

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 31, 2020

CLAIM NO. 201801428

HILLCREEK REHAB & CARE PETITIONER/CROSS-RESPONDENT

VS. **APPEAL FROM HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE**

ANTOINETTE TAYLOR RESPONDENT/CROSS-PETITIONER
DR. FRANK SIMON
UNIVERSITY OF LOUISVILLE HOSPITAL
OCCUPATIONAL THERAPY
and HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION
VACATING AND REMANDING**

* * * * *

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

STIVERS, Member. Hillcreek Rehab & Care (“Hillcreek”) appeals and Antoinette Taylor (“Taylor”) cross-appeals, *pro se*, from the November 26, 2019, Opinion, Order, and Award and the December 27, 2019, Order of Hon. Tanya Pullin, Administrative

Law Judge (“ALJ”) awarding temporary total disability (“TTD”) benefits and medical benefits for work-related right hand/wrist injuries.

On appeal, Hillcreek asserts the award of future medical benefits must be reversed. Hillcreek also asserts the ALJ erred by failing to suspend medical benefits during the period of time Taylor obstructed Hillcreek’s right to an independent medical evaluation (“IME”) by Dr. Rick Lyon.

On cross-appeal, Taylor asserts she successfully proved each essential element of her claim.

BACKGROUND

The Form 101, filed September 28, 2018, alleges Taylor sustained work-related injuries to her right hand and wrist on September 12, 2018, in the following manner: “While Plaintiff reaching down facing said resident CS of Room 141, Bed 2 on Unit 100 to unlock the left side of the CS’s wheelchair, resident CS crushed Plaintiff’s right hand and wrist downward with the wheelchair level on the left side of wheelchair.”

The September 11, 2019, Benefit Review Conference (“BRC”) Order and Memorandum lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, average weekly wage, unpaid or contested medical expense-including OT, exclusion for pre-existing disability/impairment, and TTD. Under “other” is the following: “Defendant’s motion for Sanctions under KRS 342.310 is PASSED to the Merits of the Claim; future medical treatment including referral from Dr. Simon to Norton Hand Surgeon.”

In the November 26, 2019, Opinion, Order, and Award concerning the issue of entitlement to future medical benefits, the ALJ held:

Future medical treatment including referral from Dr. Simon to Norton Hand Surgeon

KRS 342.020 (1) states in relevant part, “In addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter for the time set forth in this section, or as may be required for the cure and treatment of an occupational disease.” KRS342.020 (3) (a) states, “In all partial disability claims not involving an injury described in subsection (9) of this section, the employer’s obligation to pay the benefits specified in this section shall continue to seven hundred eighty (780) weeks from the date of injury or date of last exposure.” As to future medical treatments, it is well established that an ALJ can award future medical benefits for a work-related injury, although a claimant has reached MMI and no permanent impairment rating was assessed. See FEI Installation, Inc. v. Williams, 214 S.W.3d 318-319 (Ky. 2007).

In this case, the injury was not a temporary exacerbation of a pre-existing non-work-related condition as in Robertson v. United Parcel Service, 64 S.W. 3d 284 (Ky. 2001). Therefore, pursuant to KRS 342.020, Defendant Employer is liable for the payment for the cure and relief from the effects of Plaintiff’s work-related injury. The finding of an award of future medical benefits does not mean that any particular medical expense would be compensable. Mittee Enterprises v. Yates, 865 S.W. 2d, 654 (Ky. 1993); and National Pizza Co. v. Curry, 802 S.W. 2d 949 (Ky. App. 1991). Under 803 KAR 25:012, an employer is free to move to reopen an award to contest the reasonableness or the necessity of any medical treatment and also whether the need for any treatment is due to the effects of the injury. The proposed future medical treatment must be reasonable and necessary for the relief of the worker’s work-related condition. Square D. Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). What

treatment is reasonable and necessary depends on the facts and circumstances of each case. Ky. Emplrs. Safety Ass'n v. Lexington Diagnostic Ctr., 291 S.W.3d 683 (Ky. 2009).

Concerning sanctions sought for Taylor's failure to appear at three scheduled IME appointments with Dr. Lyon, the ALJ held:

Defendant's motion for Sanctions under KRS 342.310

Defendant Employer seeks sanctions against Plaintiff for failure to appear at three scheduled IME appointments with Dr. Lyon, dates of November 20, 2018, November 29, 2018 and December 14, 2018. While missing three separate IME appointments might be sanctionable, the question of sanctions is moot to the extent that Plaintiff is herein awarded benefits that end before the first missed appointment. See B.L. Radden & Sons, Inc. v. Copley, 891 S.W. 2d 84 (Ky. App. 1995).

