

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000369-WC

WAL-MART STORES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-01483

SAMANTHA WILLIAMS; HON. IRENE
STEEN, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Wal-Mart Stores, Inc. has petitioned this Court to review an opinion of the Workers' Compensation Board entered on January 22, 2003, which unanimously affirmed an opinion and award by Administrative Law Judge Irene Steen, wherein she found that Samantha Williams gave due and timely notice of her work-related low back injury and awarded Williams permanent partial disability benefits. Wal-Mart also complains, for the first time, that the ALJ erred in awarding temporary, total disability

benefits (TTD) from October 27, 2000, through and including April 4, 2002. This issue, however, was not raised before the Board, and therefore cannot be considered for the first time before this Court.¹ Having concluded that the Board committed no error in assessing the evidence presented to it that would cause gross injustice, we affirm.²

Williams testified by deposition on February 5, 2002, that her injury occurred while she and a co-worker attempted to catch boxes of frozen cakes being dropped off a pallet estimated to be eight feet high. Williams said one of the boxes hit her in the head and shoulder. Although she initially only experienced a headache from the accident, as she cleaned and mopped later that evening a pain in her back began to intensify until it prevented her from completing her task. The following day Williams returned to work but left only two hours into her shift. On two prior occasions when Williams had been injured at work, she filed incident reports with Wal-Mart, even though she did not seek formal medical treatment or time off from work on either occasion.

The ALJ engaged Williams in the following exchange at the final hearing on June 11, 2002:

Q. And when you went to work the next day, you still didn't report it?

¹ Newberg v. Jent, Ky.App., 867 S.W.2d 207, 209 (1993).

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

A. I told Pam. Pam was supposed to be the one to get my papers, and she never did. She asked me what happened.

. . . .

Q. When did you first report to Pam that you had an injury?

A. The next day, when she was there.

Q. What time?

A. I came in at 12:00. She was, like, "why are you crying?"

I said, "I got hit in the head yesterday." I said, "My back is hurting really bad and stuff." I kept trying to work hurting.

Her and Julie went to lunch finally about 1:30, I finally paged them and told them I had to go home, I couldn't stand it.

Q. And then you still have not filled out a report? You still have not said, "I had a work related injury; I need to fill out a report?"

A. Not that day. All I thought about that day was going home and getting something to get my back to quit hurting.

Pam Gilbert³ and Victoria Myer⁴, a co-worker, also testified. Myer's testimony confirmed Williams's testimony concerning the events on the evening of the injury. She

³ Ms. Gilbert is the bakery manager.

⁴ The record is inconsistent as to how to spell Myer; therefore we follow appellee's spelling since Myer was appellee's witness.

indicated that they tried to call a manager that night, but because it was late, everyone had already left. Gilbert testified that as Williams's immediate supervisor, she was aware of Williams's injury. According to Gilbert, however, Williams told her that she did not know the cause of the pain. Gilbert said she made calls to Williams to check up on her condition. In one of those phone calls Williams informed her that she needed to take a leave of absence because she hurt herself and, again, explained that she did not know how she injured herself. Both of Williams's written requests for leave were introduced into evidence. The sections in the forms addressing whether the injury involved a workers' compensation case were marked "No" on each form. In her testimony, Gilbert admitted that she heard many different versions of how Williams injured herself, including her being struck by falling cakes and by her moving a ladder. Gilbert also testified that Williams did not follow Wal-Mart procedure in seeking medical care for a work-related injury.

The ALJ made the following findings of fact:

Based upon the record herein, it is my finding that Plaintiff's activities at work on October 26, 2000 culminated in her low back problems, which ultimately required surgical intervention by Dr. Meriwether. If this were a perfect world and a perfect claimant, obviously the issue of notice as it has been litigated would not have existed and certainly had Ms. Gilbert been a perfect

supervisor, she would have been on the premises and answered her pages when paged for an extensive period of time on the evening in question. . . . [T]here is sufficient evidence to indicate that a long and heavy ladder needed to be moved to the big freezer to get out whatever items the girls needed for the cake walk, and that activity, together with the fact that Plaintiff was hit on the top of the head with a box weighing approximately 15 pounds, and then later engaged in mopping activities, swinging a mop from side to side, bending and stooping, all, in my opinion, are events which I believe to have happened. . . . [A]fter having attempted to page her supervisor for an extended period of time, she simply gave up and left [work]. On the following day when Plaintiff experienced excessive pain in attempting to get out of bed, she nonetheless went to work and had a conversation with Ms. Gilbert who acknowledged that Plaintiff was in pain and crying, and wished to leave to seek immediate medical attention.

