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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002386-WC
AND
NO. 2009-CA-000064-WC

TOYOTA MOTOR MANUFACTURING,
KENTUCKY, INC. APPELLANT/CROSS-APPELLEE

PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-71165

STEPHANIE LAWSON APPELLEE/CROSS-APPELLANT

AND

HON. JOHN W. THACKER AND
HON. JOE W. JUSTICE,
ADMINISTRATIVE LAW JUDGES, and
WORKERS' COMPENSATION BOARD APPELLEES/CROSS-APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Toyota Motor Manufacturing USA, Inc., appeals from an opinion and order of the Workers' Compensation Board, reversing an opinion and order of an Administrative Law Judge (ALJ) finding a knee surgery, proposed by Appellant Stephanie Lawson, to be non-compensable on the ground that it was not reasonable and necessary for the cure and relief of Lawson's work-related injury. The Board reversed the ALJ based solely upon its conclusion that Toyota had failed, as required, to reopen the underlying award and file a separate medical fee dispute within thirty days of its denial of Stephanie Lawson's proposed surgery through its utilization review procedure.

In addition to Toyota's petition, Lawson cross-petitions this Court, arguing the ALJ's finding that her proposed surgery was unreasonable and unnecessary was not supported by substantial evidence.

As to Toyota's appeal, finding the Board committed error, we reverse. Regarding Lawson's cross-appeal, we remand to the Board for further findings.

I. STATEMENT OF FACTS

On November 13, 2001, while working for Toyota, Lawson sustained an injury to her right knee, due to deep squatting and long periods of sitting, stair climbing and getting in and out of cars. This matter was initially resolved via a settlement agreement approved on July 13, 2005.

On or about August 20, 2007, Mark G. Siegel, M.D., Lawson's treating orthopedic doctor, requested preauthorization from Toyota to perform a lateral retinacular reconstruction on Lawson's right knee. Toyota referred Dr. Siegel's request to GENEX Services, Inc. for utilization review (*i.e.*, to review the requested health care services for medical necessity and appropriateness). In its report, dated August 27, 2007, GENEX recommended that Toyota approve Lawson's proposed surgery.

On September 12, 2007, Lawson moved to reopen her award for the purpose of seeking Temporary Total Disability (TTD) and Permanent Disability (PD) income benefits, based upon the worsening of her injury. In relevant part, the motion stated that:

> 2. After the workers' compensation settlement was approved, the Plaintiff continued treating with her treating orthopedic surgeon, Dr. Mark G. Siegel. Plaintiff's work-related injury has worsened to the extent that Dr. Siegel has now recommended additional surgical intervention. Once Plaintiff undergoes said surgical intervention, the Plaintiff anticipates that she will not be at maximum medical improvement and will be temporarily totally disabled. Furthermore, the Plaintiff anticipates that her condition has worsened to the extent that she is now entitled to additional permanent disability benefits. Subsequently [sic], Plaintiff moves to reopen her workers' compensation claim for a worsening of her work-related injury.

On September 13, 2007, Lawson served her motion upon Toyota and the Office of Workers' Claims. On that same date, Irene Slater at GENEX called

Dr. Siegel and said the case had been extended pending an independent medical evaluation.

On September 20, 2007, Martin G. Schiller, M.D., evaluated Lawson for an independent medical examination on behalf of Toyota. His report recommended against further surgery on Lawson's knees. Subsequent to the independent medical examination, Lawson's proposed surgery was cancelled.

On October 8, 2007, Toyota filed a response denying the claims asserted in Lawson's motion to reopen her award.

On October 22, 2007, Lawson's motion to reopen her award was sustained to the extent the claim was reopened and assigned to an ALJ for further adjudication. At the March 12, 2008 benefit review conference, Lawson and Toyota identified as contested issues "the medical fee dispute/compensability of surgery" and "TTD."

On May 23, 2008, the ALJ dismissed Lawson's claims. Specifically, the ALJ held that

> the [surgery] recommended by Dr. Siegel is not reasonable or necessary for the cure and/or relief of the claimant's work injury. Accordingly, the Administrative Law Judge finds in favor of the defendant/employer on the medical fee dispute. And, as the medical fee dispute is decided in favor of the defendant/employer, no income benefits for temporary total disability are payable.

