RENDERED: October 15, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001807-WC

HOUSING AUTHORITY
OF GEORGETOWN/COMMUNITY
DEVELOPMENT AGENCY APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-07693

BETTY K. GILLISPIE;
UNITED HEALTH CARE OF KENTUCKY, LTD.;
ROBERT L. WHITAKER, DIRECTOR OF
THE SPECIAL FUND;
J. LANDON OVERFIELD, ADMINISTRATIVE
LAW JUDGE; and
THE WORKERS' COMPENSATION BOARD APPELLEES

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

BEFORE: GARDNER, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: The Housing Authority of Georgetown (the Authority) appeals from a June 22, 1998, opinion and order of the Workers' Compensation Board affirming an award of income and medical benefits to Betty Gillispie. In February 1994, Gillispie, who had worked as a director of the Authority since 1977, was injured in an automobile accident and, as a result of her injuries, was left occupationally disabled. The Authority

does not dispute the fact of Gillispie's disability, but it maintains that her injuries were not work-related. Alternatively, the Authority complains that the Special Fund should bear a portion of the liability for Gillispie's income benefits and that Gillispie's health insurer--appellee United Health Care of Kentucky, Ltd.--forfeited its subrogated claim for medical benefits by failing to provide sufficient notice. We believe the Board correctly rejected all of these contentions.

We note at the outset that our review of Board decisions is to be deferential. In Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992), our Supreme Court described this Court's role in the review process as follows:

> The WCB [Workers' Compensation Board] is entitled to the same deference for its appellate decisions as we intend when we exercise discretionary review of Kentucky Court of Appeals decisions in cases that originate in circuit court. The function of further review of the WCB in the Court of Appeals is to correct the Board only where the [] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

With this standard of review in mind, we turn to the Authority's allegations of error.

Gillispie testified that on the morning of her accident she had intended to go to the office to sign payroll checks, but planned first, on her way there, to inspect two (2) or three (3) Authority properties. The accident occurred before she had deviated from her accustomed route to the office. The Authority, relying on the "going and coming rule," maintains that

Gillispie’s injuries are not covered by the Workers’ Compensation Act.

In general, as the Authority notes,

> injuries sustained by workers when they are going to or returning from the place where they regularly perform the duties connected with their employment are not deemed to arise out of and in the course of the employment as the hazards ordinarily encountered in such journeys are not incident to the employer’s business.

Olsten-Kimberly Quality Care v. Parr, Ky., 965 S.W.2d 155, 157 (1998) (citations omitted). Injuries sustained during travel that *is* incident to the employer’s business, however, are another matter:

> “when travel is a requirement of employment and is implicit in the understanding between the employee and the employer at the time the employment contract was entered into, then injuries which occur going to or coming from a work place will generally be held to be work-related and compensable, except when a distinct departure or deviation on a personal errand is shown.”

Id. at 157 (quoting from Haynes, *Kentucky Jurisprudence,* “Workers’ Compensation,” § 10-3 (revised 1990) (other citations omitted)).

The Administrative Law Judge (ALJ) accepted Gillispie’s testimony concerning her destination and ruled that she had not merely been on the way to the office at the time of the accident, but had been engaged in field work. Invoking the “positional risk” exception to the “going and coming rule,” the ALJ explained that Gillispie’s property-inspection duties had placed her at risk for the injuries she had sustained and thus had brought her within the provisions of the Act.

Ordinarily, an injury, to be compensable, must "arise" from the employment. This requirement has been interpreted as meaning that the injury must result from a risk inherent in and particular to the type of work being performed. General risks, so-called risks of the street, have thus sometimes been deemed not to give rise to compensable injuries. An exception to this rule has been observed, however, where job performance required the worker to be in a dangerous place even if such exposure was neither inherent in the work nor a regular feature of it. Hayes v. Gibson Hart Co., Ky., 789 S.W.2d 775 (1990). It was to this "positional risk" exception that the ALJ referred.

