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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000822-WC

CONTINENTAL INN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-96-01468

PENNY WISEMAN; HON. JAMES L.  
KERR, ADMINISTRATIVE LAW  
JUDGE; AND WORKERS' COMPENSATION  
BOARD

APPELLEES

AND

NO. 2010-CA-000841-WC

PENNY WISEMAN

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-96-01468

CONTINENTAL INN; HON. JAMES L.  
KERR, ADMINISTRATIVE LAW  
JUDGE; AND WORKERS' COMPENSATION  
BOARD

CROSS-APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, KELLER, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of a decision of the Workers' Compensation Board (the Board) affirming in part and reversing and remanding in part a decision of the Administrative Law Judge (ALJ). Based upon the following, we affirm the Board's decision.

BACKGROUND INFORMATION

Appellee, Penny Wiseman, was employed with Continental Inn in 1985 and in 1988. In October of 1985 and July of 1988, Wiseman sustained work related injuries involving an original and recurrent herniated disc at the L5-S1 level. Wiseman filed a workers' compensation claim in January of 1996 which was settled in February of 1997 with an agreement to 68 percent permanent partial disability.

In April of 1999, Wiseman sought treatment from Dr. Harry Lockstadt for low back pain and numbness in both her legs. Wiseman had originally seen Dr. Lockstadt in 1995. Wiseman also received Social Security Disability benefits after a finding that she became totally disabled in December of 1995. We adopt the following procedural facts as set forth by the Board in its findings:

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<sup>1</sup> Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In claim no. 95-33795, Wiseman alleged cumulative trauma and repetitive use syndrome of her hands and upper extremity. In claim no. 96-01468, Wiseman alleged lower back injuries received in 1985 and 1988. Wiseman settled claim no. 96-01468, her back injury claim, with both her employer and the Special Fund for lump sum payments. In claim no. 95-33795, ALJ Coleman rendered an opinion and award dated September 5, 1998, determining Wiseman suffered a 50.5% permanent partial disability. Accordingly, for the upper extremity, Wiseman had a compensable occupational disability of 50.5%, and the ALJ apportioned liability equally between Special Fund and the employer and awarded benefits accordingly.

On February 8, 2008, Continental filed a motion to reopen in claim no 96-01468 and join the medical provider, Dr. Lockstadt, as well as a Form 112 which reflected Continental was contesting the lumbar CT myelogram requested by Dr. Lockstadt. Continental asserted Dr. Lockstadt's request for the myelogram had been submitted to utilization review ("UR") and subsequently denied. It attached the UR denial and Dr. Douglass Marshall's report in which he stated the medical records in his possession did not contain any evidence indicating the current symptoms were in any way related to Wiseman's twenty-two-year-old work injury. Rather, the current symptoms were likely due to normal age-related progression of degenerative disease. Accordingly, the CT myelogram was deemed not related to the 1985 injury and was therefore not necessary and appropriate.

On February 25, 2008, ALJ Roark sustained Continental's motion to reopen to the extent the medical fee dispute would be assigned to an Administrative Law Judge. The ALJ also joined Dr. Lockstadt as a party to the claim on reopening. The claim was subsequently assigned to ALJ Kerr.

On April 4, 2008, Continental filed a motion to amend the medical fee dispute and an amended Form 112 asserting a dispute over the lumbar fusion surgery

performed by Dr. Lockstadt on March 4, 2008. Continental asserted there was no request for pre-certification, and upon receiving the bill Continental had initiated UR. Continental attached Dr. Loeb's report in which he determined the surgery was not related to the work injury. Dr. Loeb indicated Dr. Lockstadt had apparently performed fusion surgery at L5-S1 with no reference to a 1985 injury or reference to any injury at any time at L3-4 or L4-5. He pointed out Dr. Lockstadt stated in a January 23, 2008, note the exact etiology of the progressive disc degeneration is unknown, and the x-ray findings of degenerative changes at L3-4 and L4-5 are likely related to age effects. Dr. Loeb concluded there is no objective data in the record to support any relationship between the current treatment, which included the CT myelogram and the surgery, and the work injury of 1985.

On April 21, 2008, Continental filed Dr. Lockstadt's medical record generated as a result of an examination on January 23, 2008. The record reflects Dr. Lockstadt had reviewed Dr. Marshall's utilization review report. In that regard, he stated as follows:

I suppose Utilization Review is partially correct in stating they think some of her symptoms are related to age rather than to her injury from 22 years ago.

