# 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# NOT TO BE PUBLISHED OPINION

**THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

RENDERED: JUNE 19, 2008
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL
DATE 7-10-08 Ella Growth, D.C.

2007-SC-000460-WC

WASTE MANAGEMENT, INC. APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2006-CA-002321-WC
WORKERS' COMPENSATION BOARD NO. 05-89776

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

## MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant injured his low back due to repetitive trauma and a specific traumatic event but dismissed the repetitive trauma claim for a lack of notice. Based on findings that the specific traumatic event caused no permanent impairment rating and required no medical treatment, the ALJ limited the award to the temporary total disability (TTD) benefits that the employer paid voluntarily. The Workers' Compensation Board (Board) held that the ALJ erred as a matter of law by finding a lack of timely notice of the repetitive trauma injury. It reversed and remanded for the ALJ to determine if the injury caused a permanent impairment rating. The Court of Appeals affirmed. We decline the employer's invitation to re-visit Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001), and affirm.

The claimant was born in 1961 and has an eighth-grade education with specialized training in welding. He worked for previous employers as an x-ray orderly, laborer, waste truck driver/collector, carpentry helper, and coal truck driver. He sought medical treatment for complaints of generalized back pain as early as 1999 and 2000 and was told that he might have arthritis, but x-rays taken in November 2000 revealed no abnormalities in the left shoulder or in the cervical or thoracic spine. The pain resolved with anti-inflammatory medication.

The claimant began working for the defendant-employer in February 2001 as a waste collector, which required him to ride on the back of the garbage truck, lift garbage cans at each stop, and dump the contents into the truck. After about six months, he drove the truck and an assistant collected the waste. The claimant was assigned a solo route in 2004, which required him to perform both the driver and collector functions. He made about 300-500 stops per day. At each stop he lifted and dumped anywhere from 10 to 50 pounds of waste, sometimes more. He averaged a total of three to six tons per day. After each stop, he climbed up two steps on the truck's gas tank and used a grab bar and the steering wheel to pull himself up into the cab. The truck did not have shock absorbers, so he was jarred and jolted while driving on the rough roads that comprised his route. He worked 44-50 hours per week.

The claimant testified that he began to experience soreness and stiffness in his mid to low back but that they did not cause him to miss work. He sought medical treatment in July 2004, when his back began to hurt more than usual. He testified subsequently that did not receive treatment for a neck condition before July 2004, that he did not sustain a traumatic back injury before July 2004, that he did not know what

was causing his back and neck pain at that time, and that no physician had informed him that his symptoms were due to a work-related injury.

In July 2004 the claimant was referred to Dr. Sajata Gutti, a neurologist, who performed diagnostic tests, prescribed medication, administered some injections, and eventually referred him for pain management. He first saw Dr. Sai Gutti, a pain specialist, on March 1, 2005, and continued to be treated for low back pain on a monthly or bi-monthly basis thereafter. He stated that he informed his supervisor of his medical appointments but did not inform him that they were for back pain.

Medical evidence indicated that an MRI performed in August 2004 revealed a mild disc bulge at L5-S1. A contemporaneous bone scan was normal. EMG/NCV studies revealed bilateral sural neuritis but no evidence of myelopathy. Dr. Sai Gutti first saw the claimant on March 1, 2005. He diagnosed low back pain; bilateral lower extremity radiculitis with paresthesia, more on the right side; bilateral sacroiliitis, more severe on the right; and lumbar facet syndrome. His notes indicate that he wanted to rule out a herniated disc and planned to obtain and review the MRI and EMG reports.

On March 3, 2005, the claimant felt a shooting pain in his low back and legs while lifting a garbage can in the course of his work. He informed his employer that he would be unable to complete his shift, sought treatment in the emergency room, and followed up with his family doctor. He received voluntary TTD benefits from mid-March through mid-April 2005 and did not return to work thereafter. The claimant testified subsequently that back, leg, and hip discomfort prevented him from sitting for long periods or returning to the type of work that he performed at the time of injury.

Dr. Wagner evaluated the claimant on April 13, 2005. He noted that the claimant

had symptomatic complaints regarding the cervical, thoracic, and lumbar spine but that the previous MRI and x-rays were normal and showed only minimal changes. In his opinion, the claimant strained his low back, engaged in a great deal of symptom magnification, could return to his previous work without restrictions, and required no further medical treatment. In a letter dated May 1, 2005, Dr. Wagner stated that the claimant had a pre-existing condition that was active before March 3, 2005.

On July 6, 2005, the claimant filed an application for benefits. He alleged both the specific injury to his back that occurred on March 3, 2005, and a repetitive trauma injury to his neck and back.

Dr. Templin evaluated the claimant on July 19, 2005. He noted that the workers' compensation carrier had refused to authorize additional pain injections and a back brace that Dr. Sai Gutti recommended. Dr. Templin diagnosed degenerative lumbar disc disease as well as chronic low back pain, chronic cervical pain syndrome, and cervical and lumbosacral musculoligamentous strains. He stated that the March 2005 injury probably caused the claimant's complaints and that none of his impairment was active before the injury. Dr. Templin thought that the claimant had not reached MMI but stated that his present permanent impairment rating would be 13% (8% lumbar and 5% cervical) in the event that the ALJ found him to be at MMI. He imposed extensive physical restrictions and stated that the claimant lacked the physical capacity to return to his former type of work.

