2024 KY Wrk. Comp. LEXIS 38

KY Workers' Compensation Decisions

June 28, 2024

Claim No. 201872879

Reporter
2024 KY Wrk. Comp. LEXIS 38 *

Roy ***Graham***, Petitioner

v.

Coca-Cola Consolidated Inc., Dr. Matthew Furman, Dr. Stephen Bennett, Hon. Monica Rice-Smith, Administrative Law Judge, and Hon. John B. Coleman, Administrative Law Judge, Respondents

Core Terms

modify, wheelchair, prescribe, reimbursement, bladder, stimulator, reconsider, carrier, workers' compensation, travel expenses, contest, pain, administrative law judge, surgery, diaper, implant, reopen, travel, fee schedule, office visit, prescribe, notice, leg, complicate, mediate, adult, gone, incontinence, urologist, exhaust

Opinion

APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE [*1]

OPINION

AFFIRMING

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

MILLER, Member. Roy ***Graham*** ("***Graham***") appeals from the December 31, 2023 Medical Dispute Opinion and Order rendered by Hon. Monica Rice-Smith, Administrative Law Judge ("ALJ Rice-Smith") and the February 28, 2024 Order on Petition for Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ Coleman"). The claim had been reassigned by Order of Hon. Douglas Gott, Chief Administrative Law Judge ("CALJ") on February 27, 2024.

This appeal presents fundamental difficulties inherent in the worker's compensation system when injured workers move from Kentucky to distant places, yet the dictates of KRS 342.020 and the Medical Fee Schedule must be respected. ***Coca-Cola*** Consolidated Inc. ("***Coca-Cola***") filed a post-award reopening/medical dispute contesting several Form 114 reimbursement requests, and a supplemental dispute regarding Form 114 travel mileage requests asserting the request was not compensable.

Graham began working in June 2018 for ***Coca-Cola*** in Lexington, Kentucky as a heavy equipment mechanic. He suffered a significant low back injury on July 19, 2018 while lifting **[*2]** a transmission. ***Graham*** underwent surgery, a L4-L5 laminectomy and discectomy on September 25, 2018. A second surgery occurred on September 26, 2018

for a hematoma performed by Dr. Steven Bailey. Dr. Stephen Bennett in Cincinnati, Ohio implanted a bladder stimulator on February 21, 2019. All surgeries were paid for by the insurance carrier.

Hon. Stephanie Kinney, Administrative Law Judge, was assigned to the original claim, and found ***Graham*** was permanently totally disabled in her August 28, 2020 Opinion, Award, and Order, which also awarded medical benefits pursuant to KRS 342.020. ***Graham*** moved to Temple, Texas in October 2020. Difficulties ensued in finding a medical provider willing to accept the Kentucky Fee Schedule and sign a Form 113. Other complications also arose, including needing a new bladder stimulator implanted, the need for medical equipment and supplies, and home modifications. ***Coca-Cola***'s September 8, 2022 reopening/medical dispute specifically contested reimbursement for two home modifications, a power wheelchair, and an office visit with Dr. Matthew Furman in Temple, Texas on November 3, 2020. Dr. Furman would not agree to be governed by the Kentucky system and was paid through **[*3]** ***Graham***'s Medicare insurance and co-pays. A supplemental dispute was filed concerning proposed travel expenses to Cincinnati, Ohio to see Dr. Bennett, the urologist who had performed the surgery to implant a stimulator for bladder control in 2019. Finally, an issue was raised by ***Graham*** regarding the utilization review ("UR") denial for adult Depend diapers, which he deemed unconscionable.

Evidence was filed and the claim was referred to mediation. It was settled at mediation per a Notice of Settlement at Mediation filed by CALJ Douglas Gott on November 27, 2023. The issues should have been resolved at that point, but the parties ultimately did not agree on the terms negotiated and it was re-submitted for a decision on the merits.

In her Medical Dispute Opinion and Order, ALJ Rice-Smith reviewed the evidence in detail and found compensable the Form 114 requesting reimbursement of $ 474.00 for the office visit with Dr. Furman and for payment of the wheelchair. ALJ Rice-Smith also found compensable a request by Dr. Bennett for Depends adult diapers and believed the physician's UR denial was absurd because the medical records noted the bladder stimulator was failing.

ALJ Rice-Smith **[*4]** sustained ***Coca-Cola***'s contest regarding reimbursement of 2021 and 2022 home modifications finding them non-compensable. She did not find the Form 114 requests sufficient, contrasting it with the wheelchair request. The home modification expenses were never discussed or submitted to the insurance carrier until after completion of the work, hence the statutory UR procedure could not be performed.

ALJ Rice-Smith denied travel expenses in the amount of $ 17,000 and $ 59,500 to see Dr. Bennett as being unreasonable and unnecessary. During the pendency of this dispute, the parties found a physician in Jolley, Texas, to render urologic care. ALJ Rice-Smith noted the parties had found a physician at Urology Austin who was willing to evaluate ***Graham***'s bladder stimulator and accept payment directly from the workers' compensation carrier outside the fee schedule.

