

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 25, 2022

CLAIM NO. 201999094

GEORGIA PACIFIC

PETITIONER

VS. APPEAL FROM HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE

DIETRA BRISCOE and
HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
REVERSING IN PART & REMANDING

* * * * *

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

MILLER, Member. Georgia Pacific (“Pacific”) appeals from the October 12, 2021 Opinion, Award, and Order and the November 23, 2021 Order on Petition for Reconsideration rendered by Hon. Thomas G. Polites, Administrative Law Judge (“ALJ”). The ALJ awarded temporary total disability (“TTD”) benefits from July 3, 2019 through October 27, 2019, and from October 2, 2020 through April 2, 2021 at

the rate of \$693.92 per week with 6% interest. The ALJ also awarded permanent partial disability (“PPD”) benefits of \$88.47 per week for 425 weeks based on a 5% impairment rating assessed pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”), utilizing a .85 grid factor with a three-multiplier with 6% interest. Medical expenses were awarded for work-related shoulder and arm injuries.

Pacific filed a Petition for Reconsideration arguing Dietra Briscoe (“Briscoe”) failed to submit past medical expenses during the litigation, thereby rendering them non-payable by Pacific. The ALJ denied its petition.

Pacific appeals arguing pre-adjudicated contested medical expenses should not be payable as Briscoe did not submit the medical expenses per 803 KAR 25:010 § 7 and 13. It also argues the ALJ erred in multiplying the 5% impairment rating by .85 and not .65. per KRS 342.730(1)(b).

Briscoe testified by deposition on June 11, 2020 and January 29, 2021, and at the final hearing on June 25, 2021. Briscoe began working for Pacific in 2004 as a technician. Her job was to operate and maintain twelve different cup making machines. Her job duties included lifting up to seventy-five pounds of paper and film rolls. Briscoe filed a Form 101 claiming she injured her right arm on January 1, 2019 while performing her job. She was running several machines that had run out of paper. The roll itself weighs about eighty pounds and when it would not release from the shaft, she used a jackhammer motion to release it. After working on the machines, she went to use a gripper to pick up cups that had fallen on the floor when she felt a sharp pain shoot through her arm up to her shoulder. She reported the

injury to her supervisor and was seen by the plant nurse who told her to return to her job and to intermediately ice her arm and take ibuprofen.

Briscoe first treated at Redpoint Medical where she was placed on light duty with restrictions of no lifting, pushing or pulling over ten pounds, and no repetitive gripping. She was then referred to Dr. Stephen Umansky.

Dr. Umansky evaluated Briscoe on May 20, 2019 and diagnosed scapulalgia and lateral epicondylitis. On July 3, 2019, he ordered Briscoe to remain off work. Briscoe returned to light duty work in October 2019 through December 2019. Dr. Umansky assessed Briscoe to be at maximum medical improvement (“MMI”) as of December 4, 2019 and released her to work without restrictions.

Briscoe first treated with orthopedic physician Dr. Peter W. Hester on October 12, 2019 for right shoulder pain. He allowed her to return to work with restrictions of no work at or above shoulder level, and no lifting, carrying, pushing, or pulling more than five pounds. He treated her on November 12, 2019 and continued physical therapy and restrictions. Dr. Hester saw her in December 2019 and then again in February 2020. On March 24, 2020, he injected the shoulder with a steroid and stated, “Will consider right shoulder surgery bicep tendodesis if injection does not work.” He reviewed the MRI of January 31, 2019. Attached to Dr. Hester’s chart was an e-mail dated April 2, 2020 from ESIS’ adjuster Edith McCauley. “Please advise the last date that Ms. Briscoe was seen by Dr. Hester and send me the notes. That will be the last date that I will approve as I obtained an IME”.

On October 2, 2020, Dr. Hester performed right shoulder arthroscopy and debridement, labral debridement, right shoulder mini open biceps tenodesis, and open subacromial bursectomy on Briscoe. She was placed off work and given restrictions of no lifting at or above shoulder level, and no lifting, carrying, pushing, or pulling of or above five pounds. Dr. Hester treated her post-surgery on December 7, 2020 and February 8, 2021. At that time, she indicated she was ready to return to work.

