

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002047-WC

WAL-MART

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-01410

STEPHEN PETERS; and
HON. SHEILA C. LOWTHER,
CHIEF ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND HENRY, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Appellant Wal-Mart has petitioned for review of an opinion of the Workers' Compensation Board (Board) entered on September 3, 2004, which affirmed a decision of the Chief Administrative Law Judge (CALJ) rendered on April 2, 2004, that awarded permanent partial disability benefits to Stephen

¹ Senior Judge John D. Miller sitting a Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Peters (Peters) for a cumulative trauma injury to his back. We affirm.

Peters, born June 7, 1965, worked as an order filler at the Wal-Mart Grocery Distribution Center in London, Kentucky from 1997 to 1998 and again from January 3, 2000, through September 15, 2001. He worked three eleven-hour shifts per week. His position required retrieving boxes of product from a warehouse, loading the boxes onto pallets, and transporting the boxes to a loading dock by power lift. The job required constant and repetitive lifting of boxes weighing between twenty-five and seventy pounds.

In December, 2000, Peters was filling an order when he felt some back pain. As the pain was not severe, he thought he had pulled a muscle. He did not seek medical treatment and the pain subsided. By July, 2001, he had pain in his hip that radiated down his leg. Because of this pain, Peters sought medical attention. Medication did not relieve the symptoms. Peters was referred to specialists. After diagnosis, Peters was told on July 26, 2001, that the pain was work related. Peters thereafter notified his supervisors, eventually taking a leave of absence in anticipation of surgery. Peters underwent back surgeries in October, 2001, and February, 2002. He was unable to return to work at Wal-Mart due to there being no positions fitting his medical restrictions. A brief stint as a truck

driver followed but that ended due to reoccurrence of symptoms from prolonged sitting. Peters filed his workers' compensation claim on July 18, 2003. At the time of the hearing he no longer received medical treatment for his back but was symptomatic.

On April 2, 2004, the CALJ concluded that Peters' "current back complaints are the result of a cumulative trauma injury occurring in the course of his employment with Wal-Mart," and that his claim was timely filed, pursuant to Kentucky Revised Statutes (KRS) 342.185, as it was filed within two years after he first learned, after being seen by a doctor, that he suffered from a work related cumulative trauma injury to his low back.

On September 3, 2004, the Board affirmed the opinion and award of the CALJ, concluding that:

The CALJ relied upon substantial evidence contained in the record that Peters' condition was medically caused by cumulative trauma, that he was first informed by a physician of that fact on July 26, 2001, and he notified his supervisor shortly thereafter. Peters' claim is not deficient for want of notice nor was it barred by the statute of limitations.

This petition for review followed.

Before us, Wal-Mart claims that the Board erred in affirming the CALJ's decision that Peters suffered a cumulative injury. Wal-Mart alternatively argues that if Peters' injury was cumulative, his claim was barred by the statute of

limitations, contending that the manifestation date was December, 2000, and not July 26, 2001.

Our standard of review of a decision of the Board "is to correct the Board only where the the (sic) Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing evidence so flagrant as to cause great injustice." Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). For the reasons that follow, we affirm the Board.

Wal-Mart first argues that the CALJ and the Board's findings that Peters suffered a cumulative trauma injury were not supported by substantial evidence and thus erroneous. Specifically, Wal-Mart contends that the CALJ and the Board relied on the testimony of the medical experts and failed to give deference to Peters' testimony which, Wal-Mart asserts, leads to the sole conclusion that there was a single traumatic work event, not a cumulative injury. Contrary to Wal-Mart's argument, the decision of the CALJ makes specific reference to reliance on the testimony of Peters, Peters' medical expert, and Wal-Mart's medical expert in a finding of cumulative trauma injury, going as far as to indicate that even the conclusions of Wal-Mart's medical expert, concluding that Peters experienced an insidious and gradual onset of symptoms, supports a finding of cumulative trauma injury. The decision of the Board likewise

relies on the above evidence which supported the decision of the CALJ. Our review of the evidence indicates that the conclusion of the Board was supported by substantial evidence. Medical causation is a matter for the medical experts. Hill v. Sextet Mining, 65 S.W.3d 503, 507 (Ky. 2001). As such, there was no abuse of discretion.

Wal-Mart next argues alternatively that if the injury was cumulative, that Peters' claim was barred by the statute of limitations and that the CALJ and the Board misapplied the manifestation rule. We disagree. The CALJ's conclusion relied on Hill v. Sextet Mining Corporation, supra at 507, which held that a worker is not required to self-diagnose his condition and is not required to give notice of a gradual work related injury until he is advised of that fact. The Board relied on the similar analysis in the later case of Brown-Forman Corporation v. Upchurch, 127 S.W.3d 615, 620 (Ky. 2004). The evidence indicated that Peters believed he injured his back at work in December, 2000, but that he did not report the injury until the pain worsened and he was advised of the cumulative nature of the condition and that the condition was determined to be work related by a doctor on July 26, 2001, after which he notified his supervisor. The above cases indicate that, for statute of limitations purposes, Peters did not have to report the injury until so advised it was work related. Our review concludes,

therefore, that the Board did not overlook or misconstrue
controlling precedents.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Bryan Hubbard
Jonathan D. Weber
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BRIEF FOR APPELLEE STEPHEN
PETERS:

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