Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 2, 2016

CLAIM NO. 201356687

REMINGTON ARMS PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

COREY CASTLEMAN
HON DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Remington Arms appeals from the February 10, 2016 Opinion and Order and the April 25, 2016 Order rendered by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ"). The issue on appeal concerns the ALJ's imposition of sanctions pursuant to KRS 342.310. For the reasons set forth herein, we affirm.

Corey Castleman ("Castleman") was injured on August 20, 2013 while working as a machinist for Remington Arms. He underwent hernia repairs on November 20, 2013 and was off work for approximately seven weeks. He returned to light duty on January 9, 2014. He was paid temporary total disability benefits during his recovery period, and a representative of the workers' compensation insurance carrier accompanied him on medical visits.

Dr. Nonyelu Chukwuogo performed Castleman's hernia repair and, on September 9, 2014, assigned a 30% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He assigned no restrictions. On October 24, 2015, Dr. Sue Ellen Petty evaluated Castleman at his request. She assigned a 25% impairment rating, noting Castleman's continued pain due to scar tissue and problems with his mesh repair. She also assigned no restrictions.

Remington Arms submitted no evidence. In an Interlocutory Opinion and Order dated February 10, 2016, the ALJ relied on Dr. Petty's report to award permanent total disability benefits based on a 25% impairment rating. Castleman also alleged unfair claims settlement practices

and requested the ALJ to impose sanctions. The ALJ discussed the evidence relating to this allegation in a separate Order dated February 10, 2016.

On September 10, 2014, Castleman's attorney, Daniel Stratemeyer, submitted Dr. Chukwuogo's report to the claims adjuster, Beth Pahlmann. She indicated she would discuss settlement with her client. Stratemeyer sent a demand letter the following week, on September 19, 2014. Based on evidence submitted into the record relating to the issue of sanctions, the ALJ provided the following recitation of the events which followed concerning the handling of Castleman's claim:

- November 11, 2014. Pahlmann emails Stratemeyer and acknowledges the delay in responding. She advises she will not recommend settlement based on a 30% impairment rating. She makes no settlement offer. She says she is going to refer the claim to defense counsel. Stratemeyer immediately responds back and says "make us an offer." Pahlmann emails back that she will "review and respond" to Stratemeyer's demand, but that she will not get "anything close" to settlement based on the 30% rating.

- December 1, 2014. Stratemeyer emails Pahlmann about the unpaid bill from Castleman's surgery. (Exhibit 1 to transcript). On January 6, 2015, Stratemeyer emails Pahlmann a copy of the outstanding hospital bill and requests payment.

- January 14, 2015. Stratemeyer emails Pahlmann asking for an offer of settlement and whether the hospital bill has been paid. On January 23, 2015, Stratemeyer sends Pahlmann another email asking for status. On February 5, 2015, February 13, 2015, and February 20, 2015, Stratemeyer sent Pahlmann emails asking her to call him.

- March 9, 2015. Pahlmann emails Stratemeyer and apologizes for the delay. She said she needs the accompanying treatment records to process payment of the hospital bill. She did not provide a settlement offer; she said: "I do not have settlement authority in regards to this case, please advise as to your bottom line demand so that I can secure authority and we can move this case to resolution." On March 11, 2015, Stratemeyer responds to Pahlmann's email saying she was asking him to bid against a demand he had submitted five months prior; nonetheless, he lowered his demand. Pahlmann responds the same day, saying she would confer with her client and **"I promise it won't be 5 months."**

- April 6, 2015. Stratemeyer emails Pahlmann for status, noting that the lack of a settlement offer is forcing his client to file a formal claim. On April 14, 2015, Stratemeyer sent a similar email. Pahlmman responds by saying she had requested authority from the insured to refer the file to defense counsel (something she had indicated she would do five months prior). She added, **"I do not have authority to proceed w/ settlement at this time."** In another email on April

14, 2015, Pahlmann said “further negotiations” (of which there had been none) would be conducted between counsel. On April 24, 2015, Stratemeyer emails Pahlmann advising he had not heard from defense counsel (who had not been identified by Pahlmann).

