OPINION ENTERED: December 14, 2012

CLAIM NO. 199438385

CANANDAIGUA WINE COMPANY PETITIONER

VS. **APPEAL FROM HON. OTTO D. WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

HENRY HILLARD
and HON. OTTO D. WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Canandaigua Wine Company ("Canandaigua"), insured by Lumberman's Mutual Casualty Company ("Lumberman's"), seeks review of the June 20, 2012, opinion and order of Hon. Otto D. Wolff, IV, Administrative Law Judge ("ALJ") determining Henry Hillard's ("Hillard") October 25, 2011, left shoulder surgery to be work-related and awarding temporary total disability ("TTD") benefits

and medical benefits. Canandaigua also appeals from the August 6, 2012, order denying its petition for reconsideration.

This appeal centers on whether Hillard's October 25, 2011, left shoulder surgery is causally related to work injuries he sustained in 1993 and 1994. There is no dispute Hillard sustained injuries on December 15, 1993, and August 28, 1994, while working for Canandaigua. At the time of both injuries, Canandaigua was insured by Lumberman's. On April 26, 1996, Hon. Irene Steen, Administrative Law Judge ("ALJ Steen") approved a lump sum settlement of Hillard's claim for both injuries. After each injury, Hillard continued to work for Canandaigua and subsequently underwent surgery on January 22, 2002, performed by Dr. Raymond Shea consisting of an arthroscopy of the left shoulder and a subacromonial decompression. The pre-operative diagnosis was rotator cuff tear of the left shoulder. The need for the 2002 surgery related to the 1993 and 1994 injuries. After the surgery, Hillard was released to regular duty.

In 2004, Canandaigua filed a medical fee dispute contesting the compensability of medical treatment rendered by Dr. Shea based on reasonableness and work-related grounds.

On January 5, 2006, Hon. W. Bruce Cowden, Administrative Law Judge ("ALJ Cowden") entered an opinion and order resolving the medical fee dispute in favor of Hillard.[1] ALJ Cowden noted Canandaigua was relying upon the January 28, 2004, medical report of Dr. Gregory Snider, who diagnosed a "chronic rotator cuff inflammation, rotator cuff strain of August 29, 1994 and status post arthroscopy, bursectomy and acromioplasty." Dr. Snider opined Dr. Shea's management of Hillard's left shoulder had been excellent and the surgery performed by Dr. Shea resulted in a good outcome. Dr. Snider noted Hillard had been impressively motivated and had continued working despite ongoing left shoulder pain. Dr. Snider believed Hillard's left rotator cuff strain had resolved and Hillard's current treatment regimen, although appropriate, was necessitated by ongoing shoulder trauma and was not related to the August 29, 1994, injury. However, relying upon Dr. Shea's opinions, ALJ Cowden concluded as follows:

[1] Although the Medical Fee Dispute- Form 112 filed by Canandaigua on November 5, 2004, is not in the paper file it is in the electronic file. The Form 112 medical fee dispute reflects Canandaigua challenged the "reasonableness and necessity of continued treatment of the work-related injury as well as the causal connection between [Hillard's] current medical treatment and the August 29, 1994, work-related injury." Canandaigua concluded by stating: Based upon the entirety of proof set forth herein, the Movant believes that the Respondent's continued medical treatment for the lefts shoulder strain is neither reasonably necessary nor causally related to the left shoulder injury of August 29, 1994.

> It is the Defendant/Employer's position as expressed in its brief that based on the medical report of Dr. Snider and the UR decision that the Defendant/Employer has satisfied his burden of showing that the medical treatment from Dr. Shea is both not reasonable and necessary and not work related to the initial work injury. After considering all the evidence in this case the Administrative Law Judge must conclude that the Defendant/Employer and/or its insurance carrier have so failed in so showing. The Administrative Law Judge cites to the medical reports cited above from Dr. Shea and to his deposition which clearly indicate that an MRI scan of the Plaintiff's left shoulder performed in 2001 showed evidence of a small full thickness tear of the rotator cuff although a subsequent surgery demonstrated that the Plaintiff had bursitis, tendonitis and some fraying of the ligament of the shoulder. Dr. Shea further noted that this was an ongoing process from the compensation injury of September 1, 1994 and he described the whole process with the Plaintiff that the initial episode started with the work injury in 1994 and that the Plaintiff had continued to work and continued to have pain in the same shoulder and that it was a continuing problem from this injury. The Administrative Law Judge also cites to the Plaintiff's own testimony elicited at the Formal Hearing where the Plaintiff acknowledged that the pain medication prescribed by Dr. Shea helps him sleep and alleviates the pain.