Dr. Ronald Burgess examined Briscoe on March 12, 2020 and again on January 18, 2021. Dr. Burgess did not find evidence of her previous diagnosis of right lateral epicondylitis and diffuse ill-defined pain in the musculature in the right shoulder girdle without localization. He did not have a copy of the MRI of the shoulder but if it was normal as reported, then he opined she was at MMI with a 0% impairment rating according to the AMA Guides. Dr. Burgess issued two supplemental reports, the first on March 23, 2020 after reviewing an MRI of January 31, 2019 and an FCE of March 17, 2020. He maintained the patient is at MMI and felt the limitation of forty pounds was appropriate.

The second report stated:

Ms. Briscoe's work-related diagnoses are resolved right lateral epicondylitis and right shoulder pain. Based on the validity of the Functional Capacity Evaluation, I feel that her restrictions would be based on that report with lifting up to 40 lb. I feel she needs no additional treatment or surgical procedures such as biceps tenodesis.

He maintained the 0 % impairment rating.

Dr. Burgess re-examined Briscoe on January 18, 2021. At this point, he was aware of the surgery performed by Dr. Hester on October 2, 2020. He stated it was an arthroscopy of the shoulder with biceps tenodesis. It was his opinion the surgery was not reasonable or necessary, which had been his prior opinion as well. He felt after her next few weeks of physical therapy she could return to her job, and he maintained the 0 % impairment rating attributable to the work injury.

Dr. Anthony McEldowney evaluated Briscoe on April 16, 2020 and again on May 17, 2021. Initially, he received a history of Briscoe's work injury and medical treatment, reviewed medical records, and performed a physical evaluation. Dr. McEldowney performed grip strength testing and range of motion testing. He diagnosed internal mechanical derangement right shoulder, likely consisting of both rotator cuff and labral pathology. He attributed Briscoe's condition to her work injury and assigned a 5% impairment rating according to the AMA Guides. He did not opine Briscoe was at MMI and felt she was unable to perform her work activities. Dr. McEldowney assigned restrictions of no right shoulder overhead movement or any repetitive or sustained work activities pending a repeat MRI.

Dr. McEldowney re-evaluated Briscoe on May 17, 2021 and maintained his diagnosis of a 5% whole person impairment rating and placed Briscoe at MMI as of April 2, 2021. He opined Briscoe could not return to her prior work and placed restrictions of no frequent, repetitive, or sustained activities with right arm; maximum five-pound overhead lift and carry; maximum twelve-pound waist to shoulder level lift and carry; maximum 16-pound floor to waist level lift and carry; and maximum thirty pounds push/pull with the right arm.

At the Benefit Review Conference (“BRC”) on September 9, 2020, one of the contested issues listed was **Unpaid or contested medical expenses**.

The final hearing was set for October 20, 2020. The ALJ filed an Order on that day which reads as follows, *verbatim*:

This claim was scheduled for a final hearing today, October 20, 2020 and the parties appeared for same via Zoom. At that time the parties advised that the Plaintiff has undergone surgery for her right shoulder recently, was not at MMI, had been receiving short-term disability benefits and was expecting to receive long-term disability benefits with an anticipated return to work date in January. Given these circumstances it was determined that it would be preferable to continue the hearing generally pending plaintiff's achievement of MMI at which time proof time would be reset and the claim litigated to a conclusion. As such, the final hearing scheduled for October 20, 2020 is hereby CANCELED and the parties shall move for additional proof time upon plaintiff's achievement of MMI. Proof will remain open at this time for all parties

Ultimately, the parties had a final hearing on June 16, 2021.

ANALYSIS

In terms of the statutory factor, it must be noted Pacific did not file a petition for reconsideration regarding the grid factors at KRS 342.730(1)(b). This omission was pointed out by Briscoe in arguing the failure to file a petition for reconsideration dooms any attempt to correct the error. We disagree. When a petition for reconsideration is not filed, all facts as found by the ALJ are deemed conclusive and binding. KRS 342.285; Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985). The finding of the 5% impairment rating and three-multiplier are conclusive. However, applying the correct statutory provision is a matter of law.

