

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001031-WC

JANET STEWART

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-08-98020

T.J. MAXX; HON. DOUGLAS  
GOTT, ADMINISTRATIVE LAW  
JUDGE; AND THE WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KELLER, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Janet Stewart petitions this Court to review an opinion of the Workers' Compensation Board (Board) entered April 29, 2009, affirming the Administrative Law Judge's (ALJ) decision to dismiss Stewart's workers' compensation claim against T.J. Maxx. We affirm.

Stewart was born on March 1, 1951. In 2003, Stewart became employed by T.J. Maxx. In January 2007, Stewart was also hired by an optometrist, Dr. Bizer, to work in his office. Stewart continued to work part-time at T.J. Maxx while working for Dr. Bizer.

On October 19, 2007, while working at T.J. Maxx, Stewart was lifting a six-pound bar of hangers when the rack slipped away from her and a table she was leaning on gave away causing her to “pull” the right side of her neck and her right shoulder. Stewart reported the injury to T.J. Maxx on her next scheduled workday – October 26, 2007.

Stewart subsequently filed a claim for workers’ compensation benefits as a result of her injury. The ALJ ultimately found that Stewart’s testimony and medical evidence were both lacking in credibility. Thus, the ALJ concluded that Stewart had “not sustained her burden in proving that she suffered an ‘injury’ on October 19, 2007.” By opinion and order rendered December 5, 2008, the ALJ dismissed Stewart’s claim for workers’ compensation benefits.

Being unsatisfied with the ALJ’s decision, Stewart sought review with the Board. On April 29, 2009, the Board entered an opinion affirming the ALJ’s decision, thus precipitating this petition for our review.

Stewart contends the ALJ committed error by dismissing her claim for workers’ compensation benefits. In this regard, the ALJ specifically found:

The ALJ gave careful and deliberate consideration to all of the evidence and to the arguments presented by the parties. Frankly, the medical evidence on both sides

was found lacking, as will be set forth in more detail below. But the medical evidence submitted by [Stewart] was less credible than that submitted by [T.J. Maxx].

The ALJ also found [Stewart's] testimony lacking in credibility, and, when combined with medical evidence lacking in credibility, the combination caused the ALJ to conclude that [Stewart] has not sustained her burden in proving that she suffered an "injury" on October 19, 2007.

ALJ's Opinion and Order at 8.

Stewart asserts that the ALJ erred by finding that she did not suffer a compensable work-related injury and erred by relying upon the medical opinion of Dr. Thomas Loeb. As to Dr. Loeb's medical opinion, Stewart claims that the doctor failed to consider results of MRI tests in his opinion, thus rendering Dr. Loeb's medical opinion unreliable. Stewart cites to *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004), to support her argument. According to Stewart, an MRI of the cervical spine and of the right shoulder demonstrated she suffered from a cervical spine and right shoulder injury.

To prevail on appeal, Stewart must demonstrate that the record compels a finding in her favor. See *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). And, it is within the sole province of the ALJ to judge the weight and credibility of the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993).

In this case, we believe the record does not compel a finding that Stewart suffered a compensable work-related injury on October 19, 2007. As fact-

finder, the ALJ is free to determine the weight and credibility of the varying opinions by medical experts. The ALJ simply found Dr. Loeb's opinion more credible and chose to rely upon it. As to Stewart's argument that Dr. Loeb's opinion is unreliable because he failed to consider the results of two MRI tests, we view as persuasive the Board's reasoning that the ALJ properly relied upon Dr. Lobe's opinion and adopt same herein:

Dr. Loeb was specifically provided with the medical records of Dr. Barefoot, Stewart's IME physician. Dr. Barefoot's report contained the results of the MRI scan performed on June 4, 2008[,] which noted a central and right-sided C6-C7 disc herniation with severe right-sided neuroforaminal encroachment. Because Dr. Loeb's report indicates he reviewed Dr. Barefoot's report which contained the results of the MRI scan, it is reasonable to conclude the ALJ inferred that Dr. Loeb had rejected Dr. Barefoot's findings when he noted in his opinion that only Dr. Barefoot found the C6-[C]7 disc herniation to be diagnostically significant. Contrary to the assertions made by Stewart, it is clear a reading of Dr. Loeb's report demonstrates he reviewed Dr. Barefoot's medical report. In doing so, Dr. Loeb had at his disposal the results of the latest cervical MRI scan but simply did not find the results persuasive.

As such, we conclude that Dr. Loeb's medical opinion was properly relied upon by the ALJ. In sum, we agree with the Board that the evidence did not compel a finding in favor of Stewart. *See Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984).

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James D. Howes  
Louisville, Kentucky

BRIEF FOR APPELLEE T.J. MAXX:

C. Patrick Fulton  
Louisville, Kentucky