

OPINION ENTERED: March 8, 2012

CLAIM NO. 200082185

TRINA DIETZ

PETITIONER

VS.

**APPEAL FROM HON. LAWRENCE F. SMITH,  
ADMINISTRATIVE LAW JUDGE**

XEROX

DR. JOSEPH DUNAWAY

CHRISTOPHER G. SKEEN, D.C.

and HON. LAWRENCE F. SMITH,

ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING IN PART,  
REVERSING IN PART, AND REMANDING**

\* \* \* \* \*

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

**STIVERS, Member.** Trina Dietz ("Dietz") appeals from the September 26, 2011, opinion and order of Hon. Lawrence F. Smith, Administrative Law Judge ("ALJ") resolving a medical fee dispute in favor of Xerox. The ALJ determined prescriptions for Hydrocodone-Acetaminophen, Orphenadrine,

and Valium, as well as massage therapy, electrical stimulation, and gentle tapping treatment recommended by Drs. Christopher G. Skeen and L. Joseph Dunaway were not reasonable and necessary treatment of Dietz's work injury. Dietz also appeals from the November 7, 2011, order denying her petition for reconsideration.

The record reflects on August 14, 2000, Dietz filed a Form 101 alleging on March 15, 2000, a lid from a bin struck her head and shoulders injuring her "neck, left shoulder arm with headaches." On January 11, 2001, Hon. Richard H. Campbell, Jr., Administrative Law Judge ("ALJ Campbell") approved a Form 110-I Agreement as to Compensation reflecting a settlement of the claim for a lump sum of \$4,131.65. The settlement computations were based on a 5% impairment rating. The settlement did not include a waiver or buyout of future medical benefits.

On January 5, 2011, Xerox filed a motion to reopen, a Form 112 Medical Fee Dispute regarding the proposed treatment of Drs. Skeen and Dunaway, and a motion to join Drs. Skeen and Dunaway as parties. Attached to the motion to reopen is Dr. Dunaway's hand-written note stating he agrees with the proposed treatments of "electrical stimulation and gentle tapping adjustments in addition to massage therapy." Also attached is Dr. Dunaway's

handwritten note/prescription for massage therapy three times per week for twelve sessions and "evaluation and treatment recommendation." The contested medical bills of Drs. Skeen and Dunaway are also attached. In addition, Xerox attached a document, which is at the center of this dispute, which it alleged is the report of Dr. Ann Nunez.

In the Form 112, Xerox asserted it had received a request for the three prescription medications in dispute which had been denied because no treatment notes were provided, and Dietz did not provide a "current Form 106." It attached the request for the three medications. Xerox also alleged it had received a request for electric stimulation and gentle tapping adjustments, and those treatments had previously been provided in November and December, 2010, without approval. Xerox attached billing statements. Xerox asserted the request for the treatment was sent to "utilization review by Dr. Nunez" who opined massage therapy, electric stimulation, and gentle tapping adjustment "are not certified as medically necessary." Xerox stated Dr. Nunez's report is attached to the Form 112 Medical Fee Dispute. In further support of its denial of the requested treatment, Xerox asserted treatment notes had not been provided in order to evaluate Dietz's current

status and determine whether her current medical condition is related to her work injury.

On January 20, 2011, Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ Overfield") entered an order joining Drs. Skeen and Dunaway as parties to the medical fee dispute and giving the physicians and Dietz twenty days from the date of the order to file a response to the motion and Form 112. Significantly, on February 9, 2011, Dietz filed a response stating to the extent there is a controversy concerning ongoing medical treatment by Dr. Dunaway and Christopher Skeen, D.C. as well as certain medication expenses, she "joins in the Motion To Reopen and requests that this matter be reopened and assigned to an ALJ for further adjudication."

In a February 16, 2011, order, CALJ Overfield sustained Xerox's motion to reopen to the extent the matter was referred to an ALJ for final adjudication. Thereafter, Dietz filed the February 4, 2011, letter from Christopher Skeen, D.C., and the March 3, 2011, letter of Dr. Dunaway.

