

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 3, 2020

CLAIM NO. 201283372

PENNY BERRY

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

CEDAR LAKE PARK PLACE
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

STIVERS, Member. Penny Berry (“Berry”) appeals from the December 3, 2019, Opinion and Order resolving a Medical Fee Dispute filed by Cedar Lake Park Place (“Cedar Lake”) and the December 27, 2019, Order overruling Berry’s petition for reconsideration of Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ resolved the Medical Fee Dispute in Cedar Lake’s favor, holding the contested medical bills are non-compensable.

On appeal, Berry argues the ALJ erred in not finding the contested medical bills compensable.

BACKGROUND

The Form 102 alleges Berry, while working as a registered nurse, sustained work-related “pulmonary problems/sick building syndrome” on April 29, 2012, in the following manner:

I went to work for the Defendant/employer on or about September 7, 2010. During the first week or so I started to develop lung and/or allergic problems. I sought treatment with my primary care physician (Dr. Pitcock), at an Urgent Care facility and saw Dr. White , an allergist and eventually ended up under the care of Dr. Karmon, a pulmonologist.

I continued to work throughout 2010 and 2011 with my problems and was first taken off work on May 1, 2012 and returned to work on September 28, 2012 and was last exposed/last worked on October 26, 2012. I have used 4/29/12 as my date of ‘injury’ since that is the date used by the insurance carrier.

The Form 101 alleges the same.

In a June 27, 2013, Opinion and Order, Hon. William Rudloff, Administrative Law Judge (“ALJ Rudloff”) awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits enhanced by the three multiplier, and medical benefits for work-related asthma.

Cedar Lake appealed to this Board, asserting ALJ Rudloff erred in awarding PPD benefits enhanced by the three multiplier as well as TTD benefits. In a November 13, 2013, Opinion, this Board affirmed ALJ Rudloff’s award of TTD benefits, reversed the enhancement of the PPD benefits by the three multiplier, and remanded the claim to him for entry of an amended opinion and award. The Court of

Appeals and Kentucky Supreme Court affirmed our decision. In the September 4, 2015, “Amended Opinion and Order on Remand,” ALJ Rudloff complied with the Board’s instructions.

Berry filed an appeal to this Board alleging ALJ Rudloff erred in denying her “Motion Pursuant to CR 60.02,” filed November 19, 2013, and in failing to award the two multiplier. By Opinion dated February 5, 2016, this Board affirmed ALJ Rudloff’s September 4, 2015, Amended Order.

On June 4, 2018, Berry filed a Motion to Reopen/Form 112 Medical Fee Dispute asserting “[o]ut of pocket medical expenses have not been paid.” Attached to the Form 112 is a listing of out-of-pocket medical expenses Berry incurred from 2010 through 2015, along with invoices. On September 17, 2018, in three separate filings, Berry filed her medical expenses spanning from 2010 through 2018. Also on September 17, 2018, in two separate filings, Berry filed medical records that correspond with the submitted bills. On the same date, Berry filed a comprehensive spreadsheet outlining the out-of-pocket medical expenses she incurred from 2010 through 2018.

Berry testified at the October 15, 2019, hearing. The substance of her testimony is not relevant to the timeliness of the submission of her out-of-pocket medical expenses.

On November 8, 2019, Berry filed an updated spreadsheet of out-of-pocket medical expenses incurred from January 8, 2018, through October 10, 2019. On that same date, Berry also filed a “Notice of Filing of Correspondence Concerning Medical Expense” which included several documents. Among these is a

correspondence from Berry to Cedar Lake, dated June 18, 2013, referring to “attached” medical expenses. Attached to this letter is a spreadsheet of out-of-pocket medical expenses incurred by Berry from September 14, 2010, through April 17, 2013. The spreadsheet lists the date of service, the provider, amount charged, the amount Berry paid out-of-pocket, and a “comments” section indicating the reason for the provided service. The spreadsheet shows that in 2010, Berry incurred out-of-pocket medical expenses totaling \$182.55. In 2011, her out-of-pocket medical expenses totaled \$1,012.87. In 2012, out-of-pocket medical expenses totaled \$1,469.79. Finally, in 2013, through April 17, Berry’s out-of-pocket medical expenses totaled \$188.36.

