Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 8, 2015

CLAIM NO. 201399644

OWENSBORO HEALTH REGIONAL HOSPITAL PETITIONER

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

KIMBERLY ROACH
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING IN PART, VACATING IN PART,
AND REMANDING,
AND ORDER DENYING SANCTIONS
* * * * * *

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

STIVERS, Member. Owensboro Health Regional Hospital ("Owensboro Hospital") seeks review of the May 7, 2015, Opinion and Award of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") finding Kimberly Roach ("Roach") sustained a work-related injury and awarding temporary total disability ("TTD") benefits, permanent

partial disability ("PPD") benefits, and medical benefits.[1] In the opinion and award, the ALJ did not determine whether out-of-pocket medical expenses paid by Roach and an unpaid anesthesiology bill were compensable. Owensboro Hospital also appeals from the June 23, 2015, Order ruling on its petition for reconsideration.

On appeal, Owensboro Hospital asserts the ALJ erroneously failed to address the compensability of medical expenses paid by Roach and an outstanding anesthesiology bill. Owensboro Hospital maintains it preserved the issue for review when it objected to Roach's attempt to introduce various medical bills for the first time on re-direct at the March 24, 2015, hearing. It also raised this issue in its petition for reconsideration. Owensboro Hospital states it is attempting to avoid the need for a post-award medical fee dispute as the burden of proof will shift to it.

Owensboro Hospital observes the November 19, 2014, scheduling order directed the parties to file copies of all known exhibits ten days prior to the benefit review conference ("BRC"). It maintains Roach did not comply with the order, and the exhibits were first disclosed by Roach

[1] The ALJ did not enter a finding regarding the specific body part or parts affected by the work injury.

on re-direct during the final hearing. In addition, unpaid or contested medical expenses was not identified as a contested issue in the BRC Order or at the beginning of the hearing.

Owensboro Hospital argues pursuant to KRS 342.020(1) and 803 KAR 25:096 Sections 6 and 11, the bills in question are not compensable. Owensboro Hospital asserts Roach had the burden of proof regarding the compensability of the medical expenses submitted for the first time during the re-direct examination of Roach at the hearing. Owensboro Hospital contends that since Roach failed to meet her burden of proof, the ALJ was compelled to deny her request Owensboro Hospital be held responsible for paying the submitted medical expenses. Owensboro Hospital seeks reversal on this issue and remand to the ALJ with instructions to find Roach failed to meet her burden of proof with respect to the compensability of the medical expenses introduced at the hearing.

Roach counters Owensboro Hospital is attempting to escape liability for her legitimate and compensable medical expenses incurred after it denied responsibility for further treatment. Roach charges Owensboro Hospital is relying upon “the minutia of the workers’ compensation regulations.” Roach asserts Owensboro Hospital is

disingenuously claiming that it is confused by the ALJ's statement "the issue of the unpaid or contested medical bills was not raised and as such the decision regarding the work-relatedness of the Plaintiff's injury is dispositive." Roach maintains Owensboro Hospital was aware of Dr. Paul Perry's treatment and specifically denied responsibility for his treatment.

Attached to Roach's brief is a January 16, 2013, letter which Roach asserts reveals the adjuster acknowledged Roach's selection of a second designated physician, Dr. Perry, the surgeon who provided the medical treatment for which Owensboro Hospital seeks to avoid payment.[2]

Roach has also attached a March 8, 2013, letter from the adjuster which she contends documents Owensboro Hospital's position that any treatment for cubital tunnel syndrome and/or work status associated with this diagnosis is due to a pre-existing condition, will be denied as unrelated to the work injury, and should be filed with her group health insurance carrier. Roach argues for Owensboro Hospital to contend it could not have raised the issue of contested medical expenses because it was unaware of them

[2] Only one of the three bills pertains to services provided by Dr. Perry.

is false as the adjuster instructed her to submit any billing after March 8, 2013, to her group health insurance carrier. Roach complains Owensboro Hospital cannot direct a claimant to no longer submit bills to it and subsequently claim it was innocently unaware of medical expenses incurred after the denial. Roach requests sanctions for asserting an unreasonable appeal.

