RENDERED: April 14, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001799-WC

ANGELA PENROD APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-71093

CARHARTT, INC.;
SPECIAL FUND;
HON. MARK C. WEBSTER;
WORKERS' COMPENSATION BOARD APPELLEES

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

BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Angela Penrod (Penrod) has appealed the opinion of the Workers' Compensation Board which affirmed the opinion and order of the arbitrator appointed to her claim pursuant to 803 KAR 25:150, the Workers' Compensation Alternative Resolution System (ADR). Penrod alleges that the arbitrator's decision was incomplete, ambiguous or so contradictory as to make implication impracticable. 803 KAR 25:150 (2)(b). This is a case involving an appeal by a party to an ADR proceeding.

We have thoroughly reviewed the record, the arguments of the parties, and the applicable authorities. Based upon that review, we are satisfied that the board's decision is "neither patently unreasonable nor flagrantly implausible." Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 688 (1992). Likewise, we are satisfied that the board "neither overlooked nor misconstrued a controlling statute or precedent in determining that there was substantial evidence to support the ALJ's decision." Whittaker v. Perry, Ky., 988 S.W.2d 497, 498 (1999) (citing Western Baptist Hosp., supra). Accordingly, we adopt that board's well-written opinion as the opinion of this court as follows:

This appeal is one of first impression involving an appeal by a party to an Alternative Dispute Resolution ("ADR") proceeding enacted by the General Assembly, effective April 4, 1994. Pursuant to KRS 342.277 and 803 KAR 25:150, Carhartt, Inc. and a recognized or certified exclusive bargaining representative submitted to an ADR system which was subsequently approved by order of the Commissioner, Department of Workers Claims, by his issuance of a certification. The ADR system, so approved, adopted a plan for resolution of workers' compensation disputes and selection of mediators or arbitrators to hear and decide disputes. Pursuant to regulation, 803 KAR 25:150, Section 5, a party to an ADR proceeding may appeal a final order of an ADR arbitrator directly to the Workers' Compensation Board in the same manner and in the same time frame as prescribed for an appeal from a decision of an Administrative Law Judge. However,

the standard for review by the Workers' Compensation Board of a party appealing from an ADR Arbitrator order is prescribed by regulations. 803 KAR 25:150, Section 5(2) and (3). This standard of review is substantially different than from an ALJ to the Workers' Compensation Board which is established in KRS 342.285. Here, the standard of review is set forth as follows:

> (1) A party to an ADR proceeding may appeal a final order to the Workers' Compensation Board in the same manner and in the same time frame as prescribed for an appeal from the decision of an administrative law judge. A copy of the notice of appeal shall be served by the appealing party on the plan administrator, who shall within twenty (20) days file with the commissioner a copy of the record of the proceedings before the mediator or arbitrator.
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> (2) The final order of the mediator or arbitrator shall be affirmed upon review unless the Workers' Compensation Board determines:
> (a) The mediator or arbitrator exceeded the authority vested by applicable law;
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> (b) The final order is incomplete, ambiguous or so contradictory as to make implementation impracticable;
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> (c) The mediator or arbitrator was patently biased or partial;
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> (d) The mediator or arbitrator refused to admit reliable material or probative, but not redundant evidence, which if accepted would tend to change the outcome of the proceedings; or
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> (e) The final order of the mediator or arbitrator was procured by fraud.
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> (3) No issue or point of error shall be raised before the board which was

known or should have been known below, but was not raised before the arbitrator.

Angela Penrod appeals from an Opinion and Order rendered by Hon. Mark C. Webster, ADR Arbitrator ("Arbitrator"), dismissing her claim for permanent occupational disability benefits against Carhartt, Inc. ("Carhartt"). Arbitrator Webster was appointed pursuant to 803 KAR 25:150, workers' compensation alternative resolution systems. The Arbitrator determined that Penrod did not sustain any work-related permanent occupational disability as a result of her right upper extremity and cervical spine problems. On appeal, Penrod argues the Arbitrator exceeded his authority vested by the applicable law and his decision is incomplete, ambiguous or so contradictory as to make implementation impracticable.

Penrod, born September 28, 1975, has an eighth grade education and no vocational training. Her employment history consists of working as a cashier at a fast food restaurant and service station and housekeeper at a state park. She began working for Carhartt on May 5, 1995 as a sewing machine operator. Her job "set fly facing" required repetitive hand and arm movement in lifting and manipulating heavy fabric. She testified that after a three month training period, she was then paid production rate based upon eight and one-half bundles per day.

According to Penrod, on April 11, 1996, while handling a bundle of material, she felt her right wrist pop and experienced pain from her elbow to her shoulder. She sought medical attention that day and then came under the care of Dr.

