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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000218-WC

STEEL CREATIONS, BY AND THROUGH KENTUCKY EMPLOYER'S SAFETY ASSOCIATION; PRESTON HIGHWAY METERED CONCRETE, BY AND THROUGH KENTUCKY EMPLOYER'S SAFETY ASSOCIATION; MURRAY ELECTRONICS, BY AND THROUGH KENTUCKY EMPLOYER'S SAFETY ASSOCIATION; FAMILY ALLERGY AND ASTHMA, BY AND THROUGH KENTUCKY EMPLOYER'S SAFETY ASSOCIATION; AND SAMARITAN ALLIANCE, BY AND THROUGH KENTUCKY EMPLOYER'S SAFETY ASSOCIATION — APPELLANTS

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-03-69871, WC-03-73193, WC-04-02145,
WC-06-00502, AND WC-07-80884

INJURED WORKERS' PHARMACY; KEVIN KERCH; DONALD GRAMMER; KEM BARNES; RITA MERRICK; SHAUNA LITTLE F/K/A HARDIN; JACK CONWAY, ATTORNEY GENERAL; DWIGHT LOVAN, COMMISSIONER, OFFICE OF WORKERS' CLAIMS; HONORABLE J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 2015-CA-000392-WC

INJURED WORKERS' PHARMACY;
KEVIN KERCH; AND
DONALD GRAMMER APPELLANTS/CROSS-APPELLEES

CROSS-PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-03-69871, WC-03-73192, WC-04-02145,
WC-06-00502, AND WC-07-80884

STEEL CREATIONS, BY AND THROUGH
KENTUCKY EMPLOYER'S SAFETY
ASSOCIATION; PRESTON HIGHWAY
METERED CONCRETE, BY AND THROUGH
KENTUCKY EMPLOYER'S SAFETY
ASSOCIATION; MURRAY ELECTRONICS,
BY AND THROUGH KENTUCKY EMPLOYER'S
SAFETY ASSOCIATION; FAMILY ALLERGY AND
ASTHMA, BY AND THROUGH KENTUCKY
EMPLOYER'S SAFETY ASSOCIATION; AND
SAMARITAN ALLIANCE, BY AND THROUGH
KENTUCKY EMPLOYER'S SAFETY
ASSOCIATION APPELLEES/CROSS-APPELLANTS

AND NO. 2015-CA-000422-WC

KEM BARNES APPELLANT/CROSS-APPELLEE

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-80884

INJURED WORKERS' PHARMACY;
MURRAY ELECTRONICS, INC., BY
AND THROUGH KENTUCKY
EMPLOYER'S SAFETY ASSOCIATION;
J. LANDON OVERFIELD, CHIEF
ADMINISTRATIVE LAW JUDGE;
JACK CONWAY, ATTORNEY GENERAL;
DWIGHT LOVAN, COMMISSIONER,
WORKERS' COMPENSATION BOARD;
AND WORKERS' COMPENSATION
BOARD APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: This dispute concerns whether a pharmacy is a "medical provider" under KRS[1] 342.020(1) and, if so, whether the workers' compensation regulatory fee schedule, found in 803 KAR[2] 25:092 §1(6) and §2(2), stating that the maximum price a pharmacy can require a workers' compensation payer to pay for a prescription drug is the average of actual prices paid to wholesalers for that

[1] Kentucky Revised Statutes.
[2] Kentucky Administrative Regulations.

drug plus a $5 dispensing fee, was properly interpreted to allow pharmacies to use the "Average Wholesale Price" ("AWP") figures published by several commercial operators in setting their prices. The AWP figures have been alleged to be inflated and have been eliminated from Kentucky's Medicaid reimbursement system.

We believe that pharmacies are "medical providers" for purposes of KRS 342.020(1) and we decline to find that AWPs may not be used in the calculation of average wholesale prices for prescription drugs under the workers' compensation reimbursement scheme.

I. Factual and Procedural History

The Kentucky Employer's Safety Association ("KESA") is a non-profit workers' compensation self-insurance group owned by its employer members. The appellants here are five employer-members of KESA, litigating by and through KESA: Steel Creations; Preston Highway Metered Concrete; Murray Electronics; Family Allergy and Asthma;[3] and Samaritan Alliance. On behalf of its member employers, KESA pays for medical care related to employee work-related injuries and occupational diseases, including prescription drugs. Injured Workers Pharmacy ("IWP") is a pharmacy company specializing in sending prescription drugs directly to the homes of injured workers. IWP has provided some of the prescription drugs used by workers insured by KESA.[4]

[3] *Family Allergy and Asthma Association v. Rita Merrick*, claim No. WC-04-02145, was remanded in part to the Department of Workers' Claims by an order from this Court dated October 12, 2015. The issue remanded to the Department is separate from the issues before this Court on appeal.