Now the question as to why the medical leave of absence form was marked "No" under the workers' compensation block is difficult to determine[.] . . . I hereby choose to believe Plaintiff's explanation that this claim had, if fact, not at that time when she sought initial medical treatment, been filled out by her supervisors as a workers' compensation claim. In fact, the supervisors had filled out nothing at that point in spite of being aware of Plaintiff's problems the previous day, be it moving the ladder or the box hitting her in the head. Thus, at the time the initial forms were filled out, the correct workers' compensation paper work was still lacking and, although Plaintiff did have a prior experience with a workers' compensation injury with the same Defendant, it appears to me that this Plaintiff's complaints simply fell on deaf ears with Ms. Gilbert.

I find that the records introduced by Plaintiff substantiate continued complaints of back pain from the time of the injury herein and she did, in fact, never return to work. . . .

One of the Board's functions is to decide whether the evidence is sufficient to support a particular finding made by the ALJ, and a reviewing court will overturn the decision of the Board only if the Board misconstrued the law or erroneously assessed the evidence so flagrantly as to cause gross injustice.⁵ On appeal, the Board affirmed the ALJ's opinion, using the substantial evidence test and aptly pointed out that "the ability of a party to point to contradictory evidence of record is, for the most part, irrelevant if there is substantial evidence of record supporting the ALJ's ultimate conclusions."⁶

The determination of whether notice is due and timely is a mixed question of law and fact.⁷ Wal-Mart attacks the legal conclusion of timely notice at the factual level asserting that Williams's testimony is "not convincing." It is within the exclusive role of the fact-finder to determine the weight and credibility to give to testimony.⁸ Here, the ALJ placed great

⁵ Western Baptist Hospital, 827 S.W.2d at 687-88.

⁶ See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977); and Brockway v. Rockwell International, Ky.App., 907 S.W.2d 166 (1995).

⁷ See Harry M. Stevens Co. v. Workmen's Compensation Board, Ky.App., 553 S.W.2d 852 (1977).

⁸ Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 118 (1991); General Tire & Rubber Co. v. Rule, Ky., 479 S.W.2d 629 (1972).

weight on Williams's testimony. Even if Williams's testimony at the hearing was not exactly the same as it was in her deposition, that fact was brought to the ALJ's attention, and she chose to believe Williams. Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable person.⁹ Because there is substantial evidence to support the ALJ's findings, we cannot disturb her findings on this matter.¹⁰

KRS 342.185 provides that in order to maintain a claim for workers' compensation benefits, notice of the accident must be given to the employer "as soon as practicable after the happening thereof." This statute, however, does not require immediate notification. The statute leaves room for special circumstances in which immediate notification is not "practicable." More specifically, lapse of time does not necessarily indicate untimely notice.¹¹ Whether or not an explanation for lapse of time is excusable is also a question of fact for the ALJ.¹² It was within the purview of the ALJ to allocate any fault for any lapse of time between the injury and

⁹ Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971).

¹⁰ Addington Resources, Inc. v. Perkins, Ky.App., 947 S.W.2d 421, 423 (1997).

¹¹ Howell v. Shelcha Coal Co., Ky. App., 834 S.W.2d 693, 695 (1992).

¹² Id; See Buckles v. Kroger Grocery & Baking Co., 280 Ky. 644, 647, 134 S.W.2d 221, 223 (1939).

notification to Wal-Mart. In doing so, the ALJ found the lapse of time excusable.

Based on our review of the evidence of record, we cannot conclude that the Board has committed an error in assessing the evidence so flagrant as to cause gross injustice. Accordingly, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lyn A. Douglas
Louisville, Kentucky

BRIEF FOR APPELLEE:

Louis Zimmerman
Paducah, Kentucky