OPINION ENTERED: August 27, 2012

CLAIM NO. 200501349

SCOTTSVILLE MANOR PETITIONER

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

LORETTA BINION
DR. KENNETH BARTHOLOMEW
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. Scottsville Manor appeals from the April 2, 2012, opinion and order by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") resolving a medical fee dispute in favor of Loretta Binion ("Binion") and determining Scottsville Manor is "responsible for payment for the third surgical revision, the cervical MRI and the

Fentanyl patches recommended by Mrs. Binion's treating physicians." Scottsville Manor also appeals from the May 4, 2012, order denying its petition for reconsideration.

The Form 101 alleges Binion sustained a work-related injury on May 21, 2004. The manner of injury is described as follows: "medicine cart tipped over and caught her arm; cleaning cart by herself, arm trapped under cart." Binion alleged an injury to her left arm and "RSD" [reflex sympathetic dystrophy].

An August 19, 2008, Form 110-I ("Agreement as to Compensation and Order Approving Settlement"), filed in the record reflects under "Nature of injury(ies) including body part(s) affected" the "left arm." The diagnoses are as follows: "Post crush injury to left upper extremity, History of Reflex Sympathetic Syndrome, Post-Op Epidural Stimulator Placement." Binion waived her right to reopen and her right to vocational rehabilitation. The Form 110-I indicates Binion settled for a lump sum of $13,000.00.

On June 28, 2011, Scottsville Manor filed a "Motion to Reopen and Motion to Join Medical Provider." In this motion, Scottsville Manor states as follows:

> Movants, KESA and its insured, Scottsville Manor, respectfully request an order reopening this claim. As grounds for this motion, movant states as follows:

> Respondent, Loretta Binion, sustained an injury to her left arm on May 21, 2004 resulting in a diagnosis of RSD. On August 19, 2008 Respondent settled her claim retaining her right to future medicals.
>
> Respondent has treated for this injury with Dr. John Culclasure for pain control. Respondent has a spinal cord stimulator and has undergone two prior revisions of same. Dr. Culclasure has now recommended a third revision. This request was presented for utilization review. Dr. Daniel Wolens reviewed the medical records and has recommended a comprehensive second opinion. An evaluation has been scheduled with Dr. Dennis O'Keefe for July 22, 2011.
>
> WHEREFORE, movant respectfully requests that the claim be reopened and assigned to an administrative law judge for adjudication and that Dr. John Culclasure be joined in this matter.

On July 19, 2011, Scottsville Manor filed a Form 112 Medical Fee Dispute and described the nature of the dispute as follows:

> Respondent's claim was filed for a left arm injury resulting in a diagnosis of RSD. Respondent settled her claim for a lump sum payment reserving future medicals. Respondent has had two prior revisions to the spinal cord stimulator currently in place. Dr. Culclasure has now requested a third revision and a Medical Consultation Review has requested a comprehensive second opinion. This second opinion is currently schueduled [sic] for July 22, 2011. Dr. Culclasure has also recommended a CT scan of plaintiff's cervical spine which is not related to

> plaintiff's injury. The attached medical consulation [sic] reviews support these opinions.

On July 19, 2011, Scottsville Manor filed a "Renewed Motion to Reopen" which states as follows:

> Movants, KESA and its insured, Scottsville Manor, submit this Renewed Motion to Reopen.
>
> Pursuant to Order issued July 13, 2011 by Chief Administrative Law Judge, J. Landon Overfield, and pursuant to 803 KAR 25:012 § 1(3)(a) we are enclosing a Form 112 Medical Fee Dispute and copies of the Medical Consultation Reviews supporting same.
>
> Defendant notes that respondent, Loretta Binion, sustained an injury to her left arm on May 21, 2004 resulting in a diagnosis of RSD. On August 19, 2008 Respondent settled her claim retaining her right to future medicals relative to the left arm.
>
> Respondent has treated for this injury with Dr. John Culclasure for pain control. Respondent has a spinal cord stimulator and has undergone two prior revisions of same. Dr. Culclasure has now recommended a third revision. This request was presented for utilization review. Dr. Daniel Wolens reviewed the medical records and issued a report recommending a comprehensive second opinion. An evaluation has been scheduled with Dr. Dennis O'Keefe for July 22, 2011.
>
> Additionally, a request for a cervical MRI was made and submitted to the utilization review carrier. Apparently, the reviewing physician initially issued a report requesting

