

OPINION ENTERED: October 11, 2012

CLAIM NO. 199319835

DAVETTA J. ASH-SMITH  
NORMAN E. HARNED  
and HARNED BACHERT & MCGEHEE, PSC

PETITIONERS

VS.                   **APPEAL FROM HON. R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE**

COMMONWEALTH OF KENTUCKY  
HAZELWOOD ICF/MR  
CANNON COCHRAN MANAGEMENT SERVICES, INC.  
PERSONNEL CABINET  
PHILLIP A. HARMON, ACTING EXECUTIVE DIRECTOR  
OFFICE OF WORKERS' CLAIMS  
DR. DAVID ROUBEN  
HON. R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE  
and HON. JAMES L. KERR,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
VACATING AND REMANDING**

\* \* \* \* \*

BEFORE:    ALVEY, Chairman, STIVERS and SMITH, Members.

**STIVERS, Member.**    Davetta J. Ash-Smith ("Smith") and Hon.  
Norman E. Harned ("Harned"), her attorney, seek review of

various orders entered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ Borders") relative to a medical fee dispute filed by Commonwealth of Kentucky Hazelwood ICF/MR ("Hazelwood") and the attorney fees and costs which Smith and Harned sought to be assessed against Hazelwood.

On appeal, for the reasons set out in numerous pleadings contained in the record, Smith argues she is entitled to a hearing as she did not waive a final hearing on the contested issues. She asserts KRS 342.275(2) provides for a hearing and does not provide that a party can be denied a hearing when there are contested issues. Smith asserts "basic due process requires that every party to a case has a right to the opportunity to present their case to a judge."

Next, Smith argues "the ALJ, without explanation, erred by disregarding the undisputed evidence and case law" in determining an attorney fee and in refusing to enter findings of fact explaining how he determined \$1,000.00 was a fair and reasonable fee. Consequently, the ALJ did not "provide sufficient facts for meaningful appellate review."

Smith notes her motion for reconsideration and for findings of fact asserts there were no findings of fact explaining why the services provided by Harned and the

other attorneys in his office were valued at \$11.87 per hour. Smith states her motion provided the authority, method for calculating the attorney fee, and the time expended. ALJ Borders was requested to apply the applicable case law in awarding the attorney fee. Smith posits even if the award of attorney's fees is discretionary, ALJ Borders should have explained the basis for the amount of the attorney fee in order to allow for appellate review.

Smith argues since Hazelwood did not appeal or cross-appeal from the March 23, 2012, order it is now "the law of this case." Therefore, the claim should be remanded to the ALJ to consider all appropriate factors previously addressed by Smith in her motion for attorney fees. Smith maintains in John A. Richey, et al. v. Perry Arnold, Inc., et al., \_\_\_ S.W.3d \_\_\_ (Ky. 2012), No. 2011-SC-000326-WC, the Supreme Court held the failure to award sanctions based upon an incorrect understanding of the law requires reversal. Smith posits the same principle applies "to the determination of the amount of attorney fees to be awarded as sanctions." Consequently, since ALJ Borders did not make any findings of fact providing the basis for the award of attorney fees this case must be remanded for the appropriate findings of fact and an award of attorney fees

based upon a correct understanding of employer's obligations and any other relevant considerations. Smith also cites to 803 KAR 25:012 §2(1)(a) which provides sanctions shall be assessed, as appropriate, if an employer or medical payment obligor challenges a bill without reasonable medical or factual foundation.

Because of the procedural quagmire created by the motions and orders entered in this case, an in depth recitation of the procedural history is necessary.

A settlement agreement approved by Hon. Thomas A. Nanney, Administrative Law Judge ("ALJ Nanney") on January 26, 2001, reflects Smith injured her low back when she fell while assisting a patient. The agreement reflects Smith underwent surgery of "fusion X2; hardware removal; attempt at obliteration of seroma X2." The agreement recites Dr. David P. Rouben assessed a thirty percent impairment rating. The listed diagnosis is segmental disk and joint neurologic compressive disease. The agreement reflects Smith is 100% permanently disabled and receives Social Security Disability benefits. Liability for the income benefits was split equally between Hazelwood and the Special Fund. The medical benefits were to be paid pursuant to KRS 342.020.

On December 4, 2007, Hazelwood filed a motion to reopen to resolve a medical fee dispute and Form 112 disputing the reasonableness and necessity of the fusion surgery proposed by Dr. Rouben. Attached to the Form 112 is the "Final Utilization Review Decision - Denial," ("UR notice") dated November 21, 2007, denying Dr. Rouben's appeal, based upon Dr. John Guarnaschelli's evaluation on October 22, 2007, because the proposed surgery is not medically necessary. The recommendation of pain management and rehabilitation was approved. Hazelwood also attached a November 14, 2007, letter to Dr. Guarnaschelli from Linda Sacksteder ("Sacksteder") with Comp MC, its utilization manager.

In his October 22, 2007, report, Dr. Guarnaschelli stated Smith has "persistent intractable pain and radiographically has evidence of a nonunion with an intradiscal prosthesis which is escue [sic]." He noted Smith's pain was "equally severe in terms of low back and mid-back" and she had atypical hip and leg pain. He noted Smith's history of chronic smoking made her an extremely poor candidate for general anesthetic and surgery. Dr. Guarnaschelli then stated as follows:

Although Dr. Rouben feels that it is true that radiographically the instrumented fusion has failed to

progress on to a solid fusion, I believe that further surgical intervention may be of some partial help in terms of reduction of pain and long-term stabilization, although the chances of her overall pain syndrome being significantly reduced and her chances of being able to reduce the large amount of pain medication is not likely to be successful. I feel that there are absolute indications to proceed with surgery such as a progressive neurologic dysfunction, cauda equine syndrome, foot drop, etc. There are warranted indications for surgery in terms of the radiographic failure of fusion and the displacement of the intradiscal prosthesis.

Dr. Guarnaschelli provided the following answer to the posed question:

**If the proposed surgery is medically appropriate, please address smoking issue. What is your opinion regarding smoking cessation? How long should the patient be nicotine free prior to surgery? Should patient continue to remain nicotine free through the healing process?** I believe that smoking plays a significant role in terms of nonunion, and I believe that the patient and family should make a focus effort both preoperatively and postoperatively of cessation of smoking.

Dr. Guarnaschelli recommended continued pain management and rehabilitation. He noted given Smith's multiple surgical procedures and age-related degenerative changes, she was an extremely high risk patient for an additional anesthetic and surgery. He stated although the surgical procedure

recommended by Dr. Rouben might bring partial relief of symptoms, it is unlikely Smith will be "completely pain free, off schedule II drugs, or capable of resuming any forms of normal employment."

In a November 20, 2007, letter, also attached to the UR notice, Dr. Guarnaschelli states the proposed surgery is not medically indicated but that pain management and rehabilitation is recommended.

On December 14, 2007, Hon. James L. Kerr, Administrative Law Judge ("ALJ Kerr") prematurely entered an order sustaining the motion to reopen/medical fee dispute to the extent it shall be assigned to an ALJ for further adjudication. The order joined Dr. Rouben/River City Orthopedics as a party to the claim.<sup>1</sup>

Not realizing the order had been entered by ALJ Kerr, on December 28, 2007, Smith filed a response to the motion to reopen/medical fee dispute. In her response, Smith stated on March 17, 2006, she filed a motion to reopen or in the alternative, a motion for an order of enforcement which resulted in approval of a MAST/TLIFT procedure recommended by Dr. Rouben. Smith noted that

---

<sup>1</sup> KRS 803 KAR 25:010 Section 4 (6)(c)1. states a motion to reopen shall not be considered until twenty-five days after the date of filing. Hazelwood's motion was filed on December 4, 2007, thus, ALJ Kerr erroneously entered an order ten days after the motion was filed.

procedure was performed but apparently she suffered a "non-union" and to correct that problem Dr. Rouben recommended spinal fusion. Smith stated on August 28, 2007, Dr. Rouben submitted a request for approval of the fusion. Smith attached an August 28, 2007, "office visit" note of Dr. Rouben which reflects a copy was sent to Smith and "work comp." That note reflects Dr. Rouben's plan was as follows:

Our plan ideally is to remove the implants, repair the fusion, replace the intradiscal implant, extend the fusion up, or at least extend the instrumentation up with a flexible rod between a L3 and L2, and then at least for structural stabilization purposes, replace the screw at L5 to act as a strut; and in doing so get her to fuse at the L3-L4 level and maintain lordosis.