KRS 342.730(1)(b) as written requires that a 0-5% impairment rating is multiplied by 0.65. Pacific cites case law to this effect that issues regarding questions of law need not be preserved pursuant to a petition for reconsideration. Brasch-Barry General Contractors v. Jones, 175 S.W.3d 81 (Ky. 2005).

In Abel Verdon Construction v. Rivera, the Supreme Court stated:

KRS 342.285(2) and KRS 342.290 limit administrative and judicial review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers," whether the decision "was procured by fraud", or whether the decision was erroneous as a matter of law. Legal errors would include whether the ALJ misapplied Chapter 342 to the facts; made a clearly erroneous finding of fact; rendered an arbitrary or capricious decision; or committed an abuse of discretion. 348 S.W.3d749,753-54 (Ky.2011).

Whether an award is in conformity to the Act is a question of law. Whittaker v. Reeder, 30 S.W.3d 138 (Ky. 2000). The Board has long held that the calculation of benefits pursuant to KRS 342.730(1)(b) is a matter of law and the filing of a petition for reconsideration is not necessary to preserve the matter for appellate review. Franklin v. Montgomery Gate, (WCB No. 2001-71429 (2007)). The benefit calculation is reversed and the claim is remanded to the ALJ to correct the calculation for PPD benefits utilizing the proper grid factor and then multiplied by the three-multiplier.

Pacific appeals, also taking issue with the Order to pay medical expenses, which presumably includes medical expenses not paid by Pacific and not filed into evidence. This is an issue that has seen much recent litigation. The starting point is 803 KAR 25:010 § 7(2)(e) which mandates within forty-five (45) days of the

issuance of the Notice of Filing of Application, the parties shall file a notice of disclosure which shall contain the following:

803 KAR 25:010 § 7(2)(e)(7):

For plaintiff, all known unpaid bills to the parties, including travel for medical treatment, co-pays, or direct payments by plaintiff for medical expenses for which plaintiff seeks payment or reimbursement.

803 KAR 25:010 § 7(2)(f):

All parties shall amend the notice of disclosure within ten (10) days of the identification of any additional witness, or receipt of information or documents that would have been disclosed at the time of the original filing had it then been known or available.

Finally, 803 KAR 25:010 § 13(9)(a) states:

The Plaintiff shall bring to the BRC copies of known unpaid medical bills not previously provided and documentation of out-of-pocket expenses including travel for medical treatments. Absent a showing of good cause, failure to do so may constitute a waiver to claim payment for those bills.

In addition, 803 KAR 25:010 § 13(9)(b) reads:

Each defendant shall bring copies of known medical bills not previously provided and medical expenses presented to them, their insurer or representative known to be unpaid or disputed including travel expenses. Absent a showing of good cause, failure to do so may constitute a waiver to challenge those bills.

Pacific notes the use of the wording “shall bring” makes this a mandatory provision. Pacific discusses the holding in Wonderfoil Inc. v. Russell, 630 S.W.3d 706 (Ky. 2021) to support its position that the regulatory scheme applies pre-litigation, during litigation, and post-litigation. Pacific notes Wonderfoil, supra, solely addressed a different regulation, that being 803 KAR 25:096 § 11(2) and KRS

342.020(4) when deciding those provisions apply post order. However, in Wonderfoil there was discussion that the regulations now cited by Pacific in this claim, fully anticipate, expects, and requires medical expenses be submitted while the claim is being litigated. Presumably this would prevent the Employer from unfair surprise regarding requested medical expenses.

The case of Roach v. Owensboro Health Regional Hospital, 518 S.W.3d 786 (Ky. 2017) also is instructive. In that claim, the employee had surgery and began paying bills more than a year and a half before filing the Form 101. Further the list of contested issues did not include unpaid or contested medical expenses. The first mention of these bills was on re-direct at the final hearing and the ALJ did allow the submission of the bills. The Court of Appeals found the mandatory language in the regulation, 803 KAR 25:010 § 13 coupled with the utter failure to comply with the regulations or list unpaid medical as a contested issue barred the recovery.