In its petition for reconsideration, Hillcreek asserted the same arguments it asserts on appeal. By order dated December 27, 2019, the ALJ overruled Hillcreek's petition for reconsideration.

ANALYSIS

Hillcreek asserts the ALJ erroneously cited a lack of a pre-existing condition as the basis of her award of future medical benefits which is the incorrect standard. We agree, vacate the ALJ's award of future medical benefits, and remand for additional findings.

FEI Installation, Inc. v. Williams, 214 S.W.3d 284 (Ky. 2001), stands for the proposition that eligibility for future medical benefits does not depend upon a permanent impairment rating. However, an ALJ is not required to award future medical benefits. In Mullins v. Mike Catron Construction/Catron Interior Systems, Inc., 237 S.W.3d 561 (Ky. App. 2007), the Court of Appeals addressed the holding in

FEI Installation, Inc. v. Williams, *supra*, noting the ALJ is entitled to exercise his or her discretion in making a determination regarding entitlement to future medical benefits. Thus, a determination of entitlement to medical benefits is appropriate as long as it is supported by the evidence.

Here, the ALJ erroneously premised her award of future medical benefits upon a finding Taylor's injury is not a temporary exacerbation of a pre-existing non-work-related condition. While the ALJ has the discretion to award future medical benefits, the award must be based upon substantial evidence in the record. "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In FEI Installation, Inc. v. Williams, *supra*, the Kentucky Supreme Court explained:

Unlike KRS 342.0011(11) and KRS 342.730(1), KRS 342.020(1) does not state that eligibility for medical benefits requires proof of a permanent impairment rating, of a permanent disability rating, or of eligibility for permanent income benefits. Moreover, it states clearly that liability for medical benefits exists "for so long as the employee is disabled regardless of the duration of the employee's income benefits." Mindful of the relationship between impairment and disability under the 1996 Act, we conclude that disability exists for the purposes of KRS 342.020(1) for so long as a work-related injury causes impairment, regardless of whether the impairment rises to a level that it warrants a permanent impairment rating, permanent disability rating, or permanent income benefits.

Id. at 318-319.

On remand, before an award of future medical benefits may be awarded, the ALJ must cite the medical evidence in the record supporting such an award. The parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful appellate review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). If the record does not contain medical evidence supporting an award of future medical benefits, the ALJ cannot award them.

Hillcreek next contends the ALJ erred, pursuant to KRS 342.205, by failing to suspend medical benefits for the time period Taylor obstructed Hillcreek's right to an IME. Even though the period of TTD benefits awarded does not overlap with the period of obstruction, Hillcreek asserts an overlap exists with the award of medical benefits. We vacate the ALJ's determination that the issue of sanctions pursuant to KRS 342.205(3) is moot and remand for additional findings.

The record indicates that on December 19, 2018, Hillcreek filed a "Motion to Suspend Compensation and Proceedings" asserting, in relevant part, as follows:

3. The Employer now must file its second Motion to Suspend due to Plaintiff's lack of cooperation with and obstruction of the Employer's right to medical evaluation. Counsel for the Employer has scheduled three different medical evaluation appointments for the Plaintiff to be examined by Dr. J. Rick Lyon. Dr. Lyon's office is in Frankfort, Kentucky. Plaintiff lives in Shelbyville, Kentucky. The Employer measures the one-way distance from Plaintiff's address included in her Application and Dr. Lyon's office as between 16.9 and 18 miles, depending on the method used. It is also believed that Plaintiff remains able to transport herself from Shelbyville to Louisville, and possibly other locations, in her own vehicle. Plaintiff's alleged injury is a hand contusion.

Thus, the Employer submits that Dr. Lyon's office is a reasonable place for Plaintiff to travel for evaluation.

4. The Employer has issued three appointment letters to the Plaintiff. The first was written October 19, 2018, scheduling an IME appointment with Dr. Lyon for November 20, 2018. On October 23, 2018, Plaintiff wrote counsel for the Employer stating that she would be unable to attend Dr. Lyon's November 20 scheduled evaluation and asking that the evaluation be rescheduled. She further demanded that a taxi be provided to her for any future evaluation appointments.

