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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001671-WC

WONDERFOIL, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-16-02058

RICHARD RUSSELL;
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, GOODWINE, AND TAYLOR, JUDGES.

GOODWINE, JUDGE: Wonderfoil, Inc. ("Wonderfoil") petitions for review of an opinion of the Workers' Compensation Board ("Board") reversing and remanding the April 29, 2019 opinion, order, and award and May 23, 2019 order on reconsideration of the Administrative Law Judge ("ALJ") denying compensation

for medical expenses. Wonderfoil seeks reversal of the Board's holding that Richard Russell ("Russell") timely submitted his medical expenses. After careful review of the record and applicable case law, we affirm.

The relevant facts and posture of this case were summarized by the Board as follows:

Russell filed a Form 101 on November 10, 2014 alleging he injured his right arm when his shirtsleeve caught in a machine he was operating for Wonderfoil. He suffered severe burns and was admitted to University of Louisville Hospital, where he remained for six days. The injury was timely reported to Wonderfoil, however no first report of injury was filed and the company's workers' compensation insurer was not informed of the accident.

Wonderfoil filed a Form 111 on October 31, 2016, denying the claim. In particular, Wonderfoil denied liability for contested or disputed medical bills, along with potential medical disputes. Interestingly, Wonderfoil indicated it had paid all known medical expenses.

At his deposition taken on January 9, 2017, Russell indicated he had a 1% ownership interest in Wonderfoil, and his sisters owned the remainder. He testified he reported the injury, and one of his sisters called to check on him afterward. But as noted above, the injury was not reported to the workers' compensation insurer. Because he was unsure whether workers' compensation insurance covered his injury, Russell submitted his medical bills to his health insurer, Anthem. Anthem paid a portion of the bills, and he was responsible for the remainder. Wonderfoil filed stipulations on February 1, 2017 noting it had paid no medical bills.

A Benefit Review Conference was held on February 2, 2017. At that time, unpaid or contested medical bills was listed as an issue. On May 23, 2017, the ALJ entered an order giving the parties forty-five days to settle the claim, or to advise whether a formal hearing was necessary. Russell filed a status report on March 23, 2018 indicating he was gathering his medical bills to submit for payment. On May 14, 2018, Russell filed his unpaid medical bills. Wonderfoil did not file an objection to the submission of these bills, nor did it file a medical dispute.

On December 14, 2018, the ALJ again ordered the parties to file status reports. Wonderfoil submitted a status report on December 21, 2018 indicating settlement negotiations were ongoing. On January 3, 2019, Russell filed a status report indicating a settlement was not forthcoming. He also filed a motion to schedule a telephonic conference.

A hearing was held on February 27, 2019. At the hearing, the parties agreed that unpaid medical bills remained a contested issue[.]

In its brief to the ALJ, Wonderfoil argued as follows:

Plaintiff has filed unpaid medical bills allegedly related to treatment for this injury. As this injury was never reported to the workers' compensation carrier at the time of the injury the bills were not submitted to the carrier. Even after the Form 101 was filed and the carrier became aware of the work related injury, the bills were still not submitted. According to KRS^[1] 342.020(4) medical bills must be submitted within forty-five (45)

¹ Kentucky Revised Statutes.

days of treatment. The medical bills filed by Plaintiff are from service dates in 2014 and 2015. The 45 day time period has clearly passed. As such, Defendant/Employer is not responsible for the payment of the medical bills filed into the record.

Wonderfoil did not cite to the sixty-day rule contained in 803 KAR^[2] 25:096 §11.

Citing KRS 342.020 and 803 KAR 25:096, the ALJ determined the unpaid medical expenses are not compensable because they were not timely submitted.

The ALJ specifically found as follows:

The parties also listed unpaid medical expenses as a contested issue. The defendant points out that plaintiff submitted medical expenses from 2014 and 2015 and did not submit them within 45 days. Of course, as the claimant and not a medical provider, plaintiff had 60 days from the dates of service to submit such expenses, but the fact remains that these expenses were not submitted until May 14, 2018, long beyond 60 days from the date of service or even 60 days after the claim was filed in 2016. Accordingly, unpaid medical expenses to date are not compensable as not being timely submitted for payment.

