pharmacy fee schedule.

**XI. Whether a pharmacy is a medical provider.**

We first look to the issue of whether a pharmacy is a medical provider. We note, despite its arguments to the contrary, KESA listed IWP as a medical provider on each Form 112 filed.

KESA, relying on an opinion rendered by the Kentucky Attorney General, OAG 90-011, argues a pharmacy is not a medical provider. IWP argues, based upon the 1996 holding of this Board in Larry Sills Builders, Petitioner v. Paul Coyle and Hon. Donna H. Terry, Respondents, supra, a pharmacy is indeed a medical provider. While we do not cite our opinions as binding authority, we do strive for consistency. The Attorney General's opinion notwithstanding, we find no error in the CALJ's reasoning, or his citing to our previous decision, in finding a pharmacy is a medical provider. It is acknowledged a pharmacist requires a certain level of expertise, training and licensing. KRS 342.020 makes clear reference to "medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances." It is not unreasonable to believe this encompasses and includes prescription medication. Therefore, it was reasonable for the ALJ to conclude a

pharmacy which dispenses such medication is a medical provider, and his determination shall not be disturbed.

**XII. Whether an Injured Worker May Choose Which Pharmacy to Fill His or Her Prescriptions.**

We note KRS 342.020(1) provides in relevant part:

... The employer's obligation to pay the benefits specified in this section shall continue for so long as the employee is disabled regardless of the duration of income benefits. In the absence of designation of a managed health care system by the employer, the employee may select.

Kevin Fallahay ("Fallahay"), the KESA representative, testified by deposition on September 27, 2011. He acknowledged KESA is not a managed care system. Because we have determined the CALJ did not err in determining a pharmacy is a medical provider, we further determine the CALJ did not err in finding an injured worker has the right to choose which pharmacy fills his or her prescriptions related to the work injury. We agree with the CALJ's statement on p. 45 of his decision where he noted as follows:

It is the opinion of the CALJ that it is abundantly clear the Kentucky General Assembly, in enacting the above discussed statutory provisions, intended to create a workers compensation system in which the employer bears the expense for the injured/deceased [diseased] worker's medical care required by the

injury/disease AND in which the injured/diseased worker has the choice of his/her medical providers.

Again, on this issue the decision of the CALJ will not be disturbed.

**XIII. Whether an employer or its medical payment obligor may designate from which pharmacy an injured worker must obtain prescription medication prescribed for the cure and relief of a work-related injury or occupational disease.**

Other than having a managed care system in place, only KRS 342.020(7) allows an employer to direct the care of an injured worker. This statute states as follows:

Upon motion of the employer, with sufficient notice to the employee for a response to be filed, if it is shown to the satisfaction of the administrative law judge by affidavits or testimony that, because of the physician selected by the employee to treat the injury or disease, or because of the hospital selected by the employee in which treatment is being rendered, that the employee is not receiving proper medical treatment and the recovery is being substantially affected or delayed; or that the funds for medical expenses are being spent without reasonable benefit to the employee; or that because of the physician selected by the employee or because of the type of medical treatment being received by the employee that the employer will substantially be prejudiced in any compensation proceedings resulting from the employee's injury or disease; then the administrative law judge may allow the employer to select a physician to treat the employee and the hospital or

hospitals in which the employee is treated for the injury or disease. No action shall be brought against any employer subject to this chapter by any person to recover damages for malpractice or improper treatment received by any employee from any physician, hospital, or attendant thereof.

None of the grounds enumerated in this statute allow the employer or its medical payment obligor to direct the care or choice of provider merely because the medication or treatment may be obtained cheaper elsewhere. We agree with the CALJ, merely saving the employer or medical payment obligor money is not a ground for relief pursuant to this statute. Again, regarding this issue, the decision of the CALJ is affirmed.

**XIV. Whether IWP is entitled to interest on the unpaid and overdue balances.**

IWP argues the CALJ erred in failing to award interest on unpaid and overdue balances. In his decision, the CALJ noted workers' compensation is a statutory creation. He noted KRS 342.040 only provides interest for "past due and unpaid installments of wage loss benefits at either 12% per annum or 18% per annum." He accurately noted there is no mention in KRS Chapter 342 of interest on unpaid medical benefits. Because there is no statutory provision

for interest on such unpaid expenses, we determine the CALJ did not err in refusing to award the relief requested.

