

RENDERED: JUNE 2, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001912-WC

MARTHA COX

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-01-00454

TRIM MASTERS, INC.;  
HON. HOWARD E. FRASIER, JR.,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM, SENIOR JUDGE.<sup>1</sup>

JOHNSON, JUDGE: Martha Cox has petitioned for review of an opinion of the Workers' Compensation Board entered on August 12, 2005, which affirmed in part, vacated in part, and remanded the Administrative Law Judge's decision awarding her permanent partial disability benefits for a work-related right hand/wrist injury. Having concluded the Board did not overlook or

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

misconstrue controlling law or so flagrantly err in evaluating the evidence as to cause gross injustice, we affirm.<sup>2</sup>

Cox was born on November 17, 1948. She is a college graduate with a degree in organizational management and a paralegal degree. From 1967 until 1972, Cox was employed by Union Underwear Company as a sewing machine operator. Then, Cox was employed by General Electric for two years assembling air conditioning units. In 1974 Cox returned to work at Union Underwear until 1997 when she was laid off. Cox began working for Trim Masters on April 5, 1999, sewing trim covers for automobile seats.

On April 23, 1999, at approximately 1:30 a.m., Cox was leaving Trim Masters following her shift when she tripped and fell over a speed bump in the parking lot. She fell on her right side, striking her forehead, shoulder, neck, elbow down to her hand, and her knee. She was knocked unconscious for a period of time. Other employees discovered Cox and took her to Trim Masters's first aid room, but Trim Masters refused to allow Cox to leave the building or to be taken to the hospital until approximately 3 hours after the accident occurred when a relative took her home. Later that same day, Cox was referred by Trim Masters to the Harrodsburg Family Clinic, where she underwent x-rays and was released to return to work.

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<sup>2</sup> See Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

Cox saw her family physician, Dr. Bobby Brooks, in Campbellsville, Kentucky, on April 26, 1999. Dr. Brooks noted that Cox had significant injuries to the right side of her head, her right wrist and hand, and her right knee. Cox was placed on light-duty work restrictions. Because she could not perform her regular job, she was placed into a position in another part of the plant. The work she performed there caused pain in her right hand and arm. Cox put ice on her hand at least twice each shift due to pain and swelling. She continued light-duty work for four weeks. Subsequently, from May 1999 through August 1999, Cox drove to the Trim Masters plant in Nicholasville to perform safety inspections.

When Dr. Brooks informed Cox that she needed to see a specialist, Trim Masters referred her to Dr. Ronald Burgess, an orthopedic surgeon. Dr. Burgess ordered a bone scan which revealed chipped bones in the base of Cox's right, fifth metacarpal.<sup>3</sup> Dr. Burgess administered cortisone injections which only provided Cox with minimal and temporary relief.

On January 12, 2001, Dr. Richard Sheridan, an orthopedic surgeon with the Louisville Pain Treatment Physicians, performed an independent medical evaluation on behalf of Trim Masters. Dr. Sheridan diagnosed a healed fracture at the base of the right, fifth metacarpal. He opined

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<sup>3</sup> Cox is left-handed.

that Cox's current symptomatology was not related to the slip and fall incident in April 1999. Dr. Sheridan stated that Cox had no functional impairment and could return to her regular work with no restrictions.

Cox filed her application for resolution of injury claim on April 3, 2001. When Cox was initially deposed for her workers' compensation claim on June 8, 2001, she stated that she did not have any other medical problems except for her right hand. She stated that in February 2000, at her request, she was transferred to the general office at Trim Masters, where she became a PC specialist which required her to order parts and use the computer, which she did with her left hand. She testified that she had no problem performing this job until it was changed to include ordering fabrics weighing between 50 to 300 pounds, trim covers, and doors, and that she was on restrictions not to lift more than five pounds.

Cox began treating with Dr. Harold Kleinert in July 2001 following a referral from Dr. Brooks.<sup>4</sup> Dr. Kleinert diagnosed Cox with traumatic arthritis in the right, fifth carpometacarpal joint. He scheduled Cox for an arthrodesis with probable bone grafting.