Dr. Rouben indicated Smith agreed to this. He noted Smith was having numerous problems. He stated Smith had a "persistent progressive loss of function of the legs because of the instability and the stretch inherent therein, and the chemical irritation from the failed fusion at the L3-L4 level." Dr. Rouben concluded by stating as follows:

So, with accentuated pain on flexion/extension and palpable discomfort and pain over the L3-L4 level with palpable protruding implants incapacitating discomfort from sitting,

standing, walking, it is inherent therein to put in a positive metabolic balance, and get her taken care of as soon as possible.

Smith alleged she and Dr. Rouben were not notified of the utilization review. Smith stated on September 24, 2007, Dr. Ronald J. Fadel provided a utilization review report which she attached. Smith noted Dr. Fadel stated there was an urgent need for removal of the hardware; however, the report states that "the medical treatment has been reviewed and determined to not be medically necessary for the injury date listed above..."<sup>2</sup> Smith asserted Dr. Fadel did not make such a statement in his report. She asserted as follows: "Dr. Fadel stated that due to failure factor risks, 'the fusion surgery' should be more carefully considered. Textbook of indications are present..." Dr. Fadel further stated "...an independent medical evaluation by another back surgeon would be in the best interest of all the involved parties at this juncture." Consequently, Smith alleged Hazelwood had misrepresented Dr. Fadel in the utilization review denial. Smith noted on September 27, 2007, Dr. Rouben filed an appeal of the "utilization review report of

---

<sup>2</sup>The document to which Smith refers is the "Utilization Review - Notice of Denial," not Dr. Fadel's report.

denial." Smith stated on October 22, 2007, Hazelwood had Smith examined by Dr. Guarnaschelli. Smith stated on November 14, 2007, Sacksteder, a "work comp nurse," sent a letter to Dr. Guarnaschelli requesting additional information to clarify his previous report. On November 20, 2007, Dr. Guarnaschelli responded to the request by Sacksteder. Smith stated on November 21, 2007, a final utilization review denial decision was provided denying the surgery.

Smith noted on September 24, 2007, Dr. Fadel provided a utilization report to "work comp" and on September 25, 2007, a copy of the utilization review notice of denial was mailed to Smith and her treating physician, Dr. Rouben. Smith argued pursuant to 803 KAR 25:190 §5(2)(a)1, "the initial utilization review decision shall be provided to the claimant and the medical provider within two working days of initiation of the utilization review process." Therefore, Smith argued she and Dr. Rouben should have been notified on or before the close of business on August 30, 2007, of the request for the utilization review. Smith also asserted 803 KAR 25:190 §5(2)(b)1 allows ten days for the utilization review process. Smith argued she and Dr. Rouben should have been provided a copy of the utilization review report of Dr.

Fadel on or before September 7, 2007, and not on September 25, 2007.<sup>3</sup> Smith maintained Hazelwood waived its right to reopen due to its default and the ALJ should dismiss the motion to reopen and order Hazelwood to approve the surgery.

Smith also argued that statements made by Dr. Guarnaschelli in his October 22, 2007, report indicate surgery recommended by Dr. Rouben would improve her pain and medical condition and "is legitimate in the face of her neurological dysfunction such as cauda equine [sic] syndrome, foot drop, etc." Smith noted following that report on November 14, 2007, Sacksteder wrote Dr. Guarnaschelli asking different questions as an addendum to her previous letter. Smith noted on November 20, 2007, Dr. Guarnaschelli answered two of the six questions posed to him. Smith asserts in answering the first question posed, Dr. Guarnaschelli stated the proposed surgery is not medically indicated which is contrary to the opinion expressed in his October 22, 2007, report. Smith argued because she was not provided a copy of Dr. Guarnaschelli's report until November 21, 2007, Hazelwood had violated 803 KAR 25:190§7(1)(a) by failing to notify her in a timely

---

<sup>3</sup> Smith is referring to the utilization review denial dated September 25, 2007, and not Dr. Fadel's September 24, 2007, letter.

manner of the "denial of treatment by utilization review and providing a statement of the medical reasons for denial." Smith maintained Hazelwood also "failed to answer the request for reconsideration within ten days of the receipt of the request pursuant to 803 KAR 25:190 §8(1)(c)." She argued Hazelwood had not complied with the "procedural requirements" and is barred from reopening the claim.

Smith asserted her previous surgery failed and now the inserted hardware is "pressing on her skin in a manner that is palpable." In an effort to correct the ongoing problem with her posture, Dr. Rouben proposed a fusion. Smith argued since procedures to treat her pain and ongoing disability have been found reasonable, *res judicata* precludes Hazelwood from raising the issue again.

Smith also argued Hazelwood cannot deny treatment and has failed "to make out a prima facie case." Further, she argued Dr. Fadel's report does not support Hazelwood and Hazelwood had misstated his opinion and issued a utilization review denial stating it had been determined her treatment was not medically necessary. Smith asserted that in his September 27, 2007, appeal statement, Dr. Rouben provided the reasons for the recommended procedure and stated he was morally and ethically committed to

reconstructing her spine to a balanced spine. Smith maintained Hazelwood then took "two shots with Dr. Guarnaschelli." Smith posited after receiving Dr. Guarnaschelli's October 22, 2007, report which supports the need for surgery; on November 14, 2007, Hazelwood wrote to Dr. Guarnaschelli asking different questions hoping to get a more favorable answer. Smith argued his answers do not answer the question of whether the proposed surgery is unreasonable. Smith argued the issue is whether the proposed treatment is "without reasonable benefit" and that question was never asked of Dr. Fadel and Dr. Guarnaschelli. Smith requested the medical fee dispute be decided summarily on her response, the original agreement as to compensation, and the order approving settlement.

On January 7, 2008, Smith filed a supplemental response to the motion to reopen/medical fee dispute stating she had seen Dr. Rouben on December 13, 2007, for treatment and attached a copy of the office note which reflects her condition is deteriorating. Smith argued Dr. Rouben reiterates lumbar fusion surgery is the only way she will get some relief of her ongoing and incapacitating pain. Further, Dr. Rouben feels the pending matters are "just an attempt to stall the inevitable, and wreak emotional havoc on the patient and place her at continued

risk for operative and neurologic compromise.'" Smith asserted it is obvious from Dr. Rouben's latest office note that surgery is necessary for her physical and emotional wellbeing. Smith contended the treatment, on its face, is for back pain which was found by ALJ Nanney to be compensable and "the lumbar fusion is not unreasonable to correct the non-union in [Smith's] lumbar spine and prevent neurological defect."

Hazelwood filed an objection to the request for a summary disposition. It asserted Smith had at least ten separate surgeries and continues to have ongoing and incapacitating pain. Hazelwood stated it would like to do "what is best for [Smith's] welfare and treatment;" however, there is a serious question regarding the nature of her treatment. It requested a referral for a university evaluation to include an inpatient stay and any diagnostic studies needed to fully evaluate Smith's condition and determine the treatment that is in her best interest.

On January 22, 2008, the claim was reassigned to ALJ Borders and a benefit review conference ("BRC") was scheduled for May 15, 2008.

