RENDERED: JULY 30, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-002191-WC

DEIRDRE STREET — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-99990

GOODY'S FAMILY CLOTHING;
HON. GRANT S. ROARK, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of a decision of the Workers'

Compensation Board (the "Board").

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

## FACTUAL AND PROCEDURAL BACKGROUND

The appellant, Deirdre Street, was an employee of the appellee, Goody's Family Clothing beginning in November of 2005. She was an assistant manager and was enrolled in a management development program in hopes of eventually becoming a store manager. On January 7, 2006, Street was injured as she was folding and lifting banquet tables for storage. She described the incident in her deposition as follows:

> It was after the holidays. We had used banquet tables to present merchandise in the aisles of the store. We were unloading that merchandise off the tables, breaking them down, and carrying them to a storage room, and then finding room for them and standing them up against the wall. We had lifted quite a few tables. And at one point when I was lifting a table, it felt like sudden pain and like electricity was shooting through my back and kind of down into my legs.

Street stated that she informed the store manager, who was helping with the movement of the tables, at the time the incident happened.

On January 13, 2006, Street went to PrimeCare for treatment. Street received treatment by physical therapy and medication for her injuries. In October of 2006, Street went to RediCare for treatment of the same symptoms. At this time an MRI was performed which revealed a questionable right pars defect at L5. At this point, Street was referred to Dr. Sean McDonald, a neurosurgeon. Dr. McDonald ordered a myelogram, a CT and an EMG. It was his opinion that these tests revealed a chronic left L4-5 radiculopathy. Dr. McDonald restricted Street from working.

Street was also treated by Dr. Daniel Keck. He administered facet injections on May 17, 2007; however, Street indicated they did not improve her condition. Drs. McDonald and Keck suggested Street proceed with provocative discography; however, Dr. M. Robert Weiss performed an IME and the discogram was denied by the compensation carrier. Later, a neuropsychological evaluation for a dorsal column was also denied by the carrier.

Dr. McDonald did not place Street at Maximum Medical Improvement ("MMI"), but assigned her a 13 percent impairment rating. The Administrative Law Judge ("ALJ") found that Street's symptoms were due to her work-related injury. Since he was presented with conflicting evidence regarding Street's future treatment, pursuant to KRS 342.315, the ALJ held Street's action in abeyance and referred her case to a University Evaluator ("UE"), Dr. Harpring, which was scheduled for July 30, 2008. This referral was "to address the reasonableness and necessity of disputed medical treatment; what, if any, additional medical treatment was needed; whether plaintiff had reached maximum medical improvement and, if so, when; and all other information contained in a Form 107 including an impairment rating and restrictions." ALJ's opinion, pages 1-2.

Prior to the evaluation, Goody submitted medical evidence along with a four-page letter arguing its position. Street objected to the letter and the ALJ ordered on page 8 that "[Goody] shall submit a new letter to the University Evaluator limited to the submission of additional relevant medical evidence not

already provided by the Administrative Law Judge, containing a summary clearly identifying the medical provider, nature of services provided, and date of medical services, under cover of a letter instructing the University Evaluator to ignore the first letter by order of the Administrative Law Judge." Goody's filed a Petition for Reconsideration which the ALJ denied.

Street contends that the UE questioned her regarding prior back issues which, she contends, was the result of exposure to the four-page letter. Dr. Harpring submitted his report on August 7, 2008, which found Street's injury was not the cause of her symptoms due to the fact that there were no diagnostic studies to verify the complaints. Dr. Harpring put forth a differential diagnosis of possible left SI joint inflammation or ileitis while noting that x-rays did not reveal abnormality in that area. Dr. Harpring also noted that SI joint injections did not provide any relief. Dr. Harpring assigned an 8 percent whole person impairment and released plaintiff to return to work. He restricted her from performing excessive lifting, bending, walking, and climbing.

On December 18, 2008, the Kentucky Supreme Court held in T.J. *Maxx v. Blagg*, 274 S.W.3d 436 (Ky. 2008), that any disparity in the evidence of the parties did not warrant reopening the case for additional proof after it had been submitted to an ALJ for a decision. To do so, the Court found, would be an abuse of discretion. The issue in this case then became whether the ALJ erred by holding the case in abeyance and referring it to Dr. Harpring, then admitting and relying upon his report. The ALJ found:

> Because the parties' contested issues necessarily allowed for the possibility that plaintiff's claim would be placed in abeyance (if she was found not to have reached MMI), the Administrative Law Judge does not believe it was an abuse of discretion to refer plaintiff for a University evaluation as it was otherwise determined in *T.J. Maxx v. Blagg,* (citation omitted). As such, it is determined Dr. Harpring's University evaluation report is properly part of the evidence of record to be considered.

ALJ's opinion and order, page 3.