We note the numerous cases cited by IWP, however none of those are pertinent or dispositive of this issue. None of the cases cited involve interest assessed on medical or pharmacy bills submitted or unpaid in a workers' compensation claim. As noted above, workers' compensation is a statutory creation, and there is no provision for interest to be assessed in the situation presented. Whether or not this would set a good precedent is immaterial. We therefore do not believe the CALJ erred in refusing to award pre-judgment interest.

**XV. Did the CALJ err in assessing sanctions against KESA pursuant to KRS 342.310?**

KRS 342.310 states as follows:

(1) If any administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, he or it may assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses upon the party who has so brought, prosecuted, or defended them.

(2) If any administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that a party has committed acts in violation of KRS 342.335(1) or (2), that party may be ordered to make restitution for any compensation paid as a result of the commission of such acts.

Here the CALJ determined that KESA prosecuted these claims without reasonable grounds and assessed sanctions pursuant to KRS 342.310. Clearly, the CALJ was troubled by the letter sent by KESA to the injured workers advising IWP's bills would no longer be paid, and failure to use the pharmacy card provided, "may result in a delay for you to obtain your medication". The CALJ noted, nowhere in the Attorney General's opinion was KESA afforded the right to direct the pharmacy from which injured workers were to obtain prescription medication, or to prohibit them from using IWP.

We note KRS 342.285 grants an ALJ as fact-finder the sole discretion to make factual determinations based upon the evidence before him. 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 make factual determinations. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003).

While an administrative law judge has the discretion to assess such sanctions, the right to do so is not unfettered. Sanctions assessed for pursuing an action without reasonable ground must be scrutinized for a determination of whether indeed grounds did exist for such action. We note the Kentucky Court of Appeals in Kentucky Associated General Contractors Self-Ins. Fund v. Tri State Crane Rental, Inc., 240 S.W.3d 544 (Ky. App. 2007), affirmed this Board's reversal of attorney fees and costs awarded by an administrative law judge because there was in fact a reasonable basis for bringing the action.

In this instance, merely sending letters to the claimants does not support the CALJ's assessment of sanctions. Clearly the Attorney General's opinion, OAG 09-011, provided a basis for KESA to pursue a determination. Despite this Board's ruling in Sills, supra, we note there has been no determination in the courts regarding whether an injured worker has the right to choose which pharmacy may be used to obtain compensable prescriptions. Because we

believe a valid basis existed for KESA to pursue the medical disputes, the CALJ's assessment of sanctions is **REVERSED**.

**XVI. Did the CALJ err in his interpretation of 803 KAR 25:092 §1 & 2?**

We conclude the ALJ did not err in his interpretation of these regulatory provisions. The particular provisions of these sections from the Kentucky Administrative Regulations state as follows:

Section 1. Definitions. (1) "Brand name" has the meaning set forth in KRS 217.814(1).

(2) "Equivalent drug product" has the meaning set forth in KRS 217.814(5).

(3) "Generic name" has the meaning set forth in KRS 217.814(2).

(4) "Hospital" has the meaning set forth in 803 KAR 25:091, Section 1(1).

(5) "Practitioner" means any person licensed under the professional laws of Kentucky or any other state to prescribe and administer medicine and drugs.

(6) "Wholesale price" means the average wholesale price charged by wholesalers at a given time.

Section 2. Payment for Pharmaceuticals.

(1) An employee entitled to receive pharmaceuticals under KRS 342.020 may request and require that a brand name drug be used in treating the employee. Unless the prescribing practitioner has indicated that an equivalent drug product should not be substituted, an employee who requests a brand name drug shall be responsible for payment of the

difference between the equivalent drug product wholesale price of the lowest priced therapeutically equivalent drug the dispensing pharmacist has in stock and the brand name drug wholesale price at the time of dispensing.

