Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 1, 2016

CLAIM NO. 201088043

WANDA C. ZOLLNER PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

WALGREEN COMPANY
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Wanda C. Zollner ("Zollner") appeals from the Opinion and Order rendered February 4, 2016 by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), resolving a medical fee dispute in favor of Walgreen Company ("Walgreen") based upon the lack of evidence supporting the tendered medical expenses purportedly due to the work

injury she sustained on May 10, 2010. Zollner also appeals from the March 10, 2016 order denying her petition for reconsideration.

On appeal, Zollner argues the ALJ erred by incorrectly applying the law in denying her medical fee dispute. She additionally argues the ALJ improperly incorporated findings of fact from his previously vacated opinion and order dated November 4, 2015. Finally, Zollner argues the ALJ's decision is clearly erroneous. Because we determine the ALJ's decision is not erroneous, is in accordance with the Kentucky Workers' Compensation Act, is supported by the evidence, and a contrary result is not compelled, we affirm.

Zollner filed a Form 101 on May 3, 2012, alleging she injured her left knee on May 10, 2010 while squatting to sit on a stool to clean a bottom shelf. At the time, Zollner worked for Walgreen where she was employed as a beauty advisor. She explained this job involved counter sales, merchandising and cash register operation. The Form 104 filed with the claim outlines her employment history as working as a beauty advisor, medical supply delivery driver, hair dresser, production worker, fast food restaurant manager/worker, and as a residential care/

rehabilitation worker. Her claim was assigned to Hon. Steven G. Bolton, Administrative Law Judge ("ALJ Bolton").

ALJ Bolton thoroughly analyzed the evidence, and noted at the time of her injury, Zollner had just returned to work from an unrelated surgery to her left knee. He determined she sustained a left knee injury on May 10, 2010 while squatting to clean a shelf. He additionally noted she developed bilateral pulmonary emboli while undergoing arthroscopic left knee surgery. ALJ Bolton additionally noted most of Zollner's bills had been paid by United Healthcare and Kentucky Access, her health insurers. He determined the May 10, 2010 left knee injury was work-related. He also determined the bilateral pulmonary embolism she sustained during surgery was work-related, but had resolved.

ALJ Bolton noted Zollner qualified for a 20% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. Of this rating, he determined 5% was due to her pre-existing active condition. He determined Walgreen was responsible for the payment of Coumadin for treatment of her pulmonary embolism. He additionally determined Walgreen was not responsible for Zollner's March 2012 total left knee replacement surgery.

In an order regarding Walgreen's petition for reconsideration dated November 18, 2013, ALJ Bolton corrected the average weekly wage and temporary total disability rates. He also determined KRS 342.730(1)(c)2 was not applicable because Zollner had never returned to work at the same or higher rate of pay. On January 6, 2014, ALJ Bolton approved a Form 110-I settlement agreement for payment of the remainder of her permanent partial disability due benefits.

On March 24, 2015, Zollner filed a motion to reopen and medical dispute for payment of medical bills and out-of-pocket expenses. She also filed multiple bills from various entities/providers including YMCA of Greater Louisville, Louisville Bone & Joint Specialists, Mattress & More, Baptist Health, various prescription expenses, Baptist East Milestone Wellness, Gould's Medical Supply, Pomeroy & Roy Orthopaedics, Williams & Wagner P.S.C., Quest Diagnostics, Jewish Hospital, University Hospital, Norton Brownsboro Hospital, Cooley Medical Supplies, and Louisville Pulmonary Care. She additionally filed an undated note from Dr. David Rhoads recommending physical therapy for left knee bursitis.

Walgreen filed a response to the motion to reopen noting many of the bills were *prima facie* unrelated to her

May 10, 2010 work injury. It noted the tendered bills included treatment for diabetes, sleep apnea, and the March 2012 surgery specifically found non-compensable by ALJ Bolton. It also noted billings included treatment for ongoing respiratory issues, anxiety/depression, asthma and chronic obstructive pulmonary disorder (COPD). Walgreen joined in the medical dispute. Zollner filed a Form 112 on May 13, 2015.

In an order dated June 2, 2015, the ALJ determined Zollner had set forth a *prima facie* case for reopening. A telephone conference was scheduled. Subsequently, correspondence was filed by Dr. Subin Jain and Dr. Tony Karem. Dr. Jain, in an undated response, stated Zollner developed a pulmonary embolism due to her left knee surgery in July 2010 which had resolved by October 2011 based upon the review of a CT-scan, but had left her with some dyspnea. In his undated note, Dr. Karem noted Zollner's injury while working at Walgreen. He stated she developed a pulmonary embolus and deep vein thrombosis as a result of surgery to repair her work-related injury.