The July 13, 2011, Benefit Review Conference ("BRC") order reflects the following contested issues:

The contested issues are the reasonableness and necessity of treatment including message [sic] therapy, electrical stimulation and gentle tapping treatment as prescribed

by Dr. Dunnaway [sic] and Dr. Skeen. In addition hydrocodone-acetaminophen, orphenadrine and valium are also contested.

At the July 28, 2011, hearing, Dietz testified she initially saw Dr. Warren Bilkey for pain management but was referred to Dr. Dunaway. Since then, every six months she treats with Dr. Dunaway. Dr. Dunaway referred Dietz to Christopher Skeen, D.C., whom she has seen for massage therapy and exercises. Regarding the frequency Dietz sees Dr. Skeen, Dietz testified as follows:

A: Around -- I think it was like -- maybe like in 2002, 2003 maybe.

Q: When you said you saw him for about three months. . .

A: Yeah.

Q: Do -- do you know about how many occasions you have been referred back to him for these three months of -- of treatment?

A: I want to say -- you know, I have to keep going back to get new prescriptions to go, I don't know, like three to four times maybe -- for him.

Q: So every couple of years maybe?

A: Yeah, and then I -- I also went and seen Frazier Rehab and then another physical therapist off of Hurstborne.

Dietz testified the bills for her prescription medication and treatment by Dr. Skeen, Dr. Dunaway, and

Frazier Rehabilitation had been paid prior to the filing of the medical fee dispute. Dietz has been taking Hydrocodone four or five times per day for pain for approximately nine years. Dietz has been taking Orphenadrine, a muscle relaxer, intermittently for the past five years. She has taken Valium, three times per day, for approximately nine years to help relieve tension. She explained Valium helps her sleep and "relax in [her] neck and [her] shoulder." Dietz acknowledged she previously received massage therapy and electrical stimulation at Frazier Rehabilitation and at another physical therapy clinic on Hurstborne Lane. She has not received the gentle tapping treatment. Dietz testified although she has not undergone surgery her condition has worsened.

In the September 26, 2011, opinion and order, the ALJ entered the following findings of facts and conclusions of law:

**1. Are the medications and treatments prescribed to the respondent by Dr. Dunaway and Keens reasonable and necessary to treat the respondent's March 15, 2000 work injury?** The petitioner argues that 11 years after this strain injury, the treatments and medications are no longer reasonable or necessary. The respondent argues that none of these medications or treatments is [sic] medically necessary.

KRS 342.020(1) 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. The employer's obligation to pay the benefits specified in this section shall continue for so long as the employee is disabled regardless of the duration of the employee's income benefits.'

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).

Work-relatedness is not disputed. The ALJ questioned the respondent regarding why she continued to need these medications and treatments eleven years after a non-surgical injury. The petitioner correctly points out that neither Dr. Dunaway nor Dr. Skeens [sic] stated why these medications and treatments are medical necessary. The respondent points out that the petitioner's report, a letter from Coventry Workers' Comp Services to Joel Teta, defines itself as a summary of the findings of Ann Nunez, M.D.

This administrative law judge notes that the plaintiff reported an

injury when a lid of a bin fell on the plaintiff's head and shoulders on March 15, 2000 causing a cervical strain and left seratus anterior muscle strain. Dr. Bilkey assessed a 5% impairment. It has now been more than 10 years and the plaintiff asserts that she still must undergo medical treatment in the form of massage therapy, electronic stimulation and gentle tapping. The plaintiff's physician offers a one paragraph report in support of this continued recommendation. The defendant's medical expert offers a hard to understand cryptic medical explanation in opposition. This administrative law judge, having had the opportunity to observe the plaintiff and hear her testimony, finds [sic] difficult to find common sense reasons to justify the treating physician's recommendations. Consequently, I am more persuaded by the opinions of Dr. Nunez on this issue. Accordingly, I find that continued treatment in the form of massage therapy, electronic stimulation and gentle tapping is neither reasonable nor necessary for the cure and relief of the plaintiff's March 15, 2000 work injury.

Accordingly, the ALJ granted Xerox's motion to reopen and ordered it was not responsible for the payment of "prescriptions and treatments provided and proposed by Drs. Dunaway and Skeens [sic]."

