

RENDERED: NOVEMBER 2, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2011-CA-002245-WC

PIKE COUNTY FISCAL COURT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-08-85524

ELVIS HARDIN; HONORABLE  
J. LANDON OVERFIELD,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: LAMBERT, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Pike County Fiscal Court (Pike County) petitions for the review of a decision of the Workers' Compensation Board (Board) reversing a finding by the Chief Administrative Law Judge (ALJ) that a surgical procedure

was not reasonable or medically necessary. Finding the ALJ's decision was not supported by substantial evidence, we affirm.

Elvis Hardin sustained a back injury in a motor vehicle accident that occurred during the course and scope of his employment with Pike County on June 4, 2008. Pike County and Hardin settled the resulting workers' compensation claim with the exception of the compensability of a back surgery performed by Dr. Norman Mayer on June 24, 2009. Following a hearing, the ALJ found that "the low back condition for which plaintiff's surgery was required was causally related to the subject work-related injury and the surgery was, therefore, fully compensable pursuant to KRS<sup>[1]</sup> 342.020."

Pike County filed a petition for reconsideration, arguing that the ALJ failed to make a finding regarding the reasonableness and necessity of the surgery. The ALJ granted the petition for reconsideration on the basis that after reviewing the evidence, no factual basis existed to support a finding that the surgery was reasonably necessary and as a result, determined the surgery was non-compensable. Thereafter, Hardin filed a petition for reconsideration, which the ALJ denied. The Board reversed the ALJ, finding that in the original award the ALJ implicitly concluded that the surgery was reasonable and necessary, and was therefore not authorized to reconsider its factual findings or the merits of the case upon the petition for reconsideration. The Board also determined that the ALJ erred on reconsideration because the finding that the surgery was not reasonably

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<sup>1</sup> Kentucky Revised Statutes.

necessary was not supported by substantial evidence. Pike County petitioned for the review of the Board's decision.

The standard for reviewing a decision of the Board "is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The ALJ is the finder of fact and "has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citation omitted). We review the ALJ's findings of fact under a clearly erroneous standard of review. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

As an initial matter, the Board misconstrued KRS 342.281 to bar the ALJ from addressing the reasonableness and necessity of Hardin's surgery upon Pike County's motion for reconsideration. When reconsidering an original award, "[t]he [ALJ] shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision[.]" KRS 342.281. Such a review allows for the correction of all patent errors, both legal and factual, but does not permit a reconsideration of the merits or factual findings. *Wells v. Beth-Elkhorn Coal Corp.*, 708 S.W.2d 104, 106 (Ky. App. 1985) (citing *Beth-Elkhorn Corp. v. Nash*, 470 S.W.2d 329 (Ky. 1971)). In *Eaton Axle v. Nally*, 688 S.W.2d 334 (Ky. 1985), the court likened KRS 342.281 to CR<sup>2</sup> 52.04 in that both require a

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<sup>2</sup> Kentucky Rules of Civil Procedure.

party who wishes to appeal to request any necessary findings of fact before the appellate process begins. *Id.* at 338. KRS 342.281 ensures that findings of fact are made on all contested issues, and any failure to make statutorily-mandated findings of fact is considered a patent error. *Id.* The court elaborated on KRS 342.281 in *Wells v. Ford*, 714 S.W.2d 481 (Ky. 1986), determining that a logical extension of the fact-finder's authority to correct patent errors is the authority to decide a still unresolved question on the merits. *Id.* at 484.

In the case before us, the Board reversed the ALJ's order on the basis that he did not have the authority to reconsider the merits of the case regarding the reasonableness and necessity of the back surgery performed on Hardin. The Board determined that the ALJ implicitly found the surgery to be reasonable and necessary since the original award stated that "the low back condition for which plaintiff's surgery was required was causally related to the subject work-related injury[.]" However, despite this language, no factual findings were set forth in the original award to support a finding that the surgery was reasonable and necessary. Reconsideration of the evidence following an ALJ's failure to state a factual basis to support a finding is permitted. *See Ford Motor Co. v. Stevenson*, No. 2003-SC-0382-WC, 2004 WL 1123857, at \*5 (Ky. May 20, 2004) (holding that the ALJ's failure to state a factual basis for concluding the date of an accident was a patent error on the face of the award and was the type of error a petition for reconsideration was designed to correct). Here, the ALJ was permitted to reconsider the evidence regarding the reasonableness and necessity of the surgery

since no factual basis was set forth in the award. Accordingly, we turn to the merits of the ALJ's decision granting Pike County's motion for reconsideration.

With respect to the Board determining that substantial evidence did not support the ALJ's conclusion that the surgery was not reasonable or necessary, we agree.

Substantial evidence is defined as evidence that “a reasonable mind might accept as adequate to support a conclusion[.]” *Bowling v. Natural Res. & Envtl. Prot. Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1994) (quoting *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 307 (Ky. App. 1972)). In the order on reconsideration, the ALJ cited the “plain language of the deposition of Dr. Berger” and the “opinion expressed by Dr. Ravvin that the plaintiff was not a surgical candidate” as the basis for finding the back surgery was not reasonable and necessary. We must first note that Dr. Ravvin's opinion was not introduced into the record before the ALJ. The records of Dr. Berger, as well as other doctors, referred to Dr. Ravvin's report, however the ALJ improperly relied on the opinion. Further, Dr. Berger's testimony regarding the reasonableness and necessity of the surgery is inconclusive. As the Board noted,

Dr. Berger never stated the treatment was unreasonable or unnecessary. Rather, he only stated, “From what I've seen in the medical records, and referring specifically to Dr. Ravvin's note, I probably would not have suggested it.” Later, when specifically asked whether, within a reasonable degree of medical probability, the surgery was reasonable and necessary, Dr. Berger stated, “It's hard for me to know not having seen him immediately before the spinal surgery that was done whether or not I would

have recommended it. Would somebody with this sort of problem sometimes require surgery like that, yes.” Dr. Berger’s testimony is equivocal regarding whether he would recommend the surgery and he freely admitted that he was unaware of the precise state of Hardin’s condition immediately prior to the surgery. He also freely admitted he was not sure of the cause of the stenosis in Hardin’s spine and stated he would hate to speculate and “I’d really just have to see the films.”

Pike County had the burden to prove the surgery was not reasonably necessary.

*Square D Co.* 862 S.W.2d at 309 (citation omitted). Since Pike County failed to set forth substantial evidence to establish the surgery was not reasonably necessary, the ALJ erred in holding the surgery was not compensable.

Accordingly, we affirm the Board’s opinion reversing the ALJ’s order on reconsideration on the basis that substantial evidence did not support it.

The opinion of the Workers’ Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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