Zollner testified by deposition on October 23, 2015. While working for Walgreen, she was cleaning and re-scanning products on a bottom shelf when her left knee

popped. She had just returned to work from an unrelated November 2009 left knee surgery. When she returned to work, she had restrictions of no bending, kneeling, squatting, or prolonged walking, sitting and standing. After the May 2010 injury, she underwent an MRI, had surgery in July 2010 and developed pulmonary embolisms. She treated with various physicians including Dr. Jain, Dr. Rhoads, Dr. Karem and a cardiologist. She continues to take various medications, but not the Coumadin which ALJ Bolton found compensable. She testified she has difficulty walking and breathing. She has developed diabetes and uses oxygen.

Zollner outlined out-of-pocket expenses she has purportedly paid to numerous medical providers, but provided no canceled checks, receipts or other evidence of payment. In addition to the various bills submitted on the date of the motion to reopen, Zollner requested reimbursement for payments of health insurance premiums, travel, health club memberships, and a weight loss program (including the cost of food). She also requested reimbursement for a mattress, and for Walgreen to pay for a walk-in tub which was estimated to cost $16,000.00. Included in the invoices/requests attached to her deposition were various treatments, including costs related

to the 2012 knee replacement surgery previously determined noncompensable, and dermatology treatment which she admitted was not work-related. Zollner admitted some bills had been paid by Walgreen's worker's compensation insurer, and many had never been submitted until the motion to reopen was filed. She admitted she had never previously submitted a request for mileage reimbursement.

Zollner outlined her current conditions as lower intestinal bleeding, high blood pressure, diabetes, elevated white blood cell count, morbid obesity, bleeding from the stomach, anemia, breathing/COPD, sleep apnea and Coumadin intolerance.

Zollner filed Dr. Jain's July 20, 2015 office notes. Dr. Jain noted Zollner's treatment for obstructive sleep apnea and her complaints of dyspnea with weather change. Zollner advised she had water in her basement and the damp smell worsened her dyspnea. Nothing in this note relates her dyspnea to the May 2010 work-related injury.

Zollner filed Dr. Rhoads' June 26, 2015 report, who outlined Zollner's history of sustaining a left knee injury in November 2009 for which she underwent surgery. She sustained another injury to her left knee after she returned to work at Walgreen. She underwent additional left knee surgery in July 2010. In March 2012, she

underwent a total left knee replacement. He noted she currently has a left knee lipoma, but additional surgery is not recommended due to her history of pulmonary embolism.

Zollner was evaluated by Dr. Bruce Broudy at Walgreen's request on August 21, 2015. He had originally examined Zollner on July 20, 2012. Dr. Broudy diagnosed Zollner with morbid obesity, diabetes mellitus, status post multiple knee surgeries, status post pulmonary embolism, and restrictive ventilator defect due to morbid obesity. He stated Zollner's hypertension, diabetes, asthma, COPD, the use of bronchodilators, gym memberships, weight loss programs, diabetes medications, sleep apnea (including CPAP mask), back pain, hypertension, restless leg syndrome, gastroesophageal reflux, pulmonary rehabilitation, and restrictive ventilator defect are not due to her work-related left knee injury. He stated treatment with anti-coagulation medication is reasonable and necessary for the May 10, 2010 work injury.

A benefit review conference ("BRC") was held on September 10, 2015. The BRC order reflects the issue preserved included work-relatedness of Zollner's request for reimbursement of out-of-pocket expenses, reasonableness and necessity of treatment, necessity of medical expenses, and whether the arguments are *res judicata*.

The ALJ issued an Opinion and Order on November 4, 2015. He adequately summarized the evidence. The ALJ denied the medical dispute because no evidence was submitted supporting compensability or work-relatedness of the medical bills submitted by Zollner.

Zollner filed a motion to vacate the November 4, 2015 decision because proof time had not yet expired when it was rendered. On November 30, 2015, the ALJ issued an order vacating the November 4, 2015 decision. On December 30, 2015, the ALJ issued a second order vacating the November 4, 2015 decision. The parties subsequently filed briefs.

In the Opinion and Order rendered February 4, 2016, the ALJ incorporated by reference the summary of evidence set forth in the previous decision of November 4, 2015 which he subsequently vacated. The ALJ specifically stated:

> For reasons to be set forth herein, the Administrative Law Judge finds that once again the Plaintiff has not met her burden of proving that she actually made payment for the medical expenses incurred by her and for which she is seeking reimbursement. Therefore, the motion to re-open to compel payment of the medical expenses shall be overruled.

