Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 20, 2024

CLAIM NO. 201374385

RICKY PECK PETITIONER

VS. **APPEAL FROM HON. GREG ALLEN, ADMINISTRATIVE LAW JUDGE**

JEREMY WEBB M.D.
ELITE PAIN & SPINE
JESSICA LITTLE M.D.
KIDNEY SPECIALISTS OF PADUCAH PLLC
MERCY HEALTH
MANDY COOMER
NEW LIFE MEDICAL MASSAGE
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
and HON. GREG ALLEN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING

* * * * * *

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

STIVERS, Member. Ricky Peck ("Peck") seeks review of the May 7, 2024, Opinion and Order on Remand and the May 28, 2024, Order overruling his Petition for

Reconsideration of Hon. Greg Allen, Administrative Law Judge ("ALJ Allen"). On remand, ALJ Allen resolved multiple medical fee disputes filed by the parties and complied with the Board's directive.

On appeal, Peck's sole argument is ALJ Allen erred in finding his extensive use of NSAIDs was not for treatment of his work injuries and did not necessitate treatment of his kidneys by Dr. Shaukat Ali. Peck contends ALJ Allen incorrectly found, after reviewing his treatment records, that extensive use of NSAIDs did not constitute treatment of his work-related injury. Specifically, Peck argues his chronic kidney disease resulted from long-term use of NSAIDs, which was and is a residual of the treatment of his injuries arising from a 2012 work-related motor vehicle accident ("MVA"). For the reasons set forth herein, we vacate that portion of ALJ Allen's Order determining Peck's chronic kidney disease is not related to the work-related MVA and remand.

BACKGROUND

Peck's Form 101 filed against International Brotherhood of Electrical Workers ("IBEW") on August 1, 2014, alleges he was injured on August 2, 2012, when he was "driving north on Hwy 68 when a vehicle attempted to cross [his] path, causing a collision." Peck alleged he sustained "permanent injuries to his right heel, knees, hands, right shoulder, back, and head (concussion), cuts on arms, fingers, right leg, right ear, and broken nose." The Form 101 states Peck received the following medical treatment as a result of the MVA:

> Surgery on my right foot, right heel, right knee, bandages on hands, burn on right arm treated, medications, physical therapy, injections, removal of hardware, water therapy, shoe inserts Medrol dose pack,

> brace for ankle, injections for blood clots, home health, crutches, CT's, MRI's, x-rays, blood work, wound pump, cast and walking boot, home nurse, various testing.

Peck's initial treating physicians were with the Orthopaedic Institute of Western Kentucky.

Substantial medical evidence was introduced during the pendency of the claim. IBEW timely filed a Form 111 Notice of Claim Denial or Acceptance on September 2, 2014, stating the claim was accepted as compensable but there was a dispute concerning the amount of compensation owed to Peck. Peck testified at a final hearing held on February 4, 2016. Following the final hearing, the parties reached an agreement on all aspects of Peck's claim except for his entitlement to benefits for an alleged psychological/psychiatric condition and left knee injury.

The settlement agreement was approved by Hon. Thomas Polites, Administrative Law Judge ("ALJ Polites") on April 26, 2016. The Form 110-I Agreement as to Compensation reveals Peck was injured in a work-related MVA on August 2, 2012, and his injuries were "right heel, knees, hands, right shoulder, low back, head, cuts on arms and fingers and right leg and right ear and broken nose." The diagnoses are as follows:

> Nasal fracture, rib contusion, low back strain, comminuted fracture of the right calcaneous, right supraspinatus tendon tear, right medial meniscus tear, and lacerations to arms, fingers, right leg and right ear, laceration to the hand with glass fragments.

Peck received a compromised lump sum settlement of $120,000.00 broken down as follows:

> Waiver or buyout of all past, present and future income benefits. Yes $115,750.00
>
> Waiver or buyout of past medical benefits. No N/A
>
> Waiver or buyout of future medical benefits. No N/A
>
> Waiver of vocational rehabilitation. Yes $500.00
>
> Waiver of right to reopen. Yes $1,500.00
>
> Waiver and dismissal of claim with prejudice. Yes $2,250.00

The settlement agreement states there is a dismissal with prejudice of any claims for income benefits or vocational rehabilitation benefits. However, Peck's right to receive medical benefits was specifically addressed within the agreement which is set forth as follows:

> The parties agree that Plaintiff shall retain his right to reasonable, necessary and related medical expenses for the accepted conditions of right heel fracture, right knee meniscus tear, right shoulder supraspinatus tendon tear, low back strain, cuts on arms, hands, fingers and right leg with glass fragments and right ear and broken nose pursuant to KRS 342.020. As part of this settlement, the Defendant-Employer agrees to accept past, present and future medical expenses for reasonable and necessary care of lumbar strain pursuant to KRS 342.020, which Plaintiff claims arose out of the 8/2/2012 accident. All parties retain their rights to reopen this settlement to dispute compensability of or liability for medical expenses in accordance with the KAR.

The parties were not in agreement as to the compensability of medical bills incurred for treatment of Peck's alleged psychological/psychiatric injury. The parties also did not reach an agreement as to whether Peck sustained a work-related left knee injury and was entitled to medical treatment. The parties agreed as follows: "As a term of this settlement, the parties that [sic] the issues of (1) compensability of

past, present and future psychological/psychiatric treatment and (2) whether Plaintiff is entitled to medical treatment for his left knee will be submitted to the ALJ for decision as of the date of approval of this agreement."

In a July 18, 2016, Opinion and Order on Medical Fee Dispute, after summarizing the medical proof, ALJ Polites entered the following findings of fact and conclusions of law which are set forth *verbatim*:

> …
>
> In regard to Plaintiff's entitlement to medical benefits for an alleged left knee injury, Plaintiff's evaluating physician, Dr. Warren Bilkey, did not assess an impairment rating for Plaintiff's left knee although he diagnosed Plaintiff as suffering from a bilateral knee contusion/strain injury and an aggravation of degenerative joint disease in both knees. Dr. Jacob did not diagnose Plaintiff as suffering from any type of left knee condition and did not assess any impairment for same. Given that both of the evaluating experts in this claim found the Plaintiff did not suffer from permanent impairment in regard to the alleged left knee injury, the ALJ finds that Plaintiff has failed in his burden of demonstrating that he suffered an injury as defined in the Kentucky Workers' Compensation Act in regard to the left knee and therefore his claim for entitlement to medical benefits for a left knee injury pursuant to KRS 342.020 is hereby dismissed. While the ALJ is aware that a permanent impairment rating is not necessary for award of medical benefits pursuant to KRS 342.020, the ALJ concluded that there is simply a lack of evidence that Plaintiff suffered a temporary or permanent injury regard to the left knee in this claim.
>
> As the Plaintiff's entitlement to medical benefits for the alleged psychological/psychiatric condition, in regard to the alleged diagnosis of PTSD, Dr. Butler was definitive in his opinion the Plaintiff did not suffer from PTSD and Dr. Williams, Plaintiff's treating psychologist, stated in his June 2, 2015 report that Plaintiff's PTSD was sub syndromal or partial PTSD. Given that Dr. Williams acknowledged that the Plaintiff did not meet the

> requirements for a full or complete diagnosis of PTSD, the ALJ was persuaded by the testimony of Dr. Butler that Plaintiff simply does not suffer from the condition at all. Dr. Butler concluded that the psychological testing showed no evidence to support a diagnosis of PTSD, and given his qualification as a psychiatrist, the ALJ was persuaded by his testimony that Plaintiff does not suffer from PTSD, especially in light of Dr. Williams's inability to make a full or complete diagnosis of the condition. As such, Plaintiff's claim for medical benefits based on an allegation that he suffers from PTSD is dismissed.
>
> In regard to whether Plaintiff suffers from any other mental or behavioral disorder causally related to his work injury which would entitle him to medical benefits pursuant to KRS 342.020, again the ALJ determined that Dr. Butler's testimony that Plaintiff's psychiatric symptoms were minimal, that he did not suffer a permanent impairment in regard to his psychological/psychiatric condition, and that he needed no psychiatric or psychological treatment was the most credible testimony in the record. The ALJ believes Plaintiff overstated his symptomatology and there were numerous non-work injury causes for his symptoms as demonstrated by Dr. Williams diagnosis of partner relational problem in his September 10, 2014 note (along with PTSD which has been found above not to be accurate). Dr. Butler's qualification as a psychiatrist also caused the ALJ to give his testimony greater weight and therefore it is found that Plaintiff failed to meet his burden of demonstrating he suffered a psychological/psychiatric condition attributable to his work injury and as such, Plaintiff's claim for medical benefits pursuant to KRS 342.020 for a psychological/psychiatric injury is hereby dismissed.
>
> No appeal was taken from ALJ Polites' decision.

