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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000852-WC

SELECT SPECIALTY HOSPITAL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-89310

DONNA TURNER; SIGNATURE HEALTHCARE
OF GEORGETOWN, FORMERLY KNOWN AS
GEORGETOWN HEALTHCARE; HONORABLE
LAWRENCE F. SMITH, ADMINISTRATIVE LAW
JUDGE; AND THE WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: THOMPSON, VANMETER, AND WINE, JUDGES.

WINE, JUDGE: Select Specialty Hospital (“SSH”) petitions for review from a decision of the Workers’ Compensation Board (“the Board”) which vacated and remanded an Administrative Law Judge’s order dismissing a claim for benefits by Donna Turner. On appeal, SSH alleges that the Board exceeded its scope of

review by substituting its own findings of fact for those of the ALJ and for considering issues not raised in a petition for reconsideration. SSH further alleges that Turner waived the compensability of her medical benefits by failing to raise the issue before the Board and that it was error for the Board to raise the issue *sua sponte*. Turner did not file a responsive brief; however, her co-appellee, Signature Healthcare of Georgetown (“SHG”), filed a responsive brief essentially reiterating SSH’s claims of error. Upon a review of the record, we affirm the Board.

History

Donna Turner, a certified nursing assistant (“CNA”), filed two formal claims for workers’ compensation benefits alleging two separate back injuries while employed by two separate employers. The first injury alleged by Turner occurred on October 15, 2007, while she was employed by SHG. Turner sustained a back injury while she and another employee helped lift a patient into bed. Turner reported the incident to her employer and was referred to a clinic located adjacent to the hospital where she worked. Turner was seen by a physician’s assistant at the clinic who treated her for the next couple of months. She was later referred by the clinic to Dr. Travis Hunt, an orthopedic surgeon in Georgetown, Kentucky. Dr. Hunt obtained an x-ray and ordered an MRI scan. He did not recommend surgery, but rather chose to continue Turner on a course of physical therapy. Turner only missed approximately one day of work as a result of this injury (as it occurred before a long weekend), and then worked on “light duty” for SHG until January of 2008.

Turner testified in her deposition that she felt her employer was “going to get rid” of her after this extended period of light duty work, and thus, began looking for another job. Thereafter, she interviewed with SSH. Turner was extended a job offer by SSH, and Dr. Hunt “cleared” her for regular duty (instead of light duty), at her request. Turner accepted the position with SSH, discontinued her employment with SHG, and began working for SSH on January 15, 2008. She did not return to Dr. Hunt’s care after she was released to return to work on January 15, 2008.

Turner continued to work for SSH until April 28, 2008, when she experienced a second work-related injury which is the subject of this action. Again Turner was injured as she and other workers were lifting a patient into bed. Turner reported feeling a sharp pain and pressure in her low back. Turner reported the incident to her employer and was referred by her employer to the emergency room of the hospital in which she worked. After being seen in the emergency room that day, she later followed up with her family physician, Dr. Melicio Abordo on the advice of the emergency room physician. Turner has continued to treat with Dr. Abordo since that time. Turner has not worked since the April 28, 2008 injury.

An MRI was performed after each of the subject work-related accidents. Turner testified that she continues to have low back pain and intermittent numbness in both of her legs. Turner also testified that she developed neck and shoulder pain in May of 2008. She claimed she could no longer engage in activities she previously engaged in and also that she now experiences vertigo.

Turner testified that a typical day is spent lying on her couch at home or visiting with her friend, Mrs. Noble.

Turner filed two applications for resolution of her injury claims. The first was filed on July 14, 2008, wherein she alleged she was injured within the scope of her employment for SSH on April 28, 2008. Turner's claim was assigned to Administrative Law Judge Lawrence F. Smith ("ALJ Smith") on August 18, 2008. The defendant employer, SSH, filed a denial of the claim on September 26, 2008. Several months after filing the first claim, Turner filed a second claim on December 17, 2008. Turner's second claim was for the earlier injury of October 15, 2007, while employed by SHG. SHG also filed a denial of Turner's claim.

