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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002640-WC

T.J. MAXX — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 02-69078-WC

CHRISTINE L. BLAGG,
HON. JOHN. B. COLEMAN, ALJ. AND
KENTUCKY WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, HOWARD AND THOMPSON, JUDGES.

THOMPSON, JUDGE: T.J. Maxx petitions for review of a decision of the Workers' Compensation Board which vacated an opinion and order of the Administrative Law Judge dismissing Christine L. Blagg's claim against T.J. Maxx for a work-related injury and which remanded the case to the ALJ for further proceedings. T.J. Maxx contends that the ALJ abused his discretion in ordering a university evaluator after the claim had been submitted and, instead, was required to dismiss the claim based on the evidence

placed in the record by the parties. It also contends that the Board erroneously acted as fact-finder when it determined that Dr. Martyn Goldman was not employed by or on the staff of the University of Louisville Medical School.

On October 1, 2004, Blagg filed a workers' compensation claim alleging that in October 2002, she injured her neck and lower back while unloading a stock. The issue of whether she suffered any permanent impairment as a result of he injury was vigorously litigated by the parties and each submitted the opinions of their medical experts. On February 22, 2005, the claim was brought before the ALJ for a final hearing at which time the parties were ordered to tender written briefs on or before March 22, 2005.

After the receipt of the parties' evidence, on April 22, 2005, the ALJ rendered an opinion and order of abeyance stating that, after a review of the record, he found the evidence to be "in great conflict with respect to whether the plaintiff suffered an injury as defined by the Act." Since the evidence would support either a finding that Blagg was severely disabled or that she suffered no disability, pursuant to KRS 342.315, the ALJ ordered the appointment of a university evaluator.

T.J. Maxx filed a petition for reconsideration of the ALJ's order. It contended that since the ALJ was unable to render a decision based on the evidence presented by the parties, he was required to find that Blagg had failed to meet her burden of establishing a compensable work-related injury and, as a result, to dismiss the claim.

The petition was denied and Blagg was subsequently referred to the University of Louisville for a university evaluation. Dr. Martyn Goldman, who had contracted to perform evaluations on behalf of the university, evaluated Blagg on June 23, 2005, at the Medical Assessment Clinic where he is employed. He issued a Form 107 in which he stated that Blagg had not sustained a work-related injury On October 9, 2002, and that "nothing unusual had happened" which would cause an injury. He assessed a 0% impairment rating.

Blagg objected and moved to strike Dr. Goldman's report on the grounds that Dr. Goldman was not employed by the University of Louisville Medical School and, therefore, was not a university evaluator within the meaning of KRS 342.315. The ALJ rejected Blagg's objection and, in reliance on Dr. Goldman's report, found that Blagg had not sustained a work-related injury in October of 2002. After Blagg's petition for reconsideration was denied, she appealed to the Board.

While Blagg's appeal was pending, the Supreme Court rendered its opinion in *Morrison v. The Home Depot*, 197 S.W.3d 531 (Ky. 2006), in which it held that KRS 342.315 contemplates evaluators who are employed by the University of Kentucky or the University of Louisville medical school. Thus, the statute does not authorize either university medical school to subcontract with private physicians to perform evaluations. *Id*. at 535. In that case as in this case, the claimant was referred to the University of Louisville's Medical School pursuant to an order issued by the ALJ for a university medical evaluation. Again, precisely as in this case, the physician selected by the

university was Dr. Martyn Goldman. The Court held that the admission of Dr. Goldman's report was erroneous and explained its reasoning as follows:

> The purpose of KRS 342.315 is to obtain clinical findings and opinions from unbiased medical experts and to assure sufficient numbers of such experts. *Id.* KRS 342.315 does not authorize the university medical schools to subcontract with private physicians to perform evaluations. Nor does it imply a legislative intent to grant such authority. The rationale for our conclusions in *Magic Coal Co. v. Fox, supra,* was that physicians who performed evaluations under KRS 342.315 would be "affiliated with," *i.e.,* employed by or on the staff of, one of the designated medical schools. *Id.* at 95-96. A physician who is not affiliated with a university medical school is not a proper evaluator under KRS 342.315. Therefore, reports from such a physician are not admissible for the purposes of KRS 342.315.

Id. at 534-535.

The Supreme Court reversed and remanded Morrison's claim to the ALJ "for further proceedings." *Id*. at 535.

