Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 10, 2014

CLAIM NO. 200371452

FORD MOTOR COMPANY PETITIONER

VS. **APPEAL FROM HON. ALLISON E. JONES, ADMINISTRATIVE LAW JUDGE**

LANE L. ATER
RICKY COLLILS, M.D.
and HON. ALLISON E. JONES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Ford Motor Company ("Ford") appeals from the March 28, 2013, Opinion and Order and the July 10, 2013, Opinion and Order on Petition for Reconsideration of Hon. Allison E. Jones, Administrative Law Judge ("ALJ Jones"). It also appeals from the August 16, 2013, Order ruling on Ford's petition for reconsideration of Hon. J.

Landon Overfield, Chief Administrative Law Judge ("CALJ Overfield"). In the March 28, 2013, Opinion and Order, ALJ Jones sustained Ford's Motion to Reopen Contesting Compensability of Recommended Medical Treatment and resolved the medical dispute in favor of Ford determining the radiofrequency ablation procedure recommended by Dr. Ricky Collis is not reasonable and necessary treatment. Additionally, ALJ Jones overruled Lane L. Ater's ("Ater") July 2, 2012, Motion to Reopen seeking additional income benefits.

As a means of efficiently and thoroughly summarizing the factual background preceding Ater's July 2, 2012, Motion to Reopen and Ford's August 3, 2012, Motion to Reopen we set forth a portion of the Procedural and Factual Summary from the March 28, 2013, Opinion and Order which is as follows:

> **A. Original Claim**
>
> Ater filed an initial Form 101 Application for Resolution of Injury Claim with the Department of Workers' Claims on or about February 22, 2007. In his Form 101, Ater alleged that on or about August 15, 2003, he sustained a low back injury while performing the AWOL relief job at Ford.
>
> Ater testified by deposition on March 25, 2008. He testified that prior to his alleged injury date, August 15, 2003, he could not recall

having any symptoms or injuries to his lower back.

Ater explained that as part of the AWOL relief team he was required to cover between 12 and 15 different jobs. He testified that he had been doing the job about ten months. He explained that the team covered for employees who were out on vacation, for injuries, or did not show up for work. He testified that on August 15, 2003, he was performing the power distribution junction box ("PB") job. He explained that the fuse panel box is a plastic panel box that sits underneath the dash. He estimated that it is about "twelve inches long by five inches wide by about three inches deep" and weighs "two to three pounds." He explained that he had "run the cable to the box." He testified that the work was a little below his waist and that he used his hands and an airscrew gun. He explained that the job involved "a lot of pushing and pulling and then with my size I was also bent over and twisted."

He testified that while performing this job on August 15, 2003, he heard "a pop" in his back and then felt "a real sharp pain, pain that went down to my left leg, all through my hips." He testified that he immediately notified medical at Ford and "they set [him] up to go see Dr. Shea."

Ater testified that Dr. Shea ordered an MRI and treated him conservatively with epidurals, physical therapy, hydrocodone, Ambien, and a back brace. Ater described his symptoms as: "lower back pain, difficult to lift anything of any kind of heaviness. Real achy feeling at times." He testified that Dr. Shea restricted him from lifting greater

than ten pounds and no excessive standing or walking." He testified that Dr. Shea later modified it to simply "unable to work."

Ater testified that he was not able to be very active and was on medical leave from work. He explained that on an average day:

I do computer stuff for our church that I attend. I try to help do some work on the web page because things that I can do while I'm sitting down, giving advice or consulting means of different things that they could do for being able to listen to their messages online. . . . On Sundays and Wednesdays when I go to church I get to run the audio board where I sit down and do the audio for when they are singing and what he's teaching. Other than that, it's what I can do on my computer for the most part. Every now and then I get to fix breakfast if I'm feeling really good. Makes the wife happy.

On June 22, 2005, Dr. Shea's office record states:

Lane Ater is still applying for Social Security Disability. He is not going to return to work at Ford, He has only worked there for five years. He started in June 1999 and was in this office in January 2000. His disability s [sic] not totally from his back. He has a 5% disability to the lumbosacral spine as a result of any Workers' Compensation injury. He was given Vicodin and Ambien. He is applying for Social Security Disability.

On August 9, 2007, Dr. Shea authored a letter report regarding

> Ater's treatment with him. Dr. Shea states as follows:
>
> Mr. Ater has been followed in this office since January 21, 2000, for chronic back pain. This patient has had multiple MRI's of both the lumbosacral spine and the cervical spine, and these are well documented in the medical record. In my opinion, there is no evidence of permanent injury to this patient's back as a result of the worker's compensation injury. He does have pre-existing conditions to the spine with mild degenerative disc disease, but he has no permanent injury from the Ford Motor Company.
>
> Ater and Ford reached a compromised settlement. On July 30, 2008, ALJ Lawrence Smith approved the parties' Form 110 Settlement Agreement. According to that Settlement Agreement, Ater received a monetary lump sum payment of $2,984.15 based on a 3% impairment rating under the *AMA Guides to Evaluation of Permanent Impairment 5th Edition* (*"AMA Guides 5th"*). Ater retained all his rights (medical, reopen, vocational rehabilitation) as part of the settlement.

