Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 4, 2013

CLAIM NO. 200100519

INDUSTRIAL PROCESSING PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

JOHN V. RICE
DR. LOEY KOUSA
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Industrial Processing appeals from the April 30, 2013 Opinion and Order rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), and from the May 28, 2013 Order denying its petition for reconsideration. In a reopening for a medical dispute, the ALJ found

prescriptions for Percocet medically reasonable and necessary for the relief of John V. Rice's ("Rice") work-related injury. Industrial Processing argues the ALJ's finding is not supported by substantial evidence, nor supported by appropriate findings of fact. We believe the ALJ's decision finding the contested medication compensable is supported by substantial evidence and the ALJ provided sufficient findings of fact to support the decision; therefore, we affirm.

Rice sustained an injury on July 6, 1999, while lifting a metal I-beam. He settled his claim by agreement approved November 21, 2001. The agreement listed Rice's diagnosis as lumbar spine sprain or herniated disc, and retained his right to future medical benefits for the lumbar condition.

Industrial Processing moved to reopen to contest Percocet prescribed by Dr. Loey Kousa. It supported the motion with the report of Dr. F. Albert Olash, who conducted a records review and determined Percocet is not medically necessary or appropriate treatment for the work injury. Dr. Olash stated there is no documentation indicating Rice suffered any significant structural injury to his lower back. He further noted Rice's symptoms are out of proportion to the described work injury, physical

findings after the work injury, or the objective radiographic procedures following the work injury. Dr. Olash opined the effects of the work injury had long since resolved, and therefore narcotic medication is unnecessary. Instead, he recommended stretching and strengthening exercises for Rice's back and over-the-counter non-steroidal anti-inflammatory medication for pain.

In his deposition, Dr. Olash explained Percocet is a very strong narcotic analgesic used for short-term pain control, and is not indicated for maintenance of osteoarthritis or similar conditions. This is because the risks of long-term use outweigh the benefits. Dr. Olash testified the use of Percocet over a significant period of time is outside the standard of care for individuals who have long-term joint or muscle pain. He identified numerous non-narcotic alternatives.

Rice introduced Dr. Kousa's office notes documenting treatment from November 2, 2011 through November 21, 2012. These notes generally record the pain relief Rice obtains with Percocet use. Dr. Kousa issued a statement on August 23, 2012, indicating the treatment he provides is reasonable and necessary, and that Rice would require future medical treatment for the work injury.

The ALJ provided the following analysis regarding the compensability issue:

> Mr. Rice is the most effective and persuasive witness in this case. It is clear that he is sincere and candid about the quality of his treatment and his life. There are many things that the ALJ would like to do to try and help Mr. Rice, but unfortunately the scope of review here is limited.
>
> As to the Percocet (Endocet), it is a powerful narcotic that is not indicated for long term relief of musculo-skeletal or neurological pain. Probably, sound medical practice dictates an aggressive search for a non-narcotic alternative. On the other hand, according to the person most affected by the condition, it is the only thing that has been prescribed for him that significantly lessens his pain. Our law mandates that the employer shall pay for the cure and *relief* from the effects of the injury. (emphasis added).
>
> Dr. Olash opines that the prescribing of Percocet/Endocet for Mr. Rice's condition is not medically reasonable or necessary. Dr. Kousa opines that it is, although his medical records do not address the question of "Why?" Nevertheless, the ALJ finds the testimony of Mr. Rice to be the most persuasive and compelling evidence in this matter and that being the case, will so find.

Industrial Processing filed a petition for reconsideration, which the ALJ denied. The ALJ restated his reliance on Dr. Kousa's opinion the Percocet is

reasonable and necessary treatment for the work injury. Further, he clarified his suggestion Rice explore alternative medications, but that it should not be construed as a rejection of Rice's lawfully prescribed pharmacological regime. The ALJ also noted, as fact-finder, he is entitled to rely on the claimant's testimony regarding the effect of medication.

On appeal, Industrial Processing challenges the ALJ's award on two grounds. First, it argues the ALJ failed to determine whether the treatment is reasonable, focusing only on the fact Rice gains relief from the medication. It explains, pursuant to Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993), an employer is not responsible for medication which is outside the type of treatment generally accepted by the medical profession as reasonable. Industrial Processing also argues the ALJ's finding of compensability is neither supported by substantial evidence, nor supported by appropriate findings of fact.

Pursuant to KRS 342.020, medical expenses reasonably necessary for the cure and relief of a work-related injury are compensable. Square D Co. v. Tipton, id. In a post-award medical fee dispute, the employer bears the burden of proving the contested medical expenses

are unreasonable or unnecessary. Mitee Enter. vs. Yates, 865 S.W.2d 654 (Ky. 1993); Nat'l Pizza Co. vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). The claimant however bears the risk of proving work-relatedness. *See* Addington Res., Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997). Because Rice prevailed, the question on review is whether the evidence compelled a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

The ALJ relied on Dr. Kousa's records to find the Percocet prescription reasonable and necessary. These records document Rice's complaints of pain, and the effectiveness of Percocet in reducing the pain. Dr. Kousa further stated the treatment is reasonable and necessary. Though his statement is conclusory and offers no response to Dr. Olash's concerns regarding the long-term use of narcotic pain medication, it is nonetheless evidence upon which the ALJ is free to rely. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995) (the ALJ, as fact-finder, enjoys the discretion to determine the weight and inferences to be drawn from the evidence).

The ALJ also relied upon Rice's testimony concerning the relief he experiences with the use of Percocet, and the fact other medications have not brought him relief. The ALJ specifically noted Rice's testimony

Percocet is the only medicine he has been prescribed that significantly lessens his pain. Treatment which provides even temporary relief from the effects of the work injury may be compensable. Nat'l Pizza Co. v. Curry, Id.

While the opinion of Dr. Olash could have supported a contrary finding, it does not compel a finding in Industrial Processing's favor. The record contained conflicting medical opinions regarding the reasonableness and necessity of the contested medication, and the ALJ enjoys the discretion to select an opinion upon which to rely. Pruitt v. Bugg Bros., 547 S.W.2d 123 (Ky. 1977)(where the evidence is conflicting, the ALJ may choose whom or what to believe). *See also* McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974)(although an opposing party may note evidence supporting a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal). Because the ALJ's finding is supported by substantial evidence, it will not be disturbed.

Furthermore, the ALJ provided a sufficient basis to support his determination. *See* Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). The Opinion and Order summarizes the conflicting medical opinions, demonstrates the ALJ's exercise of discretion, and articulates a reliance on Dr. Kousa's medical opinion and

Rice's testimony concerning his condition. It also emphasizes the ALJ found Rice a credible and reliable witness. *See* Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988). The explanation contained in the Opinion and Order apprises the parties of the basis of the ALJ's decision, and permits meaningful appellate review. New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004).

Accordingly, the April 30, 2013 Opinion and Order rendered by Hon. Steven G. Bolton, Administrative Law Judge, and the May 28, 2013 order denying Industrial Processing's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON KATHERINE BANKS
PO BOX 1350
PRESTONSBURG, KY 41653

COUNSEL FOR RESPONDENT:

HON JOHN EARL HUNT
PO BOX 369
STANVILLE, KY 41659

ADMINISTRATIVE LAW JUDGE:

HON STEVEN G BOLTON
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601