

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001011-WC

FERNANDO LUPIAN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-66556

CINTAS UNIFORM PLANT;
HONORABLE JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MOORE, AND WINE, JUDGES.

DIXON, JUDGE: Fernando Lupian seeks review of an April 20, 2007, decision of the Workers' Compensation Board reversing and remanding an Administrative Law Judge's (ALJ) award on reopening. We affirm.

Lupian, age 46, has a twelfth grade education and completed two years of college in Mexico. He immigrated to Louisville, Kentucky, from Mexico in 1999.

Lupian was injured on May 3, 2001, during the course of his employment with Cintas Uniform Plant (“Cintas”). Lupian was pinned by a large container and suffered back, shoulder, and abdominal pain. Lupian also developed anxiety and depression as a result of the accident. Following a formal hearing, the ALJ determined Lupian's shoulder and abdominal complaints were not supported by the evidence. The ALJ awarded permanent partial disability benefits for Lupian's back injury and psychological condition. Cintas appealed the ALJ's finding that Lupian suffered a psychological injury. The Board affirmed the ALJ's decision, and the award became final on May 28, 2004.

Lupian filed a motion to reopen his claim on November 30, 2005. Lupian alleged Cintas failed to pay medical expenses for his ongoing treatment and prescription medication. A formal hearing was held on May 23, 2006, to resolve the contested medical expenses. The ALJ issued an opinion and award on July 17, 2006, finding the contested expenses compensable, excluding only Lupian's diabetes medication. Cintas appealed to the Board.

Cintas contended the medical expenses were non-compensable because the medical bills were not timely submitted, and Lupian sought treatment with physicians other than his Form 113 designated physician. Cintas also argued that Lupian could not be reimbursed for out of pocket expenses because the receipts were not timely filed and the claims were not properly submitted on a Form 114. In a lengthy opinion, the Board found the expenses non-compensable and reversed and remanded the ALJ's award.

Lupian filed this petition for review of the Board's decision.

When this Court reviews a decision of the Board, our function “is to correct the Board only where [we] perceive[] 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). In the case at bar, the Board thoroughly reviewed the parties' arguments and concluded the ALJ erred in finding the medical expenses compensable. In his petition for review, Lupian argues the evidence clearly supported the ALJ's findings. We disagree.

Lupian submitted unpaid medical bills to Cintas's attorney on November 15, 2004, several months after the Board affirmed the ALJ's initial award. KRS 342.020(1) clearly states: “The provider of medical services shall submit the statement for services within forty-five (45) days of the day treatment is initiated and every forty-five (45) days thereafter, if appropriate, as long as medical services are rendered.” Here, the evidence showed that Lupian, and not his medical provider, presented several unpaid bills to Cintas long after the treatment had actually been rendered. Lupian argues the forty-five day window was tolled during the pendency of Cintas's appeal to the Board and that the bills were timely presented after the Board's decision became final. However, Lupian offers no authority to support his position, and we are not persuaded by his reasoning. Likewise, 803 KAR 25:096 § 6 plainly states, “[i]f the medical services provider fails to submit a statement for services as required by KRS 342.020(1) without reasonable grounds, the medical bills shall not be compensable.” In this case, as the bills were not

submitted to Cintas by Lupian's medical provider within forty-five days of treatment, as required by the statute, we agree with the Board that the bills were non-compensable.

Similar logic applies to the Board's finding that Lupian's out of pocket expenses were non-compensable. 803 KAR 25:096 § 11 states:

(1) If an individual who is not a physician or medical provider provides compensable services for the cure or relief of a work injury or occupational disease, including home nursing services, the individual shall submit a fully completed Form 114 to the employer or medical payment obligor within sixty (60) days of the date the service is initiated and every sixty (60) days thereafter, if appropriate, for so long as the services are rendered.

(2) Expenses incurred by an employee for access to compensable medical treatment for a work injury or occupational disease, including reasonable travel expenses, out-of-pocket payment for prescription medication, and similar items shall be submitted to the employer or its medical payment obligor within sixty (60) days of incurring of the expense. A request for payment shall be made on a Form 114.

(3) Failure to timely submit the Form 114, without reasonable grounds, may result in a finding that the expenses are not compensable.

The evidence showed Lupian did not seek reimbursement for his out of pocket expenses until well-beyond the sixty day window allowed by the regulation.

Notwithstanding his delay in filing, Lupian also failed to submit a Form 114 as required by 803 KAR 25:096 § 11(3). Consequently, we agree with the Board that Lupian's out of pocket expenses were non-compensable.

We conclude that Lupian failed to comply with the applicable statute and regulation in this matter, and he offered no reasonable grounds to excuse his conduct. As we have determined the Board properly reversed the ALJ's award, we need not address Lupian's alternative argument regarding his Form 113 designated physician.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE

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