

OPINION ENTERED: October 5, 2012

CLAIM NO. 201091572

T-MOBILE

PETITIONER

VS.

**APPEAL FROM HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE**

DIANE ETTTELBRICK, ADMINISTRATRIX
FOR THE ESTATE OF BROOKE ETTTELBRICK
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
VACATING IN PART AND REMANDING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

STIVERS, Member. T-Mobile appeals from the April 23, 2012, "Opinion and Order and Award" and the May 22, 2012, order of Hon. R. Scott Borders, Administrative Law Judge ("ALJ") ruling on T-Mobile's petition for reconsideration. The ALJ awarded temporary total disability ("TTD") and medical benefits and dismissed the claim for permanent partial

disability ("PPD") and permanent total disability ("PTD") benefits.

The Form 101 alleges on July 9, 2009, Brooke Ettelbrick ("Brooke") injured her "[l]eft lower extremity, neck, and low back" in the following manner: "Twisted at work."¹ Medical records attached to the Form 101, generated by Dr. Lawrence Schaper at Ellis & Badenhausen Orthopedics, P.S.C., dated July 17, 2009, state as follows:

Patient is a 32-year-old female who has a history of a previous fracture of the foot about 9 years ago on the left side. She has had [sic] intermittently had some problems with it since then. She felt something pop on 07/10/09 [sic] which was about a week ago and had some swelling after this and pain with ambulation. The pain has gotten progressively worse and she comes in today to have this evaluated.

In this same record, Dr. Schaper indicates he reviewed x-rays Brooke brought with her and agreed "that nothing seems to be abnormal." On July 23, 2009, after reviewing an MRI scan, Dr. Schaper diagnosed a stress fracture of the distal 4th metatarsal. The July 23, 2009, record indicates as follows:

¹ There are numerous inconsistencies in the record regarding the date of the incident. The record reflects the incident happened on either July 7, 2009, or July 9, 2009. We defer to the last representation made by counsel for Diane Ettelbrick, Administratrix for the Estate of Brooke Ettelbrick, in her response brief to this Board which is that the incident occurred on July 7, 2009.

Ms. Ettelbrick returns after her MRI scan. The MRI is consistent with a stress fracture of the distal 4th metatarsal. This is what we had suspected. It certainly appears to be so. It is nondisplaced, but there is edema consistent with a stress fracture. I have written her a prescription for crutches. She is going to have to get off the foot in order to heal it. She understands this. I have given her a note for work stating that she must be on crutches. She is advised this may take six weeks or so to completely heal and that her weight can gradually be put back on it as it heals, but she must protect her weightbearing at least at first. I have made an appointment for her to come back in a month. She can cancel if she is doing better by then.

Brooke also alleged suffering from Complex Regional Pain Syndrome ("CRPS") as a result of the July 7, 2009, injury. The ALJ determined Brooke failed to meet her burden of proving she suffered from CRPS as a result of the injury. As the issue on appeal pertains only to the ALJ's determination regarding the stress fracture, this opinion will be limited to a discussion of that injury.

T-Mobile filed a Form 111, Notice of Claim Denial on July 16, 2010, denying Brooke's claim because the alleged injury did not arise out of and in the course of employment. Under "explain," T-Mobile stated as follows: "This appears to be a non-work related condition, an idiopathic fall, which was not reported in a due and timely

manner." (emphasis added). T-Mobile also denied the claim alleging Brooke failed to give due and timely notice.

Brooke testified by deposition on September 14, 2010. She testified she had a fracture of the fifth metatarsal in her left foot ten years ago explaining as follows: "I was walking down a stairwell and just slipped a step and did not fall but felt pain, and about three or four days later I went to Caritas." Brooke testified her current fracture is in the fourth metatarsal of the left foot. Brooke described the incident of July 9, 2009, as follows:

Q: Could you please tell us the date of that? Or I think you said July 9, 2009. What happened? What were you doing on that day, and what happened to you?

A: I was training my assistant manager on operations and proper procedures.

Q: Who was that person?

A: Her name is Sara Thompson.

Q: All right. Go ahead.

A: At the present time we were discounting accessories, changing the prices, showing her how to find them, find it on the computer and whatnot, how to find how many we have and the procedures of that manner.

Q: Now, what store were you working at?

A: Jefferson Mall.

Q: Okay. Does it have carpet in there, or are you working on just regular-

A: It's a rug.

