

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 23, 2015

CLAIM NO. 201200136

HORIZON BAY

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

MARY CHAKNINE and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

* * * * *

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

ALVEY, Chairman. Horizon Bay appeals from the June 23, 2015 Medical Fee Opinion and Order rendered by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), finding compensable a contested cervical MRI for Mary Chaknine's ("Chaknine") cervical complaints stemming from a February 7,

2011 work injury. Horizon Bay also appeals from the July 23, 2015 order denying its petition for reconsideration.

On appeal, Horizon Bay argues the ALJ erred as a matter of law and fact in finding the proposed cervical MRI is reasonable and necessary. Because we find no error in the ALJ's decision finding Chaknine's cervical condition is due to her work injury, and any challenge of that determination is barred by *res judicata*, we affirm. We vacate that portion of the ALJ's decision finding the cervical MRI is reasonable and necessary, and remand to the ALJ for additional determination supporting her decision.

Chaknine filed a Form 101 on January 30, 2012 alleging she injured her right elbow and neck when she slipped and fell on ice as she was taking out the trash at work on February 7, 2011. On November 14, 2012, Hon. Edward D. Hays, Administrative Law Judge ("ALJ Hays") rendered a decision finding Chaknine had sustained work-related injuries to her right elbow, right shoulder and neck when she slipped and fell at work. He specifically stated, "Thus, the plaintiff is entitled to medical care and treatment of the elbow, shoulder and the neck for the myofascial pain under KRS 342.020." Horizon Bay filed a petition for reconsideration arguing ALJ Hays failed to provide essential findings of fact concerning "certain

matters". The petition for reconsideration was denied by order entered January 4, 2013.

Horizon Bay appealed to this Board arguing only ALJ Hays erred in applying the three multiplier pursuant to KRS 342.730(1)(c)1. The issue of work-relatedness and compensability of Chaknine's neck or cervical condition was not raised as an issue. In an opinion entered April 5, 2013, this Board vacated in part the ALJ's decision, and remanded for a more complete analysis pursuant to KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2. In an order on remand issued August 9, 2013, ALJ Hays performed the analysis directed by this Board, and his decision was not appealed.

Horizon Bay filed a Form 112 medical dispute and motion to reopen on November 10, 2014 contesting the work-relatedness of Chaknine's spine condition and the proposed cervical MRI. Horizon Bay attached the October 29, 2014 records review report prepared by Dr. William C. Nemeth. Dr. Nemeth opined Chaknine's elbow fracture was healed. He additionally stated she had a history of unrelated neck pain neither caused nor exacerbated by the work injury. He determined Chaknine's current symptoms and request for MRI are unrelated to the work injury. On reopening, the medical dispute was initially assigned to Hon. John B. Coleman,

Administrative Law Judge, who eventually transferred it to the ALJ.

Chaknine testified by deposition on January 8, 2015. She is a resident of Crestwood, Kentucky. She has a GED and completed some college coursework. She worked as a caregiver for Horizon Bay. She subsequently worked for multiple other employers as a caregiver.

Chaknine stated she continues to have pain and swelling in her fingers, and has also developed tingling and numbness. She also continues to have shoulder pain. She stated she has continued to experience neck pain and stiffness since her work injury, and has a knot in the middle of her neck. She stated her shoulder pain worsens when her neck pain worsens. She desires to undergo the cervical MRI.

On January 12, 2015, a scheduling order was issued which listed diagnostic testing, causation and work-relatedness of the cervical condition as issues. The amount of the dispute was noted as being greater than \$2,500.00. A telephonic benefit review conference ("BRC") was held on April 28, 2015. The only item listed as a contested issue was the work-relatedness of the cervical condition.

Horizon Bay subsequently filed the report of Dr. Timothy Kriss who evaluated Chaknine on its behalf on March

25, 2015. Dr. Kriss opined Chaknine has a questionable, minimal, non-displaced right elbow fracture and right carpal tunnel syndrome, which he determined was unrelated to her work. He stated Chaknine has no cervical radiculopathy and exhibits mild symptom magnification. He additionally found her neck pain unrelated to the February 8, 2011 slip and fall at work stating, "I find no convincing evidence of cervical radiculopathy, cervical radiculitis or cervical myelopathy, and therefore I do not consider a cervical MRI medically necessary or appropriate."

Horizon Bay also filed a note of Dr. Nicholas Kenney dated February 6, 2015 who stated he defers to a spine surgeon regarding causation of Chaknine's neck complaints.

An additional BRC was held on May 26, 2015. The issues listed include the reasonableness, necessity, and work-relatedness of Chaknine's cervical condition. The parties agreed to waive the hearing.