Dietz filed a petition for reconsideration asserting the ALJ erred in finding the prescriptions and treatment provided and proposed by Drs. Dunaway and Skeen

non-compensable. Dietz pointed out work-relatedness was not disputed and asserted Xerox filed no medical evidence in support of its position other than a summary of the findings of the doctor which is not credible evidence. Therefore, Dietz asserts there was no evidence to support Xerox's position. Although Dietz stated additional findings of facts and conclusions of law were requested, she did not state the issues for which she was requesting additional findings of facts and conclusions of law. In the November 7, 2011, "Opinion on Reconsideration" denying Deitz's petition for consideration, the ALJ stated as follows:

As also stated in the opinion, the ALJ did consider the respondent's testimony. The ALJ found that the petitioner had met its burden of proof that the continued massage therapy and other treatment, 21 [sic] years following a nonsurgical injury, is no longer medically necessary. The respondent's evidence to the contrary did not adequately rebut this evidence. Finding no patent error, the petition for reconsideration is DENIED.

On appeal, Dietz argues as follows:

The ALJ erred as a matter of law and fact in granting the motion to reopen/medical fee dispute when there was not substantial evidence to support the ALJ's conclusion and there is a question as to whether or not the ALJ incorrectly assessed the burden of proof.

Dietz notes "803 KAR 25:012 Section (3)(a)(3) [sic]" states that a medical fee dispute must have the necessary supporting expert testimony. Dietz argues the evidence presented by Xerox is "woefully inadequate as expert testimony." Dietz posits there is no indication the actual report of Dr. Nunez was filed with the Form 112; rather, the document appeared to be a summary by an employee of Coventry Work Comp Services sent to Joel Teta. Dietz maintains the administrative regulation dealing with a motion to reopen does not define a medical report; however, a medical report is defined "as it relates to an Application for Adjustment of Claim." Dietz asserts a medical report may consist of "legible, handwritten notes from the treating physician which shall include a description of the injury which is the basis of the claim or medical opinion establishing a causal relationship." Dietz argues the document filed was not a medical report, therefore, there was "no evidence for the ALJ to base his opinion granting the medical fee dispute." Dietz argues Xerox had the burden of proof to establish the treatment was not reasonable and necessary, and the ALJ's November 7, 2011, "Opinion on Reconsideration" erroneously "flip-flopped that presumption."

Since Xerox had the burden of proof in this case on all issues and was successful below, the question on appeal is whether the ALJ's findings are supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as evidence of relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). 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). Similarly, the ALJ has the sole authority to judge the weight to be accorded the evidence and the inferences to be drawn therefrom. 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 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 parties' total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

In order to reverse the decision of the ALJ, it must be shown that there is no evidence of substantial or probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Because of the issue raised by Dietz, we are compelled to resolve the issue of whether the document attached to Xerox's Form 112 is the medical report of Dr. Nunez. In its Form 112, Xerox referred to the opinions of Dr. Nunez and stated her report is attached. In the January 20, 2011, order, CALJ Overfield joined Drs. Dunaway and Skeen as parties to the medical fee dispute and allowed them twenty days to file a response. Significantly, thereafter Dietz did not object to the document purporting to be Dr. Nunez's medical report or assert it was not Dr. Nunez's medical report. 803 KAR 25:012 Section (1)(3)(a) reads as follows:

The Form 112 shall be accompanied by the following items:

1. Copies of all disputed bills;
2. Supporting affidavit setting forth facts sufficient to show that the movant is entitled to the relief sought;
3. Necessary supporting expert testimony; and
4. The final decision from a utilization review or medical bill

audit with the supporting physician opinion.

In her response to Xerox's motion to reopen and Form 112, Dietz did not assert Xerox failed to file the necessary supporting expert testimony. Significantly, the BRC order reflects the contested issues were the reasonableness and necessity of the treatment and the prescriptions. No issue was raised that the appropriate medical report was not attached to the Form 112. More importantly, the July 28, 2011, formal hearing order signed by Dietz's counsel reflects the matter was called for hearing and testimony by Dietz was heard. After setting forth the items filed by Dietz to be considered as evidence, the order sets forth the following:

The following items have been filed by the defendant(s) to be considered as evidence:

**Medical records and reports from Dr. Nunez**

**(Emphasis added).**

Dietz admitted the document attached to the Form 112 is the report of Dr. Nunez and waived any objection to the admissibility of that document.

