IN THE COURT OF APPEALS OF IOWA

No. 7-262 / 06-0604
Filed June 13, 2007

TYSON FOODS, INC.,
Petitioner-Appellant,

vs.

LABOR COMMISSIONER and EMPLOYMENT APPEAL BOARD,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Tyson Foods appeals from the district court's ruling on judicial review. **REVERSED AND REMANDED.**

Mark McCormick of Belin, Lamson, McCormick, Zumbach, Flynn, P.C., Des Moines; Carla Gunnin of Constangy, Brooks & Smith, Atlanta, Georgia; and Mark A. Lies, II and James L. Curtis of Seyfarth Shaw LLP, Chicago, Illinois, for appellant.

Gail Sheridan-Lucht, Workforce Development, for appellant.

Richard Autry, Employment Appeal Board, for appellee.

Heard by Zimmer, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

We must decide whether the Employment Appeal Board erred in concluding that a company's violation of Iowa's Occupational Safety and Health Act was a repeat violation.

I. Background Facts and Proceedings

In 2002, the Iowa Division of Labor Services issued a "citation and notification of penalty" to Tyson Foods, Inc. (formerly IBP, Inc.) for what it characterized as a "serious" violation of an occupational safety and health standard. Tyson Foods and the labor commissioner subsequently executed a settlement agreement that reduced the "citation to De Minimis," reduced the penalty from $5000 to $1000, and limited the effect of the agreement. The settlement agreement was affirmed by the Employment Appeal Board, the agency charged with adjudicating contested citations issued by the Division of Labor Services.

In 2004, the Iowa Division of Labor Services again issued a "citation and notification of penalty" to Tyson Foods for the same type of infraction that was the basis of the 2002 citation. This time, the division characterized the violation as a "repeated" violation and imposed a penalty of $25,000. Tyson Foods contested the citation, claiming in part that, because the 2002 citation was reduced by agreement to a "de minimis violation," it could not be the basis for a repeat violation.

Following a hearing, an administrative law judge (ALJ) agreed with Tyson Foods that the prior de minimis violation could not serve as the predicate for a finding of a repeat violation. The ALJ issued a proposed order that reclassified

the citation to a "serious" violation rather than a "repeated" violation and reduced the penalty from $25,000 to $2500.

Tyson Foods appealed the proposed order, raising a challenge to certain fact findings made by the administrative law judge. These fact findings were not addressed in subsequent decisions. Instead, the Employment Appeal Board, the agency subdivision charged with considering the administrative appeal, framed the contested issue as "whether the first violation in this case can 'count' given that it was described in the agreement as *de minimis*." In a split decision, the Employment Appeal Board concluded the first violation could "count." The board affirmed the labor division's citation for a repeated violation of the safety standard and re-imposed the $25,000 penalty.

Tyson Foods sought judicial review. The district court affirmed the final decision of the Employment Appeal Board. On appeal, Tyson Foods contends "the district court erred in holding that a *de minimis* violation can form the basis of a repeat citation."

II. Standards of Review

We must apply the pertinent standards of judicial review set forth in Iowa Code section 17A.19(10) (2005). Those standards require us to determine (1) the agency whose action we are reviewing, (2) the nature of the agency action, and (3) whether the agency is clearly vested with discretion to take that action. *See, e.g.,* Iowa Code § 17A.19(10)(c), (l), (m).

The first question, a determination of the agency whose action we are reviewing, is muddied by the fact that two agencies are involved. The citations were issued by the Division of Labor Services, a division headed by the labor

commissioner and housed within the department of workforce development. *See id.* §§ 88.2(1), 91.2. The citations were ultimately affirmed by the Employment Appeal Board, which is under the umbrella of the department of inspections and appeals. *Id.* § 10A.601(1). We conclude that, as the Employment Appeal Board issued the final decision, it is the agency whose action is subject to judicial review. *See id.* § 17A.19.1; *City of Des Moines v. Employment Appeal Bd.*, 722 N.W.2d 183, 189 (Iowa 2006) (framing issues in terms of errors by appeal board).

Turning to the second question, the nature of the agency action subject to review, Tyson Foods contends we are reviewing the settlement agreement, a contract whose interpretation and construction is always subject to review for errors of law. The Employment Appeal Board argues we are reviewing the agency's interpretation of a provision of law and the agency's application of law to fact. *See* Iowa Code § 17A.19(10)(l), (m).

