IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 25, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000044-WC

RAYMOND O. POYNTER — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-000985-WC
WORKERS' COMPENSATION NO. 97-79559

BARREN-METCALFE AMBULANCE SERVICE;
HONORABLE CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD;
DR. MICHAEL CASSARO;
DR. AMELIA KISER; AND
THE LASER SPINE INSTITUTE — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This post-settlement medical dispute arose over the compensability of treatment provided and proposed by the claimant's physicians. The Workers' Compensation Board affirmed an Administrative Law Judge's (ALJ's) decision that the treatment was reasonable and necessary to date but that only the course of treatment recommended by the university evaluator would be reasonable and necessary in the future. A divided Court of Appeals affirmed.

Appealing, the claimant asserts that the ALJ misconstrued KRS 342.020 and found the treatment his physicians provided to be non-compensable

simply because the university evaluator preferred different treatment. He also asserts that the ALJ erred by failing to give presumptive weight to the university evaluator's opinion that the present course of treatment was reasonable and that the ALJ acted arbitrarily by requiring him to undergo surgery to implant a morphine pump.

We affirm. The ALJ did not misconstrue KRS 342.020; misapply KRS 342.315(2); or order the treatment program arbitrarily. When considered as a whole, the university evaluator's testimony supported the conclusion that the present doses of narcotic pain medication would do more harm than good if continued. It also supported the conclusion that the recommended inpatient detoxification program followed by the surgical implantation of a morphine pump constituted reasonably necessary future medical treatment. The decision to order the program was permitted by KRS 342.020 and consistent with the evaluator's testimony.

The claimant, a paramedic, sustained a work-related low back injury while lifting a patient on June 20, 1997. As approved in January 2000, the parties' settlement agreement indicates that the claimant underwent a diskectomy at L5-S1 as well as fusions at L1-2 and L5-S1. It also indicates that he employer agreed to pay permanent total disability benefits and future medical expenses.

The claimant did not return to work. He underwent additional post-settlement lumbar surgeries and physicians tried various types of injections, medications, and therapies in an attempt to manage his chronic back pain.

Dr. Cassaro, who became his treating pain management specialist in 2004, implanted a spinal cord stimulator. The device reduced his pain but was removed due to an adverse reaction. Dr. Cassaro also prescribed radiofrequency nerve ablation and trigger point injections. The claimant's family physician, Dr. Kiser, prescribed various medications to treat the injury's effects. Some of his medications as of August 2008 included Avinza (oral morphine) and Hydrocodone for chronic pain, Lorazepam for anxiety related to pain, and Flexeril for muscle spasms.

The employer filed this medical fee dispute and reopening after Dr. Cassaro requested pre-certification for a series of six trigger point injections to be performed monthly beginning in June 2008. A peer review report from Dr. Livezey stated that the request was not medically necessary and appropriate and noted that the Official Disability Guidelines recommend at least a two-month interval between injections. They also indicate that repeat injections are not medically necessary unless previous injections provided greater than 50% pain relief with reduced medication use for at least six weeks and unless there is documented evidence of functional improvement. Dr. Livezey concluded that none of the proposed injections was medically necessary because the records submitted for review failed to indicate that the injections performed in May 2008 provided greater than 50% pain relief. The employer's insurance carrier issued a final notice of denial after Dr. Howard Rosen performed a subsequent peer review and reached the same conclusion.

The employer amended the dispute in order to contest the reasonableness and necessity of antidepressant medication as well as the prescribed dose of Avinza. The employer relied on a psychiatric evaluation by Dr. Granacher, who assigned a 20% permanent impairment rating based on a pain disorder and major depression due to the pain disorder but opined that antidepressants would not improve the claimant's mood without "a substantial correction of the painful back disorder." The employer also relied on a peer review report by Dr. Ackerman, who opined that the claimant would require lifelong opioid therapy and stated that Avinza was medically necessary and appropriate but that the prescribed dose was not. Convinced that the magnitude of the dose suggested the presence of opioid hyperalgesia, Dr. Ackerman recommended weaning the Avinza.