Robert B. Lee on April 13, 1996. She has also been treated by Dr. Robert Reid, and Dr. Steven A. Rupert. Penrod testified she participated in Carhartt's "Rossiter" program which apparently is a plant sponsored physical therapy program aimed at reducing injuries.

Penrod was taken off work periodically for medical reasons and was also laid off for periods of time by Carhartt due to lack of work. She last worked for Carhartt on October 1, 1998 when she was laid off permanently. By the time of her hearing, she had obtained employment as a cashier at a service station. At the time of her hearing, she was not treating with any doctor and was taking medication prescribed by Dr. Rupert. She complained of pain at the base of her neck near her right shoulder which ran down the shoulder, the back of the right arm through the elbow over the top part of her forearm and into her wrist. She described the pain was worse with activity.

The medical evidence in the record consists of the records and deposition of Dr. Rupert, and the medical records of Drs. Reid and Lee.

Dr. Lee first saw Penrod on April 13, 1996 and diagnosed right wrist sprain with extensor tendinitis. He kept her off work until April 22, 1996 by which time her condition was much improved. Dr. Lee apparently did not see Penrod again until February 6, 1997 when she presented with complaints of recurrent pain in her right shoulder, right elbow, and right wrist. She gave a history of symptoms worsening over the past two weeks. X-rays of the cervical spine revealed no fractures, dislocations,

nor degenerative changes. She had tenderness on the right side of her neck and right shoulder with diminished grip strength on the right. Dr. Lee diagnosed repetitive strain injury of the right upper extremity with cervical sprain, right lateral epicondylitis and tenosynovitis. Penrod was temporarily excused from the production rate standard.

When re-examined on February 12, 1997, she complained her symptoms had worsened. Dr. Lee diagnosed cervical and right scapular sprain, strain, and excused her from work pending an evaluation on February 12, 1997. Apparently Dr. Lee ordered a cervical MRI which was performed on February 28, 1997. The results of the MRI are not contained in Dr. Lee's records but are contained in Dr. Rupert's records.

Penrod began treating with Dr. Reid on March 17, 1997, at which time she complained of pain in her entire arm and numbness from the wrist to the shoulder. Dr. Reid kept her off work until July 1997. Dr. Reid ordered an EMG and NCV of the right median nerve. The test ruled out carpal tunnel but indicated possible tendinitis. Dr. Naimoli, the neurologist who conducted the test, noted the findings do not correlate with Penrod's complaints of pain. Dr. Reid opined that the condition was non-surgical and recommended she sleep in a night splint and return to her regular duties on July 7, 1997. In a letter report dated August 12, 1997, Dr. Reid noted that Penrod had been performing her regular work and had multiple complaints, the most severe being a "headache". She also has "knots" in the trapezius. Dr. Reid opined that Penrod was not putting forth

maximum effort in a grip strength test. He continued to advise that her condition was non-surgical but that she sleep in a night splint if that gave her comfort. He would not recommend any restriction of work and felt that if she had trouble tolerating her job, she may need to change her occupation.

Thereafter, Penrod began to treat with Dr. Rupert who she first saw on November 20, 1997. On physical examination, Dr. Rupert found the hand and wrist to be normal except for tenderness and also found tenderness of the elbow, forearm, and shoulder. His diagnosis was: (1) sprain/strain; (2) right ulnar nerve neuritis; and (3) cervical strain with tenderness along the shoulder musculature. Nerve conduction studies were repeated and found to be normal. By December 11, 1997, her headaches and neck pain decreased. Dr. Rupert ordered an MRI of the cervical spine which was performed on January 13, 1998. It revealed mild degenerative disc narrowing at C5-6 but was otherwise unremarkable. Penrod continued to treat with Dr. Rupert through early 1998 and the physician last saw her on March 20, 1998. At that time, she complained of cervical strain, right elbow strain, and lingering headaches which were 50% better. Dr. Rupert opined she had reached maximum medical improvement as of this date. He suggested retraining and ordered a functional capacity evaluation.

Dr. Rupert performed a functional capacity evaluation in May 1998. He felt she could be placed on light duty with restrictions. He felt she could lift approximately 20 pounds occasionally, 10 pounds frequently, and 5 pounds constantly. She

would be restricted to occasional reaching with the right arm and was to avoid all overhead reaching on a frequent basis. He assessed a 4% impairment rating according to the AMA Guidelines.

At his deposition, Dr. Rupert opined that Penrod's problems were work-related due to trauma from the repetitive lifting nature of her job. He did not believe she was a surgical candidate. He also opined that she was not a malingerer because her complaints were consistent and injections into the facet of the joints helped.

