

APPENDIX F

TOWN TALK MANUFACTURING V. RAMONA LUCAS

Commonwealth of Kentucky
Workers' Compensation Board

OPINION RENDERED: May 9, 1997

CLAIM NO. 96-04259

TOWN TALK MANUFACTURING

PETITIONER

VS.

**APPEAL FROM HON. W. BRUCE COWDEN, JR.
ADMINISTRATIVE LAW JUDGE**

RAMONA LUCAS,
and HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

AFFIRMING

* * * * *

BEFORE: ABELL, Chairman, GREATHOUSE and LOVAN, Board Members

ABELL, CHAIRMAN. Petitioner, Town Talk Manufacturing ("Town Talk"), appeals from an opinion and order rendered by the Hon. W. Bruce Cowden Jr., Administrative Law Judge ("ALJ"), finding it liable for expenses related to carpal tunnel surgery for the respondent, Ramona Lucas ("Lucas"). On appeal, Town Talk argues that the ALJ erred in relying upon the opinion of Dr. Kincaid rather than those of Drs. Kasdan and Harter and that the ALJ erred in ignoring the findings made under Town Talk's carriers' utilization review.

Lucas began working for Town Talk in 1994 as a seamstress, making bills for hats and visors. She had a production quota of 702 items per hours. Lucas testified that she had previous injuries to her low back and to her neck. In May 1995, Lucas began to notice a rash on her arms and a lump on the inside of each wrist. She continued to work and sought medical treatment from her family physician. She has also been treated by Dr. Charles Kincaid, Town Talk's company doctor. Lucas testified that she has been receiving steroid injections and that Dr. Kincaid has recommended a carpal tunnel release. Currently, she complains of numbness from her fingers to her elbows and swelling in her fingers.

Dr. Kincaid diagnosed Lucas as suffering from bilateral carpal tunnel syndrome. He began treating her in May 1995. After a year of treatment, he stated that the condition was progressively worsening and would require a surgical release.

Town Talk's carrier referred Lucas to Dr. Morton Kasdan for a second opinion regarding the proposed surgery. Dr. Kasdan had Dr. Hal Corwin perform EMG/NCV studies, which were normal. Dr. Kasdan found no evidence of carpal tunnel syndrome. He, therefore, felt that surgery would not be appropriate. He also felt there was a significant chance that Lucas might get worse with surgery.

Town Talk also sent Lucas to be examined by Dr. Thomas Harter. Dr. Harter stated that his examination was essentially normal. He had nerve conduction studies performed by Dr. James McKiernan, which were normal. He

stated that she may have had an abnormal test in the past, but, apparently, her condition had improved such that the tests were normal now. He stated there was a possibility that the carpal tunnel release could help but stated that it also might not help and could conceivably make her condition worse.

Town Talk's carrier denied authorization for the carpal tunnel release based upon Dr. Harter's report. Dr. Kincaid requested that the decision be reviewed. The denial was reviewed by Dr. Oliver Herbert Lloyd, who felt that carpal tunnel release was not appropriate since the most recent nerve conduction studies were normal.

Lucas filed a claim for benefits in April 1, 1996. The claim was bifurcated and was submitted to the ALJ on the record for determination of the reasonableness and necessity of the proposed surgery. After reviewing the record, the ALJ found the testimony of Dr. Kincaid more credible and concluded that the proposed surgery was reasonable and necessary for the cure or relief of Lucas' condition. He, therefore, ordered Town Talk to pay the costs associated with the surgery and to pay Lucas temporary disability benefits from the date of surgery until she reached maximum medical improvement ("MMI"). Her claim was held in abeyance pending Lucas' attainment of MMI following surgery.

Town Talk now appeals from the ALJ's opinion, arguing that the ALJ should have been persuaded by the opinions of Drs. Harter and Kasdan, particularly because the EMG/NCV studies that they utilized were more recent than those upon which Dr. Kincaid relied. Town Talk also argues that the decision made under its carriers' utilization review program should have been treated as conclusive evidence by the ALJ.

