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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JUNE 16, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000578-WC

DEIRDRE STREET — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-002191-WC
WORKERS' COMPENSATION NO. 07-99990

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

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Having characterized as "credible" the claimant's testimony that her work-related injury continued to be symptomatic and finding her not to be at maximum medical improvement (MMI), an Administrative Law Judge (ALJ) entered an interlocutory order that resumed temporary total disability (TTD) benefits; placed the claim in abeyance; and directed a university evaluator to address all medical issues encompassed in a Form 107 report. The ALJ relied on the university evaluator's report to find ultimately that the balance of the claim must be dismissed because the claimant's continued complaints were not work-related.

A Workers' Compensation Board majority affirmed although a dissenting member opined that the cumulative effect of certain actions taken by the employer and the ALJ required the claim to be remanded with directions to appoint another university evaluator and reconsider the claim. The Court of Appeals found no error and affirmed.

Appealing, the claimant argues that *T.J. Maxx v. Blagg*[1] prohibited the ALJ from ordering a university evaluation after the claim was taken under submission. She argues in the alternative that certain actions of the ALJ denied her due process; were an abuse of discretion; and required the claim to be remanded and reconsidered after a new university evaluation.

We affirm. Not only did the claimant fail to object to the university evaluation, *T.J. Maxx v. Blagg* does not govern this claim. The ALJ neither denied the claimant due process nor committed an abuse of discretion with respect to the events surrounding or resulting from the university evaluation. The circumstances do not warrant a remand.

The claimant allegedly injured her back while working at the defendant-employer's clothing store on January 7, 2006. She stated that she felt a sudden pain and what felt like electricity shooting through her back and into her legs while lifting a six-foot banquet table that she had folded in preparation for carrying it to a storage room. She admitted receiving previous chiropractic treatment for neck pain and a back strain that resolved. She also admitted experiencing previous backaches that she described as "common muscle

[1] 274 S.W.3d 436 (Ky. 2008).

aches." She asserted when the claim was heard in April 2008 that sciatic pain, constant low back pain, and numbness and stabbing in the left buttock and foot prevented her from working.

The record indicates that the claimant sought treatment at Prime Care Center on January 13, 2006. She reported a six-day history of lumbar pain that worsened gradually and radiated into her left buttock, leg, and foot. She returned in May 2006, reporting a three-day history of pain that was unrelated to a recent injury or trauma. She described the pain as an electrical current in her upper thigh, left buttock, and foot. The previous lumbar x-rays were negative and she declined a hip x-ray.

The claimant sought treatment at Redicare in October 2006, complaining of worsening back symptoms, neck pain, and numbness in the left arm and leg that she related to the January 2006 injury. She underwent an MRI in the fall of 2006 and was referred to Dr. McDonald, who became her treating physician.

Dr. McDonald noted in November 2006 that the claimant reported constant shocking-type pain in the left lower back and buttock and a shocking sensation down the left leg into the bottom of the foot. She denied any previous low back problems but reported that she had received injections for chronic neck problems and had been diagnosed with fibromyalgia. Physical examination revealed some tenderness in the left lower lumbar region and a full range of motion but with pain on flexion and extension. The MRI revealed no nerve compression on the left to account for the pain.

Characterizing the claimant's symptoms as myofascial pain, Dr. McDonald noted in January 2007 that she reported bilateral symptoms, worse on the left. A myelogram revealed no nerve root compression, but some of the EMG/NCV results were consistent with chronic left L4-5 radiculopathy. Treatment notes from February 2007 recorded complaints of "back pain with primarily right buttock pain and pain down the right leg to the foot. Her pain extends from the back down the left buttock and down the left leg to the foot. More recently she began to develop a little bit of pain into the right buttock, but not as severe." A myelogram with post-myelographic CT scan revealed mild levoscoliosis and facet hypertrophy at L5-S1 but no significant disc abnormality, stenosis, or nerve impingement. Noting the absence of any apparent surgical lesion, Dr. McDonald recommended pain management. Subsequent lumbar spine injections provided no relief.

Dr. McDonald noted on July 11, 2007 that he disagreed with Dr. Keck's recommendation for provocative discography but thought that spinal cord stimulation remained an option. He decided to recommend discography on July 18, 2007, however, noting that "[n]othing has been successful in either treating [the claimant's] pain or finding the definite cause." The employer's insurance carrier refused to approve the procedure or a neuropsychological evaluation concerning a dorsal column stimulator based upon the results of a neurosurgical evaluation performed by Dr. Weiss.