Finally, ***Graham***'s attorney requested costs and attorney fees per KRS 342.310 and 803 KAR 25:012 related to the unreasonable denial of the diapers and other denials or delays in ***Graham*** obtaining medications. This request for sanctions was denied. ALJ Rice-Smith found both parties "have skirted around the rules." Throughout these proceedings ***Graham*** continued **[*5]** to receive his weekly permanent total disability checks.

Graham filed a Petition for Reconsideration, and the claim was reassigned to ALJ Coleman. He denied the Petition, finding it was a re-argument of the evidence which had already been considered by ALJ Rice-Smith. ALJ Coleman noted "a thorough review of the decision reveals ALJ Rice-Smith went through each issue in detail stating the reasons for the compensability of each contested item."

Graham now appeals, essentially arguing the same points as in the Petition for Reconsideration. Specifically, ***Graham*** argues ALJ Rice-Smith erred in failing to find the home modifications and travel expenses compensable. He also argues he is entitled to a decision on whether ***Coca-Cola*** wrongfully denied adult diapers without exhausting UR. ***Graham*** contends ALJ Rice-Smith erred by failing to address the underlying issues supporting his request for costs. For the following reasons, we affirm.

BACKGROUND

Graham was born in 1968 and has a limited education. He has been a diesel mechanic all his life. ***Graham*** testified by deposition on July 31, 2023 and at the hearing on September 18, 2023.

Graham began working for ***Coca-Cola*** in Lexington, **[*6]** Kentucky in June 2018 as a heavy equipment mechanic. His job duties included repairing or rebuilding trucks and equipment, and frequent heavy lifting of approximately 80-90 pounds. On July 19, 2018, ***Graham*** was assisting a co-worker in placing a new clutch system into a semi-truck on a lift. While lifting the transmission, he felt a pop in his low back, experienced sudden urination, and fell to the ground. ***Graham*** was taken to the University of Kentucky Healthcare emergency room for low back pain radiating to his left leg.

His low back injury necessitated L4-L5 disc surgery and subsequent surgery the next day performed by Dr. Bailey. ***Graham*** continues to have pain in his back and burning pain in his left leg. Further, he continues to have severe urinary incontinence, radiating low back pain, and nerve pain in his groin. He was also diagnosed with paraplegia causing him to need a wheelchair for mobility.

A stimulator for bladder control was implanted by Dr. Bennett in Cincinnati, Ohio in 2019. Dr. Maria Burton of The Christ Hospital Physicians in Northern Kentucky served as his Form 113 designated physician.

In October 2020, ***Graham*** moved to Texas where his sisters and nephews **[*7]** live. He asked Dr. Furman in Temple, Texas to complete a Form 113 and act as his designated physician. Dr. Furman refused to complete the form and would not accept Kentucky workers' compensation insurance. ***Graham*** paid out-of-pocket for his first visit with Dr. Furman on November 3, 2020. He did not receive reimbursement for this $ 474.00 office visit and paid it himself. A Form 114 for reimbursement was filed on February 3, 2021. He continues to treat with Dr. Furman, submits the bills to his Medicare plan, and pays out-of-pocket.

Gallagher Bassett, the insurer for ***Coca-Cola*** sent a nurse to Temple, Texas to assist ***Graham*** in finding a physician willing to accept Kentucky workers' compensation insurance but was unsuccessful.

Graham testified regarding his home modifications. The first modification was prescribed by Dr. Furman on June 4, 2021 and completed in August 2021. A steel ramp was built to go to the sunken living room. Bathroom work was performed as well. The invoice totaled $ 19,548.58 and was paid for by ***Graham***'s family. He did not inform the carrier or send any documentation prior to having the work done. ***Graham*** has not been reimbursed by Gallagher Bassett following the **[*8]** reimbursement request, which was submitted via a Form 114 dated August 5, 2021.

A year later, in July 2022, the living room was filled with concrete, and a sidewalk and wheelchair ramp were built outside. The previous steel ramp was removed. Tile work also was performed. Shortly thereafter, a handicap accessible tub was needed to get ice to keep ***Graham***'s swelling down. The cost for the tub was $ 2,200 paid by ***Graham*** on August 1, 2022. The second modifications totaled $ 14,150.00. ***Graham*** sent a request for reimbursement to the carrier, again after the work had been performed with no prior notice.

Lastly, ***Graham*** sent a prescription for a power wheelchair from Dr. Furman prescribed in August 2021 to Gallagher Bassett. ***Graham*** was trying to get Gallagher Bassett to pay for it and, finally, in February 2022, he purchased it himself. The receipt reflects a cost of $ 2,899. He has not been reimbursed.

There was further testimony regarding the need to see a urologist, and when no doctor could be found in Texas, ***Graham*** requested to see Dr. Bennett in Ohio. This led to the dispute regarding travel expenses.

At the final hearing, ***Graham*** discussed the initial injury and the diagnosis **[*9]** of a spinal crush injury. He had two spine surgeries and the bladder implant. Dr. Burton, his designated physician, referred him to Dr. Bennett to perform the implant surgery. Since moving to Texas, ***Graham*** treats with Dr. Furman who does not accept Kentucky workers' compensation insurance. ***Graham*** described in detail why it was necessary for him to have home modifications and the wheelchair.

