RENDERED: June 25, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-002316-WC

A. C. BRAKE COMPANY — APPELLANT

v. PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
96-WC-004704

MARK J. SANDERS; and THE WORKERS' COMPENSATION BOARD — APPELLEES

AND No. 1997-CA-002533-WC

MARK J. SANDERS — CROSS-APPELLANT

CROSS-PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD

A. C. BRAKE COMPANY; SPECIAL FUND; WORKERS' COMPENSATION BOARD; and MARK C. WEBSTER, Administrative Law Judge — CROSS-APPELLEES

OPINION
AFFIRMING IN PART and REVERSING IN PART

* * * * * * * *

BEFORE: DYCHE, EMBERTON and MILLER, Judges.

EMBERTON, JUDGE: This is an appeal from an opinion rendered by the Workers' Compensation Board reversing the Administrative Law Judge's denial of medical treatment payments and affirming the denial of temporary total disability benefits beyond August 20, 1996. The employer, A. C. Brake, appeals alleging that the ALJ's findings that a diagnostic test performed, and surgery that was proposed to be performed, on Mark J. Sanders were not reasonable nor medically necessary based on substantial evidence. Sanders cross-appeals contending that he is entitled to temporary total disability benefits until such time that he reaches maximum medical improvement. He further alleges that the ALJ's award of a 30% occupational disability award is premature.

Sanders sustained a work-related injury on October 31, 1995, while lifting a crane band off a riveter. Following the injury, Sanders continued to work but testified that he did so with pain. In March 1996, Dr. Bonnarens restricted his work and recommended surgery to fuse the sacroiliac joint. Sanders was taken off work and received TTD benefits from March 25, 1996, through June 12, 1996, and again from June 26, 1996, through August 20, 1996.

Dr. Bonnarens referred Sanders to Dr. Puno, an orthopedic surgeon. Dr. Puno diagnosed discogenic back pain caused by a disruption of L4-5 and from L3-4. A diskogram was performed which showed no pain at L3-4 or L5-S1, but pain as a

result of a herniated disc at L4-5. Dr. Puno then informed Sanders that he could live with the pain or be treated surgically with either a decompression and disc removal or decompression with a spinal fusion or spinal fusion alone. The performance of the diskogram and the need for surgical intervention are the subjects of the present controversy. After A. C. Brake refused to pay for the surgery, Sanders returned to work with restrictions. Dr. Puno testified that if Sanders did not have the surgery he had reached maximum medical improvement. He admitted that the surgery would not completely diminish Sanders' pain and that the diskogram was not a widely accepted diagnostic tool.

Dr. Hargadon saw Sanders at the request of A. C. Brake. He stated that a fusion at L5-S1 might be indicated and could be very successful. However, his opinion was that a disketomy and an anterior/posterior fusion would result in increased physical restrictions. He testified that a diskogram is a controversial procedure not accepted by most orthopedic or neurosurgeons and unnecessary to diagnose Sanders' condition.

Dr. Banerjee first saw Sanders on April 26, 1996, and treated him until August 9, 1996. He found that Sanders suffered from piriformis syndrome and that no surgery was indicated. He released Sanders to return to work on August 16, 1996. He stated that a diskogram had no value as a diagnostic tool in Sanders' case.

Sanders filed a motion seeking an order directing A. C. Brake to pay for the medical treatment and pay additional TTD benefits during his recovery. The ALJ relied on the opinion of Dr. Banerjee and concluded that the surgery was neither necessary nor reasonable. He also found the diskogram to be unnecessary. Since Dr. Banerjee had released Sanders for return to work on August 16, 1996, TTD benefits were denied past August 20, 1996, the date TTD was terminated.

During the litigation there was also testimony regarding Sanders' permanent impairment. Dr. Daniel A. Duran assessed Sanders with a 14% impairment and imposed physical restrictions. Additionally, there was testimony from a vocational expert. Ultimately, the ALJ found that Sanders had an occupational disability of 30% which he apportioned 50/50 between A. C. Brake and the Special Fund.

A. C. Brake argues that the ALJ's denial of medical treatment was based on substantial evidence. The standard for determining whether medical treatment is reasonable and necessary was explained by the court in Square D Company v. Tipton, Ky., 862 S.W.2d 308, 309-310 (1993):

> KRS 342.020(1) allows a worker to choose her own physician and to have whatever medical treatment is reasonably necessary for the cure and/or relief of her injury. The burden of proving that a treatment is unreasonable is on the employer. While the injured worker must be given great latitude in selecting the physician and treatment appropriate to her case, the worker's freedom of choice is not unfettered. KRS 342.020(3) indicates that the legislature did not intend to require an

> employer to pay for medical expenses which result from treatment that does not provide 'reasonable benefit' to the injured worker. An employer may not rely on this section simply because he is dissatisfied with the worker's choice, for example, or because the course of treatment is lengthy, costly, or will not provide a complete cure. We believe, however, that this section relieves an employer of the obligation to pay for treatments or procedures that, regardless of the competence of the treating physician, are shown to be unproductive or outside the type of treatment generally accepted by the medical profession as reasonable in the injured workers' particular case. We also believe that such decisions should be made by the ALJs based on the particular facts and circumstances of each case, so long as there is substantial evidence to support the decision. (Citations omitted).

The employer has the burden to prove that the proposed medical treatment is unreasonable and unnecessary. Mitee Enterprises v. Yates, Ky., 865 S.W.2d 654 (1993). However, the ALJ's finding that the burden has been met may not be reversed on appeal if it is supported by substantial evidence. Tipton at 310. Dr. Banerjee testified that Sanders did not require surgery, and in fact, such a procedure would worsen his condition. Additionally, he found the diskogram to be unnecessary. Dr. Hargadon did not believe Sanders needed a disketomy and found the diskogram a controversial procedure. Clearly, this is sufficient evidence to support the ALJ's decision to deny an award of medical expenses. Although the Board may have reached a different conclusion based on the conflicting evidence, it is for the ALJ and not the Board to

resolve the conflict. Pruitt v. Bugg Bros., Ky., 547 S.W.2d 123 (1977).

We do not find that the ALJ's denial of TTD for a period beyond which they have been paid to compel a contrary result. Roberts v. Estep, Ky., 845 S.W.2d 544, 547 (1993).

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, as the Board noted, the question presented is one of fact no matter how TTD is defined.

W. L. Harper Construction Co. v. Baker, Ky. App., 858 S.W.2d 202, 205 (1993).

Again, there was medical testimony that Sanders is capable of returning to work. We find no error in the ALJ's finding that Sanders has reached maximum medical improvement and is not entitled to additional temporary disability benefits.

The ALJ's decision that Sanders suffers a 30% permanent partial occupational disability is supported by substantial evidence. We agree with the Board that should Sanders proceed with future medical treatment, and benefits are owed, he could avail himself of the reopening provisions of KRS 342.125.

Sanders argues that under the present version of KRS 342.125 he could not seek a reopening until two years from the date of his award and that such restriction is unconstitutional.

Sanders' argument is based on speculation that his physical condition will deteriorate. We find the issue of the constitutionality of KRS 342.125 not to be appropriately presented for review at this time.

The opinion of the Workers' Compensation Board is reversed as to the ALJ's denial of medical expenses and in all other respects affirmed.

ALL CONCUR.

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