Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 18, 2015

CLAIM NO. 200795580

DZEVAD AGOVIC PETITIONER

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

MARCO DIE SUPPLIES, INC. and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Dzevad Agovic ("Agovic") seeks review of the decision rendered July 17, 2015 by Hon. M. Christopher Davis, Administrative Law Judge ("ALJ"). The ALJ resolved a medical dispute filed by Marco Die Supplies, Inc. ("Marco") by finding as follows:

> This medical fee dispute is resolved to the extent that Movant-Medical payment

> Obligor is Ordered to pay 50% of the bills, under the fee schedule, for the pre-surgery MRI(s), the surgery, including any directly associated costs, a post-surgery course of physical therapy up to two weeks and a post-surgery course of aqua therapy, up to four weeks and the injections, Methylprednisone, and Diazepam are non-compensable.

Agovic also appeals from the August 31, 2015 Order denying his petition for reconsideration.

On appeal, Agovic argues, "Substantial evidence compels a finding plaintiff's work related injury included injury of his lumbar spine and aggravation of a pre-existing dormant degenerative condition into disabling reality, thus surgery, evaluation, and treatment is compensable." Agovic also argues the ALJ misapplied KRS 342.020 when he ordered Marco to only pay fifty percent of the medical expenses relating to the October 10, 2015 surgery. The ALJ acted within his discretion, and his decision is supported by substantial evidence. Because a contrary result is not compelled, we affirm.

Agovic filed a Form 101 on February 19, 2007 alleging he injured his back on November 27, 2006 while lifting wood weighing sixty to one hundred pounds during the course of his employment with Marco. He subsequently underwent a micro-laminectomy and discectomy for a large

L5-S1 disc herniation. Agovic subsequently settled his claim for $21,500.00. The Form 110-I settlement agreement reflects Agovic sustained a low back injury resulting in surgery for a left L5-S1 disc herniation. The settlement included a waiver of the right to reopen the claim except for the resolution of medical fee disputes.

On December 2, 2013, Marco filed a motion to reopen the claim, and filed a Form 112 medical dispute to challenge a surgery requested by Dr. Mohammad Majd. The proposed surgery consisted of a microdiscectomy, foraminotomy and decompression from L3 to S1. In support of the medical dispute, Marco filed the October 30, 2013 utilization review report of Dr. Ira Posner, an orthopedic surgeon, who stated the surgical procedure should be denied due to the lack of conservative care. Marco also filed the September 25, 2013 record of Dr. Majd who noted Agovic had a disc herniation at L3-L4. Marco also filed the utilization review report of Dr. David Trotter, an orthopedic surgeon, dated October 10, 2013 which stated the proposed surgery from L3 to S1 was not related to the 2006 injury. He found there was no evidence of a recurrent herniation at L5-S1. On December 19, 2013, Marco filed an amended medical dispute and attached the utilization review report of Dr. Kenneth S. Bayles, who stated the recommended

L3 to S1 discectomy with possible laminectomy was not reasonable or necessary.

On January 6, 2014, the ALJ issued an order sustaining the motion to reopen. He also joined Dr. Majd as a party, and scheduled a telephonic conference. At the telephonic conference held March 7, 2014, the parties listed reasonableness, necessity and work-relatedness of a proposed microdiscectomy, decompression and foraminectomy at "L3-4-5-S1" as the issue to be resolved. Marco subsequently filed a motion to amend the Medical Fee Dispute to include an objection to prescriptions of Methylprednisone and Diazepam. On April 20, 2015, Marco again moved to amend the dispute to include contests of tendered billing statements, a proposed MRI, aquatic therapy and a referral to pain management for consideration of injections.

In addition to the utilization review reports filed with the Form 112 and motion to reopen, Marco filed multiple reports from Dr. Thomas Loeb. Dr. Loeb conducted an evaluation of Agovic on January 21, 2014. At that time he diagnosed multilevel degenerative disc disease in the lumbar spine from L3 to S1. He noted Agovic's 2006 L5-S1 discectomy. Dr. Loeb reviewed the MRI and determined Agovic had no recurrent disc herniation from L3 to S1. He

found Agovic demonstrated positive signs of symptom magnification.

Dr. Loeb disagreed with the recommended multilevel discectomy and laminectomy. He stated the only acceptable procedure would be the isolated L5-S1 anterior lumbar fusion with instrumentation, “but this would have to be preceded by an evocative discography as a diagnostic tool.”