A spreadsheet attached to an email from Berry to Cedar Lake, dated October 16, 2013, updated the above-cited spreadsheet to include additional out-of-pocket expenses incurred in 2013 through August 21. The total for 2013 increased to \$457.23.

On June 18, 2013, Cedar Lake wrote to Berry stating as follows: “With respect to past medical expenses, we would have to have the providers resubmit bills to KESA and then have the providers reimburse Ms. Berry. The only way I see around that would be to have a global lump sum that waived payment for past medicals or for past and future medicals.”

In a December 10, 2013, correspondence from Cedar Lake to Berry, it requested as follows:

During the pendency of this appeal, I received a spreadsheet of medical expenses from your office. I have forward [sic] that on to KESA and they have indicated they need the actual bills for the medical expense. Please advise if Ms. Berry can provide those bills so that they

may be submitted for payment pursuant to the fee schedule.

On August 8, 2014, Berry wrote Cedar Lake stating as follows:

I talked with Penny recently and she advises me that she has never received reimbursement for her outstanding medical expenses. You have my June 18, 2013 letter with the amounts. At this late date, I see no reason for the medical providers to resubmit bills which would also involve your client repaying the health care providers. It would be easier and less costly to reimburse her directly.

On August 11, 2014, Cedar Lake drafted a letter to Berry stating as follows:

I am in receipt of your August 8, 2014 correspondence regarding medical expenses in the above referenced claim. I have also previously received your June 18, 2013 correspondence. I have attached to this letter my June 2013 correspondence requesting copies of the medical bills. In addition, I wrote to you again in December of 2012, a copy of that letter is also attached, requesting actual bills or treatment records so that KESA could proceed with getting these bills paid. I have heard no response to either letter.

I have forwarded your request on to my client for reimbursement for Penny's out of pocket medical expenses. I do not know if that will be possible but will report back.

A letter from Berry to Cedar Lake, dated May 31, 2016, states as follows: "I have not had a response to my May 3, 2016, letter, a copy of which I enclose along with the attachments. Please advise." The May 3, 2016, letter and attachments were not attached.

A letter from Cedar Lake to Berry, dated June 17, 2016, states, in relevant part, as follows:

I am writing in response to your May 31, 2016 letter and the medial bills sent from your client. First off, your letter references a May 3rd letter to me which I never received. In any event, these bills submitted by your client have not been submitted on a Form 114 and all of the bills submitted are past the forty-five (45) day time period provided for by the regulations for submitting medical expenses. Therefore, reimbursement is denied as they are not timely per the process outlined in the regulations for seeking reimbursement of medical expenses.

If you believe that those bills were timely submitted to KESA at the time they were incurred, I am happy to talk about this further. For future medical treatment or reimbursement for your client, she can submit expenses on a Form 114 directly to KESA.

On November 8, 2019, Cedar Lake filed a “Notice of Filing Correspondence Regarding Medical Expenses” which includes, a letter from Berry, dated May 31, 2016, which references two attachments. The first attachment is a letter from Berry to Cedar Lake dated May 3, 2016, which states as follows: “Enclosed please find medical bills from 2010 through July of 2015. Prior bills from to 2010 to 2013 have already been sent but this total includes 2014-2015 expenses. Please let me know your carrier’s position as soon as possible.” Attached to the May 3 letter is a spreadsheet of out-of-pocket medical expenses incurred from September 14, 2010, through July 10, 2015, along with certain invoices. The spreadsheet includes date of service, provider name, the amount that was charged, the amount that Berry paid, and “comments” detailing the reason for the expense. Out-of-pocket totals are as follows: 2010: \$182.55; 2011: \$1,038.41; 2012: \$1,469.79; 2013: \$457.23; 2014: \$251.66; 2015: \$1,750.48.

