

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: September 26, 2014

CLAIM NO. 198615159 & 199442224

EATON CORPORATION

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE

JAMES DAVID ROBERTSON,  
DR. AMIE CLARK/CLARK FAMILY CHIROPRACTIC,  
DR. JOHN GOVER,  
HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART  
AND REMANDING

\* \* \* \* \*

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

**RECHTER, Member.** Eaton Corporation ("Eaton") appeals from the May 13, 2013 Opinion and Order and the June 12, 2014 Order on Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"). In this medical fee

dispute, the ALJ determined chiropractic care and massage therapy are reasonable and necessary for the relief of James Robertson's work-related back injury. For the reasons set forth herein, we affirm. However, we remand for a determination of the compensability of Dr. Gover's fee.

Robertson was first injured on September 16, 1985, when he twisted his low back while lifting a heavy object. In a May 4, 1987 Opinion and Award, the Workers' Compensation Board determined the work injury aroused Robertson's pre-existing spondylolisthesis and degenerative disc disease. He was awarded income and medical benefits, and returned to work.

Robertson later injured his neck and back on June 24, 1994, again while lifting a heavy object. His 1994 injury claim was settled, though he did not return to work following the second injury. The Agreement as to Compensation and Order Approving Settlement listed the nature of Robertson's injury as cervical spondylosis and degenerative disc disease. Robertson retained his right to future medical benefits.

Eaton filed a motion to reopen and medical fee dispute on December 16, 2013, contesting the reasonableness, necessity and work-relatedness of chiropractic treatment and

massage therapy treatment. In support of its motion, Eaton submitted the report of Dr. Thomas Loeb.

Dr. Loeb evaluated Robertson on November 12, 2013. He diagnosed multilevel degenerative disc disease in the lumbar and cervical spine, with a history of spondylolisthesis at L5/S1. He concluded Robertson's current diagnosis is unrelated to the work injury, which he believed caused only transient soft tissue strains or sprains. Rather, Dr. Loeb concluded Robertson's condition results from the natural progression of degenerative disc disease. Accordingly, he believed chiropractic care would not provide any demonstrable benefit and, therefore, is not reasonable or medically necessary for the cure or relief of Robertson's condition. For the same reason, he concluded the chiropractic care is not related to the work injury.

During his deposition, Dr. Loeb reiterated his belief Robertson's spondylosis was not caused by any traumatic event, but rather is congenital. He was presented with medical records of Dr. Timothy Schoettle, a neurosurgeon who treated Robertson in 1995 after his second work injury. Based on his physical evaluation, MRI report and cervical x-rays, Dr. Schoettle concluded Robertson's grade II spondylolisthesis at L5-S1 is "traumatic" and "probably related to his 1985 injury with

some exacerbation from his 1994 injury." At deposition, Dr. Loeb disagreed completely with Dr. Schoettle's characterization of Robertson's spondylolisthesis as "traumatic". Dr. Schoettle's records were entered into the record.

Robertson submitted a December 30, 2013 letter from Dr. John Gover, his long-term primary care physician. Dr. Gover summarized Dr. Schoettle's diagnosis of grade 1 to 2 anterior spondylolisthesis with bilateral spondylosis, severe disk degeneration, and severe bilateral foramen stenosis. He stated Robertson suffers from a "chronic musculoskeletal condition that appears to be historically deemed work related and can in my records find evidence of ongoing problems over the years."

Robertson also submitted a letter from Dr. Amie Clark, his treating chiropractor. Dr. Clark also summarized Dr. Schoettle's diagnosis of anterior spondylolisthesis and severe bilateral foramen stenosis, as well as mild disc bulging. She stated Robertson wishes to manage his condition conservatively to avoid surgery, and for that reason has sought chiropractic care. Dr. Clark stated "his injuries appear to be deemed work related."

Additionally, Robertson submitted a letter from his massage therapist, J.L. Mills. Mr. Mills indicated he

had been seeing Robertson for five years. He explained the various modalities he has employed with Robertson, which minimize pain and increase flexibility.

