Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 17, 2014

CLAIM NO. 200780468 & 200695103

INTERNATIONAL COAL GROUP PETITIONER

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

BERT KILBURN
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. International Coal Group ("ICG") appeals from the Opinion and Order rendered June 4, 2014 by Hon. John B. Coleman, Administrative Law Judge ("ALJ") resolving a post-award medical fee dispute in favor of Bert Kilburn ("Kilburn"). The ALJ found the disputed opioid medications, Oxycodone and Tramadol, prescribed by Dr. Warren G. Stumbo

reasonable and necessary for the cure and relief of Kilburn's work injury, and therefore compensable. ICG also seeks review of the July 8, 2014 Order denying its petition for reconsideration.

On appeal, ICG essentially argues the ALJ erred in finding the contested medication compensable since Dr. Stumbo could be prescribing them to treat an unrelated knee injury. Because substantial evidence supports the ALJ's determination, and no contrary result is compelled, we affirm.

On October 8, 2007, Kilburn filed a Form 101 alleging injuries to his "back, head, neck, arms, legs, shoulders and a psychological claim" when he picked up a piece of metal on February 8, 2006 while working for ICG as a welder. Kilburn disclosed he had previously received a lump sum settlement for a work-related left knee injury occurring on May 14, 2002. The Form 101 was later amended to include a second injury date of August 3, 2007. In an April 27, 2009 Opinion, the ALJ found Kilburn's complaints were caused by the February 8, 2006 work injury. The ALJ found Kilburn's lumbar condition causally related to the February 8, 2006 work event which was aggravated by the August 2, 2007 incident, causing no additional structural changes. The ALJ also found Kilburn's depression was work-

related. The ALJ awarded benefits based upon a 6% impairment rating for Kilburn's lumbar injury and a 15% impairment rating for his psychological condition, yielding a combined 20% impairment rating. The ALJ awarded permanent partial disability benefits increased by the three multiplier, temporary total disability benefits, and "reasonable and necessary medical expenses for the cure and relief of his lumbar spine injury and major depressive disorder pursuant to KRS 342.020." Neither party appealed the ALJ's decision.

On March 4, 2010, ICG filed a motion to reopen and a Form 112 medical fee dispute challenging ongoing prescription medication prescribed by Kilburn's treating physician, Dr. Stumbo, including Tramadol, Skelaxin, Gabapentin, and Endocet. In an Opinion and Order rendered October 18, 2010, Hon. R. Scott Borders, Administrative Law Judge ("ALJ Borders") found the disputed medications compensable relying upon Dr. Stumbo's opinions. ALJ Borders found Kilburn continued to receive relief from the effects of his February 8, 2006, work-related injury as a result of Dr. Stumbo's care, and therefore his treatment was reasonable and necessary pursuant to KRS 342.020.

On October 21, 2011, Kilburn filed a motion to reopen alleging a worsening of his lumbar condition. In a

June 11, 2012 Opinion and Order, Hon. Douglas W. Gott, Administrative Law Judge ("ALJ Gott") found Kilburn failed to prove his condition had worsened and overruled his motion to reopen. This Board affirmed in an opinion rendered November 9, 2012.

The current motion to reopen and Form 112 medical fee dispute were filed by ICG on October 21, 2013. It again challenges the medication regimen prescribed by Dr. Stumbo, Oxycodone (Percocet) and Tramadol (Ultram), based upon the utilization review reports of Dr. Leon Ensalada and Dr. Suzanne Novak. In an order dated November 6, 2013, ALJ Gott concluded ICG made a *prima facie* showing for reopening, and he sustained the motion to reopen. Dr. Stumbo was joined as a party. In the order, ALJ Gott stated the claim would be transferred to the ALJ at the end of the year.

A benefit review conference ("BRC") was held on January 27, 2014. The BRC order reflects the only contested issue to be determined is the reasonableness/necessity of opioid medication, including Oxycodone and Tramadol. Causation was not listed as a contested issue.

