Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 14, 2014
OPINION WITHDRAWN: August 26, 2014
OPINION RE-ENTERED: August 26, 2014

CLAIM NO. 200780884

STEEL CREATIONS, INC. PETITIONER

AND

STEEL CREATIONS, BY AND THROUGH KESA, PETITIONER/
THE KENTUCKY WORKERS COMPENSATION FUND CROSS-RESPONDENT

VS. **APPEAL FROM HON. J. LANDON OVERFIELD,**
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENT/
INJURED WORKERS' PHARMACY CROSS-PETITIONER

AND

KEVIN KERCH
HON. DWIGHT T. LOVAN, COMMISSIONER, DWC
HON. JACK CONWAY, ATTORNEY GENERAL OF KENTUCKY
HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE
DEAN COLLIS, M.D.
CHED JENNINGS
ERIC LAMB RESPONDENTS

OPINION
AFFIRMING
AND ORDER

* * * * * *

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

ALVEY, Chairman. Steel Creations, Inc. ("Steel Creations") appeals from the December 13, 2013 opinion and order rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"), finding treatment rendered and prescribed by Dr. Dean Collis for Kevin Kerch ("Kerch") compensable. No petition for reconsideration was filed.

On appeal, Steel Creations argues the CALJ erred in finding compensable the medications of Amitriptyline, Lyrica and Zolpidem because they were not prescribed for treatment of his work injury. Because the CALJ's decision is supported by substantial evidence, we affirm.

Kerch filed a Form 101 on September 17, 2008 alleging he injured his left hand at work on July 31, 2007. The claim was assigned to Hon. R. Scott Borders, Administrative Law Judge ("ALJ Borders"), by scheduling order issued by the Kentucky Department of Workers' Claims on October 17, 2008. A Form 110-I was approved by ALJ Borders on February 27, 2009. This reopening is separate from another dispute currently on appeal, involving several other claims concerning unrelated issues.[1] Those issues

[1] The other claims with which this claim is consolidated for issues which do not concern this appeal are 2004-02145, 2003-73192, 2003-69871, and 2006-00502.

shall be decided by separate opinion and will not be addressed here.

As noted by the CALJ in his December 13, 2013 decision, multiple medical disputes have been filed since the settlement agreement was approved on February 27, 2009. Notably, a previous reopening challenging Dr. Collis' treatment was dismissed without prejudice in an order dated June 15, 2010. The remainder of the pertinent procedural history is outlined by the CALJ and will not be reviewed here.

In its brief on appeal, Steel Creations states the following:

> In light of Dr. Moreno's[2] treatment and recommendations, a settlement was reached in this matter on February 27, 2009. The settlement provided that Petitioner would obtain medical benefits for future pain management treatments based upon the recommendations of Dr. Moreno. ***Specifically excluded from this settlement agreement was any treatment related to the Respondent's claims of reflex sympathetic dystrophy.*** (Emphasis added)

A thorough review of the February 27, 2009 settlement agreement reveals it contains no such exclusion for treatment related to reflex sympathetic dystrophy

[2] Dr. Rodrigo Moreno with Kleinert & Kutz

("RSD"). The Form 110-I approved by ALJ Borders contains no waiver or buyout of future medical benefits. On page two of the agreement, under the heading of "Other Information" the following language is noted, "Parties agree to medical benefits for future pain management treatments based upon the recommendations of Dr. Moreno and/or Dr. Gabriel." Contrary to the assertion by Steel Creations, no language in the agreement addresses any treatment for RSD. In fact, RSD is mentioned nowhere in the agreement.

The medical dispute which is the subject of this appeal was filed on January 24, 2012. The Form 112 filed on that date states the basis of the dispute is, "The claimed treatment and prescriptions are based upon a diagnosis for RSD, therefore, said prescriptions are denied in good faith as non-compensable and unrelated to the underlying work injury." In support of the medical dispute, Steel Creations filed Dr. Collis' December 14, 2011 office note where he diagnosed RSD in the left hand, with left hand pain. Also attached to the dispute were bills from the Injured Workers' Pharmacy ("IWP") for prescriptions of Lyrica dated January 4, 2012, and Amitriptyline dated December 19, 2011. Throughout the litigation of this medical dispute, Steel Creations filed multiple additional billings from IWP for medications prescribed by Dr. Collis. Attached to Dr.

