

RENDERED: January 21, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001246-WC

WAL-MART STORES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-90474

JUDY COULTER;
JAMES L. KERR, ALJ;
AND WORKERS' COMPENSATION BOARD

APPELLEES

AND NO. 2004-CA-001521-WC

JUDY COULTER

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-90474

WAL-MART STORES, INC. ;
JAMES L. KERR, ALJ;
AND WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

BUCKINGHAM, JUDGE: Wal-Mart Stores, Inc., petitions for review, and Judy Coulter cross-petitions for review of an opinion by the Workers' Compensation Board affirming in part, vacating in part, reversing in part, and remanding an award of benefits to Coulter as a result of a work-related injury. The issues in this case include whether the Board erred in not applying the KRS¹ 342.730(1)(c) multipliers and whether the Board erred in affirming the administrative law judge's finding that Coulter had reached maximum medical improvement (MMI) on June 28, 2002. We conclude that the Board correctly resolved the issues. Thus, we affirm.

Coulter was born in 1953 and had worked at Wal-Mart since November 2000. She worked primarily in the shoe department, although she spent some time working in the jewelry department. Her work in the shoe department included unloading cases of shoes and lifting boxes to restock shelves. She also worked assisting customers and making sure the department was kept in order. Coulter described her job as requiring constant grasping, pulling, and carrying shoeboxes.

On December 28, 2001, Coulter sustained a work-related injury while stacking five to six boxes of shoes on a shelf above her head. She testified that while in the process of stacking the shoes, she developed a pain in her left hand that

¹ Kentucky Revised Statutes.

caused her to drop the shoes. She noticed a knot on the top of her hand, and she stated that her wrist and hand were throbbing. Coulter's supervisor completed an accident report describing the incident.

Coulter continued to work for Wal-Mart following her injury. However, because of the pain in her left hand, she began to use her right hand exclusively. Coulter then began experiencing symptoms in her right hand, and she stated that she notified her department manager of her right hand pain approximately one month after she began to experience it.

Coulter saw Dr. Michael Sewell on January 25, 2002, for her hand condition. He diagnosed bilateral carpal tunnel syndrome. Despite her condition, Coulter continued to work at Wal-Mart until February 28, 2002, when Dr. Sewell performed a right carpal tunnel release. A left carpal tunnel release and excision of a dorsal ganglion was performed by Dr. Sewell on March 28, 2002. Coulter has not worked since her initial surgery on February 28, 2002.

Although Dr. Sewell prescribed physical therapy for Coulter following her surgery, she testified that it made her condition worse. Therefore, the physical therapy was discontinued in June 2002. Dr. Sewell then referred Coulter to Dr. Amit Gupta who saw Coulter on July 29, 2002. Dr. Gupta recommended further diagnostic studies and possible surgery.

Dr. Richard T. Sheridan examined Coulter on June 10, 2003, at her attorney's request and found that Dr. Gupta's suggestion was unwarranted.

Dr. Richard DuBou, a hand surgeon, examined Coulter on November 7, 2002, at the request of Wal-Mart's workers' compensation insurance carrier. In his medical report of the same date, Dr. DuBou stated that he did not believe Coulter had reached MMI. However, in a report to the insurance carrier approximately one month after his initial report, Dr. DuBou stated that Coulter had reached MMI approximately sixteen weeks after the March 28, 2002 surgery.

Coulter filed a claim for benefits, and a hearing was held before an administrative law judge (ALJ). In his opinion and award, the ALJ awarded Coulter temporary total disability (TTD) benefits from February 28, 2002, through June 28, 2002, with permanent benefits beginning June 29, 2002. The ALJ found that Coulter could return to the type of work performed at the time of her injury. Therefore, he declined to apply the three-multiplier found in KRS 342.730(1)(c)1. Further, the ALJ found that since Coulter had not returned to work, she did not qualify for the two-multiplier found in KRS 342.730(1)(c)2. Also, based on the testimony of Dr. Sewell, the ALJ found that Coulter was at MMI on June 28, 2002. Thus, TTD benefits were allowed through that date, with permanent benefits thereafter based on a

6% whole person impairment in accordance with testimony from Dr. Sheridan. Coulter then filed an appeal to the Board.