The ALJ ordered a university evaluation at the employer's request. As amended on January 9, 2008, the referral order requested the evaluator to determine the reasonableness and necessity of the trigger point injections recommended by Dr. Cassaro as well as the current dose of Avinza prescribed by Dr. Kiser. The order also requested an opinion concerning "what would constitute an appropriate treatment plan and, specifically, whether the dosage reduction trial being administered to Mr. Poynter by Dr. Amelia Kiser is reasonable."

Dr. Witt performed the university evaluation in February 2009. Statements in his report and deposition testimony characterized the claimant's case as being "extremely complicated" and "perhaps one of the more tragic

cases that I have reviewed." He noted that the claimant's back injury clearly was caused by the work-related accident. He stated that the repeated surgeries for chronic pain control represented "a case study in what does not work for the treatment of such an individual;" resulted in failed back surgery syndrome or post-laminectomy syndrome; and provided an unquestionable clinical basis for the claimant's severe pain.

Dr. Witt noted that the claimant rated his pain on the date of the evaluation at 6 to 7 on a 10-point scale and took four 120 mg. Avinza per day as well as four Hydrocodone 10/500. He stated that many studies "have documented the existence of opioid-induced hyperalgesia" and that "clearly this individual has manifestations of this problem." He explained that opioid-based medications tend to relieve pain to a certain extent but also produce neuroplasticity, which tends to lower the patient's pain threshold and aggravate the perception of pain. He opined that the claimant's "high dosages and long exposure" to opioids were also producing his hypogonadism and contributing to his depression, obesity, and sleep apnea. Moreover, the deprivation of delta brainwave sleep due to sleep apnea further aggravated his pain and interfered with healing.

Dr. Witt thought that the magnitude of the claimant's pathology would cause him to experience significant pain throughout his life and listed two treatment options, both of which he characterized as being "acceptable" and "reasonable." He thought there was nothing "particularly wrong" with continuing to maintain the claimant on opioid medications, so long as he

benefited and the dose was stable, or continuing the injections and radiofrequency ablations that had been shown to reduce his pain significantly. He explained that he considered such treatment to be reasonable if the physician and patient were satisfied with the results, but he did not recommend it because he found self-administered opioids not to be successful in his patients. He also stated that even if the claimant's present opioid dose was stable, it caused or contributed to his sleep apnea, hypogonadism, impotence, and depression. Dr. Witt opined that the present treatment option would afford no significant improvement in the claimant's quality of life. He would require testing and maintenance of his testosterone level; should lose weight; and should have his sleep apnea treated.

Dr. Witt strongly preferred the second option. He explained that significant data indicated the claimant would experience better pain control without opioids or with a very small dose administered directly to the spine via an intrathecal infusion pump. Such a dose would not interfere with his endocrine function or cause hyperalgesia and should allow him to function better, lose weight, and improve his sleep apnea. This option might or might not involve continued trigger point injections and radiofrequency nerve ablations. It would require the claimant to be weaned from all opioid medications for a period of at least six weeks.

Dr. Witt testified that the weaning process would be "very unpleasant and quite painful" and would require "real commitment from the patient." He stated that such a program would best be accomplished in an inpatient facility

that offers "a comprehensive inpatient treatment program which emphasizes behavioral and physical functioning in the context of chronic pain" as well as aggressive treatment of sleep apnea. He stated that no such program exists in Kentucky but recommended a program conducted in Birmingham, Alabama, which was the closest geographically and had a very good record of success.

Dr. Cassaro testified when deposed in July 2009 that he considered the medications prescribed by Dr. Kiser to be appropriate. He stated that an intrathecal infusion pump would replace the claimant's oral pain medications but would not address his nerve pain, entrapment neuropathies, muscle spasms, or muscle irritability. He stated that he had discussed such a pump with the claimant long before Dr. Witt evaluated him but that the claimant feared he would experience an immune reaction. Dr. Cassaro stated that the claimant had developed swelling and a rash after the spinal cord stimulator was implanted, which "disappeared within days" after it was removed. He stated that he considered the likelihood of such a reaction to be significant after determining that the pump's external components were nearly identical to those of the stimulator. Yet, he stated elsewhere in his deposition that there were several types of medication pumps and that he did not know which one would be used.