Collis' deposition were copies of bills for Kerch's treatment.

Dr. Collis testified by deposition on May 9, 2013. He began treating Kerch on April 10, 2009 due to a referral from Dr. Moreno. He discharged Kerch from his care on September 12, 2012 due to a failed drug screen. Dr. Collis treated Kerch for left hand pain and RSD throughout the treatment period. Dr. Collis' initial office record from April 10, 2009 notes Kerch related his left hand pain and arm pain to his 2007 work injury.

Dr. Collis stated he did not make a definitive diagnosis of RSD. He treated Kerch for left hand pain in addition to possible RSD. He stated although he did not fully confirm whether Kerch had RSD, he always listed it as a diagnosis. He stated all treatment administered or recommended was reasonable and necessary for treatment of Kerch's pain.

In its brief to the Board, Steel Creations made numerous references to Dr. Moreno's treatment and opinions. However, none of his records were introduced into evidence in the medical dispute, and none were designated from the original claim. 803 KAR 25:010 §4(6)(a)6 states a motion to reopen shall be accompanied by several items including, "[a] designation of evidence from the original record

specifically identifying the relevant items of proof which are to be considered as part of the record during reopening." No such designation was made by Steel Creations. Likewise, Kerch designated no evidence from the underlying claim as permitted by 803 KAR 25:010 §4(7)(c)3.

A review of the file reveals Steel Creations failed to file a motion to reopen pertaining to Dr. Collis' treatment after the June 15, 2010 order dismissing, without prejudice, a previous reopening on this very same issue. It is noted Steel Creations merely filed a Form 112 medical dispute without an accompanying motion to reopen. Dr. Collis was later joined as a party to the reopening. Because we find Kerch's participation in the medical dispute constitutes a waiver of any objection to the proceeding, this procedural defect is not fatal to the reopening.

In considering whether there has been substantial compliance with a procedural rule, considerations include the essential purpose of the rule and whether the opposing party's needs are adequately protected. Asplundh Tree Expert Company v. Neace, Claim No. 05-00381 (October 17, 2005).

Regarding implied consent, in Kroger Co. v. Jones, 125 S.W.3d 241 (Ky. 2004), the Kentucky Supreme Court instructed as follows:

In *Nucor Corp. v. General Electric Co.,* Ky., 812 S.W.2d 136, 145–46 (1991), the Court determined that CR 15.02 is a tool for deciding cases on their merits rather than on the basis of gamesmanship. Quoting from Bertelsman and Philipps, *Kentucky Practice,* 4th Ed., Civil Rule 15.02, the Court explained that one of the reasons for the rule is to take cognizance of issues that were actually tried. As a result, if issues that are not raised in the pleadings are tried with the express or implied consent of the parties, they are treated as if they had been raised. A party's failure to object to the introduction of evidence on an unpleaded issue implies consent to the trial of the issue. Rejecting the view that there could be no implied consent, the Court took the view that the theory of implied consent rested on an absence of actual prejudice, i.e., on the ability to present a defense. We are convinced that the principles that were expressed in *Nucor* apply equally to workers' compensation proceedings.

Here, both parties introduced evidence with respect to the left arm injury. The employer contested notice of the left arm injury at the prehearing conference, but it did not raise the claimant's failure to plead the injury until the hearing, after the proof was closed. Under the circumstances, it was reasonable for the ALJ to conclude that the employer was not prejudiced and that the claimant had not waived her right to claim an injury to her left arm. In so concluding and awarding benefits based upon both injuries, the ALJ effectively amended the claim for the right arm, *sua sponte,* and joined the claim for the left arm. We are persuaded that the ALJ's actions were authorized under the circumstances and

that the award was proper. Id. at 246.

A benefit review conference was held on August 20, 2013. The parties agreed the sole issue for determination was the work-relatedness of medication prescribed by Dr. Collis, and the treatment he rendered.