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<sup>4</sup> Following this referral, the workers' compensation carrier for Trim Masters notified Cox that it would not pay for any further medical or travel expenses.

On July 31, 2001, the ALJ placed the case in abeyance pending Cox's surgery and assignment of a permanent impairment rating. Dr. Kleinert performed surgery on Cox on August 14, 2001, which consisted of removing a bone from Cox's right arm and fusing it into her right hand, which was held with pins. Three weeks later Cox began physical therapy, which caused the pins in her hand to work loose and poke through her skin. Dr. Kleinert had to surgically remove the pins. Subsequent x-rays revealed that the fusion had not held and Cox underwent a second surgery in April 2002, in which Dr. Kleinert removed two bones from Cox's left hip and fused them into her right hand, holding it in place with a metal plate and five screws which are still in place.

On May 9, 2002, Dr. Burgess performed an independent medical evaluation of Cox at the request of Trim Masters. Dr. Burgess opined that Cox's current symptoms of pain were not related to the April 1999 injury. He further opined that Cox could perform her regular job duties and no further medical treatment was required. Dr. Burgess opined that following healing from the April 2002 surgery, Cox should undergo physical therapy and should ultimately return to unrestricted work activity.

On March 21, 2003, Cox filed a motion to amend her application concerning the April 1999 work injury to include

psychiatric injuries, including depression and high blood pressure. The claim was removed from abeyance on April 9, 2003, and the motion to amend the claim was denied on April 25, 2003. On May 30, 2003, Cox gave her second deposition in which she stated she was still employed by Trim Masters but was on restricted duty from Dr. Kleinert. She further stated that she had been treated for high blood pressure following the second surgery. She filed another motion to hold the claim in abeyance because Dr. Kleinert had indicated she had not reached maximum medical improvement and he could not assign her a permanent impairment rating. The claim was placed in abeyance on August 5, 2003.

On June 26, 2003, Dr. Kleinert was deposed. He stated that he had performed three surgeries on Cox, the latest one being on June 24, 2003, wherein he released her median nerve at the carpal tunnel and the pronator in her right hand. He further added that Cox suffered from axillary block neuritis which became secondary to her injury. He stated that Cox suffers no pain from the fracture in her hand initially caused by the April 1999 injury because the fracture has been fused. The pain Cox now has results from her blocked neuritis which developed following surgery.<sup>5</sup> Dr. Kleinert further stated that

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<sup>5</sup> Prior to Cox's surgery she was given an injection of anesthetic, or block, to numb her arm. Apparently, while uncommon, Cox suffered complications from the block causing axillary block neuritis.

the carpal tunnel may or may not be related to Cox's work injury and that when he was able to assign her a primary impairment rating it would be based upon some loss of motion where the fusion took place and some loss of strength in the hand.

Cox was seen in November 2003 by Dr. David Petruska, a neurosurgeon of the Louisville Neurosurgical Specialists, after being referred by Dr. Kleinert based on complaints of neck pain and reflex sympathetic dystrophy. Dr. Petruska diagnosed right shoulder impingement syndrome, soft tissue injury to the neck and right shoulder osteoarthritis, chronic peripheral nerve injuries, and cervical degenerative disc disease. Dr. Petruska indicated that the April 1999 injury was the cause of Cox's complaints. He assessed a 5% to 8% functional impairment rating for the neck only. He apportioned 50% of the impairment rating to cervical degenerative disc disease and shoulder osteoarthritis.<sup>6</sup>

Cox was evaluated by Dr. David Muffly on June 10, 2004. Dr. Muffly assessed a 5% impairment to the body as a whole due to work-related injuries. He placed restrictions on use of the right hand as an "assistant" hand with maximum lifting of five pounds with the right hand.

