

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 29, 2020

CLAIM NO. 201701789

TRACY SHAMPO

PETITIONER

VS.

APPEAL FROM HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

AVALANCHE AIR, LLC AND
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

RESPONDENT

OPINION
AFFIRMING

* * * * *

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

BORDERS, Member. Tracy Shampo (“Shampo”) appeals from the January 4, 2020 Opinion, Award, and Order, and the January 20, 2020 Order on Reconsideration rendered by the Hon. R. Roland Case, Administrative Law Judge (“ALJ”).

In the Opinion, Award, and Order the ALJ determined, or it was stipulated: Shampo suffered an injury as defined by the Act; that she was temporarily

and totally disabled from August 2, 2017 through January 25, 2018; she retained no permanent partial disability (“PPD”) as a result of her accident; and Avalanche Air, LLC (“Avalanche”) and/or its insurance carrier is responsible for payment of medical benefits to treat the effects of the injury pursuant to KRS 342.020. Shampo filed a Petition for Reconsideration arguing the ALJ should order the outstanding medical expenses in the amount of \$40,720.53 be paid directly to Shampo in reliance on Pierce v. Russell Sportswear Corporation, 586 S.W.2d 310 (Ky. App. 1979). The ALJ overruled the Petition determining the obligation to pay medical benefits pursuant to KRS 342.020 requires the employer or their insurance carrier to pay said benefits directly to the medical care provider or as a reimbursement to a third party, not exceeding the workers’ compensation fee schedule. The ALJ determined Shampo was not entitled to direct payment to her of unpaid medical expenses. This appeal followed.

On appeal, Shampo argues Avalanche initially denied coverage for this accident and should not be entitled to a windfall by unilaterally paying a potential health insurance subrogation interest at a reduced rate, as opposed to paying Shampo directly at the workers’ compensation fee schedule rate for unpaid medical expenses. For reasons to be set forth herein, we affirm.

The facts of this case are not in dispute. Shampo was employed by Avalanche on August 2, 2017 when she tripped and fell, suffering a fracture of her left fibula. Her claim was initially denied by Avalanche. Thereafter a Form 101 was filed, followed by a Motion for Interlocutory Relief. Avalanche then accepted the case as compensable. However, while the case was denied, Shampo used her state

medical card (Medicaid) to pay the initial expenses for her treatment. Shampo was not required to pay a premium to secure the state medical card. It was provided to her by the State. Once the claim was accepted as compensable by Avalanche, it reimbursed Medicaid for the amount of medicals Medicaid actually paid, subject to the workers' compensation medical fee schedule, as required by statute. The initial Medicaid lien was settled with Avalanche reimbursing Medicaid \$9,805.64. Furthermore, Avalanche paid additional medical expenses on behalf of Shampo, with a total of \$14,079.70 in medical expenses being paid. Shampo has received medical bills from her medical care providers in the amount of \$40,720.70. However, the record is devoid of proof indicating the bills were actually paid by Shampo or that any sort of collection activities have been initiated by the providers against her seeking payment of the medical bills from her. The proof simply indicates the expenses are outstanding and nothing more. The parties further stipulated Shampo retained no PPD as a result of her injuries.

This case then proceeded to a decision. In that decision, the ALJ found *verbatim*:

ANALYSIS AND CONCLUSIONS

The plaintiff argues she was injured while working the defendant-employer on August 2, 2017. She filed an application with the Department of Workers' Claims October 23, 2017 and further filed her Form 104-106 on October 30, 2017 and provided proof of treatment as well as medical expense to the defendant-employer on November 9, 2017, December 18, 2017 and January 11, 2018. The plaintiff argues the defendant-employer accepted compensability of her claim November 15, 2017 after filing of a Motion for Interlocutory Relief. The plaintiff indicates that from August 2, 2017 through

November 15, 2017 the defendant-employer paid no medical expenses on her behalf which caused her to incur medical expenses of approximately \$40,720.53 for which she used her health insurance to pay.

