Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 29, 2015

CLAIM NO. 201193084

WILLIAM WILLIAMSON PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

MOTORCYCLE SUPERSTORE, INC.
DR. ANTHONY MCELDOWNEY
INJURY-CARE SHV
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. William Williamson ("Williamson") appeals from the November 24, 2014, Opinion and Order on Remand and the January 20, 2015, Order on Petition for Reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). In the November 24, 2014, Opinion and Order on Remand, the ALJ resolved a post-award medical fee dispute in favor of

Motorcycle Superstore, Inc. ("Motorcycle Superstore") and determined the contested chiropractic treatment, massage therapy, and physical therapy, recommended by Dr. Anthony McEldowney, are not compensable.

On appeal, Williamson asserts the ALJ erred by characterizing his injury as a soft tissue injury. Also, Williamson argues the ALJ erred by failing to analyze the medical fee dispute pursuant to controlling precedent.

The Form 101 alleges Williamson injured his back while in the employ of Motorcycle Superstore on March 10, 2011, June 3, 2011, and August 18, 2011, in the following manner:

> Claimant sustained work related injury to his Back as follows: 3/10/11 while lifting a pallet; 6/3/11 while stacking ATV tires; 8/18/11 while raising from a bent position and hit an iron shelf.

In an Opinion and Award of March 29, 2013, Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ Weatherby") determined Williamson sustained a lumbar spine injury on August 18, 2011, and awarded temporary total disability ("TTD") benefits already paid, permanent partial disability ("PPD") benefits, and medical benefits. ALJ Weatherby provided, in relevant part, the following findings of fact:

> 19. While Dr. Barefoot opines that the June 3, 2011 injury resulted in the onset of increasing severe low back pain, Dr. Lyon disagreed citing the medical history and records of the Plaintiff. Dr. Lyon went on to opine that the Plaintiff has a 5% whole person impairment for the lumbar spine as a result of the August 2011 injury only and that he has no impairment as a result of the March 2011 injury.
>
> 20. Dr. Lyon also concluded based upon the medical evidence and the Plaintiff's own statements that the Plaintiff did not suffer an injury in June of 2011.
>
> 21. The ALJ therefore finds in accordance with the credible opinion of Dr. Lyon that the Plaintiff has a 0% impairment as a result of the March 2011 injury, that he did not suffer an injury as defined by the Act in June of 2011 and that he has a 5% whole person impairment as a result of the August 2011 work injury.
>
> 22. Dr. Lyon opined that the Plaintiff would require restrictions for his lumbar condition but declined to list any specifically. The ALJ therefore relies upon the restrictions assessed by Dr. Barefoot which would preclude the Plaintiff from returning to the same type of work.

ALJ Weatherby awarded medical benefits for "the effects of the work-related injury." There was no appeal of ALJ Weatherby’s decision.

We adopt our summary of the procedural history set forth in the August 1, 2014, Opinion Vacating and Remanding:

> Motorcycle Superstore filed a motion to reopen, and a Form 112 on October 8, 2013 challenging treatment by Dr. Anthony McEldowney who it asserted is not in its managed care network. Motorcycle Superstore also contended requested physical therapy, massage therapy and chiropractic treatment are not reasonable or necessary. A motion to join Dr. McEldowney as a party was also filed. In support of the medical dispute, Motorcycle Superstore filed the February 24, 2013 utilization review denial prepared by Dr. Peter Kirsch. Regarding Williamson's treatment, Dr. Kirsch stated as follows:
>
> He was neurologically uncompromised and treated conservatively. I believe the active effects of that injury ceased long ago, the tissues are healed, the patient returned to preinjury status, and was considered at MMI with a 5% impairment for the lumbar spine. Based on the information in the chart, I do not believe at this late date that formal physical therapy, massage therapy, or chiropractic treatment would be reasonable and medically necessary for any injury suffered to the lumbar spine on 08/18/11.
>
> Motorcycle Superstore subsequently filed a motion to join Injury-Care SHV as a party. Both Dr. McEldowney and Injury-Care SHV were joined as parties in the order dated November 11, 2013.
>
> Williamson filed a response to the motion to reopen, and moved for sanctions to be imposed against

