Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 17, 2015

CLAIM NO. 199407445

J.I.L. MINING COMPANY, INC. PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

TERRY WILLIAMSON,
DR. SAI GUTTI,
PAIN MANAGEMENT CENTER, and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. J.I.L. Mining Company, Inc. ("J.I.L."), appeals from the Opinion and Order rendered March 4, 2015 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") resolving a medical fee dispute in favor of Terry Williamson ("Williamson"), by finding the caudal epidural steroid

injection recommended by Dr. Sai Gutti compensable. J.I.L. also seeks review of the April 2, 2015 order denying its petition for reconsideration.

Williamson was working as a roof bolter for J.I.L. on January 7, 1992 when he injured his back, and sustained a crush injury to his right hand in a rock fall. In an Opinion, Order and Award rendered January 27, 1995, Hon. Lloyd Edens, Administrative Law Judge, found Williamson was entitled to temporary total disability benefits and permanent partial disability benefits based on a combined 65% impairment rating, attributing 40% to the back injury and 25% to the right hand injury.

Williamson subsequently filed a motion to reopen for a worsening of his condition. In an Opinion and Award rendered December 21, 2000, Hon. John B. Coleman, Administrative Law Judge ("ALJ Coleman"), found Williamson's condition had worsened, and awarded permanent total disability and medical benefits.

In an Opinion and Order rendered May 21, 2010, Hon. Lawrence F. Smith, Administrative Law Judge, resolved a medical fee dispute filed by J.I.L. in favor of Williamson by finding all treatment provided by Drs. Robert Windsor and Bill Webb reasonable, necessary and related to the 1992 work injury, with the exception of a prescription for Xanax.

In an Opinion and Order rendered May 23, 2011, Hon. Grant S. Roark, Administrative Law Judge, resolved a medical fee dispute filed by J.I.L. in favor of Williamson finding a new adjustable mattress prescribed by Dr. Webb was compensable.

On October 29, 2014, J.I.L. filed a motion to reopen and medical fee dispute to challenge a proposed caudal epidural steroid injection by Dr. Gutti based upon the opinion of Dr. Paul Loubser. In support of its motion, J.I.L. filed five exhibits consisting of the original January 27, 1995 opinion, the December 21, 2000 opinion, the May 21, 2010 opinion, the May 23, 2011 and the September 29, 2014 Utilization Review Notice of Denial and Physician Advisor Report by Dr. Paul Loubser.

In the September 29, 2014 report, Dr. Loubser noted Williamson had been diagnosed with intractable low back pain, lower extremity radiculitis, lumbar degenerative disc disease with central protrusion at L4-5 and status post hemilaminectomy at L4 with bulging osteophyte formation at L5-S1 level, neuropathy, and status-post back surgery as a result of the January 7, 1992 work injury. Dr. Loubser provided the Kentucky Guidelines for epidural steroid injections, which state it is an option for short-term relief of radicular pain after failure of conservative

treatment or as a means to avoid surgery. The Guidelines then list eleven criteria for the use of epidural steroid injections. The seventh criteria states, "If after the initial block/blocks are given . . . and found to produce pain relief of at least 50-70% pain relief for at least 6-8 weeks, additional blocks may be supported." In recommending non-certification of the caudal epidural steroid injection requested by Dr. Gutti, Dr. Loubser stated as follows:

> Based on the clinical information provided, the request for caudal epidural injection is not recommended as medically necessary. The patient underwent prior caudal epidural injection in January 2013. Follow up note from March 2013 states that the injection helped for greater than three months; however, the date of the note is less than 2 months after the injection was performed. The submitted records fail to document at least 50% pain relief for at least 6 weeks as required by current evidence based guidelines. There is no indication that the patient has undergone any recent active treatment. Peer discussion was not successful. Recommend non-certification.

A letter was subsequently sent to Dr. Gutti alerting him the request for caudal epidural injection had been denied due to his failure to submit adequate supporting medical documentation for the proposed injection. Dr. Gutti was notified he had fourteen days to make a request for reconsideration, which would necessarily include providing

the appropriate medical documentation. Dr. Gutti apparently made no such request, nor did he supply additional medical documentation.

On December 3, 2014, ALJ Coleman found J.I.L. had made a *prima facie* showing for re-opening, and joined Dr. Gutti as a party. A telephonic conference was held on December 30, 2014, in which the parties agreed the "reasonableness/necessity" of the proposed caudal epidural steroid injection was in dispute. ALJ Coleman set a forty-five day proof schedule, scheduled a benefit review conference ("BRC"), and noted the claim was re-assigned to the ALJ.

