

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **NAL**

2005-SC-0240-WC

DATE 12-14-05 ELLA G. GRIFFIN, P.C.
APPELLANT

WAL-MART

V. APPEAL FROM COURT OF APPEALS
2004-CA-2047-WC
WORKERS' COMPENSATION BOARD NO. 03-1410

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

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant sustained a work-related cumulative trauma injury, that he gave timely notice, and that he filed a timely claim. The Workers' Compensation Board (Board) and the Court of Appeals affirmed. Appealing, the employer continues to maintain that the claimant sustained a single specific injury rather than a gradual or cumulative trauma injury and that notice was untimely in either circumstance. We affirm.

The claimant worked as an order filler at the employer's grocery distribution center from 1997 to 1998 and again from January 3, 2000, through September 15, 2001. He was also a licensed plumber and since 1993 had worked intermittently as a self-employed plumber and electrician on construction jobs. His job for the defendant-employer required constant and repetitive lifting while moving boxes of merchandise weighing from 25 to 70 or 75 pounds and stacking them on pallets. He stated that he worked three 11-hour shifts per week and also continued to do "a little bit of plumbing

on the side." Asked how often he did plumbing, he responded that it was about every two weeks.

At the hearing, the claimant testified that sometime in December, 2000, he noticed some back pain while filling orders and thought that he must have pulled a muscle. He explained that the pain wasn't severe and that it eased off in a day or two after he kept working. He did not seek medical treatment and missed no work. He stated that the pain in his back never returned. During the following months he began to notice pain in his hip and down his leg, but he did not associate it with his work. The pain would ease off during the day, while he was moving and working, but would intensify at night. It gradually became more severe, prompting him to seek medical treatment in June or July, 2001. Dr. Hayes gave him pain medication and referred him to Dr. Balthrop, an orthopedic surgeon.

The claimant testified that Dr. Balthrop ordered various tests, diagnosed a lumbar condition, and referred him to Dr. Markowitz. He stated that he did not associate his symptoms with his work until July 26, 2001, when he was informed that his lumbar condition was work-related. Shortly thereafter, he notified Darrell Whitlege and Jeff Phipps and was advised that his failure to report an injury in December, 2000, precluded workers' compensation coverage. Therefore, when requesting a leave of absence for the surgery that Dr. Markowitz recommended, he did not indicate that it was for a work-related injury. He presented his medical bills to his health insurance carrier and received short and long-term disability benefits based on a non-work-related condition. Dr. Markowitz performed two lumbar surgeries, the latter of which included a lumbar fusion. He stated that his restrictions precluded a return to work at Wal-Mart.

When cross-examined, the claimant was reminded of his prior deposition, in which he acknowledged that he knew he had back trouble in December, 2000, and knew his work was causing it, yet he failed to report it. Asked which version of events was correct, the claimant stated, "I knew that I hurt my back in December, but I didn't know that that was what was causing the pain in my leg until the doctor told me that that's where the pain came from."

Dr. Patrick evaluated the claimant on February 1, 2003. Dr. Patrick noted a history of a December, 2001, back injury "as a result of repetitive lifting of orders" and referred consistently to that date rather than to December, 2000. He noted that diagnostic testing ordered by Dr. Markowitz revealed spondylosis at the lumbosacral junction and left lateral recess stenosis. The initial L5-S1 discectomy failed to relieve the symptoms. In February, 2002, after diagnosing a collapsed disc space, Dr. Markowitz performed a fusion with cages and a discectomy at L5-S1. At Dr. Patrick's examination, the claimant's chief complaint was left hip and leg pain that was aggravated by flexion of the lumbar spine. He attributed the claimant's complaints to "repetitive work injuries culminating in December 2001" and assigned a 23% AMA impairment.

Dr. Johnson evaluated the claimant in October, 2003, at which time he complained of pain in the left hip and posterior thigh. He indicated that his problems began very gradually in December, 2000, when he pulled a muscle while working at Wal-Mart, and worsened thereafter. He reported that he did not realize at the time that his leg pain was actually due to a back problem. After examining the claimant and reviewing his medical records, Dr. Johnson stated:

Mr. Peters had a progressive degenerative process at the lumbosacral level. In my opinion, it completely meets the criteria

for accumulative trauma as follows: There was a gradual onset. He continued to live with it until it was too severe to continue. His behavior pattern is completely genuine. It is a low grade process involving the entire lumbosacral joint of a degenerative nature. There is no alternative diagnosis or cause. Finally, it is consistent with the activities of his primary occupation; that is lifting and moving heavy boxes.

