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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002094-WC

OLIVIA ANNE STEWART — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-83231

UNIFIRST CORPORATION;
HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 2005-CA-002279-WC

UNIFIRST CORPORATION — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-83231

OLIVIA ANNE STEWART;
HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION
REVERSING AND REMANDING
WITH DIRECTIONS

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Olivia Anne Stewart has petitioned, and Unifirst Corporation has cross-petitioned, this Court for review of the September 9, 2005, opinion of the Workers' Compensation Board. In its opinion, the Board vacated and remanded a portion of the Administrative Law Judge's Opinion, Order, and Award for further factual findings related to the issue of notice. Stewart asserts that the ALJ's opinion should stand, while Unifirst argues that it should be reversed on the notice issue or that the Board's decision to remand the matter for additional factual determinations regarding the date of injury should be upheld. Having concluded that Stewart's claim should have been dismissed on the notice issue, we reverse and remand.

Stewart, a high school graduate who is now 59 years old, began working for Unifirst on December 1, 1997, as a supervisor in the ID and Emblem department and in returns. She worked in returns until 1998, but continued in the other department until she left her employment. In her Application for Resolution of Injury Claim, Stewart alleged that she injured her neck, shoulders, back and both hands on January 10, 2002, when she used a hook to dislodge a bundle jammed in a chute in

the Sew and Seal area. On that day, she stated that she was filling in for an absent supervisor, Brenda Leslie. After the incident, she alleged that she further injured herself when she picked up a box. Stewart told team leader Karen Bowling, who in turn told Stewart to inform Cheryl Younger, the Human Resources Manager. Stewart claims that she told Younger about her work injury when she was outside smoking with two other managers, including Stewart's direct supervisor, Dan Smith. According to Stewart, Younger told her to tell her assistant, Margaret Matthis, who would then complete the necessary forms. Matthis, on the other hand, disputes that Stewart asked her to complete any forms concerning a work injury, but instead asked for assistance in obtaining leave through Unifirst's Short Term Disability program.

Stewart did not seek medical assistance until January 29, 2002, when she kept an appointment with her regular physician, Dr. Bernard Buchanan, who referred her for more testing. Stewart then filed for, and received, a leave under Unifirst's Short Term Disability program and underwent surgery on her neck on February 20, 2002. She continued to work at Unifirst until her surgery, and returned to work without restrictions on March 25, 2002. Her employment with Unifirst was terminated on April 26, 2002, for her failure to enforce the company's "tardy" policy with employees and for changing

timesheet records without authorization.[1] After her termination, Stewart drew unemployment compensation benefits until January 2003. Stewart underwent a second neck surgery in March 2003. On March 14, 2003, Stewart, who at that point had not worked for Unifirst for almost a full year, contacted Bethany Johnson, the current Human Resources Manager, to notify her that she was making an injury claim in relation to the January 2002 incident. The carrier denied her claim, and Stewart filed her Form 101 in September 2003. She later amended her application to state a claim for a psychological injury.

At a benefit review conference on April 13, 2004, Stewart and Unifirst entered into several stipulations, including a stipulation that she sustained an alleged injury on January 10, 2002. Notice and causation, among other issues, remained contested. The ALJ held a formal hearing on July 28, 2004, at which time several lay witnesses testified, for the most part on the issue of notice. In particular, Unifirst introduced evidence that the only day Leslie was off sick during that month was January 11, 2002, and that Younger's last date of employment with Unifirst was January 8, 2002. This evidence was offered to contest Stewart's version of events, namely that she was injured while filling in for Leslie while she was out sick and that she reported the injury to Younger the same day.

[1] Stewart filed a wrongful termination suit in Daviess Circuit Court (No. 03-CI-00407.)