[4] KESA and IWP are the two major contestants in this lawsuit. Other parties are named, including: injured workers Kevin Kerch, Donald Grammer, Kem Barnes, Rita Merrick and

KESA has an arrangement with M. Joseph Medical ("MJM"), a company that specializes in helping workers' compensation payment obligors such as KESA establish prices with prescription drug suppliers. Under this arrangement, MJM negotiates with pharmacy benefits managers ("PBMs") to secure prices and terms with various pharmacies. KESA pays MJM for the prescription drugs, MJM pays the PBMs, and the PBMs pay the pharmacies. This arrangement supposedly allows KESA to secure prescription drugs at a lower price than what is required by the workers' compensation regulatory fee schedule.

MJM issues cards to KESA's members' injured workers, who may present the cards to purchase prescription drugs at the local pharmacies with which MJM has arrangements. When a newly injured worker goes straight to a pharmacy without first obtaining a card from MJM, KESA usually pays the pharmacy directly. Then, if the chosen pharmacy does not have a deal with MJM, KESA turns the matter over to MJM, which "reprices" the drug based on MJM's regular pricing system and requests that the pharmacy accept the price adjustment. In this case, IWP has refused to accept price adjustments since it prices its prescription drugs based upon commercially published AWPs, prices which IWP claims fit within the regulatory fee schedule contained in 803 KAR 25:092.

Shauna Little (formerly Hardin), whose interests are aligned with IWP's; the Department of Workers' Claims Commissioner Dwight T. Lovan; Chief Administrative Law Judge J. Landon Overfield; the Workers' Compensation Board; and Attorney General Jack Conway. For ease of reference, this opinion will mostly refer to KESA and IWP as the opposing parties.

Once KESA determined that IWP was charging more than other pharmacies for certain prescription drugs, KESA sent a letter to its members' employees indicating that it would no longer be paying for injured workers' prescriptions filled at IWP pharmacies. KESA then initiated each of the medical fee disputes constituting this appeal, refusing to pay IWP's prices. The disputes were ultimately heard together in front of the Chief Administrative Law Judge ("CALJ"), with KESA seeking a determination as to which party, the injured worker or the medical payment obligor (KESA), has the right to choose the prescription drug provider. KESA argued that it should be able to choose the pharmacies at which its member employees could fill their prescriptions since pharmacies are not "medical providers" pursuant to the employee choice of provider rule contained in KRS 342.020(1).

In its May 13, 2013 order, the CALJ made six findings: 1) a pharmacy is a medical provider pursuant to KRS 342.020; 2) an injured worker has the right to choose the pharmacy at which he fills his prescriptions; 3) neither an employer nor its medical payment obligor/insurer may designate which pharmacy an injured worker must use to obtain prescriptions; 4) no statutory provision entitled IWP to interest on unpaid or overdue balances owed by KESA; 5) sanctions against KESA were justified, pursuant to KRS 342.310, since KESA prosecuted these claims without reasonable grounds; and 6) 803 KAR 25:092 §1(6) and §2(2), setting the regulatory fee schedule for workers' compensation pharmaceutical reimbursement prices, were interpreted as follows:

> the wholesale price is the average price charged by wholesalers for the pharmaceuticals they sell to those who provide prescription medications on a retail basis. Wholesale price, therefore, is the price drugstores (or any other pharmaceutical providers) pay to wholesalers when purchasing pharmaceuticals for distribution in filling prescriptions for customers.
>
> . . . .
>
> As noted by Commissioner Lovan, the wholesale price as defined by the regulation is not necessarily the price published as the average wholesale price in the several national publications which are used for pricing pharmaceuticals. However, the CALJ is of the opinion that the average wholesale price may not necessarily *NOT* be the price published as the average wholesale price in the national publications which are used for pricing pharmaceuticals. The CALJ is left with the inescapable conclusion that the correct interpretation of 803 KAR 25:092 §1. (6) is that "wholesale price" is the average price charged by wholesalers for the pharmaceuticals they sell to those who provide prescription medications on a retail basis.
> The CALJ is of the opinion that the other relevant section to be interpreted is also reasonably simple. According to 803 KAR 25:092 §2. (2), a pharmacist filling prescriptions required by a workers' compensation injury is entitled to be reimbursed in an amount equal to the wholesale price the pharmacist paid for the lowest priced drug which is therapeutically equivalent to the drug use[d] to fill the prescription which the pharmacist has in his establishment at the time he [fills] the prescription, plus a $5 dispensing fee plus any applicable federal or state tax or assessment.