At the hearing, the parties clarified that the only issue to resolve was the timeliness of the contested medical bills. Regarding this issue, the ALJ stated as follows:

We have met a couple of times in the format of the medical dispute docket for what are telephonic BRCs. So we definitely have talked about the case before. We just want to clarify that the issues that we're here for today are these medical bills submitted by the plaintiff. And as of right now, and we think this is going to be the case going forward, the issue is the timeliness of the submission of the bills. There is no issue at this time regarding work-relatedness or reasonableness and necessity.

In the December 3, 2019, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law:

As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky. App. 1995). In weighing the evidence, the ALJ must consider the totality of the evidence. *Paramount Foods Inc., v. Burkhardt*, 695 S.W. 2d 418 (Ky., 1985).

As an initial matter the only issue preserved for adjudication is whether or not the Plaintiff timely submitted request for reimbursement of her co-pays. BRCs were held on July 31, 2018 and September 15, 2018. The parties were not prepared at that time to enter into a more precise list of contested issues. Nonetheless, all other purposes of a Medical Dispute BRC was fulfilled. At the October 15, 2019 Hearing the parties stipulated that the sole issue was the timeliness of the submission of the request for co-pays.

As this is a request for reimbursement of co-pays the question of whether or not the submissions were timely is governed by 803 KAR 25:096 § 11(2). In other words, the requests must have been submitted within 60 days of incurrence.

However, the ALJ finds, in accordance with *Brown Pallet v. David Jones*, (WCB 2003-69633) if good cause is shown that 60 day period can be tolled. Further, in accordance with the above, that a claim has been denied and is not yet final is good cause for said delay. To require an injured worker or their medical provider to continually submit medical bills that they can reasonably expect will be denied, especially when there is another source of payment that can reasonably be expected to pay, is not only burdensome but stands a likelihood of having treatment delayed or denied altogether.

Nevertheless, the duty to submit medical bills and requests for co-pays does begin when a claim is final. This claim became final on February 5, 2016. The Plaintiff's request for reimbursement of co-pays must have been submitted no later than April 5, 2016, for any bills incurred prior to February 5, 2016. They must have been submitted 60 days from the date of incurrence for any bills incurred on or after February 5, 2016.

It is the Plaintiff's responsibility to submit those requests for reimbursement of co-pays. The burden does not, and cannot realistically, shift to the Defendant or the Medical Payment Obligor. Failure by the Plaintiff to submit the requests for reimbursement within 60 days, keeping in mind the above analysis and proviso requires the bills to be non-compensable. There is no other reasonable grounds for tolling the 60-day period demonstrated or proven herein.

The first request for reimbursement of any of the disputed co-pays was the date of the Motion to Re-Open, June 4, 2018; two years and 60 days after the claim became final. The requests is two years too late.

Accordingly, none of the request for reimbursement of co-pays are compensable.

None of the above notwithstanding I must note that the Plaintiff has submitted, in the total amount of \$1699.79, request for reimbursement for dates of service pre-dating April 29, 2012, her date of last exposure and what has been adjudicated to be her date of loss. I also note from the original record she only began working for the Defendant, and thus exposed to the mold for the first time, a very short period prior April 29, 2012. In no case

can medical expenses or co-pays be owed prior to April 29, 2012.

In reliance on the foregoing analysis, none of the co-pays is compensable as untimely.

Berry filed a petition for reconsideration asserting several errors. Berry first asserted the ALJ erred in finding the first request for reimbursement was the date of the motion to reopen. Berry further asserted the ALJ erred in holding some of the billing pre-dated the date of injury since this is a cumulative trauma claim and the date of manifestation can be different from the last date of exposure.

