

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-002116-WC

THE KROGER COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-94-40874

ROBERT LEE SMITH, HON. R. SCOTT  
BORDERS, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AND ORDER  
DISMISSING

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BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: The Kroger Company (Kroger) petitions this Court to review an opinion of the Workers' Compensation Board in which the Board affirmed a decision of an Administrative Law Judge (ALJ). The ALJ ruled in favor of Robert

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Lee Smith regarding a dispute over medical fees and ordered Kroger to pay for the ongoing medical treatment that Smith was receiving from his treating physician. On appeal, Kroger argues that res judicata bars the ALJ from awarding payment for future medical expenses regarding psychiatric treatment. Finding that Kroger has conceded that no actual controversy exists regarding medical bills for psychiatric treatment, we order this appeal dismissed.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

In the mid-1990s, Smith filed a workers' compensation claim against his employer Kroger alleging work-related injuries to his back and knee. In addition, he claimed that he suffered from a work-related psychiatric condition due to his back and knee injuries. In a 1995 opinion, order and award, the ALJ assigned to Smith's claim ultimately determined that he suffered from a 25% permanent partial disability due to his back injuries and a 20% permanent partial disability as a result of Smith's right knee injury. Regarding Smith's psychiatric claim, the ALJ stated that he was not persuaded by the evidence that Smith "suffered any degree of permanent occupational disability due to his psychiatric condition." Regarding current and future medical expenses, the ALJ determined that Smith was entitled to recover from Kroger any expenses

for the cure and relief from the effects of the back and right knee injuries, such medical[,] surgical and hospital treatment including nursing, medical and surgical supplies and appliances, as may be reasonably required at the time of the back and right knee injuries and thereafter during disability.

After Smith was injured, his treating physician, Dr. Samuel King, treated Smith by prescribing Lortab, Robaxin, Paxil, Ambien, Lodine and Nexium. Dr. King also treated Smith by administering Toradol injections to Smith three to four times each year. Additionally, Smith's physical therapist treated Smith with Biofreeze cream and shock absorbing insoles. For the next several years, Kroger paid for all of Smith's various treatments. However, in 2005, Kroger requested that Smith undergo an independent medical evaluation (IME) to be performed by Dr. Timothy Wagner. Smith submitted to the IME, and, after performing the evaluation, Dr. Wagner opined that Smith's health problems were not caused by his work-related injuries; instead, the doctor expressed his belief that Smith's health problems were caused by his morbid obesity. According to Dr. Wagner, if Smith lost weight, he would have a decreased need for Lortab, Robaxin, Paxil and Ambien. After Dr. Wagner's IME, Kroger sought a utilization review of Smith's medications from Dr. Daniel Wolens. As a result of his review, Dr. Wolens opined that Kroger should not pay for drugs like Paxil because Smith's psychiatric condition was not a compensable injury. Moreover, Dr. Wolens opined that Kroger should not pay for Robaxin because when it was ingested along with Lortab and Ambien, it provided no additional effectiveness.

Based on the opinions of Dr. Wagner and Dr. Wolens, Kroger stopped paying for Smith's use of Paxil, Nexium, Robaxin, Biofreeze cream and shock absorbing insoles. In response to Kroger's refusal to pay for these treatments, Smith filed a Form 112 along with an attached affidavit in which Smith explained

that he had received these various treatments for the past ten years and had benefited from them over the course of time. After Smith filed his Form 112, the Chief Administrative Law Judge (CALJ) entered an order noting that there was a medical fee dispute between Smith and Kroger. The CALJ ordered Smith to provide documentation of his out-of-pocket expenses which he had incurred regarding the payment of the disputed medications and ordered Kroger to respond to Smith's allegations contained in his Form 112.

After the CALJ's initial order, Smith complied and filed documents regarding the disputed medication expenses. After Smith did this, the CALJ entered an order, upon her own motion, reopening Smith's workers' compensation claim and limiting the reopening to the medical fee dispute. The CALJ assigned the fee dispute to a new ALJ.

In adjudicating the fee dispute, the ALJ had access to the records of Dr. King, Smith's treating physician, the report of the IME performed by Dr. Wagner, the utilization review performed by Dr. Wolens and the testimony given by Smith. In the ALJ's opinion and order resolving the fee dispute, the ALJ summarized Dr. King's records, stating

[t]he records reflect the Plaintiff [Smith] began treating with him [Dr. King] in 1987 and the records continue up until June 14, 2005. The records reflect that he [Smith] is treated with medications, as well as, occasional Toradol injections. According to Dr. King[,] Plaintiff [Smith] is totally and permanently disabled from all occupations and is not a candidate for rehabilitative training. Dr. King felt that Plaintiff has persistent radiculopathy, has difficulty doing repetitive activities and performing

activities of daily living. He encouraged weight reduction, continuation of medications and restrictions. The record reflects office visits every two to three months.

