

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 1, 2015

CLAIM NO. 201486664 & 201486663

ZENITH LOGISTICS

PETITIONER

VS.

APPEAL FROM HON. UDELL B. LEVY,
ADMINISTRATIVE LAW JUDGE

ADJA DIOP
and HON. UDELL B. LEVY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING AND REMANDING

* * * * *

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

STIVERS, Member. Zenith Logistics ("Zenith") seeks review of the November 17, 2014, Opinion, Award, and Order of Hon. Udell B. Levy, Administrative Law Judge ("ALJ") finding Adja Diop ("Diop") sustained a work-related low back injury and awarding permanent partial disability ("PPD") benefits and medical benefits. Zenith also appeals from the

December 19, 2014, Order overruling its petition for reconsideration.

On appeal, Zenith challenges the award arguing the medical evidence does not establish causation and there is no basis for the ALJ's determination Diop sustained a work-related low back injury resulting in permanent impairment.

Diop testified at an August 1, 2014, deposition and at the September 24, 2014, hearing. Diop was born in Africa where she lived for nine years before moving to Europe where she lived for thirteen years. She then moved to the United States working at a White Castle warehouse for three to four years. She began working for Zenith in 2006. Diop works in the utility pool and as a result she is assigned to different departments.

Diop testified her first injury occurred on December 21, 2013, when she attempted to raise a sliding door off the ground. She explained that when she first attempted to lift the door it stuck. When she yanked on it, "it yanked [her] back." No one else was present when this occurred. Diop immediately felt pain in her low back. She paged her supervisor and they filled out an incident report. Diop sat in the sick room the rest of the day. She missed no work as a result of this injury.

Although she was not sure of the date, Diop testified she first saw Dr. Bee who checked her back.¹ She later went to the emergency room at Jewish Hospital because she fell in the bathtub. During the August 1, 2014, deposition, Diop recounted how she fell in the bathtub:

Q: When did you fall in the bathtub?

A: It was like I was asleep, and I wake up and try to use the toilet, so I can't sit down so decide to use the bathtub. That's why I slip and fall.

Q: When was this?

A: The 27th.

Q: On December 27th?

A: Uh-huh. (Affirmative)

Q: I think we're on the same page, Adja. Before you had the fall in the bathtub had you already seen Dr. Bee?

A: I think so because it was not December 27th. Because when I come back on December 27 I'd already seen him before that day because I let him know I went to the ER.

Q: And your bathtub fall, were you home alone when this occurred?

A: Yeah.

Q: Did you drive yourself to the emergency room?

A: Yeah. Because I was driving myself to work every day when my back hurt.

¹Dr. Bee is employed by Occupational Kinetics.

Q: What did you injure in this fall in the bathtub?

A: I just fell right there on the left side and the right side.

Q: In your low back?

A: Yeah.

Q: Prior to the fall were you still having pain in your back from the 21st incident?

A: Yeah. That's the reason I can't use - I can't sit down in the toilet seat. Like when you first wake up it's like it hurt worse. I can't move, you know. I was trying to use the toilet seat, so I can't sit down. That's why - and then, you know, because I was using the bathroom floor to pee, so my sister come [sic] clean it for me. And I decided to use the bathtub so she doesn't have to - you know.

Q: Did you actually fall in the bathtub?

A: No. I was trying to use it and I put my foot and there we go, I slip.

Q: Were you trying to use the bathroom in the tub?

A: Yeah.

Q: Is that what you were trying to do?

A: Yeah.

Q: Now did this incident, this fall into your bathtub, Adja, did it make your back worse, in your opinion?

A: I was feeling the same pain, but why I was scared about because it was right there in the right side, I tell them to check my kidney for me, especially

while I was in the ER. I wanted my kidney checked because they say kidney's on the right side.

Q: And after that incident did you miss any work, after the fall in the bathtub?

A: No, I was going to work every day.

