

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000681-WC

WYONIA BUTLER

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-010255

KENTUCKY MEDICAL REVIEW
ORGANIZATION; SPECIAL FUND;
HON. JOHN MANN, Arbitrator;
HON. DONNA TERRY, Chief
Administrative Law Judge;
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * * *

BEFORE: COMBS, EMBERTON, and GUIDUGLI, Judges.

COMBS, JUDGE: Wyonia Butler (Butler) appeals from the opinion of the Workers' Compensation Board (the Board), which affirmed the decision of the Chief Administrative Law Judge (CALJ). The CALJ upheld the order of the Arbitrator and overruled her motion to reopen her claim for benefits on the grounds of fraud or mistake.

Butler was employed by Kentucky Medical Review Organization (KMRO) as a monitoring specialist. Her duties included data entry and the review of medical charts. Butler stated that she sustained a work-related injury to her back on December 30, 1994, while moving furniture and boxes at work. At the time of the injury at issue, KMRO was in the process of moving to a new location. Butler continued to work until February 3, 1995, when she notified KMRO that she was no longer able to work due to severe back pain and that she was going to seek medical treatment. Butler was ultimately diagnosed as suffering a herniated disc and underwent back surgery on May 31, 1996.

Butler filed a claim for Workers' Compensation benefits based upon the injury of December 30, 1994. On July 1, 1996, the Administrative Law Judge dismissed her claim. The ALJ found that Butler had failed to prove that she had sustained a work-related injury and that she had failed to give timely notice of her alleged injury. In reaching this decision, the ALJ found the testimony of Butler's co-workers to be more credible. They testified that Butler had not indicated to them or told them that she had injured her back. In fact, their testimony as to their work activities on the day of the alleged injury are in direct conflict with Butler's statements as they maintained that they had been instructed not to move or lift any furniture or boxes. Butler appealed the ALJ's decision to the Board, and on November 8, 1996, it rendered an opinion affirming the ALJ's decision.

On April 17, 1997, Butler filed a motion to reopen her claim on the grounds of mistake and/or "constructive" fraud; she also sought payment of her medical bills. She claimed that she had in fact notified KMRO of her injury in a timely manner. For the first time in all the course of these proceedings, Butler asserted that on January 5, 1995, she sent a four-page fax to Paula Warnick, an employee of KMRO, indicating that she had sustained an injury to her back while lifting and moving boxes and furniture. She offered into evidence a fax activity sheet which indicated that a facsimile transmission had indeed been sent on January 5, consisting of four pages; she failed, however, to produce the four pages. KMRO countered that it had not received such a fax from Butler and that it first learned of her alleged injury on February 3, 1995 – more than thirty days after the injury occurred.

On August 14, 1997, the arbitrator assigned to Butler's claim issued an order denying her motion to reopen and overruling her request for payment of medical bills. The arbitrator found that there was insufficient evidence of fraud or mistake to justify a reopening. Butler appealed, requesting de novo review by an ALJ pursuant to 803 KAR 25:010, § 13.

After conducting her review of the case, the Chief Administrative Law Judge (CALJ) affirmed the arbitrator's order. The CALJ found it particularly significant that Butler had not introduced the fax activity sheet into evidence at the original hearing. The CALJ held that even if Butler had notified KMRO by

fax, her failure to testify as to the faxing or the existence of the fax sheet negated a basis for reopening her claim on the grounds of mistake, newly-discovered evidence, or "constructive fraud." As the CALJ observed, the existence of the fax was "uniquely within her knowledge" from the inception of these proceedings and, therefore, was incapable of satisfying the definition of "newly-discovered" evidence to serve as the basis for a reopening. Butler appealed the CALJ's decision to the Board, which rendered an opinion on February 23, 1998, affirming the CALJ's decision. This appeal followed.

Butler argues on appeal that her claim should be reopened on the grounds of fraud, mistake, or newly discovered evidenced. Butler contends that the fax activity sheet she has offered into evidence constitutes tangible evidence that she did in fact notify KMO of her injury in a timely manner. Based upon this evidence, she maintains that her motion to reopen her claim should have been granted. We disagree.

Pursuant to KRS 342.125(1), an arbitrator or ALJ may reopen and review any award or order on the grounds of: (a) fraud; (b) newly-discovered evidence which could not have been discovered with the exercise of due diligence; (c) mistake; and (d) change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

In this case, we are constrained to agree with the CALJ and the Board that Butler has failed to prove any of the grounds

which would justify a reopening under KRS 342.125. During the original proceedings, Butler failed to assert that she had sent a fax notifying KMRO of her injury. Clearly, she would have known of the fax as she was the one who was responsible for sending it. Since Butler had to be aware of the fax at the time of the original hearing, it cannot be characterized as newly-discovered evidence. Furthermore, Butler has failed to establish fraud. She alleges that she sent a fax which KMRO denies ever having received. The resolution of this issue turned on the credibility of the parties and the weight of their evidence. We agree with the Board that Butler failed to establish her suspicion that KMRO had attempted to conceal the truth.

In addition to the disputed fax, ALJ Nanney also based his dismissal on the testimony of the co-workers, all of whom either contradicted or certainly failed to substantiate the appellant's recounting of the events of December 30, 1994. CALJ Terry notes this dual basis for the dismissal in her opinion denying the motion to reopen. We cannot re-evaluate the credibility of testimony and deduce a different result – even though we might be persuaded otherwise. Such a role is within the exclusive purview of the fact-finders and severely limits our discretion in appellate review. Western Baptist Hospital v. Kelly Ky., 827 S.W.2d 685 (1992).

KMRO requests that the costs of the appeal be assessed against Butler as authorized by KRS 342.310. We decline to assess such costs. This is a sad case where resort to the legal

process was Butler's last hope for assistance. We find no basis for treating her in a punitive fashion by assessing penalties for her legitimate utilization of the appellate process.

We find that the Board has not "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital, supra at 687. We therefore affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert M. Lindsay
Louisville, KY

BRIEF FOR APPELLEE KENTUCKY
MEDICAL REVIEW ORGANIZATION:

David L. Murphy
Louisville, KY

BRIEF FOR APPELLEE SPECIAL
FUND:

David R. Allen
Louisville, KY