Motorcycle Superstore for acting in bad faith and violating the Unfair Clams Settlement Practices Act. In the response, Williamson stated he relied upon and designated the following items from the original claim as evidence to be considered in the reopening:

Records of Norton I.C.C., Dr. Charles Crawford, Stonestreet Medical imaging, Norton Audubon Hospital, Dr. Louis Williams and Dr. Jules Barefoot, the Hearing Transcript, and the March 29, 2013 Opinion & Award of ALJ Weatherby.

No additional evidence was filed by either party.

Williamson's request for sanctions was denied by order entered November 25, 2013. A scheduling order was issued on December 6, 2013 stating the issues to be determined included reasonableness and necessity of chiropractic treatment, physical therapy and massage therapy. A benefit review conference ("BRC") was held on January 10, 2014. The BRC order and memorandum reflecting the same contested issues as those noted on the scheduling order. The BRC order also reflects, "A hearing is waived. The providers have been joined and have [sic] an opportunity [sic] participate and have not. Claim is submitted on the record as of today's date. Briefs waived."

The ALJ rendered a decision on March 5, 2014, noting, "The Original Claim was resolved by Opinion and Award, which is *res judicata*." In the opinion, the ALJ summarized Dr. Kirsch's note, but made no reference to the evidence from the original claim designated by Williamson. The medical dispute was

> resolved in Motorcycle Superstore's favor.
>
> Williamson filed a petition for reconsideration arguing the ALJ failed to "review/summarize/analyze" the evidence he had designated from the original claim. Williamson disputed the ALJ's statements regarding Dr. Kirsch's report being uncontradicted, and that he had sustained just a "soft tissue injury". Williamson requested additional findings of fact and reconsideration of the finding he had sustained only a "soft tissue injury". Williamson also asserted the ALJ applied an improper analysis in deciding the medical dispute, which he claimed was procedurally flawed.
>
> The ALJ issued an order on May 19, 2014 denying the petition for reconsideration. In the order on reconsideration, the ALJ stated as follows:
>
> 2. The Respondent is entitled to an assurance that his evidence and arguments were considered. In fact, on page 16 of his 19 page Response, which was primarily a frivolous Motion for Sanctions, to this Medical Fee Dispute the Respondent designated medical records of Norton ICC, Dr. Charles Crawford, Stonestreet Medical Imaging, Norton Audubon Hospital, Dr. Louis Williams and Dr. Jules Barefoot.
>
> As the Respondent failed to comply with KRS 342.033 all evidence except the first two, from Norton ICC and Dr. Charles Crawford, are stricken from the record.

In our August 1, 2014, opinion, we determined the ALJ erroneously failed to consider all the medical evidence

Williamson designated from the original claim to be considered by the ALJ in resolving the medical fee dispute. We vacated the ALJ's decision and remanded the claim for consideration of all of the medical evidence designated by Williamson.

In the November 24, 2014, Opinion and Order on Remand, the ALJ elaborated further with an *additional* summary of medical records:

> 3. Extensive Medical Records Records from Norton's indicate that on March 10, 2011 the Respondent-Williamson presented to Norton's complaining of work-related low back pain. He was diagnosed, variously and at different times, with a thoracic tumor, thoracic trigger points and thoracic pain. A lumbar MRI was done on September 30, 2011. A thoracic MRI was done. Williamson later began to treat with Dr. Williams.
>
> 4. Jules Barefoot, M.D. On or about August 13, 2012 Dr. Barefoot conducted an evaluation of Williamson at the request of Hon. Chris Evensen. He assigned an impairment rating and restrictions and provided a causation statement.

