Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 24, 2016

CLAIM NO. 200476983

ARCHWAY FLORENCE INC #3398
D/B/A MCDONALDS/AIK PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

FRANK MIKE BATTAGLIA;
DR. ALLEN RISON; and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING IN PART,
VACATING IN PART & REMANDING

* * * * * *

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

ALVEY, Chairman. Archways Florence, Inc. #3398 D/B/A McDonalds/AIK ("Archways") seeks review of the decision rendered May 12, 2015 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), resolving a medical

dispute in favor of Frank Mike Battaglia ("Battaglia") by finding as follows:

> A Telephonic Benefit Review Conference was held on May 5, 2015. Neither Plaintiff nor Dr. Rison participated in the phone conference. The final hearing was waived and the Medical Fee Dispute was submitted on the record for a decision.
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> Defendant Employer introduced the January 12, 2015 utilization review report of Waldtraut Jedamski, M.D. who reviewed records and found the contested treatment should not be certified. Specifically, he recommended 4 blocks rather than 6 and 4 weeks of therapy rather than 6. He recommended denial of Tizanidine. The records of Dr. Rison were not attached but were summarized by Dr. Jedamski. After careful review of Dr. Jedamski's report, it appears much of his reasoning for denial is based on lack of documentation and verification of specific symptoms. This logic for trimming away at the recommended treatment of the treating physician is not convincing. The report notes that Tizanidine is shown to be effective for decrease in low back pain and myofascial pain.
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> In a post judgment Motion to Reopen to Assert a Medical Fee Dispute, Defendant Employer has the burden of proving that the contested medical expenses and/or proposed medical procedure is unreasonable or unnecessary while Plaintiff maintains the burden of proving that the contested medical expenses and/or proposed medical procedure is causally related treatment for the effects of the work-related injury. *Mitee Enterprises vs. Yates*,

> 865 SW2d 654 (KY 1993) *Square D Company vs. Tipton*, 862 SW2d 308 (KY 1993) *Addington Resources, Inc. vs. Perkins*, 947 SW2d (KY 1997). In addition the legislature's use of the conjunctive "and" which appears in subsection 1 of KRS 342.020 "cure and relief" was intended to be construed as "cure and/ or relief". *National Pizza Company vs. Curry*, 802 SW2d 949 (KY 1991).
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> In the specific instance, Defendant Employer has moved to reopen this claim to challenge the reasonableness and necessity of Tizanidine, Physical Therapy and Lumbar Sympathetic Injections. The opinion of Dr. Jedamski is not persuasive enough to convince the ALJ the recommendations of the treating physician are not reasonable and necessary for the cure and/or relief of the effects of the work injury at this time. Defendant Employer has not met its burden of proof on these issues. Therefore, Tizanidine, Physical Therapy and Lumbar Sympathetic Injections as recommended by Dr. Rison are found to be compensable.

Archways also appeals from the June 22, 2015 and the July 29, 2015 orders dismissing its petitions for reconsideration as untimely filed.

On appeal, Archways argues the ALJ erred in finding the contested medical treatment was reasonable, necessary and compensable by impermissibly ignoring the unrebutted medical evidence. Archways also argues the ALJ erred in dismissing its petitions for reconsideration as untimely filed. Because the petitions for reconsideration

were timely filed pursuant to 803 KAR 25:010(1)(4)(a)1 & (1)(4)(b), the ALJ's orders dismissing them are hereby reversed. The ALJ's findings regarding compensability of medical bills are hereby vacated. This claim is remanded to the ALJ for a determination of compensability in light of the holding by the Kentucky Supreme Court in Kingery v. Sumitomo Electric Wiring, 481 S.W.3d 492 (Ky. 2016).

Battaglia filed a Form 101 on September 20, 2005 alleging he injured his lower extremities when he fell from the roof of a McDonald's restaurant on August 25, 2004. On June 12, 2006, Hon. A. Thomas Davis, Administrative Law Judge, awarded temporary total disability benefits, permanent partial disability benefits based upon a 30% impairment rating, enhanced pursuant to KRS 342.730(1)(c)1, and medical benefits.

