RENDERED: MARCH 7, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-002316-WC

CHRYSALIS HOUSE, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-01480

KENNETH TACKETT; HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND WORKERS'
COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND TAYLOR, JUDGES; GRAVES,[1] SENIOR JUDGE.

KELLER, JUDGE: Chrysalis House, Inc. (Chrysalis House) appeals from an opinion by the Workers' Compensation Board (the Board) affirming the Administrative Law Judge's (ALJ) opinion and order awarding Kenneth Tackett benefits under KRS 342.730(1)(c)2. As it did below, Chrysalis House argues that Tackett should not have been awarded

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

enhanced benefits under KRS 342.730(1)(c)2 because he was terminated for cause related to alleged criminal activity. For the reasons set forth below, we affirm.

FACTS

Tackett suffered a work-related injury on September 3, 2003. Following the presentation of proof, an ALJ found that Tackett had an 11% permanent partial disability rating. Furthermore, the ALJ found that Tackett lacked the physical capacity to return to the type of work he performed at the time of injury. However, the ALJ also found that Tackett had returned to work earning at least the same wage as he earned at the time of his injury and that it was likely that Tackett would be able to continue performing that work "into the indefinite future." Therefore, the ALJ refused to award Tackett benefits under KRS 342.730(1)(c)1, but stated that Tackett would be entitled to enhanced benefits under KRS 342.730(1)(c)2 during any periods of cessation of his employment.

Tackett appealed the ALJ's opinion to the Board, arguing that he was entitled to payment of enhanced benefits under KRS 342.730(1)(c)1. The Board affirmed the ALJ, finding that the ALJ could consider Tackett's current job situation in assessing whether Tackett would likely be able to continue earning the same or greater wage. Furthermore, the Board noted that there was not sufficient evidence to compel a contrary finding.

On October 6, 2006, approximately one year after the Board's opinion, Tackett filed a motion to reopen. In his motion, Tackett asserted that he had been discharged from his employment with Chrysalis House and that he was no longer earning at least the same wage as he earned at the time of the injury. Therefore, he sought

enhanced benefits under KRS 342.720(1)(c)2. The Chief ALJ issued an order reopening Tackett's claim on October 25, 2006.

During the course of litigation on reopening, the parties developed proof regarding the reason for Tackett's discharge. The interpretation of that proof and its application to KRS 342.730(1)(c)2 form the basis for this appeal. We summarize that proof below.

Tackett testified that he found a blank money order at or near the Chrysalis House parking lot. He put the money order in his pocket and waited two days to see if anyone from Chrysalis House claimed that they had lost it. When no one came forward, Tackett made the money order payable to himself and cashed it. After Tackett cashed the money order he heard one of the residents at Chrysalis House say that one of her money orders had been stolen. Tackett then left a note in the resident's room telling her where he had found the money order and promising to repay her, which he eventually did. Sometime later, Lisa Minton (Minton) called Tackett into her office and advised him that he was terminated. Since his termination from Chrysalis House, Tackett has worked for a temporary agency earning less than he had at Chrysalis House.

Ericka Harney (Harney) is assistant director at Chrysalis House. She testified that she received an incident report indicating that a resident's property had been stolen and interviewed the treatment director to determine what investigation had been conducted. She also reported the loss to the insurance company.

In reviewing her file, Harney could find no documentation indicating that Tackett had ever been in the resident's room. Harney also noted that a trace had been placed on the money order and it came back with Tackett's name as the payee.

Minton is the executive director at Chrysalis House. Minton testified that, on September 19, 2006, she received a telephone call from the treatment director, Jennifer Stamper, who indicated that a resident had reported that a money order had been stolen. The resident "put a trace on" the money order and the return showed that Tackett had endorsed the money order.

On September 20, 2006, Minton met with Tackett, and he admitted that he had cashed the money order. Tackett said that he was sorry and embarrassed. Despite those statements, Minton discharged him. Minton testified that the money order had been taken from a resident's bureau drawer. Sometime thereafter, a note appeared in the resident's bureau drawer indicating that the writer had found the money order and cashed it. The writer promised to repay the resident. Minton believes that the money had been repaid. Minton contacted the police and was advised that she could not press charges because the money order was not the property of Chrysalis House. The resident did not want to press charges; therefore, Minton took no further action.

Minton testified that she terminated Tackett because "he knew it wasn't his, and he cashed it. And then once he found out that it was, then he put this note in her drawer and paid her back; and never once did he come and talk to anybody."

Based on the above evidence, the ALJ found that Tackett's employment at a wage at least equal to his wage at the time of injury had ended. Therefore, the ALJ found that Tackett was entitled to receive income benefits at twice the normal rate pursuant to KRS 342.730(1)(c)2. Furthermore, the ALJ found that Tackett "did steal the money order at issue and endorsed and cashed it." In doing so, the ALJ noted that "[t]he evidence on this issue was certainly conflicting, but plaintiff's explanations for how he

obtained the money order are not considered credible." Chrysalis House appealed to the Board, arguing that, as a matter of public policy, an employee discharged for theft should not be entitled to the enhanced benefits under KRS 342.730(1)(c)2.

ANALYSIS

Generally, we defer to the ALJ as to questions of fact and will only reverse the Board when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). However, when the issue presented is one solely of law, as is the issue here, our review is *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky.App. 2001); *see also A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky.App. 1999); *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 518-19 (Ky.App. 1998).