With one exception, we are persuaded by both arguments. In deciding whether the 2004 citation was a "repeated" violation triggering enhanced penalties, the Employment Appeal Board construed the term "repeatedly" in Iowa Code section 88.14(1) and interpreted the provision on citations set forth in section 88.7(1)(a) (2003). The board also construed the settlement agreement that resolved the 2002 citation. On the issue that is the subject of this appeal, the board did not apply existing law to the underlying facts that triggered either of the citations. Therefore, we are not faced with reviewing the agency's application

of law to fact, but only the agency's interpretation of provisions of law[1] and its construction of the settlement agreement.

The third question requires us to distinguish between authority that is "clearly vested" in the discretion of the agency and authority that is not. *See Mosher v. Dept. of Inspections & Appeals*, 671 N.W.2d 501, 509-10 (Iowa 2003) (discussing meaning of "clearly vested"). *Cf.* Iowa Code § 17A.19(10)(c) (2005) (reviewing agency action to determine whether it is "[b]ased upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.") *with* Iowa Code § 17A.19(10)(l) (reviewing agency action to determine whether it is "[b]ased upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency."). The Employment Appeal Board contends the agency is clearly vested with discretion to interpret Iowa's occupational safety and health statute. *See* Iowa Code ch. 88. Therefore, in its view, we should review the Employment Appeal Board decision under the "irrational, illogical, or wholly unjustified" standard of Iowa Code section 17A.19(10)(l) rather than the "erroneous" standard of section 17A.19(10)(c).

The Employment Appeal Board's position finds support in *City of Des Moines*, 722 N.W.2d at 193-94. There, the court reviewed an Employment Appeal Board interpretation of Iowa's occupational safety and health statute

[1] "Provision of law" is defined as "the whole or part of the Constitution of the United States of America or the Constitution of the State of Iowa, or of any federal or state statute, court rule, executive order of the governor, or agency rule." Iowa Code § 17A.2(10).

under the "irrational, illogical, or wholly unjustified" standard of Iowa Code section 17A.19(1)(l). *City of Des Moines*, 722 N.W.2d at 193-94*;* accord *Thoms v. Public Employees' Ret. Sys.*, 715 N.W.2d 7, 11 (Iowa 2006) (reviewing Employment Appeal Board interpretation of Iowa's public employment retirement system statute under this standard). The court reasoned that, because the initial agency decision-maker was clearly vested with authority to interpret the relevant statute, so was the Employment Appeal Board. *City of Des Moines*, 722 N.W.2d at 193-94 (analyzing labor commissioner's authority under chapter 88); *accord Thoms*, 715 N.W.2d at 11 (examining IPERS authority under chapter 97B).

City of Des Moines controls our standard of review because it involves the same two agencies, the same statute, and review of the same type of agency action. Accordingly, we conclude the Employment Appeal Board was clearly vested by a provision of law with discretion to interpret a provision of law. *Cf. Mosher v. Dept. of Inspections and Appeals*, 671 N.W.2d at 509-10 (reviewing authority of final decision-maker to interpret provisions of law in statute administered by department of human services and concluding final decision-maker not clearly vested by a provision of law with discretion to interpret the pertinent statute).[2] The question, then, is whether the Employment Appeal

[2] There is no question the labor commissioner was clearly vested with discretion to interpret a provision of chapter 88. *City of Marion v. Iowa Dept. of Revenue & Finance,* 643 N.W.2d 205, 207 (Iowa 2002) (concluding from statutory provision conferring rulemaking authority that final agency decision-maker vested with discretion to interpret statute and its interpretation entitled to deference); Iowa Code § 88.5(1) (vesting commissioner of labor with rulemaking authority to adopt and promulgate health and safety standards). There arguably remains a question whether the statutory delegation of authority to the Employment Appeal Board to hear and decide contested cases amounts to a legislative intent to "delegate to the agency interpretive power with the binding force of law" over the interpretation of Iowa Code chapter 88. *See* Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected*

Board's interpretation of Iowa Code sections 88.14(1) and section 88.7(1)(a) was "irrational, illogical, or wholly unjustified."