On February 17, 2015, Archways filed a motion to reopen the claim, and a Form 112 medical dispute to challenge treatment proposed by Dr. Allen Rison, an interventional pain specialist, consisting of six lumbar blocks/injections, six weeks of physical therapy and prescriptions of Tizanidine.

In support of the medical dispute, Archways filed the January 12, 2015 utilization review report of Dr. Waldtraut Jedamski, who opined only four blocks/injections

and four weeks of physical therapy were reasonable and necessary. He also stated the prescriptions for Tizanidine should be denied. No other evidence was submitted regarding this issue by any party.

On March 10, 2015, the ALJ issued an order finding Archways had set forth a *prima facie* case for reopening. A telephonic conference was held on March 30, 2015. Only counsel for Archways and the ALJ participated in the telephonic conference. A Benefit Review Conference ("BRC") was held on May 5, 2015. Again, only counsel for Archways and the ALJ were in attendance and participated. The BRC order reflects the issues to be determined were the compensability of Tizanidine and physical therapy. The order also reflects the hearing was waived. As noted above, the ALJ denied the medical dispute by order entered on May 12, 2015.

Archways filed a Petition for Reconsideration which was received by the Kentucky Department of Workers' Claims on June 1, 2015, arguing the ALJ erred in ignoring the uncontroverted opinion of Dr. Jedamski.

We note 803 KAR 25:010(1)(4)(a)1 & (1)(4)(b) state as follows:

> (4) "Date of filing" means the date that:

> (a) A pleading, motion, or other document is received by the Executive Director at the Office of Workers' Claims in Frankfort, Kentucky, except:
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> 1. Final orders and opinions of administrative law judges, which shall be deemed "filed" three (3) days after the date set forth on the final order or opinion; and
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> 2. Documents delivered to the offices of the Office of Workers' Claims after the office is closed at 4:30 p.m. or on the weekend which shall be deemed filed the following business day; or
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> (b) A document is transmitted by United States registered (not certified) or express mail, or by other recognized mail carriers, and the date the transmitting agency receives the document from the sender as noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing.

The ALJ, in an order dated June 22, 2015, dismissed the petition as untimely filed. According to the file, the first Petition for Reconsideration was actually shipped through United Parcel Service ("UPS") on May 29, 2015, and therefore pursuant to 803 KAR 25:010(1)(4)(a)1 & (1)(4)(b), as outlined above, was timely submitted.

Archways filed a second petition for reconsideration on July 9, 2015, also submitted through UPS, again arguing the ALJ erred in finding the contested treatment compensable in light of the uncontroverted testimony of Dr. Jedamski. Archway also argued the ALJ

erred in dismissing its first petition as untimely. In an order issued July 29, 2015, the ALJ again denied the petition as untimely filed.

We first note, in a post-award medical dispute, the burden of proof to determine 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).

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). 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). 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); 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).

The ALJ has the right and obligation to determine the compensability of medical treatment based upon the evidence presented. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *See* Smyzer v. B.F. Goodrich Chemical Co., 474 S.W. 2d 367, 369 (Ky. 1971), Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The discretion afforded to the ALJ has been modified by the holding of the Kentucky Supreme Court in Kingery v. Sumitomo Electric Wiring, supra. There, as in the case *sub judice*, the employer filed a medical dispute supported by a report from a physician which stated the

proposed treatment was not reasonable, necessary or work-related. The opinion was unrebutted. The ALJ denied the medical dispute, and her decision was affirmed by this Board. The Kentucky Court of Appeals reversed this determination, and the Supreme Court subsequently affirmed, stating:

