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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001425-WC

SUSAN GARNO — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-66400

SOLECTRON USA;
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: Susan Garno sustained work-related injuries on October 14, 2002, and January 14 or 15, 2004, while working for Solectron-USA. Garno appeals from part of a January 9, 2009 opinion, order and award of an

Administrative Law Judge (ALJ), as affirmed by the Board of Workers' Claims, resolving a medical fee and expense dispute based upon these injuries in favor of Solectron, as insured by Arrowpoint Capital Corp., formerly Royal & SunAlliance, and St. Paul Travelers. Upon review, we affirm.

FACTS AND PROCEDURAL HISTORY

In an interlocutory opinion, order, and award, dated March 24, 2006, and amended on May 4, 2006, Travelers and Royal were ordered to pay Garno's medical expenses relating to separate injuries she sustained on October 14, 2002, and January 15, 2004, as well as income benefits.

In January of 2007, Garno submitted several requests for reimbursement of expenses[1] purportedly related to the treatment of these injuries, outlined in a variety of bills and other documents, to Travelers and Royal; these expenses arose between 2004 and 2005 and included various surgical treatments, co-pays, and mileage reports totaling approximately $20,000. Along with this filing, Garno included several Forms 114, which included her signature and her handwritten date of "May 9, 2005." Travelers and Royal filed medical fee disputes regarding these expenses, attaching these bills and documents as exhibits and arguing that these requests for reimbursement were not timely submitted.

On April 30, 2008, Garno filed another request for reimbursement of expenses with a document styled "Compliance With Administrative Law Judge's

[1] While Garno mailed these requests to Travelers and Royal around this date, she did not actually file any of these expenses with the Department of Workers' Claims until June 11, 2008, in a document styled "Compliance With Administrative Law Judge's Order."

Order." This request contained copies of some of the prescriptions she had received in 2006 through 2008 showing their amounts, their respective co-pays, and a list of other expenses including mileage. Also, a separate printout from Florida Orthopaedic Institute was attached covering the period from May of 2006 through November of 2007 reflecting additional amounts claimed due. No information was attached to this printout explaining the necessity for any of these charges. Moreover, a Form 114 did not accompany this filing in order to certify that any of these services or expenses were incurred for the cure or relief of Garno's work-related injury. Travelers and Royal filed medical fee disputes regarding these expenses as well, arguing that these requests for reimbursement were not timely submitted and that they could not have been properly submitted because Garno had not followed the applicable procedures for doing so.

On November 10, 2008, the ALJ conducted a formal hearing on these medical fee disputes and on other matters not relevant to this appeal. There, Garno testified that she had given the expenses included in her January of 2007 request to opposing counsel at the first benefit review conference conducted on May 9, 2005. In support, she directed the ALJ's attention to the various Forms 114 she submitted with that request, all of which she had signed and dated "May 9, 2005."

On December 11, 2008, Garno submitted her brief in support of her case. There, the only argument she offered with regard to the medical expenses at issue was:

> The medical fee disputes except as to the issue of surgery are moot.[2] It is the Plaintiff's position that the Claimant does not have any responsibility as it relates to the presentation of medical bills at present because the Defendant/employer as insured by both carriers denied this claim and continue to deny this claim and refused to stipulate work-related injuries despite the prior interlocutory decision. Plaintiff is not required to send them medical bills in this situation until there is a final decision rendered. In addition, Plaintiff attempted, per her testimony, to seek addressal [sic] of the medical bills and prescription expenses. For all of these reasons, those medical fee disputes should be resolved in favor of the Claimant.

