

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 28, 2011

CLAIM NO. 200300668

KAWNEE MILLION

PETITIONER

VS. APPEAL FROM HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

COST CUTTERS BEAUTY SALON/HAIRCO, INC.
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman; COWDEN and STIVERS, Members.

ALVEY, Chairman. Kawnee Million ("Million") seeks review of a decision rendered June 8, 2011, by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"), resolving a medical fee dispute in favor of Cost Cutters Beauty Salon/Hairco, Inc. ("Hairco"). Million also appeals from

the order denying her petition for reconsideration entered August 6, 2011.

Million argues the issue resolved in favor of Hairco is *res judicata* based upon the previous opinions rendered in 2004 and 2007. Million additionally argues the ALJ's determination is not supported by substantial evidence. Finally, Million argues the ALJ erred in considering the supplemental medical dispute as it was untimely filed. Because the ALJ's decision regarding the medical dispute is supported by substantial evidence, there is no procedural irregularity in consideration of the medical dispute and the evidence does not compel a different result, we affirm.

A review of the procedural history of this claim is necessary. On April 2, 2003, Million filed a Form 101 alleging injuries to her hands, wrists, head, neck, legs, and arms, as well as possible psychological involvement due to the repetitive activities she was required to perform at Hairco. In an opinion, order and award rendered March 31, 2004, ALJ Lawrence Smith awarded Million benefits based upon a 3% impairment rating. ALJ Smith relied upon the October 8, 2003 report of Dr. Robert Nickerson who had performed an evaluation pursuant to KRS 342.315. Dr. Nickerson diagnosed Million with:

(1) bilateral deQuervain's tenosynovitis, right greater than left; (2) right superficial radial neuropathy at the wrist; and (3) bilateral carpal metacarpal joint arthritis.

No mention was made of either carpal tunnel syndrome or cubital tunnel syndrome.

On November 4, 2004, Chief Administrative Law Judge, Sheila C. Lowther issued an order granting Million's motion to reopen. An interlocutory order was issued by ALJ John Thacker requiring Hairco to pay for surgery. In an opinion, order and award rendered August 2, 2007, ALJ R. Scott Borders noted Million had undergone fusion surgery on both thumbs. ALJ Borders noted as a result of these surgeries, Million retained little mobility with her thumbs causing her to have difficulty with manipulating her hands and wrists. ALJ Borders found Million's condition had worsened and awarded permanent total disability benefits.

On April 23, 2010, Hairco filed a motion to reopen to challenge compensability of a right thumb injury sustained when Million fell while using crutches after knee surgery. This dispute was subsequently resolved by agreed order approved by the ALJ on May 4, 2011. During the pendency of this medical dispute, Hairco filed a supplemental dispute on August 18, 2010 concerning

compensability of right carpal tunnel and right cubital tunnel surgeries recommended on June 23, 2010 by Dr. William O'Neill, Million's treating orthopedic surgeon. No evidence exists supporting the assertion Dr. O'Neill made any request for approval of the right carpal tunnel and cubital tunnel release prior to June 23, 2010. A utilization review of the requested procedure was performed by Dr. Daniel Wolens as evidenced by his initial report dated July 15, 2010, and his supplemental report issued July 29, 2010 after he had received additional requested documentation.

At the Benefit Review Conference ("BRC") held April 12, 2011, the parties preserved the issues of work-relatedness and causation; reasonableness and necessity of proposed treatment; and sanctions pursuant to KRS 342.310 against both parties. At the hearing held on May 7, 2011, the parties agreed the issues concerning the right thumb sprain and the requests for sanctions had been resolved. The only issues remaining were causation, work-relatedness, and reasonableness and necessity of the proposed carpal tunnel and cubital tunnel surgeries. Million also maintained the supplemental medical dispute filed August 18, 2010 was defective.

Million testified at the hearing she has continued to have severe pain in both hands, arms, and wrists which extends above her elbows since her 2002 injury. Million confirmed her treating physician is Dr. O'Neill. She also confirmed she underwent left carpal tunnel and cubital tunnel surgery. Million also stated Hairco's worker's compensation insurer paid for all of the surgeries performed on her upper extremities. Million also testified she only worked for Hairco for six months and she had no surgery for carpal tunnel or cubital tunnel in 2002. Dr. O'Neill made no recommendation for carpal tunnel or cubital tunnel surgery until November 2009.

