OPINION ENTERED: April 19, 2013

CLAIM NO. 198943931

SUMITOMO ELECTRIC WIRING PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

SHEILA WOOSLEY KINGERY,
DR. TODD DOUGLAS,
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

ALVEY, Chairman. Sumitomo Electric Wiring ("Sumitomo") seeks review of a decision rendered November 13, 2012, by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), finding the treatment rendered and medication prescribed to Sheila Woosley Kingery ("Kingery") was causally related to her November 14, 1989 work injuries, for which she had

previously been awarded benefits in an opinion rendered January 2, 1992, by Hon. Dwight T. Lovan, Administrative Law Judge ("ALJ Lovan"), and were therefore compensable. Sumitomo also appeals from the January 28, 2013 order denying its petition for reconsideration.

On appeal, Sumitomo argues the ALJ erred as a matter of law in finding Kingery's current treatment proximately related to the 1989 work accident. Sumitomo also argues the ALJ erred as a matter of law and fact in finding Kingery's current treatment reasonable and necessary pursuant to KRS 342.020. Because we believe the ALJ's decision is supported by substantial evidence, we affirm.

In 1992, ALJ Lovan determined Kingery sustained cervical and thoracic spine injuries, "superimposed upon pre-existing degenerative changes in her cervical spine as a result of the work injury." Kingery had filed a Form 101, alleging injuries to her upper back and neck due to repetitively reaching above her head while performing her job.

On February 15, 2012, Sumitomo filed a motion to reopen and medical fee dispute to challenge the causation, work-relatedness, reasonableness and necessity of treatment with Dr. Todd Douglas, including office visits and

prescription medication. An order was issued by Hon. J. Landon Overfield, Chief Administrative Law Judge, on April 25, 2012, reopening the claim, joining Dr. Douglas as a party, and requesting assignment to an ALJ for further disposition. A notice was issued by the Department of Worker's Claims assigning the claim to the ALJ on May 16, 2012.

Kingery testified by deposition on June 20, 2012, and again at the hearing held September 19, 2012. Kingery is a resident of Morgantown, Kentucky. She has not worked since she left employment at Sumitomo subsequent to the 1989 injury. Kingery stated her job at Sumitomo consisted of assembling wiring harnesses for automobiles, which involved repetitive pulling and overhead reaching. Kingery is only 4'8" in height, which required her to reach further than most other employees. She sought job modification, which was denied. She stated because of the repetitive reaching, she developed pain in her mid-back through her neck. She has experienced constant pain in these areas since the date of the accident, necessitating her treatment. She further stated her neck pain worsens with activity. She also stated her condition has continued to worsen despite treatment with medication which merely dulls, but does not alleviate her pain.

Kingery stated she saw Dr. Schwank, a neurosurgeon, on one occasion who advised she did not have a condition which could be relieved by surgery. She treated with Dr. Richard Wan, a family practitioner in Morgantown until 1999 when she began treating with Dr. Douglas. She treated monthly with Dr. Douglas until 2008 when he reduced the office visits to once every three months. She stated she also treated with Dr. Woodward, a chiropractor for a period of time, but stopped when it became apparent his treatment worsened her condition.

Kingery testified she has several unrelated health conditions. She also stated she injured her low back when she fell from her porch, which is unrelated to her work injuries. In addition to treatment for her co-morbidities, Kingery takes Lorcet, Skelaxin, Lyrica, Xanax, and occasionally Phenegran for her work injuries.

Sumitomo attached two office records from Dr. Douglas with the motion to reopen. In the note dated February 29, 2010, Dr. Douglas stated as follows:

> She presented with back pain. Patient in for follow up on her back pain. Has been under a worker's Comp claim for some time, but the carrier is now contesting, and [sic]may lose her coverage. Says[sic] her initial injury was more than 20 years ago, and has not been back to work. Has pain in low back, but worse in thoracic area. Says

> pain is constant, and significantly limits her activities. Says hard time even standing long enough to do dishes. Says pain unbearable at times, even with meds. The Lorcet did not seem to be giving her any relief, and was tried on a duragesic patch through the ER. She gave it a try for over a month, but even with special tape, had a hard time to get it to stay on, and when came off, her pain was much worse. Skelaxin also seems to really help, and has been on Lyrica recently as well. Not being able to work, and decreased income causes her a lot of stress, and on Celexa and Xanax. She is still waiting on disability hearing. Has been seeing Fairview Clinic for diabetic care, as[sic] no insurance.