On February 4, 2008, Smith filed a motion to set aside ALJ Kerr's December 14, 2007, order and the January 22, 2008, scheduling order because they violate 803 KAR

25:010§4(6)(c)1. She argued that after receiving the motion and filing a response on January 29, 2008, her counsel, Harned, learned of both orders because copies were faxed to him by Smith. Smith contended since the order sustaining the motion to reopen was entered before the response was filed and before expiration of the time established by the regulations to respond to a motion to reopen, the order is void and must be set aside. Further, the scheduling order must also be set aside since the motion has not been properly ruled on. Smith asserted both orders show on their face Harned was not served with copies of the orders and Hazelwood's counsel did not advise Harned he was not on the service list notwithstanding the fact a copy of Hazelwood's motion was mailed to him. Smith asserted ALJ Kerr's order denied her due process of law. Smith also argued Hazelwood failed to meet the time deadlines contained in the regulations and therefore defaulted on any defense it may have to payment for the treatment proposed by Dr. Rouben.

On February 21, 2008, Hazelwood filed an objection to the motion to set aside the orders of December 14, 2007, and January 22, 2008, stating it filed a medical fee dispute regarding the compensability of lumbar fusion surgery proposed by Dr. Rouben. Hazelwood requested the

ALJ overrule Smith's motion and refer Smith for a university evaluation regarding the appropriate treatment.

On March 3, 2008, Smith filed Dr. Rouben's medical records.

On March 20, 2008, ALJ Borders overruled Smith's motion to set aside the orders of December 14, 2007, and January 22, 2008, stating "but is preserved for appellate review." ALJ Borders also overruled Hazelwood's motion for a university evaluation, extended proof time until May 15, 2008, and ordered a BRC be held on May 15, 2008.

On May 12, 2008, Smith filed a preliminary witness list listing Smith, Dr. Rouben, a designated representative of Hazelwood and/or its insurance carrier, a representative of the Office of Workers' Claims, and all witnesses listed by other parties. Smith filed "Proposed Stipulations" providing proposed stipulations and listed the following contested issues:

- 1) Employer has the burden of proof in this Medical Fee Dispute. Employer has failed to seek any remedy allowed by Kentucky law. The Medical Fee Dispute should be dismissed and Ms. Smith allowed to pursue the treatment proposed by her treating physician, Dr. Rouben.

- 2) Employer's Medical Fee Dispute is barred by Kentucky law and Worker's Compensation Regulations as set forth

in Respondent's Response to Motion to Reopen Medical Fee Dispute.

The May 29, 2008, BRC order reflects the contested issues were: "work relatedness/reasonableness and necessity of proposed surgery; whether D/E has met burden of proof on reopening." A hearing was scheduled for July 15, 2008.

On June 3, 2008, Hazelwood submitted the April 29, 2008, IME report of Dr. Gregory Gleis in which he stated he would not recommend surgery because he did not believe the surgery to correct the kyphosis would give Smith significant improvement of her pain. Dr. Gleis recommended monitoring the kyphosis and as long as it does not progress, he would not recommend surgery. If the kyphosis progressed, Smith may need surgery.

The record reflects no action was taken for over a year and five months until November 6, 2009, when Smith filed a "Motion For Order Requiring Defendant To Authorize Medical Treatment." Smith again argued Hazelwood failed to comply with two regulations regarding utilization review; 803 KAR 25:190 §5(2)(a)1 and (2)(b)1. Therefore, Hazelwood has no standing to question the surgery. Smith asserted Hazelwood's failure to file a medical fee dispute/motion to reopen within thirty days of the final utilization review

decision violated 803 KAR 25:012 §1(a). Smith posited the Workers' Compensation Board recently addressed this issue in Health Systems, Inc. v. Grubb, WC Claim No. 2004-94444, rendered September 23, 2009, wherein the Board upheld the thirty day filing requirement. Smith asserts the Board further held that the filing of the medical fee dispute/motion to reopen was not permissive but mandatory and the medical fee dispute/motion to reopen was fatally flawed from the beginning and could not be revived by any action or lack thereof by the Plaintiff. Smith asserted the medical fee dispute and motion to reopen is untimely and cannot be revived by any subsequent proceedings. Smith stated she is almost bedridden and has gotten progressively worse due to Hazelwood's denial of recommended medical treatment and refusal to authorize surgery.

On November 16, 2009, Hazelwood filed a response/objection stating Smith is rearguing what is already of record and was overruled but is preserved for appellate review. Hazelwood stated a BRC was held on May 29, 2008, at which time the parties discussed the concern that "[Smith's] smoking habit would negatively affect the outcome of any additional fusion surgery." Hazelwood stated it agreed to pay for a smoking cessation program if Smith would be willing to participate. Smith later decided

not to pursue the disputed surgery and a hearing scheduled for July 15, 2008, was canceled. Hazelwood further stated on July 9, 2008, it filed a motion to place the claim in abeyance which is still pending before the ALJ and no additional pleadings have been filed until this recent motion by Smith. Hazelwood asked the ALJ to schedule a telephonic status conference and to reschedule the formal hearing.<sup>4</sup>

On January 6, 2010, ALJ Borders overruled the motion for order requiring Hazelwood to authorize medical treatment and set a BRC for February 23, 2010.

On February 10, 2010, Smith filed an amended proposed stipulations and contested issues. Smith listed the previous contested issues and added the following contested issue:

Defendant Employer has violated the provisions of KRS 342.310 and defended these proceedings without reasonable ground for which the whole cost of the proceedings including court costs, travel expenses, deposition costs, physician expenses, attorney fees, and all other costs allowed by KRS 342.310 should be paid to the Plaintiff and to her counsel.

---

<sup>4</sup>We are also unable to locate Hazelwood's motion to place the claim in abeyance. Smith did not dispute the sequence of events outlined by Hazelwood in its response.

On February 16, 2010, Smith filed a second amended preliminary witness list listing one of the witnesses as:

Gayle Downs, designated representative of the Defendant and/or its insurance carrier, and to produce her claims file for review at the Benefit Review Conference, and prior to the final hearing of this case.

On February 16, 2010, Smith filed medical records of Dr. Rouben.

On February 19, 2010, ALJ Borders ordered, per the February 19, 2010, telephonic status conference, a BRC be held on February 23, 2010. The February 23, 2010, BRC order reflects the hearing would be held on March 4, 2010 and listed the contested issues as follows: "See BRC order 5/29/08, whether or not D/E violated KRS 342.310 or other appropriate statutes and regulations and whether that action bars the D/E MFD."

On March 2, 2010, Hazelwood filed its witness list listing the following witnesses who would testify at the hearing: Smith, Gayle Downs, Senior Claim Specialist, CCMSI, and Kristy Baum, supervisor Managed Care, CCMSI. Hazelwood identified the medical records upon which it would rely and added the following contested issue: "Respondent's smoking cessation."

On March 17, 2010, ALJ Borders entered a "Proposed Order" which stated the parties had participated in a telephonic status conference on March 3, 2010, and ordered the March 4, 2010, hearing canceled. The ALJ also ordered the medical fee dispute placed in abeyance pending Smith undergoing an inpatient evaluation at a multi-disciplinary facility to be agreed upon by the parties. All issues were reserved and Hazelwood "shall continue to pay medical expenses pursuant to KRS 342.020" and "status reports shall be filed by both parties within thirty days of [the] order."

On April 16, 2010, Hazelwood filed a status report representing Dr. Rouben recommended Smith be "evaluated for treatment recommendations" at the Cleveland Clinic which it approved. Hazelwood represented its medical case manager was currently coordinating the details of the evaluation and it anticipated the evaluation would be scheduled in the very near future.

On August 17, 2010, Hazelwood filed a status report representing Smith was evaluated at the Cleveland Clinic on May 7, 2010, by Dr. Michael Eppig, who made several recommendations regarding future treatment. Hazelwood stated on July 28, 2010, Dr. Rouben reviewed the recommendations of the Cleveland Clinic and agreed the

removal of the instrumentation/hardware and of a bony nodule over the left iliac spine is reasonable. Hazelwood stated it approved the request for the surgery from Dr. Rouben. The parties were waiting for the surgery to be scheduled and performed.

On August 20, 2010, Smith filed a status report indicating she had been evaluated at the Cleveland Clinic by Dr. Eppig who opined the removal of the instrumentation in her spine was appropriate, and surgery is in the process of being scheduled. Smith requested the matter remain in abeyance until she fully recovered from the proposed surgery.

