

RENDERED: September 19, 2003; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2003-CA-000784-WC

DENNIS M. JOHNSON;  
HON. CHED JENNINGS; AND  
HON. BIXLER HOWLAND

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. 98-WC-95167

RONNIE ABLES<sup>1</sup> DRYWALL;  
HON. W. BRUCE COWDEN, JR., ALJ;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

REVERSING AND REMANDING

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BEFORE: BAKER, COMBS, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Dennis M. Johnson ("Johnson"), Ched Jennings ("Jennings") and Bixler Howland ("Howland")<sup>2</sup> petition for review of a decision of the Workers' Compensation Board ("the Board"). On March 12, 2003, the Board reversed and remanded a decision of

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<sup>1</sup> The spelling of this appellee appears in the record as both "Ables" and "Abels". The appellee's attorney is consistent with "Ables" so we accept this spelling as correct.

<sup>2</sup> Jennings and Howland served as counsel to Johnson during the proceedings before the administrative law judge and the Workers' Compensation Board.

Administrative Law Judge W. Bruce Cowden, Jr. ("ALJ Cowden") that imposed sanctions against Ronnie Ables Drywall ("RAD") pursuant to KRS 342.310. ALJ Cowden determined that RAD raised the defenses of intoxication and lack of jurisdiction without reasonable grounds. In this petition, Johnson, Jennings, and Howland assert that the Board erroneously resurrected findings and conclusions made by the previously sitting ALJ, Thomas Nanney ("ALJ Nanney"), that the Board ordered set aside in an August 9, 2002, opinion. Having reviewed the arguments of counsel, the record, and the applicable law, we agree with the appellants.

On January 29, 1998, while employed by RAD, Johnson was injured while installing drywall at a job site in Indiana. Johnson's injury occurred after a co-worker, Robert Cranford ("Cranford"), pushed a scaffold on which Johnson was standing, causing the scaffold to collapse. As a result of Cranford's actions, Johnson fell approximately twenty feet and landed on his feet. From this incident, Johnson sustained multiple fractures and bone displacements in both feet, as well as an injury to his lower back. Johnson timely filed his workers' compensation claim on January 19, 1999.

During the litigation of Johnson's claim, RAD asserted the defenses of intoxication and lack of jurisdiction. The issue concerning jurisdiction resulted from a dispute between

the parties as to whether Kentucky or Indiana was the proper forum for Johnson's claim. RAD based its lack of jurisdiction defense on several points presented during the proceedings below. First, the parties did not dispute that Johnson's injury occurred in Indiana. RAD's bookkeeper, Carol Baker, also testified that RAD was incorporated in Indiana, maintained business offices in Indiana and paid taxes in Indiana. Baker further noted that, while RAD maintained a warehouse, business address and telephone number in Kentucky, RAD paid its employees out of its Indiana offices. In response to Baker's testimony, Johnson asserted that most of his work for RAD occurred in Kentucky. Johnson also stated that he was usually paid at the Kentucky warehouse, received his work assignments in Kentucky and was hired by RAD in Kentucky. The issue concerning intoxication arose after Cranford testified that Johnson smoked a marijuana cigarette immediately prior to the work-related injury. The record, however, contains no medical evidence supporting Cranford's allegation.

Pursuant to RAD's notice, the deposition of Patty Wessels was taken on July 27, 1999. Wessels testified that she was employed by Ohio Casualty Company, formerly Great American Insurance Company,<sup>3</sup> RAD's workers' compensation insurance

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<sup>3</sup> The record reveals that the commercial division of Great American Insurance Company was purchased by Ohio Casualty Company. Johnson's file was later transferred to Ohio Casualty.

carrier. Wessels acknowledged that she served as the adjuster responsible for Johnson's claim. During Wessels's deposition, Jennings stated that, in support of his request for sanctions against RAD, he wished to examine Wessels to show that this employer raised the defenses of intoxication and lack of jurisdiction in bad faith. Jennings did not schedule a separate deposition of Wessels based upon a verbal agreement with RAD's counsel that he could depose Wessels, who would bring the carrier's file concerning Johnson's claim to the deposition, concerning the sanctions issue. Notwithstanding the assurances given to Jennings by RAD's counsel, Wessels failed to have the records available at her deposition. When Jennings requested the carrier's file for purposes of cross-examination, he learned at that point that the file was not available as previously promised. At this point, the deposition ended and Jennings requested that cross-examination be rescheduled when the file could be made available. The deposition, however, was never concluded because ALJ Nanney overruled Johnson's motion to cross-examine Wessels with the carrier's file present.

On January 25, 2000, ALJ Nanney issued his opinion in this matter. Concerning the issues of intoxication and lack of jurisdiction, ALJ Nanney found as follows:

I will first address the issue of the alleged marijuana intoxication. As previously noted, Robert Cranford,

plaintiff's co-worker indicated that during lunch, the plaintiff smoked a marijuana cigarette. This was denied by the plaintiff. Having observed the plaintiff at the Hearing and having judged his credibility and demeanor, as well as the overall facts of the claim, I first find that the evidence is insufficient to establish that the plaintiff did smoke marijuana. Further, I find no evidence that even if this occurred, that it had any bearing on the cause of plaintiff's fall.