The ALJ then entered the following Findings of Fact and Conclusions of Law:

> ...
>
> With respect this claim involves a *res judicata* Opinion and Award setting forth the Respondent-Williamson's

> injury and an award of medical benefits for said injury. Any medical record or report in existence prior to the date of the Opinion, March 29, 2013, is wholly irrelevant to any extent it contradicts the Opinion. In fact it is probably entirely irrelevant and the Administrative Law Judge does as a matter of law and responsibility has [sic] a duty to act as a gatekeeper and to manage the claims regardless of opposing counsel's objections.
>
> This claim regards the currently contested physical therapy, massage therapy and chiropractic treatment. Nothing in the additional records provides any insight into that issue, is helpful or relevant. As far as this medical fee dispute goes Dr. Kirsch is still uncontradicted.
>
> The opinion of Dr. Kirsch is uncontradicted herein. In fact this judge does not believe that this soft tissue injury required the chiropractic, massage and physical therapy. It was not reasonable and necessary and not compensable.
>
> The joined providers were given every opportunity to participate and did not.

Williamson filed a petition for reconsideration arguing the ALJ erroneously found Williamson sustained a soft tissue injury. Williamson also argued the ALJ erroneously resolved the medical fee dispute in favor of Motorcycle Superstore because the contested medical treatment was not analyzed pursuant to controlling precedent.

In the January 20, 2015, Order on Reconsideration, the ALJ stated:

> 1. Perhaps I have been inarticulate. Treating medical records filed prior to an Opinion and Award, in which final Opinion and Award clearly set forth the work-related condition, have very little relevance to a post-Award medical fee dispute concerning the reasonableness and necessity of medical treatment. Even if they did, in theory, have some relevance there is nothing in the records filed herein that I, as the trier of fact, can legitimately or reasonably lead me to conclude that Dr. Kirsch has been effectively rebutted on the issue of the reasonableness and necessity of the medical treatment. The current dispute concerns the compensability of chiropractic treatment, physical therapy and massage therapy. The records the Respondent filed herein simply do not persuade me.
>
> 2. As far as the Respondent's arguments go regarding the inclusion of work-relatedness, an issue they [sic] claim was not contested, that was, at most, harmless error. In fact, I feel that this is necessary, and intentionally do this in medical fee disputes given the inconsistent use of various legal phrases among judges, attorney, appellate bodies, doctors, adjusters, the statutes and the regulations.
>
> 3. The Petition for Reconsideration is OVERRULED.

Williamson's first argument on appeal is the ALJ abused his discretion by characterizing Williamson's injury

as a soft tissue injury instead of a "Low Back injury as defined by the Act."

Motorcycle Superstore filed the utilization review denial containing the opinion of Dr. Peter Kirsch dated September 24, 2013. A review of the denial reveals the following under "Clinical Rationale for Denial":

> I have reviewed the information in the chart. Based on that information, on 08/18/11, this patient suffered findings consistent with a soft tissue sprain/strain type complex to the low back. He was neurologically uncompromised and treated conservatively. I believe the active effects of that injury ceased long ago, the tissues are healed, the patient returned to preinjury status, and was considered at MMI with a 5% impairment for the lumbar spine. Based on the information in the chart, I do not believe at this late date that formal physical therapy, massage therapy, or chiropractic treatment would be reasonable and medically necessary for any injury suffered to the lumbar spine on 08/18/11.

The ALJ and Dr. Kirsch characterized the August 18, 2011, injury as a soft tissue injury. ALJ Weatherby, in the "Summary of the Evidence" section of the March 29, 2013, Opinion and Award, noted Dr. Lyon diagnosed a "lumbar strain" as a result of the August 18, 2011, injury. However, he failed to define with any amount of specificity the nature of injury Williamson sustained on August 18,

2011, in the Findings of Fact and Conclusions of Law and the Award.[1]

Nonetheless, what is abundantly clear from the March 29, 2013, Opinion and Award is that ALJ Weatherby relied upon the opinions of Dr. Lyon who opined Williamson sustained a "***lumbar strain*** as a result of the August 2011 injury." (emphasis added). The difference between "lumbar strain" and "soft tissue injury" is a difference without a distinction. Therefore, the ALJ's characterization of Williamson's injury as being a soft tissue injury will not be disturbed as we find no error.