On July 19, 2011, ALJ Borders entered an order giving the parties twenty days to file a response as to the status of the claim.

On August 10, 2011, Hazelwood filed a status report indicating since the last report it had been working closely with Smith in order to ensure she was getting the best and most appropriate medical care. Hazelwood stated Dr. Rouben performed the recommended surgery on September 13, 2010. Hazelwood represented Smith recovered well from the surgery and Dr. Rouben's office note of November 10, 2010, states "...she has dramatic resolution of discomfort and pain." Hazelwood also represented Smith has completed

rehabilitation and a Self-Directed Wellness Program. Hazelwood stated it has paid and will continue to pay Smith's medical expenses related to her work injury, and to provide the treatment needed to serve her best interests. Hazelwood stated since the medical fee dispute filed in December 2007 regarding the compensability of additional surgery has now been resolved, its motion is now moot.

On August 12, 2011, Smith filed a status report reflecting Dr. Rouben saw her for a follow-up in June and reports she is doing "okay." Smith stated Dr. Rouben has some concerns about her weight since she is down to 112 pounds. Smith represented there are no problems with unpaid medical bills and described herself as "70% improved since the surgery." Smith stated that prior to the surgery she was in a wheelchair and now is able to walk. She stated no extensive treatment is currently planned other than the medication which she is taking. Smith asserted the case is ready for a conference with the ALJ and steps to be taken toward resolution of all issues.

On August 18, 2011, ALJ Borders entered an order scheduling a telephonic conference for August 29, 2011.

On August 26, 2011, ALJ Borders entered an order with the word "proposed" marked through which was

apparently tendered by Hazelwood. The order states as follows:

The Administrative Law Judge having reviewed the record and finding the medical fee dispute filed on December 3, 2007, regarding the compensability of an additional lumbar spine fusion surgery has now been RESOLVED, the motion to reopen is now MOOT and thereby DENIED.

On September 8, 2011, Smith filed a motion to set aside the August 26, 2011, order asserting it was premature to summarily conclude the motion to reopen is moot. Smith stated while her status report indicates she is doing as well as can be expected there are numerous other issues which have to be resolved. Harned represented that on August 29, 2011, when he called the ALJ's office for the conference call, he learned an August 26, 2011, order canceled the conference. Harned represented that based upon his communication with the ALJ's staff, it was his understanding the conference would not be rescheduled and any further steps should be by motion. Harned represented he intended to file a motion for attorney fees to be paid by Hazelwood. He pointed out he had communicated by e-mail with Hazelwood's counsel and there is a "difference of opinion and/or understanding of the facts between counsel" which is one of the topics Harned wished to address. Smith

contended if there is a factual dispute "the parties deserve an opportunity to present their facts" prior to the ALJ's decision. Smith reiterated her position that Hazelwood's motion to reopen/medical fee dispute was untimely and should not have been heard based on the recent holdings in Lawson v. Toyota Mfg., 330 S.W.3d 452 (Ky. 2010), Kentucky Associated General Contractors Self-Insurance Fund v. Lowther, 330 S.W.3d 456 (Ky. 2010), and Garrett Mining #2 v. Miller, WCB Claim No. 1997-78726. Smith believed discussion at a status conference would provide a better opportunity to discuss how to resolve the matter "rather than an exchange of paper to the ALJ."

Smith asserted while she is doing as well as can be expected, she is entitled to a hearing on the issues she has raised and has not waived a final hearing. Smith requested her motion be treated as a petition for reconsideration pursuant to KRS 342.281 and stated she does not consider the order of August 26, 2011, a final decision because it does not dispose of all issues.

On September 19, 2011, Hazelwood filed a response stating that from the onset of the medical fee dispute there was a disagreement between the parties as to whether it was timely filed. However, Hazelwood asserted there is no dispute it has utilized all available resources to

ensure Smith received and continues to receive the best and most appropriate care for her condition. Hazelwood noted Smith's status report indicates that since the surgery she is no longer in a wheelchair, is able to walk, and there is no extensive treatment currently planned. Hazelwood stated it is baffled as to what Smith hopes to accomplish by setting aside the order of August 26, 2011, since the medical fee dispute regarding compensability of additional lumbar spine surgery has been resolved and the reopening of her claim is no longer necessary.

On September 29, 2011, Smith filed a supplemental motion to set aside the order asserting Hazelwood's response was not timely filed and should be ignored by the ALJ. Smith again urged ALJ Kerr's order was in violation of the regulation and noted the March 20, 2008, order overruling her motion to set aside the order preserved the issue for appellate review. Smith again argued Hazelwood's failure to follow the applicable regulations is a waiver of its right to file a medical fee dispute and obligates it to pay for the proposed medical treatment. Harned represented he "seeks sanctions, attorney's fees, and costs for having to pursue this matter on [Smith's] behalf now for over four years." Harned argued the ALJ should hear "Smith's testimony of the effects of this delay upon her and why

sanctions should be imposed and attorney's fees and costs assessed against [Hazelwood]."

On September 29, 2011, ALJ Borders entered an order overruling Smith's motion to set aside the August 26, 2011, order.<sup>5</sup> ALJ Borders noted Smith argues there are numerous other issues to be resolved and her attorney represents he intends to file a motion for attorney fees to be paid by Hazelwood, but Smith does not identify any other issues except for entitlement to attorney fees. ALJ Borders stated a review of the file reflects Hazelwood filed a motion to reopen regarding the proposed surgery which has been paid for by Hazelwood. Therefore, he believed the matters Hazelwood raised have been resolved and a hearing is not necessary. ALJ Borders stated if Smith's counsel intends to file a motion for approval of an attorney fee then he "shall do so and [it] will be ruled upon." Further, if Smith feels she is entitled to a hearing on matters raised by Hazelwood in its motion to reopen and the medical fee dispute, she shall file a motion "so requesting and setting out with specificity what matters, if any, are still pending and in need of resolution."

---

<sup>5</sup>ALJ Borders incorrectly dated the order September 29, 2010.

On October 6, 2011, Hazelwood filed a response to Smith's supplemental motion to set aside the order pointing out Smith's counsel agreed at the May 2008 BRC that any additional surgery should not be approved until Smith was able to quit smoking. Hazelwood represented after a drug screen in April 2010 was negative for nicotine, the parties agreed Smith should undergo an inpatient evaluation at a multi-disciplinary facility to more carefully consider the surgery proposed by Dr. Rouben. Hazelwood pointed out Smith was referred to the Cleveland Clinic and Dr. Rouben agreed with the procedure recommended by Dr. Eppig rather than the surgery he initially proposed. Hazelwood asserted even if the ALJ determined the medical fee dispute was not timely filed, it has already paid for Smith's medical treatment. Further, Hazelwood asserted it did not violate KRS 342.310 and Smith is not entitled to sanctions, attorney fees, or costs.

On October 5, 2011, Smith served a motion for hearing as directed by the September 29, 2011, order erroneously dated September 29, 2010.<sup>6</sup> Smith stated she desired a hearing in order to explain the difficulties she endured over the last three years because the recommended

---

<sup>6</sup>The motion was not filed until October 11, 2011.

surgery was delayed. Smith stated she had suffered extensively from stress as a result of her condition and over the three years her condition deteriorated to the point she was bedridden and had to use a wheelchair which Dr. Rouben had predicted. Smith believed sanctions should be imposed for Hazelwood's delay and denial of the surgery for over three years. Harned asserted that although not known to Smith personally, there are "fact issues between the [parties] regarding various dates pertaining to the request for preauthorization, and other actions taken thereafter." He also stated Hazelwood's counsel declined to provide him with its "timetable for these disputes in order that they may be addressed prior to [Counsel] filing the motion for attorney fees." Harned stated he continues to believe a telephone conference is needed.

On October 10, 2011, ALJ Borders overruled Smith's supplemental motion to set aside the order and motion for a hearing. ALJ Borders directed Smith's counsel to submit a motion setting forth the relief sought accompanied by Smith's affidavit "if he deems necessary" specifically setting forth the requested relief.<sup>7</sup>

---

<sup>7</sup> Apparently the ALJ's October 10, 2011, order was issued prior to the time Smith's motion for a hearing mailed October 5, 2011, was filed in the record.