In a note dated June 23, 2010, Dr. O'Neill noted Million complained of numbness and tingling in the right hand including all fingers. He noted an EMG performed in October 2009 demonstrated mild carpal tunnel and moderate cubital tunnel abnormalities. He recommended right carpal and cubital tunnel releases. In his note dated January 31, 2011, Dr. O'Neill stated, "she wants to proceed with right carpal tunnel release and right endoscopic cubital tunnel release, the symptoms of which were work related from cutting hair." In a note dated March 14, 2011, Dr. O'Neill reiterated his recommendation for surgery.

In a utilization review report dated July 15, 2010, based upon the records provided, Dr. Dan Wolens stated he was unsure what compensable diagnoses Million may have. He likewise expressed concern as to the reasonableness and necessity of the requested procedures. Dr. Wolens received additional records, and in a report dated July 29, 2010, opined the recommended surgery "is being done so for conditions that have previously not been deemed compensable".

Dr. Ronald Burgess evaluated Million at Hairco's request on September 10, 2010. Dr. Burgess had previously seen Million on February 22, 2002 at the request of Dr. Frank Burke. Dr. Burgess noted Million was a poor historian. He diagnosed Million with mild bilateral carpal tunnel syndrome and cubital tunnel syndrome, and "status post surgery on the left". Dr. Burgess stated these conditions were not present when he saw Million in 2002. He opined the median and ulnar problems developed after her employment ended in 2002. He stated the right carpal tunnel syndrome is related to her age and gender. He further stated the right carpal tunnel syndrome and cubital tunnel diagnoses are not related to her employment with Hairco.

In the opinion and order, the ALJ found as follows:

In a post-award situation the Defendant has the burden of proof regarding issues related to the reasonableness and/or necessity of medical treatment. The burden of proof regarding questions of work relatedness remains with the employee. Addington Resources Inc. v. Perkins, 947 S.W. 2d 421 (KY.[sic] 1997).

The ALJ, as fact finder, has the sole discretion to determine the quality, character and substance of the evidence and to draw reasonable inferences from such evidence. Paramount Foods, Inc. vs. Burkhardt, Ky.[sic], 695 S.W.2d 418 (1985).

Further, the fact finder has the sole authority to judge the weight to be afforded the testimony of a particular witness. McCloud v. Beth-Elkorn Corporation, Ky.[sic], 514 S.W. 2d 418 (1985).

The problem with Defendant's Dr. Tokowitz's input is that he did not have any records prior to 2008 causing him to note, "There are no specifics as to the mechanics of injury." Likewise, Dr. Wolens wrote "I do not know how the individual's current conditions may relate to the 2002 event." Because of their acknowledged inabilities to opine on the causation issue, their input on the issue is disregarded.

The only physician Defendant can rely upon to rebut Dr. O'Neill's one very brief comment, "The symptoms of which were work related from cutting hair" is Dr. Burgess. Unlike Dr. O'Neill, who first saw Plaintiff in 2004 or 2005,

Dr. Burgess saw Plaintiff for treatment at the request of another physician on February 27, 2002. Dr. Burgess noted the symptoms of carpal and cubital tunnel syndrome were not present in 2002. In 2002 he did note there were other abnormalities with Plaintiff's right upper extremities, but such did not include carpal tunnel or cubital tunnel syndrome. He surmised Plaintiff's present problems were due to her age, and being an overweight female. Because Dr. Burgess had an opportunity to examine Plaintiff shortly after she stopped working in 2002 and again in 2010, this ALJ finds Dr. Burgess' opinions to be most persuasive. Plaintiff's cubital and carpal tunnel syndromes did not come from her brief six month work period as a hair stylist in 2002.

In a post-award medical fee dispute, the burden of proof to determine the medical treatment is unreasonable or unnecessary is with the employer while the burden remains with the claimant concerning questions pertaining to work-relatedness or causation of the condition. See KRS 342.020; Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993); and National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991).