> additional information and that [sic] this request was submitted to Comprehensive Consulting as the June 23 request did not make its way to the workers' compensation insurer. After receiving additional information, the reviewing physician issued a June 24, 2011 medical consultation review addressing the need for cervical CT scanning and indicating that the same would not be necessary. Defendant would reiterate that these reviews are attached both to the Form 112 Medical Fee Dispute and this Renewed Motion to Reopen.
>
> WHEREFORE, movant respectfully requests that the claim be reopened and assigned to an administrative law judge for adjudication as to the need of the medical procedures that are the subject of the submitted utilization review decisions and that Dr. John Culclasure be joined as a party.

In the April 2, 2012, opinion and order, the ALJ set forth the following findings:

> 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. In a post-award medical fee dispute, the burden of proof regarding the reasonableness or necessity of treatment is with the employer. *Mitee Enterprises v. 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 (Ky. 1993); and *National Pizza Co. v. Curry*, 802 S.W.2d 949 (Ky. App. 1991).
>
> In this case work-relatedness is not disputed. As to the reasonableness and necessity of the proposed third surgical revision, cervical MRI and Fentanyl patches, the uncontradicted testimony of Mrs. Binion was that Dr. Culclasure, her treating physician, recommended the third surgical revision and Dr. Bartholomew, another of her treating physicians, recommended the cervical MRI and the Fentanyl patches.
>
> This ALJ declines to second guess the opinions of Mrs. Binion's treating physicians. I, therefore, find that the third surgical revision, the cervical MRI and the Fentanyl patches are reasonable and necessary for treatment of Mrs. Binion's work injury.

In its petition for reconsideration, Scottsville Manor argued as follows:

> This petition addresses the findings made by the ALJ concerning the compensability of the contested cervical MRI and the reasonableness and necessity for the third surgical revision of the spinal cord stimulator and prescription for fentanyl patches. The ALJ states on page 4 of the Opinion that work relatedness was not disputed. That statement may be true. However, plaintiff's claim was for a left arm injury. Plaintiff has never claimed an injury to her cervical spine and the cervical spine was not included as an injured body part in the settlement agreement ratified on August 19, 2008. Moreover, the compensability of the cervical MRI was contested as stated in

Dr. O'Keefe's report on page 8 "Based upon the records available for my review, Ms. Binion had an MRI scan of the cervical spine in 2004 which showed no major abnormalities. Her CT myelogram performed in August 2009 showed only modest degenerative change. These changes are not the result of the work-related fall of May 2004." If work-relatedness is contested, the plaintiff has the burden of proof. Ms. Binion has not provided any evidence which would show that the cervical MRI is in any way related to her left arm injury from May 2004.

In regards to the reasonableness and necessity for the third surgical revision of the spinal cord stimulator and use of fentanyl patches, Ms. Binion's testimony was contradicted by the report of Dr. O'Keefe. Movant therefore requests at least a revision of the Opinion wherein it was stated that the testimony of Ms. Binion and the opinions of Dr. Culclasure and Dr. Bartholomew were uncontradicted. While **Ms. Binion** did testify that her physicians had recommended the revision and the fentanyl patches, that does not overcome the opinion expressed by Dr. O'Keefe in his report. There simply was no evidence presented to counter this medical opinion. The ALJ states on page 4 of the Opinion that he declines to second guess the opinions of her treating physicians. However, it is the ALJ's job to do just that. If not, every medical fee dispute would be ruled in favor of the claimant. The ALJ has the responsibility to review the evidence submitted and make a factual determination.

Medical Fee Disputes are not favored by the Judges or the litigants. It is ironic though the number of times that

> the undersigned has been asked about his client's position in a medical fee dispute. Often the response is simply that the position is to side with the UR determination. Often in response it is then stated that if the medical payment obligor is so serious about the dispute then perhaps an IME should have been obtained. That is precisely what happened in this claim. In fact, Dr. O'Keefe's opinion is the only medical opinion of record.
>
> This is not a situation where the dispute was a surprise to Ms. Binion. In fact, the ALJ instructed Ms. Binion at the hearing exactly what she should do. She did not. The only evidence is from Dr. O'Keefe and it is a patent error to find the disputed medical treatment to be compensable.
>
> The undersigned would request an Order denying the cervical MRI as not related to the May 2004 work injury, and denying the third surgical revision and fentanyl patches based on the medical report of Dr. Dennis O'Keefe.