In the ALJ's January 9, 2009 opinion, order, and award, he found in favor of Royal and Travelers on the issues of the medical fee disputes. Specifically, the ALJ held:

> With respect to other medical expenses, including requests for mileage expenses, the defendants point out that, as of March 24, 2006, they were ordered to pay plaintiff's compensable medical expenses but plaintiff did not submit her requests for reimbursement for expenses until January 11, 2007. Given that plaintiff's expenses for her work injuries were ruled compensable as of March 24, 2006, the Administrative Law Judge finds no excuse for plaintiff's failure to submit requests for reimbursement before January 11, 2007. As such, any expenses incurred more than 60 days prior to January 11, 2007 are not compensable per 803 KAR [Kentucky Administrative Regulations] 25:096 Section 11(2). Similarly, any expenses submitted since January 11, 2007 which were actually incurred more than 60 days prior to having been submitted are also not compensable. Any medical expenses timely submitted for payment are payable, by each defendant equally, pursuant to the Kentucky workers compensation medical fee schedule, unless and until the bills are supported by an adequate

[2] The surgery referenced in this quote is not an issue in this appeal.

> statement of the services provided and unless the bills in question are not work-related on their face.

On February 12, 2009, Garno petitioned the ALJ to reconsider the January 9, 2009 opinion. There, she argued:

> The ALJ erred as a matter of law in sustaining the medical fee disputes to the extent that the Administrative Law Judge found no excuse for Plaintiff's failure to submit requests for reimbursement before January 11, 2007. First of all, the Plaintiff testified that she submitted requests prior to that. Secondly, the original order was interlocutory in nature. Had the Claimant not been successful on the issues of causation before the current ALJ, the employer/insurance carriers would not have been liable for her medical expenses and an argument could be made and they would be entitled to reimbursal [sic]. An interlocutory award cuts both ways. Plaintiff still had the burden of proof on causation in front of the current ALJ. While that was decided in favor of the Claimant, an award of either TTD or medical expenses may not have been enforceable in any Court prior to a final decision. It was a temporary order and not a permanent award. For all of these reasons, it is felt that the ALJ erred in this particular fact situation in not finding the Plaintiff's failure to submit requests for reimbursement timely/excusable.

The ALJ denied Garno's petition for reconsideration.

Garno then appealed to the Board of Workers' Claims. She argued that she had timely submitted her requests for reimbursement; or, assuming she had not, she was still entitled to reimbursement because she had "reasonable grounds," per 803 KAR 25:096 Sections 6 and 11(3),[3] for failing to timely submit her

[3] 803 KAR 25:096 Section 6 provides that "[i]f the medical services provider fails to submit a statement for services as required by KRS 342.020(1) without reasonable grounds, the medical bills shall not be compensable." Similarly, 803 KAR 25:096 Section 11(3) provides that "failure to timely submit the Form 114, without reasonable grounds, may result in a finding that the expenses are not compensable."

statements of services and Form 114 reimbursement requests. These grounds, as Garno contended, consist of the following reasons: 1) an interlocutory award is unenforceable; 2) the possibility of an adverse final decision justified not timely reporting her medical expenses; and 3) the case of *Lupian v. Cintas Uniform Plant*, 2008 WL 275149 (Ky. App. 2008)(2007-CA-001011-WC)(unpublished), stands for the proposition that a claimant has a reasonable period of time after the rendering of a final decision to present medical expenses and because a final decision was not rendered until January 9, 2009, her requests for reimbursement were made within a reasonable amount of time.

On July 2, 2009, the Board affirmed the decision of the ALJ, holding that the requests were not timely submitted and that Garno had no reasonable excuse for failing to do so. The Board also interpreted the ALJ's order to mean that Garno's failure to include a Form 114 with her April 30, 2008 "Compliance With Administrative Judge's Order" precluded her from receiving reimbursement for all of those expenses as well, as a prerequisite for considering any request for reimbursement actually submitted was the accompaniment of an executed Form 114 with those expenses.[4]

Garno now appeals to this Court, and her arguments before this Court are identical to the arguments she presented to the Board, as stated above.

[4] Garno does not contest this reasoning, and we agree with it. Regardless of whether some expenses in this April 30, 2008 compliance were filed within sixty days of incurring them, the focus of 803 KAR 25:096 Section 11(3) is on timely filing the Form 114, not the expenses themselves. As the April 30, 2008 filing failed to include a Form 114, these expenses cannot be considered.