Regarding Smith's testimony, the ALJ summarized

[t]he Plaintiff, on the other hand [as opposed to the opinions of Dr. Wagner and Dr. Wolens], testified quite credibly that he has been undergoing this treatment regimen with Dr. King since 1995, receives relief from the treatment, is able to function, and after undergoing Toradol injections[,] is able to function without as many narcotics. The Plaintiff testified that since his medications ceased[,] he is extremely anxious, is in more pain, and has more difficulty in performing his activities of daily living.

Relying on Smith's testimony and the records of Dr. King, the ALJ concluded that Kroger failed to meet its burden of proving that the medical treatment regimen administered by Dr. King was unreasonable, unnecessary or unrelated to Smith's work-related injuries. Consequently, the ALJ ordered Kroger "to pay for the ongoing medical treatment that the Plaintiff [Smith] is receiving from Dr. Samuel King[,] and ordered Kroger "to pay all outstanding medical expenses previously denied[.]"

In response to the ALJ's adverse ruling, Kroger filed a petition for reconsideration and noted that in the original 1995 opinion, order and award, the first ALJ denied Smith's psychiatric claim and had only ordered Kroger to pay future medical expenses for Smith's back and knee injuries. According to Kroger, the original ALJ did not award payment for future medical expenses regarding psychiatric treatment. Additionally, Kroger argued that, after the reopening, Smith

had submitted no evidence to support “an award of psychiatric medications as part of this . . . medical fee dispute.” Therefore, Kroger reasoned that the second ALJ should amend his opinion and order “to specifically exclude the award of psychiatric treatment.” Subsequently, the ALJ denied Kroger’s petition for reconsideration.

After the ALJ denied Kroger’s petition, Kroger filed an appeal with the Workers’ Compensation Board. Before the Board, Kroger reiterated its argument found in its petition for reconsideration and argued that the issue regarding psychiatric treatment is now *res judicata*. However, the Board affirmed the ALJ’s opinion and order.

## **II. STANDARD OF REVIEW**

When we review a decision of the Worker’s Compensation Board, we will only reverse the Board’s decision where the Board has overlooked or misconstrued the controlling law or so flagrantly erred in evaluating the evidence that a gross injustice has occurred. *Daniel v. Armco Steel Company*, 913 S.W.2d 797, 798 (Ky. App. 1995). This means that, ultimately, we must review the ALJ’s decision.

Regarding the ALJ’s decision, the Supreme Court of Kentucky has held that

[w]hen the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which [sic] would permit a fact-finder to reasonably find as it did.

*Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). However,

[i]f the fact-finder finds against the person with the burden of proof, his burden is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which [sic] would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled “clearly erroneous” if it reasonably could have been made.

*Id.* In this case, the burden of proof rested with Kroger. Consequently, we will reverse only if Kroger proves on appeal that the evidence compels a finding in its favor. *Daniel*, 913 S.W.2d at 800; *see also Lee v. International Harvester Company*, 373 S.W.2d 418 (Ky. 1963). For evidence to be compelling, it must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. *Daniel*, 913 S.W.2d at 800 (*quoting REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985)).

Furthermore, as the finder of fact, the ALJ, not this Court and not the Board, has sole discretion to determine the quality, character and substance of the evidence. *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999) (*quoting Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985)). Not only does the ALJ weigh the evidence but the ALJ may also choose to believe or disbelieve

any part of the evidence, regardless of its source. *Whittaker*, 998 S.W.2d at 481 (quoting *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977)).

### III. ANALYSIS

On appeal before this Court, Kroger reiterates its same arguments. It once again notes that in the original opinion, order and award, the first ALJ denied Smith's claim regarding psychiatric impairment. Therefore, according to Kroger, the doctrine of res judicata bars the second ALJ from compensating Smith for psychiatric treatment. Kroger reiterates that the record contains no evidence that psychiatric treatment is "now a compensable element of the work injury."

In addition to its res judicata argument, Kroger takes issue with the Board's opinion. Regarding the Board's decision, Kroger argues in its brief that the Board

took issue with the fact that the Appellant [sic] placed no bills in dispute with regard to psychiatric treatment. No bills were placed into dispute because psychiatric treatment was not the issue surrounding the medical fee dispute and Motion to Reopen the claim. There are no bills in dispute because of the res judicata effect of the original Opinion and Award. However, this appeal became necessary due to the fact that the Appellee [Smith] has placed compensability of psychiatric medications on the coattails of [the ALJ's] finding that the Plaintiff's treatment with Dr. King was reasonable and necessary. Certainly all treatment rendered by Dr. King will be paid based upon [the ALJ's] ruling- save psychiatric treatment which is precluded. The Appellant however requests a ruling from this court to prevent any further argument with the Appellee on this matter.