(2) Any duly licensed pharmacist dispensing pharmaceuticals pursuant to KRS Chapter 342 shall be entitled to be reimbursed in the amount of the equivalent drug product wholesale price of the lowest priced therapeutically equivalent drug the dispensing pharmacist has in stock, at the time of dispensing, plus a five (5) dollar dispensing fee plus any applicable federal or state tax or assessment.

(3) If an employee's prescription is marked "Do Not Substitute," the dispensing pharmacist shall be entitled to reimbursement in an amount equal to the brand name drug wholesale price, at the time of dispensing, plus a five (5) dollar dispensing fee plus any applicable federal or state tax or assessment.

Despite KESA's arguments to the contrary, we determine the CALJ's interpretation of the Pharmacy Fee Schedule is appropriate. Michael Bartlett ("Bartlett") testified his company, M. Joseph, saves KESA 24% off of the AWP. He gave a lengthy definition of medication pricing and pharmacy benefit managers. He noted when IWP charged in excess of the pharmacy fee schedule, its reimbursements were reduced to the appropriate price. Bartlett testified about gross savings from the pharmacy fee schedule amounts.

Fallahay testified KESA receives reports from M. Joseph regarding the amount of money saved. Fallahay testified KESA attempts to obtain the lowest possible prescription price. Fallahay further testified IWP charges the AWP plus the dispensing fee provided for by regulation, which is a far higher price than prescriptions can be provided from elsewhere. Fallahay stated IWP has been paid through M. Joseph pricing.

The CALJ determined, "As noted by Commissioner Lovan, the wholesale price as defined by regulation is not necessarily the price published as the average wholesale price in the several national publications which are used for pricing pharmaceuticals." The CALJ's determination regarding this issue is set forth above, and will not be recited again. The CALJ provided an adequate analysis of the procedure to be utilized pursuant to the above regulations. The CALJ's interpretation is clear and reasonable. We do not believe he committed error.

KESA's argument it is unable to determine the appropriate amount to pay IWP rings hollow. The testimony provided by Bartlett and Fallahay establish their cognizance of the appropriate pharmacy fee schedule price, and how it is calculated. Otherwise it would be impossible to determine if a 24% savings has been realized. Merely

because another entity can provide the same prescription cheaper does not render invalid the charges by IWP if within the fee schedule. We note KESA is only required to pay no more than the amount which is authorized by the fee schedule in accordance with the CALJ's interpretation of the above regulation. Based upon the foregoing, the CALJ's interpretation of 803 KAR 25:092 §1 & 2 will not be disturbed.

**XVII. Applicability of Sandoz, Inc. v. Comm. Ex. rel. Conway, 405 S.W.3d 506 (Ky. App. 2012)**

Sandoz, Inc., involved an appeal from adverse jury verdicts for Medicaid fraud, false advertising, and violation of the Kentucky Consumer Protection Act for misrepresenting the "average wholesale prices" of its prescription drugs. It did not involve KRS Chapter 342, or 803 KAR 25:092. Despite using similar terms, acronyms and abbreviations, that case has no applicability to the case *sub judice*.

**XVIII. Issues preserved for resolution.**

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 BRC Order and Memorandum issued by the CALJ on August 17, 2012, the parties agreed the CALJ was to decide 1. Whether a pharmacy

is a "medical provider" pursuant to the statutes and regulations; 2. Whether an injured worker may choose which pharmacy to fill his or her prescriptions for a work-related injury; 3. Whether an employer or its medical payment obligor has the right to designate from which pharmacies the injured worker must have his prescriptions filled for the work-related injuries; 4. Whether IWP is entitled to interest on unpaid or overdue balances; 5. Whether any party is entitled to sanctions pursuant to KRS 342.310.

On September 20, 1992, the CALJ ordered KESA was relieved of its stipulation IWP does not charge in excess of the prescription fee schedule and statutes. The CALJ also ordered the contested issues for him to decide included the correct interpretation of 803 KAR 25:092 §1 & and 2.

All other issues were preserved to be decided by an appellate body, or a court of justice. Those issues included:

1. Whether the Kentucky Pharmacy Fee Schedule set out in 803 KAR 25:092 is constitutional under Article II of the Kentucky Constitution.

