

RENDERED: OCTOBER 19, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2018-CA-000087-WC

HITACHI AUTOMOTIVE SYSTEMS  
AMERICAS, INC.

APPELLANT

v. APPEAL FROM WORKERS' COMPENSATION BOARD  
HONORABLE REBEKKAH B. RECHTER, JUDGE  
ACTION NO. WC-13-67483

MARCUS COOTS;  
HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING IN PART AND REMANDING

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BEFORE: ACREE, JONES, AND THOMPSON, JUDGES.

JONES, JUDGE: This is an appeal from an opinion rendered by the Kentucky Workers' Compensation Board ("Board"). The Appellant, Hitachi Automotive Systems Americas, Inc. ("Hitachi"), asserts that the Board misinterpreted the term

“suspend” as used in 803 KAR<sup>1</sup> 25:096 §3(5) when it upheld the Administrative Law Judge’s (“ALJ”) conclusion that the Appellee’s failure to file the required Notice to Designate Physician Form 113 (“Form 113”) worked to delay—not eliminate—his benefits during the period of noncompliance. Having reviewed the record, in conjunction with all applicable legal authority, we affirm in part, but remand for additional findings of fact and conclusions of law.

### **I. BACKGROUND**

The Appellee, Marcus Coots, had just started working for Hitachi when he injured his right arm on or about September 11, 2013. Coots testified that his position required him to lift thirty-five to forty pound struts off the assembly line and then scan and box them. He performed this task about seventy times per hour. After his first shift, Coots noticed that his right arm was hurting. Nevertheless, he returned to work the following day. During his second shift, Coots noticed a knot the size of a golf ball inside the elbow of his right arm. This caused him to seek medical care from a local emergency room.

Eventually, Coots was referred to Dr. Ronald Burgess. Dr. Burgess diagnosed compression of the ulnar nerve. When, by January 9, 2014, Coots’s symptoms had not improved, Dr. Burgess recommended surgical intervention. However, the surgery was denied by Hitachi because it believed that the condition

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<sup>1</sup> Kentucky Administrative Regulations.

for which the surgery was recommended was not the result of any work related injury. At this point, the parties agreed to bifurcate Coots's claim so that the ALJ could make a determination with respect to work relatedness and causation, temporary total disability ("TTD"), and the medical necessity of surgical intervention. Ultimately, the ALJ concluded that Coots's right arm injury was work related. The ALJ ordered Hitachi to pay TTD benefits effective September 12, 2013, until such time as Coots reached maximum medical improvement ("MMI"), and to cover all reasonable and necessary medical treatment pursuant to KRS<sup>2</sup> 342.020. The ALJ then placed the claim in abeyance pending MMI.

In January 2015, Dr. Robert Taylor performed a nerve conduction study on Coots. After reviewing the results, Dr. Burgess opined that Coots was at MMI and no longer needed surgery. He released Coots to full duty work. As a result, Hitachi moved the ALJ to remove the claim from abeyance. The ALJ issued an order on February 25, 2015, removing the claim from abeyance, suspending TTD benefits, and setting a proof schedule.

While proof was being submitted, Coots continued treatment for his arm with Dr. Mukut Sharma. Dr. Sharma diagnosed severe right cubital tunnel syndrome attributable to Coots's work injury. Dr. Sharma performed a right ulnar

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<sup>2</sup> Kentucky Revised Statutes.

nerve decompression and submuscular transposition and right medial epicondylectomy on July 24, 2015.

On October 5, 2015, several months after the surgery was performed, Coots moved to reinstate TTD benefits, indicating he had undergone surgery by Dr. Sharma on July 24, 2015, and was not at MMI. Hitachi disputed the compensability of the surgery, arguing Dr. Burgess had deemed the surgery medically unnecessary, and Dr. Sharma had not filed a treatment plan, did not seek pre-authorization, and had not been designated as Coots's Form 113 physician. By order dated October 29, 2015, the ALJ sustained Coots's motion to reinstate benefits.

The claim then proceeded to a final hearing. The ALJ issued an Opinion and Award on April 18, 2016. The ALJ found the surgery performed by Dr. Sharma was causally work-related, reasonable, and necessary. He further found that Coots reached MMI on November 16, 2015, and awarded TTD benefits from the date of injury through November 16, 2015. The ALJ also awarded permanent partial disability ("PPD") benefits based on a 7% impairment rating.

