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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

B & B HOLDINGS d/b/a AZ CARDINALS, *Petitioner Employer,*

NAUTILUS INSURANCE CO., *Petitioner Carrier,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

SEAN MOREY, *Respondent Employee.*

No. 1 CA-IC 20-0051
FILED 10-26-2021

Special Action - Industrial Commission

ICA Claim No. 20103-060424

Carrier Claim No. 557-92673

The Honorable Amy L. Foster, Administrative Law Judge

AWARD SET ASIDE

COUNSEL

Wright Welker & Pauole PLC, Phoenix
By Linnette R. Flanigan, Shannon A. Lindner
Counsel for Petitioner Employer and Carrier

Industrial Commission of Arizona, Phoenix
By Gaetano J. Testini
Counsel for Respondent

Law Office of Trace A. Bartlett, Tempe
By Trace A. Bartlett
Counsel for Respondent Employee

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Maurice Portley joined.¹

T H U M M A, Judge:

¶1 Petitioners (the employer and carrier) seek review of an Industrial Commission of Arizona (ICA) Award ordering them to reimburse more than \$28,000 in medical expenses to Respondent Sean Morey. Because no record was made documenting what happened at a status conference, and the Award and Decision Upon Review affirming the Award lack sufficient specificity, they are set aside.

FACTS AND PROCEDURAL HISTORY

¶2 Morey played football for the Arizona Cardinals in 2009, where he received multiple concussions, eventually leading to traumatic brain injury. In 2011, his worker's compensation claim was accepted by Petitioners B & B Holdings doing business as AA Cardinals and Nautilus Insurance Company. Morey moved to New Jersey later in 2011, where he received treatment for his traumatic brain injury. At about that same time, an ICA Award authorized Morey to be treated outside of Arizona, also providing that Nautilus would be liable only for medical expenses not exceeding the Arizona Medical Fee Schedule, absent approval by Nautilus. Starting in 2017, Morey has been treated by neuropsychologist Dr. Jonathan Silver. Dr. Silver does not send bills directly to Nautilus. As a result, Morey pays out-of-pocket for treatment and medications, then seeks reimbursement from Nautilus.

¶3 In February 2012, Morey filed a request for reimbursement of medical expenses he had paid out-of-pocket for his work-related injuries. *See* Ariz. Rev. Stat. (A.R.S.) § 23-1061(J) (authorizing the ICA to investigate

¹ The Honorable Maurice Portley, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3, of the Arizona Constitution.

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claims that benefits are not being provided as required). The parties resolved that matter by stipulation. Morey filed a similar request in 2013 for other medical expenses, which the parties also resolved by stipulation.

¶4 In 2017, Morey filed another request, this time for expenses up through the first half of 2017, couching his request for reimbursement as a bad faith claim. That 2017 request included expenses for treatment by Dr. Silver. Although the bad faith claim was denied, it was treated as a request for reimbursement. The parties then tried to settle the dispute, with some resulting delay. In June 2019, the parties entered into a partial settlement requiring Nautilus to reimburse Morey for costs of prescriptions and services provided by Dr. Silver. After an evidentiary hearing, an ALJ issued a decision resolving the rest of the dispute, ruling for Morey pointing to documents “sufficient to establish that the services were reasonably necessary and appropriately charged.”

¶5 In June 2020, Morey filed another request for reimbursement, this time seeking reimbursement for payments he made starting in July 2017 totaling \$28,339.07. Morey provided documentation with his request, consisting of invoices from Dr. Silver, lists of medications and confirmation of amounts Morey had paid. The documents included a letter from Dr. Silver summarizing Morey’s treatment and some largely-indecipherable handwritten notes. A hearing was set for August 18, 2020. Before that hearing, Morey submitted documents and requested subpoenas for Dr. Silver and others. Petitioners submitted no documents and did not subpoena any witnesses.