Dr. Douglas indicated he would see Kingery in four months. He also recommended referral to a specialist for a second opinion.

In his office note dated February 1, 2012, Dr. Douglas noted Kingery's condition had progressively worsened, and she complained of pain which, "starts in the low back and moves all the way to the top." Dr. Douglas took her off Hydrocodone, and recommended a trial of Lyrica.

Sumitomo also filed the December 29, 2011 report prepared by Dr. David Randolph, an occupational medicine physician from Cincinnati, Ohio who evaluated Kingery at its request. Dr. Randolph diagnosed Kingery with:

> Morbid obesity; history of asthma and COPD; manic depression, anxiety, and social anxiety disorder with suicide attempts by history; congestive heart failure; insulin-requiring diabetes; gastroesophageal reflux disease; hypertension; complaints of chronic pain with a diffuse anatomical distribution without corroborating objective findings.

Dr. Randolph stated her "musculoskeletal complaints fall under the rubric of 'medically unexplained symptoms'." He opined her conditions were not caused by her work injury, and treatments with Dr. Douglas every three months was not reasonable or necessary. He further opined treatment with Lorcet, Skelaxin, Celexa, or Xanax was not causally related to her 1989 work injury, and was not reasonable or necessary.

Dr. Randolph testified by deposition on August 27, 2012. He noted the history of Kingery's 1989 injury, and her subsequent treatment. On physical examination performed December 29, 2011, Kingery complained of tenderness across the back of her neck, and between her shoulder blades. She also exhibited a global limited range of motion. Dr. Randolph opined Kingery may have sustained a cervical sprain/strain injury which should have resolved within four to six weeks. He again opined her current complaints are unrelated to her 1989 work injury.

Likewise, he opined treatment once every three months with Dr. Douglas, and treatment with Lorcet, Lyrica, Skelaxin, Celexa and Xanax is unreasonable and unnecessary, and no treatment is required for her work injury. He noted she may require detoxification which could require a four to five week program with medical supervision.

In the opinion rendered November 13, 2012, the ALJ found as follows:

> In a post-award medical fee dispute, the burden of proof regarding reasonableness or necessity of treatment is with the employer, while the burden remains with the claimant concerning work-relatedness or causation of the condition. 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). Defendant Employer's medical evidence, the report of Dr. David Randolph, relates both to the fact that Plaintiff's current neck and upper back conditions and ongoing pain management treatment are not related to her 1989 work injury and that the ongoing treatment is neither reasonable or necessary. In fact, it is Dr. Randolph's opinion that she requires no treatment at all.
>
> Plaintiff testified that she has never been free from pain in her neck and upper back since the work injury. She no longer treats with Dr. Douglas and is very concerned about finding

> treatment for her condition. I am more persuaded by Plaintiff's testimony that her neck and back pain are, at least in part, related to the work injury. Furthermore, while there is very likely a more favorable treatment plan for Plaintiff, I find the opinion of Dr. Randolph that she requires no treatment at all for her work-related condition to be unreasonable based on the testimony from Plaintiff as noted above. I, therefore, find that treatment of James T Douglas, M.D., including office visits and ongoing prescriptions for Lorcet, Skelazin [sic], Celexa, and Xanax was reasonable and necessary.
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> **FINDINGS AND CONCLUSIONS**
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> 1. The facts as discussed above.
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> 2. The treatment with James T Douglas, M.D., including office visits and ongoing prescriptions Lorcet, Skelazin [sic], Celexa, and Xanax is reasonable and necessary for the cure and relief from the effects of Plaintiff's workers' compensation injury and was being prescribed to treat symptoms caused by the work-related injury.
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> 3. Defendant Employer has failed to sustain the burden of proving to the satisfaction of the trier of fact that the contested prescription medication regimen is not compensable.