Also appearing in the record were the "Rossiter" records from Carhartt. The "Rossiter" program is a form of physical therapy offered within the plant to help workers in the stretching and physical therapy type of movements to prevent injury. Penrod apparently participated in the "Rossiter" program from June 15, 1995 to November 18, 1997. Over this period of time, she complained of pain in her left shoulder, both shoulders, right shoulder, neck, right wrist, both wrists, left wrist, lower left arm, both wrists and hands, right arm, chest, head, and back.

The Arbitrator reviewed the law and medical testimony in the record in considerable detail and determined that the case involved two injuries. The first which occurred on April 11, 1996 resulted in a sprained right wrist with extensor tendinitis. He found that this injury had resolved and Penrod was able to return to work and actually became more productive.

The Arbitrator found the injury involving Penrod's entire right upper extremity to be more complex. He found no

objective evidence to support the injury, though there was subjective evidence of tenderness and pain. He further found that "[s]he established a pattern whereby she switches doctors once the doctor finds her condition improved." He pointed out her changing doctors from Lee to Reid to Rupert. He further reviewed the lack of objective evidence of her physical problems. He found that the repetitive use of her right upper extremity during the course of her employment as a sewing machine operator aggravated her right upper extremity periodically and ultimately manifested itself on April 11, 1996, causing her to miss work. He, however, did not make an award of occupational disability benefits based on the 4% rating given by Dr. Rupert. The Arbitrator stated: "This rating is not based upon any type of objective evidence and indicates a very minimal amount of functional disability." Therefore, he concluded that Penrod did not sustain a permanent injury of substantial proportions or permanent injury of significant consequence. While the soreness in her right upper extremity may have caused her some temporary discomfort, he found it did not inhibit her ability to do her work at Carhartt or with any other employer.

The Arbitrator did rule in Penrod's favor as to causation and further found that all complaints manifested themselves by 1996.

On appeal, Penrod argues that the Arbitrator exceeded his authority vested by the applicable law and his opinion is incomplete, ambiguous, and so contradictory as to make implementation impracticable. Contrary to Carhartt's arguments

that the standard of review on appeal is the same as from the Administrative Law Judge, the applicable regulation requires an infinitely more difficult burden on a party appealing from an ADR Arbitrator determination.

Under ADRs, a formal claim is not filed with the Department of Workers Claims for a work-related injury. Rather, with ADR, an employer and the recognized or certified exclusive bargaining representative enter into a binding collective bargaining agreement adopting an ADR plan. 803 KAR 25:150. Claims for benefits are filed with an ADR plan administrator rather than with the Department of Workers Claims. If claims are not settled then mediators or Arbitrators render final orders containing essential findings of fact, rulings of law, and rule on other pertinent issues.

While the filing of a notice appeal and briefs before this Board are the same as in taking an appeal from an Administrative Law Judge, Penrod's burden on appeal requires her to reach a higher threshold before the ADR Arbitrator's decision can be altered, modified or reversed. In this case, Penrod charges error under Section 5(2)(a) and (b). She argues that the Arbitrator improperly refused to translate Dr. Rupert's 4% impairment rating into occupational disability. She submits that since her injury was pre-December 12, 1996, Osborne v. Johnson, Ky., 432 S.W.2d 700 (1968) requires the Arbitrator to take into consideration her age, education, and work experience and her restriction to determine whether or not she suffered any occupational disability as a result of a work injury. In

essence, she argues the Arbitrator should have taken into consideration Dr. Rupert's restrictions and applied them to factors of Osborne v. Johnson to find she sustained permanent occupational disability.

A decision by an Arbitrator is a different animal than one reached by a judicial or administrative court. The Supreme Court, in Taylor v. Fitz Coal Company, Inc., Ky., 618 S.W.2d 432 (1981) explained the great deference given an Arbitrator's decision.