Cox filed the vocational evaluation of Dr. Stephanie Barnes dated March 4, 2004. Dr. Barnes opined that Cox's age,

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<sup>6</sup> The claim was removed from abeyance on May 24, 2004.

physical limitations, earning potential, non-dominant arm limitations, and lack of experience in her degree fields made finding a job unlikely. Based on these factors, Dr. Barnes opined that Cox was totally occupationally disabled.

Trim Masters filed the vocational report of Dr. Luca Conte, dated August 19, 2004. Based on the opinions of Dr. Sheridan and Dr. Burgess, Dr. Conte opined that Cox retained the capacity to return to her prior occupation. Based on the opinions of Dr. Kleinert, Dr. Muffly and Dr. Petruska, Dr. Conte stated that Cox was capable of work with restrictions of using her right, non-dominant hand as an assistant hand, with lifting limits of three to five pounds, and the avoidance of repetitive motion with her right hand. Dr. Conte noted that Cox had an extensive academic record and that she was computer literate. Tests results indicated that Cox had an ability to perform work-related academic tasks in the semi-skilled to skilled sectors of the labor market. With consideration of the above factors, he assessed Cox a 25% occupational loss.

In a deposition taken on July 20, 2004, Michael Wright, the human resources director for Trim Masters, testified regarding Cox's employment record. Wright confirmed Cox's testimony regarding her medical treatment and the description of the various jobs she had held at the plant. He also confirmed that Trim Masters's workers' compensation carrier refused to pay

for any medical bills as of February 6, 2001, after Dr. Burgess advised that Cox's complaints of pain were not related to the April 1999 injury. Cox's wage reports revealed when she was off work and collected short-term disability benefits. Wright testified that Cox was denied long-term disability benefits because of her pending workers' compensation claim.

The final hearing in the case was held on January 21, 2005. Cox testified that she considers herself totally occupationally disabled. The ALJ issued his opinion on March 21, 2005. He determined that only the condition in Cox's right hand was caused by the work injury, and she had a 5% impairment rating due to the injury to her hand and wrist. Further, the ALJ determined that the 1.5 multiplier applied during the times Cox was not earning the same or greater wage. The ALJ left open the issue of compensability of medical expenses. The parties were instructed to supply further evidence on that issue.

Both parties filed petitions for reconsideration of the ALJ's opinion. The ALJ rendered further findings based upon the petitions on April 18, 2003. Cox appealed to the Board which affirmed the ALJ's opinion in part, but vacated and remanded the opinion to the ALJ for further findings on the issue of temporary total disability during the periods Cox was absent from work for surgery related to the work injury. This petition for review followed.

When reviewing one of the Board's decisions, this Court will only reverse the Board's decision when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice.<sup>7</sup> To properly review the Board's decision, this Court must ultimately review the ALJ's underlying decision. The ALJ as fact-finder has the sole authority to initially judge the weight, credibility, substance and inferences to be drawn from the evidence, which is now challenged on appeal.<sup>8</sup> When the evidence is in conflict, the ALJ is at liberty to choose to believe parts of the evidence and disbelieve other parts of the evidence, whether the evidence comes from the same witness or the same party's total proof.<sup>9</sup> The determinative question to be answered is whether the ALJ's finding is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.<sup>10</sup>

Cox challenges the Board's affirmance of the ALJ's determination that she did not provide timely notice to support her claims for benefits for an axillary block injury to her right arm, a neck injury, and high blood pressure, nor was there

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<sup>7</sup> Western Baptist, 827 S.W.2d at 687-88.

<sup>8</sup> Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

<sup>9</sup> Brockway v. Rockwell International, 907 S.W.2d 166 (Ky.App. 1995).

<sup>10</sup> KRS 342.285; Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

any evidence of causation. She contends that she gave immediate notice of the work injury and notice of the other alleged work-related conditions once she became aware of them based upon statements from her treating physicians. She claims that she made a good faith effort to notify Trim Masters of her injuries as soon as practicable.