We have reviewed 803 KAR 25:010, Section 10(2) through (5) which sets forth the required contents of a

medical report. After reviewing that regulation, we do not believe the document which Xerox characterizes as the medical report of Dr. Nunez is compliant. That being noted, 803 KAR 25:010, Section 10(6)(b) requires any objection to the filing of a medical report to be filed within ten days of the filing of the notice or motion for admission. In addition, (6)(c) states grounds for the objection shall be stated with particularity. Since no objection was filed, any objection to the document was waived.

After reviewing the document in question, we conclude the December 23, 2010, letter to Joel Teta sets forth the opinions of Dr. Nunez. More importantly, the document apparently bears Dr. Nunez's signature at the end of the transcription. The last line of the transcription reflects the following: "Peer Reviewer Name/Credentials: Nunez, Ann, MD," and a signature, purportedly of Dr. Nunez, is immediately below that line. Thus, we believe the ALJ could reasonably conclude the document contained the signature of Dr. Nunez and her medical opinions.

Prior to expressing any opinions, the document contains two significant statements which are as follows:

The following summary outlines the recommendation of the reviewing

physician advisor, Ann Nunez MD,  
Physical Medicine:

. . .

Reason for Referral: To establish medical necessity for electrical stimulation and gentle tapping adjustments in addition to massage therapy - 3 x 4 = 12.

After setting forth various relevant information concerning electrical muscle stimulation, massage therapy, and gentle tapping adjustment, the document contains the following:

#### Electrical muscle stimulation (EMS)

Not recommended. The current evidence on EMS is either lacking, limited, or conflicting. There is limited evidence of no benefit from electric muscle stimulation compared to a sham control for pain in chronic mechanical neck disorders (MND). Most characteristics of EMS are comparable to TENS. The critical difference is in the intensity, which leads to additional muscle contractions. Primary pain relief via gate control may be obtained by EMS, TENS, or other forms of ENS. The theory is that rhythmic muscle stimulation by modulated DC or AC probably increases joint range of motion, reeducates muscles, retards muscle atrophy, and increases muscle strength. Circulation can be increased and muscle hypertension decreased, which may lead to secondary pain relief.

#### Massage

Recommended as an option as an adjunct to an exercise program, although there is conflicting evidence of efficacy.

(Haroldsson, 2006) There is little information available from trials to support the use of many physical medicine modalities for mechanical neck pain, often employed based on anecdotal or case reports alone. In general, it would not be advisable to use these modalities beyond 2-3 weeks if signs of objective progress towards functional restoration are not demonstrated. (Gross-Cochrane, 2002) (Aker, 1999) (Philadelphia, 2001), (Haroldsson-Cochrane) (Verhagen, 2006) (Haroldsson, 2006) There is limited evidence for the effectiveness of massage as an add-on treatment to manual therapy; and manual therapy is an add-on treatment to exercises. Mechanical massage devices are not recommended.

Reviewer comments: The request for electrical stimulation and gentle tapping adjustments in addition to massage therapy 3x4=12 is non-certified. Documentation indicates the patient has participated in 7 recent sessions of therapy. There is no recent comprehensive physical exam of the cervical spine submitted for review to support the request. Official Disability Guidelines suggest the use of massage therapy as an adjunct to home exercise program with conflicting evidence for the efficacy of treatment. Guidelines also do not suggest the use of electrical muscle stimulation for the cervical spine. As such, the clinical documentation provided does not support the certification of the request at this time.

The first paragraph set forth herein relating to electrical muscle stimulation, except for stating the current evidence of electrical muscle stimulation is lacking evidence,

provides no basis for the statement electrical muscle stimulation is not recommended. However, at the end of the language set forth herein, Dr. Nunez stated the "guidelines" do not suggest the use of electrical stimulation for the cervical spine. That language sets forth Dr. Nunez's opinion and the basis for her opinion and, thus, constitutes substantial evidence supporting the ALJ's determination electrical muscle stimulation is not reasonable and necessary treatment of the work injury.

