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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000855-WC

SUMITOMO ELECTRIC WIRING — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-89-43931

SHEILA WOOSLEY KINGERY;
DR. TODD DOUGLAS; HON. JANE RICE
WILLIAMS, ADMINISTRATIVE LAW JUDGE;
And THE WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

MOORE, JUDGE: Sumitomo Electric Wiring appeals a decision of an administrative law judge (ALJ), as affirmed by the Workers' Compensation Board, resolving a medical fee dispute in favor of its former employee, Sheila Kingery. Upon review, we reverse.

FACTUAL AND PROCEDURAL HISTORY

Sheila Kingery received a workers' compensation award in 1992 for suffering an injury characterized as a "cervical and thoracic spine strain or sprain superimposed upon pre-existing degenerative changes in her cervical spine" while working in the course and scope of her employment with Sumitomo in 1989. Kingery is a very short woman, approximately 4'8" tall, and her injury was primarily caused by overhead lifting, which was difficult for her because of her height. The ALJ who entered Kingery's award assessed a 15% permanent occupational disability rating and awarded Kingery corresponding income and medical benefits. Nevertheless, the ALJ further stated in an accompanying opinion that he did not believe Kingery's injury would have more than a minimal occupational impact or would prevent Kingery from continuing to work for Sumitomo.

In 2012, Sumitomo filed the instant matter to dispute liability for expenses Kingery had incurred for office visits with her treating physician, Dr. Todd Douglas, and for ongoing prescriptions for Lorcet, Skelaxin, Celexa, and Xanax she had been receiving from Dr. Douglas. In its motion to reopen Kingery's award for this purpose, Sumitomo made two arguments: first, that these office visits and prescriptions were not related to any condition caused by Kingery's 22-year-old work injury; second, that the office visits and prescriptions were not reasonable or necessary for the cure and/or relief of her work injury.

With that said, there is little post-award medical evidence of record describing the status of Kingery's 1989 work injury; or any treatments she might have received for it; or the general condition of her body in the area of her injury since the date of her award. The medical evidence consists only of 1) a December 29, 2011 report by Dr. David Randolph (an expert who testified on behalf of Sumitomo); 2) Dr. Randolph's deposition testimony; and 3) two treatment notes from Dr. Douglas.

Dr. Randolph's December 29, 2011 report contains a review and summary of forty of Dr. Douglas's treatment notes regarding Kingery from 1999 and 2011, none of which are of record.[1] That aside, Kingery has never contested any portion of Dr. Randolph's review and summary. His review and summary make the following points:

- Kingery's weight gradually increased from approximately 178 pounds in 1992 to 255 pounds in 1999 and eventually to 270 pounds in 2011. Because she is only 4'8", this amount of weight rendered her morbidly obese;
- Kingery complained to Dr. Douglas on February 23, 1999, that she was "in pain . . . overdid it and hurt back, woke up with headache last 3 days";
- Dr. Douglas noted on November 19, 2004, that Kingery's back pain was "likely exacerbated by weight," and that Kingery stated that she would "like to have a wheelchair";

[1] Dr. Douglas also did not testify in this matter.

- Dr. Douglas took note of Kingery's subjective complaints of pain on several occasions between 1999 and 2011, but found no objective abnormalities regarding Kingery's neck, thoracic spine, or upper extremities and cited no objective link on any occasion between Kingery's subjective complaints of pain and her 1989 work injury;
- Dr. Douglas's treatment, according to his notes, was directed toward Kingery's lower back, anxiety, stress and depressive symptoms; and
- Dr. Douglas prescribed Kingery the various pain medications at issue in this matter, but did not have any specific plan for treating her condition.

The December 29, 2011 report also includes the results of Dr. Randolph's physical examination of Kingery and his consequent medical opinion that none of Kingery's current problems or complaints involving her cervical and thoracic spines relate to or were caused by her 1989 work injury. In his deposition testimony, Dr. Randolph further discussed the medical bases for the findings he made in his December 29, 2011 report, and he reiterated his medical opinion regarding Kingery's condition. Kingery did not cross-examine Dr. Randolph or otherwise challenge his testimony.

