

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: January 15, 2016

CLAIM NO. 201072244

KEVIN TURPEN

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,  
ADMINISTRATIVE LAW JUDGE

ZOELLER PUMP CO. and  
HON. JANE RICE WILLIAMS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING & REMANDING

\* \* \* \* \*

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

**ALVEY, Chairman.** Kevin A. Turpen ("Turpen") seeks review of the decision rendered July 21, 2015 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"). The ALJ resolved a medical dispute filed by Zoeller Pump Co. ("Zoeller") by finding as follows:

In a post-judgment Motion to Reopen to Assert a Medical Fee Dispute, Defendant

Employer has the burden of proving the contested medical expenses and/or proposed medical procedure is unreasonable or unnecessary while Plaintiff maintains the burden of proving that the contested medical expenses and/or proposed medical procedure is causally related treatment for the effect of the work injury. *Mitee Enterprises vs. Yates*, 865 SW2d 654 (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 work relatedness of treatment by Kim White, APRN and prescriptions for hydrocodone, Xanax and Prozac. After review of the evidence, particularly the letter from Kim White that her treatment is not related to the work injury, it is found herein Plaintiff has not met his burden of proving the treatment is reasonable and necessity [sic] for the cure and/or relief of the effects of the work injury and, therefore, the treatment is non-compensable.

Turpen also appeals from the August 20, 2015 Order denying his petition for reconsideration.

On appeal, Turpen argues procedural due process of post-award medical disputes should require a listing of the evidence on the Benefit Review Conference ("BRC") order and adjudication by the ALJ based upon a review of all of

the evidence. Turpen also argues the ALJ committed reversible error by concluding he failed to prove his medical treatment is reasonable and necessary for the effects of the August 27, 2010 work injury. Finally, Turpen argues the ALJ committed reversible error by concluding he failed to prove his medical treatment is due to the August 27, 2010 work injury. Because the ALJ incorrectly placed the burden upon Turpen to prove the contested treatment was reasonable and necessary, rather than causally related to the work injury, we vacate her determination, and remand for additional determination based upon the entirety of the evidence, and based upon the proper burden of proof.

Turpen filed a Form 101 on July 27, 2011 alleging he injured his back and right hip on August 27, 2010 while lifting a cast iron shell at work. An interlocutory decision was rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ Coleman") awarding temporary total disability and medical benefits, including a back surgery proposed by Dr. Jonathan Hodes. Although Dr. Hodes initially recommended surgery, he later stated it was unnecessary due to normal findings on a subsequent MRI. The claim was settled by the parties, and a Form 110-I was approved by ALJ Coleman on April 29, 2013.

On February 11, 2015, Zoeller filed a motion to reopen the claim, and a Form 112 medical dispute to challenge a treatment with certain medications, and ongoing treatment with Kim White, APRN ("APRN White"), as not being caused by a work injury.

On March 30, 2015, the ALJ issued an order sustaining the motion to reopen. She also joined APRN White as a party, and scheduled a telephonic conference. At the telephonic conference held March 30, 2015, the parties listed causation and work-relatedness of treatment with Hydrocodone, Xanax, and Prozac, along with medical office visits and "Treatment by Kimberly White", as the contested issues. The parties were afforded thirty days to introduce evidence, and a BRC and hearing were scheduled for May 5, 2015.

Zoeller filed the January 12, 2015 report of Dr. Steven Wunder in support of the medical dispute. Dr. Wunder noted Turpen reported his low back and hip pain began with a work injury which occurred on August 27, 2010. Dr. Wunder noted Turpen had complained of low back and hip pain for years prior to the work injury. He noted Dr. Hodes had originally recommended surgery, but this recommendation was rescinded after a subsequent MRI showed the disc protrusion had resolved. He specifically stated:

Based on my history, physical examination and review of the records, the following opinions are offered with a reasonable degree of medical probability.