- July 8, 2015. Kim Newman, an attorney at defense counsel’s office, emails Stratemeyer advising that Pahlmann had been on a six-week leave of absence. Newman said she expects Pahlmann to get back with her immediately to discuss this claim.

- July 22, 2015. Stratemeyer emails attorney Newman, noting that his settlement demand had gone 10 months without response. He said, “although I have never done this,” he may pursue referral to the Commissioner for unfair claims practices. Attorney Melanie Gabbard from the defendant’s law firm emails a response to Stratemeyer acknowledging the matter was “lingering too long.” She said she hopes to contact Pahlmann and respond to him by the next day. “If I cannot get her I am going to attempt to find someone else at the carrier to help with this situation.” Having heard nothing, Stratemeyer sends Newman and Gabbard an email on July 28, 2015. On July 29, 2015, Newman emails Stratemeyer and says her office had still not received the claims file.

- August 14, 2015. Stratemeyer files the Form 101 at DWC on behalf of Castleman. Attorney Gabbard filed an entry of appearance, Form 111, and request for production on September 21, 2015. On September 28, 2015. Stratemeyer emails

Gabbard and asks, “Any interest in trying to settle this matter?”

- October 28, 2015. Stratemeyer emails Gabbard with responses to the Defendant’s discovery requests. On November 4, 2015, Stratemeyer emails Gabbard and asks for her client’s responses to Castleman’s discovery requests. With no response, a motion was filed on November 9, 2015. Despite an Order of November 30, 2015, compelling production, none was ever furnished, except that an average weekly wage pleading was submitted at the BRC on January 12, 2016.

- January 7, 2016. Five days before the BRC, Stratemeyer emails Gabbard a settlement demand that represented a compromise between the two impairment ratings. Later on the same date of the BRC, Stratemeyer emails Gabbard withdrawing his settlement offers (because the wage records provided that day by the Defendant documented an AWW higher than the figure the parties had been using). Stratemeyer submitted a new demand the next day, January 13, 2016, again a compromise between the two impairment ratings. On January 14, 2016, Gabbard emails Stratemeyer and says, **“I have not been given authority to resolve this claim.”** She said she would not recommend his demand to her client and asks him to revise his demand. Later the same day, Stratemeyer emails and advises Gabbard that he wished a response to his client’s existing demand. Gabbard responds that she “will let you know once I hear anything back.”

In his February 10, 2016 Order, the ALJ concluded the above-recited facts compel an award for unfair claims

settlement practices pursuant to KRS 342.267, though he also cited KRS 342.310. The ALJ subsequently denied Remington Arms' petition for reconsideration in an Order dated March 1, 2016.

Castleman petitioned for reconsideration of the March 1, 2016 Order, asking for clarification as to whether the ALJ imposed sanctions pursuant to KRS 342.267 or KRS 342.310. On April 25, 2016, the ALJ issued an Order vacating the penalty for unfair claims settlement practices included in the February 10, 2016 Order. The ALJ explained he had since become aware of this Board's decision in Thomas Blackburn v. Bellsouth Communications, Claim No. 2013-59879. In the Blackburn opinion, we noted the ALJ has authority to impose sanctions pursuant to KRS 342.310. However, we clarified only the Commissioner of the Department of Workers' Claims may impose sanctions for violations of the Unfair Claims Settlement Practices Act.

Upon consideration of the Blackburn case, the ALJ explained his conclusion that Remington Arms' actions "of unfair claims practices had the effect of causing this claim to be defended without reasonable grounds." The ALJ reiterated most of his factual findings contained in the February 10, 2016 Order, and explained why Remington Arms'

actions constituted both unfair claims settlement practices, as well as demonstrating it defended the action without reasonable grounds. He more specifically noted Castleman's claim was undisputed, and determined Remington Arms prolonged the defense of the claim in bad faith. Accordingly, the ALJ awarded $12,000 to Castleman as an attorney fee sanction pursuant to KRS 342.310. He also referred the matter to the Commissioner for further consideration of unfair claims settlement practices.

