

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: October 1, 2021

CLAIM NO. 201178121

HOUCHENS FOOD GROUP, INC.

PETITIONER

VS.

APPEAL FROM HON. THOMAS G. POLITES,  
ADMINISTRATIVE LAW JUDGE

JASON REXROAT;  
MILES K. GIBSON, M.D.; AND  
HON. THOMAS G. POLITES,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** Houchens Food Group, Inc. (“Houchens”) appeals from the April 4, 2021 Opinion & Order rendered by Hon. Thomas G. Polites, Administrative Law Judge (“ALJ”). The ALJ found Jason Rexroat’s (“Rexroat”) treatment with Dr. Miles Gibson, including prescriptions for Fentanyl and Oxycodone/Percocet, are reasonable, necessary, and related to the August 12, 2011 work injury. The ALJ

also denied Houchens' request to remove Dr. Gibson as Rexroat's treating physician. Houchens also appeals from the May 14, 2021 Order denying its Petition for Reconsideration.

On appeal, Houchens argues the ALJ's determination regarding the compensability of prescriptions for Fentanyl and Oxycodone is not supported by substantial evidence. It also argues the ALJ failed to perform the appropriate analysis regarding whether Dr. Gibson should be removed as a prescribing physician. We disagree and affirm.

Houchens filed a Motion to Reopen and a Form 112 medical dispute challenging Dr. Gibson's prescriptions for Fentanyl, Percocet/Oxycodone, and Klonopin. Houchens attached the Form 110-I Settlement Agreement approved by Hon. J. Landon Overfield, Administrative Law Judge, on August 17, 2012. Rexroat sustained a low back injury at the L5-S1 level, and a cervical injury at the C5-C6 level, both requiring surgeries. The lumbar injury required a second surgery a few days after the first one. The settlement agreement reflects Dr. Rodney Chou assessed a 74% impairment rating based on the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. The claim was settled for a lump sum of \$203,000.00, with Rexroat waiving his right to vocational rehabilitation benefits, and the right to reopen his claim for a worsening of condition. Rexroat did not waive his right to future medical benefits. Notably, at the time of settlement, Houchens had paid \$143,419.00 in medical benefits.

Rexroat testified at the hearing held on February 3, 2021. Rexroat was born on March 22, 1977, and is a resident of Russell Springs, Kentucky. He last

worked for Houchens on August 12, 2011, where he was employed as a grocery store manager. At the time of the accident, he was unloading a delivery truck. As he bent down to pick up a box, he experienced a pop in his low back. He went to the Russell County Hospital emergency room that evening where X-rays were taken, and muscle relaxers were prescribed. He followed up with Dr. Gibson, his family physician, who continued to prescribe muscle relaxers, and referred Rexroat for an MRI. Afterward, he was referred to Advanced Neurosurgery of Louisville for additional treatment, and he eventually underwent surgery.

Rexroat's low back condition continued to deteriorate, and he underwent a second surgery a few days later. Rexroat is unable to use his left leg, and has had no feeling in that extremity since his second lumbar surgery. He followed up with Dr. Chou for pain management. Dr. Chou prescribed pain medication, muscle relaxers, and Baclofen. Dr. Chou eventually found Rexroat had reached maximum medical improvement ("MMI"). After he reached MMI, the nurse case manager advised he could follow up with Dr. Gibson for continued treatment since he is local, and Dr. Chou is located over two hours away.

Since the filing of the medical dispute, Rexroat has reduced his Fentanyl intake to 75 mg. per day. He had previously taken 100 mg. per day. He also no longer takes Klonopin, and his Neurontin intake has been reduced by half. He testified the pain increase he has experienced with the medication reduction is manageable. He sees Dr. Gibson every four weeks. He also stated he uses a hospital bed, although Dr. Timothy Kriss indicated he should discontinue using it. He

testified the hospital bed allows him the ability to get in and out of bed, and assists with the self-catheterization he undergoes six to seven times per day.

Rexroat testified he has cooperated with all recommendations from Dr. Gibson. He also testified he has the ability to video conference with medical providers. In addition to back pain, Rexroat has occasional anxiety, and suffers from erectile dysfunction. He also testified he does not wish to change his current medical regimen as long as it is working and providing some benefit.

