

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: July 17, 2020

CLAIM NO. 201485570

MENARDS

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

GARY SCOTT  
HELOISE WESTBROOK, M.D.  
ROBERT BYRD, M.D.  
OHIO COUNTY HOSPITAL  
DENNIS BECK, M.D.  
GREGORY G. POLKOWSKI, M.D.  
VANDERBILT MEDICAL CENTER  
and HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART, VACATING IN PART,  
AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Menards appeals from the February 25, 2020, Opinion and Order and the March 27, 2020, Order of Hon. Chris Davis, Administrative Law Judge

(“ALJ”). In the February 25, 2020, decision the ALJ determined the February 2, 2019, and April 29, 2019, surgeries performed by Dr. Gregory Polkowski are compensable. He also determined the medication Lyrica is non-compensable.

On appeal, Menards asserts the ALJ did not rely upon substantial evidence in finding the contested surgeries compensable. Menards further asserts the ALJ committed a patent error by failing to address the compensability of any additional medical treatment of Gary Scott’s (“Scott”) right knee infection.

The Form 101 alleges that on April 18, 2014, Scott sustained work-related injuries to his legs, right shoulder, left ankle, head, neck, and back in the following manner: “On ladder, about 5 feet from the ground, lifting a box of patio chairs that weighted [sic] about 68 pounds off the shelf and the ladder collapsed and Mr. Scott fell, his left leg was caught in the ladder and the chairs box landed on the right leg, hit head and was knocked out.”

The January 29, 2015, Form 110 settlement agreement indicates the parties reached a \$7,500.00 lump sum settlement dispensing with all aspects of Scott’s claim except for medical benefits. The Form 110 reflects Dr. Gregory Gleis assessed a 0% impairment rating and Dr. Paul Alley assessed a 15% impairment rating. The agreement explicitly excluded Scott’s claim for alleged injuries to his right shoulder, left ankle, head, neck, and back, and that portion of Scott’s claim was submitted to the ALJ for a determination of compensability.

In the December 12, 2017, Benefit Review Conference Order and Memorandum, the following contested issues are listed: work-related injury, temporary total disability benefits paid, physical capacity to return to the type of work

performed at time of injury, exclusion for pre-existing impairment, and permanent income benefits per KRS 342.730 including multipliers. Under “other contested issues” is the following: work-relatedness/causation and medical fee dispute.

In the February 19, 2018, Opinion and Order, Hon. Roland Case, Administrative Law Judge was required to resolve Scott’s claim for alleged injuries to his right shoulder, left ankle, head, neck, and back. His findings of fact and conclusions of law are, *verbatim*, as follows:

The Plaintiff, Gary Scott, filed a claim for injury from cumulative trauma against Defendant/employer, Menards. The parties reached a settlement as to all issues except for medical expenses. The settlement document specifies that the ALJ is to decide the Defendant’s liability for medical benefits on an alleged injury to the right shoulder, left ankle, head, neck and back.

As in any claim, an employer’s liability for medical benefits is dependent on the claimant first satisfying his burden of proof as to the compensability of his claim. Snawder v. Stice, 676 S.W.2d 276 (Ky. App. 1979). The ALJ has reviewed the record and relies on Dr. Zehner to find that Plaintiff has failed to establish a work-related injury to the right shoulder, left ankle, head, neck and back. The ALJ notes there is no evidence of impairment in the record to those body parts. Any injury to those body parts was temporary in nature and pursuant to Robinson vs. United Parcel Service, 64 SW3d 284 (Ky. 2001) and similarly in Sears Roebuck & Co., vs Dennis, 131 SW3d 351 (Ky App 2004) the employer was only liable for medicals during the period of temporary flare-up of symptoms for temporary total disability that resulted from the incident. In this case, any residuals to the right shoulder, left ankle, head, neck and back have resolved, and the Plaintiff’s claim for injury is to those body is **DISMISSED** and no future medical is warranted other than any previously paid medicals for those body parts. Therefore, the Defendant is not liable for medical benefits.

On July 30, 2018, Menards filed a Motion to Reopen/Medical Fee Dispute contesting Scott's use of Lyrica. On June 17, 2019, Menards filed a Supplemental Medical Fee Dispute characterizing the nature of the dispute as follows:

Payment obligor contests work-relatedness of right knee infection and all treatment, medication, surgery and expenses associated therein. Movant challenges any treatment resulting from or necessitated by the infection and/or surgical interventions. The medical obligor is disputing the Claimant's 2/6/2019 and 4/29/2019 surgeries, including all pre and post-operative care, medication, and requests for services or reimbursement for mileage or expenses related to the knee infection which was discovered in 2019.

On 7/13/2015, Claimant had a right total knee replacement. He recovered without any indication of hardware issues or infection. There was no indication of infection for 3 ½ years following the surgery.