Diop treated with Dr. Bee until the February 20, 2014, incident. She testified her back worsened on that date after she had been picking up grocery boxes all night. At that time, Diop was working full time as Dr. Bee had released her to full duty. She testified she told her supervisor before she left work, and the next day she told Carlos.² She indicated this last event was more a re-injury. She was first treated by Union Chiropractic Injury and Rehab Center. Later, Carlos referred her to River City Health Services. Once her workers' compensation claim was denied for this alleged incident, Diop then returned to the chiropractor. She was treated approximately 20-23 times by the chiropractor. She missed almost four weeks of work after the February injury. Diop stopped treating with the chiropractor in May. Her chiropractor released her to return to work advising her to use common sense when lifting. She denied having any x-rays other than the x-ray

²John Carlo Johnson, the regional safety manager.

performed after her fall in the bathtub. At the time of the deposition, her back was feeling okay and she only wears a back brace when lifting. She denied having any prior back problems or receiving medical treatment for back problems.

At the hearing, Diop testified she first saw Dr. Bee at Occupational Kinetics and was seen by Jewish Hospital on December 27, 2013. She explained she went to Jewish Hospital because she fell in the bathtub on December 27th. She again testified she fell because she could not sit down to use the bathroom and decided to use the bathtub. Diop testified there was a misunderstanding regarding the medical records at Jewish Hospital. She told personnel at Jewish Hospital that she fell in the bathtub that day and this was a different injury than the one occurring seven days earlier. Diop is working regular hours at Zenith. However, she experiences pain on the right side of her lower back when she has to "pick fast." When she gets home her back is painful and she can barely get to her bedroom which is upstairs.

The December 24, 2013, medical record of Occupational Kinetics was introduced and reveal Diop was seen for complaints of bilateral low back pain. Diop stated she was lifting a garage door that was stuck. When

she yanked on the garage door it opened. However, she felt immediate pain in the low back area. Diop described the pain as "sharp, stabbing, stiffness." She stated standing, bending, rotation, and squatting aggravates her complaints. She indicated her pain began on December 21, 2013. Muscle testing of Thoraco-lumbar spine revealed no weakness in any ranges. The orthopedic examination was normal. However, palpation of the spine presented restrictions of mobility. The record indicated Diop was unable to return to work until re-evaluated. The plan was as follows:

The patient was adjusted in side posture at the following levels: L2, bilateral, sacroiliac. Active Release Technique used to treat the following muscles: longissimus thoracicus bilaterally, lumbar multifidi bilaterally, lumbar spinal rotators bilaterally, quadratus lumborum bilaterally, dorsal sacral ligament bilaterally, piriformis bilaterally. Patient was seen today for: 30 minutes of therapeutic exercise. Neuro muscular re-education was used today to deep lumbar spinal stabilizers and core muscle groups for support of weakness in hips.

The records of Jewish Hospital reveal Diop was first seen on December 27, 2013. Her chief complaint was low back pain. Under the category, "Mechanism of Injury," was listed as a fall in the bathtub. The record also indicates the onset of symptoms were sudden and occurred

seven days ago. The nursing assessment states Diop complained of low back pain as a result of a fall in the tub last Saturday and has been trying Ibuprofen and ice and it still hurts. She denied numbness and tingling in the legs and feet. Diop was discharged that same day and given Flexeril and Naproxen. The record reflects there was no distress and no further questions or concerns. Diop was alert and oriented and ambulated out of the emergency room without difficulty. X-rays of the lumbar spine were performed on that date which did not demonstrate any significant abnormality. The history was a fall "in bathtub six days ago, low back pain."

The medical records of River City Health Services reveal Diop was first seen by Dr. Peter Urda on February 27, 2014. The injury date was listed as December 21, 2013. The chief complaint was listed as "strained mid-lower back pulling." Diop had pain in the right mid-lower back area. She stated she had been treated elsewhere since the injury and was there for an examination. She also stated she went to Jewish Hospital due to her pain. The report notes records were obtained from Jewish Hospital and x-rays of the lumbar spine conducted on December 21, 2013, reveal no fractures of the lumbar spine. It was specifically noted that x-rays were obtained due to a fall in the bathtub.

The diagnoses were: sprain thoracic region, sprain lumbar region, and sprain ribs. Diop was subsequently seen on March 3, 2014. That report contains the same history and diagnoses set forth in the initial report.

