

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001039-WC

SPEEDWAY/SUPERAMERICA

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-54592

MAZEN ELIAS;
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, KELLER, AND NICKELL, JUDGES.

KELLER, JUDGE: Speedway/SuperAmerica (Speedway) appeals from the opinion of the Workers' Compensation Board (the Board) affirming the ALJ's award of caregiver benefits to Mazen Elias (Mazen), for services provided by his

wife Deana Elias (Deana).¹ In its appeal, Speedway argues Mazen and Deana did not offer sufficient evidence to support the claim for caregiver benefits; the Board erred when it found that Mazen and Deana provided reasonable grounds to explain the delay in making a claim for such benefits; the ALJ and Board erred in finding the Forms 114 submitted by Mazen were “fully completed”; the Board erred by relying on facts not in evidence and in considering legal issues not previously raised by the parties when it found the Forms 114 were fully completed; and, because Deana was not a named party, the ALJ lacked jurisdiction to award her any benefits. Mazen essentially argues the Board correctly determined that the opinion of the ALJ is supported by substantial evidence and cannot be overturned on appeal. For the following reasons, we affirm.

FACTS

The parties do not dispute the underlying facts; therefore, we will only briefly summarize those facts. Mazen suffered a head injury, a ruptured spleen, injury to his adrenal gland, and fractures to his right hip, femur, pelvis, scapula, and right foot as a result of a motor vehicle accident while at work on December 1, 1999. Following the accident, Mazen underwent six orthopedic surgeries, most of which proved to be unsuccessful. As a result of his injuries, Mazen’s left leg is one and a half inches shorter than his right leg. Because of his leg length discrepancy and ongoing pain, Mazen has difficulty walking and is restricted to

¹ We note that Speedway argues that the ALJ awarded caregiver benefits to Deana. However, the ALJ’s opinion awards those benefits to Mazen. Therefore, we will refer to the benefits as awarded.

using a wheelchair when out of his house. However, he does walk to a limited degree with a walker while in the house. In addition to his physical limitations, Mazen suffers from dementia and a neurocognitive disorder that result in anxiety, depression, short-term memory loss, slurred speech, and impaired judgment.

Based on Mazen's physical and mental conditions, the ALJ found him to be totally disabled. Speedway does not challenge that finding. However, as noted above, Speedway is challenging the ALJ's award of caregiver benefits to Mazen for the care provided to him by Deana. We will summarize the evidence with regard to that care in detail below.

On October 20, 2003, Mazen submitted a Form 114 requesting payment for caregiver services that had been provided by Deana from January 1, 2000, to October 20, 2003. The Form 114 listed the type of service as "convalescent care," but it did not set forth what specific services were performed or the time expended performing each service. Furthermore, the Form 114 did not contain the name and address of the physician ordering the services.

In response, Speedway stated it was denying the request for payment for services rendered prior to August 21, 2003, because the request had not been timely made. As to any requests for payment for services rendered after August 21, 2003, Speedway "conditionally" denied payment pending receipt of additional information. Specifically, Speedway requested: a statement from Mazen's physician "demonstrating the medical necessity for any" services Deana provided; a statement from Mazen's physician stating that Mazen could not perform any of

the services himself; and “a detailed list of the various activities [Deana] is performing including the date, time, and duration of each activity.” Speedway stated that, following receipt of the requested information, it would “be in a better position to evaluate” the requests for payment.

Mazen’s counsel continued to submit Forms 114 approximately every sixty days and Speedway continued to deny payment because the requested additional information had not been provided. On August 30, 2004, counsel for Mazen submitted a handwritten note from Deana stating as follows:

Degree of help depends on condition.
Time of accident full care.
After each surgery he required a lot of care.
Now he is recovering from last injuries [sic] and needs moderate care.
Dressing (lower extremities); bathing, to the bathroom [sic] exercises (physical therapy would have him do at home)
Medications, injections and IVs [sic] (he is not on these now, but was for about 2 months)
Cleaned & dressed wounds
Dr. appointments
Therapy appointments
Help in & out of house, car
heat, ice, massaged muscles (back & legs)

In response to this correspondence and Deana’s note, Speedway stated that, in order “to fully evaluate whether (1) the services she is providing are compensable and (2) to determine the amount of time spent in such activities” it needed

a daily breakdown of the activities [Deana] was performing for Mazen Elias such as a medical provider would keep records. She should note the date, activity,

the time that the activity began, and the time that the activity ended, along with a description of how Mr. Elias is responding.