The parties briefed the contested issues, and Unifirst specifically contested the notice issue and whether Stewart had sustained a work injury. On November 8, 2004, the ALJ issued an Opinion, Order and Award, in which he found that Stewart sustained a work injury for which she gave due and timely notice and that as a result she was permanently and totally disabled.[2] The ALJ's ruling on notice reads as follows:

> 1. **Did plaintiff provide adequate notice of any work-related injury to her superiors?** KRS 342.185 provides that no proceeding for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof.... KRS 342.20 also provides that a delay in getting notice is excused if the employer "had knowledge of the injury" or the delay was due to mistake or other reasonable cause. Plaintiff asserts that she told her supervisor, Sheryl [sic] Younger, about her work injury incident as soon as it happened. Ms. Younger agrees. She, however, states Margie Matthis failed to record the injury as she had directed. While confirming the plaintiff reported an injury to her, Ms. Matthis denies that plaintiff ever reported a work injury. She also denies that her former supervisor told her about the work injury.
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> Defendant relies on the testimony of a number of witnesses including Ms. Matthis to show that plaintiff, a supervisor, never filed a proper protocol for filing a workers compensation claim. Defendant also relies on the glaring inconsistencies in

[2] The ALJ found for Unifirst on Stewart's carpal tunnel syndrome claim.

> plaintiff's allegations regarding the actual date of the actual injury.
>
> This ALJ has been overly saturated with evidence on this issue. The parties have aggressively, but professionally litigated each and every possible issue producing an abundance of conflicting evidence. The burden of proof and risk of non-persuasion are on the claimaint, relative to each and every essential element of her claim. Snawder v. Stice, Ky.App., 576 S.W.2d 276 (1979). When, as here, the evidence is conflicting, the ALJ must resolve the conflict. Millers Lane Concrete Co., Inc. v. Dennis, Ky.App., 599 S.W.2d 464 (1980). Codell Constr v. Dixon, Ky., 478 S.W.2d 703 (1972).
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> After an undue amount of deliberation, due to the fact that all witnesses appeared honest, forthright, and credible, I am more persuaded by the plaintiff's demeanor, her testimony and the testimony of Sheryl [sic] Younger, as reviewed above. Accordingly, although there are discrepancies as to the actual date of the work injury incident which is the subject of this litigation, I find that plaintiff has complied with the requirements of KRS 342.185 in providing notification of her work injury as soon as practicable to her supervisors.

Unifirst filed a Petition for Reconsideration, contesting the ALJ's rulings on the notice issue and that Stewart had met her burden of proving a work injury. The ALJ denied the petition on those two issues. On the issue of notice, the ALJ stated:

> First, defendant points out that the parties entered into an agreed stipulation that the "plaintiff alleges a work related injury on January 10, 2002." According to defendant's payroll records, plaintiff's last date of work was January 8, 2002.

> Plaintiff correctly points out that although the BRC stipulations included the plaintiff alleged a work-related injury on January 10, 2002, the evidence submitted by the parties indicated confusion on the issue. Even defendant's witnesses testified that they believed plaintiff reported an injury after January 8, 2002, which was reportedly her last day of work. The ALJ, noting the discrepancy between the evidence and the stipulation, arrived at a decision consistent with the evidence. Accordingly, defendant's request for reconsideration on this issue is DENIED.

Unifirst filed a timely appeal with the Board, and again argued that the stipulation as to the date of injury was binding and that the facts did not support Stewart's version of the events. Unifirst also disputed the ALJ's decision regarding the work-relatedness of Stewart's injury. The Board issued its opinion on September 8, 2005, affirming on the work-relatedness issue and vacating and remanding on the notice issue. After noting that it was "not at all clear that the ALJ had a correct understanding of the [] evidence at the time he rendered his findings of fact on the notice issue" as evidenced in the record of the hearing and in his written orders, the Board vacated the ALJ's opinion on that issue:

> [G]iven Stewart's affirmative testimony that she was injured on a day in January 2002 when Leslie was off work and that she reported the injury to Younger, and the inconsistency of such an assertion, we believe Unifirst is entitled to know that the ALJ considered the whole record before

