

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001213-WC

JOE HART

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-66345

PETTER SUPPLY COMPANY;
LIBERTY MUTUAL INSURANCE GROUP;
HON. MARCEL SMITH, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: DYCHE¹ AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.²

SCHRODER, JUDGE: Joe Hart petitions for review of an opinion of the Workers' Compensation Board which affirmed a denial of temporary total disability (TTD) benefits by the Administrative Law Judge (ALJ). The ALJ denied TTD benefits because, although the claimant was temporarily unable to perform his unloading and

¹ Judge R. W. Dyche, III concurred in this opinion prior to his retirement effective June 17, 2006.

² Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

stocking job at appellee's warehouse where he received his injury, the claimant worked a concurrent part-time job as a referee during the period of disability. In light of the holding in the recent case of Double L Construction, Inc. v. Mitchell, 182 S.W.3d 509 (Ky. 2005), we reverse the denial of TTD benefits and remand the matter to the ALJ for an award of TTD benefits consistent with this opinion.

Joe Hart, who is currently 30 years old, went to work in 2002 for the appellee, Petter Supply Company (Petter). From the time of his hiring until his injury, Hart worked in Petter's warehouse in receiving. In receiving, Hart unloaded UPS trucks and stocked shelves. The receiving job required a lot of heavy lifting, usually in the 30-50 pound range.

On September 3, 2003, Hart injured his back at Petter while unloading boxes from a UPS truck. He reported his injury to his employer who sent him to Occunet, a walk-in clinic in Paducah. The doctor at Occunet referred Hart to Dr. Robert Meriwether, a neurosurgeon in Paducah. Hart has been in Dr. Meriwether's care ever since.

Dr. Meriwether's physical examination of Hart revealed a positive straight leg raising test on the right and spinal cord compression in the distribution he described was in the S1 nerve root pattern. An MRI showed degenerative disc disease at the L5-S1 level. An EKG showed an S1 radiculopathy. Dr.

Meriwether offered to perform a foraminotomy at the L5 level. Hart opted for conservative treatment instead.

Dr. Meriwether related Hart's injury to the September 3, 2003, lifting incident at Petter. Based upon the latest edition of the AMA Guidelines, he rated Hart's permanent impairment at thirteen (13%) percent to the body as a whole.

Dr. Meriwether took Hart off work at Petter on December 16, 2003. Dr. Meriwether pronounced Hart at maximum medical improvement on June 22, 2004. At that time, he released Hart to return to work with restrictions based upon a functional capacity evaluation. On July 1, 2004, Hart returned to work at Petter as a material handler.

Hart sought a second opinion and was sent by the Worker's Compensation carrier to Dr. Robert Weiss, a neurosurgeon in Nashville. Weiss examined Hart on February 11, 2004. In his report of February 11, 2004, Dr. Weiss concluded that Hart had a lumbosacral strain/sprain, but no impairment according to the most recently published AMA Guidelines.

Hart was also examined by Dr. Richard Sheridan, an orthopaedic surgeon, on March 17, 2004. Dr. Sheridan's report, based on his examination and review of the results of the diagnostic studies, concluded that Hart sustained an acute low back strain as a result of the September 3, 2003, lifting event, that he was at maximum medical improvement, and that he could go

back to work without restrictions. Dr. Sheridan further opined that Hart had no permanent partial impairment according to AMA Guidelines Fifth Edition.

It is undisputed that during the period Hart was off work at Petter (December 16, 2003 - July 1, 2004), Hart continued working on and off as a referee for the City of Paducah, a concurrent, paid, part-time job that Hart had worked since 1998. TTD benefits were voluntarily paid to Hart beginning December 16, 2003, and continuing through March 22, 2004. According to Petter, these benefits were paid because Petter and its carrier were not aware that Hart continued to work and earn wages by officiating basketball and softball games for the City of Paducah during the winter of 2003-2004 and spring of 2004. Hart sought additional TTD benefits for the period from March 22, 2004, (when the benefits were voluntarily terminated) to June 22, 2004. On November 12, 2004, the ALJ issued its opinion and award not only denying the additional TTD benefits for the period from March 22, 2004, to June 22, 2004, but also taking away the TTD benefits voluntarily paid for the period of December 16, 2003, to March 22, 2004. The ALJ's reasoning was as follows:

I find that plaintiff was not entitled to temporary total disability benefits during the period of December 16, 2003 to March 22, 2004, as voluntarily paid by Defendant because Plaintiff was working and earning

wages. KRS 342.0011(11)(a); KRS 342.040.
Defendant shall have credit for these
payments on any award.

On May 13, 2005, the Workers' Compensation Board
affirmed the ALJ. This petition for review by Hart followed.

Subsequent to the filing of the briefs in this case,
the Kentucky Supreme Court rendered its opinion in Double L
Construction, Inc. v. Mitchell, 182 S.W.3d 509 (Ky. 2005), which
is dispositive of the case at hand. In Mitchell, the claimant
was injured while performing his usual job as a carpenter and,
as a result, was off work for a seven-month period from his
carpenter job. However, during this seven-month period, the
claimant continued to work a concurrent part-time janitorial
job. As with the present case, the issue was whether the
claimant was entitled to TTD benefits when he continued to work
a concurrent part-time job. The Court held that a claimant is
entitled to TTD benefits if the work-related injury resulted in
a temporary inability to perform the job in which the injury
occurred, even if the claimant continues to work a concurrent
job during the period of disability. Relying on Central
Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Court
reasoned that while permanent disability awards require a
complete inability to perform any type of work (KRS
342.0011(11)(b) and (c); KRS 342.730(1)(a) and (b)), temporary
total disability awards require only that the claimant is unable

to perform the job in which the injury occurred. Mitchell, 182 S.W.3d at 514. The Court further opined that workers should not be penalized for performing what work they are able to do, and the employer in whose employment the injury occurred should not be absolved of liability for TTD benefits simply because the worker is still able to work a concurrent job. Id.

Based on the holding in Mitchell, we adjudge that the ALJ erred in denying Hart TTD benefits simply because he was able to work his concurrent part-time job as a referee during the time he was disabled from performing the job in which the injury occurred. Accordingly, the decision of the Board is reversed, and this matter is remanded to the ALJ for an award of TTD benefits consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE PETTER
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