I do not believe that Mr. Turpen's chronic low back symptoms are a direct and proximate result of the August 27, 2010, incident. I believe his symptoms would be due to the chronic low back pain that dated back to 2005. This is well documented in the records. This is further confirmed by Dr. Ballard. She did not think the need for his ongoing care was related to the work accident on August 27, 2010. His current exam showed a lot of exaggerated, inconsistent and non-organic findings. The medication prescriptions are the same as what he was taking before August 27, 2010.

Zoeller also filed the March 30, 2015 note of APRN White which states, "I have not been seeing Kevin Turpen for his workers' comp injury. I see him every six months for his regular checkups and fill his pain medication monthly for his chronic back pain."

Zoeller additionally filed the April 30, 2013 report of Dr. Ellen Ballard who noted Turpen's history of chronic low back pain, which he stated worsened with walking, or movements in his sleep. Dr. Ballard determined Turpen's chronic low back pain existed prior to his work injury. She noted Turpen reported he began treating with

medication for this condition in 2006, and had additionally sought treatment with a chiropractor.

APRN White testified by deposition on June 22, 2015. She began treating Turpen in 2008 for various conditions, including high blood pressure, reflux, chronic low back pain and diverticulosis. Although she stated Turpen takes Hydrocodone as a maintenance treatment for his chronic low back pain, she admitted he had complained of this condition since she first treated him in July 2008, and he has taken this medication consistently since that time. She additionally noted Turpen has taken Xanax since 2008.

Attached to APRN White's deposition were the report of Dr. Hodes which was filed with the Form 101, and the October 30, 2008 report of Dr. Lawrence Peters. Dr. Peters stated as follows:

Mr. Turpen was referred here initially via Dr. Kemper, I believe, for back pain with left lower extremity radiculopathy. He does have discogenic back abnormalities with herniation at L5-S1, which is consistent with his symptom complex.

A BRC was held on July 7, 2015. The parties waived the need for a hearing, and the case was submitted for decision on that date. The BRC order notes the issues

to be determined were the causation and work-relatedness of treatment administered and recommended by APRN White, and medications including Hydrocodone, Xanax and Prozac. As noted above, the ALJ resolved the medical dispute in Zoeller's favor. Turpen filed a petition for reconsideration arguing the ALJ erred by making no reference to APRN White's deposition testimony. Turpen requested the ALJ set aside her decision until she had the opportunity to review APRN White's testimony.

The ALJ issued an order on August 20, 2015 denying the petition for reconsideration. She noted the deposition was not filed into evidence until July 16, 2015. The ALJ stated she had no knowledge of the deposition at the time she wrote the decision. She stated the deposition transcript had been reviewed, but her opinion remained unchanged.

We first note, in a post-award medical 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).

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). 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). 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); 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).

The ALJ has the right and obligation to determine the compensability of medical treatment based upon the evidence presented. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. See Smyzer v. B.F. Goodrich Chemical Co., 474 S.W. 2d 367, 369 (Ky. 1971), Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

However, the ALJ's determination must be based upon the appropriate standard. In this instance, the ALJ correctly identified the employer bears the burden of proof of establishing the contested treatment is not reasonable or necessary. However, she actually placed this burden upon Turpen in her decision. Likewise, the ALJ clearly identified the issues to be determined were the work-relatedness and causation of the contested treatment administered by APRN White and the medications prescribed. However, she issued no finding on this issue.

Because the ALJ incorrectly determined Turpen bore the burden of proving the treatment was reasonable and necessary, and made no determination regarding the work-relatedness and causation, we must vacate the decision and remand for an appropriate determination. We make no findings, as we are not permitted to do so. Likewise, we

do not direct the ALJ to arrive at any particular result. On remand, the ALJ must make a determination based upon the evidence, including the testimony of APRN White, utilizing the appropriate standard.

Accordingly, the July 21, 2015 Opinion and Order, and order denying the petition rendered August 20, 2015 by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **VACATED and REMANDED** for additional determination in accordance with the direction set forth above.

ALL CONCUR.

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