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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002090-MR

KENTUCKY ASSOCIATED GENERAL CONTRACTORS SELF-INSURANCE FUND; AND THIRD PARTY ADMINISTRATOR, LADEGAST & HEFFNER CLAIMS SERVICE, INC. — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 08-CI-00149

SHEILA C. LOWTHER, ADMINISTRATIVE LAW JUDGE; DWIGHT T. LOVAN, COMMISSIONER, DEPARTMENT OF WORKERS' CLAIMS (PREVIOUSLY, PHILIP A. HARMON, ACTING EXECUTIVE DIRECTOR); AND DEPARTMENT OF WORKERS' CLAIMS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Kentucky Associated General Contractors Self-Insurance Fund (KAGC) and Ladegast & Heffner Claims Service, Inc. (Ladegast) seek review of a determination of the executive director of the Kentucky Office of Workers' Claims that a fine in the amount of $10,000 was appropriate for failure of KAGC and Ladegast to pay a claim. We affirm the decision of the Franklin Circuit Court upholding that penalty.

An employee of Back Construction Company sustained a work-related injury to his lower back on May 3, 2004. Back Construction was insured by KAGC. Ladegast administers claims for and on behalf of KAGC. The claim was ultimately settled with the worker being entitled, *inter alia*, to payment of covered medical expenses through April 12, 2008, pursuant to KRS 342.020. In 2006, the injured employee's treating physician requested pre-authorization from Ladegast for a procedure requiring a series of injections. Ladegast submitted this request to utilization review by a physician other than the treating physician.

The utilization review physician determined that the injections were not a reasonable and necessary treatment for the work related injury. A utilization review notice of denial was issued and that denial was appealed. A second utilization review physician also found that the injections were not reasonable and

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

necessary. A final utilization review decision was sent to both the employee and his physician denying the pre-authorization request.

Medical services are subject to a utilization review upon a preauthorization request. 803 Kentucky Administrative Regulations (KAR) 25:190 § 5(1)(a). "[U]tilization review shall toll the thirty (30) day period for challenging or paying medical expenses pursuant to KRS 342.020(1). The thirty (30) day period shall commence on the date of the final utilization review decision." 803 KAR 25:190 § 5(4). When an injured worker or a treating physician submits a preauthorization request, the insurance carrier has 30 days to either pay or challenge the request after the final utilization review decision. The only way to challenge payment is through a reopening of the case. "[T]he proper procedure is for the employer to file a motion to reopen and get the issue of reasonableness back before the fact-finder." *R.J. Corman R.R. Const. v. Haddix,* 864 S.W.2d 915, 918 (Ky. 1993).

Neither KAGC nor Ladegast filed a formal reopening with the Office of Workers' Compensation (OWC) after the final utilization review decision. The record is not clear, but either the injured employee or the treating physician contacted the OWC regarding the denied claim. The OWC sent letters to KAGC and Ladegast regarding the allegation that they had committed unfair claims practices by failing to promptly pay a claim.

A hearing was held before the OWC executive director and by Order entered March 20, 2007, KAGC and Ladegast were found to have failed to

promptly rectify and pay a valid workers' compensation claim and to have failed in good faith to promptly pay a claim where liability was clear. Upon those findings, a fine of $10,000.00 was imposed. KAGC contested those findings before then Chief Administrative Law Judge Sheila C. Lowther. Judge Lowther upheld the penalty and dismissed KAGC's appeal. KAGC appealed to the Franklin Circuit Court.

The Franklin Circuit Court, sitting as a court of appellate review, concluded that:

> [T]he office of Workers' Claims and Defendant ALJ Lowther correctly relied upon established Kentucky law when she determined that the KAGC and Ladegast & Heffner violated the provisions of KRS 342.267 and applicable regulations. Simply stated, when a request for pre-authorization is received, it is submitted to utilization review. If the final utilization review decision supports the request, then payment to the provider is to be assured within thirty (30) days of the final UR decision. Conversely, if the final utilization review decision does not support assurance of payment for the treatment or services for which preauthorization is sought, then a dispute has risen and the matter must be resolved by way of filing a medical fee dispute that is initiated by the insurance carrier[.]

KAGC insists that the trial court erred in imposing a fine when there is no specific language in the statute that requires a carrier to file a motion to reopen in post-settlement or post-award claims when pre-authorization has been denied by utilization review, absent receipt of a statement of services rendered.

