Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 28, 2011

CLAIM NO. 198415781

STEVEN D. TILFORD PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

WESTVACO
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Steven Tilford ("Tilford") seeks review of a decision rendered June 24, 2011, by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), resolving a medical fee dispute in favor of Westvaco. Tilford also appeals from the order denying his petition for reconsideration entered July 25, 2011.

Tilford argues the ALJ erred in basing his decision on the report of Dr. Henry Tutt who performed an evaluation on March 2, 2011. Because the ALJ's decision regarding the medical dispute is supported by substantial evidence and the evidence does not compel a different result, we affirm.

A review of the procedural history of this claim is necessary. On June 26, 1984, Tilford filed a Form 101 claim form alleging an injury to his low back occurring January 13, 1984, while working for Westvaco. Tilford claimed at the time of the accident he was picking up trash outside of a building when he slipped in mud, causing him to fall backward and jerk his back. On February 10, 1986, the old Worker's Compensation Board found Tilford to be 65% occupationally disabled, and apportioned 2½% to Westvaco, 2½% to the Special Fund, and 60% to prior active unrelated conditions. In a subsequent decision on reopening, ALJ Thomas Dockter increased the award to 100% occupational disability with the same apportionment percentages. On July 27, 1998, Chief Administrative Law Judge ("CALJ") Donna Terry assigned the claim to Andrew Manno, the Chief Ombudsman for the Department of Worker's Claims for mediation. On November 23, 1999, ALJ Thomas Nanney, serving as acting Arbitrator, determined Westvaco was not

responsible for a surgical procedure proposed by Dr. David McCord, an orthopedic surgeon. In an opinion, order and award rendered July 6, 2000, ALJ Lloyd Edens determined the lumbar surgery recommended by Dr. McCord was reasonable and necessary, and found Westvaco responsible for payment for the surgery.

On October 17, 2001, CALJ Sheila Lowther overruled Tilford's motion to reopen. On April 13, 2001, this Board affirmed CALJ Lowther's determination. On July 17, 2002, Westvaco reopened Tilford's claim based upon another motion to reopen to determine compensability of medical treatment. In an opinion entered April 23, 2003, ALJ W. Bruce Cowden found a portion of the treatment requested by Tilford to be compensable while disallowing other treatment. On October 14, 2010, Tilford filed a motion to reopen and a Form 112 medical dispute. On March 30, 2011, Westvaco filed a Form 112 medical dispute based upon the report of Dr. Tutt.

In support of his motion to reopen, Tilford filed various medical bills and treatment notes including hospital records from Lourdes Hospital for treatment on May 4, 2010, for complaints of severe abdominal pain which he attributed to his medication. The note from that emergency room visit notes a past medical history of chronic lumbago,

hypertension, hyperlipidemia, gastroesophageal reflux disease, and chronic insomnia. Tilford subsequently filed a February 15, 2010 note from Dr. Allen Tinsley, which states as follows:

> Mr. Stven Tilford (dob 06/11/1954) has been my patient since November 2009. I have been treating him for hypertension, erectile dysfunction, anxiety and GERD that are all secondary conditions due to a back injury suffered by Mr. Tilford in 1984.

Tilford was evaluated by Dr. Tutt, a neurosurgeon, on March 2, 2011, who opined as follows:

> Persisting low back pain is especially difficult to explain in the presence of a solid arthrodesis of his degenerative segments, from L4 to S1, where he has no motion whatsoever. As mentioned, his lack of dermatomal pain distribution and his normal neurological examination certainly exclude any evidence of active lumbar radiculopathy. In the end, then, the basis of his persisting ongoing pain is essentially un-established and inexplicable. He does have a "chronic pain syndrome, as defined by modern parlayence[sic], but in the opinion of the undersigned this is due to chronic iatrogenic opioid hyperesthesia as opposed to any neurocompressive or axial spinal pain medication. Simply expressed, Mr. Tilford is addicted to narcotics, has a situation no different then[sic] if he was addicted to any narcotic drug. He has resisted any suggestion that he change his manner of pain management, typical for an addict. This constitutes his chief medical

problem and is fostered by continuing narcotic usage. His lumbar condition was long-ago structurally stabilized by virtue of the fusion performed by Dr. McCord. Although pain treatment centers promote chronic pain as a "disease", as opposed to a "symptom", the truth of the matter is that Mr. Tilford cannot be free of his pain unless he has the ability to be free of his narcotic analgesics, which he has shown no inclination to pursue. He has consistently declined pursing[sic] any other options, perfectly satisfied with his chronic short-term narcotic usage. In the opinion of the undersigned however, he does not have a structural basis for need for this medication other than his dependence on that medication and the sensible course, which he will never want to pursue, is that he simply beweaned[sic] from the medication, usually accomplished with methadone, and that he become "drug free".