Graham testified about his pain, the loss of bladder control, and the need for Depends diapers which he changes often. He occasionally had blood in his urine. On September 15, 2022, Dr. Bennett signed a new Form 113 as the need for a new bladder stimulator was pressing.

On cross-examination by ***Coca-Cola***, ***Graham*** did not know if Dr. Furman provided a recommendation for specific home modifications. He believed Dr. Furman came to his home, but a nephew was present, not ***Graham***.

Graham gave the following testimony regarding his condition:

Q. Okay. Now after those two surgeries, did you experience any relief of your symptoms?

A. No, not for the most part. I mean, it was better that -- no, I -- it was better, but not to the point to where it's ever gone, by any means, and, you know, the burning **[*10]** down the leg and just numerous things. And after this, you know, not -- after the surgery, it was just the beginning of the problems as far as, you know, of course the older I get.

Q. Okay. Has your low back pain gone away at any point since July 19th of 2018?

A. No, not at all.

Q. Has the burning pain down your left leg gone away at any time since then?

A. No. It's from the tips of my toes to the top of my rear end cheek.

Q. Okay. And what about the groin pain, has that gone away at all?

A. No. It goes all the way up and -- and they had done this test and stuff on it. It goes all the way up into my testicles.

Q. Okay. So you've dealt with the testicle pain since the injury date?

A. Oh, yes.

Q. Okay. What about the urinary incontinence, has that gotten any better or gone away at all since the injury?

A. Well, no, it hasn't gone away, but they had worked on me, but no, it hasn't gone away.

...

Q. So when everything's working normally and you have your medications, what kind of symptoms are you having then?

A. Just a -- a lot of pain. I have to push my myself, like he showed me, to even get enough out to to go, or sometimes it will just do its own **[*11]** thing and it'll be -- my diaper will be filling up and running down the leg, the -- my right leg, and that's when I know it because I can fell it running down my right leg.

Q. I see. So even when you receive your medications, your bladder still loses control without you knowing it?

A. Oh, yeah. I mean, this machine is -- is -- yeah, it -- it's

Q. How often -

A. -- not doing what it used to do.

Q. How often do you lose control like that?

A. Oh, I couldn't count. I mean, just -- I don't get a warning. I mean, it's a minimal of 15 to 18 times a day, and that's not counting when I go to bed and try to sleep.

Q. Okay. And that's on a good day when you have your medications, correct?

A. That is correct.

Q. And then if I understand you correctly, on a bad day, when you don't have your medications, you urinate blood and it gets worse?

A. I just lay in bed, yes, and have somebody empty my bed pan for me. I've even went as far as using a plastic tub to just be able to try to roll over enough to make it go in there. But yeah.

Dr. Furman was joined as a party to the medical dispute. He submitted a medical report dated June 7, 2023, stating he would be willing **[*12]** to provide ***Graham*** with consultation and evaluation at his home. He also indicated he prescribed medication for neuropathic pain in the bilateral extremities. He indicated treatment of the bladder condition needed to be done by the surgeon familiar with his condition.

The November 3, 2020, office record from Dr. Furman was filed along with the attached bill of $ 474.00. Two prescriptions issued by Dr. Furman for a wheelchair were submitted. The first was a letter dated June 4, 2021, stating "To Whom It may concern, Mr. ***Graham*** requires a wheelchair due to being paraplegia. If you have any further questions, feel free to contact me at ..." Dr. Furman again prescribed the need for the wheelchair on August 3, 2021: "Wheelchair with outdoor tires. Dx: Paraplegia G82.20." ***Graham*** testified he needed a new wheelchair because access to his home was limited with a manual wheelchair. He paid $ 2,899 out of pocket for the power wheelchair for outdoors and did not receive reimbursement.

Graham testified to using approximately eight cases of Depends a month, even with his urinary medications. He loses control of his bladder without knowing until he feels urine running down his leg. On bad days, **[*13]** ***Graham*** is bedridden and someone else has to empty his bed pan.

Graham filed the UR Notice of Denial for adult Depends, eight cases per month, dated April 13, 2023, requested by Dr. Bennett. The UR physician wrote as follows:

> The claimant had been followed for bladder issues and is status post bladder stimulator implant. The last evaluation of the claimant did not discuss incontinence issues. No other current information was provided to support the need for adult diapers without additional supporting clinical information, certification is not recommended.

A request for Reconsideration was filed by ***Graham***'s attorney on May 4, 2023 with no other documentation. The reopening/medical dispute litigation had already commenced.

Dr. Bennett signed a Form 113 on September 15, 2022. Dr. Bennett implanted the bladder stimulator in 2019 in Cincinnati but had not seen ***Graham*** in person since he moved to Texas. A telehealth appointment occurred in October 2022 for neurogenic bladder and urinary incontinence. A March 15, 2023 request by Dr. Bennett notes the stimulator might require replacement. An April 10, 2023 prescription states ***Graham*** needed on-ground travel transport with onboard **[*14]** toilet and appropriate personnel. A letter from Dr. Bennett dated the same day states in pertinent part, *verbatim*:

> Patient currently has a Sacral Nerve Stimulation (SNS) implant to treat his urinary incontinence. This device was inserted in February of 2019 and has worked very well for him up until the end of last year. At this time the device keeps shutting off and per device recommendations the battery life is failing. This device will need to be removed and replace.
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> ...
>
> Mr. ***Graham***'s condition is complicated and can change rapidly. He should be assessed in person at least twice a year, sometimes possibly more.
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> ...
>
> I do feel Mr. ***Graham*** receiving treatment near his home would be more medically beneficial for him. The complexity of his condition requires more than simply a visit to Cincinnati every year. Given his potential for complications, he should be under the care of someone that render assistance in a moments notice.