Dr. Lockstadt also stated Wiseman had progressive disc degeneration at the L3-4 and L4-5 levels, but the exact etiology of the progressive disc degeneration is unknown. He indicated he would investigate further. He also stated Wiseman's problem is likely related to the effects of aging, and Wiseman will have the myelogram billed to her health care insurance "as this is a health care normal age wear and tear condition rather than a work related condition." Dr. Lockstadt went on to acknowledge the work related disc is at L5-S1 and he is now reviewing L3-4 and L4-5.

Continental submitted Dr. Greg Snider's May 6, 2008, report which was generated as a result of an

independent medical evaluation (“IME”) conducted on May 6, 2008. Dr. Snider concluded Wiseman had suffered a work-related low back injury twenty-three years ago resulting in an L5-S1 diskectomy. Wiseman had ongoing back pain and progressive degenerative changes over the years and had been unable to work for the last twelve years. She had a couple of falls with apparent aggravation of her condition. Wiseman had relatively advanced degenerative changes considering her age. Dr. Snider opined there was no clear causal correlation between Wiseman’s current complaints and the remote work-related low back injury of 1985. Dr. Snider concluded the CT myelogram and the most recent surgery may have been indicated from a medical standpoint, but neither was necessary “for the effects from the 1985 injury.”

On June 23, 2008, Continental filed a letter from Dr. Snider dated June 12, 2008, in which Dr. Snider stated he had reviewed medical records which included Dr. Lockstadt’s office notes from 1999 through March 2007, as well as MRI, CT, and myelogram reports, and operative reports from August, 2000, and March, 2008. Dr. Snider did not see any information which would cause him to change the opinions expressed in his IME report of May 6, 2008. He stated it was difficult to relate Wiseman’s current complaints to a low back injury from twenty-three years ago. He opined one could not clearly relate the cause of her current complaints to the remote back injury.

Our review of the record reflects no order was entered by the ALJ sustaining Continental’s motion to include in the medical fee dispute the compensability of the lumbar fusion performed by Dr. Lockstadt. That said, we note the July 8, 2008, BRC order reflects the parties stipulated to the following contested issues:

work-relatedness/compensability of the proposed lumbar fusion and proposed CT myelogram recommended by Dr. Lockstadt, unpaid medicals.

Thereafter, on July 25, 2008, Continental filed another motion to amend the medical fee dispute and a second amended Form 112 which sought to include within the medical fee dispute the prescription of Lyrica prescribed by Dr. Corales and to join Dr. Corales as a defendant in the action.

On August 1, 2008, Continental submitted another letter from Dr. Snider dated July 3, 2008. In this letter, Dr. Snider again notes he had received certain medical records which included the March 5, 2008, and June 16, 2008, notes of Dr. Lockstadt and physical therapy evaluation of May 13, 2008. He pointed out Dr. Lockstadt's June 16, 2008, note reflects Wiseman's L4-5 degeneration could be related to the fusion she had at L5-S1 as a result of her work-related injury. He also observed Dr. Lockstadt stated it is well documented that a transitional syndrome occurred at the L4-5 level presumably related to the neighboring L5-S1 fusion. Dr. Snider was not aware of any data which supports or refutes such an assertion, therefore, he was unable to comment specifically on that issue. He recommended that Continental speak with another neurosurgeon in this regard. Dr. Snider concluded by noting he remained skeptical Wiseman's current complaints were directly related to her 1985 injury.

On August 8, 2008, the ALJ sustained the second motion to amend the medical fee dispute to include the prescription for Lyrica. On August 22, 2008, Continental filed a motion to withdraw the medical fee dispute regarding the Lyrica prescription because Continental had found there was a referral to Dr. Corales. The ALJ sustained that motion by order dated September 4, 2008.

On November 12, 2008, Continental filed a motion to amend the medical fee dispute to include the medication Ropinirole which Wiseman obtained through the Injured Workers Pharmacy. Continental asserted it had initiated UR which resulted in a finding Ropinirole was not reasonable and necessary treatment of Wiseman's twenty-three year old injury. Therefore,

Continental argued the Form 112 must be amended and the Injured Workers Pharmacy must be joined as a party.