While the statute may not expressly assign the burden of reopening to the insurance carrier, Kentucky decisions are clear that when a dispute arises an

ALJ and not a utilization review physician or insurance carrier is to make the determination. KRS 342.325. KAGC's argument would put the entire decision of whether medical treatment is appropriate in the hands of Utilization Review. It is clear from the statutory scheme that when a final utilization review decision reveals a dispute, the payment obligor "shall have thirty (30) days" to file a Form 112 medical dispute. This is true whether services have been rendered and a bill sent, or whether pre-authorization has been denied. KAGC did not seek reopening of the claim and it was therefore in violation of its duty under the workers' compensation laws to promptly pay or contest a claim.

The OWC executive director may promulgate administrative regulations determining the "procedures by which disputes relative to the necessity, effectiveness, frequency, and cost of services may be resolved." KRS 342.020(1). In this case, when the final utilization review resulted in a denial of the claim, the regulations clearly placed the burden on KAGC to seek reopening. This court will not substitute its judgment as to the interpretation of an agency's regulations as long as they are "compatible and consistent with the statute under which [they were] promulgated and [are] not otherwise defective[.]" *Hughes v. Kentucky Horse Racing Authority,* 179 S.W.3d 865, 872 (Ky. App. 2004).

The executive director found that KAGC failed to "attempt in good faith to promptly pay a claim in which liability is clear[.]" 803 KAR 25:240 § 6(1). Additionally, the executive director found KAGC failed to meet the appropriate time limits imposed by KRS Chapter 342. Upon those determinations,

the OWC is authorized to impose a fine upon the insurance carrier of between $1,000 and $5,000 for each violation. Here, the fine was $10,000 for two violations. The fine imposed was not arbitrary or lacking in sound legal authority.

Accordingly, the judgment of the Franklin Circuit Court is affirmed.

COMBS, CHIEF JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MOORE, JUDGE, DISSENTING: The question squarely presented in this case is: Can an employer or carrier be sanctioned for bad faith if it fails to contest the reasonableness and necessity of an employee's proposed medical treatment before an administrative law judge (*i.e.*, fails to reopen an employee's award of benefits) within 30 days of denying preauthorization of said treatment through utilization review? The majority answers with an affirmative. I respectfully disagree.

In the context of workers' compensation, an employer, carrier, *or employee* may file a Form 112, reopen an award of benefits, and contest a medical fee before an administrative law judge. *See* 803 Kentucky Administrative Regulation (KAR) 25:012 § 1(1) and (2). *See also, Bartee v. University Medical Center*, 244 S.W.3d 91, 95 (Ky. 2008) (stating that nothing prevents an employee from preserving her rights by filing a prospective motion, supported with a report from her treating physician, in which she seeks to compel the employer to authorize surgery through a medical fee dispute). As a caveat to the issue of reopening an award of benefits for the purpose of a medical fee dispute, however,

it is recognized that a carrier "shall attempt in good faith to promptly pay a claim in which liability is clear[,]" and that a carrier may be sanctioned if it compels an employee to institute formal proceedings with the Office of Workers' Claims to recover benefits where liability is clear. *See* 803 KAR 25:240 § 6(1) and (3). In addition, if an employer or carrier receives a bill for medical services rendered to the employee and does not act to contest the bill for a period exceeding thirty days, the employer is estopped from contesting it thereafter. *See Phillip Morris, Inc. v. Poynter*, 786 S.W.2d 124, 125 (Ky. App. 1990); *see also*, Kentucky Revised Statute (KRS) 342.020(1). In my opinion, sanctions were inappropriate here because the facts of this case do not lend themselves to either of these caveats.

The employer's liability is not clear in this instance, as is required under 803 KAR 25:240 § 6(1) and (3). The subject of this case is a medical fee dispute, and the rule applicable to medical fee disputes is that an employer is clearly liable for medical expenses if these expenses arise from "reasonable and necessary medical treatment 'for the cure and relief from the effects of an injury.'" *Kentucky Employers Safety Ass'n v. Lexington Diagnostic Center*, 291 S.W.3d 683, 685 (Ky. 2009) (quoting *FEI Installation, Inc. v. Williams*, 243 S.W.3d 313 (Ky. 2007)). *See also*, KRS 342.020(1). Appellees argue that KAGC was properly sanctioned because it was clearly liable to pay for the treatment (*i.e.*, the series of injections) for which Wallace sought preauthorization. However, Wallace does not explain how these injections were either reasonable or necessary treatment, and it

defies logic to state such a conclusion prior to any ruling of an administrative law judge on this issue.