In order for the defendant/employer to maintain a defense under KRS 342.610, it must establish that plaintiff's voluntary intoxication was the proximate cause of the injury. In this case, I have found that the statements of Robert Cranford were insufficient to establish that the plaintiff did, in fact, smoke marijuana while on the job. Further, there is no indication that any type of intoxication played any part in plaintiff's fall. This defense, therefore, has no merit.

. . .

The determination of whether the State of Kentucky has jurisdiction must be determined based upon the provisions of KRS 342.670 regarding extra-territorial coverage. Essentially, that statute sets forth certain criteria which are necessary in order [for] the State of Kentucky to assume jurisdiction. Based upon the plaintiff's own testimony, I find that the plaintiff was hired in Kentucky and has established that his employment with the defendant/employer was principally localized in the State of Kentucky. In making this finding, I note that KRS 342.670(4) provides that a person's employment is principally located in this state, if the employer has a place of business in this state and a plaintiff regularly works at or from such place of business. That is precisely what

has happened here. The defendant/employer maintained a warehouse with a Kentucky telephone number in the State of Kentucky and plaintiff received his work instructions from that location. In addition, the plaintiff maintains that he worked the majority of the time in the State of Kentucky. Therefore, having considered the criteria set forth in KRS 342.670 as well as the discussions in Eck Miller Transportation Corporation v. Wagers, [Ky. App., 833 S.W.2d 854 (1992)], I conclude that Kentucky has jurisdiction and plaintiff is entitled to maintain his claim in Kentucky.

After issuing this ruling, ALJ Nanney addressed Johnson's request for sanctions. In his opinion and order, ALJ Nanney found that the defenses of intoxication and lack of jurisdiction were without merit. Despite making these findings, ALJ Nanney refused to award sanctions because, in his opinion, RAD presented some evidence in the record supporting these defenses. Finally, ALJ Nanney awarded Johnson temporary total disability benefits of \$212.25 per week for a 43.75% permanent partial disability rating. Johnson appealed ALJ Nanney's decisions to the Board.

On appeal, the Board affirmed ALJ Nanney's decision that Johnson was entitled to permanent partial disability benefits based upon a 43.75% permanent partial disability rating. However, the Board reversed and remanded ALJ Nanney's refusal to impose sanctions against RAD. In making this decision, the Board found that ALJ Nanney erred as a matter of

law by failing to bifurcate the issue of entitlement to sanctions and render a separate ruling on that issue after the issue concerning Johnson's entitlement to benefits had been adjudicated. Specifically, the Board stated:

We therefore reverse in part as premature and order set aside those findings of the ALJ with regard to Johnson's entitlement to sanctions. We further remand this claim with instructions to the ALJ that proof time be reopened on the issue of appropriateness of sanctions only, and that the parties be afforded the right to conduct reasonable discovery, including the right of either party to again depose the lay witness Wessels. At the conclusion of proof time, a decision by the ALJ on the appropriateness of sanctions shall be rendered.

After this matter was remanded to the ALJ, two significant events occurred. First, ALJ Nanney died, prompting the chief administrative law judge to reassign this matter to ALJ Cowden. Next, Wessels left her position with RAD's workers' compensation carrier. This development forced the parties to depose Wessels's supervisor, Joe Raker, concerning the issue of sanctions.

During his deposition, Raker testified that he reviewed each file, including Johnson's, every 30 to 60 days. After reviewing Johnson's file, Raker testified that an entry was made on February 3, 1998, indicating that Johnson was hired in Kentucky and worked in Kentucky. Another entry noted that Johnson sustained his injuries while working in Indiana.

Despite this conflicting information, the insurance company decided to treat Johnson's injuries as a Kentucky claim. Raker later admitted that the carrier's decision was proper because Johnson was entitled to file his claim in Kentucky under Kentucky's workers' compensation statutes. As for the intoxication defense, Raker admitted that the claims file contained no medical evidence that Johnson possessed a foreign or illegal substance in his body at the time of the incident.

After reviewing all of the evidence contained in the record, as well as Raker's deposition testimony, ALJ Cowden determined that RAD unreasonably raised the defenses of intoxication and lack of jurisdiction. After deciding that RAD possessed no reasonable grounds to support these defenses, ALJ Cowden awarded sanctions to Johnson pursuant to KRS 342.310. RAD immediately appealed ALJ Cowden's decision to the Board. On appeal, the Board reversed ALJ Cowden's opinion because:

We believe that defense counsel was acting within the bounds of the law when he pursued the defenses of jurisdiction and intoxication based on the information supplied to him by the insurance adjuster. The new evidence on remand, Raker's deposition, added nothing to a determination of whether or not the defenses has been unreasonably raised. Instead, it is clear the matter was simply referred to the defense attorney who took discovery to determine whether or not the defenses were viable. Therefore, we conclude that ALJ Cowden impermissibly considered the evidence already considered by ALJ Nanney to make his

own determination that the defenses were unreasonably raised. This was beyond the scope of our directive on remand.

