OPINION ENTERED: December 7, 2012

CLAIM NO. 200000542

WHITE CASTLE PETITIONER

VS. **APPEAL FROM HON. ROBERT SWISHER, ADMINISTRATIVE LAW JUDGE**

TINA HANEY
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. White Castle seeks review of a decision rendered March 9, 2012, by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), finding the treatment rendered and medication prescribed by Dr. Leon Butler to Tina Haney ("Haney") was causally related to her October 28, 1999 work-related motor vehicle accident ("MVA"), and

therefore compensable. White Castle also appeals from the August 2, 2012 order overruling its petition for reconsideration.

On appeal, White Castle argues the temporal relationship hypothesis advanced by Dr. Butler is not evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men. White Castle also argues the ALJ committed a fact-finding error by assigning any medical significance to the clinical results of sympathetic steroid blocks administered in December 1999. White Castle next argues it was fact-finding error for the ALJ to have assigned any medical significance to Haney's brief, recent abstinence from alcohol and its failure to cure her peripheral neuropathy. Finally, White Castle argues it was fact-finding error for the ALJ to have given any credence to Dr. Butler's opinion on causation of peripheral neuropathy which has no scientific basis. We disagree and affirm.

Haney sustained injuries, including a traumatic brain injury, in a MVA occurring on October 28, 1999, as she was en route to a training class for her work at White Castle. Haney filed a Form 101 (Application for Resolution of Injury Claim), on May 1, 2000, alleging injuries to her head, foot, arm and leg. On October 3, 2003,

Administrative Law Judge, Hon. R. Scott Borders ("ALJ Borders") approved a settlement agreement which provided Haney would receive income benefits from White Castle until she reaches 71 years of age.

On May 10, 2006, White Castle filed a motion to reopen and medical fee dispute to challenge whether treatment with Depakote and Seroquel was causally related to the MVA. In an opinion rendered March 1, 2007, Administrative Law Judge, Hon. John B. Coleman ("ALJ Coleman") found the treatment with those two medications to be work-related and compensable.

White Castle then filed another motion to reopen and a Form 112 medical dispute on October 19, 2011, which is the subject of this appeal. White Castle disputes the compensability of treatment and medications prescribed by Dr. Butler as being due to unrelated co-morbidities rather than resulting from the 1999 MVA.

Haney testified by deposition on February 1, 2012, and again at the hearing held April 25, 2012. Haney is a resident of Louisville. She has not worked since the October 28, 1999 MVA. She testified she currently treats with Dr. Butler, who she began seeing following the death of Dr. David Decker, her previous family physician. She has had no additional MVA's since 1999 and no longer has a

driver's license. She further testified she has had substance abuse issues in the past, and no longer takes Oxycontin. She stated her problems have not diminished since she has been sober. She testified her current problems are in her legs and low back. She also described problems with balance, neuropathy and depression which she did not recall having before the 1999 MVA. She also described diminished sensation to touch in her hands, and stated her hands and feet are discolored and are always cold.

In support of the medical fee dispute, White Castle filed the report of Dr. Timothy Kriss, a neurosurgeon, who evaluated Haney on July 18, 2011. Dr. Kriss reviewed numerous medical records and provided an outline of Haney's history of injury and treatment. At her evaluation, Haney's primary complaint was neuropathy in her feet. Her secondary complaint was reflex sympathetic dystrophy ("RSD"), and she complained of low back pain, insomnia, loss of heat sensation in both hands, and weight gain. She also complained of decreased short-term memory, concentration and balance. Dr. Kriss stated Haney appeared to be overly medicated and heavily sedated. He diagnosed her with a mild closed head injury. Dr. Kriss noted Haney's history of poly-substance abuse, and questioned

whether her current complaints were due to the MVA. He recommended treatment with Benadryl and Hydroxyzine. He further indicated Lyrica and Neurontin may be reasonable, but were unrelated to the MVA. Finally, he opined treatment with Seroquel was not indicated.

Dr. Kriss testified by deposition on February 13, 2012. He stated he evaluated Haney on July 18, 2011, at which time he interviewed her, reviewed records, performed physical and neurological testing, and reviewed diagnostic studies. Dr. Kriss stated Haney advised she had RSD numerous times during the evaluation, but he determined she did not meet the criteria for such diagnosis. On physical examination he observed she had a normal gait, but she had problems with balance, cognition and edema from a fluid imbalance. Dr. Kriss determined there was no connection between the peripheral neuropathy and the MVA. Likewise, he determined a connection between the traumatic brain injury and peripheral neuropathy is not supported by the medical literature. He opined none the medication she was taking at the time of the evaluation was due to the MVA. He further opined her neuropathy was caused by a metabolic insult that accumulated over time from either a toxin such as alcohol, or the absence of a vitamin.