On July 2, 2012, Ater filed a Motion to Reopen requesting additional temporary total disability ("TTD") benefits. On July 18, 2012, Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ Miller") overruled Ater's Motion to Reopen for failure to support his motion with an affidavit or medical report.

On July 26, 2012, Ater again filed a Motion to Reopen alleging as follows:

> (1) his physical condition has worsened since the time of his settlement; (2) the effects of his work related lower back injury on his occupational opportunities is greater than was previously demonstrated in the original proceedings; and (3) a previous Motion for additional TTD Benefits was filed on June 29, 2012 (Exhibit B).

On August 3, 2012, Ford filed its Motion to Reopen and a Form 112. In the Form 112, the nature of the dispute is characterized as follows:

> Radiofrequency ablation of the L3-4 facet joints does not represent reasonable and necessary treatment of the effects of the Plaintiff's work injury and/or is not related to treatment of the effects of the Plaintiff's work injury.

The Form 112 indicates that a copy of the final utilization review decision is attached. Significantly, a letter by Dr. Bart J. Goldman, dated July 23, 2012, was attached in which he concluded as follows:

> Without more documentation of the extent and duration of pain relief after facet injections I cannot state, within a reasonable degree [sic] medical probability, that this gentleman is a candidate for radiofrequency ablation of the facet joints. That being said, even if he is a candidate for this procedure, this

> would be related to the natural effects of aging on his degenerative disease of his lumbar region and not to a strain injury of the lumbar region on 8/15/2003. The strain injury and subsequent strain injuries neither caused his degenerative change nor significantly accelerated the natural effects of aging on this pre-existing change.
>
> It is, therefore, recommended that radiofrequency ablation of bilateral facets at L3-4 and L4-5 be denied for lack of information as well as for lack of relatedness to the injury in question.

Also attached is the June 22, 2012, Independent Medical Examination ("IME") report of Dr. Warren Bilkey, who opined Ater's radiofrequency ablation "is not likely to help."

On August 22, 2012, Ater filed an Objection to Ford's August 3, 2012, Motion to Reopen and Form 112 asserting as follows:

> 1. The Defendant has failed to comply with the DWC regulations for utilization review. As such, the Defendant is estopped from denying the recommended medical treatment of Dr. Ricky Collis.
>
> 2. Although Dr. Bart Goldman is a licensed physician in the Commonwealth of Kentucky, the report of Dr. Goldman is merely an 'evaluation' obtained by the Defendant under the guise that such is somehow in compliance with the UR regulations. To the contrary, --the subject report is <u>not</u> a utilization

> review by a UR plan approved by the Commissioner per the DWC regulations.
>
> 3. The Defendant has a long history of utilizing local physicians-- who perform IMEs-- instead of an approved utilization review program as approved by the Commissioner. As such, the Defendant is stopped [sic] from relying upon any medical report of Dr. Bart Goldman that does not comply with the regulations concerning utilization review.

The January 15, 2013, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730 [handwritten: "increased impairment"] and unpaid or contested medical expenses [handwritten: "see Form 112"]. Under "other" is the following: "failure to follow UR procedures w/sanctions."

In the March 28, 2013, Opinion and Order, ALJ Jones set forth the following findings of fact and conclusions of law:

> **A. Plaintiff's Motion for Increased Impairment KRS 342.125**
>
> A settlement agreement to a workers' compensation claim becomes final upon approval by the ALJ, relief from which can only be obtained if it is reopened pursuant to KRS 342.125. *Uninsured Employers' Fund v. Turner*, 981 S.W.2d 544, 545 (Ky. 1998). The grounds for reopening are set forth in KRS 342.125(1). Ater relies on subsection (d). It provides that reopening is permitted if the claimant can prove "a change of disability as

shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order."

"Whether a worsening of impairment rises to the level of greater compensability is determined under KRS 342.730(1) and KRS 342.0011(11). KRS 342.730(1)(b) and KRS 342.0011(11)(b) require a worker who remains partially disabled to show a greater permanent impairment rating in order to obtain a greater award. But KRS 342.730(1)(a) and KRS 342.0011(11)(c) require a worker who was partially disabled at the time of the initial award and totally disabled at reopening to show only that a worsening of impairment due to the injury is permanent and causes the worker to be totally disabled." *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213, 218 (Ky. 2006).

KRS 342.125(7) addresses the re-opening of workers' compensation awards, and, with respect to prior settlement agreements, provides in part:

Where an agreement has become an award by approval of the administrative law judge, and a reopening and review of that award is initiated, no statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered by the administrative law judge as an admission against the interests of any party. The parties may raise any issue upon reopening and review of this type of award which could have been considered upon an original application for benefits.

