Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **February 8, 2019**

CLAIM NO. 201100134

SARAH TOOLE PETITIONER

VS.

APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

FORD MOTOR CO. KY TRUCK PLANT,
BLUEGRASS PAIN CONSULTANTS, PLLC,
DR. JOHN T. MAHAN,
And HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Sarah Toole appeals from the October 5, 2018 Opinion and Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"), resolving a medical fee dispute in favor of Ford Motor Co., Kentucky Truck Plant

("Ford"). On appeal, Toole argues the ALJ erred in finding proposed surgery is not related to her work injury. Because the evidence does not compel a contrary result, we affirm.

Toole filed her claim alleging a cervical injury on September 1, 2010 as a result of repeated bending, twisting, stooping and lifting overhead. The injury required surgical intervention, and Dr. John T. Mahan performed a discectomy and fusion at C3-4 on April 28, 2011. Toole underwent a second cervical fusion at C5-6, which Dr. Mahan performed on January 31, 2012.

The claim was settled by an agreement approved on August 16, 2013. The agreement utilized the 13% impairment rating assigned by Dr. Mahan, and listed her diagnosis as "C3-4 disc herniation with moderate to severe degree of foraminal stenosis and spinal stenosis at C3-4." The medical evidence concerning the injury filed prior to the settlement refers only to injury to the C3-4 level.

Toole had previously suffered a work injury in 2005 while employed at Ford. This injury also involved her cervical spine, and Dr. Mahan performed an anterior cervical fusion at the C4-5 level on March 17, 2005. Department of Workers' Claims records indicate Ford paid for the surgery, as well as temporary total disability ("TTD") benefits from March 16, 2005 through July 25, 2005, though no formal claim was initiated.

The current medical fee dispute was filed on March 28, 2018, to contest a proposed fourth cervical surgery. The proposed procedure involved the removal of a plate at C5-6, and an anterior discectomy and fusion at C6-7. Neither Toole nor Dr. Mahan filed any evidence in the dispute.

Dr. John Guarnaschelli performed an independent medical evaluation ("IME") on March 29, 2011 during the litigation of the underlying claim, which Ford designated for consideration in this medical fee dispute. At his 2011 examination, Dr. Guarnaschelli noted signs of a bilateral cervical radiculopathy secondary to a C3-4 disc herniation, superimposed on a moderate to severe degree of foraminal stenosis and spinal stenosis at C3-4. He indicated Toole suffers pre-existing, multilevel cervical spondylosis and degenerative changes, which play a significant underlying role in her current condition. Because of these significant pre-existing conditions, Dr. Guarnaschelli believed it would be difficult to identify the work-related injury as the sole source of her symptoms, particularly in the absence of a distinct injury such as a slip and fall. However, he noted chronic, accumulative, repetitive trauma may be a contributor to her symptoms, although not the only cause.

Dr. Leon Brooks performed a peer/medical record review on February 26, 2018. Dr. Brooks concluded the proposed surgery to remove the C5-6 plate and perform a fusion is not causally related to the 2010 work injury. He noted the only compensable level related to the 2010 injury is C3-4, and the only surgery related to the 2010 injury was the 2011 C3-4 discectomy and fusion. The 2005 work injury involved the C4-5 level, for which a repeat fusion was performed in 2012 at C5-6. Because the C4-5 and C5-6 levels are not causally related to the 2010 work injury, Dr. Brooks concluded the proposed surgery is not work-related.

In an April 23, 2018 IME report, Dr. Robert Sexton stated the proposed surgery by Dr. Mahan is not reasonable, medically necessary or related to

work activities at Ford. He noted Toole has no objective signs of cervical radiculopathy or cervical myelopathy. She has a mildly positive right Hoffman test, but that symptom has been present since 2005. Furthermore, there is no objective evidence of cervical instability at the C6-7 segment. He stated the absence of these indicators for a surgical fusion exhausts the ODG treatment recommendations for this procedure. Even more, Dr. Sexton found no indications to justify the original 2005 fusion. In short, he concluded, "Ms. Toole's cervical pathology, aside from the iatrogenic damage done by three operations is from the outset degenerative, not traumatic."

The ALJ's findings relevant to this appeal are as follows:

> Defendant contests the reasonableness, necessity, and work-relatedness of removal of C5-6 plate, anterior discectomy and fusion and reasonableness and necessity of urine drug screens, relying on the opinions of Drs. Sexton, Brooks and Whitley.
>
> This ALJ notes Dr. Mahan was joined as a party to this medical fee dispute, but has not submitted a report addressing the work-relatedness, reasonableness, and necessity of the contested treatment. This claim was resolved by settlement agreement, approved on August 16, 2013. Thus, the issue of work-relatedness has never been formally adjudicated. The settlement agreement noted Plaintiff's C3-4 anterior discectomy and fusion. However, the treatment currently at issue is removal of hardware at a different level (i.e. C5-6) and an anterior discectomy and fusion.
>
> Based upon the evidence of record, this ALJ is not convinced Plaintiff has met her burden of proving the contested surgery including removal of C5-6 plate, anterior discectomy and fusion is related to the 9/1/2000 [sic] work injury. Dr. Mahan has not provided an opinion addressing causation of surgery recommended to an entirely different level of Plaintiff's

