Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 30, 2015

CLAIM NO. 200883331

WAL-MART STORES, INC. PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

TAMMY KITTINGER
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Wal-Mart Stores, Inc. ("Wal-Mart") appeals from the May 15, 2015, Opinion, Order, and Award finding Tammy Kittinger ("Kittinger") permanently totally disabled and awarding permanent total disability ("PTD") benefits from June 22, 2008, the date of injury. The ALJ found Kittinger did not suffer from a pre-existing active

disability and also assessed the whole cost of the proceedings against Wal-Mart pursuant to KRS 342.310(1). The ALJ did not assess enhanced interest on past due temporary total disability ("TTD") benefits pursuant to KRS 342.040. Wal-Mart also appeals from the June 10, 2015, Order denying its petition for reconsideration.

Wal-Mart challenges the decision on two grounds. First, it contends the ALJ erred in finding Kittinger did not have previous restrictions from Reflex Sympathetic Dystrophy ("RSD").[1] Second, Wal-Mart asserts the ALJ's imposition of sanctions is clearly erroneous and an abuse of discretion.

Kittinger began working for Wal-Mart in 2001. Within six months she was promoted to a full-time customer service manager, the position she held at the time of the June 22, 2008, injury. Kittinger was injured when she accidently cut her arm with a box cutter. After cutting her arm, medication and bandages were applied. She finished her shift and went home. When she got up the next morning, she was not feeling well but went to work. Because she developed more symptoms, she went to the

[1] The 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") refer to RSD as Complex Regional Pain Syndrome ("CRPS"). However, since the physicians in this claim continuously refer to the condition as RSD, we will also.

hospital. Ultimately, surgery was performed to debride gangrene in her left arm. Kittinger did not return to work, and on November 11, 2008, underwent a “left VATS/thoracotomy with sympathectomy” performed by Dr. Mark Stanfield. Dr. Stanfield diagnosed RSD. Kittinger returned to work on January 9, 2009. Wal-Mart did not pay TTD benefits during the entire period Kittinger was off work. Wal-Mart also did not pay for much of her treatment during this period including the sympathectomy surgery. Kittinger continued to have problems with swelling and pain in her left arm. Kittinger submitted many of her medical bills to her private health insurance carrier, and some of the bills remained unpaid at the time of her first deposition on October 12, 2010.

At her October 12, 2010, deposition, Kittinger identified medical bills and travel expenses which were unpaid. She testified Wal-Mart’s failure to pay these medical bills resulted in garnishment of her paychecks in January 2009. She testified she was forced to cash in her vacation time, personal time, and sick time in order to pay some of her medical expenses. A number of documents were introduced concerning her unpaid medical bills, out-of-pocket payment of the medical bills, unpaid travel expense,

and the payments made by her private health insurance carrier.

A December 8, 2010, Benefit Review Conference ("BRC") Order & Memorandum reflects the parties stipulated Kittinger sustained a June 22, 2008, injury, TTD benefits were paid from June 22, 2008, to July 12, 2008, and from October 16, 2008, to October 26, 2008, and Wal-Mart paid medical benefits totaling $39,555.79. The unresolved issues were average weekly wage ("AWW") and whether Kittinger retained the physical capacity to return to her former work. The BRC order noted Kittinger returned to work on January 9, 2009, earning the same or greater wage. She had a high school diploma and three years of college. Significantly, the order reflects the parties agreed as follows:

> Defendant has agreed to pay for outstanding compensable medical expenses, along with out-of-pocket expenses will be submitted on Form 114 and medical bills from providers for determination of the relatedness of outstanding bills. Further matters will be bifurcated. Plaintiff is being currently treated for the effects of the injury and the claim will remain open for proof.

After setting forth a proof schedule, the order also stated "[t]he outstanding bills to be paid will be through January 22, 2009. Other bills may be submitted for

consideration." Under "Other matters," the BRC order reflects a separate order will be issued from the ALJ.

On December 13, 2010, the ALJ entered an order stating the parties acknowledged they entered into certain stipulations at the BRC and other matters had been discussed. She noted the parties agreed Wal-Mart would pay Kittinger's outstanding compensable medical expenses along with the out-of-pocket expenses through and including January 22, 2009. The medical bills were to be submitted by the provider on the appropriate forms, and Kittinger was directed to submit her out-of-pocket expenses on a Form 114. The ALJ noted that currently Kittinger was being treated for the effects for the work injury. The ALJ set the proof schedule and a formal hearing for April 2011.

Thereafter, medical evidence was introduced including the reports from Drs. Joseph Zerga, Robert Weiss, and Richard DuBou.

At the hearing on May 21, 2011, the parties acknowledged their agreement to bifurcate the proceeding, and to limit the testimony to duration of TTD benefits, AWW, referral for additional medical treatment, entitlement to that medical treatment, and reimbursement of out-of-pocket medical and travel expense. During the hearing, Kittinger testified that after the first surgery to remove

the gangrene, her doctors recommended thoracic sympathetic surgery which was performed by Dr. Stansfield at Regional Medical Center. Prior to the surgery, on a scale of one to ten her pain was a ten; after the surgery, her pain was reduced to a two or three. Kittinger returned to work in January 2009. She had no income between October 2008 and January 2009 when she was off work, and this resulted in financial stress. Consequently, she undertook a second job on May 2, 2009, at Daydreams Academy in Madisonville, Kentucky, where she worked twenty-two to thirty hours per week.

Kittinger testified she made eleven trips to Dr. James K. Cooper prior to the second surgery which was all related to her left arm.[2] After the thoracic surgery, Trover Clinic and Regional Medical Center began garnishing her wages and have continued to do so.[3] Between October and January, she sold her sick days, vacation time, and personal time to secure income. Kittinger was not able to amass any of those benefits until November 2009.

At the time of the hearing, Kittinger's arm was in the same condition as it was when she was deposed in

[2] Dr. Cooper was her pain management physician.

[3] The Trover Clinic treated Kittinger after the June 21, 2008, injury.

October 2010. Her symptoms included swelling in the hand, wrist, and arm. Range of motion in her left shoulder, arm, and hand was limited. Her arm changes color and gets cold. She indicated the pain was unbearable. The scar resulting from the surgery to remove the gangrene was very sensitive and she could not touch it. Kittinger has problems in cold weather and at work. She takes medication prescribed by the doctors who previously treated her. Kittinger acknowledged the Trover Clinic had treated her for other conditions unrelated to the work injury. She has obtained prescriptions from Wal-Mart for medication unrelated to the injury. However, Owensboro Medical Health only treated her injury.

Kittinger's Collective Exhibit 1 consisted, in relevant part, of the following:

- A "statement of earnings" indicating garnishment with supporting documents.

- Documents evidencing three out-of-pocket payments to Trover Clinic totaling $42.23. Significantly, two payments were for services rendered pre-injury.

- Four statements from Trover Clinic showing charges and BlueCross BlueShield payments and adjustments and the balance due from Kittinger on September 6, 2008, December 6, 2008, January 3, 2009, and February 7, 2009. These

documents contain many of the same charges and the last document reflects a balance due of $902.07.

- A statement from Regional Medical Center dated January 24, 2009, for $543.85.

- A health insurance claim form completed by Anesthesia Services for services rendered on October 3, 2008, in the amount of $204.00 submitted to Wal-Mart Claims Management.

- A statement of account from Owensboro Medical Health Center showing charges totaling $700.85, and payment of $281.04 and a current balance of $419.81. It stated no action was required as the claim was "insurance processing."

- Documents relating to a bill from Owensboro Ambulatory Services evidencing total amount owed, BlueCross/BlueShield adjustments and payments, Kittinger's payment of $65.00 and the amount of $219.69 due from Kittinger.

- A list of medications and bandages purchased from Wal-Mart Pharmacy on fifteen different dates with supporting documentation showing each charge and the amount Kittinger paid which totaled $38.08 of the total cost of the items.

- Explanation of Benefits from BlueCross/BlueShield relating to ten separate bills from Trover Clinic, one bill from Regional Medical Center, and one bill from Richard King. Each reflects the

amount Kittinger may owe. The service date pertaining to one bill from Trover Clinic pre-dated the work injury.

- A list of additional bills and out-of-pocket expenses. These bills pertained to services provided by Trover Clinic, Ohio Valley Neurology, and Yellow Ambulance of Daviess County. There was also listed an account summary statement indicating a balance of $1,017.38 with a written notation "not out of pocket." Two prescriptions for Gabapentin with $8.00 written out from each prescription.

- Trover Foundation's itemized statement of charges relating to Kittinger's stay from November 11, 2008, to November 14, 2008, totaling $19,502.08 which provided BlueCross/BlueShield's payments and adjustments and the balance due of $543.85.

- Account charge activity summary with the provider unidentified reflecting total charges of $1,017.38. The balance due from Kittinger and the insurance were both listed as 0. The non-collectible balance is $1,017.38.

- A collection agency notice from Cash Pro, Inc. dated February 18, 2011 for Ohio Valley Neurology LLC in the amount of $62.77.