Diop was again seen on March 10, 2014, March 21, 2014, April 4, 2014, and April 14, 2014. On each occasion the diagnosis remained the same. On April 14, 2014, Dr. Urda noted Diop had no rib pain and needed physical therapy.

The records of Union Chiropractic Injury & Rehabilitation were introduced but provide no relevant information concerning causation and therefore will not be discussed.

The March 5, 2014, note of Dr. Bee introduced by Zenith reveals Diop was last seen by him on February 20, 2014, at approximately 5:15 p.m. for ongoing low back complaints. She was examined and tested for physical ability. The examination and testing revealed Diop was fit for full duty and no longer required care for her low back complaints. As a result, she was released from Occupational Kinetics' care. Diop did not report any new complaints and seemed very satisfied with her care.

Zenith introduced the August 21, 2014, report of Dr. Ellen Ballard generated after performing an independent medical evaluation ("IME") on that same date. After obtaining a history, reviewing various records, and conducting a physical examination, Dr. Ballard's impression was low back pain. Diop reported she was being treated by Dr. Bee but there were no records regarding this treatment. Dr. Ballard stated if Diop was treated from December 13, until she was seen in the emergency room on December 27, she needed to review the records and requested the records be forwarded.

In a September 2, 2014, letter, based on a review of a medical chronology prepared by Zenith's counsel, a note that Dr. Urda was made aware Diop had fallen in her bathtub in December, and the records of Jewish Hospital clearly state Diop had fallen in her bathtub, Dr. Ballard provided answers to questioned previously posed to her. Dr. Ballard stated that on December 21, 2013, Diop had reported a strain but at the same time had reported back pain after falling in a tub. Therefore, in Dr. Ballard's opinion there was no evidence of a December 21, 2013, or February 20, 2014, alleged work injury. Concerning the impairment rating as a result of either the December 21,

2013, or the February 20, 2014, alleged work injuries, Dr. Ballard stated as follows:

Based on the Fifth Edition of the AMA Guides, she has a 0% impairment based on the alleged work injury. She may have a pre-existing impairment of 5% (DRE Category II, Table 15-3, Page 384) from her fall.

Dr. Ballard believed Diop could perform her job, required no permanent restrictions, no further treatment, and no further medication.

Diop introduced the October 25, 2014, report of Dr. Jules Barefoot based on an IME performed on August 5, 2014. He noted Diop provided a history that she was injured pulling on an overhead door at work on December 21, 2013, and felt the onset of low back pain. She also reported she was seen at Jewish Medical Center East and had x-rays of her back approximately six days later. Diop reported she was seen at River City Health Services on March 21, 2014. He noted Diop had complaints of ongoing low back pain after sitting for more than an hour and complained of pain in the lower back radiating to her right thigh and buttock region. Dr. Barefoot noted Diop complained of pain with flexion and rotation at her waist. Dr. Barefoot concluded "unfortunately for Ms. Diop, the medical records do not support her reported history of a

workplace injury." He noted the records of Jewish Medical Center East reveal her visit on December 27, 2013, was prompted by a fall in the bathtub which occurred seven days prior. Dr. Barefoot observed "[p]ut simply, there is nothing in Ms. Diop's medical records that support her history of a workplace history." Dr. Barefoot indicated if there were any further medical records available that would substantiate Diop's claim of work-relatedness, he would be happy to evaluate them. As of the date of his report, Diop did not have a ratable impairment attributable to the work incident.

The Benefit Review Conference Order and Memorandum reflects the parties only stipulated Diop sustained an alleged work-related injury on December 21, 2013, and February 20, 2014. Zenith acknowledged notice of the first injury but did not stipulate notice was given for the second injury. The contested issues were "benefits per KRS 342.730; work-relatedness/causation; notice as to second injury; unpaid or contested medical expenses; injury as defined by the ACT; and TTD."