On June 4, 2008, Lawson petitioned for reconsideration and argued that Toyota had waived its right to contest the compensability of her proposed

surgery because it had failed to timely reopen her award for the purpose of filing a medical fee dispute. Her petition was denied on July 7, 2008.

Subsequently, Lawson appealed the ALJ's May 23, 2008 order denying compensability of her proposed surgery and TTD and the ALJ's July 7, 2008 order denying reconsideration to the Board.

On November 20, 2008, the Board reversed the ALJ's July 7, 2008 order with regard to the medical fee dispute, holding that, in order to contest Lawson's proposed surgical procedure, Toyota had a burden to timely file a motion to reopen Lawson's award within thirty days of August 27, 2008, which date was the conclusion of Toyota's utilization review process. Finding Toyota failed to do so, the Board held that Toyota obligated itself to pay for her proposed surgery regardless of any question of reasonableness or necessity. With regard to Lawson's claim for TTD, the Board remanded this issue to the ALJ for further findings.

Toyota now appeals, contending that: 1) it had no obligation to reopen Lawson's claim and file a medical fee dispute within thirty days of the utilization review; 2) if such obligation existed, Lawson waived it as an issue by not raising it prior to the hearing in the matter; and 3) Lawson's own filing to reopen her claim made said obligation moot. In addition, Lawson cross-appeals, contending that there was not sufficient evidence to support the ALJ's finding that her proposed surgery was unreasonable and unnecessary.

II. STANDARD OF REVIEW

When we review a decision of the Worker's Compensation Board, we will only reverse the Board's decision where the Board has overlooked or misconstrued the controlling law or so flagrantly erred in evaluating the evidence that a gross injustice has occurred. *Daniel v. Armco Steel Co.,* 913 S.W.2d 797, 798 (Ky. App. 1995). Ultimately, we must review the ALJ's decision to accomplish this.

Regarding the ALJ's decision, the Supreme Court of Kentucky has held that when the ALJ finds in favor of the party with the burden of proof, then the reviewing court will affirm the ALJ's decision if it is supported by substantial evidence. *Special Fund v. Francis,* 708 S.W.2d 641, 643 (Ky. 1986). However, if the ALJ finds against the party with the burden of proof, then the reviewing court may only reverse if the evidence compels a finding in the favor of the party with the burden of proof. *Daniel,* 913 S.W.2d at 800; *see also Lee v. Int'l Harvester Co.,* 373 S.W.2d 418, 420-21 (Ky. 1963). In addition, as the finder of fact, the ALJ, not this Court and not the Board, has sole discretion to determine the quality, character and substance of the evidence. *Whittaker v. Rowland,* 998 S.W.2d 479, 481 (Ky. 1999) (*quoting Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418, 419 (Ky. 1985)). Not only does the ALJ weigh the evidence, but the ALJ may also choose to believe or disbelieve any part of the evidence regardless of its source. *Whittaker,* 998 S.W.2d at 481 (*quoting Caudill v. Maloney's Discount Stores,* 560 S.W.2d 15, 16 (Ky. 1977)).

III. ANALYSIS

We turn first to Toyota's contention that the Board erred in reversing the ALJ. Lawson contends, and the Board found, that the ALJ erred in making any determination on the subject of a medical fee dispute because Lawson reopened her award only on the ground that her condition had worsened. In order to bring the issue of a medical fee dispute before the ALJ, Lawson asserts that it was necessary for Toyota to have separately reopened her award for that purpose and that incorporating the issue into her reopening was improper. We disagree.

