**OPINION ENTERED: June 19, 2012**

CLAIM NO. 199023273

LOUISVILLE METRO GOVERNMENT PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

JAMES CISSELL
LORI L. BOND, LMT;
SARAH MURROW, D.C.,
TAMINA KAREM, LMT,
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION AFFIRMING**
**AND ORDER REMANDING**

* * * * * *

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

**ALVEY, Chairman.** Louisville Metro Government ("Louisville Metro") seeks review of a decision rendered September 6, 2011, by Hon. Chris Davis, Administrative Law Judge ("ALJ"), who found contested chiropractic treatment and massage therapy sought by James Cissell ("Cissell"), to be

compensable. Louisville Metro also appeals from the October 31, 2011 order denying its petition for reconsideration.

On appeal, Louisville Metro argues the ALJ erred by making an ultimate finding of fact and conclusion of law in determining ongoing chiropractic treatment and massage therapy are reasonable and necessary. We affirm, and remand.

Cissell sustained work-related injuries on June 18, 1990 when a post-driver weighing approximately 80 to 100 pounds, fell four to six feet, striking him on the head. Cissell has complained of head and neck pain since the accident. He has continued to treat with chiropractic and massage therapy. The claim was settled by agreement approved November 19, 1991, by ALJ Thomas Dockter, based upon a 20% permanent partial disability, without waiving entitlement to future medical, chiropractic, or massage treatment.

In an opinion and award on reopening rendered February 10, 1995, and affirmed by this Board on May 12, 1995, concerning chiropractic care, ALJ Edward Fossett found as follows:

> Under the requirements of KRS 342.020 there is absolutely no proof in this record that the charges themselves are

> unreasonable, or that the frequency of treatments is unreasonable. Therefore based upon KRS 342.019, KRS 342.020, and Curry, supra[1], I find that the chiropractic treatments for this Plaintiff which are the basis for this dispute, have been shown by the Plaintiff to be reasonable, necessary, and are affording the Plaintiff temporary, if not total, relief from his work-related injury. Therefore such medical expenses are compensable.

In an order entered November 26, 1996, ALJ Denis Kline ordered the following:

> Inasmuch as the defendant-employer has failed to comply with the order of October 15, 1996, their [sic] motion to be relieved of payment of tendered medical expenses is overruled.

On January 21, 1997, Chief Administrative Law Judge, Donna Terry, entered an order overruling Louisville Metro's petition for reconsideration stating as follows:

> This matter comes before the Chief Administrative Law Judge on petition for reconsideration from the order dated November 26, 1996 filed by the defendant-employer. As grounds for its petition, the defendant-employer argues that it did reply to the prior order of Judge Webster dated October 15, 1996 and attaches a copy of its alleged reply. However, the records of the Department of Workers' Claims do not indicate that the "notice of submission", which was filed under an erroneously[sic] claim number was ever

[1] National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App. 1991)

> received. In addition, it appears from the certificate of service that only Hon. Freeda Clark and Hon. Walter Bedford was [sic] serviced [sic] copies of the "notice of submission". While counsel for the defendant-employer states that the documents were forwarded to Judge Webster, his name does not appear on the service caption and Judge Webster's order dated October 15, 1996 contains a prominent notice that all pleadings should be addressed to the Frankfort Motion Docket and not to an Administrative Law Judge.
>
> As a Petition for reconsideration must point an error patent on the face of an order, it is hereby found that the petition must be overruled, as no error appears on the face of Judge Kline's November 26, 1996 order. The defendant-employer is directed to comply with said order.
>
> As it appears that the deep muscle massage expenses will be an ongoing problem, the defendant-employer is advised that all such expenses must be submitted for medical bill audit and utilization review pursuant to 803 KAR 25:190.

On March 8, 2011, Louisville Metro filed a medical fee dispute, motion to reopen, and motion to join Dr. Murrow, D.C.; Tamina Karem, L.M.T.; and Germantown Chiropractic. In the medical fee dispute, Louisville Metro stated, "The defendant is challenging the reasonableness, necessity, and work relation of continuing chiropractic treatment and massage therapy."

