

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000877-WC

MICK MURF CONSTRUCTION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-04-79947

SARAH GANT;  
HON. DONNA TERRY, CHIEF  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: KELLER, MOORE, AND TAYLOR, JUDGES.

KELLER, JUDGE: Mick Murf Construction (Mick Murf), appeals from an opinion of the Workers' Compensation Board (the Board), vacating an order by the Chief Administrative Law Judge (the CALJ), that required Mick Murf to pay disputed medical expenses on reopening. On appeal, Mick Murf argues that it

appropriately gave notice of its intent to contest the disputed expenses; that there was no evidence to support the CALJ's finding that the expenses were related to Sarah Gant's (Gant), work injury; and that the CALJ ordered Mick Murf to pay a medical expense that had not been included in Gant's motion to reopen. For the following reasons, we reverse and remand.

## FACTS

Gant is 58 years of age, has three years of college education, served in the military, and has worked a variety of jobs. On July 21, 2004, while working as a concrete finisher, Gant injured her right shoulder. As part of her treatment regimen following the injury, Gant underwent physical therapy. During one of her therapy appointments in May 2005, Gant had some sort of syncopal (fainting) episode.<sup>1</sup> She was taken to the emergency room at T.J. Sampson Community Hospital (T.J. Sampson), where she received treatment. In June 2005, while at T.J. Sampson waiting to undergo a procedure to relieve adhesive capsulitis, Gant had another syncopal episode. Gant received treatment related to this episode and, because of the episode, her physician cancelled the procedure. The hospital submitted bills associated with treatment of Gant's May and June 2005 syncopal episodes to Mick Murf.<sup>2</sup> Mick Murf denied payment indicating that the syncopal episodes were not related to Gant's shoulder injury. We note that Mick Murf did

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<sup>1</sup> There is some difference of opinion in the medical records regarding the exact nature of this and a subsequent episode; however, for the sake of uniformity, we will refer to them as syncopal episodes.

<sup>2</sup> We recognize that T.J. Sampson submitted the bills to Mick Murf's insurer. However, because the liability is ultimately Mick Murf's, we will refer to Mick Murf and its insurer simply as Mick Murf.

not refer to any medical authority in support of its denial. Shortly after receiving notice of that denial, Gant filed her claim.

Mick Murf timely filed a Notice of Claim Denial on April 19, 2006, in which it contested the work relatedness of Gant's "psychiatric problems" and "a variety of physical symptoms and complaints relating to her right upper extremity." Mick Murf did not specifically state that it was contesting any medical expenses, noting simply that it had paid "[a]ll known medical expenses."

During litigation, the parties filed a number of medical records and reports. In pertinent part, Dr. Goldman noted in his August 16, 2005, report the two syncopal episodes and stated that Gant:

is having panic attacks and appears to have either a hysterical reaction or a conversion disorder as far as her right upper extremity is concerned. . . . She apparently has a previous history of panic attacks. Her "breathing disorder" and "seizures", which are actually syncopal episodes, are likely related to her panic attacks.

We note that Dr. Goldman apparently evaluated Gant at the request of Mick Murf because his report was forwarded directly to the Mick Murf's claims adjuster.

Dr. Shraberg, who performed a psychiatric evaluation at the request of Mick Murf, stated in his December 13, 2005, report that Gant's "'syncopal episodes' appear to be hysterical;" however, Dr. Shraberg did not relate those episodes to the work injury. In June and July 2005, Dr. O'Keefe treated Gant for what he classified as atypical seizures, noting that he did not feel they were truly syncopal or work-related.

T.J. Sampson's medical records, filed during the initial litigation, reveal that Gant suffered a syncopal episode on June 1, 2005, while being prepped for right shoulder manipulation. It appears that Gant had this episode because she was holding her breath.