Turner moved to consolidate the claims and, after several telephonic conferences, the claims were consolidated by ALJ Smith on January 21, 2009. Thereafter, the parties began taking proof in the case. Benefit review conferences were held on June 12, 2009 and September 15, 2009, but the parties were unable to ultimately agree on the issues. Hearings in the case were conducted on July 16, 2009 (hearing on interlocutory relief) and October 22, 2009 (final hearing). After the final hearing on October 22, 2009, each party filed briefs with the court.

Turner testified on four occasions concerning her injuries in this case, twice by deposition and twice during hearings. She provided inconsistent testimony concerning her back pain after each of the accidents. On one occasion, she testified that she continued to experience low back pain from the time of the October 15, 2007 injury until the time of her second injury on April 28, 2008.

However, at a different time she testified that her back pain from the first injury had resolved itself before the second injury (or re-injury) occurred on April 28, 2008. Turner testified at times that she took prescription pain medication for her injuries, but testified at other times that she could not afford her prescription pain medication and did not take it.

Evidence was introduced at the hearings in the case concerning the findings of two private investigators hired by the defendant employers. Cody Kirchner testified that he is a field investigator who was assigned to conduct surveillance on Turner. Kirchner testified that he conducted surveillance of Turner on March 11 and March 12, 2009. On the first day of surveillance, Kirchner traveled to Turner's place of residence and determined that she was not home. Thereafter, Kirchner traveled to the home of a Mrs. Cleta Noble upon information that Turner may be at Noble's residence. Upon arriving at Noble's residence, Kirchner observed a vehicle he believed to be Turner's. Surveillance was discontinued on that date after no further activity was observed. On March 12, 2009, Kirchner resumed surveillance and observed an unidentified female arrive at Turner's home. Kirchner observed Turner travel with the woman in the car, making stops at local businesses. Kirchner testified that he saw no overt signs of pain or limping when Turner entered and exited the vehicle with the woman after the various stops.

A second private investigator, Mary Carol Burnette, also testified in the case. Burnette undertook surveillance of Turner on May 13 and 14, 2009.

Burnette arrived at Turner's house at 7:30 a.m. on the morning of May 13, 2009 and observed that there were no vehicles in the driveway. She then proceeded to the home of Cleta Noble, where she believed Turner was working.¹ Upon arriving at Noble's residence, Burnette observed Turner's vehicle. Burnette testified that she observed Turner and an elderly woman (presumably Mrs. Noble) leave the residence and drive the vehicle to perform some errands. Burnette testified that Turner drove the vehicle while Noble sat in the passenger seat. Burnette observed the pair stop at a First National Bank where Turner went inside, leaving Noble to wait in the vehicle. Burnette also observed the pair travel to a Save-A-Lot store where Turner went inside to shop for groceries while Noble waited in the car. Burnette testified that when Turner emerged from the store, she was pushing a cart loaded with groceries and that she proceeded to unload several bags of groceries into the car. Burnette testified that she observed Turner bending, squatting, stooping, and lifting, without any outward signs of difficulty or discomfort.

After Turner and Noble left the Save-A-Lot, Burnette followed Turner to a Wal-Mart store. Burnette testified that Turner went into the store alone, again leaving Noble to wait in the vehicle. When Turner emerged from the store, she unloaded multiple bags of goods into the car. Burnette testified that she followed the women back to Noble's residence where she observed Turner unload all of the bags and carry them into the home. She stated that she observed Turner carrying multiple bags at a time without apparent difficulty. Burnette testified that she also

¹ Turner adamantly denied that she worked for Mrs. Noble and testified that Noble was a dear family friend.

observed Turner unload and carry a watermelon into the house. Burnette testified that after unloading the groceries, Turner returned to the vehicle, retrieved a wheelchair from the trunk, assisted Noble with a transfer from the vehicle into the wheelchair, then proceeded to push Noble into the home. Burnette testified that she did not observe any outward signs of difficulty or pain when Turner removed the wheelchair and assisted Noble into the home. Thereafter, Burnette ceased surveillance for that day, but resumed surveillance on May 14, 2009. On the following morning, she was again able to locate Turner's vehicle at Noble's residence. However, no other notable activity was observed on that date. Burnette testified that the events of May 13, 2009 were recorded on DVD, and the DVD was introduced into evidence along with Burnette's report.