In its opinion entered on June 9, 2004, the Board affirmed the ALJ's finding that the date of Coulter's MMI was June 28, 2002. As to the applicability of the two-multiplier provision of the statute, the Board held that such provision was applicable because Coulter returned to work at the same or greater wage. As to the applicability of the three-multiplier provision, the Board remanded the matter to the ALJ for reconsideration. Wal-Mart's petition for review and Coulter's cross-petition for review followed.

Wal-Mart argues that the Board erred as a matter of law when it found that the two-multiplier provision applied in this case. As we have noted, the ALJ determined that the two-multiplier did not apply because Coulter had not returned to work. On the other hand, the Board noted that Coulter had returned to work, or never missed any work, following the December 28, 2001 injury. The Board reasoned that Coulter's surgeries caused TTD and not the injury.

The pertinent part of the two-multiplier provision of the statute states as follows:

If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under

paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection.

KRS 342.730(1)(c)2.

Wal-Mart claims that the ALJ treated Coulter's injury as a cumulative trauma injury and consequently there was no single date of injury but rather that injury occurred "every day she worked prior to December 28, 2001 and every day that she worked after December 28, 2001." Wal-Mart thus maintains that Coulter did not work after the last date of her injury, February 28, 2002. Therefore, Wal-Mart asserts that she did not return to work following the injury so as to be covered by the two-multiplier statutory provision.

We disagree with Wal-Mart and agree with the Board that the ALJ clearly erred as a matter of law by failing to apply the two-multiplier provision. The ALJ had determined that Coulter sustained a cumulative trauma injury with an acute aspect of that injury occurring on December 28, 2001. Coulter returned to work earning the same wage and did not seek medical attention until January 25, 2002. She continued to work until

her surgery on February 28, 2002. Thus, we find no error by the Board in this regard.²

Coulter's cross-petition for review relates to the ALJ's determination that her date of MMI was June 28, 2002. The ALJ's determination was affirmed by the Board. However, as the Board noted, "the medical opinions and testimony addressing MMI contained in the record are not a model of clarity."

Dr. Sewell initially indicated that Coulter reached MMI on June 28, 2002, because she had "plateaued." He then sent her to Dr. Gupta. Dr. Sewell later retracted his opinion that Coulter had reached MMI on June 28, 2002.

Likewise, the testimony by Dr. Dubou, the hand surgeon who evaluated Coulter at the request of Wal-Mart's insurance carrier, was conflicting. In Dr. Dubou's medical report of November 7, 2002, he stated that he did not believe Coulter had reached MMI. Nevertheless, in his report dated one month later, Dr. Dubou stated that Coulter had reached MMI approximately sixteen weeks after the March 28, 2002 surgery.

The ALJ noted that Dr. Sewell's opinion that Coulter was at MMI on June 28, 2002, was consistent with Dr. Dubou's opinion that she would have been at MMI sixteen weeks after her

² Wal-Mart also argued that the Board exceeded its scope of review in determining the applicability of the two-multiplier. Because the facts were not in dispute, we conclude that the Board had the authority to determine the applicability of the statute to the undisputed facts.

March 28, 2002 surgery. The Board affirmed the ALJ's determination that MMI was reached on June 28, 2002, stating, "Given the contradictory medical testimony concerning the date Coulter reached MMI, we cannot say the ALJ's determination that Coulter reached MMI on June 28, 2002 was wholly unreasonable."

When there is conflicting medical evidence, the discretion to choose whom to believe rests exclusively with the ALJ. See Staples v. Konvelski, Ky., 56 S.W.3d 412, 416 (2001). Further, an ALJ has the authority to determine the weight, credibility, and substance of the evidence and to draw reasonable inferences therefrom. See Transp. Cabinet, Dept. of Highways v. Poe, Ky., 69 S.W.3d 60, 62 (2002). Also, an ALJ has the right to believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. See Magic Coal v. Fox, Ky., 19 S.W.3d 88, 96 (2000). Pursuant to these standards, we conclude that there was substantial evidence to support the ALJ's determination in this regard.

The Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS
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BRIEF FOR APPELLEE/CROSS-
APPELLANT, JUDY COULTER:

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