

RENDERED: FEBRUARY 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001474-WC

BETTS USA, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-98477

DEBBIE MURSKI; HON. JOSEPH
W. JUSTICE, ADMINISTRATIVE LAW
JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

AND

NO. 2009-CA-001640-WC

DEBBIE MURSKI

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-98477

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL AND THOMPSON, JUDGES; GRAVES,¹ SENIOR
JUDGE.

GRAVES, SENIOR JUDGE: Betts USA, Inc. petitions for review of a decision of the Workers' Compensation Board. Betts argues that the Board exceeded its authority in reversing the decision of the Administrative Law Judge (ALJ), who had determined that Debbie Murski, a Betts employee, had not sustained a work-related injury. Murski has filed a cross-petition, arguing that the Board erred in not remanding the matter to the ALJ to determine whether she has a permanent disability and is therefore entitled to disability benefits. We affirm.

Murski was born in 1966 and has a ninth-grade education. In 1991, she began working for Betts as an injection mold technician overseeing machines which manufacture toothpaste tubes. Her duties included evaluating production quality and assisting in packaging the products. She lifted approximately fifteen thirty-pound boxes every day and spent most of her time at work on her feet, except for about two hours of each shift which she spent doing paperwork.

¹ Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Murski's injury occurred on January 8, 2007, during the company's Christmas shutdown. Murski had volunteered to work during the shutdown, performing maintenance that involved kneeling and crawling in order to clean the machines. On January 8, as she was getting up from a kneeling position after cleaning a press, she heard a loud "pop" and experienced pain in her left knee. She immediately informed her supervisor and went to St. Elizabeth Business Health Center for treatment. At the hospital, she reported that there was a lot of tightness in her knee as well as a cracking and popping noise.

Murski was off work until January 22, 2007, and received temporary total disability (TTD) benefits during that period. She was last treated at St. Elizabeth on February 21, 2007; the physicians diagnosed knee strain and released her with a work status of regular duty. She worked for seven weeks performing her usual duties. She was off work again from March 14, 2007, until April 29, 2007. She received cortisone injections in her knee during this period and was paid TTD benefits. The cortisone treatment was not particularly beneficial, however. She returned to work for five more months and ultimately underwent knee surgery on September 28, 2007. Dr. John Larkin performed an arthroscopy with chondroplasty, lateral release and VMO advancement. Murski has not returned to work since the surgery.

The ALJ found that Murski had not suffered a work-related injury, and that Betts was not liable for the payment of any medical expenses from the effects of an injury subsequent to February 21, 2007 (the day Murski was last seen

at St. Elizabeth), nor for the payment of any future medical expenses. The ALJ denied Murski's claims for temporary total disability benefits, permanent partial benefits and total disability benefits.

Murski appealed to the Board, which reversed the ALJ's determination that Murski had not suffered a work-related injury, and affirmed the ALJ's denial of income benefits. The matter was remanded to the ALJ for entry of an order finding that Murski is entitled to necessary and reasonable medical expenses for the treatment of her left knee from and after January 8, 2007.

Betts has petitioned for review of the Board's decision, arguing that the Board erred by substituting its judgment for that of the ALJ in determining that a work-related injury had occurred.

In reviewing a decision of the Workers' Compensation Board, our function "is to correct the Board only where the . . . Court perceives 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*, 827 S.W.2d 685, 687-88 (Ky. 1992).

"Injury" is defined for purposes of workers' compensation as
any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.

KRS 342.0011(1). "It is well-established that the work-related arousal of a pre-existing dormant condition into disabling reality is compensable." *Finley v. DBM*

Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007) (citing *McNutt Construction/First Gen. Servs. v. Scott*, 40 S.W.3d 854, 859 (Ky. 2001)).

Both sides in this dispute agree that Murski had degenerative patellofemoral disease in both knees prior to January 8, 2007. The point of contention is whether the event which occurred on that day, when she rose to her feet and felt a “pop” in her left knee, brought this condition into disabling reality and thus constituted an injury compensable under the workers’ compensation statutes.

The ALJ acknowledged that Murski had a preexisting condition due to her “body habitus” (she is knock-kneed) but that what she experienced on January 8, 2007, was a “temporary arousal of pain” caused by rising from a squatting position. He found “no evidence of an arousal of the conditions of Plaintiff’s knee into disabling reality.” The ALJ thus concluded that the surgery performed by Dr. Larkin was not for an “aroused condition” but solely for the preexisting condition.

The Board disagreed with the ALJ, noting that the reports of Dr. Burger, a pain specialist; Dr. Wunder, the independent medical examiner; and the medical records of Dr. Larkin and the St. Elizabeth Business Health Center all supported a finding that Murski had sustained a work-related injury. Only the employer’s expert, Dr. Bender, an orthopedic surgeon, opined that Murski’s condition was not work-related. Dr. Bender testified that his examination of Murski’s MRI showed no significant injury or trauma related to the event of January 8. Similarly, he opined that Dr. Larkin’s surgery did not discover or

address an entity that had earmarks isolated to trauma related to January 8 and was rather an attempt to correct a longstanding problem.