Inexplicably, in early 2019, an infection was discovered. A 1/7/2019 bone scan suspected infection or hardware loosening. He was diagnosed with infection vs. loosening. Upon surgical intervention on 2/6/2019, his 'components' were noted to be well fixed. Diagnosis of infection was confirmed.

Payment obligor has attached the report of Shelley Freimark, M.D. opining that she can not directly attribute the infection to the injury or prior replacement which was placed and maintained for over 3 years before any sign of infection.

On June 24, 2019, Menards filed a Motion to Amend Medical Dispute From 112 in order "to include the issue of compensability for Plaintiff's right knee infection and all treatment resulting from or necessitated by the infection, surgical interventions, pre and post-operative care, medication, and expenses associated therein and for an extension of proof time until 7/31/2019."

By order dated July 3, 2019, the ALJ sustained Menards' Motion to Amend to contest "all treatment related to the right knee infection."

Scott was deposed on January 24, 2020. He testified that his right knee, following the original total knee replacement, stayed painful. He recounted the following:

Q: What I'm getting at, I don't want your medical knowledge, but I want to know what your symptoms were that led you to believe that infection was there earlier.

A: Well, number one, I had the – the pain was totally different from recovery to – it stayed there. And my knee kept on getting hot. It blew up twice the size of my left knee like that was water in it.

Q: Is this after the total knee replacement?

A: Yes, sir. Yes, sir. And I went to doctors that actually took fluid off the right knee. There's been a lot of things done to the right knee as far as trying to get it motivated, but most of it was the same symptoms from 2015 to 2019. I wasn't really – I'm not a doctor, but it was – when you look back on it it looks like infection that was in the knee.

Scott and Menards filed a voluminous number of medical records from the Ohio County Specialty and Family Care. Persuasive to the ALJ are the medical records that contain references to right knee pain which include, but are not limited to, records on the following dates: November 28, 2017; December 1, 2017; December 11, 2017; January 29, 2018; April 4, 2018; September 5, 2018; October 17, 2018; November 15, 2018; November 21, 2018; December 19, 2018; January 2, 2019; and January 16, 2019.

Numerous medical records of Dr. Polkowski were filed in the record by Scott. The ALJ found convincing the records generated by Dr. Polkowski on January

22, 2019, after Scott's first appointment. In the history section of the records, Dr. Polkowski noted that Scott has had difficulty ever since his July 13, 2015, right knee arthroplasty. As cited by the ALJ in the February 25, 2020, Opinion and Order, Dr. Polkowski diagnosed: "**Infection and inflammatory reaction due to internal right knee prosthesis**, initial encounter." (emphasis added). Later in the same record, under "Plan," Dr. Polkowski reiterated his diagnosis:

**His clinical presentation, history and most recent aspiration are consistent with prosthetic joint infection of his right total knee arthroplasty.**

We did discuss the current randomized clinical setting of one stage versus 2 stage treatment for **prosthetic joint infection**.

In order for enrollment in the study patient must have a culture positive bacteria of his **prosthetic joint infection**.

...

Risks, benefits, complications, limitations and alternatives of a one stage versus 2 stage treatment for **right knee prosthetic joint infection** were discussed extensively. (emphasis added.)

Dr. Polkowski's February 6, 2019, record reveals Scott underwent a right knee arthrotomy during which the prosthesis was removed from his right knee and an antibiotic knee spacer was inserted. Both the preoperative and postoperative diagnoses were as follows: "Infection and inflammatory reaction due to internal right knee prosthesis."

Dr. Polkowski's April 29, 2019, record reflects Scott underwent a revision arthroplasty of his right knee. Once again, both the preoperative and

postoperative diagnoses were as follows: “Infection and inflammatory reaction due to internal right knee prosthesis.” Under “Indications” is, in relevant part, as follows:

Gary is a 72-year-old gentleman I have been treating for chronic infected right knee replacement. A couple of months ago he underwent removal of his infected knee replacement components and placement of temporary implants/antibiotic spacer. He completed his course of intravenous antibiotics and had resolution of his inflammatory spacer. He completed his course of intravenous antibiotics and had resolution of his inflammatory markers, and was therefore deemed appropriate for reimplantation.

The February 25, 2020, Opinion and Order contains the following findings of fact and conclusions of law which are, *verbatim*, as follows:

...

The essence of this dispute is whether the Lyrica and the surgeries are work-related. It can also be fairly said that the Medical Payment Obligor’s evidence and arguments are based on a theory that the treatment is not work-related due to Scott’s co-morbid conditions, which have caused his need for medical treatment.

The Plaintiff’s position is that the symptoms which gave rise to the treatment continued to varying degrees, but unabated, since the time of his 2015 right total knee arthroplasty, which he argues is work-related as well. He states all currently contested treatment flows from the prior treatment and injury. Therefore, all treatment is work-related.

