Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 1, 2014

CLAIM NO. 200094688

HOUCHENS FOOD GROUP PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

ANNAJO SULLIVAN,
DAVID H. MCCORD, M.D.
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Houchens Food Group, Inc. ("Houchens") appeals from the December 16, 2013 Opinion and Order and the February 5, 2014 Order overruling its petition for reconsideration rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"). In a reopening for a

medical dispute, the ALJ found proposed surgery by Dr. David McCord compensable. On appeal, Houchens argues the ALJ's determination is not supported by substantial evidence. We disagree and affirm.

AnnaJo Sullivan ("Sullivan") sustained an injury to her back on September 20, 1999 when she slipped and fell on a concrete floor. She underwent laminectomies at L4-5 and L5-S1 in April 2000. Her claim was resolved by settlement agreement approved October 10, 2001. Sullivan's symptoms worsened, however. She sought treatment from Dr. David McCord, who performed a posterior lumbar fusion at L5-S1 in January, 2004. Most recently, on May 1, 2013, Houchens filed a motion to reopen and medical dispute to challenge compensability of a proposed second fusion surgery by Dr. McCord.

Houchens submitted the report of Dr. Richard Berkman who saw Sullivan on March 22, 2013 to provide a second surgical opinion. Dr. Berkman agreed with Dr. McCord that Sullivan has loss of sagittal balance and appears to have mechanical instability at L3-4 and L4-5. Dr. Berkman felt Sullivan might be better suited for a spinal cord stimulator rather than a two level spinal fusion, explaining as follows:

> I would recommend that her pain management physician performed [sic] a spinal stimulator trial. If it afforded her satisfactory relief, this would be a better way for her to proceed. If not, then from a technical standpoint, Dr. McCord is correct and proceeding with surgery is reasonable based upon the imaging studies prpoded [sic]. My reluctance to recommend spinal fusion surgery would be based solely on the fact that she did so poorly from her initial operation, that she's addicted to narcotics, and that she has symptom magnification.

Dr. Martin Schiller performed an independent medical examination ("IME") on August 29, 2013. He previously performed an IME on January 18, 2007. Dr. Schiller diagnosed failed back surgery syndrome. He doubted the necessity of the initial disk removal procedure, and believes her current diagnosis is the result of the past inappropriate surgical procedures. He characterized Dr. McCord's proposed surgery as excessive, unnecessary and unreasonable. Dr. Schiller noted Sullivan already had two unsuccessful spine surgeries and it was unlikely she would benefit from a third. He stated further surgery "could make this woman more of a back cripple than she is now." Dr. Schiller cited several articles concerning the low success rate following revision surgeries in failed back syndrome cases. He characterized

Dr. McCord as an overly aggressive physician who makes recommendations for extensive spine surgeries which are not indicated.

Houchens submitted the April 10, 2013 utilization review notice of denial by Dr. Peter T. Kirsch, who stated the procedure proposed by Dr. McCord are not reasonable or medically necessary. Though technically the proposed surgery appears appropriate, Dr. Kirsch posits all attempts at conservative treatment should first be exhausted, primarily because prior surgeries have proved unsuccessful.

Houchens also submitted the March 14, 2013 treatment note from Dr. Paul Maglinger, a pain specialist who evaluated Sullivan for complaints of chronic back pain. He diagnosed failed lumbar back syndrome, radiculopathy and myofascial syndrome. Dr. Maglinger recommended a referral to a clinical psychologist for Sullivan's depression and anxiety, as well as consideration of a spinal cord stimulator as a surgical alternative.

In a June 21, 2013 letter addressed to the ALJ, Dr. David McCord noted Sullivan did well following surgery. She returned in 2006 with complaints of increased pain, and her evaluation at that time revealed a new disc rupture at the level adjacent to and above the previous fusion site. He stated it was not uncommon for an adjacent disc to

degenerate or become unstable following fusion surgery. He disagreed with Dr. Berkman's assessment that Sullivan was not a good candidate for surgery, and criticized Dr. Berkman's statement that she did not improve after surgery. Dr. McCord noted there was a period of improvement and she was "certainly better off" following the January, 2004 procedure. Dr. McCord indicated he observed no symptom magnification, would have noted it if it were present, and would likely have made a different recommendation if she had engaged in magnification. He was critical of spinal cord stimulators, noting a stimulator "is nothing more than a means of pretending like she doesn't have an issue physically" and predicting it would only mask her problems. With use of a stimulator, her back would continue to degenerate, becoming increasingly stenotic and leading to permanent nerve damage. Dr. McCord opined Sullivan had "in the mid 80 to 90% chance" of good results. He stated one of the goals of surgery was to reduce or eliminate the use of narcotic medication.