We begin by stating that Lawson's filing of a motion to reopen in order to allege a worsening of her condition did not, by itself, operate to place the issue of a medical fee dispute before the ALJ. In the recent case of *Bartee v. Univ. Med. Ctr.*, 244 S.W.3d 91 (Ky. 2008), the Supreme Court of Kentucky held that an employer's motion to reopen a workers' compensation case to dispute certain medical expenses does not place the issue of TTD before the ALJ. In *Bartee*, the employee moved to reopen the case for a ruling on the question of entitlement to TTD. That motion was denied as having been filed outside the time limitations set forth in KRS 342.125(3) and (8). The benefit review conference memorandum listed the sole issue as "medical fee dispute/compensability of surgery." Thereafter, the claimant asserted in her brief not only that the surgery was compensable but also that she was entitled to TTD benefits from the date of the surgery until her return to work. The ALJ awarded TTD benefits because he believed it was a natural extension of the medical dispute. Alternatively, the ALJ concluded that the principles of waiver and estoppel precluded the employer from

objecting to the TTD award. The Board affirmed the ALJ's award based upon different reasoning.

In reversing, the Supreme Court held that 1) the employee had not properly sought to invoke the jurisdiction of the ALJ to rule on the issue of TTD; and 2) the principles of waiver and estoppel did not preclude the employer's objection to the TTD award because no evidence in the record demonstrated that the employer either intentionally relinquished a known right, led the claimant to believe that she would receive TTD benefits, or engaged in other conduct that would warrant an equitable remedy.

The facts of the instant case are similar to those considered by the Supreme Court in *Bartee*; the employee sought reopening of a claim to allege a worsening of her condition and to affect her entitlement to permanent disability and TTD on the ground of an anticipated surgery. The employer did not properly follow statutory mandates for disputing the medical expense of the anticipated surgery; instead, the issue of the medical fee dispute was "piggy-backed" onto the employee's motion. The ALJ allowed the issue of the medical expense dispute to be heard and held the medical expense to be unnecessary. Finally, in reversing, the Board held that the employer had failed to timely reopen the employee's award.

However, the facts of the instant case are distinguishable from *Bartee* because, upon careful review of the record, the issue of the medical expense dispute was tried before the ALJ by consent of both parties. In *Bartee*, the issue of TTD was never identified as contested at the benefit review conference, was held

barred by the statute of limitations, and was raised for the first time in the claimant's brief before the ALJ. Here, Lawson referred to the proposed surgery that was the subject of the ensuing medical expense dispute in her motion to reopen and cited it as the basis for the additional TTD she was requesting. At the March 12, 2008 benefit review conference, the parties identified the issue of "medical fee dispute/compensability of surgery" and listed it as a contested issue. Both parties extensively briefed the issue of the reasonableness and necessity of the surgery before the ALJ. Finally, following the ALJ's decision, Lawson stated in her petition for reconsideration that "[Toyota] never filed a medical fee dispute and instead forced [Lawson] to file a motion to reopen to seek the medical treatment."

In light of the above, it is disingenuous for Lawson to have placed the issue of the medical fee dispute before the ALJ by briefing it and identifying it as a contested issue at the benefit review conference and then argue that Toyota's failure to separately reopen her award precluded the ALJ from determining the issue of the medical fee dispute. Moreover, in Lawson's own words, it was Lawson, and not Toyota, who "[moved] to reopen to seek the medical treatment." For reasons of equity, we hold that the medical fee dispute herein is the product of a prospective motion by Lawson to compel Toyota to authorize medical treatment. There is certainly nothing that prohibits an employee from preserving her rights by filing a prospective motion, supported with a report from her treating physician, in order to compel an employer to authorize medical treatment. *See Bartee,* 244

S.W.3d 91. As such, however, it was unnecessary for Toyota to separately reopen her award as Lawson had already done so, or consented to do so, for that purpose.

Next, Lawson contends that even if her claim was reopened for purposes of a medical fee dispute, our holding in *Phillip Morris, Inc. v. Poynter*, 786 S.W.2d 124 (Ky. App. 1990), interpreting the mandates of KRS 342.020(1), nevertheless estopped Toyota from contesting her proposed surgery. We disagree.