I note, as a procedural matter that while there has been an Opinion and Order on other issues in this claim there has never been an Opinion regarding the work-relatedness of the right knee. There has only been a Form 110, Settlement Agreement. That is not binding on the Medical Payment Obligor as to any issues, including causation of the right knee.

Regardless, the record demonstrates that after his fall from the ladder at work, on April 18, 2014, the Plaintiff had extensive conservative medical treatment,

culminating in a right total knee arthroplasty on July 13, 2015. The MPO paid for that surgery.

The record also fails to reflect that prior to April 18, 2014 the Plaintiff had any surgery to his right knee, nor was he assigned an impairment rating nor had any documented, on-going occupational disability.

As such, while the MPO is not estopped from arguing there was never a work-related injury, a fair reading of Dr. Pemmaraju's opinions, this argument is not very strong and is disregarded. Rather I find that the Plaintiff did have a permanent work-related injury, to the right knee, on April 18, 2014. That injury resulted in the July 13, 2015 TKA. For that injury, the treating surgeon, Dr. Beck, assigned an impairment rating and Dr. Barlow agreed it was work-related.

The MPO's next, and perhaps stronger, argument is that the February 6 and April 29, 2019 surgeries by Dr. Polkowski are not work-related even if the 2015 surgery was. Their argument contains two components. One, the inflammation that occurred to cause the removal and revision surgeries is too remote in time to be related to the 2015 surgery and the Plaintiff's co-morbid medical conditions are the actual cause. Again, this is a fair reading of Drs. Dyer and Freimark.

However, this argument is counter-balanced by several pieces of evidence. The first is Scott's own testimony that the swelling and hotness in his right knee continued unabated from 2015 through the time he saw Dr. Polkowski and was treated by him. While Plaintiffs are not expected to, and really can't, make complex medical diagnoses they can provide relevant testimony. This testimony, which I accept, demonstrates that the symptoms did not arise 3 ½ years after the 2015 surgery but immediately.

Second, the records from Scott's primary care physicians at Ohio County Family Medical demonstrate that on no less than 14 visits between December 1, 2017 and January 16, 2019, Scott complained about his right knee and received treatment for it. This again demonstrates this was an on-going problem and did not materialize in late 2018 or early 2019.

Third, and most relevant to me, is that the treating surgeon, Dr. Gregory Gerald Polkowski, on January 22, 2019, writes that Scott's right knee "infection and inflammation **reaction due to internal right knee prosthesis.**" (Emphasis added) He does not say it is a reaction to the 2015 surgery. I am not a doctor nor am I supposed to put myself in place of one. I do not know how an infection and inflammation can arise in this manner. I do know that if the Vanderbilt surgeon, with no known or demonstrated bias, makes this diagnosis and causation statement I am persuaded. As such, the infection and inflammation were due to the internal right knee prosthesis.

If the infection and inflammation are due to the prosthesis, which I have already found work-related then it stands to reason that the February 6, 2019 surgery to remove the prosthesis due to the infection is work-related as is the April 29, 2019 revision arthroplasty, of which Scott still needed a new one.

In reliance on the above analysis, the February 6, 2019 and April 29, 2019 surgeries by Dr. Polkowski are work-related. There has been no contest over the treatment's reasonableness and necessity. Therefore, the surgeries are compensable.

As far as the Lyrica goes, I am unfortunately faced with a difficult fact. I believe the Plaintiff that it helps him. I also believe that my above analysis regarding the causation of the right knee is correct.

But for the Lyrica the record contains no medical opinions or statements that it is work-related. The Plaintiff does have multiple co-morbid medical conditions, as documented by the records from Drs. Jones and Cabelin, the VA and Ohio County Family Medical. Dr. Dyer states the Lyrica is not work-related. With no evidence to support its work-related, at least one medical opinion against its work-relatedness, and with the existence of the non-work-related co-morbid conditions I find the Lyrica non-compensable as not work-related.

Menards filed a petition for reconsideration asserting the same arguments it now makes on appeal. By order dated March 27, 2020, the ALJ overruled Menards' petition.

Before addressing Menards' specific argument on appeal, we are compelled to note Menards is not contesting the ALJ's determination Scott sustained a permanent work-related right knee injury on April 18, 2014, necessitating the July 13, 2015, right total knee replacement surgery.

Menards first asserts the ALJ did not rely upon substantial evidence in concluding the two surgeries are compensable. Specifically, Menards asserts Dr. Polkowski "does not give an opinion as to the onset or work-relatedness/causation of the infection." We affirm on this first issue.

Menards has not contested the reasonableness or necessity of the two surgeries. Instead, it is contesting the work-relatedness of the surgeries. Menards filed the medical fee dispute contesting work-relatedness. Therefore, the burden of proof rests on it to prove the contested treatment – i.e. the two surgeries performed by Dr. Polkowski – is not work-related. Since Menards was unsuccessful in its 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).