The ALJ found as follows regarding the compensability of the bills and recommendations which are subject of this dispute:

> As previously set forth the undersigned Administrative Law Judge rendered an Opinion and Order on November 4, 2015. That has been stricken by Order of November 30, 2015. However, in that Opinion and Order the Administrative Law Judge summarized medical proof from Dr. Jain, Dr. Rhodes,[sic] Dr. Karem, the payment history ledger, and medical proof from Dr. Bruce Broudy. The summaries of this evidence will not be set forth in full again, but are incorporated by reference from the previous opinion.
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> In addition, the deposition of the Plaintiff was taken on October 23, 2015. The Plaintiff testified in great detail in regards to the medical treatment that she received. The Plaintiff testified that she created several spreadsheets indicating the out-of-pocket expenses paid by her to each of the medical providers for what she feels is treatment for her work-related conditions.
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> However, the Plaintiff has not submitted any proof whatsoever indicating that these expenses were actually paid by her such as a canceled check or any type of receipt verifying that payment was made by her to the medical providers in question. The only evidence that she has submitted is her testimony, that she paid the bills. There is no documentation in the record to substantiate her statements.
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> The Plaintiff did submit an estimate for a walk-in tub in the amount of

$12,603.00 with no medical testimony indicating the reasonableness, necessity, or relatedness of this purchase. The Plaintiff has also testified that in her opinion, because her claim was denied by the Defendant/Employer, she had to purchase health insurance and pay for the premiums out of her own pocket. She argues that she was required to purchase health insurance in order to pay for her medical treatment resulting from her work-related injuries as her claim had been denied by Walgreen's. Now she wants Walgreen's to reimburse her for these health insurance policy premiums. However, she cites no case law or statutory provisions entitling her to this reimbursement for health insurance.

The Plaintiff did submit medical bills from Norton's Healthcare, CT and Open MRI Lagrange, Internal Medicine, and Pediatric[sic] Associates. However, there is no way to tell, from reviewing these medical bills, whether the treatment was for the Plaintiff’s work-related conditions or not. Once again the Plaintiff testified that these expenses were incurred for treatment of her work-related conditions, but no documentation was submitted substantiating the same.

In a post judgment Motion to Re-open to Assert a Medical Fee Dispute the Defendant/Employer has the burden of proving that the contested medical expenses and/or proposed medical treatment is unreasonable or unnecessary while the Plaintiff maintains the burden of proving that the contested medical expenses and/or proposed medical treatment is causally related treatment for his work-related injuries. *Mitee Enter vs. Yates*, 865

SW2d 654 (KY 1993), *Square D Company vs. Tipton*, 862 SW2d 308 (KY 1993), *Addington Resources, Inc. vs. Perkins*, 947 SW2d 42 (KY App. 1997).

In addition, the legislature by use of the conjunctive "and" which appears in subsection 1 of the KRS 342.020 intended the phrase "cure and relief" be construed as "cure and/or relief". *National Pizza Company vs. Curry*, 802 SW2d 949 (KY 1991).

The Plaintiff has moved to re-open this claim to compel the Defendant/Employer to pay her outstanding medical expenses, specifically her out-of-pocket co-pays, for an adjustable bed, and for a walk-in shower.

In regards to the adjustable bed and walk-in shower, there has been no evidence submitted in the record indicating that either of these items would be reasonable, necessary, or are related to treat the effects of her March 10, 2010, work-related injury. Therefore, the Administrative Law Judge finds that the requested reimbursement for the adjustable bed and request for payment of a walk-in shower has not been proven to be reasonable, necessary, or causally related for treatment of Plaintiff’s work-related injuries, and is therefore found to be non-compensable. The only evidence in the record indicating the reasonableness, necessity, and relatedness of the same comes from the Plaintiff herself, which is not sufficient evidence to the undersigned.

In regards to the Plaintiff's request to be reimbursed for outstanding medical expenses, there have only been a few medical bills introduced into the record, as summarized above. It is

impossible to tell from reading these medical bills whether [sic] not the treatment is causally connected to the Plaintiff's March 10, 2010- work-related incident and the Plaintiff's testimony regarding the same, once again, is not sufficient. While the Administrative Law Judge acknowledges the Plaintiff's opinion, her opinion in and of itself is not sufficient to prove that the requested items are reasonable, necessary, and related. This evidence must come from her medical providers. No evidence from the medical providers regarding these issues was submitted.

