

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2003-SC-0664-WC

DATE 12-16-04 E. A. Grawitt, DC

TRIM MASTERS, INC.

APPELLANT

APPEAL FROM COURT OF APPEALS

2003-CA-56-WC

V.

WORKERS' COMPENSATION BOARD NO. 00-WC-78291

SHAWN CLARK;
HON. W. BRUCE COWDEN, JR.,
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 which affirmed the opinion of the Workers' Compensation Board, which in turn, had upheld the opinion and award of the Administrative Law Judge of temporary total disability benefits to Clark and the payment of medical bills.

The questions presented are whether temporary total disability benefits can be awarded to an individual who was already off work for a nonwork-related cause; whether the award by the ALJ of medical bills to Dr. O'Neill is erroneous and whether there is substantial evidence to support an impairment of 13%.

Clark was employed by Trim Masters in May 1999, and in March 2000, she began suffering from the symptoms of carpal tunnel syndrome. At the time of her injury she was working as an assembly-line welder. She testified that her job as a welder

required repetitive pushing and pulling of up to 30 lbs. with repetitive wrist flexion/extension, and the occasional use of vibratory tools. She stated that her job also involved frequent lifting, pushing and pulling, as well as lifting the finished product which had an average weight of 15 to 20 lbs. In March 2000, Dr. Rice placed her on restrictions of lifting no more than 10 lbs. and referred her to a specialist, Dr. Ronald Burgess, who performed bilateral carpal tunnel release surgery on her right hand in May 2000 and on her left hand in June 2000. She returned to work, but the symptoms reoccurred. In December 2001, she was taken off work for a nonwork-related condition. She has not worked since that time.

The ALJ found her to have a 13% functional impairment rating which translated into a 16.25% occupational disability. He awarded her benefits for an additional period of temporary total disability from February 26, 2001 through July 16, 2001 and determined the medical bills of Dr. O'Neill should be the responsibility of the employer. The Board affirmed the decision of the ALJ stating that there was substantial evidence to support the award. A unanimous panel of the Court of Appeals affirmed the Board. This appeal followed.

The claimant testified that she had surgery on her right hand in May 2000 and on her left hand in June 2000. She stated that upon her return to work, she continued to have problems with her hands. Clark testified that she saw Dr. Sajadi at the request of an insurance adjuster for the employer in order to obtain a second opinion. In December, she sought medical advice from Dr. O'Neill, but had to postpone any further treatment because she was hospitalized for two weeks for surgery not related to the employment.

Trim Masters introduced the deposition of Michelle Corey, an insurance claims specialist who testified that she received a form 113 from Clark in March 2000 indicating that Dr. Burgess was the treating physician. Corey stated that Clark indicated a desire to seek a second opinion. Corey advised Clark that the physician she chose for the second opinion would be the last doctor authorized. Corey testified that she did not authorize any payment to Dr. O'Neill because Clark selected Dr. Sajadi as her second treating physician.

Dr. O'Neill's office never contacted Corey concerning authorization and a form 113 was never completed for payment of his bills. Corey indicated that she received a call from Trim Masters on July 23, 2001, stating that Clark had told them that she had been under the treatment of Dr. O'Neill for the past few months and had submitted those bills under her group health insurance. Further, she asked that the bills of Dr. O'Neill be paid. Corey told Trim Masters that Dr. Sajadi was the second and last choice of physicians and no payment would be made to Dr. O'Neill.

Medical testimony was submitted by both parties. Clark introduced a medical report of Dr. Emily Rayes, a physical medicine and rehabilitation specialist employed by the University of Kentucky who performed an independent evaluation on the claimant. Dr. Rayes was of the opinion that a 13% impairment should be assessed and that Clark did not have the physical capacity to return to the type of work that she performed at the time of her injury. Dr. Rayes testified by deposition

On vigorous cross-examination, Dr. Rayes only agreed that if her job could exist with severe restrictions, Clark could return to such a hypothetical job. For four pages of the deposition, Dr. Rayes answered rigorous questioning by Trim Masters' counsel. Dr. Rayes was making the point that she did not believe that the welding job could be

performed under Clark's restrictions. Counsel demanded a direct yes or no response as to whether, if the welding job could hypothetically be performed under the restrictions, would Dr. Rayes believe Clark could work it. Dr. Rayes did not believe the welding job would follow the restrictions, but conceded that if it could, Clark could return. Trim Masters' brief says, "She would be able to return to the same employment." This statement relies on a dependent conditional clause in the brief immediately preceding it that adds, "If Clark's job position would allow her to follow restrictions, such as no lifting over 15 pounds, no repetitive flexion or extension of her wrists." Therefore, Dr. Rayes agreed that Clark could return to work only under severe restrictions. Such a statement was obviously not a general release back to Clark's previous work, nor does it conflict with Dr. Rayes' assignment of a 13% functional impairment to Clark.