Dr. Butler testified by deposition on February 28, 2012. He is board certified in family medicine. He first saw Haney for treatment on February 11, 2011. At that time she complained of paresthesias, numbness, and tingling involving her bilateral lower extremities without any focality. She also complained of depression, anxiety and hot flashes. At that time, she had no complaints of paresthesias in her upper extremities. He noted the paresthesias were consistent with peripheral neuropathy which could be caused by diabetes, metabolic disturbances, nutritional deficiencies, or could be post-traumatic in origin. Although Haney initially denied any issues with substance abuse, he learned of her past history after she underwent in-patient detoxification and psychological counseling.

Dr. Butler agreed Haney does not have RSD. He noted her history of falling which he attributed to her post-traumatic residuals of upper motor neural lesions stemming from the head injury she sustained in the MVA. He also noted spastic leg muscles due to upper motor lesions stemming from her spinal cord or brain injuries. He also diagnosed restless leg syndrome which he attributed to her injuries. Dr. Butler opined the treatment he has administered has been for residuals from her work-related

MVA. Specifically, he stated, “all of her symptoms seem to center around her automobile accident she had in October. Her problems seem to be centered around swelling, weight gain, and leg pain.” He noted she had the same symptoms in 2003 when she was treating with Dr. Karen Bloom.

In an undated report filed by Haney on February 7, 2012, Dr. Butler stated he first saw her on February 11, 2011. He opined she has a permanent spinal cord injury due to the 1999 MVA. Her residual symptoms stemming from that accident include decreased short-term memory, blurry vision, peripheral neuropathy, paresthesias, loss of balance and frequent falls. He further stated the medications he prescribes are reasonable and medically necessary for the treatment of the residual effects of the injuries she sustained in the MVA. Additional records from Dr. Butler outline treatment through February 13, 2012 for restless leg syndrome, ataxia, paresthesias, depression, anxiety disorder and edema.

Records from Dr. Ricky Collis dated December 13, 1999 and January 18, 2009 reflect complaints of bilateral lower extremity problems of pins and needles hypersensitivity from the knees to the ankles and feet stemming from the October 28, 1999 MVA. He ordered a series of lumbar sympathetic blocks and physical therapy.

Haney also submitted records from Dr. Christopher Manik from Community Medical Associates. Dr. Manik's records from December 27, 2000 through December 30, 2005, outline treatment for pain in the arms, legs, hip, low back, as well as seizures and psychiatric disorders related to the 1999 MVA. He stated medication for seizures and bipolar disorder was due to the work-related injury.

Dr. George Shee saw Haney for treatment from February 4, 2000 through July 19, 2000. He noted she continued to complain of pain in both legs, and all of her symptoms seemed to center around the October 1999 MVA.

Haney also submitted records from Dr. Decker which are generally illegible. However, in his note dated December 15, 2010 Dr. Decker stated she had complaints of severe neuropathy and pain.

The records of Dr. Karen Bloom from December 1, 1999 through March 26, 2003 were submitted as evidence. Dr. Bloom noted Haney was status post brain injury due to the 1999 MVA. She observed Haney walked slowly due to pain in her legs, and noted she had complaints of hand cramping, leg pain and balance issues. She further noted Haney has depression, bilateral pedal edema, vision problems, and bilateral lower extremity pain.

The June 9, 2011 office note of Gayle Mink, ARPN from Seven Counties Services was introduced. She had treated Haney for major depression, grief, opiate dependency (in remission), and marijuana abuse (in early partial remission).

Records from the University of Louisville Hospital for an admission from October 28, 1999 through November 5, 1999 were submitted. Those records include a diagnosis of closed head injury and scalp laceration stemming from the October 28, 1999 MVA. The final diagnosis was a brain hemorrhage with discharge to Frazier Rehabilitation in Louisville.

Finally, Haney submitted reports from Dr. Robert Granacher dated July 2, 2001 and January 11, 2012. Dr. Granacher determined Haney has dementia and mood disorder resulting from the October 28, 1999 traumatic brain injury. He additionally found she had poly substance abuse problems unrelated to, but exacerbated by, the injuries she sustained in that MVA.