Dr. Bray evaluated the claimant on October 26, 2005. He noted that the claimant had many subjective symptoms and stated that he agreed more with Dr. Wagner than the other evaluators. In his opinion, the claimant had no permanent

impairment rating from the March 2005 incident. He needed no physical restrictions and would benefit from a reconditioning program.

Dr. Potter evaluated the claimant on November 11, 2005. He noted a history of low back pain that began four to five years earlier and resolved with treatment as well as a history of numbness and tingling in the right upper extremity that began in the summer of 2004. The claimant reported that he had discontinued pain management treatment with Dr. Gutti about a month earlier because the medication and injections were ineffective. Dr. Potter diagnosed a cervical strain or sprain, cervical radiculitis, a lumbar strain or sprain, lumbar degenerative disc disease at L5-S1, and a non-work-related left shoulder tendonitis or impingement syndrome. He attributed the cervical and lumbar conditions to the March 2005 injury, superimposed on years of work-related cumulative trauma and repetitive strain. He stated that the claimant lacked the physical capacity to return to his former work, imposed extensive physical restrictions, and assigned work-related permanent impairment ratings of 5% to the cervical condition and 7% to the lumbar condition. In his opinion, a course of physical therapy and other treatment for which the employer denied payment would reduce the permanent impairment rating.

The ALJ determined that the claimant sustained a low back strain based on Dr. Wagner's report. Based on the claimant's testimony, Dr. Sujata Gutti's records, and Dr. Wagner's report, the ALJ determined that the injury resulted from repetitive trauma as well as the March 3, 2005, incident. Noting the claimant's testimony that he informed his supervisor that he had back problems before the incident but informed no one that his back pain was caused by his work, the ALJ found that he "failed to give notice of

repetitive trauma as required by KRS 342.185." Thus, the question of limitations regarding cumulative trauma was moot. Relying on Dr. Bray's opinion as corroborated by objective medical evidence and Dr. Wagner's report, the ALJ found that the claimant "suffers no permanent impairment as a result of an injury." Finally, the ALJ relied on Dr. Wagner, noted that the claimant was receiving treatment for back complaints before March 3, 2005, and concluded that the incident required no medical treatment.

The ALJ erred when finding that the claimant failed to give notice of repetitive trauma. KRS 342.185 requires a worker to give notice of a work-related accident and runs the period of limitations for two years from the date of accident. KRS 342.190 requires a worker to give notice of the nature and extent of a resulting injury. In Alcan Foil Products v. Huff, 2 W.S.3d 96 (Ky. 1999), the court acknowledged the difficulties of applying KRS 342.185 to repetitive trauma injuries. It reaffirmed the principle that a rule of discovery governs the notice and limitations requirements rather than the date of accident, noting that such injuries often occur imperceptibly.

Nothing prevents a worker who thinks that work-related trauma is causing symptoms from informing the worker's employer, but neither a suspicion nor a reasonable belief will prove that the symptoms are caused by a work-related condition. Medical causation must be proven with expert testimony unless it is obvious, and workers generally are not experts in medical causation. Thus, the court determined in Hill v. Sextet Mining Corp., supra, that the obligation to give notice of a work-related repetitive trauma injury does not arise until a physician informs the worker of the injury and its cause. Smith v. Cardinal Construction Co., 13 S.W.3d 623 (Ky. 2000), and Peabody Coal Co. v. Powell, 351 S.W.2d 172 (Ky. 1961), explain that notice of a work-

related injury may be given by filing a claim but that the circumstances determine if such notice is timely.

The parties stipulated to timely notice of the March 3, 2005, incident. The claimant notified his employer of an alleged repetitive trauma injury on July 6, 2005, when he filed his application for benefits. Regardless of whether a physician at the Potter Clinic treated him for back pain in 1999 and 2000, no evidence indicated that a physician diagnosed a gradual or repetitive trauma injury or related it to his work before July 6, 2005. The claimant testified that he did not know what was causing the back and neck pain for which he sought treatment in July 2004. Although he may have suspected that his back and neck conditions were caused by his work, he was not a physician. It was not until November 2005 that Dr. Potter attributed the cervical and lumbar conditions to a combination of the March 3, 2005, injury and work-related repetitive trauma. Thus, the evidence compelled a finding that the employer received timely notice of the injury.

The ALJ determined that the claimant sustained a work-related repetitive trauma injury but dismissed the claim for lack of notice. Thus, it is unclear whether the ALJ intended for the subsequent finding that the claimant "suffers no permanent impairment as a result of an injury" to apply to the repetitive trauma injury as well as to the March 2005 injury. In any event, the finding regarding medical benefits refers only to the March 2005 injury. The claim must be remanded, therefore, for findings that address the extent to which the repetitive trauma injury causes permanent disability and warrants medical benefits.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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