On October 24, 2011, Smith filed a renewed motion for hearing and affidavit sworn to by Harned. After noting the October 10, 2011, order directed Smith submit her affidavit, if counsel deemed it necessary, setting forth the relief she is requesting, Harned stated that due to distance and difficulty traveling, Smith's affidavit was not being submitted. However, Harned represented the contents of the motion were based upon his conversations with Smith and he believed the motion reflects the expected testimony of Smith and the relief she is requesting. Harned again asserted a hearing is necessary to explain to the ALJ the difficulties she endured. Based on Hazelwood's failure to comply with applicable regulations and to timely file the motion to reopen, Smith argued Hazelwood is precluded from asserting a medical fee dispute. Further, case law holds Smith's actions do not waive Hazelwood's violation or allow it to assert a defense.

On November 8, 2011, Smith filed a motion for sanctions, costs, and attorney's fees and affidavit setting forth her previous arguments regarding her entitlement to sanctions.

On November 15, 2011, ALJ Borders overruled Smith's renewed motion for hearing and affidavit. ALJ Borders gave Smith fifteen days to submit a motion for

sanctions accompanied by her affidavit and Hazelwood was given fifteen days thereafter to respond.<sup>8</sup>

On November 15, 2011, Hazelwood filed an objection to Smith's motion for sanctions, costs, and attorney's fees stating even though the pleading stated an affidavit was attached no such affidavit was attached to Smith's motion. Hazelwood contended it did not "unreasonably defend" the medical fee dispute in violation of KRS 342.310.

On November 21, 2011, without explanation, ALJ Borders entered an order stating as follows:

IT IS HEREBY ORDERED that the Administrative Law Judge hereby imposes sanctions, costs and attorney's fees on the Defendant. Counsel for Plaintiff/Respondent shall file an Affidavit and motion setting forth the claimed amounts.

On November 28, 2011, Smith filed a response to the November 15, 2011, order stating her motion for sanctions, costs, and attorney's fees and affidavit was mailed on November 4, 2011, and Hazelwood filed a response. After noting Hazelwood asserted no affidavit was attached, Smith argued the entire motion was "under oath of the undersigned as part of the body of the Motion." Smith

---

<sup>8</sup> Apparently, the ALJ was unaware of Smith's November 8, 2011, motion for sanctions.

asserted since she was unsure whether the ALJ was aware of her previously filed motion for sanctions, attorney's fees, and cost and affidavit when he entered the November 15, 2011, order, she incorporated the previously filed motion by reference.

On December 2, 2011, Hazelwood filed a petition for reconsideration and/or motion to set aside the ALJ's order of November 21, 2011. It pointed out the order was issued despite the fact Smith had a pending motion for sanctions, costs, attorney's fees mailed on November 4, 2011, to which it had filed a response on November 14, 2011. Hazelwood stated on November 28, 2011, it received a copy of Smith's response to the order of November 15, 2011. Hazelwood asserted while the sequence of the recent pleadings is overlapping and confusing, it renewed its objection to the motion for sanctions, costs, and attorney's fees and petitioned the ALJ to reconsider his November 21, 2011, order and set it aside as sanctions, costs, and attorney's fees in this case were not appropriate.

Hazelwood also addressed Smith's argument regarding its failure to comply with the applicable regulations regarding utilization review and a medical fee dispute. Hazelwood outlined what occurred at a BRC held on

May 29, 2009. It represented the parties were able to discuss the evidence and concerns that Smith's smoking habits would negatively affect the outcome of additional fusion surgery. Accordingly, Hazelwood had represented it would pay for a smoking cessation program should Smith agree. Thereafter, Smith decided not to pursue the disputed surgery and a formal hearing scheduled for July 15, 2009, was canceled. Hazelwood represented that by agreement of the parties, it filed a motion to hold in abeyance in order to give Smith time to stop smoking and possibly obtain a fusion without additional surgery. The matter remained dormant for over a year and half until November 2009, when Smith filed a motion for an order requiring Hazelwood to authorize medical treatment.

Hazelwood noted that after Smith's motion for an order requiring it to authorize medical treatment was overruled, a BRC was held on February 23, 2010, at which time a formal hearing was scheduled for March 4, 2010. Hazelwood stated that in a telephonic conference between the parties on March 3, 2010, the parties agreed Smith's best interest would be served by undergoing an in-patient evaluation at a multi-disciplinary facility and the medical fee dispute was again placed in abeyance. Hazelwood then recounted the events leading to the surgery recommended by

Dr. Eppig. Hazelwood noted Dr. Rouben stated Smith has dramatic resolution of discomfort and pain. Further, Smith completed a rehabilitation and self-directed awareness program. Hazelwood submitted Smith's good result was due in great part to its efforts to provide her with the best possible care. Hazelwood asserted the numerous post-injury surgeries Smith underwent were complicated by Smith's tobacco use. Consequently, it monitored Smith's condition and worked closely with her to ensure she received the correct treatment for her condition.

Hazelwood also noted Smith has not appeared for any of the proceedings in her case since the initial litigation and has not produced her affidavit as ordered by the ALJ on November 15, 2011. Hazelwood posited if Smith were put under oath, her testimony would be that Hazelwood has treated her fairly and very well since her injury and continues to do so. Hazelwood represented to date it has paid \$513,393.29 in medical expenses on Smith's behalf and has gone above and beyond its obligation to provide medical care to Smith.

On January 5, 2012, ALJ Borders entered an order overruling Hazelwood's petition for reconsideration and/or motion to set aside the ALJ's order of November 21, 2011.

On February 3, 2012, Smith and Harned filed a "Motion, Memorandum, and Affidavit for Attorney's Fees, and Costs." They argued Alexander v. S & M Motors, Inc., 28 S.W.3d 303, 307 (Ky. 2000) and Boden v. Boden, 268 S.W.2d 632 (Ky. App. 1954), set out the factors to be considered in determining attorney fees. Relying upon various data attached to the motion, Harned computed a base attorney fee of \$18,250.50. Although Harned provided the hours spent in representing Smith, he did not provide an itemization of his time. Harned provided a checklist of the type of services performed, but did not provide an hourly rate for his services or anyone else in his firm.<sup>9</sup> Rather, based on the data from two surveys, portions of which he attached, Harned arrived at a proposed hourly rate for partners, associates, and paralegals multiplied by what appears to be the time spent by each in this claim. Harned asserted in addition to the time expended on Smith's behalf, there were costs for postage and photocopying of \$27.69, and a court reporter's fee of \$37.50. Harned asserted there should be enhancement by a two multiplier and thus the attorney fee should be \$36,501.00.

---

<sup>9</sup> Harned stated no itemization of time was provided because it was protected by the attorney-client privilege. He stated if the ALJ desired, he would provide an itemization under seal and a redacted version to other counsel.

On February 14, 2012, Hazelwood filed a response and objection to Smith's motion for attorney fees and costs asserting pursuant to KRS 342.320(7) no attorney fees shall be awarded if no additional amount is recovered upon reopening. Hazelwood further asserted attorney fees for services under this chapter on behalf of an employee are limited to a maximum of \$12,000.00. Hazelwood asserted a review of the numerous and voluminous pleadings filed since the medical fee dispute was resolved and the motion to reopen was denied reveals Smith's counsel has been "zealously representing himself in his quest for an attorney fee." Hazelwood contended after it spent over half a million dollars in medical expenses on behalf of Smith and balked at voluntarily paying her attorney's fees the real dispute between the parties began. Hazelwood again stated Smith has not appeared for any of the proceedings in this matter since the initial litigation following her 1993 work-related injury and although her affidavit has been ordered to be produced, it has yet to be provided.

On February 17, 2012, ALJ Borders entered an order overruling Smith's motion for attorney fees as it did not include the ordered affidavit from Smith setting forth

the requisite facts showing Harned is entitled to the fee requested.