Q: Okay. It has a rug.

A: It's a weird rug, like- almost like-not Astroturf, but bizarre. It would kill our vacuums all the time.

Q: So, you're training Sara Thompson at the Jefferson Mall, and go ahead.

A: She was on the floor marking down the accessories, and I was, as we say, on the floor. As I was coaching her, still being aware of customers or possible client- possible customers, and turning around to make sure no one was behind me- of course, we're in the middle of the mall.

Q: So, you're within your store area?

A: Yes. It was a ten-by-fifteen kiosk.

Q: So, you're walking in one direction, and you turned around?

A: I'm standing looking at her, and I am turning to the left to scan the area behind me and took a step to the left, and my foot had massive pain.

Q: Were you- is this the same kind of physical activity you've done every day?

A: Yes.

Q: You didn't slip, did you?

A: No.

Q: You just turned like you do all the time, except this time when you turned,

you felt a pop and the pain; is that correct?

A: Yes. I may have jammed it. The carpet was weird. I don't remember.

Q: Were you wearing high heels?

A: I was wearing the same shoes I have on now.

Q: And what are- I don't recall them.

A: Sketchers.

Q: Okay. Do those have heels on them?

A: No. They're more like tennis shoes.

(emphasis added).

In his September 30, 2010, independent medical examination ("IME") report, Dr. M.G. Schiller noted the following regarding the July 9, 2009, incident:

On July 9, 2009, she claims that she injured her foot at work. This injury was related to a simple stepping on her left foot. **There was actually no fall or striking of her foot and therefore it was an innocuous incident that occurs to all people who normally walk.** Nonetheless, it gave her pain in her left foot, so she went to the Norton Surgeon Care Center. X-rays taken showed no evidence of a fracture.

(emphasis added).

Regarding the cause of the stress fracture, Dr. Schiller stated: "This patient has no work-related causation as a

result of the onset of a stress fracture of the fourth metatarsal." Dr. Schiller assigned no impairment rating.

Dr. Anthony Alexander's record generated on March 15, 2010, indicates the following under "reported history":

A recent severe illness or injury 7/9/2009 wearing lace up tennis shoes and took a step to the left and fracture [sic] 4th toe on left foot. Went to Urgent Care on that same day. Xrays were negative. Went to Orthopedic 1 week later and a stress fracture was seen on MRI. Has MRI of the foot from 8/2009 and MRI Lumbar spine with her today on CD.

Dr. Morton L. Kasdan's record dated October 4, 2010, indicates the following "lower extremity history":

Brooke Ettelbrick is a 33-year-old, right-hand-dominant female who reports an injury of her left foot on 9 July 2009. She states she was doing her normal duties training an assistant manager at a kiosk in the mall when she took a step to the left and felt a pop in her left foot.

Dr. Michael G. Cassaro's record dated April 18, 2011, indicates as follows concerning the history of Brooke's stress fracture:

Then on July 9, 2009, the patient was running and took a quick step to the left and felt something pop in her foot and knew from the feeling of it that she had broken her foot.

Because Brooke died on September 5, 2011, by order dated February 21, 2012, the ALJ ordered Diane

Ettelbrick ("Diane"), Administratrix of the Estate of Brooke Ettelbrick, substituted as Party-Plaintiff pursuant to Diane's motion. The record does not reveal the cause of Brooke's death. The February 21, 2012, benefit review conference ("BRC") order lists the following contested issues: "benefits per KRS 342.730; work-relatedness/causation; notice; unpaid or contested medical expenses; injury as defined by the ACT; credit for LTD, and TTD."

Regarding the work-relatedness of the stress fracture, in the April 23, 2012, "Opinion and Order and Award," the ALJ's findings of fact and conclusions of law are as follows:

The first issues for determination are whether the Plaintiff suffered an injury as defined by the Act which encompasses the issues of work-relatedness/causation of her left foot condition.

KRS 342.0011 (1) defines injury meaning "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."

The Plaintiff bears the burden of proof and risk of non-persuasion in each and every element of her case. *Snawder vs. Stice*, 576 SW 2d 276 (KY App. 1979)

Jones vs. Newberg, 890 SW 2d 284 (KY 1994).