Stated another way, the application of *res judicata* and collateral estoppel are prohibited on a motion to re-open a settled workers' compensation award. *Beale v. Faultless Hardware*, 837 S.W.2d 893, 896 (Ky. 1992). Thus, before the ALJ can determine if a claimant's disability has increased, she must first determine the percentage of disability that existed at the time of settlement. *Commercial Drywall v. Wells*, 860 S.W.2d 299, 300 (Ky. App. 1993).

Dr. Shea's records and reports are the only evidence in the record dealing with Ater's impairment rating and condition at the time of settlement. To some degree, they conflict. On June 22, 2005, Dr. Shea's office record states:

Lane Ater is still applying for Social Security Disability. He is not going to return to work at Ford. He has only worked there for five years. He started in June 1999 and was in this office in January 2000. His disability is not totally from his back. ***He has a 5% disability to the lumbosacral spine as a result of any Workers' Compensation injury.*** He was given Vicodin and Ambien. He is applying for Social Security Disability.

On August 9, 2007, Dr. Shea authored a letter report regarding Ater's treatment with him. Dr. Shea states as follows:

Mr. Ater has been followed in this office since January 21, 2000, for chronic back pain. This patient has had multiple MRI's [sic] of both the lumbosacral spine and the cervical spine, and these are well documented in the medical record. ***In my opinion,***

there is no evidence of permanent injury to this patient's back as a result of the worker's compensation injury. He does have pre-existing conditions to the spine with mild degenerative disc disease, but he has no permanent injury from the Ford Motor Company.

The ALJ is uncertain what to make of the discrepancy between the two reports, especially since Ater's subjective complaints and pathology were similar during both time-frames. Based on a review of Dr. Shea's treatment records and Ater's March 2008 deposition testimony, the ALJ finds that at the time of Ater's July 2008 settlement, he had a 5% impairment rating due to his work-related injury.

With respect to Ater's current impairment rating, the ALJ finds Drs. Shea and Best's 5% impairment rating more convincing than Dr. Bilkey. Dr. Shea has treated Ater since 2000. He has seen him for numerous office visits and has reviewed diagnostics from both before and after the work injury and settlement. Thus, the ALJ finds that Ater's actual impairment rating is the same as it was at the time of the 2008 settlement.

The ALJ further finds that Ater's condition has not worsened to the extent that he is now totally occupationally disabled. Ater is 50 years old with an associate's degree. He is articulate and appeared intelligent. His medical restrictions are compatible with light to medium category work. The ALJ finds that despite his symptoms and work restrictions, Ater should be able to find employment. As such, the ALJ does

not believe that Ater is totally occupationally disabled.

B. Ford's Medical Dispute

KRS 342.020(1) requires the employer to pay for such medical treatment "as may reasonably be required" for the cure or relief of a work-related injury and its effects." "An employer's dissatisfaction with an injured worker's choice of physicians or with the cost, duration, or choice of treatment is not a proper basis for challenging the compensability of medical treatment." *Poynter v. Barren-Metcalfe Ambulance Serv*., No. 2011–SC–000044–WC 2011 WL 3793321, at *5 (Ky. Aug. 25, 2011). However, the Act does not require an employer "to pay for treatments or procedures that, regardless of the competence of the treating physician, are shown to be unproductive or outside the type of treatment generally accepted by the medical profession as reasonable in the injured worker's particular case." *Square D Co. v. Tipton*, 862 S.W.2d 308, 310 (Ky. 1993).

Ford contests the radiofrequency ablation therapy recommended by Dr. Collis. Dr. Goldman opined that "without more documentation of the extent and duration of pain relief after the facet injections" he could not state that Ater was an appropriate candidate for radiofrequency ablation of the facet joints. Dr. Best opined that Ater had previously "received three facet joint injections, and these provided no long-lasting or significant relief of symptoms. Therefore, clearly, there is no indication for the facet joint ablations." Dr. Bilkey's similarly opined "it is unlikely he would benefit from any additional

> formal diagnostic or treatment procedures. It does not appear that he has had adequate response to facet blocks and therefore radio frequency ablation of the nerves that innervate the facet joints is not likely to help."
>
> Based on Drs. Goldman, Best, and Bilkey the ALJ finds that the radio frequency ablation procedure recommended by Dr. Collis is not reasonable and/or necessary to treat Ater's work-related injury as it is not likely to provide him relief. As such, the procedure is not compensable under the Act.

