Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 25, 2014

CLAIM NO. 200770707

KELLEY WALSH PET/CROSS-RESP
HON. THOMAS M. RHOADS,
as Attorney and real party
in interest for KELLEY WALSH

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY,**
ADMINISTRATIVE LAW JUDGE

CHRISTIAN COUNTY BOARD OF EDUCATION; RESP/CROSS-PET
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Kelley Walsh ("Walsh") appeal and Tom Rhoads, her attorney, appeal, and Christian County Board of Education ("Christian County") cross-appeals, from the July 19, 2013 Opinion and Award rendered by Hon. Jonathan R.

Weatherby, Administrative Law Judge ("ALJ"). In a medical fee dispute initiated by Christian County, the ALJ approved trigger point injections not more often than every six weeks. On appeal, Walsh argues the ALJ erred in failing to assess relief pursuant to KRS 342.310. In its cross-appeal, Christian County argues the ALJ's finding with respect to the trigger point injections is not supported by substantial evidence. For the reasons set forth herein, we affirm.

Walsh sustained an upper extremity injury on June 13, 2007 when a filing cabinet fell on her while she was in a stooped position. The claim was litigated, resulting in an Opinion, Order and Award issued by ALJ Lawrence Smith on February 7, 2011. Christian County filed a medical fee dispute and motion to reopen on April 20, 2012 challenging the reasonableness and necessity of the trigger point injections and physical therapy. The ALJ's determination that Christian County failed to satisfy its burden with respect to the physical therapy has not been appealed, and therefore will not be discussed herein.

Dr. Monte Rommelman testified by deposition on April 15, 2013. He began treating Walsh on February 2, 2009 and administered trigger point injections on eighty-seven occasions between March 12, 2009 and March of 2013.

After administering an injection, Dr. Rommelman would instruct Walsh to call when she felt she needed another injection. Walsh reported the injections allowed her to continue in her level of activity at work. Dr. Rommelman acknowledged the rate at which Walsh received injections was unusual in his practice. Generally his patients receive regular injections for a period of six months to a year, depending on the severity of the injury. Typically, Dr. Rommelman administers injections on a weekly basis at the onset of treatment and less frequently as the treatment progresses. However, because Walsh reported significant relief after each injection, he continued her treatment.

Walsh testified by deposition on August 23, 2012 and at the hearing held May 23, 2013. She receives injections from Dr. Rommelman every two or three weeks. Without the injections, she would not be able to function in her job and would be homebound or hospitalized. Two weeks after an injection, her pain reaches eight or nine on a scale of one to ten, and the pain makes it difficult to concentrate on her work. Walsh has received mileage reimbursement from the carrier for her travel to Dr. Rommelman's office, but has not been reimbursed for the actual injections. She has paid the expense out-of-pocket, but a substantial portion is past due. Walsh further

indicated she has yet to be reimbursed for some expenses that arose prior to the original opinion and award.

Christian County submitted the March 21, 2012 peer review report of Dr. Naresh D. Sharma regarding the reasonableness and necessity of the trigger point injections being administered by Dr. Rommelman. He opined as follows:

> The guidelines for repeat trigger point injections indicate in subsection 6, no repeat injection unless greater than 50% pain relief with reduced medication use is obtained for six weeks after an injection and there is documented evidence of functional improvement. In subsection 10, if pain persists after two or three injections, the treatment plan should be reexamined as this may indicate lack of appropriate diagnosis, lack of success with this procedure or lack of incorporation of other more conservative treatment modalities for myofascial pain. Pain relief from the previous trigger point injection lasted for two weeks only. The guidelines criteria are not met, therefore; there is non-certification.

Dr. Ray Garman performed an independent medical evaluation on September 6, 2012 to determine the reasonableness and necessity of the trigger point injections. He stated recurrent trigger point injections were not supported by clinical guidelines and were not reasonable or necessary. Therefore, he indicated the frequency of the injections is not an issue. He instead

recommended continuation of a home-based physical therapy exercise program.

The ALJ found Christian County met its burden in the medical fee dispute to the extent the trigger point injections are not medically necessary at the current frequency of every two weeks. Instead, he determined Christian County would continue to be responsible for the cost of trigger point injections, but not more frequently than every six weeks. The ALJ summarily denied relief pursuant to KRS 342.310.

Christian County filed a petition for reconsideration raising essentially the same arguments it makes on appeal. The ALJ issued an order on September 19, 2013 providing the following additional findings:

> 1. The ALJ finds that the Plaintiff was credible in her testimony regarding the relief that she experiences following each trigger point injection. Plaintiff also credibly stated that these injections allow her to maintain the use of her hands. The ALJ therefore finds that the Plaintiff receives the appropriate relief as described in the guidelines discussed by Dr. Sharma.
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> 2. The ALJ further finds that the evidence submitted regarding the recommended frequency of trigger point injections is also credible and that it is reasonable and necessary for the Plaintiff to receive the disputed injections every six weeks as of the

date of the Opinion and Order, July 19, 2013.

