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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-1004-WC

UNIVERSITY OF LOUISVILLE /
AMERICAN INTERSTATE INSURANCE COMPANY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-59022

SHELLEY MATZ; DR. MARCO ARAUJO;
HON. DOUGLAS GOTT, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, MOORE, AND TAYLOR, JUDGES.

MOORE, JUDGE: This is an appeal by the University of Louisville/American Interstate Insurance Company from an Opinion of the Workers' Compensation Board. On review, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Shelly Matz, a medical assistant and employee of the University of Louisville, was injured at work when an autistic child ran into a door, knocking the doorknob into Matz's head. As a result, she developed low back and right leg pain and numbness. The Administrative Law Judge (ALJ) found Matz to be totally occupationally disabled and ordered reasonable and necessary medical expenses.

Subsequently, American Interstate Insurance Company, the University of Louisville's insurance carrier, both referred to herein as the University of Louisville, filed a medical fee dispute alleging that it was not responsible for Matz's medical treatment proposed by Dr. Marco Araujo, a pain management specialist. Dr. Araujo recommended a series of transforaminal epidural injections, a psychological evaluation to determine if she was a candidate for the implantation of a spinal cord stimulator, a spinal cord stimulator, and referral to a psychiatrist for treatment. Under Dr. Araujo's care, Matz was prescribed Fentanyl and MS-Contin, among other medications.

Through an Opinion and Order, the ALJ resolved the medical fee dispute. The ALJ decided the issue of transforaminal epidural injections in favor of the University of Louisville, relying on Dr. Marvin Chang's statement that further injections would not be appropriate because they had not been successful in the past. With regard to the psychological evaluation, the ALJ determined that "[n]otwithstanding the approval or disapproval of the spinal cord stimulator itself, the Employer should be responsible for the evaluation that has been performed

because it was recommended by the UR physician." Finding the combined testimony of Dr. Lawrence Frazin and Dr. Brad Grunert persuasive, the ALJ determined that the spinal cord stimulator was not reasonable or necessary. Finally, the ALJ found that the University of Louisville would be liable for continued psychiatric treatment because the work-related injury was at least partially attributable to her mental health issues.

In addition to the ALJ's determinations outlined above, the ALJ also made a finding concerning medication management. Dr. Frazin gave testimony in his deposition pertaining to the medications Matz was currently prescribed. Although he found the Fentanyl and MS-Contin to be appropriate, Dr. Frazin recommended "consideration be given" for Matz to be put on Methadone rather than the combination of Fentanyl and MS-Contin. From this testimony, the ALJ ordered that the University of Louisville be responsible for Methadone as treatment of Matz's physical symptoms, relieving the employer of liability for Fentanyl and MS-Contin.

Matz filed a Petition for Reconsideration, and the University of Louisville filed a response. The ALJ overruled Matz's petition, and Matz appealed to the Workers' Compensation Board. Matz asserted that (i) the ALJ erred as a matter of law in his finding that Matz was limited to Methadone because her medications were not at issue, (ii) even if the ALJ had authority to decide the issue of medication, there was not substantial evidence to support denial of her present pain management, and (iii) the ALJ erred in finding that the injections and the spinal

cord stimulator were not reasonable and necessary at the present time and in the future.

The Board vacated the ALJ's decision requiring the prescription of Methadone rather than Fentanyl and MS-Contin and affirmed the ALJ regarding the current necessity and reasonableness of the injections and spinal cord stimulator. However, the Board remanded the case to the ALJ for clarifications pertaining to the reasonableness and necessity of injections and a spinal cord stimulator in the future. Although the Board found that "[t]here is no language in the order which indicates the employer is relieved prospectively of the responsibility for payment of epidural injections or [sic] spinal cord stimulator should they be recommended at a later date." The ALJ, "out of an abundance of precaution," was directed to

> clarify his order to reflect that his ruling only pertains to the reasonableness and necessity of the currently recommended transforaminal epidural injections and implantation of the spinal cord stimulator which is the subject matter of this medical fee dispute.
>
> At some point in time, if Matz's doctors again recommend one or both of those treatment modalities, then at that time a medical fee dispute may be filed to determine the reasonableness and necessity of either one or both of those procedures. Certainly facts may develop after resolution of this dispute which may necessitate revisiting the necessity and reasonableness of these treatment modalities.

On appeal, the University of Louisville asserts that the issue of medication management was properly before the ALJ for consideration, there is substantial

evidence in the record to support the ALJ's determination that the University of Louisville is liable for Methadone only, and the Board cannot substitute its judgment for that of the ALJ on the issue of permanently prohibiting liability for epidural injections and a spinal cord stimulator.