In his decision, the ALJ provided the following analysis, findings of fact, and conclusions of law:

The December 24, 2013 records from Occupational Kinetics document that palpation during the physical

examination demonstrated that Plaintiff had spasms in the intermediate and deep layers of muscles from her mid to low back. After examining Plaintiff at River City Health Services on 2/27/14, Dr. Urda documented "point tenderness over upper and lumbar spines" and "tenderness in the right upper and lumbar paravertebral muscles". From this, it is not clear if the "tenderness" was by palpation or by Plaintiff's subjective report. However, he prescribed Flexeril on 3/3/14 after noting "tenderness and spasm in the right upper, lower, thoracic and lumbar paravertebral muscles." Involuntary contraction of a muscle or group of muscles is a recognized objective factor which health care providers look for as a sign of acute injuries, including spinal injuries. Furthermore, Dr. Ballard found at least 1cm difference in the circumference of Plaintiff's right and left calf. These factors provide objective evidence of a harmful change.

Another question in this case is whether Plaintiff fell in her bathtub before the alleged work injury occurred. Plaintiff was consistent when she explained in her deposition and final hearing that she fell in her bathtub trying to urinate because she was unable to use the toilet after straining her back at work. She was observed during her testimony at the final hearing and found to be extremely credible. The records from Occupational Kinetics- which provide documentation of treatment "from December 13 until she was seen in the emergency room on December 27" Dr. Ballard had requested and was never provided- clearly establishes Ms. Diop injured her back lifting on the garage door at work.

Neither Dr. Ballard nor Dr. Barefoot was provided with this critical piece of the puzzle which provided the missing evidence supporting Plaintiff's history of a workplace injury. Where it is clear that a physician's history regarding work-related causation is corrupt due to it being substantially inaccurate or largely incomplete, any opinion generated by that physician on the issue of causation cannot constitute substantial evidence. *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004).

On the other hand, it follows that a sense of urgency, or emergency, compelled Plaintiff to go to the emergency room at 3:00 in the morning. Plaintiff went to the ER because she had recently fallen in her bathtub rather than six or seven days earlier. Moreover, the history related by providers at Jewish Medical Center East is inconsistent with what Occupational Kinetics documented. Jewish Medical Center personnel simply misstated what Plaintiff told them. It is consistent that, as she testified, Plaintiff fell in the bathtub because she was using it as an alternative to urinate at 3:00 in the morning because symptoms from her prior back injury- which evidence shows were caused by the claimed lifting incident at work- made it uncomfortable for her to sit on the toilet. *Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc.*, 618 S.W.2d 184 (Ky. App. 1981).

Work-Relatedness/Causation

The next issue to be resolved is whether Plaintiff's symptoms were caused by the subsequent fall in her bathtub rather than the lifting incident at work. Pursuant to the

"direct and natural consequence rule", it makes no difference. This rule was applied to Kentucky workers' compensation claims by the Court of Appeals in *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky. App. 1997):

The applicable rule has been referred to as the direct and natural consequence rule and is explained in Larson, *Workmen's Compensation Law* § 13.11 (1996), as follows: "The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury." (citations omitted) Thus, even though the subsequent injury was to a different part of the back and followed a non-work-related incident, the medical expenses arising therefrom are compensable since the work-related injury caused the part of the back that was subsequently injured to be more susceptible to injury.

Records from Occupational Kinetics document that, barely 3 days before she fell in her bathtub, Plaintiff had sharp, stabbing, radiating pain from her low back to her buttock that resulted in stiffness and muscle spasms. Functionally, she had a limp that caused her to favor her right leg. This condition, which was directly related to the lifting event at work, severely compromised Plaintiff's mobility and her ability to engage in a critical activity of daily living.

Consequently, this caused her to fall while attempting an alternative way to engage in a basic bodily function. Defendant is liable for the ultimate result since the second injury was a direct consequence of the first.

The ALJ determined there was no pre-existing disability and notice of the second injury had been provided. The ALJ also concluded all of Diop's treatment was reasonably necessary for the cure and effects of the work injury. He also determined Diop was not entitled to TTD benefits.