Purely as a matter of law, The Board disagreed with the ALJ's application of the "positional risk doctrine." It believed that the question was not so much whether Gillispie's injury had "arisen" from her work, but whether she had been engaged in her job at the time of the accident. The "positional risk doctrine," the Board opined, simply does not address this situation. The Board nevertheless agreed with the ALJ that Gillispie's inspection activities removed her travel that morning from the "going and coming rule." It accepted, first of all, the ALJ's finding that Gillispie was not merely commuting at the time of the accident but was engaged in employment-related travel. Travel for inspection purposes, the Board concluded, unlike ordinary travel to and from the work place, was for the employer's convenience, and so injuries sustained during the course of that travel had properly been deemed compensable.

Without commenting on the "positional risk doctrine," we agree with the Board that Gillispie's travel to the properties she was to inspect did not fall within the "going and coming rule." Those inspections and the travel they necessitated were among the duties contemplated by her employment contract--were for the "convenience" of her employer, as the Board said--and thus the injuries she sustained during that travel were covered by the Act. Olsten-Kimberly Quality Care v. Parr, *supra*.

The Authority's objection to the Board's ruling conflates the factual finding that Gillispie was traveling not to her office but to an inspection site, with the legal rationale for deeming her injuries covered by the Act. Four (4) times in its brief, the Authority remarks that, at the time of the accident, Gillispie had not yet deviated from her usual route to the office. This fact has no significance, however, apart from its bearing on the further factual question as to whether Gillispie was commuting or inspecting, and, contrary to the Authority's insinuation, it does not compel a finding that Gillispie was commuting. Gillispie testified that she was inspecting; the ALJ accepted that testimony. His doing so was within his discretion and may not be second guessed on appeal.

Nor does the Board's rejection of the "positional risk doctrine" necessitate a remand to the ALJ. The Authority asserts that the Board usurped the ALJ's function by affirming his decision for a reason he had not discussed and perhaps had not considered. We disagree. As is its proper practice, the Board deferred to the ALJ's substantiated findings of fact and agreed

that Gillispie was on the job at the time of the accident, not merely on the way to the job. However, as an administrative reviewer of administrative-branch fact finders, the Board's legal rulings are binding on the ALJ. In this situation, there is no constitutional requirement for the reviewing body to defer to the fact finder's legal reasoning and thus no constitutional requirement that the reviewing body refrain from affirming a decision of the fact finder for reasons different from his or hers. *Cf.* Tamme v. Commonwealth, Ky., 973 S.W.2d 13 (1998) (applying this notion in the judicial branch); Newman v. Newman, Ky., 451 S.W.2d 417 (1970) (same). The Authority has referred us to no statutory or regulatory provision imposing such a duty on the Board, and otherwise we are aware of none. We are not persuaded, therefore, that the Board erred by affirming the ALJ's conclusion concerning the "going and coming rule" despite rejecting his reasoning.

The Authority advances a second reason for denying Gillispie coverage under the Act. In early March 1994, about two (2) weeks after her accident, Gillispie tendered her resignation to the Authority. She pre-dated her resignation letter to February 14, 1994, and thus agreed, according to the Authority, that she was retired on the date of her accident (February 23) and no longer covered by workers' compensation. The Board rejected this argument. Even if there were no doubt that the parties intended Gillispie's letter to have the effect the

Authority alleges,[1] the Board explained, such an agreement is in essence a settlement of Gillispie's claim and is thus unenforceable absent proof of the contract's existence, terms, and approval by the agency. The Authority introduced no such proof. Indeed, it did not even introduce Gillispie's letter. The Authority insists to the contrary, however, that Gillispie is capable of unilaterally waiving her claim and that she did so by agreeing to be deemed unemployed on the date of her accident. We agree with the Board.

The Authority is correct, of course, that Gillispie had the power to abandon her workers' compensation claim. The holder of virtually any right, by declining to assert it, will eventually be deemed to have abandoned it. Our law generally presumes, however, that rights are not intended to be abandoned, and so requires proof of waiver sufficient to overcome that presumption. "[A]n express waiver must be supported by consideration," our Supreme Court has held, and

> an implied waiver arises only where a party has engaged in conduct or performed acts inconsistent with the existence of the right alleged to have been waived, misleading the other party to his prejudice.