On October 25, 2011, Hillard underwent left shoulder surgery performed by Dr. Edward D. Tillett

consisting of “arthroscopy with acromioplasty and distal clavicle excision” and “arthroscopy with arthroscopic rotator cuff repair.” The pre-operative and post-operative diagnosis was “rotator cuff tear of the left shoulder with acromioclavicular joint arthritis.” Hillard was off work from October 25, 2011, through January 9, 2012. He returned to work in January and has continued to work since.

On November 9, 2011, Hillard filed a motion to reopen asserting he had undergone left shoulder surgery on October 25, 2011, which had been authorized by Canandaigua “as compensable and related to his work injury.” However, Hillard stated Canandaigua was refusing to pay TTD benefits while he was off work recovering from surgery.

On November 16, 2011, Canandaigua filed an objection to the motion noting Hillard had undergone arthroscopic decompression of the left shoulder on January 22, 2002, and the operative report indicates his rotator cuff was intact at that time. Canandaigua attached a copy of the operative report. It stated Hillard was released to regular duty effective March 15, 2002, and nine years and seven months later Dr. Shea interpreted an MRI of the left shoulder to reveal a full thickness rotator cuff tear for which he recommended arthroscopic repair. Canandaigua

stated utilization review approved the procedure as medically necessary but it was apparent Hillard had sustained a “new objectively identifiable injury” to his left upper extremity and surgery was mistakenly approved. It represented an independent medical examination (“IME”) with Dr. John J. Larkin has been scheduled for December 1, 2011, in order to address the work-relatedness and causation. Canandaigua maintained it is not responsible for paying for the surgery and TTD benefits.

On December 2, 2011, Hon. James L. Kerr, Administrative Law Judge (“ALJ Kerr”) sustained Hillard’s motion to reopen to the extent the claim would be assigned to an ALJ for further adjudication.

The parties introduced medical reports and records, and Hillard testified at the April 25, 2012, hearing.

After summarizing Hillard’s testimony and the medical evidence, the ALJ determined as follows:

> The undersigned had an opportunity to observe and hear Plaintiff testify at his final hearing. The undersigned noted Plaintiff was very honest and credible. His testimony is persuasive and to be believed.
>
> The ALJ has the sole discretion to determine the quality, character and substance of the evidence and to draw reasonable inferences from such

evidence. *Paramount Foods, Inc. v. Burkhardt*, Ky., 695 S.W.2d 418 (1985). Further, the ALJ has the sole authority to judge the weight to be afforded the input of a particular witness. *McCloud v. Beth-Elkhorn Corporation*, Ky., 514 S.W.2d 46 (1974). When medical evidence is conflicting, the question of which evidence to believe is within the exclusive province of the ALJ. *Square D. Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993).

The medical records of Dr. Shea and Dr. Tillett confirm, Plaintiff had a continuous course of treatment from 2001 through his 2011 surgery, for his work-related left shoulder injuries. Plaintiff’s testimony also sets forth this continuous course. Dr. Larkin's initial input, as well as portions of his subsequent input, also constitutes persuasive evidence that Plaintiff's 2011 left shoulder surgery was needed because of Plaintiff’s 1993 and 1994 left shoulder work injuries.

Based upon Plaintiff's testimony, Dr. Shea's chain of records, and the input of Dr. Larkin, Plaintiff has presented persuasive evidence that his 2011 surgery was needed because of his 1993 and 1994 work injuries. Based upon the persuasive evidence, the issues presented in Plaintiff’s reopening are decided in Plaintiff's favor.

Accordingly, the ALJ ordered as follows:

1. Plaintiff’s 2011 left shoulder surgery was needed because of his 1993 and 1994 work injuries, therefore, Defendant is obligated to pay all reasonable and necessary medical expenses now associated with and in the future associated with the 1993 and 1994 injuries and subsequent surgeries.

> 2. Defendant is obligated to pay Plaintiff TTD benefits at the rate of $332.80 per week from October 25, 2011 through January 9, 2012, with interest at the rate of 12% per annum on all due and unpaid installments of such compensation.