The ALJ, by order dated May 4, 2012, addressed Scottsville Manor's petition for reconsideration as follows:

> 1. Petitioners have filed a Petition for Reconsideration and the Administrative Law Judge has carefully considered same.
>
> 2. In Ford Furniture Company v. Claywell, 473 S.W.2d 821 (Ky.1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award,

order of decision. There are no patent errors here and the movants are attempting to reargue the case.

3. In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky.2008). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky.1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky.1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky.1974). The board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky.1999). It is well established, whether on reopening or at the time of an original proceeding, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky.2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky.1976).

4. I saw and heard Mrs. Binion testify at the hearing on March 30, 2012 and found her to be a credible and convincing witness. There is no

contradicting lay testimony in the record.

5. She stated that her work injury was to her left upper extremity. As part of her medical treatment she had a spinal cord stimulator implanted and there have been two surgical revisions. Dr. Culclasure, her treating physician, recommended a third revision, which the workers' compensation insurer has denied. Dr. Bartholomew, another of her treating physicians, recommended medical treatment, including a CT scan, an MRI of the cervical spine and pain patches, all of which were denied by the workers' compensation insurer. In addition, the insurer has refused to pay for Lyrica prescribed by Dr. Bartholomew.

6. Dr. O'Keefe examined Mrs. Binion at the request of her employer and its workers' compensation insurer. Dr. O'Keefe noted in his medical report that Mrs. Binion had been examined by Dr. Weiss, a neurosurgeon, who diagnosed that she had reflex sympathy [sic] dystrophy. Dr. O'Keefe also noted in his report that Dr. Bartholomew, Mrs. Binion's treating physician, recommended for her Fentanyl patches to control her pain and also recommended revision of her spinal cord stimulator. The employer filed Dr. Bartholomew's medical records, which medical records state that his diagnosis is that Mrs. Binion has pain and reflex sympathy [sic] dystrophy in her upper limb. Dr. Bartholomew's medical records documented his recommendation of an MRI of Mrs. Binion's cervical spine.

7. In a post-award medical fee dispute, the burden of proof regarding the reasonableness or necessity of

> treatment is with the employer. *Mitee Enterprises v. 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 (Ky.1993); and *National Pizza Co. v. Curry*, 802 S.W.2d 949 (Ky.App.1991).
>
> 8. Based upon the totality of the evidence from Mrs. Binion and Dr. Bartholomew, her treating pain specialist, I made the factual determination that the reasonable and necessary medical treatment for her work-related upper extremity injury included Fentanyl patches, revision of her spinal cord stimulator and a cervical MRI. In so ruling, I relied on the medical records from Mrs. Binion's treating physicians, Dr. Culclasure and Dr. Bartholomew.

On appeal, Scottsville Manor makes the same arguments contained in its petition for reconsideration.

In a post-award medical fee dispute, the burden of proof regarding the reasonableness and necessity of treatment is with the employer. *See* KRS 342.020; Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). However, the burden remains with the claimant concerning questions of work-relatedness or causation of the condition. *See* Addington Resources, Inc. vs. Perkins, 947 S.W.2d 421 (Ky. App. 1997). Concerning the revision of the spinal cord stimulator, the Fentanyl patches, and the

cervical MRI, Scottsville Manor had the burden to prove the medical treatment was not reasonable and necessary for the treatment of Binion's work injury. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since the ALJ found in favor of Binion, the standard of review on appeal is whether the evidence compelled the result Scottsville Manor now seeks. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

The ALJ, as fact-finder, is the sole judge of the weight and inferences to be drawn from the evidence and determines the quality, character, and substance of all the evidence. *See* Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence. *See* Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). The law is well settled that the testimony of a claimant or interested party, even if unrebutted, compels no particular result. *See* Hush v. Abrams, 584 S.W. 2d 48 (Ky. 1979). More importantly, our appellate courts have explained that a fact-finder is free to reject even uncontradicted medical evidence of record if the fact-finder provides a sufficient explanation for the rejection. *See* Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W. 2d 540 (Ky. App. 1991); Mengel v. Hawaiian-Tropic Northwest &