Bound by the decision in *Morrison*, the Board held that the ALJ's admission of Dr. Goldman's report in this case was likewise erroneous. Because the ALJ explicitly relied on the report, it further held that the error was prejudicial and required reversal. In light of the conflicting medical evidence in the record, the Board suggested that the ALJ either reopen proof time for both parties or order a second, valid university evaluation, or both.

In a separate order, the Board denied a motion filed by T.J. Maxx to place the appeal in abeyance pending a determination on remand in *Morrison* as to whether Dr. Goldman is "affiliated with" the University of Louisville so as to render him qualified as

a university evaluator under KRS 342.315. The Board denied the motion on the basis that whatever evidence may be introduced on remand in *Morrison* would necessarily be new or additional evidence that was not presented to the ALJ and, therefore, could not be introduced on appeal. *See* KRS 342.285(2)

T.J. Maxx contends that regardless of the status of Dr. Goldman as a university evaluator, after the case was submitted for a decision, the ALJ did not have the authority to order a university evaluation and, instead, was required to dismiss the claim. An ALJ has broad discretion to control the taking and presentation of proof in workers' compensation proceedings. *Elkhorn Coal Co. v. Bates*, 314 Ky. 837, 236 S.W.2d 946, 949 (Ky. 1951). The question presented is whether the ALJ has authority to appoint a university evaluator in cases where the parties have presented medical opinions so disparate that the ALJ finds it impossible to render a fair decision.

In a workers' compensation proceeding, the cause, extent, and duration of the claimant's medical condition are issues vigorously litigated and subject to vastly different opinions of the parties' medical experts. To eliminate the bias often associated with such opinions, the legislature enacted KRS 342.315 and with it, conferred to the ALJ the authority to obtain clinical findings and opinions from independent medical experts. *Morrison,* 197 S.W.2d at 534. KRS 342.315(1) expressly provides that: "[r]eferral for evaluation may be made to one of the medical schools [either the University of Kentucky or the University of Louisville] whenever a medical question is at issue." KRS 342.315(3) further provides that "an administrative law judge may...upon

his own motion, direct appointment by the executive director...of a medical evaluator to make any necessary medical examination of the employee."

The statute contemplates a situation such as here where the parties have presented expert medical opinions that are so disparate that the ALJ is unable to render a decision. We agree with the Board that for the purpose of assisting in the judicious resolution of the issues, the ALJ acted within the discretion afforded him.

Having found that the ALJ did not abuse his discretion by ordering a university evaluation, the remaining issue is whether the Board properly interpreted and applied the Supreme Court's decision in *Morrison.* Rare is the case where this court can state that a particular precedent is factually and legally on "all fours" with the case under consideration. However, this case and the *Morrison* case are virtually identical. The ALJ ordered a university evaluation and, through the University of Louisville, both claimants were referred to Dr. Goldman. The same ALJ in both cases considered the report and relied on it when he denied the claimants' benefits.

Unable to find any factual or legal dissimilarities, T.J. Maxx maintains that the Court in *Morrison* did not make a finding of fact that Dr. Goldman was not a university evaluator but only established that he must be employed by or affiliated with the university in order to be a university evaluator under KRS 342.315. It contends that on remand, the Supreme Court limited the taking of proof to the issue of whether Dr. Goldman meets the criteria for a university evaluator set forth by the Supreme Court. Thus, T.J. Maxx contends that in this case the Board erroneously acted as fact-finder

when it stated that Dr. Goldman was not affiliated with the University of Louisville Medical School.

We reject T. J. Maxx's contention that the Board acted as a fact-finder in regard to Dr. Goldman's affiliation with the University of Louisville. As in *Morrison,* there was nothing in the record before the ALJ which even remotely indicated that Dr. Goldman was employed by or on the staff of the University of Louisville Medical School. While the Board made a statement of fact, it did not, as T.J. Maxx suggests, make a finding of fact. It merely applied the law as set forth in *Morrison* to the facts presented.

We find no error in the Board's directive that additional proof may be submitted on remand as to whether Blagg incurred a compensable work-related injury. *See* KRS 342.285(2); *Broadway & Fourth Avenue Realty Co. v. Metcalfe*, 230 Ky. 800, 20 S.W.2d 988 (1929). This is particularly true when, as here, the ALJ has admitted that the medical evidence is in such conflict that a just decision cannot be rendered.

Since Dr. Goldman was not employed by or on the staff of the University of Louisville Medical School at the time he performed his evaluation of Blagg, his report was properly held to be inadmissible by the Board and the case was properly remanded to the ALJ. The opinion and order of the Board is affirmed.

ALL CONCUR.

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