Both Houchens and Rexroat filed documentation from Dr. Gibson. In his April 9, 2019 office note, Dr. Gibson stated he agreed with Dr. Kriss regarding the reduction of certain types of medication. He mentioned two treatment options. The first involved inpatient management and counseling, and the second involved Dr. Gibson acting as the primary physician tapering medications over a five to six month period. Dr. Gibson disagreed with Dr. Kriss regarding curtailing medication, but he hoped for a reduction.

In a letter filed on May 6, 2019, Dr. Gibson described his role in Rexroat's treatment. He noted he had prescribed the same medication for several years without escalation. He noted the treatment he administered had never been questioned until this medical dispute was filed. Dr. Gibson took offense from Dr. Woodley B. Mardy-Davis criticizing the treatment he had administered. Dr. Gibson hoped to reduce Rexroat's medications, but doubted he would ever be pain free due to the extent of his condition.

On December 3, 2019, Dr. Gibson noted Rexroat had experienced increased neck and shoulder pain. He stated the use of Klonopin had decreased. He

also noted he had reviewed the Kasper report, and it was acceptable. On December 31, 2019, he noted Rexroat had adjusted to the decreased Klonopin dosage. On January 7, 2020, he noted Rexroat had made significant progress toward Klonopin weaning. On July 14, 2020, Dr. Gibson stated Rexroat has chronic pain syndrome, discogenic cervical disease, and depression due to his work injury. On August 11, 2020, Dr. Gibson noted Rexroat was stable, and previous attempts at medication reduction were unsuccessful. On August 31, 2020, Joseph Garland, PA-C, diagnosed Rexroat with a neurogenic bladder, urinary retention, and autonomic dysreflexia. On September 8, 2020, Dr. Gibson noted Rexroat was stable with no additional medication reduction. On November 3, 2020, Dr. Gibson noted Rexroat was functional and Fentanyl reduction had caused no problems. On December 1, 2020, Dr. Gibson noted Rexroat appropriately follows his medication refill schedule. He stated there had been no escalation of dosage over the past few years. He additionally noted the Kasper report was reviewed, and is acceptable. On December 28, 2020, Dr. Gibson noted Rexroat is wheelchair dependent, and his medication regimen is helpful.

Dr. Mark Etscheidt, a psychologist with the University of Kentucky Interventional Pain Associates, prepared a report dated October 30, 2020. He stated Rexroat's use of the Fentanyl patch was apparently beneficial, without indication of abuse. He indicated ongoing treatment with this regimen is reasonable. He noted there is no substance abuse history. Dr. Etscheidt diagnosed Rexroat with pain disorder associated with psychological factors and a medical condition, opioid dependence, and chronic pain. He recommended Rexroat continue to attempt to

wean himself from opioids, and indicated an intrathecal morphine pump trial could be merited.

Rexroat filed Dr. Bart Olash's March 27, 2017 utilization review report. Dr. Olash noted Rexroat met the criteria for treatment with various medications, including Fentanyl.

Dr. Kriss evaluated Rexroat on February 13, 2019 at Houchens' request. Dr. Kriss noted Rexroat underwent a discectomy at L5-S1 on October 7, 2011. Rexroat underwent an additional discectomy at L5-S1 with bilateral foraminotomy, and an anterior cervical discectomy and fusion at C6-C7 on October 17, 2011. Dr. Kriss opined Rexroat should not use a hospital bed, should be weaned from opioids, and should not take Klonopin.

Dr. Kriss testified by deposition on October 14, 2020. He testified he believed Rexroat's high dosage of Fentanyl caused more problems than it helped. He believed Rexroat should be taken off all treatment with opioids. He opined Fentanyl and Oxycodone are not viable long-term treatment options. He recommended a ten-week weaning course, followed by treatment with non-opioid medication. He opined Dr. Gibson is not providing appropriate treatment, noting that previous weaning efforts were unsuccessful. Dr. Kriss admitted that weaning from opioids would not return Rexroat's ability to walk or get out of the wheelchair. Dr. Kriss did not know Rexroat had not taken Klonopin for over six months.

