RENDERED: March 5, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000435-WC

JAMES HANSEL — APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-96-088570

FRUIT OF THE LOOM; — APPELLEES
SPECIAL FUND;
HON. J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

OPINION
VACATING AND REMANDING

* * *

BEFORE: GUDGEL, CHIEF JUDGE; DYCHE AND KNOX, JUDGES.

KNOX, JUDGE: James Hansel petitions our Court for the review of a ruling by the Workers' Compensation Board (Board) affirming the decision of the Administrative Law Judge (ALJ) that appellant was terminated from his employment for reasons not related to his work injury, and interpreting KRS 342.730(1)(b) in such a way as to limit appellant's temporary total disability (TTD) benefits to two (2) times his impairment rating.

Appellant began work at Fruit of the Loom (FOL) in September 1994 as an inker in the screen print department. In September 1995, while lifting buckets of ink, appellant injured his back. After reporting the incident, he continued to work. He requested to be sent to a doctor, and was sent to see Dr. Lynn Haddix, the company doctor. Ultimately, he was referred to Dr. Bothwell Lee, a neurosurgeon, who performed back surgery in October 1995. Appellant returned to work in February 1996, starting on light-duty work, then gradually working into his regular duties. He re-injured his back in May 1996. He consulted with Dr. Haddix and Dr. Lee. Dr. Haddix diagnosed a muscle strain and placed him on light-work duty. However, appellant began to miss several days of work. On June 20, 1996, he returned to Dr. Lee, who gave him a statement directing him to be off work as of June 20, 1996, for a period of three (3) weeks. When appellant arrived at his workplace on June 21, 1996, to give Dr. Lee's statement to his employer, he was told he had missed too much work, and was terminated for excessive absenteeism.

The ALJ found that appellant's termination was not related to his back problem, and, consequently, his "off-work status . . . does not alter his status as having returned to work in a manner so as to subject him to the limitations of KRS 342.730(1)(b)."[1] The ALJ then awarded appellant benefits equal

[1]The 1994 amendment to KRS 342.730(1)(b), which applies here, reads in part:

(continued...)

to two (2) times his functional impairment attributable to the injury he sustained while employed by FOL. Appellant appealed the ALJ's ruling and award of benefits, both of which were later affirmed by the Board.

Appellant disputes the ALJ's conclusion that his termination from employment was due to excess absenteeism rather than his work-related back problem. The record reflects that FOL had an absentee policy in place which allowed an employee, depending upon his length of employment, a particular number of hours of absence during the year. In appellant's case, he was allowed sixty-four (64) hours of absences within the year. If he missed in excess of sixty-four (64) hours of work, he was to

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[1](...continued)

> (1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:
>
> (b) For permanent, partial disability, where an employee returns to work at a wage equal to or greater than the employee's preinjury wage, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by his percentage of impairment caused by the injury . . .unless the employee establishes a greater percentage of disability as determined under KRS 342.0011(11), in which event the benefits shall not exceed two (2) times the functional impairment rate . . . .

receive a verbal warning. After eighty (80) hours of missed[2] work, appellant was to receive a written warning informing him that, if he reached eighty-eight (88) hours of absences, he would receive a final warning, in which he would be informed that, at ninety-six (96) hours, he would be terminated. The record reflects that appellant missed work on June 5, 14, 18, and 19 of 1996, and that, after the June 5 absence, his yearly absence total stood at 93.25 hours. Jana Moore, a supervisory employee with FOL, testified that appellant had reached 101.5 hours of absences as of June 19, 1996.

Appellant saw Dr. Lee on June 20, 1996, and obtained from him a statement taking him off work beginning June 20, 1996, for a period of three (3) weeks. However, when appellant gave the statement to FOL's plant manager on June 21, 1996, the plant manager terminated appellant's employment. Although appellant testified his June 1996 absences were work related, the ALJ noted the testimony of Tony Pelaski, another of FOL's supervisory employees, that, on June 20, 1996, when Pelaski asked appellant where he had been, appellant responded that he was having personal problems, and mentioned nothing about his back. In addition, the ALJ noted Dr. Lee's handwritten notes of June 20, 1996, wherein he noted that appellant complained of various personal concerns.

[2]The record appears to reflect that appellant did not receive warnings from FOL about his absences.