Mazen continued to submit Forms 114 that were consistent with the first one; however, he did not submit any additional documentation or information.

Deana testified that she has worked as an assistant to the editor of a publishing company for 26 years, working 37.5 to 40 hours per week. In addition to her full-time job, Deana provides care for Mazen and cares for the couple's five children. We note that, at the time of the accident, the children ranged from six months to ten years of age.

For approximately one year following the accident, Mazen received care from a home health nurse for approximately eight hours a day. Deana assisted the home health nurse as necessary and, with the cooperation of her employer, worked primarily from home during that year. Sometime during the second year, Deana was advised the home health nurse could provide services half a day every day or come for a full day, but for only two to three days a week. Deana requested that the nurse come for full days, so she could arrange her work schedule accordingly. With the home health nurse attending to Mazen from approximately 7:30 a.m. to 3:00 p.m. two to three days a week, Deana was able to return to working primarily at her office. When the home health nurse left for the day, and on days when the home health nurse did not come to the house, Deana would "take over," bathing Mazen, assisting him when he used the bedside commode, changing dressings, cleaning stapled surgery sites, preparing and giving injections, assisting

with home exercises, preparing and dispensing medications, and helping him dress and undress.

The level of care Mazen requires has changed over time. Since late 2002, Mazen has been able to take care of more of his personal needs. However, he continues to require assistance with basic activities of daily living. Deana estimated she spends at least six hours a day tending to Mazen, describing her typical day as follows:

In the mornings he has some medications he has to take on an empty stomach so usually I give those to him. He has to wait an hour. Other medicines he needs to have with food so therefore I have to wait and give him something in the morning to eat and then give him his food [sic]. That's what we do before - - his medicine I mean. We keep an eye on his blood pressure. Do his - - check his sugar levels every morning. Then basically I head off to work and come back

...

I come back around 3:00 most days. Some days I have to come home and check on him at noon. I have done that before, he's had problems and sometimes fallen and I'd have to come home and help him. We do physical therapy when I come in. We do some strengthening and range of motion and these are papers that were given to me by physical therapy.

...

They gave me directions and papers to follow and when we were in physical therapy they said it was very important that he keep these up when he wasn't there during the day, you know, on his own in order to keep his strength up. Otherwise his muscles and everything would lock up and he would lose a lot more than he had already lost. So we do that. He's able, of course, to feed

himself, but he doesn't do any of the cooking. He doesn't do anything around the house like that because, you know, he forgets. He's left stuff on, if he's tried to before. It's dangerous you know.

When asked at her deposition if she had any documents to verify what she does to care for Mazen and the time she spends doing so, Deana responded that she did

not have any documents. . . . I do not have time to document everything that I do for him, and, I mean, quite frankly, it just takes all my time. . . . Between my work and taking care of him, I don't have time to document.

With regard to how much time she spent caring for Mazen, Deana stated:

[h]e had different things throughout his surgeries that would pop up and had to be done, and I - - I mean, this is eight years ago. I cannot give you specific times, that it took me this long to change a bandage or it took me this long to do his IV or it took me this long - - you know, I can give you an about figure, but I can't tell you exact [sic].

When asked, at the hearing, why she did not have written records regarding the care she provided to Mazen, Deana stated:

I have not done that simply for time issues. I - - my focus has always been from the beginning and I've never realized that this would go on for this long. In the beginning we were told three months, you know, I thought he would be up and moving. I had no idea that this was going to continue. I had no idea. At the time, even his doctors didn't know the extent of all his injuries. We've slowly been uncovering things as we've went [sic] along. He's got - - I'm up with him from the time I come in, you know if he goes anywhere, it's a special trip for - - you know, we have to do special things to take him with us. At night I'm up with him, he's up during the night, I'm up during the night. We use heat - - I mean

ice. We did use heat in the beginning, now use mostly ice. That feels a little bit better for him. He uses his Tinz [sic] unit. You know, I get these things for him, I help him, so there's just a whole lot that I was not expecting in the beginning.