As to whether Diop had a permanent impairment rating as a result of the injury, the ALJ concluded as follows:

Benefits per KRS 342.730

Dr. Ballard found that Plaintiff has a DRE Lumbar Category II and assigned a 5% permanent partial impairment rating. She based this on the fall in the bathtub which, without the benefit of reviewing the records from Occupational Kinetics, she incorrectly assumed occurred before the 12/21/13 work injury. Since Defendant is liable for the effects from the fall regardless, as well as any effects from the lifting incident, the evidence in this case shows Plaintiff has sustained this 5% permanent partial impairment as a result of the work injury. The parties stipulated that Plaintiff retains the physical capacity to return to the type of work performed at the time of the injury. Therefore, her

permanent partial disability benefits
are calculated as follows:

\$564.52 (75% of State AWW) x .05 x .65
= \$18.35 per week

Although not specifically referencing a date of injury, the ALJ began the award of PPD benefits on December 21, 2013. The ALJ also awarded medical benefits.

Zenith filed a petition for reconsideration arguing no medical expert opinion supports a finding of causation. It asserted there is "no medical evidence regarding causation of a specific work injury," and there was no medical opinion relating the fall in the bathtub to a work injury. Thus, the ALJ erred in his finding resolving causation in favor of Diop.

Zenith also took issue with the ALJ's finding that "'involuntary contraction of a muscle or group of muscles is a recognized factor which health care providers look for as a sign of acute injuries, including spinal injuries.'" It contended the record is devoid of any supporting medical evidence which could be used in support of an award in this case.

Zenith insisted the ALJ erroneously determined the opinions of Drs. Ballard and Barefoot on causation were flawed based on a lack of documentation of treatment with Dr. Bee. It cited to medical records which support its

conclusion and maintained the opinions of Drs. Barefoot and Ballard are unrebutted.

Finally, Zenith argued the ALJ erred in concluding the history set forth in Jewish Hospital's record contained a misstatement because it did not coincide with the initial records from Occupational Kinetics. It insisted the veracity of the history relayed to Occupational Kinetics by Diop is the center of this claim, and based upon the evidence of record is inaccurate. Further, Zenith stated Diop's history of falling in a bathtub prior to December 27th, is recorded in three different places, both in the emergency room record and the x-ray report. It requested the ALJ reconsider his opinion and reverse his findings on causation based on the unrebutted evidence.

In overruling Zenith's petition for reconsideration, the ALJ reasoned as follows:

This matter comes before the Administrative Law Judge on Defendant's Petition for Reconsideration of the Opinion Award and Order rendered on November 17, 2014. Pursuant to KRS 342.281, the administrative law judge is limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision. In this instance, Defendant's petition is merely a re-argument of the merits of the case, which have already been decided, and the Defendant

otherwise points out no patent errors to justify the remedy they seek.

The evidence in this case shows Plaintiff first sought treatment at Occupational Kinetics on December 24, 2013 with complaints of bilateral low back pain. Presumably, it would be significant for a medical provider to note if an individual complaining of low back pain had sustained a recent fall. Yet, the Occupational Kinetics record, which was made three days after the date Plaintiff claims she was injured at work and three days before presenting at Jewish Hospital with low back complaints, makes no mention of any fall. To the contrary, it specifically notes Plaintiff was "lifting a garage door that was stuck" after which she "felt immediate pain in the low back area."

Occupational Kinetics' records also document physical examination findings identifying specific muscles where spasms were noted. Defendant argues it was error for the Administrative Law Judge to find that "Involuntary contraction of a muscle or group of muscles is a recognized factor which health care providers look for as a sign of acute injuries, including spinal injuries." Even if this was correct, this would not constitute "patent error" subject to reconsideration per the statute. Nevertheless, it is fairly common knowledge that muscle spasms provide one measure of objective evidence that an individual has sustained recent back trauma. In fact, Dr. Ellen Ballard- whose report Defendant introduced as evidence in this case- specifically checked for spasm at the time she examined Plaintiff at Defendant's

request eight months after Ms. Diop was injured.

In contrast to the earlier note from Occupational Kinetics, the December 27, 2013 entry at Jewish Hospital reported Plaintiff was presenting to that facility with a back injury sustained a week earlier by falling in her bathtub. Defendant asserts "the veracity of the history relayed to Occupational Kinetics by the Plaintiff is at the center of this claim." As the undersigned pointed out in the Opinion, however, the critical determination in this case was the chronology of events vis-à-vis the lifting incident at work and Plaintiff falling in her bathtub. The two medical records were certainly incompatible in chronicling when Plaintiff fell in her bathtub. Therefore, the veracity of both medical records was at issue. The Jewish Hospital records were inaccurate since it is more likely that an individual presenting to an emergency room at 3:00 a.m. sustained a recent fall as opposed to a week earlier.