Concerning massage therapy, Dr. Nunez states it is not advisable to use massage therapy beyond two or three weeks if signs of objective progress towards functional restoration are not demonstrated. Dietz's testimony establishes she had undergone massage therapy for some time and had undergone electrical muscle stimulation at Frazier Rehabilitation. Dr. Nunez went on to state there is limited evidence for the effectiveness of massage as an add-on treatment to manual therapy; and manual therapy as an add-on treatment to exercises. Mechanical massage devices are not recommended. Accordingly, Dr. Nunez opined the request for electrical stimulation and gentle tapping adjustments, in addition to massage therapy, is non-certified. She went on to point out documentation indicated Dietz had participated in seven sessions of

therapy, and there was no recent comprehensive physical examination of the cervical spine submitted for review to support the request. Dr. Nunez concluded there was no clinical information to support the certification of the treatment requested at that time. Dr. Nunez concluded by stating as follows:

Based on the clinical information submitted for this review and using the evidence-based, peer-reviewed guidelines referenced above, the request for electrical stimulation and gentle tapping adjustments in addition to massage therapy - 3x4=12 is non-certified.

Based on the contents of Dr. Nunez's report, we believe the ALJ could reasonably conclude Dr. Nunez understood her task was to determine whether the electrical muscle stimulation, gentle tapping adjustments, and massage therapy are medically necessary. Further, we believe, the ALJ could conclude the document purporting to be Dr. Nunez's medical report provided specific information in support of her opinions. Therefore, her opinions constitute substantial evidence to support the ALJ's determination the electrical muscle stimulation, gentle tapping adjustments, and massage therapy are not reasonable and necessary treatment of Dietz's work injury. The deficiency of the report which, at best, contains scant

information in support of Dr. Nunez's opinion, goes to its weight and not its admissibility. Because the signed report contains Dr. Nunez's medical opinions with a modicum of a basis for her opinions, it therefore constitutes substantial evidence which supports the ALJ's decision regarding the reasonableness and necessity of electrical muscle stimulation, gentle tapping adjustment, and massage therapy.

That said, since the BRC order and the September 26, 2011, opinion and order establish the prescription medication is causally related to Dietz's injury, on appeal the sole question is whether substantial evidence supports the ALJ's decision the prescription medications are not reasonable and necessary treatment. Dietz testified she had been taking Hydrocodone-Acetaminophen and Valium for over nine years and Orphenadrine for approximately five years as needed. There is no medical evidence in the record which establishes those prescriptions are not reasonable and necessary treatment of Dietz's work injury. Dr. Nunez offers no opinion regarding the prescription medication and, therefore, we conclude there is no basis for the ALJ's determination the prescription medications are not reasonable and necessary treatment of Dietz's work injury.

In the findings of facts and conclusions of law, the ALJ made no finding the prescription medications are not reasonable and necessary treatment for the cure and relief of Dietz's work injury. In that regard, Dietz's petition for reconsideration noted the ALJ had erred in finding the prescription medication non-compensable and indicated there is no evidence to support Xerox's position. The only documents filed by Xerox regarding the prescription medication are three separate printouts relating to each prescription, but there is nothing in those documents which indicate the prescription medications are not reasonable and necessary treatment of Dietz's work injury. Consequently, the portion of the ALJ's September 26, 2011, Opinion and Order finding the prescription medications are not reasonable and necessary treatment and relieving Xerox of its responsibility to pay for those medications is reversed.

Accordingly, the portion of the September 26, 2011, Opinion and Order and the November 7, 2011, Opinion on Reconsideration determining the massage therapy, electrical muscle stimulation, and gentle tapping adjustments are not reasonable and necessary treatment of the work-related injury is **AFFIRMED**. However, the portion of the September 26, 2011, Opinion and Order and the

November 7, 2011, Opinion on Reconsideration determining the prescription medications are not reasonable and necessary treatment of Dietz's work-related injury is **REVERSED**. This claim is **REMANDED** to the ALJ, as designated by the CALJ, for entry of an amended Opinion and Order overruling Xerox's motion with respect to the contested medications of Hydrocodone-Acetaminophen, Orphenadrine, and Valium. The ALJ shall find the prescription medications in question comprise reasonable and necessary treatment of the work-related injury and order Xerox to continue to pay for the prescription medications.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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