STANDARD OF REVIEW

The duty of this Court is to correct the Board only where it has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-688 (Ky. 1992); *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). It has long been settled in this Commonwealth that "judicial review of administrative action is concerned with the question of arbitrariness. . . . Unless action taken by an administrative agency is supported by substantial evidence it is arbitrary." *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). Substantial evidence is defined as "that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994); *see also Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298 (Ky. 1972). In weighing the evidence, "the trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it." *Bowling*, 891 S.W.2d at 409-10; *see also McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 (Ky. App. 2003). A reviewing court may not substitute its own judgment on a factual issue "unless the agency's decision is arbitrary and capricious." *McManus*, 124 S.W.3d at 458.

As in this case, "[w]here the fact-finder's decision is to deny relief to the party with the burden of proof or persuasion, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it." *Id.*; *see also Bourbon County Board of Adjustment v. Currans*, 873 S.W.2d 836 (Ky. App. 1994). The failure to grant relief would be arbitrary "if the record compels a contrary decision in light of substantial evidence therein." *Currans*, 872 S.W.2d at 838. Once a reviewing court has determined that the agency's decision is supported by substantial evidence, the court must determine whether the correct rule of law was applied to those facts by the agency in making its determination. If so, the final order of the agency must be upheld. *Bowling*, 891 S.W.2d at 410.

ANALYSIS

Garno first contends that she did in fact submit her requests for reimbursement of her 2004 and 2005 expenses on May 9, 2005, that her requests relating to those amounts were timely as a consequence, and that it was error for the ALJ to hold otherwise. In support, she again points to the fact that she testified to this effect at the November 10, 2008 hearing, and also to the fact that she wrote "May 9, 2005" on each of the Forms 114 submitted with her January of 2007 reimbursement request. However, even assuming it was proper for her to submit these expenses within thirty days of May 4, 2005, rather than March 24, 2005, we nevertheless disagree.

Regarding the issue of reimbursement, if an employee is provided with medical services, Kentucky Revised Statutes (KRS) 342.020(1) mandates that the provider shall submit the statement for those services to the employer or its medical payment obligor within forty-five days of the day treatment is initiated and every forty-five days thereafter. In addition, if an employee incurs expenses in order to access compensable medical treatment (*i.e.*, co-payments for prescription medication and similar items, as well as reasonable travel expenses), these expenses shall be submitted to the employer or its medical payment obligor, within sixty days of incurring the expense, and on a Form 114. 803 KAR 25:096 Section 11(2).

Here, the evidence before the ALJ demonstrated that both Royal and Travelers denied ever receiving any request for reimbursement prior to January of 2007, and January of 2007 was approximately nine months after the date those expenses were incurred and in excess of either the forty-five or sixty-day limitation. Moreover, the ALJ determined that Garno's contrary testimony was not credible, as nothing in the record established that the Forms 114 and documents attached thereto were ever submitted to any carrier prior to January of 2007. As stated above, the decision of an administrative agency is arbitrary if it is not based upon substantial evidence. *See American Beauty Homes Corp., supra.* As we find that the ALJ's decision in this respect was supported by substantial evidence and because Garno's self-serving testimony and the several Forms 114 that she herself dated do not compel a different result, we cannot find error on this basis.

Similarly without merit is Garno's argument that she had "reasonable grounds," per 803 KAR 25:096 Sections 6 and 11(3), for failing to timely submit her Form 114 reimbursement requests. As noted above, the assertions underlying this argument are that 1) an interlocutory award is unenforceable; 2) the possibility of an adverse final decision justified not timely reporting her medical expenses; and 3) the case of *Lupian v. Cintas Uniform Plant*, *supra*, stands for the proposition that a claimant has a reasonable period of time after the rendering of a final decision to present medical expenses, and because a final decision was not rendered until January 9, 2009, they were timely submitted.

