OPINION ENTERED: JANUARY 11, 2013

CLAIM NO. 201092030

LICKING RIVER MINING, LLC PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

DONNA GAMBLE
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

SMITH, Member. Licking River Mining Company, LLC ("Licking River") appeals from the August 13, 2012 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), and from the September 10, 2012 Opinion and Order on Reconsideration. The sole question on appeal is whether the ALJ erred in finding Licking River responsible for payment for an orthopedic spinal evaluation, in the

event Donna Gamble's ("Gamble") treating physician determines such an evaluation is needed.

Gamble filed a Form 101, Application for Resolution of Injury Claim, on February 2, 2012, alleging an injury to her back with pain radiating into her pelvis as a result of lifting a 100 pound water pump on January 28, 2010.

Licking River filed a notice of claim denial and acceptance on March 6, 2012, accepting the claim as compensable, but denying that Gamble's spondylolisthesis was work-related. Further, it contested certain medications.

Gamble testified by deposition on March 5, 2012, and at the hearing held August 2, 2012. She began working for Licking River on August 18, 2009, and has worked in the coal mining industry since 1993. Gamble stated she had no symptoms or treatment for low back pain prior to her work injury. On January 28, 2010, she lifted a 100 pound water pump and felt immediate pain in her low back radiating into her legs. She sought treatment at the Morgan County ARH emergency room and followed up with her family physician, Dr. James Frederick, who referred her to Dr. Phillip Tibbs. Gamble continues to have back pain, radiating into her hips which no longer radiates into her legs. Although medication relieves some of her symptoms, she can no longer do yard work or household chores.

Licking River submitted medical records from Dr. Joseph Zerga. On September 23, 2010, Dr. Zerga obtained an electromyogram ("EMG") which showed radiculopathy. However, a second EMG on January 16, 2012 showed no radiculopathy. Dr. Zerga diagnosed an L1–2 herniation with radiculopathy, resolved, and spondylolisthesis at L4–5. He assigned a 7% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") and opined Gamble could not return to her pre-injury job. Dr. Zerga stated Gamble's restrictions arose from the spondylolisthesis rather than the work injury. He recommended no repetitive bending, stooping, crawling, or crouching and no lifting more than twenty-five pounds with a change of position every 30 minutes. He opined Gamble's current condition was related to the natural aging process, inactivity and spondylolisthesis.

Licking River submitted the November 21, 2011 utilization review report of Dr. Bart Olash. He indicated Lyrica was not reasonable and necessary because he assumed it had been prescribed for radicular pain which had resolved.

Licking River also submitted the report of Dr. Frank Parker, who conducted a utilization review on December 28, 2011. He opined Lyrica was not reasonable and necessary

because Gabapentin had been ineffective, and therefore, Lyrica would not be effective.

Dr. Bruce Guberman evaluated Gamble on March 26, 2012. He diagnosed acute and chronic lumbosacral strain with disc herniation at L1–2 and radiculopathy. He noted Gamble was at maximum medical improvement ("MMI") and assessed an 8% impairment pursuant to the AMA Guides caused by the lifting injury of January 28, 2010. He concluded she had no active impairment prior to the work injury.

Dr. Russell Travis, a neurosurgeon, evaluated Gamble on June 6, 2012. His impression was "complaints of low back pain without radicular symptoms." He opined lumbar flexion and extension films did not exhibit sufficient listhesis or movement to qualify for classification as an alteration of motion segment stability according to the AMA Guides. Since Gamble did not qualify for a loss of motion segment integrity, Dr. Travis disagreed with Dr. Tibbs, who placed Gamble in DRE category V.

Dr. Travis concluded Gamble suffered low back pain from the work injury on January 28, 2010 with no records of previous low back pain.

