

**Commonwealth Of Kentucky**

**Court Of Appeals**

NO. 2002-CA-001987-WC

SIGHTS DENIM SYSTEMS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
CLAIM NO. WC-99-78335

JULIE DEBORTOLI; BONNIE KITTINGER,  
Administrative Law Judge; and  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

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BEFORE: HUDDLESTON, PAISLEY and TACKETT, Judges.

HUDDLESTON, Judge: Sights Denim Systems appeals a decision by the Workers' Compensation Board which affirmed in part and reversed in part an Administrative Law Judge's opinion and award. The ALJ found Julie Debortoli entitled to temporary total and permanent partial disability benefits arising from a

work-related injury. The Board affirmed the ALJ's award of temporary total disability, but reversed her permanent partial disability award.

The factual background of the case was succinctly summarized by the Board as follows:

Debortoli, who is now 36 years old, alleged an injury of June 1, 1999[,] while moving and stacking boxes of jeans. She began to complain of her neck hurting, pain into her shoulders and numbness and tingling in her arms and fingers. She subsequently developed headaches. Debortoli was off work from June 6, 1999[,] to October 6, 1999, being paid temporary total disability benefits during that time. She returned for a short period but felt she could not continue doing that work and ceased employment.

Debortoli has been seen by a number of physicians. Initially, she was sent to a clinic upon referral from the plant physician and was diagnosed with a neck strain and degenerative disk disease in the cervical spine. She then went to her family physician, who referred her to Dr. Pedro Dominguez, an Evansville, Indiana[,] neurosurgeon, who performed specialized testing and recommended a lighter job. Debortoli was later referred by a different family

physician to Dr. [Michael S.] Mayron, a neurologist, who performed a variety of examinations. She also participated in some physical therapy and a functional capacity evaluation.

Debortoli continues to have difficulties, does not believe she can return to the work she was doing at the time, [and] continues to experience neck and arm pain with some headaches although not as bad as they were initially. She acknowledged she had previous headaches but nothing like what she experienced after the injury. Debortoli has prior work experience with Wal-Mart as a press operator and in temporary jobs with Commercial Testing Engineering, furniture [sic] and Millstone Coffee. She has a high school education.

The ALJ found that Debortoli has a 6% permanent impairment as a result of the work-related injury she suffered in June of 1999. This award was increased using the 1.5 multiplier pursuant to Kentucky Revised Statutes (KRS) 342.730(1)(c)1 because, according to her own testimony and that of Dr. Mayron, Debortoli lacked the physical capacity to return to the type of work she performed at the time of her injury. The ALJ used Dr. Mayron's testimony to set the date of maximum

medical improvement (MMI) at March 16, 2001. Using that date, the ALJ awarded Debortoli temporary total disability benefits under KRS 342.0011(11)(a).

On review, the Board reversed that part of the ALJ's award which found Debortoli entitled to permanent partial disability. It held that the ALJ's reliance on the 6% impairment rating assessed by Dr. Agustin Sierra was improper in that Dr. Sierra's assessment was made using the Fourth Edition of the American Medical Association Guidelines to Functional Impairment at a time when the Fifth Edition had been certified as widely available. The Board therefore struck Dr. Sierra's impairment rating, and was left with only that of Dr. Dennis O'Keefe whose assessment was that Debortoli suffered a 0% impairment. Accordingly, the Board remanded the case to the ALJ to find Debortoli 0% permanently impaired pursuant to Dr. O'Keefe's assessment.

On appeal, Sights contends that it was error to award Debortoli temporary total disability benefits. Sights argues that the ALJ did not consider whether Debortoli had reached a level of improvement which would have allowed her to return to employment.

Our function upon review is to correct the Board only when we perceive that it has "overlooked or misconstrued controlling statutes or precedent, or committed an error in

assessing the evidence so flagrant as to cause gross injustice.”<sup>1</sup>  
In that we agree with the Board’s analysis of this issue, we  
adopt that portion of its opinion as our own:

[The issue of whether Debortoli was at maximum medical  
improvement or was capable of returning to work] is a  
question of fact for the ALJ. Here, we believe the  
ALJ pieced together an unusual set of circumstances  
and drew reasonable inferences from the record to  
conclude temporary total disability benefits were  
appropriate. Reasonable inferences are for the ALJ.<sup>[2]</sup>

Although Debortoli was able to return to  
work for a few days in October of 1999, she discovered  
she could not continue performing those working  
activities. We believe the medical evidence from Dr.  
Mayron coupled with that from Drs. Dominguez and  
Sierra supports the ALJ’s conclusion. This, in spite  
of the fact that Dr. Mayron did have questions  
concerning the pathological efficacy of Debortoli’s  
complaints. While Debortoli had experienced headaches  
in the past[,] the evidence from her, coupled with the  
medical evidence, could lead to a reasonable

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<sup>1</sup> Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687  
(1992).

<sup>2</sup> Jackson v. General Refractories, Ky., 581 S.W.2d 10 (1979).

conclusion that for some period of time even after October 1999 these headaches were of greater severity and more problematic than had previously existed.

While Sights takes issue with the evidence regarding Debortoli's capability to return to work, that issue was for the ALJ to decide. As discussed above, there is sufficient evidence in the record to support the ALJ's conclusion. In finding that Debortoli lacked the capacity to return to work, the ALJ chose to accept Debortoli's testimony on that issue, which was certainly within her discretion.

Finally, Sights argues that Debortoli failed to support her claim with objective medical findings. Again, we look to the Board's analysis:

KRS 342.0011(1) as it became effective on December 12, 1996[, ] obligates an injured work[er] to establish the existence of an injury by objective medical findings. In Gibbs v. Premiere Scale Company<sup>[3]</sup> and Konvelski v. Staples,<sup>[4]</sup> the Supreme Court provided us with guidance on what that means. As defined in the statute and as interpreted by the Supreme Court, it is not an issue of causation but rather an issue as it relates to a

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<sup>3</sup> Ky., 50 S.W.3d 754 (2001).

<sup>4</sup> Ky., 56 S.W.3d 412 (2001).

harmful change in the human organism. It does not require evidence of permanency but rather the existence of a harmful change as born out by standard medical practices. [In its argument to us, Sights focuses on ambiguity and equivocation in the medical diagnoses.] While we acknowledge there is medical evidence that questions whether there is exaggeration or physiological inconsistencies evidenced by these examinations, we also have testimony from physicians as to loss of range of motion, spasm, physiological changes demonstrated on x-ray and specialized testing and evidence of some nerve malfunction, all of which were established by standardized accepted medical testing and direct observations of the physicians.

[ ] So long as there is evidence supporting the conclusion of the ALJ, that there may be evidence to the contrary does not allow for the alteration of the ALJ's conclusions on appeal.<sup>5</sup> Clearly, a harmful change in the human organism, whether big or small, was established by "objective medical findings" as noted above. Whether that objective medical evidence supports a finding of entitlement to temporary total

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<sup>5</sup> McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

disability or permanent disability is a function of the totality of the circumstances, including the assessment of disability pursuant to KRS 342.0011(11). Simply put, the medical evidence supports the ALJ's conclusion that there was an "injury" as that term is defined by KRS 342.0011(1).

Accordingly, the decision of the Board which affirmed the ALJ in part, reversed in part, and remanded for entry of findings consistent with its decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

John C. Morton  
Samuel J. Bach  
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