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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001367-WC

THOMPSON BROTHERS
PLUMBING — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-85314

MARK WHEAT; BRENT E. DYE,
ADMINISTRATIVE LAW JUDGE;
JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD OF KENTUCKY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: Thompson Brothers Plumbing ("Thompson") appeals from an opinion of the Workers' Compensation Board reviewing the case

of Mark Wheat, who was injured during the course of his employment with Thompson. The only issue is the calculation of Thompson's subrogation credit against the proceeds of a personal injury settlement obtained by Wheat. Thompson argues that the Board erred in affirming the finding of the Administrative Law Judge (ALJ) that there was insufficient evidence of Wheat's future medical expenses to be included in the credit.

Wheat was employed as a plumber for Thompson. In 2014, he injured his knee at a customer's house when going down some steps which collapsed. He ultimately underwent total knee replacement surgery on April 27, 2016, at the age of forty-seven. Wheat brought suit against the customer and received a settlement of $100,000 from the homeowner's insurance. He also was awarded workers' compensation benefits in the following amounts: $537.28 for temporary total disability (TTD) from May 1, 2014 through July 20, 2014 and from April 27, 2016 through September 3, 2016 and permanent partial disability (PPD) benefits of $107.45 per week for 425 weeks beginning April 30, 2014.

As required by Kentucky Revised Statutes (KRS) 342.700(1), which provides that an employer is entitled to subrogation credit against proceeds recovered by an employee from a negligent third party, ALJ Jeanie Owen Miller calculated the apportionment of the $100,000 settlement between Wheat and Thompson Brothers. As part of this process, she assigned values to Wheat's

medical expenses, lost wages, future wage loss, and pain and suffering. She found insufficient evidence, however, to assign a value to future medical expenses.

The ALJ stated that the only evidence proffered regarding future medical expenses was a "Life Care Plan" submitted by Thompson. The report was prepared by Kelly West, a registered nurse, certified case manager and certified nurse life care planner and approved by Pamela Hawkins, also a registered nurse and certified case manager, of BHN Medical Review Services. After reviewing Wheat's medical records, the report recommended as follows:

> I was asked to provide cost analysis for future medical needs for Mr. Mark Wheat. At this time, current treatment is only anticipated at one orthopedic visit with an x-ray in one year. With his life expectancy at 33.3 years, it could be anticipated that the knee replacement will need to be revised after 17-20 years as that is the typical life expectancy of the hardware. Based on his life expectancy, one replacement revision would need to be performed on the right knee. The cost provided for the TKA revision is based on the median cost nationally in ODG. The cost could vary based on the facility and the current cost to charge ration at the time of treatment. In the grid sheets that are attached, you will find anticipated future treatment based on follow up visits anticipated as well as the charges that would be anticipated for post-operative care after the total knee replacement. Please note this does not take into consideration any unforeseen issues that could occur.
>
> The medication grid sheet provides anticipated medications for post-operative care for the revised TKA. These costs are based on the current lowest AWP in Redbook Online, 2017. Utilizing a pharmacy benefit manager (PBM) would allow for lower costs associated with these type[sic] medications.

> This Life Care Plan medical cost projection can be updated after Mr. Wheat is seen by the orthopedic surgeon in one year or should there be any change in his current condition of the right total knee replacement recovery.
>
> The estimated total lifetime expenses equal $74,284.94.

The ALJ found that the Life Care Plan was not persuasive evidence of future medical expenses because it was a projection based on the opinion of a registered nurse, rather than the opinion of an orthopedic surgeon based upon reasonable medical probability.

Thompson filed a petition for reconsideration, arguing that the ALJ had overlooked relevant evidence of future medical expenses in the form of a note and opinion of Dr. Jeffrey Stimac, of the Shea Orthopedic Group. The note states in relevant part as follows:

> Based on the patient's failed conservative treatment as well as his physical exam findings and his x-ray findings, I do think the only other reasonable option for him at this point is to proceed with a right total knee replacement. I do not think any other conservative treatments are going to be effective. The patient is not a candidate for any other kind of procedures like an arthroscopy or a partial knee replacement, as his arthritis is tricompartmental. I did explain to the patient that weight loss would help improve the longevity of his joint replacement. I explained to the patient that at 47 years of age he is certainly young for a total knee replacement he likely would need to have a revision in the future. I explained to the patient that a knee replacement for him may only last 20 to 25 years.

Thompson's petition for reconsideration was addressed by ALJ Brent E. Dye. He described Dr. Stimac's opinion as internally conflicted, as on the one hand it stated Wheat would "likely" require a revision, which implied the hardware might never require replacing, whereas on the other hand also stated the hardware might last only 25 years. The ALJ did not find the opinion credible or reliable, further noting it was issued before Wheat even underwent the knee replacement surgery.

> Therefore, Shea Orthopedic Group did not issue this opinion after post-operatively examining and evaluating the Plaintiff [Wheat]. Shea Orthopedic Group simply took general guidelines and statistics, and applied them to a specific individual, with a specific condition – similar to a one size fits all theory. The undersigned ALJ does not find this persuasive, at least in this case. The Plaintiff is more than a statistic. He is a unique individual with a unique condition. His body type and habitus, as well as other factors, are controlling.

