OPINION ENTERED: AUGUST 31, 2012

CLAIM NO. 200775713

ABEL SACERIO PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

BAKERY CHEF, INC. AKA RALCORP HOLDING;
VASUDEVA IYER, M.D.;
NORTON HEALTHCARE;
MILAGROS RIVERA, M.D.;
NORTON LEATHERMAN SPINE;
PAIN MANAGEMENT KY;
JEWISH HOSPITAL;
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Abel Sacerio ("Sacerio) seeks review of a decision rendered January 3, 2012, by Hon. Chris Davis, Administrative Law Judge ("ALJ"), resolving most of the

issues raised in a medical fee dispute in favor of Ralcorp Holdings ("Ralcorp"). Sacerio also appeals from the order denying his petition for reconsideration entered February 6, 2012.

On appeal, Sacerio argues an injured worker is entitled to treatment by the physician of his choice except under circumstances which were not found to exist in this instance. He also argues the ALJ should not have limited medical care based on crystal ball projections. Finally, Sacerio inexplicably argues the use of the Form 113 physician is not required. Because the ALJ's decision regarding the medical dispute is supported by substantial evidence and a different result is not compelled, we affirm.

A review of the procedural history of this claim is necessary. Sacerio sustained a low back injury on September 19, 2007 while working for Ralcorp. On March 12, 2009, a Form 110 settlement agreement was approved by J. Landon Overfield, ALJ. The settlement was based upon a 5% impairment rating assessed by Dr. Warren Bilkey pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), to be paid at the rate of $44.97 per week for 425 weeks. In his March 11, 2008 report attached to the settlement

agreement, Dr. Bilkey diagnosed Sacerio with a lumbar strain.

On June 1, 2010, Ralcorp filed a motion to reopen, a Form 112 medical fee dispute, and a motion to join additional parties. Ralcorp alleged the following:

> Narcotics are not deemed to be reasonably necessary at this time due to lack of appropriate initial measures. Further, no acute trauma or precipitation fact justifies the emergency room visit. Finally, UR and IME demonstrates [sic] that referral to a neurosurgeon is not reasonably necessary.

In support of its motion, Ralcorp filed three utilization review reports from Dr. Terry Troutt, a physical medicine and rehabilitation physician who performed a records review at Ralcorp's request. Dr. Troutt first stated he did not find treatment with Vicoprofen to be reasonable or medically necessary. He stated the guidelines do not support the long term use of narcotics for subjective low back pain. Dr. Troutt likewise did not recommend referral of Sacerio to a neurosurgeon. Finally, Dr. Troutt opined the emergency room visit of March 23, 2010 was neither reasonable nor medically necessary.

In addition to Dr. Troutt's reports, Ralcorp filed the November 17, 2009 report of Dr. Ellen Ballard who

evaluated Sacerio on that date. Dr. Ballard opined Sacerio is not a candidate for a dorsal column stimulator. She saw no reason for restarting narcotic pain medications. Finally, she stated injections would not be reasonable since he did not respond to them previously.

On July 1, 2010, R. Scott Borders, Acting Chief ALJ, entered an order reopening the claim, and directed the claim be assigned to an ALJ for further proceedings.

Ralcorp filed additional reports by Dr. Ballard who performed a second evaluation on September 27, 2010. She noted Sacerio was no longer employed by Ralcorp, and was working at a desk job. Sacerio continued to take Gabapentin, Hydrocodone and Amitriptyline, in addition to medications for hypertension. She stated Sacerio had a history of back pain with bilateral leg symptoms; an MRI was read as, “relatively normal lumbar spine with annular tear on the right at L4-L5”; and, an EMG was interpreted as suggestive (not diagnostic) of bilateral L5 and left S1 radiculopathy. She noted Sacerio has high blood pressure and high cholesterol unrelated to the injury. Dr. Ballard again opined Sacerio did not need narcotics. She also stated there was no connection between the work injury and the emergency room visit of March 23, 2010. Finally, Dr.

Ballard stated there was no need to refer Sacerio to a neurosurgeon.

In a later report dated October 26 2010, Dr. Ballard stated Sacerio's emergency room visit on October 23, 2010 was precipitated by the fact he ran out of medication, rather than due to an acute exacerbation. She stated the emergency room visit was not medically necessary.

In a report dated November 11, 2010, Dr. Ballard stated, "Mr. Sacerio does not need to be referred to a pain management physician, an orthopedic surgeon, or undergo ongoing physical therapy. It is my opinion this gentleman does not require further treatment."