The ALJ rendered a decision on June 23, 2015 finding the contested cervical MRI compensable. The ALJ specifically found as follows:

The evidence includes the November 14, 2012 Opinion, Award and Order of ALJ Ed Hays who found the neck injury work related. Specifically, on page 12 he stated, "Thus, the plaintiff is entitled

to medical care and treatment of the elbow, shoulder, and the neck for myofascial pain under KRS 342.020."

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 the 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 42 (KY App. 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).

In the specific instance, Defendant Employer has moved to reopen this claim to challenge the reasonableness, necessity and work relatedness of a cervical condition. Defendant Employer has supported its argument with reports including Dr. Kriss who does not find the condition was ever work related. Likewise, Dr. Nemeth mistakenly stated the work injury was to the right arm only. The decision of work relatedness of the cervical condition has already been decided by ALJ Hays in favor of Plaintiff and his decision is not up for reconsideration. Plaintiff's attorney noted as to the unconvincing evidence, not only is the issue of causation of Plaintiff's cervical complaints already established under the *Doctrine of Res Judicata*, an MRI will assist the medical

professionals in deciding Plaintiff's care. As the issue of work relatedness has already been established, the MRI is found reasonable and necessary for future treatment.

Horizon Bay filed a petition for reconsideration on July 2, 2015, arguing the ALJ erred in finding the cervical MRI reasonable and necessary. Horizon Bay requested specific findings regarding the evidence relied upon by the ALJ in determining the cervical MRI is reasonable and necessary. On July 23, 2015, the ALJ issued an order denying the petition for reconsideration as an impermissible reargument of the case.

The ALJ clearly reviewed and summarized the medical documentation submitted. She noted Horizon Bay had the burden of proving medical treatment is not reasonable or necessary pursuant to National Pizza Company v. Curry, 802 S.W.2d 949 (Ky. App. 1991); and Chaknine had the burden of proving work-relatedness and causation pursuant to R.J. Corman R.R. Construction Company v. Haddix, 864 S.W. 2d 915 (Ky. 1993). The ALJ noted ALJ Hays had previously determined Chaknine's cervical condition is work-related, and that finding was not appealed, therefore we find she did not err in determining that issue is *res judicata*.

Notwithstanding the holding in C & T Hazard v. Chantella Stollings, et al., 2012-SC-000834-WC, 2013 WL 5777077 (Ky. 2013), an unpublished case from the Kentucky Supreme Court, a long line of reported decisions establish in a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving entitlement to the relief sought, except that the claimant bears the burden of proving work-relatedness. National Pizza Company vs. Curry, supra; Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993).

That said, we acknowledge KRS 342.285 designates the ALJ as the finder of fact, and as such she is granted the sole discretion in determining the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Likewise, the ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

However, such discretion is not unfettered. In reaching her determination, the ALJ must also provide findings sufficient to inform the parties of the basis for her decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

We note the ALJ merely denied Horizon Bay's petition for reconsideration as a reargument of the case without providing the requested additional findings. While substantial evidence may very well exist supporting the ALJ's determination regarding the reasonableness and necessity of the cervical MRI, she must provide an adequate explanation of the basis for her decision, especially when requested to do so by petition for reconsideration. This Board may not, and does not direct any particular result because we are not permitted to engage in fact-finding. See KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, supra.

While we agree with the ALJ's determination the cervical condition is work-related based upon the doctrine of *res judicata*, we must remand for the ALJ to provide the basis for her decision finding the requested testing is reasonable and necessary as requested by Horizon Bay.

Accordingly, the Medical Fee Opinion and Order rendered by Hon. Jane Rice Williams, Administrative Law Judge, on June 12, 2015, and the order denying Horizon Bay's petition for reconsideration issued July 16, 2015 are hereby **AFFIRMED IN PART, VACATED IN PART, AND REMANDED** for additional findings consistent with the directions set forth above.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, DISSENTS AND FURNISHES A SEPARATE OPINION.

RECHTER, Member. I respectfully dissent because, under the circumstances of this case, I find the ALJ's analysis was sufficient. In a post-award medical fee dispute, the employer bears the burden of proving the contested medical treatment is unreasonable or unnecessary. Horizon Bay submitted the opinions of Drs. Kriss and Nemeth. The ALJ provided her reasons and rationale for rejecting both opinions. Consequently, she determined Horizon Bay failed to satisfy its burden of proof. Sufficient and cogent reasons were provided by the ALJ, and I do not believe further fact-finding is necessary.

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