Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 13, 2014

CLAIM NO. 200869605

SBCC, INC. PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

TERRY SMALLWOOD
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. SBCC, Inc. ("SBCC") appeals from the July 16, 2013 Opinion, Award and Order and August 23, 2013 Opinion denying its petition for reconsideration, rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"). The ALJ determined Terry Smallwood ("Smallwood") is entitled to medical expenses related to the implantation of

a spinal cord stimulator. On appeal, SBCC argues the award is neither in conformity with various provisions of KRS Chapter 342, nor supported by substantial evidence. SBCC also contends the ALJ's determination the spinal cord stimulator is reasonable and necessary is clearly erroneous. For the reasons set forth herein, we affirm.

Smallwood was employed as a janitor for SBCC on November 24, 2008, when he injured his low back while lifting car parts. Dr. Leon Ravvin performed surgery on herniated discs at two levels on May 14, 2010. The claim was subsequently settled based upon a 13% impairment rating.

After the surgery, Smallwood continued to experience pain and numbness, stating he had never been totally pain-free or symptom-free since the date of injury. Smallwood received conservative treatment from Dr. Ravvin and his partner, Dr. Greg Snider, until he moved to Danville, Kentucky. In addition to trying various prescription medications, he sought chiropractic relief, to no avail. Eventually, his family practitioner, Dr. William Stafford, referred him to Dr. Robert Knetsche for evaluation, who initially administered injections. Following an MRI, Dr. Knetsche implanted a trial spinal cord stimulator. When this resulted in relief, Dr.

Knetsche implanted a permanent spinal cord stimulator on July 16, 2012 after the trial provided relief. Smallwood testified the stimulator has reduced his pain significantly.

SBCC received no statements of service until September 21, 2012, when Ephraim McDowell Hospital submitted a bill for the spinal cord stimulator implantation procedure performed on July 16, 2012. No request for pre-authorization was submitted. Smallwood argued reasonable grounds exist to explain why the statements were not submitted within 45 days and why no pre-authorization was sought, offering the following testimony:

> Q: How did you happen to see Dr. Knetsche?
>
> A: Well, when I moved to Danville, I seen – I was looking for a doctor, you know, a spine doctor, and I seen the spinal center there, so I called and the lady that I talked to there, her name – Jamie, I think was her name, she told me that she would call and check to see about my Workers' Comp and she would give me a call back, and when she called me back, she told me, that they claim they didn't have a claim with me. And I said, well they do. You know, I said they've been court-ordered to pay my hospital bills, and she said, well, they're saying they don't.
>
> Q: You went to see Dr. Knetsche then, but before you ever went there, you

> talked to someone in the office, and that's where you just related the conversation that you had with them. You said they called you back and said that Workers' Comp wasn't going to pay, and then what happened after that?
>
> A: Well, I went –- you know, I stayed in pain all the time, so I -- you know, sometimes it just gets aggravating trying to get into a doctor and things, so I –- you know, I went on, and then I finally called them back and, you know, asked them to redo it again, and she called me back and told me the same thing, that they had said there was no claim, and I said, well, I have a medical card, can I use the medical card? And she said yes, so that's….I used it.

On December 17, 2012, SBCC filed a medical fee dispute challenging most of Smallwood's post-surgery treatment. It asserted the treatment was non-compensable because the statements of services were submitted outside the 45-day period required by KRS 342.020; because the treatment was performed by Dr. Knetsche, who was not Smallwood's Form 113 designated physician; and because no pre-authorization was requested, thereby preventing utilization review. The ALJ rejected these arguments, and further determined the spinal cord implantation was reasonable and necessary. SBCC's subsequent petition for reconsideration, raising the same issues now presented on appeal, was denied.

SBCC continues to argue the award is not in conformity with the Act. It points to the undisputed evidence the statements of services were not received within 45 days as required by KRS 342.020(1), no pre-authorization was requested, and the treatment was performed by a physician other than Smallwood's designated Form 113 physician or upon referral. Rejecting each of these assertions, the ALJ reasoned:

> Mr. Smallwood testified that he has only an eighth grade education and that he was unaware of the requirement that he designate a new Form 113 physician. Mr. Smallwood was referred to Dr. Knetsche and when he first appeared in Dr. Knetsche's office he advised the staff member that he had a current workers' compensation claim. The staff member contacted the workers' compensation carrier and was told that no claim was in existence on Mr. Smallwood. When the Plaintiff insisted that he did have a workers' compensation claim, which had been settled with future medical services reserved, the staff at Dr. Knetsche's office again contacted the carrier. This evidence was submitted through the testimony of Mr. Smallwood and it has not been rebutted by anyone on behalf of either the Defendant-Employer or the insurance carrier. Thus, the ALJ finds this account of the facts to be true and accurate. When Claimant was advised that he had no recourse through the workers' compensation insurance carrier, the decision was made to turn over the medical statements to Medicare since Claimant was eligible for Medicare coverage.