A benefit review conference ("BRC") was held on April 10, 2012. The issues preserved for determination included unpaid or contested medical expenses; medical fee dispute regarding treatment for RSD, low back pain and peripheral neuropathy, along with prescriptions for Lasix,

Lyrica, Neurontin, Requip, Cymbalta, Sebella, and Trazadone as being unrelated to injuries sustained in the October 28, 1999 MVA.

In an opinion and order rendered June 21, 2012, the ALJ found as follows:

> **1. Compensability for treatment of RSD, low back pain and peripheral neuropathy.**
>
> This is a medical fee dispute in which the defendant/employer contests certain treatment currently provided by Dr. Leon Butler to Tina Haney on the grounds that the same is not causally related to the injuries sustained in the work-related motor vehicle accident of August 28, 1999. In a post-award medical fee dispute the plaintiff retains the burden of proof on the issue of work-relatedness. *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky. App. 1997).
>
> As an initial matter, the defendant has preserved as a contested issue treatment for RSD (reflex sympathetic dystrophy). It does not appear, however, that the plaintiff is being treated for that condition by Dr. Butler or otherwise. Moreover, both Dr. Butler and the plaintiff's evaluating physician, Dr. Kriss, are of the opinion that the plaintiff does not have reflex sympathetic dystrophy. Although the medical records document that there was a suspicion by some of the plaintiff's prior treating physicians that she, in fact, had reflex sympathetic dystrophy, it is clear now that she does not and it is further clear that she has not been treated for that condition.

Accordingly, this aspect of the defendant's medical fee dispute is overruled as moot.

The defendant next contends that it should be relieved of the responsibility for payment for treatment of low back pain. The plaintiff, in her brief, notes that "there is no low back treatment currently being requested and therefore low back treatment is not a contested issue to be decided by the ALJ." The ALJ notes that the plaintiff was seen by Dr. Nair on January 8, 2002 complaining of low back pain but subsequent records do not provide a history of ongoing complaints or treatment. Moreover, after a review of Dr. Butler's treatment records it does not appear that plaintiff has complained to him of any low back pain and it is also apparent that Dr. Butler has never diagnosed the plaintiff with low back pain or treated her for that condition. It is Dr. Butler's treatment regimen which is being contested. In the absence of any specific treatment directed to "low back pain" there is no present basis for determining work-relatedness of a condition which is neither presently diagnosed nor treated and, therefore, no basis on which to prosecute a medical fee dispute. This aspect of the defendant's medical fee dispute is, likewise, therefore, overruled as moot.

The truly contested issues in this claim are whether the plaintiff's peripheral neuropathy and peripheral edema are causally related to the motor vehicle accident of August 28, 1999 so as to render medical treatment provided by Dr. Butler compensable. In support of her claim that these conditions are work-related, the plaintiff has

submitted medical records reflecting prior treatment as well as a report and deposition testimony of her current primary physician, Dr. Butler. In reviewing prior treatment records the ALJ notes that the plaintiff complained of bilateral lower extremity pins and needles and hypersensitivity type pain from the knees down to her ankles and feet as early as December 13, 1999, i.e., less than two months after the motor vehicle accident. Further, as early as December 1, 1999 plaintiff was noted to have Grade I pitting edema in her feet. Initially it was thought that the plaintiff might have reflex sympathetic dystrophy but that, ultimately, has been determined not to be the case. In addition to her prior records, Dr. Butler testified that he has treated the plaintiff for the same complaints since he took over her care in early 2011 and he opined that the plaintiff's peripheral edema and neuropathy are related to the motor vehicle accident. He testified that peripheral neuropathy can result from trauma and that by virtue of the plaintiff's history of the development of symptoms close in time to the trauma from the motor vehicle accident, there was a sufficient causal relationship in his mind. The defendant, for its part, has submitted a detailed report and even more detailed deposition testimony from Dr. Kriss, a neurosurgeon well-known in the context of evaluating workers' compensation claimants. The gist of Dr. Kriss' opinion is that regardless of any temporal relationship between the onset of symptoms particularly with respect to peripheral neuropathy, and the motor accident, there is no medical basis from which to conclude that there is any causal relationship between plaintiff's traumatic brain injury and/or the motor

vehicle accident and the development of peripheral neuropathy. While he is somewhat less certain with regard to the cause of plaintiff's peripheral edema, he indicated that that[sic] condition is the result of fluid imbalance which he believed could be attributable to congestive heart failure, oncotic liver problem or proteins, kidney problems and pulmonary hypertension. He did not relate the peripheral edema in the plaintiff's legs to her head injury or peripheral neuropathy but acknowledged that an internal medicine physician and vascular surgeon would know more about edema than he does.