Central Distributors, Inc., 618 S.W. 2d 184 (Ky. App. 1981); Collins v. Castleton Farms, 560 S.W. 2d 830 (Ky. App. 1977). Should the ALJ reject this uncontroverted medical testimony, he must specify his grounds. *See* Collins v. Castleton Farms, Inc., 560 S.W.2d 830 (Ky. App. 1977). As the Court of Appeals stated in Collins, supra, quoting 3 A Larson, Workmen's Compensation Law s 80.20 (9th ed. 1976):

> The Commission may even refuse to follow the uncontradicted evidence in the record, but when it does so, its reasons for rejecting the only evidence in the record should appear e.g., that the testimony was inherently improbable, or so inconsistent as to be incredible, that the witness was interested, or that his testimony on the point at issue was impeached by falsity in his statements on other matters. Unless some explanation is furnished for the disregard of all uncontradicted testimony in the record, the Commission may find its award reversed as arbitrary and unsupported.

Collins at 831.

Scottsville Manor introduced the medical records of Dr. Kenneth E. Bartholomew dated December 29, 2011, January 26, 2012, and February 23, 2012. As the ALJ noted in the May 4, 2012, order on reconsideration, Dr. Bartholomew's records set forth a diagnoses of "pain and reflex sympathy [sic] dystrophy" in Binion's left upper

limb. Dr. Bartholomew's records also "documented his recommendation of an MRI of Mrs. Binion's cervical spine."

In the May 4, 2012, order on reconsideration, the ALJ also noted Dr. O'Keefe's report reflects he noted Dr. Bartholomew recommended Fentanyl patches to control Binion's pain and recommended revision of her spinal cord stimulator.

Binion testified as follows at the March 30, 2012, hearing:

> ALJ: As I understand it, basically you're talking about a work injury to your left upper extremity, correct?
>
> Binion: Yes, sir.
>
> ALJ: And your medical treatment for those injuries included the implantation of a spinal cord stimulator, correct?
>
> Binion: Yes, sir.
>
> ALJ: And what doctors did those surgeries?
>
> Binion: The first one that I had put in was Dr. Culclasure. And then--
>
> ALJ: He is in Nashville, correct?
>
> Binion: Right, he's at St. Thomas.
>
> ALJ: All right. Now, who did the second surgical revision?
> Binion: Kenneth Bartholomew.
>
> ALJ: And those are the only spinal cord stimulation revisions, correct?

Binion: Yes.

ALJ: Okay. Now, Dr. Culclasure recommended a third surgical revision of the stimulator, correct?

Binion: Yes.

ALJ: And do you have any letter from him stating that?

Binion: Not with me.

ALJ: Do you have any letter like that at home someplace?

Binion: Yes, I'm sure I do.

ALJ: Well, can you mail that to me today, or can you fax it to me today? Do you have access to a fax machine?

Binion: That's what I'm trying to think. Surely I can find a place.

ALJ: Who is your primary care physician in Scottsville?

Binion: Dr. John Hall.

ALJ: Can you get the letter from Dr. Culclasure and go to Dr. Hall's office and fax it to me at this location?

Binion: Where they're wanting to implant the third?

ALJ: Yes.

Binion: Okay.

ALJ: Do you have a letter to that effect?

Binion: I believe so.

> ALJ: All right. Get that letter, go to Dr. Hall's office and fax it to me and here's my fax number here.
>
> Binion: Okay.

Binion testified Dr. Bartholomew recommended an MRI and CT scan of her cervical spine. Regarding Dr. Bartholomew's recommendation of pain patches, Binion testified as follows:

> ALJ: Have you had any pain patches yet?
>
> Binion: Yes.
>
> ALJ: How many?
>
> Binion: Well, they write me a prescription for them and I have to pay for them because workman's comp won't.
>
> ALJ: Okay. So workman's comp has refused to pay for the pain patches?
>
> Binion: Yes, sir.