In support of its dispute, Louisville Metro filed a utilization report completed by Dr. Steven Smith, D.C., issued January 28, 2011. In his report, Dr. Smith stated, “Medical necessity and appropriateness of chiropractic care and massage at a frequency of three times per week is not supported by the chiropractic clinical record.”

Louisville Metro also filed the report of Dr. Ellen Ballard, a physical medicine and rehabilitation physician, who evaluated Cissell on April 21, 2011. Dr. Ballard opined Cissell does not require massage therapy three times per week due to the 1990 injury. She also found chiropractic treatment administered three times per week is not reasonable or necessary. Dr. Ballard opined Cissell needs exercises reviewed by a physical therapist, and should be “issued a heating pad”. Louisville Metro filed a supplemental report of Dr. Ballard dated August 22, 2011 reiterating massage therapy provides no benefit whatsoever. She stated:

> Manipulation of the muscles does not affect the condition and will not provide any type of benefit. Severe massage to significant areas of arthritis is not something that changes the underlying condition, has no medical benefit and potentially could cause harm to the soft tissue.

Cissell testified at the hearing held July 21, 2011, he had been in pain for twenty-one years, since the date of the accident. He further testified the chiropractic treatment and massage therapy visits he receives three times per week provide relief from his constant pain, albeit for periods of only 24-36 hours at a time. Finally, he testified the massage therapy allowed him to no longer take pain medication, although he continues to take medications for seizures due to his head injury.

Ms. Tamina Karem, L.M.T., also testified at the hearing held July 21, 2011. She is a licensed massage therapist in Louisville who began treating Cissell on December 11, 2007. According to Cissell, the treatment she administers provides some pain relief for 24-36 hours at a time, allowing him to perform activities of daily living. She provides deep tissue massage, stretching and myofascial releases. Ms. Karem testified she believes Cissel's condition will worsen if he is prevented from receiving massage therapy. She testified, "I believe Mr. Cissell needs therapeutic massage, whether he gets it from me or from someone else, to maintain a quality of life."

In a letter date May 4, 2011, Karem stated the following:

> In response to the statement that this treatment is not curative and should be eliminated, I would like to state that while it may not 'cure' his injury, it will keep his chronic pain at a level where he can function, take care of his personal needs, and live without assistance for as long as possible. As I state in my SOAP notes, therapeutic massage reduces Mr. Cissell's pain, and gives him greater range and ease of motion, allowing Mr. Cissell a quality of life that he will not have if treatment is denied. It is also my opinion that without consistent treatment, Mr. Cissell's pain levels will revert to unbearable levels, negatively impacting his quality of life, and the quality of life of his family that depends on him.

In a letter dated November 2, 2010, Dr. Murrow opined Cissell requires treatment three times per week to maintain a functional pain level. In a subsequent letter dated May 12, 2011, Dr. Murrow described the treatment regimens attempted. She stated all treatments were geared toward allowing him to keep pain at a tolerable level in order to have an adequate quality of life.

In the opinion and order rendered September 6, 2011, the ALJ found:

> 9. The issue before the Administrative Law Judge is the reasonableness and necessity of chiropractic treatment and massage therapy.

As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D. Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. Paramount Foods Inc., v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

The Administrative Law Judge has carefully reviewed all of the records, reports, testimony and arguments made in this claim.

The Administrative Law Judge understands and has considered the opinions of Dr. Ballard and Dr. Smith. Clearly these doctors feel and have stated that chiropractic treatment and massage therapy, three times a week, for several years, is excess treatment and not reasonable and necessary nor work-related.

The Administrative Law Judge acknowledges the potential, in each case, that palliative treatment can be abused by both the medical practitioners and the recipient. However, I am persuaded by the Plaintiff's testimony that without the chiropractic treatment and massage therapy his pain is higher and his functioning is lower.

I am also persuaded by the records, reports and testimony of Dr. Murrow and Ms. Karem regarding their treatment plans for the Plaintiff and effectiveness of the treatment they provide.