Ater filed a petition for reconsideration asserting, in part, as follows:

> It is respectfully submitted that the assigned ALJ has failed to provide any findings or analysis concerning the primary issue submitted for adjudication, i.e., did the Defendant exhaust utilization review as required by 803 KAR 25:012 §1(8)?
>
> ...
>
> It is undisputed that the Defendant was required to exhaust UR in this specific instance (See Form 112); however, the only record attached to the Form 112, is a letter from Dr. Bart Goldman, in which he indicates that it was 'recommended that radiofrequency ablation...be denied for lack of information as well as for lack of relatedness to the injury.' **Dr. Goldman's letter does not qualify as a utilization review.**

> Utilization review is a highly regulated process, which requires requests for pre-certification to be submitted to a DWC-approved plan pursuant to 803 KAR 25:190 §3. Following each instance of utilization review denial, **a written notice of denial** must be issued to both the medical provider and employee that is **'clearly entitled** "UTILIZATION REVIEW-NOTICE OF DENIAL." 803 KAR 25:190 §7(1)(a)-(c). Further, the Notice of Denial **shall** contain the 'name, state of licensure, and medical license number of the reviewer.' Id. Finally, and most importantly, the notice of denial **shall** contain an explanation of utilization review reconsideration rights.' These reconsideration rights are explained in 803 KAR 25:190 §8(1)(a)-(d), which states that the 'reconsideration process shall be provided within the structure of the utilization review.' None of the elements described above are present in Dr. Goldman's July 23, 2012 letter. Perhaps most importantly, there is **no indication on the face of the letter that the injured employee or provider was notified of Dr. Goldman's opinion** as required by 803 KAR 25:190 §5(2)(1)1.

(emphasis in original)

On July 10, 2013, ALJ Jones entered the following Opinion and Order on Petition for Reconsideration:

> This claim is before the undersigned Administrative Law Judge on Plaintiff's petition for reconsideration. Plaintiff is correct that the ALJ inadvertently failed to address one of the central disputed issues in this claim, Defendant

Employer's alleged failure to follow the UR procedures. This warrants reconsideration.

KRS 342.020 entitles an injured worker to reasonable and necessary medical treatment for the effects of a work-related injury. Pursuant to 803 KAR 25:96 ¶8(1) "[F]ollowing resolution of a claim by an opinion or order of an arbitrator or administrative law judge, including an order approving settlement of a disputed claim, the payment obligor shall tender payment or file a medical fee dispute with an appropriate motion to reopen the claim, within 30 days following receipt of a completed statement for services." If UR is pending, the 30-day period for filing a medical fee dispute does not commence until the final decision from UR. 803 KAR 25:96¶8(2)(d).

"An obligation for payment or challenge shall not arise if the statement for services ***clearly indicates*** that the services were not performed for a work-related condition." 803 KAR 25:96¶8(3) (emphasis added). The ALJ concludes that the "clearly indicates" standard under 803 KAR 25:096¶8(3) is meant to apply to requests that are so far outside the scope of potentially covered services that no reasonable person could conclude they are for a work-related condition. If the face of the request reasonably relates it to a work condition, the carrier has the burden of complying with the regulations even if it ultimately denies/contests the request on work-relatedness grounds.

Under the regulations, a pre-authorization request is analogous to and treated the same as a "statement

for services." *See Kentucky Associated General Contractors Self-Insurance Fund v. Lowther*, 330 S.W.3d 456, 457 (Ky. 2010) (holing [sic] this interpretation is consistent with the authorizing statute as well as the regulatory language and noting that courts give great deference to an administrative agency's reasonable interpretation of its own regulations).

1. This claim is post-award/post-settlement, therefore, 803 KAR 25:96 ¶ 8 applies.

Former Administrative Law Judge Lawrence L. Smith approved a Form 110 Settlement Agreement on July 30, 2008. Pursuant to the settlement: "medicals remain open pursuant to applicable statute."

2. The request for pre-certification triggered the carrier's obligations under 803 KAR 25:096 ¶ 8.

Since the request itself appeared reasonably related to the work injury, the carrier was not absolved of its procedural responsibilities under the Act. As such, it was required to comply with 803 KAR 25:096 ¶ 8.

3. The carrier failed to comply with 803 KAR 25:190

The purpose of 803 KAR 25:190 is to "insure that insurance carriers, group self-insurers, and individual self-insured employers implement a utilization review and audit program." Among other things, the regulation requires the carrier to submit a utilization review and medical audit plan. The plan must contain a description "of the process for rendering and promptly notifying the

medical provider and employee of the initial review decision." The regulation also requires that a utilization review notice apprise the employee and the medical provider of certain rights. It states:

Section 7. Written Notice of Denial.

(1) Following initial review, a written notice of denial shall:

(a) Be issued to both the medical provider and the employee in a timely manner but no more than ten (10) days from the initiation of the utilization review process;

(b) Be clearly entitled "UTILIZATION REVIEW - NOTICE OF DENIAL"; and

(c) Contain:

1. A statement of the medical reasons for denial;

2. The name, state of licensure and medical license number of the reviewer; and

3. An explanation of utilization review reconsideration rights.

(2) Payment for medical services shall not be denied on the basis of lack of information absent documentation of a good faith effort to obtain the necessary information.

The ALJ has reviewed the medical dispute the Defendant Employer filed on August 3, 2012. Based on the review, it appears that on July 23, 2012, Dr. Goldman issued a report to the carrier recommending denial of the treatment at issue. There is no indication in the record that the carrier communicated the letter or any other notice to the Plaintiff or the provider. Moreover, Dr. Goldman's letter is neither entitled utilization review nor does it

provide any explanation of the reconsideration process.