Russell filed a Petition for Reconsideration arguing as follows:

1. Considering the inconsistent line of cases concerning Petitions for Reconsideration as well as the changes in

² Kentucky Administrative Regulations.

KRS Chapter 342, and out of an abundance of caution, Plaintiff states that nothing in this Petition for Reconsideration should be considered to be a waiver of any other appealable issue that is not a patent error appearing on the face of the award or any errors on questions of law.

2. The Administrative Law Judge's [sic] erred in not awarding unpaid medical expenses. The Claimant was relieved of the duty of filing expenses within 60 days of the award as this was not accepted as a compensable claim and the notice of claim acceptance or denial clearly states that causation was disputed. The filing of the expenses on May 14, 2018, before the claim was decided is "reasonable" pursuant to the case law.

In denying the petition, the ALJ stated as follows:

This matter comes before the Administrative Law Judge upon the plaintiff's petition for reconsideration of the Opinion & Order rendered in this matter on April 29, 2019. Having reviewed the petition, the ALJ is not persuaded plaintiff points out any patent errors to justify an Award of past medical expenses. Nothing in his petition provides any authority for his argument and it is otherwise contrary to the statute and regulations referred to in the Opinion. Accordingly, plaintiff's petition is overruled.

On appeal, Russell argues the submitted medical expenses are compensable. He asserts the unpaid medical expenses were filed before the claim was

decided, and therefore are timely. Russell also emphasizes that Wonderfoil did not submit evidence to dispute the expenses, nor did it file a notice of denial.

The Board held “the ALJ erred by finding Wonderfoil is not liable for the payment of Russell’s medical bills.” The Board began its analysis by discussing KRS 342.020(1), which requires medical service providers to submit medical expenses to the employer, insurer, or medical payment obligor within 45 days after treatment is initiated and requires the employer or medical payment obligor to reimburse the employee for the expenses within 30 days after submission.

This Board has held on a number of occasions the forty-five day rule for submission of statements for services in KRS 342.020(1) has no application in a pre-award situation. The Kentucky Supreme Court in [*R.J. Corman Railroad Construction v. Haddix*], 864 S.W.2d 915, 918 (Ky. 1993) pointed out the requirement in KRS 342.020(1) for the payment of bills within 30 days of receipt of the statement for services “applies to medical statements received by an employer after an ALJ has determined that said bills are owed by the employer.” In other words, it does not apply pre-award.

We held in [*Brown Pallet v. David Jones*], Claim No. 2003-69633, (entered September 20, 2007) the reasoning of the Supreme Court in [*R.J. Corman Railroad Construction, supra*], concerning the thirty-day provision for payment of medical benefits should also apply to the forty-five day rule for submission of medical bills.

Then, the Board extended the application of the *R.J. Corman* holding and concluded that the 60-day submission requirement of 803 KAR 25:096 § 11 should only apply post-award.

The court in [*R.J. Corman*] stated, “until an award has been rendered, the employer is under no obligation to pay any compensation, and all issues, including medical benefits, are justiciable.” By extension, we find the sixty-day requirement contained in 803 KAR 25:096 §11 is likewise not applicable until an award has been entered finding the claim is compensable. We agree with Russell that pursuant to *Garno v. S[o]lectron USA*, 329 S.W.3d 301 (Ky. 2010), the sixty-day rule found at 803 KAR 25:096 §11 applies only after an interlocutory decision or final award has been entered. Since an interlocutory award was not entered, the sixty-day rule was not applicable until after the ALJ rendered his decision.

We also find it significant that Wonderfoil did not object to Russell’s filing of the medical bills, nor did it file a medical dispute although they were filed more than nine months prior to the hearing. We additionally note that Wonderfoil, or its insurer, never paid any medical bills, which it admitted in its stipulations filed on February 1, 2017. We also note that in its Form 111, Wonderfoil completely denied the claim.

Based upon the foregoing, we find the ALJ erred in determining the contested medical bills are not compensable. On remand, the ALJ shall review the bills and determine whether they are related to the work injury, and if so, find that Wonderfoil is responsible for payment.

We give the Board a great deal of deference on review.