Second, our holding in *Phillip Morris, supra*, is inapplicable to the facts of this case. There, we interpreted the plain language of KRS 342.020(1) to mean exactly what it says: that an employer must contest, within thirty days of receipt, a bill for services rendered. We also held that an employer's failure to do so estopped it from contesting it thereafter. The obvious difference between this case and *Phillip Morris* is that this case involves neither a bill nor services rendered. Rather, it involves preauthorization for prospective, unperformed treatment; issue is taken with the fact that, after denying Wallace's claim through its utilization review process, KAGC failed to follow up its denial with a medical fee dispute within 30 days.

Appellees ask this Court to look beyond the plain language of KRS 324.020(1) and the holding in *Phillip Morris, supra*. Laid bare, the support for this view is as follows: first, an employer is liable for the payment of all services that are reasonable and necessary for the treatment and relief of an employee's work-related injury. Second, the term "preauthorization" is defined in the administrative regulations. Third, preauthorization is subject to utilization review and 803 KAR 25:190 § 5(4) tolls, during utilization review, KRS 342.020(1)'s thirty-day period for challenging or paying medical expenses. Fourth, when filing a medical fee dispute, 803 KAR 25:012 § 1(6) requires the party filing the medical fee dispute to include a motion to reopen with their Form 112. Finally, 803 KAR 24:240 § 5(4)

mandates that "[a] carrier shall meet the time constraints for accepting and paying workers' compensation claims established in KRS Chapter 342 and applicable administrative regulations."

With regard to the first point, while an employer is liable to pay for fees related to reasonable and necessary treatment and relief of a work-related injury per KRS 342.020(1), nothing in KRS 342 or any regulation promulgated under it mandates that the onus to file a medical fee dispute falls upon an employer; to the contrary, 803 KAR 25:012 § 1(2) states that an employee may also file a medical fee dispute, and KRS 342.020 only provides that an employer is estopped from filing a medical fee dispute if it fails to contest a bill for services rendered within 30 days of receipt. This time limit has no application here, and there is no basis for estoppel because treatment was not rendered.

With regard to the second point, the fact that preauthorization is defined in the regulations is irrelevant.

With regard to the third point, 803 KAR 25:190 § 5(4) does toll, during utilization review, KRS 342.020(1)'s thirty-day period for challenging or paying bills. However, this fact is similarly irrelevant. 803 KAR 25:190 specifies two forms of utilization review: preauthorization (*i.e.*, utilization review conducted prior to treatment being rendered and a bill submitted, per 803 KAR 25:190 § 5(2)(a)) and retrospective (*i.e.*, utilization review conducted after treatment is rendered and a bill is received, per 803 KAR 25:190 § 5(2)(b)). 803 KAR 25:190 § 5(4) acknowledges by its own terms that the thirty-day period mandated by KRS

342.020(1), which it purports to toll, applies to the circumstance of challenging or paying medical *expenses*. Furthermore, the plain language of KRS 342.020(1) states that those expenses must relate to services already *rendered*. As this case regards preauthorization utilization review, rather than retrospective utilization review, 803 KAR 25:190 § 5(4) is inapplicable because no expenses exist for services rendered, and no basis exists for holding KACG to any thirty-day limitation.

The fourth point, that a motion to reopen should accompany a Form 112 in order to initiate a medical fee dispute, is similarly irrelevant to the issues of who has the duty to initiate a medical fee dispute, or when such a dispute must be initiated.

With regard to the final point, 803 KAR 25:240 § 5(4) is similarly inapplicable. This regulation mandates that "[a] carrier shall meet the time constraints for accepting and paying workers' compensation claims established in KRS Chapter 342 and applicable administrative regulations." But, no time constraint exists for an employer or carrier to initiate a medical fee dispute in the event it denies preauthorization through utilization review.

To conclude, the General Assembly has left the language of KRS 342.020(1) at issue in this case intact. The words used in this statute create a duty of an employer to contest a bill for services rendered, not a request for preauthorization, within thirty days of its receipt. "Where a statute is intelligible on its face, the courts are not at liberty to supply words or insert something or

make additions which amount, as sometimes stated, to providing for a *casus omissus*, or cure an omission." *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000). Under that elementary rule of construction, we simply are not at liberty to add language to cure a perceived omission. For these reasons, I respectfully dissent.

BRIEF FOR APPELLANTS:

Douglas A. U'Sellis
Louisville, Kentucky

BRIEF FOR APPELLEES:

B. Dale Hamblin, Jr.
Frankfort, Kentucky