Consequently, KESA was ordered to pay IWP the AWP-based prices it charged for the injured workers' drugs. After multiple petitions for reconsideration, KESA and IWP each appealed the CALJ's opinion to the Board, which affirmed all of the CALJ's decisions except for the assessment of sanctions against KESA, which it

reversed. KESA filed a petition for review with this court, and IWP and Kem Barnes each filed cross-petitions for review, which we will now address.

On appeal, KESA argues that due to their inflation, the AWP figures are not the "average of actual prices paid to wholesalers" for drugs. KESA further argues that the Board erred in its determination that pharmacies are "medical providers" under the employee choice rule of KRS 342.020(1). On its cross-appeal, IWP contends that the sanctions originally imposed by the CALJ should be reinstated. Barnes, in his separately filed cross appeal, joins IWP in asserting that sanctions against KESA should be reinstated.[5]

II. Standard of Review

The well-established standard of review for the appellate courts of a workers' compensation decision "is to correct the [Workers' Compensation] Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence

[5] Barnes further argues, in both his cross-petition for review and his response brief to KESA's petition for review, that the Board did not have jurisdiction to hear KESA's appeal because KESA failed to name an indispensable party, the CALJ, in its original notice of appeal. *See* 803 KAR 25:010 §21(2)(c)(3) ("The notice of appeal shall . . . [n]ame the administrative law judge who rendered the award, order, or decision appealed from as a respondent[]"). While KESA did fail to name the CALJ in its original notice of appeal, filed after the first order on reconsideration was entered, that notice of appeal was filed as a precaution in anticipation of an argument by IWP that KESA's second petition for reconsideration was filed improperly and thus unable to toll the period for filing an appeal. KESA requested that the appeal be held in abeyance until the petitions for reconsideration had been resolved. KESA subsequently filed another notice of appeal following the final order issued by the CALJ in the matter, which denied the second petitions for reconsideration, and included the CALJ as a respondent. Since a notice of appeal could not be filed until after such a final order was entered, pursuant to 803 KAR 25:010 §21(2)(a), KESA's timely notice of appeal filed after the final order denying petitions for reconsideration is the final notice of appeal, and it names the CALJ as a respondent. Thus, we find that KESA did not fail to name an indispensable party and the Board had jurisdiction to hear the appeal.

so flagrant as to cause gross injustice." *E.g., W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992); *Butler's Fleet Serv. v. Martin*, 173 S.W.3d 628, 631 (Ky. App. 2005); *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky. App. 2004). *See also Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986) (holding that if the fact-finder finds in favor of the person having the burden of proof, the burden on appeal is only to show that some substantial evidence supported the decision); *cf. Gray v. Trimmaster*, 173 S.W.3d 236, 241 (Ky. 2005) (If the ALJ finds against the party having the burden of proof, the appellant must "show that the ALJ misapplied the law or that the evidence in her favor was so overwhelming that it compelled a favorable finding[.]").

III. Arguments

A. Sanctions

First, we address the matter of sanctions. The CALJ assessed sanctions against KESA, pursuant to KRS 342.310 and 803 KAR 25:012 §2(1)(a), after determining that KESA prosecuted these claims without reasonable grounds. 803 KAR 25:012 §2(1)(a) states, "[i]n accordance with KRS 342.310, a sanction . . . [s]hall be assessed, as appropriate, if . . . [a]n employer or a medical payment obligor challenges a bill without reasonable medical or factual foundation[.]" *See also Richey v. Perry Arnold, Inc.*, 391 S.W.3d 705, 711 (Ky. 2012) (803 KAR 25:012 §2(1)(a) *requires* sanctions to be assessed in such a situation). The CALJ found that KESA's reliance on OAG[6] 09-011, opining that pharmacies are not

[6] Opinion of the Attorney General.

medical providers for purposes of the employee choice rule of KRS 342.020(1), in challenging the injured workers' bills from IWP was unreasonable since the opinion does not provide that KESA has the right to direct the pharmacy from which an injured worker must obtain his medication.

