

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: May 6, 2022

CLAIM NO. 200571170

ELMO GREER & SONS LLC

PETITIONER

VS.           **APPEAL FROM HON. CHRISTINA D. HAJJAR,  
ADMINISTRATIVE LAW JUDGE**

JAMES KELLY LACKEY  
DR. HARRY LOCKSTADT  
and HON. CHRISTINA D. HAJJAR,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**STIVERS, Member.** Elmo Greer & Sons, LLC (“Greer”) appeals from the December 15, 2021, Opinion and Order and the January 12, 2022, Order overruling its Petition for Reconsideration of Hon. Christina D. Hajjar, Administrative Law Judge (“ALJ”). In the December 15, 2021, Opinion and Order, the ALJ determined

the Form 112 Medical Dispute raised by Greer was not timely filed and dismissed the dispute in favor of James Kelly Lackey (“Lackey”).

We note Lackey has proceeded *pro se* throughout the entirety of the Medical Fee Dispute.

On appeal, Greer asserts that the ALJ erred as a matter of law in finding its Motion to Reopen and Medical Fee Dispute untimely filed.

### **BACKGROUND**

The August 14, 2006, Form 101 alleges Lackey sustained a work-related injury to his left shoulder on September 21, 2005, “when he was involved in a truck wreck.”

The parties entered into a Form 110 Settlement Agreement for a lump sum payment. There was no buyout of future medical expenses.

On June 9, 2021, Greer filed a Motion to Reopen/Form 112 Medical Fee Dispute. The nature of the dispute is set forth as follows: “Defendant/Employer believes there is a prima facie issues [sic] of medical causation pertaining to the decompression and fusion at L3 to S1, which is currently being recommended to Plaintiff by Dr. Harry Lockstadt.” Importantly, on page two of the Form 112, Greer left blank the following inquiry: “The date(s) on which each disputed statement for services or request for services was first received by the employer, insurance carrier, or any agent thereof is as follows...”

Attached to the Form 112 is the May 10, 2021, Peer Review Report of Dr. Darryl Thomas. Pertinent to the issue on appeal is the following language regarding Dr. Harry Lockstadt’s May 3, 2021, evaluation of Lackey:

**The 05/03/21 evaluation noted continuing low back pain.** The physical exam noted referred pain in the hips and legs in a L5 distribution. There was tenderness to palpation noted over the lumbar area. There was limited range of motion noted. The claimant was recommended for decompression and fusion from L3 to S1. (emphasis added).

By order dated July 28, 2021, the ALJ sustained Greer's Motion to Reopen.

The October 25, 2021, Benefit Review Conference Order and Memorandum contains the following under the heading "Contested Issues":

The following issues were preserved in this medical dispute: work-relatedness of decompression and fusion at L3 to S1 recommended by Dr. Lockstadt. Additionally, the ALJ raised the issue of the timeliness of the dispute under 803 KAR 25:012 Section 1(6)(a), which states that '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 of services pursuant to 803 KAR 25:096.'

A final hearing was waived.

Attached to Greer's brief to the ALJ is the May 3, 2021, "Bluegrass Orthopaedics Surgery Request Form" in which Dr. Lockstadt requested approval of the following surgery: "L3-4, L4-L5-S1 Lumbar decomp. + fusion."

The December 15, 2021, Opinion and Order contains the following findings of fact and conclusions of law which are set forth *verbatim*:

Before considering the dispute on the merits, the threshold issue of whether Defendant filed a timely medical dispute must be resolved. As an initial matter, Defendant filed the motion to reopen on June 9, 2021. The ALJ reopened the claim, noting that Defendant made a prima facie showing for reopening. However, Defendant did not fill out a line on page two of the

medical dispute which asks for the date upon which each disputed statement for services or requests for services was first received. Thus, at the time of reopening, the ALJ did not have enough information to determine whether the claim was timely filed.

At the first conference, which Mr. Lackey attended, the ALJ asked Defendant when the request was first received, raised the issue of the timeliness of the dispute, and permitted the parties to file evidence. However, no additional evidence was filed regarding the timeliness issue.

The only evidence concerning the date of the request was in the physician advisor report by Dr. Darryl Thomas. The summary of records reviewed indicates a surgery request form was dated May 3, 2021. There was no other indication as to when the request for surgery was made by Dr. Lockstadt or received by the carrier. However, Defendant filed a brief asserting that Dr. Lockstadt requested the surgery on May 3, 2021, and that the surgery request form was faxed to the claims adjuster on May 3, 2021. Although this was not evidence, it is consistent with Dr. Thomas's report indicating the request was made on May 3, 2021.

The Motion to Reopen was not filed until June 9, 2021, more than 30 days after the request for the surgery by Dr. Lockstadt. Under 803 KAR 25:012 Section 1(6)(a), “[u]nless 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 of services pursuant to 803 KAR 25:096.”