Houchens filed Dr. Mardy-Davis' April 9, 2017 report. He noted Dr. Gibson does not have the appropriate specialty to conduct narcotic weaning. He stated appropriate pain management is needed.

The parties also referenced a report from Dr. Brandon Gish, with Commonwealth Pain Associates, who evaluated Rexroat on April 28, 2020. Dr. Gish's report was not separately filed, but was merely attached to Houchens' June 12, 2020 status report. Nonetheless, Dr. Gish noted Rexroat has a long history of chronic pain dating back to his August 2011 work injury sustained while working for Houchens. Dr. Gish indicated Rexroat could be weaned from Fentanyl patches within six months.

We also acknowledge Houchens' filings of medical literature regarding medications.

A Benefit Review Conference was held on November 19, 2020. The contested issues listed included whether treatment with Oxycodone, Fentanyl patches, and Klonopin is reasonable or necessary, and related to Rexroat's original injury.

The ALJ rendered his Opinion & Order on April 4, 2020. The ALJ noted the medical dispute included prescriptions for Fentanyl patches, Oxycodone, and Klonopin as work-related, reasonable, or necessary. He also noted Houchens argued Dr. Gibson should be removed as Rexroat's treating physician. The ALJ noted Rexroat's injury and surgical history. He noted Rexroat has never regained use of his left leg since the second lumbar surgery. The ALJ additionally noted Rexroat sees Dr. Gibson once per month, and he reported the medication he takes allows functionality. He also noted Rexroat no longer takes Klonopin, and he has reduced the Fentanyl. The ALJ specifically found as follows *verbatim*:

Having reviewed and considered the entirety of the testimony in this matter, it is hereby determined that

the treatment provided by Dr. Gibson to Plaintiff in the form of the disputed medications Fentanyl patches and Oxycodone/Percocet is determined to be reasonable and necessary and is therefore compensable. Further, it is hereby determined that the Defendant's motion to remove Dr. Gibson as Plaintiff's treating physician is denied.

In support of this determination it should first be noted that it is undisputed that Plaintiff suffered a catastrophic injury that has caused him to be in significant pain on a daily basis and also caused him to lose the use of his left leg as result of a mistake that occurred in one of his surgeries. Given the severity of Plaintiff's injury, it is understandable that Plaintiff experiences significant ongoing symptoms for which he is in need of medical treatment. It should further be noted that Plaintiff presented at Final Hearing as an extremely credible individual and his testimony regarding his symptoms, the effect his pain has on his daily life, the benefits of the medication, and his desire to continue on his current medication regimen and to have Dr. Gibson continue to be his treating physician was deemed to be credible and believable. In fact, Plaintiff's testimony at the Final Hearing was as impressive in terms of its sincerity as this ALJ has witnessed as he was alert, appropriate, responsive, polite, calm, earnest, well spoken, concerned, thoughtful, affable, and cooperative, all of which is even more impressive in light of the severe functional effects his injury has caused including the paralysis of his left leg, bladder dysfunction requiring catheterization, being wheelchair-bound, and in daily pain. The ALJ was also very impressed with the fact that despite his ongoing significant functional limitations and symptoms, he continues to live a commendable life as a husband and father, trying to be as active as possible, and enjoy his life despite his limitations. Plaintiff's credibility was further enhanced by his willingness to have previously weaned himself with Dr. Gibson from Klonopin completely and to have reduced the strength of the fentanyl patches by 25% from which the ALJ infers that Plaintiff is sensitive to the arguments of the Defendant in support of weaning and that he recognizes that there is concern for the deleterious effects of high dosage of opioids but despite his understanding of the Defendant's

concerns it remains his belief that his current medication regimen allows him a level of function which enables him to participate in the daily life of his family and live a life that he is content with despite his problems. As such, the ALJ concluded that Plaintiff was a very credible individual and his testimony was given significant weight in regard to the issues herein.