The record also reflects that, on May 13, 1997, as a part of the record before the ALJ, FOL stipulated that appellant was entitled to TTD payments from June 20, 1996, to August 26, 1996. The record appears to reflect that those benefits were indeed paid. Appellant argues that the stipulation is a conclusive admission by FOL that appellant's termination was injury related, and compels a conclusion that appellant's dismissal on grounds of excessive absenteeism was not the true reason for his dismissal.

The ALJ did not initially address the stipulation in his opinion and award. Appellant moved the ALJ for reconsideration, arguing the stipulation represented a conclusive judicial admission by FOL that appellant was totally disabled at the time of his termination, and therefore, his "off-work status" as a result of his termination was related to his injury. The ALJ, in response to appellant's motion for reconsideration, entered an order recognizing that appellant was temporarily totally disabled from June 20, 1996 through August 26, 1996. However, the ALJ did not alter his conclusion that appellant's dismissal was due to absenteeism. Nor does his order reflect that he weighed the effect of the stipulation upon his conclusion that appellant was terminated due to excess absenteeism. On appeal, the Board ruled that since the stipulation was entered into after June 20, 1996, the date appellant's employment was terminated, it was not determinative of the reasons for the termination.

Appellant argues the stipulation is of such evidentiary significance, it rebuts any other evidence that his termination was for a non-injury-related reason. FOL counters that the ALJ heard evidence sufficient to establish appellant's termination was due to excessive absenteeism.

We agree that FOL's payment of TTD benefits from June 19, 1996, to August 26, 1996, subsequent to termination of appellant's employment, is an important evidentiary fact the ALJ could have considered in ruling upon the reason for appellant's termination. Durham v. Copley, Ky., 818 S.W.2d 610 (1991). We further agree that stipulations made by an employer in the context of a workers' compensation proceeding can be binding upon that employer. Shuman Co. v. May, Ky., 327 S.W.2d 14 (1959). However, we see the question here as relating to whether FOL's payment of TTD benefits to appellant after his termination is a conclusive admission that appellant was terminated due to his disability, or whether the ALJ could consider other circumstances, in addition to FOL's payment of TTD benefits, in determining the cause of appellant's dismissal.

We believe, according to the weight of authority, FOL's payment of TTD benefits is not a conclusive admission that the cause of appellant's dismissal was related to his injuries. See 7 Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law § 79.43 (1998), wherein it is stated:

> Payment of compensation or furnishing or offering of medical services is not in itself an admission of liability. This is

> especially true when the Commission has made a practice of encouraging carriers to pay voluntarily, assuring them that any overpayment will be credited to them. Sound public policy . . . requires that carriers be allowed to make voluntary payments without running the risk of being held thereby to have made an irrevocable admission of liability.
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> Note that, although all states agree that payment should not in itself amount to a complete estoppel to deny liability, or to conclusive evidence of liability, there is some variation in the weight, short of this, which payment may be accorded.

Given that authority, we believe FOL's payment of TTD benefits is, as recognized in Durham, an "important" factor related to the cause of appellant's dismissal, and should have been weighed by the ALJ in the context of the other evidence considered by him. However, while the ALJ acknowledged the stipulation in his order responding to appellant's motion to reconsider, he merely affirmed his original conclusion that appellant was fired for absenteeism, without any indication that he considered the effect of the stipulation.

"The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence[,]" in workers' compensation proceedings. Square D Co.. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993) (citation omitted). Further, the reviewing Court is limited to determining whether the ALJ "committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hosp. v. Kelly, Ky., 827

S.W.2d 685, 687-88 (1992). Because it is not our role to assess the weight to be given to the facts and the evidence, we believe this matter should be remanded to the ALJ with instructions to re-evaluate the reasons for appellant's dismissal, taking into consideration the fact that FOL paid TTD benefits after June 20, 1996.

Because the issue raised by appellant with respect to whether the ALJ and the Board properly interpreted KRS 342.730(1)(b) in limiting appellant's TTD benefits is dependent upon the ultimate outcome of the ALJ's findings concerning the cause of appellant's termination, we decline to address that issue.

For the foregoing reasons, we vacate the Board's decision and remand this matter with instructions to direct the ALJ to re-evaluate the reasons for appellant's dismissal, weighing all appropriate evidence, including the stipulation made by FOL.

GUDGEL, CHIEF JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

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Frankfort, Kentucky

BRIEF FOR FRUIT OF THE LOOM:

Norman E. Harned
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