

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000605-WC

WAL-MART STORES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-74930

LORI CARMICLE; HONORABLE
SHEILA C. LOWTHER, CHIEF
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD;
AND JEFFREY SAMPSON

APPELLEES

AND _____ NO. 2000-CA-000826-WC

LORI CARMICLE AND JEFFREY SAMPSON

CROSS-APPELLANTS

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-74930

WAL-MART STORES, INC.; HONORABLE
SHEILA C. LOWTHER, CHIEF
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

DYCHE, JUDGE. Wal-Mart Stores, Inc., brings this direct appeal from an opinion of the Workers' Compensation Board ("Board") which affirmed an award by the Administrative Law Judge ("ALJ") of income benefits to Lori Carmicle, and an award of attorney fees to Carmicle; Carmicle cross-appeals, asserting that Wal-Mart's appeal is frivolous, and deserves sanctions.

Carmicle received a work-related injury to her lower back on April 7, 1998, while helping other employees lift a loaded pallet; the pallet became too heavy, and it fell, partially trapping Carmicle beneath it. It is unchallenged that she received an injury from this incident. Wal-Mart insists, however, that two earlier incidents caused her to have pre-existing injuries to her back which should be taken into consideration when figuring her disability.

The earlier injuries occurred when Carmicle lifted one of her children on July 31, 1997, and on March 30, 1998, when she was playing ball with her children. It is clear from the record, however, that specific examination following those two incidents, and before the Wal-Mart incident, showed no neurological deficit, and that the injury received while at Wal-Mart was different in character than an injury which might have been received in either of the other two incidents.

The medical evidence is completely consistent with her receiving the injury which has caused her disability at work on April 7, 1998, and not on any other date.

Wal-Mart complains of the unconstitutionality of the provisions of Kentucky Revised Statutes 342.320(2)(c), which requires an employer, or its insurer, to pay a maximum of \$5,000 in additional attorney fees if the employer unsuccessfully appeals an order of an arbitrator or ALJ. The statute imposes no such restriction/penalty on an employee. While we might agree with Wal-Mart that this is a violation of its equal protection rights and is without rational basis in fact or law, this matter has been adversely decided to Wal-Mart in Earthgrains v. Cranz, Ky. App., 999 S.W.2d 218 (1999). Until that decision is reversed by this court *en banc*, or by the supreme court, it is binding upon us.

Carmicle and her attorney cross-appeal, claiming that Wal-Mart's appeal is frivolous, and seeking sanctions for the prosecution of the cross-appeal. We decline the opportunity to so hold.

McANULTY, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT/
CROSS-APPELLEE:

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BRIEF FOR APPELLEES/
CROSS-APPELLANTS LORI
CARMICLE AND JEFFREY SAMPSON:

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