In support of its motion to reopen, ICG filed treatment records of Dr. Stumbo from January 16, 2013; March 26, 2013; May 28, 2013; and July 29, 2013. Dr. Stumbo performed an examination on each visit, and regularly

prescribed Percocet and Ultram. In the most recent note dated July 29, 2013, Dr. Stumbo noted Kilburn complained of "LBP WITH LEFT LEG RADICULOPATHY, STATES OCC HE CAN'T FEEL HIP LEFT LEG AND FELL LAST WEEK . . . LONG STANDING WORK RELATED INJURY TO BOTH BACK AND KNEES OVERALL STABLE WITH PEROIDS (sic) OF FLARE-UP." He examined Kilburn's back and observed "DECREASED ROM, BILATERAL PARASPINAL TENDERNESS DTR2+ VIBRATORY OK NEG ST. LEG TEST." He assessed Kilburn with a stable work-related injury to back and knees. He also stated Kilburn is totally and permanently disabled, and reviewed his current medications including Percocet and Ultram.

ICG also filed the October 2, 2013 utilization review ("UR") report of Dr. Ensalada who opined Kilburn's current medication regimen of Oxycodone and Tramadol is not medically reasonable or necessary. Dr. Ensalada noted Kilburn was injured over seven years ago and the medical records do not support a diagnosis of radiculopathy. At most, Kilburn sustained a lumbar strain/sprain from the February 8, 2006 work event. After reviewing Kilburn's prescribed dosages of Oxycodone (Percocet) and Tramadol (Ultram), he calculated the current morphine equivalent dose to 90 to 110 mg per day. He concluded Kilburn's morphine equivalent dose places him at substantial risk for death

from prescription opioid overdose, opioid induced hyperalgesia, and opioid induced androgen deficiency. Dr. Ensalada opined Kilburn is likely experiencing the complications of opioid induced hyperalgesia due to his long term exposure to high doses of such medication. He also stated the risks of continuing the chronic opioid therapy far outweigh any benefits. Dr. Ensalada concluded Kilburn's opioid medication should be tapered and ultimately discontinued. Kilburn appealed the UR denial of Dr. Ensalada.

Dr. Suzanna Novak prepared a report on October 22, 2013 after reviewing medical records. She expressed her concern there was no evidence of a KASPER report, urine drug screen or addition screen. She concluded Dr. Stumbo's records do not comply with the Kentucky HB 1 legislation, which requires a practitioner to review the course of treatment at reasonable intervals, provide patients with any new information about treatment, obtain KASPER at least once every three months, and review a KASPER report before issuing any prescriptions or refills for these substances. Dr. Novak concluded until the above information can be provided, opioids of any kind should not be authorized. Dr. Novak also recommended a random urine drug screen, addiction screen, evidence of a drug treatment agreement and pill

counts. Dr. Novak recommended Tramadol and Oxycodone be discontinued if the above referenced monitoring information is not provided within one to two months.

Kilburn filed additional treatment records of Dr. Stumbo from December 12, 2011 through December 10, 2013. Those records reflect Kilburn visited Dr. Stumbo on twenty-eight occasions during this three year time period for treatment related to his work-related back injury, as well as several unrelated conditions. The records consistently note complaints of lower back pain. Kilburn also complained of knee pain on several occasions. The record indicates Dr. Stumbo regularly performed examinations, reviewed Kilburn's medication regimen, and prescribed Ultram and Percocet. He generally assessed long standing stable back/knee injury with occasional flare ups. In the most recent visit on December 10, 2013, Dr. Stumbo noted Kilburn complained of low back pain "all the time" and right foot cramps. He examined Kilburn and reviewed his current medications, including Ultram and Percocet. Dr. Stumbo stated "PT STABLE NO NEED FOR NEW TEST. ALL WORK RELATED BACK WORSE BUT KNEES ALSO A PROBLEM. PT NOT LIKELY TO EVER BE ABLE TO RESUME FULL OR PARTTIME WORK."

Kilburn also filed a letter prepared by Dr. Stumbo on March 7, 2014. It stated as follows:

After many months of responding about Mr. Kilburn’s work related injuries, it is hard for me to find any new way to restate his current medical condition.

First, despite the fact that he is a Diabetic, has heart disease with stable Angina and lung disease with symptoms that usually require most of my time with the patient.

Secondly, if Bert Kilburn had no other problems but his back and knee problems only, which are related to his long work history along with several acute injuries these two problems by themselves would make him totally and permanently disabled.

What are my plans? Hopefully, not having to respond in a case that has used more of my time over the last two years than is necessary.

Currently, with the medications:

1. His quality of life has improved
2. His pain has been reduced
3. His ability to be mildly active has improved
4. He has had no adverse side effects
5. His anxiety and worry about his life-status has been reduced.

Compensation has his case reviewed by a physician that restate facts out of the literature about medication that while helpful to him they do not wish to pay for. The facts that they state do not replace the clinical judgment of the treating physician.