Dr. Cassaro's treatment records conflicted with his testimony. They indicated that he sought pre-authorization to remove the spinal cord stimulator on October 11, 2006 "to relieve ligament irritation caused by the pocket creation made to insert the stimulator" and that the claimant's pain could no

longer be controlled without explanting the device because the requested injections were denied. The operative report, dated October 26, 2006, stated that the stimulator was non-functional and "causing irritation to the supraspinous ligament which is increasing his baseline pain." Dr. Cassaro's February 2, 2007 treatment note indicates that the claimant's "continuous rash" and "GI problem" remained and that they discussed the claimant's diet as well as "the role that the Indocin may have played."[1]

The claimant testified that radiofrequency ablation provided 50% or greater pain relief for about a year and that the trigger point injections provided 40% to 50% relief for anywhere from three to six weeks, depending on his subsequent activity level. He stated that the employer's insurance carrier continued to pay for his Avinza and Hydrocodone but that he paid for the trigger point injections and antidepressants personally.

The claimant testified that his quality of life had improved significantly under the care of Drs. Cassaro and Kiser. He did not wish to undergo the implantation of an intrathecal infusion pump due to the risk of infection or an immune reaction.

As listed on the Benefit Review Conference Memorandum, the contested issues included the reasonableness and necessity of medications, radiofrequency ablations, facet nerve blocks, and continued treatment by Dr. Cassaro. The employer conceded in its brief that the claimant's back pain was

[1] Indocin, known generically as indomethacin, is a non-steroidal anti-inflammatory medication. Among its known side effects are nausea, rash, itching, and hives. http://www.nlm.nih.gov/medlineplus/druginfo/meds/a681027.html.

work-related but argued that to expect it to pay for pain management by Dr. Cassaro as well as for "incredible amounts" of opioid-based pain medication was unreasonable, particularly in light of Dr. Witt's opinion that the medication caused additional physical difficulties. The employer requested the ALJ to order the claimant to undergo the treatment recommended by Dr. Witt.

After acknowledging that Dr. Witt characterized the opinions of Drs. Cassaro and Kiser concerning the claimant's treatment as being reasonable, the ALJ noted that KRS 342.315 affords presumptive weight to a university evaluator's clinical findings and opinions but does not require the evaluator to state that no other opinion is reasonable. The ALJ interpreted the whole of Dr. Witt's testimony as expressing clear opinions "that the level of pain medications and treatment the Plaintiff is receiving is not reasonable and necessary;" "that the treatment is, in his opinion, actually harmful, not helpful;" and that the recommended in-patient detoxification program followed by the implantation of a morphine pump constituted reasonable medical treatment at the present time.

Addressing Dr. Witt's recommendations, the ALJ acknowledged his testimony that an individual should not be forced to undergo detoxification; the claimant's testimony that he does not wish to undergo the procedure or the implantation of a morphine pump; as well as Dr. Witt's testimony that the claimant should be continued on his present treatment regimen if he does not undergo detoxification. Noting, however, that the claimant's need for pain management had increased over the years without a change in his physical

condition, the ALJ found that "the unnecessary doses of narcotics are doing more harm than good." Having found the claimant's past medical treatment to have been reasonable and necessary for the effects of his injury, the ALJ ordered the employer to pay for all medical treatment provided to date as well as for all pain and antidepressant medication during the pendency of any appeal. Finding, however, that Dr. Witt's future treatment recommendations were "the most accurate and . . . in the best interests of the Plaintiff," the ALJ ordered that "the treatment program recommended by the University Evaluator shall be followed."