In a subsequent filing, Dr. Bennett did not have an opinion on the issue of travel expenses as it did not involve the reasonableness or necessity of the treatment.

Coca-Cola filed a Motion to Reopen/Medical Dispute on September 8, 2022. The services **[*15]** being disputed were the November 3, 2020 office visit with Dr. Furman; the September 8, 2021 home modifications; the wheelchair prescribed on March 11, 2022; and the August 8, 2022 additional home modifications. A supplemental medical dispute was filed by ***Coca-Cola*** contesting whether travel costs of $ 17,000 and $ 59,500 to Cincinnati are reasonable costs for access to medical treatment.

Graham moved to dismiss the reopening based on failure to have a medical doctor address reasonableness and necessity and that UR had not occurred. ***Coca-Cola*** countered that the expenses were incurred without approval or involvement of the carrier, and ***Graham*** had not followed procedures to allow for UR per 803 KAR 25:190 Sec. 6(1)(a). The reopening/medical dispute was sustained by Order of ALJ Rice-Smith on March 31, 2023.

In his October 27, 2023 Brief, ***Graham*** requested ALJ Rice-Smith order ***Coca-Cola*** to approve treatment with Dr. Bennett regarding the bladder stimulator and approve travel expenses in the amount of $ 17,000 and $ 59,500.

Thereafter, in a Motion to Resubmit Claim for Submission following the mediation, ***Graham*** acknowledged the parties worked together in finding a physician who could provide **[*16]** the bladder stimulator surgery closer to ***Graham***'s location. Dr. Bryan Kansas at Urology Austin was willing to evaluate ***Graham***'s bladder simulator and he accepted payment from a workers' compensation carrier. ALJ Rice-Smith ruled on the medical dispute in her December 31, 2023 Medical Dispute Opinion and Order finding the request for reimbursement of the wheelchair, the office visit with Dr. Furman, and the request for Depends adult diapers compensable. Those findings have not been appealed.

The ALJ found the request for reimbursement of the 2021 and 2022 home modifications and the travel expenses of $ 17,000 and $ 59,500 non-compensable.

The ALJ made the following findings as set forth *verbatim*:

> The ALJ finds the Form 114 requesting reimbursement for the wheelchair compensable. Although ***Graham*** submitted the wheelchair prescription instead of the physician, the prescription is a request for preauthorization. As evidenced by the emails ***Graham*** submitted, he notified ***Coca Cola*** of the requested treatment prior to purchasing the wheelchair providing ***Coca Cola*** the opportunity to contested or deny the treatment. Initially, Dr. Furman prescribed the wheelchair in a To Whom It May Concern letter **[*17]** dated June 4, 2021. ***Graham***'s attorney's email dated July 26, 2021, indicated that prescription was transmitted to ***Coca Cola***. On August 3, 2021, Dr. Furman wrote another prescription for the wheelchair, which was transmitted to ***Coca Cola*** via email on September 8, 2021. That email indicated that ***Graham***'s current wheelchair was inoperable as it had a broken wheel bearing. With his other wheelchair inoperable, ***Graham*** purchased a wheelchair on February 17, 2022 and requested reimbursement via Form 114 on March 11, 2022. ***Coca Cola*** did not initiate a utilization review. In addition to failing to initiate utilization review, ***Coca Cola*** did not file a timely medical dispute to the Form 114. Under Langer, the Form 114 constituted a sufficient statement for services, which was not timely disputed. The Court in Langer noted that to reimburse the employee based on a Form 114 the receipts for payment must show a connection between those payments and the compensable treatment. ***Graham***'s Form 114 included a receipt for the wheelchair showing payment in full and prescriptions for the wheelchair. Those prescriptions indicate ***Graham***'s need for the wheelchair is due to his paraplegia, establishing a connection **[*18]** between the payment and the compensable treatment. ***Coca Cola*** did not file a medical fee dispute contesting the Form 114 until September 8, 2022, well outside the 30 days required. Based on the foregoing, the ALJ finds the Form 114 requesting reimbursement for the wheelchair compensable.
>
> The ALJ finds the home modifications in 2021 and 2022 not compensable. Unlike with the wheelchair, ***Graham***'s Form 114s are not sufficient statements of services, and he did not allow ***Coca Cola*** the opportunity to follow the statutory utilization review process. Although ***Graham***'s Form 114s contain receipts for the modification services performed and a prescription for the modifications, the prescription does not provide a connection between those payments and the compensable treatment. The June 4, 2021 prescription of Dr.