The ALJ stated he was persuaded by Dr. Gibson's statements regarding the reasonableness and necessity of Rexroat's continued treatment. The ALJ determined the treatment and prescriptions from Dr. Gibson are reasonable and necessary. He noted Dr. Gibson's statements and opinions are bolstered by Dr. Etscheidt's report. The ALJ additionally noted Rexroat has been on virtually the same treatment regimen for many years without exhibiting addiction behavior. The ALJ additionally stated as follows regarding Dr. Gibson's treatment:

In sum, the ALJ considered the Defendant's experts as merely supporting an alternative method of pain management treatment, not as persuasive testimony that Dr. Gibson's treatment is unreasonable, unnecessary, or outside the type of treatment generally accepted by the medical profession as reasonable in this type of case and as such, it's experts were not found to be persuasive.

As to the Defendant's argument that Dr. Gibson should be removed as Plaintiff's treating physician pursuant to KRS 342.020(7), the Defendant is correct that this statutory provision allows the Defendant to select a medical provider to treat the injured worker if the worker's current treatment is not proper and recovery was substantially affected or delayed, or that medical expenses were being spent without reasonable benefit to the worker. However, the statute further requires that the Defendant demonstrate the above conditions to the satisfaction of the ALJ and the Defendant has not done that in this matter. As set forth above, the ALJ was not convinced that Plaintiff was not receiving proper medical treatment and that the funds being spent by the Defendant were not being spent

without benefit to the Plaintiff in this matter. As such, the Defendant has not met the grounds for the selection of a treating physician of its choice pursuant to KRS 342.020(7).

The ALJ resolved the medical dispute in Rexroat's favor regarding treatment with Oxycodone and Fentanyl. However, he determined Houchens is not responsible for additional treatment with Klonopin, which Rexroat has already ceased taking.

Houchens filed a Petition for Reconsideration requesting additional findings of fact regarding its multiple legal arguments. It argued the ALJ failed to address its arguments in his decision. It argued Dr. Etscheidt is a psychologist and not a licensed *medical* physician, and he is not qualified to provide an opinion regarding Rexroat's medication regimen. (Emphasis added). It also argued the ALJ failed to address the CDC Guidelines for medications prescriptions for chronic pain. It argues the ALJ failed to address Dr. Gish's opinions regarding that issue. It additionally argued the ALJ failed to address whether narcotic pain medication presents an unreasonable risk to Rexroat. Houchens made additional arguments regarding Rexroat's treatment regimen, and whether Dr. Gibson should be removed as his treating physician.

The ALJ entered an Order on May 14, 2021, in large part denying Houchens' Petition for Reconsideration as a re-argument of the merits of his decision. The ALJ noted he had addressed Houchens' concerns in his decision. He outlined the information he found most persuasive in reaching his determination. The ALJ specifically stated as follows:

In sum, the Defendant's Petition for Reconsideration is a re-argument of the merits of the claim and while the ALJ considered the testimony of Dr. Kriss and Dr. Gish, their testimony was not persuasive and the ALJ was convinced by the testimony of Dr. Gibson and Dr. Etscheidt that Dr. Gibson's treatment was reasonable, necessary and appropriate and therefore the medical dispute was resolved in favor of the Plaintiff. As such, the Defendant's Petition for Reconsideration is OVERRULED.

On appeal, Houchens argues the record does not support the ALJ's determination regarding the appropriateness of treatment with Fentanyl and Oxycodone. It also argues the ALJ failed to perform an appropriate analysis regarding whether Dr. Gibson should be removed as Rexroat's treating physician. Houchens asserts that pursuant to the holding in Kingery v. Sumitomo Electric Wiring, 481 S.W.3d 492 (Ky. 2015), the ALJ should have resolved the medical dispute in its favor.

We initially determine the holding in Kingery v. Sumitomo Electric Wiring, *supra*, is not controlling. Kingery provided no evidence establishing the disputed medical treatment was causally related to her work injury. In this instance, it is uncontroverted that Rexroat sustained a catastrophic injury while working for Houchens. There is absolutely no evidence in the record establishing Rexroat does not require ongoing treatment for his injuries, only the type of care has been questioned. The opinions provided by Drs. Gibson and Etscheidt clearly support the ALJ's determination. Interestingly, Houchens argues Dr. Etscheidt is not a medical physician; however, we note KRS 342.0011(32) defines "physician" as follows:

'Physician' means physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and

osteopathic and chiropractic practitioners acting within the scope of their license issued by the Commonwealth.