A series of petitions for reconsideration and related orders followed. These were primarily focused on Coots's failure to file a Form 113 designating Dr. Sharma as his treating physician and Dr. Sharma's failure to file a treatment plan and a statement of services. The ALJ found that Coots unreasonably failed to

designate Dr. Sharma as his Form 113 physician. As a result, the ALJ concluded that payment of TTD benefits was suspended until Coots complied with the regulation. In doing so, the ALJ rejected Hitachi's argument that 803 KAR 25:096 §3(5) required a complete forfeiture of TTD during the period of noncompliance. Next, the ALJ determined that Hitachi could not be held responsible for the surgery by Dr. Sharma because he failed to provide a treatment plan and a statement of services. Both parties appealed to the Board.

The Board concluded that the ALJ's finding that Dr. Sharma failed to provide a treatment plan was inconsequential because: (1) it is unclear whether a plan was required and (2) even if the treatment plan was required, the Regulations do not specify a penalty. The Board found no error with respect to the ALJ's finding that Dr. Sharma did not submit a timely statement for services.

Nevertheless, it concluded that remand was required because the ALJ failed to address whether reasonable grounds exist which would excuse Dr. Sharma's failure to timely submit a statement for services. This portion of the Board's opinion has not been appealed.<sup>3</sup>

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<sup>3</sup> On remand, we believe the ALJ should consider whether it is necessary to join Dr. Sharma. The Regulations provide that a provider cannot bill a patient directly if the provider failed to timely submit a statement for services. 803 KAR 25:096 §10(3) ("The medical provider shall not bill a patient for services which have been denied by the payment obligor for failure to submit bills following treatment within forty-five (45) days as required by KRS 342.020 and Section 6 of this administrative regulation."). As such, Coots has no stake in the resolution of this issue. It would seem only proper then that Dr. Sharma should be provided with the opportunity to respond to Hitachi's assertions regarding the statement for services.

Next, the Board considered the effect of Coots's failure to designate Dr. Sharma as his Form 113 physician. After examining the language of 803 KAR 25:096 §3(5), the Board affirmed the ALJ's conclusion that the term "suspend" denoted a temporary suspension only. Based on this interpretation, the Board reasoned that once Coots filed the Form 113, Hitachi was responsible for paying the entire amount of TTD the ALJ ordered. This appeal by Hitachi followed.

## **II. STANDARD OF REVIEW**

The sole issue on appeal is whether the Board correctly determined that the suspension of benefits referred to in 803 KAR 25:096 §3(5) is temporary. This is a purely legal question, which we review *de novo*. *Steel Creations By and Through KESA, The Kentucky Workers' Comp. Fund v. Injured Workers Pharmacy*, 532 S.W.3d 145, 153 (Ky. 2017). "[W]e are bound neither by an ALJ's decisions on questions of law [n]or an ALJ's interpretation and application of the law to the facts." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009). However, in interpreting an administration regulation, like the one at issue in this case, we do give the agency's interpretation great weight. *Roach v. Owensboro Health Reg'l Hosp.*, 518 S.W.3d 786, 790 (Ky. App. 2017).

## **III. ANALYSIS**

In relevant part, 803 KAR 25:096 §3 provides:

- (1) Except for emergency care, treatment for a work-related injury or occupational disease shall be rendered

under the coordination of a single physician selected by the employee. The employee shall give notice to the medical payment obligor of the identity of the designated physician by tendering the completed Form 113, including a written acceptance by the designated physician, within ten (10) days after treatment is commenced by that physician.

...

(5) The unreasonable failure of an employee to comply with the requirements of this section may suspend all benefits payable under KRS Chapter 342 until compliance by the employee and receipt of the Form 113 by the medical payment obligor has occurred.

Hitachi asserts that the suspension of benefits referred to in the Regulation is permanent such that no benefits, income or medical, are ever due for the period of noncompliance. Hitachi likens the Regulation's suspension of benefits to the sanction for an employee's refusal to submit to an independent medical evaluation provided for in KRS 342.205(3). The Board disagreed. It held that the ALJ correctly determined that the regulation's suspension of benefits was only temporary. The Board explained its holding as follows:

We reject the argument that benefits payable during the period of suspension are permanently forfeited. The term "suspended" is not defined in 803 KAR 25:096 §3(5). A suspension may be either temporary or permanent. The above provision does not specifically call for the permanent loss or termination of the suspended benefits. Rather, the suspension is temporary "until compliance" by the employee.