On March 19, 2014, Dr. Loeb stated he disagreed with Dr. Majd. His opinion remained unchanged after reviewing additional medical information. He opined Agovic was not a candidate for surgical intervention.

On September 9, 2014, Dr. Loeb stated the July 19, 2014 MRI compared to the May 28, 2013 MRI, “reveals marked worsening of disc extrusion at the L4-5 level and some inflammatory changes of the left S1 nerve root at the L5-S1 level but no evidence of severe herniated nucleus pulposus recurrence.”

On October 5, 2014, Dr. Loeb agreed Agovic needs surgery, but stated it is not related to the original work injury. He stated, “His current findings represent the natural course of his pre-existing disease.”

On November 10, 2014, Dr. Loeb noted the original level of involvement was at L5-S1, but the current affected

level is at L4-L5 and is not work-related. He agreed Agovic needs surgery at the L4-L5 non-work-related site. He additionally stated if improvement following surgery is incomplete, Agovic would need a multilevel anterior and posterior fusion.

On November 18, 2014, Dr. Loeb noted Agovic had undergone L4-L5 and L5-S1 discectomies. He stated only the surgery at L5-S1 was work-related. He additionally stated two weeks of physical therapy was reasonable.

On February 5, 2015, Dr. Loeb stated he had previously recommended physical therapy. He opined a short course of aqua therapy (three to four weeks) was reasonable. Marco filed the May 15, 2014 note from Star physical therapy. That note reflects Agovic was non-compliant with this physical therapy. The physical therapist noted Agovic appeared to be responding to therapy before he stopped attending. Marco also filed records from Align Networks Physical Therapy which noted Agovic attended physical therapy on seven occasions between March 31, 2014 and April 21, 2014.

Marco filed records from the Floyd Memorial Group dated August 1, 2014. Those records reflect a microdiscectomy at L4-L5 was scheduled for August 14, 2014.

Marco filed a utilization review report of Dr. Kimberly Terry, a neurosurgeon, dated October 21, 2014. Dr. Terry opined Methylprednisone and Diazepam were not medically reasonable or necessary. She also opined treatment with these medications was not related to the November 27, 2006 work injury.

Marco filed Dr. Michael Doyle's operative report dated October 10, 2014. Dr. Doyle stated the pre-operative diagnosis was lumbar strain superimposed upon disk herniation stenosis, L4-L5; status post previous L5-diskectomy. The post-operative diagnosis was the same. The procedure consisted of a redo left L5 laminectomy, L4-L5 and L5-S1 laminotomies, foraminotomies and discectomies.

Marco filed the December 10, 2014 utilization review report of Dr. Clarence Frazier, an orthopedic surgeon. Dr. Frazier stated up to sixteen physical therapy visits over a course of eight weeks was medically necessary and causally related to the November 27, 2006 work injury.

Marco filed the February 15, 2015 utilization review report of Dr. Heidi Klingbeil, a physical medicine and rehabilitation physician, who stated the recommended aqua therapy was not reasonable or necessary.

On May 14, 2015, Marco also filed the undated physician advisor report of Dr. Howard Grattan who stated

the requested aquatic therapy, pain management to discuss injections, and request for an additional MRI were not medically necessary. He also opined these were for conditions not causally related to the November 27, 2006 injury.

Agovic also submitted multiple medical records and reports. He filed the February 18, 2014 record from Dr. Majd who disagreed with Dr. Loeb's recommendation of a discogram. He stated, "We are dealing with the disc degeneration, disc herniation, spinal and foraminal stenosis at L3-S1 profoundly at the level of L3-L4 and L5-S1, his spinal canal is extremely narrow at the level of L3-L4 and L5-S1." On March 19, 2014, he saw Agovic for a follow up of low back pain with bilateral leg pain. He noted Agovic complained of intractable low back pain, right worse than left. The MRI findings were compatible with disc degeneration, disc protrusion, and stenosis from L3 to S1. On July 9, 2014, Dr. Majd noted Agovic had intractable pain in the left lower extremity, weakness in the left foot and has foot drop. On July 29, 2014, Dr. Majd noted Agovic was scheduled for an L4-L5 microdiscectomy, foraminotomy, and decompression. He noted Agovic had degeneration from L3 to S1. He stated if Agovic developed instability, he may require a fusion from L3 to S1.