Dr. Warren Bilkey evaluated Gamble on July 3, 2012. He noted she continued to have lumbar pain radiating into the lower thoracic region and into her lumbosacral region. He

diagnosed a lumbar strain that aggravated Gamble's lumbar degenerative disc disease. He opined the L1 disc herniation with radiculopathy had resolved but Gamble had developed symptomatic L4–5 instability for which she had not received treatment. He explained as follows:

> More concerning however is the apparent instability at the L4–5 level with flexion extension x-rays. This on clinical grounds with today's examination appears to be the cause of ongoing back pain symptoms. This is a problem that is not lumbar radiculopathy. It is a problem with the ligament structures of the spine and their failure to hold the vertebra together such that when there is forward and back bending of the spine, there is no tilting of the vertebra but rather a sliding of the L4 vertebra on the L5 vertebra. The only definitive treatment for this is the lumbar fusion procedure that Dr. Tibbs referred to. Ms. Gamble has not been evaluated by an orthopedic spine surgeon. This is the appropriate surgeon for consideration for a lumbar spine fusion procedure.

Dr. Bilkey opined Gamble was not at MMI because the condition was not treated. He recommended an orthopedic spinal evaluation of the instability and noted Gamble appears to be a reasonable candidate for an L4-5 procedure.

Dr. Bilkey observed no undue pain behaviors. He stated all treatment to date had been reasonable, necessary and related to the work injury. Dr. Bilkey noted Gamble had no history of back pain or treatment prior to the work injury.

He recommended sedentary work with maximum occasional lifting of fifteen pounds. He stated Gamble should alternate between sitting and standing every ten to fifteen minutes. Dr. Bilkey opined, if Gamble received no additional treatment, she would have an 8% whole person impairment attributable to the work injury pursuant to the AMA Guides.

The benefit review conference ("BRC") order and memorandum dated June 12, 2012, lists the contested issues as follows:

> "extent and duration, injury as defined by the act, work relatedness of spondylolisthesis, carve-out for natural aging process, and responsibility of continuing medical treatment for spondylolisthesis."

In his August 13, 2012 Opinion and Order, the ALJ made the following findings relevant to this appeal:

> **3. Is the defendant responsible for medical treatment with regard to the plaintiff's spondylolisthesis?** KRS 342.020 requires the employer to pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease.

> The ALJ has found the plaintiff's spondylolisthesis work-related. I therefore find that the defendant is responsible for future medical care for the effects of the work injury, including the previously dormant spondylolisthesis. Should the plaintiff's treating physician opine that she should have an orthopedic spinal evaluation, per the opinion of Dr. Bilkey, this would be compensable as well.

Licking River filed a petition for reconsideration on August 27, 2012, arguing the ALJ improperly ruled on a future referral to an orthopedist for a spinal evaluation. It argued the ALJ adjudicated an issue which was neither presented for decision, nor ripe for consideration. Licking River also argued that, by ruling on the issue, the ALJ inappropriately deprived it of its right to contest the reasonableness and necessity of future medical treatment. Finally, Licking River argued the ALJ should only have stated it remained liable for future reasonable, necessary and work-related treatment and the ALJ should be ordered to strike the language dealing with the specific orthopedic spinal evaluation. Thus, it would be free to exercise its right to reopen and contest any future treatment.

In his September 10, 2012 Opinion and Order on Reconsideration, the ALJ noted one of the issues preserved for adjudication was the responsibility for continuing

medical treatment for spondylolisthesis. The ALJ noted he had ruled KRS 342.020 required the employer to pay for medical treatment of the spondylolisthesis. The ALJ stated the ruling that Licking River is responsible for the evaluation, if the treating physician decides she should have one, was based upon the credible and convincing evidence in the record including reports of Drs. Guberman and Bilkey and the plaintiff's testimony. Accordingly, the ALJ denied the petition for reconsideration.

On appeal, Licking River again argues the ALJ erred as a matter of law in making findings regarding the reasonableness and necessity of future medical treatment which had not been requested and was not under contest for precertification or payment at the time of the ALJ's decision. Licking River argues the ALJ negated its right to freely move to reopen the award to contest reasonableness or necessity of medical treatment in the future. Licking River asks the Board to require the ALJ to revise his opinion and award to comply with the standard that future medical treatment is to be reasonable, necessary and work-related, thus leaving open its rights to move to reopen to contest future treatment on the grounds of reasonableness necessity and work- relatedness should evidence be obtained which would permit reopening pursuant to KRS 342.125 and 803 KAR

25:012. Licking River requests the ALJ be directed to remove specific language regarding the compensability of the future orthopedic spinal evaluation as being reasonable and necessary.