Accordingly, the Board remanded this matter to ALJ Cowden for entry of an order in conformance with the Board's belief that sanctions should not be issued. This petition for review followed.

We note that our review of decisions from the Workers' Compensation Board is to be deferential. In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992), the Kentucky Supreme Court outlined this Court's role in the review process as follows:

The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the the [sic] 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.

It is well established that a claimant in a workers' compensation action bears the burden of proving every essential element of his cause of action. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Since Johnson was successful before the ALJ, the question on appeal is whether substantial evidence supports the ALJ's conclusion. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence has been conclusively defined by Kentucky courts as evidence which, when

taken alone or in light of all the evidence, has probative value to induce conviction in the mind of a reasonable person.

Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409 (1994), citing Kentucky State Racing Comm'n v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

Guided by these principles, we now turn to the assertions of error raised by these appellants.

The appellants herein argue that it is error for the Board to resurrect findings or conclusions made by ALJ Nanney that were set aside by the Board on August 9, 2000. We agree. In its August 9, 2000 opinion, the Board specifically decided to "reverse in part as premature and order set aside those findings of the ALJ with regard to Johnson's entitlement to sanctions." It is clear that a judgment, opinion, or order is conclusive and binding upon the parties until that judgment, opinion, or order is modified, vacated, or set aside. First State Bank, Pineville v. Asher, 273 Ky. 574, 117 S.W.2d 581, 583 (1938). When any court orders that a judgment, opinion, or order be set aside, that decision effectively reverses, vacates, cancels, annuls, or revokes a judgment, order, or opinion. See Black's Law Dictionary, 1372 (6<sup>th</sup> Ed. 1990). Here, the Board's language in its August 9, 2000, opinion very clearly set aside ALJ Nanney's findings concerning Johnson's entitlement to sanctions. After nullifying those findings, the Board remanded this matter for

further proceedings and required the ALJ to reopen discovery on the issue of sanctions only. By reopening discovery, it appears to us that the Board intended to vacate, cancel, annul, revoke or otherwise void ALJ Nanney's findings. We believe that the Board's action of setting aside ALJ Nanney's findings permitted the ALJ, on remand, to make new findings of fact concerning the issue of sanctions. Consequently, we find that the Board erred in resurrecting ALJ Nanney's findings of fact that were specifically set aside in the August 9, 2000, opinion.

Next, the appellants assert that the Board erred by substituting its judgment for that of ALJ Cowden's because ALJ Cowden's determination that the intoxication and jurisdictional issues were defended without reasonable grounds was supported by substantial evidence. Again, we agree.

KRS 342.310(1) provides that an ALJ, the Board or any court may assess the "whole cost" of any proceedings, including but not limited to, "court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses" against a party found to have a claim "brought, prosecuted, or defended without reasonable ground." See Travelers Indem. Co. v. Reker, Ky., 100 S.W.3d 756, 762 (2003). Here, ALJ Cowden, after reviewing the entire record, determined that RAD raised the defenses of intoxication and lack of jurisdiction without

reasonable grounds for doing so. The record clearly reveals that ALJ Cowden's decision to impose sanctions was supported by substantial evidence as required by Kentucky law. First, the record is devoid of any medical evidence showing that Johnson was intoxicated at the time of the injury. Other than Cranford's bare allegation that Johnson allegedly smoked marijuana prior to the accident, RAD identifies no other evidence supporting its intoxication defense. As for its defense on jurisdiction, Raker testified that he possessed no information indicating that Kentucky did not have jurisdiction of Johnson's claim. Moreover, even though RAD's bookkeeper testified that RAD had more contacts with Indiana than with Kentucky, ALJ Cowden properly rejected her testimony. As the finder of fact, the ALJ has the sole authority to assess and to evaluate the quality, character, and substance of the evidence. Square D Co. v. Tipton, Ky., 862 S.W.2d 308 (1993). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000). Nevertheless, the Board found that ALJ Cowden abused his discretion in awarding sanctions because Raker's deposition testimony contained no evidence requiring an alteration of ALJ Nanney's original conclusion. Mere evidence contrary to the

ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999). In order to reverse the decision of the ALJ, it must be shown that no substantial evidence exists to support his decision. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Here, it is clear to us that ALJ Cowden's award of sanctions was supported by substantive evidence of probative value. As such, the Board was required to affirm that decision. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 420 (1985). Moreover, since the Board utilized findings of fact it initially set aside in reaching its conclusion, we believe that the Board erroneously substituted its judgment for that of ALJ Cowden as to the weight of the evidence and questions of fact concerning the issue of sanctions.

For the foregoing reasons, we reverse the judgment of the Workers' Compensation Board and remand this matter to the Board with directions that it enter an order affirming ALJ Cowden's decision to impose sanctions against Ronnie Ables Drywall.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE,  
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