

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 20, 2013

CLAIM NO. 201078743

HARDEE'S

PETITIONER

VS.

APPEAL FROM HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

LORETTA SIZEMORE,
DR. OLIVER JAMES,
and HON R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART
AND REMANDING IN PART

* * * * *

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

RECHTER, Member. Hardee's appeals from the June 10, 2013 Opinion, Order and Award rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), and from the July 11, 2013 order overruling its petition for reconsideration. The ALJ awarded Loretta Sizemore ("Sizemore") temporary

total disability benefits, permanent partial disability benefits and medical benefits. Hardee's argues the ALJ erred in relying on the opinions of Dr. James C. Owen, in preserving Sizemore's right to reopen to seek the two multiplier in the future, in awarding future medical benefits, and in failing to rule on contested medical treatment. We affirm in part and remand in part, for further fact-finding regarding medical treatment.

Sizemore injured her low back on August 16, 2010 when she slipped and fell. She testified she experienced extreme pain in her back and down her left leg, but denied any prior injuries to, or treatment for, her lumbar spine. When confronted with a March 2009 medical record indicating she was treated for low back pain, and an August 31, 2009 record noting chronic low back pain, Sizemore could not recall the treatment. She also could not recall having complaints of joint or back pain in September 2009. Sizemore sustained a shoulder injury in 2001 for which she took Lortab "off and on" over the years. She indicated her shoulder caused constant pain in 2007 and she was referred to Dr. Grau. Dr. Ertel referred her to Dr. Napolitano for treatment of carpal tunnel syndrome in September 2010.

Sizemore testified she returned to work at Hardee's in a supervisory capacity and performed most of

her regular activities. However, she refused to lift fifty pound buckets of shortening and does not "put up" the deliveries. Sizemore testified she continues to have pain in her lower back radiating into her hips and legs. She is able to continue working but has to take medication to do so.

Dr. Owen performed an independent medical evaluation ("IME") on October 24, 2012. He received a history of the August 16, 2010 injury and subsequent treatment. Dr. Owen diagnosed persistent radicular low back pain with non-verifiable radiculopathy. He stated, within reasonable medical probability, her injury was the cause of her complaints. Using the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), he assigned an 8% impairment, but noted her impairment would be 13% if an EMG showed nerve damage. Dr. Owen stated Sizemore did not have an active impairment prior to the injury. Dr. Owen stated Sizemore retained the physical capacity to return to the type of work performed at the time of the injury, noting "She has returned to that work and, therefore, can do so."

On January 7, 2013, after reviewing an EMG study, Dr. Owen indicated Sizemore should be placed in DRE category III with a 13% impairment rating. He stated the

severity of her radiculopathy warranted "full attention by pain management." Dr. Owen further stated pain management protocols were appropriately followed, and her treatment would be considered appropriate and payment for the injections would be expected.

Size more submitted records from Dr. Gregory Grau. Dr. Grau obtained an MRI revealing herniated discs at L4/5 and L5/S1. EMG results revealed axonal pathology affecting the right lower lumbosacral nerve root levels, most evident at the right L5 and S1 nerve root levels, and on the left, most evident at the S1 nerve root level. Dr. Grau diagnosed lumbar radiculopathy.

Hardee's submitted a medical report of Dr. Lisa Gill who performed a medical records review as part of the utilization review process. Dr. Gill recommended denial of facet injections, stating radiculopathy had not been verified to support administration of the injections.

Hardee's submitted the report of Dr. Robert Jacob who performed a medical records review. He opined there was no medical indication or necessity to undergo additional injection therapy. He further stated there was no need for continued use of Percocet, Neurontin, or Flexeril.

Hardee's submitted records from Dr. Larry Ertel. On August 31, 2009, Sizemore was treated for chest pain. Dr. Ertel noted a past medical history of chronic back pain. Dr. Ertel noted there was no neck or back pain. Dr. Ertel's note on March 11, 2009 includes back pain in his assessment, but does not indicate any treatment was rendered for that condition. On October 2, 2009, Sizemore was seen with a chief complaint of back pain that was noted to have "flared up from all the MRIs and tests she has been having with Dr. Rogers."