Defendant also asserts there were "no *further* records from Occupational Kinetics" for Dr. Ballard to review. But the evidence in this case shows Dr. Ballard didn't review *any* records from Occupational Kinetics. Moreover, she certainly established their materiality when requesting to review those records in the "Discussion" at the end of her report. Defendant further suggests "it is apparent from Dr. Barefoot's report that he was supplied with and reviewed records from Occupational Kinetics dated December 24, 2013 and December 26, 2013." The record in this case clearly shows that neither physician was provided with Occupational Kinetic's office note. [footnote

omitted] This corrupted both their opinions.

However, Dr. Ballard assessed Plaintiff with a 5% permanent partial impairment based on a DRE Lumbar Category II as set out in the AMA Guides, Fifth Edition but determined it was caused by the fall. There is no question that Plaintiff fell and, based on Dr. Ballard's opinion, became impaired as a result. But the evidence further shows the fall was caused by Ms. Diop's preexisting active impairment due to the lifting incident that occurred at work a week earlier. Dr. Ballard simply came to the wrong conclusion as to the order of events because it appears she wasn't provided with material medical evidence addressing Plaintiff's treatment the week before she went to Jewish Hospital on 12/27/13.

In support of its argument Zenith contends the records of Occupational Kinetics, relied upon the ALJ in discrediting the doctor's opinions on causation, merely contains a history given to the chiropractor by Diop when she was first seen after the alleged injury. It posits the only information that can be garnered from this record is Diop provided this information. Zenith argues no opinion on causation was given, and that fact in combination with the remaining overwhelming evidence of record, cause Diop's history to the chiropractor to be suspect.

Zenith observes the ALJ attributed great importance to the fact a fall was not recorded in the

initial records of Occupational Kinetics. It states no one was aware of such an occurrence or had the opportunity to review records from the Jewish Hospital emergency department at the time Diop was first seen by Occupational Kinetics. Further, when Diop acknowledged to Dr. Urda she had received treatment at Jewish Hospital, she did not volunteer that it was due to a fall. Rather, she stated she sought treatment due to kidney stones which it contends was obviously incorrect. Zenith argues the medical opinions of Dr. Ballard should not have been discarded as corrupt "as the fact that [Diop] informed the chiropractor she saw close in time to her alleged event that it occurred is irrelevant to their findings as this was information already known." It asserts the initial chiropractic record from Occupational Kinetics does not form a proper basis for the ALJ's conclusions regarding causation or for disregarding the medical expert opinion addressing the issue.

Zenith takes issue with the ALJ's finding that involuntary contractions of a muscle or group of muscles is a recognized factor which health care providers look for as a sign of acute injuries, including spinal injuries. It again notes the record is devoid of any supporting medical

evidence indicating such an opinion was held by a medical practitioner.

Zenith maintains that based upon the lack of medical evidence supporting the decision and the overwhelming medical evidence of record, the ALJ's decision is erroneous and must be reversed.

Diop, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including causation. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Diop was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the

evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's

role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Because substantial evidence does not support the ALJ's finding Diop sustained a permanent work injury which generated a 5% permanent impairment rating, we reverse the ALJ's decision.

The medical records are contradictory as to what occurred on December 21, 2013. The records of Occupational Kinetics indicate Diop was hurt at work. However, the records of Jewish Hospital and River City Health Services indicate Diop was injured either on December 20, 2013, or December 21, 2013, due to a fall in the bathtub. Within his discretion, the ALJ could choose to believe Diop experienced back pain at work and her injury on December 21, 2013, was not due to a fall in the bathtub.

That said, the ALJ's findings in this case are not supported by the medical evidence. We agree with Zenith that the ALJ's statement "involuntary contractions of muscles or a group of muscles is a recognized objective factor with health care providers looked for as a sign of

acute injuries including spinal injuries," is a conclusion drawn by the ALJ unsupported by the medical evidence.