5. On October 26, 2018, counsel for the Employer wrote Plaintiff the attached letter rescheduling the appointment from November 20, 2018 to November 29, 2018. Counsel for the Employer thanked Plaintiff for providing notice of her inability to attend. Counsel for the Employer stated that the Employer would not provide Plaintiff a taxi from Shelbyville to Frankfort for an IME, and that the Employer had no duty to provide a taxi. Plaintiff wrote counsel for the Employer again on October 30, 2018, and declined to attend the November 29, 2018 evaluation, again also demanding a taxi. Neither of these letters declining to attend the evaluation with Dr. Lyon explained why the Plaintiff would be unable to attend. Nonetheless, the Employer once again scheduled Plaintiff's evaluation with Dr. Lyon to take place on December 14, 2018. By letter of November 21, 2018 [sic] and another letter of December 10, 2018 sent by overnight FedEx delivery, counsel for the Employer advised Plaintiff that, absent documentation of the reason of her claimed inability to attend an evaluation with Dr. Lyon, the Employer would expect her to attend the December 14 appointment. Also, in response to Plaintiff's requests, Plaintiff was provided Dr. Lyon's qualifications obtained from his medical practice website, even though those are freely available online with a simple Google search. Plaintiff again wrote counsel (on December 16, two days after the appointment) refusing to attend the December 14 evaluation and demanding a taxi to any evaluation. The undersigned understands that Plaintiff failed to attend the December 14, 2018 appointment.

6. In each of the letters from the Plaintiff refusing to attend evaluations, Plaintiff demanded that the Employer

provide a taxi cab or other transportation to the evaluations. The Employer has repeatedly responded that it is under no obligation to provide such transportation. The Employer's insurer has repeatedly sent Plaintiff travel expense checks to the scheduled evaluations, only to have them returned each time by Plaintiff. The Employer believes that Plaintiff has her own transportation and can drive herself. She has not required transportation to any treatment appointments and did not require transportation to be provided to her to attend her employment before her alleged work injury. Her alleged injury is a hand contusion. It is not expected that such a condition would limit her from driving 16.9 to 18 miles to see Dr. Lyon. It should be noted that the report of Dr. Tuna Ozyurekoglu, which has been submitted into evidence, contains the opinion that Plaintiff's alleged contusion to the right hand due to the work accident does not require any further limitations on her physical activities. The Employer also submits that Plaintiff is under an obligation to make herself available for evaluation when given sufficient notice, as she has been, even if that means changing her personal plans or schedule in a reasonable manner.

7. KRS 342.205 requires a claimant in a workers' compensation claim to submit to medical evaluation at a reasonable time and place at the Employer's expense at any time the [sic] she is claiming compensation. It further provides that the right to compensation is suspended during any period of refusal or obstruction of evaluation. Under Finke v. Comair, Inc., 489 S.W.3d 242 (Ky. App. 2016), such benefits are permanently suspended, and there is no basis under the law to reinstate them, even if the Claimant eventually consents to examination. This applies to all benefits under KRS Chapter 342, including but not limited to income and medical benefits.

8. For the above reasons, the Employer respectfully requests that the Administrative Law Judge permanently suspend any right to compensation of any type of the Plaintiff herein for the period beginning December 14, 2018 and continuing until Plaintiff submits to and cooperates with medical evaluation. The Employer further moves the ALJ for an order suspending all other activity in these proceedings until such time as Plaintiff submits to and cooperates with medical evaluation on

behalf of the Employer. The Employer also requests that the ALJ order Plaintiff to attend the rescheduled evaluation absent subsequent ALJ Order excusing her and holding that the Employer is under no obligation to provide a taxi cab, ride service or other common carrier. The Employer further submits that the ALJ should also find that if Plaintiff fails to attend an IME if ordered to do so, requiring further legal action by the Employer, she will also be subject to being assessed with the costs of unreasonable proceedings under KRS 342.310.

9. There is no reason the Employer should be required to move forward with any aspect of this case, or certainly to pay any further compensation of any type, until and unless Plaintiff stops obstructing what should be an uncomplicated, routine and straightforward litigation process. The litigation process cannot meaningfully proceed without Plaintiff's cooperation. Therefore, until Plaintiff submits to evaluation, the Employer should be required to do or pay nothing further in this matter.

10. Because the above course of events raises concerns about whether Plaintiff will submit to an evaluation absent the ALJ ordering same, and because the third missed IME appointment resulted in a no-show fee being imposed on the Employer, the Employer respectfully advises that it intends to wait until such time as it receives a ruling on this Motion before it again schedules Plaintiff to see Dr. Lyon. One [sic] there is a ruling, the Employer will schedule Plaintiff to be seen by Dr. Lyon as soon as possible.

(emphasis in original).

Attached to Hillcreek's motion are the pertinent letters between the parties.

