Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 10, 2021

CLAIM NO. 199502674

TOYOTA MOTOR MANUFACTURING KENTUCKY, INC. PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

DARRELL SWIFT
PETER HESTER, M.D.
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS, Member, and VACANT.

STIVERS, Member. Toyota Motor Manufacturing Kentucky, Inc. ("Toyota") appeals from the June 7, 2021, Opinion and Award and the July 6, 2021, Order on Petition for Reconsideration of Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). The ALJ resolved Toyota's December 16, 2020, Motion to Reopen/Form 112 Medical Fee Dispute in favor of Darrell Swift ("Swift") by holding the left knee

arthroscopy and meniscectomy proposed by Dr. Peter Hester is reasonable, necessary, and related to Swift's March 1993 injury.

On appeal, Toyota argues the ALJ erred by finding the proposed left knee surgery is work-related. Toyota does not contest the ALJ's determination that the surgery is reasonable and necessary treatment of Swift's left knee condition.

BACKGROUND

The Form 101, filed on February 28, 1995, alleges Swift injured both of his knees on February 23 and March 3, 1993, due to prolonged standing and walking on plant floors.

On August 11, 1995, the parties entered into a Form 110-I Settlement Agreement for a lump sum payment for work-related "cysts in each knee due to repetitive minitrauma."

On December 16, 2020, Toyota filed a Motion to Reopen/Form 112 Medical Fee Dispute asserting the following: "Left knee arthroscopy with meniscectomy is not reasonable, necessary, or work-related. The need for surgery is due to an April 2016 basketball injury. Surgery is not indicated at this time due to a lack of mechanical symptoms."

Attached to the Form 112 is Dr. Jerry Magone's November 12, 2020, Independent Medical Examination ("IME") report. After conducting a physical examination and a medical records review, Dr. Magone opined that the recommended surgery on Swift's left knee is not related to the work injury but related to a basketball injury occurring in 2016. He opined, in relevant part, as follows: "In summary, I do [sic] personally do not see indications for a recommended surgery of

a meniscal repair at the time and regardless, it is my opinion the surgery would be considered to be related to the April 2016 basketball injury and not to any injury or the previous surgeries that went on in 1993."

Also attached to the Form 112 is the November 23, 2020, Utilization Review report of Dr. Keith Harvie, DO. After performing a medical records review, Dr. Harvie recommended approval of the proposed surgery opining, in relevant part, as follows:

> In this case, the 60-year-old claimant has a date of injury of 03/23/93. Since the date of injury, the claimant tried treatments that included oral medications, DME, activity modifications and physical therapy. The claimant underwent an unspecified left knee surgery (date unknown). Currently, the claimant reports left knee pain. The claimant also reports left knee stiffness, soreness with limited ADL's and activity. On exam of left knee, there is atrophy. There is medial joint line tenderness on palpation. There is no lateral joint line tenderness. The range of motion is from 0-100 degrees. There is positive medial McMurray's test. The provider reviews and notes that the MRI shows medial meniscus tear. MRI shows mild thickening of the distal patellar tendon, representing tendinosis. There is mild thinning of the articular cartilage along the medial femoral condyle. There is minimal marginal osteophytic spurring. There is a small joint effusion. The provider recommends left knee surgery – medial meniscus debridement. Considering the persistent pain with supportive objective findings that correlates with the imaging evidence of medial meniscus tear and marginal osteophytic spurring and also given the trial of conservative management with persistent functional limitations, the medical necessity of the left knee arthroscopy with meniscectomy (medial or lateral, including and meniscal shaving) including debridement/ shaving of articular cartilage (chondroplasty), same or separate compartments is established. Recommendation is to approve.

Toyota filed Dr. Magone's March 2, 2021, addendum report which reads, in full, as follows:

> I received your recent letter requesting my opinion on an additional matter related to Darrell Swift and claim #953502836. In preparation of my report, the following documents were reviewed:
>
> • Independent medical evaluation I performed on the claimant dated November 12, 2020, and all medical records provided at that time.
>
> • MRI of the left knee dated April 5, 1996.
>
> • Records of G.J. Sweeney, Jr., M.D.
>
> In preparation of my report, I accept the findings of the examining physicians, although I may not necessarily agree with their conclusions. All conclusions and opinions are based upon a reasonable degree of medical certainty and probability.
>
> Please review attached records to see if these change your opinions in the original IME report. Please explain either way.
>
> The additionally attached records do not change my opinions as set forth in my original IME report of November 12, 2020.
>
> I previously opined that the ongoing findings that this individual is experiencing were unrelated to the prior injury from 1993 or the prior cyst surgery of almost 30 years ago. The opinion in the prior report suggesting more of a correlation to the 2016 basketball incident is still my opinion. It remains my opinion the surgery proposed would be considered to be related to the April 2016 basketball injury and not to any injury or the previous surgeries that went on in 1993.