Next, Dr. Douglas's treatment note from February 1, 2012, does not discuss any objective findings or any of Kingery's medical history relating to the general condition of Kingery's body in the area of her 1989 work injury; it merely recites Kingery's subjective complaints of pain. To that effect, it relates that Kingery "complained of back pain," was "tender @ thoracic spine, tender @

lumbar spine, decreased flexion, decreased extension and decreased rotation," and further states:

> [Kingery] presented with back pain. Patient says having progressively worseing [sic] pain. Her pain medication has not really seemed to help as much lately, Says [sic] starts in low back and moves all the way up to the top. Could not stand the pain any longer, and finally went to ER. Did not get any X-rays doine [sic], but says they gave her a "pain shot", dose of muscle relaxer, and put her on duragesic patch and told her to stop her hydrocodone. Says the first day she did really well, but it was in an awkward location and moved it yesterday, and since then the pain has been severe again. Says pain is "throbbing" Seemed [sic] to tolerate OK. Has chronic back pain from. [sic]

Finally, Dr. Douglas's February 29, 2012 treatment note also discusses Kingery's subjective complaints of pain and provides that Kingery was "tender @ thoracic spine, tender @ lumbar spine, decreased flexion, decreased extension and decreased rotation." It also states:

> [Kingery] presented with back pain. Patient in for follow up on her back pain. Has been under a worker's comp claim for some time, but her carrier is now contesting, and may lose her coverage. Says her initial injury was more than 20 years ago, and has not been back to work. Has pain in low back, but worse in thoracic area. Says pain is constant, and significantly limits her activities. Says hard time even standing long enough to do dishes. Says pain unbearable at times, even with meds. The lorcet did not seem to be giving her any relief, and was tried on a duragesic patch thru the ER. She gave it a try for over a month, but even with special tape, had a hard time to get it to stay on, and when came [sic] off, her pain was much worse. Skelaxin also seems to really help, and has been on lyrica recently as well. Not being able to work, and decreased income causes her a lot of stress, and on celexa and xanax. She is still waiting on

> disability hearing. Has been seeing Fairview Clinic for diabetic care, as [sic] no insurance.
>
> . . .
>
> **Patient instruction**:
>
> Have recommended that she consider getting another opinion from a specialist, as she may lose her Worker's Comp coverage soon. May be able to help better with her pain.

Aside from the above, the only other evidence introduced in this matter was Kingery's testimony taken over the course of a deposition and a formal hearing. The ALJ's December 3, 2012 opinion in this matter accurately summarizes the extent of this evidence as follows:

> [Kingery] is currently 48 years old and is married but separated from her husband. She has two adult children and no dependents. She has no income and no vehicle and depends on her family members to drive her. [Kingery] had worked for [Sumitomo] for approximately a month at the time of her injury and worked very little for [Sumitomo] following the injury. Shortly thereafter she works [sic] for a company called Life Skills for a couple of months. She described this as a company that employed people specifically who suffer from disabilities. She was not successful with this job endeavor and has not attempted to work since that time.
>
> In describing her health condition, [Kingery] stated that she has become overweight weighing approximately 269 pounds. She is diabetic and has a heart condition. She has breathing problems which she has had all of her life but these have progressed through the years. She has high blood pressure and high cholesterol. Because she has no income, she treats with Fairview Community Clinic in Morgantown where she sees Dr. Curry. She has had numerous hospitalizations related to breathing problems and congestive heart failure.

> [Kingery] described the work injury that has affected her upper back and neck. Over the years she has treated with Dr. Wan and has seen the neurosurgeon Dr. Schwenk who recommended against surgery. She also treated with Dr. Woodward.[2] Rather than improving, her pain has worsened.
>
> [Kingery] noted that prior to a fall within the past year, she had never had low back pain and any notations in the medical records indicating low back pain prior to 2011 were mistakes. Dr. Douglas treated her for both her back problems and numerous other health problems. She treated approximately every three or four months with Dr. Douglas. However, Dr. Douglas has merged with another clinic and she no longer treats with him. Dr. Douglas had indicated that he would refer her to another physician but that he has not done so.
>
> Comparing the pain in her neck and low back, [Kingery] states that the neck pain is the worse of the two. She states that her pain has worsened over the years. The medications tend to dull the pain but it is always there. She is under restrictions to lift no more than 10 pounds.
>
> Plaintiff discussed that while Dr. Douglas treated her for many conditions, he separated her office visits that were for treatment related to the work injury from other visits to treat non work-related conditions.
>
> The hearing transcript documents some discussion by [Kingery] and defense counsel prior to the hearing regarding her current difficulties with finding a treating physician.