Remington Arms now appeals, arguing the imposition of sanctions was improper because the action was defended with reasonable grounds. It relies specifically on the fact that the medical proof was contested. Remington Arms also urges that the carrier's delinquency in settling the claim is irrelevant to the issue of whether the claim was defended with reasonable grounds.

KRS 342.310(1) provides:

> If any administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, he or it 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.

KRS 342.267, which incorporates the Unfair Claims Settlement Practices Act into the Workers' Compensation Act, provides:

> If an insurance carrier, self-insured group, or self-insured employer providing workers' compensation coverage engages in claims settlement practices in violation of this chapter, or the provisions of KRS 304.12-230, the commissioner of the Department of Workers' Claims shall fine the insurance company, self-insured group, or self-insured employer the sum of one thousand dollars ($1,000) to five thousand dollars ($5,000) for each violation and if they have a pattern of violations, the commissioner may revoke the certificate of self-insurance or request the commissioner of insurance to revoke the certificate of authority of the insurance carrier or the self-insured group.

In the April 25, 2016 Order, the ALJ clarified he awarded attorney's fees pursuant to KRS 342.310. Remington Arms is correct in stating it is the task of the Commissioner of the Department of Workers' Claims to determine whether a carrier's actions constitute an unfair claims settlement practice pursuant to KRS 342.267. The ALJ enjoys the discretion to assess sanctions pursuant to

KRS 342.310. Officeware v. Jackson, 247 S.W.3d 887 (Ky. 2008). Thus, the sole issue for our determination is whether the ALJ abused his discretion in concluding Remington Arms defended the claim "without reasonable grounds."

The ALJ's determination that Remington Arms unjustifiably prolonged the litigation of this claim is supported by the evidence and is detailed in the ALJ's very thorough recitation of the progress of the claim. After the claim had been referred from the third party administrator to defense counsel, Stratemeyer testified he continued to pursue a settlement to no avail. His requests for production of documents, particularly regarding Castleman's wage records, were ignored and provided only at the benefit review conference. Emails submitted by Stratemeyer, and submitted into evidence, support these assertions. For this reason, it is unavailing for Remington Arms to now argue there was a valid issue as to whether Castleman returned to work at his pre-injury wages. Remington Arms presented no evidence to challenge Castleman's testimony concerning his wage reduction, and, as the employer, was in possession of the wage records supporting his testimony.

More importantly, Remington Arms filed no evidence in this case. It argues the claim was defended with reasonable grounds because the medical proof and the extent and duration of the injury were contested. We find this assertion highly disingenuous. The two impairment ratings were sought by Castleman himself, and differed by 5%. As noted by the ALJ, Dr. Petty's impairment rating was requested by Castleman after a year had passed without any activity regarding the settlement of his claim. On appeal, Remington Arms identifies alleged deficiencies in Dr. Chukwuogo's assessment of impairment rating. However, before the ALJ, it presented no medical proof to dispute either Dr. Petty's or Dr. Chukwuogo's impairment rating, nor did it request Castleman be evaluated by its own physician. It filed no objection to the submission of Dr. Chukwuogo's report, and did not argue in its brief to the ALJ that his report was invalid or inconsistent with the AMA Guides. In short, it made no attempt to contest any of the medical proof, all of which was submitted by Castleman.

We conclude there is substantial evidence upon which the ALJ could rely in concluding Remington Arms had defended this claim without reasonable grounds. Therefore, it cannot be said the ALJ abused his discretion.

Accordingly, the February 10, 2016 Opinion and Order and the April 25, 2016 Order rendered by Hon. Douglas W. Gott, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON MELANIE GABBARD
PO BOX 34048
LEXINGTON, KY 40588

COUNSEL FOR RESPONDENT:

HON DANIEL S STRATEMEYER
PO BOX 1246
PADUCAH, KY 42002

ADMINISTRATIVE LAW JUDGE:

HON DOUGLAS W. GOTT
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601