II. STANDARD OF REVIEW

In order to reverse the decision of the ALJ, it must be shown that there was no substantial evidence of probative value to support his decision. *See Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). Substantial evidence is evidence of relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

When reviewing the Board's decisions, the Court of Appeals will reverse only when the Board has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that its decision has resulted in a gross injustice. *Butler's Fleet Service v. Martin*, 173 S.W.3d 628, 631 (Ky. App. 2005) (citing *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky. App. 2004)); *Daniel v. Armco Steel Company*, 913 S.W.2d 797, 798 (Ky. App. 1995); *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). To properly review the Board's decision, we must ultimately consider the ALJ's underlying decision. The burden of persuasion is on the claimant to prove every element of a workers' compensation claim. *Wolf Creek Collieries*, 673 S.W.2d at 736. The ALJ, as fact-finder, has sole discretion to determine the quality, character, and substance of the

evidence. *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999) (citing *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1987)); *see also Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). Not only does the ALJ weigh the evidence, he may also choose to believe or disbelieve any part of the evidence, regardless of its source. *Whittaker*, 998 S.W.2d at 481 (citing *Caudill v. Malony's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977)). We may not substitute our judgment for that of the ALJ. *Wolf Creek Collieries*, 673 S.W.2d at 736.

III. ANALYSIS

A. MEDICATION MANAGEMENT

1. ISSUE NOT BEFORE THE ALJ FOR CONSIDERATION

The employer argues that the Board committed error when it found that the medical fee dispute did not involve the issue of medication management. The Board agreed with Matz that the issue was not properly before the ALJ for consideration and, even if the issue was before the ALJ, there was not substantial evidence to support the ALJ's determination that the University of Louisville would be liable for Methadone rather than Fentanyl and MS-Contin.

The University of Louisville does not deny that the issue of medication management was not listed as a contested issue on the Form 112. However, the University claims that it is listed as an issue on the BRC Order and Memorandum. In its appellate brief, the University of Louisville writes:

> On the BRC Order and Memorandum the contested issue is listed by the ALJ as follows: "This is a reopening

> initiated by the D/E over the compensability of treatment recommended by Dr. Araujo." Underneath the word "treatment", the ALJ also wrote the words "spinal cord stimulator, epidural injections." The ALJ certainly did not think that he was restricted from addressing the issue of medication management by the way the contested issues were listed otherwise he would not have made findings on this issue.

The University of Louisville goes on to argue that the ALJ has the discretion to conclude whether a contested issue has been tried by consent of the parties. It is the employer's position that the "ALJ thought that medication management was an open and obvious issue litigated by the parties otherwise he would not have made any findings of fact."

Matz points out that the Benefit Review Conference (BRC) Order and Memorandum signed by both parties lists only the epidural injections and spinal cord stimulator as contested issues. Further, the ALJ noted the issues before him in his Statement of the Case. "[The University of Louisville] filed the motion to reopen . . . challenging the following treatment recommended by [Matz's] pain management physician, Dr. Marco Araujo: transforaminal epidural injections . . . ; psychological evaluation for spinal cord stimulator candidacy; spinal cord stimulator; and referral to a psychiatrist for treatment."

Matz cites to 803 KAR[1] 25:010 §13 in support of her argument that the ALJ improperly addressed an issue which was not identified, was not litigated, and was not before the ALJ. The applicable portion of 803 KAR 25:010 §13, outlining the procedure for adjustment of claims, reads:

[1] Kentucky Administrative Regulations.

> (13) If at the conclusion of the benefit review conference the parties have not reached agreement on all the issues, the administrative law judge shall:
>
> > (a) Prepare a summary stipulation of all contested and uncontested issues which shall be signed by representatives of the parties and by the administrative law judge; and
> >
> > (b) Schedule a final hearing.
>
> (14) Only contested issues shall be the subject of further proceedings.

In response to the employer's assertion that the ALJ has discretion to conclude whether a contested issue has been tried by the consent of the parties, Matz argues that the ALJ made no findings regarding whether the issue of medication management had been raised during the course of litigation. "There is no support for [the University of Louisville's] argument ALJ Gott found the issue of future medication had been tried by consent of the parties."

The Board agreed with Matz. In its Opinion, the Board determined that the record clearly reflects the medical fee dispute did not relate to the medication Matz was currently taking for her physical symptoms.

We find that the Board did not overlook or misconstrue controlling law or so flagrantly err such that its decision has resulted in a gross injustice. Therefore, we affirm the Board's finding that the issue of medication management was not before the ALJ for consideration.

2. NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Although our affirmation of the Board's Opinion that the issue of medication management was not before the ALJ would foreclose further argument that the determination of liability for Methadone was valid, we will address the employer's claim that substantial evidence did support the ALJ's finding that "Methadone is preferable to a combination of other narcotics being prescribed."

The University of Louisville correctly states that it has the burden of showing that the proposed medical treatment it is contesting is not reasonable, necessary, or productive. *National Pizza Co., v. Curry*, 802 S.W.2d 949, 951 (Ky. App. 1991). The employer points to Dr. Frazin's testimony to support its assertion that the use of Fentanyl and MS-Contin are unreasonable and unnecessary. In its appellate brief, the University of Louisville writes:

> The Board also stated that Dr. Frazin did not testify that MS-Contin and Fentanyl were unreasonable and unnecessary. No, he did not testify to this fact but he did testify that Methadone, health-wise for the respondent is more reasonable and productive but how can drug dependency, overdose, respiratory depression and possible death be considered reasonable and productive?