We are further convinced of this conclusion by reference to KRS 342.205(3). If an employee refuses to submit to an IME or otherwise obstructs the examination, the employee's "right to take or prosecute any proceedings under this chapter shall be suspended until the refusal or obstruction ceases." KRS 342.205(3) goes on to specifically provide that "[n]o compensation shall be payable for the period during which the refusal or obstruction continues." In *Finke v. Comair, Inc.*, 489 S.W.3d 242 (Ky. App. 2016), the Court of Appeals interpreted this provision as a complete forfeiture of compensation during the period of suspension. Focusing on the statutory provision that, "no compensation shall be payable for the period" during which the obstruction continues, the Court concluded the suspended benefits were permanently forfeited. "We fail to find any mechanism in the statute for the retroactive restoration of previously suspended benefits." *Id.* at 252.

Unlike KRS 342.205(3), 803 KAR 25:096 §3(5) contains no language referencing the permanent forfeiture of suspended benefits. On the contrary, 803 KAR 25:096 §3(5) states benefits will be removed from suspension when compliance is reached. Absent more specific statutory language requiring the suspension of benefits, we are not at liberty to read a penalty into the regulations which the legislature has not specifically included.

Despite the convoluted procedural course of this claim, we conclude Coots' [sic] income benefits have not been permanently terminated. The ALJ awarded TTD benefits from the date of injury through November 18, 2016, and PPD benefits thereafter. This period of the TTD award was not altered in the subsequent orders on reconsideration. In his August 1, 2016 Order, the ALJ noted the regulation does not call for the termination of TTD benefits for the claimant's failure to comply with the requirement to designate a physician. In fact, the ALJ ordered benefits suspended "pending the designation



of Dr. Sharma as his Form 113 physician.” If, as Coots asserts, he has complied by designating Dr. Sharma as his Form 113 physician, payment for the entire period of TTD was due as of the date Coots came into compliance by designating Dr. Sharma as his Form 113 physician. Hitachi remains responsible for the full award of TTD and PPD benefits.

(Board’s Opin. at 15-17).

Like the Board, we note that 803 KAR 25:096 §3(5) provides only for a “suspension” of benefits “until compliance by the employee and receipt of the Form 113.” Unlike KRS 342.205(3), the Regulation does not suggest that benefits are “not payable” during the period of noncompliance. To the contrary, the Regulation indicates that the suspension lasts only “until” the employee complies by submitting his Form 113. Moreover, the suspension is not mandatory. The Regulation provides that an unreasonable failure to submit a Form 113 “*may* suspend” benefits. This language suggests that the ALJ retains discretion to determine whether suspension is warranted. The Board determined that the ALJ appropriately exercised his discretion to order a suspension of benefits until such time as Coots filed a proper Form 113, and that according to the language of the Regulation, the suspension is temporary. We agree with the Board’s interpretation of the Regulation.

Despite Hitachi’s arguments, we do not believe that the ALJ was misinformed or misguided in his application of the Regulation such that remand is

necessary for the ALJ to reconsider the scope of the suspension. In fact, the ALJ allowed for the most drastic sanction authorized by the Regulation: temporary suspension of all benefits until Coots complied with his requirement to file a proper Form 113.

Next, we turn to Hitachi's argument that the Board erroneously determined that Coots had complied with the Form 113 requirement. Specifically, Hitachi argues that 803 KAR 25:096 §3(5) requires that in order for an injured employee to reach compliance, the injured employee must: (1) complete a Form 113 and (2) the medical payment obligor must receive the completed Form 113. Hitachi maintains there is no evidence of record of when Coots completed the Form 113 and when it was received by the medical payment obligor. As such, Hitachi asks this Court to remand this issue for further findings. We agree with Hitachi that no proof was taken on this issue and no findings rendered by the ALJ regarding when the date benefits became due for the period of noncompliance. On remand, the ALJ should take additional proof, if necessary, and make a finding regarding the date upon which the suspension terminated. This is necessary to avoid Hitachi having to pay interest for benefits during the period of noncompliance.

#### IV. CONCLUSION

For the reasons set forth above, we affirm the Board's interpretation of 803 KAR 25:096 §3(5). However, we must remand this matter for additional findings of fact and conclusion of law. On remand, the ALJ shall determine when the suspended benefits became payable. This determination will require the ALJ to make a factual finding regarding the date the medical payment obligor received the Form 113 from Coots.

ALL CONCUR.

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