Furthermore, Deana testified no one from Speedway ever directly told her she needed to document her time spent providing care to Mazen. If anyone had, she likely would have said that, with a full-time job and five children to raise, she simply did not have time.

With regard to how she knew what services to provide, Deana stated that “[t]he doctors would pass the orders on to the nurses, and then they would tell me - - they trained me on what it was I needed to do, a certain way to bandage or a certain way to clean, and they would tell me that.” The physicians would also tell Deana, “He’s going to need this, and we do this at home. So home health will come in and show you how to do this, and then you will do this at home.”

Mazen testified that he had a number of surgeries; however, he could not recall many details about those surgeries. In addition to his surgeries, he has undergone several rounds of physical therapy to increase the strength in his legs and improve his balance. Although his condition has improved somewhat, he continues to have difficulty walking and with his balance, noting he has fallen on several occasions, once fracturing his wrist.

At some point in time following the injury, Speedway offered Mazen the opportunity to work from home. However, he did not do so because he “was concentrating on getting better” and was having problems with his memory.

In addition to his and Deana's testimony, Mazen filed the report of Mary T. Moraja, R.N. (Moraja), and Speedway filed Moraja's deposition. In her report and deposition, Moraja stated that she performed a "home assessment and assistance evaluation" on February 27, 2007. During that evaluation, Deana advised Moraja that Mazen received home health care from an outside provider until 2002; however, since that time, Deana has provided all of Mazen's home health care services. Those services include:

dosing of medications three time per day, range of motion and strengthening exercises two times per day, assistance with showering and grooming daily, assistance with mobility and standby guard assistance, checking blood pressure twice daily, monitoring blood sugar levels using finger sticks twice daily, monitoring of his feet for diabetes related ulcers, care of any such ulcers, transporting to and from pool therapy sessions two to three times per week, transportation to and from physicians appointments three to four times per month, and consulting with Mazen's physicians regarding his care and medications.

Deana estimated that she spent an average of six hours per day performing these tasks. Moraja stated that without the care provided by Deana, Mazen "would most certainly require twenty four [sic] hour personal care assistance or reside [sic] in an assisted living facility."

After consulting with several outside vendors, Moraja determined skilled nursing care would cost \$100 per visit, private duty care would cost \$16.50 per hour, adult day care would cost \$60.50 per day, and residence at an assisted living facility would cost \$2,500 per month.

Mazen also filed several reports from Dr. Corbett. Notably, in his March 2007 report, Dr. Corbett stated he agreed with Moraja's recommendations.² Those recommendations included "an adult day care program or full time assistance in the home to care for and monitor Mr. Elias when his wife is at work" or "an assisted living facility if Mrs. Elias should become unavailable for any reason."

Speedway filed selected records from Caretenders, a home health agency, for statistical purposes. These records indicate that, on several days in 2000, a person from Caretenders provided services to Mazen from approximately 7:00 a.m. to 3:00 p.m. We note that the records contain, for the most part, fairly detailed notes regarding the services provided and the time expended in providing those services.

Speedway also filed a report from Kathi L. Rose, RN, BSN, MA, CCM (Rose). Rose stated "[t]he ultimate home health goal is for the patient to reach a stage of self-management or if that is not possible, for the family to be independent in caring for the patient." According to Rose, aide care, which consists of services such as bathing, dressing, and grooming but no medication management or wound care, would cost \$15.00 to \$25.00 per hour, with a three to

² We note that the Board, in its opinion, quoted Dr. Corbett as saying, "In reflection of the note and evaluation performed by Mary T. Moraja, RN, I **do not** believe Mr. Elias should conform to the recommendations made by the case manager at the close of her report." (Emphasis added.) However, Dr. Corbett actually states on pages 3 and 4 of his March 27, 2007, report, "In reflection of the note and evaluation performed by Mary T. Moraja, RN, I **do** believe that Mr. Elias should conform to the recommendations made by the case manager at the close of her report." (Emphasis added.)

four hour minimum. From that charge, the aide would receive \$7 to \$11 per hour. Aides are generally required to keep a log detailing what services were provided, what observations they made about the patient, and the time they spent at the patient's residence. Rose noted Deana had not provided any "written record of the care she stated she provided or the clock hours defining the time period the care was given." According to Rose, the services provided by Deana were "of a personal nature and consistent with the expectations of a family caregiver."