Agovic filed Dr. Doyle's August 27, 2014 note. Dr. Doyle saw him for complaints of back pain, leg weakness, and balance problems. He noted the pain increased with standing or walking. He noted Agovic never fully recovered from the 2006 injury. Agovic stated his pain had increased over the previous few months, and he had developed pain radiating down his left hip and leg. Dr. Doyle recommended a left L5-S1 laminectomy, L4-L5 and L5-S1 laminotomy and foraminotomy, and a discectomy at L4-L5. On November 5, 2014, Dr. Doyle stated although Agovic continued to have back and leg pain, he was somewhat improved. On January 14, 2015, he stated the left sciatica had improved, but Agovic had developed left leg numbness. He recommended aqua therapy, which he again recommended on February 25, 2015.

In his report dated March 17, 2015, Dr. Doyle stated as follows:

> This patient clearly injured himself at work and developed a very large disc herniation. His MRI showed a fragment in the spinal canal at L4-5 impinging upon the nerve producing severe pain. His surgery consisting of a redo left L5 laminectomy, L4-5 and L5-S1 laminectomy, foraminotomy and discectomy performed on 10/10/2014 was absolutely necessary and was performed from a pathology sustained in a work related injury.

> Mr. Agovic's severe sciatica has improved following surgery, but he continues to have mechanical back pain and would benefit from aquatic therapy in order to mobilize and stabilize his lumbar spine.

Agovic also filed the September 16, 2014 utilization review report of Dr. Kenneth Bode. Dr. Bode stated, "RE-OP left L5 Laminectomy/L405, L5-S1 Laminotomy/ Foraminotomy/L4-5 Discectomy are medically necessary and appropriate since the patient has worsening radiculopathy signs and symptoms and the MRI shows recurrent nerve root compression at these levels."

Agovic filed Dr. Terry's October 8, 2014 peer review report. She opined the problem at L5-S1 is related to the original injury, but the L4-L5 is not.

Agovic also filed records from his original claim including those of Dr. Ivan Ljubic, Dr. Dante Morassutti, Dr. Jacob Blum, and Norton Hospital. Those records document his treatment for a disc herniation at L5-S1 for which surgery was performed on December 9, 2006. Those records also reflect the presence of degenerative disc disease.

As noted above, the ALJ rendered a decision on July 17, 2015 finding the contested medical treatment partially compensable. Agovic filed a petition for

reconsideration on July 31, 2015 requesting additional findings of fact regarding the ALJ's determination there is no contradicting evidence the pain management referral is non-compensable. This petition for reconsideration was denied on August 31, 2015.

In a post-award medical fee 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).

Here, the ALJ determined a portion of the treatment rendered and surgery performed was due to the 2006 work-related injury, and part of the treatment was due to non-work conditions. This involves an issue of causation. While no clear-cut percentage was afforded by a physician regarding treatment attributable to the work-related condition versus the non-work-related condition, it was reasonable for the ALJ to conclude a portion of the treatment was compensable and a portion was not. Without a

specific apportionment, it was not unreasonable for the ALJ to conclude Marco was responsible for only half of the treatment he found reasonable and necessary. Likewise, the ALJ was free to determine a portion of the contested treatment was not reasonable and necessary, and that determination is also supported by the evidence.

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). In this instance, the ALJ's determinations are supported by substantial evidence of record and will not be disturbed.

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).

Here, the ALJ properly considered the evidence of record and applied the correct analysis in reaching his determination. He determined a portion of the treatment, including surgery, was for treatment of the 2006 work injury at L5-S1, and a portion was due to non-compensable unrelated conditions. Since substantial evidence supports the ALJ's determination, and he clearly outlined his reasoning for doing so, we must affirm. While Agovic may point to Dr. Doyle's report as support for his position, a contrary decision is not compelled. This merely

constitutes evidence upon which the ALJ could have relied, but did not. He was not compelled to do so.

We emphasize the ALJ’s decision does not relieve Marco from its responsibility for the payment of reasonable and necessary medical treatment for the L5-S1 injury Agovic sustained in 2006. Marco remains responsible for the cure and/or relief of the plaintiff's work-related injury pursuant to KRS 342.020.

Accordingly, the July 17, 2015 Opinion and Order, and order denying the petition rendered August 31, 2015 by Hon. M. Christopher Davis, Administrative Law Judge, are hereby **AFFIRMED.**

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

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