On December 9, 2008, Continental filed Dr. Tutt's report dated November 11, 2008, generated as a result of an IME he performed on that same date. Dr. Tutt noted Wiseman had an L5-S1 disc herniation as a result of the 1985 injury. Wiseman later developed back and left leg pain because she underwent a second left L5-S1 discectomy. Many years later for reasons which were unknown or not well-defined to Dr. Tutt, Wiseman underwent an anterior fusion at L5-S1 and later a posterior decompression at that level and the level above despite the records revealing no pathology at the level above. Dr. Tutt noted that as a result of persistent complaints of pain and some imaging studies showing ligamentum flavum hypertrophy and facet joint hypertrophy causing spinal stenosis at L3-4 and L4-5 in March, 2008, Wiseman underwent posterior decompression as well as instrumented fusion from L3 to L5, although the studies had shown no evidence of joint instability. Wiseman had been on opioid analgesics for many years and presently used Duragesic patches and Oxycodone. Dr. Tutt believed Wiseman showed no clinical evidence of active nerve root compression and demonstrated some inconsistencies in her musculoskeletal examination. He opined none of the treatment rendered since the first two operations in 1985 and 1987 had any relationship to the original work injuries of October 3, 1985, or July 7, 1988. He stated the CT myelogram and prescription for Ropinirole were not causally related to the original work injuries of 1985 and 1988 nor were they reasonable and necessary as they relate to the original work injury.

Although no amended Form 112 regarding Ropinirole was filed by Continental, on January 6, 2009, the ALJ sustained Continental's motion to amend the medical fee dispute to include within the medical fee dispute the prescription Ropinirole.

On February 6, 2009, Continental filed a supplemental report from Dr. Tutt which indicated he had

reviewed his IME report of November 13, 2008. He opined none of the surgeries performed many years after the original October 3, 1985, work injury, including the anterior lumbar fusion of 2000 and the posterior decompression and instrumented fusion of 2008, had any relationship to that injury. Dr. Tutt concluded the subsequent fusions were performed because of the natural progression of progressive degenerative lumbar osteoarthritis which had no relationship to her undergoing lumbar diskectomies in 1985 and 1988. The same degenerative osteoarthritis, “upon which the disk herniations occurred,” was the reason the unsuccessful lumbar fusions were performed. Dr. Tutt considered the most recent posterior fusion to be unnecessary and unreasonable because Wiseman had shown no evidence of joint instability.

On March 30, 2009, Continental filed another motion to amend the medical fee dispute “to include prescription medications submitted by plaintiff’s counsel for prescriptions from Dr. Lockstadt and Dr. Danny Corales.” Continental stated in light of the bill presented to it, it must file this medical fee dispute in order to protect the record. Continental also filed an amended Form 112 and a copy of a printout from the Injured Workers Pharmacy showing prescriptions written by Drs. Lockstadt and Corales for Ropinirole, Lyrica, Fentanyl, and Endocet during the period from August 8, 2008, through February 24, 2009. Although the Form 112 styled “Third Amended Medical Fee Dispute” stated the medical bills for the prescriptions had been submitted to UR and a copy of the UR decision with supporting medical opinions was attached, the UR decision and documents with supporting medical opinions were not attached. The only attachment was a copy of a February 2, 2009, letter from Dr. Corales to Wiseman’s attorney stating Wiseman was placed on Requip for irritability and restlessness in her legs which she reported resulted from chronic back pain issues and the Requip helped her obtain restful sleep. The only reason given in the Form 112, styled “Third Amended Medical Fee Dispute,” for adding the prescriptions was the statement: Prescriptions



of Ropinirole, Lyrica, Fentanyl, and Endocet challenged under KRS 342.020.

On April 13, 2009, Continental filed a copy of invoices for prescriptions it had received from the Injured Workers Pharmacy covering the period from August 28, 2008, through February 24, 2009. Those records reflect Dr. Corales prescribed Ropinirole, Lyrica, and Fentanyl, and Dr. Lockstadt prescribed Endocet.

On April 24, 2009, the ALJ sustained Continental's motion to amend the medical fee dispute to include prescription medications written by Dr. Lockstadt and Dr. Danny Corales which had been submitted by Wiseman's counsel. By separate order of the same date, the ALJ also joined Dr. Corales as a party to the medical fee dispute.