- An Ohio Valley Neurology bill dated September 7, 2010 reflecting three charges totaling $1,264.00 with a balance due of $627.86.

- Copies of two prescriptions dated January 11, 2011, showing patient owed $8.00 for each. The costs of the prescriptions were $47.72 and $47.78.

Kittinger testified some of the bills were introduced at her October 2010 deposition and represent the amount of the garnishment of her wages. Kittinger testified she continued to work except for a five to seven day period when she had pneumonia. She was still working the same hours at the same wage as set forth in her October 2010 deposition. She was also working a second job at the daycare center.

In the June 8, 2011, Interlocutory Order, the ALJ noted Kittinger was working as an associate office manager for Wal-Mart with a period of overlapping employment at Daydreams Academy. The ALJ passed any ruling on Kittinger's entitlement to sanctions pursuant to KRS 342.310 and KRS 342.140.[4]

After discussing the medical evidence from Drs. Cooper, Stanfield, Naghma S. Mufti, Zerga, Weiss, and DuBou, the ALJ found Kittinger entitled to TTD benefits from June 22, 2008, through July 12, 2008, and again from October 16, 2008, to January 8, 2009. The ALJ determined

[4] This is an error as the ALJ meant to cite KRS 342.040.

Kittinger's AWW to be $424.43. Relying upon Kittinger's deposition and hearing testimony and the collective exhibit introduced at the hearing and exhibits one through eight of Kittinger's October 12, 2010, deposition, the ALJ found Kittinger was entitled to reimbursement for out-of-pocket medical and travel expenses. In addition, the ALJ found Kittinger was entitled to the treatment recommended by Dr. Mufti which consisted of an examination by Dr. Susan E. Mackinnon at Washington University Hospital in St. Louis, Missouri, or any other specialist recommended by Dr. Mufti. Wal-Mart was directed to pre-authorize the examination by Dr. Mackinnon. The ALJ placed the claim in abeyance and directed it would remain in abeyance until such time as either party filed the appropriate motion. The parties were to file status reports every forty-five days.

Kittinger was seen by Dr. Mackinnon on December 20, 2011. In her report, Dr. Mackinnon stated Kittinger did not have RSD or CRPS. Rather, there was "evidence of lateral antebrachial cutaneous neuroma with a Tinel's sign in the site of the old scar in the line of the lateral antebrachial cutaneous nerve distribution into that nerve distribution and hypersensitivity in the territory of that nerve." Dr. Mackinnon recommended exploration of the lateral antebrachial cutaneous nerve, excision of the

neuroma and proximal transposition of the nerve, as well as decompression of the radial sensory nerve with a brachioradialis tenotomy and a carpal tunnel release with a possible release of the median nerve in the proximal forearm. Dr. Mackinnon stated Kittinger's problems were related to the work injury of June 2008. Kittinger was not at maximum medical improvement ("MMI"). Dr. Mackinnon did not impose any work restrictions since Kittinger is able to work in spite of the pain.

The parties continued to file status reports.

Kittinger underwent surgery performed by Dr. Mackinnon on April 5, 2012.

On July 24, 2012, Wal-Mart filed a motion to terminate TTD benefits attaching the report of Trover Health System indicating Kittinger returned to work "somewhere" on July 16, 2012. Further, Kittinger returned to work at Wal-Mart on July 19, 2012. Wal-Mart attached the July 18, 2012, report from Trover Clinic documenting Dr. James M. Donley returned Kittinger to unrestricted work beginning the next day. The report reflects Kittinger worked at a fairly high position at the local Wal-Mart and the most demanding part of her job was to move and count the change in the safe.

By order dated August 9, 2012, the ALJ terminated TTD benefits effective July 16, 2012.

Kittinger was again deposed on October 26, 2012. She testified she has RSD of the right leg and underwent total left knee replacement surgery at least twenty years ago. At the time of the deposition, she was working full time in the accounting department at Wal-Mart. She was off work for at least three months after the surgery performed by Dr. Mackinnon. After the last surgery performed by Dr. Donley, she was off for a month.[5] Both times she received TTD benefits. At some point after the thoracic sympathetectomy, the condition of her arm regressed and she began experiencing coldness and burning. In addition, when she touches the scar from the surgery performed to debride the gangrene, she experiences a shocking sensation. After the surgery performed by Dr. Mackinnon, the swelling in Kittinger's arm was reduced considerably, and the pain and burning had decreased on a scale of one to ten from ten to five.

In March 2012, Kittinger returned to her previous position in the accounting office. When she returned to

[5] This surgery was performed by Dr. Donley to relieve infection which had set up in the left arm at the surgical site due to a stitch remaining from the surgery performed by Dr. Mackinnon which had abscessed.

work she was still having problems with swelling, sensitivity to touch, and weakness of grip strength. Kittinger explained her left arm, from her elbow to her wrist, is a deep red color. Dr. Donley directed Kittinger to take Keflex to combat potential re-occurrence of infection. She also takes Gabapentin, Lortab, and Flexeril. Kittinger again described her arm as being extremely cold, different in color, and swollen to twice its size. Because of the swelling, she cannot straighten one of her fingers and she has extreme pain from her thumb to her elbow.

At the time of her deposition, Kittinger was working the same hours but at a higher pay rate. She worked at Wal-Mart from 10:00 p.m. to 7:00 p.m. and then went to the daycare where she worked as a daycare curriculum instructor. Kittinger's job at Wal-Mart was to balance accounts. This entailed counting money primarily using her right hand with some assistance from her left hand. She puts out the money to be used at the registers the next day, made the deposits, and counted money. She explained counting money caused severe pain.

Kittinger also created free-hand murals for which she was paid. She acknowledged she drew a mural at the daycare the week before her deposition. She has also drawn

murals in people's homes. She also drew portraits using charcoals or pastels. Every Monday morning Kittinger worked on the floor as a customer service manager and helped with stocking. Lifting caused her severe pain and counting money also caused her problems. Almost every day her arm was swollen after an eight hour shift. She explained that as of November 2012, she has worked for Wal-Mart for thirteen years. In the four years following the injury, she experienced pain to some degree daily. Any retraining she might desire would encompass returning to college. Further, if her pain continued to worsen and her doctors take her off work at Wal-Mart, Kittinger expressed interest in teaching preschool through 6th grade. She could pursue the needed classes at Murray State University at the Madisonville site.

Significantly, the following exchange took place at Kittinger's deposition:

> Q: Okay. Looking back through the pleadings, this was an issue at one time, and I just want to make sure we're caught up. Do you have any outstanding medical bills that you are aware of that are currently due and owing or have not been paid?
>
> A: Yes.
>
> Q: Okay. What are those?

A: They come from when I was in the hospital with Dr. Donley, and Dr. Dave was my – he’s kind of my primary doctor, I guess. I haven’t really seen him but once other than this. But they keep billing me for the surgery that I had for any time that Dr. Dave was there in the hospital, and I’ve called them –

Q: Do you know what those total or –

A: No clue. I’ve contacted them and talked to them, and they said that they would go back in and put it on work rehab – I mean Workers’ Comp, sorry – but I don’t know that they’ve done that because I just recently received a bill from them.

Q: Who is ‘they,’ when you say you’ve talked –

A: Trover Clinic.

Q: Okay. So you’re not aware if they’ve properly billed CMI or –

A: No.

Q: -- you don’t know what the problem is?

A: No.

Q: Would you please provide a copy of the correspondence of bills that you have been sent to Mr. Rhoads, who can contact our office –

A: Absolutely.

Q: -- and we’ll try to facilitate it that way with a B schedule and all that.

MR. RHOADS: Just one other question.

RECROSS-EXAMINATION

BY MR. RHOADS:

Q: You gave me a bill for $121.54 from Parkway Hotel, St. Louis, and that –

A: That’s from the last –

Q: -- has not been paid?

A: On May – I believe it was May 21st was the date that I was there. I’ve never been paid for mileage or anything when I was there.

MR. SKAGGS: When we say, ‘there’ –

THE WITNESS: In St. Louis.

MR. SKAGGS: Dr. McKinnon [sic]?

THE WITNESS: Yes.

MR. SKAGGS: Was this a follow-up visit?

THE WITNESS: That was the very last visit I had with her when she released me to my family doctor.

Q: (By Mr. Rhoads): So you haven’t been paid for mileage, or is this the –

A: That’s the hotel where we stayed.

Q: Do you know if this has been submitted to the –

A: I know that it hasn’t because that’s the second copy that I’ve given to Cheryl.

Q: Okay. And let me just give this to you. This is – we don’t need to make an exhibit – it’s Parkway Hotel in St. Louis, $121.54. This was a visit with Dr. –

A: Dr. McKinnon [sic].

> Q: Okay. We'll get you those other bills.

On January 11, 2013, Kittinger filed a motion to place the claim in abeyance relying upon the report of Dr. Donley who indicated she was not at MMI from the RSD. She noted Wal-Mart was voluntarily paying TTD benefits.