Dr. Weiss evaluated the claimant on July 27, 2007. He found the lumbar MRI to be normal with mild degenerative changes typical for her age.

He noted that she clearly had subjective symptoms but found no objective evidence of neurological disease on either physical examination or diagnostic testing that would warrant a discogram or dorsal column stimulator. He also found no rational explanation for her continued pain complaints "after an activity/'injury' that usually would not be correlated with such a protracted clinical course." Dr. Weiss opined that the claimant had reached MMI; assigned a 0% permanent impairment; and stated that she could return to work without restrictions. He doubted that any therapeutic or diagnostic measure would be fruitful and thought that her subjective symptoms would probably worsen if she underwent a fusion.

Dr. McDonald's last note, from March 2008, indicated that the claimant's symptoms continued without relief. He was not sure what anatomic abnormality, if any, could account for the ongoing pain but noted that the CT myelogram revealed an extra lumbar "joint" at L5-S1 on the left side, which was a congenital condition and in an area that coincided with the area where she reported the greatest lumbar tenderness. The myelogram also revealed a slight pars defect on the right side, but it was not consistent with her complaints. Facet blocks and epidural steroid injections had been fruitless, so he recommended an S1 joint injection to try to alleviate her pain. Noting that the injection would encompass both the abnormal joint and S1 joint, he stated that it might also help to determine the cause of the pain.

Dr. McDonald testified when deposed that the only objective physical finding was tenderness in the left lower back. Imaging studies showed no

objective neurological deficits or surgical lesions, and there was no objective evidence of a fracture, gross instability, disc herniation, or injury. EMG did, however, reveal a nerve root problem at L4-5 on the left that was chronic and consistent with the symptoms reported at the time of the injury. He opined that the work-related injury caused the dormant, non-symptomatic congenital defect to become symptomatic. He also stated, "So whether it's [the congenital condition] or whether it's the L4-5 radiculopathy, that injury is what brought everything into fruition." He assigned a 13% impairment rating at that time but did not consider the claimant to be at MMI.

The employer argued that the claimant was at MMI because she had no objective signs of an ongoing injury; that she should have recovered from the work-related incident completely by July 27, 2007 as Dr. Weiss opined; and that the injury produced no permanent impairment.

The claimant asserted that TTD benefits should be reinstated, arguing that she had not reached MMI and remained unable to return to work. She also argued that the disputed medical treatment was reasonable and necessary.

The ALJ found that the claimant had not reached MMI based on her testimony that ongoing pain prevented her from working as well as Dr. McDonald's testimony that her injury required further medical treatment. The ALJ reserved judgment concerning the disputed treatment, however, noting the lack of objective medical findings to support the claimant's ongoing complaints. The ALJ concluded that a university evaluation would help determine whether

she had reached MMI; what permanent impairment rating, if any, the injury produced; and what additional treatment the injury required. An interlocutory order entered on June 23, 2008 reinstated TTD benefits; indicated that a subsequent order would refer the claimant for a university evaluation "to determine her need, if any, for additional treatment or diagnostic studies, and all other information contained in a Form 107;" and placed the claim in abeyance pending the evaluation.

Attached to the July 2, 2008 referral order were the claimant's deposition and the medical evidence of record. The order gave the parties 14 days to tender any additional relevant medical evidence but required such evidence to be accompanied by a summary that clearly identified the provider, date, and nature of the services provided.

The claimant filed additional records from Dr. McDonald. The employer filed a copy of a letter that it sent to Dr. Harpring, the designated university evaluator. The letter described the claimant's testimony concerning the injury and prior medical history and summarized the previously-submitted medical evidence. Enclosed were selected records from Prime Care Center and Dr. McDonald.

The claimant objected, complaining that the employer's letter was not a summary of new evidence and that the enclosed records had already been provided to Dr. Harpring. Asserting that the letter was highly prejudicial and precluded an adequate remedy if the evaluator had already read it, she requested the ALJ to enter an order directing the employer to submit a new

letter that was limited to evidence not provided previously. The ALJ entered the requested order on July 21, 2008. The employer then filed a petition for reconsideration, which the ALJ denied on July 29, 2008. On August 4, 2008 the employer filed a revised letter, dated July 31, 2008, in which it requested Dr. Harpring to disregard its previous correspondence. The employer claimed subsequently that it faxed the letter to Dr. Harpring on August 1, 2008.

