

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-001478-WC

UNITED PARCEL SERVICE, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-00328

SHARON JERNIGAN; HON. LAWRENCE SMITH,  
ADMINISTRATIVE LAW JUDGE; AND  
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: HOWARD,<sup>1</sup> NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: United Parcel Service, Inc. (UPS) petitions this Court to review an opinion of the Workers' Compensation Board (Board) affirming the Administrative Law Judge's (ALJ) award of temporary total disability (TTD) benefits to Sharon Jernigan from July 24, 2003, through September 8, 2004. We affirm.

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<sup>1</sup> Judge James I. Howard concurred in this opinion prior to the expiration of his appointed term of office on December 6, 2007. Release of this opinion was delayed by administrative handling.

This case presents a unique procedural history. Jernigan sustained a knee injury while employed by UPS on May 3, 2002. She subsequently filed a claim for workers' compensation benefits. The record reveals that Jernigan underwent knee surgery on January 7, 2003. Ultimately, the ALJ determined that Jernigan reached maximum medical improvement (MMI) on July 24, 2003, and awarded seven percent (7%) permanent partial disability. This seven percent disability rating was based upon the medical opinion of Dr. Warren Bilky. UPS sought review with the Board. In its opinion reversing and remanding, the Board concluded that the ALJ erred by relying on Dr. Bilky's permanent impairment rating of seven percent because it was rendered on May 9, 2003, before Jernigan reached MMI on July 24, 2003. Upon remand, the Board directed the ALJ to determine the permanent partial impairment rating after Jernigan reached MMI.

When the matter was remanded to the ALJ, Jernigan filed a "Motion To Remove Claim From Submission And To Institute A New Proof Schedule." Therein, Jernigan stated that she had undergone additional medical treatment for the work-related injury, including a second surgery on March 8, 2004, and incurred additional impairment. The ALJ granted the motion and gave the parties sixty days to present additional evidence concerning Jernigan's condition. After considering the newly submitted evidence, the ALJ entered an opinion and award on November 17, 2006. The ALJ found that Jernigan's second surgery to repair a medial meningeal tear in her knee was directly related to the original work-related injury and, thus, compensable. The ALJ also found that Jernigan

now suffered a ten percent (10%) permanent partial disability. Most important to this appeal, the ALJ awarded TTD benefits to Jernigan from the date Jernigan reached MMI, July 24, 2003, through September 8, 2004. UPS again sought review with the Board. In particular, UPS claimed the ALJ erred by starting the award of TTD benefits from the date of July 24, 2003; rather, UPS argued that Jernigan was only entitled to TTD benefits from the date of her second surgery, March 8, 2004. The Board affirmed the ALJ's award of TTD benefits. Our review follows.

UPS contends that the ALJ erred by awarding TTD benefits to Jernigan from July 24, 2003. UPS believes the proper date to commence TTD benefits is March 8, 2004, the date of Jernigan's second surgery.

In arguing for reversal of the ALJ, UPS particularly argues:

As to the Appellee's first right knee surgery on January 7, 2003, the Administrative Law Judge already ruled that she reached MMI on July 24, 2003. It was the date to which the Board directed him on remand. Although new impairment ratings can be entered following her second surgery after she reaches MMI for the second surgery, the Administrative Law Judge is estopped from changing her date of MMI following the first surgery. Even though he found the second surgery of March 8, 2004[,] causally related to her second surgery, he is prohibited from changing his finding that she reached MMI from that first surgery on July 24, 2003.

Significantly, the medical evidence continues to show that between July 24, 2003[,] through March 8, 2004, the Appellee remained at MMI for her first surgery. The Administrative Law Judge and Board overlook this. Dr. Stacie Grossfeld saw her on November 20, 2003[,] and determined she could return to work without restrictions. Even reports of the Appellee's treating physician, Dr. Craig,

continue to evidence that she is only entitled to TTD beginning with her second surgery on March 8, 2004.

Following the Appellee's January, 2003 surgery, the medical evidence shows that she reached MMI after [sic] six months afterwards as anticipated, or in July, 2003. Similarly, it shows she reached MMI following her second surgery in March, 2004[,] also six months afterwards, or September, 2004.

Jernigan's Brief at 13-14.

It is well-established that the findings of fact of an ALJ are entitled to great deference and will only be disturbed on appeal if clearly erroneous. Moreover, this Court will not reverse upon an issue of fact unless the evidence is “patently unreasonable or flagrantly implausible.” *Toyota Motor Mfg. Ky. Inc. v. Czarnecki*, 41 S.W.3d 868, 871 (Ky.App. 2001)(citing *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992)).

In reaching the decision to award TTD benefits, the ALJ specifically found the medical opinion of Dr. Jules Barefoot persuasive. In particular, the ALJ pointed out that “[a]ccording to Dr. Barefoot on July 24, 2003 the plaintiff was not yet at maximum medical improvement. . . . That is a reason why I conclude that the plaintiff is awarded TTD from July 24, 2003 through September 8, 2004.”

We view the medical opinion of Dr. Barefoot alone as constituting substantial evidence to support the ALJ's finding that Jernigan had not reached MMI improvement on July 24, 2003. Additionally, we do not believe that the ALJ was somehow “estopped” from reaching the issue of MMI based upon the newly presented evidence upon remand. Although this case is somewhat procedurally out of the ordinary,

we agree with the Board's analysis that the ALJ did not abuse his discretion set out in the Board's opinion as follows:

At the time of the ALJ's original opinion on April 8, 2004, Jernigan was still undergoing treatment for her right knee condition. Thus, while she may have reached MMI from her original surgery, the issue of ongoing temporary total disability as a result of her right knee condition was not fully developed. Once it was determined Jernigan's right knee still had laxity, Dr. Bonnarens' original opinion viewed in hindsight is incorrect. Because there was no finality of the ALJ's original decision and proof was reopened on remand, it was within the province of the ALJ to revisit the issue of MMI. The ALJ possesses wide latitude to control the introduction of evidence and absent due process considerations it is rare that the exercise of this discretion constitutes error. Scarcy v. Three Point Coal Co., 134 S.W.2d 351 (Ky.App. 1939). See also Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991).

This was simply an ongoing claim and armed with the medical evidence at the time of his opinion on remand, the ALJ had substantial evidence upon which to base a determination that Jernigan's temporary total disability continued until the time she reached MMI from the second surgery. The ALJ, in his order on petition for reconsideration, explained he relied on the medical evidence from Dr. Barefoot that Jernigan reached MMI following her second surgery. Dr. Barefoot described Dr. Bonnarens' and Dr. Bilkey's prior medical examinations as invalid because they were performed prior to Jernigan reaching MMI. Because the ALJ's decision is based on substantial evidence in the record, we are without authority to direct a different result. KRS 324.285; Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Upon the whole, we are of the opinion that the Board properly affirmed the ALJ's award of TTD benefits from July 24, 2003, through September 8, 2004.

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

ALL CONCUR.

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