On January 9, 2013, the ALJ entered an order placing the claim in abeyance, canceled the BRC and directed the parties to file status reports.[6]

Thereafter, the parties filed various pleadings.

The May 20, 2013, deposition of Dr. Joseph Zerga was introduced. Dr. Zerga testified Kittinger had CRPS, and implantation of a spinal cord stimulator was reasonable and necessary. Dr. Zerga acknowledged Kittinger was not at MMI and required a pain management specialist on a regular basis for the next several months.

Dr. Suk Ki Kim's September 17, 2013, deposition was introduced in the record on October 8, 2013.[7]

On October 22, 2013, Wal-Mart filed a status report indicating Dr. Kim believed Kittinger could return to work for Wal-Mart with certain limitations. In addition, Kittinger was seen by Dr. Donley who concurred

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[6] Evidently, the motion was received by the ALJ before it was filed in the record.

[7] Dr. Kim implanted the spinal cord stimulator.

she could return to work in a restricted capacity. Wal-Mart represented it was able to accommodate the restrictions assigned by the doctors and noted Kittinger had returned to work on restricted duty on October 17, 2013. It also noted Kittinger had continuously worked at her second job as activities coordinator at the daycare center. Wal-Mart asserted the claim should remain in abeyance since neither of Kittinger's physicians had placed her at MMI.

Dr. DuBou's December 19, 2013, report was introduced.

Thereafter, Wal-Mart filed a status report indicating Dr. DuBou believed Kittinger needed aggressive physical therapy before she attained MMI. He also felt stellate ganglion blocks were not unreasonable. It represented Kittinger was working modified duty for Wal-Mart and was also working her regular position for the daycare center. Wal-Mart again indicated the claim should remain in abeyance until Kittinger was placed at MMI and her condition can be rated.

On April 25, 2014, Wal-Mart filed a status report stating Kittinger continued to work for it on modified duty and at Daydreams Academy. Further, the stellate ganglion blocks had been administered. Wal-Mart acknowledged

because Kittinger had not attained MMI the claim should remain in abeyance.

On June 11, 2014, Wal-Mart filed a status report with the attached report of Dr. Kim. It represented Dr. Kim believed Kittinger would not reach MMI for one year, and she continued to receive physical therapy. Since Kittinger was not at MMI, it stated the claim should remain in abeyance.

One month later, Wal-Mart moved to remove the claim from abeyance citing to the attached report of Dr. Donley in which he indicated Kittinger had now attained MMI. Dr. Donley assessed a 60% impairment rating.

On July 22, 2014, the ALJ removed the claim from abeyance.

Kittinger was again deposed on September 15, 2014. She testified she stopped working for Daydreams Academy on December 17, 2013. Prior to quitting her job at the daycare she served as curriculum director which entailed hiring and firing teachers and conducting job interviews. She provided the curriculum for the teacher which meant she planned the day for them. She explained she quit because the kids bumped her arm which caused severe pain.

Kittinger stopped working at Wal-Mart on July 6, 2014, because Dr. Donley told her to stop. Before quitting, she was working in the fitting room where she folded clothes and answered the phone. She testified she had been off work a year and returned to work in October 2013 as a customer service manager. However, her primary position was accounting associate which involved counting the cash from the registers in the store, making deposits, and resetting the registers for the next day. Kittinger testified she worked in a wheelchair because of problems with her legs.

At the time of the September 15, 2014, deposition, Kittinger did not believe she could work at the daycare or anywhere else. She explained she had worked one-handed for both employers for a long time. Any contact or movement caused severe pain. A family member was coming to her home and helping with household tasks. The spinal cord stimulator was still in place. On re-direct, Kittinger was asked if all of her medical bills, except for one which had been discussed off the record, had been paid. Her response was “as far as I know.” The one bill she identified in the amount of $234.40 was for treatment by Dr. Hamman on May 9, 2014, whom she saw on referral from Dr. Donley.

Dr. Donley's November 3, 2014, deposition and Dr. DuBou's November 13, 2014, deposition were introduced.

At the March 17, 2015, hearing, Wal-Mart represented it paid total medical expenses of $183,089.22 and TTD benefits were paid at the rate of $345.83 for the following time frames: June 22, 2008, through June 8, 2009; and April 6, 2012, through October 16, 2013, for a total of $27,202.06. Kittinger's counsel stated although he could not verify the accuracy of the figures, he had no reason to dispute them. He noted he did not have access to the figures.[8]

Kittinger testified at the hearing she had not worked anywhere since her 2014 deposition. She indicated when her spinal cord stimulator was off she noticed a tremendous difference. She again discussed her physical problems and her problems performing household chores. Kittinger testified that in the month before the hearing and the current month, Wal-Mart put a hold on her medications which caused a delay in getting them refilled.

[8] On April 20, 2015, Kittinger filed a Notice of Filing of TTD Print-Out. Kittinger indicated she had forwarded a joint stipulation to Wal-Mart indicating the attached print-out represents the correct amount and periods of TTD paid. Kittinger noted the TTD information read in the record at the hearing was incorrect. Kittinger requested the print-out be filed as evidence. Kittinger summarized the TTD as follows: Weekly Benefit Amount of $282.96 from 10/16/2008 – 1/8/2009; Weekly Benefit Amount of $345.83 from 4/6/2012 – 7/18/2012; Weekly Benefit Amount of $345.83 from 11/7/2012 – 10/9/2013. The ALJ did not enter an Order ruling on the Notice of Filing.

She testified her prescriptions have to be approved through workers' compensation and the delay in approval caused her to run out of medication. She stated this previously occurred when Dr. Kim initially prescribed Cymbalta and Lyrica, but the problem was resolved. Kittinger explained she gets her medications at Wal-Mart in Madisonville.

At the hearing, Kittinger introduced various exhibits consisting of medical bills, travel expenses, and out-of-pocket expenses. These exhibits will be discussed later.

Kittinger also introduced copies of two reimbursement checks dated July 12, 2011, which she received from Wal-Mart in the amounts of $2,795.68 and $558.36. She also introduced a letter from her counsel dated August 12, 2011, requesting a breakdown of the checks. She indicated she had received no response to this letter.

Kittinger acknowledged she continues to paint and produced the drawings at the hearing using her iPad. She testified she had sold some of these paintings. She also paints shoes. She acknowledged she had previously been diagnosed with RSD in her right leg and in one finger on her left hand. She did not remember a diagnosis of RSD in her arm and hand. She was treated for RSD in her right leg

from 2002 to 2007 which is still symptomatic. She testified Wal-Mart instructed her to use the wheelchair at work. Prior to the subject work injury, she had full use of her left hand and arm. She had no previous symptoms, medical treatment, or work restrictions relating to the left arm. Before her injury, Kittinger had no problems at home doing her housework or performing personal hygiene tasks.

In the course of her testimony, there was extensive discussion about Kittinger's exhibits. Significantly, the following exchange took place between counsel:

> MR. HUBBARD: I don't wish to object to the introduction of any and all relevant information regarding my client's need to pay reasonable and related medical expenses. However, to the extent that medical providers have failed to follow either the statute or the regulations with regard to either the process of billing or the time in which billing is to be tendered, then certainly for the Plaintiff's protection, as well as that of my client, we need to reserve the right to initiate whatever medical fee disputes are applicable to these expenses from the providers themselves.
>
> MR. RHOADS: If I may respond briefly, Judge? We are not at a medical fee dispute stage. We are in the – we are in the concluding portions of the claim and this is not a post-award proceeding and we just want to get straight all of

the medical bills that have been incurred, all of them that have been paid, all of them that have not been unpaid. And due to the failure of response by the Defendant throughout this proceeding showing what has been paid and timely paying them, this whole thing has gotten very jumbled. And, consequently, we are taking extra precautions to get every bill in the record because we haven't been furnished documentation as to what has been paid. And most of this, or much of this has been paid by Blue Cross Blue Shield. So we are just trying to get it all laid out.

MR. HUBBARD: To the extent medical providers have exercised their discretion as to which insurer to bill or have not been presented with the information in which to make proper billings, then I would have to assert my client's right to contest expenses based on the medical providers failure to follow the protocols which apply to them under the Act and the Regs.

And while I certainly can understand and respect counsel's frustration with regard to prior counsel, the bulk of these don't contain any evidence of prior correspondence. And, certainly, this is the first time I have seen the bulk of it myself.

THE COURT: All right. I will note both the motion, I am going to assume that is, Mr. Hubbard, that on your behalf a motion to just – or an acknowledgement by me as to whether or not there is any defenses to the exhibits that the Plaintiff is tendering here.