Dr. Harpring evaluated the claimant on July 30, 2008 and prepared a Form 107, which was dated August 7, 2008. He received a history that included the January 2006 injury and noted that the claimant continued to take Neurontin for pain in the left sacroiliac joint and upper mid buttock pain that radiated into the left foot. The claimant also reported intermittent decreased sensation, numbness, and tingling down the left lower extremity and walked with an antalgic gait, favoring the right leg. A lumbar spine examination revealed no tenderness upon palpation; no evidence of paravertebral muscle spasm or guarding; and normal forward flexion, backward extension, lateral rotation to the left and right, motor strength in the lower extremities, deep tendon reflexes, and dorsalis pedis pulses. The straight leg raise and Fabere signs were positive on the left, but the slight amount of pain elicited in the Fabere test was in the left hip joint. Dr. Harpring found no signs of vascular changes, edema, or muscle atrophy in the lower extremities.

Dr. Harpring diagnosed left leg radiculopathy, possibly secondary to questionable S1 joint inflammation, and noted that there was no evidence of a lumbar herniated disc, stenosis, or instability. Noting that the claimant's

symptoms fit the L5 nerve distribution but that the diagnostic studies were negative except for the "very questionable" EMG, he concluded that the January 2006 injury was not the cause of her present complaints. He assigned an 8% permanent impairment rating under DRE lumbar category II,[2] none of which was active before the injury.

Dr. Harpring could not explain why the claimant continued to complain of left lower extremity radicular pain. He noted that the EMG was the only objective evidence of any type of pain referable to the radicular area and that only the needle EMG test indicated a possible chronic L4-5 component.[3] He noted that a possible explanation for the pain was left S1 joint or sacroiliac joint inflammation, which could only be ruled in or out with a bone scan. He did not think that the work-related injury would cause continued S1 joint pain without there being findings on the CT scan.

On August 15, 2008 the claimant moved to strike Dr. Harpring's report and order a new university evaluation, arguing that the employer failed to send its revised letter until after the ALJ denied its petition for reconsideration of the July 21, 2008 order. As a consequence, he received it after he performed the evaluation. She complained that the employer's initial letter influenced him to her detriment, stating that he questioned her closely concerning her previous back problems and chiropractic treatment. She asserted that the employer's

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[2] Dr. Harpring referred specifically to Table 15-3, DRE Category II, which permits a 5% to 8% rating to be assigned based on "complaints of radicular pain without objective findings."

[3] The other three portions of the EMG test were normal.

conduct tainted the university evaluation process irrevocably, particularly because KRS 342.315 assigns presumptive weight to an evaluator's clinical findings and opinions. She supported the motion with affidavits from herself and the friend who allegedly accompanied her, which contained various allegations concerning Dr. Harpring's conduct during and after the evaluation.

The ALJ struck the affidavits from the record and denied the claimant's motion, stating that the lack of objective medical findings to support her otherwise credible testimony regarding her present complaints was a reason for ordering the evaluation. The ALJ acknowledged signing the order tendered with the claimant's July 28, 2008 motion but found that the employer's initial letter to Dr. Harpring was not so biased as to affect his objectivity and that his report only corroborated the medical evidence submitted by the parties. The ALJ concluded that the report would remain part of the record but gave the parties 15 days to depose him. Neither did so.

The ALJ denied a request by the employer to take the claim under submission and granted the claimant's request to undergo and submit the report of a bone scan as suggested by Dr. Harpring. A report from Dr. McDonald indicated that a bone scan was performed in September 2008 and revealed no findings consistent with S1 joint or sacroiliac joint inflammation.

The ALJ terminated TTD on October 7, 2008 but denied the employer's renewed motion to submit the claim on the record. Although the ALJ granted the claimant additional time to submit a report from her appointment with Dr. McDonald on December 4, 2008, no such report is found in the record.