In relevant part, KRS 342.020(1) provides "[t]he employer, insurer, or payment obligor acting on behalf of the employer, shall make all payments for services rendered to an employee directly to the provider of the services within thirty (30) days of receipt of a statement for services." In *Phillip Morris*, we noted that "we have reviewed KRS Chapter 342 and do not find any direct expression of a procedure to be followed in [medical fee disputes]." We also considered the Supreme Court's decision in *Westvaco Corp. v. Fondaw*, 698 S.W.2d 837, 839 (Ky. 1985), wherein that Court required employers who wish to challenge a medical or drug bill to file a motion to reopen. In construing both the statute and the Supreme Court's holding together, we held that

> [w]ithout some penalty for failing to comply with its dictates, *Westvaco* would be effectively negated. We do not think that the Supreme Court intended that its opinion become so much surplusage. As a result, we conclude the board was correct in finding that [the employer] waived whatever objection it might have had to the bills submitted by [the employee] since no motion to reopen was filed.

Phillip Morris, 786 S.W.2d at 125. Consequently, this Court interpreted KRS 342.020(1) to mean that an employer has thirty days in which to pay the bill for services rendered to an employee and that failure to do so forecloses the employer from challenging it. *Id*.

Our 1990 holding in *Phillip Morris*, however, referred to only the dual circumstances of services *rendered* to an employee and a *bill* for those services received by an employer. It derived from our interpretation of the plain language of KRS 342.020(1), which language, to date, remains unchanged. Moreover, our holding in that case could not have considered or implicitly incorporated the issues of utilization review or the regulations regarding preauthorization of medical treatment upon which Lawson now relies because, at that time, they did not exist. As part of the 1994 workers' compensation reform, KRS 342.035 required the commissioner of the Department of Workers' Claims to promulgate administrative regulations governing medical provider utilization review activities conducted by an insurance carrier, group self-insurer or self-insured employer. Both Lawson and the Board rely upon 803 KAR 25:190, which resulted from KRS 342.035. That regulation, requiring every individual self-insured employer, group self-insurance fund and insurance carrier to implement a utilization review and medical bill audit program and submit a written plan describing the program to the commissioner for approval, became effective September 19, 1995.

To summarize, the legislature has not incorporated the subject of preauthorization for medical treatment into the plain language of KRS 342.020.

Under that statute, the executive director of the Office of Worker's Claims is limited only to "promulgat[ing] administrative regulations establishing conditions under which the thirty (30) day period for payment [for services rendered to an employee] may be tolled." *Westvaco* mandates only that the burden is on an employer to timely challenge a medical bill for services rendered. Finally, our holding in *Phillip Morris* did not consider issues of utilization review or preauthorization. As such, we decline to expand our holding in *Phillip Morris* to allow for estoppel under the circumstances of this case because 1) services have not been rendered; and 2) there is no bill. We restate that an employee may preserve her rights by filing a prospective motion, supported with a report from her treating physician, in order to compel an employer to authorize medical treatment. *See Bartee, supra*. Absent a bill for services rendered, however, there is nothing to support that an employer is estopped from denying that medical treatment.

The Board may have thought that Lawson's further contention, *i.e.*, that the ALJ's decision was not supported by substantial evidence, was necessarily resolved by its conclusion that Toyota was estopped from contesting her surgery. While the Board's opinion recites roughly twenty pages of facts regarding the evidence submitted in this case, it relied exclusively upon its conclusion that Toyota was estopped from contesting Lawson's surgery and altogether failed to address the issue of whether the ALJ's decision was based upon substantial evidence. But we have found the Board's conclusion to be in error. The issue of

the medical fee dispute was properly before the ALJ and not barred on grounds of estoppel.

We express no opinion on whether the ALJ's decision was supported by substantial evidence. KRS 342.290 mandates that a "decision of the board shall be subject to review by the Court of Appeals." Here, the Board has made no decision regarding whether the ALJ's denial of Lawson's proposed surgery was supported by substantial evidence, and "a reviewing court, circuit or appellate, may not substitute its judgment for that of the Board." *American Bakeries Co. v. Hatzell*, 771 S.W.2d 333, 334 (Ky. 1989).

We therefore REVERSE the Board's decision that Toyota was estopped from contesting Lawson's proposed surgery and REMAND to the Board for further proceedings. On remand, the Board must resolve the issue of whether the ALJ's denial of Lawson's proposed surgery was supported by substantial evidence.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS APPELLEE:	BRIEF FOR APPELLEE/CROSS APPELLANT:
H. Douglas Jones Kenneth J. Dietz Florence, Kentucky	Charles W. Gorham Lexington, Kentucky