With the above in mind, the ALJ resolved this medical fee dispute in favor of Kingery. The ALJ reasoned:

> [Kingery] testified that she has never been free from pain in her neck and upper back since the work injury. She no longer treats with Dr. Douglas and is very concerned about finding treatment for her condition. I am more

[2] According to the record, Dr. Mark Woodward is a chiropractor.

> persuaded by [Kingery's] testimony that her neck and back pain are, at least in part, related to the work injury. Furthermore, while there is very likely a more favorable treatment plan for [Kingery], I find the opinion of Dr. Randolph that she requires no treatment at all for her work-related condition to be unreasonable based on the testimony from Plaintiff as noted above. I, therefore, find that treatment of James T. Douglas, M.D., including office visits and ongoing prescriptions for Lorcet, Skelazin [sic], Celexa, and Xanax was reasonable and necessary.

Thereafter, Sumitomo filed a petition for reconsideration. Sumitomo pointed out that Dr. Randolph's expert medical testimony and report explained that no causal relationship existed between Kingery's current complaints of back pain and her 1989 work injury, and that his testimony and report had gone unchallenged. Sumitomo argued that it was therefore inappropriate for the ALJ to disregard that evidence and instead find in favor of Kingery based upon Kingery's own lay testimony. In overruling Sumitomo's petition, however, the ALJ explained in relevant part:

> The fact-finder lacks authority to reject uncontradicted evidence absent a sufficient explanation of the reasons for doing so. *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184 (Ky. App. 1981). As stated in the Opinion, I found plaintiff to be a credible witness when she stated her current pain, particularly in her neck, has been constant since her work injury and that the treatment has been beneficial.
>
> Dr. Randolph, on the other hand, found not only that Plaintiff's injury would not require treatment 23 years later, he was skeptical that her original injury was related to her work for Defendant Employer. This issue has long been settled since ALJ Lovan found plaintiff's injury to be work related in 1992. This statement by Dr. Randolph

> led to my rejection of his opinion about her current condition and treatment.

Subsequently, Sumitomo filed a petition for review with the Workers' Compensation Board, and the Board affirmed. In particular, the Board agreed that Kingery's own testimony that her current pain had been constant since the date of her injury and that Dr. Douglas's treatment and her prescriptions had provided some benefit constituted substantial evidence capable of supporting the ALJ's finding of compensability. Moreover, the Board held: "Sumitomo's assertion Dr. Randolph's report and deposition are the only medical evidence of record and a contrary result is compelled, is incorrect. Sumitomo failed to note the office notes of Dr. Douglas which it filed with the motion to reopen."[3]

This appeal followed.

ANALYSIS

The crux of Sumitomo's arguments involve Kingery's burden of proof as the claimant in this medical fee dispute. Sumitomo asserts that Kingery's own testimony, and the office notes of Dr. Douglas which Sumitomo filed with its motion to reopen, did not constitute the kind of evidence Kingery was required to put forth to sustain her burden of demonstrating her appointments with Dr. Douglas and prescriptions for Lorcet, Lyrica, Skelaxin, Celexa and Xanax were related to her work injury (*i.e.*, her 1989 "cervical and thoracic spine strain or

[3] "The office notes of Dr. Douglas" referenced by the Board are the February 1, 2012, and February 29, 2012 office notes described earlier in this opinion.

sprain superimposed upon pre-existing degenerative changes in her cervical spine") or a condition caused by it. We agree.