Greensburg Deposit Bank v. GGC-Goff Motors, Ky., 851 S.W.2d 476, 478 (1993) (citing Taylor v. Fuller, 162 Ky. 568, 172 S.W. 959 (1915)). Waivers of Workers' Compensation Act claims, moreover, are subject to administrative scrutiny and approval. KRS 342.265 requires that voluntary dispositions of workers' claims be

[1] In fact, Gillispie testified that the Authority coerced her to pre-date her letter of resignation.

reviewed and approved by the agency. "The basic purpose and policy of th[is] statute is to prevent an employe [sic] who has a claim under KRS Ch. 342 from signing it away without the approval of the Board." Industrial Track Builders of America v. LeMaster, Ky., 429 S.W.2d 403, 405 (1968) (construing an earlier version of KRS 342.265, but still applicable). *See also* Commercial Drywall v. Wells, Ky. App., 860 S.W.2d 299 (1993) (also noting this purpose and policy).

The waiver alleged by the Authority does not satisfy these requirements. There can be no express waiver because Gillispie's alleged agreement was never specified, was not submitted to the Board, and was not exchanged for a valuable consideration. Nor can a waiver be inferred, as the Authority suggests. Even granting, for the sake of argument, that such an inference could be reconciled with the worker-protection purposes of KRS Ch. 342, and further that Gillispie's pre-dating her letter of resignation was inconsistent with her claim, there has been no showing that the Authority relied to its detriment on that act. The Board did not err, therefore, by ruling that Gillispie's retirement did not effect a waiver of her right to compensation benefits.

The Authority next contends that, even if Gillispie is entitled to benefits (as we believe she is), the Board erred by deeming it liable for all of the benefits awarded. First, it maintains that liability for a portion of Gillispie's income benefits should have been assigned to the Special Fund, and, since the ALJ's findings on this issue were unclear, the matter

should be remanded for clarification. We are not persuaded that the Authority is entitled to a remand.

Gillispie claimed that she had been rendered totally disabled by her accident and proffered evidence tending to show that she had suffered injuries to both knees, her right hip, right shoulder, and back. She also claimed to have incurred a disabling psychological impairment. The ALJ found, however, that Gillispie was only sixty-five percent (65%) permanently disabled and that all of this disability was work-related. The ALJ found that the disability arose from accident-related damage to Gillispie's right knee, a joint that had been surgically replaced in 1993. There was medical testimony that the original replacement surgery had been successful. There was also proof that, after the replacement surgery, Gillispie had been able to return to work with no significant job restrictions. Following the accident, the knee required additional surgery, was weakened to the extent that Gillispie was restricted to sedentary work, and had become subject to recurrent infection. All of these conditions lessened Gillispie's employability. The ALJ found that, with the exception of a portion of Gillispie's depression, none of her other impairments were work-related (most arising from arthritis), and none of them gave rise to any occupational disability.

Under the statutes in effect at the time of Gillispie's injury (KRS 342.120 and 122 (1992)), the Special Fund was liable for income benefits only to the extent that the claimant's occupational disability resulted from the arousal of pre-existing

but dormant or non-disabling conditions. Wells v. Bunch, Ky., 692 S.W.2d 806 (1985). Finding no such arousal, the ALJ assigned all the liability for income benefits to the Authority.

Unhappy that Gillispie's artificial knee was not deemed a dormant but potentially disabling condition that had been aroused by the accident, the Authority complains that the ALJ's findings may have been based on a misreading of one of the doctors' reports. The report in question, provided by the Authority, opines that Gillispie is totally disabled, but that half of her disability is the result of the arousal of pre-existing arthritic and pulmonary conditions. The report also opines that Gillispie's right knee injury and the related complications are the only impairments resulting directly from the accident. The ALJ cited this report and two (2) others as the basis for his finding that none of Gillispie's permanent disability resulted from the arousal of a pre-existing condition. Insisting that this report does not support that finding, the Authority seeks to have the issue remanded to the ALJ for clarification.