The claimant's petition for reconsideration relied on Dr. Witt's testimony that the current treatment regimen was reasonable to assert that a refusal to have a pain pump implanted was not unreasonable.[2] He also argued that KRS 342.020 entitles an injured worker to select his own medical provider and, when the selection is reasonable, does not permit an ALJ to require the worker to submit to another physician's treatment preference simply because that physician is a university evaluator. The ALJ denied the petition, however, convinced that Dr. Witt did not consider the present treatment to be reasonable and necessary within the meaning of Chapter 342 and that there was no reason to reject his opinion. Appealing, the claimant asserted that the ALJ misconstrued KRS 342.020; failed to give presumptive weight to Dr. Witt's opinion that the contested treatment was reasonable; and ordered him to undergo surgery arbitrarily.

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[2] *See Bethlehem Mines Corp. v. Hall*, 379 S.W.2d 58 (Ky. 1964).

I. STANDARD OF REVIEW.

KRS 342.285 designates the ALJ as the finder of fact, whose decision is "conclusive and binding as to all questions of fact." KRS 342.285 gives the ALJ the sole discretion to determine the quality, character, and substance of evidence.[3] An ALJ 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 party's total proof.[4] KRS 342.285(2) and KRS 342.290 limit administrative and judicial review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers;"[5] whether the decision "was procured by fraud;"[6] or whether the decision was erroneous as a matter of law.[7] Legal errors would include whether the ALJ misapplied Chapter 342 to the facts; made a clearly erroneous finding of fact; rendered an arbitrary or capricious decision; or committed an abuse of discretion.

As construed by the courts, KRS 342.285 requires a party who appeals a finding that favors the party with the burden of proof to show that no substantial evidence supported the finding, *i.e.*, that the finding was

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[3] *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

[4] *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

[5] KRS 342.285(2)(a).

[6] KRS 342.285(2)(b).

[7] KRS 342.285(2)(c), (d), and (e). *See also American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Commission*, 379 S.W.2d 450, 457 (Ky. 1964).

unreasonable under the evidence.[8] A party who fails to meet its burden of proof before the ALJ must show that the unfavorable finding was clearly erroneous because overwhelming favorable evidence compelled a favorable finding, *i.e.*, no reasonable person could have failed to be persuaded by the favorable evidence.[9] Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal.[10]

II. KRS 342.020.

The ALJ found that the treatment contested by the employer addressed a lumbar condition resulting from the claimant's work-related injury, which placed the burden to prove that the treatment was not compensable on the employer. An employer's dissatisfaction with an injured worker's choice of physicians or with the cost, duration, or choice of treatment is not a proper basis for challenging the compensability of medical treatment. KRS 342.020(1) requires the employer to pay for such medical treatment "as may reasonably be required" for the cure or relief of a work-related injury and its effects.[11]

Although KRS 342.020(1) gives the injured worker great latitude in selecting a treating physician and in choosing a course of medical treatment, the worker's choice is not unfettered. Not only does KRS 342.020(3) permit an employer to provide medical benefits through a managed care system, KRS

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[8] *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986); *Mosley v. Ford Motor Co.*, 968 S.W.2d 675 (Ky. App. 1998); *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985).

[9] *Id.*

[10] *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974).

[11] *See National Pizza Co. v. Curry*, 802 S.W.2d 949 (Ky App. 1991).

342.020(7) provides that an employer is not required to pay for treatment that substantially delays the worker's recovery; that fails to provide "reasonable benefit;" or that would substantially prejudice the employer in workers' compensation proceedings.

The ALJ did not misinterpret KRS 342.020 by concluding that future medical treatment must conform to Dr. Witt's recommendation. Exercising a fact-finder's authority to interpret and draw reasonable inferences from the medical evidence and to choose the evidence upon which to rely, the ALJ found the opinions of Dr. Witt to be "most accurate." The ALJ interpreted the whole of his testimony to imply that continued use of the present doses of narcotic pain medication would do more harm than good. Thus, the ALJ concluded that they would be neither reasonable nor necessary within the meaning of KRS 342.020 and found the program for detoxification and pain control recommended by Dr. Witt to be reasonable and necessary future medical treatment. The findings were consistent with KRS 342.020 and based on substantial evidence.[12]

