

RENDERED: FEBRUARY 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001731-WC

WASTE MANAGEMENT, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-89776

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

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: LAMBERT AND THOMPSON, JUDGES; KNOPF,¹ SENIOR
JUDGE.

LAMBERT, JUDGE: Waste Management, Inc., petitions this Court for review of
an August 20, 2009, opinion of the Workers' Compensation Board. The Board

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

affirmed a February 13, 2009, opinion and award of workers' compensation benefits to Keith Collins rendered by Hon. Otto D. Wolff, IV, Administrative Law Judge (ALJ). Finding no reversible error, we hereby affirm the Board's opinion.

ALJ Wolff's February 13, 2009, opinion and award was entered on remand. Collins' entitlement to workers' compensation benefits was initially premised on the following two grounds: (1) he suffered a gradual repetitive stress injury to his neck, back, and limbs caused by repeated activities engaged in during the course of his employment; and (2) he suffered a specific traumatic injury occurring in March 2005 to his back.

On March 17, 2006, Collins' claim for a repetitive trauma injury to his neck, back, and limbs was dismissed by an opinion rendered by Honorable Marcel Smith, ALJ, for lack of notice to the employer. The claim for a specific traumatic injury to his back occurring in March 2005 was found compensable; however, ALJ Smith determined that this injury resulted in only temporary, not permanent, impairment to the back. Collins appealed only the dismissal of his claim for benefits resulting from a repetitive trauma injury. The Board reversed and this Court affirmed on review. In an unpublished opinion,² the Kentucky Supreme Court affirmed this Court's review. The Supreme Court ordered as follows:

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

² *Waste Management, Inc. v. Collins*, 2007 WL 1575348 (Ky. 2007) (2006-CA-002321-WC).

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.

On remand, ALJ Wolff determined, among other things, that the repetitive trauma injury suffered by Collins caused an overall 12% permanent impairment to the neck and back. Waste Management appealed this finding to the Board, arguing that the impairment rating adopted by ALJ Wolff was erroneous on several grounds. The grounds appealed to this Court are the following: (1) the impairment rating assigned by ALJ Wolff for Collins' neck was erroneous because a previous ALJ decision had already determined that no neck injury occurred; and (2) ALJ Wolff erred in adopting the opinion of Dr. Potter for Collins' permanent impairment rating to his back because some portion of this impairment rating was assignable to the March 2005 lifting injury.

In its August 20, 2009, opinion, the Board determined that Waste Management's assignments of error were without merit. Waste Management now appeals to this Court for direct review, contending that the Board erred in its determinations of the above two issues. After careful review, we affirm.

In its first assignment of error, Waste Management contends that it was unreasonable for both ALJ Wolff and the Board to read the first ALJ's opinion as not precluding a finding that Collins suffered a repetitive trauma injury to his neck as well as to his back. Waste Management argues that the previous ruling

already addressed this issue, albeit indirectly, and that the ultimate determination set forth therein was that Collins did not suffer a neck injury.

In *W.T. Sistrunk & Company v. Kells*, 706 S.W.2d 417 (Ky. App. 1986), this Court held that “the legal significance of language in an administrative order is always subject to interpretation by a reviewing court, which must enforce such orders according to existing law.” *Id.* at 418. It is the reviewing court’s obligation to utilize “applicable principles of statutory and contract interpretation” to construe language set forth in court orders. *Crouch v. Crouch*, 201 S.W.3d 463, 465 (Ky. 2006). *Crouch* directs us that, like statutes and contracts, court orders should be “liberally construed according to the fair import of their terms, to promote justice, and to effect the objects of the law.” *Id.* (quoting statutory construction principle set forth in KRS 500.030).

In this case, both ALJ Wolff and the Board read the previous ALJ’s order as not preclusive to a finding that Collins suffered a repetitive trauma injury to his neck as well as to his back. As noted by the Board, the previous order does not address the issue. The Board explained that findings regarding the full extent of Collins’ repetitive trauma injury were simply not necessary in light of ALJ Smith’s ruling that any injury would have been time barred.

Waste Management contends that the following language set forth in the original order implicitly establishes the existence of a negative finding regarding whether a repetitive trauma injury was sustained to Collins’ neck:

KRS 342.0011(1) defines an injury as any work-related traumatic event or series of events including cumulative trauma arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. Defendant has raised the issue of whether the plaintiff has suffered an injury as defined by the Act. I am persuaded by Dr. Wagner that plaintiff suffered a strain injury to his low back. I am persuaded by plaintiff's testimony, Dr. Sujata Gutti's records and Dr. Wagner and find that it is the result of repetitive trauma and of the event of March 3, 2005.

On the issue of notice of the repetitive trauma, I am persuaded by plaintiff's testimony that although his supervisor knew he had back problems, plaintiff never told anyone that his back pain was due to work. I find plaintiff failed to give notice of repetitive trauma as required by KRS 342.185. The Statute of Limitations is inapplicable to the March 3, 2005[,] event because it was less than two years ago. KRS 342.185.