Hardee's submitted reports from Dr. John Vaughan who performed IMEs on October 27, 2011 and January 2, 2013. Dr. Vaughan diagnosed "chronic lumbar strain and lumbar spondylosis (age-related degenerative changes)." Dr. Vaughan assigned a 5% impairment, placing Sizemore in DRE category II.

In his January 2, 2013 report, Dr. Vaughan indicated he had reviewed additional medical records and opined Sizemore's impairment was pre-existing and active prior to the work injury. He stated there was no objective basis to increase her impairment rating after the work incident. Dr. Vaughan stated lumbar facet injections and lumbar epidural steroid injections were not reasonable or medically necessary treatment for the effects of the work

injury. He felt prescriptions for Flexeril, Neurontin and Tramadol were reasonable or necessary, but were related to the pre-existing active condition.

Dr. Vaughan testified by deposition on March 1, 2013. On cross examination, Dr. Vaughan admitted the records do not reflect Sizemore underwent back surgery, had an MRI performed on her lumbar spine, or underwent an EMG study prior to the work injury. When questioned regarding the specific records from Dr. Ertel, Dr. Vaughan acknowledged the treatment she received was for conditions other than back pain. He further acknowledged the records did not definitively show the Lortab had been prescribed solely for back pain. Dr. Vaughan testified there was no evidence in the medical records indicating Sizemore complained of radiculopathy prior to the August 16, 2010 injury.

During the pendency of the claim, Hardee's filed two medical fee disputes to contest the proposed L3-S1 facet injection and "the medication regimen prescribed by Dr. Oliver James." "Unpaid or contested medical expenses" was listed as a contested issue in the Benefit Review Conference order.

In the June 10, 2013 Opinion, Order and Award, the ALJ found Sizemore credible regarding her back

condition prior to the work injury. The ALJ determined Sizemore sustained a lumbar strain injury with radiculopathy. The ALJ found no pre-existing active impairment/disability. The ALJ determined Sizemore returned to work at an average weekly wage higher than she was earning at the time of the injury. The ALJ found Sizemore did not retain the physical capacity to return to the type of work she performed at the time of the injury. After performing an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the ALJ determined Sizemore was likely to be able to continue to earn equal or greater wages for the indefinite future and, therefore, application of the three multiplier was not indicated. The ALJ provided that, should Sizemore's employment at the greater wage cease for reasons connected with her work injury, she would be able to reopen her claim to seek enhancement by the two multiplier pursuant to KRS 342.730(1)(c)2 and Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009). The ALJ's decision contained the standard award of medical benefits.

Hardee's filed a petition for reconsideration raising essentially the same arguments it now makes on appeal. By order dated July 11, 2013, the ALJ overruled the petition for reconsideration based upon the reasons set

forth in the Opinion and Sizemore's response to the petition for reconsideration.

On appeal, citing Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), Hardee's argues Dr. Owen's opinions do not constitute substantial evidence because he had an inaccurate history of Sizemore's prior back complaints. Hardee's contends Dr. Owen relied on a "false denial" of prior back complaints. Hardee's notes, after reviewing records of prior treatment, Dr. Vaughn opined Sizemore's current low back condition is related to a pre-existing active condition. Hardee's argues the ALJ was compelled to find Sizemore is not entitled to any permanent income or future medical benefits.

After examining the record, we conclude Cepero, *supra*, is inapplicable in the case *sub judice*. Cepero was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was

adequately informed of this prior history opined Cepero's left knee impairment was not work-related, but instead, was attributable to the non-work-related injury two and a half years previous.

In this case, while Dr. Ertel's records reflect a diagnosis of chronic back pain, the prior treatment administered was primarily for other conditions. There is no evidence in the record indicating Sizemore had radiculopathy or herniated discs prior to the work injury. Additionally, there is nothing in the record to indicate any prior condition affected Sizemore's ability to perform her work prior to the injury. The evidence falls far short of compelling a finding Sizemore had a prior active impairment. Sizemore testified she took prescription medication for her shoulder condition, not her back condition, prior to the work injury. The ALJ, as was his prerogative, found Sizemore credible regarding her pre-injury condition. We cannot conclude Dr. Owen had a history so inaccurate or incomplete as to render it lacking in probative value.