On March 2, 2012, Smith filed "Plaintiff's Renewed and Supplemental Motion and Memorandum for Attorney's fees and costs, Motion to Set Aside and Correct Erroneous Findings in the ALJ's Order of February 17, 2012, and Petition for Reconsideration, and Affidavit." Smith stated the ALJ's February 17, 2012, order is confusing and asserted given the ALJ's previous ruling, Smith and Harned were "quite puzzled since the issue was the amount of attorney's fees and costs to be allowed." Harned submitted "it would seem to the undersigned that if the Motion and Attachments are not adequate, the Administrative Law Judge would have stated such and directed the undersigned as to the additional information the Administrative Law Judge required." Smith noted the ALJ's order stated Hazelwood's response to her motion raised the issue of the absence of her required affidavit. Harned argued the motion is "under oath" and is counsel's notarized affidavit. Smith asserted the reference to the lack of her affidavit pertained to a previously filed motion for hearing. The ALJ's order of October 10, 2011, did not require her to file an affidavit; rather, it stated one was to be provided "if he deems necessary." Thus, there was no requirement to file Smith's

affidavit. Harned also noted the February 17, 2012, order overruled the motion because it did not include the ordered affidavit of Smith “`setting forth the requisite facts to show he is entitled the fee requested.’” Harned stated “[they] interpreted” that portion of the order to refer to the “Motion, Memorandum and Affidavit of Attorney’s Fees and Costs” and argued Smith would not have any real knowledge of the facts relating to the attorney’s fee. Harned argued the previous orders resolved all issues regarding the award of attorney fees and costs, except the amount, and Smith would have no knowledge of what had occurred within his office other than the conversations she had with him. Harned requested the ALJ address the issue of the amount of attorney fees to be awarded based upon his decision of November 21, 2012.

On March 12, 2012, Hazelwood filed a motion to strike “[Smith’s] Renewed and Supplemental Motion and Memorandum for Attorney’s Fees and Costs, Motion to Set Aside and Correct Erroneous Findings in the ALJ’s Order of February 17, 2012, and Petition for Reconsideration, and Affidavit.” Hazelwood stated the ALJ’s order of February 17, 2012, clearly overruled Smith’s motion for attorney fees as the motion did not include Smith’s affidavit setting forth the requisite facts showing Harned is

entitled to the fee requested. Hazelwood asserted instead of filing an affidavit from his client as ordered by the ALJ, Harned filed yet another lengthy pleading containing two separate motions and a petition for reconsideration along with another memorandum and his own affidavit. Hazelwood asserted that pleading is non-responsive to the February 17, 2012, order and should be stricken from the record.

On March 20, 2012, Harned filed a response to Hazelwood's motion to strike asserting there is no reason for Smith's affidavit regarding the facts which entitle him to an attorney fee. Harned contended this is entirely a matter of the ALJ's review of the work performed by the lawyer as shown by pleadings in the file, affidavit of counsel and other relevant evidence. After recounting the history of the recent pleadings and order, Harned stated he was tendering a Notice of Filing of Smith's affidavit in support of his motion and her motion for a hearing.

On March 20, 2012, Smith filed a Notice of Filing of Affidavit with her affidavit attached. Smith's affidavit provided the history of her treatment, discussed Dr. Rouben's request for a pre-authorization for surgery, and Hazelwood's action in denying the pre-authorization. She explained the mental and physical effects resulting

from the delay in surgery. She explained why she believed sanctions were appropriate and lauded the efforts of her attorney in representing her.

On March 23, 2012, based upon Smith's "Renewed and Supplemental Motion and Memorandum for Attorney's Fees and Costs, Motion to Set Aside and Correct Erroneous Findings in the ALJ's Order of February 17, 2012, and Petition for Reconsideration, and Affidavit," ALJ Borders entered the following order:

IT IS HEREBY ORDERED; the undersigned's Order dated February 17, 2012, is hereby set aside.

IT IS FURTHER ORDERED; the undersigned ALJ grants the Plaintiff's Attorney Fee to be \$1,000.00 as fair and reasonable.

On March 29, 2012, ALJ Borders overruled Hazelwood's motion to strike "based upon the Order dated March 23, 2012."

On April 4, 2012, Harned and Smith filed a petition for reconsideration and motion for findings of fact arguing the ALJ should set aside the March 23, 2012, order granting attorney fees of \$1,000.00 because the order contains no findings of fact supporting the awarded fee. They posited this is an error on the face of the award and can and should be addressed by the ALJ because neither the

order of March 23, 2012, nor any previous order contain any findings of fact concerning reasonable attorney fees. They argued as follows:

We believe that if the Administrative Law Judge would make findings of fact as to the work performed on behalf of Ms. Ash-Smith by the undersigned and other attorneys and staff of this firm, and the appropriate rate for Partners, Associates and Paralegals, then the undersigned would warrant a fee of more than \$11.87 per hour.

Smith and Harned argued no evidence has been filed by Hazelwood to support such a meager award. They assert the findings of fact should be based on the evidence submitted by Smith and Harned. After summarizing the various orders and motions filed in this case, Smith and Harned asserted "the purpose of findings of fact to support the conclusions and decisions of the [ALJ] are to provide meaningful appellate review, but also findings of fact provide the basis for the parties to understand" the ALJ's reasoning. They asserted a request for findings of fact is required prior to any appeal raising an issue concerning the findings of fact. Smith and Harned requested the ALJ examine the factors identified in the previous motions and make findings of facts consistent with the requirements of Alexander v. S & M Motors, Inc., supra, and Boden v. Boden, supra, and award reasonable attorney fees.

We vacate ALJ Borders' November 21, 2011, order imposing sanctions, the March 23, 2012, order awarding attorney fees of \$1,000.00, and the orders denying the parties a hearing on the remaining contested issues.

However, we find no reason to vacate the August 26, 2011, order denying Hazelwood's motion to reopen. Smith's motion and supplemental motion to set aside that order did not argue the motion to reopen should not have been overruled. Rather she argued the ALJ should conduct a hearing and allow her to testify regarding the imposition of sanctions in the form of attorney fees and costs.

Concerning Smith's entitlement to a hearing, KRS 342.275(2) reads as follows:

The administrative law judge may grant continuances or grant or deny any benefits afforded under this chapter, including interlocutory relief, according to criteria established in administrative regulations promulgated by the commissioner. The administrative law judge shall render the award, order, or decision within sixty (60) days following the final hearing unless extension is mutually agreed to by all parties. The award, order, or decision, together with a statement of the findings of fact, rulings of law, and any other matters pertinent to the question at issue shall be filed with the record of proceedings, and a copy of the award, order, or decision shall immediately be sent to the parties in dispute.

803 KAR 25:010 Section (13)(b) reads as follows:

If at the conclusion of the benefit review conference the parties have not reached agreement on all the issues, the administrative law judge shall:

(a) Prepare a summary stipulation of all contested and uncontested issues which shall be signed by representatives of the parties and by the administrative law judge; and

(b) Schedule a final hearing.

803 KAR 25:018 Section 18(1) reads, in relevant part, as follows:

(1) At the hearing, the parties shall present proof concerning contested issues. If the plaintiff or plaintiff's counsel fails to appear, the administrative law judge may dismiss the case for want of prosecution, or if good cause is shown, the hearing may be continued.

. . .

(8) The parties with approval of the administrative law judge may waive a final hearing. Waiver of a final hearing shall require agreement of all parties and the administrative law judge. The claim shall be taken under submission as of the date of the order allowing the waiver of hearing. A decision shall be rendered no later than sixty (60) days following the date of the order allowing the waiver of hearing.

The February 23, 2010, BRC identifies as one of the contested issues whether Hazelwood "violated KRS

342.310 or other appropriate statutes and regulations." Clearly, Smith did not waive a hearing. After entry of the August 26, 2011, order denying the motion to reopen, Smith filed a motion for a hearing and a renewed motion for a hearing both of which were overruled. Since violation of KRS 342.310 was listed as a contested issue, Smith was entitled to a hearing irrespective of the ALJ's denial of Hazelwood's motion to reopen on the grounds it was moot. The above statutes and regulations mandate a hearing was required on the issue of sanctions pursuant to KRS 342.310. Further, there is no statutory or regulatory provision for summary disposition of a contested issue.