The defendant-employer stipulated to coverage under the ACT and that an employment relationship existed at all relevant times herein. The defendant-employer argues the plaintiff sustained no permanent functional impairment under the AMA Guides, Fifth Edition as a result of the August 2, 2017 incident. The defendant-employer stipulated to an average weekly wage of \$400.00 and argues the plaintiff retains the physical capacity to perform regular work.

The ALJ has reviewed the medical evidence concerning the date of maximum medical improvement. Dr. DeGruccio felt the plaintiff reached maximum medical improvement on January 25, 2018 while Dr. Harston noted the plaintiff had minimal pain and had returned to regular activities by the time of his evaluation on January 25, 2018.

In the claim at hand, the only issue presently before the undersigned Administrative Law Judge is the plaintiff's entitlement to reasonable and necessary contested or unpaid medical expenses and to whom said medical expenses are to be paid.

MEDICAL BENEFITS

The plaintiff argues she incurred \$40,720.53 in work-related medical expenses resulting from the August 2, 2017 injury and that she continues to receive bills from medical providers regarding unpaid medical expenses. The plaintiff filed a letter from Equian on behalf of Aetna Better Health / Medicaid wherein it was noted as of October 20, 2018 Aetna KY had paid medical benefits on behalf of the plaintiff totaling \$9,799.49 from August 2, 2017 through January 5, 2018. The letter indicated the total charges were \$40,997.53 and that Medicaid had paid \$9,799.49 for which they were now seeking reimbursement. A letter dated September 5, 2019 from Equian notes a check was received January 22, 2019 in the amount of \$9,805.64

from State Farm and that their file was now considered closed.

KRS 342.020 provides that it is the responsibility of the defendant-employer to pay for the cure and relief from the effects of an injury or occupational disease, all medical, surgical, hospital treatment, including nursing, medical and surgical supplies and appliances as may be reasonably be required at the time of the injury and thereafter during disability. However, treatment which is shown to be unproductive or outside the type of treatment generally accepted by the medical profession is deemed unreasonable and non-compensable. This finding is made by the Administrative Law Judge based upon the facts and circumstances surrounding each case. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993).

The ALJ finds that the plaintiff will be entitled to an award of reasonable and necessary medical expenses for the treatment of the work related injury as found herein. The plaintiff will be awarded temporary total disability benefits as previously paid and any claim for permanent partial disability benefits will be dismissed.

The plaintiff is entitled to an award of medical expenses for her work related injury. However, these benefits are limited to the medical fee schedule. The plaintiff is seeking an award of the entire amount of the alleged medical expenses and wants same to be paid directly to her. However, the employer owes the medical expenses to the provider, or if the benefits have already been paid by a third party to reimburse that party to the extent of the medical fee schedule. The ALJ is unaware of any provision for the direct payment of medical expenses to the worker rather than to the medical provider.

The plaintiff relies upon Pierce v. Russell Sportswear Co., 586 S.W.2nd 301 (1979). The ALJ has reviewed same and simply does not believe that case supports the position of the plaintiff that the ALJ should order the direct payment of the entire medical expenses to the plaintiff. In Pierce, supra, the Court held: “the sole forum for enforcement of an award is the Circuit Court and the workman’s compensation board was without

jurisdiction to modify the original award of medical expenses.” The Court further elaborated “if the medical expenses have been previously paid by another source under circumstances which would give rise to subrogation under the collateral source rule, the employer may defend a motion to enforce the award by furnishing the Court with that proof.”

If there are outstanding medical bills and the defendant-employer refuses to pay same, then the plaintiff can properly file an enforcement action in Circuit Court. In this particular claim, the defendant is asserting they have reimbursed the third party. If this is inaccurate, and medical bills are still owed, then the proper forum is an enforcement action in Circuit Court. The ALJ is going to enter the usual award of medical expenses.

