

RENDERED: JUNE 18, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-002642-WC

WAYNE L. RAYBOURNE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-01772

UNITED PARCEL SERVICE;
HONORABLE ROGER D. RIGGS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Wayne Raybourne ("Raybourne") seeks review of an opinion of the Workers' Compensation Board ("the Board") which reversed and remanded a decision of the Administrative Law Judge ("ALJ") granting Raybourne a permanent partial disability award based upon a 13% impairment rating. The Board opined that

the record contained no evidence of substantial probative value sufficient to support the existence of a cumulative trauma injury producing permanent functional impairment as found by the ALJ. We affirm the opinion of the Board.

The facts are not in controversy. Raybourne began working for United Parcel Service ("UPS") in 1990 as a part-time package sorter. The position required repetitive lifting, bending, and twisting. In 1996, he began working as a full-time delivery driver. This position also required the lifting of packages weighing up to 150 pounds.

In March, 2000, Raybourne stepped off of a delivery truck and felt pain in his left posterior hip and lateral thigh area. He reported the pain to his superiors and initially was treated by a UPS physician, Dr. Nunnelley. Raybourne was placed on disability leave for 30 days, after which he returned to work.

For more than two years thereafter, Raybourne continued to work but would have reoccurring problems with his back and leg. When the problem worsened, he again reported it to his superiors. The pain caused him to stop working on September 13, 2002. Raybourne was eventually referred to Dr. John Harpring ("Dr. Harpring"). Dr. Harpring diagnosed a lumbar disk herniation, and performed surgery to correct the condition on November 20, 2002.

After a period of recovery, Raybourne returned to work with no restrictions in January, 2003. At approximately the same time, he filed a claim for benefits with the Department of Workers' Claims. Raybourne claimed entitlement to temporary total disability benefits for his period of total disability (September, 2002 to January, 2003) in addition to permanent partial occupational disability benefits.

The matter went before the ALJ who, upon hearing proof, concluded that Raybourne suffered a work-related back injury or condition due to cumulative trauma. The conclusion was based on the medical evidence showing Raybourne to be suffering from a 13% impairment to the body as a whole. On May 22, 2003, the ALJ rendered an award to Raybourne for both temporary total disability benefits and permanent occupational disability benefits. UPS's petition for reconsideration was denied.

UPS appealed the ALJ's decision and award to the Board. Upon considering the issues raised, the Board concluded that the record contained no evidence of substantial probative value sufficient to support the existence of a cumulative trauma injury producing permanent functional impairment as found by the ALJ. Rather, it found that the medical evidence wholly confirmed that Raybourne's disk herniation produced by the May 7, 2000 work related traumatic incident (i.e., stepping off of

the delivery truck) was the cause of his current condition. Having found no evidence in the record to support the ALJ's conclusion that cumulative trauma resulted in Raybourne's condition, the Board concluded that the Workers' Compensation claim had been filed outside the permissible statute of limitations. The Board reversed the award and remanded the matter for an order in accordance with its decision. This appeal followed.

Raybourne now argues that the findings and award of the ALJ are supported by the medical and lay evidence, and that as such it was clear error for the Board to substitute its finding and judgment for that of the ALJ. He directs our attention to 1) the medical questionnaire of Dr. S. Pearson Auerbach ("Dr. Auerbach") which he claims affirmatively and specifically describes Raybourne's back condition as being work-related; 2) the definition of "injury" including either a single traumatic incident or cumulative mini-traumas; and, 3) his assertion that report of Dr. Robert Baker ("Dr. Baker") failed to controvert the work-related opinions of Dr. Auerbach and Dr. Warren Bailey ("Dr. Bailey"). Raybourne also argues that the Board was without authority to rely on the statute of limitations because this issue was not raised by the parties. He seeks an order reversing the opinion of the Board and reinstating the ALJ's award.

We have closely examined the record and the written arguments, and cannot conclude that the Board erred in finding that the record contained no evidence of substantial probative value sufficient to support the existence of a cumulative trauma injury producing permanent functional impairment as found by the ALJ. The weight of the medical evidence at issue is represented by the opinions of Drs. Bilkey, Auerbach and Baker. Additional evidence was produced by Dr. Joseph Goben (chiropractor) and Lisa Dunsmore, the business manager for UPS.

Dr. Bilkey assessed a 13% whole body impairment, which he attributed not to cumulative trauma, but to "the work injury that occurred in March of 2000, in combination with the degenerative disease that he had in his spine." Dr. Auerbach also assessed a 13% impairment rating, which he attributes entirely to the March 7, 2000 injury. Lastly, Dr. Baker assessed a 10% impairment rating (post-surgically), and did not attribute the rating to cumulative trauma.

The Board properly concluded that "there is no evidence to support the ALJ's finding that following the original work-related injury of March 7, 2000, Raybourne suffered from additional cumulative trauma or that any of his 13% impairment was attributable to repetitive work activities." It noted that none of the physicians of record diagnose or reference phrases like "cumulative trauma," "mini-trauma," or

"repetitive trauma" to describe the genesis of Raybourne's condition.

Where the ALJ's award is in favor of the party with the burden of proof, the issue on appeal before the Board is whether the decision was supported by substantial evidence. Transportation Cabinet v. Poe, Ky., 69 S.W.3d 60 (2001). The Board properly applied this standard of review, and in so doing correctly determined that the record contains no substantial evidence in support of the ALJ's finding of cumulative trauma producing Raybourne's functional impairment.

KRS 342.0011 defines injury as resulting from a work-related traumatic event, or from a series of traumatic events including cumulative trauma. Raybourne was required to file his claim for benefits within two years of the date of injury. KRS 342.185(1). Since the date of injury was March 7, 2000, and as there is no medical evidence in the record showing Raybourne's condition to have resulted from cumulative trauma occurring subsequent to March 7, 2000, the Board properly concluded that Raybourne's application for benefits was not timely filed. Its reliance on the statute of limitations was proper even though the issue had not been raised by UPS.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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