In the Opinion and Order, the ALJ found Sullivan's current lumbar condition for which Dr. McCord recommended additional surgery was directly related to the work injury of September 20, 1999. The ALJ's findings

regarding the reasonableness and necessity of the proposed procedures are as follows:

> Having carefully considered the evidence in the record, the ALJ [ultimately] finds the opinion of plaintiff's long-time treating orthopedic surgeon, Dr. McCord, to be the most probative and persuasive with respect to the issue of medical reasonableness and necessity. While Drs. Kirsch and Maglinger have suggested less invasive forms of treatment prior to surgery, and while Dr. Schiller is rather vehement in his objection to the proposed procedure for reasons which he has well-articulated in his report, the ALJ still believes that it is appropriate to defer to the assessment and recommendation of plaintiff’s long-time treating physician over objections voiced by the defendant/employer’s medical evaluators. Certainly, Dr. McCord is the most intimately familiar with plaintiff’s lumbar spine and her response to prior surgical procedures and non-surgical treatment having been her treating surgeon. Moreover, Dr. McCord addresses concerns raised by the defendant/employer’s evaluators including acknowledging plaintiff’s dependence on narcotic medication and the desire that both he and plaintiff have that she be able to rid herself of that medication following the recommended surgery. In addition, Dr. McCord credibly disputes Dr. [Berkman’s] assessment that plaintiff is magnifying her symptoms. The fact that Ms. Sullivan is willing to undergo a third lumbar spine surgery, the first two of which provided neither complete nor lasting resolution of her symptoms, in the hopes that her pain will be decreased and she will be able to be

> weaned from narcotic pain medication, is very telling and persuasive to the undersigned. Therefore, having carefully considered the evidence of record, the ALJ is ultimately persuaded that Dr. McCord's recommendation of an extension of plaintiff's lumbar fusion surgery is medically reasonable and necessary and affords plaintiff the best opportunity for symptomatic relief. Accordingly, this medical dispute is resolved in favor of plaintiff. The defendant/employer and/or it workers' compensation carrier shall immediately pre-certify payment of the proposed laminectomy, fusion and instrumentation, bone graft and in-patient hospital stay recommended by Dr. McCord.

Houchens filed a petition for reconsideration essentially seeking more detailed explanation as to why the ALJ relied on Dr. McCord's opinion. The ALJ, in his order on reconsideration, found Houchens' petition was nothing more than a re-argument of the merits. The ALJ reaffirmed he found Dr. McCord offered the most probative and persuasive opinion with respect to the proposed surgical treatment and overruled Houchens' petition for reconsideration.

On appeal, Houchens argues the ALJ's decision is not based upon substantial evidence. It contends Dr. McCord's opinions and recommendation are so outrageous and at variance with those of the other physicians, that he cannot be taken seriously and his opinions cannot

constitute substantial evidence. Houchens contends the ALJ did not adequately address the concerns expressed by the other physicians including Sullivan's probable addiction to narcotics, multiple Waddell findings on examination, and the statistical likelihood surgery will be useless and possibly damaging to Sullivan. Due to the supposedly outlandish nature of Dr. McCord's statements, Houchens deems his opinion "nonsense" and unreliable.

In a post-award medical dispute, the employer bears the burden of proving the contested medical expenses are unreasonable or unnecessary. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The claimant retains the burden of proof on the issue of work-relatedness.[1] Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997). Because Houchens was unsuccessful on the issue of reasonableness and necessity, the question on appeal is whether the evidence compelled a finding in its favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence so overwhelming no reasonable person could reach the same

[1] It appears debate currently exists as to the burden of proof in post-award medical fee disputes. *See e.g*. Sumitomo Elec. Wiring v. Kingery, ___ S.W.3d ____, 2014 WL 2916965 (Ky. App. 2014). In this case, we have stated the law as it presently stands under final and published authority. Furthermore, we do not believe it alters our holding herein, as our ultimate determination is that the ALJ's decision is based on substantial evidence.

conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

Though couched in histrionic terms which toe the line of propriety, the essence of Houchens' appeal is a request for this Board to reweigh the evidence and reach a conclusion contrary to that of the ALJ. We have no authority to do so. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). The evidence is conflicting regarding reasonableness and necessity of the recommended surgery. The ALJ found Dr. McCord to be the most persuasive, indicating Dr. McCord addressed the concerns raised by Houchens' evaluators. While Dr. Berkman felt a spinal cord stimulator should be tried prior to considering additional surgery, Dr. McCord explained the stimulator would only mask the problem while additional degeneration and stenosis occurred resulting in additional permanent nerve damage. The ALJ referred to the failure of the prior surgeries to provide lasting resolution of Sullivan's symptoms and was well aware of the objections to the procedure voiced by the evaluating physicians. Nevertheless, he was persuaded additional surgery provided the best opportunity for symptomatic relief. The ALJ articulated his reasoning in

rationale and detailed terms, sufficient to inform the parties of the basis of his decision. Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program vs. Chaffins, 502 S.W.2d 526 (Ky. 1973).

While Houchens has identified evidence supporting a conclusion different than that reached by the ALJ, there was substantial evidence presented supporting the ALJ's determination. As such, the ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). We are convinced the ALJ fully considered the evidence presented and reached a conclusion supported by the evidence.

Accordingly, the December 16, 2013 Opinion and Order and the February 5, 2014 Order rendered by Hon. Robert L. Swisher, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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