Defendant relies on 803 KAR 25:096, arguing the request was not a “complete statement of services,” as it was not on a properly-submitted HCFA form, and that the 30-day period was tolled. However, in *Kentucky Associated General Contractors Self-Insurance Fund v. Lowther*, 803 S.W.3d 456 (Ky. 2010) and *Lawson v. Toyota Motor Manufacturing, Kentucky, Inc.*, 330 S.W.3d 452(Ky. 2010), the Kentucky Supreme Court clearly set forth that post-award medical bills must be paid or disputed within 30 days of the final utilization review determination and that a request for pre-authorization equates to a “statement for services.” Thus, this ALJ rejects Defendant's argument that Dr. Lockstadt's

request for surgery on May 3, 2021, was not a complete statement for services.

Defendant admitted that utilization review was not initiated within 30 days, because the concern in this medical dispute related to causation and not reasonableness and necessity. Thus, this ALJ further finds that utilization review was not initiated, and thus, the 30-day period provided for under KRS 342.020(4) is not tolled by 803 KAR 25:012.

Defendant appears to argue that the time to file the motion to reopen was extended because a peer review report was requested. Defendant argues the motion to reopen was filed within 30 days after the peer review report by Dr. Thomas (dated May 10, 2021). However, there is no provision in the regulations which allows for a tolling of the 30-day period because an opinion on work-relatedness is pending. The regulations do allow for tolling of the 30-day period if the expense is subject to utilization review and a utilization review decision is pending, if a medical provider fails to respond to a reasonable information request, or if the doctor fails to provide a treatment plan. However, Defendant has not provided evidence these are applicable to this case.

Defendant next argues that any issue by the ALJ with respect to timeliness should have been raised in her Order regarding Defendant/Employer's Motion to Reopen, and the motion should have been denied at that time based on timeliness. However, the Kentucky Supreme Court stated:

*A prima facie* showing adequate to support granting a motion to reopen need not be sufficient to support a finding for the movant on the merits in the event that the respondent fails to go forward with evidence to the contrary. The standard for deciding the motion is whether the movant has made a preliminary showing of the substantial possibility of proving one or more of the prescribed conditions sufficient to justify putting the adversary to the expense of re-litigation.

*Turner v. Bluegrass Tire Co.*, 331 S.W.3d 605, 609 (Ky. 2010) See *Crawford & Company v. Wright*, 284 S.W.3d 136 (Ky.2009); *Stambaugh v. Cedar Creek Mining Co.*, 488 S.W.2d 681, 682 (Ky.1972).

At the time of reopening, the ALJ did not have sufficient information to determine if the report was timely filed, as Defendant did not fill out the portion of the medical dispute indicating when the request was made. Additionally, the ALJ did not deny the motion to reopen at that stage, as there could have been other reasons as to why the dispute was not filed sooner, such as Defendant requested additional information from the treating provider.

The initial finding of a prima facie case does not prohibit the ALJ from raising jurisdictional issues such as timeliness. The ALJ further finds the ALJ has the obligation to determine whether a dispute is timely filed regardless of whether the claimant has raised the issue.

For these reasons, this ALJ finds the dispute was not timely filed, and the dispute is dismissed in favor of Lackey.

Greer filed a Petition for Reconsideration, asserting the ALJ erred in not treating Dr. Thomas' Peer Review report, dated May 10, 2021, as a Utilization Review report. Greer argues because it filed its Motion to Reopen/Form 112 on June 9, 2021, it is timely as it was filed within 30 days from the date of Dr. Thomas' Peer Review report.

The January 12, 2022, Order overruling Greer's Petition for Reconsideration contains the following:

This matter is before the undersigned Administrative Law Judge for consideration of Defendant's petition for reconsideration of the Opinion and Order of December 15, 2021. Defendant contends that the undersigned should have found that the Defendant/Employer timely filed its Motion to Reopen in this case and that the recommended lumbar decompression and fusion surgery at L3 to S1 is not causally related to the work-injury.

Defendant argues that the ALJ should have held the peer review report to the same standard as a utilization review report and allowed the dispute to be filed within 30 days after the peer report was issued.

KRS 342.281 provides that an administrative law judge is limited on review on petition for reconsideration to the correction of errors patently appearing upon the face of the award, order or decision. The ALJ may not reweigh the evidence and change findings of facts on petition for reconsideration. *Garrett Mining Co. v. Nye*, 122 S.W.3d 513 (Ky. 2003). Having reviewed Defendant's petition for reconsideration, the undersigned notes that it is simply an impermissible re-argument of the merits of the claim, and the petition for reconsideration is, therefore, OVERRULED.

Defendant asserts it did not initiate utilization review. The utilization review process provides time limits for utilization review to be initiated, for reports to be issued, and for medical disputes to be filed thereafter. There is no similar provision in the regulations which provides for a time limit to request and obtain a peer review report, other than the requirement of the 30-day period to pay or contest bills and treatment. The regulation does not provide for a tolling of this requirement for a pending peer review report. Thus, this ALJ does not consider peer review and utilization review to be held to the same standard with regard to timely filings.

