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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000633-WC

ST. JOSEPH HOSPITAL — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-91-49311

PAMELA LITTLETON-GOODAN;
R. SCOTT BORDERS, ALJ; WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: St. Joseph Hospital appeals from an opinion of the Workers' Compensation Board (Board) insofar as the opinion upheld the Administrative Law Judge's (ALJ) consideration of a Department of Workers' Claims Form 107 medical report filed into the record in the original proceedings, but not specifically designated as part of the reopening record following St. Joseph's petition to reopen. St. Joseph

[1] Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

reopened the case to contest its liability for medical and prescription medication expenses alleged by its former employee, Pamela Littleton-Goodan, to be connected with a work-related injury while in the Hospital's employ. We affirm.

Littleton-Goodan originally brought a claim for occupational disability benefits alleging a work-related repetitive trauma injury (alleged bilateral carpal tunnel syndrome and thoracic outlet syndrome) that became manifest in May of 1991. On April 14, 1997, the parties entered into a settlement agreement for a lump-sum payment based upon a 5% disability rating. The settlement did not include a waiver of future medical expenses; however, it was noted within the agreement that the hospital disputed whether Littleton-Goodan's condition was work-related.

Littleton-Goodan subsequently incurred expenses for medical fees and drug expenses in connection with ongoing treatment provided by Dr. Erdagon Atasoy. Littleton-Gordon attributed the expenses to her 1991 injury, and sought payment from St. Joseph. St. Joseph contested payment responsibility, and filed a motion to reopen and medical fee dispute contending that Littleton-Goodan's carpal tunnel syndrome and thoracic outlet syndrome were not causally related to her work at the hospital. The matter was referred to the ALJ for further adjudication.

Following an evidentiary hearing, on October 2, 2006, the ALJ issued an opinion and award dismissing the hospital's challenge to the medical and drug expenses. The opinion stated, in relevant part, as follows:

> Dr. Atasoy is consistent throughout his records in contributing her bilateral thoracic outlet compression to her

employment as reflected by encircling yes in regard to whether the condition is work-related.

In addition to the medical records of Dr. Atasoy a Form 107 was submitted. The form was prepared by Dr. Atasoy on August 20, 1996. In this Form 107 Dr. Atasoy diagnoses the Plaintiff as having bilateral thoracic outlet compression, bilateral myofacitis, and right rotator cuff tendinitis. He opined within reasonable medical probability her complaints were felt to be related to the nature of the responsibilities of her work which he states requires repetitive motion and which in part arouses a pre-existing dormant non-disabling condition into disabling reality.

In fact, Dr. Atasoy at the time assessed her a 15% functional impairment rating to the body as a whole.

The Plaintiff submitted the medical report of Dr. Warren Breidenbach, hand surgeon. Dr. Breidenbach saw the Plaintiff on January 13, 2006, for a second opinion for Workers' Compensation regarding her complaints of bilateral minimal sensation in her hands, bilateral neck, chest, shoulder muscle pains, and headaches. He was advised she treated with Dr. Atasoy and have been treated with medication, multiple trigger point injections as well as undergoing scalene muscle injections of 1995.

However, due to her other health concerns no more injections have been performed. He was also advised that the Plaintiff felt her symptoms were secondary to repetitive motion at work which began around 1991 or 1992. He was also advised that the Plaintiff treated with Dr. Combs and underwent three surgical procedures.

Dr. Breidenbach thereafter performed a detailed physical examination on the Plaintiff and as a result of the same diagnosed her as having thoracic outlet compression. He felt she may benefit from scalenectomy for first rib resection but due to her multiple comorbidities he would advise caution with the surgery.

. . . .

> Therefore, after careful consideration of the expert and lay testimony herein the Administrative Law Judge finds persuasive the testimony of Dr. Atasoy and Dr. Breidenbach and finds the Plaintiff has met her burden of proving her bilateral carpal tunnel syndrome and right thoracic outlet syndrome are causally related to her work at St. Joseph Hospital. Therefore this issue is resolved in favor of the Plaintiff.

St. Joseph filed a petition for rehearing, which was denied. Thereafter, St. Joseph appealed to the Board. Before the Board, St. Joseph argued that the ALJ had erred in characterizing Dr. Breidenbach's report as supportive testimony of causation, and that the ALJ had erred in relying on the Form 107 of Dr. Atasoy because it had never been properly designated into the record.

On February 23, 2007, the Board issued an opinion wherein it concluded that the Form 107 was properly before the ALJ, but that the ALJ had, indeed, misunderstood Dr. Breidenbach's report, and remanded the cause to the ALJ for a decision based upon a correct understanding of the report. St. Joseph then petitioned for review to this court solely on the issue of whether Dr. Atasoy's Form 107 was properly designated into the record upon reopening for consideration by the ALJ.

Before us, St. Joseph contends that the Board erred in concluding that the Dr. Atasoy's Form 107 was properly introduced into the record for consideration by the ALJ in its decision of whether Littleton-Goodan's impairments are work-related. St. Joseph argues that because neither it, nor Littleton-Goodan, specifically designated the form for inclusion in the record, the ALJ's consideration of the document constituted the

consideration of evidence outside the record. St. Joseph further contends that it was, in effect, unfairly blind-sided by the ALJ's consideration of the form because it had no notice that there was such a form, and was unable therefore unable to mount a rebuttal to its conclusions. We disagree.