Hardee's next argues Sizemore retains the physical capacity to return to the type of work she performed at the time of injury and is thus limited to benefits pursuant to KRS 342.730(1)(b). Hardee's asserts

that when an employee retains the physical capacity to return to the type of work performed at the time of the injury, regardless of post-injury income, the employee is only entitled to benefits calculated pursuant to KRS 342.730(1)(b).

We find no error in the ALJ's inclusion of the provision Sizemore may reopen to seek the two multiplier if she ceases to earn an average weekly wage equal to or greater than the wage earned at the time of the injury for reasons related to the injury.

KRS 342.730(1)(c)2 provides:

If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reasons, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection.

Here, there is no dispute Sizemore returned to work at a greater wage and continued to earn that wage at the time of the ALJ's decision. Since the ALJ found the provisions of KRS 342.730(1)(c)1 and 2 could apply, he

performed a Fawbush analysis and determined Sizemore was likely to be able to continue to earn that wage for the indefinite future. Appropriately, the ALJ determined KRS 342.730(1)(c)1 could not be applied. Because Sizemore continued to work for Hardee's earning equal or greater wage, as acknowledged by the ALJ, KRS 342.730(1)(c)2 is applicable subject to the conditions set forth in Chrysalis House, Inc. v. Tackett, supra. The ALJ's inclusion of the provision regarding reopening is a statement of the law regarding KRS 342.730(1)(c)2 and KRS 342.730(4) which allows a claim to be reopened in order to modify or "conform" the "award payments" with the "requirements of subparagraph 2" i.e., the two multiplier. Sizemore is entitled to have the two multiplier language included in her award, contingent upon any cessation at such a wage during any period Sizemore's employment for a reason related to the disabling injury.

In Toy v. Coca Cola Enter., 274 S.W.3d 433 (Ky. 2008) the Court stated:

KRS 342.125(3) permits reopening at any time to conform an award made under KRS 342.730(1)(c)2 to a post-award change in circumstances. When read in tandem with KRS 342.125(3), KRS 342.730(1)(c)2 permits an award to be reopened and doubled during any period in which the recipient's average weekly wage is less

than the average weekly wage earned at the time of injury.

Application of KRS 342.730(1)(c)2 does not depend upon a claimant also qualifying for benefits pursuant to KRS 342.730(1)(c)1. Substantial evidence supported the ALJ's finding Sizemore did not retain the physical capacity to perform the same work she performed at the time of her injury. Assuming *arguendo* the ALJ had erroneously concluded Sizemore retained the physical capacity to return to the type of work performed at the time of injury, KRS 342.730(1)(c)2 would remain applicable. Any error regarding Sizemore's physical capacity would be nothing more than harmless error since the ALJ determined KRS 342.730(1)(c)2 was applicable after performing the Fawbush analysis.

Finally, Hardee's argues the ALJ erred in awarding future medical benefits and failed to rule upon the contest of specific treatment modalities ordered by Dr. James. The ALJ did not specifically rule on the contested injections and prescriptions for Percocet, Neurontin and Flexeril. Hardee's requests if the claim is not dismissed in total, the claim be remanded for further consideration of the reasonableness and necessity of the contested medical treatment.

We do find it necessary to remand this matter for ruling on the medical fee disputes filed by Hardee's. The ALJ provided an award of medical expenses for Sizemore's lumbar condition, but failed to rule on the reasonableness and necessity of the facet injection or contested prescriptions. The record contains conflicting evidence regarding the contested treatment, requiring the ALJ to exercise his fact-finding authority on the issue.

Accordingly, the June 10, 2013 Opinion, Order and Award rendered by Hon. R. Scott Borders, Administrative Law Judge, and the July 11, 2013 order overruling Hardee's petition for reconsideration are **AFFIRMED** as set forth herein. However, this matter is **REMANDED** for the limited purpose of additional fact-finding and a decision regarding the contested medical treatment.

ALL CONCUR.

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