Statutory and case law both require the administrative fact-finder to "support its conclusions with facts drawn from the evidence in each case so that both parties may be dealt with fairly and be properly apprised of the basis for the decision." Wilder v. The Great Atlantic and Pacific Tea Company, Inc., Ky., 788 S.W.2d 270, 272 (1990) (quoting from Shields v. Pittsburg and Midway Coal Mining Company, Ky. App., 634 S.W.2d 440 (1982)). *See also* KRS 342.275. Findings are inadequate if they frustrate

review by requiring the reviewing body to speculate as to what the fact-finder may have done. Wilder, *supra.* On the other hand, as noted by the Board, the administrative fact finder has the prerogative to determine the weight, substance, credibility, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

In this case, although the ALJ apparently rejected that portion of the report at issue asserting that Gillispie was totally disabled with half that disability the result of an arousal of pre-existing conditions, that report does support the ALJ's finding that Gillispie's work-related right knee injury, independently of her other impairments, caused her to be significantly disabled. This selective use of the report is within the ALJ's discretion and does not render Gillispie's award ambiguous or otherwise beyond review. The other aspects of the ALJ's findings are supported by the other cited medical reports. There are no grounds for a remand.

Finally, the Authority complains that the ALJ should not have ordered it to reimburse Gillispie's health insurer, United Health, for its payment of medical expenses because the (pre-award) claim for reimbursement was not made within forty-five (45) days of the date medical services were rendered. It derives the purported forty-five (45) day requirement from KRS 342.020(1) (1992), which provides in pertinent part as follows:

> The employer, insurer, or payment obligor acting on behalf of the employer, shall make all payments for services rendered to an employee directly to the provider of the services within thirty (30) days of receipt of a statement for services. The

> commissioner shall promulgate administrative regulations establishing conditions under which the thirty (30) day period for payment may be tolled. The provider of medical services shall submit the statement for services within forty-five (45) days of the day treatment is initiated and every forty-five days thereafter, if appropriate, as long as medical services are rendered.

The Authority asserts that by paying Gillispie's medical expenses the insurer assumed the providers' duty to give notice. We disagree.

It is by no means clear from the Authority's brief why the insurer, by paying Gillispie's debt, should be deemed to have assumed the provider's statutory duty. We agree with the Board, in fact, that the plain language of the statute does not support such an interpretation. Even assuming, moreover, for argument's sake, that such is case, we are not persuaded that the statute would apply to this situation. In R.J. Corman Railroad Construction v. Haddix, Ky., 864 S.W.2d 915 (1993), our Supreme Court explained that the notice provisions of KRS 342.020(1) apply only *after* it has been determined that the employer is liable for medical expenses and an award has been made. Prior to that determination, "the employer is under no obligation to pay any compensation, and all issues, including medical benefits, are justiciable." *Id.*, at 918. The employer not yet being under a duty to pay, the provider is not yet obligated to give notice. Obviously, the employer may challenge the reasonableness and necessity of any pre-award medical treatment at the original award hearing, and it is entitled to the usual pre-hearing notice. We assume the Authority had that opportunity in this

case; it does not suggest otherwise. If this procedure denies the employer a fair opportunity to contest medical benefit claims, the Authority has failed to raise the issue and explain how.

To summarize, Gillispie's engagement in field work at the time of her accident removes her claim from the "going and coming rule," and her pre-dated letter of resignation is insufficient evidence of an intent to waive her claim. We agree with the ALJ and the Board, accordingly, that Gillispie is entitled to the protections of the Workers' Compensation Act. We deem sufficiently clear and supported, furthermore, the agency's determination that none of Gillispie's work-related disability is attributable to the arousal of a prior condition. The Authority, therefore, was properly held liable for all of Gillispie's income benefits. We concur, too, in the agency's rejection of the Authority's asserted right, under KRS 342.020(1), to extraordinary pre-award notice of the provision of medical services. The asserted right comports neither with the plain meaning of the statute nor with its prior interpretations. KRS 342.020(1) thus provides no ground for relieving the Authority of its liability for medical expenses.

For all of these reasons, we affirm the June 22, 1998, order of the Workers' Compensation Board.

ALL CONCUR.

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