

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002637-WC

WAL-MART STORES, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-98-67828

JUDY ARMSTRONG;  
HON. LLOYD EDENS,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: BARBER, GUIDUGLI, AND TACKETT, JUDGES.

BARBER, JUDGE: The Appellant, Wal-Mart Stores, Inc., ("Wal-Mart") contends that the Workers' Compensation Board erred in affirming an award of 16.25% permanent partial disability on the ground that a surveillance tape was not given proper consideration by the ALJ.

On May 27, 1999, the Appellee, Judy Armstrong ("Armstrong") filed a Form 101 alleging a right shoulder injury on June 17, 1998 (fell from a skid) and a reinjury on October 1, 1998 (lifting a bag of potting soil) while working at Wal-Mart. The parties stipulated that Armstrong had been paid temporary

total disability benefits from August 3, 1998 through August 17, 1998 and from September 22, 1998 to September 23, 1998; further, Armstrong returned to work for Meijers's on December 1, 1998. The surveillance tape at the crux of this appeal documents Armstrong's activities on October 22 and 23, 1998.

In an Opinion rendered April 11, 2000, the ALJ found that:

The Claimant has testified that she returned to work . . . [for Meijer's] on December 1, 1998 following her termination by the Employer. The Employer produced a videotape showing the Claimant engaged in various activities on October 22 and October 23, 1998. The Claimant testified during the hearing that she did assist her brother-in-law briefly in a roofing project and that she only carried four or five shingles at a time. The videotape depicts these activities by the Claimant and her estimate in the number of shingles would appear to be correct. Additionally, I noted that the shingles were carried on the left shoulder. Her activities while loading and unloading the van show her reaching with her right arm and shoulder in order to close the back of the van. This activity would indicate that the Claimant is able to reach above shoulder level but does not show her engaged in lifting at that level. I am persuaded by her testimony, the records and opinions of Dr. Sweet, as well as the opinion of Dr. Martin that the Claimant has suffered a functional impairment as the result of her work injury. I am further persuaded by the opinion of Dr. Martin that the Claimant has suffered a 13% functional impairment. Pursuant to KRS 342.730(1)(b), the functional impairment rating is multiplied by a factor of 1.25, yielding a permanent disability rating of 16.25%.

Wal-Mart filed a petition for reconsideration and contended that the ALJ erred in relying upon Dr. Sweet because Armstrong had not told Dr. Sweet about her roofing activities, and Dr. Sweet had refused to view the surveillance videotape.

Wal-Mart also contended that the ALJ erred in relying upon Dr. Martin because she had not seen the surveillance videotape and her impairment rating was based solely upon Armstrong's "subjective demonstration of her right shoulder motion." By order dated June 22, 2000, the ALJ denied the petition for reconsideration because it "seeks to reargue the merits of the case."

Wal-Mart appealed to the Board which unanimously affirmed in a detailed, 17-page opinion, rendered October 11, 2000:

Wal-Mart argues that the ALJ erred in relying upon the medical opinions of Dr. Sweet and Dr. Martin because neither of these experts had an opportunity to review the surveillance videotape. According to Wal-Mart, therefore, their medical findings and conclusions failed to meet the standard of substantial evidence. Wal-Mart contends that only Dr. Goldman's conclusion should be afforded any probative weight and therefore Armstrong's claim must be dismissed.

. . . .

Certainly we agree with Wal-Mart that the record contains evidence which, if believed by the ALJ, could have been fatal to Armstrong's recovery of benefits. However, we do not believe that evidence must be viewed as uncontroverted by the ALJ. The fact that neither Dr. Sweet, nor Dr. Martin, reviewed the surveillance tape merely goes to the weight of their credibility, but not does necessarily render their opinions and conclusions unusable by the factfinder.

. . . .

We note that the ALJ did, in fact, consider the videotape as part of his determination that Armstrong remained able to return to the type of work she was performing at the time of her injury. The ALJ was also free, as a matter of law, to adopt the impairment rating

rendered by Dr. Martin over the opinions of Dr. Goldman . . . . [I]t is the ALJ's prerogative to select what evidence upon which to rely, and when one of two reasonable inferences may be drawn from the evidence, the ALJ, as fact-finder, may choose. Paramount Foods, Inc. v. Burkhardt, [Ky., 695 S.W.2d 418 (1985)] . . . .

We note with interest, that . . . Wal-Mart cites . . . Osborne v. Pepsi-Cola, Ky., 816 S.W.2d 643 (1991) . . . [for the proposition] that because the histories . . . received by Dr. Sweet and Dr. Martin were impeached by the surveillance tape, the ALJ must disregard those experts' opinions. We disagree.

Osborne v. Pepsi Cola, supra does not require that medical testimony be disregarded if the history upon which it is based is impeached. On the contrary, it merely allows the ALJ to disregard such testimony. Whether the ALJ does so is up to him. While another factfinder may well have relied upon the testimony of Dr. Goldman and the surveillance videotape to determine that Armstrong's claim was without merit, there is substantial evidence supporting the finding made by this ALJ.

On this appeal, Wal-Mart makes the same argument that it made to the Board. Wal-Mart contends that the ALJ should have relied upon Dr. Goldman instead of Dr. Sweet and Dr. Martin in light of the surveillance videotape. Having reviewed the record, including the surveillance videotape, we find no error. Clearly, the ALJ did consider the surveillance videotape as reflected by his finding summarizing Armstrong's activities. The ALJ simply did not consider the tape to be as persuasive as Wal-Mart would have liked. That was his prerogative. We agree with the Board that, although another ALJ may have decided the case differently, the ALJ's determination is supported by substantial evidence.

Wal-Mart also mentions that the ALJ erred in failing to "consider the propriety of medical expenses" based upon Armstrong's failure to adhere to the physicians' restrictions. The unreasonable failure to follow medical advice is an affirmative or special defense. KRS 342.035(3); 803 KAR 25:010 §1(9) [now 803 KAR 25:010 §1(8)]. It does not appear that Wal-Mart properly raised the issue as a special defense. The "propriety of medical expenses" was simply listed along with other contested issues, such as notice, average weekly wage and work-relatedness, in Wal-Mart's "Employer's Statement of Proposed Stipulations, Notice of Contested Issues and Designation of Evidence" filed November 1, 1999. Moreover, Wal-Mart does not explain how the Board erred nor does it provide any citation of authority in support of its position. Thus, there is nothing for us to consider.

The Workers' Compensation Board's Opinion rendered October 11, 2000, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Scott C. Wilhoit  
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BRIEF FOR APPELLEE:

Phillipe W. Rich  
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