When the ALJ and Board found in favor of Kingery, both relied upon *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184 (Ky. App. 1981), to support that a fact-finder's decision can be upheld on review even though, as here, its findings relative to medical causation contradict the medical evidence of record and instead rely upon lay testimony and inference. The holding of *Mengel* supports that lay testimony and inference may be utilized in this manner, but only in a limited fashion. *Mengel* involved both a work-related injury (which occurred in 1976) and a subsequent incident (which occurred in 1978). At issue was whether the worker's present condition was due to the work-related incident or the subsequent incident, *i.e.*, a question of medical causation. The fact-finder determined that the latter incident caused the worker's condition, disregarding uncontroverted medical evidence to the contrary. This Court reversed and explained that except in situations where causation is apparent (usually matters of observable causation), it must be proved by competent medical evidence and may not be inferred. Specifically, this Court held:

> There are some situations in which a board decision will be upheld on review when the board has made findings contradicting the medical testimony. Those cases usually involve matters of observable causation where the doctors have testified negatively and the board has found causation. See 3 Larson, Workmen's Compensation Law s 79.52 (1981). There are also situations in which the board may ignore medical testimony and rely on lay testimony and its own expertise. But when the question

> is one properly within the province of medical experts, the board is not justified in disregarding the medical evidence. See 3 Larson, supra, s 79.54. Especially in this case, where the causal relationship is not apparent to the layman and where there has been a lapse of time between the initial trauma and the disc operation, we think that the board's decision, based on its own observations and contrary to the medical evidence, was improper.

Id. at 186-87.

A further application of *Mengel* is found in the unpublished case of *Nalley v. Keith Wheatley Const.*, No. 2004-SC-0362-WC, 2005 WL 924394 (Ky. April 21, 2005).[4] There, the claimant sustained a work-related injury in 1992 after falling from a roof and pursuant to a 1995 settlement with his employer his injury was characterized as a "low back injury with pre-existing disc degeneration and stenosis." *Id*. at *1. In 2002, the claimant then sought to reopen his claim to assert a worsening of his work-related injury and to compel his employer to pay for additional medical treatment. However, the claimant presented no medical evidence regarding the progress of his work-related back condition during the period between his initial treatment (1992) and a subsequent "lumbar sprain secondary to a fall" he suffered at home in November, 2001. *Id*. at *2-3. The ALJ and Board nevertheless found in the claimant's favor by inferring medical causation from 1) the claimant's own testimony that his symptoms never went away following the 1992 injury; 2) the claimant's medical records demonstrating a long history of treatment for difficulty with his lumbar spine; and 3) a medical

[4] For this proposition of law, we find *Nalley* to be persuasive authority in this case and proper to cite as it fulfills the criteria of Civil Rule (CR) 76.28(4)(c).

report of Dr. Collis, which recited the claimant's medical history, diagnosed lumbago and lumbar degenerative disc disease, but found the source of the claimant's pain to be unclear. *Id*. at *3-4. Relying upon *Mengel* the Supreme Court reversed, explaining:

> The present case involved a 1992 work-related incident and an incident that occurred in the claimant's home more than nine years later. Under such circumstances, it would not be apparent to a lay person whether the November, 2001, incident represented a worsening of the 1992 injury rather than an entirely separate injury. Furthermore, if the 2001 incident did represent a separate injury, it would not be apparent to a lay person that the claimant's present complaints were linked to the 1992 injury rather than the subsequent incident. Under such circumstances, causation was properly a matter within the province of the medical experts.
>
> The claimant presented medical records concerning the acute treatment of his 1992 injury. Although he maintained that his back had worsened over the years that followed he presented no records of any subsequent treatment until February, 2001, when he saw Dr. Klindt for an acute episode that involved primarily the cervical spine. More significantly, he presented no medical evidence that the November, 2001, incident represented a worsening of the 1992 injury rather than an entirely separate injury or that the proximate cause of his present complaints was a worsening of the 1992 injury rather than an injury he sustained in November, 2001. Not only did the ALJ acknowledge that there was no clear-cut opinion in favor of causation, Dr. Ballard clearly did not think that the claimant's present condition was caused by the 1992 injury. Under the circumstances, the finding in the claimant's favor was unreasonable because no competent medical evidence supported it.

Id. at *5.

