Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 17, 2013

CLAIM NO. 201078541

WAL-MART STORES, INC. PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

MICHAEL HELVEY
and HON J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Wal-Mart Stores, Inc. ("Wal-Mart") appeals from an Order denying its petition to reopen, rendered June 13, 3013 by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"). Wal-Mart also appeals from a July 25, 2013 Order denying its petition for reconsideration. In its petition, Wal-Mart sought to reduce previously-awarded

benefits pursuant to KRS 342.710(5), alleging Michael Helvey ("Helvey") had refused to accept vocational rehabilitation.

While employed as a buggy pusher at Wal-Mart, Helvey was injured on two separate occasions. The first injury occurred while he was lifting a swimming pool into a customer's truck. Helvey was injured a second time while assisting a customer with a weight bench. The claims were consolidated.

Vocational rehabilitation was preserved as a contested issue, and two vocational evaluations were conducted prior to the final hearing. Dwight McMillion, a rehabilitation counselor, opined Helvey is unable to perform his prior duties as a buggy pusher. In making his recommendations, Mr. McMillion noted Helvey "has a ninth grade education, a reading grade level of 3.9, [and] no transferable skills to lighter work." Factoring in his complaints of chronic pain, even when sedentary, Mr. McMillion's overall impression was that "[v]ocational rehabilitation potential is guarded."

Ralph Crystal, PhD. performed a vocational and occupational employability evaluation of Helvey. His testing placed Helvey at grade 3.7 in reading, grade 1.7 in sentence comprehension, grade 3.3 in spelling, and grade

2.5 in arithmetic. Dr. Crystal noted a 9th-10th grade level is needed for formal training, though Helvey "would be able to perform a range of entry level jobs requiring a basic academic level of functioning." Regarding academic remediation, Dr. Crystal was optimistic: Helvey "[has] the potential to succeed in an educational remedial program and the capability to learn compensatory educational strategies for entry level jobs requiring academic abilities." He recommended Helvey "complete a GED or at least raise his academic levels to a third or fourth grade level as part of a vocational and educational retraining program."

By Opinion dated August 15, 2012, Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") found Helvey permanently and totally disabled as a result of the two work-related injuries. Acknowledging his deficient academic skills, the ALJ found Helvey's condition qualifies him for vocational rehabilitation benefits. Citing KRS 342.715, the ALJ awarded Helvey an increased income benefit for the weeks he participates in a vocational or physical rehabilitation program. The ALJ further ordered:

> The Plaintiff, Michael Helvey, pursuant to KRS 342.710 and KRS 342.715, shall undergo a vocational rehabilitation evaluation. [Helvey] will be notified by a Department of Workers' Claims rehabilitation counselor of the date, time and location of the rehabilitation

> evaluation. [Wal-Mart] shall pay the rehabilitation provider selected by the Department of Workers Claims for the vocational evaluation, including the pre-payment, if necessary. Upon receipt of the vocational evaluation report, the employee and employer or insurance carrier shall cooperate in the implementation of services designed to restore the employee to suitable employment.

The August 15, 2012 Opinion was not appealed. On November 15, 2012, Helvey underwent a vocational assessment conducted by Deanna Griffith, a vocational evaluator with the Office of Vocational Rehabilitation. Consistent with the two prior evaluations, Ms. Griffith's report notes Helvey's deficient academic skills, which "are not high enough for college or technical college training." In a subsequent sworn statement, Ms. Griffith explained the various tests she had administered. She was specifically asked whether she makes "any kind of recommendation as to what course the tested person should take next as far as getting retrained." She replied that she does not make any such recommendation, and elaborated that once she generates a report, she has no further involvement with the claimant's file.

Ms. Griffith's report was sent to Tara Aziz, a vocational rehabilitation coordinator with the Kentucky Department of Workers' Claims ("DWC"). She sent what

appears to be a form letter to Helvey on November 26, 2012, accompanied by a copy of this evaluation report, containing general information for claimants pursuing a variety of educational and vocational retraining opportunities. The portion of the letter applicable to Helvey reads: “If your scores were below 12th grade level, you may need to enroll in an adult education or GED program to improve those skills.” Ms. Aziz advised Helvey to contact her within 15 days “if he was interested in pursuing vocational rehabilitation or retraining benefits”. Helvey did not respond to her letter or to two telephone calls to his residence. On January 7, 2013, Ms. Aziz sent a second letter advising him of her “intent to close his file as he had not contacted me to advise of his interest in pursuing vocational rehabilitation or retraining.” Helvey did not respond to this letter either.

Wal-Mart moved to reopen the claim, seeking a 50% reduction in Helvey’s permanent total disability ("PTD") award pursuant to KRS 342.710(5) on the grounds he refused to accept rehabilitation pursuant to the ALJ’s order. The CALJ denied the motion, determining there was insufficient evidence Helvey had refused to accept rehabilitation. Emphasizing Ms. Aziz’s letter only asked for a response from Helvey “*if* [he was] interested in vocational

rehabilitation", the CALJ reasoned Helvey's silence cannot be considered a refusal to accept rehabilitation.

In the subsequent order denying Wal-Mart's petition for reconsideration, the CALJ again rejected the argument Helvey was refusing to accept a vocational rehabilitation program as ordered by the ALJ, on two grounds. The CALJ found no indication a vocational rehabilitation program had been formally recommended to Helvey by either Ms. Griffith or Ms. Aziz, therefore he cannot be considered non-compliant. Further, he interpreted the ALJ's Order as requiring only that Helvey undergo a vocational rehabilitation evaluation, which he completed.