I have considered the medical evidence in its entirety. I am more persuaded by the opinions expressed by Dr. Bray that plaintiff suffers no permanent impairment as the result of an injury. His opinion is supported by objective medical evidence and is corroborated by Dr. Wagner. I find plaintiff has no permanent disability.

I am persuaded by Dr. Wagner that plaintiff was treating for something prior to March 3, 2005. I find that any treatment is not compensable because it is not required due to the event of March 3, 2005. KRS 342.020.

As noted by the Supreme Court, the language of this order is unclear.

The existence of neck or limb injuries is never addressed in the order. When the order is read as a whole, we disagree that the above language is completely inconsistent with the interpretation of ALJ Wolff and the Board. Reference in the order to a back injury resulting from repetitive trauma but not to the alleged neck

injury does not create a negative finding as to the existence of the neck injury. Rather, the most obvious explanation for its reference was that it was necessary for ALJ Smith to distinguish this back injury (which was non-compensable) from the back injury resulting from a specific March 2005 lifting incident (which was compensable). Ultimately, the ALJ determined that impairment to the back resulting from a specific March 2005 injury was only temporary, and did not result in any permanent disability.

The Supreme Court held that the order was unclear as to whether the ALJ's ultimate determination of no permanent disability also extended to the repetitive injury claim. The Supreme Court construed the order liberally and remanded the matter to allow further fact finding as to the existence of any such permanent disability. Such a liberal interpretation of the order is again mandated on this issue, especially in light of the "the munificent, beneficent and remedial purposes of the Workers' Compensation Act." *Kentucky Associated General Contractors Self-Insurance Fund v. Tri State Crane Rental, Inc.*, 240 S.W.3d 644, 650 (Ky. App. 2007) (internal quotation and citation omitted); *see also Cabinet for Workforce Development v. Cummins*, 950 S.W.2d 834, 836 (Ky. 1997) ("the Workers' Compensation Act is social legislation which is to be construed liberally and in a manner consistent with accomplishing the legislative purpose").

"Our standard of review of Workers' Compensation Board decisions is well known in that our function 'is to correct the Board only where the [] Court perceives the Board has overlooked or misconstrued controlling statutes or

precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Tri State Crane Rental, Inc.*, 240 S.W.3d at 648 (quoting *AK Steel Corp. v. Childers*, 167 S.W.3d 672, 675 (Ky. App. 2005)).

There is no such flagrant, overlooked, or misconstrued error in this case. The reading of the previous ALJ’s order propounded by the Board was a reasonable construction of the intent of the ALJ that entered that order. While other constructions of the order may have been possible, they were not compelled as a matter of law. In any event, it seems likely that in cases where two reasonable constructions of an order are possible, the construction favoring the worker would be preferred in light of the authority set forth herein. Accordingly, we find no error in the Board’s determination that ALJ Wolff’s finding regarding Collins’ overall permanent impairment to both his neck and back resulting from a repetitive trauma injury was not in conflict with the findings set forth in the order previously entered by ALJ Smith.

Waste Management next argues that the Board erred as a matter of law in failing to vacate and remand ALJ Wolff’s finding that Collins suffered a 7% permanent impairment to his back on grounds that ALJ Wolff was required to attribute a portion of this rating to the March 2005 specific lifting injury. Waste Management argues that without such an apportionment, there is not substantial evidence to support the ALJ’s finding of 7% permanent impairment to Collins’ back caused by repetitive trauma. Upon careful review, we disagree that a remand

is necessary to establish substantial evidence in this record to support ALJ Wolff's finding.

ALJ Wolff depended on the opinion of Dr. Potter in assessing a 5% permanent impairment rating to Collins' neck and a 7% permanent impairment rating to his back. Dr. Potter opined that the 7% permanent impairment rating to Collins' back was caused by the effects of the March 2005 specific lifting injury "superimposed upon many years of cumulative trauma and repetitive strain associated with the physical job demands encountered through [Collins'] employment." In light of ALJ Smith's finding that Collins suffered no permanent impairment as a result of the March 2005 specific lifting injury to his back, Waste Management argues that it was improper for ALJ Wolff to subsequently rely on any portion of Dr. Potter's opinion assessing a permanent impairment rating without making a carve out for the portion of the rating that was attributable to the specific injury. We disagree.

As held by the Board, "ALJ Wolff was free to accept the 7% impairment assessed for the low back condition based upon Dr. Potter's assessment without accepting Dr. Potter's opinion that the specific incident also played a part in producing the impairment." *See Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977) (factfinder has "right to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof"). Carving out any portion of Dr. Potter's permanent impairment rating to account for the March 2005 specific

lifting injury would have been erroneous, or at the very least, unnecessary, in light of the fact that ALJ Smith already determined that this injury did not cause any permanent disability. Upon careful review of this record, we agree with the Board that there was substantial evidence in this record to support ALJ Wolff's finding of fact without the need to make additional findings.

Having been presented with no reversible error by Waste Management, we hereby affirm the Board's August 20, 2009, opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES

Roberta K. Kiser
Lexington, Kentucky