Here, a lapse of time amounting to almost 23 years exists between the date of Kingery's award and this medical fee dispute. In 1992, the ALJ noted that Kingery already had pre-existing degenerative changes in the area of her injury when her injury occurred in 1989; furthermore, the ALJ did not believe that Kingery's work injury should have prevented Kingery from continuing to work for Sumitomo or anywhere else at all, let alone for the next two decades. Little is known about the status of Kingery's 1989 work injury, any treatments she might have received for it, or the general condition of her body in the area of her injury since the date of her award. But, Kingery does not dispute that she complained to Dr. Douglas on February 23, 1999, that she was "in pain . . . overdid it and hurt back, woke up with headache last 3 days." Kingery admitted that she suffered a "fall" in 2011 and injured at least one other part of her back as a result. It is also unclear what effect Kingery's weight and two decades have had upon the condition of her back, even if her subjective complaints of pain are taken at face value. Under these circumstances, it is consistent with *Mengel* and *Nalley* to hold, as we are now, that the medical cause of Kingery's complaints of pain would not be apparent to a lay person. It was, therefore, impermissible for the ALJ to rely upon Kingery's lay testimony as a basis for finding that Kingery's current condition and complaints of pain were medically caused by Kingery's 1989 work injury.

Also, if the ALJ had relied upon Dr. Douglas's February, 2012 treatment notes (contrary to the Board's insinuation, nothing in the ALJ's opinion suggests this actually occurred), these treatment notes have no more evidentiary

value than the treatment notes that were erroneously relied upon in *Nally*. They offer no opinion regarding the origin of Kingery's back pain or whether it was medically caused by her 1989 work injury. They merely recite Kingery's subjective complaints of pain and what Kingery told Dr. Douglas about the medical cause of her pain. They further indicate that Dr. Douglas responded by advising Kingery to seek an "opinion from a specialist" regarding her condition or risk "los[ing] her Worker's Comp coverage soon."

Before closing, we will briefly address the points raised by the dissent in this opinion. To summarize, the dissent indicates that in the context of a post-award medical fee dispute the employee has no obligation to prove (with medical evidence or otherwise) that contested medical expenses bear any relationship to a work injury; or, alternatively, that even if this obligation does properly belong to the employee, the employee's own testimony is sufficient. In either event, the dissent maintains that the ALJ in this matter was therefore free to ignore Dr. Randolph's uncontroverted expert medical testimony and find in favor of Kingery. Similarly, the dissent believes that the claimant in *Nalley* only had the burden of proving that his lower back complaints and disability were related to his 1992 work injury because the employee was the one who moved to reopen in that matter, and because the employee had also alleged a worsening of his work injury. We read the implications of the cases relied upon in the dissent much differently.

In *National Pizza Co. v. Curry*, 802 S.W.2d 949 (Ky. App. 1991), for example, the opinion indicates that the employer only "contested the necessity and

reasonableness of the treatment" at issue. *Curry*, 802 S.W.2d at 950. Nothing in *Curry* indicates that the employer also contested whether the proposed treatment related to the work injury. But, *Curry* undermines the dissent's notion that no evidence was required to support the ALJ's decision in favor of the employee. In affirming, the Supreme Court noted that the ALJ's decision in favor of the employee was "supported by substantial evidence." *Id*. at 951.

In *Crawford & Co. v. Wright*, 284 S.W.3d 136 (Ky. 2009), the employer made an adequate *prima facie* showing in a motion to reopen to contest the compensability of certain post-award medical expenses relating to the employee's knees. The ALJ (acting on behalf of the CALJ at the Frankfort motion docket) determined that the employer would be entitled to a summary adjudication if, within 20 days, the employee did not respond to the employer's motion and rebut it with proof from his treating physicians demonstrating "why [the employee's] current bilateral knee problems are causally related to the subject December 3, 1987 work incident." *Id*. at 139. The employee did not tender this evidence within the 20-day deadline and the medical fee dispute was resolved in favor of the employer. In its later review, the Supreme Court determined that the employee was not required to respond to employer's motion or to rebut it with proof, and that the ALJ was not, under the circumstances, authorized to summarily resolve the proceedings in favor of the employer at that particular phase of the proceedings. The Supreme Court did not, however, determine that the employee had no obligation to produce evidence supporting a decision in his favor; to the

contrary, the Supreme Court agreed that the correct disposition was to assign the matter to an ALJ for a review on the merits, and to allow the employee additional time to introduce proof. *Id*. at 141.