I do agree that there has been a tremendous amount of medical bills generated, and it's been many, many

> years that this has been going on. So, I'm not sure that anything that's tendered today hasn't probably already been tendered at some point in time in the record, but I think Mr. Rhodes [sic] is correct that this being the formal final hearing, this is the appropriate place for essentially the tendering and admission of those medical bills that may or may not have been tendered on time, processed on time, and paid on time, or denied on time. That will be hopefully determined as we go through the documentation in this case.
>
> Obviously, there was an Interlocutory Order in this case; and, hopefully, I am only dealing with the period of time post Interlocutory Order. But that will have to be sorted out in the Opinion. And I think your objection and/or your preservation of your client's right to object is noted. We may have some major problems trying to sort all of that out.
>
> MR. HUBBARD: I don't wish to object to the introduction of any of this for its consideration. I simply wish to preserve my client's right to review it and to tender proper denials through the appropriate procedures where they apply.
>
> THE COURT: All right, sir, and that is noted.

In the May 15, 2015, decision relying upon the testimony of Kittinger and the medical opinions of Drs. Donley and DuBou, the ALJ found Kittinger totally occupationally disabled. As to whether Kittinger had a

prior active impairment or disability, the ALJ entered the following findings of fact and conclusions of law:

> The Defendant/employer argues that Plaintiff purposely did not disclose her diagnosis of RSD in 2002. The Defendant then argues that Plaintiff suffered from RSD as early as 2002. It is not clear to the undersigned that Defendant is arguing that Plaintiff suffered from a pre-existing condition (RSD) and that it was active and impairment ratable immediately prior to this 2008 injury. However, to attempt to address what appears to be a "pre-existing" argument, the undersigned will note the following:
>
> Although there is no medical evidence regarding impairment or symptoms (that required treatment) immediately before Plaintiff's work injury in 2008, there are medical records that indicate a diagnosis of RSD in her left arm in 2002. In determining whether Plaintiff suffered from a pre-existing disability, I turn to the case of Roberts Bros. Coal Co. vs. Robinson, 113 SW3d 181 (Ky. App. 2003) for guidance. Although there is evidence that Plaintiff had been diagnosed with RSD in 2002, there is no evidence that supports a conclusion that she suffered from an active impairment and would have qualified for an impairment rating immediately before her injury in 2008. I also find that Plaintiff did not suffer from a pre-existing disability immediately before her 2008 work injury.
>
> In Roberts Bros, supra, a coal miner, while working without medical restrictions, injured his back. He had no pre-existing active disability, but medical testimony established one-

quarter to one-half of his impairment was due to the natural aging process. As a result, the ALJ reduced Robinson's award by twenty-five percent but still attributed his total disability to his on-the-job injury. As stated in Roberts Bros.:

> an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(l)(a). *Id,* at 183.

In Roberts Bros, the court noted an award under KRS 342.730(1)(a) is based upon a finding of disability. In contrast, the court pointed out an award of PPD under KRS 342.730(1)(b) is based on a finding the injury resulted in a particular AMA impairment rating, with the amount of disability being determined by statute. The court noted, in other words, KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730(1)(b) requires the ALJ to determine the worker's impairment. The court concluded by noting an exclusion from a total disability award must be based upon a pre-existing disability, while an exclusion from a partial disability award must be based upon a pre-existing impairment. Roberts Bros.

> therefore underscored that if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award made under KRS 342.730(1)(a).
>
> Immediately before this injury, Plaintiff was working her regular work hours with no medical treatment for RSD. She was under no restrictions for past RSD and there was no medical evidence that she had an impairment rating for RSD. The mere existence of a pre-existing functional impairment rating is only one factor to be considered by the ALJ who must determine whether the pre-existing impairment rating was producing some occupational diminution of the worker's ability to work for wages in a competitive economy. The burden of proving the existence of a pre-existing active condition falls upon the employer. Wolf Creek Collieries vs. Crum, 673 SW2d 735 (Ky. App. 1984); Finley vs. DBM Technologies, 217 SW3d 261 (Ky. App. 2007) and I find that the Defendant/employer did not meet that burden.

In imposing sanctions pursuant to KRS 342.310(1), the ALJ entered the following findings of fact and conclusions of law:

> An Interlocutory Opinion and Award was entered in this case on June 9, 2011 in which the Plaintiff was awarded TTD, medical benefits including ongoing treatment, and out of pocket medical expenses. The issue of sanctions pursuant to KRS 342.310 and 342.140 was passed to the merits of this claim.

Even after the Order of the undersigned to pay the past due compensable medical bills, the Defendant continued with the conduct of delaying payment, denying payment with no Medical Fee Dispute having been filed, delay of payment of prescription medication, and left a wide swath of financial and personal destruction for this Plaintiff. It is important to review the findings of the undersigned in the case for interlocutory benefits. Below is a reiteration of a portion of the undersigned's Opinion and Order of June 9, 2011:

> The Defendant/employer stipulated it paid TTD from June 22, 2008 through July 12, 2008 and again from October 16, 2008 to October 26, 2008. Apparently, the Plaintiff's surgery was denied on the basis of two UR reports. The first was dated October 15, 2008 by Dr. Wolens and the second UR was dated November 13, 2008 authored by Dr. Ensalada. The Plaintiff provided this evidence as exhibits to her deposition in October 2010. (See Exhibits 11 and 12). Plaintiff's counsel specifically asked for letters from the Defendant/employer setting out its denial so that Plaintiff could apply for and receive personal health insurance coverage and short-term disability. The STD was denied and Plaintiff was required to exhaust her sick days and any vacation days before qualifying for any income benefits. She

testified she was essentially without income of any type between October 26, 2008 until her return to work on January 6, 2009. (See affidavit of Plaintiff dated February 20, 2009 attached to Plaintiff's deposition). No evidence disputes these statements by the Plaintiff. There was no offer of an explanation by the Defendant/employer of why, after receiving the results of an evaluation by Dr. Weiss (requested by the Defendant/employer) on December 9, 2008, Plaintiff's TTD was not restored.

The Defendant/employer now admits they owe TTD and medicals, but apparently have not made the payments for reasons that will be discussed below. Essentially the Defendant/employer's argument was that "we know we owe the TTD and the medicals but Plaintiff hasn't submitted them on the proper forms – so we aren't responsible for them". This argument was discussed at the formal hearing and all parties were made aware of the position of the undersigned – which was set out in the undersigned's Order of December 13, 2010. The Defendant/employer was ordered to pay Plaintiff's outstanding, compensable medical expenses along with Plaintiff's out-of-pocket expenses through and including January 22, 2009.

The Defendant/employer has not complied with that Order. The Defendant/employer argues in its brief it could not comply with the Order of December 13, 2010 because the submissions were not on proper forms and therefore confusing. The problem is there is no evidence of substance to support that argument. While it may be true that the bills submitted by the Plaintiff or the health care providers were confusing and/or not submitted on proper forms, there was no affidavit, deposition or testimony from any agent of the Defendant/employer regarding same. There has been no formal denial of these claims after the December 13, 2010 Order. Prior to the Order, in its Form 111 (filed September 17, 2010) the Defendant/employer denied the claim by stating: "The Defendant/Employer wishes to preserve all defenses that may become evident over the course of this claim". It then lists witnesses that may have testimony relevant to its denial as the Plaintiff, Dr. Zerga and Wal-Mart representatives.Conspicuously absent from this list was Dr. Weiss.

Arguments of counsel, no matter how well intentioned, no matter how well-spoken or convincing, must be based upon the evidence in the record. Essentially there is

no evidence of substance to support Defendant/employer's arguments on this issue. The Defendant/employer was allowed additional and ample proof time after the December 13, 2010 Order to provide reasons why it could not or would not pay what was ordered to be paid. It submitted nothing that addresses this issue.

The Plaintiff, although not tendering specific Form(s) 114, had essentially provided all of the same information as required on the Form 114 at the Plaintiff's deposition on October 12, 2010. Exhibits 1 through 13 supported by the Plaintiff's sworn testimony provided the basis of making a claim for payment of same under KRS 342.020 et.seq. Apparently, no written denial for TTD payments was made even after the Plaintiff's counsel requested same. After the Order of December 13, 2010, no additional filings were made until the formal hearing.

During the hearing Plaintiff introduced several out-of-pocket bills, outstanding medical bills and garnishment amounts collectively as Exhibit 1. On cross-examination the Plaintiff explained what she knew (or didn't know) about the relatedness of the medical bills to her work injury.

The Plaintiff also introduced, as Exhibit 2, wage records. She testified that as a result the Defendant/employer wouldn't pay her STD, made her use-up her accumulated vacation 121 hours and her accumulated 14 hours personal time and her accumulated 2.47 hours sick-time. She has not been reimbursed for round-trip mileage to Dr. Cooper in Owensboro. She paid many medical bills out of her own pocket or made co-pays on her health-insurance via employment at Wal-Mart.

While all of the above is discussed to provide the basis of the undersigned's findings and rulings on the contested issue of TTD, it should also provide the basis of facts for the ruling on contested issues of relief pursuant to KRS 342.310 and KRS 342.140 to be determined at a later time. (See separate Order dated June 8, 2011). (Interlocutory Opinion and Order of June 9, 2011)

The Plaintiff has returned to work. In fact, she is currently the associate accounting office manager for Wal-Mart in Madisonville with a period overlapping/ concurrent employment at Daydreams Academy when deposed on October 12, 2010. She had to take-on that second job because medical creditors garnished her paycheck at Wal-Mart and

> because she got $3,000 in arrears on paying her rent while she was recovering from surgery. She worked at the day care center 5 days per week from 8:00 a.m. to noon, or 2:00 p.m. (PRN of that employer).

