

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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001651-WC

ALCO MANAGEMENT, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-78710

HATTIE BROWN; HON. GRANT
ROARK, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; CLAYTON AND STUMBO, JUDGES.

STUMBO, JUDGE: Alco Management, Inc., appeals from an Opinion of the
Workers' Compensation Board Affirming in Part, Reversing in Part and
Remanding an Opinion, Order and Award of the Administrative Law Judge
dismissing Hattie Leigh Brown's claim for income benefits and awarding medical

benefits. The Board affirmed the ALJ's determination that a spinal fracture was the sole injury caused by a workplace slip and fall and did not entitle Brown to permanent total disability or permanent partial disability benefits. It reversed and remanded for further findings the ALJ's decision denying Brown temporary total disability benefits. Alco now argues that the Board improperly substituted its judgment for that of the ALJ on the issue of Brown's claim for temporary total disability benefits. For the reasons stated below, we affirm the Opinion of the Workers' Compensation Board.

Alco owns and manages apartment complexes in Kentucky. Brown was employed by Alco. Her position entailed managing two of Alco's apartment complexes located in Edmonton and Tompkinsville, Kentucky. Brown was injured during the course of her employment on August 2, 2007, when a rug she was standing on slipped out from under her while she was opening a door. Brown fell backward, landing on her right side on the pavement.

The following day, Brown was examined by her family physician, Dr. Charles Townsend. Dr. Townsend ordered an MRI after Brown complained of tingling and numbness in her legs and total numbness in her feet. The MRI revealed that Brown had experienced burst fractures of the spine located at T4, T7, T10, and T11. The MRI also showed lesions of the spine which were highly suggestive of metastatic breast cancer.

Around September 13, 2007, Brown began treatment under the care of West Palm Beach, Florida, neurosurgeon Dr. Amos Dare. Dr. Dare examined Brown's MRI and noted a burst fracture at T11 and noted multiple metastatic lesions in the thoracic and lumbar spine. On September 17, 2007, he performed a surgical procedure to fuse the T4 – L2 vertebrae and remove a spinal tumor. A postoperative report noted metastatic breast cancer affecting 4 vertebrae between T4 and T11, with fractures noted in those same vertebrae. About 10 days later, Dr. Dare's records noted for the first time, and contrary to his initial opinion, that Brown's fall resulted in a thoracic spine fracture.

Dr. Dare later stated that in his opinion Brown's work-related fall on August 8, 2007, caused the spinal fracture at T11 which resulted in the need for surgery to decompress the spinal cord. He went on to conclude that while Brown's cancer may have weakened her spine, the spinal fractures were caused by the fall.

On June 4, 2008, Brown filed an application for workers' compensation benefits resulting from the alleged work-related injury. Additional medical evidence was later adduced, including that of neurosurgeon Dr. Richard Mortara. Dr. Mortara evaluated Brown on September 10, 2008, and opined that Brown's metastatic cancer was the sole cause of her spinal fracture. As a result, he opined that Brown did not sustain any harmful change to the human organism as a result of the work incident and that she has no work-related impairment. In sum, he determined that the sole medical effect of Brown's fall was that it led to her discovery of the cancer. In his opinion, the surgery was necessary to treat the

effects of the cancer but was not necessary to treat the effects of Brown's slip and fall.

On November 26, 2007, Dr. John Cassidy reviewed Brown's medical records. He agreed with Dr. Mortara's conclusion that Brown's medical treatment after August 27, 2007, including the surgery, was related only to her metastatic cancer and not the fall at work. He determined that the principal cause for Brown's treatment was the metastatic lesions and that the surgery was directed only at repairing the effects of those lesions.

The matter proceeded before the ALJ, who rendered an Opinion, Order and Award on March 30, 2009. The ALJ determined that Brown's slip and fall caused the burst fracture at the T11 level of the thoracic spine, but that all of her other spinal conditions resulted solely from the breast cancer. He found as persuasive Dr. Mortara's conclusion that the x-ray findings at multiple spinal levels were consistent with the effects of metastatic breast cancer. The ALJ went on to find that Brown would have required surgery even if she had not fallen, and that, therefore, the only compensable portion of her surgery was that which repaired the burst T11 vertebrae.