We will only discuss the evidence and proceedings relative to the sole issue on appeal.

In the Form 101, filed November 4, 2014, Roach alleged she injured her right elbow on December 28, 2012. Roach testified she underwent surgery performed by Dr. Perry on May 22, 2013, which consisted of situ ulnar nerve decompression of the right elbow. Owensboro Hospital stipulated Roach sustained a work-related injury, but contended the injury did not result in an impairment rating meriting an award of permanent income benefits.

Significantly, the November 19, 2014, scheduling order issued by the Commissioner of the Department of Workers' Claims assigning the case to the ALJ required Owensboro Hospital to file a Form 111 either accepting or denying the claim. It granted both parties sixty days from the date of the notice to file proof. The defendant was granted an additional thirty days for proof-taking after

which the plaintiff had fifteen days for rebuttal. It also stated that at least ten days prior to the BRC conference the parties were to file a witness list and copies of all known exhibits, proposed stipulations, and notice of contested issues. During the proceedings, Roach did not file any pleadings indicating she was seeking reimbursement for medical bills she had paid and payment of an outstanding medical bill.

During her February 11, 2015, deposition, Roach did not testify she was seeking reimbursement for medical bills and payment of unpaid medical bills. The March 10, 2015, BRC Order reflects the parties agreed the contested issues were: "benefits per KRS 342.730; work-relatedness/causation; and TTD." "Unpaid or contested medical expenses" was not checked as a contested issue.

Owensboro Hospital filed a witness list, proposed stipulations, and statement of contested issues in which it did not indicate unpaid medical bills or reimbursement for medical bills Roach had paid was a contested issue. Similarly, Roach filed a document styled "Plaintiff's Witness List, Stipulations, and Contested Issues," which did not identify unpaid medical bills or reimbursement for medical bills as a contested issue. Roach listed extent and duration, TTD, and medical treatment as contested

issues. Significantly, Roach did not identify any exhibits or attach any exhibits to her filing.

At the March 24, 2015, hearing, with regard to medical expenses, the ALJ stated Owensboro Hospital had paid medical expenses on behalf of Roach in the amount of $1,095.28, and the parties stipulated her average weekly wage. The ALJ stated the contested issues were benefits per KRS 342.730, work-relatedness/causation, and TTD benefits. Both parties stated on the record the ALJ had accurately summarized the stipulations and contested issues. The ALJ went over the evidence introduced by the parties. There was no mention of any filings regarding unpaid medical bills or medical bills for which Roach was seeking reimbursement. During direct and cross-examination, the issue of unpaid medical expenses was not addressed. However, on re-direct examination, for the first time, Roach improperly raised the issue of unpaid medical bills and reimbursement for bills she paid. The re-direct examination and re-cross-examination is set out in full below:

> BY MR. CASLIN:
>
> Q: Just something relating to your medical bills. I believe the insurance carrier did not pay for any of your medical bills after the first time you saw Dr. Perry; is that right?

A: Correct.

Q: So you had to pay for his surgery?

A: Yes, sir.

MR. MORTON: Judge, let me note – let me raise something here. First of all, medical bills aren't a contested issue. Hasn't been listed as one. Those bills have never been submitted to my client. I mean, we can't –

THE COURT: Well, TTD is a contested issue and it's – let's go off the record.

MR. MORTON: Sure.

(Off-the-record discussion)

THE COURT: Let's go back on the record. I will note that while we were off the record, an objection was made to the entry of evidence of certain medical records. That objection has been overruled. Please proceed.

MR. CASLIN: All right. Thank you, Judge.

Q: Did you pay, since the claim was denied by the insurance carrier, did you pay for Dr. Perry's surgery yourself?