The Defendant describes the Plaintiff's counsel's introduction of Exhibits 1 through 14 at the March 17, 2015 Hearing as being done "with fanfare". Then proceeds to submit over 5 pages of explanation(s) as to why each exhibit is not evidence of the unreasonableness of the defendant's actions or inactions.

The undersigned's concern with the presentation of facts and documents (as exhibits to the Defendant's Brief to the ALJ) is that none of these statements, proffered actions or tendered documents have been submitted into the record as evidence. This issue of lack of evidence was also noted in the Interlocutory Opinion Order and Award. While it may be true that the Defendant's actions were are [sic] result of certain miscommunications between former counsel, incompetence of medical bureaucracies or any number of other explanations, the problem with the Defendant's position is that there was no evidence submitted to support its position. Even after making some of the very same assertions in the case before the ALJ for interlocutory relief, the Defendant compounds its unsustainable position with assertions that have no evidence to support them. It is clear that the Defendant had every opportunity to submit by testimony its action on this claim with over three years between the Interlocutory Opinion and the Hearing herein, the Defendant cannot

claim it lack the opportunity to fully explain and submit evidence to support its position. None was ever forthcoming. Even after the Interlocutory Order of June 9, 2011, there was never any testimony provided to this ALJ from the Defendant's personnel. The production of documents appended to a Brief is not evidence. The actions or inaction of former counsel may be a reasonable explanation, but it is not supported by any evidence – testimony or otherwise.

Attached to the Transcript of Hearing were numerous receipts, correspondence, and billing statements reflecting unpaid medical bills and out-of-pocket expenses incurred by the Plaintiff. It is clear that a large amount of medicals were paid, pursuant to the stipulations at the Hearing and BRC(s) in this matter. However, the conduct of the Defendant throughout this litigation has been the subject of numerous pleadings by the Plaintiff --- all which have gone unanswered by any agent of the defendant who administered this claim.

An attorney's written and/or verbal explanations or "defenses" of the action of the defendant, especially as it relates to the adjusting and payment of medical expenses rings hollow when then [sic] is no testimony or evidence of substance to support those defenses.

The undersigned purposely "passed" the issue of sanctions per KRS 342.310 and 342.140 at the time of the Interlocutory Order of June 9, 2011, in part to allow the Defendant to conduct its management of Plaintiff's claim in a manner that would allow her the medical treatment which she had proved she was entitled to before the ALJ.

In August following the Interlocutory Opinion of the Administrative Law Judge, the Defendant issued two checks to Plaintiff purportedly for payment of out-of-pocket expenses. The Plaintiff's counsel requested an accounting of items for which these checks were written. Plaintiff testified that no explanation was forthcoming from the Defendant. In its brief the Defendant counters that there was a letter containing an explanation from former counsel --- however, this was never presented to Plaintiff so a response could be elicited. While it is clear some payments were made (as stipulated), Exhibits 2 through 14, which were supported by Plaintiff's testimony, are substantive evidence of the Defendant's unreasonable conduct in this action which went without response. Some of the actions were even after the Interlocutory Order of this ALJ. At the hearing, Plaintiff testified that when she gets her medications filled at Wal-Mart, there is always a delay before approval is given, so that she has to go without her pain medication. (Hearing Transcript, p. 22). She testified this problem started when Dr. Kim prescribed Cymbalta and Lyrica, then the problem was fixed, and it has now happened the last two times she has gotten her prescriptions filled. (Hearing Transcript, pp. 22-23).

The undersigned takes very seriously the issuing of sanctions per KRS 342.310, and KRS 342.140. The conduct of the Defendant in this claim has been outrageous and done with impunity toward the system in which it is required to participate in order to do business in this Commonwealth. Indeed the actions of the Defendant have been willful, intentional, and

negligent in its failure and delay to pay for medical expenses and reimbursements. Even after being put on notice of the unacceptable behavior, and after the opportunity to explain and or remedy the unacceptable conduct, the Defendant once again ignores the requirements of the law and the orders of this ALJ. Denial of payment of submitted bills without a follow-up medical dispute, delay in authorization for payment of pharmacy prescription are all in violation of the regulations.

For these reasons, the undersigned finds that the Defendant/employer has not defended this action with reasonable grounds. Pursuant to KRS 342.310 (1) the Defendant shall be assessed the whole cost of the proceedings which shall include actual expenses, including court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses. The Plaintiff is directed to submit a verified accounting of said costs, expenses, and fees to the undersigned within twenty (20) days of this Opinion, Order and Award.

The undersigned does not find the requisite grounds for costs, fees and enhanced interest rate on past due benefits pursuant to KRS 342.140 and therefore those sanctions shall not be assessed.

This matter shall also be referred to the Commissioner of the Department of Workers' Claims for Kentucky for an investigation into the possible violations of KRS 342.267 and 803 KAR 25:240.

Wal-Mart filed a petition for reconsideration raising the same issues it now raises on appeal.

In the June 10, 2015, Order overruling the petition for reconsideration concerning whether Kittinger had a pre-existing active disability, the ALJ cited her findings Kittinger was working regular hours with no medical treatment for RSD, was under no restriction for past RSD, and there was no medical evidence establishing Kittinger had an impairment rating for RSD. With respect to the sanctions imposed, the ALJ stated as follows:

> The second error proffered by the Defendant is almost as outrageous as its conduct during the course of this litigation. The Defendant violated the provisions of KRS 342.310 on numerous occasions, both before and after the Interlocutory Order of this ALJ. The list is voluminous as to the number of medical bills that were denied without grounds. The Defendant seems to believe that if a statement is made a sufficient number of times, there has to be some substance contained therein. Let it be perfectly clear from this fact-finder, the Defendant was given ample opportunity to present evidence regarding the circumstances and actions surrounding the adjusting and management of this claim. This is particularly true regarding the denial of the Plaintiff's requests for payment of medical bills. No presentation of evidence, other than the Defendant's counsel making statements that certain actions were taken in reference to an "audit", was ever even attempted by this Defendant. What was tendered by

the Defendant at the last minute as "evidence" was indeed not evidence and the Opinion clearly discusses same.

To characterize the Plaintiff's presentation of evidence as an "ambush" is uncivil and patently untrue. The documents presented at the Hearing as exhibits had been tendered at least on one other occasion and several of them twice. The Interlocutory Opinion and Order discusses many of billings. The Defendant has retained three different attorneys during the course of this protracted litigation. The ALJ has been more than lenient with counsel in order to assure fairness and impartiality was the standard by which this Opinion was decided. A review of the entire record makes that clear. Whether or not the most recent counsel was afforded the entire record from previous counsel is not the undersigned's concern, but counsel would do well to review the record before making ill-advised allegations concerning the Plaintiff or Plaintiff's counsel's conduct.

For the above stated reasons, and those contained within the Opinion and Award of September 15, 2015 the Defendant's "request to vacate that portion of the Opinion which imposed sanctions pursuant to KRS 342.310 and KRS 342.140" is **DENIED**.

Accordingly, **IT IS HEREBY ORDERED** that the Defendant's request for the vacating of the Opinion and Order of September 15, 2015 is **DENIED**.

With regard to the remainder of the Petition for Reconsideration, there is no specific error identified by the Defendant. As such, it appears that the Defendant is simply re-arguing its position on the merits of the claim. Re-argument of the case on the merits

> is not appropriate for a Petition for Reconsideration. See KRS 342.281 and Wells vs. Beth-Elkhorn Coal Corp. 708 SW2d 104 (Ky. 1985).

Concerning its first argument, Wal-Mart contends Kittinger had been diagnosed with, treated for, and under work restrictions for RSD prior to her work injury. It notes the prior treatment she received for her left arm and right leg. Wal-Mart contends the evidence clearly demonstrates Kittinger was working with restrictions due to RSD. It requests remand with instructions for the ALJ to make additional findings of fact regarding the work restrictions for RSD prior to Kittinger's injury.

Concerning its second argument, Wal-Mart contends the imposition of sanctions pursuant to KRS 342.310(1) is erroneous and an abuse of discretion. It argues Kittinger bears the burden of proof of establishing it affirmatively denied compensable medical treatment. Wal-Mart asserts Kittinger's "accusation, implication, or suggestion" it has acted in bad faith does not create a rebuttable evidentiary presumption causing it to present incontrovertible evidence in order to avoid imposition of sanctions. It notes even though its IME physician, Dr. Weiss, found the procedure performed by Dr. Stanfield and subsequent medical treatment to be reasonable and necessary, it had the right to deny

this treatment in good faith based on a medical opinion the treatment was not reasonable and necessary. Wal-Mart also notes Kittinger received two checks: one for payment of out-of-pocket expenses and another for mileage reimbursement.