We turn to the Employment Appeal Board's authority to construe the settlement agreement executed by Tyson Foods and the labor commissioner. Iowa Code section 88.8(3) provides "[i]f the parties enter into a settlement agreement prior to a hearing, the Employment Appeal Board shall enter an order affirming the agreement." This provision affords the Employment Appeal Board no discretion to do anything but approve the settlement agreement. The Employment Appeal Board followed this mandate and affirmed the settlement agreement. After the 2004 citation was issued, the board was called upon to construe the agreement it had previously affirmed. The board was not "delegated any special authority or power" to do so. *See ABC Disposal Sys., Inc. v. Dep't. of Natural Resources*, 681 N.W.2d 596, 606 (Iowa 2004). We conclude the Employment Appeal Board is not clearly vested with discretion to construe the contract. Therefore, we review the agency's construction of the settlement agreement for errors of law. *See Chicago & N.W. Transp. Co. v. Du-Mor Crop Care Co.*, 500 N.W.2d 43, 47 (Iowa 1993) (concluding agency applied incorrect standard in construing contract between carrier and consignee). *Cf.* Iowa Code § 17A.19(10)(c) (reviewing for errors of law agency interpretation of "provision of law" not clearly vested in discretion of agency); Zo*mer v. West River Farms, Inc.,*

Provisions to Iowa State Bar Association and Iowa State Government 63 (1998). *Cf.* Iowa Code §§ 88.8(3) (authorizing Employment Appeal Board to act as "adjudicatory body" in hearings involving contested citations); 10A.001(1) (conferring on Employment Appeal Board authority to "hear and decide contested cases" under chapter 88); 10A.001(6) (conferring on Employment Appeal Board authority to adopt rules "to establish the manner in which contested cases are to be presented, reports are to be required from the parties, and hearings and appeals are to be conducted.").

666 N.W.2d 130, 132 (Iowa 2003) (reviewing for errors of law agency refusal to reform a contract).

III. Analysis

Iowa's Occupational Safety and Health Act provides two tracks for informing employers of hazards in the workplace. The labor commissioner may issue a citation pursuant to Iowa Code section 88.7(1)(a) or the commissioner may issue "a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety and health." Iowa Code § 88.7(1)(b). The statute sets forth procedures for contesting and adjudicating the validity of citations. *Id.* § 88.8(3). The statute does not prescribe similar procedures for notices in lieu of citations, but authorizes the commissioner to implement procedures by rule. *Id.* § 88.7(1)(b). The commissioner has not done so, choosing, instead, to rely on guidance contained in a federal manual known as the OSHA Field Inspection Reference Manual (FIRM).

At issue here is Iowa Code section 88.14(1), which provides for enhanced penalties against employers who "willfully or repeatedly" violate the requirements on workplace safety. The Employment Appeal Board was asked to decide whether Tyson Foods "repeatedly" violated the requirements, where it was previously cited for a workplace violation but an agreement was reached to downgrade the citation to a de minimis violation.

To elucidate the term "repeatedly," the board relied on the FIRM,[3] which states in pertinent part:

[3] Tyson Foods did not object to the board's use of the FIRM and relies on its language in support of its arguments for reversal.

> C.2.f. Repeated Violations. An employer may be cited for a repeated violation if that employer has been cited previously for a substantially similar condition and the citation has become a final order.
>
> C.2.g. De Minimis Violations. De Minimis violations are violations of standards which have no direct or immediate relationship to safety or health and shall not be included in citations . . . . The employer should be verbally notified of the violation and the CSHO/IH should note it in the inspection case file.

Applying this language, the board considered whether Tyson Foods was "cited previously" or whether the previous citation was actually a "de minimis violation" as asserted by Tyson Foods. The board also considered whether the previous citation had "become a final order." The board concluded that the violation to which the parties stipulated bore "the hallmarks" of a citation rather than a notice in lieu of citation/de minimis violation. The board reasoned:

> The previous violation in this case was established as the result of an agreement. That agreement did result in an order of this Board. The usual de minimis notice is not even necessarily reduced to writing much less embodied in an order. Unlike the prior order here, the usual de minimis notice is not posted or served on the union. Finally, the previous violation resulted in a payment of a fine of $1,000 which payment, obviously, is not a normal part of a de minimis notice.