On October 2, 2017, IBEW filed a medical fee dispute regarding Dr. John Ruxer's recommendation of massage therapy treatment. On April 15, 2019, Hon. Grant Roark, Administrative Law Judge, found that treatment non-compensable.

On October 10, 2019, Peck filed a medical fee dispute regarding his need for Lyrica, Norco, and compounding cream. Peck also filed a supplemental medical fee dispute the next day. On November 12, 2018, IBEW filed a medical fee dispute regarding Peck's use of Hydrocodone. On March 9, 2020, IBEW filed another medical fee dispute regarding Peck's request for reimbursement of travel expenses to see Dr. Ali, a nephrologist, and Dr. W. James Tidwell, a dermatologist.

On March 27, 2020, Hon. Christina Hajjar, Administrative Law Judge ("ALJ Hajjar") entered an Interlocutory Medical Dispute Opinion and Order which provides the following procedural history which is set forth *verbatim*:

> On April 26, 2016, Plaintiff, Ricky Peck, was awarded the right to receive medical benefits pursuant to KRS 342.020 for his August 2, 2012 injury he sustained while working for the employer, IBEW, including a right heel fracture, right knee meniscus tear, right shoulder supraspinatus tendon tear, low back strain, cuts on arms, hands, fingers, right leg, and right ear, and broken nose. His claim for medical benefits for his alleged left knee injury and alleged psychological injury was dismissed. A prior medical dispute concerning massage therapy and associated mileage expenses was resolved in favor of Defendant.
>
> On October 10, 2019, Peck filed a motion to reopen and medical dispute against IBEW and its workers' compensation insurance company and/or third party administrators State Farm and Sedgwick Claims Management Services, Inc., ("Defendants") due to Defendant's repeated denials of medications and failures to pay for medications, including compounding cream, Lyrica and Norco. Peck requested payment of the medical expenses which were denied without the benefit of a medical dispute, for an award of reasonable attorney's fees for the reopening, and for State Farm and Sedgwick Claims Management Services, Inc. to be referred to the Commissioner for an investigation into his treatment.

> Defendant responded on October 29, 2019, admitting the utilization review notices of denial were issued on June 25, 2019, August 8, 2019, August 16, 2019, and August 19, 2019, and medical disputes were not timely filed within 30 days of the denials. Defendant also asserted the medical expenses were going to be processed for payment and requested dismissal of Peck's motion to reopen and medical dispute.
>
> On November 12, 2019, Defendant filed a Form 112 Medical Dispute and Motion to Reopen challenging the reasonableness, necessity and work-relatedness of Hydrocodone. The medical dispute was formally reopened on November 19, 2019, and Dr. John Ruxor was joined as a party.
>
> On December 3, 2019, Peck's motion regarding the repeated denials of Lyrica, compound cream, and Norco was resolved in favor of Defendant and Defendant agreed to pay for the past medications. The ALJ set a deadline for December 19, 2019 for payment.
>
> Thereafter, Peck filed expenses from Injured Worker's Pharmacy showing $4,002.23 in outstanding charges and additional bills in the amount of $1,845.00 from the Orthopedic Institute of Western Kentucky. During the conference on January 30, 2020, Defendant requested additional time to review the bills.
>
> The ALJ conducted a Benefit Review Conference on February 18, 2018. The parties waived a hearing and submitted the following issues for decision: the reasonableness, necessity and work-relatedness of hydrocodone, sanctions in the form of payment of Plaintiff's attorney's fees, whether Defendant should be referred to the Commissioner for unfair claims practices, and the compensability of the outstanding bills of $4,002.23 to the Injured Workers Pharmacy and $1,845.00 to the Orthopedic Institute of Western Kentucky.
>
> ALJ Hajjar's findings of fact and conclusions of law are set forth below *verbatim*:
>
> For the reasons set forth herein, the bills are compensable and shall be paid, the hydrocodone is

reasonable and necessary, Defendant is responsible for Peck's attorneys' fees, and Defendant is referred to the Commissioner of the Department of Workers' Claims for investigation of unfair claims.

Defendant has not set forth any defense as to why the bills have not been paid. Based upon the affidavit filed by Peck, there is an outstanding charge of $4,002.23 in pharmacy bills which have been submitted to the carrier and remain unpaid. There is also a bill in the amount of $1,845.00 which has not been paid to OIWK. As no medical disputes were filed disputing such bills, this ALJ finds such bills are compensable.

ALJ Hajjar ordered as follows:

1. The Motion to Reopen to assert a Medical Dispute by the Defendant and/or its insurance carrier is sustained.

2. Hydrocodone is reasonable, necessary, and related to the injury, and is thus, compensable.

3. The bills from OIWK in the amount of $1,845.00 are compensable.

4. Defendant is responsible for $4,002.23 in pharmacy bills to the Injured Workers' Pharmacy.

5. Defendant/Employer shall pay for the medical expenses improperly denied by Defendant.

6. The whole cost of the proceedings with respect to Peck's motion to reopen, including Peck's attorney's fees, are assessed against Defendants. As set forth above, counsel for Peck is hereby ordered to submit an affidavit detailing the services he provided with respect thereto including the time spent in that representation within ten (10) days hereof, at which point the ALJ will enter an order and award with respect to such costs.

7. This matter is hereby referred to the Commissioner of the Department of Workers' Claim for investigation as to whether additional sanctions are appropriate against the defendant/employer and/or its workers' compensation carrier by virtue of a potential violation of 803 KAR 25:240.

> 8. By separate order, the ALJ will be ruling on the motion to amend the dispute. This order remains interlocutory until all issues are resolved.
>
> 9. Defendant/Employer shall remain responsible for reasonable and necessary medical treatment for the cure and/or relief of Plaintiff's work-related injury pursuant to KRS 342.020.
>
> 10. All motions for approval of attorney fees shall be filed with the Department of Workers' Claims within thirty (30) days after the final disposition of this decision.

On June 2, 2020, ALJ Hajjar entered an Order noting the parties agreed the dermatological treatment was not related "at this time" and mileage expenses for that treatment was not compensable. However, IBEW agreed to pay other contested mileage expenses. All other mileage expenses submitted on the Form 114 which were the subject of the dispute were to be paid.

On August 25, 2020, IBEW filed another medical fee dispute regarding Peck's need for lumbar epidural steroid injections. IBEW followed up with a supplement on January 12, 2021, contesting Southern Orthopedic Associates' bill for epidural steroid injections.

In an April 30, 2021, Medical Dispute Opinion and Order, Hon. John H. McCracken, Administrative Law Judge, ruled in Peck's favor finding the lumbar epidural steroid injections compensable and denied IBEW's medical dispute. His reasoning is set forth *verbatim* as follows:

> The [sic] reviewed the opinions of Dr. Getz, Dr. Patel and Dr. Jacob. They assert that there is either no radicular symptoms or no documented reduction in pain medication. However, the ALJ is more persuaded by the treating physicians/APRN's opinions as they personally treated Peck on each visit. Dr. Ruxer's notes clearly document lumbar radicular symptoms since he began

> treating Peck. Additionally, the records clearly reveal that Peck received a reduction in pain following the prior injections. The records indicate that the pain medication was at times prescribed to be taken as needed.
>
> The ALJ relies on Dr. Ruxer and Dustin Thompson, APRN, to find the LESIs in question are both medically reasonable and necessary for the treatment and/or cure of the August 1, 2012 work injury and therefore denies Defendant's motion to reopen.

On July 6, 2021, Peck filed a Motion to Reopen contesting IBEW's denial of his referral to an orthopedist. On September 21, 2021, IBEW filed a medical fee dispute regarding Peck's need for Narcan.