ORDER

The only issues before the Administrative Law Judge herein are the plaintiff’s entitlement to unpaid and/or contested medical expenses and to whom said expenses were to be paid. Based upon the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED AND ADJUDGED:**

1. Plaintiff, Tracy Shampo, shall recover from the Defendant, Avalanche Air, LLC, and/or its insurance carrier temporary total disability benefits at the rate of \$266.67 per week from August 2, 2017 through February 1, 2018 as have already been paid.

Shampo filed a Petition for Reconsideration, once again arguing Avalanche should be responsible for payment directly to her all medical expenses incurred for treatment of her work-related injuries and failure to do so creates a windfall to Avalanche. In response to Shampo’s petition, the ALJ ruled as follows:

The above claim comes before the Administrative Law Judge (ALJ) on Plaintiff’s Petition for Reconsideration. Having considered the Petition, response thereto and record herein, **IT IS CONSIDERED AND ORDERED**

the Plaintiff's Petition for Reconsideration is **OVERRULED**.

The Plaintiff is requesting direct payment of medical expenses to the claimant. The Plaintiff relies on Pierce vs. Russell Sportswear Corporation, 586 SW2d 310 (Ky. App. 1979). The ALJ would initially note this case was decided before the adoption of a medical fee schedule. Additionally in that case the court concluded: "if no subrogation rights or exclusion exist, the employer shall pay the claimant, irrespective of other coverage." In this case, the ALJ has made an award of medical benefits. It appears at least some of the medical benefits have been paid by a third party. The ALJ believes the obligation to pay medical benefits would be to the provider or reimbursement of the third party but not to exceed the medical fee schedule. If the third party payment to the medical provider was less than the medical fee schedule, then the ALJ believes the employer would owe the medical provider the difference not to exceed the medical fee schedule. If there are currently unpaid medical bills, then they should be appropriately submitted to the employer for a determination of whether they are work-related and reasonable and necessary for the treatment of the injury. If the medical expense are denied, then either the Plaintiff or the employer could file a medical dispute. To direct the employer to pay the claimant directly would be contrary to the way medical expenses are generally paid. If the ALJ understands the argument of the Plaintiff, it would require the employer to pay directly to the claimant, for example, the cost of a surgery. This would wreak havoc on the system in the opinion of the ALJ if the employer were required to pay, for example, \$50,000 for the cost of the back surgery directly to the claimant rather than to the hospital or medical provider.

For the above reasons, the Plaintiff's Petition for Reconsideration is overruled.

As the claimant in a workers' compensation proceeding, Shampo had the burden of proving each essential element of her claim. Snawder v. Stice, 576

S.W.2d 276 (Ky. App. 1979). Because she was unsuccessful in proving entitlement to the direct payment of medical expenses to her, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Compelling evidence” is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ’s decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

In rendering a decision, KRS 342.285 grants an ALJ, as fact-finder, the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party’s total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney’s Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). If the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal.

On questions of law, mixed questions of law and fact, the Board's standard of review is de novo. See Bowerman v. Black Equipment, 297 S.W.3d 858 (Ky. App. 2009).

This appeal concerns a question of law as the facts are not in dispute. Shampo suffered a work-related fracture to her fibula. Avalanche initially denied the claim. The initial medical expenses incurred for the treatment of the injury were paid by Medicare. The initial bill incurred for the treatment was in excess of \$49,000.00. Medicaid paid the bill at the reduced rate of \$9,805.64 to the medical providers. Avalanche reimbursed Medicare per the Kentucky workers' compensation fee schedule, and also payed additional medical bills presented to them per the Medical fee schedule, leaving an unpaid balance of \$40,720.53 to the medical providers. Shampo argues she is entitled to be paid directly by Avalanche the sum of \$40,720.53, the remaining balance due the medical providers. Avalanche argues it has paid all outstanding medical expenses to either the providers or in reimbursement to Medicaid per the Kentucky workers' compensation fees schedule, and are not responsible for any additional medical expenses.

KRS 342.020(4) states in pertinent part, "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 of services.”