Canandaigua filed a petition for reconsideration making the same argument it asserts on appeal that the central issue was whether the October 25, 2011, surgery was a result of a repetitive trauma injury occurring after March 31, 2000, the date Lumberman's coverage ended. Consequently, it argued the ALJ committed a patent error by failing to make a finding as to whether repetitive trauma occurring after March 31, 2000, caused the rotator cuff tear which was diagnosed in 2011.

By order dated August 6, 2012, the ALJ summarily denied the petition for reconsideration.

On appeal, Canandaigua asserts the evidence does not suggest Hillard suffered a left rotator cuff tear during Lumberman's coverage period and the ALJ failed to make a finding as to whether the injury occurred as a result of a repetitive trauma injury occurring after its coverage expired on March 31, 2000. It notes the 2002 operative report states Hillard's rotator cuff was examined and was intact. Since Dr. Shea's medical records reflect Hillard had full range of motion and returned to regular duty on

March 18, 2002, and Dr. Shea did not assign an impairment rating, Canandaigua asserts he did not have a left rotator cuff tear when the surgery was performed in January 2002. Therefore, it is undisputed whatever caused the rotator cuff tear occurred after Lumberman's coverage ended.

Canandaigua also cites to the IME performed by Dr. Snider on January 28, 2004, and his conclusions the work injuries in 1993 and 1994 caused a sprain or strain which had resolved. Dr. Snider reasoned Hillard's continued work caused his tendonitis to progress. Accordingly, Dr. Snider noted the treatment in question was unrelated to the 1993 and 1994 work injuries.

Canandaigua posits Hillard's treatment between 2006 and 2010 appears to be sporadic, and he was kept on regular duty with conservative management. It argues since Dr. Shea's July 2, 2011, examination and the August 18, 2011, MRI resulted in a diagnosis of a "'near full thickness if not full thickness'" rotator cuff tear and surgery was recommended, the critical question which the ALJ failed to address was what caused Hillard's rotator tendonitis to progress and the rotator cuff tear which necessitated the surgery.

Canandaigua also relies upon Dr. Larkin's opinions contained in his December 1, 2011, report as clarified in

his January 12, 2012, report. Since the ALJ failed to make a finding of fact as to what caused Hillard's condition to progress to the point he suffered a torn rotator cuff, Canandaigua requests the claim be remanded to the ALJ for findings of fact on this issue.

In a post-award medical fee dispute, the burden of proof and risk of non-persuasion with respect to the reasonableness of medical treatment falls on the employer. National Pizza Company v. Curry, 802 S.W.2d 949 (Ky. App. 1991). However, the burden remains with the claimant concerning questions of work-relatedness or causation of the condition. Id; *see also* Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997). Since the sole issue before the ALJ was whether the surgery of 2011 was causally related to the 1993 and 1994 work injuries, Hillard had the burden of establishing the surgery was causally related to his previous work injuries.

Since Hillard was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the

minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ 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 Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of

substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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, 998 S.W.2d 479 (Ky. 1999).

Hillard's October 25, 2012, hearing testimony reveals he has worked for Canandaigua for thirty-three years; twenty-seven of which as a labeler. Hillard testified his job involves operating a label machine putting labels on bottles. Hillard testified he injured his left shoulder in 1993 and 1994 and since then has seen Dr. Shea every three months. Hillard testified the first surgery performed in 2001 was necessitated because of increased pain.[2] He explained that from 1994 until surgery was

[2] The records reveal the surgery was actually performed on January 22, 2001.

performed he continued to have pain at the top of his shoulder and did not have a lot of arm strength. The 2001 surgery helped for a while, but Hillard's shoulder condition worsened to the extent he was having trouble sleeping. He explained the ball of his shoulder began to ache and throb all the time and pain medication was not much help.

Hillard acknowledged that after the first surgery substantial repetitive movement aggravated his shoulder. As a result, he never did a lot of lifting using his left arm and relied instead on his right hand since he is right-hand dominant. Between the first and second surgeries Hillard continued to perform the same type of work. During that period, Dr. Shea prescribed pain medication and also placed Hillard on an "inflammatory."[3]

Hillard testified the 2011 surgery has been extremely helpful, and he can now raise his arm. Hillard believes his condition is better now than when he settled his claim in 1996. Hillard continues to see Dr. Shea every three months.

