

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JANUARY 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2002-SC-0983-WC

DATE 2-12-04 E. W. Craft, D.C.

THE HAMILTON-RYKER COMPANY,
INC.

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2002-CA-750-WC
WORKERS' COMPENSATION BOARD NO. 1998-WC-1033

BRENDA TALBOTT; HON. DONALD G.
SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a decision of the Court of Appeals affirming an opinion of the Workers' Compensation Board that affirmed an opinion, order and award by the Administrative Law Judge.

The defining issue in this case can be framed as whether there was substantial evidence to support the decision of the ALJ in finding a work-related injury. This is the third appeal of this case and it can be described as a procedural and legal nightmare.

Hamilton questions whether there was sufficient evidence to support causation of Talbott's disability. It asks this Court to reinstate the order of the ALJ that dismissed Talbott's claim.

In its argument, Hamilton raises the following points. That the findings of the ALJ relied on by the Court of Appeals are misleading and unsupported by the record; that the 3% PPD award is based on a rating by Dr. Love which fails to relate any causation to her work activity; that the award of the ALJ on August 30, 2001, did not reinstate the original award for PPD or medical benefits; that the order of January 4, 2001, by the ALJ dismissing this claim was a final adjudication and should not have been set aside for more sufficient findings of fact or for noncompliance with the law of the case doctrine and that the holding of the Court of Appeals that the evidence compelled an award of TTD is patently unreasonable and erroneous as a matter of law.

The injury in this case dates back to September 18, 1997. The Hamilton-Ryker Company is a labor staffing company for whom Talbott began to work on September 17. Talbott's right arm and hand were injured on her second day of work. She had been placed at a Mattel/Fisher Price factory in Murray, Kentucky where she was working on a production line removing the excess plastic remaining on molded toys with a paint scraper-type tool. The nature of her injury was a tingling sensation and pain in her arm. She reported this injury to her supervisor. She had a weekend to rest after the first report and when she returned on Monday, she was placed in an assembly line job that had considerably less repetitive stress. There was conflicting testimony as to whether she was assigned and worked a light duty assignment, but she stopped working altogether on September 28, 1997 and eventually saw Dr. Charette, her first physician, on October 2, 1997. Although the initial diagnoses mentioned carpal tunnel syndrome, she was later diagnosed with reflex sympathetic dystrophy. Later, a third treating physician, Dr. Love, assigned a 3% total body impairment based upon the AMA Guidelines due to cervical nerve root dysfunction causing sensory discomfort

attributable to the C6, C7, and C8 nerve roots. Dr. Love noted that an intervening vehicular accident, occurring in August 1998, in which Talbott was injured with whiplash and injury to the left arm, shoulder, knee, and low back may have affected the overall impairment rating.

A thorough review of the record in this case reveals a significant amount of interplay between the appellate review process and the ALJ during remands because the ALJ failed to follow instructions to cure an imperfectly rendered opinion and award. This Court notes that there were nine orders from the ALJ, three reviews by the Board, and two reviews by the Court of Appeals.

On June 4, 1998, Talbott filed a claim for workers' compensation benefits alleging that she had sustained a work-related injury to her right arm while working for Hamilton on the production line. On March 19, 1999, the ALJ found that Talbott had a 3% occupational disability and awarded PPD benefits. Talbott filed a petition for reconsideration, urging the ALJ to reconsider his decision not to award her TTD benefits. The ALJ denied her petition for reconsideration, stating that the issue of TTD benefits had not been raised and that the evidence did not support such an award. Both Hamilton and Talbott appealed the decision to the Board. The Board reversed and remanded the case to the ALJ for additional findings of fact to support his conclusions that the injury was work-related and she was not entitled to TTD benefits. The Board found that the ALJ had not set out sufficient reasoning to support his conclusions. In addition, the Board determined that the request for TTD benefits was preserved. The Board did not address the substantive merits of the appeal, but directed the ALJ on remand to "provide additional findings of fact to support his conclusions as they relate to work-relatedness causation and the entitlement to total temporary disability benefits."

Hamilton appealed to the Court of Appeals, arguing that the Board should have reversed the award for PPD benefits because there was simply no medical evidence to support the conclusion that her injury was work-related and that the evidence did not support an award of TTD benefits. On September 8, 2000, the Court of Appeals dismissed the appeal as interlocutory. The opinion noted that on remand, the job of the ALJ was not to take new evidence or alter his original decision, but he was to provide adequate findings in support of his original award. The opinion also noted that following the entry of the findings, presumably the Board would then review the case in light of the additional findings.

Instead of setting out findings of fact as required by the opinion of the Board of October 8, 1999, and the opinion and order of the Court of Appeals, the ALJ entered an order to reverse his original award of PPD benefits because the claimant had failed to show her condition was causally related to her repetitive work. The ALJ also failed to make findings regarding the TTD issues, stating that the remaining issue regarding entitlement to temporary total disability was rendered moot and would not be discussed further.

Talbott again appealed to the Board which entered an order remanding the case to the ALJ. The opinion noted that the ALJ had not complied with the mandate on the first remand to make findings of fact and had improperly disregarded the expression of the Court of Appeals that the ALJ was precluded from altering his opinion on remand. On the second remand, the Board directed the ALJ to provide a detailed analysis of the facts and observed that detailed findings are required in order to give due deference to the opinion of the Court of Appeals.