Binion testified to the pain she currently experiences stating as follows:

> Binion: Okay. It goes up my left arm and it goes up into my shoulder and across, you know. And you know, it started like into my back but, you know, that's where it goes to.
>
> ALJ: All right. Any other pain that you attribute to the work injury?
>
> Binion: No.

The above-cited evidence comprises substantial evidence in support the ALJ's determination the third surgical revision of the spinal cord stimulator, the cervical MRI, and the Fentanyl patches are reasonable and necessary treatment. As previously noted, the ALJ is free to reject uncontradicted medical evidence as long as he provides an adequate explanation for the rejection. *See* Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W. 2d 540 (Ky. App. 1991); Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W. 2d 184 (Ky. App. 1981); Collins v. Castleton Farms, 560 S.W. 2d 830 (Ky. App. 1977). The ALJ's explanation, as set forth in the April 2, 2012, opinion and order and the May 4, 2012, order on reconsideration, comprises an adequate explanation for his rejection of Dr. O'Keefe's contrary medical opinions. The ALJ based his findings on the medical records of Dr. Bartholomew and Binion's hearing testimony. This is clearly within the ALJ's discretion. A different result is not compelled, and the ALJ's determination will not be disturbed.

Scottsville Manor also argues the ALJ failed to address the work-relatedness of the cervical MRI, despite the fact it raised this issue in its petition for reconsideration. Scottsville Manor states as follows:

> The Administrative Law Judge ruled on page 4 that work relatedness was not an issue. However, in the Form 112 and motion to reopen the Petitioner listed the cervical MRI as a contested issue because it was not related to the work injury.

As an initial matter, we feel compelled to note a chronic discrepancy throughout this medical fee dispute. In the Form 112, Scottsville Manor asserts it is contesting the work-relatedness of a cervical CT scan. In its Motion to Reopen and Renewed Motion to Reopen, Scottsville Manor uses cervical MRI and cervical CT scan interchangeably. To make matters worse, at the March 30, 2012, final hearing, the following exchange took place between the ALJ, Binion, and counsel for Scottsville Manor:

> ALJ: Have they refused to pay for the cervical MRI?
>
> Binion: Yes.
>
> ALJ: Have they refused to pay for the CT scan of your cervical spine?
>
> Binion: Yes.
>
> ALJ: Has workers' compensation refused to pay for the third revision of the stimulator?
>
> Binion: Yes.
>
> ALJ: All right. Tell me what's wrong with you at the present time. Where do you have pain?

> **Counsel for Scottsville Manor: Your Honor, if I may interject an objection at this point just because, I don't know anything about a CT scan.**
>
> ALJ: All right. Your objection is noted.
>
> Counsel: Thank you, sir.
>
> ALJ: And overruled....

(emphasis added).

Concerning the work-relatedness of the cervical MRI, in the April 2, 2012, opinion and order, the ALJ stated "work-relatedness" is not issue. However, the record reveals Scottsville Manor's Form 112, albeit mischaracterizing the MRI as a cervical CT scan, clearly called into question whether the cervical MRI is work-related. Scottsville Manor also addressed the lack of findings concerning the work-relatedness of the cervical MRI in its petition for reconsideration. However, the ALJ once again failed to address this issue in the May 4, 2012, order ruling on the petition for reconsideration. The burden of proof regarding the work-relatedness of the cervical MRI rests with Binion, and the ALJ failed to address whether Binion met this burden. *See* Addington Resources, Inc. vs. Perkins, supra. Therefore, the ALJ's determination the cervical MRI is compensable is **VACATED**

and this claim is **REMANDED** for further findings of fact. On remand, the ALJ must directly address the work-relatedness of the cervical MRI.

Accordingly, those portions of the April 2, 2012, opinion and order and May 4, 2012, order ruling on the petition for reconsideration determining the third surgical revision of the spinal cord stimulator and Fentanyl patches are reasonable and necessary treatment and compensable are **AFFIRMED**. Those portions of the April 2, 2012, opinion and order and the May 4, 2012, order ruling on the petition for reconsideration to the extent the ALJ determined work-relatedness of the cervical MRI is not an issue and finding the cervical MRI to be compensable are **VACATED**. This claim is **REMANDED** to the ALJ for additional findings regarding the work-relatedness and compensability of the cervical MRI.

ALL CONCUR.

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