

IMPORTANT NOTICE **NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

2010-SC-000217-WC

WASTE MANAGEMENT, INC.

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-001731-WC
WORKERS' COMPENSATION BOARD NO. 05-89776

KEITH COLLINS;
HONORABLE OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined on remand from this court that a repetitive trauma injury to the claimant's neck and back produced a 12% permanent impairment rating and awarded benefits accordingly. The Workers' Compensation Board (Board) affirmed, finding no merit in the employer's arguments that the ALJ exceeded the order of remand by awarding benefits for a neck injury as well as a back injury. The Court of Appeals affirmed and the employer appeals.

We affirm. ALJ Smith, who considered the claim initially, found no timely notice of repetitive trauma and, thus, had no need to address whether repetitive trauma found to affect the claimant's back in combination with a

specific injury also affected his neck. This court determined that the evidence compelled a finding of timely notice and remanded for findings concerning the extent to which the repetitive trauma injury caused permanent disability.

Thus, ALJ Wolff remained free to conclude on remand that the injury caused a 12% permanent impairment rating based on the cervical and lumbar spine.

The claimant began working for the defendant-employer as a garbage truck driver/collector in 2001. He was assigned a solo route in 2004, which required him to make 300 to 500 stops per day and to lift and dump 10 to 50 pounds of waste per stop. He then climbed up two steps and used a grab bar and the steering wheel to pull himself back into the cab. The truck had no shock absorbers, so he was jarred and jolted while driving on the rough roads that comprised his route.

The claimant began to experience soreness and stiffness in his mid to low back, but they did not cause him to miss work. He sought medical treatment in July 2004, when his back began to hurt more than usual. On March 3, 2005, he 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 and sought medical treatment. Filed on July 6, 2005, his application for benefits alleged both the specific injury to his back on March 3, 2005, and a repetitive trauma injury to his neck and back.

Dr. Wagner evaluated the claimant on April 13, 2005. He noted a "long history of lower back problems" and present complaints of cervical, thoracic, and lumbar spine discomfort. An MRI and x-rays were normal and showed

only minimal changes. Dr. Wagner concluded that the claimant strained his low back but magnified his symptoms greatly and required no further medical treatment. He stated in a letter dated May 1, 2005 that the claimant had a pre-existing condition in his spine that was active and under treatment before the March 2005 incident.

Dr. Templin evaluated the claimant in July 2005. He diagnosed degenerative lumbar disc disease, chronic low back pain, chronic cervical pain syndrome, and cervical and lumbosacral strains and stated that the March 2005 injury probably caused the claimant's complaints. He assigned a 13% impairment rating (8% lumbar spine, 5% cervical spine), characterizing none of the impairment as being active before March 2005. Dr. Templin imposed extensive physical restrictions and opined that the claimant lacked the physical capacity to return to the type of work he performed at the time of the injury.

Dr. Bray evaluated the claimant in October 2005. Noting that the claimant had many subjective symptoms, he stated that he agreed more with Dr. Wagner than the other evaluators. He opined that the March 2005 incident caused no permanent impairment rating.

Dr. Potter evaluated the claimant in November 2005. He diagnosed a cervical strain or sprain, cervical radiculitis, a lumbar strain or sprain, lumbar degenerative disc disease among other things. He attributed the cervical and lumbar conditions to the March 2005 injury superimposed on years of work-related cumulative trauma and repetitive strain. Dr. Potter assigned a 12% impairment rating (5% cervical spine, 7% lumbar spine); imposed extensive

physical restrictions; and stated that the claimant lacked the physical capacity to return to his former type of work.

The issues submitted for a decision included: "injury" as defined by the Workers' Compensation Act; causation/work-relatedness; pre-existing active impairment; extent and duration; medical expenses; statute of limitations; and notice with regard to gradual trauma.