Briscoe cites the Board holding in Brown Pallet v. Jones, Claim No. 2003-69633 that once the Employer/Insurance Carrier advises the Plaintiff that it would not pay for further treatment, then the filing requirement of KRS 342.020(4) and the regulations are deemed moot. Hence, once it is shown the bills will not be paid by the carrier absent an order to do so, the filing of the bills is unnecessary until the matter is adjudicated. Briscoe believes the same reasoning would apply to the regulations now being cited.

The ALJ conducted a thorough analysis of the proof and made a finding of fact that the medical experts for Pacific stated no further medical treatment

was needed. This is found in Dr. Burgess' report of March 12, 2020. The ALJ cited the copy of the April 2, 2020 e-mail from the insurance adjuster to Dr. Hester stating no further medical treatment will be paid based upon an Independent Medical Evaluation report.

The ALJ stated:

As such, while compliance with statutory and regulatory rules regarding submission of medical bills may have been preferable, the Defendant's medical experts' opinions that any further treatment was unreasonable, unnecessary, and not work-constitutes a reasonable basis for not submitting the bills in a timely fashion.

The Form 101 was filed on April 24, 2020. The date the initial Notice of Disclosure was issued was May 19, 2020. The surgery date and post-surgical treatment did not occur until October 2020. Therefore, known unpaid bills did not exist at the origination of the claim. The BRC was held on September 9, 2020. Again, the surgery occurred after that date. A listed contested issue was unpaid or contested medical expenses.

Pacific, through the insurance carrier, notified the treating orthopedic surgeon, Dr. Hester, that bills would not be paid after April 2, 2020. Pacific was fully aware of the surgery performed in October 2020 because the ALJ canceled the final hearing set for October 20, 2021 leaving proof open precisely because the parties advised the ALJ of the recent right shoulder surgery, that Briscoe was not at MMI and was receiving short-term disability benefits and expecting to receive long term disability benefits. No mention was made of medical bills.

It is completely speculative whether there were any known medical bills at that time which Briscoe wanted paid by Pacific. Pacific also has obligations to provide known bills, unpaid or disputed, per the regulations.

Lastly, the potential penalties of 803 KAR 25:010 § 13(9)(a) specifically state, “Absent a showing of **good cause**, failure to do so **may** constitute a waiver to claim payment of those bills.” (Emphasis added)

The ALJ explained his reasoning that the opinions of Dr. Burgess stating no further medical treatment was needed coupled with the adjuster notifying the treating doctor in an April 2, 2020 Email that no further treatment would be paid, constituted a reasonable basis for not submitting the medical bills. This was tantamount to “good cause” as found by the ALJ.

Further, the timing of the surgery post BRC, whether there were any known bills, and Pacific being fully aware that it was not paying for the surgery all support the ALJ’s decision not to impose a penalty. The function of this Board is not to intrude on discretionary decisions by the ALJ unless there was a clear unwarranted exercise of discretion pursuant to KRS 342.285(2)(e).

Compliance with the regulations or lack thereof during the proceedings and whether a particular penalty should be imposed must be decided based on the particular facts of each case. The filing of the notice of disclosure, amending it when new witnesses or information becomes known and filing all known unpaid or contested medical expenses at the BRC is clearly the preferable practice. With that in mind, the exercise of discretion afforded to the ALJ will normally not be disturbed unless it is clearly unwarranted.

Accordingly, the October 12, 2021 Opinion, Award, and Order and the November 23, 2021 Order on Petition for Reconsideration rendered by Hon. Thomas G. Polites are hereby **AFFIRMED IN PART and REVERSED IN PART**. This claim is **REMANDED** to the ALJ for entry of an amended opinion regarding the application of the statutory factor per KRS 342.730(1)(b).

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON RONALD J POHL
HON CAROLYN A ALLEN
11901 BRINLEY AVENUE
LOUISVILLE, KY 40243

COUNSEL FOR RESPONDENT:

LMS

HON KELLY P SPENCER
HON LYMAN DARBY
HON WILLIAM E BROWN
2224 REGENCY RD
LEXINGTON, KY 40503

ADMINISTRATIVE LAW JUDGE:

LMS

HON THOMAS G POLITES
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601