

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: March 13, 2020

CLAIM NO. 201702121

REDHAWK MINING, LLC

PETITIONER

VS.            **APPEAL FROM HON. CHRISTINA D. HAJJAR,  
ADMINISTRATIVE LAW JUDGE**

RODNEY WARD  
and HON. CHRISTINA D. HAJJAR,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**STIVERS, Member.** Redhawk Mining, LLC (“Redhawk”) appeals from the October 11, 2019, “Medical Dispute Opinion & Order” and the November 14, 2019, Order ruling on Redhawk’s petition for reconsideration of Hon. Christina D. Hajjar, Administrative Law Judge (“ALJ”). In resolving a Medical Fee Dispute filed by Redhawk, the ALJ determined as follows:

[T]he gabapentin is reasonable and necessary, the zolpidem and Hydrocodone are not reasonable or necessary, the L4, L5 and S1 laminectomy is reasonable, necessary and related to the injury, and quarterly office visits for pain management, three medication management visits with a psychiatrist, and three psychotherapy sessions with a therapist per year are reasonable and necessary.

On appeal, Redhawk asserts the ALJ's determination that the contested laminectomy is causally related to Rodney Ward's ("Ward") work-related injuries is not supported by substantial evidence.

### **BACKGROUND**

Ward's Form 101, filed in the record on December 14, 2017, alleges he sustained work-related injuries to multiple body parts while in the employ of Redhawk on December 15, 2015, in the following manner: "Suffered cumulative and repetitive injuries in the workplace to his back, neck, knees, shoulders, and hands, which has been complicated by anxiety and depression."

In the May 9, 2018, Benefit Review Conference ("BRC") Order and Memorandum, the following contested issues are listed: "work-related injury/causation, notice, permanent income benefits per KRS 342.730, exclusion for pre-existing impairment, and proper use of the AMA Guides." Under "Other contested issues" is the following: "Injury under the Act/causation/work-relatedness; pre-existing condition." The BRC Order indicates Ward's hearing loss claim was settled.

The July 16, 2018, Opinion, Order, and Award rendered by Hon. Richard E. Neal, Administrative Law Judge ("ALJ Neal"), awarded Ward permanent

partial disability benefits and medical benefits for his work-related low back, neck and left shoulder injuries.

On May 31, 2019, Redhawk filed a Motion to Reopen and a Form 112 Medical Fee Dispute contesting the reasonableness, necessity, and work-relatedness of Gabapentin, Zolpidem, Hydrocodone, nine therapy sessions, seven medical management visits and the work-relatedness of the request for an L4, L5, and S1 laminectomy.

Attached to Redhawk's Motion to Reopen is the April 22, 2019, report of Dr. Kimberly Terry. Dr. Terry performed a medical records review and set forth the following opinions regarding the need for the contested laminectomy:

The claimant's most recent MRI studies demonstrated unrelated degenerative disc disease and spondylosis contributing to disc bulging and resulting stenosis. These findings are consistent with ordinary aging and would not have been caused by reported cumulative trauma. An excerpt of a report that is undated was submitted for review stating that the claimant's job activities led to chronic low back pain. The excerpt stated that the claimant did have degenerative disc disease and clinical findings of paresthesia. However, the report failed to provide any convincing rationale as to how the claimant's job activities caused or contributed to the development of clear degenerative conditions that are commonly found in patients of similar age without a history of similar work activities. There is no evidence to support that these findings were secondary to the reported work injury. Therefore, it is unlikely that the current plans for laminectomy at L4 to S1 is related to the work injury.

Redhawk filed the August 26, 2019, Independent Medical Examination report of Dr. John Vaughan. After performing a medical records review and a physical examination of Ward, Dr. Vaughan offered the following opinions:

Mr. Ward has multifocal musculoskeletal complaints. Subjectively he said the worst of the pain was lower back radiating in to his legs, left greater than right.

Objectively, there is a finding of low-grade radiculopathy left leg. He was motor intact, but noted to have an absent left Achilles reflex and numbness in an S1 distribution. He has diagnostic studies that correlate with a small to medium-sized left-sided disc herniation at L5-S1.

I believe the above condition (left-sided L5-S1 disc herniation and resulting S1 radiculopathy) can be treated in different manners. One option is nonoperative treatment. That would consist of activity modification, use of gabapentin, and weight loss. Surgical treatment is also a reasonable consideration. I believe a left-sided L5-S1 discectomy could be considered. That would be an outpatient procedure. I think there is a reasonably good chance it could help his subjective complaint of left leg sciatica. It would probably not help his lower back pain or neck pain. I doubt if surgical intervention would improve his functional status much. If Mr. Ward understood that surgery would have a chance of helping his leg pain, I believe an outpatient L5-S1 discectomy is a reasonable thing to do. I personally do not see much indication for any surgery at other levels (L4-L5). I believe the sciatic pain is emanating from the left-sided disc herniation at L5-S1.