It is unworthy of any physician, in the opinion of the undersigned, to state that Mr. Tilford has pancreatitis, hypertension, hyperlipidemia, GERD or an aortic abdominal aneurysm as a consequence of his work injury alleged[sic] occurring on 1/13/1994[sic] or as an affect to any residuals from his work injury occurring in January 1994[sic]. In the opinion of the undersigned, none of the medications prescribed for Mr. Tilford related to the work injury of 1/13/1984, including his oxycodone, except for his addiction to same. The pathological condition originally warranting use of some degree of pain medication no longer exists.

Tilford then filed Dr. Tinsley's office note of March 17, 2011. Dr. Tinsley noted the following:

> The doctor Steve saw in Lexington, a Dr. Tutt, who felt all his conditions and medication needs were unrelated to his previous work injuries at West vaco[sic], this is of course patently absurd. While it is unlikely that his thn[sic], high cholesterol, diabetes and aneurysm is[sic] related to his work injury, his need for pain pills due to chronic pain is clearly related, his need for testosterone therapy is related to the analgesics he requires, and his pancreatitis is also plausibly related to his pills. Obviously I disagree with Dr. Tutt's inflammatory report, wherein he questioned my competence.

Tilford testified at the hearing held on April 26, 2011. He is a resident of Wickliffe, Kentucky. He testified he filed this medical dispute based upon Westvaco's insurer advising they would not pay for Oxycodone 10, aneurysm and staph infection. Tilford also testified he contracted pancreatitis, hyperlipidemia and high blood pressure from taking pain medication due to his low back injury. He further testified the Oxycodone causes an increase in his blood sugar. Tilford testified he currently takes two Oxycodone 5's every four hours and he also takes a muscle relaxer.

In the opinion and order, the ALJ found as follows:

> The issues to be determined in this re-openings[sic] are whether the Plaintiff is entitled to mileage reimbursement, whether the hospitalization in May of 2010 at Lourdes Hospital was work related, whether the medical treatment of [sic] Plaintiff is receiving for hyperlipidemia, aortic abdominal aneurysms, pancreatitis, diabetes, Gerd[sic], hypertension, and low testosterone is reasonable, necessary, or related to his work related injuries, and whether the continued use of narcotic pain medication is reasonable and necessary.
>
> In a Motion to Re-open to assert a post judgment Medical Fee Dispute, the Defendant Employer bears the burden of proving that the challenged medical expenses and/or proposed medical treatment are unreasonable or unnecessary for the treatment of the Plaintiff's work-related injuries. The Plaintiff maintains the burden of proving that the medical treatment for which he is seeking compensation is related to his work-related injury. Mitee Enters v Yates, 865 SW 2d 654 (KY 1993). Square D Company vs. Tipton, 862 SW 2d 308 (KY 1993). Further, the legislature, by use of the conjunctive "and" which appears in subsection 1 of KRS 342.020 intended the words "cure and relief" be construed as "cure and/or relief". See National Pizza Company vs. Curry, 802 SW 2d 654 (KY 1993).
>
> The Plaintiff has testified, in his opinion, all of the conditions for which he seeks medical treatment for are related to his 1984 work-related

low back injury for which he was found to be totally disabled. However, 60% of that occupational disability was deemed non-compensable and due to the non-work-related fall. In addition, the Plaintiff has submitted medical proof from Dr. Richardson and Dr. Tinsley. Both physicians have opined the Plaintiff's medical conditions for which they had treated him relates back to his 1984 low back injury for myriad of reasons. They also opine that the narcotic medications that they are prescribing the Plaintiff are reasonable and necessary. Dr. Tinsley adamantly disagrees with Dr. Tutt's findings regarding his evaluation of the Plaintiff.

The Defendant Employer has submitted medical proof from Dr. Tutt who opines, "it is unworthy of any physician, in the opinion of the undersigned, to state that Mr. Tilford has pancreatitis, hypertension, hyper-lipidemia, Gerd[sic], or an aortic abdominal aneurysm as a consequence of his work injury." In addition, there has been no persuasive proof submitted by the Plaintiff to prove that his hyperlipidemia, aortic abdominal aneurysm, pancreatitis, diabetes, Gerd[sic], and hypertension are in any way connected to his 1984 work-related low back injury.

In this specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge finds the Plaintiff has not met his burden of proving the conditions hyperlipidemia, aortic abdominal aneurysm, pancreatitis, diabetes, Gerd[sic], hypertension, and low testosterone, are in any way causally related to his 1984 work-related low back injury and therefore the Defendant

Employer shall not be responsible for payment of medical expenses to treat the same.

In so finding, the Administrative Law Judge likewise finds that the Plaintiff's hospitalization in May of 2010 at Lourdes Hospital was for the treatment of his abdominal aortic aneurysm which the Administrative Law Judge finds is not causally related to his 1984 work-related back injury. Therefore, the Administrative Law Judge finds that the medical expenses incurred for the hospitalization to treat his abdominal aortic aneurysm are not the responsibility of the Defendant Employer.