Finally, Speedway presented the testimony of Deborah Sunday-Dalton (Dalton), supervisor of benefits administration and workers' compensation. Dalton testified that Speedway took a number of measures to assist with Mazen's treatment, including providing for day care treatment and equipment and raising \$10,000.

Dalton further testified that, after home nursing care stopped in March 2002, Deana requested that an LPN be provided. However, Speedway determined Mazen only needed custodial care at the most; therefore, it offered to provide a certified home health aid. Deana declined that offer.

Dalton verified Mazen's testimony that Speedway offered home employment to him in May 2000. Had Mazen accepted Speedway's offer, he would have acted as a customer service representative, fielding calls from customers and attempting to address their complaints. According to Dalton, Deana declined this offer stating "the family didn't want to do this."

In rebuttal testimony, Deana stated, she requested an LPN in March 2002 because Mazen required twice daily injections of medication and had an IV that had to be changed three times a day. Because she had been advised that only she or an LPN could provide such services, Deana did not see much point in having a certified home health aid.

As to the offer of employment, Deana testified, with his poor memory, judgment deficits, depression, and anxiety attacks, Mazen had difficulty dealing with members of his family. Therefore, he would not have been able to handle a position in customer service.

After reviewing this evidence, the ALJ found that the services rendered by Deana were compensable under KRS 342.020 and *Bevins Coal Co. v. Ramey*, 947 S.W.2d 55 (Ky. 1997). The ALJ found Mazen did not timely seek payment for services rendered from 2000 through August of 2003. However, she excused that delay, noting Deana “worked full time, took care of five children in addition to the care she provided for” Mazen and “there simply wasn’t the time available to do paperwork.” The ALJ noted the documentation submitted in support of the Forms 114 may have been less than Speedway requested; however, she found the Forms 114 were “fully completed” as required by 803 KAR 25:096 § 11(1). Finally, the ALJ found Deana’s testimony was credible and, in conjunction with the evidence from Moraja and Rose, supported Mazen’s request for payment of \$10.00 per hour for six hours per day for caregiver services. Based on these findings, the ALJ awarded Mazen \$420 per week as payment for caregiver services

rendered by Deana beginning December 1, 1999, and “continuing until a further Order is entered changing or terminating the payment amount.”

Speedway appealed the ALJ’s decision and the Board affirmed in part, vacated in part, and remanded. In doing so, the Board found the ALJ properly awarded home caregiver benefits at the rate of \$10 per hour for six days per week. However, the Board found the ALJ’s award of those benefits beginning on December 1, 1999, was not appropriate. Therefore, the Board remanded this matter to the ALJ for a determination of when Deana began providing home caregiver services. Finally, the Board vacated that portion of the ALJ’s award extending home caregiver benefits indefinitely into the future. The Board noted that Mazen’s care requirements had changed over time, and they might very well continue to do so. Therefore, in order to receive ongoing caregiver benefits, Mazen was required to file Forms 114 as appropriate. It is from this opinion by the Board that Speedway appeals.

As noted above, Speedway raises five issues on appeal. We will address those issues in the order listed.

STANDARD OF REVIEW

There are three levels of review in workers’ compensation appeals. The ALJ has the sole discretion to determine the quality, character, and substance of the evidence, may reject any testimony, and may believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same party’s total proof. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418,

419 (Ky. 1985), and *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). If the party with the burden of proof failed to convince the ALJ, that party must establish on appeal that the evidence was so overwhelming as to compel a favorable finding. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). As long as the ALJ's opinion is supported by substantial evidence, we cannot disturb it on appeal. *See Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). Therefore, the first level of review is whether the ALJ abused her discretion.

The second level of review involves issues that raise mixed questions of fact and law. At this mid-level, we have greater latitude in determining if the underlying decision is supported by probative evidence. *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).

The final level of review involves issues that raise questions of law. Those issues are subject to *de novo* review. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001); *see also A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999); *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 518-19 (Ky. App. 1998); and *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). This appeal contains issues requiring the application of all three levels of review.