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). Although a party may note evidence supporting a different outcome than 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 the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under 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). The Board 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 (Ky. 1999). As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, *supra*.

In the February 25, 2020, decision the ALJ found Dr. Polkowski's medical records were most convincing to his determination the two contested surgeries are work-related and, therefore, compensable. Throughout Dr. Polkowski's medical records, particularly the records detailed herein, he diagnosed an "infection and

inflammatory reaction **due to** internal right knee prosthesis.” (emphasis added). We take issue with Menards’ allegation this is not a statement pertaining to causation. Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scarce, 896 S.W.2d 7 (Ky. 1995). Further, “[i]t is the quality and substance of a physician's testimony, not the use of particular “magic words,” that determines whether it rises to the level of reasonable medical probability, i.e., to the level necessary to prove a particular medical fact.” Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004). Dr. Polkowski utilized the phrase “due to,” thereby transforming this diagnostic statement into one in which the ALJ can properly infer causation. Consequently, Dr. Polkowski’s opinions constitute substantial evidence supporting the ALJ’s finding of a causal connection between Scott’s right knee infection and the prosthesis implanted during the original July 15, 2015, total knee replacement surgery. The ALJ concluded Scott’s right knee injury and the July 15, 2015, total knee replacement are work-related, and that determination has not been challenged on appeal. Therefore, when the contested surgeries performed by Dr. Polkowski are necessitated in any part by Scott’s work-related right knee injury, *they must be compensable*.

Menards alleges the ALJ erred by relying, in part, upon Scott’s testimony regarding the right knee pain he experienced from the date of the original total knee replacement through the two reparative surgeries performed by Dr. Polkowski. The ALJ’s reliance upon Scott’s testimony on this issue was, at most, supplementary. As noted, most relevant to the ALJ’s ultimate conclusion were the medical opinions of Dr. Polkowski. However, the ALJ was free to rely upon Scott’s

testimony as a means of further bolstering Dr. Polkowski's opinions. Similarly, the ALJ was free to rely upon the many references to right knee pain in the medical records from Ohio County Specialty and Family Care as additional evidence corroborating Dr. Polkowski's opinions.

Dr. Polkowski's medical opinions, Scott's testimony, and the medical records from Ohio County Specialty and Family Care constitute substantial evidence supporting the ALJ's determination the two contested surgeries are work-related and, therefore, compensable.

Menards next argues the ALJ erred by failing to address what other treatment might be related and compensable. We agree and remand for additional findings.

As noted, on June 24, 2019, Menards filed a Motion to Amend Medical Dispute in order "to include the issue of compensability for Plaintiff's right knee infection and all treatment resulting from or necessitated by the infection, surgical interventions, pre and post-operative care, medication, and expenses associated therein and for an extension of proof time until 7/31/2019." In the July 3, 2019, Order, the ALJ sustained Menards' Motion to Amend. However, the February 25, 2020, Opinion and Order fails to address this portion of Menards' Medical Fee Dispute. Despite Menards raising this oversight in its petition for reconsideration, the ALJ failed to render additional findings in his March 27, 2020, Order. On remand, the ALJ must address this portion of the Medical Fee Dispute and enter an amended order and award determining the compensability of medical expenses Scott has already incurred for treatment of his right knee infection. Further, as the ALJ concluded Scott sustained

a permanent injury to his right knee by relying upon the impairment rating in the record by Dr. Dennis Beck, a general award of future medical benefits is mandated. As noted by the Court in FEI Installation v. Williams, 214 S.W.3d 313 (Ky. 2007), “[u]nder 803 KAR 25:012; Mitee Enterprises v. Yates, 864 S.W.2d 654 (Ky. 1993) and National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App. 1991), an employer is free to move to reopen an award to contest the reasonableness or necessity of any medical treatment and also whether the need for treatment is due to the effects of the injury.” Id. at 319.

The ALJ’s finding the contested surgeries are work-related and compensable as set forth in the February 25, 2020, Opinion and Order and the March 27, 2020, Order is **AFFIRMED**. That portion of the March 27, 2020, Order overruling the request in the petition for reconsideration to resolve the compensability of the medical care resulting from the right knee infection and resulting surgery is **VACATED**. This claim is **REMANDED** to the ALJ to address the compensability of “all treatment resulting from or necessitated by the [right knee] infection, surgical interventions, pre and post-operative care, medication, and expenses associated therein any other medical treatment related to Scott’s right knee infection” as contested in the June 24, 2019, Motion to Amend and enter an amended order and award. Further, in an amended order and award, the ALJ must award future medical benefits for Scott’s work-related right knee injury.

ALL CONCUR.

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