It is possible that medical management will continue to work for years. However, surgery may very well be needed on his knees. I don’t see any need for CTS or back surgery now or in the near future.

Kilburn also testified at the final hearing held on April 16, 2014. He stated Dr. Stumbo has been his primary care physician for approximately twenty-nine years and treated him following his work injuries in 2006 and 2007. He sees Dr. Stumbo every two months. On each visit, Dr. Stumbo performs an examination, discusses his condition, and reviews his mediations. Dr. Stumbo asks if the prescribed medications provide relief and adjusts his dosages accordingly. Kilburn testified he has several unrelated health problems, including diabetes and a heart condition, which Dr. Stumbo treats, in addition to his pain.

Kilburn testified his pain has improved since his work accidents, but he still loses his balance and falls. The pain medication he takes for his work injury is beneficial. He can tolerate his pain level and stated “if I didn’t take it there I wouldn’t even probably get out of bed. I mean, it - - my back bothers me so bad. . .” His pain medication enables him to do things around the house. Kilburn confirmed he takes Tramadol which also provides relief. He stated “Yes, them - - it and the Percocets and the Skelaxin all three together, I can tell, you know, it makes my back to where it’s not - - don’t hurt as bad, but I still got pain, but I can . . . move around.” Kilburn

agreed the pain medicine and muscle relaxer helps him keep moving, and stated he can tell when they wear off.

Kilburn testified he uses a cane due to fluid in his right knee. He had previously undergone surgery on his left knee and surmised he has overused his right knee, causing swelling and fluid.

On cross-examination, Kilburn testified as follows when asked how long he been taking Percocet

> A: I took them two years while I was working, and - - well about nine years, now.
>
> Q: So, you were taking Percocet back - - back while you were still working?
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> A: For two years. I hurt my back. I went back to work there, but Dr. Stumbo took me off work and made me quit work. I never could get nothing straightened out with Workers' Comp, so I went over there and begged him to let me go back, and he said I could go back pending an MRI on my back. They never did - - done the MRI on my back and I messed it up - - I had the heart attack and messed it up with a sledge hammer that last time swinging. And, they finally done one and he wouldn't let me go back to work then.

Kilburn also explained he had left knee surgery approximately four years before he stopped working. He indicated another surgery on his left knee was required after the 2006 work incident, but was not covered by worker's compensation. He also stated his left foot was

smashed and he broke five bones while working. However, his foot and left injuries are unrelated to the 2006 work incident related to his lower back.

After providing a detailed summary of the medical and lay evidence, the ALJ determined the continued medication regimen, including Oxycodone and Tramadol, offered by Dr. Stumbo is reasonable and necessary for the cure and relief of Kilburn's work injury, stating as follows:

> In this case, the defendant is once again contesting the medication regimen prescribed to the plaintiff by his treating physician, Dr. Grady Stumbo. Dr. Stumbo was treating the plaintiff's lower back pain with Percocet and Ultram. While the defendant has offered opinions from two physicians who felt there was no need for continued narcotic medications, the treating physician has offered the opinion the medications are being prescribed to relieve the plaintiff from his long term pain and the medication regimen has improved his quality of life and reduced his pain. While the opinions of the evaluating and reviewing physicians indicate the possibility of dangerous side effects after long term usage, I note that Dr. Stumbo is the plaintiff's treating physician who is in charge of his care and, as such, is in the best position to determine whether the plaintiff is at risk for such ill side effects.
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> In 2010, the defendant previously questioned the medication regimen being prescribed by Dr. Stumbo. At that

> time, the plaintiff was on more medications including Tramadol, Skelaxin, Gabapentin and Endocet. At that time, Dr. Novak offered the opinion herein and also felt the plaintiff should not be on any of these medications. However, at that time, Dr. John Vaughn noted the Percocet which he was taking would be reasonable. After hearing the evidence before him at that time, the Administrative Law Judge found the medication regimen to be reasonable and necessary for the cure and/or relief of the plaintiff's work injury. At the current time, the undersigned is[sic] has not seen much difference in the treatment regimen which according to the plaintiff continues to the helpful. The treating physician has indicated there are no adverse effects at the current time. Therefore, I am convinced the continued medication regimen offered by the treating physician is reasonable and necessary for the cure and relief of the plaintiff's work injury.
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> Dr. Novak indicated she believed that there were non-compliance issues with current law on the part of the provider, but the undersigned only has jurisdiction to determine whether the ultimate treatment provided to the plaintiff is reasonable, necessary and compensable under KRS 342.020. Therefore, technical compliance with HB 1 is not an issue for this forum.