Christian County argues the finding regarding the frequency of trigger point injections is not supported by substantial evidence. Essentially, it maintains the ALJ misinterpreted Dr. Sharma's opinion and fashioned a remedy that is not supported by the medical evidence of record. According to Christian County, Dr. Sharma's report indicates repeat injections should not be administered unless the patient experiences greater than 50% pain relief which lasts for at least six weeks. Because Walsh did not experience 50% relief for six weeks, Dr. Sharma concluded the injections were neither reasonable nor necessary. The ALJ's reliance on Dr. Sharma's report, as stated in the Order on Reconsideration, is therefore in error. Furthermore, Christian County emphasizes that Walsh never testified she received six weeks of relief from the injections. In sum, it contends the ALJ "usurped the role of medical expert by basing his conclusion on his own application of medical guidelines."

KRS 342.020 provides the employer must pay for medical benefits that are reasonable and necessary for the cure and relief of an employee's work-related injury. National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App.

1991). A medical procedure will not be considered reasonably necessary for the cure and relief of an injury if it is unproductive or outside the type of treatment accepted by the medical profession as reasonable. Square D. Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Temporary relief may be sufficient to justify payment for treatment depending on the circumstances of a given case. However, a demonstration of "relief" alone is not the standard for compensability. KRS 342.020. The treatment provided must also be reasonable and necessary, providing a "reasonable benefit" to the injured worker. Id. The issue of what is a "reasonable benefit" is a medical question of fact that must be decided by the ALJ on a case-by-case basis. Where the medical proof regarding the issue is conflicting, the ALJ may pick and choose what evidence is most credible.

Dr. Sharma based his opinions on the Official Disability Guidelines, a publication of the Work Loss Data Institute. Although some states have adopted these guidelines, Kentucky has not. The ALJ is not bound by the guidelines and the actual text of the guidelines was not submitted in record. The ALJ was faced with conflicting medical testimony regarding the reasonableness and necessity of the injections. Dr. Rommelman acknowledged the injections were given to Walsh more frequently than in

a typical case in his practice, but stated the frequency was acceptable in her case. He observed Walsh had significant relief for two to four weeks. Walsh testified the injections improved her functioning and allowed her to continue working. The ALJ could reasonably conclude the injections provide Walsh with a reasonable benefit.

Furthermore, the ALJ could reasonably infer from Dr. Sharma's report the injections should not be administered more often than every six weeks. The essence of Christian County's appeal seems to rest on the ALJ's reference to Dr. Sharma's "guidelines" in the September 19, 2013 Order on Reconsideration. However, Christian County's arguments necessarily assume the ALJ is bound to either accept or reject Dr. Sharma's opinion in its entirety. This is not so. *See* Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000)(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). It is within the ALJ's discretion to infer from Dr. Sharma's opinion that injections should not be given more frequently than every six weeks, but also accept Dr. Rommelman's belief Walsh experiences sufficient relief to warrant repeated injections. This proof constitutes the requisite

substantial evidence to support the ALJ's award and, therefore it will not be disturbed.

On appeal, Walsh argues she is entitled to relief pursuant to KRS 342.310. She contends the carrier simply ignored repeated requests for reimbursement and payment for treatment since the original decision by ALJ Smith.

The imposition of sanctions pursuant to KRS 342.310 falls within the discretion of the ALJ. In order to impose sanctions pursuant to KRS 342.310, it is necessary for an ALJ to determine that an action has been brought, prosecuted or defended without reasonable ground. Our review of the appropriateness of an award of costs and attorney fees is based upon the determination of whether or not the fact-finder abused his discretion. The Board has consistently utilized the standard set forth by the Kentucky Supreme Court in Roberts v. Estep, 845 S.W.2d 544 (Ky. 1993), *i.e.* whether it can be reasonably conceived the action was brought in good faith.

We find no abuse of discretion on the part of the ALJ in declining to award sanctions and, therefore, affirm. The defendant/employer, post award, has the burden regarding the reasonableness and necessity of medical treatment. National Pizza Co., id. Here, Christian County produced substantial evidence that could have supported a

finding in its favor, including the opinions of Drs. Sharma and Gorman. Although the ALJ, in weighing the evidence, was not completely convinced by Christian County's evidence, he ruled partly in its favor. The failure to convince an ALJ of one's position on the merits does not compel the imposition of sanctions.

To the extent Walsh sought sanctions for failure to pay benefits ordered in the original award, it is unclear to the Board, after reviewing the record, the issue was properly before the ALJ. We note the action pending before the ALJ was a dispute by the employer contesting continuing treatment. Walsh filed no motion to reopen nor did she file a specific motion for sanctions. No benefit review conference was held until immediately prior to the hearing. The BRC order listed "Motion for 310 relief" as a contested issue, but provided no specific detail as to the scope of the motion. Therefore, it is not clear from the record the request for sanctions was made or the employer was aware of the extent of the sanction issue asserted by Walsh until the day of the hearing. Again, we note the imposition of sanctions is a purely discretionary act within the authority of the ALJ. We cannot say under the circumstances the ALJ abused his discretion.

Accordingly, as to both the appeal and the cross-appeal, the July 19, 2013 Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, is **AFFIRMED**.

ALL CONCUR.

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