It has long been established in the Commonwealth that an “actual controversy” is a fundamental requirement of any case, and courts are prohibited from rendering advisory opinions regarding issues that have not yet ripened into concrete disputes. *Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky. 2007); *see also Freeman v. Danville Tobacco Bd. of Trade, Inc.*, 380 S.W.2d 215, 216 (Ky. 1964); *Commonwealth ex rel. Watkins v. Winchester Water Works Co.*, 303 Ky. 420, 197 S.W.2d 771, 772 (1946). A court will not rule upon “speculative rights or duties which may or may not arise in the future[.]” *Commonwealth ex rel. Watkins*, 197 S.W.2d at 772; *see also Veith v. City of Louisville*, 355 S.W.2d 295, 297 (Ky. 1962). A court will only rule upon “rights and duties about which there is a present actual controversy presented by adversary parties.” *Id.*

In its brief, Kroger concedes that no actual controversy exists in this case as it admits there are no disputed medical bills regarding psychiatric treatment. Furthermore, Kroger makes it clear that it is requesting this Court to issue an advisory opinion in order to forestall “any *further* argument with the Appellee on this matter.” Appellant’s brief at page 6 (emphasis added). Kentucky courts are prohibited from addressing this type of question; therefore, we dismiss this appeal for lack of an actual controversy.

However, even though we have dismissed Kroger’s appeal for lack of an actual controversy, we will still briefly address the efficacy of the ALJ’s underlying opinion. For this, we adopt the reasoning of the Workers’ Compensation Board because the Board’s analysis is both cogent and sound.

According to the Board,

Kroger maintains it is not required to pay for Smith's psychiatric treatment, but does not set forth what medical bills relate to psychiatric treatment. In a post award medical fee dispute, the burden of proof regarding the reasonableness and necessity of treatment is with the employer, while the burden remains with the claimant concerning questions pertaining to the work-relatedness or causation of the condition. See KRS 342.020; *Mitee Enterprises v. 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 (Ky. 1993) and *National Pizza Co. v. Curry*, 802 S.W.2d 949 (Ky. App. 1991). Therefore, Kroger had the burden of establishing the medical expenses were unreasonable, unnecessary or unrelated to Smith's work-related injury. The ALJ found that Kroger did not meet that burden. Since the ALJ found against Kroger the standard of review on appeal is whether the evidence compelled the result Kroger now seeks.

We believe the ALJ was faced with a conflicting medical opinion regarding the reasonableness and necessity of the treatment. Certainly, the letters of Dr. King as well as the testimony of Smith explained the necessity for the insoles, biofreeze cream and the three prescriptions in question, Robaxin, Paxil, and Nexium. Dr. Wagner's testimony is equivocal. Dr. Wagner does not say the medication should not be prescribed. He merely says that the medication should be curtailed. The mere presence of evidence that could have supported a finding in favor of Kroger is not an adequate basis for reversal on appeal. *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999).

Kroger's request for relief regarding the psychiatric treatment is vague at best. In its brief and motion for reconsideration, Kroger does not say which prescription or mode of treatment amounts to psychiatric treatment. It is presumed that the prescription for Paxil is the medical bill for which Kroger does not want to pay. The problem

is Kroger does not say what medical bill it is objecting to paying. That said, the testimony of Smith establishes why the Paxil was needed. Kroger has paid for Paxil over many years. We believe, as the ALJ found, the totality of the record contains substantial evidence supporting the ALJ's findings and thus we will not disturb his decision on appeal. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

#### IV. CONCLUSION

Given the lack of an actual controversy, this Court ORDERS that this said appeal be, and it is hereby, DISMISSED.

ENTERED: July 25, 2008

/s/ Joy A. Moore  
JUDGE, COURT OF APPEALS

WINE, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS.

BUCKINGHAM, SENIOR JUDGE, DISSENTING. Because I disagree with the majority's view that there is not an actual controversy, I respectfully dissent. The ALJ ordered Kroger to pay "for the ongoing medical treatment that the Plaintiff is receiving from Dr. Samuel King." Dr. King is currently treating Smith with prescriptions for both a physical injury and a psychological complaint. However, the psychiatric portion of Smith's claim was dismissed in 1995. In light of the ALJ's recent decision, Smith now claims that

psychiatric medication and care are compensable despite the fact that the psychiatric portion of his claim was dismissed years ago. See page 7 of his brief. Smith's claim in his brief is clear evidence that an actual controversy presently exists. I conclude that we should reverse this portion of the decision by the ALJ and the Board on the ground that the dismissal of the psychiatric portion of Smith's claim in 1995 is res judicata and precludes his now receiving benefits in connection with that claim. Further, there was no evidence submitted by Smith that would support an award of psychiatric medication as part of the reopening.

BRIEF FOR APPELLANT:

Melanie Gabbard  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Miller Kent Carter  
Pikeville, Kentucky