In reversing the CALJ's decision with regard to sanctions, the Board found that OAG 09-011 provided a basis for KESA to pursue a determination, despite the Board's holding in *Larry Sills Builders v. Coyle*, Claim No. 87-35615 (September 27, 1996), that a pharmacy is a medical provider, since the courts have never decided whether a pharmacy constitutes a medical provider for purposes of the employee choice rule. We agree with the Board's reasoning. Given the OAG opinion, KESA had reasonable grounds to bring a medical dispute and seek a determination of whether a pharmacy is considered a medical provider under KRS 342.020. Therefore, the CALJ's assessment of sanctions was erroneous and the Board's reversal of the sanctions was appropriate.

B. Whether a pharmacy is a "medial provider"

Next, KESA claims that the Board erred by affirming the CALJ's finding that pharmacies are "medical providers" under the employee's choice rule of KRS 342.020(1). KRS 342.020(1) states, "[i]n the absence of designation of a managed health care system by the employer, the employee may select medical providers to treat his injury or occupational disease." As previously mentioned, the courts have not decided whether a pharmacy is a medical provider. The only two opinions rendered prior to the CALJ and Board decisions are found in OAG

09-011, opining that a pharmacy is *not* a medical provider, and the Board's opinion in *Coyle*, finding that a pharmacy *is* a medical provider. Neither of these determinations is binding on this court.

"[A]lthough this Court is not bound by the opinions of the Attorney General, they have been considered highly persuasive. This Court will give great weight to the reasoning and opinion expressed [by the Attorney General]." *Medley v. Bd. of Educ.*, 168 S.W.3d 398, 402 (Ky. App. 2004) (internal citations and quotations omitted). Nonetheless, we do not agree with the Attorney General's opinion. Long-standing interpretation by an administrative agency is entitled to weight,[7] and the Board has interpreted the term "medical provider" to include pharmacies since 1996. *See Coyle*. Such an interpretation is not inconsistent with the statute; "medical providers" are referred to in KRS 342.020(1) as those who "treat [] injury or occupational disease" and within the same chapter, KRS 342.0011(15) includes "medicines" in the definition of "medical services." A common sense reading of the chapter dictates that "medical providers" provide "medical services." We agree with the Board that the practice of pharmacy requires expertise in the provision, administration and interaction of prescription medicines in the treatment of injury and disease. We therefore hold that a pharmacist is a "medical provider" for purposes of KRS 342.020 and an

[7] *See Cabinet for Health & Family Serv. v. Family Home Health Care, Inc.*, 98 S.W.3d 524, 527 (Ky. App. 2003) ("[W]e note that an administrative agency's interpretation of its own regulations is entitled to substantial deference. A reviewing court is not free to substitute its judgment as to the proper interpretation of the agency's regulations as long as that interpretation is compatible and consistent with the statute under which it was promulgated and is not otherwise defective as arbitrary or capricious[]") (internal citations omitted).

injured worker's right to choose his own medical provider extends to his selection of his pharmacy.

C. Utilization of AWPs

Lastly, we address KESA's contention that commercially issued AWPs should not be used to determine pharmacy reimbursements in workers' compensation because they do not reflect the actual average wholesale price charged by wholesalers. 803 KAR 25:092, titled "Workers' Compensation Pharmacy Fee Schedule" states, in relevant part:

> (2) Any duly licensed pharmacist dispensing pharmaceuticals pursuant to KRS Chapter 342 shall be entitled to be reimbursed in the amount of the equivalent drug product wholesale price of the lowest priced therapeutically equivalent drug the dispensing pharmacist has in stock, at the time of dispensing, plus a five (5) dollar dispensing fee plus any applicable federal or state tax or assessment.

803 KAR 25:092 §2(2). The regulation further explains, "'[w]holesale price' means the average wholesale price charged by wholesalers at a given time." 803 KAR 25:092 §1(6). KESA argues that the Board erred by ruling that the average wholesale price charged by wholesalers at a given time may incorporate the AWP figures, which KESA claims are known to be inflated. KESA maintains that the AWP figures must be eliminated from the workers' compensation system, much like they were eliminated from Kentucky's Medicaid reimbursement system.[8]

[8] KESA cites *Sandoz Inc. v. Commonwealth ex rel. Conway*, 405 S.W.3d 506, 510-11 (Ky. App. 2012), for this contention, but *Sandoz* did not hold that AWPs were no longer permitted to be used in the Medicaid reimbursement system. AWPs and the term "average wholesale price" were phased out of the Medicaid reimbursement scheme by the 2003 version of the Medicaid Act. *See* 42 United States Code § 1395u(o), 1395w-3, 1395w-3a, 1395w-3b (2006).

