RENDERED: JUNE 1, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002321-WC

WASTE MANAGEMENT, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-89776

KEITH COLLINS;
HONORABLE MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

DIXON, JUDGE: Waste Management, Inc. petitions this Court for review of a decision of the Workers' Compensation Board reversing and remanding the decision of an

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Administrative Law Judge (ALJ) which denied benefits to Waste Management's former employee, Keith Collins.[2]

Collins's date of birth is March 1, 1961, and he has an eighth grade education. He began working as a garbage collector for Waste Management in February 2001, which required lifting garbage cans and dumping them into the truck's receptacle. After six months he became a driver, and he had a collection assistant who dumped the garbage in the truck. In 2004, he was assigned to work a route without any assistance. On the solo route, he was responsible for 300-500 stops per day in a rural area, which required him to get out of the truck, dump the garbage, and then drive to the next house.

On March 3, 2005, Collins attempted to lift a garbage can and felt shooting pain in his lower back and legs. He was unable to finish his shift and sought treatment at the emergency room. Collins was given prescription medication and scheduled a follow-up visit with Dr. Keith Webb. Collins never returned to his job at Waste Management following the March 3, 2005 injury.

On July 6, 2005, Collins filed an application for resolution of his injury claim. He requested benefits for the March 3, 2005, traumatic injury to his back. Additionally, Collins claimed he suffered a repetitive stress injury to his neck and back during the course of his employment with Waste Management.

In the proceedings before the ALJ, the evidence showed Collins sought treatment with a physician twice in 1999 and 2000 (prior to his employment with Waste

[2] We do not have the benefit of reviewing Collins's responsive appellate brief. His brief was returned by the Court as untimely filed.

Management), complaining of generalized back pain. Collins next saw a physician in July 2004, with complaints of increasing back and neck pain. He was referred to a neurologist, Dr. Sajata Gutti, for tests. Dr. Sajata Gutti then referred Collins to Dr. Sai Gutti for pain management.

After Collins was injured on March 3, 2005, Dr. Timothy Wagner conducted an independent medical exam (IME) on April 13, 2005. Dr. Wagner diagnosed a low back strain and concluded Collins was at maximum medical improvement. Dr. Wagner opined Collins was capable of returning to work at Waste Management without restrictions.

After filing his claim for benefits, Collins was evaluated by Dr. James Templin on July 19, 2005. Dr. Templin found the March 3 injury to be the most likely cause of Collins's symptoms. Dr. Gary Bray evaluated Collins on October 26, 2005. Dr. Bray agreed with the conclusions of Dr. Wagner and recommended a reconditioning program.

On November 11, 2005, Dr. Ira Potter conducted an IME. Dr. Potter found that cumulative trauma and repetitive stress coupled with the March 5 injury caused Collins's symptoms. Dr. Potter opined that Collins could not return to his position at Waste Management due to the nature of the work.

Following a formal hearing, the ALJ found:

> KRS 342.0011(1) defines an injury as any work-related traumatic event or series of events including cumulative trauma arising out of and in the course of employment which is the proximate cause producing a

> harmful change in the human organism evidenced by objective medical findings. [Waste Management] has raised the issue of whether [Collins] has suffered an injury as defined by the Act. I am persuaded by Dr. Wagner that [Collins] suffered a strain injury to his low back. I am persuaded by [Collins's] testimony, Dr. Sujata Gutti's records and Dr. Wagner and find that it is the result of repetitive trauma and of the event of March 3, 2005.
>
> On the issue of notice of the repetitive trauma, I am persuaded by [Collins's] testimony that although his supervisor knew he had back problems, [Collins] never told anyone that his back pain was due to work. I find plaintiff failed to give notice of repetitive trauma as required by KRS 342.185. The Statute of Limitations issue with regard to cumulative trauma is moot. The Statute of Limitations is inapplicable to the March 3, 2005 event because it was less than two years ago. KRS 342.185.
>
> I have considered the medical evidence in its entirety. I am more persuaded by the opinions expressed by Dr. Bray that [Collins] suffers no permanent impairment as the result of an injury. His opinion is supported by objective medical evidence and is corroborated by Dr. Wagner. I find [Collins] has no permanent disability.
>
> I am persuaded by Dr. Wagner that [Collins] was treating for something prior to March 3, 2005. I find that any treatment is not compensable because it is not required due to the event of March 3, 2005. KRS 342.020.