A: Yes, sir.

Q: And how much did you have to pay out of your own pocket?

A: A little over $1,500 to Dr. Perry.

Q: And then the physical therapy?

A: A thousand.

Q: You paid a thousand for that?

A: Yes, sir.

Q: And then the anesthesiology bill, is that still outstanding?

A: Yes, sir.

Q: And how much is that, approximately?

A: Over $2,200.

Q: And those are all related only to this work-related injury you had –

A: Yes, sir.

Q: --on December 28, 2012?

A: Yes, sir.

Q: All right.

MR. CASLIN: I'd like to submit these as an exhibit that effect.

MR. MORTON: Same objection, plus they weren't identified as exhibits in a witness list.

THE COURT: I will admit them over the objection and allow a generous rebuttal time post hearing for you to challenge those, if necessary.

MR. MORTON: Okay.

THE COURT: But they will be admitted, thank you, as, I guess, cumulative Plaintiff's 1.

(Copy of Medical Bills for Kimberly Roach is attached hereto and marked Plaintiff's Exhibit 1.)

MR. CASLIN: Thank you, Your Honor. No further questions.

THE COURT: Anything else, Mr. Morton?

MR. MORTON: Yes, just with respect to these bills.

THE COURT: Sure.

RECROSS-EXAMINATION

BY MR. MORTON:

Q: Did you ever submit these bills to K.J. Solutions for payment?

A: No, sir.

Q: Okay.

MR. MORTON: That's all I have.

THE COURT: Anything else?

MR. CASLIN: No, Judge.

. . .

THE COURT: With that, we are closed and off the record.

Attached as "Collective Exhibit 1" to the hearing is the following:

- A statement dated April 4, 2014, addressed to Roach from Frost-Arnett, a collection company in which it sought payment of a $2,224.00 bill due Gulf to Bay Anesthesiology.

- A statement from Hand Therapy reflecting charges and payments made by Roach spanning the period from March 19, 2013, through November 24, 2014.

- A Patient Ledger from Tri-State Orthopedic Surgeon, Inc. reflecting charges and payments made by Roach covering the period

> from February 28, 2013, through August 13, 2013.

In addition to listing the evidence filed by the plaintiff and defendant, the final hearing order further states:

> **IT IS FURTHER ORDERED:** Certain medical bills incurred by the Plaintiff have been admitted over the objection of the Defendant. The Defendant shall be granted an additional two weeks to provide rebuttal evidence.

In her brief to the ALJ, Roach argued she was entitled to reimbursement for the medical bills she paid and payment of the bills relating to her surgery.

Concerning the medical bills introduced at the hearing, Owensboro Hospital, in its brief to the ALJ, noted its objection to this evidence was overruled. Owensboro Hospital asserted many of the same arguments it raises on appeal. In the May 7, 2015, Opinion and Award, relying upon the opinions of Dr. Perry, the ALJ found Roach sustained a work-related injury which resulted in a 3% whole person impairment.

Despite the fact both parties argued the merits of whether Owensboro Hospital was required to pay the anesthesiology bill and reimburse Roach for the two medical bills she paid, the ALJ did not address this issue.

In its petition for reconsideration, Owensboro Hospital raised multiple issues, including the issue raised on appeal. Owensboro Hospital requested the ALJ deny Roach's request for reimbursement and payment of medical expenses.

In the Order ruling on the petition for reconsideration, the ALJ amended the May 7, 2015, Opinion and Award in accordance with Owensboro Hospital's requests which are unrelated to the issue on appeal. The ALJ determined as follows with regard to the issue raised on appeal:

> The Defendant has also challenged certain medical bills submitted by the Plaintiff at the final hearing as being untimely. **The issue of unpaid or contested medical was not raised and as such the decision regarding the work relatedness of the Plaintiff's injury is dispositive. (emphasis added).**

As he did in the May 7, 2015, Opinion and Award, the ALJ ordered Roach shall recover from Owensboro Hospital "such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing supplies, and appliances as may be reasonably required for the cure and relief from the effects of the work-related injury."