In *Mitee Enterprises v. Yates*, 865 S.W.2d 654 (Ky. 1993), the Supreme Court held that it is the employer's burden to file a post-award medical fee dispute within 30 days of receiving a statement for services regarding an employee's medical expenses if it wishes to contest the reasonableness or necessity of those medical expenses. *Id*. at 656-57. *Mitee* does not hold that an employer must do so where the statement for services, on its face, reveals that the medical expenses were nonwork-related. *See* 803 KAR 25:096 § 8(3). And, where an employer does reopen an award for a medical fee dispute, no part of *Mitee* authorizes an ALJ, in the absence of any substantial evidence of work-relatedness, a stipulation of work-relatedness, or a waiver of that issue, to find in favor of an employee regarding the compensability of medical treatment.

Ira A. Watson Dep't Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), is largely a discussion of an employee's burden of proof regarding a claim for either permanent partial disability benefits or permanent total disability benefits, neither of which are at issue here. The dissent cites *Hamilton* for the proposition that an employee's own testimony "is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured." *Id*. at 52 (citing *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979)). While this is true, *Hamilton* does not overrule or otherwise contradict the holding of *Mengel*,

discussed extensively above. Nor, for that matter, do any of the other published cases cited by the dissent.

This, in turn, leads to a discussion of the unpublished case cited by dissent. In *C&T of Hazard v. Stollings*, 2012-SC-000834-WC, 2013 WL 5777066 (Ky. October 24, 2013), an ALJ decided a post-award medical fee dispute in favor of an employee. On appeal, the issue was whether the ALJ erred in placing the burden to prove work-relatedness upon the employer, rather than the employee. *Id*. at *2. Upon review, the Supreme Court determined that in requesting post-award medical treatment, the employee qualified as the party who was defending the award, and "[i]t is not the responsibility of the party who is defending the original award to make the case for the party attacking it. Instead, the party who is defending the original award must only present evidence to rebut the other party's arguments." *Id*.

Reading *Stollings* as a whole sheds further light upon the meaning of the Supreme Court's statement regarding the need to prove work-relatedness. There, the employer initially introduced expert medical evidence indicating that the employee's medical treatment was not related to the work-related injury. *Id*. at *1 (*i.e.*, an opinion from its expert, Dr. Henry Tutt). The employee *rebutted* that evidence with medical testimony from her treating physician, Dr. Katherine Ballard, whom the ALJ relied upon as more credible and persuasive. *Id*. And, the Supreme Court affirmed the ALJ's opinion *because* it was supported by that rebuttal testimony and other substantial evidence of record. *Id*. at *3. Nothing in

the *Stollings* opinion indicates that the employer even contested that the employee had introduced substantial evidence regarding work-relatedness. Thus, for what it is worth,[5] *Stollings* appears to stand for the proposition that an employer has an initial burden to produce substantial evidence of nonwork-relatedness, which triggers a reciprocal burden on the part of an employee to produce substantial evidence in rebuttal. *Stollings* does not conflict with *Mengel* and, in that light, would have no effect upon our holding or any other application to the case at bar.

CONCLUSION

In sum, Kingery failed to produce medical evidence capable of sustaining her burden to prove that her appointments with and prescriptions from Dr. Douglas were causally related to her 1989 work injury, or a condition caused by it. The ALJ's decision to resolve this medical fee dispute in favor of Kingery

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[5] *Stollings* is not binding law, nor do we cite it as having any persuasive value in this matter; indeed, it is contrary to at least two other recent unpublished opinions authored by the Supreme Court on this subject, and in the context of an employer-filed medical fee dispute where the claimant does not allege any worsening of their work-related injury. *See, e.g., American Nursing Care, Inc. v. Jenkins*, 2010-SC-000361-WC, 2011 WL 1103903 (Ky. March 24, 2011) (noting that the employer filed the motion to reopen and medical fee dispute at issue, *id*. at *2, and further noting:

> The employer had the burden in this medical reopening to prove that the proposed surgery was unreasonable or unnecessary. The claimant had the burden to prove causation, i.e., *that the condition for which she sought surgery resulted from the work-related injury*.

