Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 28, 2014

CLAIM NO. 201079549

MARIE MCMANIS PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

BAPTIST HOSPITAL NORTHEAST;
DR. SANJIV MEHTA;
INJURED WORKERS' PHARMACY;
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Marie Cassidy McManis ("McManis") seeks review of the Opinion and Order rendered September 30, 2013 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"), dismissing her claim for cervical and right shoulder injuries, and awarding temporary total disability ("TTD")

benefits and medical benefits only for a temporary injury she sustained while working for Baptist Hospital Northeast ("Baptist"). McManis also appeals from the order on reconsideration issued November 5, 2013.

On appeal, McManis argues the ALJ erred by failing to award future medical benefits despite objective findings of harmful change to the human organism. McManis also argues the ALJ's decision is not supported by substantial evidence, and a contrary result is compelled. We note the ALJ performed a proper analysis pursuant to Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001); FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007). Because the ALJ's determination is supported by substantial evidence, and a contrary result is not compelled, we affirm.

McManis[1] filed a Form 101 on November 15, 2010, alleging she injured her neck and right shoulder on August 20, 2010 from lifting a pan of surgical instruments while assisting with a surgery. She attached the August 23, 2010 Baptistworx treatment record which indicates she was seen for follow-up of her right shoulder, upper arm, and forearm injury. The note references treatment with ice, Naprosyn

[1] At the time the Form 101 was filed, her name was Marie E. Cassidy. She subsequently married and changed her name during the course of litigation of this claim.

and Cyclobenzaprine, and indicates she could return to work on August 23, 2010.

McManis testified by deposition on May 18, 2011, and at the hearing held July 31, 2013. She is a resident of Louisville, Kentucky. She is a high school graduate with a certification as a surgical technician. McManis began working as a surgical technician in 1999, and prior to that she worked as a dental assistant and in medical billing. She began working for Baptist in February 2010, where she was apparently assigned to work through an agency. Her job required moving equipment and setting up surgery rooms. The number of surgical pans she was required to lift, as well as the size and weight of the surgical instruments, depended upon the type of procedure to be performed. She estimated the pans of instruments weighed twenty-five to eighty pounds. As a surgical technician, she also moved patient beds, hung IV's, cleaned equipment, and physically assisted surgeons upon request.

On August 20, 2010, she was assisting with a surgery for treatment of a fractured hip which required larger equipment. She stated the incident occurred as she lifted a pan of instruments from a ring stand which she estimated weighted fifty to seventy pounds. She stated the pan was stuck in the ring stand, and when she pulled upward,

she experienced painful shocking and burning in her neck into her right shoulder, scapula, arm and hand.

McManis initially treated at Baptistworx. She stated physical therapy was administered on three occasions and provided some relief. She next treated with a chiropractor, which she stated provided no relief, and actually worsened her condition. She stated the chiropractic treatment was more painful than her original injury. McManis has treated with Dr. Sanjev Mehta, Dr. Gary Reasor, Dr. Rodney Chou, and at various other facilities. Her treatment since the accident has consisted of physical therapy, epidural steroid injections, stellate ganglion blocks, medications, Lidoderm patches, massage, and acupuncture.

McManis missed only a few days of work after the August 20, 2010. She continued to work for Baptist until her gallbladder began bothering her in December 2010 which required surgery. She stated she had difficulty doing her job after the accident with passing instruments and holding items with her right hand. Subsequent to the gallbladder surgery, McManis returned to work for a different employer. She stated she does not believe she can return to work as a surgical technician.