Following the second remand, the ALJ entered an order complying with his

mandate to enter findings supporting his original award of PPD benefits. Apparently, the ALJ misunderstood the prior appellate rulings and instead of simply setting out the findings of fact in support of his original denial, the ALJ reversed his original decision concerning TTD benefits and awarded the benefits. Hamilton filed the third appeal to the Board which rendered an opinion affirming the award of PPD benefits and TTD benefits. Hamilton again sought review by the Court of Appeals which affirmed the decision of the Board to the effect that there was substantial evidence to support the original award based on a 3% occupational disability. This appeal followed.

I. TTD – Second Remand

Hamilton argues that the ALJ on the second remand was not permitted to make an award of TTD benefits on the basis that his order of April 16, 1999 denying the motion for reconsideration stated that “TTD was never raised as an issue and the medical evidence fails to support that award.” The claim was dismissed on the first remand in the order of January 4, 2001, and the opinion of the Court of Appeals and the order of September 8, 2000, prevented the ALJ from changing his decision on remand.

Considering the law of the case doctrine, the original denial by the ALJ of TTD benefits on the basis that “the medical evidence fails to support that award” is the decision presented for review, and not the award of TTD benefits in the August 30, 2001 order. We agree with the Court of Appeals that the award of TTD benefits on August 30, 2001, should be disregarded. We also agree that for the purposes of reviewing the original denial, the findings of fact made by the ALJ in the August 30, 2001 order are to be considered when reviewing the original denial. Under all the circumstances, the standard of review will follow the principle that where a party with

the burden of proof was unsuccessful before the ALJ, the issue on appeal is whether the evidence compels a finding in his favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). In order to be compelling, the evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985).

The ALJ, as fact finder, has the sole discretion to determine the weight, credibility, character and substance of the evidence and inferences to be drawn from the evidence. The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Evidence which would support a conclusion contrary to the decision of the ALJ is not alone an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). Where the medical evidence is conflicting, the ALJ is the sole authority to determine which witness is to be believed. Pruitt v. Bugg Bros., Ky., 547 S.W.2d 123 (1977).

Pursuant to KRS 342.0011(11)(a), awards of TTD benefits are appropriate where a worker is totally disabled by the effects of a compensable injury but has not yet reached maximum medical improvement. Clemco Fabricators v. Becker, Ky., 62 S.W.3d 396 (2001). TTD benefits are payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the condition of the claimant, is over and the underlying condition has stabilized to such a degree that the claimant is capable of returning to his job or some other position which he is capable of that is available on the local labor market. See W.L. Harper Constr. Co., Inc. v. Baker, Ky.App., 858 S.W.2d 202 (1993). Here, the ALJ

found that the testimony of Talbott was credible regarding the onset of her symptoms while at work and her inability to perform job related activities thereafter. The ALJ specifically accepted the medical findings of Dr. Charette. Although the initial order of the ALJ on March 19, 1999, found that medical evidence did not support an award of TTD, based on the findings in the order of August 30, 2001, we agree with the Court of Appeals that the medical evidence compels a finding that the claimant is entitled to TTD benefits. We agree with the Board and the Court of Appeals that Talbott is entitled to TTD benefits and that the proper termination date for those benefits is December 23, 1997.

II. PPD Benefits

As we noted earlier, the order of the ALJ dated January 4, 2001 is of no relevance because, to the extent that it intended to do anything more than make findings of fact, it violated the law of the case and the order was reversed by the opinion of the Board on June 6, 2001. Reliance by Hamilton on the ALJ order of January 4, 2001 is misplaced.

The issue on appeal is whether there is substantial evidence to support the decision of the ALJ. Substantial evidence is evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). In regard to the PPD questions, the order of the ALJ of August 30, 2001, asserts reliance on the credibility of the testimony of the claimant and her medical history as testified to by her physicians. The ALJ has the sole discretion to determine the weight and credibility of the evidence and the inferences to be drawn from the evidence. Paramount Foods, supra,

Despite the difference in reasoning, the Court of Appeals and the Board arrived

at the same conclusion, which is that the benefits to Talbott are: TTD benefits for the period of September 18, 1997 to December 23, 1997, PPD benefits for a 3% total body impairment determined according to the AMA Guides for an amount totaling \$4.02 per week, and medical payments.

III. Standard of Review

Finally, Hamilton asks this Court first “to disregard the convoluted history of the claim” and second “to conduct its own review of the medical evidence to reach its own conclusion as to whether any PPD award is supportable”. Such a review is not the proper function of this Court. The function of further review in our Court is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude. Western Baptist Hosp., supra. If the decision of the ALJ is supported by any substantial evidence of probative value, it may not be reversed on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Here, we find that the Board and the Court of Appeals reviewed the evidence and found substantial evidence to support the ALJ's findings on causation, extent and duration, and notice. Hamilton's primary objection to the evidence is that the same doctor who rated Talbott with a 3% permanent partial disability did not specifically state causation in the same report. We note that Dr. Love treated Talbott for the same symptoms of which she complained to her previous two treating physicians: Dr. Charette and Dr. Riley. Dr. Charette saw Talbott first and made the notations of causation. Because of this fact, the ALJ specifically used Dr. Charette's testimony to supply the findings of fact to support causation. Likewise, because Dr. Love was treating Talbott for the symptoms when she reached maximum medical improvement,

his rating of permanent partial disability according to the AMA Guides was selected by the ALJ. There is no requirement that all medical evidence must come from the same doctor. Accordingly, we hold that the ALJ's findings on causation, PPD, and TTD are supported by substantial evidence.

Therefore, the opinion of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Bradley D. Harville
One Riverfront Plaza
401 W. Main Street, Suite 1706
Louisville, KY 40202

COUNSEL FOR APPELLEE:

Rodger W. Lofton
928 Broadway
P.O. Box 1737
Paducah, KY 40202