

RENDERED: JANUARY 27, 2006; 2:00 P.M.

ORDERED NOT PUBLISHED BY KENTUCKY SUPREME COURT:
NOVEMBER 9, 2006
(2006-SC-0159)

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001445-WC

SANDRA HARTLAGE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-04-01282

KROGER #394; HON. JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.¹

PAISLEY, SENIOR JUDGE: Sandra K. Hartlage files this petition for review seeking relief from an opinion of the Workers' Compensation Board (Board). In its opinion, the Board vacated an order of the Administrative Law Judge (ALJ) dismissing

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Hartlage's workers' compensation claim without prejudice and remanded Hartlage's claim to the ALJ for further proceedings. Finding that the Board correctly applied the law, we affirm.

On August 1, 2002, Kroger #394, a local Kroger store in LaGrange, Kentucky, hired Hartlage as a frozen food clerk. In April 2003, Hartlage injured her left arm and shoulder when she caught a falling box of frozen meat. Then, in June 2004, Kroger fired Hartlage for reasons not connected to her work-related injuries.

On July 21, 2004, Hartlage filed a workers' compensation claim regarding her injuries. Medical proof was filed in Hartlage's case and her claim was scheduled for a benefits review conference (BRC) on December 2, 2004. At the BRC, according to Hartlage's brief, the parties and the ALJ discussed whether her claim should be held in abeyance or dismissed without prejudice since the medical proof suggested that Hartlage had not reached maximum medical improvement (MMI). We note that a review of the record reveals that, by the close of proof, no physician had assigned to Hartlage a permanent functional impairment rating.

On December 6, 2004, Hartlage filed a motion to dismiss her claim without prejudice. In her motion, Hartlage did not set forth any grounds for dismissal. Kroger objected to the motion, but, in a brief order dated December 9, 2004, the

ALJ granted Hartlage's motion and dismissed her claim without prejudice. In his order, the ALJ set forth no reasons for the dismissal. Kroger filed a petition for reconsideration, which was denied. Kroger then appealed the dismissal to the Workers' Compensation Board. The Board vacated the order of dismissal and remanded the claim to the ALJ. Hartlage now petitions this Court to review the Board's decision.

In Hartlage's petition, she argues that "[s]ince the rules and regulations of the Office of Workers [sic] Claims do not provide for summary judgments or involuntary dismissals with prejudice before any adjudication of the merits, workers [sic] compensation claimants may request and receive a voluntary dismissal without prejudice as a matter of right." Appellant's brief at page 5.

According to Kentucky Rules of Civil Procedure (CR) 41.01(1), a plaintiff may voluntarily dismiss his claim without seeking a court order by filing a notice of dismissal at any time before the defendant has filed an answer. If the defendant has filed an answer, then the plaintiff can only secure a voluntary dismissal by either obtaining the defendant's stipulation or by obtaining a court order. CR 41.01(1) & (2). After Hartlage filed her claim, Kroger promptly answered it; thus, she was not entitled to a voluntary dismissal as a matter of right. Pursuant to CR 41.01, Hartlage was required to either

obtain a stipulation from Kroger or seek an order from the ALJ, which, in fact, she did.

In the alternative, Hartlage argues if she does not have an absolute right to a voluntary dismissal of her claim without prejudice, then the dismissal of her claim was still within the sound discretion of the ALJ. According to Hartlage, the ALJ did not abuse his discretion. She insists that the Board erroneously substituted its judgment for the ALJ's when it vacated the dismissal because the Board was not present at the benefit review conference and did not hear the ALJ's reasons for wanting a dismissal without prejudice.

In addition, relying on Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991), Hartlage argues that a claimant may receive a "procedural dismissal". Hartlage argues that in Cornett, the Supreme Court suggested that a "procedural dismissal" is always without prejudice and that a claimant may subsequently re-file his claim if the statute of limitations has not expired. A careful reading of Cornett, however, shows that it does not support the proposition that a "procedural dismissal" (a term not found in Cornett) is always without prejudice. The issue of whether the dismissal in that case should have been with or without prejudice was not argued by the parties since they were clearly aware that any re-filing would have been time-barred.

We agree that the granting of a voluntary dismissal without prejudice is within the discretion of the ALJ. However, voluntary dismissals are governed by CR 41.01 and the ALJ's discretion to grant one is not unlimited. Sublett v. Hall, 589 S.W.2d 888, 893 (Ky. 1979). Some of the factors an ALJ should consider while analyzing a request for a voluntary dismissal without prejudice are: 1) the amount of preparation made by the opposing party; 2) the time lapse between the filing of the claim and the filing of the motion to dismiss; 3) the prejudice that the opposing party may suffer; 4) the adjudicative effect that the dismissal may have on the merits of the case; 5) the need for terms and conditions to govern the dismissal; and 6) the prejudice that the moving party may suffer due to a term or condition which governs the dismissal. Id. In essence, the ALJ must make sure that the opposing party does not suffer substantial injustice or substantial prejudice by the dismissal. Id.

In her motion for dismissal, Hartlage did not set forth any grounds for her request. She claims that she was seeking the dismissal because she had not reached MMI by the time of the BRC. She also claims that the ALJ decided that a dismissal without prejudice was appropriate because he would not be returning to Louisville for an extended but unspecified period of time. These are simply not sufficient grounds to

support a dismissal without prejudice at this stage of the proceedings over the objection of the employer. If Hartlage had truly not reached MMI, she would have clearly known that prior to the end of the proof time and prior to the benefit review conference. Knowing this, Hartlage could have filed a motion for an extension of the proof time as provided by 803 KAR 25:010, Section 15. Or, alternatively, she could have filed a motion to postpone the BRC pursuant to 803 KAR 25:010, Section 13(12). According to 803 KAR 25:010, Section 13(12), the ALJ may postpone the BRC upon a showing of good cause. Hartlage not being at maximum medical improvement would have constituted good cause. Either way, given the facts of this case, it was inappropriate and simply unnecessary for Hartlage to resort to dismissal of her claim without prejudice. The ALJ abused his discretion by granting the dismissal without prejudice since the regulations, which set forth the procedures for workers' compensation claims, provide appropriate remedies that would have protected Hartlage's rights and that would have been less onerous for Kroger. Moreover, in resolving Hartlage's motion, the ALJ acted arbitrarily, thereby abusing his discretion, since he failed to apply any of the factors set forth in Sublett. Dismissing this case without prejudice under these circumstances caused Kroger to suffer substantial injustice.

The opinion of the Workers' Compensation Board
vacating the order dismissing Hartlage's claim is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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