Hillard introduced the records of the Shea Orthopaedic Group covering the period from December 19, 2003, through December 12, 2011. Those records reveal that

[3] We believe Hillard meant to say an anti-inflammatory.

between December 19, 2003, through July 17, 2009, Hillard regularly complained of pain and stiffness in the shoulder. During that time period, Dr. Shea regularly prescribed medication and one occasion injected the shoulder with Xylocaine and Cortisone. Dr. Shea's October 16, 2009, note reflects a diagnosis of a rotator cuff tear of the left shoulder. He noted Hillard continued to have pain and stiffness in the shoulder with loss of motion. On January 29, 2010, April 23, 2010, July 23, 2010, October 29, 2010, February 4, 2011, and April 29, 2011, Dr. Shea diagnosed tendonitis of the left shoulder. Significantly, in the April 23, 2010, note, Dr. Shea stated the left shoulder symptoms were the "result of a workers' compensation injury." In a February 4, 2011, note, Dr. Shea also stated Hillard's continued pain and stiffness in left shoulder were from a "long-standing rotator cuff tear." In a July 22, 2011, note Dr. Shea stated Hillard had continued pain and stiffness in the left shoulder "from the comp injury, but was working." He noted Hillard had osteoarthritis of the acromioclavicular joint and a Type II acromion causing impingement and ordered an MRI.

In an August 31, 2011, office note Dr. Shea diagnosed a rotator cuff tear of the left shoulder. He indicated the MRI revealed "a full thickness tear of the

anterior portion of the rotator cuff, a Type III acromion, and osteoarthritis of the acromioclavicular joint." Dr. Shea stated "this is a comp injury" and believed Hillard "would benefit from arthroscopic debridement and decompression from the impingement." He directed Hillard to see Dr. Tillett for repair of the rotator cuff "as a workers' compensation case." In a September 19, 2011, office note, Dr. Tillett stated Hillard has developed a work-related "repetitive use injury of the left shoulder," and "as a workers' compensation case" prior approval was required.

In a December 12, 2011, letter, Dr. Shea stated Hillard had been seen and followed in his office since April 18, 2001, "for a work-related injury in 1998."[4] Hillard's complaints and findings during the entire time were consistent with the diagnosis of a rotator cuff tear. Dr. Shea stated a recent MRI demonstrated evidence of the rotator cuff tear with a Type III acromion and osteoarthritis of the acromioclavicular joint. Surgery was performed by Dr. Tillett on October 25, 2011, which confirmed the findings seen on the MRI of a Type III acromion, osteoarthritis of the acromioclavicular joint, and

[4] We believe this is a typographical error as it appears Dr. Shea meant 1993 or 1994.

a complete tear of the rotator cuff. Dr. Shea stated Hillard would have "a permanent medical impairment to the shoulder as a result of the 1998 compensation injury to the left shoulder at the distillery."

Canandaigua introduced the December 1, 2011, IME report of Dr. Larkin generated as a result of an examination conducted on that same date. In the report, Dr. Larkin responded to the following questions posed to him by Canandaigua's counsel:

> **Question #1 – Does Mr. Hillard's rotator cuff tear constitute an objectively identifiable harmful change?** The answer to that would be no.
>
> **Question #2- Did the cuff tear occur after January 21st of 2002; if so, can you approximate when based upon review of the medical records and also the history as obtained from the patient today at the time of the independent medical evaluation?** The answer to that is that I am not sure that this tear was not present at the time of original arthroscopic intervention.
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> At the time of his original arthroscopic intervention it was not seen arthroscopically, although the MRI, in reviewing both the scan that was done previously and the scan that was done at this time, shows very similar changes. However, the arthroscopic photographs that Mr. Hillary [sic] brought with him today definitely show that he has had a complete full-thickness tear with some retraction. Therefore, I believe that it represents a progression of the original injury.

In regard to what caused the tear, I think this does represent a progression of the original problem over and almost ten-year period.

Question #3- Did Mr. Hillard's continued work in a physical demanding job cause the tear? I think that this certainly aggravated the chronic problem and resulted eventually in a complete tear of the rotator cuff as noted on the arthroscopic photographs reviewed today.

Question #4- Do you agree with Dr. Snider that Mr. Hillard's continued work activities both maintained and caused Mr. Hillard's rotator cuff tendinitis to progress? The answer to that would be yes.

Question #5- Assuming that Mr. Hillard stopped working in his physically demanding job on March 31st of 2000 – more likely than not, would ongoing treatment for the left shoulder have been required? The answer to that is that based upon review of the medical records it sounds like, and the patient admits, that he was never pain-free following the original surgery. Therefore, I do believe that ongoing treatment was justified. If he stopped working in this type of job, I do not know, and I speculate, as to whether or not his symptoms would have resolved without progression.