On May 22, 2009, Continental filed another motion to amend the medical fee dispute to include the referral of Wiseman to the Pain Treatment Center. Continental noted it had submitted the request for the referral to the Pain Treatment Center to Utilization Review and Dr. Goldman, the UR physician, found the referral to be non-compensable. Continental attached the notice of denial and Dr. Goldman's May 14, 2009, report. In his report, Dr. Goldman noted Wiseman had sustained an injury in 1985. He set out a brief history of Dr. Lockstadt's records and Wiseman's treatment with Dr. Lockstadt beginning March 13, 2003. In regard to the medical fee dispute, he noted on January 14, 2008, Dr. Lockstadt recommended Wiseman undergo a CT myelography which had been denied through utilization review. He then referenced Dr. Lockstadt's comments in his January 23, 2008, report. Dr. Goldman noted that on March 4, 2008, Wiseman underwent decompression at L3-4 with interbody and posterolateral instrumented fusions. After setting out Wiseman's prescriptions, Dr. Goldman then stated regarding the referral to pain management as follows:

As far as I can tell this lady is not on any significant pain medicines at this time

other than perhaps a Duragesic patch. It appears that her symptoms have been reasonably well controlled until her previous surgery in March of 2008. Since, as far as I can tell, the surgery in March of 2008 was denied as related to the injury in 1985, I can find no way to relate the referral to pain management to the injury in question. Additionally, if I have her medication regimen correct above, I can find no indication for pain management.

Dr. Goldman recommended the referral to pain management be denied for lack of relatedness to the injury.

On May 22, 2009, Continental filed a motion to join the Pain Treatment Center as a party to the claim. The order amending the medical fee dispute to include the referral to the Pain Treatment Center was sustained on June 9, 2009. By separate order of the same date, the ALJ also joined Pain Treatment Center as an indispensable party.

On June 9, 2009, Wiseman filed a response objecting to the numerous amended medical fee disputes, and a request for hearing, attorney fees, and for designation of the records. Attached to that response and request were the prescriptions provided by the Injured Workers Pharmacy reflecting the prescriptions written by Drs. Lockstadt and Corales for Wiseman from October 28, 2008, through May 21, 2009.

Thereafter, Continental filed a letter from Dr. Snider dated May 28, 2009, discussing Dr. Goldman's utilization review. Dr. Snider concluded Dr. Goldman's "peer review" regarding pain management was well thought-out. Dr. Snider stated if the March, 2008, surgery was deemed unrelated to the 1985 work injury, Dr. Snider agreed referral to pain management for the remote injury is not indicated. Dr. Snider concluded by saying:

It is not clear, in this situation, what pain management would have to offer Ms. Wiseman, except to monitor her medication, which is already being done by her family physician.

The BRC order of July 8, 2009, indicated the contested issues were:

contested comp of myelogram; comp of surgeries; present & past meds; contested comp & nec of pain management; contested unpaid medicals; attorney fees.

On July 13, 2009, Wiseman filed a letter dated April 28, 2009, from Dr. Lockstadt. In that letter, Dr. Lockstadt indicated he had reviewed Dr. Tutt's report and disagreed with it completely. Dr. Lockstadt noted Wiseman had suffered a back injury at L5-S1 and had undergone fusion surgery which was successful. In the ensuing years she developed transitional syndrome above her fusion "which is well-documented to be associated with a stiffened motion level by fusion." Dr. Lockstadt stated Wiseman's transitional syndrome was at L4-5 with some at L3-4, and he recommended surgical fusion as treatment. He believed the results of the surgery speak for themselves. Wiseman had dramatic improvement in both pain and function. Dr. Lockstadt noted Dr. Tutt had failed to note that the x-rays revealed an obvious loss of disc space height, anterior attraction osteophytes, and severe degeneration at L4-5 and lesser so at L5-S1. Dr. Lockstadt concluded by stating the literature "well-documents" that 40% of the patients will develop a transitional syndrome within four years and greater than 60% within 10 years. He opined "this is a much higher incidence than related to age alone."

On August 10, 2009, Continental filed the letter of Dr. Snider dated July 23, 2009, addressing the letter of Dr. Lockstadt. Dr. Snider believed the issue is whether Wiseman suffered from transitional syndrome or is simply predisposed to lumbar disk degeneration. Dr. Snider pointed out he is not a neurosurgeon but is aware

of the “theory of causation”; however, he was also aware there is much debate in the neurosurgical community as to whether this is a valid theory. Dr. Snider observed studies have been performed which seem to support both positions. Dr. Snider stated he personally had “not noted a trend in patients that [he has] referred for lumbar diskectomies and fusions that additional procedures are typically performed.” In his “non-neurosurgical opinion” there was no clear consensus regarding the validity of the theory of transitional syndrome. Dr. Snider opined Wiseman appeared to be an individual with previous predisposition to lumbar disk degeneration without any clearly defined etiology.