As to her claim for benefits, the ALJ determined that while Brown may be totally disabled, she was not entitled to an award of permanent or temporary income benefits because there was no evidence in the record that established how much, if any, of her current impairment was attributed to the T11

burst fracture. The ALJ awarded to Brown all reasonable and necessary medical expenses associated with the cure or relief of her T11 burst fracture.

Brown appealed to the Workers' Compensation Board, where she argued that she was entitled to an award of temporary total disability benefits or permanent total disability benefits based solely on the fact that the ALJ's finding that the T11 burst fracture resulted from the slip and fall. The Board affirmed the ALJ's determination that Brown's T11 burst fracture was the sole injury caused by her slip and fall and that, based on that finding, she was not entitled to an award of permanent partial disability benefits or permanent total disability benefits. Pursuant to KRS 342.285(3), the Board reversed and remanded that portion of the ALJ's Opinion denying Brown temporary total disability benefits for a determination of whether maximum medical improvement had been reached and, if so, to award temporary total disability benefits. This appeal followed.

Alco now argues that the Board erred in reversing the ALJ's determination that she is not entitled to temporary total disability benefits. It contends that the Board improperly acted as fact finder and substituted its judgment on this issue as the ALJ's determination is supported by substantial evidence and there is no evidence that compels a contrary finding. Alco notes that the ALJ specifically found that Brown would have required the spine surgery even in the absence of the burst fracture. It also points out that Brown did not file a Petition for Reconsideration requesting additional findings of fact regarding whether she should be entitled to temporary total disability benefits as a result of

the T11 fracture. Alco maintains that the finding of the ALJ that Brown is not entitled to temporary total disability benefits is proper and that the Opinion of the Board should be set aside.

We have closely examined the Board's Opinion, the parties' written argument, the record and the law, and find no basis for reversing the Order on appeal. The Board determined as a matter of law that "because the surgery was necessitated in part by the T11 burst fracture, which the ALJ found to be a work-related injury, and the ALJ found Brown's spinal condition and surgery prevent her from returning to gainful employment on a regular and sustained basis, Brown is entitled to a period of TTD." We find no error in this conclusion.

As the Board properly noted, KRS 342.0011(11)(a) defines temporary total disability as, "[t]he condition of an employee who has not reached maximum medical improvement from an injury and who had not reached a level of improvement which would not permit a return to employment." In *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579, 581 (Ky. App. 2004), a panel of this Court examined the two-prong test for establishing entitlement to benefits arising from temporary total disability. It stated that,

While the Board was correct in recognizing that that definition encompasses two analyses, it erred when it rephrased them in disjunctive terms of "or" when the statute is clearly written using the conjunctive "and." In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement **and** not have improved enough to return to work.

In this case, once the ALJ determined that Helms had reached maximum medical improvement, she ended her eligibility for TTD benefits. Whether she remained under restrictions which prohibited her from returning to work even after reaching maximum medical improvement is relevant to the issue of the extent and duration of impairment.

The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered.

In the matter before us, the Board determined that the ALJ concluded that the second prong of KRS 342.0011(11)(a) was met because the medical evidence established that Brown had not improved enough to return to work. The sole question as it relates to TTD then is whether Brown has reached maximum medical improvement. The evidence on this issue was conflicting because Dr. Dare opined that Brown attained MMI in August, 2008, whereas Dr. Mortara testified that Brown had not reached MMI. The ALJ made no finding as to MMI. Because the Board cannot serve as fact finder, *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985), it remanded the matter to the ALJ for a determination of whether Brown had reached MMI. We find no error in this determination. KRS 342.0011(11)(a) requires a finding to be made on the issue of whether the claimant has reached MMI. As no finding was made, and because the medical evidence was conflicting, the Board properly reversed and remanded the matter to the ALJ for further findings as to whether Brown has reached MMI.

For the foregoing reasons, we affirm the Opinion of the Workers' Compensation Board reversing and remanding the matter to the ALJ for additional findings.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
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