Furman does not specify any of the treatment contained in the receipts. His prescription is very general and does not prescribe or indicated what accommodations ***Graham*** needed at his home. Further, there was no updated prescription for the 2022 modifications. The same June 4, 2021 prescription was submitted to request reimbursement for the additional modifications in 2022. Is it expected **[*19]** a general blanket prescription for home modifications provided in 2021 can be used indefinitely for home modifications of any kind? Moreover, there is no evidence ***Graham*** submitted the June 4, 2021 prescription to ***Coca Cola*** prior to completing the home modifications. The evidence indicates ***Coca Cola*** was unaware of the need for home modification until submission of the Form 114 on September 8, 2021, after the modifications had been performed on August 4, 2021. Again, there is no evidence that ***Coca Cola*** was aware of the 2022 modifications until submission of the Form 114 on August 8, 2022, after the modifications had been performed. The Form 114s do not constitute sufficient statement of services and ***Graham*** deprived ***Coca Cola*** of the opportunity to use utilization review or even inquire further as to what specific modifications were being requested. The ALJ does not understand why ***Graham*** repeatedly submitted the prescription for the wheelchair for authorization but choose not to attempt authorization for much more costly home modifications. Based on the foregoing, the Form 114s for the 2021 and 2022 home modifications are not compensable.

...

The ALJ finds the travel expenses of **[*20]** $ 17,000 and $ 59,000 unreasonable and unnecessary medical expenses. Again, the circumstances of this case are difficulty, but the ALJ believes both parties have failed to exercise reason and compassion. Dr. Bennett's opinion regarding the travel to Ohio seems contradictory, but ultimately the ALJ believes his opinion supports a finding that the travel expenses are unreasonable and unnecessary, particularly in light of the fact that the motion to resubmit indicates the parties have determined that Dr. Bryan Kansas at Urology Austin, Jollyville Office is willing to evaluate ***Graham***'s bladder stimulator and accept payment directly from the workers' compensation carrier outside the fee schedule.

Despite Dr. Bennett's request for ground travel with onboard toilet and appropriate personnel, his opinion indicates that it is in ***Graham***'s best interest to obtain treatment closer to his home. Dr. Bennett opined it is more medically beneficial for ***Graham*** to receive treatment closer to his home. He advised that ***Graham***'s condition is complicated and can change rapidly. He will require more than simply a visit to Cincinnati once a year. ***Graham*** should be assessed in person at least twice a year, **[*21]** sometimes possibly more. Further, his sacral nerve stimulator will require change periodically due to the life of the battery. His condition regarding his bladder will evolve over time, requiring repeated assessments including tests such as urodynamics testing, renal ultrasounds, frequent urine cultures and other tests as deemed necessary. Given ***Graham***'s potential for complications he should be under the care of someone that can render assistance in a moment's notice. Emergency room treatment is not adequate nor good care or someone with his complicated condition. Ultimately, Dr. Bennett advised he could remain available to reassure ***Graham*** regarding treatment plans and options, but the majority of his treatment should happen locally. He also advised he would send a referral to a willing local provider.

In addition to the opinion of Dr. Bennett, as mentioned earlier it appears ***Coca Cola*** has agreed to treatment with Dr. Bryan Kansas paying outside the fee schedule. The records also document ***Coca Cola*** previously allowed urology treatment with Dr. Lucas.

Based on the foregoing, the ALJ finds the $ 17,000 and $ 59,500 travel unreasonable at this time since there is a local provider **[*22]** available. Although the ALJ understands this case is complicated by ***Graham***'s residence in Texas, ***Graham*** is entitled to his medical treatment and if some arrangements for local treatment are not made, these travel amounts may be reasonable in the future.

...***Graham*** preserved the issue of ***Coca- Cola*** 's failure to provide medical benefits under KRS 342. The evidence is undisputed that since moving to Texas ***Graham***'s medications have been delayed on numerous occasions resulting in him suffering greatly. This is evident by ***Graham***'s testimony and the email documentation of medical denials. The ALJ having found the failure to file a Form 113 reasonable, the

treatment of Dr. Furman should be paid until a doctor can be found who will accept Kentucky's workers' compensation or other arrangements for treatment can be made.

Graham has requested cost and attorney fees under 803 KAR 25:012 and KRS 342.310. 803 KAR 25:012 allows sanctions to be assessed if a movant files a medical dispute prior to exhaustion of the required utilization review or medical bill audit procedure. Further, KRS 342.310 allows costs to be assessed if the ALJ determines proceedings have been brought, prosecuted, or defended without reasonable grounds. The ALJ does not **[*23]** assess any costs or fees as both parties have been found to have skirted around the rules. Although the ALJ found ***Coca Cola*** failed to initiate utilization review with regard to the wheelchair, the ALJ also found ***Graham*** denied ***Coca Cola*** the ability to use utilization review with regard to home modifications.

Graham filed a Petition for Reconsideration, which was denied by the CALJ. Subsequently, the claim was reassigned to ALJ Coleman. After a Response to the Petition was filed, ALJ Coleman overruled the Petition, deeming it a reargument of the issues. He stated *verbatim*: "A thorough review of the decision reveals the ALJ went through each issue in detail stating the reasons for deciding the compensability of each contested item."