The ALJ then examined the evidence and found that Street's symptoms and need for ongoing treatment were not casually related to her injury at work, dismissing her claims.

Street thereafter appealed the ALJ's decision to the Board. The Board found:

> We reject Street's argument that the ALJ erred in not applying the dictates of *T.J. Maxx v. Blagg* to the facts of this case. At the benefit review conference, the parties listed among the contested issues whether Street had reached maximum medical improvement. In his initial opinion and order, the ALJ determined from the evidence presented that Street had not reached maximum medical improvement. Having previously determined that the claim was work-related and having further determined from the evidence that Street was unable to return to her regular and customary work, the ALJ further ordered reinstatement of temporary total disability benefits from October 17, 2007 and continuing until terminated by further order or upon the proper motion of any party. The ALJ placed the claim in abeyance pending completion of the university evaluation and styled his decision "Opinion and Interlocutory Order".
>
> 803 KAR 25:010 Section 12(5) provides as follows:

> If interlocutory relief is awarded in the form of income benefits, the application shall be placed in abeyance unless a party shows irreparable harm will result…. Upon motion and a showing of cause, or upon the administrative law judge's own motion, interlocutory relief shall be terminated and the claim removed from abeyance.
>
> From the above, it is clear the ALJ's order was interlocutory in nature since it did not decide all the contested issues. (Citations omitted.) The ALJ, as fact finder, has always been vested with the authority to control the taking and presentation of evidence. (Citation omitted.)
>
> 803 KAR 25:010 Section 11 (2) also provides as follows as it is applicable to this issue:
>
> > Upon all other claims except coal workers' pneumoconiosis claims, the executive director <u>or an administrative law judge may direct appointment by the executive director of a university medical evaluator</u>. (Emphasis added)
>
> Based on the interlocutory nature of the prior opinion, the ALJ did not err in holding the claim in abeyance.

Workers' Compensation Board's opinion, pages 27-29.

The Board went on to uphold the decision of the ALJ dismissing Street's action. This appeal followed.

## STANDARD OF REVIEW

As a reviewing court in workers' compensation cases, our function is to correct the Board when we believe it "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, 687-88 (Ky. 1992).

"It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers' compensation claim." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). We recognize that it is within the broad discretion of the ALJ "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). With this standard in mind, we examine the merits of Street's case.

DISCUSSION

Street first argues that her claim should have been submitted on the record as of the date of the hearing. She contends that this is required due to the holding in *T.J. Maxx,* 274 S.W.3d at 436. The Court therein held as follows:

> Although KRS 342.315 permits a referral for a university evaluation whenever a medical question is at issue, it evinces no intent to depart from the regulations that govern the taking of proof. The regulations afford ALJs considerable latitude to control the taking of proof, but do not allow unfettered discretion to do so. They anticipate that proof will be complete before the benefit review conference. The applicable version of 803 KAR 25:010, §13(10) requires the parties' witness lists to be submitted at least 10 days before the benefit review conference and requires a summary of each witness's anticipated testimony. For medical witnesses, the summary must include the diagnosis, the clinical findings and diagnostic studies that form the basis for the diagnosis, and any functional impairment rating or work-

> related restrictions that the witness assigned. Although 803 KAR 25:010, §13(15) permits an ALJ to order additional discovery or proof between the benefit review conference and the hearing upon motion with good cause shown, no regulation anticipates that additional proof will be take after a claim has been heard, briefed and taken under submission.

*T.J. Maxx,* 274 S.W.3d at 438-39.

As set forth above, the Board found that the situation in Street's case could be distinguished from the facts in *T.J. Maxx*. We agree. In Street's case, the ALJ originally found that she had not reached MMI and that further evidence was necessary. It was at this point that he ordered the University Evaluation. We believe he did so within his discretion. When a contested fact is whether MMI has been reached, the ALJ must determine whether it has or not. In order to do so in this case, the ALJ ordered the University Evaluation. This was within his discretion and the Board did not err in upholding the ALJ"s decision.

Next, Street argues that even if *T.J. Maxx* was not applicable to the facts of her claim, the ALJ's order stating that he would issue his opinion with the University evaluation omitted from the record, and without additional briefs from the parties, was the "law of the case", and the claim should be remanded with the instruction that the claim should be submitted on the record as of the date of the hearing.

In his order from March 16, 2009, the ALJ set forth that:

> The claim shall be submitted on the record, as of the date of the Hearing, with the University Evaluation omitted from that record, in the light of the recent Kentucky

> Supreme Court decision in *T.J. Maxx v. Blagg*, 2008 WL 5272771 (Ky.). As no additional evidence is in the record from the date of the Hearing, the Administrative Law Judge will issue his opinion, whether again in interlocutory form, or in final form, without the need for additional briefs from the parties.