At the pre-hearing conference, Mick Murf stipulated that it had paid \$81,613.92 in medical expenses and the parties listed as issues: extent and duration and causation of psychological injury and non-shoulder right upper extremity conditions. Neither party listed any specific medical expenses as being contested or unpaid at either the pre-hearing conference or the hearing. However, the parties stipulated at the hearing that the correct amount of medical expenses paid was \$41,029.78.

After receiving the parties' briefs, the CALJ entered an opinion and order (hereinafter the opinion) finding Gant's psychological condition was related to the work injury. In the opinion, the CALJ did not specifically address whether treatment Gant received following her May and June 2005 syncopal episodes was compensable. However, the CALJ did mention the June 2005 incident. Furthermore, the CALJ found that Mick Murf was "liable for payment of medical expenses for treatment of Ms. Gant's recurrent depression and any elements of a conversion disorder/hysterical reaction since effective treatment of these psychological disorders" was deemed to be "a necessary precursor to recovery from the physical injury." The CALJ then made a standard order requiring Mick Murf to pay medical expenses "reasonably required for the care and relief from the

effects of the work-related injury” subject to “the Kentucky Medical Fee Schedule.” Following entry of the opinion neither party filed a petition for reconsideration or an appeal.

On September 22, 2008, Gant filed a motion to reopen seeking an order to compel payment of medical expenses. In the body of that motion, Gant stated that she sought payment in the amount of \$1,643.90 for the June 1, 2005, T.J. Sampson bill for treatment related to her syncopal episode. We note that bill is in the amount of \$654.55. Although Gant did not mention the May 2, 2005, bill in the body of her motion, she did attach it to her motion. We note that the May 2, 2005, bill is in the amount of \$989.35, and the two bills total \$1,643.90.

In its response, Mick Murf noted the discrepancy between the language in the body of Gant’s motion and the attachments to that motion. Mick Murf attached to its response medical records from T.J. Sampson, Dr. Lessenberry, and KORT, a physical therapy provider. The KORT record from May 2, 2005, indicates that Gant had a “possible mini-stroke” on April 27, 2005, and that her “passing out spells started” on April 20, 2005. The T.J. Sampson records indicate that Gant was treated on May 2, 2005, for a “syncopal episode” that occurred at Dr. Lessenberry’s. On June 1, 2005, Gant was treated for low oxygen saturation after holding her breath. Dr. Lessenberry’s office note from June 2, 2005, indicates that Gant was treated the preceding day for a “syncope like episode.”

Mick Murf also attached correspondence dated March 15, 2006, from its insurer to T.J. Sampson indicating that the May 2, 2005, bill was not

compensable because the condition treated was not work-related. It does not appear from the face of the correspondence that copies were forwarded to any other persons. On April 25, 2006, Gant's attorney forwarded copies of bills from the May and June 2005 T.J. Sampson treatments to Mick Murf's attorney asking if payment had been denied. Counsel responded on May 16, 2006, stating that the bills had been denied.

The CALJ reviewed the pleadings from the parties, found that the bills were compensable, and ordered Mick Murf to make payment. In doing so, the CALJ stated that Mick Murf had not specifically contested the June 2005 bill during litigation. The CALJ found that the treatment in June 2005 was work-related; that Mick Murf knew of the bill; and that Mick Murf "had an obligation to raise this medical dispute during the claim litigation or, at the latest, thirty days after the Administrative Law Judge's opinion regarding causation became final." Based on these findings, the CALJ ordered Mick Murf to pay the June 2005 bill.

As to the May 2005 bill, the CALJ stated she could find no indication in the record that the treatment was work-related. However, because Mick Murf did not specifically raise the issue during litigation or within thirty days after the opinion became final, the CALJ ordered Mick Murf to make payment. Mick Murf appealed this order by the CALJ to the Board.

