Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 16, 2013

CLAIM NO. 200885913

DAVID HATFIELD PETITIONER

VS. **APPEAL FROM HON. JONATHAN WEATHERBY, ADMINISTRATIVE LAW JUDGE**

JAY & MARTY GRAY,INC.,
DR. ROBERT HOSKINS/HOSKINS MEDICAL CENTER,
SPINE & BRAIN NEUROSURGICAL CENTER,
LAKE CUMBERLAND REGIONAL PAIN CENTER,
LAKE CUMBERLAND NEUROSURGICAL CLINIC,
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AND

JAY & MARTY GRAY, INC. PETITIONER

VS.

DAVID HATFIELD,
DR. ROBERT HOSKINS/HOSKINS MEDICAL CENTER,
SPINE & BRAIN NEUROSURGICAL CENTER,
LAKE CUMBERLAND REGIONAL PAIN CENTER,
LAKE CUMBERLAND NEUROSURGICAL CLINIC,
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING and REMANDING
* * * * * *

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

RECHTER, Member. David Hatfield ("Hatfield") appeals from an Order dated May 26, 2011, an Order Upon Remand entered on October 8, 2012 and an Order on reconsideration dated January 24, 2013. Hatfield's employer, Jay & Marty Gray, Inc. ("Gray"), cross-appeals. An outline of the procedural history of this matter is necessary for consideration of the appeal.

Hatfield initiated a claim on May 5, 2008, which was assigned to Hon. James L. Kerr, Administrative Law Judge ("ALJ Kerr"). Hatfield sought income benefits as a result of an injury sustained while he was employed as a coal truck driver for Gray. After lifting the heavy hood of a coal truck, Hatfield experienced a stinging sensation in his right chest, shoulder and back. The pain worsened over the next few days, and he eventually experienced symptoms in his low back and right leg.

Gray filed a Form 112 Medical Fee Dispute on May 3, 2010. The Form 112 was not accompanied by a motion to join medical providers, although numerous medical bills were submitted to utilization review. At the final hearing conducted on March 29, 2011, ALJ Kerr identified "unpaid and contested medicals" as an issue, without objection.

Further, in his post-hearing brief, Hatfield addressed the issue of medical expenses, arguing Gray had "failed in its burden of proof on the medical fee dispute it has filed." Gray likewise discussed medical fees in its post-hearing brief, referring specifically to the utilization review reports and requesting "relief from liability for this unreasonable and unnecessary medical billing."

ALJ Kerr issued an Opinion and Order dated May 26, 2011, finding Hatfield has sustained a work-related injury, and awarded permanent partial disability benefits based on a 5% impairment rating, not enhanced by a multiplier. Of particular importance to the present appeal, ALJ Kerr noted there remained a disputed issue regarding unpaid and contested medical expenses. Because no motion to join the medical providers had been filed, he determined it would be premature to resolve the issue. Instead, he ordered as follows:

> Dr. Robert Hoskins/Hoskins Medical Center, Lake Cumberland Regional Pain Center, Spine and Brain Neurosurgical Center, Lake Cumberland Neurosurgical Clinic and Manchester Memorial Hospital Physical Therapy are hereby **JOINED** as party to this matter and shall have thirty (30) days to submit evidence in respect to the issues raised in the medical fee dispute filed May 7, 2010. Any party may submit a brief fifteen (15) days thereafter and the medical fee

> dispute shall stand submitted as of that date.

Thereafter, Hatfield petitioned for reconsideration, contesting the joinder of the medical providers. Relying on the fact the medical fee dispute concerned pre-award medical expenses, ALJ Kerr overruled the petition on July 6, 2011. Hatfield then appealed the May 26, 2011 Order and subsequent Order on Reconsideration. By Order of this Board dated August 31, 2011, the appeal was placed in abeyance and the claim was remanded for resolution of the medical fee dispute.

Meanwhile, the claim was subsequently reassigned to Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ Weatherby"). By Order dated October 8, 2012, ALJ Weatherby adjudicated the outstanding medical fee dispute, disallowing three prescriptions, physical and occupational therapy, and referrals to an orthopedic surgeon. Upon Gray's petition for reconsideration, the ALJ amended the October 8, 2012 order to more specifically permit recommended epidural steroid injections, office visits with his treating physician, and prescriptions for Hydrocodone, Tizanidine and Ultram.

With the medical fee dispute finally adjudicated, Hatfield's appeal was removed from abeyance and is now ripe

for consideration. In this present appeal, Hatfield argues the ALJ's failure to adjudicate the medical fee dispute following the final hearing compelled the ALJ to dismiss Gray's Form 112 and to find all contested medical bills compensable. In its cross-appeal, Gray argues the ALJ failed to set forth sufficient findings of fact to support the award of medical expenses.

Turning to Hatfield's appeal, we look first to 803 KAR 25:012, which governs the resolution of medical disputes. Section 1, subsection (5) of that regulation is mandatory:

> If an application for adjustment of claim is pending concerning the injury or disease which is the subject of the dispute, the movant **shall** file a Form 112 with the executive director and **shall** also serve copies on the other parties of record. The movant **shall** further file a motion to join the medical provider as a party to the claim. (Emphasis added).