> In short I am persuaded, and so find, that the chiropractic treatment and massage therapy is reasonable and necessary for the work injury and therefore compensable.
>
> In making this determination I reject the diagnosis of DISH made by Dr. Ballard. I also acknowledge the recommendation that the Plaintiff be weaned from his current treatment to determine the effectiveness but I reject that recommendation.

Louisville Metro filed a petition for reconsideration on September 23, 2011 asserting the treatment received by Cissell is unproductive and does not provide a reasonable benefit. Louisville Metro further asserted the ALJ abused his discretion by rejecting, "the recommendation that the Plaintiff be weaned from the current treatment." In the order on reconsideration issued October 31, 2011, the ALJ ordered as follows:

> The Opinion in this matter is supported by substantial evidence. The ALJ has determined that the treatment provides a reasonable benefit. The ALJ has decided the treatment is reasonable and necessary and work-related. The Petition is DENIED.

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 vs. 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). After going forward, the burden is upon the employer to prove the contested medical expenses are unreasonable or unnecessary. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); National Pizza Company vs. Curry, *supra*. The claimant, however, bears the burden of proving work-relatedness. *See* Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

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). He or she 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).

In this instance, Louisville Metro was the party with the burden of going forward, and had the burden of

proof in establishing whether treatment was reasonable and necessary. Louisville Metro was unsuccessful before the ALJ, therefore the issue on appeal is whether the evidence compels a different result. 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 weight, credibility, substance and inferences to be drawn from the evidence. Square D Company v. Tipton, *supra*; 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). Although an opposing party may note evidence supporting a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The ALJ has the discretion 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).

In National Pizza v. Curry, *supra*, the Kentucky Court of Appeals held:

> We are convinced that our legislature by using the conjunctive "and" did not intend that only one who has sustained a "curable" work-related injury or disease should be entitled to medical benefits for relief therefrom. Accordingly, we hold that the words in KRS 342.020(1) "cure and relief" should be construed as "cure and/or relief." See KRS 446.080 and Firestone Textile Company Division, Firestone Tire and Rubber Company v. Meadows, Ky., 666 S.W.2d 730 (1984), which states that "[a]ll presumptions will be indulged in favor of those for whose protection the enactment [the Workers' Compensation Act] was made." Id. at 732. Thus KRS 342.020(1) requires the employer of one determined to have incurred a work-related disability to pay for any reasonable and necessary medical treatment for relief whether or not the treatment has any curative effect.

On appeal, Louisville Metro outlined evidence which could have supported a determination by the ALJ the ongoing treatment is non-compensable. However, such was not his determination. Louisville Metro seeks to have this Board to substitute our judgment on the facts for that of the ALJ which we are not allowed to do. Louisville Metro admits Cissell sustained a work injury on June 18, 1990. The settlement agreement outlines Cissell sustained injuries in the form of a blow to the head, neck strain and

impairment of memory. ALJ Fossett previously found ongoing chiropractic care to be reasonable and necessary. The evidence in the record establishes Cissell receives some relief from the contested treatment.

Based upon the foregoing, we find no error with the ALJ's determination of compensability of the ongoing chiropractic treatment and massage therapy which Cissell, Dr. Murrow and Ms. Karem all testified provided relief from the effects of the injury. The evidence does not compel a contrary result.

In its brief filed December 14, 2011, Louisville Metro requested an oral argument be held. After having reviewed the record, it is determined an oral argument is unnecessary in arriving at a decision in this appeal, and therefore the request is **DENIED**.

Accordingly, the decision rendered September 6, 2011, and the order ruling on the petitions for reconsideration rendered October 31, 2011, by Chris Davis, Administrative Law Judge, are hereby **AFFIRMED.** In addition, this claim is **REMANDED** to the ALJ for a determination of supplemental medical disputes filed by Louisville Metro subsequent to the rendering of the opinion and order. The ALJ shall take any steps necessary to render a decision on these contested expenses.

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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