¶6 The hearing was conducted by videoconference and Morey, his counsel, and Petitioners’ counsel (but no company representative for Petitioners) appeared. Petitioners contended that they needed additional documents before they could make payment. Morey disagreed, asserting that the documents he had provided were sufficient. The ALJ discussed how Petitioners should issue payment to Morey for any undisputed part of the request. The ALJ then took testimony from Morey, who laid the foundation for the request and testified that all the payments for which he was requesting reimbursement related to his industrial brain injury. After Morey’s testimony, the ALJ set the matter for a telephonic status conference on September 1, 2020. The ALJ stated that, at that September 1 hearing, Petitioners would be expected to describe “exactly what they were disputing” and when Morey would be paid for the undisputed portion of his request.

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¶7 After the August 18, 2020 hearing, the record presented to this court is nearly silent. There is no notice that references the September 1 status conference, no record of such a conference and no indication of who appeared or what was said at the conference. *But see* A.R.S. §23-943(C) (requiring a transcription of any oral proceedings after a request for review has been filed). Nor is there any memorialization of the ALJ's rulings at that conference. Instead, the record contains only a few references to a proceeding that seems to have been held on September 1.

¶8 The record also suggests that Nautilus emailed the ALJ and counsel on August 20, 2020, two days after the hearing where the ALJ directed Nautilus to identify the disputed items. That email lays out the specific disputed items as directed by the ALJ, stating that Nautilus was missing supporting documentation. The email notes a pending attempt to confirm prescribed medications directly from Dr. Silver, but a concern that HIPAA issues may preclude a helpful response. The email also lists healthcare records Nautilus has in its database relating to prior reimbursements paid to Morey.

¶9 On September 3, 2020, two days after the unrecorded status conference, the ALJ issued an Award ordering reimbursement for the entire amount requested. The Award states Petitioners had submitted "no records" and that Petitioners' counsel had not reviewed the documents supplied by Morey or sent the documents to the employer Petitioner. Referring to the unrecorded September 1 conference, the Award states that Petitioners' counsel informed the ALJ that he "had emailed his client but had heard nothing back" from Petitioners following the August 18 hearing. Finding Petitioners "failed to provide any evidence or valid excuse for why they have not reimbursed" Morey, the ALJ ordered full reimbursement as requested by Morey. The ALJ also noted that Morey had pressed "the same issue" in 2012, 2013, and 2017, adding "[t]his is unacceptable."

¶10 On the same date the Award issued, Petitioners' counsel filed a letter with the ALJ concerning the September 1 unrecorded status conference. That letter states Nautilus had not paid reimbursement because documentation was missing. There is no indication that Petitioners' counsel was aware of the August 20 Nautilus email. In addition, the letter states: "I am sending a copy of this letter to [the Chief ALJ] because at the conference . . . it was stated that [the Chief ALJ] would be consulted about the Commission filing a bad faith complaint on its own."

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¶11 Later in September 2020, new counsel for Petitioners filed a Notice of Substitution, and in earlier October 2020, new counsel for Petitioners filed a Request for Review. The Request argued that Nautilus had responded to the ALJ and attached the August 20 email as evidence of that response. The Request pointed out that the email contradicts a finding in the Award that Nautilus had not responded to the ALJ’s direction and asked for an opportunity to be heard on the merits. New counsel avowed that Nautilus had paid Morey the total amount of the reimbursement request, even though Nautilus disputed a portion of that amount. The Request also sought clarification on whether the Arizona Fee Schedule capped the ordered payments, pointing out that the ALJ had cited in the Award the rule referencing the applicability of the fee schedule. *See* A.A.C. R20-5-117(C) (stating reimbursement is required in “the amount allowed by the fee schedules” set annually by the ICA as authorized by A.R.S. §23-908(B)).