This appeal follows. ***Graham*** argues ALJ Rice-Smith applied an incorrect legal standard when ruling on the compensability of home modification reimbursement requests; she erred regarding compensability of travel expenses; and she erred in not awarding sanctions, specifically related to the exhaustion of UR regarding the denial of adult diapers.

ANALYSIS

In a post-award medical fee dispute, the burden of proof and risk of non-persuasion with respect **[*24]** to the reasonableness and necessity of medical treatment falls on the employer. National Pizza Company ***v***. Curry, 802 S.W.2d 949 (Ky. App. 1991). Similarly, the employer has the burden of proving any allegation that the treatment in question is not work-related. The Kentucky Supreme Court in C & T of Hazard ***v***. Stollings, 2012-SC-000834-WC, rendered October 24, 2013, Designated Not To Be Published, explained as follows:

> The party responsible for paying post-award medical expenses has the burden of contesting a particular expense by filing a timely motion to reopen and proving it to be non-compensable. Crawford & Co. ***v***. Wright, 284 S.W.3d 136, 140 (Ky. 2009) (citing Mitee Enterprises ***v***. Yates, 865 S.W.2d 654 (Ky. 1993) (holding that the burden of contesting a post-award medical expense in a timely manner and proving that it is non-compensable is on the employer)). As stated in Larson's Workers' Compensation Law, § 131.03[3][c], "the burden of proof of showing a change in condition is normally on the party, whether claimant or employer, asserting the change ...." The burden is placed on the party moving to reopen because it is that party who is attempting to overturn a final award of workers' compensation and thus must present facts and reasons to support that party's position. It is not the responsibility of the party who is defending the original award to make the case for the party attacking it. Instead, the party who **[*25]** is defending the original award must only present evidence to rebut the other party's arguments.

In Conifer Health ***v***. Frieda Singleton, 2020-SC-0609-WC, rendered September 30, 2021, Designated Not To Be Published, the Supreme Court held as follows: "The burden in a medical fee dispute is upon the employer to show that the expenses were unreasonable, unnecessary, and unrelated to the work injury." Slip Op. at 14. In this claim, there is no contest whether the treatment is work-related. The contest revolves around the reasonableness of the costs of obtaining proposed treatment and appliances and supplies.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made 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). 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 other conclusions or

reasonable inferences that otherwise could have been drawn from the evidence. Whittaker ***v***. Rowland, 998 S.W.2d 479 (Ky. 1999).

KRS 342.020 states:

> (1) In addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects **[*26]** 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 length of time set forth in this section, or as may be required for the cure and treatment of an occupational disease.
>
> ...
>
> (4) In the absence of designation of a managed health care system by the employer, the employee may select medical providers to treat his injury or occupational disease. Even if the employer has designated a managed health care system, the injured employee may elect to continue treating with a physician who provided emergency medical care or treatment to the employee. 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 for services. The commissioner shall promulgate administrative regulations establishing conditions under which the thirty (30) day period for payment may be tolled. The provider of medical services shall submit the statement for services within **[*27]** 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. Except as provided in subsection (7) of this section, in no event shall a medical fee exceed the limitations of an adopted medical fee schedule or other limitations contained in KRS 342.035, whichever is lower. The commissioner may promulgate administrative regulations establishing the form and content of a statement for services and procedures by which disputes relative to the necessity, effectiveness, frequency, and cost of services may be resolved.

Graham contends ALJ Rice-Smith applied an incorrect legal standard, arguing the terms "as may reasonably be required" in KRS 342.020 refers only to the treatment and never the cost of the treatment or equipment or supplies. ***Graham*** argues there is no legal authority requiring notice be given to the medical payment obligor prior to tendering a request for reimbursement through a Form 114. ***Graham*** posits the prescription by Dr. Furman, along with the receipt and photos of the home modification work are sufficient.

The prescription by Dr. Furman dated June 4, 2021 states, "Due to paraplegia, associated **[*28]** neurogenic bladder and multiple chronic medical conditions, Roy needs household modifications to accommodate his needs."

This was the sole prescription that led to two home modifications, the first in August 2021, paid in cash on August 5, 2021. The cost was $ 19,548.58. Neither the prescription, filled out by a non-designated Form 113 physician nor any proposed work orders were sent to the medical payment obligor. No notice was provided to the carrier until the filing of the Form 114. ***Graham*** posits UR should have taken place after the fact. This same scenario took place a year later in July 2022 with a re-do of the modifications. The same prescription was utilized again without any notice to the medical payment obligor. This modification cost $ 14,150 and was paid in full. On the Form 114 filed there was a second reimbursement request, stating: "I sold Roy ***Graham*** a handicap tub for $ 2200. cash dated 8/01/2022."

ALJ Rice-Smith found the home modification expenses noncompensable. She found the prescription was generic and did not prescribe what specific accommodations were needed in ***Graham***'s home. She also found the prescription did not provide a connection between the payments **[*29]** and the compensable treatment. It is clear ***Graham*** did not utilize pre-authorization.