803 KAR 25:190 requires all insurance carriers and self-insured employers to implement and maintain a utilization review and medical bill audit program. The purpose of the utilization review program is to manage and assess patient care through the assessment of the medical necessity and appropriateness of medical care. The regulation requires the utilization review to be performed only by appropriately licensed professionals. It requires that notice of denials contain a statement of the reasons for denial and set out the parties' reconsideration rights. A utilization review plan is required to have a reconsideration process by which an initial determination may be appealed. Nothing in the regulation or its enabling statute, KRS 342.035, makes the utilization review findings conclusive on the ALJ. Town Talk argues that 803 KAR 25:190 is essentially meaningless if utilization review findings do not have conclusive weight before the ALJ. We believe that this is a policy matter which must be addressed by the Department's regulations or by the General Assembly. However, we note that the utilization review procedures are established and conducted solely by insurance carriers and self-insured employers. We believe that some serious due process questions would arise if utilization review findings were given conclusive weight before the ALJ. We, therefore, find no error with the ALJ's failure to make findings in accord with utilization review findings.

Town Talk also argues that the ALJ should have relied upon the opinions of Drs. Kasdan and Harter, rather than Dr. Kincaid. Since no final award or decision had previously been entered establishing Lucas' right to medical services under the Act, the burden of proof regarding entitlement to medical benefits lies with Lucas, and the burden of proof regarding the unreasonableness and nonnecessity of the proposed treatment lies with Town Talk. 803 KAR 25:012, §3(2).

On appeal, Town Talk must either show that the ALJ's finding that Lucas is entitled to medical benefits under the Act is not supported by substantial evidence, or there is compelling evidence that the carpal tunnel release surgery is unreasonable and unnecessary. *Wolf Creek Collieries v. Crum*, Ky.App., 673 S.W.2d 735 (1984). Substantial evidence is defined as evidence of substance and 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 (1971). Compelling evidence is defined as evidence which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. *REO Mechanical v. Barnes*, Ky.App., 691 S.W.2d 224 (1985). As long as the ALJ's conclusion is supported by substantial evidence, we must affirm. *Special Fund v. Francis*, Ky., 708 S.W.2d 641 (1986).

The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. V. Burkhardt*, Ky., 695 S.W.2d 418 (1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. *Pruitt v. Bugg Brothers*, Ky., 547 S.W.2d

123 (1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Furthermore, this Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence in questions of fact. KRS 342.285(2).

Town Talk's arguments regarding the ALJ's reliance on the testimony of Dr. Kincaid, rather than that of Drs. Kasdan and Harter, go only to the weight of the evidence. While we believe that another fact finder may well have relied upon the fact that Drs. Kasdan and Harter relied upon later EMG/NCV studies in determining that Lucas does not suffer from carpal tunnel syndrome, we believe that this argument also goes only to the weight of evidence. Dr. Kincaid diagnosed Lucas as suffering from carpal tunnel syndrome and felt that carpal tunnel release would be a reasonable and necessary procedure to cure or relieve the effects of the condition. Moreover, the probative value of evidence is not determined by the number of doctors who testify or their relative credentials. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). We believe that the testimony of Dr. Kincaid was substantial evidence upon which the ALJ could rely in finding that Lucas suffers from carpal tunnel syndrome as a result of her work with Town Talk and that the carpal tunnel release is a reasonable and necessary treatment. We, therefore, must affirm.

Accordingly, the decision of the ALJ is hereby **AFFIRMED** and this appeal **DISMISSED**.

ALL CONCUR.

TO BE ENTERED: May 12, 1997

COUNSEL FOR PETITIONER:

HON MARY JO WEASEL
WOODWARD HOBSON 7 FULTON
2500 NATIONAL CITY TOWER
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON JULIA B BARRY
CHESTNUT CTR 7TH FLOOR
610 S FOURTH AVE
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON W BRUCE COWDEN JR
950 NATIONAL CITY PLZ
301 E MAIN STREET
LEXINGTON KY 40507