Swift filed the April 5, 1996, MRI report containing Dr. J. West's impression:

> Impression: 1) Abnormal signal related to anterior aspect of the anterior horn of the lateral meniscus. I

> believe there is a small tear in the periphery of the lateral meniscus – anterior horn and this cluster of abnormality is most likely compatible with parameniscal cyst formation. 2) Suspect horizontal tear – posterior horn of medial meniscus.

The June 7, 2021, decision contains the following findings of fact and conclusions of law which are set forth *verbatim*:

> In this reopening for a medical dispute, the defendant maintains Dr. Hester's proposed left knee surgery is not causally related to plaintiff's 1993 work injury based on the opinions of its examining physician, Dr. Magone. He noted plaintiff's 1993 injury, but maintained treatment records after August, 2016 noted plaintiff complained of left knee pain following a basketball injury and that an MRI at that time showed a medial meniscus tear. Dr. Magone therefore concluded the current treatment and recommendation for left knee surgery are not due to the original work injury but, instead, are due to the intervening and unrelated basketball incident in 2016.
>
> However, the Administrative Law Judge is not persuaded by Dr. Magone's opinions. Dr. Magone focused entirely on the 2016 basketball incident and glossed over treatment records after the 1993 injury. In particular, Dr. Magone did not address the fact that plaintiff was diagnosed with a left knee medial meniscus tear following a left knee MRI in 1996, after ongoing left knee symptoms since the 1993 work injury. This fact renders Dr. Magone's findings questionable on its own. However, also persuasive is the fact that the defendant's initial utilization review physician, Dr. Harvie, determined that the proposed surgery was reasonable and necessary for plaintiff's 1993 work injury. The totality of these facts leads the ALJ to conclude that Dr. Hester's proposed left knee surgery is causally related to plaintiff's 1993 surgery.
>
> As to the issue of reasonable and necessary necessity, the ALJ is, again, not persuaded by Dr. Magone's opinions. He seems to suggest that due to plaintiff's age and the fact that he was not having "mechanical symptoms" such surgery is not reasonable or necessary at this time for what he acknowledged was a left knee

> medial meniscus tear. Dr. Magone did not elaborate on what kinds of mechanical symptoms would make such surgery reasonable and necessary in his mind. Moreover, the UR physician, Dr. Harvie, noted plaintiff's list of ongoing symptoms, and the lack of response to more conservative methods and the objective evidence of the meniscal tear and concluded the proposed surgery is reasonable and necessary. Based on the more persuasive opinions from Dr. Harvie, it is determined the proposed left knee surgery is reasonable and necessary for plaintiff's work related 1993 injury.

Toyota's Petition for Reconsideration asserted the same arguments that it now makes on appeal. In the July 6, 2021, Order, the ALJ overruled Toyota's Petition for Reconsideration furnishing the following additional findings which are set forth *verbatim*:

> This matter comes before the Administrative Law Judge pursuant to the defendant's petition for reconsideration of the Opinion & Order rendered in this reopening for a medical dispute on June 7, 2021. In its petition, the defendant maintains the ALJ erroneously stated that the defendant's utilization review physician, Dr. Harvie, indicated the disputed left knee surgery was reasonable and necessary for plaintiff's left knee condition. The defendant requests an additional finding and point to that portion of the record which supports this statement.
>
> The ALJ is not persuaded this represents any patent error. While Dr. Harvie did not explicitly state the disputed surgery was reasonable and necessary for Lent's 1993 work injury. A review of the last paragraph at the bottom of page 3 of Dr. Harvie's UR report certainly supports that reasonable inference:
>
> In this case, the 60-year-old claimant has a date of injury of 03/23/93. Since the date of injury, the claimant tried treatments that included oral medications, DME, activity modifications and physical therapy. The claimant underwent an unspecified left knee surgery (date unknown). Currently, the claimant reports left knee pain. The claimant also reports left knee stiffness, soreness with limited ADL's and activity. On exam of left knee, there is atrophy. There is medial joint line

tenderness on palpation. There is no lateral joint line tenderness. The range of motion is from 0-100 degrees. There is positive medial McMurray's test. The provider reviews and notes that the MRI shows medial meniscus tear. MRI shows mild thickening of the distal patellar tendon, representing tendinosis. There is mild thinning of the in particular cartilage along the medial femoral condyle. There is minimal marginal osteophytes purring. There is a small joint effusion. The provider recommends left knee surgery-medial meniscus debridement. Considering the persistent pain with supportive objective findings that correlate with the imaging evidence of medial meniscus tear and marginal osteophytic spurring and also given the trial of conservative management with persistent functional limitations, the medical necessity of the left knee arthroscopy with meniscus to me (medial or lateral, including any meniscal shaving) including debridement/ shaving of articular cartilage (chondroplasty), same or separate compartments is established. Recommendation is to improve.