ANALYSIS

1. Sufficiency of the Evidence

Speedway argues that Mazen did not offer sufficient evidence to support his claim for caregiver benefits. In *Bevins Coal Co. v. Ramey*, 947 S.W.2d 55 (Ky. 1997) the Supreme Court of Kentucky held that, under KRS 342.020(1), a homemaker may be entitled to payment for providing services “for the cure and relief from the effects of injury.” *Id.* at 56. In order to be compensable, the services must “be medically necessary, performed competently, and provide cure and relief from the effects of the injury.” *Id.* at 59. As claimant, Mazen had the burden of proving all of the preceding elements of his claim for caregiver benefits. *See Roark v. Alva Coal Corporation*, 371 S.W.2d 856 (Ky. 1963); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984); *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979).

In support of his claim, Mazen offered the testimony of Deana that she was advised by Mazen’s physicians and therapists to perform the services she performed. Furthermore, she testified she received instructions from the physicians, therapists, and/or Mazen’s home health care nurses regarding how to perform those services.

Additionally, Mazen offered the report and testimony of Mojara detailing the services performed by Deana and indicating that, absent Deana’s care, Mazen would require twenty-four hour personal care or residence in an assisted living facility. Dr. Corbett concurred with Mojara’s recommendations, and Rose

stated that Deana was providing services “consistent with the expectations of a family caregiver.”

The preceding is substantial evidence that the services provided by Deana were medically necessary, performed competently, and provide cure and relief from the effects of Mazen’s injury. There is no evidence that would compel a different result. Therefore, we hold Mazen presented sufficient evidence to support his claim for caregiver services.

2. Grounds for Delay in Filing the Initial Form 114

Speedway next argues any services provided before August 30, 2003, are not compensable because the initial Form 114 was not timely filed. 803 KAR 25:096 § 11(1) provides that a person who is not a physician or medical provider who, nonetheless, provides compensable medical services, must seek reimbursement by submitting a Form 114 to the employer or carrier within sixty days after the service is initiated and every sixty days thereafter. 803 KAR 25:096 § 11(3) provides that “[f]ailure to timely submit the Form 114, without reasonable grounds, may result in a finding that the expenses are not compensable.”

The parties do not dispute that Mazen did not timely present the initial Form 114 to Speedway. However, the ALJ found Mazen offered a reasonable explanation for his delay in presenting the Form 114. On appeal, Speedway argues that Deana’s testimony might explain the lack of supporting documentation for the Forms 114, but it does not explain the delay in submitting the initial Form 114. In

support of its position, Speedway cites to Deana's hearing testimony that she did not have "spare time to sit down and take notes of everything I do for him."

However, Speedway is reading Deana's testimony too narrowly. As noted above, Deana testified that she did not "have time to document." From that testimony, the ALJ could infer Deana lacked the time to prepare the initial Form 114 and to prepare any supporting documentation that might be required.

Considering Deana's full-time job and her need to care for the couple's five minor children and Mazen, the ALJ's inference is supported by evidence of substance and cannot be disturbed on appeal.

Furthermore, although not cited by either the ALJ or the Board, the ALJ's opinion is supported by Deana's testimony that no one from Speedway ever directly informed her that she was required to submit any specific documentation seeking reimbursement for the services she provided. 803 KAR 25:240 § 3(1) provides that "[a] carrier shall provide adequate notice with regard to policy provisions and information with regard to coverage and benefits."

Caregiver benefits have been available in Kentucky since the Supreme Court rendered its opinion in *Bevins*. Dalton testified she was aware Deana did not want a certified home health aide, but an LPN, and Mazen needed, at a minimum, additional services a certified home health aide could provide. Therefore, Speedway should have advised Mazen and/or Deana of the availability of caregiver benefits and how to apply for such benefits.

Based on the above, we hold the ALJ's finding that Mazen provided a reasonable explanation for the delay in submitting the initial Form 114 is supported by substantial evidence and we affirm that finding.

3. Completion of the Forms 114

Speedway argues that the Forms 114 submitted by Mazen were not "fully completed" as required by 803 KAR 25:096 § 11(1). We agree with Speedway that the purpose of a Form 114 is to provide the employer/carrier with sufficient information so it can determine if the listed services are compensable. Furthermore, we agree with Speedway that the Forms 114 herein provided only limited information regarding the specific services performed, the dates of service, or the time required to perform the services. However, the Forms 114 were not the only documents available to Speedway.

