Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 1, 2015

CLAIM NO. 199794907

UNIVERSITY OF KENTUCKY PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

JACK PEPPERS
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. The University of Kentucky ("UK") appeals from the May 23, 2014 Opinion and Order and the July 1, 2014 Order on Reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ determined a proposed surgery for Jack Peppers ("Peppers") is compensable because UK failed to timely file a medical fee dispute. On appeal, UK

argues it had no duty to file a medical fee dispute and the referral for consideration of sanctions was in error. It also claims there is no substantial evidence to support a finding that the proposed surgery is work-related. We affirm.

Peppers was employed by UK as an auto mechanic. He injured his left knee on November 6, 1996, and was awarded vocational rehabilitation benefits, income benefits, and future medical benefits in an opinion dated November 27, 2000. Following the injury, he underwent three arthroscopic procedures which were paid by UK. He did not receive any treatment for his condition between 2000 and 2012.

On August 9, 2013, UK filed a medical fee dispute. In its Form 112, it stated Dr. Peter Hester recommended a left total knee arthroplasty and Peppers sought pre-authorization. Attached to its Form 112, UK submitted the utilization report of Dr. Thomas Loeb dated September 25, 2012, who opined the requested surgery relates to longstanding pre-existing osteoarthritic changes, and not to Pepper's work-related injury. UK also submitted an independent medical evaluation report of Dr. Philip Corbett dated June 24, 2013, who likewise opined the surgery is due to non-work-related osteoarthritis. Peppers was

unrepresented during the proceedings before the ALJ, and submitted no proof.

The ALJ ultimately determined the left total knee arthroplasty is compensable, concluding the medical fee dispute was untimely filed. The ALJ noted UK's Form 112 was filed over ten months after Dr. Loeb conducted his utilization review, and at least six weeks after Dr. Corbett's evaluation. He also determined the issue of work-relatedness was previously determined by Hon. Sheila Lowther, Administrative Law Judge, in the November 27, 2000 Opinion. Troubled by UK's "attempt in reviewing medical records 15 and 16 years old to determine work-relatedness despite the presence of a res judicata Opinion on the issue", the ALJ referred the matter to the Commissioner for the consideration of sanctions. UK petitioned for reconsideration, which was denied.

On appeal, UK first argues its medical fee dispute was timely filed. It argues it did not have an obligation to file a medical fee dispute, because the statement for services clearly indicated that the services were not being performed for a work-related condition. We disagree.

803 KAR 25:096 §8(1) requires the employer to "tender payment or file a medical fee dispute with an appropriate motion to reopen the claim, within thirty (30)

days following receipt of a completed statement for services." If sent to utilization review, the medical fee dispute must be filed within thirty days of the final decision from the utilization review physician. 803 KAR 25:096 §8(2)(d). A request for pre-authorization, such as submitted by Dr. Hester, is considered a statement for services for purposes of these regulations. Kentucky Associated General Contractors Self-Insurance Fund v. Lowther, 330 S.W.3d 456, 461 (Ky. 2010).

UK did not file its Form 112 within thirty days of Dr. Loeb's utilization review. To excuse the delay, UK relies on 803 KAR 25:096 §8(3), which provides that "an obligation for payment or challenge shall not arise if a statement for services clearly indicates that the services were not performed for a work-related condition." The ALJ rejected this argument, stating: "[G]iven the prior Opinion and the surgical history prior to that Opinion no good faith argument can be made that the request for the arthroplasty is not work-related on its face."

Upon review, we conclude this factual finding is supported by substantial evidence. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). The proposed arthroplasty is for Peppers' left knee, which was injured in the work accident. He underwent three surgeries to this knee, all of which were

deemed compensable. We believe the ALJ reached a reasonable conclusion based on the totality of the circumstances in concluding the request for pre-authorization of surgery does not "clearly" concern a non-work-related condition. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Furthermore, contrary to UK's assertions on appeal, the fact Dr. Loeb determined the proposed surgery is not work-related is of no consequence. The regulation relates only to the "statement for services", not the result of a utilization review. As such, the ALJ properly determined the medical fee dispute was untimely filed and, therefore, UK may not contest compensability.

UK also challenges the sufficiency of the evidence supporting the ALJ's decision. We need not address this argument, as we have concluded the ALJ properly determined the medical fee dispute was untimely filed.

Finally, UK argues the referral for sanctions is unwarranted because it had no obligation to file a medical fee dispute. Again, we have rejected the argument UK had no obligation to file a medical fee dispute. Nonetheless, we do not believe it is within this Board's statutory authority to review the ALJ's decision to refer the claim to the Commissioner of the Department of Workers' Claims. KRS 342.285 permits review by this Board of an "award or order"

of the ALJ. A referral of the matter to the Commissioner does not constitute an “order or award”. Though included in his Opinion and Order, the ALJ was not relying upon his unique authority as an ALJ to refer the matter to the Commissioner. In fact, any party may invoke the Commissioner’s authority to impose sanctions pursuant to KRS 342.267 and KRS 342.990. Chapter 342 does not limit the ability to refer a matter to the Commissioner to solely the ALJ. As the issue of sanctions has not yet been fully determined, we do not believe UK has a justiciable issue for review. Furthermore, it would have a chilling effect should this Board undertake to review an ALJ’s decision to simply refer a matter to the Commissioner for review.

For the foregoing reasons, the May 23, 2014 Opinion and Order and the July 1, 2014 Order on Reconsideration of Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON THERESA GILBERT
163 WEST SHORT STREET SUITE 555
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON CHRIS CREECH
116 N. MAIN ST.
NICHOLASVILLE, KY 40356

RESPONDENT:

JACK L PEPPERS
126 PALISADES
HARRODSBURG, KY 40330

ADMINISTRATIVE LAW JUDGE:

HON. CHRIS DAVIS
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601