We first observe Roach failed to comply with the Commissioner's scheduling order. Roach also failed to comply with various sections of 803 KAR 25:010, Section 13, which reads, in relevant part, as follows:

> Section 13. Benefit Review Conferences.
>
> (1) The purpose of the benefit review conference shall be to expedite the processing of the claim and to avoid if possible the need for a hearing.
> . . .
>
> (9)(a) The defendant shall provide a completed Form AWW-1, Average Weekly Wage Certification.
>
> (b) The plaintiff shall bring copies of unpaid medical bills and documentation of out-of-pocket expenses including travel for medical treatments.
>
> (c) Each defendant shall bring copies of disputed medical bills and medical expenses.
>
> (10) Ten (10) days before the benefit review conference, the parties shall exchange final stipulations and lists of known witnesses and exhibits that:
>
> . . .
>
> (d) Identify any exhibits.

Roach testified she never submitted the bills to Owensboro Hospital for payment. Roach did not bring copies of the unpaid medical bills and documents reflecting out-of-pocket payment of medical bills to the BRC. Since Roach admitted she never submitted the bills to Owensboro

Hospital, it could not bring copies of the disputed medical bills or medical expenses to the BRC. In addition, Roach did not identify in the BRC Order "unpaid or contested medical expenses" as a contested issue to be resolved by the ALJ. 803 KAR 25:010 Section 13(14) states only the contested issues shall be the subject of further proceedings. Further, in violation of 803 KAR 25:010 Section 13(10)(d), Roach did not identify as exhibits the bills for which she was seeking payment. The first time Roach raised this issue was on re-direct at the hearing when she testified about the medical bills and sought to introduce them as a collective exhibit.

Roach's attempt to introduce the bills on re-direct was improper. As a general rule, re-direct is limited to covering testimony given on cross-examination.[3] Offering testimony regarding unpaid medical bills and the attempt to introduce evidence concerning the medical bills during the hearing without previously complying with the regulations was also improper. This is particularly true since Roach did not identify unpaid or contested medical expenses as a contested issue in the BRC Order. Thus, the ALJ committed an abuse of discretion by allowing Roach to

[3] *See* Lawson's Kentucky Evidence Law Handbook – 5th Edition, Section 3.20(5).

introduce as exhibits the medical bills for which she sought reimbursement and payment.

Roach's assertions that Owensboro Hospital knew she was being treated by Dr. Perry and would not pay Dr. Perry's bills is not supported by any document in the record. Rather, this argument is based on documents attached to her brief which are not in evidence. Roach testified the bills were never submitted to Owensboro Hospital for payment and the record does not establish Owensboro Hospital was advised these bills were in existence. Although Owensboro Hospital was aware Roach was being treated by Dr. Perry and learned she underwent surgery performed by Dr. Perry during Roach's deposition, it was still entitled to a copy of Dr. Perry's bill as well as all bills relating to her surgery and subsequent treatment. Owensboro Hospital cannot be expected to guess as to the number of Perry's unpaid bills and the amount of each bill.

Further, we take issue with Roach's characterization Owensboro Hospital is arguing the minutia of workers' compensation regulations. Owensboro Hospital appropriately contested Roach's failure to comply with these administrative regulations governing the proceedings before the ALJ including those pertaining to the resolution

of any disputes concerning contested medical treatment and/or unpaid medical bills.

We decline to hold the ALJ could properly resolve the compensability of unpaid medical bills when Roach has utterly failed to comply with any of the regulations regarding the introduction of exhibits and failed to identify unpaid and contested medical expenses as a contested issue. At the very least, once the claim was instituted Roach should have filed all documents in support of her contention that these bills should be paid so the issue could be fully addressed by the parties. Importantly, the ledgers from Dr. Perry and Hand Therapy reflect she began making payments on both bills sometime in the first quarter of 2013 which is approximately a year and a half before her claim was filed on November 4, 2014.