On April 21, 2022, IBEW filed a medical fee dispute contesting Peck's need to see Dr. Jessica Little, a podiatrist who diagnosed Morton's Neuroma of the third interspace of the right foot (between his toes) and recommended injections. IBEW filed supplemental medical fee disputes contesting the bills of Dr. Jeremy Webb with Mercy Health, Kidney Specialists of Paducah PLLC, and Dr. Little. IBEW also contested Peck's use of the prescription Magcalquin.

In a September 7, 2022, Medical Dispute Opinion and Order, ALJ Hajjar noted IBEW contested the work-relatedness of the treatment with Dr. Little for Morton's Neuroma, the timeliness of medical bills from Dr. Webb, Kidney Specialists of Paducah, PLLC and Mercy Health, and the compensability of the medication Magcalquin. ALJ Hajjar noted IBEW had also contested the prescription Norcan but this issue was resolved as moot. ALJ Hajjar determined the medical bills from Mercy Health, Kidney Specialists of Paducah, PPLC and Dr. Webb were not compensable. However, ALJ Hajjar determined IBEW was responsible for the

treatment of Morton's Neuroma and the prescription Magcalquin as they were related to the injury.

Peck filed a Petition for Reconsideration on September 21, 2022. Relative to the issue before us now, Peck noted as follows:

> The Medical Dispute Opinion and Order in this case was rendered on September 7, 2022. There is a patent error in the Medical Dispute Opinion and Order which should be corrected. The Administrative Law Judge correctly noted that the 'chronic use of a nonsteroidal agent has also contributed toward a decline in his renal function.' Opinion and Order p. 6. While the Administrative Law Judge also correctly noted there 'was no evidence filed in this dispute establishing the right knee replacement was related to the injury,' not only was the right knee included in the Form 110 Agreement as to Compensation, the right knee replacement which was done after the Form 110 was signed as paid for by the workers' compensation obligor. Id. More significantly, however, Mr. Peck has taken nonsteroidal agents for his chronic pain for years prior to his first visit with Dr. Ali. On Mr. Peck's first visit on 11-4-19, Dr. Ali noted Mr. Peck was 'taking nonsteroidal agents almost every day for the last several years.' Notice of Filing Ali d. 8-10-22. Dr. Ali diagnosed 'Stage III chronic kidney disease secondary to hypertensive nephrosclerosis and chronic use of nonsteroidal agent has contributed towards decline in renal function. I have recommended him to discontinue the use of diclofenac.' Id. And while the Q & A form completed by Dr. Webb is relative to the Magcalquin compounded prescription, the history Dr. Webb confirmed for Mr. Peck is that of 'right heel pain, right knee pain, right shoulder pain, low back pain, and pain radiating down the right leg … related to the 8/2/12 work related motor vehicle accident.' Notice of Filing Q & A Report of Dr. Webb d. 7-27-22. Mr. Peck did not receive diclofenac only for knee pain, whether right, left, or bilateral – he was having pain in and received diclofenac for right heel pain, right knee pain, right shoulder pain, low back pain, and radiating pain down the right leg. Id. On 9-3-21, Mr. Peck gave a history to Dr. Ruxer [sic] of his work related MVA in 2012, and of

having tried and failed with pain medications 'tylenol (sic), motrin (sic) or aleve (sic) or ibuprofen,' the last here of which are NSAIDs. Notice of Filing Ruxer d. 10-18-21.

This is not the first, or the second, Medical Fee Dispute that the Defendant has filed disputing treatment for Mr. Peck, and numerous medical records in prior Medical Fee Disputes discuss Mr. Peck's injured body parts, his treatment, and the discontinuation of diclofenac as a pain-relieving medication due to the damage to Mr. Peck's kidneys. The need for Dr. Ali's treatment is a direct result of Mr. Peck's 2012 motor vehicle accident, and this treatment should be found reasonable, necessary, and work related. As an example, during Mr. Peck's 10-21-20 visit to the Orthopaedic Institute, when he was being seen for his lumbar spine, the following history was noted:

> 'Symptoms began in 2012 following an MVC [sic] when he was the restrained driver, hitting another vehicle. He has had multiple orthopaedic procedures including right foot and ankle surgery x 3, bilateral total knee arthroplasty and right shoulder surgery x 2. He has chronic low back pain with radiation into the right lower extremity … He has previous he (sic) treated with diclofenac, but this was discontinued after he was found to have chronic kidney disease.' Notice of Filing Records and Billing of OIWK d. 12-22-20 (emphasis added).

As a contrast to the above 10-21-20 note, when Mr. Peck was first seen three years earlier on 8-4-17 by Dr. Ruxer at the Orthopaedic Institute for his lumbar spine, included in the pain medications he was receiving for his work injury was 'diclofenac sodium 75 mg tablet delayed release' with instructions to 'TAKE 1 TABLET (75 MG) BY ORAL ROUTE 2 TIMES EVERY DAY.' Notice of Filing Records of Dr. Ruxer [sic] d. 10-13-20 (all caps in original). The Administrative Law Judge should note that under the 'Elsewhere' or 'Prescribed Elsewhere' heading on both this and subsequent office visits, it states 'N,' meaning that diclofenac sodium is prescribed by that provider for low back pain. Id. This

medication was prescribed for pain relief of his work injuries on subsequent visits to the Orthopaedic Institute on 11-1-17; 2-19-18; 4-25-19; 10-2-19; and on 12-2-19. Id. The Administrative Law Judge should note that on Mr. Peck's visit to the Orthopaedic Institute on 1-7-20, two months after his first visit to Dr. Ali, diclofenac is no longer being prescribed, and that medication is instead listed on this and all subsequent visits to the Orthopaedic Institute under the 'Allergies' section as causing 'Kidney problems.' Id. Mr. Peck's treating physicians prescribed him diclofenac for the pain he suffered from his work-related motor vehicle accident. That same diclofenac damaged his kidneys. Treatment with Dr. Ali should be found compensable. Mr. Peck asks that the Administrative Law Judge find that she misunderstood the history of the prescriptions for diclofenac, and amend her Opinion accordingly.

Significantly, in a prior Opinion rendered by this Administrative Law Judge, it was found that:

> 'Dr. Ruxor (sic) opined Peck's complaints of pain are due to the work accident. He is given some pain relief and increased functioning from Norco for his pain. He opined it is reasonable, necessary and work-related for the cure and relief of the injury. Dr. Ruxor's (sic) records from December 2, 2019 indicate he rated his current pain as a 4/10. Dr. Ruxor (sic) also ordered a urine drug test. He noted Peck has improved activities of daily living, increased function, and decreased pain with opioid pain medication. There are no side effects and the most recent drug screen was reviewed and the results were satisfactory. He increased the Norco. **He also noted a nephrologist ordered him to discontinue the use of all NSAIDS**.' Interlocutory Medical Dispute Opinion and Order p. 6 (emph. added).

While the Administrative Law Judge's previous Opinion did not directly find that the diclofenac was work-related, or that treatment with Dr. Ali was compensable, this issue was already front and center in Mr. Peck's

treatment. And so, while this is not the law of the case, it is certainly law adjacent to the case. Mr. Peck asks that the Administrative Law Judge once again review the medical records filed into evidence in the case – not just those of Dr. Ali in the current case, but those in prior Medical Fee Disputes and in the original claim – and see that diclofenac was being prescribed to Mr. Peck for the cure and relief of his work injury for close to a decade, with the clear implication that treatment with Dr. Ali should be found compensable, and the Opinion should be amended. Mr. Peck asks that relief.

In that vein, of going back in time in this injury, the Notice of Filing d. 2-6-20 includes an IWP listing of medications prescribed and the physicians prescribing them. Significantly, IWP filled a prescription for 'Diclofenac SOD 75 MG TAB EC' prescribed on 2-3-16 by Dr. William Adams – the orthopaedic surgeon who treated Mr. Peck's injured right foot and ankle, and who performed the right heel fracture reduction on 8-16-12. See Notice of Filing Affidavit and IWP Listing d. 9-6-20 and Notice of Filing Bilkey for a summary of dates of surgery d. 10-23-14. Going further back in time, on 10-19-15, in an attempt to treat Mr. Peck's intractable and significant foot pain, Dr. Adams stopped one NSAID, diclofenac, and started another NSAID, Celebrex, while also discussing injecting the neuroma third interspace that the Administrative Law Judge found to be compensable Notice of Filing Dr. William R. Adams II d. 11-9-15. As Mr. Peck was being prescribed diclofenac from very early in the original claim by Dr. Adams, who performed surgery on Mr. Peck two weeks after the 8-2-12 MVA, Mr. Peck submits that the Administrative Law Judge simply did not have a clear picture of this ongoing medication stream of NSAIDs. Mr. Peck requests additional findings of fact, and reluctantly asks that the Administrative Law Judge go back into the recesses of this claim and see, as has undersigned counsel, the lengthy history of Mr. Peck being prescribed NSAIDs, and that the Administrative Law Judge amend the Opinion and Order appropriately and find that the ongoing NSAIDs were for not only knee pain (bilateral or not), but also for heel and foot pain, with Dr. Adams prescribing NSAIDs for pain relief for the heel and foot pain, and for lumbar pain, with Dr. Ruxer prescribing

> NSAIDs for pain relief for Mr. Peck's low back. Mr. Peck asks for that relief.