> … as the Court of Appeals noted, ALJs are not permitted to rely on lay testimony, personal experience, and inference to make findings that directly conflict with the medical evidence, except in limited situations, such as matters involving observable causation. *Mengel v. Hawaiian–Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184, 187 (Ky. App. 1981). In other words, "when the question is one properly within the province of medical experts, the [ALJ] is not justified in disregarding the medical evidence." Id.
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> It is thus clear that the current ALJ rejected the uncontroverted medical opinions, at best, based on a misreading of the record. In any event, the ALJ's findings in this respect were not based on substantial evidence and were insufficient to justify rejection of the medical evidence in this case.
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> . . .
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> Of course, that is not to say that reasonable medical minds could not disagree with Dr. Randolph's conclusions. After all, the human body is perhaps the most complex system known to humankind, so very little will ever garner unanimous consensus among medical professionals and experts. But

this is exactly why our legal system requires reliable expert proof on issues such as medical causation and the necessity of medical treatment when they would not be apparent to a layperson. It does so because this is the only way to reasonably ensure that the fact-finder answers those questions reasonably, rather than arbitrarily.

Such questions are solely within the province of medical experts who are equipped with the proper education and experience to enable them to provide reliable answers within a reasonable degree of medical probability. We cannot accept ignoring uncontroverted medical evidence in favor of unreliable lay testimony and the ALJs' own proclivities and experience when determining such medical issues. That is not substantial evidence.

And it would not have required much medical evidence to support the ALJ's decision to disregard Dr. Randolph's opinions here. Some contrary report from Kingery's treating physician, for example, likely would have sufficed.

But that is not what occurred here. Indeed, nearly the opposite happened: Dr. Douglas proactively declined to continue treating Kingery for her alleged work-related complaints when he became aware that the compensability of the treatment he was providing for those complaints was being questioned (while continuing to see her for her other, unrelated medical problems). Even Kingery's treating physician was unwilling to opine that the drugs he was prescribing were reasonable and necessary to treat her complaints resulting from the 1989 work injury.

In the end, our rationale is slightly different than that of the Court of Appeals, but of course "an appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result." *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009). Whether or not the employer had the burden of proof, under the circumstances of this case, the evidence compels a finding that the treatment at issue is not compensable. See *Wagoner v. Smith*, 530 S.W.2d 368, 369 (Ky. 1975) ("In order to reverse the findings of the board unfavorable to the claimant and upon which he had the burden of proof the test is whether the evidence compelled a finding in his favor."). Upon careful review of the entire record, it is clear that the ALJ's decision to wholly reject the uncontroverted medical evidence introduced by Sumitomo in favor of Kingery's lay testimony, and thereby find that Kingery's use of Xanax, Celexa, Lorcet, and Skelaxin is reasonable and necessary and related to the 1989 work injury, was not based on substantial evidence.

The questions in this medical dispute were undeniably those which should fall within the sole province of expert medical opinion. When all the medical evidence on such a question points to one conclusion, the ALJ acts outside the immense discretion she otherwise typically enjoys when she rejects that evidence in favor of lay testimony to reach a contrary conclusion without sufficient justification for doing so.

Id. at 496, 499 & 500.

As noted above, the ALJ's determination must be based upon the appropriate standard. In this instance, the ALJ correctly identified the employer bears the burden of proof of establishing the contested treatment is not reasonable or necessary. However, pursuant to Kingery v. Sumitomo Electric Wiring, supra, the ALJ declined to render a decision in accordance with the uncontroverted evidence of record. Because the ALJ failed to render a decision in accordance with the evidence, and failed to provide a valid reason for doing so, her decision must be vacated. On remand, she must provide a decision in accordance with the evidence as set forth above. We make no findings, as we are not permitted to do so. Likewise, we do not direct the ALJ to arrive at any particular result. On remand, the ALJ must make a determination based upon the evidence.

Regarding the timeliness of Archway's petitions for reconsideration, we reverse. The applicable regulations set forth above clearly establish the petitions were timely filed and erroneously dismissed.

Accordingly, the May 12, 2015 Medical Fee Opinion and Order, and the orders dismissing the petitions for reconsideration rendered June 22, 2015 and July 29, 2015 by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **REVERSED IN PART**, **VACATED IN PART and REMANDED** for

additional determination in accordance with the direction set forth above.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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