Evidence was also introduced that Turner was evaluated by Dr. Daniel Primm on October 24, 2008, at the request of SSH. Dr. Primm issued a report of said evaluation. Primm found that Turner walked well and did not limp, that she could walk normally on heel and toe, and that she had normal ranges of motion and rotation. Primm opined that Turner had pre-existing degenerative changes of the lumbar spine with a history of lumber strains. Thus, he found that neither work injury resulted in a permanent harmful change to Turner. He recommended that she avoid heavy lifting for an additional six weeks before returning to work. Primm testified that Turner could return to her regular employment as a CNA.

SSH also requested that Dr. Russell Travis review Turner's medical records. Dr. Travis noted that Turner was released to go back to regular work after

the first injury and that she was told to return to work in two days with “light lifting” restrictions after the second injury. Upon viewing her MRI, Dr. Travis was of the opinion that her MRI showed only mild degenerative changes.

Evidence was also introduced concerning an evaluation of Turner by Dr. William J. Lester. Dr. Lester obtained a history from Turner and reviewed her medical records. His examination revealed no abnormality of reflexes. He further found that Turner had a good range of motion and found her to be at maximal medical improvement (“MMI”), assigning a 5% whole person impairment rating. Dr. Lester found that all restrictions for the patient were based on the initial injury of October 15, 2007.

In addition, Dr. Henry Tutt conducted an independent medical examination (“IME”) of Turner. He noted that Turner exhibited normal sitting and standing posture and a normal gait. He also noted her movements to be natural and fluid, noting that she had no trouble getting on or off of the examining table, or in removing and replacing her shoes. Dr. Tutt also viewed the surveillance footage of Turner taken on May 13, 2009. Dr. Tutt observed that Turner was able to carry several bags of groceries in each hand, naturally shift the bags from one hand to the other while opening the door, and that she was able to lift a watermelon and place it on her shoulder to carry it into the home. Dr. Tutt concluded that the activities he saw Turner perform on the video were not significantly different from the activities of an individual working as a CNA in a nursing home. He further

concluded that her complaints were “inexplicable and ungrounded in physiologic and pathologic principles.”

At the hearings, Turner admitted to often being at the home of Cleta Noble, but insisted that Mrs. Noble was a close family friend whom she often helped. Turner denied any allegation that she was employed by Mrs. Noble. Turner introduced a limited power of attorney and designation of health care surrogate by Cleta Noble designating Turner as her limited power of attorney and health care surrogate in order to show that the nature of their relationship was not employer-employee. In addition, Turner claimed that she *did* exhibit a limp when walking on one of the days in question, but that it was not captured on videotape.

After the hearing, and upon reviewing the evidence, ALJ Smith entered an opinion and order dismissing the case on December 21, 2009. Although ALJ Smith found that Turner did suffer injuries to her back in 2007 and 2008, he found that she did not suffer any permanent impairment in connection with those injuries. Thus, ALJ Smith found that Turner was not entitled to any permanent partial disability (“PPD”) benefits. ALJ Smith made no findings in regard to Turner’s claim for temporary total disability (“TTD”) benefits or when she had reached MMI. Turner appealed from the opinion and order dismissing, arguing on appeal that ALJ Smith erred by failing to make a determination as to whether she was entitled to TTD benefits. Although Turner disagreed with the ALJ’s determination regarding PPD benefits, she did not appeal that part of the decision.