2. Whether the Commissioner's Administrative Regulation(s) (including the Kentucky Pharmacy Fee Schedule set out in 803 KAR 25:092) adopting and/or utilizing Average Wholesale Price (AWP) as established by "Redbook" for pricing prescription medications under the Pharmacy Fee Schedule is fair, current,

reasonable and constitutional under Article II of the Kentucky Constitution or otherwise violates the enabling statute, KRS 342.035(1), and/or other applicable statute, regulation or case law.

3. What is the correct interpretation of the Kentucky Pharmacy Fee Schedule under 803 KAR 25:092§§1-4 and/or other applicable statute, regulation or case law and is the Commissioner's current interpretation of these regulations arbitrary and/or capricious under the Kentucky Constitution or otherwise violate the enabling statute, KRS 342.035(1), and/or other applicable statute, regulation or case law?

4. What is the current interpretation of "wholesale price" under 803KAR 25:092§1(6) and/or other applicable statute, regulation or case law?

5. Has the Commissioner improperly defined or interpreted the term "wholesale price" under 803 KAR 25:092§1(6) as meaning using "AWP" as defined by Redbook, First Databank, or other nationally recognized publishing company as the appropriate pricing mechanism for prescription medications and should the term "wholesale price" be defined as warehouse acquisition cost, a AWP minus a percentage, or some other definition to more appropriately reflect a fair, current and reasonable pricing mechanism for purpose of payment of prescription medications.

6. Is the five dollar (\$5) dispensing fee under 803 KAR 25:092§2(2) fair, current and reasonable?

7. Whether the CALJ's order striking movants evidence is proper.

None of the issues subsequently raised which are not reflected above were appropriately preserved for decision. To the extent the CALJ made this determination in his orders on the petitions for reconsideration, we find no error. Again, we reiterate, the CALJ's decision and orders on reconsideration are **AFFIRMED**, except for the assessment of sanctions pursuant to KRS 342.310 which is **REVERSED**.

**IT IS HEREBY ORDERED AND ADJUDGED** Claim nos. 2007-80884, 2003-69871, 2003-73192, 2004-02145, and 2006-00502 are **DECONSOLIDATED**.

Counsel for KESA requested an oral argument be held. After having reviewed the record, **IT IS FURTHER ORDERED AND ADJUDGED** an oral argument is unnecessary in arriving at a decision, and therefore the request is **DENIED**.

A Board Order was entered on August 14, 2014 placing Claim no. 2007-80884 Steel Creations v. Kevin Kerch in abeyance. The Order was subsequently withdrawn and re-entered on August 26, 2014. **IT IS FURTHER ORDERED AND ADJUDGED** this portion of the appeal is **REMOVED FROM ABEYANCE**.

In the notices of appeal filed by KESA on January 10, 2014, Hon. Ched Jennings, Hon. Eric Lamb, Hon. Jeffrey A. Roberts, Hon. McKinnley Morgan, and the Hon. Paul Guthrie were improperly listed as parties. These attorneys

represent parties to the appeal, but were never joined as parties themselves. Therefore, they are hereby **DELETED** as parties to this appeal.

Accordingly, the Opinion and Order rendered by Hon. J. Landon Overfield on May 13, 2013, and the orders on petitions for reconsideration issued on July 15, 2013 and December 13, 2013 are hereby **AFFIRMED IN PART, and REVERSED IN PART.**

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MICHAEL W. ALVEY, CHAIRMAN  
WORKERS' COMPENSATION BOARD

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY, DISSENTS FROM THE ORDER DENYING ORAL ARGUMENT, AND FILES A SEPARATE OPINION.

**MEMBER, STIVERS.** I disagree with the majority's decision denying oral argument. The issues raised in the case *sub judice* cannot be fully developed by briefs. There are numerous questions which have been raised which have not been answered by the briefs. Rather, the briefs raise more questions than they purport to answer. In addition, there have been assertions made within the briefs regarding access to the opinion in Sills which also must be addressed. Therefore, prior to the issuance of any

opinion, I would order oral argument so the issues raised in these briefs can be more fully addressed.

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