> Generally, an arbitrator's award is not reviewable by a court. See M. Domke, The Law and Practice of Commercial Arbitration Secs. 33.01-3402 (1968 & Cum.Supp. 1979); 5 Am.Jur.2d, Arbitration and Award Sec. 145 (1962 & Cum.Supp. 1980); G. Friedman, Correcting Arbitrator Error: The Limited Scope of Judicial Review, 33 Arb. J. 9 (No. 4 1978); J. Yarowsky, Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality, 23 U.C.L.A. L. Rev. 936 (1976). The rationale for this principle is inherent in the concept of arbitration. 'The decision by the arbitrator is considered an extension of the parties' voluntary agreement to arbitrate, and is final and binding.' M. Domke, supra at 304. In fact, the finality of decision has long been recognized as one of the objects of arbitration. Park Const. Co. v. Independent School Dist. No. 32, Carver County, 216 Minn. 27, 11 N.W.2d 649 (1943).
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> Logically included in this limitation on a court's scope of review is the nonreviewabiltiy of the sufficiency of the evidence supporting the award. Torano v. Motor Vehicle Accident Indemnification Corp., 19 App. Div.2d 356, 243 N.Y.S.2d 434 aff'd 15 N.Y.2d 822, 258 N.Y.S.2d 418, 206 N.E.2d 353 (1963); Pacific Vegetable Oil Corp. V. C.S.T., Ltd., 29 Cal.2d 228, 174, P.2d 441 (1946). This is so because when a court examines the evidence and imposes its view of the case it substitutes the decision of another tribunal for the arbitration upon which parties have agreed, and in effect sets

aside their contract. Fireman's Fund Ins. Co. v. Flint Hosiery Mills, Inc., C.A. 4, 74 F.2d 533, cert. den. 295 U.S. 748, 55 S.Ct. 826, 79 L.Ed. 1692 (1935). As early as 1855 the Supreme Court of the United States, assuming the absence of statutory or contractual provisions to the contrary, put it this way in Burchell v. March, 17 How. 344, 58 U.S. 344, 349, 15 L.Ed.96 (1855),

> If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.

The scope of review by a court of an arbitrator's award is similarly strictly limited in this Commonwealth. Our expression of the rule is that an award may be set aside if there has been a 'gross mistake of law or fact constituting evidence of misconduct amounting to fraud or undue partiality.' Smith v. Hillerich & Bradsby Co., Inc., Ky., 253 S.W.2d 629 (1952). See also First Baptist Church (Colored) v. Hall, Ky., 246 S.W.2d 464 (1952). Neither party here suggests fraud or undue partiality on the part of the arbitrators. An arbitrator's award in absence of such misconduct is not reviewable by our judiciary, and a fortiori, the evidence supporting that award may not be evaluated by our courts. The Court of Appeals exceeded its authority when it sifted the evidence presented during the arbitration hearings. Consequently, its decision to increase the amount of the award based on insufficiency of the evidence cannot stand.

Here, the standard of review is established by regulation promulgated by the Commissioner, Department of Workers Claims, but the deference afforded the Arbitrator's decision

cannot be over emphasized. An Arbitrator's decision will not be disturbed "merely because it was unjust, inadequate, excessive or contrary to law." Carrs Fork Corp. v. Kodak Mining Co., Ky., 809 S.W.2d 699 at 702 (1991). The Supreme Court has consistently held that an arbitration award is to be considered the end of the controversy-not the beginning. Id.

Penrod specifically charges error under Subsections (a) and (b) of 803 KAR 25:150, Section 5(2). To be reversed, the Arbitrator must exceed authority vested by applicable law. 803 KAR 25:010, Section 5(2)(a). If an Arbitrator determines a matter not within the terms of the arbitration agreement or grants relief not requested by the submission, then he has exceeded his duty and the award may be set aside. 6 C.J.S., Arbitration, Section 153. Clearly, that is not the case herein. The Arbitrator decided the matter submitted to him pursuant to the ADR plan.

Penrod also argues the Arbitrator's award must be set aside under Subsection (b). An Arbitrator's decision is incomplete if it makes a partial award and does not decide all the matters entrusted to him. 6 C.J.S., Arbitration, Section 117. Again, the Arbitrator herein clearly decided the issues submitted to him and therefore this Board is without authority to set aside his decision. Likewise, the Board finds the Arbitrator's decision was neither ambiguous nor so contradictory as to make implementation impracticable. In fact, Penrod, in her brief before this Board, does not point to anything in the Arbitrator's decision which she considers ambiguous or

contradictory. We conclude that the Arbitrator's decision is clear and his decision is not susceptible to inconsistent reasonable interpretations so as to render it ambiguous. In other words, it is not subject to more than one interpretation. Furthermore, we find it is not contradictory. The Arbitrator simply relied on the evidence contained in the record to reach his result. While Penrod would have rather had the Arbitrator rely on Dr. Rupert's 4% impairment and translate that rating into occupational disability, that does not render the decision ambiguous and contradictory.

Finally, we conclude that Penrod did not sustain her burden of proof on appeal in showing that the Arbitrator exceeded his authority vested by applicable law, nor was his final order incomplete, ambiguous, nor so contradictory as to make implantation impracticable.

Accordingly, the decision by Hon. Mark C. Webster, Arbitrator, is hereby **AFFIRMED** and the appeal of Angela Penrod is **DISMISSED.**

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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