Because Hairco was successful before the ALJ in demonstrating the proposed surgery was not causally related

to Million's 2002 work injury, the question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, as to compel a finding in her 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 Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ has the discretion and sole authority to reject any testimony and believe or disbelieve 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 (Ky. 1977).

Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The ALJ, as fact-finder, 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 v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

An injured worker's right to medical care for a work-related injury is not unfettered. The ALJ has the right and obligation to determine the compensability of medical treatment based upon the evidence presented. In this case, the ALJ found the recommended surgery was not caused by the work injury Million sustained in 2002. In making this assessment, the ALJ relied upon the report of Dr. Burgess, who had the opportunity to see Million in both 2002 and 2010.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and

credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, supra. Because the outcome selected by the ALJ is supported by the record, we are without authority to disturb his decision on appeal. Special Fund v. Francis, supra.

It is readily apparent the ALJ considered the evidence presented and found the proposed treatment to be unrelated to Million's work injury. It was within his discretion to do so. Although conflicting evidence exists, it was not unreasonable for the ALJ to arrive at the conclusions set forth in his decision. Therefore, we believe the ALJ's decision is supported by substantial evidence.

Million also asserts Hairco's medical dispute was not timely filed. First, this issue was not preserved as a contested issue in the BRC Order and Memorandum. Likewise, Million filed neither a proposed witness list nor proposed stipulations from which such contested issue could be gleaned. 803 KAR 25:010 § 13(14) specifically mandates that following a BRC, only those contested issues identified at the time of the BRC shall be the subject of further proceedings. Because Million did not preserve this issue, the issue was not timely raised and, as such, is not

preserved for the Board's review.

Even if it were properly preserved, the argument must fail. No evidence was produced indicating Hairco or its' insurer were advised prior to June 23, 2010 of Dr. O'Neill's request for right carpal tunnel or cubital tunnel surgery. Utilization review was promptly initiated after June 23, 2010, and the dispute was filed within thirty days after the final determination. 803 KAR 25:096 Section 8 outlines the appropriate procedure for contesting a statement for medical services as follows:

(1) Following resolution of a claim by an opinion or order of an arbitrator or administrative law judge, including an order approving settlement of a disputed claim, the medical payment obligor shall tender payment or file a medical fee dispute with an appropriate motion to reopen the claim, within thirty (30) days following receipt of a completed statement for services.

(2) The thirty (30) day period provided in KRS 342.020(1) shall be tolled during a period in which:

(a) The medical provider submitted an incomplete statement for services. The payment obligor shall promptly notify the medical provider of a deficient statement and shall request specific documentation. The medical payment obligor shall tender payment or file a medical fee dispute within thirty (30) days following receipt of the required documentation;

(b) A medical provider fails to respond to a reasonable information request from the employer or its medical payment obligor pursuant to KRS 342.020(4);

(c) The employee's designated physician fails to provide a treatment plan if required by this administrative regulation; or

(d) The utilization review required by 803 KAR 25:190 is pending. The thirty (30) day period for filing a medical fee dispute shall commence on the date of rendition of the final decision from the utilization review. A medical fee dispute filed thereafter shall include a copy of the final utilization review decision and the supporting medical opinions.

It is clear Hairco timely sought utilization review. After final utilization review was concluded, a supplemental medical dispute was filed on August 13, 2010, within the thirty days required by regulation. Even if properly preserved, Million's argument pertaining to the timing of the filing of the medical dispute must fail.

Finally, Million argues the compensability of the carpal tunnel surgery is *res judicata*, and therefore the proposed surgery is compensable. Again, we disagree. Carpal tunnel syndrome and cubital tunnel syndrome were not conditions originally diagnosed by Dr. Nickerson, and therefore not covered by the awards of ALJ Smith or ALJ

Borders. The procedures requested, as noted by Dr. Burgess, were for conditions unrelated to either the 2004 or 2007 award and therefore were properly dealt with by this ALJ. Again, the ALJ's determination is supported by the evidence.

Accordingly, the decision rendered June 8, 2011, by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, as well as the order ruling on the petition for reconsideration entered August 6, 2011, are hereby **AFFIRMED**.

ALL CONCUR.

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