The fact Dr. Etscheidt is a psychologist rather than a medical doctor does not disqualify his opinions pursuant to the definition provided in the statute, it merely goes to the weight.

We next note that as the moving party in a post-award medical dispute, Houchens had the burden of proving the contested treatment was not reasonable and necessary. We note that notwithstanding the holding in C & T Hazard v. Chantella Stollings, et al., 2012-SC-000834-WC, 2013 WL 5777066 (Ky. 2013), an unpublished decision from the Kentucky Supreme Court, a long line of reported decisions establishes in a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving entitlement to the relief sought, except that the claimant bears the burden of proving work-relatedness. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. 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).

Because Houchens was unsuccessful, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Compelling evidence” is defined as evidence that is 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 function of the Board in reviewing the ALJ’s decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be

reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, *supra*. Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ 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 party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). We find the opinions provided by Drs. Gibson and Etscheidt constitute substantial evidence supporting the ALJ's decision, and a contrary result is not compelled.

Houchens additionally argues the ALJ failed to provide sufficient findings regarding its arguments. While authority generally establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, he is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). The ALJ sufficiently outlined the evidence he relied upon in reaching his determination. He also clearly outlined the issues he was required to resolve. We find the ALJ adequately described the issues he was required to resolve, and the evidence he reviewed in reaching his conclusion. Again, the ALJ's determination will not be disturbed.

Finally, Houchens argues the Dr. Gibson should be removed as Rexroat's treating physician for his ongoing pain issues because the treatment he renders is improper and ineffective. KRS 342.020(10) states as follows:

Upon motion of the employer, with sufficient notice to the employee for a response to be filed, **if it is shown to the satisfaction of the administrative law judge** by affidavits or testimony that, because of the physician selected by the employee to treat the injury or disease, or because of the hospital selected by the employee in which treatment is being rendered, that the employee is not receiving proper medical treatment and the recovery is being substantially affected or delayed; or that the funds for medical expenses are being spent without reasonable benefit to the employee; or that because of the physician selected by the employee or because of the type of medical treatment being received by the employee that the employer will substantially be prejudiced in any compensation proceedings resulting from the employee's injury or disease; then the

administrative law judge may allow the employer to select a physician to treat the employee and the hospital or hospitals in which the employee is treated for the injury or disease. No action shall be brought against any employer subject to this chapter by any person to recover damages for malpractice or improper treatment received by any employee from any physician, hospital, or attendant thereof. (Emphasis added).

Houchens bore the burden of proof in establishing Dr. Gibson's treatment is not proper, and Rexroat's recovery has been delayed. In support of this contention, it filed medical evidence from Drs. Kriss, Mardy-Davis, and Gish. The ALJ, however, chose to rely upon the opinions of Drs. Gibson and Etscheidt, along with Rexroat's own testimony, in determining the treatment is productive. The ALJ denied Houchens' request. His determination is supported by substantial evidence and a contrary result is not compelled, and again we will not disturb the ALJ's determination.

Accordingly, the April 4, 2021 Opinion & Order, and the May 14, 2021 Order on Petition for Reconsideration rendered by Hon. Thomas G. Polites, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:**

**LMS**

HON CHRISTOPHER M MAYER  
HON ROBERT F FERRERI  
614 WEST MAIN STREET, SUITE 5500  
LOUISVILLE, KY 40202

**COUNSEL FOR RESPONDENT:**

**LMS**

HON H K COOPER  
PO BOX 650  
JAMESTOWN, KY 42629

**RESPONDENT:**

**USPS**

MILES K GIBSON, MD  
PRIMARY CARE ASSOCIATES RUSSELL COUNTY  
92 JOE T PETTY DRIVE  
RUSSELL SPRINGS, KY 42642

**ADMINISTRATIVE LAW JUDGE:**

**LMS**

HON THOMAS G POLITES  
MAYO-UNDERWOOD BLDG  
500 MERO STREET, 3<sup>rd</sup> FLOOR  
FRANKFORT, KY 40601