We disagree. The Board's interpretation, or rather affirmation of the CALJ's interpretation of the fee schedule, simply states that average wholesale price means exactly what it says: the average price charged by wholesalers at a given time.[9] As the CALJ stated, this figure may or may not be consistent with the figure published in the AWPs. 803 KAR 25:092 neither excludes nor requires the use of AWPs; AWPs are simply a piece of evidence to be used in calculating average wholesale prices, assuming they are actually what a pharmacy pays for a drug at wholesale price. We agree with the Board that this is an appropriate interpretation of the fee schedule, particularly since the regulation has been interpreted this way for over nineteen years.

Next, KESA argues that the Board's interpretation of 803 KAR 25:092 violates KRS 13A.130, which states in relevant part:

> (1) An administrative body shall not by internal policy, memorandum, or other form of action:
>
> (a) Modify a statute or administrative regulation;
>
> (b) Expand upon or limit a statute or administrative regulation; and
>
> . . . .
>
> (3) This section shall not be construed to prohibit an administrative body issuing an opinion or administrative decision which is authorized by statute.

[9] According to KESA's expert witness, Dr. Peter Rost, only three large drug wholesalers are left in the United States. Thus, determining the actual average wholesale price charged by wholesalers at any given time is not as cumbersome as it might sound.

KESA claims that 803 KAR 25:092 does not create a fee schedule, and therefore, the Board created a fee schedule above and beyond what is permitted by the worker's compensation statutory and regulatory system when it stated that AWPs may be used in calculating average wholesale price. We disagree. 803 KAR 25:092 §2, combined with the definition of "average wholesale price" contained in §1(6), establishes the very fee schedule the Board applied. Simply stating that commercially published AWPs may be used in determining the average wholesale price of a drug does not expand upon or modify the regulation. KESA's argument further ignores the fact that the Board's opinion was not gathered from an internal policy or memorandum; KRS 13A.130(3) specifically permits an administrative body to issue an opinion/administrative decision, which is what occurred in this case.[10]

Here, the Board followed a reasonable interpretation of a duly promulgated regulation, 803 KAR 25:092. KRS 342.035(1) directs,

> Periodically, the commissioner shall promulgate administrative regulations to adopt a schedule of fees for the purpose of ensuring that all fees, charges, and reimbursements under KRS 342.020 and this section shall be fair, current, and reasonable and shall be limited to such charges as are fair, current, and reasonable for similar treatment of injured persons in the same community for like services[.]

[10] KESA also argues that the Board permitting the use of AWPs in the pharmaceutical fee schedule violates Section 2 of Kentucky's Constitution because it constitutes an exercise of arbitrary power, specifically an administrative agency acting outside its statutory powers. As we stated with regard to KRS 13A.130, we do not believe the Board acted outside its statutorily prescribed powers, and therefore, we will not address this argument in depth.

The use of the actual average wholesale price of a drug as the fee schedule for pharmacy reimbursements under the workers' compensation system is fair, current and reasonable. Thus, 803 KAR 25:092 is statutorily authorized. IWP was never paid in excess of AWP prices plus the $5 dispensing fee. The fact that KESA is able to obtain a cheaper price by working with MJM and its PBMs does not necessitate the conclusion that IWP's prices, gathered from AWPs, are not representative of the average wholesale price.

Hence, we find no reason to hold that commercially published AWPs should be banned from the workers' compensation fee schedule and reimbursement system. Such a change, if necessary, should be effectuated by the legislature or the Department of Workers' Claims. As the regulation stands now, we do not interpret it to prohibit the use of AWPs in the calculation of average wholesale prices.

IV. Conclusion

We agree with the Board's conclusion that pharmacies are "medical providers" for purposes of the employee choice rule contained in KRS 342.020. Furthermore, we agree with the Board's interpretation of the reimbursement fee schedule contained in 803 KAR 25:092 and decline to hold that commercially published AWPs should not be used in calculating average wholesale prices. Therefore, the opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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