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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000555-WC

HOMETOWN CONVENIENCE APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-93569

BARBARA MCCOY; DR. DANIEL KRENK,
HOLSTON VALLEY HOSPITAL;
COMMONWEALTH OF KENTUCKY,
WORKERS' COMPENSATION BOARD;
AND HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND NICKELL, JUDGES.

NICKELL, JUDGE: Hometown Convenience appeals from a decision of the Workers Compensation Board (Board) holding the Administrative Law Judge (ALJ) properly concluded that Hometown Convenience failed to carry its burden

of proving the claimant, Barbara McCoy, unreasonably failed to follow medical advice. Hometown Convenience argues the ALJ misapplied the statutory requirements of its affirmative defense and the Board misconstrued the proper standard of review on appeal. We affirm.

McCoy injured her ankle after falling from a ladder while working for Hometown Convenience. On June 4, 2009, she underwent surgery to repair her ankle and was restricted to toe-touch weight-bearing of the lower right extremity for eight to twelve weeks. Two weeks later, McCoy complained that her right knee "gave out" and eventually underwent surgery commencing on October 19, 2009. Hometown Convenience disputed the compensability of the knee injury and argued McCoy unreasonably failed to follow the weight-bearing medical restriction.

Hometown Convenience filed a medical fee dispute. After reviewing the evidence, the ALJ found the knee injury was not caused by the fall which injured McCoy's ankle. The ALJ further found the knee injury could only have been caused by a violation of the weight-bearing restriction, but also found there was not enough evidence to establish McCoy had unreasonably failed to follow the restriction. Hometown Convenience filed a petition for reconsideration which the ALJ denied. On appeal, the Board affirmed the decision of the ALJ. This petition for review followed.

Hometown Convenience argues the ALJ misapplied the requirements of KRS[1] 342.035(3) by requiring it to prove: 1) how McCoy violated the medical restriction and 2) that the Board erred by failing to address its appeal as a question of law.

On appeal, if a claimant has been awarded benefits and the employer appeals, "the question before the court is whether the decision of the board is supported by substantial evidence." *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). In our review, we may "correct the Board only where 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 (Ky. 1992).

KRS 342.035(3) states:

> Where these requirements are furnished by a public hospital or other institution, payment thereof shall be made to the proper authorities conducting it. No compensation shall be payable for the death or disability of an employee if his or her death is caused, or if and insofar as his disability is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.

An employer must satisfy three requirements to establish the affirmative defense contained in KRS 342.035(3): "1) failure to follow medical advice and 2) the failure must be unreasonable. A third factor is whether the unreasonable failure caused disability." *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334, 336 (Ky.

[1] Kentucky Revised Statutes.

App. 1994). "The determination of whether the failure to follow medical advice is unreasonable is a question of fact for the ALJ." *Id.* "Refusal to submit to treatment is unreasonable if it 'is free from danger to life and health and extraordinary suffering, and, according to the best medical or surgical opinion, offers a reasonable prospect of restoration or relief from the disability.'" *Id.* (Citation omitted).

Hometown Convenience argues McCoy refused to obey her medical restrictions and that refusal is *per se* unreasonable under *Luttrell*. We disagree. In *Lutrell,* the evidence demonstrated the claimant refused to submit to medical treatment for various personal reasons despite the unanimous medical opinion that physical therapy was necessary. *Id.* In the present case, the record is silent as to the circumstances surrounding the violation of McCoy's medical restrictions. Contrary to Hometown Convenience's suggestion, neither the statute nor the caselaw requires McCoy to prove the reasonableness of her actions. The ALJ correctly applied the appropriate legal standard and simply found as a matter of fact that Hometown Convenience had failed to carry its burden of proving McCoy unreasonably refused to submit to her medical restrictions. We cannot conclude the Board erred so flagrantly as to cause gross injustice by affirming the factual finding of the ALJ. Further, the Board properly applied the controlling law. As stated above, the issue of the unreasonableness of refusing medical treatment presents a question of fact. *Luttrell, supra.*

Accordingly, the decision of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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