Sacerio testified at the formal hearing held November 21, 2011. He sustained a low back injury on September 19, 2007 while working for Ralcorp. His job was to make biscuits. At the time of the accident, the bag which caught flakes from the biscuits had fallen. As he attempted to reposition the bag, he experienced low back pain, left leg pain and right leg weakness. He was taken to the hospital by ambulance. Subsequent to the treatment at the hospital, Sacerio began treating with Dr. Warren Bilkey, who he designated as his treating physician by executing a Form 113. His treatment prior to entering the

settlement consisted of physical therapy, epidural injections, home exercises and medications. Epidural steroid injections did not work and caused an elevation in his blood pressure. He last worked at Ralcorp in December 2007, and was unable to continue to work there due to his restrictions. He eventually began working for a different employer in a more sedentary position. Dr. Bilkey eventually released him from his care.

Sacerio later treated with Dr. Rivera who ordered an MRI, and referred him to Dr. Crawford, an orthopedic surgeon with the Leatherman Spine Center, who recommended physical therapy, but no surgery. Sacerio completed a second Form 113 which he provided to Dr. Rivera, but he was unsure whether she ever sent it in. Dr. Rivera also referred him to Dr. Arul Verghis for pain management. Sacerio later returned to treat with Dr. Bilkey, because Dr. Rivera moved away. Sacerio stated a second round of epidural steroid injections provided temporary relief.

Sacerio continues to complain of low back pain radiating into his leg on a constant basis. He stated he sought treatment at the emergency room in March of 2010 because he was in pain and had no medications. At that time, he left work with his subsequent employer to go to the emergency room.

Sacerio filed the records from the emergency room visit on March 23, 2010. Those records reflect Sacerio complained of low back pain with a gradual onset beginning March 22, 2010. The records reflect complaints of pain radiating into the left leg, but no sciatica.

Sacerio filed the report of the MRI performed at the Norton Audubon Hospital on November 13, 2009. That report reflects Sacerio had a disc protrusion to the right at L4-L5, with no evidence of disc herniation.

Sacerio filed the records of Dr. Verghis for treatment administered between July 29, 2010 and October 1, 2010. Dr. Verghis diagnosed Sacerio with a herniated disc at L4-L5, with an annular tear at that level to the right causing L4 nerve root impingement. He noted injections provided satisfactory relief.

Sacerio filed the report of the EMG performed by Dr. Vasudeva Iyer on January 21, 2010. The results of the test were suggestive of mild, chronic lumbosacral radiculopathy involving both sides of the L5, and to the left at S1.

Sacerio filed the December 18, 2010 office note of Dr. Charles Crawford, III, an orthopedic surgeon with the Leatherman Spine Center. Dr. Crawford noted Sacerio was in no acute distress and had a normal gait. He

reviewed the MRI which he opined demonstrated an annular tear at L4-L5 on the right. He further stated Sacerio's symptoms were worse than the findings demonstrated on the imaging studies. He recommended EMG/NCV studies be performed.

Finally, Sacerio filed numerous records from Dr. Bilkey, reflecting treatment from January 15, 2008 through October 20, 2010. On October 20, 2010, Dr. Bilkey stated Sacerio has incapacitating low back pain due to his work injury, and the March 23, 2010 emergency room visit was reasonable, necessary and work-related. He further stated a chronic intake of mild opiate analgesics is reasonable to help control pain and function. He did not believe Sacerio needs to be evaluated by a neurosurgeon. In his note dated November 6, 2010, Dr. Bilkey stated Sacerio needs home exercise, not physical therapy. He also noted Sacerio needs a referral to pain management, but does not need a pain-type stimulator.

In the opinion and order, the ALJ found as follows:

> The issue before the Administrative Law Judge is reasonableness and necessity and work-relatedness of narcotics, emergency room visits, an EMG, neurosurgeon referrals and/or treatment and prescriptions from Dr. Verghis and Dr. Bilkey.

As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. Paramount Foods Inc., v. Burkhardt, 695 S.W. 2d 418 (Ky., 1985).

The Administrative Law Judge has carefully reviewed the evidence and the parties' arguments.

In reviewing this claim the Administrative Law Judge takes note of several important factors. First, other than the annular tear, which is debatable in terms of the symptoms it should or does cause, the Plaintiff does not have a clear diagnosis of any injury beyond a lumbar strain. Second, the Defendant has certainly not, since the date of injury, denied all medical care. This is relevant because it demonstrates that, as I find, the Plaintiff has been given ample opportunities and trials with MRIs and narcotic pain medications to help me formulate an opinion as to their on-going use.

