RENDERED: AUGUST 17, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000354-WC

VISION MINING (KMMC, LLC) APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-66393

EDWARD L. WEBSTER;
DR. DAVID EGGERS;
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD;
AND ANDREW GRAHAM BESHEAR,
ATTORNEY GENERAL APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

NICKELL, JUDGE: Vision Mining (KMMC, LLC) appeals from the February 2, 2018, opinion of the Workers' Compensation Board ("Board") affirming an

Administrative Law Judge's (ALJ) orders overruling and denying Vision Mining's motion to reopen and petition for reconsideration. Because the motion to reopen was timely filed within thirty days of the final utilization review (UR) decision, the Board's opinion is reversed and the matter remanded for entry of an order consistent with this Opinion.

Edward Webster was injured in a rock fall accident while working for Vision Mining. In an opinion rendered September 16, 2008, ALJ R. Scott Borders found Webster permanently and totally disabled, and awarded permanent total disability benefits and medical benefits.

Webster was seen by neurosurgeon Dr. David Eggers on multiple occasions with various pain complaints. On April 3, 2017, Dr. Eggers' office sent a fax to Vision Mining's insurance carrier, AIG, requesting approval for an Anterior Cervical Discectomy and Fusion (ACDF) C4-5 surgery. Vision Mining contends that request enclosed an office visit note from November 14, 2016, stating, "I do not think [Webster] is a surgical candidate[,]" rather than the note from the April 3, 2017, office visit indicating Dr. Eggers believed "an ACDF at C4-5 is certainly worth considering[.]" Dr. Eggers' office resent the approval request to AIG on May 19, 2017, including the April 3, 2017 office note. AIG submitted the request to Occupational Managed Care Alliance, Inc. (OMCA) for UR. OMCA, at the recommendation of its Physician Advisor Dr. Ring Tsai,

denied the proposed surgery on June 14, 2017. The decision was appealed and resubmitted to OMCA. OMCA, at the recommendation of Physician Advisor neurosurgeon Dr. Kimberly Terry, denied the surgery in a final UR decision on July 3, 2017.

On August 2, 2017, Vision Mining filed a Form 112 and motion to reopen asserting "the treatment that is subject of this reopening has been deemed not reasonable and necessary for treatment of the work injury" and requested a summary decision on the pleadings in its favor or assignment to an ALJ. ALJ Jeanie Owen Miller overruled Vision Mining's motion to reopen, finding Vision Mining failed to: document the pre-approval was timely submitted for UR, properly complete the Form 112, and identify the date it received the request for payment of medical services.

Vision Mining petitioned for reconsideration arguing: (1) the pre-approval request was timely submitted to UR—or, in the alternative, failure to institute UR in a timely fashion does not require dismissal—and (2) because request for pre-authorization of a medical procedure does not constitute a statement of disputed services, it was not required to complete that section on the Form 112. ALJ Miller denied the petition on the grounds the medical dispute challenging the request for the surgery was untimely filed.

Vision Mining appealed ALJ Miller's orders overruling the motion to reopen and denying the petition for reconsideration to the Board. The Board found Vision Mining failed to timely file its medical dispute within thirty days of the final UR decision—using the date of Dr. Terry's letter recommending denial, June 30, 2017—and affirmed the ALJ's orders. This petition for review followed.

On appeal, Vision Mining argues the Board erred in affirming the dismissal of the medical fee dispute for failure to file within thirty days of the doctor's June 30, 2017, report recommending denial of treatment rather than the July 3, 2017, notice date of the final UR decision. Vision Mining asserts the Board's decision is contrary to 803 KAR[1] 25:190 which requires the dispute to be filed within thirty days of the final UR decision. We agree.

The appropriate standard of review for workers' compensation claims was summarized in *Bowerman v. Black Equipment Company*, 297 S.W.3d 858 (Ky. App. 2009).

> Appellate review of any workers' compensation decision is limited to correction of the ALJ when the ALJ 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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).
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> . . .

[1] Kentucky Administrative Regulations.