Wal-Mart notes Kittinger alleges there has twice been a delay in payment when she fills her prescriptions at Wal-Mart. It asserts Kittinger never testified the delay was through any fault of Wal-Mart since she clearly testified no medical provider has ever told her that Wal-Mart has denied her medical treatment. Wal-Mart asserts it is unaware of any reason for the delay. It contends the alleged non-payments do not amount to substantial evidence of unreasonable conduct. Further, there was no proof Wal-Mart affirmatively denied payment of a compensable medical expense in contravention of KRS 342.020 or as directed by the interlocutory order.

Wal-Mart also contends that pursuant to KRS 342.020 and 803 KAR 25:096, the employer must receive a statement for services, as defined by the applicable regulation, from an employee’s medical provider. It notes 803 KAR 25:096 directs a non-compliant provider shall not be paid for those services which are not submitted in conformity with KRS 342.020. Thus, to the extent any

medical provider failed to submit a completed statement for services within forty-five days of the delivery of treatment to an employer, the provider's medical bills is not compensable. Wal-Mart contends it paid all reasonable and necessary medical bills related to Kittinger's work injury which were properly submitted. It notes for unknown reasons, Kittinger's medical providers did not bill, or in some cases, timely bill workers' compensation for the medical treatment. Wal-Mart notes Kittinger testified she repeatedly told the medical providers to bill workers' compensation, and no provider ever told her that workers' compensation was denying her medical treatment. Wal-Mart notes it cannot pay for bills which were never submitted, and it is not required to pay for medical bills more than forty-five days after the date of service.

Wal-Mart takes issue with the ALJ's statement that the documentation attached to its brief which evidences payment of the bills is not in evidence. It argues the ALJ's refusal to consider the attachments to its brief as evidence is clearly erroneous. It contends the documents it submitted with its brief are no different than the documents introduced by Kittinger at the final hearing, many of which Kittinger could not recall or verify as being compensable medical expenses which were improperly denied.

It further argues this is especially true in light of the ALJ's assurance at the final hearing it would be able to respond to the documents presented. It cites to the following statement of the ALJ in the transcript:

> I do agree that there has been a tremendous amount of medical bills generated … so I'm not sure that anything that's tendered today hasn't probably already been tendered at some point in time in the record … but that will have to be sorted out in my opinion. And I think your objection and/or your preservation of your client's right to object is noted. [Final Hearing Transcript page 48, Lines 16-25; Page 49, Lines 1-8]

Wal-Mart asserts the above statement confirms its ability to respond to the evidence presented at the final hearing. It contends the ALJ did not consider the documents attached to its brief and deprived it of the opportunity to investigate fully the documents tendered at the final hearing as it was not granted additional proof time to determine the status of the medical bills. Wal-Mart complains since many of the bills submitted at the hearing had never been tendered, it was not allowed to investigate and respond. Further, it was not given the opportunity to review the bills and submit them through utilization review which is in contravention of the statutes and regulations.

Finally, Wal-Mart asserts that in finding it willfully, intentionally, and negligently failed and delayed to pay for medical expenses and reimbursements, the ALJ did not cite to any specific non-payment or otherwise explain how it defended the claim unreasonably. It contends to the extent they were submitted, the bills and expenses have been paid. Thus, the ALJ erred in finding it had failed to pay medical expenses. Wal-Mart requests the ALJ's decision be vacated.

Wal-Mart's first argument regarding the ALJ's finding concerning Kittinger's previous restrictions for RSD has no merit. We note Wal-Mart merely seeks additional findings Kittinger was under previous work restrictions for RSD. That is not sufficient grounds for reversal. In Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007), the Court of Appeals held that to be characterized as an underlying pre-existing condition it must be both symptomatic and impairment ratable pursuant to the AMA Guides.

In the case *sub judice*, although Kittinger admitted to having RSD in the right leg and ankle, there is no evidence she had an impairment rating based on the AMA Guides for this condition. Further, while RSD may have been in various body parts, there was no proof Kittinger had an

impairment rating pursuant to the AMA Guides due to this pre-existing active condition. Dr. Donley, upon whom Kittinger relied, testified Kittinger had a 60% impairment rating. Dr. DuBou, Wal-Mart's examining physician, testified Kittinger's impairment rating was between 30% and 45%. Neither physician attributed any of the impairment rating to a pre-existing active condition. Thus, there is no reason to remand for additional findings regarding the work restrictions.

Although the ALJ addressed the Supreme Court's holding in Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003), it is inapplicable because there was no evidence in the record of an impairment for a pre-existing active condition. Relying upon Kittinger's testimony, the ALJ found she had no work restrictions or pre-existing problems with the left hand prior to the injury. Thus, the ALJ's determination Kittinger is permanently totally disabled without any reduction for a pre-existing occupational disability will be affirmed.

That said, we reverse that portion of the ALJ's decision assessing costs pursuant to KRS 342.310. KRS 342.310(1) reads as follows:

> 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.

In Mastin v. Liberal Markets, 674 S.W.2d 7, 14 (Ky. 1984) the Supreme Court stated as follows:

> …But in any event, assessment pursuant to KRS 342.310 is contingent upon a finding that the employee was forced to bring, prosecute or defend an action "without reasonable ground." Here the appellees' actions in suspending further payments in the circumstances could not be classified as groundless. Indeed, as this opinion specifies, in some respects they have merit.

Even though the ALJ found Wal-Mart has not defended this action with reasonable grounds, her reasons were based solely on her belief Wal-Mart was willful, intentional, and negligent in its delay in paying for medical expenses and reimbursement. Notably absent is a finding by the ALJ that Wal-Mart improperly defended Kittinger's claim for income benefits which is necessary for the ALJ to assess the entire cost of the proceedings against Wal-Mart.

Further, Wal-Mart had no obligation to pay any medical expenses and out-of-pocket expenses or file a medical fee dispute prior to the December 8, 2010, BRC Order and the June 8, 2010, Interlocutory Opinion, Order, and Award which expanded Wal-Mart's liability for medical benefits. The December 8, 2010, BRC Order and the ALJ's December 2010 order directed Wal-Mart to pay out-of-pocket expenses through January 22, 2009. Kittinger's medical providers were to submit their bills on the appropriate forms and Kittinger was to submit her out-of-pocket expenses on the Form 114. The June 9, 2011, Order directed Wal-Mart to pre-certify and pay for all medical expenses related to the treatment recommended by Dr. Mufti as well as all reasonable and necessary medical expenses.

In R.J. Corman R.R. Const. v. Haddix, 864 S.W.2d 915, 918-919 (Ky. 1993) the Supreme Court stated as follows:

> In the case at bar, the bills were submitted to the employer two and six months before an award was entered. The employer obviously believed that the proper time to challenge payment was at the hearing before the ALJ. However, that was in excess of 30 days after the bills were received. Therefore, according to the Board and Court of Appeals decisions, the employer should have challenged payment by motion prior to the expiration of 30 days, which would also have been prior to the hearing before the ALJ, and before an

award of medical benefits had ever been made.

The amendment to KRS 342.020(1) requiring the payment of medical benefits in 30 days is clearly intended to hasten payment of those medical bills that the employer is obligated to pay. Until an award has been rendered, the employer is under no obligation to pay any compensation, and all issues, including medical benefits, are justiciable. Therefore, we believe that KRS 342.020, which addresses additional compensation for injuries, which must be determined to be work-related per KRS 342.0011(1) to be compensable, applies to medical statements received by an employer after an ALJ has determined that said bills are owed by the employer. Likewise, the rules enunciated in *Westvaco* and *Poynter* only apply post-award.

From a practical standpoint, pre-award application of the 30–day rule to either pay or contest medical costs is an exercise in futility and simply adds another step to the process. In essence, the rule requires employers to file a motion to contest in order to preserve the issue for consideration at the hearing. The ALJ would hardly be able to rule on the motion before considering the merits of the claim and determining whether claimant is entitled to any compensation. Therefore, the motion to contest would necessarily be held in abeyance, with no real benefit derived from the extra procedural step.

We have been offered no logical reason why *Westvaco* and *Poynter* should apply to medical bills submitted to an employer during the litigation of a claim. Without a sound basis for

> extending the rule further, we reverse the Court of Appeals' affirmance of the Board on this point. The proper time to contest issues involved in a workers' compensation claim, including whether certain medical treatment should be at the expense of the employer, is at the hearing before the ALJ.

Thus, the ALJ could not rely on Wal-Mart's failure to pay certain medical bills and/or failure to file a medical fee dispute prior to entry of the December 2010 order as grounds for imposing sanctions pursuant to KRS 342.310. We note that in her October 26, 2012, deposition, Kittinger identified her travel expenses to see Dr. Mackinnon as the only unpaid bill. At the conclusion of the October 26, 2012, deposition, Kittinger's counsel represented Kittinger would "get [Wal-Mart] those other bills." There is no showing in the record those bills were ever tendered by Kittinger to Wal-Mart. In the same vein, Kittinger's September 15, 2014, deposition only reflects she had one outstanding bill of $234.40 at that time for services provided by Dr. Hamman on May 9, 2014.