In the December 27, 2019, Order, the ALJ set forth the following corrections and additional findings:

This matter comes before the undersigned on the Plaintiff's Petition for Reconsideration and the Defendant's Response thereto. The ALJ has made material errors of fact, which require correction. The first is that the first notice by the Plaintiff, to the Defendant, of a request for the reimbursement of copays, was May 31, 2016. The second is that the ALJ erred in how long the Plaintiff worked for the Defendant prior to her date of manifestation. Both of those statements are stricken from the record.

Nonetheless, the claim became final on February 5, 2016. Thereafter all submissions of medical bills, including co-pays, is governed by 803 KAR 25:096 § 11(2), which requires that the request be submitted on a Form 114 and submitted within 60 days of incurrence. While this period is tolled until a claim is final the 60-day period does begin once the claim is final. Therefore, no co-pay incurred prior to April 1, 2016 can be compensable.

I have spent a great deal of time reviewing the spreadsheets and medical bills again. I can still find no basis to find the bills compensable. While the Plaintiff has submitted copies of letters sent, as above, and has submitted spreadsheets and related medical bills, there is still no way for me to tell when the actual bills were

submitted and if they were submitted timely. While the first request for reimbursement was sent on May 31, 2016 that does not mean all requests were. Obviously co-pays incurred after that date would need to be requested subsequently and timely.

I also note that it is difficult, if not impossible, to determine if, regardless of timeliness, the submitted bills are compensable as work-related or reasonable and necessary or if the documentation as submitted even gives the Medical Payment Obligor sufficient opportunity to contest them on either of those grounds.

Finally, if a great deal of the medical bills were incurred prior to Judge Rudloff's Opinion then any question of them has been waived.

On appeal, Berry asserts the ALJ erred in not finding the disputed medical bills compensable. She asserts the majority of medical bills were submitted before the claim was decided and are therefore timely. As argued, "[t]he bills filed after the institution of the Medical Fee Dispute were previously sent to counsel for the Employer as evidenced by the myriad letters and of course there are the filings that were part of the Motion to Reopen." We vacate the ALJ's determination that Berry's out-of-pocket medical expenses are untimely and, consequently, non-compensable and remand the claim for additional findings.

In the December 3, 2019, Opinion and Order, the ALJ held Berry's "first request for reimbursement of any of the disputed co-pays was the date of the Motion to Re-Open, June 4, 2018; two years and 60 days after the claim became final." This, as pointed out by Berry in her petition for reconsideration, is factually incorrect. The ALJ, in the December 27, 2019, Order, "corrected" his original finding by finding Berry's first request for reimbursement took place on May 31, 2016. However, this is

still incorrect, as the record clearly indicates at least two spreadsheets of out-of-pocket medical expenses plus certain invoices were sent to Cedar Lake prior to May 31, 2016.

As detailed above, Berry sent Cedar Lake the first spreadsheet of out-of-pocket medical expenses as an attachment to a June 18, 2013, letter and which covered out-of-pocket medical expenses Berry incurred in 2010, 2011, 2012, 2013 (through April 17). The record indicates Cedar Lake received this correspondence, as Berry also filed in the record a response letter from Cedar Lake that references Berry's June 18, 2013, demand letter and medical expenses. The record further contains an email correspondence from Berry to Cedar Lake dated October 16, 2013, which has an attached spreadsheet of out-of-pocket medical expenses incurred through August 21, 2013. Significantly, Berry filed in the record a letter from Cedar Lake, dated December 10, 2013, which explicitly states that it had "*received a spreadsheet of medical expenses.*" (emphasis added).

Regarding the May 3, 2016, correspondence from Berry to Cedar Lake, we note that on June 17, 2016, Cedar Lake stated that it did not receive a May 3, 2016, letter. Therefore, receipt of the May 3, 2016, correspondence cannot be confirmed.