Id. at *3 (internal footnotes and citations omitted; emphasis added)); *see also Crystal Springs, Inc. v. Dempsey*, 2008-SC-000405-WC, 2009 WL 735955 (Ky. March 19, 2009) (noting that the employer filed the motion to reopen and medical fee dispute at issue, *id*. at *1, and further noting:

> Although the employer had the burden to prove that a contested post-award medical expense for treating the cardiac arrhythmia, chest pain, or other related symptoms that were present at the time of the award was unreasonable or unnecessary, *the claimant had the burden to show that a condition not present in the initial claim (i.e., hypertension) was work-related*.

Id. at *3 (internal footnote and citation omitted; emphasis added)).

was not based upon substantial evidence. The record does not contain any substantial evidence that would have otherwise allowed Kingery to prevail in this matter. For these reasons, we REVERSE.

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent. The opinion and order affirming the ALJ should be affirmed.

The majority's reasoning is flawed from inception. It relies on *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky.App. 1997), for the proposition that in a post-award medical fee dispute, the claimant bears the burden of proving that the treatment at issue is related to the work injury or a condition caused by it. However, in the recent unpublished case of *C&T of Hazard v. Stollings*, 2012-SC-000834-WC, 2013 WL 5777066 (Ky. 2013), the Supreme Court specifically rejected this same proposition when it clarified *Perkins* did not hold the claimant has the burden to prove his treatment is work-related on a motion to reopen filed by the employer. Noting several unpublished opinions indicate the burden of proof is upon the claimant to show medical expenses were work-related, the Court specifically declined "to consider those cases as persuasive." *Id*. at 2. The Court held the employer "had the burden of proof to show [the claimant's] treatment was unreasonable and not work-related." *Id*.

The Supreme Court's most recent pronouncement is not a departure from existing published case law. The controlling law is "[t]he party responsible for paying post-award medical expenses has the burden of contesting a particular expense by filing a timely motion to reopen and proving it to be non-compensable." *Crawford & Co. v. Wright*, 284 S.W.3d 136, 140 (Ky. 2009). When an employer challenges compensability of medical treatment, "the employer is the 'complaining party' and carries the burden of proving the treatment to be unnecessary." *National Pizza Co. v. Curry*, 802 S.W.2d 949, 951 (Ky.App. 1991) (internal citation omitted). "Medical expenses that a worker submits are presumed to be compensable unless the employer challenges them in a timely manner and proves ultimately that they are not." *Crawford & Co.*, 284 S.W.3d at 141. "KRS 342.020(1) shifts to the employer the burden to prove that contested medical expenses are unreasonable or unnecessary[.]" *Mitee Enterprises v. Yates*, 865 S.W.2d 654, 656 (Ky. 1993).

The majority analogizes this case to *Nalley v. Keith Wheatley Const*., 2004-SC-0362-WC, 2005 WL 924394 (Ky. 2005). It overlooks that in *Nalley*, **the claimant** filed a motion to reopen claiming a worsening work-related condition and, therefore, had the burden of proof to establish his worsened condition was caused by his earlier work-related injury. Under those circumstances, and where the cause of his current complaints was not apparent to a layperson, the claimant was required to present competent medical testimony to establish causation.

In this case, Sumitomo filed the motion to reopen and, therefore, had the burden of proof. The ALJ was not persuaded by Dr. Randolph's testimony in which he expressed skepticism that Kingery's original injury was related to her work for Sumitomo. As correctly pointed out by the ALJ, that issue was conclusively established by the 15% permanent occupational disability benefits award. The ALJ found Kingery to be a credible witness and testimony that her neck pain has been constant since her work injury and treatment persuasive.

KRS 342.285(2) specifically prohibits the Board from reweighing the evidence or substituting its judgment for that of the ALJ with regard to a question of fact. It is well-established that a workers' testimony is competent evidence of her physical condition and it is the ALJ's function to translate the lay and medical evidence. *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). As fact finder, the ALJ was entitled to believe Kingery's testimony regarding her physical condition and continued pain.

This was sufficient to support the ALJ's decision and, therefore, I would affirm.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Joel W. Aubrey Brian D. Wimsatt Louisville, Kentucky	No brief filed.