¶12 Morey responded, arguing that Petitioners lost the case because of previous counsel’s lack of preparation and that a party should be bound by the decisions and actions of its counsel. In November 2020, the ALJ issued a Decision Upon Review, summarily denying the Request for Review and incorporating Morey’s response by reference. The Decision Upon Review does not address or mention the August 20 email or resolve the fee schedule issue. Petitioners then timely sought review by this court.

DISCUSSION

¶13 This court defers to the factual findings of the ALJ, but reviews questions of law de novo. *Young v. Indus. Comm’n*, 204 Ariz. 267, 270 ¶ 14 (App. 2003). Petitioners argue multiple errors by the ALJ, two of which warrant setting aside the Award.

¶14 As asserted by Petitioners, Morey was required to show that: (1) the treatment was medically necessary and appropriate, A.R.S. §23-1062(A); (2) the reimbursement requests were timely, A.R.S. §23-1062.01(C); (3) there is proof of payment by claimant, A.A.C. R20-5-117(C); and (4) the charges are reasonable and in accordance with applicable fee schedules, A.A.C. R20-5-117(C). *See Arrowhead Press, Inc. v. Indus. Comm’n*, 134 Ariz. 21, 24 (App. 1982).

¶15 The Award does not explicitly address any of these issues, yet finds for Morey. The record, however, shows that the ALJ and the parties anticipated either full or partial settlement to have been achieved by the time of the September 1 unrecorded status conference. When that did not

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occur, the ALJ issued the Award. There is no record showing that the ALJ told the parties that would be the result or that the parties agreed to that result. From later correspondence, it appears that Petitioners did not.

¶16 In the Award, the ALJ appears to have found that Morey made a prima facie case for reimbursement and that Petitioners failed to provide evidence or reason for failing to reimburse Morey. Thus, the ALJ ordered reimbursement in the amount “as submitted” by Morey, with no further analysis. When the Request for Review presented the ALJ with evidence that might have been filed by Nautilus on August 20 but was not addressed in the Award, and when the ALJ’s attention was called to a possible conflict in the Award with the Arizona Fee Schedule, the ALJ did not address these issues. That constitutes error.

¶17 A carrier may withhold payment to a physician for services rendered to a claimant until the physician provides sufficient supporting documentation. A.A.C. R20-5-113(D). This rule also appears to apply in a reimbursement situation. In addition, a claimant who pays a bill out-of-pocket is entitled to reimbursement upon proof of payment. A.A.C. R20-5-117(C). However, that rule does not abolish the requirement for supporting documentation, thereby supporting Nautilus’ legal position.

¶18 Because the record is murky and with gaps, and the ALJ did not address the email, it is not clear whether or when the August 20 email was filed with the ICA. On its face, the email complies with the ALJ’s instructions at the end of the August 18 hearing. Yet there is no record as to how that email was treated at the September 1 unrecorded status conference or whether it was part of the record timely provided to or relied on by the ALJ. In addition, upon review, the ALJ did not clarify the order concerning the Arizona Fee Schedule. Thus, the Award can be read two ways. Taken literally, the Award may not apply the fee schedule to reimbursement, which appears contrary to ICA rule. But this court will not guess as to what the Award sought to do.

¶19 In *Post v. Indus. Comm’n*, the Arizona Supreme Court held that an ICA award will be set aside if a court “cannot determine the factual basis of [the] conclusion or whether it was legally sound.” 160 Ariz. 4, 7 (1989). On the record provided, this court cannot determine the factual basis of the conclusion for the Decision Upon Review or whether it is legally sound. This court is not a finder of fact and thus cannot evaluate the effect of the August 20 email on the other evidence. Nor can this court rewrite the Award to address the fee schedule but must either affirm an award or set it aside. A.R.S. §23-951(D). Finally, it is impossible to determine whether

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substantial justice was achieved under A.R.S. §23-941(F) because there is no record by which to evaluate any decisions made at the unrecorded status conference.

CONCLUSION

¶20 For these reasons, the Award is set aside.



AMY M. WOOD • Clerk of the Court
FILED: JT