Most troubling, is that pursuant to the regulations, the provider or employee has 14 days from receipt of a written notice of denial to request reconsideration of the denial. 803 KAR 25:190 ¶ 8(1)(a). Until expiration of the 14-day period, the denial would not be considered final. The Defendant Employer filed this medical dispute 11 days after the review letter, 3-days prior to expiration of the 14-day period.

As such, the ALJ finds that the carrier did not follow the regulations with respect to either notice or reconsideration. This deprived the employee and provider with a meaningful opportunity to challenge the denial as part of the utilization review process and forced them to defend a premature medical dispute. The ALJ concludes that by failing to follow the UR procedures the carrier waived its right to contest the compensability of the treatment at issue.

4. The carrier's conduct is subject to KRS 342.310

In this instance, the ALJ finds that the conduct at issue is subject to the provisions of KRS 342.310. The ALJ believes sanctions are appropriate in this case because the carrier failed to withdraw the dispute even after having received notice from Plaintiff's counsel highlighting the procedural and substantive deficiencies of the utilization review process. As such, the Plaintiff was forced to litigation [sic] the issues. *See Garrett Mining # 2 v. Ronald Miller,* Claim No. 97–78726,

entered by the Workers' Compensation Board on August 29, 2001.

Pursuant to KRS 342.310 (1) “if any administrative law judge . . . before whom proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, he may assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses upon the party who has so brought, prosecuted or defended them.”

The ALJ finds that the Defendant Employer had no basis upon which to contest the requested procedure based on their failure to comply with the procedural requirements of the Act and its regulations. The ALJ will enter an award in accordance with KRS 342.310 assessing the “whole costs of the proceedings” against the Defendant Employer upon submission of a bill of costs by Plaintiff’s counsel detailing any expenditures, the time incurred on this matter, and what he believes to be a fair hourly rate.

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

1) Plaintiff’s petition for reconsideration is **SUSTAINED/GRANTED**;
2) The ALJ’s March 28, 2013 Order regarding the compensability of the radio frequency ablation procedure is **VACATED**;
3) Defendant Employer’s motion to reopen is **OVERRULED/DENIED**. Defendant

> Employer shall therefore cover the contested treatment under KRS 342.020; 4) Within 20 days of this Order, Plaintiff shall submit a bill of costs consistent with this Opinion & Order on Reconsideration.

On July 19, 2013, Ford filed a Petition for Reconsideration requesting as follows:

> Ford Motor Company (KTP), hereby requests that an Order be entered (1) striking from page four (4) of the Opinion and Order issued on July 10, 2013, the sentence indicating that neither the Plaintiff nor Dr. Collis had been provided with the report of Dr. Goldman and the July 27, 2012, letter denying the request for medical treatment and (2) page six (6) of the Opinion and Order of July 10, 2013, be amended to reflect that the Plaintiff's counsel is only entitled to the 'costs' he incurred in defending the Medical Fee Dispute filed by the Defendant and is not entitled to 'costs' he incurred in prosecuting the Motion to Reopen for additional income benefits he filed on the behalf of the Plaintiff.

By order dated August 16, 2013, CALJ Overfield granted Ford's July 19, 2013, petition for reconsideration in part and ordered stricken those portions of the July 10, 2013, Opinion and Order on Petition for Reconsideration in which ALJ Jones found Ford failed to communicate Dr. Goldman's letter to Ater or Dr. Collis. The remainder of Ford's petition for reconsideration was denied. CALJ Overfield determined as follows:

This matter comes before the undersigned Chief Administrative Law Judge (CALJ) as “caretaker” of claims left by Hon. Allison Emerson Jones, Administrative Law Judge (ALJ), when she was appointed to the Kentucky Court of Appeals. In this matter, Defendant Employer has petitioned for reconsideration of the Opinion & Order on Petition for Reconsideration rendered July 10, 2013 by ALJ Jones who was, on that date, the ALJ to whom the claim was then assigned. Plaintiff has responded objecting to the relief requested in the petition for reconsideration. Some history and discussion is in order.

Plaintiff and Defendant Employer both filed motions to reopen, Plaintiff requesting an increase in occupational disability benefits and Defendant Employer contesting treatment recommended by Ricky Collis, M.D. in the nature of radiofrequency ablation of Plaintiff’s L3-4 facet joints. The claim upon reopening was assigned to ALJ Jones. Plaintiff responded to the medical dispute arguing, among other issues, Defendant Employer had not followed the utilization review procedures set forth in 803 KAR 25:190 and requested sanctions pursuant KRS 342.310 for having to defend the medical dispute.