Baptist filed a surveillance video and records outlining observations of McManis' activities on July 5, 14 and 15, 2012. Both parties filed voluminous treatment and evaluation records from a significant number of medical providers and facilities, many of which are illegible. McManis filed records from Baptistworx, Baptist Hospital Northeast, LaGrange Chiropractic and Rehabilitation, Dr. Craig Roberts, Dr. Mehta, Dr. Reasor, Dr. Warren Bilkey, New Leaf Wellness, Dr. Gary Pittman, Dr. Dan Wolens, Dr. Thomas Loeb, Dr. Chou and Baptist Hospital. Baptist filed records from Dr. Bart Goldman, Dr. Wolens, Dr. Loeb, Dr. Timothy Allen, Dr. Joseph Zerga, Dr. Chou and Baptist Hospital. These records were exhaustively reviewed in the ALJ's decision, and will not be extensively summarized here.

A Benefit Review Conference ("BRC") was held on June 20, 2013. The BRC order and memorandum reflects the contested issues were benefits per KRS 342.730; work-relatedness/causation; unpaid and contested medical bills; injury as defined by the Act; TTD; whether McManis has reached maximum medical improvement ("MMI"); medical fee dispute regarding the use of Lidoderm patches, cervical epidural blocks, and Voltaren gel; and the need for future medical treatment.

On September 30, 2013, the ALJ awarded temporary medical benefits and TTD benefits, but dismissed McManis' claim in all other respects. McManis filed a petition for reconsideration on October 14, 2013 arguing the ALJ made no specific finding of an August 20, 2010 work injury, or whether any such injury was permanent or temporary. In the order on reconsideration rendered November 5, 2013, the ALJ found as follows:

> Plaintiff first requests a finding that she suffered an injury on August 20, 2010. On this point, there is really no dispute plaintiff suffered at least a temporary injury on that date. To this extent, it is therefore determined plaintiff suffered a temporary cervical/right upper extremity injury on August 20, 2010.
>
> Plaintiff requests also a reconsideration of the finding that she suffered no permanent cervical/right upper extremity injury. Plaintiff's Petition in this regard is merely a re-argument of the merits of the case, which have already been decided and explained. Plaintiff's Petition for Reconsideration in this regard is therefore denied.
>
> Plaintiff also requests a specific award of already paid medical expenses and TTD benefits. The employer objects and argues that, based on the ALJ's finding that plaintiff misrepresented her symptoms to the physicians of record, no such finding is appropriate. Reviewing the record and the Opinion again, the ALJ is persuaded plaintiff was entitled to the medical and TTD

> benefits already paid. Although it was determined she did not suffer a permanent injury, the ALJ is not persuaded plaintiff's misrepresentations of her permanent condition obviate her temporary injury or the benefits she already received. As such, it is determined plaintiff is entitled to medical and TTD benefits as already paid.
>
> Plaintiff requests a finding of entitlement to future medical expenses as well. Having already determined plaintiff did not suffer a permanent injury, she is not entitled to future medical expenses. Plaintiff's Petition for Reconsideration on this point is therefore denied.
>
> In addition, plaintiff also requests an award of underpaid TTD benefits. TTD was paid at the rate of $526.43 per week. Based on the stipulated AWW of $841.55, TTD should have been paid at $561.03. Plaintiff therefore is entitled to the difference of $34.60 per week from August 17, 2011 to August 2, 2012, the period of TTD actually paid.

The ALJ denied Baptist's request for a fraud investigation.

McManis, as the claimant in a workers' compensation case, bore the burden of proving each of the essential elements of her cause of action before the ALJ. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was unsuccessful in her burden, the question on appeal is whether the evidence is so overwhelming, upon

consideration of the record as a whole, 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 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 and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

As noted by the ALJ, Dr. Loeb initially evaluated McManis on April 17, 2012. At that time he diagnosed her with degenerative changes at C5/C6 with radiculopathy. He also noted she may have a variant of chronic regional pain syndrome, and "could have Parsonage-Turner syndrome." He opined the August 20, 2010 work injury aggravated a dormant condition, and further stated, "the exact structural defect cannot be identified in this case." Dr. Loeb stated she had not reached MMI, and therefore a functional impairment rating could not be assessed. He further outlined restrictions and treatment recommendations as of the time of the evaluation.