The Plaintiff testified that while she was working within the course and scope of her employment as a manager for T-Mobile she was walking across the floor of the kiosk where she was working when she felt a pop in her left foot, noticed the sudden onset of pain, and was thereafter diagnosed as suffering a compression fracture of the fourth metatarsal by MRI scan. This incident was witnessed by Ms. Sarah Thompson who testified that she saw Ms. Ettelbrick walking across the floor when something happened to her left foot, causing her to complain of excruciating pain.

In this instance, the evidence is uncontradicted that Ms. Ettelbrick sustained a fourth metacarpal compression fracture on July 7, 2009. This diagnosis was agreed to by Dr. Schaper, Dr. Salamon, Dr. Schiller, and Dr. Kasdan. The true question is whether or not this incident was causally related to her work.

The Plaintiff argues that the incident occurred while she was walking, within the course and scope of her employment as a sales clerk/store manager for T-Mobile on their [sic] premises, and therefore is compensable. The Defendant Employer argues that her stress fractures are not work-related, based on Dr. Schiller's opinion that this cannot be remotely considered to be a work-related injury because it occurs for unknown reasons in people who simply walk and do not have a discrete injury.

Therefore, it appears that this incident may arguably be considered an idiopathic injury. In the case of

Vacuum Depositing, Inc. vs Dever, 285 SW3d 730 (Ky. 2009).[sic] The Court held that, in an idiopathic injury case there are three types of risk that must be analyzed to determine if the incident is work-related (1) risks distinctly associated with employment; (2) risks that are idiopathic or personal to the employee; and (3) risks that are neutral. The *Dever* case defined an idiopathic fall as those caused by personal factors, such that they would have occurred and resulted in harm regardless of the employment. Examples of such personal factors include pre-existing disease, physical weakness, personal behavior or a personal mortal enemy.

It appears from reviewing the Defendant Employer's arguments that they [sic] are maintaining that Ms. Ettelbrick's injury was clearly personal to her and that her employment had nothing to do with it other than the fact that she simply was working.

However, Kentucky has adopted a presumption that an unexplained workplace fall arises out of the employment unless the Employer presents substantial evidence to show otherwise. See *Workman v. Wesley Manor Methodist Home*, 462 SW2d 898 (KY 1971). The Employer cannot prevail in such a case unless they show affirmatively that the fall was not work-related, and therefore must offer sufficient evidence that it was idiopathic to negate the presumption that it was not.

In this instance, there is [sic] been no evidence presented, other than Dr. Schiller's personal opinion, that Ms. Ettelbrick's fall did not arise out of her employment. Ms. Ettelbrick's job required her to be on her feet and to

walk which is exactly what she was doing when she felt a pop in her left foot and sustained her fracture. Therefore, she was clearly within the course and scope of her employment when this traumatic incident occurred and therefore it is deemed to be work-related.

T-Mobile filed a petition for reconsideration asking for "further findings of fact with regard to the findings of compensability as an idiopathic injury." The ALJ, by order dated May 22, 2012, failed to make any additional findings and simply overruled T-Mobile's request.²

On appeal, T-Mobile asserts the ALJ erred by discounting Dr. Schiller's testimony on the issue of causation. T-Mobile states as follows:

Secondly, the 'cause' of a stress fracture is a medical question. None of the examining physicians found a work related stress fracture. Dr. Schiller, an orthopedic surgeon, was the only one to address this issue. He did a medical examination in order to determine whether or not Ms. Ettelbrick had suffered a work related stress fracture and the extent of any residual impairment. He stated in his opinion letter that the stress fracture was not work related. The ALJ recognized this as 'evidence', but then disparaged it as 'just his personal opinion.'

² The ALJ did correct the date of the incident which was incorrectly cited in the award as July 7, 2005.

T-Mobile also asserts the ALJ "mischaracterized" the evidence by characterizing the incident as a fall.

It is clear from the April 23, 2012, "Opinion and Order and Award" the ALJ has treated the nature of Brooke's incident at work in an inconsistent manner. The ALJ described the July 7, 2009, incident as follows:

She testified that she was turning to the left to scan the area behind her, took a step to the left, and her left foot had massive pain. At that time, she felt a pop in her left foot. She immediately e-mailed her supervisor Chris Goode and advised of the incident. Within 10 minutes she took her shoe off and her foot began to swell. She presented herself to Norton Urgent Care and underwent x-rays and returned to work. The following Thursday she was sent home by Mr. Goode. The next day she sought treatment at Ellis and Badenhausen, orthopedic surgeons. She came under the care of Dr. Schaper and underwent an MRI scan and on July 17, 2009, was told that she had suffered a fractured metatarsal and was placed on crutches.