In regards to the Plaintiff’s request to be reimbursed for out of pocket expenses, the only evidence in the record indicating the amount the Plaintiff allegedly paid out-of-pocket comes from her self-generated spreadsheets and testimony regarding what she paid out-of-pocket. The Plaintiff did not submit a single receipt, canceled check, or other documentation indicating that she actually paid these expenses other than her testimony, which once again is not sufficient.

Therefore, in this specific instance, after careful review of the lay and the medical testimony the Administrative Law Judge finds that the Plaintiff has not met her burden of proving that the out-of-pocket medical expenses incurred by her were actually paid by her as evidenced by receipts, canceled checks, or the like. While the undersigned Administrative Law Judge has no reason to doubt the Plaintiff's credibility, receipts, and/or some sort of proof must be submitted before the Defendant/ Employer will be held responsible for

> repayment to the Plaintiff for the amount she is claiming.
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> Therefore, the Administrative Law Judge finds that the Plaintiff has once again failed in her burden of proving that the outstanding medical expenses claimed by her including her out of pocket expenses, reimbursement for an adjustable bed, and payment for a walk-in shower are causally related expenses incurred for her work-related injuries. The simple fact that the Plaintiff testified that she incurred these expenses, for conditions that she believes are work-related, without documentation, either in the way of receipts indicating payment made or medical reports making the causal connection for the specific bills submitted, is clearly not sufficient to prove that they are in fact expenses incurred for the Plaintiff's work-related injuries.
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> Due to the foregoing findings remaining issues herein are deemed moot.

We begin by noting in a post-award medical dispute, the burden of proof to determine whether medical treatment is unreasonable or unnecessary is with the employer, while the burden remains with the claimant concerning questions pertaining to work-relatedness or causation of the condition. *See* KRS 342.020; Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d

915, 918 (Ky. 1993); and National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ has the discretion and sole authority to reject any testimony and believe or disbelieve parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Zollner had the burden of proving the tendered medical bills and requests for reimbursement were due to her work-related injury. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable based on the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Where the evidence is conflicting, the ALJ, as fact-finder, has the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores,

supra. The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We note the ALJ incorporated by reference his factual summary from November 4, 2015 in the February 4, 2016 decision. While the ALJ may have been better served by reprinting this summary, we do not believe reliance upon this factual summary constitutes reversible error. There is no evidence the facts changed, other than the subsequent submission of Zollner's deposition. In the February 4, 2016 decision, the ALJ reviewed Zollner's deposition testimony which he supplemented to the previous factual analysis. There is no evidence this improperly swayed or prejudiced the ALJ's determination and his reliance upon his previous evidentiary analysis will not be disturbed.

Next, as noted above, Zollner bore the burden of proving work-relatedness of the contested medical treatment. Other than Coumadin, which was supported by Dr.

Broudy, no evidence was produced that any of the treatment, out-of-pocket expenses, or the request for a walk-in shower were due to Zollner's work-related injury. The only medical evidence supplied by Zollner reflects she sustained a left knee injury in 2010, had surgery, and developed pulmonary emboli. The evidence stops short of establishing the numerous bills and requests submitted as part of this dispute are compensable.

Zollner submitted no evidence the medical bills, requests for reimbursement, or the request for installation of a walk-in tub were necessitated or causally related to her work injury. We determine the ALJ correctly understood the evidence before him, and properly concluded it falls short of supporting Zollner's request. The evidence does not compel a finding the contested bills and invoices are causally related to her work injury. Because Zollner failed to meet her burden of proof, the ALJ properly denied the medical dispute.

Zollner impermissibly requests this Board to engage in fact-finding and substitute its judgment regarding her medical dispute. This is not the Board's function. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, supra. The ALJ clearly understood the evidence of record, properly weighed it, and, as was his

prerogative, determined Zollner's evidence was not persuasive. Even if we were allowed to engage in fact-finding, which again we are not, we agree with the ALJ, Zollner failed to file evidence sufficient to support her requests for reimbursement, payment of invoices, or approval for the installation of a walk-in shower. Nothing in the ALJ's decision prevents Zollner from future requests for medical bills or reimbursement of out-of-pocket expenses properly and timely submitted pursuant to KRS 342.020(1). However, any such request must be supported by sufficient evidence which would provide a basis for a finding of work-relatedness.

Accordingly, the February 4, 2016 opinion and order and the March 10, 2016 order on petition for reconsideration by Hon. R. Scott Borders, Administrative Law Judge, are hereby **AFFIRMED.**

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

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