Clark presented the deposition of Dr. William O'Neill, a specialist in reconstructive and plastic surgery, who began treating Clark in February 2001. He also referred Clark to Dr. Robert Taylor for a repeat of the nerve test because of possible recurrent carpal tunnel syndrome. Dr. O'Neill testified that he did not believe Clark needed additional surgery and thus he treated her conservatively. Dr. O'Neill stated that if Clark returned to repetitive work, it would possibly worsen her symptoms.

Trim Masters introduced the deposition and medical reports of Dr. Joseph Zerga who performed an independent evaluation of Clark on January 14, 2002. He believed that Clark's condition was work related, but that she would be able to return to the welding job. Trim Masters introduced a deposition and medical report of Dr. Daniel Primm. He agreed with the report of Dr. Burgess finding no objective medical basis to

substantiate the subjective complaints. He was of the opinion that Clark could return to her previous work.

Trim Masters also introduced the medical reports of Dr. Burgess, who first treated Clark in 2000 on a referral from her family doctor. He had performed carpal tunnel syndrome release on both the left and right wrists and directed restrictions following the surgery. Dr. Burgess denied Clark's request to be taken off work because he could not find any objective evidence to substantiate the complaints. Clark indicated that she would seek another medical opinion.

The ALJ found the impairment rating of 13% assessed by Dr. Rayes to be the most accurate. He indicated that he relied on the testimony of Dr. O'Neill as well as the latest EMG and NCV studies from Dr. Taylor which reflected that Clark had experienced a worsening on the right side and now suffered from moderate to severe motor median neuropathy at the wrist. Based on the recommendations of Dr. O'Neill and Dr. Rayes, the ALJ determined that Clark could not return to repetitive work and did not have the physical capacity to return to the type of work performed at the time of injury.

I. Temporary Total Disability Benefits

The award of the administrative law judge of additional temporary total disability benefits from February 26, 2001 to July 16, 2001 is supported by substantial evidence. The ALJ relied on the testimony of Dr. O'Neill who treated Clark during that period of time and stated that she was not at maximum medical improvement until July 16, 2001 and that he would have placed her on restricted duty not to do repetitive work with her hands during that time. There was also evidence from Dr. Rayes who assessed an impairment rating of 13% and indicated that Clark could not return to the type of work performed at the time of injury. We are not convinced that the argument of the

employer that the concurrent disability that the claimant experienced during this period of time as a result of her Crohn's disease has merit. The ALJ, the Board and the Court of Appeals were not persuaded either. The ALJ, the Board and the Court all relied on Daugherty v. Watts, Ky., 419 S.W.2d 137 (1969), for the proposition that when there are two causes of temporary disability, a worker will not be denied compensation merely because of the existence of an independent, concurring cause of disability.

II. Medical Bills of Dr. O'Neill

There was conflicting testimony as to who actually chose Dr. Sajadi that Clark sought for a second opinion. The insurance investigator testified that it was Clark who requested to see Dr. Sajadi. However, Clark changed her mind and did not see Dr. Sajadi, but rather sought a second opinion from Dr. O'Neill. As often noted, it is the responsibility of the ALJ to select from conflicting evidence and make a determination based on his evaluation of such conflicting evidence. See Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); Pruitt v. Bugg Bros., Ky., 547 S.W.2d 123 (1977). Clearly the ALJ did not accept the arguments of the employer.

III. Permanent Partial Benefit Award

There was substantial evidence to support the award of permanent partial disability benefits based on the 13% impairment rating of Dr. Rayes. The report of Dr. Taylor indicated that the most recent EMG/NCV study demonstrated that the employee suffered from moderate to severe medium neuropathy of the right wrist.

A careful review of the record indicates that the ALJ considered all the lay and medical testimony. It is well settled that the ALJ as the finder of fact, has the sole authority to determine the weight, credibility, substance and inference to be drawn from the evidence. Paramount Foods, Inc., supra. Where the evidence is conflicting, the

ALJ may choose whom and what to believe. Additionally, the ALJ may choose to believe part of the evidence and disbelieve other parts. Pruitt, supra. This is clearly a question relating to findings of fact. The testimony presented by Dr. O'Neill and Dr. Rayes was sufficient substantial evidence upon which the ALJ could rely. There is nothing incredible about their testimony. Special Fund v. Francis, Ky., 708 S.W.2d 641. A review of the evidence does not compel a finding otherwise. Paramount Foods; See also Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685 (1992).

The opinion of the Court of Appeals is affirmed.

All concur.

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