On August 2, 2012, Dr. Loeb prepared a letter stating he had reviewed the video surveillance records from July 2012. He stated as follows:

> This individual appears to use her right upper extremity in a normal fashion in several different circumstances and positions. This changes my position in that I believe she is at MMI and has 0% PPI of the right upper extremity and neck according to the AMA Guidelines to the Evaluation of Permanent Impairment, 5th Edition. I do not see any evidence of CRPS on this video.

In a follow-up letter dated August 7, 2012, Dr. Loeb stated he did not believe McManis required additional

treatment or prescription medication based upon the information recently shared in his August 2, 2012 letter.

McManis was again evaluated by Dr. Loeb on May 7, 2013. He referenced the previous examination performed on April 17, 2012. He noted continued complaints of neck pain radiating from the right trapezius to the fingers of the right hand with a “pins and needles” sensation, and occasional coldness. He stated McManis advised the video he reviewed was taken subsequent to stellate ganglion blocks. Because of the blocks, he stated she would have been expected to perform much better. He reiterated the diagnosis of brachial plexopathy in the right upper extremity. He again stated she had not reached MMI, he could not assess an impairment rating or restrictions, and outlined treatment.

In a final letter dated June 18, 2013, Dr. Loeb stated he had reviewed records from Baptist Physical Therapy, Dr. Chou and Dr. Reasor. Despite McManis advising him the stellate ganglion block had been administered prior to the video surveillance, it in fact was not done until afterward. Dr. Loeb stated, “the current objective data casts a dark cloud over Mrs. McManis’ credibility in terms of the events surrounding her stellate ganglion block and the surveillance video.” He further stated as follows:

> With this new information, I will now reverse my opinion back to my original impression and add that it appears that this claimant is manipulating her history to serve her devices. I have great doubt at this point as to the validity of any of her symptoms.

In his decision rendered September 30, 2013, the ALJ stated as follows:

> Having reviewed the evidence of record, and bearing in mind that plaintiff bears the burden of proving every essential element of her claim, the Administrative Law Judge is ultimately not persuaded plaintiff has carried her burden of proving a work-related permanent cervical/upper extremity injury. In reaching this conclusion, the Administrative Law Judge finds several facts. First, it is determined plaintiff's actions on the surveillance video are not consistent with her presentation of symptoms to her providers or to the IME physicians prior to the point she learned of the surveillance video. Although plaintiff is not seen performing any heavy activities on the videos, she appears to use her right arm/shoulder with no obvious pain or limitation whatsoever. Moreover, although plaintiff argues her symptoms wax and wane from day to day and that she is not always in disabling pain, the Administrative Law Judge finds it unlikely that plaintiff was videotaped only on her "good" days. This persuades the Administrative Law Judge that plaintiff is not as limited as she has presented to her providers or to this court. That is not to say plaintiff has not had legitimate symptoms in the past. It very well may be that plaintiff initially had very

painful symptoms. Rather, it is simply determined that plaintiff has failed to persuade this Administrative Law Judge that she suffered a permanent cervical/ right upper extremity injury as she alleges.

It is also determined that plaintiff misrepresented her condition and treatment to Dr. Loeb after she learned of the surveillance video and after he questioned her about her activities on the video. Dr. Loeb reported plaintiff explained she had undergone her stellate ganglion block shortly before the surveillance videos were taken, which provided her great relief, thereby explaining why she appeared so unlimited in her actions on video. Based on the known dates of the stellate block and of the surveillance videos, this representation to Dr. Loeb is provably false. Although plaintiff denies Dr. Loeb ever questioned plaintiff about her activities on the videos, her denial is not found credible. Instead, Dr. Loeb's report is considered more credible and persuasive in this regard. Having concluded plaintiff misrepresented her condition and treatment to Dr. Loeb in this regard, the inference drawn is that plaintiff misrepresented her condition because she is not having significant cervical/right shoulder pain or limitations.