Continental filed a notice it would contest the prescription filled by Injured Workers Pharmacy written by Dr. Corales for Ropinirole which was filled on July 8, 2009.

It should be pointed out that throughout the proceedings, Wiseman filed various medical records/reports of Dr. Lockstadt in addition to what has been outlined herein in support of her position. Those records/reports were dated May 5, 2008, June 16, 2008, and August 11, 2008.

Drs. Wright and Ballard submitted their pain management evaluation of Wiseman and contained within that record is a list of prescriptions which Wiseman was taking.

Wiseman testified at the hearing held July 22, 2009, that at the time she settled her back claim she had pain in the lower back extending to her lower extremities. She first saw Dr. Lockstadt in 1995. Drs. Herms and Ravvin performed surgery prior to 1995 which was paid for by the carrier. [Footnote omitted] After that surgery, she had pain extending from her hip into her leg and numbness in the feet. She also had pain in part of her right leg. Since then, Dr. Lockstadt had performed two surgeries. In 2008, Dr. Lockstadt requested a CT myelogram. At that time, because Wiseman could not walk due to pain in her left hip and leg, she had to use a

wheelchair. Dr. Lockstadt tried different medications and injections. Although Dr. Lockstadt was “working on the L5-S1,” she had lower back trouble with other disks. Wiseman believed her pain is due to her original work injury because it has been continuous and her pain and symptoms have been at the same location since her work injury. The carrier has refused to pay for the Ropinirole and Requip which Wiseman takes for back and leg spasms. The carrier has refused to pay for Lyrica which Dr. Corales prescribed for back pain and to “control sensations in her leg” which is due to the “nerve being crushed in [her] back.” The carrier also refused to pay for the Fentanyl pain patch which she has used for three to four years for lower back pain because of the pain she described in her lower back. The carrier refused to pay for the Endocet for lower back pain which she has taken for several years along with the Fentanyl patch. Since 1995, when Dr. Lockstadt first saw her, Wiseman’s symptoms have remained the same. All of the prescriptions in dispute have been prescribed by Dr. Lockstadt and Dr. Corales for her work injury. Wiseman was referred by them to Dr. Ballard at the Pain Clinic to get a handle on her pain medications. Dr. Ballard increased her Fentanyl dosage and kept her on Percocet. The fusion surgery she underwent in 2008 was because of the pain in her left hip, leg, and back. After the surgery, her leg pain was better but she still has back and hip pain.

After hearing proof, the ALJ found “that the key to this decision is the causation of current complaints, . . .” and concluded that Wiseman had not met her burden which, in a post settlement medical fee dispute was the burden of proof and the risk of non-persuasion. Thus, the ALJ held that the medical fee disputes brought by Wiseman were non-compensable.

Wiseman thereafter filed a petition for reconsideration with the ALJ, pointing out that she had previously undergone five lumbar surgeries and that the

carrier had paid for each one except for the last. She also noted that many of the prescriptions that the ALJ found to be non-compensable had been prescribed and paid for by the carrier for many years prior to the dispute.

Wiseman argued that the ALJ's decision removed her right to continued medical treatment and to pain medication. She contended that there was no finding of fact that she did not need her medication for low back pain and numbness in her lower extremities and requested the ALJ revisit his findings regarding Dr. Lockstadt's opinions. Wiseman asserted that Dr. Lockstadt had not backed off his opinion that the myelogram and need for surgery were related to a work injury.

Wiseman also pointed out the ALJ failed to consider the source of the medical opinions submitted by Continental and requested the ALJ revisit his findings regarding the surgery. Regarding the Pain Treatment Center, Wiseman asserted there was no finding by the ALJ that she will never again experience pain due to her original injuries. Rather, the records clearly indicate she continues to need pain medication. Wiseman concluded by asking the ALJ to clarify the effective date of the order and determine whether Wiseman is required to repay AIK for anything paid for prior to entry of the opinion and award.

In his order overruling Wiseman's petition for reconsideration, the ALJ indicated he reviewed the evidence a second time and it still appeared to him that Dr. Lockstadt's initial opinion is supported by Drs. Snider, Tutt, and Goldman and therefore the petition was overruled.

The Board affirmed the decision of the ALJ determining that the CT myelogram, fusion surgery performed by Dr. Lockstadt, referral to pain management, and the prescription for Robinirole are not causally related to the work injury and not treatment caused by the work injury. The Board reversed and remanded that portion of the ALJ's decision finding that the prescriptions Lyrica, Fentanyl, and Endocet are unrelated to Wiseman's work-related injuries. Continental appealed and Wiseman filed a cross-appeal.