No additional proof was submitted by either party. The February 24, 2015 BRC order reflects Dr. Gutti did not respond to the medical fee dispute. The parties identified the reasonableness and necessity of the proposed caudal epidural steroid injection as the contested issue. The parties also waived their right to a hearing.

The ALJ made the following findings of fact and conclusions of law:

> . . . .
>
> The record contains the September 29, 2014 utilization review report of Paul Loubser, M.D. who noted a diagnosis of, among other things, intractable low back pain, lower extremity radiculitis.

The denial notice to claimant stated the treatment is denied for lack of documentation. In his report, Dr. Loubser noted the Kentucky Guidelines state Epidural steroid injections are an option for short-term relief of radicular pain after failure of conservative treatment. The record reviewed by Dr. Loubser indicated that two months following the injection, Plaintiff was enjoying relief but because there was not a report later than the two month mark, Dr. Loubser found there was no proof Plaintiff's relief lasted longer than two months. Plaintiff's attorney related that the treatment has been effective for several months and that he has not had an injection in several years.

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 and

> necessity of an epidural steroid injection (ESI). Dr. Loubser stated the ESI should not be certified as there was no proof the relief lasted longer than two months. Based on the review of the record, Defendant Employer has not met its burden of proving the ESI is not reasonable and necessary for the cure and/or relief of the effects of the work injury as the guideline states the ESI is intended for short term relief only.

J.I.L. filed a petition for reconsideration making the same arguments it now raises on appeal. In the April 2, 2015 order denying J.I.L.'s petition, the ALJ stated as follows:

> . . . . Basically, Defendant Employer's petition is an impermissible reargument of the merits of the case.
>
> Plaintiff was found to be totally disabled by Opinion, Order and Award dated December 21, 2000 as a result of a back and leg injury. The ALJ is not convinced based on the UR report that the treatment is not beneficial. The reason for denial in the UR report is that Dr. Gutti's records do not contain enough information. Specifically, the report stated to Dr. Gutti:
>
>> The principal reason for our determination is that you did not submit adequate supporting documentation that the test or procedure is appropriate.
>
> This explanation is not considered adequate to support a determination in favor of Defendant Employer. This is more than enough reason to decide the

> claim in favor of Plaintiff. Defendant Employer failed to meet its burden of proving the treatment was not reasonable and necessary.

On appeal, J.I.L. argues the opinion of Dr. Loubser is uncontroverted since Williamson produced no medical or lay evidence indicating the contested medical treatment is reasonable and medically necessary. It argues since it established a *prima facie* case for re-opening, the burden shifted to Williamson to rebut its evidence, which he failed to do. Since Williamson failed to produce any evidence to rebut the opinion of Dr. Loubser, J.I.L. argues the ALJ's decision is not based upon substantial medical evidence. Further, J.I.L. argues the ALJ failed to provide a sufficient explanation for rejecting the uncontroverted medical opinion of Dr. Loubser in the opinion and order on reconsideration. J.I.L. also argues the ALJ erred by making an improper finding of fact based on unsworn statements of Williamson's attorney when she stated, "Plaintiff's attorney related that the treatment has been effective for several months and that he has not had an injection in several years."

Reopening of a claim pursuant to KRS 342.125 is a two-step process. Stambaugh v. Cedar Creek Mining, 488 S.W.2d 681 (Ky. 1972). The first step is the filing of a

motion, which places the burden on the moving party to provide *prima facie*/or sufficient information to demonstrate a substantial possibility of success in the event evidence is permitted to be taken. AAA Mine Service v. Wooten, 959 S.W.2d 440 (Ky. 1998). "*Prima facie* evidence" is evidence which "if unrebutted or unexplained is sufficient to maintain the proposition, and warrant the conclusion [in] support [of] which it has been introduced . . . but it does not shift the general burden. . . ." Prudential Ins. Co. v. Tuggle's Adm'r., 72 S.W.2d 440, 443 (Ky. 1934). Only if the moving party prevails in making a *prima facie* showing as to all essential elements of the grounds alleged for reopening will the adversary party be put to the expense of further litigation. Big Elk Creek Coal Co. v. Miller, 47 S.W.3d 330 (Ky. 2001). Documentation sufficient for reopening is not necessarily sufficient to support a decision in the movant's favor. Step two of the reopening process then commences, with additional proof time being afforded to allow the merits of the reopening to be finally adjudicated. Campbell v. Universal Mines, 963 S.W.2d 623 (Ky. 1998).