Peck requested additional findings of fact and more importantly the following:

> Wherefore, Plaintiff asks that additional findings of fact be done regarding the ongoing prescription of NSAIDs by Dr. Adams and Dr. Ruxer for Mr. Peck's foot and heel pain and low back pain, and that the treatment by Dr. Ali be found compensable, so that this patent error in the Medical Dispute Opinion and Order will be corrected.

On October 4, 2022, ALJ Hajjar entered an Order ruling on the Petition for Reconsideration. The Order is set forth *verbatim*:

> This matter is before the undersigned Administrative Law Judge for consideration of Plaintiff's petition for reconsideration of the Opinion and Order of September 7, 2022. Plaintiff contends that diclofenac was being prescribed to Plaintiff for the cure and relief of his work injury for close to a decade, with the clear implication that treatment with Dr. Ali should be found compensable and the Opinion should be amended accordingly.
>
> KRS 342.281 provides that an administrative law judge is limited on review on petition for reconsideration to the correction of errors patently appearing upon the face of the award, order, or decision. The ALJ cannot reweigh the evidence and change findings of facts on petition for reconsideration. Garrett Mining Co. v. Nye, 122 S.W.3d 513 (Ky. 2003). Having reviewed Plaintiff's petition for reconsideration, the undersigned notes that his argument is well-taken and that on the face of the Opinion and Order, this ALJ failed to consider the prior disputes, settlement agreement, and medical treatment prior to the current dispute which clearly indicate Plaintiff's right knee condition was accepted as compensable, and he was taking NSAIDs for the work injury. Thus, the petition for reconsideration is, therefore, SUSTAINED.

> As noted in the ALJ's decision, the chronic use of a nonsteroidal agent has also contributed toward a decline in his renal function. Dr. Ali noted he was taking an NSAID for the right knee replacement. Although there was no evidence filed specifically for this dispute establishing the right knee replacement was related to the injury, in the settlement agreement dated April 26, 2016, the right knee meniscectomy was accepted as compensable. His medical treatment records for the work injury thus far also indicate he was taking NSAIDs for the work-related injury.
>
> This ALJ failed to take this into consideration, when she made the erroneous conclusion that the treatment with Dr. Ali was not related to the work injury. This ALJ finds the bills are related to the work injury. However, since the invoice was submitted more than 45 days from the January 19, 2022 date of service, and the invoice submitted was not a proper "completed statement of services," the bill is not compensable. Kidney Specialists of Paducah, PLLC was joined as a party, but did not file evidence or explain why a completed statement of services was not filed timely. Thus, this ALJ finds neither Defendant nor Plaintiff is responsible for the medical bill associated with the January 19, 2022 date of service, and the September 7, 2022 Medical Dispute Opinion and Order is amended accordingly.

IBEW appealed to this Board on October 14, 2022, arguing ALJ Hajjar abused her discretion by deciding "issues not plead, defended, litigated by the parties and preserved on the BRC Order and Memorandum." It noted the medical dispute relating to the treatment with Kidney Specialists of Paducah and Dr. Ali was based on the fact an invoice was submitted by Peck without any supporting medical documentation and far outside the 45-day limitation period. Thus, the only issue preserved by the parties was whether the medical bill was submitted for payment in a timely manner as required by the Act. IBEW argued ALJ Hajjar arbitrarily and capriciously rendered a decision regarding the relatedness of chronic kidney disease

when that issue had not been raised, litigated, or preserved for a decision by the parties. IBEW asserted its due process rights were violated when ALJ Hajjar rendered a decision on matters not litigated by the parties and not submitted for a decision. It requested the Board find ALJ Hajjar improperly decided an issue that had not been submitted for a decision and in doing so abused her discretion and violated its due process rights.

Notably, in his brief, Peck requested the Board remand with instructions that the bill from Kidney Specialists of Paducah be found untimely submitted and that neither party is responsible for the bill associated with the January 19, 2022, date of service, and any reference to the work-relatedness or lack thereof of any treatment by the Kidney Specialists of Paducah in either the opinion or in the order sustaining the Petition for Reconsideration be found to be patent error.

On November 8, 2022, IBEW filed a medical fee dispute contesting bills received from Kidney Specialists of Paducah PLLC.

On August 1, 2023, Peck filed a medical fee dispute raising IBEW's repeated failure to pay for the treatment of his work-related injuries. A supplemental medical fee dispute sought referral to the Commissioner. Peck raised as an issue IBEW's failure to pay Dr. Ruxer's medical bills and failure to reimburse Peck for payment of certain medical bills and compensate him for his mileage.

On August 7, 2023, IBEW filed a medical fee dispute regarding payment of Peck's mileage and payment of the bills from Dr. Ali and Mercy Health. IBEW contended Peck did not timely submit his mileage request and the two

medical providers did timely submit their bills. On October 5, 2023, IBEW filed a medical fee dispute regarding bills paid by Anthem which Peck contended should be paid by IBEW.

In accordance with the positions taken in the parties' briefs, on October 27, 2023, this Board issued an Opinion Vacating in part and Remanding holding as follows:

> On appeal, IBEW argues, and Peck agrees, the underlying issue of the causation and work-relatedness of the kidney condition was not preserved as an issue for the ALJ to decide. The only issue for the ALJ to decide was whether the bill for kidney treatment was timely submitted within 45 days after the date of service. Neither Peck nor IBEW submitted evidence, nor sought a determination regarding work-relatedness or causation of the condition. As we have frequently held, 803 KAR 25:010 §13(12) specifically states, "[o]nly contested issues shall be the subject of further proceedings." Work-relatedness of the kidney condition was not preserved for decision for the ALJ and was not ripe for her to decide.
>
> The Kentucky Court of Appeals held in Sargent & Green Leaf v. Quillen, 2010-CA-001612-WC, rendered February 11, 2011 (Designated Not to be Published), Sargent & Green Leaf was precluded from challenging a physician's report after final hearing, noting no objection was filed prior to submission of the case for decision. The Court of Appeals explained a challenge to a physician's testimony, raised after the final hearing and not addressed at the BRC, was not timely, and therefore it was barred. Although that case involved a party failing to preserve an issue, it goes to the core of the current case. That is, the issues of causation and work-relatedness were not preserved for decision by the ALJ, and therefore she was precluded from deciding the issues. The only issue pertaining to kidney treatment was the timeliness of the submission of a bill for that condition. In her decision, the ALJ noted the bill was not timely submitted, but she found it non-compensable based upon work-relatedness and causation. Since the

> ALJ improperly issued a determination on an issue that was not before her, we vacate that portion of her decision. However, the ALJ appropriately held the bill for kidney treatment was non-compensable because it was not timely filed within 45 days as required by KRS 342.020.

The Board vacated ALJ Hajjar's determination of the work-relatedness and cause of Peck's alleged kidney condition. The remainder of ALJ Hajjar's determinations were not disturbed. The claim was also remanded for consideration of the pending medical disputes unaffected by the decision.

On November 9, 2023, IBEW filed a medical fee dispute asserting the medical providers, Dr. Ali and Mercy Health, did not submit their bills within 45 days as required by the statute and Peck did not submit certain bills within 60 days and timely request payment of mileage.

Additional medical fee disputes were filed on December 23, 2023, and January, February, and March 2024.

The March 7, 2024, Benefit Review Conference ("BRC") Order identifies the medical providers whose treatment is at issue and the contested issues reads as follows: "Dr. Jeremy Webb, Dr. John Ruxor [sic] at Elite Pain & Spine, Mandy Coomer at New Life Medical Massage, Mercy Health, Dr. Shaukat Ali at Kidney Specialists of Paducah, PLLC." The BRC Order also reflects the hearing was waived and briefs, if desired, were to be filed by April 8, 2024, and the case to be submitted as of March 15, 2024.