Here, there is no dispute Gray failed to file a motion to join the medical providers with its Form 112, as required by the regulation. However, we cannot ignore the reality that the matter proceeded to a final hearing as if the medical providers had been joined. Both parties addressed the issue of contested medical expenses in their respective post-hearing briefs. Further, Hatfield never

objected to Gray's omission until after ALJ Kerr entered the May 26, 2011 Order. Neither party took the opportunity to file further briefs regarding the medical fee dispute. We interpret this as additional indication the parties considered the matter fully and adequately litigated.

We find no error in ALJ Kerr's actions. Apparently realizing the medical providers had not been joined, the ALJ *sua sponte* cured this procedural defect and reserved judgment of the medical fee dispute. It is within the discretion of the ALJ to *sua sponte* join necessary parties. *See e.g.* Dabney v. Langley & Morgan, WCB 199452584 (December 8, 2011). We find no abuse of that discretion here, particularly where the litigants had conducted the final hearing as if no procedural problem existed.

The ALJ is also the gatekeeper and arbiter of the evidence both substantively and procedurally. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005). It was well within the ALJ's authority as gatekeeper to reserve judgment on the medical fee dispute, and grant additional opportunity to further brief the issue. In fact, the measure ensured neither party was prejudiced by this circumstance.

This Board has previously considered a somewhat analogous case, also involving the failure to join medical providers. In Barnes v. A.O. Smith Corp., WCB 86-06248

(December 6, 2000), the medical providers were incorrectly identified, the result being two legitimate providers were neither joined nor notified of the medical fee dispute at the time the Form 112 was filed. The Board concluded any error was harmless, particularly because the medical providers ultimately received actual notice and an opportunity to be heard prior to final adjudication of the dispute. The Board particularly noted, "[t]he regulatory scheme requiring joinder of providers should not be so broadly applied as to skew the underlying purpose and goal of KRS Chapter 342."

While the procedural posture of the present case is distinct from Barnes, we are guided by its underlying principle that failure to strictly comply with joinder requirements *may* be deemed harmless. Here, the joinder error was corrected by the ALJ prior to final adjudication of the medical fee dispute, and the parties were given the opportunity to be heard on that issue. Under the particular circumstances of this case, any deficiency in Gray's compliance with the regulations did not prejudice Hatfield and is therefore harmless.

On cross-appeal, Gray finds two errors in the ALJ's October 8, 2012 Order adjudicating the medical fee dispute, as amended by the January 24, 2013 Order. First,

Gray argues the ALJ failed to adequately substantiate the award. Gray also claims the award regarding prescription medications is inherently inconsistent.

For several reasons, ALJ Weatherby's decision regarding the medical fee dispute must be vacated and remanded. First, the October 8, 2012 Order misstates the burden of proof. Contrary to the statement at page 5 of the Opinion, the defendant-employer did not "bear[] the burden to prove that the contested medical treatment is not reasonable or necessary for the cure and relief of a work injury." Rather, in a pre-award medical fee dispute, the burden of proof lies with the claimant to demonstrate the medical necessity of any medical treatment. KRS 342.735(3). While it is true ALJ Kerr had already entered an award of benefits, that May 26, 2011 Order was interlocutory. Even if not explicitly styled as "interlocutory", the Order expressly states it does not fully and finally adjudicate all contested issues. *See* CR 54.02(1). In light of the procedural posture of the case, the medical fee contest must be considered a pre-award dispute. Therefore, the burden of proof rests with Hatfield. The opinion must be clarified to ensure the proper burden was applied, even if in so doing the same result is reached.

We also agree with Gray the Order does not set forth sufficient findings of fact to substantiate the approval of epidural injections, which were first awarded in the ALJ's Order on reconsideration dated January 24, 2013. In summarizing the evidence in the original Order, ALJ Weatherby noted the epidural injections were approved in the utilization review process. However, he failed to make any express finding of fact regarding the necessity of these injections, or that he relied upon the utilization review in deeming the injections compensable. The ALJ is required to make findings sufficient to inform all parties of the basis of his decision which would allow for meaningful review. Kentland v. Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky.App. 1988).

Finally, despite the amendment made pursuant to the January 24, 2013 Order on reconsideration, there remain apparent inconsistencies in the award with respect to prescription medications. By the January 24, 2013 Order, ALJ Weatherby clarified Gray would be responsible for "thoracic epidural steroid injections, office visits with the treating physician Dr. Hoskins and his corresponding prescriptions for Hydrocodone, Tizanidine and Ultram for the Plaintiff's back condition." However, paragraph 8 of the original Order was not amended, and that paragraph found

"Tramadol, Tizanidine and Zanaflex … to be unreasonable and unnecessary." In addition to the obvious inconsistency regarding the prescription medication Tizanidine, it is further uncontested Zanaflex and Tizanidine are the same drug sold under different names. Likewise, Ultram and Tramadol are the same drug sold under different names. Upon remand, these inconsistencies should be clarified.

Accordingly, the Opinion Upon Remand rendered October 8, 2012 by Hon. Jonathan R. Weatherby, Administrative Law Judge, and the Order issued January 24, 2013, are hereby **VACATED** and this matter is **REMANDED** for entry of an order consistent with the views expressed herein.

ALL CONCUR.

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