In this claim the ALJ is faced with the very difficult task of weighing medical opinions from physicians with opposing opinions as to whether plaintiff's peripheral neuropathy and edema are [sic] result of injuries sustained in the motor vehicle accident. While the ALJ notes that Dr. Kriss' opinion as to causation is far more detailed than the opinions and testimony of Dr. Butler, the ALJ finds the ultimate opinion of Dr. Butler that plaintiff's lower extremity neuropathy and edema are the result of the motor vehicle accident to be more persuasive. In so finding, the ALJ acknowledges Dr. Kriss' argument that medical causation should not be based solely on the temporal relationship between an event and the subsequent development of a medical condition. On the other hand, the ALJ does not believe that contemporaneous development of symptoms post-injury should be ignored, either. While Dr. Kriss argues passionately that plaintiff's peripheral neuropathy is logically more appropriately explained as a result of either diabetes or alcoholism, the ALJ notes that the

plaintiff has never been diagnosed with diabetes and that her primary care physician, Dr. Butler, has specifically excluded that diagnosis. As to the plaintiff's alcoholism, the undersigned finds that likewise to be an unpersuasive explanation for two reasons. First, the plaintiff testified that she has not consumed alcohol for approximately six months yet her symptoms continue unabated. Second, and more compelling is that when plaintiff was initially complaining of "aching, burning, pins and needles type sensation" in her feet on December 13, 1999, she was treated with a series of sympathetic lumbar blocks under the theory that she had reflex sympathetic dystrophy. Records from Dr. Collis reflect that the plaintiff had a series of selective lumbar epidural sympathetic blocks in December of 1999 and that when she returned to see Dr. Collis on January 18, 2000 she reported that she had had[sic] significant relief of her pain, was not having any pain or swelling in her feet or ankles and had no hypersensitivity, and was able to stand and walk without any problems. On physical examination of the lower extremities plaintiff had no swelling or edema and no hypersensitivity with full range of motion of the ankles and normal motor and sensory exam. Dr. Collis felt at that time that the sympathetic pain had resolved and that she was to return as needed if the pain returned. The significance of this part of the plaintiff's medical history is that treatment was provided during a time when the ALJ infers that the plaintiff was still consuming alcohol inasmuch as she testified that she had done so ever since she was 18 years old and that as a result of that treatment consisting of injections in the upper

lumbar spine, plaintiff's symptoms abated. This is consistent with Dr. Butler's opinion that plaintiff's peripheral neuropathy is a result of spinal pathology. In addition, Dr. Butler notes that although peripheral neuropathy is seen in patients suffering from alcoholism, plaintiff does not have the other "stigmata" of alcoholism and that he, therefore, did not believe that that[sic] was the medical explanation for her peripheral neuropathy.

As for the peripheral edema, Dr. Kriss noted that that[sic] was not particularly within his field of expertise and he would defer to an internal medicine or vascular physician with respect to that issue. Dr. Butler, a board certified internal medicine specialist, while acknowledging the potential contribution of "non-traumatic" factors such as COPD and a cardiovascular condition, testified that he prescribed Lasix "to take care of the peripheral edema" and that that[sic] medication was "reasonable and necessary for the MVA". He went on to explain that peripheral edema would make plaintiff's peripheral neuropathy symptoms worse. Even if the ALJ were, therefore, to accept the proposition that plaintiff's peripheral edema is not directly and causally related to the motor vehicle accident, the ALJ is persuaded from Dr. Butler's testimony that treatment of that condition is appropriate as an adjunct treatment to minimize the symptoms from plaintiff's work-related peripheral neuropathy and, therefore, is compensable. Moreover, it is significant to the ALJ that there is no evidence that the plaintiff ever complained of nor was diagnosed with either peripheral neuropathy or

peripheral edema at any time prior to the motor vehicle accident and that symptoms attributable to both of those conditions appeared within weeks of the accident itself. The ALJ is unpersuaded by the underlying but unspoken basis of Dr. Kriss' opinion that plaintiff's peripheral neuropathy and edema developed spontaneously and simultaneously with the injuries she sustained in the motor vehicle accident but completely independent thereof. Accordingly, the ALJ finds and concludes that treatment for plaintiff's peripheral neuropathy and peripheral edema are causally related to the motor vehicle accident of August 28, 1999 and, therefore, compensable. This aspect of the medical fee dispute is resolved in favor of the plaintiff.