On March 15, 2024, counsel for the parties provided an Updated Joint Statement of Contested Issues identifying the medical fee disputes which each contends is ripe for a decision.

In a May 7, 2024, Opinion and Order on Remand, ALJ Allen dealt with all medical fee disputes pending at that time by providing the following analysis which, in relevant part, is set forth *verbatim*:[1]

> …
>
> The Peck is obligated to present medical evidence to overcome expert medical testimony on issues of causation, which are not apparent to a layperson. Kingery v. Sumitomo Electrical Wiring, 481 S.W.3d 492 (Ky. 2015).
>
> Ultimately, it is the employer's responsibility to pay for the cure and relief of the effects of an injury or occupational disease, all medical, surgical, hospital treatment, including nursing, medical and surgical supplies, and appliances as may be reasonably be required at the time of the injury and thereafter during disability. KRS 342.020. Treatment which is shown to be unproductive or outside the type of treatment generally accepted by the medical profession is unreasonable and non- 3 compensable. This finding is made by the Administrative Law Judge based upon the facts and circumstances surrounding each case. Square D Company v. Tipton 862 S.W.2d 308 (Ky. 1993).
>
> Kentucky law adopted the current treatment guidelines (ODG) published by MCG Health via 803 KAR 25:260 on June 2, 2020, to become effective September 1, 2020. In pertinent part, 803 KAR 25:260 §3, paragraphs (1)-(12) provide the applicability of the Guidelines to the issues in this case.
>
> 803 KAR 25:260 §1(12)(a) provides the following additional definitions for consideration:
>
> (a) "Medically necessary" or "medical necessity" means healthcare services, including medications, that a medical provider, exercising prudent clinical judgment, would provide to a patient for the purpose of preventing,

[1] On the same day as ALJ Allen's decision, IBEW filed a medical fee dispute regarding massage therapy for Peck as well as additional medical fee disputes on June 4, 2024, June 18, 2024, and August 20, 2024, none of which will be discussed herein.

evaluating, diagnosing or treating an illness, injury, disease or its symptoms, and that are:

1. In accordance with generally accepted standards of medical practice;

2. Clinically appropriate, in terms of type, frequency, extent, site and duration; and

3. Considered effective for the patient's illness, injury, or disease.

Moreover, 803 KAR 25:260 §3 (8)(a)-(c), states:

Medical providers proposing treatment designated as "Not Recommended" under the guidelines or not addressed in the treatment guidelines shall articulate in writing sound medical reasoning for the proposed treatment, which may include:

(a) Documentation that reasonable treatment options allowable in the guidelines have been adequately trialed and failed;

(b) The clinical rationale that justifies the proposed treatment plan, including criteria that will constitute a clinically meaningful benefit; or

(c) Any other circumstances that reasonably preclude recommended or approved treatment options.

Finally, when the issue in contest relates to the pharmaceuticals, 803 KAR 25:270 § 3(6) & (7) requires the provider to articulate sound medical reasoning for deviating from the pharmaceutical formulary. The basis to do so may include:

(a) Documentation that reasonable alternatives allowable in the formulary have been adequately trialed and failed;

(b) The clinical rationale that justifies the proposed treatment plan, including criteria that will constitute a clinically meaningful benefit; or

(c) Any other circumstances that reasonably preclude the approved formulary options.

803 KAR 25:195 (5) specifically requires a medical obligor to subject a request for pre-certification of a medical treatment or procedure to utilization review procedures unless the claim is denied as non-compensable. In addition, 803 KAR 25:260(3)(4) requires requests for preauthorization be subject to utilization review. Furthermore, 803 KAR 25:260(3)(3) requires the ODG be applied in the utilization review decision-making process.

The ALJ will address the contested issues numerically in the order they were listed on the Joint Statement filed by the parties.

1. IBEW filed a Form 112 on November 8, 2022, disputing compensability of out-of-pocket expenses and medical bills of Drs. Webb and Ali as untimely and/or unrelated to the work accident. The bills were submitted on November 3, 2022. The ALJ has reviewed the filing and the attachments. The "bills" consisted of notes for treatment on November 4, 2019, December 3, 2019, June 11, 2020, December 7, 2020, May 20, 2021, June 8, 2021, January 19, 2022, and July 11, 2022. There is no indication in the record of when, or if, there were formal billings for these dates of services or if they were ever presented to IBEW or its insurer prior to the correspondence from Peck's counsel to counsel for IBEW. All the "bills" were submitted well after 45 days from the date of services rendered. Pursuant to KRS 342.020 and Farley v. P&P Construction, Inc., 677 S.W.3d 415 (Ky. 2023) the bills were not timely submitted for consideration and payment. Under 803 KAR 25:096, 10(3), neither IBEW nor Peck are responsible for payment of these bills.

2. Peck filed a Form 112 on August 1, 2023, asserting IBEW is obliged to provide physical therapy and epidural steroid injections. Peck requests attorneys' fees and sanctions due to the Defendant-Employer's failure to approve the treatment or file a Form 112 within 30 days. The epidural steroid injections have since been approved. There is a dispute as to whether physical therapy treatment is compensable, and whether sanctions and attorney's fees are proper.

The medical records accompanying the Peck's motion to reopen on indicate on May 16, 2023, Dr. Ruxer ordered

a LESI at the L4/5-disc level and physical therapy. The injection was to take place on May 30, 2023. The front page of the progress noted had handwriting from Dr. Ruxer's office that "approval requested-LESI on May 30, 2023" was being requested. There was no indication the physical therapy was also being requested.

At the time of the motion to reopen, the claim was pending on appeal before the Workers' Compensation Board, and by order dated May 31, 2023, the case was kept in abeyance. At no time was the claim remanded by the Board to an ALJ for further proceedings on the contest.

Ultimately, it appears the injection was approved by the insurer for IBEW via email on August 4, 2023.

Pursuant to 803 KAR 25:096 (8)(1) in a post award case situation, a payment obligor shall tender payment of file a medical fee dispute with an appropriate motion to reopen within 30 days following receipt of the required documentation. In this case, IBEW did neither until August 4, 2023. It had, at the latest, through June 15, 2023, assuming the request for the LESI was received on date of the requesting progress note. The failure to either contest or pay for the procedure renders it compensable to IBEW and its insurer.

As regards the request for physical therapy, the ALJ does not see that it was formally requested on May 16, 2023, although mentioned in the body of the progress note. The request for pre-certification was clearly directed at the LESI and did not mention physical therapy. Thus, the ALJ finds the purported request for physical therapy was never formally presented to IBEW or its insurer and, as such, had no requirement to either pay or contest the procedure. Lawson v. Toyota, 330 S.W.3d 452 (Ky. 2010).

Peck has requested sanctions pursuant to KRS 342.310, and a referral to the commissioner for unfair claim settlement practices act violations. Peck argues such sanctions are especially appropriate because the insurer for IBEW had previously been sanctioned for similar actions.

In this case, the ALJ finds the failure of IBEW, and its insurer, to either obtain utilization review and file a medical dispute or motion to reopen and contest the LESI request is sanctionable under KRS 342.310(1). That section states:

> (1) If any administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, he or it may assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other outgo pocket expenses upon the party who has so brought, prosecuted, or defended them.

In this situation, it appears IBEW essentially did nothing with the request for approval until it ultimately approved the injections several months later for reasons not explained in the evidence. There was no reasonable grounds set forth for the delay in either paying or issuing a denial and contest of the initially rejected injections. Simply because other proceedings in the case were taking place is not a sufficient reason to comply with the regulations regarding prompt payment or contest of a request for precertification.

Pecks counsel is directed to file with the ALJ a bill of costs outlining his request for attorney fees and costs associated with the medical dispute filed August 1, 2023, including a detailed statement the time spent in preparing and filing the dispute, his hourly rate, and any actual costs incurred. This award of sanctions is limited to the contest for the subsequently approved injections only, and should encompass time and costs expended from the filing of the motion to reopen until acknowledgement of approval from IBEW.

The ALJ will not exercise his discretion to refer this matter to the Commissioner for consideration of further unfair claims practices penalties.