I do not think it is medically necessary for this man to have more injections in his neck or back. He has already had two epidural injections and said they only give him temporary relief, lasting 1 week. I do not believe it is medically necessary for this man to stay on narcotic pain medications. I do not believe Norco is medically necessary for his neck or lower back. I do not believe Flexeril is medically necessary. This medication is no longer being prescribed. Apparently it did not give him much relief in the past. I do not believe it is medically necessary for this man to be on zolpidem (Ambien) for his back condition. This medicine is for insomnia, and that is not related to his back condition.

Mr. Ward does have subjective complaints of radicular pain, and he does have objective evidence of radiculopathy. I, therefore, think it would be reasonable

for him to stay on gabapentin, which is efficacious for treating nerve pain. I believe it would be reasonable for him to see his primary care provider three or four times a year for refill of this medication.

The October 2, 2019, BRC Order lists the following contested issues:

“The issues to be determined is [sic] the reasonableness, necessity, and work-relatedness of prescriptions Gabapentin, Zolpidem, and Hydrocodone/APAP, L4, L5 and S1 laminectomy, and frequency of visits for medication management and counseling services.” A formal hearing was waived.

In the October 11, 2019, decision, the ALJ set forth, in relevant part, the following findings of fact and conclusions of law:

It is the employer's responsibility to pay for the medical expenses reasonably related to the injury pursuant to KRS 342.020. In a post-judgment medical fee dispute, it is the employer who bears the burden of proving that the contested medical expenses are unreasonable or unnecessary. The legislature's use of the conjunctive "and" which appears in subsection 1 of KRS 342.020 "cure and relief" was intended to be construed as "cure and/or relief". *National Pizza Company vs. Curry*, 802 S.W.2d 949 (Ky. 1991). Treatment which is shown to be unproductive or outside the type of treatment generally accepted by the medical profession is unreasonable and non-compensable. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). 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). In the initial conference order and the BRC Order, the ALJ noted that the reasonableness, necessity and work-relatedness of all treatment was in dispute. Thus, this ALJ addresses each in turn.

#### **L4, L5 and S1 Laminectomy**

The ALJ recognizes that Ward has the burden of proving causation. However, this ALJ does not understand this to mean that Defendant may re-litigate whether Ward sustained a work-related cumulative

trauma injury. This was already decided by the ALJ Richard Neal in his Opinion, Award and Order. Defendant argues against the laminectomy by arguing that there is insufficient evidence to support a finding that his degenerative disc disease and radiculopathy in his low back are caused by his work activities. However, ALJ Neal noted that Ward had objective findings of low back pathology, including diagnostic studies that show degenerative disc disease, and positive physical examination findings including paresthesia over his left thigh. He relied on Dr. Nadar to find that these findings were due to the cumulative trauma work activities. Dr. Terry relied on an undated excerpt of a report and found that it did not prove that his degenerative conditions were caused by his job activities. She then concluded that it is unlikely that the current plans for the laminectomy at L4 to S1 are related to the work injury. This ALJ finds this opinion to be inconsistent with the prior decision, and unconvincing.

This ALJ also considered Dr. Vaughan's opinion in which he stated that there was not "much" indication for any surgery at other levels (L4-L5), and he doubted it would help his low back pain. However, this ALJ does not believe that the opinion rises to the level of proving that the recommended surgery is unreasonable or unnecessary. This ALJ believes that Dr. Vaughan's report is simply his recommendation of other treatment options, and it was not persuasive evidence of the reasonableness and necessity of the surgery proposed. Thus, this ALJ finds the surgery compensable.

In its petition for reconsideration, Redhawk put forth the same argument it now makes on appeal.

On appeal, Redhawk argues the ALJ's determination regarding the cause of the L4-S1 laminectomy is not based on substantial evidence, as there is no medical evidence in the record establishing a connection between the injury and the surgery. It maintains the burden of proof concerning the issue of causation for the contested laminectomy was on Ward. Redhawk contends it provided substantial

evidence concerning the issue of causation in the form of Dr. Terry's medical opinions which remained uncontradicted by Ward. It argues an ALJ cannot disregard uncontradicted medical proof without providing a sufficient basis for doing so. We affirm.