On March 28, 2013, ALJ Jones rendered her Opinion & Order overruling Plaintiff’s motion to reopen and sustaining Defendant Employer’s motion to reopen/medical dispute. ALJ Jones determined the radiofrequency ablation treatment was not reasonably necessary for the cure and relief from the effects of Plaintiff’s work-related injury. HOWEVER, ALJ Jones did not address the issue raised by Plaintiff

that Defendant Employer had not properly followed the utilization review procedures.

Plaintiff filed a petition for reconsideration of the March 28, 2013 decision pointing out ALJ Jones had not addressed one of the primary issues of the medical dispute. Defendant Employer responded. Upon review of the record, ALJ Jones agreed with Plaintiff's position in his petition and, on July 10, 2013, rendered the Opinion & Order on Petition for Reconsideration for which Defendant Employer now seeks reconsideration.

In her July 10, 2013 Opinion & Order, ALJ Jones specifically found that Defendant Employer did not follow the regulations set forth in 803 KAR 25:190 with respect to either notice or reconsideration of the utilization review decision. She further found Defendant Employer's prosecution of the medical dispute after being notified of its failure to comply with the utilization review regulations entitled Plaintiff to sanctions pursuant KRS 342.310. ALJ Jones, in the order rendered July 10, 2013, vacated so much of her March 28, 2013 order as it regarded the compensability of the radiofrequency appellation procedure, OVERRULED/ DENIED Defendant Employer's medical dispute concerning the contested treatment, ordered Defendant Employer to pay the expenses for the contested medical treatment pursuant to KRS 342.020, and directed counsel for Plaintiff to submit a bill of costs consistent with the July 10, 2013 Opinion & Order thereby imposing sanctions against Defendant Employer for the full cost of the litigation upon reopening.

In the July 10, 2013 Opinion & Order, ALJ Jones found "[t]here is no indication in the record that the carrier communicated the letter or any other notice to the Plaintiff or the provider." Defendant Employer notes in its petition currently under consideration that Exhibit 2 to the transcript of hearing in the medical dispute, held January 30, 2013, was a July 27, 2012 letter from Defendant Employer to Plaintiff, with a copy to Dr. Collis, enclosing the records review report upon which the medical dispute was based and notifying Plaintiff and Dr. Collis that the recommended treatment was being denied. Defendant Employer further cited testimony by Plaintiff concerning his recollection of having received the letter and the report from the utilization review physician. Defendant Employer requests the sentence noting Plaintiff and Dr. Collis had not been advised of the report and the denial of the recommended treatment be stricken from the Opinion & Order. It is important to note Defendant Employer does not request the order vacating that portion of the March 28, 2013 Opinion & Order sustaining Defendant Employer's motion to reopen/medical dispute and imposing on Defendant Employer the responsibility of payment of those medical expenses. The sole request concerning the overturning of the previous Opinion & Order relating to the medical dispute is that the cited sentence be stricken.

Defendant Employer further requests reconsideration of the award of sanctions relating to the extent of the sanctions awarded. Defendant Employer points out the entirety of the litigation did not relate solely to the medical dispute. As noted by Defendant

Employer, the litigation also involved Plaintiff's claim for an increase in disability benefits. Defendant Employer requests that the award of sanctions be limited to costs relating SOLELY to Plaintiff's defense of the medical dispute. Plaintiff has responded objecting to Defendant Employer's request for relief.

The CALJ having reviewed the pleadings, particularly the March 28, 2013 Opinion & Order and the July 10, 2013 Opinion & Order on Petition for Reconsideration, finds there is an error patently appearing on the face of the July 10, 2013 Opinion & Order on Petition for Reconsideration regarding the finding by ALJ Jones that "[t]here is no indication in the record that the carrier communicated the letter or any other notice to the Plaintiff or the provider." The record does not support such a finding. That portion of Defendant Employer's petition will be granted.

The issue concerning the award of sanctions is much more difficult. The CALJ must determine whether or not the award of sanctions by ALJ Jones amounts to a patent error. The issue is not whether or not the CALJ, or any other reviewer of the July 10, 2013 Opinion & Order, would have made such an award or whether or not the award is a proper application of KRS 342.310. As noted by Plaintiff in his response, the ALJ is awarded with broad discretion in the award of sanctions. While the sanctions may not be upheld on appeal, the CALJ is of the opinion that that portion of Defendant Employer's petition cannot be granted as the award of sanctions is not a patent error.

On appeal, Ford sets forth five arguments. First, Ford argues the proper remedy for failure to comply with the Utilization Review procedures is set forth in 803 KAR 25:010(24) and KRS 342.310 and it did not waive its right to pursue the dispute. It asserts as follows:

> Creating a new equitable remedy to an already codified claim procedure is clearly an act beyond the scope and authority of the ALJ and is an abuse of discretion. Thus, as a matter of law, such Order must be overturned by this Board KRS 342.285.

Ford requests the Board vacate the ALJ's finding it waived its right to prosecute the medical fee dispute.