Here, ALJ Coleman determined J.I.L. made a *prima facie* showing for reopening, set additional proof time, and assigned the claim to the ALJ for an adjudication of the merits. However, neither party filed additional evidence

during the forty-five day proof time. In addition, the right to a hearing was waived. As such, the only evidence in the record regarding the current medical dispute consists of the five exhibits attached to J.I.L.'s motion to reopen and medical fee dispute.

Contrary to the assertion by J.I.L., in a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving the contested treatment or expenses are unreasonable or unnecessary. National Pizza Company v. 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). The claimant, however, bears the burden of proving work-relatedness. *See* Addington Resources, Inc. v. Perkins, supra.

Since J.I.L. was unsuccessful in proving the contested medical expenses are unreasonable or unnecessary, the question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, to compel 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 conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as the fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, supra; Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). More important to this appeal, a fact finder is free to reject even uncontradicted medical evidence of record if the ALJ provides a sufficient explanation for the rejection. Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W. 2d 540 (Ky. App. 1991); Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W. 2d 184 (Ky. App. 1981); Collins v. Castleton Farms, 560 S.W. 2d 830 (Ky. App. 1977). Should the ALJ reject this uncontroverted medical testimony, he or she must specify his grounds. *See* Collins v. Castleton Farms, Inc., supra. In other words, unrebutted evidence compels a finding for the party that it favors unless the ALJ has a proper basis for rejecting it.

In this instance, the ALJ rejected the uncontroverted medical opinion of Dr. Loubser, which was the only evidence in the record addressing the contested injection. In support of her rejection, the ALJ essentially found Dr. Loubser's opinion inconsistent with the mandates of KRS 342.020. As noted by the ALJ, KRS 342.020 provides the employer shall pay "for the cure and relief" from the effects of an injury the medical treatment as may reasonably be required, and the obligation shall continue for so long as the employee is disabled. The phrase "cure and relief" has been construed as "cure and/or relief." *See* National Pizza Company v. Curry, supra. The ALJ noted Dr. Loubser stated the Kentucky Guidelines provide steroid injections are an option for short-term relief of radicular symptoms after failure of conservative treatment. She subsequently found no proof in the medical records confirming Williamson's pain relief lasted longer than two months as required by the Guidelines. The ALJ then determined J.I.L. failed in its burden of proving the injection is not reasonable and necessary "for the cure and/or relief of the effects of the work injury as the guideline state the ESI is intended for short term relief only."

In addition, in the order denying J.I.L.'s petition for reconsideration, the ALJ reiterated Dr.

Loubser's opinion failed to convince her the caudal epidural steroid injection is not beneficial. She also found the fact Dr. Gutti failed to submit supporting documentation was inadequate to support a determination in favor of J.I.L.

When considered together, we find the ALJ provided a sufficient basis for rejecting Dr. Loubser's opinion. The ALJ essentially determined Dr. Loubser's underlying basis for recommending denial of the contested injection inconsistent with KRS 342.020, and found the failure of Dr. Gutti to submit additional documentation an inadequate basis for finding in J.I.L.'s favor. Therefore, the ALJ's determination J.I.L. failed to meet its burden in establishing the contested treatment is unreasonable and not medically necessary will not be disturbed.

We note J.I.L.'s contention the ALJ erred by making an improper finding of fact based on unsworn statements of Williamson's attorney when she stated, "Plaintiff's attorney related that the treatment has been effective for several months and that he has not had an injection in several years." It is well-established an ALJ cannot consider evidence outside the record or any argument based on facts not in evidence. In this instance, although the ALJ made this statement in the opinion in summarizing the facts of the claim, it appears she did not consider

this conversation in finding in favor of Williamson. Rather, her analysis in both the opinion and order, and order on the petition for reconsideration only address the opinions of Dr. Loubser, and her reasoning for ultimately rejecting his opinion. Therefore, the ALJ's reference to the unsworn statement is found to be a harmless error.

Accordingly, the March 4, 2015 Opinion and Order and April 2, 2015 order denying J.I.L.'s petition for reconsideration by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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