The Plaintiff has also made an issue of whether the Defendant Employer has paid all outstanding medical expenses and specifically argued that Dr. Tinsley had not been paid by the Defendant Employer. The Defendant Employer has responded that the bills have been paid and on May 23, 2011, the undersigned entered an order denying the Plaintiff's Motion to Compel the Employer to pay for said expenses. Therefore this issue is deemed moot.

The next issue for determination is whether the Plaintiff is entitled to mileage reimbursement [sic] the Plaintiff has submitted mileage expenses that have apparently been incurred by him and in the amount of $187.06. However, it appears that travel expenses were incurred by Mr. Tilford to receive treatment for conditions deemed non-work-related. Therefore, the Plaintiff is not entitled to be reimbursed for travel expenses incurred for treatment of non-work-related conditions.

The last issue for determination is the reasonableness and necessity of continued usage of narcotic pain medication. The Plaintiff testified that he receives benefits from the use of narcotic pain medications and that they allow him to perform at least some activities of daily living. Dr. Richardson and Dr. Stewart, the Plaintiff's treating physicians, opined that the medications prescribed by them are reasonable and necessary for the treatment of the Plaintiff's work-related low back injury and allow him to perform activities of daily living.

Dr. Tutt who saw the Plaintiff at the request of the Employer opined that the Plaintiff is addicted to narcotics and he has resisted a suggestion that he change his manner of pain management, which is typical for an addict.

Dr. Tutt felt that this constitutes his chief medical problem and is fostered by continuing narcotic usage. Dr. Tutt felt his lumbar conditions long ago structurally stabilized by virtue of the fusion performed by Dr. McCord. Dr. Tutt opined that the Plaintiff does not have a structural basis for need for this medication other than his dependence on the medication. Dr. Tutt opined that none of the medication being prescribed to the Plaintiff is reasonable or necessary and that he should be weaned from his narcotics.

In this specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge is persuaded by the opinion of Dr. Tutt and finds that the continued use of narcotic pain medications is not reasonable or necessary for the treatment of the Plaintiff's low back condition.

> Therefore, the Defendant Employer shall pay for the Plaintiff to be successfully, or a reasonable attempt be made, to the [sic] wean him from his narcotic pain medication at which time the Defendant Employer shall no longer be responsible for payment of the same.

In a post-award medical fee dispute, the burden of proof to determine the medical treatment is unreasonable or unnecessary is with the employer while the burden remains with the claimant concerning questions pertaining to work-relatedness or causation of the condition. See KRS 342.020; Mitee Enterprises vs. 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, 918 (Ky. 1993); and National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991).

Because Westvaco was successful before the ALJ in demonstrating a majority of the contested medical treatment was unrelated, unreasonable and unnecessary, the question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, as to compel a finding in Tilford's favor. 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 quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); 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). The ALJ has the discretion and sole authority 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).

Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The ALJ, as fact-finder, 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 v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker

v. Rowland, 998 S.W.2d 479 (Ky. 1999).

An injured worker's right to medical care for a work-related injury is not unfettered. The ALJ has the right and obligation to determine the compensability of medical treatment based upon the evidence presented. In this case, the ALJ found Tilford's treatment for conditions unrelated to or not caused by his low back injury to be non-compensable. Likewise, he relied upon Dr. Tutt's findings in ordering Westvaco responsible for payment for a program weaning Tilford from his dependence on narcotic pain medication. Ample evidence exists in the record to support the ALJ's findings and award.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, supra. Because the outcome selected by the ALJ is supported by the record,

we are without authority to disturb his decision on appeal. Special Fund v. Francis, supra.

It is readily apparent the ALJ considered the evidence presented, as indicated above, and found the contested treatment to be unreasonable and not necessary. It was within his discretion to do so. Although conflicting evidence was presented, it was reasonable for the ALJ to arrive at the conclusions set forth in his decision. Therefore, we believe the ALJ's decision is supported by substantial evidence.

Accordingly, the decision rendered February 16, 2011, by Hon. R. Scott Borders, Administrative Law Judge, as well as the order ruling on the petition for reconsideration entered July 25, 2011, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

COWDEN, MEMBER, NOT SITTING.

COUNSEL FOR PETITIONER:

STEVEN D TILFORD
1708 NEW YORK ROAD
WICKLIFFE, KY 42087

COUNSEL FOR RESPONDENT:

HON R CHRISTION HUTSON
P O BOX 995
PADUCAH, KY 42002

ADMINISTRATIVE LAW JUDGE:

HON R SCOTT BORDERS
8120 DREAM STREET
FLORENCE, KY 41042