Under KRS 342.185(1), no proceeding for workers' compensation for an injury shall be maintained "unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof[.]" KRS 342.190 requires the notice to include "the time, place of occurrence, nature and cause of the accident . . . and the work or employment in which the employee was at the time engaged[.]" KRS 342.200 further states that "[w]ant of notice or delay in giving notice shall not be a bar to proceedings under this chapter if it is shown that the employer, his agent or representative had knowledge of the injury or that the delay or failure to give notice was occasioned by mistake or other reasonable cause." The purposes of the notice requirement are threefold: (1) "to provide prompt medical treatment in an attempt to minimize the worker's ultimate disability and the employer's liability"; (2) "to enable the employer to make a prompt investigation of the circumstances of the accident"; and

(3) to prevent the filing of fictitious claims because of the lapse of time.<sup>11</sup>

The employee bears the burden of proof on the notice requirement as an initial matter, as well as any claim of justifiable delay.<sup>12</sup> Mere lack of prejudice to an employer alone is not sufficient to excuse a delay in providing notice.<sup>13</sup> Whether a claimant gave timely and adequate notice is ultimately a legal question, but the notice issue also involves factual findings making it a mixed question of law and fact.<sup>14</sup> As the fact-finder, an ALJ's findings on factual issue are conclusive if supported by substantial evidence. But, when legal questions or mixed questions of law and fact are involved, the reviewing court has greater latitude to determine whether the decision below is supported by evidence of probative value.<sup>15</sup>

In this case, the ALJ noted that Cox's symptoms of pain for her shoulder and neck did not arise until May 2003,

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<sup>11</sup> Smith v. Cardinal Construction Co., 13 S.W.3d 623, 627 (Ky. 2000); Harlan Fuel Co. v. Burkhardt, 296 S.W.2d 722, 723 (Ky. 1956).

<sup>12</sup> See, e.g., Newberg v. Slone, 846 S.W.2d 694 (Ky. 1992); Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986); and Buckles v. Kroger Grocery & Baking Co., 280 Ky. 644, 134 S.W.2d 221 (1939).

<sup>13</sup> See Blue Diamond Coal Co. v. Stepp, 445 S.W.2d 866 (Ky. 1969).

<sup>14</sup> See, e.g., Blackburn v. Lost Creek Mining, 31 S.W.3d 921 (Ky. 2000); and Harry M. Stevens Co. v. Workmen's Compensation Board, 553 S.W.2d 852 (Ky.App. 1977).

<sup>15</sup> Purchase Transportation Services v. Estate of Wilson, 39 S.W.3d 816, 817-18 (Ky. 2001); Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991).

approximately three years after her work injury occurred. Also, in her first deposition, Cox did not identify any injury other than the one to her right hand and little finger. Although Dr. Petruska indicated that Cox's neck condition was work-related, his opinion was based solely on the history he received from her. The ALJ further determined that there was no evidence that Cox gave verbal or written notice of any injury to her neck, or that she had high blood pressure, prior to the time her symptoms first appeared in the medical records of Dr. Kleinert.

We agree with the Board that while Hill v. Sextet Mining Corp.,<sup>16</sup> stands for the proposition that "an injured worker is not under a duty to diagnose injuries or to otherwise identify latent injuries which are not apparent at the time of a work-related fall[,]" the holding "does not render Cox's numerous complained of conditions work-related as a matter of law." The ALJ's determinations regarding lack of notice and causation were not clearly erroneous because both findings were reasonable based upon the evidence of record. Dr. Muffly assessed an impairment rating for the right hand injury, but found the neck injury unrelated to the work injury. There is no evidence in her work records, as testified to by Wright, that Cox ever complained of work-related injuries to her neck or right shoulder, or high blood pressure. Although Dr. Kleinert

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<sup>16</sup> 65 S.W.3d 503 (Ky. 2001).

assessed an impairment rating for Cox's shoulder, Dr. Petruska limited his impairment rating to her neck only. The ALJ's findings that Cox did not provide due and timely notice of these injuries, nor that they were causally related to the work injury of April 1999, were reasonable based upon the evidence.