3. IBEW filed a Form 112 on August 7, 2023, disputing compensability of out-of-pocket expenses incurred by Peck for treatment with Dr. Ali for chronic kidney disease. The expenses were submitted to IBEW on July 24, 2023. IBEW argues the out of pocket of expenses for treatment with Dr. Ali for chronic kidney disease are unrelated to the work accident. Peck argues his chronic kidney disease was due to long term use of NSAIDS that were required as a residual of his work-related automobile accident in 2012.

The medical evidence is mixed in the matter, however, the ALJ relies upon the notes of Dr. Conyer, Dr. Ali, and the IME report of Dr. Nabert that Peck's chronic kidney disease is not related to the work-related MVA. At best, it appears the condition is related to chronic left knee problems that required daily use of NSAIDS, and ultimately knee replacement. Previously, ALJ Polites found the left knee condition not related to the 2012 work-related MVA.

This determination also resolves contest numbers 4 and 6.

5. IBEW filed a Form 112 on November 9, 2023, disputing compensability of services rendered to Peck by Mercy Health on July 7, 2023, on the grounds a completed statement for services was not submitted within 45 days of the date on which services were provided. A Mercy Health invoice was submitted to IBEW on October 25, 2023.

The bill in this contest listed as service date of July 7, 2023. However, the statement was dated October 5, 2023, far in excess of 45 days. Pursuant to KRS 342.020 and Farley, supra the bills were not timely submitted for consideration and payment. Under 803 KAR 25:096, 10(3), neither IBEW nor Peck are responsible for payment of these bills.

7. IBEW filed a Form 112 on December 13, 2023, disputing compensability of the untimely Mercy Health invoice for services rendered July 7, 2023. The Form 112 also raises an issue as to compensability of out-of-pocket expenses incurred by Peck for massage therapy, which was previously found not medically necessary by a prior ALJ in 2019. There is an issue as to whether massage

therapy is medically necessary under the ODG, and whether the treatment is causally related to the work accident.

IBEW argues massage therapy is not reasonable and necessary based on the medical report of Dr. Whiteacre from March 2, 2018, and the ODG which does not recommend the procedure. It further argues the bills were not submitted for payment within 45 days of the date the treatment was performed.

Peck argues the mere fact a prior ALJ previously found the massage therapy was not compensable based on reasonableness and necessity does not compel a similar finding at present. However, he also argues the bills in question were not submitted within 45 days of the date of service and are non-compensable.

The ALJ has reviewed the filings and agrees the bills were not submitted within 45 days of service and, therefore, pursuant to KRS 342.020 and Farley, supra the bills were not timely submitted for consideration and payment. Under 803 KAR 25:096, 10(3), neither IBEW nor Peck are responsible for payment of these bills.

Having found the current bills in question are not compensable from a procedural standpoint, the issue of reasonableness and necessity is moot.

This same issue was also raised in contest 8. The ALJ has reviewed the filings and agrees the bills were not submitted within 45 days of service and, therefore, pursuant to KRS 342.020 and Farley, supra the bills were not timely submitted for consideration and payment. Under 803 KAR 25:096,10(3), neither IBEW nor Peck are responsible for payment of these bills.

Having found the current bills in question are not compensable from a procedural standpoint, the issue of reasonableness and necessity is moot.

9. IBEW filed a supplement to its prior Forms 112 on February 20, 2024, to dispute additional expenses presented by Peck for massage, which IBEW submits is not medically necessary for cure or relief of the effects of the work accident. IBEW also disputes additional expenses presented by Peck for treatment of chronic

kidney disease, which the IBEW submits is unrelated to the work accident.

As regards the contest of billing for massage therapy, IBEW argues the treatment is not reasonable and necessary, and cites to the ODG in support. Peck argues the ODG does suggest massage treatment for no more than two weeks is appropriate.

The initial contest of this treatment was supported by a report from Dr. Whiteacre from March 2, 2018. The ALJ did not find any updated medical evidence on the issue. The ALJ does not find Dr. Whiteacre's opinion from over 6 years ago probative on the current treatment as regards reasonableness and necessity. Clearly, the appropriateness of treatment at different times can change.

The ALJ has reviewed the ODG under the topic "massage therapy." It states as follows:

"CR Conditionally Recommended

Recommended as an option; may be a first-line or second-line option.

ODG Criteria

Massage therapy may be indicated for 1 or more of the following:

Anxiety and depression associated with cancer treatment (1)

Burn wound treatment (2)

Chronic ankle instability (3)

Knee osteoarthritis (4)

Low back pain, subacute or chronic (ie, duration ≥ 4 weeks) (5) (6) (7)

Neck pain, subacute or chronic (ie, duration ≥ 4 weeks) (8) (9)

Postoperative pain (10) (11)

Massage therapy is NOT recommended for any of the following:

Ankle sprain, acute (12)

Carpal tunnel syndrome (13)

Headache, tension-type and migraine (14)

Hypertrophic scar (15) (16)

Low back pain, acute (ie, duration < 4 weeks) (17)"

The treatment in question was noted to be for the "rt. Side, back, ankle treatment." It does not indicate which ankle but would seemingly relate to the right lower extremity. In this case, the treatment would be for chronic low back pain in excess of 4 weeks in duration. The Guidelines further note therapy was frequently used 1-2 times per week for a duration of 4-8 weeks.

Based on the ODG, massage therapy is appropriate for the lumbar spine and right ankle at the rate of 1-2 times per week for a maximum of 4-8 weeks. To the extent the contested bills fall within these frequency and duration parameters, and were timely submitted, they are compensable. Any billings outside these parameters are unreasonable and unnecessary, and are not compensable.

As to the supplemental contest of medical treatment for chronic kidney disease, the ALJ has determined that condition to not be related to the work injury and, therefore, those bills are not compensable.

10. IBEW filed a supplement to its prior Forms 112 on March 8, 2024, to dispute additional out-of-pocket expenses presented by Peck, which include receipts for massage, a prescription, and pharmacy items. IBEW disputes compensability of massage treatment as not medically necessary. IBEW disputes relatedness of Peck's treatment for chronic kidney disease, for which Peck is prescribed Vitamin D. And finally, IBEW disputes compensability of dentemp one step kit.

IBEW argues the message therapy is not reasonable and necessary, that the Vitamin D is for chronic kidney

issues that are not work related, and the detemp one step kit is not related to the work injury.

Peck argues the bills for massage therapy should be found compensable as should the Vitamin D, but agrees the dentemp one step kit is not compensable.

The ALJ has previously found the massage therapy treatment is compensable at the rate of 1-2 visits per week but for no more than 4-8 weeks. To the extent this treatment falls within these frequency and duration parameters, and billing was timely submitted, it is compensable. Any billings outside these parameters are unreasonable and unnecessary, and are not compensable.

The ALJ has previously found Peck's chronic kidney disease not related to the work injury or treatment. To the extent Vitamin D is being prescribed for the residuals of the kidney disease, it is found not compensable as non-work related.

Finally, the parties agree on the non-compensability of the dtemp kit. Therefore, this expense is not related to the motor vehicle accident of August 2012, and is found non-compensable.

ALJ Allen ordered as follows:

1. The medical dispute is resolved in favor of the respective parties as follows:

On issue 1 of the Joint Statement of Contested Issues, the contest is resolved in favor of IBEW and neither it nor Peck shall be liable for the contested bills.

On issue 2 of the Joint Statement of Contested Issues, the contest regarding the request for a LESI at the L4/5-disc level, the contest is resolved in favor of Peck and IBEW or its insurer is responsible for payment of the procedure. On the issue of sanctions against IBEW and its insurer, the contest is resolved in favor of Peck and he shall file a bill of costs for attorney's fees and costs incurred in the medical dispute filed August 1, 2023, including a detailed statement the time spent in preparing and filing the dispute, his hourly rate, and any actual costs incurred. This award of sanctions is limited

to the contest for the subsequently approved injections only, and should encompass time and costs expended from the filing of the motion to reopen until acknowledgement of approval from IBEW. The request for physical therapy is resolved in favor of IBEW as it was never formally presented to IBEW or its insurer and, as such, had no requirement to either pay or contest the procedure. Lawson v. Toyota, 330 S.W.3d 452 (Ky. 2010).