The Board first determined that Mick Murf's arguments were so "totally without merit and unreasonable as to constitute a violation of KRS 342.310(1)." In doing so, the Board stated that the parties litigated the

compensability of the syncopal episodes, and that the CALJ referred to those episodes in the opinion and ultimately determined the treatment related to those episodes was compensable. The Board then noted that, once an ALJ's opinion becomes final, neither an ALJ nor the Board has the jurisdiction to enforce it. Thus, the Board concluded that Gant should have pursued an enforcement action against Mick Murf in circuit court, rather than filing a motion to reopen, and the Board vacated the CALJ's order on reopening.

The Board also addressed Mick Murf's argument that the CALJ in the opinion did not specifically address the bills related to treatment of the syncopal episodes stating:

Even if we accepted Mick Murf's premise that the compensability of these syncopal episodes was not specifically addressed or determined in the CALJ's September 11, 2006 Opinion and Award, Mick Murf nonetheless is required to pay the hospital bills as the CALJ's Opinion and Award included a general award of "such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing, supplies, and appliances as may be reasonably required for the care and relief from the effects of the work-related injury." Since Gant properly submitted the hospital bills for payment to Mick Murf prior to the CALJ's consideration of the claim and Mick Murf failed, despite ample opportunity, to timely file a petition for reconsideration/appeal to the CALJ/this Board addressing the CALJ's lack of findings regarding the payment of the bills at issue, any objections to the compensability of these bills are now waived. See Patterson v. Appalachian Regional Hospital, Inc., 419 S.W.2d at 563 (In a situation such as this the general medical award becomes an order for the employer to pay the medical expenses. . . ." [sic]); National Pizza Company v. Curry, 802 S.W.2d 949, 951 (Ky. App. 1991) ("Clearly, the employer must raise the

issue of compensability of medical treatment with the board or the right to object is waived.”)

Moreover, the fact that Mick Murf never filed a medical fee dispute pursuant to 803 KAR 25:096, Section 8, even further demonstrates the uncontested nature of these bills and hence, the waiver of any objections to their payment by Mick Murf. Enforcing payment of uncontested medical bills via the CALJ’s general medical award, however, also falls within the jurisdiction of the circuit court. See Patterson v. Appalachian Regional Hospital Inc., 419 S.W.2d at id.; West [sic] Westvaco Corporation v. Fondaw, 698 S.W.2d at 839.

The Board then assessed “the whole cost of this appeal before this Board . . . against Mick Murf,” and remanded this matter to an ALJ for a determination regarding the amount to be assessed.

Finally, the Board determined that Mick Murf may have violated the unfair claims settlement practices provisions of Kentucky Revised Statute (KRS) 342.267 and 803 Kentucky Administrative Regulation (KAR) 25:280 § 6, and referred this matter to the Commissioner of the Department of Workers’ Claims for investigation. It is from the Board’s opinion that Mick Murf appeals.

#### STANDARD OF REVIEW

Mick Murf raises issues of law and fact, which have different standards of review. As to issues of law, *i.e.* whether the CALJ acted outside her jurisdiction, we review the findings of the CALJ and the Board *de novo*. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). When reviewing factual findings, *i.e.*, whether the evidence supports the CALJ’s findings, the determinative question is whether the CALJ’s findings are “so unreasonable under



the evidence that [they] must be viewed as erroneous as a matter of law.” KRS 342.285; *Ira A. Watson Dep’t. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000).

With these standards in mind, we review the issues raised by Mick Murf and the Board’s *sua sponte* determination that the CALJ lacked jurisdiction to reopen this claim.

## ANALYSIS

### 1. Lack of Evidence to Support CALJ’s Findings

Mick Murf first argues that “there is no evidence in the record indicating that the syncopal/fainting episode was a symptom of a psychological condition or was in any way causally related to the work injury.” That argument is not supported by the record. Dr. Goldman stated that Gant was “having panic attacks and appear[ed] to have either a hysterical reaction or a conversion disorder as far as her right upper extremity is concerned” and that her syncopal episodes were “likely related to her panic attacks.” Furthermore, although Dr. Shraberg stated that Gant’s syncopal episodes were not work-related, he stated that they appeared to “be hysterical.” These two physicians attributed Gant’s syncopal episodes to hysteria and/or panic attacks and Dr. Goldman related those attacks to Gant’s shoulder injury. This is evidence of substance sufficient to support a finding that Gant’s syncopal episodes were related to her right shoulder and, thereby, to the work injury. Therefore, we discern no merit in this argument by Mick Murf.