The district court adopted this reasoning.

On appeal, the Employment Appeal Board concedes "that where a de minimis notice alone is given and no further action results then the de minimis notice cannot be the basis of a subsequent repeat citation." The board reiterates, however, that this stipulated violation was "in substance, a citation and not a notice in lieu of citation." Tyson Foods counters that the settlement agreement unambiguously downgraded the citation to a "de minimis" violation, de minimis violations "shall not be included in citations," and the prior citation "never

became part of a final order" that established the underlying violation. To resolve these facially appealing arguments, we are compelled to parse the board's rationale.

First, the board declined to characterize the stipulated violation as a de minimis violation because "the usual de minimis notice is not necessarily reduced to writing much less embodied in an order." The board is correct that the FIRM allows verbal notification of a de minimis violation. However, the stipulated de minimis violation had to be reduced to writing because Employment Appeal Board rules require the filing of all settlement agreements in contested cases. Iowa Admin. Code r. 486-4.100(4) (2005). Therefore, the fact that the settlement agreement was in writing does not convert this stipulated "de minimis" violation to a citation. Similarly, the board is correct that the stipulated "de minimis" violation was affirmed in a final order. However, this affirmance was required by statute. *See* Iowa Code § 88.8(3) ("If the parties enter into a settlement agreement prior to a hearing, the Employment Appeal Board shall enter an order affirming the agreement."). The affirmance did not follow a hearing adjudicating the merits of the violation but was simply a statutorily prescribed rubber-stamp of the settlement agreement. *See id*. (noting that at a hearing on a contested citation, "the appeal board shall act as an adjudicatory body."). Therefore, although there was a final order approving the settlement agreement, that order did not convert the stipulated "de minimis" violation to a citation.

Next, the board characterized the stipulated violation as a citation because "[u]nlike the prior order here, the usual de minimis notice is not posted or served on the union." However, these actions were taken in compliance with the board's

procedural rules in contested cases. Employment Appeal Board rules require the posting of settlement agreements filed with the board. Iowa Admin. Code r. 486-4.7(15). In this case, the settlement agreement was attached to the board order. The rules also require service of pleadings or other documents filed with the board. *Id.* at 486-4.7(1). In short, these actions did not convert a stipulated "de minimis" violation to a citation.

Finally, the board reasoned the stipulated violation was more like a citation because "the previous violation resulted in a payment of a fine of $1,000 which payment, obviously, is not a normal part of a de minimis notice." However, we have found no provision in chapter 88, in the commissioner's implementing rules, or in the cited portion of the FIRM that precludes the commissioner from imposing a fine in connection with a notice in lieu of citation. Additionally, it is axiomatic that a settlement agreement may encompass terms not prescribed by statute. 17A C.J.S. *Contracts* § 212 (1999) ("Generally, a person may lawfully waive by agreement the benefit of a statutory . . . provision.").

We are left with the settlement agreement. That agreement clearly and unambiguously downgraded the 2002 citation to a "de minimis" violation. As Tyson Foods points out, the statute characterizes such violations as "notices *in lieu of* citations," Iowa Code § 88.7(1) (emphasis added), and the FIRM states such violations "shall not be included in citations."

The settlement agreement also expressly limited the use of that violation in other proceedings, as follows:

> None of the foregoing agreements, statements, findings, and actions taken by Respondent shall be deemed an admission by the Respondent of the cited allegations unless specifically admitted

> herein. The agreements, statements, findings, and actions taken herein are made for the purpose of compromising and settling this matter economically and amicably, and they shall not be used for any other purpose whatsoever, except as herein stated, or in connection with any action to enforce this Settlement Agreement or in matters arising out of this action before the Employment Appeal Board.

We conclude the 2002 citation, which was downgraded to a de minimis violation by agreement, could not be used as the basis for a "repeated" citation. The board's contrary interpretation of Iowa Code chapter 88 and its contrary construction of the settlement agreement was "irrational, illogical, or wholly unjustified" or was erroneous. Accordingly, we reverse the district court and order remand to the Employment Appeal Board for imposition of a penalty based on a serious rather than a repeated violation. In light of our disposition, we find it unnecessary to address the remaining issues raised by Tyson Foods.

REVERSED AND REMANDED.