With regard to her first assertion, an ALJ is authorized, pursuant to KRS 342.275(2), to order interlocutory medical benefits. While Garno contends that such an interlocutory order would be unenforceable, she presents no authority in support of her conclusion. This Court will not assume that the authority conferred to an ALJ by the plain language of KRS 342.275(2) is mere surplusage; the ALJ certainly could have determined what medical expenses were to be paid as required by his interlocutory order. Furthermore, Garno's contention is disingenuous at best, as she readily accepted income benefits pursuant to that same award. In sum, this is not a "reasonable ground" for her delay.

With regard to her second assertion, that an adverse final decision could have subjected Garno to a suit for reimbursement, this also is not an excuse for her delay in timely submitting her expenses for reimbursement. 803 KAR 25:010 Section 12(b) provides that medical benefits provided under an

interlocutory order are "pursuant to KRS 342.020." In turn, KRS 342.020(1) requires a party seeking reimbursement for medical services to submit the statement for services within forty-five days of the day treatment is rendered and every forty-five days thereafter; and 803 KAR 25:096 § 11(2), enacted pursuant to KRS 342.020, requires a party seeking reimbursement of medical expenses to submit them within sixty days of the date they were incurred. In short, the time constraints for submitting medical expenses to an employer under a final order are identical to those relating to interlocutory orders, and apprehension of a suit for reimbursement does not constitute an exception to this rule.

Finally, the case of *Lupian v. Cintas Uniform Plant*, *supra*,[5] cited by Garno, provides no support for the proposition that medical expenses need not be submitted until "a reasonable time" after a final adjudication in favor of a claimant; rather, it serves only to contradict her argument. In *Lupian*, the claimant submitted unpaid medical bills to his employer's attorney several months after the Board affirmed the ALJ's initial award. In concluding that the claimant, Lupian, failed to comply with the applicable statute and regulation allowing for reimbursement of medical expenses, and failed to offer reasonable grounds to excuse his conduct, we held

> KRS 342.020(1) clearly states: "The provider of medical services shall submit the statement for services within forty-five (45) days of the day treatment is initiated and every forty-five (45) days thereafter, if appropriate, as

[5] We do not believe *Lupian* meets the criteria for citation under Kentucky Rules of Civil Procedure (CR) 76.28(4)(c). We do not cite it as authority, but will briefly distinguish it from Garno's case.

> long as medical services are rendered." Here, the evidence showed that Lupian, and not his medical provider, presented several unpaid bills to Cintas long after the treatment had actually been rendered. Lupian argues the forty-five day window was tolled during the pendency of Cintas's appeal to the Board and that the bills were timely presented after the Board's decision became final. However, Lupian offers no authority to support his position, and we are not persuaded by his reasoning. Likewise, 803 KAR 25:096 § 6 plainly states, "[i]f the medical services provider fails to submit a statement for services as required by KRS 342.020(1) without reasonable grounds, the medical bills shall not be compensable." In this case, as the bills were not submitted to Cintas by Lupian's medical provider within forty-five days of treatment, as required by the statute, we agree with the Board that the bills were non-compensable.

Id. at *1.

In sum, *Lupian* concerned a final award that was being appealed and was subject to reversal. However, we found in that case that reimbursement of medical benefits ordered pursuant to that decision remained subject to the submission requirements of KRS 342.020(1), even on appeal, and that failure to timely submit them pursuant to those guidelines would excuse an employer from reimbursing them. Likewise, this case presents an interlocutory award that would also be subject to reversal, and 803 KAR 25:010 Section 12(b) mandates that KRS 342.020 applies to interlocutory awards with equal force.

Similar to *Lupian*, Garno did not timely present her expenses to her employer for reimbursement. Similar to *Lupian*, Garno presents no authority demonstrating that the window for presenting expenses for reimbursement could

be tolled for anything other than "reasonable grounds." Similar to *Lupian*, Garno has likewise presented no reasonable grounds. And similar to *Lupian*, these expenses are consequently non-compensable.

Accordingly, as we find no error, the decisions of the ALJ and Board are affirmed.

ALL CONCUR.

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