We begin our review by setting forth the Board's discussion of the issue:

> The hospital first argues Dr. Atasoy's Form 107 was never submitted into or designated as part of the record by Littleton-Goodan. The hospital submits that even though the Form 107 was part of the original claim, it was not identified or designated as evidence in the present medical fee dispute and that neither Littleton-Goodan nor the hospital designated the Form 107 as evidence on the hearing order. The hospital contends that since Littleton-Goodan submitted other evidence from Dr. Atasoy that pre-dated the Form 107, but did not submit the Form 107, Littleton-Goodan did not intend to rely on the Form 107 as evidence of causation. The hospital contends that ALJ's opinion reveals he thought Littleton-Goodan had resubmitted or designated the Form 107 in the present claim.
>
> Initially we must point out that Dr. Atasoy's Form 107 was an attachment to Littleton-Goodan's original Form 101, Application for Resolution of Injury Claim. 803 KAR 25:010 Section 8(4) provides:
>
> > (4) All medical reports filed with Forms 101, 102-0D, or 103 shall be admitted into evidence without further order if:
> >
> > (a) An objection is not filed prior to or with the filing of the Form 111; and
> >
> > (b) The medical reports comply with Section 10 of this administrative regulation.
>
> Here, the medical report of Dr. Atasoy was properly introduced into evidence in the original claim. On reopening,

it was the obligation of the hospital, not Littleton-Goodan, to make a designation of evidence. 808 KAR 25:010 Section 4(6)(a)6 requires a motion to reopen to be accompanied by "[a] designation of evidence from the original record specifically identifying the relevant items of proof which are to be considered as part of the record during reopening[.]" With that in mind, the regulation, at Section 4(6)(b)2, further requires:

> The burden of completeness of the record shall rest with the parties to include so much of the original record, up to and including the award or order on reopening, as is necessary to permit the administrative law judge to compare the relevant evidence that existed in the original record with all subsequent evidence submitted by the parties.

Here, Littleton-Goodan's original claim was filed in 1996 [sic]. At the time of the reopening, there was no longer a paper file; however, all pleadings and filings were preserved by electronic imaging. As a practical matter, once a motion to reopen is filed, the "Case Files" section of the Office of Workers' Claims must reconstruct a paper file for the ALJ if the original claim file no longer exists. This reconstructed file consists of : 1) the Form 101 and attachments; 2) any settlement agreement or opinion rendered by the ALJ; 3) an attorney's fee order, if any; 4) any orders on petition for reconsideration; 5) orders directing that additional parties either be added or dismissed; 6) amended claims; and, 7) final orders of the Board, Kentucky Court of Appeals, or Kentucky Supreme Court. Thus, Dr. Atasoy's Form 107, an attachment to the Form 101, was included in the reconstructed file and Littleton-Goodan was not required to designate that medical report in order for the ALJ to properly consider it in the context of comparing the evidence in the original claim to the evidence ion reopening. *See W.E. Caldwell Co. v. Borders*, 193 S.W.2d 453 (Ky. 1946). Since Dr. Atasoy's opinion was available to the ALJ and, because it was probative of the issue of causation and part of the record, there was no error in considering the Form 107. This is true even though Littleton-Goodan may have never intended to rely on that particular

piece of evidence. Compare *Copar, Inc. v. Rogers*, 127 S.W.3d 554 (Ky. 2003).

Our function in reviewing the Board's decision "is to correct the Board only where the [ ] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Moreover, while we ultimately review issues of law de novo, we afford deference to the Board's interpretation of the statutes and regulations it is charged with implementing. *Board of Trustees of Judicial Form Retirement System v. Attorney General of Com.,* 132 S.W.3d 770, 787 (Ky. 2003); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984).

We are persuaded that the Board has properly interpreted its regulations as placing the duty upon the moving party in a reopening case to designate all relevant evidence from the original proceedings into the reopening record. As noted by the Board, 808 KAR 25:010 Section 4(6)(a)6 requires a motion to reopen to be accompanied by "[a] designation of evidence from the original record specifically identifying the relevant items of proof which are to be considered as part of the record during reopening[.]" Moreover, 808 KAR 25:010 Section 4(6)(b)3 provides that "'[e]xcept for good cause shown at the time of the filing of the designation of evidence, a party shall not designate the entire record from the claim for which reopening is being sought."

The foregoing regulations plainly contemplate that the movant in a reopening case will sift through the record and, in good faith, designate those portions relevant to the issues raised upon rehearing. If causation is an issue, and a particular item of evidence in the original record relates to causation, including a Form 107 introduced into the original record by the nonmoving party, the duty is upon the movant to detect the evidence and designate it into the rehearing record. St. Joseph appears to suggest that it was entitled to pick and choose the evidence it wished placed into the reopening record, and then shift the burden to Littleton-Goodan to do her independent review and designate the evidence she wanted placed before the ALJ. We believe that interpretation is contrary to the plain language, and intent, of the regulations.

In any event, in determining whether an award should be reopened, the ALJ may look to the record made at a former hearing or hearings had before it with reference to same accident. *W. E. Caldwell Co. v. Borders*, 301 Ky. 843, 193 S.W.2d 453, 455 (Ky. 1946). The Form 107 was in the record of the original proceedings, and, it follows, the ALJ properly looked to this relevant item of evidence in reaching its decision.

St. Joseph, however, suggests that it was, in effect, blind-sided by the ALJ's reliance upon the Form 107. However, as previously noted, St. Joseph had a duty to have examined the complete original record itself in connection with refiling its reopening motion, and compliance with this duty would have disclosed the form. Moreover, it was a party to the original proceedings and, as such, would be charged with at least constructive notice of the contents of the original litigation file. In short, with minimum

diligence, St. Joseph could have made itself aware of the Form 107, and if it disagreed with the conclusions contained therein, it could have preemptively challenged the evidence, thereby assuring that its position on the verity of the report was placed before the ALJ.

For the foregoing reasons the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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