In addition to the Forms 114, Speedway had available to it all of Mazen's medical records. Included in those records were copies of the notes provided by the home health care nurses. Those notes put Speedway on notice regarding the extent of the services Mazen required and the time necessary to provide those services. Speedway cannot simply close its eyes to the information it has and deny payment because that information did not come to it by way of a Form 114. Furthermore, based on Dalton's testimony that she closely monitored Mazen's treatment and was involved in determining the level of home care needed, Speedway cannot deny it understood the significance of the medical records in its possession. Finally, throughout the course of this litigation, Deana testified as to

what services she provided and how long it took her to provide those services.

That testimony, coupled with the reports of Mojara, Rose, and Dr. Corbett, provide sufficient information to support the ALJ's finding that the Forms 114 were "fully completed."

In a related matter, we note that Speedway states in its Brief that:

the Board "cherry-picks" information from other testimony and medical records, and concludes that Speedway should have known what tasks Mrs. Elias was performing in caring for Plaintiff. The Board even went so far as to rely upon an alleged handwritten list of services which Mrs. Elias purportedly provided for her husband, without the list ever being offered as evidence in this case!

Speedway cites this alleged impropriety by the Board as "reason alone to reverse the Board's decision in this case." We note that the document to which Speedway refers is page 176 of the record. It is attached to a letter from Mazen's counsel to Speedway's counsel and is part of what appears to be a group of documents attached to Speedway's July 12, 2007, Notice of Contest of Additional Requests for Payment. Therefore, the document in question is part of the record and the Board's citation to it was not improper or grounds to reverse.

4. Consideration of Issues not Previously Raised

In addition to arguing the Board impermissibly relied on evidence that Speedway itself filed, Speedway argues the Board improperly questioned whether Speedway properly denied payment. We agree with Speedway that it was not required by the regulations to formally contest the requested payments by way of a

Form 112. However, the Board’s discussion of this issue was not dispositive of its ultimate findings and is not dispositive of our holding on appeal. Therefore, we hold that the Board’s discussion of this issue is not grounds for reversal.

5. Lack of Jurisdiction

Finally, Speedway argues that, because Deana was never joined as a party, the ALJ was without authority to award her “compensation.” Speedway’s argument is flawed for at least three reasons. First, the ALJ did not make an award to Deana. In her opinion and award, the ALJ stated that:

[t]he Plaintiff, Mazen Elias, shall recover of the Defendant-employer, Speedway/SuperAmerica, and/or its insurance carrier, such medical, surgical and hospital expenses as may be reasonably required for the treatment of Plaintiff’s occupational injury including payment for caregiver services by Deana Elias in the sum of \$420.00 per week

Second, while medical care providers whose services are being contested are often joined as parties, they are only arguably required to be joined if a defendant is contesting the reasonableness and necessity of the treatment. *See Ausmus v. Pierce*, 894 S.W.2d 631 (Ky. 1995). In this case, Speedway was not contesting the reasonableness/necessity of the care provided by Deana; it was contesting whether Mazen’s claim for benefits was timely filed and/or whether that claim was supported by adequate evidence. Therefore, Deana was not a necessary party to this litigation under *Ausmus*.

Finally, and perhaps most importantly, Speedway did not raise this jurisdictional issue before the ALJ. 803 KAR 25:010 § 13(13) provides that, at the

benefit review conference, the ALJ shall prepare a summary of all contested and uncontested issues. Only the issues listed as contested “shall be the subject of further proceedings.” 803 KAR 25:010 § 13(14). Because Speedway did not raise the jurisdictional issue before the ALJ, it is foreclosed from doing so now.

CONCLUSION

The ALJ’s findings that the delay in filing the initial Form 114 was reasonable, the Forms 114 were fully completed, and Mazen is entitled to caregiver benefits are supported by evidence of substance and cannot be disturbed on appeal. We agree with the Board that the evidence did not support the ALJ’s award of caregiver benefits dating to the date of Mazen’s injury. Finally, we note that Mazen did not file a cross-appeal; therefore, we cannot disturb the Board's findings that the ALJ lacked the authority to award caregiver benefits in a fixed amount into the future and that Mazen is required to continue filing Forms 114. Therefore, we affirm the Board. This matter is remanded to the ALJ for additional proceedings consistent with the Board’s opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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