Further, while we agree with Cox that her axillary block neuritis was work-related, we also agree with the Board that the ALJ's failure to find the axillary neuritis compensable was a harmless error. Thus, we adopt that part of the Board's opinion on this issue:

Cox correctly argues that as a general rule injuries arising from surgical treatment of an original work injury are compensable. Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986). We agree with Cox that the ALJ erred in finding the condition non-compensable on the basis it was neither reasonable nor necessary. Dr. Kleinert explained the axillary block, which was the anesthesia necessary to perform the surgery, resulted in the unusual condition of block neuritis. There is no evidence in the record stating otherwise. According to Dr. Kleinert, this was an unfortunate result which happened when the anesthesiologist perforated and damages the nerve while administering the axillary block.

While we agree with Cox that the ALJ erred in failing to find the axillary neuritis compensable, it does not appear Cox was harmed by this error. The ALJ relied on Dr. Kleinert's impairment rating for the hand and wrist to award benefits. The ALJ excluded the impairment rating for the shoulder as non-work-related. Inasmuch as

any impairment rating resulting from the axillary block neuritis was included in Dr. Kleinert's impairment rating for the wrist and hand, the ALJ's error is harmless error which does not warrant reversal on appeal. See Bingham v. Davis, 444 S.W.2d 123 (Ky. 1969).

Cox next argues that she is entitled to an award of permanent total disability benefits "because her work-related limitations prevent her from performing work as defined by KRS 342.0011(34) on a regular and sustained basis." Cox states that the ALJ "failed . . . to perform a fact specific individualized determination of what [she] is and is not able to do" since she is limited to work with her left hand and arm. Cox argues that she went to "extraordinary lengths" to maintain employment at Trim Masters, and that now she cannot even perform general office duties because she is limited and restricted to using only her left hand. She also states that the ALJ erred in using a "means standard" with regard to income from collateral sources, including the benefits Cox and her husband received from Social Security.

Under Kentucky's workers' compensation law, awards for permanent, partial disability are a function of the worker's AMA impairment rating, the statutory multiplier for that rating, and whether the worker can return to the pre-injury employment.<sup>17</sup> The ALJ has limited discretion when determining the extent of a

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<sup>17</sup> KRS 342.730(1)(b) and (c).

worker's permanent partial disability.<sup>18</sup> However, determining whether a particular worker has sustained a partial or total occupational disability as defined by KRS 342.0011(11) requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy.<sup>19</sup>

In McNutt Construction, the Supreme Court of Kentucky provided the analysis that must be used when determining whether a worker's occupational disability is partial or total. Consistent with factors described in Osborne v. Johnson,<sup>20</sup> the Supreme Court stated that an individualized determination of a worker's ability to work after recovering from injury is required.

[The determination] necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be dependable and whether his physiological restrictions prohibit him from using the skills which are within his individual vocational capabilities. The

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<sup>18</sup> McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001).

<sup>19</sup> Ira A. Watson, 34 S.W.3d at 51.

<sup>20</sup> 432 S.W.2d 800, 803 (Ky. 1968).

definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled.<sup>21</sup>

In the case before us, we agree with the Board that substantial evidence exists to support the ALJ's determination that Cox is not totally and permanently disabled and the evidence does not compel a contrary finding. The ALJ applied the McNutt Construction principles and found that Cox's age did not prohibit her from holding light or sedentary employment. Additionally, while the ALJ found credible Cox's medical restrictions limiting her work to her left hand, he noted that she was left-hand dominate. Although Cox's employment records indicate that she had been employed in factories most of her life, the evidence indicated that Cox has a college degree and vocational training as a paralegal and should be able to find suitable employment in those areas. While the ALJ did comment on the fact that Cox was receiving Social Security disability benefits, we agree with the Board that "in light of his other findings we do not believe the ALJ failed to award total disability benefits based on the consideration that Cox had other sources of income." We cannot say that the evidence in this case compels a finding that Cox is totally occupationally disabled.

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<sup>21</sup> McNutt Construction, 40 S.W.3d at 860.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas W. Davis  
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BRIEF FOR APPELLEE, TRIM  
MASTERS, INC.:

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