Dr. Johnson assigned a 27% AMA impairment and recommended restrictions that limited or precluded repetitive lifting, bending, and pulling. In his opinion, the claimant lacked the physical capacity to return to his work as an order filler.

The employer submitted the report from a December, 2003, evaluation by Dr. Kriss. At that time, the claimant complained of lower back pain that radiated into the left buttock and posterior thigh. He indicated that in December, 2000, he began to experience pain in his lower back and left leg that was "not real bad at first." Over the next 3-4 months, his symptoms gradually worsened, however. Asked if there was a specific injury, the claimant responded "No, just one day in December, 2000, I noticed some low back pain with burning." After examining the claimant and reviewing his medical records, Dr. Kriss noted that the claimant had not reported any specific work-related injury or strain to Dr. Balthrop. Likewise, Dr. Markowitz noted that there was "no precipitating cause or event to explain Mr. Peters' pain."¹ In Dr. Kriss's opinion, this type of history was characteristic of natural, progressive, degenerative changes rather than a traumatic injury, particularly in view of the "unusually explicit histories from multiple specialists ruling out any work-related cause whatsoever." He also noted that there was no evidence of an onset of symptoms at work or work-related aggravation of symptoms.

¹ Although Dr. Kriss and the other testifying experts reviewed Dr. Balthrop's and Dr. Markowitz's treatment notes, those notes were not made part of the record and, therefore, were not available to the ALJ.

An ALJ determined that the claimant was injured by the effects of cumulative work-related trauma. Convinced that he notified his employer shortly after he learned from his physicians that his condition was work-related and that he filed a claim within the requisite two-year period, the ALJ determined that notice and the claim were timely. The claimant received temporary total disability benefits from the initial surgery through the date that he was released to return to work with restrictions. Permanent income benefits were based on a 27% impairment and enhanced due to his physical inability to return to order filling.

First, the employer takes issue with a purported finding that the claimant's symptoms "disappeared" after December, 2000. What the ALJ actually stated was that the claimant's "back pain had disappeared" within a few days after he noticed it. The finding is clearly supported by the claimant's hearing testimony, and there is no evidence to the contrary. Therefore, the finding is not erroneous.

In a second argument, the employer asserts that the evidence compelled the ALJ to find that the claimant sustained a specific injury in December, 2000, rather than a cumulative trauma injury. It argues that the claimant's symptoms began with a single, perceptible event in December, 2000, and worsened thereafter, indicating a single, specific injury. In contrast, a cumulative trauma injury is characterized by a gradual onset of symptoms.

Where medical causation is not obvious to the lay person, it must be shown by expert medical testimony. Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001); Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986); Mengel v. Hawaiian-Tropic Northeast & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Contrary to the employer's assertion, its own expert, Dr. Kriss, noted that Dr.

Balthrop's and Dr. Markowitz's treatment notes contained no history of a specific traumatic injury. Furthermore, he stated that the claimant's history was consistent with progressive, degenerative changes rather than a single traumatic incident. Although Dr. Kriss attributed the degenerative changes to natural events, Drs. Patrick and Johnson attributed them to the effects of cumulative trauma in the claimant's work. Convinced that the condition was due to work-related cumulative trauma, that a physician first informed the claimant of that fact on July 26, 2001, and that he notified his employer shortly thereafter, the ALJ determined that notice and the claim were timely.

KRS 342.185 and KRS 342.190 require timely notice of a work-related "accident," including "the nature and extent of the injury sustained." KRS 342.0011(1) defines the word "injury" as being a work-related traumatic event that is the proximate cause producing a harmful change in the human organism. When no voluntary payments have been made, KRS 342.185 requires a claim to be filed within two years of the "date of accident." In contrast, when an injury is caused by the cumulative effects of repetitive trauma rather than by a single traumatic event, the notice and limitations provisions are triggered when a physician informs the worker of the gradual injury and its cause. Hill v. Sextet Mining Corp., supra.

There is no evidence or argument that any physician based an opinion of causation on an inaccurate history. Although the claimant stated that he noticed back pain in December, 2000, and thought that he must have pulled a muscle, he did not relate it to a particular work-related event or subsequently allege a December, 2000, injury. Furthermore, no physician attributed his lumbar condition to a specific traumatic event that occurred in December, 2000. The claimant alleged a cumulative trauma injury, and the ALJ relied upon his experts when concluding that his injury resulted from

cumulative trauma due to the constant and repetitive lifting that his job required. The findings regarding notice and limitations were based on the date when a physician informed him that his hip and leg symptoms were caused by a work-related condition. The findings were supported by substantial evidence under a correct interpretation of the law and, therefore, were properly affirmed on appeal.

The decision of the Court of Appeals is affirmed.

All concur.

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