Concerning ALJ Borders' November 21, 2011, order imposing sanctions, costs, and attorney's fees, in addition to the fact ALJ Borders improperly summarily decided the issue of whether there was a violation of KRS 342.310(1) and other statutes and regulations, we conclude there is no evidence in the record supporting imposition of sanctions against Hazelwood. Aside from allegations and counter-allegations contained in the record, there is no testimony or documentary evidence in the record conclusively establishing Smith's entitlement to sanctions, costs, and attorney's fees. Significantly, we note the November 21, 2011, order is the proposed order attached to Smith's

"Response to Order of November 15, 2011." As required by KRS 342.275(2), that order does not contain any findings of fact and conclusions of law stating why, pursuant to KRS 342.310(1), the imposition of sanctions, costs, and attorney's fees is appropriate.

We acknowledge Hazelwood has not appealed from the order of November 21, 2011, order imposing sanctions and the March 23, 2012, order awarding attorney fees of \$1,000.00. Moreover, we note on appeal, Hazelwood argues the March 23, 2012, order assessing attorney fees of \$1,000.00 is supported by substantial evidence. However, we reject Smith's argument that since no appeal was filed by Hazelwood of the order assessing attorney fees the decision of the ALJ is now the law of the case. In McGuire v. Coal Ventures Holding Company, Inc., 2009-SC-000114-WC, rendered October 29, 2009, Designated Not To Be Published, the Supreme Court defined the law of the case as follows:

The law of the case doctrine concerns the preclusive effect of judicial determinations in the course of a single litigation before a final judgment. [footnote omitted] As applied to workers' compensation cases, a final decision of law by an appellate court [footnote omitted] or the Board [footnote omitted] establishes the law of the case and must be followed in all later proceedings in the same case.

Slip Op. at 6.

There has been no final decision by this Board or an appellate court in the case *sub judice*. This is the first appeal to this Board. Thus, the November 21, 2011, and March 23, 2012, orders are not the law of the case.

In addition, we believe Hazelwood's position on appeal does not preclude this Board from vacating orders which are the subject of the appeal when those orders do not in any form or fashion comport with the statutes and regulations. We are unable to determine the basic facts supporting ALJ Borders' conclusions resulting in the November 21, 2011, order imposing sanctions. See Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). Further, we are unable to determine the grounds for entry of the March 23, 2012, order awarding attorney fees of \$1,000.00.

In Select Specialty Hospital v. Turner, 2010-CA-000852-WC, rendered December 3, 2010, Designated Not To Be Published, the Court of Appeals stated as follows:

However, KRS 342.285 also authorizes the Board to review an award or order in the absence of a petition for reconsideration. KRS 342.285 provides that, although the Board may not substitute its judgment for that of the ALJ as to questions of fact or weight of the evidence, the Board may determine whether:

(a) The [ALJ] acted without or in excess of his powers;

(b) The order, decision, or award was procured by fraud;

(c) The order, decision, or award is not in conformity to the provisions of [KRS Chapter 342];

(d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or

(e) The order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Indeed, the Board has the authority to decide questions of law regardless of whether a petition for reconsideration is filed. See, e.g., *Bullock v. Goodwill Coal Co.*, 214 S.W.3d 890, 893-94 (Ky. 2007); *Brasch-Berry General Contractors v. Jones*, 175 S.W.3d 81 (Ky. 2005). With regard to whether an issue presented for review before the Board is a legal one, our Supreme Court has instructed that it is the Board's province on appeal to ensure that orders and awards of an ALJ are in conformity with Chapter 342, and thus, that determinations of whether an ALJ's award or order is in conformity with Chapter 342 is a question of law. *Whittaker v. Reeder*, 30 S.W.3d 138, 145 (Ky. 2000).

In the present case, the Board found that the ALJ's opinion was not in conformity with Chapter 342. Specifically, the Board noted that while ALJ Smith found Turner had

sustained work-related injuries on October 15, 2007 and April 28, 2008, and further found that Turner's injuries had since fully resolved, ALJ Smith failed to make findings with regard to *when* Turner had reached MMI and whether she was entitled to TTD. Additionally, the Board found that ALJ Smith failed to render an opinion in conformity with Chapter 342 by failing to make any finding with respect to the compensability of medical benefits. The Board noted that it was not attempting to substitute its judgment for that of the ALJ and that the ALJ could find on remand that Turner was not entitled to TTD or medical benefits, but that *some findings* on each were required under the statute.

We disagree with SSH and SHG that the Board exceeded the scope of its review by vacating and remanding on the two above issues where no petition for reconsideration was filed and where Turner failed to raise the compensability of medical benefits in her appeal before the Board. Indeed, as previously stated, it is within the Board's purview on appeal to ensure that orders and awards of an ALJ are in conformity with Chapter 342. *Whittaker v. Reeder*, 30 S.W.3d at 144. As our Supreme Court has noted:

Workers' compensation is a creature of statute. As set forth in Chapter 342, workers' compensation proceedings are administrative rather than judicial. Although the principles of error preservation, *res judicata*, and the law of the case apply to workers' compensation proceedings, they apply differently than in the context of a judicial action.

*Id.* at 143. Where, as here, an ALJ

fails to make essential findings under Chapter 342, the Board does not exceed the scope of its authority by reversing and remanding for the ALJ to make findings in compliance with the Chapter.

Even though Hazelwood has not raised this issue on appeal, we believe the above language and KRS 342.285(2) grant the Board the authority to set aside orders of the ALJ which are not in conformity with the statutes and applicable regulations. KRS 342.275(2) requires an award, order, or decision to have "a statement of findings of fact, rulings of law, and any other matters pertinent to the question at issue" to be filed in the record. In the November 21, 2011, order, ALJ Borders did not set forth the basis for the imposition of sanctions, costs, and attorney's fees. We can only surmise ALJ Borders chose to believe the allegations set forth in Smith's motion in assessing attorney fees. However, the order tendered by Smith clearly fails to provide the basis for the imposition of sanctions. Moreover, the order does not designate that the sanctions, costs, and attorney fees are being awarded pursuant to KRS 342.310. Without any explanation by ALJ Borders, we believe that order on its face is deficient as a matter of law and we *sua sponte* vacate the November 21, 2011, order. Likewise, the January 5, 2012, order denying

Hazelwood's petition for reconsideration and motion to set aside the ALJ's November 21, 2011, order must be vacated.

The current record is insufficient to support the imposition of sanctions. Smith's assertion ALJ Borders' failure to enter findings of fact or provide an explanation for the award of attorney fees violates the statute and regulations also holds true for the November 21, 2011, order. As previously stated, there is no provision for a summary disposition of a contested issue. The statute and regulations require a hearing followed by rendition of a decision containing findings of fact and conclusions of law.

Smith's position on appeal is inconsistent. First, Smith seeks a hearing which could only relate to the contested issue, identified in the February 10, 2010, BRC order, of whether Hazelwood violated KRS 342.310(1) and other applicable statutes and regulations. Smith also seeks to have the award of attorney fees of \$1,000.00 vacated and the matter remanded solely for an award of attorney fees. Smith cannot have it both ways. On remand, a hearing should be held on the issue identified in the February 10, 2010, BRC order and not for the sole purpose of determining sanctions to be imposed against Hazelwood.

On remand, ALJ Borders must render sufficient findings of fact as to whether Hazelwood brought and/or prosecuted all or any portion of these proceedings without reasonable grounds. If the ALJ resolves the issue in favor of Smith, he shall also render findings of fact regarding sanctions, if any, he imposes.