Wal-Mart has appealed, arguing the evidence is uncontroverted Helvey never responded to Ms. Aziz's letters or phone calls. According to Wal-Mart, this is *prima facie* proof of noncompliance warranting a reopening. Further, it argues the essence of the CALJ's Order is vocational rehabilitation is not appropriate for Helvey, a determination which lies outside the proper scope of a petition to reopen.

Helvey responds by initially challenging the motion to reopen as the proper avenue to seek a reduction in benefits pursuant to KRS 342.710(5). He then emphasizes

the CALJ's broad discretion in considering motions to reopen, and the evidence supporting the conclusion vocational rehabilitation is not appropriate for Helvey.

In Neighbors v. River City Interiors, 187 S.W.3d 319 (Ky. 2006), the Kentucky Supreme Court considered a factually similar case. Neighbors, a dry wall finisher, suffered a work-related injury which rendered him permanently totally disabled. In addition to income benefits, the ALJ ordered Neighbors undergo a vocational rehabilitation evaluation. He attended the evaluation, which indicated he needed academic remediation before he could be eligible for vocational training. Neighbors responded to a subsequent letter from a DWC specialist, but informed the specialist retraining was impossible due to his continuing medical problems. Neighbors made no further contact with the DWC specialist.

River City Interiors eventually moved to reopen the claim, requesting a reduction in income benefits pursuant to KRS 342.710(5). Neighbors advanced three responsive arguments. First, he asserted, because KRS 342.710 is silent as to the mechanism to be used for considering a request for benefit reduction, River City's remedy lay in circuit court. Next, Neighbors responded he had complied with the vocational rehabilitation evaluation

order, but no services were recommended; therefore his obligation was fulfilled. Finally, he claimed he was not a candidate for vocational or educational rehabilitation because of his physical condition. The CALJ granted the motion to reopen and referred it to another ALJ for further proceedings, noting "that the process anticipated by KRS 342.710(3) had not occurred." 187 S.W.3d at 321. The ALJ ultimately found Neighbors' physical condition did not preclude retraining and retraining was practical, and accordingly ordered him to be referred for the recommended rehabilitation services.

The Kentucky Supreme Court affirmed the ALJ's order, and determined the CALJ enjoyed jurisdiction to consider the motion to reopen. It determined a post-award dispute concerning vocational rehabilitation is a matter arising under Chapter 342, and therefore KRS 342.325 grants an ALJ jurisdiction to decide the issue. Next, the Court explained the procedure anticipated by KRS 341.710:

> KRS 342.710(3) entitles an injured worker who is unable to perform work for which he has previous training or experience to receive reasonable vocational rehabilitation services at the worker's request. It also permits an ALJ to order a rehabilitation evaluation at the employer's request or upon the ALJ's own motion. The Department's procedure for implementing KRS 342.710(3) appears to be informal

> and to involve a subsequent ALJ order only in instances where the parties disagree. We infer this based on Mr. Mahin's letter of December 6, 2002; on 803 KAR 101, § 4(1), which indicates that a Department employee will assist an injured worker in implementing rehabilitation services; and on 803 KAR 25:101§ 4(6), which provides:
>
> > Upon receipt of the vocational evaluation report, the employee and employer or insurance carrier shall cooperate in the implementation of services designed to restore the employee to suitable employment.
>
> KRS 342.710(3) and 803 KAR 25:101§ 4 anticipate that a Department representative will present the results of the evaluation and the available options for physical and/or vocational rehabilitation to the parties. They also anticipate that the parties will cooperate in devising and implementing a reasonable plan for the injured worker's rehabilitation. KRS 342.710(5) and (6) help to ensure their cooperation.

Accordingly, the Supreme Court agreed the claim was properly reopened and referred to an ALJ for further proceedings. Having found Neighbors an eligible candidate, the ALJ did not err in referring him again to the DWC for implementation of the recommended services.

Helvey's matter is largely similar to Neighbors. The ALJ ordered Helvey to undergo an evaluation and to "cooperate in the implementation of services." Based on

this language, we disagree that the order only required Helvey to attend an evaluation. Furthermore, regardless of whether Ms. Aziz's letter can be construed as an 'invitation' to participate in vocational rehabilitation, the fact remains the ALJ's order unequivocally initiated the process anticipated by KRS 342.710. This process contemplates both an evaluation and a recommendation. While Helvey argues no formal rehabilitation program was ever proposed, it is apparent this circumstance exists because he refused to complete the process.

Wal-Mart has presented uncontroverted proof Helvey has ceased participating in the evaluation and recommendation process. This constitutes a *prima facie* case for reopening pursuant to KRS 342.125. Because the parties are in apparent disagreement about the propriety of the rehabilitation plan, a subsequent ALJ order is necessary. If Helvey continues to assert he is not a candidate for vocational rehabilitation, he "has the burden to show that the evaluator's recommendations or the available options are impractical or inappropriate." 187 S.W.3d at 324. Any request for the imposition of a KRS 342.710(5) penalty is also a determination for the ALJ upon reopening.

Accordingly, the June 13, 2013 and July 25, 2013 Orders of Hon. J. Landon Overfield are hereby **VACATED**. This matter is **REMANDED** to the Chief Administrative Law Judge with directions to grant Wal-Mart's petition for reopening and to assign the matter to an Administrative Law Judge.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS AND FILES A SEPARATE OPINION.

ALVEY, Chairman. I agree with the majority that Wal-Mart has set forth a *prima facie* case for reopening, and the claim should be referred to an administrative law judge for further proceedings. However, nothing in our decision should be construed as making any determination of Helvey's compliance, or non-compliance. Therefore, no particular result is directed.

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