> The ALJ finds the Claimant was reasonably diligent in identifying the responsible party for his medical services and that having twice been informed that the Defendant-Employer's workers' compensation insurance carrier had denied the existence of a claim and had disavowed the Claimant altogether, the ALJ does further find that the requirements regarding pre-authorization, Utilization Review, and the submission of medical service bills within 45 days were all waived by the employer/carrier and are not applicable to the facts and circumstances of this case. Once the workers' compensation insurance carrier disavowed any responsibility, it was reasonable for Claimant and his physicians to conclude that any further communications with the carrier would be as futile as had been the first two efforts to communicate with them. The breakdown of the system was the direct result of the carrier's wrongful disavowal of its responsibility to pay for Claimant's reasonable and necessary medical care and treatment. The ALJ so finds.

KRS 342.020 requires a medical provider to submit the statement of services within 45 days of treatment. However, the regulations qualify this strict requirement. 803 KAR 25:096(6) further provides that "[i]f the medical services provider fails to submit a statement of services as required by KRS 342.020(1) without reasonable ground, the medical bills shall not be compensable." 803 KAR 25:012 sets forth the utilization review procedure, the protections of which SBCC claims it was unfairly denied.

The ALJ determined Smallwood established reasonable grounds for the delay in the submission of statements to SBCC. This conclusion was based on Smallwood's testimony he informed Dr. Knetsche's office of his claim, and was informed the workers' compensation carrier twice denied the existence of a valid claim. In the ALJ's opinion, this circumstance also explained why pre-authorization was not obtained and, consequently, why SBCC was unable to initiate the utilization review process. Acting within his discretion, the ALJ found Smallwood's unrebutted testimony credible evidence establishing reasonable grounds for the delay. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993)(the ALJ enjoys the discretion to determine the character and quality of the evidence). Furthermore, contrary to SBCC's assertions, this testimony constitutes the requisite substantial evidence of probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). As such, this Board is not at liberty to disturb his ruling.

SBCC has also raised the fact Dr. Knetsche is not Smallwood's Form 113 designated physician, nor was he referred by the designated physician. This issue was identified as a contested issue at the benefit review conference. However, other than a reference to Smallwood's

testimony he was unaware of the requirement to designate a new physician, the ALJ did not expressly rule on the issue in the final Order and Opinion. Nor did the ALJ explicitly reject SBCC's argument the treatment is non-compensable because it was not rendered by Smallwood's designated physician or upon referral. Nonetheless, SBCC did not request additional findings of fact or a more explicit ruling in its petition for reconsideration, as required by KRS 342.281 and KRS 342.285. As such, the issue is not properly preserved for review by this Board. *See* Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007)(failure to make statutorily-required findings of fact is a patent error which must be requested in a petition for reconsideration in order to preserve further judicial review).

SBCC next challenges the sufficiency of the evidence supporting the ALJ's determination the spinal cord stimulator was reasonable and necessary for the cure or relief from Smallwood's injury. In a post-award medical fee dispute, the claimant continues to bear the burden of proof on questions of work-relatedness. Nat'l Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App. 1991). The employer bears the burden as to reasonableness and necessity of the services. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky.

1993). SBCC does not challenge the ALJ's determination as to causation, only reasonableness and necessity. Because Smallwood prevailed on these issues, the question on review is whether the evidence compelled a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

SBCC presented the utilization review report of Dr. Leon Ensalada. He opined the spinal cord stimulator was not reasonable or necessary for the cure of Smallwood's condition. In fact, Dr. Ensalada did not believe Smallwood's prior surgery was reasonable or necessary. The bulk of Dr. Ensalada's report is a discussion of his general belief spinal cord stimulators, are not appropriate for patients with chronic pain syndrome. Smallwood did not present any medical testimony to rebut Dr. Ensalada's report. Nonetheless, the ALJ determined the treatment was reasonable and necessary for the cure of Smallwood's work-related injury. He stated:

> The evidence reflects that various conservative measures were attempted prior to the permanent implantation of the spinal cord stimulator. Plaintiff testified that the stimulator has provided him with significant relief from his pain symptoms. This evidence is unrebutted, except for the evidence from Dr. Ensalada, who opined that a spinal cord stimulator was not reasonable or necessary. The ALJ is not persuaded by the report of Dr. Ensalada, but is convinced that Dr.

> Knetsche's decision to permanently install the spinal cord stimulator, as supported by the successful results, was a reasonable and necessary medical treatment.

While Dr. Ensalada's report could have supported a contrary finding, the ALJ enjoys the discretion to believe or disbelieve any evidence presented. Pruitt v. Bugg Bros., 547 S.W.2d 123 (Ky. 1977)(where the evidence is conflicting, the ALJ may choose whom or what to believe). *See also* McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974)(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). Instead, the ALJ found Smallwood's testimony concerning the relief he has experienced credible and convincing. Treatment which provides even temporary relief from the effects of the work injury may be compensable. Nat'l Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App. 1991). The ALJ further relied on the fact Dr. Knetsche implanted the permanent spinal cord stimulator only after the trial had proved relief for Smallwood's symptoms. We believe this evidence is sufficient proof of probative value to support the ALJ's conclusions.

Accordingly, the July 16, 2013 Opinion, Award and Order rendered by Hon. Edward D. Hays, and the August 23,

2013 Order on petition for reconsideration are hereby **AFFIRMED.**

ALL CONCUR.

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