> As a reviewing court, we are bound neither by an ALJ's decisions on questions of law or an ALJ's interpretation and application of the law to the facts. In either case, our standard of review is *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001); *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). *De novo* review allows appellate courts greater latitude in reviewing an ALJ's decision. *Purchase Transportation Services v. Estate of Wilson*, 39 S.W.3d 816, 817-18 (Ky. 2001); *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991).

Id. at 866.

The Supreme Court of Kentucky addressed issues similar to the ones presented in this case in *Kentucky Associated General Contractors Self-Insurance Fund v. Lowther*, 330 S.W.3d 456 (Ky. 2010).

> The courts have construed KRS 342.020(1) as placing on an injured worker's employer the burden to contest a post-award medical bill within 30 days or to pay it. At issue presently is whether a final utilization review decision refusing to pre-authorize medical treatment is equivalent to a "statement for services" to which the 30-day requirement pertains.
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> 803 KAR 25:096, § 8(1) requires a "medical payment obligor" to "tender payment" or file a medical dispute and motion to reopen within 30 days of receiving "a completed statement for services." . . .
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> Pre-authorization is a process by which a carrier assures a provider that it will pay the bill for a proposed medical service or course of treatment. The regulations require a provider's pre-authorization request to be submitted to another medical expert for utilization review, i.e., "a review of the medical necessity and appropriateness of

medical care and services for purposes of recommending payments for a compensable injury or disease." Whether conducted before or after the treatment is provided, the purpose of utilization review is to provide the parties with an independent medical opinion concerning the compensability of medical treatment in order to help them resolve disputes without resorting to litigation. Initiation of the process tolls the 30-day period for challenging or paying medical expenses until the date of the final utilization review decision.

. . . In cases involving a post-award medical dispute, the regulation requires a motion to reopen and medical dispute to be filed within 30 days of receipt of "a complete statement for services" unless utilization review has been initiated. If a contested expense is subject to utilization review, such as in the case of a pre-authorization request, the regulation prohibits a medical dispute from being filed before the process is exhausted but gives the "[t]he employer or its medical payment obligor" 30 days after the final utilization review decision in which to file a medical dispute.

. . .

Neither KRS 342.020 nor the regulations states explicitly that an employer must file a medical dispute and motion to reopen within 30 days of receiving a final utilization review decision denying pre-authorization or pay for the medical treatment to which it pertains. We note, however, that the Board has interpreted the regulations since 2001 as equating a final utilization review decision to grant or deny pre-authorization with a "statement for services" that an employer must contest within 30 days or pay. We find no error in the Board's interpretation, having concluded that it is consistent with the authorizing statute as well as the regulatory language and being mindful of the principle that the courts give great deference to an administrative agency's reasonable interpretation of its own regulations.

> . . . The term "statement for services" and the regulatory definition of the term may be construed as referring to a bill for services rendered previously, but that is not the only reasonable interpretation. We agree with the Board that the term also encompasses a final decision to grant or deny pre-authorization.

Id. at 459-61 (footnotes omitted). Thus, it is incumbent upon the employer to initiate a medical fee dispute or pay within thirty days of receiving a final UR decision, which constitutes a "statement for services."

> Pursuant to 803 KAR 25:190, a final UR decision:
>
> shall be clearly entitled "UTILIZATION REVIEW - RECONSIDERATION DECISION". If the reconsideration decision is made by an appropriate specialist or subspecialist, the written decision shall further be entitled "FINAL UTILIZATION REVIEW DECISION".

Such language is notably absent in Dr. Terry's June 30, 2017, letter. The July 3, 2017, letter from OMCA enclosing Dr. Terry's report does contain this language. Therefore, we hold it was the July 3, 2017, letter from OMCA which constituted the final UR decision, not the letter from Dr. Terry to OMCA. As such, Vision Mining's motion to reopen was timely filed within thirty days of the final UR decision and the Board erred in determining otherwise.

For the foregoing reasons, the opinion of the Workers' Compensation Board is REVERSED and REMANDED for entry of an order consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

H. Brett Stonecipher
Courtney Risk Straw
Lexington, Kentucky

NO BRIEF FILED FOR APPELLEES