Second, Ford argues that not only did Dr. Best and Dr. Goldman determine the radiofrequency ablation treatment was unreasonable and unnecessary, but Dr. Bilkey, Ater's IME physician, also determined the treatment was unreasonable and unnecessary. Ford also notes Dr. Bilkey offered this opinion prior to its motion to reopen and the subsequent utilization review. In addition, it notes the ALJ initially agreed with the three physicians and determined the proposed ablation treatment was unreasonable and unnecessary. Therefore, the statute and regulations do not permit costs and sanctions to be awarded against it because "there was a reasonable basis for the merits of the

denial, regardless of whether the technical UR procedures of 803 KAR 25:190 were followed."

Third, Ford asserts any sanctions must be limited to the costs relating to the medical fee dispute, not the costs relating to Ater's Motion to Reopen based on a worsening of condition.

Fourth, Ford requests an award of costs against Ater, asserting as follows:

> With the Respondent's Reopening dismissed and the proposed ablation therapy found unreasonable, the claim should have been final. Given the subsequent request for the same therapy in light of Dr. Bilkey's recommendation that the therapy is unnecessary and/or reasonable [sic], the continued litigation and request for sanctions against the Petitioner, the Petitioner submits that if any Party [sic] engaged in unreasonable and sanctionable behavior, Mr. Ater and his Counsel could look 'inward'. For instant [sic], Petitioner advised the ALJ the [sic] that neither Respondent nor his provider received notice of the UR denial. This allegation is patently false and is the type of significant allegation that could form an entire basis of an opinion of 'reasonable' notice of a denial. Of course, this matter was later cleared up by the CALJ, but not until the record was muddied with further allegations and requests for sanctions. Again, the question is begot [sic]: which party is really engaged in sanctionable behavior?

Finally, Ford requests the Board's opinion reflect that although it has agreed to pay for the contested radiofrequency ablation procedure, Ford still asserts the treatment is unreasonable and unnecessary.

Concerning Ford's first argument on appeal, the record reveals Ford's August 3, 2012, Motion to Reopen and Medical Fee Dispute were not timely filed pursuant to 803 KAR 25:012, Section 1(6)(a) which reads as follows:

> Unless utilization review has been initiated, the motion to reopen and Form 112 shall be filed within thirty (30) days following receipt of a complete statement for services pursuant to 803 KAR 25:096.

Ford's Form 112 Medical Fee Dispute, dated August 3, 2012, indicates it first received a statement for the contested services on June 22, 2012. Significantly, in its July 19, 2013, petition for reconsideration, Ford did not contest the findings made by ALJ Jones in the July 10, 2013, Opinion and Order on Petition for Reconsideration that Ford did not comply with the applicable regulations prior to filing its motion to reopen and medical fee dispute and sanctions related to the medical fee dispute were appropriate. These findings include but are not limited to: 1) "Dr. Goldman's letter is neither entitled utilization review not does it provide any explanation of the

reconsideration process"; 2) Ford failed "to follow the UR procedures." ALJ Jones' findings, in total, clearly delineate Ford failed to initiate utilization review as Dr. Goldman's letter does not constitute a utilization review report as defined by applicable regulations and it completely disregarded the provisions of 803 KAR 25:190 §7. Thus, as Ford failed to initiate utilization review, the 30-day limitation period contained in 803 KAR 25:012, Section 1(6)(a) and KRS 342.020(1) was not tolled. *See* 803 KAR 25:096, Section 8(2)(d). Consequently, Ford's August 3, 2012, Motion to Reopen/Form 112 Medical Dispute, filed more than 30 days after it received a statement for the contested services on June 22, 2012, was untimely. Hence, Ford's failure to comply with the applicable regulations relative to utilization review and timely file a motion to reopen and medical fee dispute prohibited it from contesting the compensability of the treatment proposed by Dr. Collis. For this reason, any findings made by ALJ Jones regarding the merits of Ford's Motion to Reopen/Medical Fee Dispute are superfluous, as these findings resolved a Medical Fee Dispute which was untimely filed and thus without merit.

In its second argument, Ford appears to contend that despite its procedural deficiencies, there is still a

reasonable basis for the denial of the radiofrequency ablation therapy. This Board is not a fact-finding tribunal. For this reason and because this inquiry is irrelevant in light of Ford's failure to timely file a Medical Fee Dispute, this issue will not be addressed. We again emphasize that due to Ford's failure to timely file a Medical Fee Dispute in accordance with the relevant regulations, the merits of the dispute are now irrelevant.

In addition, regardless of the opinions of Drs. Best, Goldman, and Bilkey, and the ALJ's decision in the March 28, 2013, order, the fact remains when Ford did not timely file a medical fee dispute and failed to comply with any of the regulations relating to utilization review, the radiofrequency ablation treatment proposed by Dr. Collis became compensable. Stated another way, since Ford failed to submit this matter to utilization review and did not timely file a denial and a motion to reopen, it is responsible for the radiofrequency ablation treatment recommended by Dr. Collis. *See* Kentucky Associated General Contractors Self-Insurance Fund v. Lowther, 330 S.W.3d 456 (Ky. 2010) and Lawson v. Toyota Motor Mfg., Kentucky, Inc., 330 S.W.3d 452 (Ky. 2010). Consequently, Ford is responsible for its actions of pursuing the medical fee dispute to a conclusion.