In contrast to the finding of compensability of the wheelchair and Dr. Furman's office bill, ALJ Rice-Smith discussed the holding in Holiday Inn Express ***v***. Langer, 2017-CA-001606, rendered March 20, 2020, Designated

Not To Be Published, which provides some guidance on sufficiency of Form 114s in the context of a reimbursement when the physician will not participate. The Court of Appeals held the carrier was entitled to the same quantum of proof as if the physician had participated, hence, equivalent to a statement of services. If the carrier is not satisfied, then it shall promptly request more information.

We note ALJ Rice-Smith found some treatment by Dr. Furman, the non-Form 113 physician, compensable including the prescription for the wheelchair. She found reasonable grounds excusing the Form 113 noncompliance as neither ***Graham*** nor Gallagher Bassett, the carrier, could find a doctor willing to accept Kentucky workers' compensation insurance. ALJ Rice-Smith then analyzed whether the documentation submitted with the Form 114 was equivalent to a Statement of Services and found it was equivalent regarding Dr. Furman's **[*30]** office visit and the wheelchair. Concerning Dr. Furman's office bill, ALJ Rice-Smith noted the reimbursement request was sent within the 60-day requirement, contained the bill for the November 3, 2020 office visit, and most importantly, the treatment note for that specific office visit.

The wheelchair was found compensable as the Form 114 reimbursement request was sent to the carrier before purchase and with Dr. Furman's second prescription stating the current wheelchair was inoperable, needing outdoor tires. ALJ Rice-Smith found the reimbursement request was timely submitted, the documentation was equivalent to a statement of services, and ***Coca-Cola*** did not initiate UR nor file a timely medical dispute.

ALJ Rice-Smith contrasted this with the lack of specific information contained in the prescription for home modifications and the failure to submit it prior to the work being done. She did not find the connection between the payments and the compensable treatment. Additionally, there was no updated prescription for the 2022 modifications. For these reasons, ALJ Rice-Smith denied compensability. Her findings are supported by substantial evidence, and we affirm on the issue of **[*31]** the home modifications.

Regarding the compensability of travel to Cincinnati, ALJ Rice-Smith found the proposed expenses unreasonable and unnecessary. She noted both parties failed to exercise reason and compassion. ***Graham*** argues since Dr. Bennett signed a Form 113, his treatment was guaranteed. However, Dr. Bennett while noting the need for bladder treatment opined it is in ***Graham***'s best interest to have a physician closer to his home in Texas.

Most important, this issue is moot since in the Motion to Re-submit Claim for Decision, ***Graham*** states as follows:

> Since the mediation on 10/27/23, the parties have worked together to find a medical provider in Mr. ***Graham***'s area who is able to evaluate and replace his bladder stimulator. The parties have determined that Dr. Bryan Kansas at Urology Austin, Jollyville Office is willing to evaluate ***Graham***'s bladder stimulator and accept payment directly from the workers' compensation carrier outside the fee schedule.

A Court "will not decide speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy presented by adversary parties, and in which **[*32]** a binding judgment concluding the controversy may be entered." Veith ***v***. City of Louisville, 355 S.W.2d 295, 297 (Ky. 1962) (quoting Black ***v***. Elkhorn Coal Corp., 26 S.W.2d 481, 483 (1930)).

The Board will not decide the issue of the cost of transportation and whether that is to be a factor in determining reasonable treatment per KRS 342.020. There is no longer a justiciable controversy regarding travel as any decision would have no practical effect.

We note the oft cited case for compensability of travel expenses, C & L Constr. ***v***. Cannon, 884 S.W.2d 647, 648 (Ky. 1994) did not address the reasonableness of the costs, as that issue was not before the Court. The Court stated, "All obligations to reimburse are subject to limitations stated in the act, and to challenge before the Administrative Law Judge." Id. (citing Square D Co. ***v***. Tipton, Ky 862 S.W.2d 308 (Ky. 1993); KRS 342.020; KRS 342.035).

Next, ***Graham*** requested ALJ Rice-Smith award costs and attorney fees. He argues UR was not exhausted by ***Coca-Cola*** prior to filing the medical dispute. This issue relates to the Reconsideration of a UR denial of Depends diapers, eight cases per month, requested by Dr. Bennett. ***Graham*** filed the request in addition to a request for a finding by ALJ Rice-Smith that the Reconsideration was timely filed per 803 KAR 25:190 Sec. 9(1)(a) and sanctions be awarded per KRS 342.310.

Graham also contends ALJ Rice-Smith erred in not awarding costs regarding the home **[*33]** modifications as ***Coca-Cola*** could have performed UR when it received the Form 114, though clearly this was after the work had been done.

803 KAR 25:096 Sec. 3 provides:

> (1) Except for emergency care, treatment for a work-related injury or occupational disease shall be rendered under the coordination of a single physician selected by the employee. The employee shall give notice to the medical payment obligor of the identity of the designated physician by tendering the completed Form 113, including a written acceptance by the designated physician, within ten (10) days after treatment is commenced by that physician.

803 KAR 25:012 Sec. 2 states:

In accordance with KRS 342.310, a sanction:

(2) May be imposed if a movant files a medical dispute prior to exhaustion of the required utilization review or medical bill audit procedures. (Emphasis added).

KRS 342.310 states:

> (1) If any administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, he or it may assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court **[*34]** costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of pocket expenses upon the party who has so brought, prosecuted, or defended them. (2) If any administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that a party has committed acts in violation of KRS 342.335(1) or (2), that party may be ordered to make restitution for any compensation paid as a result of the commission of such acts. (Emphasis added).