Williamson's second argument on appeal is the ALJ should have evaluated only the reasonableness and necessity of the contested medical treatments.

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.

[1] ALJ Weatherby's Award of medical benefits is for "the effects of the work-related injury." This ambiguity was asserted in Motorcycle Superstore's April 4, 2013, petition for reconsideration. In the May 3, 2013, Order, ALJ Weatherby clarified to some extent: "The Defendant's Petition is GRANTED to the extent that the Defendant as insured by KEMI is determined to be responsible for payment of the expenses reflected in the Form 114s pertaining to the August 18, 2011 incident only...." Even with this clarification, ALJ Weatherby still did not define, with specificity, the nature of the injury Williamson sustained on August 18, 2011.

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 the Scheduling Order issued on December 6, 2013, and the January 10, 2014, Benefit Review Conference order, the issues to be decided were the reasonableness and necessity of the contested physical therapy, massage therapy, and chiropractic treatment. In the November 24, 2014, Opinion and Order on Remand, the ALJ did not deviate from these contested issues. A review of the November 24, 2014, Opinion and Order on Remand reveals the ALJ did not consider any additional issues other than the reasonableness and necessity of the contested treatments. While Williamson implies the ALJ considered the issue of causation/work-relatedness, and even though the ALJ, in the January 20, 2013, Order on Reconsideration conceded to doing so, there is no such analysis in the November 24, 2014, Opinion and Order on Remand. On remand, the ALJ summarized Dr. Kirsch's opinions as follows:

"Therefore he does not think chiropractic treatment, massage therapy or physical therapies are reasonable and necessary at this late date." In his Findings of Fact and Conclusions of Law, the ALJ concluded as follows:

> The opinion of Dr. Kirsch is uncontradicted herein. In fact this judge does not believe that this soft tissue injury required the chiropractic, massage and physical therapy. ***It was not reasonable and necessary and not compensable***. (emphasis added).

Since the ALJ *only* resolved the reasonableness and necessity of the contested physical therapy, massage therapy, and chiropractic treatment, Williamson's argument has no merit.

Williamson also asserts "the rationale listed in Dr. Kirsch's one paragraph UR Denial letter simply does not rise to the level set forth by the Kentucky Supreme Court and Court of Appeals to deny recommended treatment."

As Motorcycle Superstore was the party with the burden of proof in this post-award medical fee dispute and was successful before the ALJ, the sole issue in this appeal is whether substantial evidence supports the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as evidence of substance and relevant consequence and having the

fitness to induce conviction in the minds of reasonable people. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

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).

Dr. Kirsch's Utilization Review Notice of Denial ("UR Denial") contains a sufficient analysis and explanation of his conclusions concerning the reasonableness and necessity of the contested treatment. Dr. Kirsch’s report comprises substantial evidence in support of the ALJ's determination the contested medical treatment is not necessary and reasonable treatment of Williamson's low back injury of August 18, 2011. As such, the ALJ’s decision cannot be disturbed.

The November 24, 2014, Opinion and Order on Remand and the January 20, 2015, Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON CHRISTOPHER P EVENSEN
6011 BROWNSBORO PK BLVD STE A
LOUISVILLE KY 40207

COUNSEL FOR RESPONDENT:

HON SHERRIE BROWN
300 EAST MAIN STREET STE 400
LEXINGTON KY 40507

RESPONDENTS:

DR ANTHONY MCELDOWNEY
3934 DIXIE HWY STE 345
LOUISVILLE KY 40216

INJURY-CARE SHV
3955 DIXIE HWY
LOUISVILLE KY 40216

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
410 WEST CHESTNUT ST
SEVENTH FLOOR
LOUISVILLE KY 40202