Question #6- Do you attribute Mr. Hillard's most recent surgery to his 1993 injury? The answer to that would be. Do I attribute his most recent surgery to the injury of 1994? The answer to that would be yes, based upon review of the medical records and his ongoing complaints.

Contrary to Canandaigua's argument, the ALJ was not required to narrow his focus to whether repetitive trauma injury occurring after May 31, 2000, caused the rotator cuff tear diagnosed in 2011. Rather, the ALJ correctly focused on what caused the need for the surgery performed in 2011 by Dr. Tillett.

Further, the ALJ was not required to rely on the notation in the January 22, 2002, operative report, that there was no rotator cuff tear. In light of the other medical evidence and Hillard's testimony regarding his continuing problems after both work injuries until the second surgery, the ALJ was permitted to reject that conclusion as inaccurate. Indeed, the records of Dr. Shea corroborate Hillard's testimony that he continued to experience problems after the work injuries until the rotator cuff tear was diagnosed in 2011 and surgery was performed. Significantly, Dr. Shea, who performed the surgery on January 22, 2002, and observed at that time there was no rotator cuff tear, expressed the opinion the October 25, 2011, surgery performed by Dr. Tillett was related to the original work injuries occurring in 1993 and 1994. Although his December 12, 2011, letter references a 1998 work-related injury and a "1998 compensation injury to the left shoulder at the distillery," the ALJ was permitted

to conclude the reference to a 1998 work injury was a typographical error and Dr. Shea meant to refer to one or both of the work injuries. There is no dispute Hillard did not sustain an injury in 1998.

We emphasize ALJ Cowden determined the treatment provided by Dr. Shea after the surgery performed on January 22, 2002, to be related to the August 29, 1994, work injury. ALJ Cowden's decision is the law of the case, and the parties are bound by that determination. *See* Inman v. Inman, 648 S.W.2d 847 (Ky. 1982). As ALJ Cowden's January 5, 2006, decision establishes Hillard's shoulder symptoms prior to January 5, 2006, were related to his 1994 work injury, the ALJ was free to reject Dr. Snider's opinions.

We believe the ALJ could reasonably conclude, based on the lay and medical testimony, the need for surgery was causally related to Hillard's shoulder injury or injuries occurring in 1993 and 1994. The ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, supra. Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969). While medical causation usually requires proof from a medical expert, the ALJ may properly

infer causation from the totality of the circumstances as evidenced by the lay and expert testimony of record. *See* Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981); Union Underwear Co. v. Scearce, supra. Reasonable inferences regarding causation are fundamental to an ALJ's role as fact-finder. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979).

In this case, the ALJ stated he found Hillard to be "very honest and credible" and his testimony to be persuasive. Hillard outlined, in depth, the problems which continued to persist after the 1993 and 1994 injuries. Acknowledging the 2002 surgery helped, Hillard outlined his continuing physical symptoms until the 2011 surgery was performed to repair the rotator cuff tear. Hillard's testimony, Dr. Shea's medical records and his December 12, 2011, letter, corroborate Hillard's testimony and constitute substantial evidence supporting the ALJ's decision.

Moreover, Dr. Larkin's December 1, 2011, letter constitutes substantial evidence supporting the ALJ's determination the 2011 surgery was causally related to the 1994 injury. Dr. Larkin stated "the completed full-thickness tear with some retraction" represented a progression of the original injury. In addition, Dr.

Larkin attributed the need for the 2011 surgery to the 1994 injury. Although in his January 12, 2012, report, Dr. Larkin attempted to retreat somewhat from the opinions contained in the December 1, 2011, report, the ALJ was free to reject Dr. Larkin's opinions in the January 12, 2012, letter and rely upon his opinions contained in the December 1, 2011, report. Dr. Larkin's answers to the six questions set out herein are unequivocal and establish a causal link between Hillard's work-related injuries of 1993 and 1994 and the surgery performed on October 25, 2011.

Hillard's testimony, Dr. Shea's records and his opinion expressed in his December 12, 2011, report, along with the opinions of Dr. Larkin constitute substantial evidence supporting the ALJ's determination the October 25, 2011, shoulder surgery was necessitated by Hillard's 1993 and 1994 left shoulder work injuries.

Accordingly, the June 20, 2012, opinion and order and the August 6, 2012, order denying the petition for reconsideration of ALJ Wolff are **AFFIRMED**.

ALL CONCUR.

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