To assess the entire cost of the proceedings against Wal-Mart, as required by Mastin v. Liberal Markets, supra, there must have been a finding Kittinger was forced to bring or prosecute this entire claim without reasonable grounds. There was no such finding.

The nature and severity of Kittinger's injury was not finally determined until mid to late 2014. The only impairment ratings submitted prior to the ALJ's interlocutory decision came from Wal-Mart's physicians, Drs. Weiss, Zerga, and DuBou. Dr. Weiss initially assessed a 7% impairment rating but later reduced it to 1%. Dr. Zerga, like Dr. DuBou, initially assessed a 1% impairment rating and neither found the presence of RSD.

After recovering from surgery to debride the gangrene and the thoracic sympathetomy surgery, Kittinger returned to work on January 9, 2009, and continued to work off and on. As the condition of her left arm worsened, it became necessary to place the claim in abeyance. The claim was first placed in abeyance pursuant to the ALJ's interlocutory decision of June 9, 2011, which directed Kittinger be seen by Dr. Mackinnon. As evidenced by the pleadings, the parties continued to be guided by the medical opinions as to Kittinger's MMI status. The claim was removed from abeyance when Kittinger returned to work in July 2012. The ALJ once again placed the claim in abeyance by agreement of the parties. On two different occasions, Wal-Mart filed medical fee disputes regarding procedures which it subsequently withdrew after its medical evidence established the procedures comprised appropriate treatment.

Significantly, we note in filing its status reports Wal-Mart acknowledged Kittinger was working both for it and at the daycare center. It did not seek to remove the claim from abeyance because Kittinger had returned to work.

Assuming, *arguendo*, Wal-Mart intentionally failed to pay one or multiple medical bills, the ALJ may not assess the entire costs of the proceedings. An intentional failure to pay medical expenses and unreasonably defending the claim are two separate issues. Although Kittinger's medical condition continued to worsen, there was no clear assessment of Kittinger's medical condition until the depositions of Drs. DuBou and Donley were taken in November 2014. Further, Kittinger regularly worked two jobs during the proceedings until she quit the daycare job on December 17, 2013, and her job at Wal-Mart on July 6, 2014.

Dr. DuBou's testimony of November 3, 2014, upon whom the ALJ relied, sets out the problems which occurred in this claim concerning the ability to arrive at a definitive diagnosis of Kittinger's condition. Dr. DuBou noted he saw Kittinger three times. The first time he saw Kittinger the pain was not over the entire arm but in a specific area. At that time she did not have severe pain upon either light touching or even blowing over the area. Therefore, pursuant to the AMA Guides, Dr. DuBou determined it was not

appropriate to diagnose RSD. Dr. DuBou believed she had a 1% impairment rating. He noted Dr. Zerga also assessed a 1% impairment rating. When he performed a second evaluation on December 19, 2013, he noted the procedures Kittinger had undergone, including implantation of a spinal cord stimulator. Kittinger had marked limitation of range of motion, but because she did not have physical therapy she was not at MMI. Her arm was swollen but nothing like it was when he last saw her. Kittinger was still working for Wal-Mart and at the daycare.

At his last examination on October 28, 2014, Dr. DuBou noted Kittinger was much worse. Her arm was two to three times bigger than the other arm and she had very little motion in her fingers. Dr. DuBou finally made a diagnosis of RSD as he believed she had the classic symptoms. Dr. DuBou testified this type of progression was something he had never seen before in his thirty years of practice. He was unable to explain how Kittinger got in this condition as a result of a superficial cut. Dr. DuBou assessed a 30% to 45% impairment rating which he indicated was the highest impairment rating he had ever assessed. Since Kittinger’s final condition was undetermined until 2014, Wal-Mart did not defend this action unreasonably and

there is no basis for assessing the entire costs of the proceedings against Wal-Mart.

In addition, as pointed out by Wal-Mart, the ALJ made no finding that a specific bill or expense was unpaid. The closest the ALJ came to finding specific medical bills were unpaid is contained on page 38 of her opinion in which she stated "attached to the transcript of the hearing were numerous receipts, correspondence, and billing statements reflecting unpaid medical bills and out-of-pocket expenses incurred by the Plaintiff." However, the ALJ undid any purported finding of unpaid medical bills by then stating "it is clear that a large amount of the medicals were paid pursuant to the stipulation of the hearing and the BRCs in this matter." On page 39 of her opinion, the ALJ again discussed unpaid medical bills stating "while it is clear some payments were made (as stipulated), Exhibits 2 through 14, which were supported by Plaintiff's testimony are substantive evidence of Wal-Mart's unreasonable conduct which went without response." Again, the ALJ does not identify which of exhibits two through fourteen, if any, were unpaid medical bills, out-of-pocket expenses, or travel expenses.

Significantly, the ALJ failed to note that during Kittinger's March 17, 2015, hearing testimony, she was

unable to state that any of the previous bills and expenses evidenced by the exhibits introduced at her October 2010 deposition and at the April 21, 2011, hearing remained unpaid. Kittinger did not identify one unpaid bill which pre-dated the ALJ's June 2011 Interlocutory Opinion, Order, and Award that was unpaid.

This is compounded by the fact that upon receipt of two checks, Kittinger did not assert these payments did not fully compensate her for her travel expenses and out-of-pocket payment of her medical bills. Once Kittinger received these checks, she was obligated to determine if she was owed any additional sums. Kittinger had her itemized expenses and could have determined whether this was payment in full. There was no finding by the ALJ addressing whether these checks constituted payment in full of Kittinger's out-of-pocket expenses, including her travel and meal expenses. Thus, there could be no finding Wal-Mart had failed to reimburse for out-of-pocket expenses and travel expenses. The ALJ's assessment of the total cost of the proceedings was an abuse of discretion.

We emphasize the request for sanctions pursuant to KRS 342.310(1) requires Kittinger to allege and prove Wal-Mart defended this claim without reasonable grounds. Here, there is no such assertion. The sole basis for her request

for sanctions pursuant to KRS 342.310 was based on what she perceived to be Wal-Mart's unreasonable failure or delay in paying medical bills. Kittinger did not allege Wal-Mart defended her claim for income benefits without reasonable grounds, thus the ALJ could not assess the entire cost of the proceedings against Wal-Mart.

As noted by the Kentucky Supreme Court in Hardee's Food Systems v. Allen, Claim No. 2007-SC-000883-WC, rendered August 21, 2008, Designated Not To Be Published:

> Although we have affirmed the Court of Appeals' decision, the record contains evidence that would have permitted a decision in either party's favor. We are not convinced that the employer appealed without reasonable grounds or that the appeal is so lacking in merit as to imply bad faith.

See also Kentucky Associated General Contractors Self-Insurance Fund v. Tri-State Crane Rental, Inc., 240 S.W.3d 644 (Ky. 2007). Whether sanctions pursuant to KRS 342.310(1) are appropriate mandates a determination of whether the denial of the claim was based on reasonable grounds.

In the case *sub judice*, the issue of whether Wal-Mart unreasonably denied Kittinger's claim was not raised as an issue and; thus, assessment of the entire cost of the proceedings was clear error.

We agree the documents attached to Wal-Mart's brief to the ALJ did not constitute evidence to be considered by the ALJ. However, we will separately address the alleged failure by Wal-Mart to pay medical bills and out-of-pocket expenses evidenced by the exhibits introduced at the March 17, 2015, hearing.

Relative to the issue of whether Wal-Mart willfully, intentionally, and negligently failed to pay certain medical bills, we note during Kittinger's October 26, 2012, deposition, Wal-Mart's counsel specifically noted he was looking back through the proceedings and wanted to make sure Wal-Mart was "caught up." He asked Kittinger if she had any medical bills which had not been paid. Kittinger stated when she was in the hospital being treated by Dr. Donley she kept getting a bill "for the surgery that [she] had for any time that Dr. Dave was there in the hospital." Kittinger was then asked if there was a total, and she said she "had no clue." She stated she had contacted Trover Clinic and was informed it would "put it on worker's compensation." She emphasized she had no idea what Trover Clinic had done because she had recently received a bill from them. Kittinger also acknowledged she was unaware

if CMI had been properly billed.[9] She stated she would provide a copy of the "correspondence of the bills" to her counsel who would then provide a copy to Wal-Mart. Thereafter, on re-cross, her counsel inquired as to whether she had been paid for the hotel in St. Louis when she was seen by Dr. Mackinnon. Kittinger testified the hotel bill and expenses for the last visit to Dr. Mackinnon had not been paid. Counsel for Kittinger stated he would get the other bills. At this time, it appeared there remained very few unpaid medical expenses.

Just as important is the previously cited representation by Kittinger's counsel at the March 2015 hearing. In discussing the exhibits being introduced, counsel represented as follows:

> Mr. Rhoads: I am going to put this in as the next Plaintiff's exhibit.
>
> (Copy of 10-Page Owensboro Medical Health System Bill, $419.8, is attached hereto and marked Plaintiff's Exhibit 10.)
>
> Mr. Rhoads: And I'm hopeful that we can get a complete printout itemizing what has been paid so we can know which of these has been and has not been paid. Bryan, I am hoping we can get that.