> making his final determination. In his order on reconsideration, with respect to the issue of notice, the ALJ indicated, "This ALJ, noting the discrepancy between the evidence and the stipulation, arrived at a decision consistent with the evidence." It is not clear to us, however, that the ALJ's decision can be reconciled with the evidence upon consideration of the record as a whole. On remand, the ALJ is directed to address that evidence purporting to show that Younger's last day of work at Unifirst was January 8, 2002, and that the only date in January 2002 for which Leslie was absent and Stewart might have worked in her place was January 11, 2002. Specifically, the ALJ is directed to the final hearing testimony of Johnson, incorporating the payroll records attached to Unifirst's Amended Exhibit List filed April 5, 2004.

Stewart's petition for review and Unifirst's cross-petition for review followed.

In her petition, Stewart argues that the Board erred in remanding the case to the ALJ for more findings of fact and that substantial evidence supported the ALJ's decision. She requests that this Court reinstate the ALJ's original award. In its cross-petition, Unifirst argues that the stipulation regarding the date of injury is binding on the parties and on the ALJ, that Stewart's and Younger's testimony cannot be relied upon as their version of the facts is chronologically impossible, and that the ALJ's finding on the notice issue is therefore not supported by substantial evidence, meaning her claim must be denied. Alternatively, Unifirst argues that the

Board's opinion vacating and remanding on the notice issue should be affirmed. Unifirst chose not to address the work-relatedness issue in its cross-petition.

In Western Baptist Hospital v. Kelly,[3] the Supreme Court of Kentucky addressed its role and that of the Court of Appeals in reviewing decisions in workers' compensation actions. "The function of further review of the WCB in the Court of Appeals 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."[4] With this standard in mind, we shall commence our review in this matter.

Regarding the applicable standard of review, the Supreme Court of Kentucky recently set forth the proper standard in McNutt Construction v. Scott,[5] as follows:

> KRS 342.285 provides that when reviewing the decision of an ALJ, the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact. The standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law.[6] Where

[3] 827 S.W.2d 685 (Ky. 1992).

[4] Id., at 687-88.

[5] 40 S.W.3d 854, 860 (Ky. 2001).

[6] See American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Commission, 379 S.W.3d 450, 457 (Ky. 1964).

> the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination.[7] Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people.[8] Although a party may note evidence which would have supported a different conclusion than that which the ALJ reached, such evidence is not an adequate basis for reversal on appeal.[9] The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.[10]

Because the issue Unifirst raised in its cross-petition is determinative, we shall consider that issue without first reviewing the issue Stewart raised in her petition. In its cross-petition, Unifirst contests the ALJ's finding that Stewart provided it with due and timely notice. Pursuant to KRS 342.185(1), a claim for compensation cannot be maintained "unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof[.]" Unifirst's initial argument centers on its assertion that the parties and the ALJ are all bound by the stipulations entered into at the benefit review conference, in particular that the

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[7] Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

[8] Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

[9] McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

[10] Special Fund v. Francis, supra, at 643.

date of the alleged work injury was January 10, 2002. While the Board did not specifically address this issue in its opinion, we shall review it as it pertains to a question of law. Pursuant to the applicable regulations, if the parties have not agreed upon all of the issues at the end of the benefit review conference, the ALJ is required to prepare a stipulated list of all contested and uncontested issues, which the parties' representatives and the ALJ must sign.[11] Only those issues that are contested are permitted to be the subject of further proceedings.[12] However, parties are permitted to withdraw prior stipulations of fact: "Upon cause shown, a party may be relieved of a stipulation if the motion for relief is filed at least ten (10) days prior to the date of the hearing, or as soon as practicable after discovery that the stipulation is erroneous."[13] It is undisputed that Stewart never moved the ALJ to withdraw the stipulation regarding the date of injury.

The cases Unifirst cites in its cross-petition support this statement of the law. In Osborne v. Pepsi-Cola,[14] although the parties stipulated at the prehearing conference that the claimant had sustained a work-related injury, the ALJ

[11] 803 KAR 25:010 § 13(13)(a).