### **ANALYSIS**

As an initial matter, we note the Medical Fee Dispute filed by Redhawk only contested the work-relatedness of the contested laminectomy and not the reasonableness and necessity of the surgery. Further, it has not appealed the ALJ's determination regarding the reasonableness and necessity of the surgery. Therefore, our discussion herein will only focus on the issue of causation.

There can be no debate that in a post-award medical fee dispute, the burden of proof and risk of non-persuasion with respect to the reasonableness and necessity of medical treatment falls on the employer. Crawford & Co. v. Wright, 284 S.W.3d 136 (Ky. 2009). However, despite this Board's previous representations regarding upon whom the burden of proof lies concerning the issue of causation in a post-award medical fee dispute, the unpublished decision of C & T of Hazard v. Stollings, 2012-SC-000834-WC, rendered October 24, 2013, Designated Not To Be Published, is controlling. In Stollings, the Kentucky Supreme Court specifically held the employer, who had filed the medical fee dispute contesting certain opioid medications, had the burden of proving the contested medication was neither reasonable, necessary, *nor work-related*. In doing so, the Supreme Court ruled as follows:

“The party responsible for paying post-award medical expenses has the burden of contesting a particular

expense by filing a timely motion to reopen and proving it to be non-compensable.” *Crawford & Co. v. Wright*, 284 S.W.3d 136, 140 (Ky.2009) (citing *Mitee Enterprises v. Yates*, 865 S.W.2d 654 (Ky.1993) (holding that the burden of contesting a post-award medical expense in a timely manner and proving that it is non-compensable is on the employer)). As stated in *Larson's Workers' Compensation Law*, § 131.03[3][c], “the burden of proof of showing a change in condition is normally on the party, whether claimant or employer, asserting the change ...”. **The burden is placed on the party moving to reopen because it is that party who is attempting to overturn a final award of workers' compensation and thus must present facts and reasons to support that party's position. It is not the responsibility of the party who is defending the original award to make the case for the party attacking it.** Instead, the party who is defending the original award must only present evidence to rebut the other party's arguments.

The Board in finding that Stollings had the burden to prove that the medical expenses were work-related cited to *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky. App. 1997). However, the only reference to the burden of proof in *Perkins* was the following sentence: “Since the fact-finder found in favor of Perkins who had the burden of proof, the standard of review on appeal is whether there was substantial evidence to support such a finding. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).” We believe that this sentence did not indicate the claimant had the burden to prove that his treatment is work-related on a motion to reopen but instead was a recitation of the well-established standard of review as set forth in *Wolf Creek Collieries*. C & T also presents several unpublished opinions which indicate that the burden of proof is upon the claimant to show the medical expenses were work-related. However, we decline to consider those cases as persuasive. CR 76.28(4)(c). **Thus, C & T had the burden of proof to show that Stolling's treatment was unreasonable and not work-related.**

Slip Op. at 2. (emphasis added).

The Kentucky Supreme Court had an opportunity to clarify where the burden of proof with respect to causation lies in a post-award medical fee dispute in the published opinion Kingery v. Sumitomo Electric Wiring, 481 S.W.3d 492 (Ky. 2016) and it did not do so. Instead, it affirmed the Court of Appeals without reaching the issue of whether Kingery or Sumitomo had the burden of proof regarding causation. Kingery at 496. Therefore, pursuant to the Supreme Court's pronouncement in Stollings, the burden of proof on the issue of the work-relatedness of contested medical treatment in a post-award medical fee dispute brought by the employer rests squarely on the employer.<sup>1</sup> We turn now to the medical proof in the record.

In the case *sub judice*, the ALJ rejected Dr. Terry's medical opinions set forth in her April 22, 2019, report because she determined Ward's back condition was not caused by cumulative trauma and, consequently, the laminectomy is not work-related. However, as noted by the ALJ, ALJ Neal, in the July 16, 2018, Opinion, Order, and Award, previously determined Ward had satisfied his burden of proving his low back condition was caused by work-related cumulative trauma through the medical opinions of Dr. Ambu Nadar. This determination is *res judicata*. In offering an opinion on the work-relatedness of the recommended laminectomy, Dr. Terry was not free to reject the causal connection between Ward's low back condition and his work

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<sup>1</sup> This Board is fully aware of the mandate against citing unpublished opinions contained in CR 76.28(4)(c). However, this same provision states as follows: "[U]npublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court." This Board is unable to find a published decision that *directly* addresses the issue of the burden of proof regarding the issue of causation in a post-award medical fee dispute brought by an employer contesting only causation of the contested medical treatment.

that was established as precedent by ALJ Neal's July 16, 2018, Opinion, Order, and Award. Significantly, Dr. Terry failed to consider ALJ Neal's decision or Dr. Nadar's medical opinions before offering her opinions concerning the cause of Ward's low back condition and the recommended laminectomy. The ALJ was free to exercise the discretion afforded to her under the law and ultimately reject Dr. Terry's opinions as being "inconsistent with the prior decision" and "unconvincing." This Board will not decree otherwise.

