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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-000438-WC

UNIVERSITY OF KENTUCKY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-84274

SUE ANN ANDERSON;
DR. ROBERT NICKERSON;
HONORABLE CHRISTINA
HAJJAR, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND K. THOMPSON, JUDGES.

MAZE, JUDGE: The University of Kentucky appeals from an opinion of the Workers' Compensation Board affirming an order holding that right-side trigger point injections were reasonable, necessary, and related to a work-related injury for

which the University is responsible for payment. Finding no error in the decision of the Board, we affirm.

While lifting a heavy patient in the course of her employment with the University Medical Center, Anderson sustained a 1999 work-related C5-C6 spinal injury ultimately requiring fusion surgery to relieve her left shoulder and arm pain. Anderson was subsequently awarded temporary total and permanent partial disability benefits based upon a finding that she had sustained a herniated disc at C5-C6 which first manifested as shoulder pain. In addition to those benefits, the University was ordered to pay medical benefits "related to the surgical procedure and other work-related medical expenses." In 2006, Anderson's fall from an exercise ball resulted in a fusion surgery at C6-C7. Anderson stated in her deposition relative to this claim that she was a Medicare recipient at the time of that surgery. It is undisputed that that surgery was not submitted to or paid for under her compensation award with the University, despite her deposition testimony that she considered all of her treatment with Dr. Robert Nickerson as related to her 1999 injury. In 2019, while still under the care of Dr. Nickerson, Anderson sought payment for trigger point injections in the *right* lower trapezius muscle. In response, the University filed a Form 112 Medical Dispute and motion to reopen disputing the reasonableness, necessity, and work-relation of the trigger point injections, as well as the work-relation of continued treatment for diagnoses

of cervical failed back syndrome and myofascial syndrome. Relying upon the report of Dr. Nickerson, the ALJ determined that the injections were reasonable, necessary, and compensable under her finding that the cervical failed back syndrome and myofascial syndrome were related to Anderson's work injury.

In its appeal to the Board, the University challenged as clearly erroneous the ALJ's findings regarding the compensability of the right-side trigger point injections and work-relation of the cervical failed back and myofascial syndromes. Citing *National Pizza Company v. Curry*, 802 S.W.2d 949 (Ky. App. 1991), the Board noted that in a post-award medical fee dispute, the employer bears the burden of establishing that the requested treatment is not reasonable or necessary, while the claimant maintains the burden of proving that the contested treatment is causally related to the work injury. Because the Board concluded that substantial evidence supported the ALJ's decision, it affirmed her decision that the trigger point injections were compensable. This appeal followed. Additional facts will be developed as necessary to an understanding of our opinion.

We commence with a reiteration of the well-established standard by which this Court reviews opinions of the Workers' Compensation Board:

> The function of further review of the WCB in the Court of Appeals is to correct the Board **only** where [the] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, **or committed an error in assessing the evidence so flagrant as to cause gross injustice.**

W. Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992) (emphasis added). Further, as the Board correctly noted, in post-award medical fee disputes the burden of proving whether a proposed medical treatment is unreasonable or unnecessary falls upon the employer. *See* Kentucky Revised Statutes (KRS) 342.020(1); *Mitee Enterprises v. Yates*, 865 S.W.2d 654 (Ky. 1993); and *National Pizza, supra*. Because the University failed to meet its burden of establishing that Anderson's trigger point injections were unreasonable and unnecessary, the sole issue on appeal is whether the evidence before the ALJ "was so strong as to reasonably compel a finding" in the University's favor. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Thus, we focus our review on the substance of the evidence before the ALJ.

The University insists in this appeal that because it submitted evidence establishing that the cervical failed back and myofascial syndromes resulted from an intervening injury at C6-C7 completely unrelated to the work-related injury at C5-C6, there was no substantial evidence supporting the decision of the ALJ. Again, in order to prevail on its contention, the University must demonstrate that the Board "committed an error in assessing the evidence so flagrant as to cause gross injustice." Our review of the evidence in this appeal discloses no such error.