Here, compensability of treatment for Gamble's spondylolisthesis was an issue preserved at the benefit review conference for adjudication. Licking River does not contest the ALJ's determination that the spondylolisthesis is a compensable condition, nor does it contest the award of medical benefits pursuant to KRS 342.020 for the condition. The ALJ provided for an award of benefits pursuant to KRS 342.020. Given the facts in this specific case, we find no error in the ALJ's determination Licking River would be responsible for payment for an orthopedic spinal evaluation, should Gamble's physician determine she should have one.

In making the determination, the ALJ accepted the testimony of Dr. Bilkey who stated Gamble's current problems were not the result of a herniation which had been addressed by neurologists, but rather were the result of the spondylolisthesis, which is an orthopedic condition. It appears the ALJ was merely stating that, before receiving treatment for an orthopedic condition, one would undergo an evaluation by an orthopedist. The proposed evaluation is a necessary antecedent to determine the proper future care for

the spondylolisthesis. The ALJ made no specific ruling regarding future treatment following the initial evaluation. As noted by Gamble in her brief to the Board, Licking River will retain its right to contest future care following the initial orthopedic spinal evaluation.

Although the dissent suggests referral to an orthopedic surgeon was not ripe for a decision by the ALJ as it was not preserved as an issue at the BRC, responsibility for the treatment of Gamble's spondylolisthesis was raised as an issue. Accordingly, the ALJ ultimately determined the spondylolisthesis was a work-related condition and the employer was responsible for treatment of that condition. Dr. Bilkey, in his July 3, 2012, report suggested an orthopedic consultation for the purpose of determining the appropriate treatment of the spondylolisthesis. The ALJ obviously believed Dr. Bilkey's recommendation was appropriate.

Accordingly, the ALJ prudently and in the interest of judicial economy stated Licking River would be responsible for the orthopedic consultation recommended by Dr. Bilkey. We see no reason why the ALJ should not have been permitted to address Dr. Bilkey's suggestion in the opinion, award, and order.

We believe the ALJ was well within his authority in ordering that Licking River be responsible for the initial orthopedic spinal evaluation.

Accordingly, the Opinion and Order issued August 13, 2012, by Hon. William J. Rudloff, Administrative Law Judge, and the September 10, 2012 Opinion and Order on Reconsideration are hereby **AFFIRMED.**

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FILES A SEPARATE OPINION.

ALVEY, CHAIRMAN. I respectfully dissent. The issue on appeal is whether the ALJ erred in finding Licking River responsible for payment of an orthopedic spinal evaluation. In the opinion rendered August 13, 2012, the ALJ stated the following:

> The ALJ has found the plaintiff's spondylolisthesis work-related. I therefore find that the Defendant is responsible for future medical care for the effects of the work injury, including the previous dormant spondylolisthesis. **Should the plaintiff's treating physician opine that she should have an orthopedic spinal evaluation, per the opinion of Dr. Bilkey, this would be compensable as well.**
> (Emphasis added).

In the order on reconsideration issued September 10, 2012, the ALJ again found Licking River responsible for the

referral to an orthopedic surgeon, if the treating physician makes such request in the future.

Because this was not an issue preserved at the Benefit Review Conference ("BRC"), or otherwise litigated, I would reverse the ALJ's decision regarding a prospective evaluation. KRS 342.020 provides the mechanism and basis for challenge of medical disputes. The question of referral for an orthopedic evaluation was not ripe for a decision by the ALJ. While Licking River was found responsible for ongoing treatment for spondylolisthesis, the specific issue of referral to an orthopedic surgeon was not an issue either raised or preserved at the BRC.

The referral to an orthopedic surgeon has not been made; therefore, any decision regarding such referral is speculative. Because the issue was not raised and is not pending, the parties have not been afforded the opportunity to litigate whether this particular treatment modality is reasonable, necessary and required. If a treating physician indeed makes such referral in the future, Licking River should be afforded the opportunity to challenge the recommendation at that time. The statement in Dr. Bilkey's report does not in and of itself create a contested issue and was therefore not ripe for consideration by the ALJ. I would reverse that portion of the ALJ's decision finding

compensable a potential referral to an orthopedic surgeon which is not currently at issue. In all other respects, I would affirm the decision of the ALJ.

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