Within this section of its brief, Mick Murf also argues that the CALJ did not make a finding regarding the compensability of the syncopal episodes in the opinion. As noted above, two physicians who examined Gant at Mick Murf's request determined that her syncopal episodes were related to a conversion disorder or hysterical reaction. The CALJ found that Mick Murf "was liable for payment of medical expenses for treatment of Ms. Gant's recurrent depression and any elements of a conversion disorder/hysterical reaction. . . ." While this finding by the CALJ did not specifically mention the two bills in question, it clearly encompasses those bills. Therefore, this argument by Mick Murf is not persuasive.

## 2. Failure to Include May 2005 Bill in Medical Fee Dispute

Likewise, we discern no merit to Mick Murf's argument that Gant did not include the May 2005 bill in her motion to reopen. In the body of that motion Gant only mentioned the June 2005 bill. However, Gant attached both the May and June 2005 bills to the motion. Furthermore, the total amount claimed in the body of the motion encompassed both bills. Finally, we note that Mick Murf was aware from early in the life of this claim that Gant sought payment for both bills; it addressed both bills in its response to Gant's motion; and it filed medical proof regarding both bills along with its response. Therefore, Mick Murf's argument that the CALJ improperly considered the May 2005 bill is not persuasive.

## 3. Obligation to File Medical Fee Dispute

Mick Murf argues that, once it denied payment for the bills pre-litigation, it had no obligation to make any further denial or to formally institute a

medical fee dispute during litigation. Rather, Mick Murf argues that Gant had the obligation to raise any issue with regard to the T.J. Sampson bills before the CALJ and, having failed to do so, she waived the issue. This argument ignores the fact that Mick Murf, in its Notice of Claim Denial, stated that it was contesting payment of any benefits related to Gant's psychological condition. Because the evidence established that Gant's syncopal episodes were the result of her psychological condition, any medical treatment related to that condition was incorporated in Mick Murf's denial. Thus, the compensability of the T.J. Sampson bills, along with any other medical bills related to Gant's psychological condition, was raised before the CALJ by Mick Murf.

It would have been better practice for Mick Murf or Gant to formally advise the CALJ of the dispute regarding the T.J. Sampson bills. However, because Mick Murf's Notice of Claim Denial necessarily included those bills, neither party was required to formally file a medical fee dispute during litigation.

We note that Mick Murf argues that the Board incorrectly referred to correspondence by Gant's counsel as a renewed request for payment. According to Mick Murf, the correspondence "was nothing more than a letter of inquiry from counsel for the Appellee to counsel for the Appellant. There was no actual medical bill tendered" and no formal statement for services "which, even arguably, would have raised any duty to formally deny." This argument is unpersuasive for at least two reasons. First, the correspondence from Gant's counsel is not simply "a letter of inquiry." The correspondence asks Mick Murf's counsel whether the bills have

been denied, and if so, why. In the alternative, the correspondence asks that the bills, if not denied, be placed in line for immediate payment. Thus, the correspondence is both an **inquiry** regarding the status of the bills and a **request** for payment.

Second, it appears that, with this argument, Mick Murf is attempting to “have its cake and eat it too.” On the one hand, Mick Murf argues that it appropriately denied payment pre-litigation. In order to appropriately deny payment, Mick Murf was required to undertake some investigation and have some basis for the denial. *See* 803 KAR 25:096 § 7 and 803 KAR 25:240 § 4.

Furthermore, pursuant to 803 KAR 25:240 § 5(3), if Mick Murf believed it needed additional information, it had an obligation to advise Gant what information it needed. Because Mick Murf did not request any additional information from Gant, it either had all the information it believed it needed to reasonably deny payment or it denied payment without a reasonable basis. If the former is true, which Mick Murf argues, then Gant had no obligation to provide any additional information.