ICG filed a petition for reconsideration raising the same arguments it now makes on appeal. ICG did not request any additional findings of fact, but instead argued

the evidence compels a finding in its favor. The ALJ denied ICG's petition on July 8, 2014.

On appeal, ICG argues the medical dispute should have been resolved in its favor given the concerns raised by Drs. Ensalada and Novack, and the failure of Dr. Stumbo to specify what treatment is for Kilburn's work-related back injury. ICG asserts Dr. Stumbo's treatment regimen is aimed both at Kilburn's back and unrelated knee problems. ICG asserts the ALJ did not address Kilburn's testimony indicating he has been taking Percocet since approximately two years before he stopped working and his unrelated knee problems started four years prior to his cessation of work. ICG states it is not responsible for treatment related to Kilburn's knee and Dr. Stumbo's letter does not specify what medication is for his knee and what medication is for his low back.

Despite the seemingly inconsistent decision rendered by the Kentucky Supreme Court in the unreported decision from the Kentucky Supreme Court, C & T Hazard v. Chantella Stallings, et al., 2012-SC-000834-WC, 2013 WL 5777077 (Ky. 2013), a long line of reported decisions establish that 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, 802 S.W.2d 949 (Ky. App. 1991); 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), Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997). Since ICG was unsuccessful in it burden, the question on appeal is whether, upon consideration of the whole record, the evidence compels a finding in its favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). As fact-finder, the ALJ 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 adversary party's total proof. Magic

Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). It must be shown that there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In this post award medical dispute, substantial evidence supports the ALJ's determination of compensability, and no contrary result is compelled. The ALJ provided a detailed summary of the facts, and the basis for his decision. Based upon the record, the ALJ could reasonably conclude Percocet and Ultram are reasonable and necessary for treatment of Kilburn's work-related low back condition. In making his determination, the ALJ relied upon Dr. Stumbo's opinion and the previous opinion rendered October 18, 2010 by ALJ Borders finding the same medication compensable.

Dr. Stumbo's treatment records indicate he regularly prescribed Ultram and Percocet after Kilburn consistently complained of low back and left leg pain. The records also indicate Kilburn complained of knee pain. In the March 7, 2014 letter prepared by Dr. Stumbo, he

emphasized he treats Kilburn for many conditions, including his low back and knees. He opined Kilburn's medications have improved his quality of life, reduced his pain, improved his ability to be mildly active, reduced his anxiety and worry, and have had no adverse side effects. He also set forth possible future treatment for Kilburn, including surgery for his unrelated knee problem. However, he does not foresee back surgery at this time. Although an ALJ is not obligated to give more weight to the evidence of the treating physician than to the evidence of others, Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829, 830 (Ky. 2008), as fact-finder, he or she may do so if they choose. The records and opinions of Dr. Stumbo, in addition to Kilburn's testimony regarding the effects of the medication regime on his back condition, constitute the requisite substantial evidence upon which the ALJ can rely in determining Percocet and Ultram are reasonable and necessary for the cure and/or relief of Kilburn's work injury.

The fact Dr. Stumbo simultaneously treats Kilburn for other unrelated conditions, including his knee problems, does not negate ICG's obligation to pay the reasonable and necessary medical expenses for the cure and relief of Kilburn's his lumbar spine injury and major depressive

disorder pursuant to KRS 342.020. This conclusion is bolstered by the previous opinion rendered by ALJ Borders in October 2010, resolving a medical dispute in Kilburn's favor. As noted by the ALJ, ICG challenged the medication regimen prescribed by Dr. Stumbo. At that time, Kilburn was prescribed more medication than now, including Endocet for pain, Tramadol an anti-inflammatory, the muscle relaxer Skelaxin, and Gabapentin. ALJ Borders ultimately found the disputed medications compensable since Kilburn continued to receive relief from the effects of his February 8, 2006, work-related injury as a result of Dr. Stumbo's care.

Accordingly, the June 4, 2014 Opinion and Order and the July 8, 2014 Order denying ICG's petition for reconsideration by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON JEFFREY D DAMRON
PO BOX 351
PIKEVILLE, KY 41502

COUNSEL FOR RESPONDENT:

HON THOMAS W MOAK
PO BOX 510
PRESTONSBURG, KY 41653

ADMINISTRATIVE LAW JUDGE:

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