Sumitomo filed a petition for reconsideration raising the same issues advanced in this appeal. In an order entered January 28, 2013, the ALJ found as follows:

> This matter comes before the Administrative Law Judge (ALJ) pursuant

to Plaintiff's Petition for Reconsideration of the January 8, 2013 Order finding that the first Petition for Reconsideration had not been timely filed. The second Petition for Reconsideration asks that the ALJ find the filing timely and reverse the Opinion, thus, finding in favor of Defendant Employer on the grounds that Plaintiff did not meet her burden of proof.

Regarding the filing date, the certificate of service states that the Opinion was mailed to the parties on November 13, 2012 the same day it was mailed to the Department of Workers' Claims. Counsel for Defendant Employer states said the Opinion was not received in his office until December 8, 2012 and, while there is no explanation for the more than three week delay from the time of mailing from the ALJ's office to the time of receipt by Defendant Employer, the ALJ will take counsel at his word and find the Petition for Reconsideration has been timely filed.

The second issue, whether plaintiff met her burden of proof, Defendant Employer has requested additional findings by the ALJ to support her opinion. Specifically, Defendant Employer has taken a position that since plaintiff has not filed medical proof, she cannot meet her burden of proof that the treatment is for a work related condition. I disagree. Plaintiff's own testimony is sufficient regarding the issues to be determined. Defendant Employer's reliance on *Magic Coal Co. v. Ronnie Fox*, 19 S.W.3d 88 (Ky. 2000), is misplaced since the analysis in that case was limited to KRS 342.315 §2 which pertains only to occupational disease claims and the requirement the

> clinical findings and opinions of University Evaluators be given presumptive weight by the ALJ. In fact, *Magic Coal, supra* specifies there is no comparable requirement concerning injury claims.
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> The fact-finder lacks authority to reject uncontradicted evidence absent a sufficient explanation of the reasons for doing so. *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184 (Ky. App.1981) As stated in the Opinion, I found plaintiff to be a credible witness when she stated her current pain, particularly in her neck, has been constant since her work injury and that the treatment has been beneficial.
>
> Dr. Randolph, on the other hand, found not only that Plaintiff's injury would not require treatment 23 years later, he was skeptical that her original injury was related to her work for Defendant Employer. This issue has long been settled since ALJ Lovan found plaintiff's injury to be work related in 1992. This statement by Dr. Randolph led to my rejection of his opinion about her current condition and treatment.
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> **WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED**, the Petition for Reconsideration is **SUSTAINED** in that it was timely filed and the remainder is **OVERRULED**.

In a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving the contested treatment or expenses are unreasonable or unnecessary. National Pizza Company v.

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). The claimant, however, bears the burden of proving work-relatedness. *See* Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, supra; Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He or she may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

Despite stating the ALJ erred in her determinations as a matter of law, the crux of this appeal is an impermissible attempt to have this Board to substitute its judgment for that of the ALJ. The question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, as to compel a finding

in Sumitomo's 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). The ALJ may choose whom or what to believe. 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).

In her decision, the ALJ set forth the reasons for finding in Kingery's favor. The ALJ found significant Kingery's testimony regarding her current pain, and the fact it had been constant since her injury, and further noted treatment had provided some benefit. Sumitomo's assertion Dr. Randolph's report and deposition are the only medical evidence of record and a contrary result is compelled, is incorrect. Sumitomo failed to note the office notes of Dr. Douglas which it filed with the motion to reopen. Further, the ALJ was not required to rely upon Dr. Randolph's opinions. It is well-established that the claimant's own testimony as to her condition has some probative value and is appropriate for consideration by the ALJ. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

We believe the ALJ's determination regarding the compensability of the contested treatment is supported by substantial evidence and is not so unreasonable under the evidence that it must be reversed as a matter of law. Ira Watson Department Store vs. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the decision rendered November 13, 2012, by Hon. Jane Rice Williams, Administrative Law Judge, and the order overruling Sumitomo's petition for reconsideration issued January 28, 2013, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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