The ALJ awarded Collins temporary total disability benefits that he had already received from Waste Management following the March 3 injury. The ALJ denied Collins's petition for reconsideration on May 3, 2006. Collins then appealed to the Workers' Compensation Board, arguing the ALJ erred by dismissing his cumulative trauma claim. In a lengthy opinion, the Board reversed and remanded the ALJ's decision. The Board reasoned:

> Based on *Hill v. Sextet Mining Corp.*, [65 S.W.3d 503 (Ky. 2001)], and its progeny, the Board finds that

> the ALJ's opinion that notice was not timely given on the repetitive trauma claim to be clearly erroneous. From the evidence it is clear that Collins first gave notice of a repetitive trauma claim by filing his Form 101 on July 6, 2005. Moreover, from the record [it] is clear that the first physician to find that a portion of Collins['s] complaints were not only attributable to March 3, 2005 traumatic injury, but also caused by the many years of cumulative trauma and repetitive trauma, and repetitive strain associated with the physical demands encountered through Collins['s] employment was Dr. Potter, who so opined in a medical report dated November 14, 2005. It is clear that nothing would prevent a worker who thinks he has sustained a work-related gradual injury from reporting it to his employer before the law requires him to do so, and nothing would prevent him from reporting an injury he thinks is work-related before a physician confirms his suspicion. *See American Printing House for the Blind v. Brown*, 142 S.W.3d 145 (Ky. 2004); *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615 (Ky. 2004).
>
> Moreover, this claim must also be remanded to the ALJ to determine whether or not the repetitive trauma claim has produced an impairment rating. Here the ALJ was persuaded that Collins had sustained a cumulative trauma injury and so found. Because the ALJ dismissed the cumulative trauma claim on notice grounds, she provided no findings or any indication whether she believed there was a permanent impairment rating attached to the cumulative trauma injury. Moreover, Collins requested a finding on this issue in his petition for reconsideration. The law is settled that parties are entitled to know the basis of an administrative law judge's decision so as to afford adequate appellate review. *See Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440 (Ky. App. 1982). For these reasons, this matter is hereby remanded to make said finding.

This petition for review followed. Waste Management argues the Board exceeded its authority by substituting its judgment for that of the ALJ.

The ALJ enjoys great discretion in determining what weight is to be given to evidence and in assessing the credibility of witnesses. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). Consequently, the Board must uphold the ALJ's decision unless the evidence is so overwhelmingly in the claimant's favor that no reasonable person could agree with the ALJ. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). On review, this Court gives deference to the Board's decision and only intervenes when the Board commits a flagrant error resulting in gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Waste Management contends the Board usurped the province of the ALJ by determining Collins gave adequate notice of cumulative trauma. The Board relied on *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503 (Ky. 2001), to reach its decision. In *Hill*, the ALJ awarded benefits to the claimant for a work-related back injury that developed over time. *Id*. at 505. The Board reversed the ALJ, finding the claimant did not timely notify his employer "after the disabling reality of his injury became manifest . . . ." *Id*. A panel of this Court affirmed in part, but vacated and remanded as to the issue of notice. *Id*. The Supreme Court reversed, holding that:

> Medical causation is a matter for the medical experts and, therefore, the claimant cannot be expected to have self-diagnosed the cause of the harmful change to his cervical spine as being a gradual injury versus a specific traumatic event. He was not required to give notice that he had sustained a work-related gradual injury to his spine until he was informed of that fact.

Id. at 507. Here, Waste Management argues that Collins filed his Form 101 alleging a gradual injury four months before Dr. Potter diagnosed his cumulative trauma. Waste Management contends this constitutes evidence Collins must have been aware his increasing back pain was work-related prior to filing the Form 101. However, much like the claimant in *Hill*, Collins was treated for complaints of back pain in the year preceding his workers' compensation claim. None of the physicians who treated Collins's earlier symptoms advised him that his back pain could be work-related. As such, Collins was not required to self-diagnose the cause of his back pain. *See Id*.

Waste Management also claimes notice was insufficient because it occurred prior to the actual diagnosis. We disagree. Collins had a subjective suspicion of cumulative injury and gave Waste Management adequate notice by filing a claim for benefits. *See Id*. And, as the Board pointed out, a claimant who suspects he developed a work-related cumulative trauma is free to report the condition to his employer "before a physician confirms [his] suspicion." *American Printing House for the Blind v. Brown*, 142 S.W.3d 145, 149 (Ky. 2004).

In light of the entire record, we agree with the Board that the evidence compels a finding that Waste management was properly notified of Collins's claim for cumulative injury upon the filing of the Form 101. As such, the ALJ erred by prematurely disposing of Collins's cumulative injury claim.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ronald J. Pohl
Roberta K. Kiser
Lexington, Kentucky

NO BRIEF FOR APPELLEE KEITH COLLINS.