Relying on Dr. Wagner, ALJ Marcel Smith determined that the claimant "suffered a strain injury to his low back" due to the combined effects of repetitive trauma and the March 2005 incident. ALJ Smith found, however, that he "failed to give notice of repetitive trauma as required by KRS 342.185," which rendered moot the issue concerning the statute of limitations with regard to cumulative trauma. Relying on the opinions of Dr. Bray, who opined that the claimant had no permanent impairment rating from the March 2005 incident, ALJ Smith found that the claimant "suffers no permanent impairment as a result of an injury." Finally, noting Dr. Wagner's testimony that the claimant was receiving treatment for back complaints before March 3, 2005, ALJ Smith found that the incident required no medical treatment.

This court determined in an opinion rendered on June 19, 2008, that the evidence compelled a finding that the employer received timely notice of a work-related repetitive trauma injury. Noting that ALJ Smith had dismissed that portion of the claim for lack of timely notice, the court found it unclear whether the ALJ intended for the finding that the claimant suffered "no permanent impairment as a result of an injury" to apply to the repetitive

trauma injury as well as to the March 2005 injury. The court noted also that the finding regarding medical benefits referred only to the March 2005 injury. As a consequence, the court remanded the claim “for findings that address the extent to which the repetitive trauma injury causes permanent disability and warrants medical benefits.”

ALJ Wolff awarded income and medical benefits on remand, finding there to be no need to determine whether the claimant experienced a repetitive trauma injury because ALJ Smith had done so. Noting the magnitude of the difference in range of motion test results obtained by the various physicians and the significance of range of motion to an impairment rating based on the spine, ALJ Wolff found the similar results obtained by Drs. Templin and Potter to be most persuasive. ALJ Wolff chose to rely on the 12% impairment rating that Dr. Potter assigned and enhanced the resulting income benefit under KRS 342.730(1)(c).

In a petition for reconsideration the employer complained that the 12% impairment rating assigned by Dr. Potter included a 5% rating for the cervical spine but that ALJ Smith found only a strain injury to the lower back, to which Dr. Potter assigned a 7% rating. The employer also complained that the 7% rating included the combined effects of the March 2005 incident and repetitive trauma. ALJ Wolff rejected the arguments, after which the employer raised them on appeal.

The employer has abandoned the latter argument and argues presently that ALJ Wolff exceeded the scope of the remand by awarding benefits for a repetitive trauma injury to the neck. We disagree.

The claimant alleged the March 3, 2005 back injury as well as a repetitive trauma injury to his neck and back. ALJ Smith summarized the evidence concerning all of the alleged injuries. Yet, when deciding whether the claimant sustained an “injury” as defined by the Act, ALJ Smith found that he sustained “a strain injury to his low back” due to a combination of the March 3, 2005 incident and repetitive trauma but failed to address whether repetitive trauma also affected his neck. We are not convinced that the absence of a specific finding concerning the alleged neck injury implied a negative finding because ALJ Smith found subsequently that the claimant failed to give timely notice of repetitive trauma, which rendered the existence of a repetitive trauma neck injury moot.

We determined in the initial appeal that the evidence compelled a finding of timely notice. ALJ Smith relied on Dr. Bray when finding that the claimant sustained “no permanent impairment as a result of an injury,” but Dr. Bray’s opinion addressed only the March 3, 2005 incident. Thus, being unclear about whether ALJ Smith intended the finding of no permanent impairment to apply to the alleged repetitive trauma injury as well as the injury sustained in the incident, we remanded the claim for findings that addressed the extent to which the claimant’s repetitive trauma injury caused permanent disability and warranted medical benefits.

ALJ Smith's finding that the claimant failed to give timely notice of a repetitive trauma injury precluded the need for her to determine whether the injury affected the neck as well as the low back. We conclude, therefore, that ALJ Wolff did not exceed the scope of the remand by finding implicitly that the injury affected the claimant's cervical as well as his lumbar spine and by concluding that it produced a 12% impairment rating.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

**COUNSEL FOR APPELLANT,
WASTE MANAGEMENT, INC.:**

Roberta Kaye Kiser
Pohl, Kiser & Aubrey, PSC
100 First National Building
167 West Main Street
Suite 100
Lexington, KY 40507-1323

**COUNSEL FOR APPELLEE,
KEITH COLLINS:**

Not Represented by Counsel