Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 30, 2014

CLAIM NO. 200397099

JERRY DAVIS PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

LIBERTY MUTUAL INSURANCE CO.
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Jerry Davis ("Davis") appeals from the November 13, 2013 order rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") overruling an amended motion for attorney's fee. Davis argues entitlement to attorney's fee pursuant to KRS 342.310, contending Liberty Mutual Insurance ("Liberty") filed and

pursued a medical dispute without reasonable grounds. We affirm.

Davis was injured on January 24, 2003 while employed by Petro Stopping Centers Holding ("Petro"). Davis underwent a two level cervical fusion. By agreement approved March 17, 2004, the parties settled the claim for a lump sum based upon a 25% impairment rating with medical benefits remaining open. Davis had additional cervical surgery in 2010.

Liberty filed a motion to reopen and medical dispute on November 14, 2012 contesting the reasonableness and necessity of a requested cervical MRI. In support of the motion, Liberty submitted the October 16, 2012 peer review report of Dr. Paul R. Riggs who opined the request for a cervical MRI after two cervical fusion surgeries was not medically necessary. Dr. Riggs stated there were no documented "red flags" or progressive neurological deficits as required by medical guidelines in order to consider the need for an MRI scan.

Davis submitted medical records from Dr. Ayaz Ahmed who requested pre-authorization for a cervical MRI on October 11, 2012 to evaluate the worsening of Davis' symptoms. For the most part, handwritten portions of the records are illegible. On June 1, 2012, he noted increased

neck pain. On October 11, 2012, he noted Davis continued to have neck pain. On November 9, 2012 he noted the MRI was not approved.

In a July 2, 2013 Opinion and Order, the ALJ found the opinions of Dr. Ahmed and Dr. John E. Harpring more persuasive, and concluded the requested cervical MRI was reasonable and necessary for treatment of the work injury. Davis filed a motion for approval of attorney's fee with a proposed order attached directing the employer to pay the fee. The ALJ overruled the motion for attorney's fee by order dated July 24, 2013, indicating that Petro was not responsible for any attorney's fee for service rendered to Davis.

Davis filed an amended motion for attorney's fee on July 26, 2013 arguing entitlement to a fee paid by the employer pursuant to KRS 342.310(1). The amended motion was denied by order dated November 13, 2013.

On appeal, Davis argues the evidence establishes Liberty filed the medical dispute without reasonable grounds. He notes a long medical history regarding his neck and progressive symptoms documented Dr. Harpring's records, who wanted to obtain a CT scan as early as September 2011 to check the status of the 2010 fusion surgery. Davis argues the utilization review of Dr. Riggs

is invalid because he is not licensed in Kentucky and thus not a physician as defined in KRS 342.0011(32). Davis also contends Dr. Riggs, as an osteopath, was not appropriately qualified to review the case and the records he reviewed were incomplete.

We find no error in the ALJ's refusal to award attorney's fee pursuant to KRS 342.310. Davis did not request sanctions prior to the ALJ's decision. The issue of sanctions was not included as a contested issue in the benefit review conference order. Pursuant to 803 KAR 25:010 Section 13 (14), only contested issues shall be the subject of further proceedings after the conclusion of the benefit review conference. Davis did not request sanctions until after the ALJ had rendered the opinion, award and order.

Additionally, we note the imposition of sanctions is within the ALJ's discretion. Before imposing sanctions pursuant to KRS 342.310, an ALJ must determine an action has been brought, prosecuted or defended without reasonable ground. Our review of the appropriateness of costs and attorney's fees is based upon the determination of whether the fact-finder abused his discretion. The Board has consistently utilized the standard set forth by the Kentucky Supreme Court in Roberts v. Estep, 845 S.W.2d 544

(Ky. 1993), *i.e.* whether it can be reasonably conceived the action was brought in good faith. We find no abuse of discretion on the part of the ALJ in declining to award sanctions and, therefore, affirm.

Here, Liberty produced substantial evidence that could have supported a finding in its favor. Dr. Riggs opined the records failed to document a current need for a cervical MRI. He referenced the Official Disability Guidelines in support of his conclusion, identifying numerous circumstances where an MRI would be warranted, and stated there were "no documented red flags or progressive neurological deficit" required by those guidelines. Although Dr. Riggs did not review the entirety of Davis' treatment records, he did review recent treatment notes from Dr. Ahmed. Those records do not contain an explanation of the physical findings supporting the request for an MRI and do not document a physical examination of the cervical spine. The only basis for the request we can discern from his records is the subjective complaint of increased pain.

Determinations concerning Dr. Riggs' qualifications are within the ALJ's authority as fact-finder. While Davis takes issue with Dr. Riggs being licensed in North Carolina rather than in Kentucky, 803 KAR

25:190(6)(2) permits utilization review by a physician who holds a license required by the jurisdiction in which he is employed. The ALJ, in weighing the evidence, was not convinced by Liberty's evidence, but she is not precluded from believing Liberty had a good faith basis to rely on that evidence and to pursue the medical dispute.

Accordingly, the November 13, 2013 order rendered by Hon. Jeanie Owen Miller, Administrative Law Judge, is **AFFIRMED**.

ALL CONCUR.

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