As thoroughly articulated in the Board's opinion, there was ample evidence supporting the ALJ's decision to rely on the testimony of Dr. Nickerson rather than the medical evidence offered by the University. Despite the University's claim to the contrary, the Board cited evidence indicating that in a March 22, 2000 letter to Dr. Debbie Fibel, Dr. Phillip Tibbs noted some myofascial pain in Anderson's cervical spine. In addition, there was evidence that Anderson's C6-C7 herniation was shown on an MRI in early 2004. While the Board acknowledged that there was no direct indication in the record as to the source of the C6-C7 herniation, evidence of that herniation manifested at least two years prior to the exercise ball incident the University cites as the cause of the failed cervical syndrome and myofascial pain.

In addition, the Board extensively reviewed the evidence provided by Dr. Nickerson, who has treated Anderson's cervical spine condition for more than fifteen years. Concerning the fall from the exercise ball, which the University claims is the intervening injury and the source of her right-side complaints, Dr. Nickerson's notes indicate that it increased her pain on the *left* side. Thus, the Board concluded that Dr. Nickerson was well-aware of the timing and circumstances surrounding Anderson's C6-C7 herniation, the resulting fusion surgery, the back infection which ensued from that surgery, her numerous falls, and the role of foot drop in those falls, yet nevertheless continued to relate her

current complaints to the original compensable injury. Because the Board determined that the ALJ clearly explained her rationale for finding Dr. Nickerson's testimony more credible than that offered by the University's experts, it found no error in the ALJ's conclusion that Dr. Nickerson was in the best position to determine causation in relation to the need for the contested treatment.

We are convinced that the Board's conclusion fully comports with our Supreme Court's instruction as to the role of the ALJ is assessing expert testimony:

> It is well-settled that the ALJ, as fact-finder, has the "sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). And "[**w]here . . . the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ**." *Id.*

Kingery v. Sumitomo Electric Wiring, 481 S.W.3d 492, 496 (Ky. 2015) (emphasis added). Certainly, the record in this case is such that we cannot say the evidence compelled a finding for the University on its claim that the trigger point injections were unreasonable and unnecessary or that there was no substantial evidence to support the finding that Anderson's current complaints stem from the original work-related injury. Accordingly, we find ourselves in total agreement with the Board's analysis and conclusions.

Furthermore, we find no merit to the University's contention that the ALJ impermissibly shifted the burden of proving causation. The University's claim

centers on the ALJ's statement in her findings that "[a]lthough the second surgery [at C6-C7] may not have been paid for by workers compensation, there was no prior dispute or finding that the surgery was unrelated." We agree with the Board that the statement is merely an observation, not an attempt to shift the burden of proving causation to the University. The ALJ specifically noted that Anderson had the burden of establishing that the complaints for which she was seeking treatment were work-related. We are thus convinced that this isolated statement in no way diminishes the reliance the ALJ placed on Dr. Nickerson's opinion or the fact that his opinion fully supports her finding as to work-relation.

Finally, we concur in the Board's assessment that Anderson's testimony before the ALJ does not constitute a judicial admission as to causation. Despite her testimony that, at a time when she was covered by Medicaid, she did not submit the bills for the C6-C7 surgery to the University, it is clear that her testimony cannot be construed as an admission as to causation. Not only did the Board correctly conclude that Anderson's testimony cannot be construed as offering an opinion as to causation, it also correctly concluded that she was not qualified to do so.

In sum, the Board's opinion falls squarely within the rationale set out by this Court in *Addington Resources, Inc. v. Perkins*:

> The applicable rule has been referred to as the direct and natural consequence rule and is explained in

> Larson, *Workmen's Compensation Law* § 13.11 (1996), as follows: "The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury." *See also Dutton v. Industrial Commission of Arizona*, 140 Ariz. 448, 682 P.2d 453 (Ct. App. 1984); and *Beech Creek Coal Co. v. Cox*, Ky., 314 Ky. 743, 237 S.W.2d 56 (1951). Thus, even though the subsequent injury was to a different part of the back and followed a non-work-related incident, **the medical expenses arising therefrom are compensable since the work-related injury caused the part of the back that was subsequently injured to be more susceptible to injury**.

947 S.W.2d 421, 423 (Ky. App. 1997) (emphasis added). Because we are fully convinced that the Board correctly viewed the testimony of Dr. Nickerson in this light, we have no basis for concluding that it "committed an error in assessing the evidence so flagrant as to cause gross injustice." Accordingly, the Board's decision in this appeal is hereby affirmed.

ALL CONCUR.

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