We agree with Ford that any costs assessed against it pursuant to KRS 342.310(1) should only be those associated with Ater's defense of Ford's Medical Fee Dispute and not the costs associated with Ater's Motion to Reopen alleging a worsening of condition.

In the July 10, 2013, Opinion and Order on Petition for Reconsideration, ALJ Jones determined as follows:

> The ALJ finds that the Defendant Employer had no basis upon which to contest the requested procedure based on their failure to comply with the procedural requirements of the Act and its regulations. The ALJ will enter an award in accordance with KRS 342.310 assessing the **"whole costs of the proceedings"** against the Defendant Employer upon submission of a bill of costs by Plaintiff's counsel detailing any expenditures, the time incurred on this matter, and what he believes to be a fair hourly rate.

(emphasis added).

ALJ Jones ordered Ater to submit a bill of costs within twenty days of the date of the order. Ater complied with this request on July 26, 2013, by submitting a total bill of $10,847.11. Acknowledging there should be "some apportionment between the Plaintiff's Motion to Reopen and the Defendant's Medical Fee Dispute," Ater requested an order directing Ford to pay 50% of the bill or $5,423.55.

On August 5, 2013, Ford filed a Response to Plaintiff's Request for Attorney Fees and Costs asserting as follows:

> Obviously, the proper manner in which to handle this situation would be to look at each of the individual time entries and first decide whether that time entry did involve defense of the Medical Fee Dispute, and, secondarily, if it did, how much of that particular time entry represented defense of the Medical Fee Dispute.

Ford should not be required to pay the costs associated with Ater's Motion to Reopen alleging a worsening of condition. ALJ Jones' assessment of "the 'whole costs of the proceedings'" in the July 10, 2013, Opinion & Order on Petition for Reconsideration is erroneous as a matter of law and comprises an abuse of discretion. Since the ALJ resolved Ater’s motion to reopen in favor of Ford, we believe it is obvious Ford had reasonable grounds for resisting Ater’s motion. Consequently, sanctions relating to this portion of the proceedings are inappropriate. Therefore, to the extent the July 10, 2013, Opinion and Order on Petition for Reconsideration of ALJ Jones and the August 16, 2013, Order of CALJ Overfield assess costs against Ford in excess of those associated with Ater's defense of Ford's Medical Fee Dispute, those portions of the orders will be reversed. The

claim will be remanded to the ALJ for entry of an amended order reflecting costs assessed against Ford shall relate solely to those associated with Ford’s medical fee dispute.

Ford's fourth argument regarding sanctions against Ater can be dispensed with in short order. In this section of its appeal brief as in others, Ford returns to the premise that the proposed ablation therapy was found unreasonable and that Ford is the prevailing party. It further asserts that *Ater* has committed a sanctionable offense by informing the ALJ he did not receive notice of the alleged "UR denial." However, these are moot points. Once again, as Ford's Medical Fee Dispute was untimely filed, any ruling made by ALJ Jones on the merits of the medical fee dispute is a nullity. In other words, Ford is not nor ever was the prevailing party. Additionally, any representations made by Ater regarding his receipt or lack thereof of the alleged "UR denial" are irrelevant, as the entire Medical Fee Dispute litigation resulted from an improper filing. We note that while Ford raised its entitlement to such sanctions in its brief to the ALJ, ALJ Jones never ruled on this issue. Significantly, Ford did not request a ruling on this issue in its petition for reconsideration nor did it identify its entitlement to

sanctions as a contested issue in the BRC order. Thus, the issue was waived. *See* 803 KAR 25:010 § 13(13) and (14).

Finally, we decline to grant Ford's request that this Board's Opinion reflect that Ford still believes the ablation treatment to be unreasonable and unnecessary despite paying for the treatment. The Board is not a fact-finding tribunal. Additionally, it is clear from the record Ford’s stance on this issue.

Accordingly, concerning the issues raised on appeal, those portions of the July 10, 2013, Opinion and Order on Petition for Reconsideration finding Ford waived its right to contest the compensability of the treatment at issue, assessing sanctions against Ford related to its prosecution of the medical fee dispute, and failing to assess costs against Ater are **AFFIRMED**. Further, this Board declines to grant Ford’s request that the opinion reflect its position regarding the reasonableness and necessity of the proposed treatment by Dr. Collis. That portion of the July 10, 2013, Opinion and Order on Petition for Reconsideration assessing costs for the entire proceedings and that portion of the August 16, 2013, order of the CALJ affirming the assessment of costs for the entire proceedings are **REVERSED**. This matter is **REMANDED** to the CALJ or to an ALJ as designated by the CALJ for

entry of an amended opinion and order assessing costs against Ford for the proceedings relating to the medical fee dispute filed by Ford.

ALL CONCUR.

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