After a February 2009 teleconference, the employer moved to submit the claim on the record, including Dr. Harpring's report. The claimant objected based solely on the then-recent decision in *T.J. Maxx v. Blagg.* An order entered on March 16, 2009 stated that the evaluation would be omitted from the record under *Blagg* and the claim decided without further briefing. Without withdrawing the order or entering another order to the contrary, the ALJ rendered an opinion on May 13, 2009 that found *Blagg* to be distinguishable and then considered and relied on Dr. Harpring's report.

The ALJ determined that *Blagg* did not require Dr. Harpring's report to be stricken from the record simply because the university evaluation was ordered after the claim was heard and taken under submission. The ALJ reasoned that, unlike *Blagg*, the present claim included a dispute over whether the claimant had reached MMI. The interlocutory order found her not to be at MMI and held the remaining issues in abeyance until she did so.

Addressing the claimant's present condition, the ALJ noted that KRS 342.315 entitled Dr. Harpring's clinical findings and opinions to presumptive weight but also found specifically that "his opinion and explanation [was the] most rational and persuasive." Noting that the "litany" of post-injury diagnostic studies failed to produce any objective evidence the claimant's symptoms correlated with a lumbar abnormality, even a congenital one, the ALJ found that the current symptoms did not result from the alleged work-related injury of January 2006 and dismissed the claim.

I. APPLICABILITY OF *T.J. MAXX V. BLAGG.*

Blagg is distinguishable. It did not require Dr. Harpring's report to be stricken from the record simply because the ALJ ordered the university evaluation after the claim was heard and taken under submission.

KRS 342.730(1) bases permanent income benefits on a finding that the work-related injury produced a permanent impairment rating as determined by the *Guides to the Evaluation of Permanent Impairment (Guides)*, which consider only the impairment that remains at MMI to be permanent. The Fifth Edition of the *Guides* explains on page 2 that MMI from an injury occurs when the impairment is "well stabilized and unlikely to change substantially in the next year with or without medical treatment."

Blagg concerned a dispute over the extent of the worker's permanent impairment at MMI. The ALJ ordered a university evaluation after the claim was submitted because the parties offered greatly conflicting evidence concerning whether Ms. Blagg sustained an injury as defined by KRS 342.0011(1) and whether it produced a severe disability or no disability. The court determined that the ALJ lacked discretion to order a university evaluation at that time, noting that disability was hotly contested throughout the claim; that the ALJ allowed the parties to submit evidence from more than two physicians; and that no regulation permitted the proof to be reopened after a claim was heard, briefed, and submitted for a decision.

Blagg does not govern the present claim for two reasons. First, the claimant failed to object to the university evaluation and, as a consequence,

failed to preserve an argument that the ALJ lacked the authority to order an evaluation after the claim was submitted for a decision. Second, unlike the situation in *Blagg*, the issues submitted in the present case included whether the claimant had reached MMI as well as the extent and duration of her disability. The ALJ entered an interlocutory opinion and order finding that she sustained a work-related injury from which she had yet to reach MMI and holding the balance of the claim in abeyance pending MMI.

KRS 342.275(2) gives an ALJ the authority to "grant continuances" and award interlocutory benefits. Implicit in KRS 342.275(2) is the authority to order additional proof concerning issues held in abeyance pending MMI. Resolving those issues clearly requires evidence concerning when the worker reached MMI from the injury; the cause of any complaints remaining at MMI; the extent of any permanent impairment resulting from the injury; and the need for continued medical treatment after MMI. Having held a claim in abeyance pending MMI, an ALJ clearly may admit and consider such evidence.

II. THE NECESSITY OF A REMAND.

The claimant asserts that the claim must be remanded for the appointment of a new university evaluator and a reconsideration of the merits. Stating that she met her burden of proof and risk of non-persuasion as of the interlocutory opinion and order, she claims that subsequent actions by the ALJ denied her due process and/or constituted an abuse of discretion and that the cumulative effect of the employer's and ALJ's actions require the claim to be reconsidered after a new university evaluation. We disagree.

a. Due Process.

The claimant complains that the ALJ reversed the decision to delete Dr. Harpring's report from the record without giving her an opportunity to be heard. Noting that KRS 342.315 requires an ALJ to afford a university evaluator's opinions presumptive weight, she complains that his report was the evidence that decided her case and that she lost income benefits and the right to future medical care as a consequence.[4] We disagree.