When reviewing an ALJ’s decision, this Court will reverse only if the ALJ overlooked or misconstrued

controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. On appellate review, the ALJ's findings of fact are entitled to considerable deference and will not be set aside unless the evidence compels a contrary finding. However, we review the ALJ's application of the law *de novo*. On appeal, our standard of review of a decision of the Workers' Compensation 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.

Plumley v. Kroger, Inc., 557 S.W.3d 905, 909-10 (Ky. 2018) (citations and internal quotation marks omitted).

The sole issue on appeal is whether Russell's medical expenses were timely submitted under 803 KAR 25:096 § 11 and therefore compensable. 803 KAR 25:096 § 11 provides in pertinent part:

(2) Expenses incurred by an employee for access to compensable medical treatment for a work injury or occupational disease, including reasonable travel expenses, out-of-pocket payment for prescription medication, and similar items shall be submitted to the employer or its medical payment obligor within sixty (60) days of incurring of the expense. A request for payment shall be made on a Form 114.

(3) Failure to timely submit the Form 114, without reasonable grounds, may result in a finding that the expenses are not compensable.

As mentioned above, the Board held this administrative regulation does not apply until after the ALJ renders a decision. The Board begins its

analysis with a discussion of *R.J. Corman*. There, the Supreme Court of Kentucky held the requirement that an employer pay medical expenses within 30 days after submission only applies post-award. 864 S.W.2d at 918. *R.J. Corman* does not address the requirement that medical service providers must submit medical expenses to the employer within 45 days of the initiation of treatment.

The Board then discusses its holding in *Brown Pallet*.³ There, the Board extended the *R.J. Corman* holding to the 45-day submission requirement under KRS 342.020. *Id.* The Board's rationale was based on the following reasoning from *R.J. Corman*: "Until an award has been rendered, the employer is under no obligation to pay any compensation, and all issues, including medical benefits, are justiciable." *R.J. Corman*, 864 S.W.2d at 918. The Board held "the requirement that the provider submit statements for services within forty-five days of treatment would also apply post-award and not during the pendency of a claim as is the case here." The Board further found the claimant had reasonable grounds under 803 KAR 25:096 § 11(3) for not submitting the bill because the employer informed the employee that it would not pay for his surgery.

Finally, the Board reconciles its holding with *Garno v. Solelectron USA*, 329 S.W.3d 301 (Ky. 2010). In *Garno*, the Supreme Court of Kentucky addressed an issue similar to the one at hand. The ALJ entered an interlocutory

³ https://www.comped.net/opinions_boarddisp.php?ID=3953&searchterm=david%20jones.

order finding the claimant's medical expenses compensable, but the claimant failed to submit her expenses until after entry of the final award. *Id.* at 304. The Supreme Court held that the claimant was required to submit her medical expenses upon entry of the interlocutory order because "KRS 342.275(2) authorizes an ALJ to 'grant or deny any benefits afforded under this chapter, including interlocutory relief[.]'" *Id.* at 305.

Based on the foregoing, the Board concluded *R.J. Corman* should be extended to the 60-day submission requirement in 803 KAR 25:096 § 11. Unlike *Garno*, there was no interlocutory order. Russell submitted his medical expenses during settlement negotiations, which were ultimately unsuccessful. The Board found Russell's submission of medical expenses was timely as 803 KAR 25:096 § 11 is not applicable until an ALJ enters an award finding the claim in compensable.

We hold the Board's interpretation of controlling precedent and the 60-day submission requirement of 803 KAR 25:096 § 11 are reasonable; and, we "generally defer to an administrative agency's interpretation of its own regulations." *St. Joseph Hosp. v. Littleton-Goodan*, 260 S.W.3d 826, 828 (Ky. 2008). We also hold that the mandatory deadlines specified in KRS 342.020(1) and its accompanying regulations apply post-award, whether that award is final or

interlocutory.⁴ Because medical expenses are not compensable until an award is entered, it is reasonable that an employee is not required to submit medical expenses until an award is entered.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE RICHARD
RUSSELL:

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⁴ See *Western Kentucky Door v. Cross*, No. 2012-CA-001101-WC, 2013 WL 764666, at *8 (Ky. App. Mar. 1, 2013).