Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 1, 2014

CLAIM NO. 201193084

WILLIAM WILLIAMSON PETITIONER

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

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

OPINION
VACATING AND REMANDING

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

ALVEY, Chairman. William Williamson ("Williamson") seeks review of the Opinion and Order rendered on March 5, 2014 by Hon. Chris Davis, Administrative Law Judge ("ALJ") finding in favor of Motorcycle Superstore, Inc. ("Motorcycle Superstore") in a medical dispute filed on October 8, 2013

challenging certain medical treatment. Williamson also appeals from the order issued May 19, 2014 denying his petition for reconsideration.

On appeal, Williamson first argues the ALJ abused his discretion and erred in failing to consider evidence designated from the underlying claim pursuant to 803 KAR 25:010 §4 (6)(c)3. Williamson next argues the ALJ abused his discretion and erred in finding he suffered only a soft tissue injury. Finally, Williamson argues the ALJ failed to properly analyze the contested medical treatment pursuant to controlling precedent in resolving the medical dispute in Motorcycle Superstore's favor.

We agree the ALJ erred in ordering medical evidence stricken from the record which had been relied upon previously by another ALJ in the original claim. We therefore vacate the ALJ's decision regarding the medical dispute, and remand for a determination based upon a review of the entirety of the evidence designated from the previous claim, in addition to any evidence filed by either party on reopening. We do not direct any particular result, and the ALJ may ultimately reach the same conclusion after reviewing the entirety of the record.

Williamson filed a Form 101 on August 8, 2012, alleging low back injuries occurring March 10, 2011; June 3,

2011 and August 18, 2011 while working for Motorcycle Superstore. The claim was assigned to Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ Weatherby") who rendered a decision awarding temporary total disability benefits, permanent partial disability benefits and medical benefits.

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.

Contrary to the ALJ's statement in the order on reconsideration, Williamson was not precluded from consideration of all items designated from the original claim in determination of the medical dispute. Concerning designation of evidence from the original proceeding by a respondent, 803 KAR 25:010(6)(c)3 states, "A response may contain a designation of evidence specifically identifying evidence from the original record not already listed by the moving party that is relevant to matters raised in a response."

KRS 342.033 allows an ALJ the discretion to consider whether evidence from more than two providers may be introduced in a claim. In this instance, the medical records designated, albeit from more than two providers, had already been introduced into evidence when the claim was before ALJ Weatherby. Any discretion afforded pursuant to KRS 342.033 regarding admissibility is only applicable to additional evidence filed in the reopening, not upon that which already existed in the claim, and designated by either of the parties. Clearly, the ALJ could limit the submission of evidence to no more than two medical providers for new evidence filed on reopening, but was precluded from doing so on evidence previously filed and designated to be relied upon in the reopening.

We note Motorcycle Superstore acknowledges the ALJ should have considered the designated evidence. Specifically, Motorcycle Superstore admitted, "We agree that an ALJ should not strike evidence from the record post Opinion and Order, much less sua sponte."

It is well settled that an ALJ has broad discretion to control the taking and presentation of proof in a worker's compensation proceeding. New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004). Thus, as a general proposition, any purported error by the

fact-finder must be reviewed under the abuse of discretion standard. Abuse of discretion by definition "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky National Park Commission v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945).

Because the ALJ failed to consider all of the evidence Williamson designated from the original claim, his decision is vacated. On remand, the ALJ shall make his determination based upon all of the evidence filed or designated in the record. The ALJ may well arrive at the same decision, and certainly is not precluded from doing so. However he must make his determination based upon all of the evidence. This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

We decline to address the other issues raised by Williamson on appeal since the ALJ failed to base his decision upon the entirety of the evidence presented. Williamson is not precluded from appealing any issue which may arise from any subsequent decisions or orders rendered after the consideration of all of the evidence.

Accordingly, the Opinion and Order rendered by Hon. Chris Davis, Administrative Law Judge, rendered March 5, 2014, and the order denying Williamson's petition for reconsideration dated May 19, 2014, are hereby **VACATED,** and this claim is **REMANDED** for entry of a decision in conformity with the views expressed herein.

ALL CONCUR.

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