On January 9, 2019, Hillcreek filed a "Supplemental Motion to Suspend Compensation and Proceedings in This Claim" asserting as follows:

Comes the Employer, by counsel, and hereby supplements its previous Motion to Suspend Compensation and Proceedings in this matter that was filed due to Plaintiff's failure to cooperate with the

Employer's right to an Independent Medical Evaluation in this matter, by submitting the attached correspondence from Plaintiff to the Employer's insurance carrier, in which Plaintiff returns the mileage check issued to her for the most recent missed evaluation, characterizing issuing a mileage check to her as 'fraudulent activity.' This further evidences the Plaintiff's lack of cooperation and efforts to frustrate the Employer's right to an IME.

By Order dated January 22, 2019, the ALJ passed Hillcreek's motion to suspend compensation to be addressed at the BRC, stating, in relevant part, as follows: "At this time, it is not clear on what grounds Defendant Employer is paying compensation to Plaintiff as Plaintiff's request for interlocutory relief was denied by Administrative Law Judge Roark."

On February 11, 2019, Hillcreek filed a "Notice of Suspension of Compensation" which states as follows: "Comes the Employer, by and through counsel, and hereby gives Notice that it has suspended payment of compensation to or on behalf of the Plaintiff due to her obstruction of the Employer's rights to medical evaluation, pursuant to KRS 342.205."

By Order dated March 12, 2019, the ALJ cancelled the BRC and ordered Taylor to attend an IME scheduled by Hillcreek within thirty days of the date of the order. The ALJ also ordered Hillcreek to reimburse Taylor's mileage to and from the IME.

In the November 26, 2018, Opinion, Order, and Award, the ALJ addressed Hillcreek's request for sanctions pursuant to KRS 342.205(3) erroneously determining the issue is "moot" to the extent that the period of TTD benefits awarded does not overlap with the time period Taylor evaded the IMEs with Dr. Lyon.

In Finke v Comair, Inc., 489 S.W.3d 242 (Ky. 2016), the Court of Appeals affirmed this Board's decision upholding the ALJ's determination the claimant did not have the right to have a family member present at her IME by claiming only general discomfort. The Court of Appeals also agreed with the ALJ and the Board that Finke forfeited her benefits during the period of non-compliance. The Court of Appeals held, in relevant part, as follows:

KRS 342.205(3) provides:

If an employee refuses to submit himself or herself to or in any way obstructs the examination, his or her right to take or prosecute any proceedings under this chapter shall be suspended until the refusal or obstruction ceases. No compensation shall be payable for the period during which the refusal or obstruction continues.

Like the Board, we are not persuaded the ALJ erred when he declared Finke's benefits "forfeited." Finke argues that once she submitted to the IME, her previously suspended benefits should have been restored to her.

KRS 342.205(3) provides the ALJ the only mechanism for imposing a penalty on an employee who refuses to submit to an IME for an employer. *B.L. Radden & Sons, Inc. v. Copley*, 891 S.W.2d 84 (Ky. App. 1995). **"Compensation" as defined by KRS 342.0011(14) includes "all payments made under the provisions of this chapter representing the sum of income benefits and medical and related benefits[.]"** Thus, when Finke refused to submit to Dr. Primm's IME protocols on August 29, 2012, the ALJ correctly determined that Finke was not entitled to any compensation benefits during the period she refused or obstructed the proceedings.

Id. at 253. (emphasis added).

Thus, pursuant to KRS 342.205(3), KRS 342.0011(14), and Finke, supra, the ALJ erroneously found the issue of sanctions pursuant to KRS 342.205(3)

is moot because the award of TTD benefits ended before Taylor's obstruction began. The ALJ can, pursuant to the discretion afforded him or her, conclude Taylor forfeited entitlement to medical benefits during the *entire* period of obstruction. On remand, the ALJ must resolve the issue of sanctions pursuant to KRS 342.205(3) utilizing the correct legal standard. We direct no particular result as this is purely a discretionary matter to be resolved entirely by the ALJ.

While we acknowledge sanctions, *specifically sanctions pursuant to KRS 342.205(3)*, were not made a contested issue at the BRC, the record is replete with examples of Hillcreek preserving this issue for review, including its motion, supplemental motion, brief to the ALJ, and its petition for reconsideration. Further, the ALJ addressed this issue in the November 26, 2019, Opinion, Order, and Award. Therefore, we deem this issue to have been tried by consent.

On cross-appeal, Taylor asserts she has successfully proven each essential element of her claim. Our ruling resolves any issue asserted by Taylor. Consequently, there is nothing for this Board to address.

Accordingly, to the extent the ALJ awarded future medical benefits and determined sanctions pursuant to KRS 342.205(3) are moot, the November 26, 2019, Opinion, Order, and Award and the December 27, 2019, Order are **VACATED**. The claim is **REMANDED** for additional findings consistent with the views set forth herein.

ALL CONCUR.

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