Significantly, Diop's evaluating physician, Dr. Barefoot, concluded "the medical records do not support [Diop's] reported history of a workplace injury." Consequently, Diop did not have a ratable impairment attributable to a work incident.

Further, Dr. Ballard's opinions do not constitute substantial evidence in support of the ALJ's determination Diop sustained a work injury and she had an impairment rating due to the fall in the bathtub which was directly attributable to the effects of her December 21, 2013, work injury. In her September 2, 2014, letter, Dr. Ballard concluded there was no evidence of a December 21, 2013, or February 20, 2014, alleged work injury. Thus, she assessed no impairment based on either alleged injury. Significantly, Dr. Ballard stated Diop may have a pre-existing 5% impairment rating from her fall. Dr. Ballard did not identify the fall to which she was referring. More importantly, assuming the fall to which Dr. Ballard was referring was Diop's fall in the bathtub, Dr. Ballard did not attribute that fall to a physical condition caused by the December 21, 2013, work injury. Thus, as observed by Zenith there is nothing establishing the fall in the

bathtub relates to the effects of Diop's alleged injury on December 21, 2013.

In addition, the ALJ erroneously stated Dr. Ballard assessed a 5% impairment rating as a result of the fall in the bathtub. That finding is incorrect for two reasons. First, Dr. Ballard did not state Diop had a 5% impairment rating. She stated Diop may have a pre-existing impairment rating of 5% due to a fall. That statement by Dr. Ballard does not constitute substantial evidence supporting a finding Diop has a 5% impairment rating due to a work injury. Dr. Ballard's statement establishes the existence of an impairment rating is not a medical probability and any potential impairment is attributable to a pre-existing condition. Second, Dr. Ballard did not state the fall to which she was referring was Diop's fall in her bathtub. More importantly, as previously noted, Dr. Ballard did not state the fall in the bathtub was caused by the effects of the alleged injury of December 21, 2013.

We agree with Zenith, it was error for the ALJ to solely rely upon Diop's unverified statements in resolving the issue of causation. As a general rule, causation is a factual issue to be determined within the sound discretion of an ALJ as fact-finder. Union Underwear Co. v. Scarce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W.2d 565

(Ky. 1969). Nevertheless, it is well settled that where the matter being considered involves a question of medical causation that is not obvious to a lay person, it must be established by expert medical testimony. Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986); Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). In the case *sub judice*, causation could only be established by medical evidence, and there is no medical evidence which supports a finding Diop sustained a work-related injury meriting a 5% permanent impairment rating.

The fact Diop testified she fell while trying to use the bathroom in the bathtub does not establish a sufficient connection to the alleged work injury of December 21, 2013. That causal connection must be established by medical evidence, and there is no medical evidence providing such a connection. Since the medical evidence, and more particularly the opinions of Dr. Ballard, does not support the ALJ's findings, the ALJ's determination Diop sustained a work-related back injury resulting in a 5% impairment rating and the award of PPD benefits must be reversed.

However, based on the contents of Occupational Kinetics' December 24, 2013, report and portions of the

records of River City Health Systems, we believe the ALJ could reasonably conclude that Diop sustained a temporary work injury. Therefore, the claim must be remanded to the ALJ for a determination of whether Diop sustained a temporary work injury and whether she is entitled to medical benefits for that injury. We note the ALJ's determination Diop is not entitled to temporary total disability benefits has not been appealed by Diop.

Accordingly, those portions of the November 17, 2014, Opinion, Award, and Order and the December 19, 2014, Order ruling on the petition for reconsideration finding Diop sustained a permanent work-related back injury and awarding PPD benefits and permanent medical benefits is **REVERSED**. This matter is **REMANDED** to the ALJ for a determination of whether Diop sustained a temporary work-related injury and whether she is entitled to medical benefits as a result of the temporary work injury.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

RECHTER, MEMBER. I dissent as to that portion of the majority opinion concluding Diop's statements are insufficient to resolve the issue of causation. Under the totality of the circumstances in this case, particularly

the temporal proximity of the alleged work injury and the bathtub fall, I believe the ALJ was permitted to rely on the lay testimony and reasonable inferences drawn therefrom to establish causation. See Cf. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981).

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