In the decision rendered December 13, 2013, the CALJ found the contested treatment and medications compensable. The CALJ outlined the procedural history of the claim, and the fact this issue was bifurcated from the remaining issues on appeal which are not addressed in this opinion. He specifically found as follows:

> In this medical dispute, Defendant Employer has challenged the causal relationship between the treatment medications offered by Dr. Collis and the subject work-related injury. In this post-award medical fee dispute, the burden of proof regarding the work-relatedness or causation of the condition as related to the challenged treatment rest on Plaintiff. *KRS 342.020*; *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).*
>
> The only medical evidence submitted in this medical dispute is that of Dr. Collis. It is the unchallenged opinion

> of Dr. Collis the treatment he was providing for Plaintiff which is the subject of this medical dispute was treatment for left hand pain and, possibly, for RSD. Based on this testimony, the CALJ is convinced and finds the challenged treatment, including the prescription medications prescribed by Dr. Collis, is causally related to, and part of a treatment regimen offered for, the cure and relief from the effects of Plaintiff's subject work-related injury to his left hand.
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> **FINDINGS AND CONCLUSIONS**
>
> 1. The facts as stipulated by the parties and as discussed above.
>
> 2. The treatment and medications which are the subject of this medical dispute, including the treatment rendered by Dr. Collis and the prescription medications Amitriptyline, Lyrica, Hydrocodone and Zolpidem, are causally related to and reasonably necessary for the cure and relief from the effects of Plaintiff's subject work-related injury to his left hand and, therefore, are compensable pursuant KRS 342.020.
>
> 3. The medical dispute initiated by Defendant Employer by its Form 112 filed January 24, 2012 and as subsequently amended is resolved in favor of Plaintiff.

Here the CALJ outlined the facts and the basis for his decision. Based upon the facts, we believe the ALJ could reasonably conclude the treatment rendered and recommended was causally related to Kerch's work injury,

and therefore compensable. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984); REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). Hence, we find no error.

Despite the seemingly inconsistent decision rendered by the Kentucky Supreme Court in the unreported case of C & T Hazard v. Chantella Stallings, et al., 2012-SC-000834-WC, 2013 WL 5777077 (Ky. 2013), a long line of reported decisions establish that in a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving entitlement to the relief sought, except that the claimant bears the burden of proving work-relatedness. 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); Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993).

Regardless of who bore the burden of proof, the CALJ determined the evidence established the contested treatment was compensable. The CALJ then proceeded to outline the basis for his decision. As noted by the CALJ, the only evidence of record was Dr. Collis' deposition and office notes, along with the medical bills. Here, the issue is whether the treatment recommended and administered

by Dr. Collis is compensable. It was reasonable for the ALJ to conclude it was, especially in light of the fact the only evidence considered was that of Dr. Collis, and no contrary opinions or evidence were filed.

The CALJ, 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 the evidence. *See* Square D Company v. Tipton, supra. He could 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). Where the evidence is conflicting, the CALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). However, as noted above, no conflicting evidence was introduced regarding this particular medical dispute.

We are troubled by the statement of counsel for Steel Creations in its brief to this Board asserting the original settlement agreement contained a provision which is not present in the agreement. An argument made upon facts which do not appear to exist, is not taken lightly. The assertion that the settlement agreement contained a provision which excluded RSD, when in fact no such provision existed causes this Board great concern.

Erroneous recitation or fabrication has no place in any proceeding, including an administrative one.

Accordingly, the opinion and order rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge, on December 13, 2013 is hereby **AFFIRMED.** Pursuant to agreement of the parties, it is hereby **ORDERED** this opinion is **PLACED IN ABEYANCE**, and will not be considered final and appealable until a decision is rendered in the companion appeal regarding unrelated issues. It is further **ORDERED** counsel for Steel Creations, Inc. is granted fifteen (15) days from and after the date of this order to **SHOW CAUSE** why sanctions should not be assessed pursuant to KRS 342.310 for making statements of fact in its brief to this Board which appear to have no factual basis. Counsel shall also address whether this matter should be referred to the Kentucky Bar Association per SCR 3.130(3.3).

ALL CONCUR.

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