Similarly, the ALJ was free to reject Dr. Vaughan's opinions. A review of Dr. Vaughan's August 26, 2019, report reveals he was aware of the recommended laminectomy. As detailed in the "history" section of his report, "He [Dr. Tibbs] has recommended a laminectomy." *However, Dr. Vaughan never specifically opined the laminectomy was not work-related. In fact, Dr. Vaughan offered no opinions regarding the recommended laminectomy.* The ALJ determined Dr. Vaughan's report "is simply his recommendations of **other** treatment options." (emphasis added). Indeed, Dr. Vaughan opined "[s]urgical treatment is also a reasonable consideration" and an outpatient L5-S1 discectomy, a wholly different procedure from the recommended laminectomy, "is a reasonable thing to do." He also addressed non-operative options to treat Ward's low back pain such as weight loss and activity modification. Thus, the ALJ's conclusion regarding Dr. Vaughan's report addressing other treatment modalities and not the recommended laminectomy is supported by substantial evidence, and her rejection of Dr. Vaughan's report for this reason will not be disturbed.

We add there is no logic in requiring Ward to set forth medical proof on the issue of causation in a medical fee dispute *brought by Redhawk in which it is contesting causation*. Assuming, *arguendo*, this is indeed an accurate interpretation of the law, every employer asserting a post-award medical fee dispute contesting work-relatedness would be excluded from having to provide any evidentiary support. Instead, the burden of proof would shift to the claimant to defensively prove causation in direct contravention of the Supreme Court's warning in Stollings that "[i]t is not the responsibility of the party who is defending the original award to make the case for the party attacking it." *Id.* at 2. In light of the holding in Stollings, this Board will not reverse the ALJ's finding of compensability in a post-award medical fee dispute brought by the employer to contest the work-relatedness of the treatment, unless clearly instructed to do so by the appellate courts.

Regarding Redhawk's assertion that the ALJ was unable to reject the uncontradicted medical evidence of Dr. Terry regarding the issue of causation without providing a sufficient reason and rational explanation of her basis for doing so, we find that the ALJ provided a cogent explanation for her rejection of the opinions of Drs. Terry and Vaughan. She provided further explanation for her rejection of Dr. Terry's opinions in the November 14, 2019, Order ruling on Redhawk's petition for reconsideration. In reaching a determination, the ALJ must provide findings sufficient to inform the parties of the basis for the decision to allow for meaningful review, and as noted above the determination must be based upon substantial evidence. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy

Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). That said, he or she 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. Here, the ALJ set forth a sufficient explanation for her rejection of both doctors' opinions, and further explanation is unnecessary.

The record supports a finding that Redhawk failed to meet its burden of proving the contested L4-S1 laminectomy is not work-related; therefore, we affirm the ALJ's determination the laminectomy is compensable.

Accordingly, the ALJ's determination regarding the compensability of the contested laminectomy as set forth in the October 11, 2019, "Medical Dispute Opinion & Order" and the November 14, 2019, Order is **AFFIRMED**.

BORDERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS IN RESULT ONLY AND FILES A SEPARATE OPINION.

**ALVEY, Chairman.** I concur in result only. The only evidence provided by Redhawk challenges ALJ Neal's finding in his original decision that Ward sustained a compensable low back injury. Essentially, it is attempting impermissibly to re-litigate the merits of the original claim. Dr. Terry did not acknowledge the compensability of Ward's low back injury, nor did she make a determination regarding whether the proposed surgery was reasonable and necessary for that compensable condition. While I agree with the majority's opinion affirming the ALJ's determination regarding the compensability of the lumbar treatment, I do not go so far as to agree with its determination regarding the burden of proof. The majority has cited multiple cases,

which I believe establish that on reopening, the employer has the burden of proving reasonableness and necessity, and the injured worker has the burden of proving work-relatedness/causation. Again, in this instance, work-relatedness and causation was established by ALJ Neal's determination in the original claim, and no evidence to the contrary has been produced on reopening. Therefore, I concur in result only.

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