On appeal, Greer asserts the same argument made in its Petition for Reconsideration. It claims the ALJ erred as a matter of law in finding its Motion to Reopen/Medical Fee Dispute untimely, as Dr. Thomas' May 10, 2021, Peer Review should be held to the same standard as a Final Utilization Review since Greer had 30 days from the date of Dr. Thomas' May 10, 2021, Peer Review report in which to file its Motion to Reopen/Medical Fee Dispute. Its Motion to Reopen/Medical Fee Dispute was filed on June 9, 2021. Consequently, it posits the Motion to Reopen/Medical Fee Dispute is timely and this Board should remand for a determination as to the work-relatedness of the contested surgery.

## ANALYSIS

KRS 342.020 (4) states, in relevant part, as follows:

The employer, insurer, or payment obligor acting on behalf of the employer, shall make all payments for services rendered to an employee directly to the provider of the services within thirty (30) days of receipt of a statement for services. The commissioner shall promulgate administrative regulations establishing conditions under which the thirty (30) day period for payment may be tolled.

803 KAR 25:012 (1)(6)(a) states 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.

As an initial matter, and as recognized by the ALJ, Greer admits it did not initiate Utilization Review. Greer makes this admission in its November 4, 2021, brief to the ALJ, the Petition for Reconsideration, and its brief to this Board. In its brief to the ALJ and its Petition for Reconsideration, Greer admits as follows:

- “Utilization Review was not initiated because Defendant/Employer’s concerns raised in this Medical Fee Dispute relates to causation and not reasonableness/necessity.”

Greer reiterates this in its appeal brief. However, despite its admission that it failed to initiate Utilization Review, the crux of Greer’s argument on appeal is that Dr. Thomas’ May 10, 2021, Peer Review report *should be treated the same as a* Utilization Review for the purpose of tolling the 30-day period set forth in 803 KAR 25:012 (1)(6)(a). We reject this argument.

In the December 15, 2021, Opinion and Order, the ALJ correctly held as follows:



The regulations do allow for tolling of the 30-day period if the expense is subject to utilization review and a utilization review decision is pending, if a medical provider fails to respond to a reasonable information request, or if the doctor fails to provide a treatment plan. However, Defendant has not provided evidence these are applicable to this case.

Dr. Thomas' May 10, 2021, Peer Review simply does not fall within the above-cited circumstances thereby tolling the applicable 30-day limitation period. More specifically, there is no language within the applicable statute or regulations pertaining to Utilization Review suggesting Dr. Thomas' May 10, 2021, Peer Review should be deemed the equivalent to Utilization Review, thereby tolling the 30-day deadline. Utilization Review is a creature of statute and instructive regulations. 803 KAR 25:190 is a highly detailed regulation which explicates the Utilization Review process, and a review of this regulation reveals there is nothing within its language directing that any *other* type of physician review, in this case Dr. Thomas' Peer Review initiated to address the issue of causation, should be treated in the same manner as a Utilization Review, thereby tolling the 30-day period set forth in KRS 342.020(4). Since the regulation is silent as to whether Utilization Review encompasses a Peer Review conducted to address the issue of causation, we are not at liberty to add or subtract language from the plain meaning of the regulation. The basic tenets of statutory interpretation apply here. "The most commonly stated rule in statutory interpretation is that the 'plain meaning' of the statute controls." Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 614 (Ky. 2004). Where the language of a statute is clear and unambiguous, it is not open to construction or

interpretation and must be applied as written. Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008).

As stated, Greer has acknowledged that it did not initiate Utilization Review in the case at hand and the regulations pertaining to Utilization Review do not encompass other types of review such as Dr. Thompson's Peer Review. Greer was certainly free to contest the reasonableness and necessity of the recommended surgery and initiate Utilization Review. However, it did not. Consequently, we affirm the ALJ determination that the 30-day requirement set forth in KRS 342.020(4) was not tolled.

Greer's tangential assertion that Dr. Lockstadt's May 3, 2021, "Bluegrass Orthopaedics Surgery Request Form" is not a "complete statement of services" pursuant to KRS 342.020 (4) and 803 KAR 25:012 (1)(6)(a) also lacks validity. As correctly held by the ALJ in the December 15, 2021, Opinion and Order, in Kentucky Associated General Contractors Self-Insurance Fund v. Lowther, 803 S.W.3d 456 (Ky. 2010) and Lawson v. Toyota Motor Manufacturing, Kentucky, Inc., 330 S.W.3d 452 (Ky. 2010), the Kentucky Supreme Court unequivocally explained that "a request for pre-authorization equates to a 'statement of services' that an employer must contest within 30 days or pay." Lowther, supra, at 460. Consequently, Greer had 30 days from Dr. Lockstadt's May 3, 2021, evaluation and request in which to file the Motion to Reopen/Medical Fee Dispute, and it failed to do so. Therefore, we affirm the ALJ's dismissal of Greer's Motion to Reopen/Medical Fee Dispute.

On the issue raised on appeal, the December 15, 2021, Opinion and Order and the January 12, 2022, Order overruling the Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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