Also germane to the issue of whether sanctions were appropriate for failure to pay medical bills is

[9] Apparently, CMI is Wal-Mart's claims administrator.

Kittinger's counsel's representation at the March 2015 hearing that they were not at a medical dispute stage. Since the parties were not at a medical fee dispute stage, it stands to reason there was no clear indication of what, if any, bills or expenses remained unpaid.

At the hearing, Kittinger introduced as Exhibit 1 a bill which had not previously been provided to Wal-Mart, in contravention of the regulations. The bill was a receipt for a functional resting hand splint dated December 30, 2014, of $72.98. The ALJ noted this bill had not been tendered to Wal-Mart prior to that date.

Kittinger's Exhibit 2 is styled "Additional Out-of-Pocket Medications" totaling $287.78 dated from 2012 or later. Kittinger was asked if they were sent to Wal-Mart and whether it had declined to pay them. She testified she was not sure at what point she submitted them, but she believed it was after she saw Dr. Mackinnon on May 21.[10] She stated she was not sure of the year when she spoke with Cheryl, but at that time Cheryl informed her she needed to turn in her out-of-pocket expenses. Kittinger testified she was never aware she was supposed to be "taking care of that." Kittinger provided a short synopsis of her

[10] Presumably, the year was 2012.

conversation with a lady in an office. As a result, some forms were sent to Kittinger and she filled them out and returned them but had not heard anything since.

Exhibit 3 is a bill for $9.60 for Neosporin and Band-Aids which Kittinger supplied to her counsel on the date of the hearing.

Exhibit 4 is a June 10, 2012, letter attaching the expenses for Kittinger's last stay in St. Louis when she saw Dr. Mackinnon.

Exhibit 5 is an August 15, 2014, bill from Baptist Health Medical Associates addressed to Kittinger for $234.40 which indicates the total charge was $532.00 and her insurance paid and/or adjusted $297.00. Relative to this bill, Kittinger testified Baptist Health had been billing her insurance carrier instead of worker's compensation. She indicated she thought the itemized statement had been sent to her and she thought she sent it to Cheryl. However, she did not testify the bill had been sent to Wal-Mart for payment before the date of the hearing. Further, the bill reflects it is for services rendered May 9, 2014, from Dr. Hamman. This is the bill Kittinger identified at her September 15, 2014, deposition as her only unpaid bill.

Exhibit 6 is a list of Kittinger's mileage. Kittinger had twenty-six trips for physical therapy from

July 18, 2012, through February 18, 2013, three trips to Regional Medical Center in June and July 2012, and January 2013, nine trips to Dr. Donley from June 28, 2012, through August 8, 2013, and one trip to Owensboro Pain Clinic. The round trips for physical therapy were 8.5 miles, to Dr. Donley were 3.2 miles, Regional Medical Center were 7.4 miles, and 137 miles to Owensboro Pain Clinic. Kittinger did not represent the mileage breakdown was ever sent to Wal-Mart for reimbursement prior to the hearing. Further, it appears this is the first time the mileage list was filed in the record.

Exhibit 7 consists of two checks written to Kittinger; one for $2,795.69 as reimbursement of out-of-pocket expenses and the other for $558.36 for mileage reimbursement. Also attached is a letter from Kittinger's counsel stating he has enclosed copies of two checks received for mileage reimbursement and payment of out-of-pocket expenses seeking a breakdown of what the checks represent. Kittinger testified she received no response to the letter.

Exhibit 8 is a Health Insurance Claim Form from Anesthesia Care Enterprises, LLC addressed to Wal-Mart Claims Management with accompanying documents showing a balance of $204.00 for services rendered on October 3, 2008.

Kittinger acknowledged this was attached to the original hearing transcript. She did not testify this bill was unpaid.

Exhibit 9 contains a list of three separate payments Kittinger made to Trover Clinic: two for $20.00 and one for $2.23. The statements evidencing the payments show two of the three payments were for services rendered on October 29, 2007, and April 3, 2008. These bills clearly pre-date the injury and on their face were not compensable. There were also statements from Trover Clinic with closing dates of September 6, 2008, November 8, 2008, December 6, 2008, January 3, 2009, January 24, 2009, and February 7, 2009. Almost all of the statements contain many of the same charges but provide an updated list of subsequent charges. There was also a bill from Trover Foundation/Regional Medical Center dated January 24, 2009, for $43.85. Again, Kittinger did not testify these bills had not been paid.

Exhibit 10 is a bill from Owensboro Medical Health System. Kittinger stated she recently received a bill reflecting her part is zero. The amount of the bill was $700.85 and with an adjustment, the current balance was $419.81. She stated she thought $134.00 or $234.00 was still owed on the bill, but she was unsure if it had been paid. She assumed a portion had been paid. Notably,

Kittinger's counsel stated he was hoping to get a complete printout itemizing what had been paid so they would know which bills were paid and which were unpaid.

Exhibit 10 is the bill alluded to in Kittinger's first deposition which states "insurance processing," "no action required," and "balance not reflected." Thus, on its face, the bill reflects Kittinger owed nothing at that time.

Exhibit 11 consists of a bill and other related documents relating to charges from Owensboro Ambulatory of $1,298.00 which reflect Kittinger had paid $65.00 and the estimated balance she will pay is $64.80. Relative to Exhibit 11, Kittinger testified she did not recall whether this was an out-of-pocket expense. She testified she had not paid it. Another document attached as part of the exhibit reflects the amount due from the patient is $219.69 and reflects it is not an out-of-pocket expenditure. Kittinger testified she did not know if it had been paid.

Exhibit 12 lists out-of-pocket expenses of $38.08 for prescriptions and bandages. It appears Kittinger made partial payment for ten items. Kittinger did not pay anything for five items. Kittinger did not testify she was not paid this amount.

Exhibit 13 is a bill from Owensboro Ambulatory Surgery. Kittinger testified she called the provider and

explained it was for treatment of her arm. She testified the bill was returned to the provider and she did not know if it had been paid.

Exhibit 14 contains some of the same exhibits introduced at Kittinger's October 2010 deposition and at the April 2011 hearing relating to the bifurcated issues. The sole introductory question asked of Kittinger before introduction of Exhibit 14, the final set of bills, was "[i]s this some bills that were also related to [her] accident." Kittinger answered yes, but did not testify these bills were unpaid.

More importantly, Kittinger did not testify any of her out-of-pocket expenses and medical bills introduced as exhibits to her October 2010 deposition and the April 2011 hearing remained unpaid. Without a finding from the ALJ that any of the exhibits introduced at her October 2010 deposition, the April 2011 hearing, and the March 2015 final hearing represent unpaid compensable medical bills, out-of-pocket expenses, and/or travel expenses which Wal-Mart failed to pay without reasonable grounds, the ALJ cannot impose sanctions pursuant to KRS 342.310.

Thus, on remand the ALJ will be given the opportunity to determine if sanctions are appropriate pursuant to KRS 342.310(1) for Wal-Mart's failure to pay

compensable medical bills, out-of-pocket expenses, and/or travel expenses without reasonable grounds.

We note the ALJ's finding there are not "requisite grounds for costs, fees, and enhanced interest rate on past due benefits pursuant to KRS 342.140 [sic]." The reference to "KRS 342.040" is clearly a typographical error as that statute pertains to the calculation of the claimant's average weekly wage. The ALJ's finding the requisite grounds were not present to support a finding Wal-Mart did not deny, delay, or terminate Kittinger's TTD benefits without reasonable foundation is inconsistent with the finding Wal-Mart unreasonably defended the entire proceedings. Kittinger has not appealed this ruling.

Finally, we note Wal-Mart does not raise as error the ALJ's award of PTD benefits beginning on the date of the injury. Kittinger clearly worked two jobs during much of the time this claim was pending, and Wal-Mart has not sought to avoid paying PTD benefits during the periods Kittinger worked one or both jobs. Kittinger's testimony clearly demonstrates she held positions of substantial responsibility with both employers and her positions were not menial work. Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009) does not require all awards of income benefits begin on the date of injury.

Accordingly, the ALJ's determination Kittinger is permanently totally disabled and has no pre-existing active disability is **AFFIRMED**. That portion of the May 15, 2015, Opinion, Order, and Award and the June 10, 2015, Order denying the petition for reconsideration and assessing the entire costs of the litigation including attorney fees against Wal-Mart is **REVERSED**. This matter is **REMANDED** to the ALJ for a determination whether Kittinger is entitled to sanctions pursuant to KRS 342.310 for Wal-Mart's unreasonable failure to pay any medical bills or reimburse Kittinger any out-of-pocket expenses in conformity with the views expressed herein. On remand, in order for the ALJ to impose sanctions she must determine which medical bills, out-of-pocket expenses, and travel expenses remain unpaid and set forth findings establishing Wal-Mart acted unreasonably in not paying any such items.

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