

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-001801-WC

WAL-MART STORES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-64479

SHEILA SOUTHERS;
DONNA TERRY, ALJ; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.

BUCKINGHAM, JUDGE: Wal-Mart Stores, Inc., petitions for our review of an opinion by the Workers' Compensation Board (Board) which affirmed a decision by an administrative law judge (ALJ). The sole issue involves whether the applicable statute of limitation was tolled so as to allow an otherwise untimely claim for benefits by Sheila Southers. We affirm.

Southers worked part-time at Wal-Mart beginning in 1996. On August 21, 1998, she injured her back while assisting a customer in loading some potting soil into a vehicle.

Temporary total disability (TTD) benefits were paid by Wal-Mart from August 26, 1998, through December 2, 1998.

When Wal-Mart ceased paying TTD benefits, it complied with KRS¹ 342.040 and electronically filed an IA-2 with the Department of Workers' Claims (DWC) indicating that the termination of such benefits had occurred on December 2, 1998. The IA-2 reflected Southers' address as being 1685 Kennedy Britch Road, Harrodsburg, Kentucky 40330. However, Southers' correct address was 1685 Kennedy Bridge Road, Harrodsburg, Kentucky 40330.

DWC mailed a termination notice to Southers at 1685 Kennedy Britch Road, the address provided by Wal-Mart in the IA-2. The letter detailed her rights and indicated that she had two years to file an Application for Resolution of Benefits. Although Southers testified that she never received the letter and did not know that the statute of limitation had expired, evidence was presented which revealed that the letter from DWC was sent and was never returned to the DWC.

Pursuant to KRS 342.185(1), Southers had two years following the suspension of the payment of TTD benefits within which to file her claim. She filed her claim on September 4, 2001, more than two years after TTD benefits had been suspended.

¹ Kentucky Revised Statutes.

In the proceedings before the ALJ, Wal-Mart asserted that Southers' claim was barred by the two-year statute of limitation.

The ALJ found Southers to be "a very credible witness" and determined "that she did not receive the notification mailed by the DWC." The ALJ also held that "[t]ransmittal of incorrect information which could prevent an employee from receiving timely notice of her right to prosecute a claim cannot be construed as compliance with an employer's statutory duty under KRS 342.040." The ALJ also reviewed the evidence concerning Southers' injury and awarded benefits to her.

Wal-Mart appealed to the Board. The Board acknowledged that there was evidence that would indicate that the letter had been delivered and that "it was equally credible as believed by the ALJ that Southers did not receive the letter." The Board then held as follows:

We believe when considering the unique facts of this case and recognizing that the address of the individual plays a key role in whether or not the notice letter is properly sent, however inadvertent it may have been, the failure to provide a correct address absent a showing of actual receipt of the document by the claimant is a defect, tolling the statute of limitations.

Thus, the Board affirmed the ALJ on the statute of limitation issue.²

In a recent case the Kentucky Supreme Court stated as follows:

This Court has construed KRS 342.285 to mean that the fact-finder, rather than the reviewing court, has the sole discretion to determine the quality, character, and substance of evidence; that an ALJ, as fact-finder, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof; and that where the party with the burden of proof is successful before the ALJ, the issue on appeal is whether substantial evidence supported the ALJ's conclusion. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal.

Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002).

(Citations omitted). Southers testified that she did not receive the letter, and the ALJ found her to be a credible witness and accepted her testimony. Further, it was undisputed that the letter was not sent to Southers' correct address. We conclude that this evidence was substantial and supported the ALJ's findings.

² The Board remanded the issue of the average weekly wage to the ALJ. That issue is not before this court.

Wal-Mart contends that tolling the statute of limitation in this case will set a precedent whereby future injured workers could get the statute of limitation tolled simply by claiming they did not receive a notice from the DWC. We disagree. The key factor in this case was that Wal-Mart did not provide the correct address to the DWC. Based on that fact and the ALJ's acceptance of Southers' testimony that she did not receive the letter, the ALJ determined that the statute of limitation had been tolled. As the Board noted, these are "unique facts." Had the ALJ not accepted Southers' testimony as credible evidence, then it appears the result would have been different.

The opinion of the Board is affirmed.

ALL CONCUR.

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