### STANDARD OF REVIEW

As a reviewing court in workers' compensation cases, our function is to correct the Board when we believe it "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

"It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers' compensation claim." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). We recognize that it is within the broad discretion of the ALJ "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). With this standard in mind, we examine the merits of the appeal.

### DISCUSSION

Continental Inn first contends that the Board erred when they found there was no proof to support the ALJ's finding that the medications including Lyrica, Fentanyl and Endocet were unrelated to Wiseman's work-related injury.

In *Westvaco v. Fondaw*, Ky., 698 S.W.2d 837, 839 (1985) this Court placed squarely on the employer the burden of going forward with evidence to contest the reasonableness of medical bills it denied having an obligation to pay. The Court determined that an employer who wished to dispute a medical bill submitted by a disabled worker must, within a reasonable time, file a motion to reopen the award pursuant to KRS 342.125.

*Mitee Enterprises v. Yates*, 865 S.W.2d 654, 655 (Ky. 1993). The claimant, however, maintains the burden concerning questions relating to causation and whether a condition is work related. KRS 342.020; *Mitee, supra*. In order for the Board to reverse the ALJ's decision, there must be no evidence of substantial or probative value to support the ALJ's decision. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

The Board concluded that the ALJ's ruling regarding the above prescriptions was unsupported by the record. It concluded that when Continental filed its motion to amend the medical fee dispute to include the above prescriptions, it did not allege any grounds nor attach any medical evidence that supported its argument. We agree. In not setting forth whether the objection to the prescription was due to a lack of causation or whether it was reasonable or necessary for Wiseman's injury, we find Continental did not carry its burden of proof. The



Board, therefore, correctly found in Wiseman's favor on the issue of the prescription drugs.

Wiseman, in her counter-appeal, argues that the ALJ and the Board's affirmation of his decision, second guessed years of treatment and medication for consistent and constant pain from her injuries. Drs. Marshall, Loeb, Tutt and Snider provided support for the ALJ's decision that the need for a CT myelogram and surgery were not related to the work injury Wiseman had suffered. As set forth above, in order to reverse, we must find there was no substantial or evidence of probative value to support the ALJ's decision. "Substantial evidence" is considered evidence of a relevant consequence which induces conviction in the mind of a reasonable person. *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

The ALJ, as the fact-finder, has the sole authority to judge the quality, character and substance of the evidence presented to him. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). He also has the sole authority to accord the weight of the evidence presented. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329 (Ky. 1997). Given this standard and the evidence presented by the above physicians, we find the Board correctly affirmed the decision of the ALJ regarding the need for the CT myelogram scan and surgery. Specifically, Dr. Marshall opined that the scan was related to normal degeneration due to age and not Wiseman's work-related injury. Dr. Loeb found that there was no relationship

between Wiseman's current treatment and her work injury, thus, the surgery would not be related. Dr. Snider agreed with this assessment.

For the foregoing reasons, we affirm the decision of the Board.

KELLER JUDGE, CONCURS.

ISAAC, SENIOR JUDGE, CONCURS IN PART AND DISSENTS  
IN PART.

ISAAC, SENIOR JUDGE, CONCURRING IN PART AND  
DISSENTING IN PART. I concur with the majority in affirming the decision of the Board in upholding that portion of the ALJ's opinion finding the need for a CT myelogram and surgery were not related to the work injury that Wiseman had suffered. However, I respectfully dissent with that part of the majority's opinion which affirms the Board's reversal of the ALJ opinion that the need for certain medications was not causally related to Wiseman's work injury.

In a post-settlement medical fee dispute, the plaintiff retains the burden of proof and risk of non-persuasion in respect to the causation of post settlement medical care. Certainly, if Wiseman's current complaints of pain are not causally connected to her work injury, as opined by various physician-witnesses, it would reasonably follow that the present need for pain medications is also not causally related to the work injury. The ALJ concluded that the plaintiff (Wiseman) had not met her burden of proving causation of her current complaints to work injuries occurring in 1985 and 1988. He found that the need for prescriptions of Lyrica, Fentanyl and Endocet were unrelated to Wiseman's

original work-related injuries. There was more than ample evidence of record to support that conclusion by the ALJ. I would reverse the Board in part and reinstate the ALJ's original opinion.

BRIEFS FOR APPELLANT/CROSS-  
APPELLEE:

George T.T. Kitchen, III  
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-  
APPALLANT:

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