RENDERED: MAY 20, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000552-WC

BILL CHURCH PAINTING CO., INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-74367

CLAUDE W. BLANKENSHIP;
HON. IRENE STEEN, ADMINISTRATIVE LAW JUDGE; DR. LARRY D. FLORMAN;
UNIVERSITY ANESTHESIOLOGY ASSOCIATES, PSC;
LOUISVILLE VA MEDICAL CENTER;
DAVID RHOADS, M.D.;
AND WORKERS COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

ACREE, JUDGE: Appellant, Bill Church Painting Co., Inc. (the Company), appeals the Workers' Compensation Board's Opinion Vacating and Remanding the

Administrative Law Judge's order dismissing the workers' compensation claim of the Company's employee Claude Blankenship. We affirm.

On September 19, 2008, the Company's employees, including Blankenship, were at work painting parts of Oldham County High School, including an addition to the school. At the end of that workday, as Blankenship was departing the workplace and heading for his personal vehicle, he encountered a temporary construction fence and gate erected by the general contractor. The general contractor had already locked the gate upon leaving that day. Blankenship climbed, or "hopped," the fence and in the process broke his leg severely.

Blankenship claimed benefits in accordance with the Workers' Compensation Act. The Company denied the claim on the grounds that Blankenship was engaged in horseplay and that the injury was not work-related.

On March 23, 2009, Blankenship filed a request for interlocutory relief. The evidence presented to the ALJ included Blankenship's affidavit stating how he had broken his leg. The evidence also included the deposition of Kenneth Church who testified that: Blankenship could have taken other, less risky routes to get beyond the fence; the Company did not require Blankenship to park where he did; the Company had no control over the temporary fence; Blankenship had not climbed this fence before; and climbing the fence did not benefit the Company.

Whether interlocutory relief should be granted is governed by 803 Kentucky Administrative Regulations (KAR) 25:010 Section 12. Among other things, this regulation requires that "[e]ntitlement to interlocutory relief shall be shown by

means of affidavit, deposition, or other evidence of record demonstrating the requesting party . . . [i]s eligible under Kentucky Revised Statute (KRS) Chapter 342[.]" 803 KAR 25:010 Section 12(4)(a). Under Chapter 342, no injury is covered unless it is a "*work-related* traumatic event or series of traumatic events[.]" KRS 342.0011(1) (emphasis supplied).

On April 1, 2009, after considering this regulatory requirement and the available evidence, the ALJ entered an order granting Blankenship's motion for interlocutory relief. The Board concluded, and we agree, that this order necessarily included the implicit finding that Blankenship's injury was work-related.

The April 1, 2009 order also placed the claim in abeyance. However, a subsequent order, while stating, "The case is currently in abeyance[,]" also inconsistently suggested that "the case shall proceed with proof taking of any potential lay witnesses." Consequently, the Company took Blankenship's deposition.

In its brief before this Court, the Company describes the evidence in Blankenship's deposition as including admissions that: Blankenship could have taken other, less risky routes to get beyond the fence; the Company did not require Blankenship to park where he did; the Company had no control over the temporary fence; Blankenship had not climbed this fence before; and climbing the fence did

not benefit the Company.[1] As the Board noted, this evidence is of the same nature and regarding the same facts as contained in Kenneth Church's deposition.

Nevertheless, relying on Blankenship's deposition, the Company filed a new motion to dismiss. At the time, Blankenship was still undergoing treatment and had not yet reached maximum medical improvement. *See* KRS 342.0011(11)(a). Furthermore, the ALJ had not removed the claim from abeyance. *See* 803 KAR 25:010 Section 12(5).

Upon consideration of this second motion to dismiss, the ALJ reversed course, stating, "I am of the opinion that Plaintiff's [Blankenship's] actions did not in any way benefit the employer." The order granting the Company's motion to dismiss was entered on November 3, 2009. Blankenship appealed the decision to the Workers' Compensation Board.

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[1] Blankenship's actual testimony was somewhat less clear than the Company's description:

> Q . . . The climbing of the fence had nothing to do with your – with your job as a painter, did it?
>
> In other words, you're not required to climb that fence as part of your job as a painter for Church Painting?
>
> A No, sir.
>
> Q Okay. And – and frankly, in climbing the fence, you weren't doing anything to help the employer out?
>
> That wasn't – that didn't benefit the employer in any way; it just benefited you, right –
>
> A For me to –
>
> Q – so you could get to your car?
>
> A For me to get to my car on a Friday to go home.

The Board determined that the issue was governed by *Bowerman v. Black Equipment Co*., 297 S.W.3d 858 (Ky. App. 2009). We agree.

The issue and its resolution are stated succinctly in *Bowerman* as follows.

> The primary issue before us is whether an ALJ, as finder of fact, may reverse a dispositive interlocutory factual finding on the merits in a subsequent final opinion, absent a showing of new evidence, fraud, or mistake. Though this appears to be a matter of first impression, our review of relevant legal authority leads us to conclude the reversal of prior dispositive factual findings rendered by an ALJ in an interlocutory opinion, absent introduction of new evidence, fraud, or mistake, is arbitrary, unreasonable, unfair, and unsupported by sound legal principles.

Bowerman, 297 S.W.3d at 867.

The Board concluded that the evidence the Company presented with its second motion to dismiss was not new evidence, but cumulative of the same evidence presented by the Company's representative, Kenneth Church, in his deposition. Applying *Bowerman*, the Board held that the ALJ's dismissal of Blankenship's claim was arbitrary, capricious and an abuse of discretion. We agree with this analysis.

In its order remanding the claim to the ALJ, the Board stated,

> Significantly, although the ALJ had previously been persuaded as to the validity of Blankenship's claim to the extent that she awarded interlocutory relief benefits, she subsequently inconsistently dismissed the claim without the introduction of any evidence to the contrary. She did so without removing the claim from abeyance to allow the parties to prove or disprove the merits of the claim. . . .

> It would be contrary to fundamental fairness, and the purpose of the Kentucky Workers' Compensation Act to permit this matter to stand as decided by the ALJ. . . .
>
> [D]ismissal of this action was arbitrary, capricious, and a [sic] clearly constituted an unwarranted abuse of discretion as described in KRS 342.285(2). We, therefore, vacate the November 3, 2009 opinion and dismissal, and remand this matter with instructions that the ALJ . . . , at a minimum, issue a standard order scheduling time for taking proof for all parties, to be followed by a benefit review conference and a final hearing, and a decision on the merits of Blankenship's claim . . . .
>
> . . . The final result of this action may well result in a dismissal as previously decided by the ALJ. However, Blankenship deserves the opportunity to present his case.

When this Court reviews a decision of the Board, our role is to correct the Board only if we believe it "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Applying this standard, we can find no error on the part of the Board.

Accordingly, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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