I note that Dr. Bilkey has previously indicated that the Plaintiff should discontinue narcotics and clearly indicated he would no longer prescribe narcotics. It is true that Dr. Bilkey later, to a less degree, backpedaled on this point. It is true that the only diagnosis ever given by Dr. Bilkey was of a low back strain.

Ultimately, given the above, but more importantly and with specific reliance on Drs. Ballard and Troutt I do not believe the Plaintiff requires any on-going prescriptions for narcotics for the work-related low back strain. Since these medicines are not reasonable and necessary they are not compensable.

Likewise, while nothing legally prevents me from finding the ER visits, which were made to obtain narcotics, compensable I find they are not reasonable and necessary, given the above reason, and therefore non-compensable.

Regarding the MRI, EMG and neurosurgical referral there is no evidence of any significant structural or neurological deficit that would require a third MRI or any neurosurgical referral. They are simply excessive and more likely a response to the Plaintiff's continued, extreme symptom claims, which are not wholly accepted. Therefore the disputed MRI, EMG and neurosurgical referral are non-compensable.

Finally, however, it is not my intention to find the Plaintiff has no work-related, on-going pain. I simply find the above treatment is unnecessary. I believe that a referral to a pain management specialist in order to develop a more appropriate treatment plan for him is an excellent idea. It is noted, contrary to the opinions of some, that the injections have been beneficial.

In a post-award medical fee dispute, the burden of proof to determine whether the medical treatment is unreasonable or unnecessary is with the employer while the burden remains with the claimant concerning questions pertaining to work-relatedness or causation of the condition. *See* KRS 342.020; Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993); and National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991).

Because Ralcorp was successful before the ALJ in demonstrating a majority of the contested medical treatment was unrelated, unreasonable and unnecessary, the question on appeal is whether the decision is supported by substantial evidence, and upon consideration of the whole record, whether a finding in Sacerio's favor is compelled. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862

S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ has the discretion and sole authority to reject any testimony and believe or disbelieve parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The ALJ, as fact-finder, 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 adversary party's total proof. Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

An injured worker's right to medical care for a work-related injury is not unfettered. The ALJ has the

right and obligation to determine the compensability of medical treatment based upon the evidence presented. In this case, the ALJ found the contested treatment, except for the referral to a pain management specialist, to be unrelated, unreasonable or unnecessary, and therefore non-compensable.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, supra. Because the outcome selected by the ALJ is supported by the record, we are without authority to disturb his decision on appeal. Special Fund v. Francis, supra.

It is readily apparent the ALJ considered the evidence presented, as indicated above, and found the contested treatment to be unreasonable and unnecessary. It was within his discretion to do so. Although conflicting evidence was presented, it was reasonable for the ALJ to

arrive at the conclusions set forth in his decision. Despite Sacerio's argument that, "medical care should not be determined by an ALJ as if he had a crystal ball," we believe the decision is supported by substantial evidence, and a contrary result was not compelled.

Finally, Sacerio raised an issue concerning the requirement of using a Form 113 physician. This was not an issue decided by the ALJ, nor was it preserved as an issue at the benefit review conference. Therefore, we will not address it.

Accordingly, the decision rendered January 13, 2012 by Hon. Chris Davis, Administrative Law Judge, as well as the order ruling on the petition for reconsideration entered February 6, 2012, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON DOUGLAS LAMB
P O BOX 34275
LOUISVILLE, KY 40232

COUNSEL FOR RESPONDENT RALCORP:

HON J CHRISTOPHER HOPGOOD
318 SECOND STREET
HENDERSON, KY 42420

OTHER RESPONDENTS:

VASUDEVA G IYER, MD
2505 BUSH RIDGE DR, STE A
LOUISVILLE, KY 40245

NORTON HEALTHCARE
DEPT. 86100
P O BOX 36370
LOUISVILLE, KY 40233

MILAGROS RIVERA, MD
2355 POPLAR LEVEL ROAD
LOUISVILLE, KY 40219

NORTON LEATHERMAN SPINE CENTER
210 EAST GRAY ST, STE 900
LOUISVILLE, KY 40202

PAIN MANAGEMENT KY PSC
P O BOX 37192
LOUISVILLE, KY 40233

JEWISH HOSPITAL HEALTHCARE SERVICES
217 EAST CHESTNUT
LOUISVILLE, KY 40201

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
410 WEST CHESTNUT ST STE 700
LOUISVILLE KY 40202