> cervical spine. Plaintiff underwent surgery at the C4-5 level. Later Dr. Mahan performed a fusion at the C4-5 and C5-6 levels, which required a subsequent revision surgery in 2012. Thus, Plaintiff has a complicated cervical history, and this ALJ feels the evidence does not support a causation opinion in favor of Plaintiff regarding the contested surgery.
>
> Conversely, Drs. Brooks and Sexton have each opined the recommended surgery is not compensable. Dr. Sexton, a neurosurgeon, evaluated Plaintiff and concluded the proposed surgery was not work-related. As such, this ALJ finds the removal of C5-6 plate and discectomy and fusion, recommended by Dr. Mahan is not related to Plaintiff's 9/1/2000 [sic] work injury, relying on Drs. Sexton and Brooks.

Toole's primary contention on appeal is that the current proposed surgery relates to her 2005 work injury and, therefore, is compensable. She argues the ALJ erred in stating, "This claim was resolved by settlement agreement, approved on August 16, 2013. Thus the issue of work-relatedness has never been formally adjudicated." Rather, Toole contends that Ford has stipulated, by virtue of the settlement agreement, that she suffered "repeated work-related injuries to her neck." She contends even Ford's physicians relate the current surgery proposal to the 2005 injury, and therefore the ALJ was bound to accept this opinion.

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. National Pizza Company v Curry, 802 S.W.2d 949 (Ky. App. 1991). Toole was required to set forth medical proof showing the proposed surgery is causally related to a work injury. Because Toole was unsuccessful in that burden, 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

We begin by noting that Department of Workers' Claims records indicate Toole received TTD benefits for the 2005 injury, and received a notice of termination of those benefits on July 25, 2005. Thus, she was required to assert any claim for the 2005 injury by July 25, 2007. KRS 342.185(1). Because she did not, any claim for the 2005 injury is time-barred. Moreover, even if Dr. Brooks related the current need for surgery to the 2005 injury, the ALJ was not required to adopt his opinion. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Dr. Sexton concluded the current proposed surgery is "unrelated to the other three surgeries." The ALJ was entitled to rely upon his opinion.

Furthermore, Toole presented no evidence relating the current proposed surgery to the 2010 injury. Because her injury in 2010 involved the C3-4 level, some medical opinion was necessary to establish a link between that injury and the conditions at C5-6 and C6-7 levels for which the surgery was proposed. No physician stated the 2010 injury or subsequent surgery at the C3-4 level had an effect on the C5-6 or C6-7 disc levels. It is simply insufficient to argue an adjacent level must be compensable without a supporting medical opinion to that effect. The C3-4 level affected by the 2010 injury is not directly adjacent to the levels involved in the contested surgery. Dr. Sexton specifically stated the proposed surgery is not causally

related to the 2010 injury. Further, Dr. Brooks unequivocally stated only the C3-4 level surgery relates to the 2010 injury. The opinions of Drs. Sexton and Brooks constitute the requisite substantial evidence to support the ALJ's determination, and a contrary result is not compelled. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In a related argument, Toole argues the ALJ improperly failed to afford *res judicata* effect to the settlement agreement. She emphasizes the ALJ's statement that, "This claim was resolved by settlement agreement, approved on August 16, 2013. Thus the issue of work-relatedness has never been formally adjudicated." Toole is correct that settlement agreements carry the force and effect of a judgement, as if decided after full litigation. In this regard, she is correct that the settlement agreement establishes the 2010 injury was work-related. However, the settlement agreement does not establish the work-relatedness of future medical treatment. The work-relatedness of the proposed surgery was a question properly before the ALJ, and we find no error in her consideration of the evidence or her decision. While the relevancy of the ALJ's statement is unclear, we discern no indication it resulted in the improper consideration of the burden of proof. The ALJ concluded Toole failed to prove the proposed surgery at C5-6 and C6-7 is causally related to the 2010 work injury. The record contained substantial evidence to support the ALJ's conclusions. It cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Lastly, Toole argues the ALJ erroneously identified Dr. Sexton as an independent medical examiner. She contends Dr. Sexton is not an independent medical examiner because he was retained by Ford, and was not a "University Physician" appointed by the ALJ. In workers' compensation parlance, the term "independent medical examiner" distinguishes a physician who evaluates a claimant to offer an opinion for litigation purposes, from a treating or consulting physician who offers an opinion for purposes of treatment. Physicians hired by claimants and employers alike are designated as independent medical examiners if they offer opinions for purposes of litigation rather than treatment.

Accordingly, the October 5, 2018 Opinion and Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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