Moreover, although the defendant is correct that no physician of record reported Dr. Hester's proposed surgery was causally related to the 1993 injury, the ALJ reached this reasonable inference based on the totality of the evidence. In particular, as pointed out in the Opinion, the defendant's expert, Dr. Magone, concluded Dr. Hester's proposed surgery was to address a medial meniscus tear that Dr. Magone noted was present on MRI performed after plaintiff complained of knee soreness in 2016 after playing basketball. Dr. Magone therefore concluded the need for surgery was due to plaintiff playing basketball in 2016. However, pointing out that Dr. Magone did not address the fact that plaintiff was actually diagnosed with this medial meniscus tear after his 1993 injury and after a 1996 left knee MRI. Therefore, using the same logic that Dr. Magone erroneously attempted, the ALJ concluded plaintiff's need for the currently disputed surgery is due to the medial meniscus tear seen for the first time after plaintiff's 1993 injury and discovered and diagnosed while he was treating for that injury. The totality of these facts, allow for this reasonable inference based on plaintiff's actual medical history which Dr. Magone did not accurately or fairly account for.

On appeal, Toyota posits the issue of whether the proposed surgery is work-related is a medical question and not one that falls under "observable causation." As there are no medical opinions in the record causally relating the need for the proposed surgery to the 1993 work injury, Toyota maintains the ALJ erred by finding the surgery work-related. We affirm.

ANALYSIS

As an initial matter, we note Toyota is not contesting the ALJ's determination the proposed surgery is reasonable and necessary, but only his determination regarding its work-relatedness.

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). Similarly, the employer has the burden of proving any allegation that the treatment in question is not work-related. This was verified by the Kentucky Supreme Court in C & T of Hazard v. Stollings, 2012-SC-000834-WC, rendered October 24, 2013, Designated Not To Be Published. In Stollings, the Supreme Court explained 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.)

In other words, the burden is placed on the party moving to reopen because the party attempting to overturn a final award of workers’ compensation benefits must present facts and reasons to support its position.

More recently, in Conifer Health v. Frieda Singleton, 2020-SC-0609-WC, rendered September 30, 2021, Designated Not To Be Published, the Supreme Court held as follows: **“the burden in a medical fee dispute is upon the employer to**

show that the expenses were unreasonable, unnecessary, and unrelated to the work injury." Slip Op. at 14. (emphasis added.) Consequently, since Toyota is the party contesting the proposed surgery, it had the burden to prove the contested surgery is neither reasonable, necessary, **nor work-related.** As Toyota was unsuccessful before the ALJ, the sole issue in this appeal is whether the evidence compels a different conclusion. 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). In other words, an unsuccessful party bearing the burden on appeal must prove that the ALJ's findings are unreasonable and, thus, clearly erroneous in light of the evidence in the record. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight to be accorded the evidence and the inferences to be drawn therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The fact-finder 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 parties' total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

While medical causation usually requires proof from a medical expert, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). The ALJ may properly infer causation, or a lack thereof, from the totality of the circumstances as evidenced by the lay and expert testimony of record. *See* Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981); Cf. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995).

In the case *sub judice*, the ALJ inferred causation from the totality of the evidence. As elaborated in both the June 7, 2021, Opinion and Award and more extensively in the July 6, 2021, Order, the ALJ was persuaded by the fact that Dr. Magone, in his IME report and subsequent addendum, failed to acknowledge that in 1996, when he was still experiencing problems following the 1993 injury, Swift was diagnosed with a left knee medial meniscus tear. The April 5, 1996, MRI report indeed indicates Swift had a horizontal tear in the "posterior horn of medial meniscus." However, a review of Dr. Magone's November 12, 2020, IME report reveals no mention of the April 5, 1996, MRI report. In fact, the MRI report is not referenced within the list of medical records Dr. Magone reviewed before issuing his report. Even though the MRI report is listed as having been reviewed by Dr. Magone before issuing his March 2, 2021, addendum, he failed to discuss it. Thus, in his decision the ALJ concluded as follows:

> Dr. Magone focused entirely on the 2016 basketball incident and glossed over treatment records after the 1993 injury. In particular, Dr. Magone did not address the fact that plaintiff was diagnosed with a left knee medial meniscus tear following a left knee MRI in 1996,

> after ongoing left knee symptoms since the 1993 work injury.

The ALJ was persuaded Toyota failed to meet its burden to prove the proposed surgery is not work-related. Pursuant to C & T of Hazard v. Stollings, supra, and Conifer Health v. Frieda Singleton, supra, since Toyota is the party contesting the reasonableness, necessity, and work-relatedness of the proposed surgery, it bore the burden to set forth sufficient proof to persuade the ALJ that the surgery is neither reasonable, necessary, nor work-related. Toyota failed to meet this burden. Stated another way, and as articulated by the ALJ in the July 6, 2021, Order, "[t]he totality of these facts, allow for this reasonable inference based on plaintiff's actual medical history which Dr. Magone did not accurately or fairly account for."

Because substantial evidence supports the ALJ's determination the proposed left knee surgery is work-related, a different conclusion is not compelled. Accordingly, the June 7, 2021, Opinion and Award and the July 6, 2021, Order on Petition for Reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

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