The Board agreed with Turner, vacating in part and remanding. The Board held that it was error for the ALJ to find that Turner sustained two work related injuries, but failing to assess when she had reached MMI and whether she was entitled to any period of TTD. The Board vacated and remanded to the ALJ for a determination of whether Turner was entitled to TTD benefits, and if so, to make findings as to a specific period of entitlement and as to which employer is responsible for the payment of those benefits. The Board also raised the compensability of medical benefits, *sua sponte*, stating that although the claim was dismissed as it pertains to PPD benefits, no determination was made by the ALJ as to the payment of medical benefits. Thus, the Board also remanded to the ALJ for a determination regarding the compensability of medical benefits.

SSH petitioned this Court for review, and now argues that the Board exceeded the scope of its review by remanding for a determination of whether TTD benefits were warranted. SSH further argues that it was improper for the Board to raise the issue of compensability of medical benefits since the claim was waived by Turner when she failed to raise it before the Board. SHG filed a response, essentially agreeing in all salient respects with SSH on appeal. Turner filed no brief before this Court.

Analysis

Upon review of a decision of the Workers' Compensation Board, we will not reverse the Board unless the Board has "overlooked or misconstrued controlling statutes or precedent" or has "committed an error in assessing the

evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Upon reviewing the Board’s decision, we are mindful that the ALJ, as the finder of fact, has the sole discretion to determine the quality, character, and weight of the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). In the present case, the Board determined that Turner was not required to file a petition for reconsideration in order to preserve her right to appeal. For the reasons stated herein, we agree and affirm the Board.

Kentucky Revised Statute (“KRS”) 342.281 provides that a petition for reconsideration may be filed with the ALJ within fourteen (14) days of the date of an award, which petition should clearly set out any errors relied upon and an argument for reconsideration. This Court has held that a petition for reconsideration must be filed with the ALJ in order to preserve an issue for appellate review in a workers’ compensation proceeding. *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327 (Ky. App. 2000). Indeed, KRS 342.285 provides that an award or order of the ALJ is conclusive as to questions of fact, and binding on the Board, unless a petition for reconsideration is filed.

However, KRS 342.285 also authorizes the Board to review an award or order in the absence of a petition for reconsideration. KRS 342.285 provides that, although the Board may not substitute its judgment for that of the ALJ as to questions of fact or weight of the evidence, the Board may determine whether:

- (a) The [ALJ] acted without or in excess of his powers;

- (b) The order, decision, or award was procured by fraud;
- (c) The order, decision, or award is not in conformity to the provisions of [KRS Chapter 342];
- (d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or
- (e) The order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Indeed, the Board has the authority to decide questions of law regardless of whether a petition for reconsideration is filed. *See, e.g., Bullock v. Goodwill Coal Co.*, 214 S.W.3d 890, 893-94 (Ky. 2007); *Brasch-Berry General Contractors v. Jones*, 175 S.W.3d 81 (Ky. 2005). With regard to whether an issue presented for review before the Board is a legal one, our Supreme Court has instructed that it is the Board's province on appeal to ensure that orders and awards of an ALJ are in conformity with Chapter 342, and thus, that determinations of whether an ALJ's award or order is in conformity with Chapter 342 is a question of law. *Whittaker v. Reeder*, 30 S.W.3d 138, 145 (Ky. 2000).

In the present case, the Board found that the ALJ's opinion was not in conformity with Chapter 342. Specifically, the Board noted that while ALJ Smith found Turner had sustained work-related injuries on October 15, 2007 and April 28, 2008, and further found that Turner's injuries had since fully resolved, ALJ Smith failed to make findings with regard to *when* Turner had reached MMI and whether she was entitled to TTD. Additionally, the Board found that ALJ Smith

failed to render an opinion in conformity with Chapter 342 by failing to make any finding with respect to the compensability of medical benefits. The Board noted that it was not attempting to substitute its judgment for that of the ALJ and that the ALJ could find on remand that Turner was not entitled to TTD or medical benefits, but that *some findings* on each were required under the statute.