The above reflects the ALJ understood Brooke did not fall during the July 7, 2009, incident. However, later in the April 23, 2012, "Opinion and Order and Award," the ALJ states as follows:

However, Kentucky has adopted a presumption that an unexplained workplace **fall** arises out of the employment unless the Employer presents substantial evidence to show otherwise.

See *Workman v. Wesley Manor Methodist Home*, 462 SW2d 898 (KY 1971). The Employer cannot prevail in such a case unless they show affirmatively that the **fall** was not work-related, and therefore must offer sufficient evidence that it was idiopathic to negate the presumption that it was not. In this instance, there is been no evidence presented, other than Dr. Schiller's personal opinion, that **Ms. Ettelbrick's fall** did not arise out of her employment. Ms. Ettelbrick's job required her to be on her feet and to walk which is exactly what she was doing when she felt a pop in her left foot and sustained her fracture. Therefore, she was clearly within the course and scope of her employment when this traumatic incident occurred and therefore it is deemed to be work-related.

(emphasis added).

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion with regard to every element of his or her claim. *Durham v. Peabody Coal Co.*, 272 S.W.3d 192 (Ky. 2008). As Brooke was the party with the burden of proof and was successful before the ALJ, the sole issue in this appeal is whether substantial evidence supported the ALJ's conclusion. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B. F. Goodrich*

Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id. Substantial evidence must be "something of substance and **relevant consequence**, and not vague, uncertain, or irrelevant matter not carrying the quality of proof or having the fitness to induce conviction." Clear Branch Min. Co. v. Holbrook, 247 S.W.2d 48, 50 (Ky. 1953) (emphasis added).

While the Board is not a fact-finding body, it can determine whether the ALJ has an adequate understanding of the evidence and, pursuant to KRS 342.285(3), can request additional findings if the ALJ has fallen short of providing the necessary findings of fact. Here, the ALJ has fallen short of providing the necessary findings of fact and has repeatedly mischaracterized Brooke's work incident as a fall. In doing so, the ALJ has mistakenly discussed case law pertaining to idiopathic or unexplained falls, which is not relevant in this claim. In the April 23, 2012, "Opinion and Order and Award," the ALJ has provided inconsistent and inadequate findings of facts and has based an award of TTD benefits and medical benefits on this faulty understanding.

T-Mobile added to the confusion by its own mischaracterization of Brooke's incident as an idiopathic

fall in its July 16, 2010, Notice of Claim Denial. Even in its appeal brief, while arguing the ALJ mischaracterized the evidence as a fall, T-Mobile itself mischaracterizes the evidence by stating as follows: "We agree that the initial lack of explanation for Ms. Ettelbrick's fall shifted the burden of persuasion to the defendant to disprove work relatedness." (emphasis added). We have no explanation for T-Mobile's inconsistencies regarding the nature of the incident, particularly in light of its arguments on appeal. However, while T-Mobile's lack of consistency concerning this issue has no significant ramifications, the ALJ's discussion of irrelevant case law and his finding based thereon create understandable confusion. The ALJ should have determined whether Brooke's stress fracture was causally related to her employment without erroneously relying on case law pertaining to idiopathic falls. Thus, we remand the claim to the ALJ for a discussion of the applicable law findings *consistent with* the evidence in the record. Stated another way, the ALJ must determine whether Brooke sustained a work-related stress fracture of the distal 4th metatarsal as a result of the event at work on July 7, 2009, as recounted by Brooke.

In light of our ruling, T-Mobile's argument regarding causation is now moot.

Consequently, we **VACATE** that portion of the ALJ's April 23, 2012, "Opinion and Order and Award" and May 22, 2012, order on reconsideration indicating Brooke's work incident was a "fall." We also **VACATE** the ALJ's award of TTD and medical benefits as set out in the ALJ's April 23, 2012, "Opinion and Order and Award" which is based on the ALJ's erroneous understanding of the evidence. We **REMAND** the claim to the ALJ for entry of an amended opinion, order, and award based upon the applicable law and an accurate understanding of the evidence in the record in accordance with the views expressed herein.

ALL CONCUR.

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