After a thorough and detailed summary of the evidence, the ALJ ultimately determined the chiropractic care and massage therapy are reasonable and necessary for the relief of Robertson's work-related injury. In considering whether Robertson's treatment is related to a work injury, he explained:

In this particular case, I note that Dr. Loeb places great emphasis on the fact that he believes the plaintiff's current condition is unrelated to his original injuries. He notes the plaintiff to have congenital spondylolisthesis and suffers from degenerative disc disease. However, a review of the plaintiff's original actions indicates that his injuries were in fact the arousal of just those conditions. The treating physician and treating chiropractor have indicated the historical fact the plaintiff's condition for which he is treated have been considered work related. I am convinced from the entire record including the documents from the original proceedings and the medical evidence supplied by the plaintiff's physicians that his conditions are indeed work related. I am further convinced by the opinion of the treating chiropractor, Dr. Amie Clark, the continued use of chiropractic manipulation and massage therapy is medically necessary in order to help the plaintiff maintain his quality of life and perform activities of daily living. I further note that Dr. Loeb generally

criticizes the use of chiropractic care beyond an acute phase following an injury. However, Dr. Clark has indicated the current treatment is aimed at helping the plaintiff maintain his quality of life and prevent episodic flare-ups. As the treating chiropractor, I am convinced she is in the best position to determine whether the plaintiff is receiving adequate benefit from the treatment. After a review of the entirety of the evidence, I am convinced the contested treatment is [] reasonable and necessary under KRS 342.020.

In its petition for reconsideration, Eaton requested additional findings of fact concerning work-relatedness. In an order denying Eaton's petition for reconsideration, the ALJ further explained:

[Robertson] is of course being treated for degenerative disc disease and congenital spondylolisthesis and [Eaton] obtained a report from Dr. Loeb to offer the opinion that these conditions were not related to the plaintiff's original work injuries. The current treating physicians, of course, were not treating [Robertson] back in 1987 when he sustained injuries but did offer the opinion that they were continuing to treat [him] for what was considered a work-related injury. A review of the original Opinion and Order dated May 4, 1987 indicates [Roberston] was awarded benefits for the arousal of these pre-existing dormant conditions.

...

When one considers the evidence from the original proceeding combined with the opinions of the current treating physicians, it is clear

[Robertson's] current treatment is for the same arousal of pre-existing congenital and degenerative conditions for which he was awarded benefits.

On appeal, Eaton concedes Robertson's chiropractic and massage care are reasonable for the relief of his condition, but contest the ALJ's determination that condition is related to his work injury. It first contests the sufficiency of the evidence supporting that conclusion, then also argues the ALJ failed to enter sufficient findings of fact concerning work-relatedness. Finally, Eaton maintains the Dr. Gover's narrative medical report was prepared solely for the purpose of litigation and is, therefore, non-compensable as a medical expense.

We first address Eaton's challenge to the sufficiency of the evidence. Eaton argues the opinions of Drs. Gover and Clark cannot be considered substantial evidence because both simply reiterated the "historical fact" that Robertson's conditions had been deemed work-related. As part of this argument, it also challenges the ALJ's reliance on evidence contained in the original records of Robertson's prior injury claims.

Eaton is correct neither Dr. Gover nor Dr. Clark appear to have formulated an independent diagnosis considering causation. Rather, both restated Dr.

Schoettle's diagnosis and indicated they were treating Robertson for the same condition diagnosed in 1995. Dr. Schoettle's reports were submitted in the record for the ALJ's review, and included his diagnosis of "traumatic grade II spondylolisthesis at L5-S1" and his opinion the condition was aggravated by the work injuries.

In exercising his discretion to determine the quality and character of the evidence, the ALJ is entitled to draw reasonable inferences from the proof. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Dr. Schoettle determined Robertson's condition was related to his 1985 and 1994 injuries. Dr. Gover and Dr. Clark stated they were treating Robertson for the same condition. When considered together, we believe this proof constitutes the requisite substantial evidence to support the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Furthermore, we do not believe the ALJ erred in relying upon records relating to Robertson's prior injury claims. In considering the issue of work-relatedness, the ALJ, in the Opinion and Order, stated his reliance on "documents from the original proceedings and the medical evidence supplied by [Robertson's] physicians." This statement is somewhat vague, as it could arguably be interpreted to include the settlement agreement of the 1994

injury. Eaton is correct KRS 342.125(7) prohibits any statement contained in a settlement agreement from being considered as an admission against a party. However, it is worth noting, nowhere does the ALJ state his specific reliance on any statement contained in the 1994 settlement agreement.