We disagree with SSH and SHG that the Board exceeded the scope of its review by vacating and remanding on the two above issues where no petition for reconsideration was filed and where Turner failed to raise the compensability of medical benefits in her appeal before the Board. Indeed, as previously stated, it is within the Board's purview on appeal to ensure that orders and awards of an ALJ are in conformity with Chapter 342. *Whittaker v. Reeder*, 30 S.W.3d at 144. As our Supreme Court has noted:

Workers' compensation is a creature of statute. As set forth in Chapter 342, workers' compensation proceedings are administrative rather than judicial. Although the principles of error preservation, *res judicata*, and the law of the case apply to workers' compensation proceedings, they apply differently than in the context of a judicial action.

Id. at 143. Where, as here, an ALJ fails to make essential findings under Chapter 342, the Board does not exceed the scope of its authority by reversing and remanding for the ALJ to make findings in compliance with the Chapter. Specifically, KRS 342.0011(11)(a) defines temporary total disability as the condition of an employee who has not reached MMI and has not reached a level of improvement which would allow her to return to work. Here, where the ALJ

found that Turner was injured and had subsequently reached MMI, he clearly erred as a matter of law by failing to find *when* Turner had reached MMI and whether she was entitled to TTD during the period between injury and MMI. Further, the ALJ based his finding that Turner was not entitled to PPD on the fact that she had reached MMI, but again, made no finding as to when MMI was reached. The ALJ's finding that Turner was not entitled to PPD did not resolve the issue of when MMI was reached and whether she was entitled to TTD, and it is not the place of the Board or this Court to remedy this inconsistency in the opinion by making such findings. *See, e.g., Robertson v. United Parcel Service*, 64 S.W.3d 284 (Ky. 2002) (It is possible for an injured employee to fail to establish PPD, but nonetheless still establish TTD). Without such findings, neither the Board nor this Court may conduct a meaningful review. *Finley v. DBM Technologies*, 217 S.W.3d 261, 266 (Ky. App. 2007). For the same reasons, the ALJ's failure to make any determination with respect to the compensability of medical benefits was also appropriately reversed and remanded by the Board under KRS 342.285(2)(c). *See, e.g., Whittaker v. Reeder, supra*. (Board may review question of law, such as whether opinion or award is in conformity with Chapter 342, *sua sponte*). *See also, Brasch-Berry General Contractors v. Jones, supra.*²

² We recognize that a clear standard has not yet been elucidated by our Courts, to date, concerning how one is to distinguish between omitted findings on a contested issue (which must be preserved by a petition for reconsideration) (*see, e.g., Halls Hardwood Floor Co., supra*) and omitted findings that are required by statute (which may be reviewed without preservation) (*see, e.g., Brasch-Berry General Contractors, supra* and *Bullock, supra*). Here, we are satisfied that the omitted findings as to the contested issues may be reviewed absent a petition for reconsideration as they effectively render the opinion in non-compliance with the Chapter because they create an internal inconsistency in the opinion.

We further disagree with SSH's contention on appeal that the Board exceeded its scope of review by improperly making its own findings of fact. SSH contends that the Board "determined that ALJ Smith was . . . required to award benefits for temporary total disability." (Appellant's brief). However, quite to the contrary, the Board held that Turner *might not* be entitled to benefits for temporary total disability on remand, but that it was a decision to be made by the finder of fact rather than the Board. Indeed, the Board was careful not to make any findings with regard to TTD or the compensability of medical benefits, noting that the ALJ was free to reject either on remand. Instead, the core of the Board's holding was that the ALJ's opinion and order was insufficient under Chapter 342 absent such findings.

Accordingly, we affirm the Board's opinion vacating and remanding in part as the Board is authorized under KRS 342.285 to determine whether any order, decision, or award is not in conformity with the Chapter.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Barry Lewis
Hazard, Kentucky

BRIEF FOR APPELLEE:

Kimberly Van Der Heiden
Lexington, Kentucky