

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001762-WC

LESTER RATLIFF

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-90-41623

RALPH BREWER D/B/A R & S TRUCKING;
ROBERT L. WHITTAKER, DIRECTOR OF THE
SPECIAL FUND; W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE, AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: GUDGEL, CHIEF JUDGE; KNOPF AND McANULTY, JUDGES.

KNOPF, JUDGE: Lester Ratliff appeals from a July 19, 1999, opinion of the Workers Compensation Board affirming a decision by an Administrative Law Judge (ALJ) that ordered restitution of Ratliff's disability benefits. Ratliff maintains that there was insufficient competent evidence to sustain the finding that restitution is appropriate. We disagree and so affirm the decision by the Board.

In May 1994, Ratliff was awarded benefits for total occupational disability. His disability allegedly stemmed from

injuries he suffered in August 1990 when he leapt from a run-away coal truck. He filed his claim for benefits in November 1992. Pursuant to that claim Ratliff twice testified, in April and August 1993, that he had not been employed since the day of his injury. In November 1994, Ratliff's former employer, R & S Trucking, Inc., moved to reopen Ratliff's claim on the ground that Ratliff had procured his benefits by fraud. R & S's owner, Ralph Brewer, alleged that throughout 1992 Ratliff had worked for R & S on an informal basis and that in August of that year Ratliff had leased from R & S a tractor-trailer rig suitable for hauling coal and rock. Ratliff's claim was reopened as of December 9, 1994.

From then until April 1999, when the ALJ issued his final opinion, the parties engaged in procedural sparring and inundated the record with mutual recriminations. Ratliff denied having done anything more for R & S after his injury than odd jobs, and, while he admitted that he had intended to lease from R & S a tractor-trailer for his son, he denied that the arrangement had ever come to fruition. The tractor had needed a new engine, Ratliff maintained, but in December 1992, before it had been made fully operable and before it had come into his possession, it had been destroyed in a wreck.

Of particular concern to this appeal is a motion by R & S in December of 1997 to submit into evidence documents substantiating Brewer's allegations. The documents included receipts for fuel charged to R & S during 1992 and signed by Ratliff; a lease-purchase contract for the tractor-trailer,

executed by Ratliff and Brewer in August 1992; and insurance records showing that Ratliff had purchased coverage for the tractor-trailer and had filed a claim following the December 1992 wreck. The insurance report also indicated that Ratliff had been operating the tractor when it had gone out of control and crashed over an embankment. Ratliff moved to have these documents stricken from the record, or, alternatively, to be granted time to respond to them. The ALJ granted him time to respond. Ratliff eventually admitted having purchased insurance and having endorsed the benefit checks following the wreck, but he claimed to have done both at Brewer's behest and to have given the endorsed checks to Brewer. He denied that he had been operating the tractor when it was destroyed.

In his final opinion the ALJ expressed frustration with both parties' apparent lack of candor. Relying heavily on the documents submitted by Brewer, however, he found that Ratliff had misrepresented his workers' compensation claim and was liable, therefore, for restitution. On appeal to the Board, Ratliff argued that those documents should have been stricken because they had been proffered without authentication, and that without them there was insufficient evidence of his alleged fraud to find him culpable. Affirming this aspect of the ALJ's decision,¹ the Board agreed with Ratliff that the documents may have been improperly admitted into evidence, but ruled that he had failed

¹The ALJ determined that Ratliff was liable for restitution as of the date R & S filed its motion to reopen. The Board ruled that the ALJ should have considered restitution from the beginning of the award and remanded for that consideration. This portion of the Board's ruling has not been appealed.

to preserve that issue for review. His motion to strike, the Board noted, had not specified any ground for objecting to the documentary evidence, and even after the ALJ had pointed out this defect, Ratliff had declined to elaborate. Consequently, the Board ruled that his explanation on appeal was too late.

Ratliff now argues that the Board erred by refusing to review his evidentiary claim. The ground for his motion to strike, he asserts, was obvious, and thus his motion preserved that obvious issue for review. Even if the disputed documents are included, Ratliff further argues, the evidence does not support the conclusion that he procured his workers' compensation benefits fraudulently.

This latter argument need not long detain us, for, as the parties acknowledge, our review of the agency's factual determinations is narrowly restricted. Where, as in this reopening, the party with the burden of proof was successful before the fact finder, "the issue on appeal is whether substantial evidence supported the [fact finder's] conclusion." Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999). As the ALJ noted, the documents R & S submitted, particularly the insurance documents, provide that substantial evidence. They confirm Brewer's testimony that Ratliff had resumed truck driving for hire prior to receiving his workers' compensation disability award and they stand in diametric opposition to Ratliff's sworn testimony in the course of those proceedings. If the documents were validly considered, therefore, the decisions by the ALJ and the Board must be affirmed.

Were those documents validly considered? Or, rather, did the Board err by refusing to address that question? We may reverse the Board's application of its procedural rules only if it clearly erred. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992). We are not persuaded that it did.

With only minor variation, the Board has adopted the judicial rules of evidence for proceedings before the ALJs. 803 KAR 25:010 § 15(1). One of those rules, KRE 103, provides in part as follows:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, and upon request of the court stating the specific ground of objection, if the specific ground was not apparent from the context[.]

Unless the context made the ground of Ratliff's motion apparent, his failure to specify that ground precludes his raising the issue on appeal. We are not persuaded that the ground of the objection was apparent. Although authentication of the documents may ordinarily have been an obvious question, in tendering its motion to submit these documents, R & S cited 803 KAR 25:010 § 15(3) which provides in part that

[a]ny party may file as evidence before the arbitrator or administrative law judge pertinent material, and relevant portions of hospital, Armed Forces, or Social Security records. . . .

The ALJ could well have wanted help interpreting this rule and so could rightly have thought that any earnest objection to the documents would address it. Ratliff did not do so.

Moreover, the ALJ stated that among his reasons for overruling the motion to strike was Ratliff's failure to specify his grounds. Even if Ratliff had formerly believed that the ground was obvious, he was thereupon put on notice that the ALJ did not agree. If he wished to pursue the matter, therefore, it behooved Ratliff to make his objection specific. There is one last point. Ratliff's motion to strike requested extra time to reply as alternative relief, and the ALJ granted him that extra time. Having obtained the relief that he himself requested, Ratliff will not now be heard to complain that the ALJ erred.

For these reasons, we agree with the Board that Ratliff waived his right to object on appeal to the admission of R & S's documentary evidence. We also agree that the evidence of record supports the ALJ's finding that Ratliff obtained workers' compensation benefits by fraud and so should be required to make restitution. Accordingly, we affirm the Board's July 19, 1999, order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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