Concerning the alleged violation of KRS 342.310(1), we point out the August 28, 2007, office note of Dr. Rouben which Smith refers to as a request for approval of the fusion surgery is a record of an "office visit."<sup>10</sup> It is not a letter. Although the record reflects a copy was sent to Smith and "Work Comp" there is nothing in the record establishing when and how the August 28, 2007, office record was transmitted by Dr. Rouben and when it was received by Hazelwood or its carrier. Significantly, the September 25, 2007, utilization review notice of denial states the date of request from Dr. Rouben is September 24, 2007. Thus, ALJ Borders must determine when the August 28, 2007, note was actually sent by Dr. Rouben and received by Hazelwood or its carrier/adjuster in determining whether utilization review was timely instituted. There appears to be no dispute regarding when

---

<sup>10</sup> See page two of Smith's Response to Motion to Reopen Medical Fee Dispute.

the September 27, 2011, letter of Dr. Rouben was received by the carrier or adjuster as the "Final Utilization Review Decision-Denial" dated November 21, 2007, reflects that the appeal was received on September 27, 2007, and the requesting provider was Dr. Rouben. What transpired after September 27, 2011, is not apparent.

We note both parties' witness lists identify as witnesses individuals involved in the utilization review process. Since none of these individuals were deposed or testified at a hearing, it is impossible to determine the time frame within which various documents were received and processed. Consequently, the current state of the record does not permit an informed decision regarding whether the regulations concerning utilization review were properly followed. In light of the date Dr. Rouben's appeal was received, the timing of Dr. Guarnaschelli's October 22, 2007, report and letter of November 20, 2007, must be reconciled with the fact the final utilization review decision was not sent until November 21, 2007. Finally, we point out Smith's assertion Hazelwood's motion to reopen was not timely filed, may not be correct. In that respect 803 KAR 25:012§1(8) requires Hazelwood to file a medical fee dispute within thirty days following a final utilization review decision. Assuming Hazelwood properly

followed the utilization review regulations, it had thirty days from November 21, 2007, the date of the final utilization review denial to file a medical fee dispute.

ALJ Borders will have to resolve these issues after the parties have had an opportunity to depose or question at the hearing the various individuals handling the utilization review on behalf of Hazelwood who were identified as witnesses. We also believe ALJ Borders must consider the fact there were no pleadings filed after March 20, 2008, until November 6, 2009, when Smith filed a motion for an order to authorize medical treatment. It is clear based on the pleadings in the record that the parties agreed to a course of treatment which ultimately led to Dr. Rouben performing surgery other than that which he recommended. The record reflects the parties do not dispute the surgery was based upon the recommendations of Dr. Eppig after the parties agreed Smith would be referred to the Cleveland Clinic at Hazelwood's expense.

That said, if ALJ Borders finds Hazelwood did not follow the applicable regulations regarding utilization review then the Supreme Court's holding in Richey v. Perry Arnold, Inc., supra, is germane. In Richey, the Supreme Court stated as follows:

The Board, since at least 2001, has viewed an employer who waives its right to contest a medical expense but defends against the injured worker's motion to reopen as having done so without reasonable ground. Then-Chairman Lovan stated on behalf of a unanimous Board as follows:

When, as here, the employer never files a medical dispute, never files a motion to reopen, continues to refuse to pay medical expenses, even if based upon utilization review, and requires the employee to seek litigation of those benefits either through the workers' compensation administrative process or through KRS 342.305, we believe an ALJ becomes virtually obligated to assess sanctions pursuant to KRS 342.310. In order for KRS 342.310 to be used by an ALJ, it matters not whether a party asks for sanctions. [footnote omitted]

We agree but also acknowledge that KRS 342.310(1) is discretionary.

The ALJ denied sanctions in the present case based on a conclusion that the employer had no obligation to file a medical dispute and motion to reopen. *Kentucky Associated General Contractors Self-Insurance Fund v. Lowther*, which determined that an employer did have such an obligation, was rendered while the present case was pending before the Court of Appeals. The claimant raised the same argument concerning an employer's obligation from the outset and preserved it on appeal. [footnote omitted] We conclude, therefore, that the case must be remanded to the ALJ to reconsider the question of sanctions based on a correct understanding of the employer's obligations and on any other considerations relevant to the reasonableness of its action under KRS

342.310(1) and 803 KAR 25:012, §  
2(1)(a).

The decision of the Court of Appeals is hereby affirmed in part and reversed in part, and this claim is remanded to the ALJ to reconsider the issue of sanctions.

Here, the situation is different. The record is silent as to when Dr. Rouben's note of August 28, 2007, was forwarded to and received by the carrier or adjuster for Hazelwood regarding the proposed surgery discussed in the office note. Aside from the September 25, 2007, notice of denial, the record is also silent as to when after receiving Dr. Rouben's August 28, 2007, office note Hazelwood, or its carrier/adjuster, instituted utilization review. It is also unclear as to what transpired after the initial "Utilization Review - Notice of Denial" was sent on September 25, 2007. Certainly, ALJ Borders must determine a timeline as to when documents were transmitted and received during the utilization review process. ALJ Borders may also consider Smith's assertion that Hazelwood misrepresented the contents of Dr. Fadel's report upon which the September 25, 2007, utilization review denial was based.

Stated another way, ALJ Borders must determine whether the utilization review was timely instituted

pursuant to the applicable regulations and the regulations continued to be followed throughout the utilization review process. At the end, ALJ Borders must determine whether sanctions are appropriate pursuant to KRS 342.310(1). In any case, ALJ Borders must set forth specific findings of fact regarding the applicability of KRS 342.310(1). Likewise, if ALJ Borders determines sanctions are appropriate he must make specific findings of fact regarding imposition of sanctions.

We have reviewed Boden v. Boden, supra, and Alexander v. S & M Motors, Inc., supra, cited by Smith. In Boden v. Boden, supra, the Court of Appeals set out the factors to be considered in determining an attorney fee. Alexander v. S & M Motors, Inc., supra, dealt with attorney fees to be awarded pursuant to the Kentucky Consumer Protection Act which is completely different than the statute in this case. There, the Supreme Court noted the award of attorney fees was based on the attorney's actual hourly rate of \$120.00. Our review of those cases does not support Smith's calculation of attorney fees. First, we point out KRS 342.310 permits the ALJ to "assess the whole costs of the proceedings which shall include actual expenses" which includes among other items, attorney fees. (emphasis added). Therefore, the attorney's hourly rate

must be based on Harned's hourly rate and those of his partners, associates, and paralegals. The hourly rate should not be based upon the two studies cited by Smith in her motion, memorandum, and affidavit for attorney's fees and costs filed on February 3, 2012. Further, we find nothing in the statute which permits enhancement of the attorney fees by a multiplier.

Accordingly, for the reasons stated herein, the November 21, 2011, order imposing sanctions, costs, and attorney's fees, the January 5, 2012, order overruling Hazelwood's petition for reconsideration and/or motion to set aside the ALJ's order of November 21, 2011, the October 5, 2011, order overruling, in part, Smith's motion for a hearing, the November 5, 2011, order overruling Smith's renewed motion for a hearing, and the March 23, 2012, order granting an attorney fee of \$1,000.00, and the April 19, 2012, order overruling Smith's petition for reconsideration and motion for findings of fact are hereby **VACATED**. This matter is **REMANDED** to the ALJ for the taking of additional proof and a hearing on the issues identified in the February 23, 2010, BRC order. On remand, the decision of ALJ Borders regarding Hazelwood's alleged failure to comply with the statutes and regulations, whether sanctions are appropriate and, if appropriate, an award of sanctions,

shall contain findings of fact and conclusions of law supporting his decision on all issues.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON NORMAN E HARNED  
324 EAST TENTH AVENUE  
P O BOX 1270  
BOWLING GREEN KY 42102

**COUNSEL FOR RESPONDENT:**

HON M KATHRYN MANIS  
841 CORPORATE DR STE 101  
LEXINGTON KY 40503

**RESPONDENT:**

DR DAVID ROUBEN  
9300 STONESTREET RD STE 200  
LOUISVILLE KY 40272

**ADMINISTRATIVE LAW JUDGE:**

HON R SCOTT BORDERS  
8120 DREAM STREET  
FLORENCE KY 41042