The ALJ concluded that the opinion was speculative and indecisive and simply did not meet the reasonable medical probability standard.

The ALJ also rejected Thompson's contention that the evidence of future medical expenses in the form of the Life Care Plan and Dr. Stimac's note had to be accepted because it was unrebutted and not objected to by Wheat.

The Board affirmed the opinion of the ALJ on the issue of future medical expenses, holding that the ALJ had not misunderstood or misapplied the

law nor erred in rejecting the evidence of the BMH Life Care Plan and Dr. Stimac's note. This appeal by Thompson followed.

Thompson argues that we should apply a de novo standard of review to the Board's decision because the basic facts of the case are not in dispute. We agree that there is no dispute that Dr. Stimac evaluated Wheat prior to surgery, nor is there any dispute that two registered nurses prepared and submitted the Life Care Plan. The facts which are in dispute concern the weight to be given to the evaluations provided by these medical professionals. This assessment of the evidence is solely within the purview of the ALJ as the fact finder and may not be usurped by the Court of Appeals. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). The ALJ, "not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence." *Id.* (citing *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985)). We are only permitted to reverse the ALJ's findings if the evidence is so overwhelming as to compel a finding in Thompson's favor. *Commonwealth v. Workers' Compensation Bd. of Kentucky*, 697 S.W.2d 540, 541 (Ky. App. 1985). When, as in this case, the evidence is uncontradicted, the ALJ is required to provide an explanation of the reasons for rejecting the evidence. *Id*. (citing *Collins v. Castleton Farms, Inc.*, 560 S.W.2d 830 (Ky. App. 1977)). We agree with the Board the ALJ provided adequate explanations for rejecting the evidence. Dr. Stimac's opinion was

discounted because it was offered before Wheat even underwent his knee replacement surgery and was not definitive regarding the longevity of the knee replacement. Similarly, the Life Care Plan was rejected because the ALJ determined that the opinion of a registered nurse did not meet the "reasonable medical probability standard." The absence of conflicting evidence does not require the ALJ to accept what evidence there is without qualification – to do so would be an abdication of the ALJ's role.

Thompson argues that the ALJ misunderstood the law and improperly applied the "made whole" doctrine to ensure that Wheat's civil settlement was not subject to any subrogation credit. The Kentucky Supreme Court has expressly rejected the applicability of the equitable "made whole" doctrine in the context of workers' compensation, stating: "KRS 342.700(1) expresses a legislative purpose that the employer or insurer is entitled to recoup from the third-party tortfeasor the workers' compensation benefits it paid to the injured worker; thus, the common law 'made whole' rule cannot be applied to preclude that recovery." *AIK Selective Self Ins. Fund v. Bush*, 74 S.W.3d 251, 257 (Ky. 2002). Thompson contends ALJ Miller erroneously believed she was required to give priority to making the injured employee whole and allowed this belief to distort her calculations. Thompson claims it is not mere coincidence that her assessment of the damages reached a mathematical conclusion that the employer had no subrogation credit. This

argument is purely speculative. As the Board pointed out, although the ALJ did use the phrase "making the injured employee whole," she thereafter performed the subrogation analysis fully in accordance with our case law.

Thompson argues that the ALJ also profoundly misunderstood the holding of *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381 (Ky. App. 2002). *Cantrell* stands for the proposition that future medical expenses do not become 'duplicative' of the future medical expenses received under a civil judgment until they are actually incurred and determined to be payable under the workers' compensation law. *Cantrell* at 386. In other words, an employer does not receive immediate reimbursement for future medical expenses not actually incurred. According to Thompson, the ALJ interpreted *Cantrell* to mean that she could not award damages for future medical expenses because a jury could not do so. We disagree. The ALJ expressly found insufficient evidence to support a finding of the value of future medical expenses and hence any future subrogation credit for such expenses became moot.

Thompson's final arguments concern the ALJ's assessment of the evidence and subsequent ruling on the petition for reconsideration; specifically, Thompson alleges that the ALJ misunderstood Dr. Stimac's opinion, drew unreasonable inferences from it and, erred as a matter of law in excluding the evidence as not based on a reasonable medical probability. Specifically,

Thompson claims that Dr. Stimac's opinion was not internally conflicted, that Wheat's obesity means the life of his knee replacement will be shortened, that Dr. Stimac's use of the word "likely" is equivalent to the word "probable," and the fact that Dr. Stimac expressed his opinion before surgery is irrelevant. These arguments all concern the sufficiency and persuasiveness of Dr. Stimac's opinion, which are within the exclusive purview of the ALJ. Thompson argues that "even the general public knows that joint replacements have a projected and expected life expectancy, and that a morbidly obese person will wear out the hardware more quickly than a person who is not obese." But that is the precise point made by the ALJ addressing the petition for reconsideration: Dr. Stimac's opinion offers no medical insight or particularly reliable assessment of Wheat's specific future medical expenses that would exceed a lay person's general understanding.

The ALJ provided reasonable grounds for rejecting the medical evidence relating to future medical expenses. The evidence was not overwhelming and did not compel a different finding.

For the foregoing reasons, the Board's opinion of August 17, 2018, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James G. Fogle
Louisville, Kentucky

BRIEF FOR APPELLEE MARK WHEAT:

Ched Jennings
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