On issues 3, 4 and 6, of the Joint Statement of Contested Issues, the contest regarding the work relatedness of treatment for chronic kidney disease are resolved in favor of IBEW and it and its insurer are relieved of responsibility of bills for that treatment. The ALJ finds the diagnosis of chronic kidney disease does not relate to the work injury in this case.

On issue 5 of the Joint Statement of Contested Issues, the contest is resolved in favor of IBEW, and neither it nor Peck shall be liable for the contested bills.

On issue 7 of the Joint Statement of Contested issues, the contest is resolved on favor of IBEW as the bills were not timely submitted for consideration and payment. Pursuant to 803 KAR 25:096, 10(3), neither IBEW nor Peck are responsible for payment of these bills. The issue of reasonableness and necessity is moot.

On issue 8 of the Joint Statement of Contested Issues, the contest is resolved in favor of IBEW as the bills were not timely submitted for consideration and payment. Pursuant to 803 KAR 25:096, 10(3), neither IBEW nor Peck are responsible for payment of these bills.

On issue 9 of the Joint Statement of Contested Issues, the contest is resolved in favor of Peck for massage therapy to the lumbar spine and right ankle at the rate of 1-2 times per week but for a maximum of 4-8 weeks. To the extent the contested bills fall within these frequency and duration parameters, and were timely submitted, they are compensable top IBEW. Any billings outside these parameters are unreasonable and unnecessary and are not compensable to either Peck or IBEW.

As regards that part of Joint Statement of Contested Issue 9 relating to supplemental contest of medical

> treatment for chronic kidney disease, that contest is resolved in favor of IBEW as the ALJ has determined that condition to not be related to the work injury.
>
> On issue 10 of the Joint Statement of Contested Issues regarding massage therapy, the contest is resolved in favor of Peck for massage therapy to the lumbar spine and right ankle at the rate of 1-2 times per week but for a maximum of 4-8 weeks. To the extent the contested bills fall within these frequency and duration parameters, and were timely submitted, they are compensable to IBEW. Any billings outside these parameters are unreasonable and unnecessary and are not compensable.
>
> As regards that part of Joint Statement of Contested Issue 10 on the use of Vitamin D, the contest is resolved in favor of IBEW to the extent Vitamin D is being prescribed for the residuals of the kidney disease, which was found not to be work related.
>
> As regards that part of Joint Statement of Contested Issue 10 on the dtemp kit, the contest is resolved in favor of IBEW as this expense is not related to the motor vehicle accident of August 2012.
>
> 2. All motions for approval of attorneys' fees shall be filed within 30 days of final disposition of this Opinion.

Peck filed a Petition for Reconsideration addressing two issues. First, Peck requested ALJ Allen clarify he is entitled to massage therapy. Next, Peck took issue with ALJ Allen's finding Peck's kidney problems are not related to the work-related MVA. Peck cited to Dr. Warren Bilkey's reports and the records of the physicians with the Orthopaedic Institute of Western Kentucky, Drs. William R. Adams, II, Brian S. Kern, Clint Hill, and Ruxer which establish he was taking Diclofenac, an NSAID, as part of his treatment of the work-related injuries. Peck argued Diclofenac prescribed by the physicians at the Orthopaedic Institute of Western Kentucky was prescribed for pain caused by the work-related MVA. Since Diclofenac damaged his kidneys, Peck argued the treatment with Dr. Ali should be

found compensable as the treatment is a natural consequence of his work injuries. Peck sought additional findings of fact regarding the ongoing prescription of NSAIDs prescribed by Drs. Adams, Kern, Hill, and Ruxer as treatment for his multiple work injuries and requested a finding his treatment with Dr. Ali is compensable.

ALJ Allen's May 28, 2024, Order overruling Peck's Petition for Reconsideration is set forth *verbatim* as follows:

> Plaintiff has petitioned for reconsideration in of the ALJ's Opinion on Remand rendered May 4, 2024. Plaintiff has asserted two errors for reconsideration: the first requests clarification on the entitlement to reimbursement of expenses for massage therapy visits as regards the number of visits over the period of time in question. The second error requests the ALJ to review medical evidence and change his findings regarding the causation of his chronic kidney disease to determine it was caused by the work-related MVA which is the subject of this claim. Defendant has responded to the petition with no objection to clarification as to the entitlement to reimbursement expenses for massage therapy but has objected to the reconsideration of medical evidence and changing the ALJ's determination on the causation of Peck's chronic kidney disease.
>
> KRS 342.281 permits the ALJ to correct errors patently appearing on the face of the award, order, or decision. This is not limited to correction of only clerical errors. *Commonwealth Department of Mental Health v. Robertson*, 447 S.W.2d 857 (Ky. 1969). The request for clarification of the ALJ's award is akin to a request for additional findings. While the ALJ believes he was clear in his opinion, this portion of the petition for reconsideration is sustained, and he will address the issue raised by Peck.
>
> Here, the issue regarding reimbursement for massage therapy and travel to obtain the treatment were raised by four separate contests as follows: a contest dated December 13, 2023 for services rendered on November 1 and 15, 2023; a contest dated January 30, 2024 for

> services rendered December 1, 2023; a contest dated February 20, 2024 for services rendered January 5, and January 29, 2024, and a contest dated March 8, 2024 for services rendered February 26, 2024.
>
> As the ALJ found in his Opinion, the ODG conditionally recommended massage therapy for conditions consistent with Peck's complaints for no more than 4-8 weeks in duration at the rate of 1-2 times per week. In this case, the initial visit was on November 1, 2023. Hence, the "clock" for the 4-8 weeks of treatment started on that date. The time for these treatments would correspondingly end on December 26, 2023. During this period, Peck obtained treatments on November 1 and 15, 2023 and December 1, 2023. Therefore, he is entitled to reimbursement for treatment for massage therapy visits for those dates only, together with any transportation expenses incurred in obtaining that treatment. The remainder of the visits fall outside the time frame of compensable treatment identified in the ODG and are non-compensable.
>
> As regards Peck's second assignment of error in the petition for reconsideration, it requests the ALJ revisit the evidence in the matter and come to a different determination. This is not permitted by KRS 342.281. Wells v. Beth-Elkhorn Coal Corp., 708 S.W.2d 104 (Ky. App. 1985). Moreover, the ALJ explained the reasoning for his determination based on medical opinions in the record he relied upon. Peck is simply requesting the ALJ again address the evidence and come to a different opinion as to medical causation. Therefore, this portion of the petition for reconsideration is overruled.

On appeal, Peck first argues ALJ Allen erroneously declined to make additional findings of fact and to review the multiple treatment records showing his use of NSAIDs for treatment of his work injuries resulted in damage to his kidneys. Peck seeks remand for additional findings since ALJ Allen failed to correct a patent error appearing on the face of the Order. According to Peck, the records of the

various physicians treating his work-related injuries establish NSAIDs were prescribed for problems caused by those injuries.

Peck contends that initially ALJ Allen made the same mistake as ALJ Hajjar when she found NSAIDs were for treatment of his chronic left knee problem found by ALJ Polites to be a non-work-related condition. Peck points out Celebrex, another NSAID, was prescribed by multiple physicians at the Orthopaedic Institute of Western Kentucky, who had performed various surgeries, as pain management modalities for Peck's work-related injuries.

Peck also contends Drs. Austin Nabet and Bill Conyer erroneously opined his need for NSAIDs constituted treatment of his left lower extremity. Peck argues his treating physicians prescribed Diclofenac for the pain caused by his work-related MVA resulting in damage to his kidneys. Thus, the treatment with Dr. Ali is compensable. Peck requests the Board determine ALJ Allen did not understand nor review the history relating to the need for Diclofenac and Celebrex for the cure and relief of his work injuries. Thus, he requests the Board vacate ALJ Allen's decision and remand for additional findings of fact on this issue.

ANALYSIS

This claim has a long, tortuous, and, to a large extent, unnecessary, history. Notably, the records date back to 2012 when Peck sustained injuries arising out of an August 2, 2012, work-related MVA. The claim was not filed until August 1, 2014. Thus, at the time of ALJ Allen's decision, he was faced with reviewing over 12 years of medical records. Although we are sure ALJ Allen reviewed the voluminous medical records, our decision must be based on the contents of his

decision. In reading the May 7, 2024, decision, we are unable to discern what specific medical records ALJ Allen reviewed in reaching his conclusion. In his preamble to the analysis in his decision, ALJ Allen did not summarize any of the medical records. The same holds true for the analysis portion of his decision.

