RENDERED: September 3, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1999-CA-000556-WC

STEARNS TEXTILE COMPANY, d/b/a Phoenix Uninsured Employers' Fund — APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-95-19287

VIVIAN MOONEY; JOHN PENDLEY, Manager of Uninsured Employers' Fund; ROBERT SPURLIN, Director of Special Fund; DR. MARC DUBICK/ST. JOSEPH PAIN MANAGEMENT CENTER; DONALD G. SMITH, Administrative Law Judge; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

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BEFORE: BUCKINGHAM, HUDDLESTON, AND KNOPF, Judges.

BUCKINGHAM, JUDGE. Stearns Textiles Company, d/b/a Phoenix Manufacturing, (Stearns) petitions for review of an opinion of the Workers' Compensation Board (the Board) which affirmed an

opinion and order rendered by an administrative law judge (ALJ). We affirm.

Vivian Mooney (Mooney) was employed by Stearns as a production worker in its textile plant in June 1994 when she suffered a back injury while running a cloth winding machine and attempting to pull a roll of cloth off the line. An ALJ awarded Mooney benefits based on a finding that she was totally occupationally disabled. After Stearns's appeal to the Board was dismissed and the ALJ's opinion and award was affirmed, Stearns filed a petition for review with this court. See 1996-CA-002818-WC.

While that petition was pending in this court, Stearns filed a motion to reopen to challenge the necessity of Mooney's purchase of a whirlpool spa as a medical expense. The ALJ granted Stearns's motion to reopen to contest the expense, and Stearns later filed a motion to amend seeking to have the ALJ determine whether Mooney's disability had decreased and further contesting the necessity of more of Mooney's medical expenses. The ALJ issued a subsequent order stating that he had no jurisdiction to determine if Mooney's disability had decreased due to the fact that his previous finding concerning Mooney's disability was before this court on a petition for review.

The ALJ's final opinion and order found that all of Mooney's medical expenses were reasonable and necessary with the exception of her purchase of a therapeutic spa. Stearns then appealed the ALJ's ruling regarding the propriety of Mooney's

medical expenses and the ALJ's finding that he had no jurisdiction to consider a change in Mooney's disability while a petition for review to this court was pending. After the Board affirmed the decisions of the ALJ, Stearns filed the petition for review sub judice.

Stearns's first contention is that the ALJ and the Board erred in determining that the original opinion and award concerning Mooney's disability was not final and precluded reopening even though there was evidence that Mooney's occupational disability had decreased. In Jerry's Drive In, Inc. v. Young, Ky., 335 S.W.2d 323 (1960), a worker was awarded compensation and the employer appealed. While that appeal was pending, the employer moved the old Workers' Compensation Board to reopen the award, but the Board refused to do so based upon a lack of jurisdiction. The Young court affirmed the Board's decision, stating as follows: "This precise question was settled in 1933. Farmer Motor Co. v. Smith, 249 Ky. 445, 60 S.W.2d 929, 930. There it was said: 'After an appeal is perfected * * the board's jurisdiction, right, or authority to take any further steps in the case ceases, while pending appeal.'" Id. As the case sub judice is indistinguishable from Young, we conclude that the ALJ and the Board did not err in holding that the reopening of Mooney's claim was precluded while the issue of her disability was still before this court on petition for review.

Stearns's second argument is that the ALJ and the Board erred in finding that the treatment provided for Mooney,

including chiropractic care and the prescription of narcotic pain medication, was reasonable. KRS 342.020 governs medical treatment at the expense of an employer. KRS 342.020(1) provides that

> [i]n addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects 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 during disability . . . .

The ALJ found that the treatments were reasonable based upon Mooney's testimony that they provided her some minor pain relief and Dr. Dubick's testimony that the procedures were reasonable and necessary, and the Board affirmed the ALJ's decision based upon this testimony.

"The burden of proving that a treatment is unreasonable is on the employer." Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993). The fact that the treatments in question afforded Mooney only temporary relief does not mean that the treatments were unreasonable under KRS 342.020, as an employer must pay for "any reasonable and necessary medical treatment for relief whether or not the treatment has any curative effect." National Pizza Co. v. Curry, Ky. App., 802 S.W.2d 949, 951 (1991). When the medical testimony is conflicting, "the question of which evidence to believe is the exclusive province of the ALJ." Tipton, supra at 309.

When the fact finder finds against the party with the burden of proof (i.e., Stearns), an appellate body may not reverse the fact finder's decision unless the evidence compels a different result. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). "To be compelling, evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ." Daniel v. Armco Steel Co., L.P., Ky. App., 913 S.W.2d 797, 800 (1995).

The ALJ chose to rely upon the testimony of Mooney and Dr. Dubick rather than the contrary testimony of Dr. Goodman. Thus, as there was evidence in the record to support the ALJ's decision, the record does not compel a contrary result. Accordingly, the Board properly affirmed the ALJ on this issue.

Stearns also argues that the medical expenses should not be approved since Dr. Dubick failed to comply with 803 KAR 25:096 § 5. That regulation requires a physician to provide a treatment plan if a patient undergoes certain procedures. Stearns contends that Dr. Dubick was required to provide a treatment plan since he had treated Mooney with "passive modalities" as set forth in 803 KAR 25:096 § 5(1)(b). 803 KAR 25:096 § 5(2) provides that a treatment plan for a patient being treated with passive modalities "shall be provided within fifteen (15) days following a request by the medical payment obligor." However, as noted by the Board, "[t]here is no indication in the record that either Stearns, or its workers' compensation carrier,

has made a request for a treatment plan from Dr. Dubick." In short, we find no error in this regard.

Finally, Stearns argues that the ALJ and the Board should not have found the medical expenses in question incurred by Mooney to be reasonable and necessary, since the doctors treating Mooney have admitted that their treatment methods were not recognized by the American Medical Association. However, Stearns has failed to cite to any specific portion of the voluminous record in support of this statement. Furthermore, Stearns has not cited the content, context, or title of the AMA guidelines in question.

It is true that an employer is not required to pay for treatments which are "outside the type of treatment generally accepted by the medical profession as reasonable in the injured worker's particular case." Tipton, supra at 310. However, as noted by the Board, Stearns has provided insufficient expert testimony to demonstrate that the treatment prescribed for Mooney "reflect[s] an extreme position that is not supported by the medical community at large."

Stearns has failed to show that "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 Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). Thus, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jill A. Campbell
Cincinnati, OH

John F. Kelley, Jr.
London, KY

BRIEF FOR VIVIAN MOONEY:

Marilyn Benge McGhee
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BRIEF FOR SPECIAL FUND:

David W. Barr
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