

RENDERED: SEPTEMBER 12, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002417-WC

RITA BUTLER

APPELLANT

PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-96435

HARDIN MEMORIAL HOSPITAL;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

*** * * * *

BEFORE: CLAYTON, NICKELL, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Workers' Compensation Board (Board) affirming a decision of the Administrative Law Judge (ALJ).

FACTUAL SUMMARY

The Appellant, Rita Butler, worked for Appellee, Hardin Memorial Hospital (Hardin) beginning in May of 1997. Her job entailed various housekeeping duties for the hospital. On October 26, 2005, Ms. Butler broke her ankle when she climbed on a chair to clean a television in the hospital's isolation room. The injury actually occurred when she was stepping off the chair she had used to gain access to the television.

Immediately after injury, Ms. Butler was taken from the room in a wheelchair to the "Workwell Complex" where she was examined. Physicians at the site diagnosed a non-displaced distal fibula fracture. Ms. Butler was subsequently diagnosed by Dr. Marcis Craig on October 28, 2005. Dr. Craig made the same diagnosis as the physicians at the Workwell Complex; i.e., that she had a fractured ankle.

After being put on "light duty," Ms. Butler did sitting work only where she mainly folded towels for Hardin, but she worked the same hours for the same earnings as she had prior to her injury. After twelve (12) weeks of working light duty, Ms. Butler's position was terminated. She then began employment with Denny's Restaurant (Denny's) as a dishwasher and table busser. At Denny's, Ms. Butler makes \$8.00 per hour and works between 29 and 40 hours per week.

Ms. Butler brought a workers' compensation action asserting that she had partial permanent damage (PPD) associated with her October injury. The ALJ, after listening to testimony from physicians employed by Ms. Butler and Hardin as

well as an Independent Medical Examiner, found that Hardin was liable for past medicals, however, did not find that Mrs. Butler had a PPD. Ms. Butler then appealed this decision to the Board who upheld the findings of the ALJ. This appeal followed.

STANDARD OF REVIEW

As a reviewing Court, we must decide, in light of the record, whether the evidence is so overwhelming as to compel a finding in favor of the appellant. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). When this Court reviews a decision of the Board, its function is to correct the Board when we believe it “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).

“It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers’ compensation claim.” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). We recognize that it is within the broad discretion of the ALJ “to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party’s total proof.” *Caudill v. Maloney’s Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

DISCUSSION

Ms. Butler contends that the Board overlooked and/or misconstrued controlling law and erred in affirming the ALJ’s dismissal of her claim for future

medical benefits arising from her work-related injury. Hardin, however, argues that Ms. Butler was not awarded future medical benefits because it was determined that she did not need any further medical treatment.

KRS 342.020(1) provides in pertinent part, 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, or as may be required for the cure and treatment of an occupational disease. The employer's obligation to pay the benefits specified in this section shall continue for so long as the employee is disabled regardless of the duration of the employee's income benefits. . . .

Ms. Butler contends that it was not necessary for the ALJ to find she had a permanent impairment in order to award future medicals under KRS 342.020(1). She cites *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007) in support of her argument. In *FEI*, the Court found that while:

[m]indful of the relationship between impairment and disability under the . . . Act, we conclude that disability exists for the purposes of KRS 342.020(1) for so long as a work-related injury causes impairment, regardless of whether the impairment rises to a level that it warrants a permanent impairment rating, permanent disability rating, or permanent income benefits.

Id. at pp. 318-19.

In this action the Board found that:

[t]he ALJ reviewed the evidence contained in the record in considerable detail. The ALJ first determined

that Butler met her burden of proving she suffered a work related injury as defined by the act inasmuch as when she fell she sustained a fractured [sic] to her left ankle. On the issue of extent and duration the ALJ relied on the evidence from Dr. Schiller who opined Butler did not retain a functional impairment rating to the left ankle as a result of the October 26, 2005 work injury.

Board Opinion at pp. 6-7.

In Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), the Supreme Court of Kentucky held that it is indeed possible for a claimant to suffer a work-related injury for which temporary medical benefits may be paid, but for the claimant to fail to prove that she has a need for future medical benefits associated with the injury. In *Robertson*, the Court found that “the claimant was not entitled to income benefits for permanent, partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident.” *Id.* at 286. We find this case to be applicable in this situation as well.

In this case, “Dr. Schiller noted in his report no additional treatment in the future was necessary. . . . [Further,] Dr Schiller stated there was no evidence Butler had a fracture since it had completely healed. He indicated no fracture line was visible so that if a fracture was present it was a nondisplaced hairline fracture which had completely healed. Furthermore it was a non-articular fracture and therefore did not have the propensity to develop ankle arthrosis.” Board’s Opinion at p. 11.

The ALJ, therefore, based his decision on medical testimony in the record and the Board's decision affirming his decision was not in error.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher P. Evensen
Louisville, Kentucky

BRIEF FOR APPELLEE:

Michael P. Reilly
Louisville, Kentucky