Nonetheless, we believe any confusion was clarified in the Order on Reconsideration. The ALJ more specifically referred to the Board's 1987 opinion and the "evidence from the original proceeding." Certainly, the ALJ is at liberty to consider the fact the 1987 Board opinion awarded benefits for the arousal of pre-existing, dormant conditions; to wit, spondylolisthesis and degenerative disc disease.

Furthermore, when read in conjunction with the Opinion and Order, it is clear the "evidence from the original proceeding" relied upon by the ALJ is Dr. Schoettle's records. Very little evidence was submitted in this medical fee dispute. While a copy of the settlement agreement was submitted into the current record, Dr. Schoettle's medical records are the only "evidence" from the 1994 claim which were placed in the current record. The ALJ was also entitled to rely on Dr. Schoettle's records in rendering his decision.

Finally, we must address Eaton's reliance on Sumitomo Elec. Wiring v. Kingery, -- S.W.3d --, 2014 WL 2916965 (Ky. App. 2014). This is an unpublished decision of the Court of Appeals which is currently pending review by the Supreme Court, and therefore is of limited persuasive authority. See CR 76.28. Nonetheless, we have reviewed Kingery and believe the present case is distinguishable. Kingery involved a medical dispute in which the ALJ relied solely on the claimant's testimony to determine causation. Here, the ALJ relied upon the diagnosis contained in the 1987 Board decision, along with Dr. Schoettle's records and statements from Robertson's current providers in rendering his decision.

Eaton also challenges the sufficiency of the ALJ's findings regarding the work-relatedness of the contested treatment. As stated above, we believe the ALJ sufficiently clarified his conclusions in the Order on Reconsideration. Especially when considered in context of the relatively limited evidentiary record, we conclude the ALJ has made sufficiently clear he relied on the diagnosis contained in 1987 Board opinion, Dr. Schoettle's diagnosis in 1995, and the statements of Drs. Gover and Clark. While the ALJ might have articulated his reasoning more directly, given the limited evidence presented and the thorough summary of the

evidence provided, we believe he has made it sufficiently clear to the parties upon what evidence his determinations rest. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

Finally, Eaton argues Dr. Gover's letter is not compensable because it is a narrative statement prepared in response to the medical fee dispute. Eaton preserved the compensability of Dr. Gover's letter as a contested issue at the Benefit Review Conference. In its petition for reconsideration, it requested clarification on this issue, which was not expressly addressed in the Opinion and Order. Rather, the ALJ stated Eaton "shall be responsible for the payment of the contested medical treatment." The ALJ did not address Dr. Gover's fee in the Order on Reconsideration.

KRS 342.020(1) requires the employer to pay for the "cure and relief from the effects of an injury." Although the letter appears to simply be a narrative report prepared in response to litigation, that question is one of fact and, therefore, not within this Board's province to determine. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). For this reason, we must remand to the ALJ for a specific determination as to the compensability of Dr. Gover's fee.

Accordingly, this matter is **REMANDED** to Hon. John B. Coleman for a determination as to the compensability of Dr. Gover's fee. The May 13, 2013 Opinion and Order and the June 12, 2014 Order on Reconsideration are **AFFIRMED** in all other respects.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON KELLEY GRAY  
303 N HURSTBOURNE PKWY, STE 110  
LOUISVILLE, KY 40222

**RESPONDENT, PRO SE:**

MR JAMES D ROBERTSON  
3711 OLD GREENHILL ROAD  
BOWLING GREEN, KY 42103

**OTHER RESPONDENTS:**

DR AMIE CLARK  
CLARK FAMILY CHIROPRACTIC  
351 PASCOE BLVD, STE 106  
BOWLING GREEN, KY 42104

DR JOHN GOVER  
990 WILKINSON TRACE, STE 100  
BOWLING GREEN, KY 42103

**ADMINISTRATIVE LAW JUDGE:**

HON JOHN B COLEMAN  
PREVENTION PARK  
657 CHAMBERLIN AVENUE  
FRANKFORT, KY 40601