[12] 803 KAR 25:010 § 13(14).

[13] 803 KAR 25:010 § 16(2).

[14] 816 S.W.2d 643 (Ky. 1991), superseded by statute on other grounds as stated in Smith v. Dixie Fuel Co., 900 S.W.2d 609, 612 (Ky. 1995).

nevertheless dismissed Osborne's claim, finding that his injury was not work-related. Regarding the binding nature of these stipulations, the Supreme Court of Kentucky stated:

> Initially we note KRS 342.270 encourages stipulations of facts not in dispute to aid in the disposition of workers' compensation claims in a summary and efficient fashion. The regulations of the Workers' Compensation Board infuse stipulations with strength. One may obtain relief from a stipulation only by motion and showing good cause. 803 KAR 25:011.
>
> Neither party moved to set aside the stipulation. Thus, the parties and the administrative law judge were bound by the stipulation.[15]

In response, Stewart relies upon an unpublished opinion of this Court, which she asserts provides a means to distinguish the present case from Osborne. Although the opinion cited by Stewart is unpublished, we have reviewed that decision and note that it does not offer any support for Stewart's position. Unifirst also cites to a decision of the Sixth Circuit Court of Appeals, in which that court noted that it, and the parties, are bound by stipulations that the parties voluntarily entered into.[16]

[15] Osborne, 618 S.W.2d at 644.

[16] Varga v. Rockwell International Corp., 242 F.3d 693 (6th Cir. 2001).

Based upon regulations and the cases cited by Unifirst, we must hold that the parties are bound by the stipulation as to the date of the alleged injury.

With the date of the alleged injury stipulated, Unifirst next argues that the ALJ's findings of fact regarding notice, based upon Stewart's and Younger's respective testimony, are not supported by substantial evidence because Stewart's version of the events is impossible. In support of this proposition, Unifirst cites to the opinion of Pioneer Coal Co. v. Lisenbee,[17] in which the former Court of Appeals stated that it was "thoroughly in accord" with the proposition that:

> [E]vidence of alleged facts inherently impossible and absolutely at variance with well-established and universally recognized physical, mechanical and scientific laws, is not evidence within the meaning of the law, requiring evidence of some probative value to justify the finding of the workmen's compensation board.[18]

Here, while she could never pinpoint the exact date of her alleged injury, Stewart nevertheless has always maintained that she was injured on a day in January 2002 while she was filling in for Leslie and that she notified Human Resources Manager Younger the same day. The documentary evidence introduced shows that the only day Leslie missed in January (other than for the

[17] 124 S.W.2d 94 (Ky. 1939).

[18] Id. at 96.

New Year's holiday) was January 11, 2002. Younger's last day of employment with Unifirst was January 8, 2002. Therefore, we agree with Unifirst that Stewart's version of the events is chronologically impossible, and that her and Younger's testimony cannot serve as substantial evidence supporting her assertion that she provided due and timely notice. Therefore, the ALJ erred in relying upon that particular testimony, and his finding on the notice issue is not supported by substantial evidence of record. In so holding, this Court is not impermissibly substituting its judgment for that of the ALJ, as the ALJ clearly did not understand the impact, or the import, of the undisputed documentary evidence Unifirst presented.

Because we have determined that the ALJ's finding that Stewart provided due and timely notice of her injury is erroneous, the Opinion, Order and Award must be reversed and Stewart's claim must be dismissed. Because the Board overlooked controlling precedent by merely vacating that portion of the ALJ's decision and remanding the matter for additional factual findings, we must reverse that decision as well. Because the issue Unifirst raised in its cross-petition is determinative of the case as a whole, we need not address Stewart's petition or Unifirst's alternative argument.

For the foregoing reasons, we reverse the portion of the Board's opinion vacating and remanding. Likewise, we

reverse the ALJ’s decision, and remand this matter to the ALJ with directions that Stewart’s claim be dismissed.

ALL CONCUR.

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