For all these reasons, the Administrative Law Judge is persuaded by the opinions of Dr. Loeb. He noted plaintiff's degenerative findings on her cervical MRI and her repeated symptoms, but based on plaintiff's actions observed on surveillance video and her misrepresentations to him, Dr. Loeb concluded plaintiff does not actually suffer from a permanent injury

> to warrant any permanent impairment rating. Based on Dr. Loeb's opinions, it is determined that plaintiff did not suffer a permanent injury within the meaning of KRS 342.0011(1) and (33). As such, her claim for permanent benefits must be dismissed.

Here, the record contains substantial evidence supporting the ALJ's finding McManis sustained only a temporary injury, and no contrary result is compelled. The ALJ acted well within his discretion as fact-finder relying upon Dr. Loeb's opinions and his own review of the surveillance video in assessing this claim. Magic Coal Co. v. Fox, supra.

The ALJ explained why he did not find McManis particularly credible, and additionally why he did not believe she had sustained a permanent injury, based primarily upon Dr. Loeb's opinion, and his own assessment of McManis' credibility, which constitute substantial evidence. Since substantial evidence exists in the record and no contrary result is compelled, we will not disturb the ALJ's determination McManis' work incident caused only a temporary injury without resulting permanent impairment.

Since the rendition of Robertson v. United Parcel Service, supra, this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail

to prove a permanent harmful change to the human organism for which permanent benefits are authorized. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

> Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident.

Here, the ALJ correctly followed this standard, and awarded temporary medical benefits for her cervical and right upper extremity problems which he determined had resolved based upon Dr. Loeb’s opinions, the surveillance video and his determination regarding her credibility, pursuant to FEI Installation v. Williams, supra. While McManis points to evidence which could have supported an

award in her favor, that in and of itself does not compel a finding she is entitled to any additional award.

Accordingly, the September 30, 2013 Opinion and Order, and the November 5, 2013 order on reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED**.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

MEMBER, STIVERS. Because I believe the ALJ did not conduct a sufficient analysis and enter the appropriate findings of fact as to McManis' entitlement to future medical benefits, I respectfully dissent from that portion of the opinion affirming the ALJ's denial of future medical benefits. In the September 30, 2013, opinion and order the ALJ discussed the issues of notice, causation/work-relatedness/injury under the Act, and entitlement to TTD benefits. The ALJ stated Dr. Loeb concluded McManis did not "suffer from a permanent injury to warrant any permanent impairment rating." Finding she did not suffer a permanent injury as defined by the Act, he stated her claim for permanent benefits must be dismissed. The ALJ did not sufficiently address McManis' entitlement to future medical benefits in the opinion and order.

In her petition for reconsideration, McManis requested specific findings of fact regarding her entitlement to future medical benefits and an award of future medical benefits. In the November 5, 2013, order ruling on the petition for reconsideration, the ALJ merely stated "[h]aving already determined plaintiff did not suffer a permanent injury, she is not entitled to future medical expenses" and her petition for reconsideration on this issue was denied. Significantly, in the order ruling on the petition for reconsideration, the ALJ determined McManis suffered a "temporary cervical/right upper extremity injury on August 20, 2010." The ALJ ordered McManis was entitled to medical and temporary total disability benefits already paid.

In the November 5, 2013, order, the ALJ stated that he based the denial of future benefits on the fact that he did not find McManis suffered a permanent injury. However, FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007) firmly establishes a mere finding as claimant did not sustain a permanent injury is not a proper basis for denying future medical benefits. FEI Installation, supra, stands for the proposition that even though a claimant may not have suffered a permanent injury he or she still may be entitled to an award of future medical

benefits. An injured worker is entitled to an award of medical benefits "at the time of injury and thereafter during disability" in the absence of a permanent injury or disability. KRS 342.020(1); Combs v. Kentucky River District Health Dept., 194 S.W.3d 823 (Ky. App. 2006). Therefore, I submit the matter should be remanded for specific findings as to McManis' entitlement to future medical benefits.

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