The claimant received the interlocutory TTD award that she sought. Not only did she fail to object to the subsequent university evaluation, she received all of the relief she requested in her July 2008 motion concerning the employer's initial letter to Dr. Harpring. After Dr. Harpring rendered an unfavorable report and the employer moved to terminate TTD, she moved to strike the evaluation and request a new one, arguing that the letter biased the evaluation.

The ALJ denied the motion, persuaded that the letter did not improperly "'poison the well' of Dr. Harpring's objectivity" but gave the claimant time to cross-examine him. She failed to do so although a deposition would have afforded her an opportunity to undermine the opinions expressed in his report as well as to determine whether he read the employer's initial letter and, if so, whether it biased his evaluation. She also failed to request an opportunity to depose herself or the friend that accompanied her concerning the manner in

[4] *See Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970).

which he conducted the evaluation.[5] She did file a report concerning the bone scan Dr. Harpring recommended.

The claimant objected to the employer's February 2009 motion to include Dr. Harpring's report in the record based on *Blagg*. The ALJ committed a legal error by concluding that *Blagg* barred the report.[6] Having done so and entered an interlocutory order striking the report based on *Blagg*, the ALJ had the authority to reverse the decision *sua sponte*.[7] Despite citing KRS 342.315 with respect to Dr. Harpring's opinions, the ALJ exercised the prerogative of a fact-finder to find specifically that his opinions were the "most rational and persuasive." Nothing prevented the ALJ from relying on the report or making different factual findings based on the report because the previous orders and findings were only interlocutory. We are not convinced that the circumstances required the ALJ to order another hearing or additional briefing to enable the claimant to address perceived inconsistencies in Dr. Harpring's report.[8]

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[5] Her inaction could not have resulted from reliance on *Blagg*, which was not rendered until December 18, 2008, or from reliance on the ALJ's subsequent decision to delete Dr. Harpring's report based on *Blagg*.

[6] Contrary to the claimant's assertion, the "law of the case" doctrine applies to rulings by an appellate court or the Board but does not apply to an ALJ's rulings. *See Dickerson v. Commonwealth*, 174 S.W.3d 451, 467 (Ky. 2005); *Whittaker v. Morgan*, 52 S.W.3d 567 (Ky. 2001); *Davis v. Island Creek Coal Co.*, 969 S.W.2d 712 (Ky. 1998).

[7] *Wheatley v. Bryant Auto Service*, 860 S.W.2d 767 (Ky. 1993) (an ALJ may correct a legal error in a final award *sua sponte).*

[8] We note that briefing is discretionary under 803 KAR 25:010, § 18(2) but acknowledge the difference between the present circumstances and those that the regulation appears to contemplate.

b. Abuse of Discretion and Cumulative Effect.

We disagree with the claimant's assertion that the ALJ's actions after rendering the interlocutory order were arbitrary and capricious; that they constituted an abuse of discretion; or that the circumstances require the claim to be remanded and reconsidered after a new university evaluation.

Although the employer's initial letter included information not authorized by the medical evaluation referral order, the claimant received the relief she requested in her July 2008 motion. We are not convinced that the ALJ's refusal to grant the claimant's August 2008 motion strike Dr. Harpring's report constituted an abuse of discretion. Although the employer's petition for reconsideration delayed the sending of a revised letter until after Dr. Harpring examined the claimant, his Form 107 report was dated a week after the employer claims to have faxed him the revised letter. Despite the claimant's assertions, nothing indicates that he read either of the employer's letters. The ALJ found that Dr. Harpring's report corroborated the other medical evidence and did not find the information contained in the employer's initial letter to be so biased as to have affected his objectivity. Having failed to grasp the opportunity the ALJ gave her to obtain evidence that it did, the claimant cannot complain.

The ALJ reversed positions concerning whether *Blagg* prohibited Dr. Harpring's report from being considered, but we are not convinced that correcting a legal error *sua sponte* amounts to an abuse of discretion. Nor are we convinced that the ALJ's failure to order another hearing or additional

briefing after doing so constituted an abuse of discretion on these facts. The decision to dismiss the claim was reasonable under the evidence and, hence, was neither arbitrary nor capricious.[9] Having concluded that the ALJ did not deny the claimant due process or commit an abuse of discretion, we are not convinced that the cumulative effect of the employer's and ALJ's actions required the claim to be remanded for reconsideration based on a new university evaluation.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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[9] *See Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).