In summary, Owensboro Hospital was entitled to receive the bills prior to or at the time of the BRC in order to determine whether to resist Roach's claim the bills are compensable.[4] Producing the bills in question and seeking to introduce the bills on re-direct examination at the formal hearing is not the appropriate time to raise entitlement to payment of these bills as an issue to be

[4] We note Owensboro Hospital stipulated Roach sustained a work-related injury.

decided by the ALJ. The regulations contained within 803 KAR 25:010 are designed to allow the parties to identify the issues, review all exhibits, and to introduce the proof necessary to address the other parties' position. Since Roach failed to notify Owensboro Hospital of the specific bills, did not identify the bills as exhibits, nor identify unpaid or contested medical expenses as a contested issue, she has waived her right to have the ALJ order Owensboro Hospital to pay the bills in question.

Accordingly, this matter will be remanded to the ALJ for an order reversing his ruling at the March 24, 2015, final hearing admitting the bills into evidence. On remand, in an amended opinion and order, the ALJ shall find that since Roach did not comply with the regulations, she has waived her right to have the ALJ adjudicate whether the medical bills in question are compensable. Further, the ALJ's finding in the June 23, 2015, Order that the "decision regarding the work-relatedness of Roach's injury is dispositive" is reversed.

Although not raised by either party and since this matter is not being remanded, we will address two issues which must be corrected by the ALJ on remand. This Board is permitted to *sua sponte* reach issues even if unpreserved.

KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

First, in the findings of fact and conclusions of law as set forth in the May 7, 2015, Opinion and Award, the ALJ found Roach sustained a work-related injury and has a 3% whole person impairment. However, the ALJ did not state the specific body part which was injured. For purposes of future medical fee disputes, in the amended opinion and award, the ALJ shall specifically identify the body part or parts encompassed by the work injury.

In addition, the award of PPD benefits is not in accordance with the law, as that award should begin on December 28, 2012, the date of the injury. The ALJ awarded TTD benefits from December 28, 2012, through December 1, 2013, with PPD benefits commencing on December 1, 2013. On remand, the PPD benefits shall commence on December 28, 2012, to be suspended during any period TTD benefits are paid and shall be reinstated upon cessation of the payment of TTD benefits.

Accordingly, to the extent the ALJ addressed Roach's entitlement to reimbursement for certain medical expenses and to have the anesthesiology bill paid, the May 7, 2015, Opinion and Award is **REVERSED**. In addition, the last portion of the sentence in the June 23, 2015, Order

stating the May 7, 2015, “decision regarding the work relatedness of the Plaintiff’s injury is dispositive” is **REVERSED**. However, the first portion of that sentence in the June 23, 2015, Order which reads “the issue of unpaid or contested medical was not raised” shall not be disturbed. The award of PPD benefits is **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion and award holding Roach waived her right to a determination of the compensability of the three medical bills in question. In the amended opinion and award, the ALJ shall specifically identify the body part or parts encompassed by the work injury and shall commence the award of PPD benefits on December 28, 2012. Finally, for the reasons set forth herein, Roach’s request for sanctions is **DENIED**.

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FRANKLIN A. STIVERS, MEMBER,
WORKERS’ COMPENSATION BOARD

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS AND FILES A SEPARATE OPINION.

RECHTER, MEMBER. I concur in the result reached by the majority, and the finding that Roach failed to comply with the 803 KAR 25:010 in submitting her medical expenses for adjudication. I write separately to acknowledge the harsh result to the claimant. Moreover, it seems, from the record before this Board, there was no resulting prejudice to Owensboro Hospital. However, the language of the applicable regulations is mandatory, and sets forth what a claimant "shall" submit at a Benefit Review Conference.

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