III. KRS 342.315(2).

KRS 342.315(2) affords a university evaluator's clinical findings and opinions "presumptive weight" and places the burden to overcome such findings and opinions on the party who opposes them. The statute creates a rebuttable presumption, the procedural effect of which is governed by KRE

[12] *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

301.[13] It views the clinical findings and opinions of a university evaluator as being substantial evidence that the ALJ may not disregard unless rebutted, but it does not restrict the ALJ's authority to interpret or draw reasonable inferences from the evidence or to weigh conflicting evidence.[14]

Although KRS 342.315(2) required the ALJ to give presumptive weight to Dr. Witt's opinions, it did not require the ALJ to conclude from his testimony that the treatment Drs. Cassaro and Kline recommended presently would be reasonable in the future. Dr. Witt opined clearly that the claimant's injury would probably require him to take pain medication for the rest of his life. Reluctant to criticize a course of treatment with which a patient and his physicians were satisfied, he stated that the claimant's present treatment was a reasonable option but that he would not treat a patient in the same manner. He explained that the present doses of opioids caused the claimant to suffer from opioid-induced hyperalgesia, hypogonadism, depression, obesity, and sleep apnea, all of which contributed to the amount of pain he experienced. Dr. Witt recommended a course of treatment that would, in his opinion, provide greater pain control without the harmful side effects.

The ALJ provided an adequate explanation and acted within the authority granted by KRS 342.315(2) when interpreting Dr. Witt's testimony to mean that reasonable physicians might differ concerning the claimant's treatment but that, in his opinion, the present treatment would do more harm

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[13] *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 95 (Ky. 2000).

[14] *Id. at 96-97.*

than good if continued. When considered as a whole, Dr. Witt's opinions supported the ALJ's legal conclusions that to continue the present treatment program would be unreasonable within the meaning of KRS 342.020; whereas, the recommended program would be reasonable.

III. KRS 342.285(2)(e).

KRS 342.285(2)(e) permits an ALJ's decision to be reversed if it is "arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion." The claimant maintains that the ALJ's decision to order him to enter a detoxification program and undergo the implantation of an intrathecal morphine pump warrants reversal based on Dr. Witt's testimony that his present treatment was reasonable and on his previous allergic reaction to the spinal cord stimulator. Relying on Dr. Cassaro's testimony that the pump was manufactured from the same material as the stimulator, he argues that his refusal to undergo an additional surgery to implant the device is not unreasonable and that KRS 342.020 entitles him to choose from the two reasonable treatment options in evidence. We disagree.

KRS 342.020(7) permits an ALJ to allow the employer to select a treating physician when improper medical treatment substantially affects or delays the worker's recovery or when the medical treatment received fails to provide "reasonable benefit" or would prejudice the employer in a workers' compensation proceeding. No finding under KRS 342.035(3) is at issue presently, but it is instructive. KRS 342.035(3) prohibits compensation to the extent that a worker's disability "is aggravated, caused, or continued, by an

unreasonable failure to submit to or follow" competent medical treatment or advice.

The ALJ's decision concerning the claimant's future medical treatment was authorized by Chapter 342; reasonable under the evidence; and neither arbitrary nor capricious. Dr. Witt's testimony indicated that a patient's ultimate need for pain medication and pain management procedures such as injections remains unknown until after the individual has undergone detoxification. Relying on his experience as well as studies that showed very small doses of opioid medication administered directly to the spine via a pump to be highly effective, he opined that the treatment would provide the claimant with greater pain control without the harmful side effects of the present dose. He acknowledged that the detoxification program he recommended would be difficult, unpleasant, and require the claimant's commitment, but nothing indicated that the program or the implantation of a morphine pump would present a risk to the claimant's life or health any greater than the risks of continuing his present treatment. Moreover, nothing indicated that the implantation of a morphine pump would involve major surgery[15] and Dr. Cassaro's records conflicted with his testimony that the claimant experienced an immune reaction to the spinal cord stimulator.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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[15] *See Hefley v. E. I. duPont de Nemours & Company*, 424 S.W.2d 396 (Ky. 1968).

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