803 KAR 25:190 Sec. 9:

(1) A reconsideration process to appeal an initial decision shall be provided within the structure of utilization review.

> (a) A request for reconsideration of the initial utilization review decision shall be made by an aggrieved party within fourteen (14) calendar days of receipt of a written notice of denial.
>
> (b) Reconsideration of the initial utilization review decision shall be conducted by a different reviewer of at least the same qualifications as the initial reviewer.
>
> (c) A written reconsideration decision shall be rendered within ten (10) calendar days of receipt of a request for reconsideration. The written decision shall be clearly **[*35]** entitled "UTILIZATION REVIEW - RECONSIDERATION DECISION". If the reconsideration decision is made by an appropriate specialist or subspecialist, the written decision shall further be entitled "FINAL UTILIZATION REVIEW DECISION".
>
> (d) Those portions of the medical record that are relevant to the reconsideration, if authorized by the patient and in accordance with state or federal law, shall be considered and providers shall be given the opportunity to present additional information.

With these statutory and regulatory provisions controlling this claim, it is noteworthy that as ***Graham*** stated in his Petition for Reconsideration, "this is not an ordinary case."

The awarding of costs and sanctions by the ALJ is purely discretionary. Steel Creations By and Through KESA, the Kentucky Workers' Comp Fund ***v***. Injured Workers Pharmacy, 532 S.W.3d 145 (Ky. 2017). There is no mandatory wording in KRS 342.310 or the administrative regulation governing the UR procedure. The ALJ was the proper adjudicator to either award or not award sanctions and costs. The test on review is whether ALJ Rice-Smith abused her discretion in denying sanctions and costs. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. Commonwealth ***v***. English, 993 S.W.2d 941, 945 (Ky. 1999).

While **[*36]** ALJ Rice-Smith found it was despicable that the request for diapers was even sent to UR, we note a physician denied the request. ***Graham***'s continued assertion UR could be undertaken based on a Form 114 sent after the fact regarding home modifications, is premised upon the notion that any prescription, however general, automatically entitles the claimant to reimbursement. Extrapolating ***Graham***'s argument, reasonableness never applies to the cost of treatment or appliances, which the Board rejects as a fundamental proposition. Reasonableness of treatment per KRS 342.020 does apply to the costs of the treatment or subsequent appliances or supplies, and this is a finding for the ALJ to resolve. Clearly, when a general home modification, or equipment such as a van is at issue, it is incumbent upon the injured worker to coordinate to some degree with the insurance carrier. It is interesting that this is exactly what occurred when the parties found a urologist in Texas willing to evaluate ***Graham*** regarding the implant stimulator, which Dr. Bennett in Cincinnati believed to be the correct course of action.

ALJ Rice-Smith found both parties "skirted the rules" in this difficult situation. ***Graham***'s initial **[*37]** designated physician, Dr. Burton, did not treat him after he moved to Texas. His treating physician in Texas would not accept Kentucky worker's compensation. Dr. Bennett, the treating urologist in Cincinnati, signed a Form 113 in September 2022, but believed it was in ***Graham***'s best interest to have treatment closer to where he lived. The carrier sent a representative to Texas to help find a medical provider, to no avail.

This Board cannot second guess the judgment of ALJ Rice-Smith who made detailed findings throughout her Opinion. ALJ Rice-Smith determined not to assess sanctions based on the totality of the actions of the parties and the proceedings. We cannot rule her decision is unreasonable.

Of final note, mediation resulted in full resolution of the claim per the filing by the CALJ. It is unknown what memorandum of settlement was signed by the parties at mediation and where the subsequent disagreement occurred. When the claim was resubmitted to ALJ Rice-Smith for decision, ***Graham*** noted the parties worked together to find a urologist in Texas who would accept direct payment by the carrier outside the fee schedule.

The Board recognizes that circumstances will occur when **[*38]** injured workers, entitled to medical benefits per statute, move out of the state or even the country, thereby creating substantial issues regarding continuing treatment. Communication between the parties may be the only practical solution to obtaining timely medical care prior to the institution of reopening/medical disputes brought by the worker or their employer.

Accordingly, the Medical Dispute Opinion and Order rendered by Hon. Monica Rice-Smith, Administrative Law Judge on December 31, 2023, and the February 28, 2024, Order on Petition for Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER: LMS

HON PIERRE J. COOLEN

333 WEST VINE ST., STE 1200
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENTS:

HON ALLISON M. HELSINGER LMS
HON MICHEL E. HOOPER LMS
2408 SIR BARTON WAY, STE 375
LEXINGTON, KY 40509

HON. DAVID BLACK LMS
101 S FIFTH ST., STE 2500
LOUISVILLE, KY 40202

RESPONDENT:

DR. MATTHEW FURMAN USPS
1713 SW HK DODGEN LOOP
TEMPLE, TX 76502

ADMINISTRATIVE LAW JUDGE:

HON JOHN B. COLEMAN LMS
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601

HON DOUGLAS W. GOTT LMS **[*39]**
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601

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