The only issue on appeal relates to ALJ Allen's determination concerning the compensability of Dr. Ali's bills discussed in numerical paragraph 3 on page 7 of the May 7, 2024, decision. In that paragraph, ALJ Allen noted IBEW was contesting the compensability of out-of-pocket expenses incurred by Peck for treatment with Dr. Ali for chronic kidney disease. After providing a one line sentence identifying each parties' argument, ALJ Allen stated he relied upon the notes of Drs. Conyer and Ali along with Dr. Nabet's IME report in finding Peck's chronic kidney disease is not related to the work-related MVA. Based on those records, he concluded Peck's kidney disease is related to non-work-related chronic left knee problems requiring daily use of NSAIDs and ultimately a knee replacement. ALJ Allen noted ALJ Polites had previously found Peck's left knee condition is unrelated to his work-related 2012 MVA. ALJ Allen generally refers to the records and reports of Drs. Conyer, Ali, and Nabet but does not cite to the specific portions of the records upon which he relied. There is no reference to dated medical opinions in the records generated by the three doctors as support for his decision. ALJ Allen provided no summary of those records and did not identify any specific portion of those records which support his conclusion that the treatment of Peck's kidneys is not related to the 2012 work-related MVA. Thus, we are unable to determine the

portions of the records of Drs. Conyer and Ali and Nabet's report upon which ALJ Allen relied.

We acknowledge both parties in their briefs to us have cited to numerous records supporting their positions. Additionally, in his Petition for Reconsideration, Peck cited to the records of Dr. Bilkey, Orthopaedic Institute of Western Kentucky, Dr. Hill, Dr. Kern, Dr. Adams, Dr. Ruxer, and the affidavit and records of IBEW regarding the medications prescribed for him during the period of his treatment for his work injuries which support a finding of work-relatedness. Conversely, IBEW cites to the records of Drs. Conyer, Kyle Parrish, Kern, Webb, and Ali, as well as Dr. Nabet's report as support for a finding of non-work-relatedness. However, for us to sift through the doctor's records in order to find support for ALJ Allen's decision would constitute fact-finding, a task solely within an ALJ's province. ALJ Allen is the one who must inform the parties and this Board of the actual medical records and opinions upon which he relied in reaching a decision and not generally state he relied upon the records and reports of various doctors in reaching his conclusion. Merely stating he relied upon the notes of Drs. Conyer and Ali and the opinions set forth by Dr. Nabet in his report is insufficient. Instead, ALJ Allen must cite to specific portions of the records upon which he relied in reaching his decision i.e., the date and portion of the doctors' records which swayed his ruling. Similarly, the specific opinion of an evaluating physician which ALJ Allen found probative must also be set forth.

Within his May 28, 2024, Order ruling on Peck's Petition for Reconsideration, ALJ Allen does not provide any additional support for his May 7,

2024, decision. In the May 28, 2024, Order, overruling Peck's Petition for Reconsideration requesting he review the medical evidence and come to a different determination regarding the compensability of Dr. Ali's bills, ALJ Allen merely stated such action is not permissible.

Arnold v. Toyota Motor Manufacturing, 375 S.W.3d 56, 61-62 (Ky. 2012) is instructive. There, the Kentucky Supreme Court stated:

> Mindful that Chapter 342 and the Kentucky Constitution require review of decisions in post–1987 workers' compensation claims by the Board, the Court of Appeals, and the Supreme Court, [footnote omitted] when requested, we conclude that KRS 342.275(2) and KRS 342.285 contemplate an opinion that summarizes the conflicting evidence concerning disputed facts; weighs that evidence to make findings of fact; and determines the legal significance of those findings. Only when an opinion summarizes the conflicting evidence accurately and states the evidentiary basis for the ALJ's finding [footnote omitted] does it enable the Board and reviewing courts to determine in the summary manner contemplated by KRS 342.285(2) whether the finding is supported by substantial evidence and reasonable. [footnote omitted]

Although ALJ Allen identified in a general sense medical records of various doctors upon which he relied, he did not provide the dates or cite to the specific opinions of the doctors set forth in those records. Consequently, we are unable to determine the specific records upon which ALJ Allen relied, and whether substantial evidence supports his finding Dr. Ali's treatment is not compensable.

The Kentucky Court of Appeals stated in Bluegrass Rehabilitation Center v. Miles, Claim No. 2013-CA-000973-WC, rendered July 25, 2014, Designated Not To Be Published, as follows:

> Instead, the ALJ's opinion is simply conclusive, stating that he considered the evidence without any explanation of how he did so. As a result, the record does not contain the evidentiary basis for the ALJ's findings so as to allow for a meaningful review of this case. We believe the Board erred in affirming the ALJ's decision, since the ALJ did not make sufficient findings to support his award of PTD benefits.

Slip Op. at 5.

Again, although ALJ Allen stated he relied upon the records of Drs. Conyer and Ali along with Dr. Nabet's report, he did not cite the portions of each of those records and the opinions expressed within those records upon which he relied. Consequently, remand is necessary. Moreover, ALJ Allen must also identify the medical records he reviewed in weighing the validity of each parties' argument. On remand, while ALJ Allen does not have to recite with specificity the contents of all the medical records, he must identify the records he reviewed in arriving at his decision.

Where conflicting evidence exists regarding an issue preserved for determination, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Likewise, the ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Id. at 16; Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties

are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

The following language in Ford Motor Company v. Brown, Claim No. 2021-SC-0051-WC, rendered February 24, 2022, Designated Not To Be Published, is also instructive:

> Suffice it to say, the Board may not hypothecate alternate inferences or interpretations of the evidence to reverse an ALJ's finding of fact. *Miller*, 473 S.W.3d at 629. Nor may it make its own findings. KRS 342.285(2). It must be remembered that by its very definition, substantial evidence is evidence fit to induce conviction in the minds of reasonable men. Nonetheless, "it is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an [ALJ's] finding from being supported by substantial evidence." *Ky. State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 307 (Ky. 1972) (internal quotation and citation omitted).

Slip Op. at 5.

The above language is applicable in the case *sub judice*, as we are not permitted to guess which portions of the records of Drs. Conyer and Ali upon which ALJ Allen relied in arriving at his decision resolving the disputed issue. The same

holds true for Dr. Nabet's opinions expressed within his report. This Board does not enjoy the authority to sort through his medical report and cite the specific portions which support ALJ Allen's decision.

Accordingly, those portions of ALJ Allen's May 7, 2024, decision resolving the compensability of Dr. Ali's services and bills and the May 28, 2024, Order reaffirming his decision on the issue are **VACATED**. This claim is **REMANDED** for additional findings of fact and a decision as to the compensability of Dr. Ali's services and the bills Peck incurred due to chronic kidney disease in conformity with the views expressed herein. We express no opinion as to the outcome. We also emphasize ALJ Allen is not required to summarize over 12 years of Peck's medical records. Rather, he must only set forth the evidence and cite to the specific medical evidence he found most probative in reaching his decision.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON GEORGIE GARATT **LMS**
109 S 4TH ST P O BOX 1196
PADUCAH KY 42002

COUNSEL FOR RESPONDENT:

HON LYN POWERS **LMS**
1315 HERR LN STE 210
LOUISVILLE KY 40222

RESPONDENTS:

DR JEREMY WEBB **USPS**
BAPTIST HEALTH MEDICAL
GROUP FAMILY MEDICINE
627 W FAIRVIEW AVE
EDDYVILLE KY 42038

DR JESSICA LITTLE **USPS**
1029 MEDICAL CENTER CIR STE 401A
MAYFIELD KY 42066

DR JOHN RUXER **USPS**
ELITE PAIN & SPINE
4645 VILLAGE SQUARE DR STE C
PADUCAH KY 42001

KIDNEY SPECIALISTS OF PADUCAH PLLC **USPS**
1532 LONE OAK RD STE 315
PADUCAH KY 42003

MANDY COOMER **USPS**
NEW LIFE MEDICAL MASSAGE
222 CROOKED OAK LOOP
BENTON KY 42025

MERCY HEALTH **USPS**
11511 REED HARTMAN HIGHWAY
CINCINNATI OH 45241

ADMINISTRATIVE LAW JUDGE:

HON GREG ALLEN **LMS**
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601