Street contends that this order took the issue of whether the University Evaluation should be admitted off the table and it was an abuse of discretion for the ALJ to change its opinion in its May 13, 2009 order. When confronted with this issue, the Board held:

> "[T]he "law of the case doctrine" does not apply to the facts of this case so as to deny the ALJ the opportunity in reversing himself on the question of the admissibility of the university evaluation. (Footnote omitted). It first must be pointed out there can be no appeal from the ALJ's prior order of March 16, 2009, omitting the university report since it was interlocutory in nature. As such, the ALJ retained jurisdiction in this case. To this extent, since there had been no appeal from this order, "the law of the case doctrine" had no applicability.
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> ****
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> The Board recognizes the better practice would have been for the ALJ to have given notice by way of order he was changing his mind as to the admissibility of the university evaluation prior to the rendition of the final decision. Notwithstanding the above, the record reflects the parties were given ample opportunity to cross-examine the university evaluator and was also given the opportunity to rebut the university evaluator's findings by other evidence.

Workers' Compensation Board's opinion, pages 31-32.

We agree with the finding of the Board.

Since the ALJ had not reached a final decision in this case, any ruling would have been interlocutory. The ALJ's decision to introduce the UE's findings was not in error and the Board was correct in upholding that decision.

Street next argues that she should have been given an opportunity to submit additional evidence, have a hearing, and submit a brief on the evidence in the record after the hearing, including the UE's findings. She contends that she should have been able to address the internal inconsistencies of the UE's report. Street asserts that had she been given an opportunity to submit additional evidence, have another hearing and brief the matter, there would have been no error. She argues that she was not allowed to present or preserve any objections to the UE's report and that; therefore, her claim should be remanded with instructions from the Board to omit the UE's report from the record or, in the alternative, to allow the parties to brief the case inclusive of the evidence which was included after the hearing.

On August 28, 2008, the ALJ allowed the parties fifteen days to request additional time to either depose the UE or to allow the matter be submitted. On September 23, 2008, the ALJ granted Street's request for a bone scan and allowed her thirty days to submit the results of the scan.

Dr. Sean McDonald performed the bone scan which was entered into evidence and considered by the ALJ in his final decision. Thus, Street's argument regarding the ALJ's decision being made without an opportunity to present further evidence must fail. As to her argument regarding an opportunity for additional

briefing, 803 KAR 25:010, Section 18(2) allows a claim to be taken under submission immediately after a hearing OR for the ALJ to order briefs. In choosing not to order additional briefs, the ALJ did not err.

Street next contends that the UE report should be stricken from the record due to the four-page letter the appellee sent. She argues this letter was, in fact, an argumentative brief and that it violated 803 KAR 25:010, Section 11(f).

The ALJ ruled that the four-page letter was not biased and that he was not persuaded that Dr. Harpring's objectivity was called into question by it. Thus, the ALJ made a decision based upon the evidence presented to him, including the four-page letter and its possible bias. As fact finder, the ALJ has the authority to control the taking and presentation of evidence. *Searcy v. Three Point Coal Co.,* 280 Ky. 683, 134 S.W.2d 228 (Ky. App. 1939). In this case, there is nothing to indicate that the ALJ's decision regarding the inclusion of the UE report even after the letter was an abuse of discretion.

As set forth above, the ALJ allowed the parties an additional fifteen days to depose Dr. Harpring should they choose to do so. This granted an opportunity to Street to ferret out any bias created by the letter should she have chosen to take Dr. Harpring's deposition. We find nothing in the record to indicate the ALJ abused his discretion in using the UE's report.

Finally, Street contends that she has suffered an injury under the Act. She argues that she has presented ample evidence of a work injury, including immediate notice to her manager, who was working with her at the time of her

injury. She asserts that Goody's has, through counsel, admitted that there is nothing to show she had any history of lower back problems prior to January of 2006. The Board held as follows:

> we determine the evidence did not compel a contrary decision on the issue of causation. New evidence consisting of Dr. Harpring's KRS 342.315 evaluation as well as the results of the bone scan provides substantial evidence to support the ALJ's decision. KRS 342.315(2) specifically provides the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by the Administrative Law Judge and the burden to overcome such findings falls on the opponent of that evidence. See also *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000). Substantial evidence supports the ALJ's decision in dismissing this case on causation grounds which cannot be reversed on appeal. See KRS 342.285 (2).

Workers' Compensation Boards opinion, pages 35-36.

The evidence presented by Dr. Harpring as well as the bone scan results are sufficient evidence upon which the ALJ could make his causation determination. Thus, we find he did not err in determining Street was not to be compensated.

For the foregoing reasons, we affirm the decision of the Board upholding the ALJ's determination that Street's case should be dismissed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Geordie Garatt
Paducah, Kentucky

BRIEF FOR APPELLEE:

Felicia A. Snyder
Lexington, Kentucky