We acknowledge the language in Berry's petition for reconsideration claiming her first request for repayment was "probably" made on May 31, 2016. As Berry utilized the word "probably" in her petition for reconsideration, and since the record speaks for itself through the filings in the record of Berry and Cedar Lake, we conclude the record unequivocally demonstrates that Berry's first request for reimbursement of her out-of-pocket medical expenses took place on June 18, 2013. Receipt of the June 18, 2013, correspondence was explicitly confirmed in a response

letter from Cedar Lake on the same date. Further, receipt of “a spreadsheet” was once again confirmed in Cedar Lake’s December 10, 2013, letter which could either be referring to the spreadsheet sent on June 18, 2013, or sent via email on October 16, 2013. Nonetheless, we vacate the ALJ’s determination, as made in the December 27, 2019, Order, that the first time Berry requested reimbursement for out-of-pocket medical expenses was May 31, 2016. We remand for the ALJ to enter an amended order finding Berry first requested reimbursement of her medical expenses on June 18, 2013.

Further, on remand, the ALJ must resolve whether Cedar Lake received the October 16, 2013, email correspondence from Berry. Even though the record contains a letter from Cedar Lake, dated December 10, 2013, that refers to having received a spreadsheet of medical expenses, the ALJ must make a determination as to whether Cedar Lake is referring to the original spreadsheet of expenses sent with the letter dated June 18, 2013, or the updated spreadsheet Berry ostensibly emailed on October 16, 2013. This determination is significant, as the out-of-pocket medical expenses Berry incurred in 2013 were updated through August 21, 2013, in the second spreadsheet.

In light of our determination regarding when Berry first requested reimbursement for her medical expenses, we believe the ALJ must undertake a new analysis, reviewing anew all the requests made by Berry for reimbursement beginning with the first one on August 8, 2013. Once the ALJ has made this determination regarding the October 16, 2013, correspondence, he must, pursuant to 803 KAR 25:096 §11 (2) and the law set forth in both Garno v. Selectron USA, 329 S.W.3d 301

(Ky. 2010) and Speedway/Super America v. Elias, 285 S.W.3d 722 (Ky. 2009), engage in a new analysis concerning the timeliness of Berry's requests for reimbursement for her out-of-pocket medical expenses. Regarding any request for reimbursement made before February 5, 2016, the date ALJ Rudloff's September 4, 2015, Amended Order was finalized, the 60-day rule in 803 KAR 25:096 §11(2) is not applicable. Garno v. Selectron USA, supra. However, for any medical expenses presented after February 5, 2016, if they were presented for the first time outside of the 60-day period set forth in 803 KAR 25:096 §11(2), they are non-compensable. Whether Berry utilized a Form 114 is not determinative of the issue of timeliness. Speedway/Super America v. Elias, supra.

Finally, we are compelled to point out the only issue to be resolved by the ALJ is the timeliness of Berry's requests for reimbursement. The issue of reasonableness and necessity of the medical expenses was not preserved for his resolution. Therefore, we vacate the ALJ's language in the December 27, 2019, Opinion regarding the difficulty in assessing the reasonableness and necessity of the medical bills. We also vacate the ALJ's determination, as set forth in the December 3, 2019, Opinion and order, that "[i]n no case can medical expenses or co-pays be owed prior to April 29, 2012," the date of injury as adjudicated by ALJ Rudloff. As long as the medical expenses were not incurred prior to Berry's first day of employment with Cedar Lake, the reasonableness and necessity of the expenses are not at issue here. Instead, it is only the timeliness of Berry's request for reimbursement of these expenses.

Accordingly, the ALJ's determination that the submitted bills are non-compensable, as set forth in the December 3, 2019, Opinion and Order and the

December 27, 2019, Order, is **VACATED**. Further, the ALJ's determination that no medical expenses or co-pays incurred prior to April 29, 2012, can be deemed compensable is **VACATED**. Finally, the ALJ's determination that Berry's first request for reimbursement took place on May 31, 2016, and all language regarding the difficulty of assessing the reasonableness and necessity of the medical expenses as set forth in the December 27, 2019, Order are also **VACATED**. This claim is **REMANDED** to the ALJ for additional analysis and a decision in accordance with the views set forth herein.

ALL CONCUR.

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