Betts argues that the Board impermissibly substituted its judgment for that of the ALJ as to the weight of the evidence on this question of fact, in contravention of KRS 342.285(1). The Board reviewed Dr. Bender's report and deposition testimony at some length and noted the following factors which support the conclusion that Murski's injury brought her dormant condition into disabling reality: 1) Bender admitted that the degenerative changes and patellofemoral disease are conditions that can be symptomatic and aroused into disabling reality as a result of a traumatic event or injury; 2) that Murski sustained a sprain or strain as a result of a work event on January 8, 2007, and that this sprain or strain was an injury; 3) that such a sprain or strain, if severe enough, is capable of causing an underlying arthritic condition to become symptomatic or painful; 4) that Murski had "smoldering" left and right knee disease; and 5) the only event in her recent medical history that could account for the onset of the problems with her knee was the incident of January 8, 2007. "Although KRS 342.285 provides that an ALJ is the designated finder of fact, a finding that is unreasonable under the evidence is subject to reversal on appeal." *Lizdo v. Gentec Equipment*, 74 S.W.3d 703, 705 (Ky. 2002) (citing *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986)). We agree with the Board that this evidence compels a finding that Murski sustained a work-related injury and that the injury resulted from the arousal of a preexisting dormant condition into disabling reality. It strains credulity to believe that what

occurred on January 8 was an isolated strain or sprain that had no connection with the knee problems that ensued immediately thereafter and culminated in the surgery some nine months later.

Betts further argues that the Board improperly relied on *Finley v. DBM Technologies, supra*, as dispositive authority that the ALJ erred as a matter of law. The Board did quote at length from the opinion, but only after it had concluded that the evidence compelled a finding that Murski sustained a work-related injury. In *Finley*, it was undisputed that the claimant's work injury aroused her dormant preexisting condition (scoliosis) into disabling reality. At issue was whether two subsequent surgeries performed on the claimant were compensable. The ALJ found that the first surgery was a reasonable and necessary treatment of the work-related injury but that the subsequent surgery was solely for the treatment of the preexisting condition; the ALJ therefore concluded that the first surgery was compensable but that the second was not. This Court remanded the case to the ALJ for a finding of fact upon

whether Finley's pre-existing scoliosis was temporarily or permanently aroused by the work-related back injury. If the ALJ finds that the scoliosis was permanently aroused, Finley would be entitled to recover benefits for any medical treatment and for any permanent impairment directly attributed to the arousal of the scoliosis. On the other hand, if the ALJ finds that the scoliosis was merely temporarily aroused, Finley would be entitled to only recover benefits for medical treatment of the scoliosis while temporarily aroused but would not be entitled to recover benefits for medical treatment thereafter. Under the later scenario, Finley would not recover benefits for

permanent impairment attributed to the scoliosis because no such impairment would exist.

Finley, 217 S.W.3d at 266.

The Board relied on *Finley* to support its decision that Murski was entitled to recover all medical expenses directly attributed to the arousal of her dormant condition. The legislature did not intend “to limit compensability to harmful changes that are solely caused by work-related trauma.” *Ryan’s Family Steakhouse v. Thomasson*, 82 S.W.3d 889, 893 (Ky. 2002) (citing *McNutt Construction v. Scott*, 40 S.W.3d 854 (Ky. 2001)).

The Board further noted, however, that the ALJ had by implication found that Murski did not suffer any permanent impairment (unlike *Finley*, where the case was remanded due to the absence of such a finding). The Board therefore concluded that only Murski’s medical expenses were compensable.

In her cross-petition, Murski argues that the Board erred in “speculating” that the ALJ would not have found her to have a permanent impairment. None of the physicians provided an impairment rating except Dr. Wunder, who assessed a seven percent impairment under the Guides based on his observation of a mild antalgic limp. The ALJ pointed out that Dr. Wunder was the only physician who had made such an observation. The Board concluded, based on the reliance by the ALJ on the opinions of Dr. Bender as more credible and his discussion of Dr. Wunder’s impairment rating, that the ALJ had, implicitly if not explicitly, rejected the impairment rating imposed by Dr. Wunder based on an

antalgic gait. As a result, since no other impairment rating was assessed upon which the ALJ could base an award of income benefits, the Board held that Murski had failed to satisfy her burden of establishing entitlement to income benefits.

Murski argues that the Board was merely theorizing about what the ALJ might have decided in regard to an impairment rating and whether she had reached maximum medical improvement (MMI) if he had not first erred in deciding that Murski did not sustain an injury. Murski points to her final hearing testimony that she was incapable of returning to her past work activity and unable to return to any type of work considering her age and education. She contends that the ALJ and the Board failed to consider that her impairment is based not only on gait but on the presence of arthritic changes in the knee.

“A finding of permanent partial or permanent total disability under KRS 342.0011(11)(b) or (c) must be supported by evidence of a permanent disability rating, which requires a permanent impairment rating as determined under the latest available edition of the *Guides*.” *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213, 217 (Ky. 2006). As the Board observed, however, the only physician to provide such a rating was Dr. Wunder, and his assessment was based solely on the presence of an antalgic gait that was not found by any of the other physicians. As to Murski’s contention that the ALJ never proceeded to a consideration of MMI because of his initial error regarding the existence of an injury, Betts has correctly pointed out that even Dr. Bender, upon whose opinion the ALJ relied, assessed Murski’s current condition (which he described as stable

and not requiring further medical treatment) separately from his assessment of causation. For these reasons, we agree with the Board that the ALJ had implicitly rejected Dr. Wunder's impairment rating.

The opinion of the Workers' Compensation Board affirming in part, reversing in part and remanding is therefore affirmed.

ALL CONCUR.

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