Applicable portions of Dr. Frazin's testimony are as follows:

> The medications she is presently taking, Fentanyl and MS Contin, would be appropriate and secondary to the work injury.
>
> . . . .
>
> It would be my recommendation that consideration be given to having Ms. Matz put on Methadone instead of the combination of Fentanyl and MS Contin. The

> Methadone would represent only one drug. It would decrease the possibility of overdose from mixing medications.

The Board found there was not substantial evidence to support a determination that MS-Contin and Fentanyl were not medically necessary or reasonable for the treatment of Matz's physical injuries. The Board opined:

> It was merely [Dr. Frazin's] suggestion or recommendation that Matz's doctor consider using one prescription, Methadone, instead of two. Clearly, Dr. Frazin did not state MS-Contin and Fentanyl were unreasonable and unnecessary for the treatment of Matz's physical injuries. Accordingly the decision of the ALJ requiring Matz to discontinue the use of MS-Contin and Fentanyl and begin taking Methadone is erroneous as a matter of law and must be vacated.

Because the Board's finding does conform to the law and does not result in gross injustice, we affirm.

B. **PROSPECTIVE LIABILITY FOR EPIDURAL INJECTIONS AND A SPINAL CORD STIMULATOR**

In his opinion, the ALJ indicated that two experts "suggested further epidural injections would not be appropriate because [the injections] had not been successful previously." The ALJ concluded that "[t]he issue of further injections will be resolved in favor of [the employer]." In the same section, the ALJ found the combined opinions of experts persuasive in determining "that a spinal cord stimulator is not reasonable or necessary in this case."

The Board pointed to the ALJ's language written above and concluded, contrary to the employer's argument, that the ALJ's Opinion did not extend so far as to permanently relieve the employer of payment for any future treatment of Matz's injuries with the epidural injections or spinal cord stimulator. The Board found the use of such language is without effect in light of contrary language in the ALJ's Findings and Conclusions section as well as his Order establishing that the ALJ's ruling only addressed the currently proposed epidural injections and spinal cord stimulator. "There is no language in the order which indicates the employer is relieved prospectively of the responsibility for payment of epidural injections or [sic] spinal cord stimulator should they be recommended at a later date."

The Board remanded this case to the ALJ, directing him to clarify his Order to reflect that his ruling only pertains to the reasonableness and necessity of the currently recommended epidural injections and spinal cord stimulator. If Matz's doctors again recommend one or both of these treatments, the Board determined that a medical fee dispute may then be filed to determine the reasonableness and necessity of either one or both of those procedures. "Certainly facts may develop after resolution of this dispute which may necessitate revisiting the necessity and reasonableness of these treatment modalities."

The University of Louisville first asserts that the Board substituted its judgment for that of the ALJ. Secondly, the employer claims that the ALJ can limit prospective treatment. In support of its argument, the University of

Louisville cites this Court to two cases[2] that allegedly support its proposition that the ALJ has discretion to order that an employer is absolved of liability for future medical care. "These cases are cited for the proposition that an ALJ can limit future care, even when a person is deemed to have sustained a compensable injury." The employer points out that these cases involve the limitation of either future medical care for "a temporary exacerbation" of a prior condition which has stabilized or future care of an injury which has healed.

These cases are distinguishable from the case *sub judice*. In this case, Matz's condition still requires active treatment for relief of her symptoms. Because the injury still exists, circumstances could certainly change that would require alterations in her treatment plan.

Kentucky Revised Statute (KRS) 342.020(1) entitles a worker to reasonable and necessary medical treatment at the time of the injury and thereafter during disability. A finding that a work-related injury produces a permanent impairment rating, which was present in this case, compels a finding that the worker is entitled to an award of future medical benefits. *See FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007). In the event that a post-award medical expense is unreasonable, unnecessary, or unrelated to the compensable injury, *Mitee Enterprises v. Yates*, 865 S.W.2d 654 (Ky. 1993) and *National Pizza Company* permit the employer to reopen and contest it. KRS 342.125(l)(d) specifically allows a "reopening and review" upon a "[c]hange of disability as shown by

[2] *Greene v. Paschall Truck Lines*, 239 S.W.3d 94 (Ky. App. 2007); *Robertson v. United Parcel Service*, 64 S.W.3d 284 (Ky. 2001).

objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order."

Our case law and statutes clearly provide the employer an opportunity to contest the reasonableness and necessity of epidural injections and a spinal cord stimulator in the future, should Matz's doctors recommend those procedures at a later date. The ALJ found those two treatments to be unreasonable and unnecessary at the present time, and the Board agreed. Pursuant to the Board's determination, the ALJ did not make a finding as to future liability for those treatments. The ALJ will be able to make findings at a later date if facts develop that necessitate revisiting the necessity and reasonableness of these treatment modalities. The Board has not overlooked or misconstrued controlling law. Neither has the Board so flagrantly erred in evaluating the evidence that its decision has resulted in a gross injustice. Therefore, the Workers' Compensation Board is affirmed.

IV. CONCLUSION

This Court being otherwise duly advised, the Opinion of the Workers' Compensation Board is hereby AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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