KRS 342.035(2) provides in pertinent part:

No provider of medical services or treatment required by this chapter, its agent, servant, employee, assignee, employer, or independent contractor acting on behalf of any medical provider, shall knowingly collect, attempt to collect, coerce, or attempt to coerce, directly or indirectly, the payment of any charge, for services covered by a Workers’ Compensation insurance plan for treatment of a work –related injury or occupational disease, in excess of that provided by the schedule of fees, or cause the credit of any employee to be impaired by reason of the employee’s failure or refusal to pay the excess charge.

The above two statutory sections stand for the proposition that in a Kentucky workers’ compensation claim, the employer or their agents are responsible for the payment of medical expenses incurred directly to the provider of the services, or to a third party who made payments to the medical provider, for which the employer was ultimately liable. The statute does not provide the injured worker is entitled to payment of medical expenses incurred but excluded by the fee schedule. In addition, the statute does not allow for balance billing to the injured worker for medical expenses not covered by the fee schedule. In other words, the medical payment obligor must accept the payment from the employer per the fee schedule and cannot balance bill the injured worker or his health insurance carrier for the difference.

Shampo argues the medical expenses outstanding in the amount of \$40,720.53 should be paid directly to her in order to prevent Avalanche from

receiving a “windfall” based on their initial denial of this claim. Shampo cites Pierce v. Russell Sportswear Corp., supra, as supporting this argument.

In Pierce the Court reviewed an enforcement action from a Circuit Court of a Workers’ Compensation Board order. Pierce was awarded workers’ compensation benefits, including medical benefits. An enforcement action to compel payments of the benefits was filed with the Board, which overruled the motion. The Court held that the Board had no jurisdiction to enforce the award and that the proper forum for an enforcement action is Circuit Court. In Pierce, the Court recited KRS 342.020 as requiring the employer to make medical expense payments to the provider. In Pierce, the employer argued it was not responsible for medical expenses paid by another source. The Court held that the employer should not be required to pay the medical payments twice. If the medical expenses had been paid by another source under circumstances which would have given rise to subrogation under the collateral source rule, the employer may have been able to defend the enforcement action with that proof. The Court would have then reversed the matter and remanded it to the trial court with instructions consisting in part that if no subrogation rights exist, the employer shall pay the claimant, irrespective of coverage.

The Pierce decision fails to support Shampo’s arguments and in fact supports the ALJ’s determination in this case.

Shampo also cites the case of Speedway/Super America v. Elias, 285 S.W.3d 722 (Ky. 2009) as supporting her position. However, that reliance is misplaced as the Elias case concerned paying a party’s spouse for performing home

health services for her injured spouse, which is compensable per KRS 342.020. This case does not support the argument for payment of medical expenses incurred, but not paid, by a medical payment obligor should therefore be awarded to the injured worker.

Lastly, Shampo cites Baptist Healthcare Systems v. Miller, 177 S.W.3d 676 (Ky. 2005) as standing for the proposition that a plaintiff is entitled to submit proof of medical expenses incurred, versus the amount of medical expenses paid, as a result of their injuries. However, this case is clearly distinguishable from the case at bar. The Miller case concerns submission of proof of damages in a civil action in Circuit Court and not the presentation of proof in a workers' compensation claim. The amount of medical expenses incurred in calculating damages in a civil matter is not translatable to proof of damages in a workers' compensation claim. In a workers' compensation claim the "damages" are set by statute and only include, with rare to any exceptions, monetary compensation for temporary and permanent disability incurred as determined by use medical proof substantiating the disability and the use of impairment ratings calculated pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. No award of medical benefits, by way of monetary payment of said benefits directly to the injured worker, is set forth in our statutes or case law.

Therefore, the Opinion, Award, and Order of February 4, 2020, and the Order on Reconsideration dated February 20, 2020, rendered by the Hon. R. Roland Case, Administrative Law Judge are **AFFIRMED**.

ALL CONCUR.

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