ANALYSIS

KRS 342.730 sets forth the method for determining and calculating income benefits. Pursuant to KRS 342.730(1)(b), an injured worker who is found to have a permanent partial disability is entitled to receive income benefits at a rate based on his average weekly wage multiplied by his impairment rating and then multiplied by the appropriate factor from paragraph (1)(b). KRS 342.730(1)(c)2 provides that,

> If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, **for any reason, with or without cause**, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection.

> This provision shall not be construed so as to extend the duration of payments. (Emphasis added.)

Chrysalis House argued before the ALJ and the Board and argues before us that the ALJ's finding that Tackett "did steal the money order at issue and endorsed and cashed it" is sufficient to remove Tackett from the purview of KRS 342.730(1)(c)2. In support of its argument, Chrysalis House notes "the longstanding, well-established public policy within the Commonwealth of Kentucky, preventing any individual from profiting from his own illegal activity." While we agree that such a public policy exists, we must hold in favor of Tackett.

Initially, we note that, when interpreting a statute, we are to assume that the General Assembly intended the statute to mean exactly what it says. *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). While we can be guided by legislative intent and legislative purpose when interpreting a statute, *City of Louisville v. Helman*, 253 S.W.2d 598, 600 (Ky. 1952), if the language is unambiguous, no such interpretation is permitted. *AK Steel Corp. v. Commonwealth*, 87 S.W.3d 15, 17 (Ky.App. 2002); *Hale v. Combs*, 30 S.W.3d 146, 151 (Ky. 2000).

We find nothing in KRS 342.730(1)(c)2 which is confusing or unclear. The words "for any reason, with or without cause" mean exactly what they say. Therefore, we are bound to interpret those words literally and must hold that there is no exception for an injured workers' illegal activity.

We note the argument by Chrysalis House that permitting Tackett to benefit from his "illegal activity" is against public policy. In addressing this argument,

> [w]e must first note what has long been the law in Kentucky: "[T]he establishment of public policy is not within the authority of the courts. . . . It is the prerogative of the

> legislature to declare that acts constitute a violation of public policy." *Commonwealth v. Wilkinson,* Ky., 828 S.W.2d 610, 614 (1992) (citing Ky. Const. § 27). "[C]ourts are interpreters and not makers of the law." *Gathright v. H.M. Byllesby & Co.,* Ky., 154 Ky. 106, 157 S.W. 45, 52 (1913).

Kentucky Farm Bureau Mut. Ins. v. Thompson, 1 S.W.3d 475, 476-77 (Ky. 1999). We also note that the "the legislature is presumed to be aware of the existing law at the time of enactment of a later statute." *Stogner v. Commonwealth,* 35 S.W.3d 831, 835 (Ky.App. 2000). *See also St. Clair v. Commonwealth,* 140 S.W.3d 510, 570 (Ky. 2004); *Shewmaker v. Commonwealth*, 30 S.W.3d 807, 809 (Ky.App. 2000). Therefore, if the legislature had wanted to make a public policy statement regarding criminal conduct and the application of KRS 342.730(1)(c)2, it clearly could have and would have done so when it amended KRS Chapter 342 in 1996 and 2000. However, it did not; therefore, we must hold that the legislature, by the plain meaning of KRS 342.730(1)(c)2, did not intend to make an exception for criminal activity.

For the sake of completeness, we will address Chrysalis House's argument regarding *American Cold Storage v. Sinegra*, 2003-SC-0972-WC, 2004 WL 2624163 (Ky. 2004). In *Sinegra*, the employee was discharged based on allegations that he had stolen some meat. There was no evidence that any investigation had been conducted, that any charges had been filed, or that Sinegra had been asked to make restitution. Furthermore, there was no finding by the ALJ that Sinegra actually committed theft. Despite these deficits, American Cold Storage argued that Sinegra should not be entitled to enhanced benefits under KRS 342.730(1)(c)2 because doing so would violate public policy. Because of the evidentiary shortfalls and the lack of a finding of theft, the Supreme Court declined to address the public policy argument.

Chrysalis House cites to *Sinegra* as evidence that, given the opportunity, the Supreme Court of Kentucky might be inclined to accept its public policy argument. While the Court may agree to do so, we are not so inclined. In declining to accept Chrysalis House's argument, we note that an ALJ's jurisdiction is limited to those "duties assigned to [him] by statute." KRS 342.320(3). While ALJs do have the authority to hear matters that could result in the assessment of civil penalties, KRS 342.990(5), they do not have the authority to determine criminal guilt or innocence. In fact, when the executive director of the Office of Workers' Claims initiates criminal proceedings, he must do so through the "appropriate local prosecutor." KRS 342.990(8). Furthermore, even if this ALJ had been so authorized, there is no indication that he made his finding that Tackett "did steal the money order" based on evidence beyond a reasonable doubt. Therefore, Chrysalis House's public policy argument fails because Chrysalis House has failed to establish that Tackett committed a crime.

Additionally, even if we were willing to accept Chrysalis House's public policy argument, we note that Minton testified that she discharged Tackett because "he knew [the money order] wasn't his, and he cashed it. And then once he found out that it was, then he put this note in her drawer and paid her back; and never once did he come and talk to anybody." She did not testify that she discharged Tackett because he stole the money order. As the ALJ noted, any "profit" Tackett may have received, was the result of his discharge, not from his alleged theft, and the discharge "may or may not [have been] directly related to the illegal act." Therefore, Chrysalis House's public policy argument must also fail because Chrysalis House cannot establish that Tackett's

discharge was caused by his alleged theft. Absent that causal connection, any "profit" Tackett may have received cannot be linked to the alleged theft.

Therefore, for the above reasons, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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