2. Prescriptions of Lasix, Lyrica, Neurontin, Requip, Cymbalta, Savella, and Trazodone.

Initially, the ALJ notes that prescriptions of Cymbalta and Trazodone are written primarily for plaintiff's depression and psychological condition which even the defendant's evaluating psychiatrist, Dr. Granacher, attributes to the residual effects of the motor vehicle accident. Moreover, according to Dr. Butler, plaintiff is no longer being prescribed Lyrica as she has been cut off from all narcotic medication in light of her substance abuse history. Lasix is prescribed for fluid retention and treatment of plaintiff's peripheral edema which, as set forth above, was determined to be compensable. The prescription for Lasix, therefore, is found to be compensable for the same reason.

Neurontin and Savella are prescribed by Dr. Butler for plaintiff's peripheral

neuropathy. Having determined above that plaintiff's peripheral neuropathy is causally related to the injuries received in the motor vehicle accident, prescriptions of those medications are likewise compensable considering that there is no argument with respect to reasonableness/necessity.

With respect to the prescription for Requip, the undersigned has been unable to determine from a review of all the evidence submitted by the parties that Requip is currently being prescribed for the plaintiff. That medication is mentioned in Dr. Kriss' report of July 18, 2011 as "prescribed but not yet approved or filled." From a review of the transcript of the plaintiff's discovery deposition as well as a transcript of the Formal Hearing, it does not appear that the plaintiff has been prescribed or is taking Requip. Moreover, Dr. Butler does not address that specific medication and all that Dr. Kriss says about it is that plaintiff's mother told him that plaintiff had been prescribed Requip for "restless leg syndrome". In his report he indicates that Requip is appropriate only for true restless leg syndrome and "clearly Ms. Haney does not have restless leg syndrome" so he recommends discontinuing the medication. Dr. Butler testified at deposition, however, that plaintiff does have restless leg syndrome and while he initially prescribed Lyrica to treat that condition, he had changed plaintiff to Gabapentin (Neurontin). The ALJ infers from Dr. Kriss' report that the plaintiff has been prescribed Requip to address restless leg syndrome. While Dr. Butler diagnosed that condition he did not offer any opinion or testimony with respect to the causal connection between that

> condition and the injuries sustained in the motor vehicle accident in his deposition testimony. Moreover, in his written summary report submitted by the plaintiff, Dr. Butler does not diagnose restless leg syndrome and does not indicate that he is prescribing Requip at all. Accordingly, the ALJ finds that the plaintiff has failed to carry her burden of proof that the prescription of Requip is directly and causally related to the effects of the August 28, 1999 motor vehicle accident. The medical fee dispute is resolved in favor of the defendant as to the contested prescription of Requip.

White Castle filed a petition for reconsideration raising the same issues advanced in this appeal. In an order entered August 2, 2012, the ALJ overruled the petition as being nothing more than a re-argument of the merits of his decision.

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 the numerous arguments advanced by White Castle, the crux of this appeal is an impermissible attempt for 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 White Castle'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). Where evidence is conflicting, 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 his decision, the ALJ set forth the reasons for finding in Haney's favor regarding the contested treatment. 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).

Finally, we find no merit in White Castle's argument regarding the applicability of Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). White Castle argues pursuant to Cepero, supra, Dr. Butler's opinion regarding causation between the 1999 MVA and Haney's current complaints is erroneous, based upon unsupported evidence, and therefore should be disregarded. We cannot say the history provided to Dr. Butler, or his interpretation of the work-relatedness or causation of her complaints was so flawed as to render his opinions so lacking in probative value as to require rejection pursuant to Cepero, supra. In fact, it is clear Dr. Butler's opinions are consistent with the numerous medical records and reports stemming from the earliest dates of treatment

for Haney's work-related injuries. We therefore do not find Cepero, supra, to be applicable to the case *sub judice*, and the ALJ's decision shall not be disturbed.

Accordingly, the decision rendered June 21, 2012, by Hon. Robert L. Swisher, Administrative Law Judge, and the order overruling White Castle's petition for reconsideration issued August 2, 2012, are hereby **AFFIRMED**.

ALL CONCUR.

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