Finally, we note that both the CALJ and the Board found the Mick Murf had an obligation to file a post-litigation medical fee dispute to preserve the issue of liability for the T.J. Sampson bills. Because we hold that the CALJ’s opinion encompassed the T.J. Sampson bills, no post-litigation medical fee dispute existed. Therefore, we need not address this issue.

#### 4. Jurisdiction

Although not specifically raised by the parties, we must address the Board's finding that Gant's vehicle for relief was not through a motion to reopen, but through an enforcement action in circuit court. KRS 342.305 provides that "[a]ny party in interest may file in the Circuit Court of the county in which the injury occurred a certified copy . . . of an order or decision of the administrative law judge. . . ." The circuit court "shall render judgment in accordance therewith and notify the parties." We agree that the CALJ and the Board lack statutory or regulatory authority to enforce their decisions and that such enforcement must be had in circuit court. *Southeast Coal Co. v. Mansfield*, 231 S.W.3d 122, 124 (Ky. 2007). However, we do not agree that the motion filed by Gant was an enforcement action. Rather, we believe that Gant was seeking an unambiguous order from the CALJ and/or the Board which she could then take to circuit court for enforcement, if necessary.

We recognize that KRS Chapter 342, through reconsideration, does provide a mechanism for a party to obtain additional findings of fact or clarification of an ALJ's opinion. However, in this case, from Gant's perspective, the opinion was unambiguous - Mick Murf was liable for medical expenses related to Gant's "recurrent depression and any elements of a conversion disorder/hysterical reaction," which of necessity included the T.J. Sampson bills. Therefore, Gant had no reason to seek additional findings of fact through reconsideration. Mick Murf also could have sought additional findings of fact through a petition for reconsideration, but it chose not to do so.

That being stated, we believe that, from a practical standpoint and for the sake of judicial economy, before Gant could have expeditiously obtained enforcement of the CALJ's award in circuit court, it was necessary for her to obtain an unambiguous order from the CALJ and/or the Board regarding these specific medical bills. As noted by the Supreme Court of Kentucky in *Westvaco Corp. v. Fondaw*, 698 S.W.2d 837, 839 (Ky. 1985), it would be "inefficient and expensive to have a matter such as this filed in circuit court in the first instance and then be referred to the Board." An ALJ and the Board are in a better position to interpret what might be an unclear opinion than is the circuit court. Therefore, we hold that, in circumstances such as this, *i.e.*, when an ALJ's initial opinion may be clear to an ALJ or the Board but is not clear on its face, a motion to reopen for clarification is appropriate. Thus, we reverse the Board for reinstatement of that portion of the CALJ's order finding the T.J. Sampson bills compensable. Once that is accomplished, Gant will be free to seek enforcement of that unambiguous order in circuit court. The parties and the bar should not take this opinion to be an abrogation of the procedures already in place requiring a party to timely file a motion for reconsideration to obtain clarification or additional findings in an opinion. However, when the ALJ's opinion might not be clear to circuit court judges who rarely deal with workers' compensation matters, obtaining clarification through a motion to reopen is appropriate prior to seeking enforcement in circuit court. Absent such clarification, the parties might well be in the position of being

ordered to return to the ALJ and/or the Board by the circuit court, which would be burdensome to both systems.

#### 5. Request for Sanctions

Finally, we note that Gant has requested that we award her costs and attorney fees arguing that Mick Murf's appeal was unwarranted. Having reviewed the record, and in particular the Board's holding that the CALJ lacked jurisdiction to reopen Gant's claim, we do not believe that this appeal was brought without reasonable grounds. Therefore, we decline to award the costs and fees sought by Gant.

#### CONCLUSION

For the foregoing reasons, we reverse the Board and remand this matter for reinstatement of the CALJ's order on remand as set forth above.

ALL CONCUR.

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