

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002250-WC

CARHARTT, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-00527

JOEY AUDUS; MARK WEBSTER,
ADR ARBITRATOR; AND THE WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, EMBERTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Carhartt, Inc., a textile processing company, appeals from an August 30, 1999, order of the Workers' Compensation Board affirming an award of medical benefits and temporary total disability benefits (TTD) to Joey Audus, a production worker at Carhartt's facility in Madisonville, Kentucky. At the time of Audus's alleged injury, Carhartt and its employees had duly adopted an alternative dispute resolution program (ADR). Audus's claim was decided by an arbitrator pursuant thereto. Carhartt maintains that the arbitrator misconstrued recent changes to this state's workers' compensation

statutes and, that in overlooking the arbitrator's errors, the Board misapplied its standard of review. Being unpersuaded that the Board adopted an inappropriate standard of review or that it otherwise misconstrued controlling law or precedent, we affirm its order.

Audus's job involved loading a large roll of cloth onto a spindle above a thirty-five yard long table and then unrolling the cloth back-and-forth along the table's length. The table top was about waist high, and the work sometimes required Audus to stand on it. In August 1997, Audus (who was then in his mid-thirties) was jumping down from the table when his shoe caught on something and he fell. He landed heavily on his right hip. The next day the hip had become so sore that Audus sought medical attention. Examinations did not clearly reveal what damage had been caused by the fall. There were no major fractures, but there were signs, such as inflammation, that were likely to indicate small bone fractures, connective tissue damage, or a compression of the joint. The examinations also showed that a small portion of the bony part of the joint had lost its blood supply and died, a disease condition known as avascular necrosis. The examining doctor thought it unlikely that Audus's fall had caused the necrosis, but when Audus's pain persisted, the doctor concluded that the necrosis was interfering with the healing process and that surgery was necessary.

Accordingly, in December 1997, Audus underwent a "core decompression," a surgical invasion of the necrotic area designed, in part, to induce new blood vessels and bone tissue to

grow there. Immediately following this surgery, Audus enjoyed some pain relief, but the relief, he alleges, was short-lived. Within two or three months, his hip had again become so painful as to be disabling. At that point, Audus's doctor began to recommend the more radical hip-replacement surgery. It was also at about that point that Audus's claim came before the arbitrator.

In the arbitration, Audus alleged that the work-place fall had caused his hip problems and that he was thus entitled to benefits. Carhartt insisted that the pre-existing disease, the avascular necrosis, was the cause of Audus's problems and that Audus had thus failed to prove an "injury" within the contemplation of the 1996 revisions to the Workers' Compensation Act. In particular, Carhartt contended that the revised statutory definition of "injury"¹--by emphasizing that work-place traumas must, if they are to be deemed injury producing, be the *proximate cause of an objectively evidenced* harmful bodily change--was intended to narrow an employer's potential liability for losses arising from its employees' pre-existing conditions. Because, Carhartt maintained, the evidence did not clearly establish that the fall rather than the disease was the proximate cause of Audus's pain, and because there was no clear, objective evidence apart from the diseased portion of Audus's hip joint to account for his pain, the revised statute precluded liability in this case. The arbitrator, as noted above, disagreed with Carhartt's argument. He found, based largely on the testimony of

¹KRS 342.0011(1)).

Audus's treating physician, that the fall rather than the disease was the main factor in rendering Audus symptomatic. And he concluded that this finding satisfied the amended statute's "objective evidence" and "proximate cause" requirements. Accordingly, in March 1999 the arbitrator awarded Audus medical benefits (including hip-replacement surgery) and TTD benefits until his maximum medical recovery could be determined.

Carhartt appealed to the Board and argued that the arbitrator had misconstrued KRS 342.0011(1), particularly its provision with respect to proximate cause. The Board, rather than addressing the merits of Carhartt's reading of the statute, focused on the difference between arbitration awards and awards by an Administrative Law Judge (ALJ). The two types of awards, the Board opined, are subject to different standards of review. While the decisions of an ALJ are reviewed (assuming appropriate preservation of the alleged error) for clearly erroneous factual determinations, for abuses of discretion, and for erroneous conclusions of law, the review of an arbitrator's award has been limited, both under regulation--803 KAR 25:150 § 5--and under precedent, to "gross mistake[s] of law or fact constituting evidence of misconduct amounting to fraud or undue partiality."

Taylor v. Fitz Coal Co., Inc., Ky., 618 S.W.2d 432, 433

(1981) (internal quotation marks and citations omitted).

Convinced that the error alleged by Carhartt did not rise to this latter standard, the Board affirmed the arbitrator's award. It is from this ruling that Carhartt appeals.

We may observe at the outset that our own standard of review in this case is generally a deferential one.

The function of . . . 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.

Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). Where the issue on appeal concerns the Board's construction of one of its own regulations, furthermore, there is additional reason for deference. Delta Air Lines, Inc. v. Commonwealth of Kentucky Revenue Cabinet, Ky., 689 S.W.2d 14 (1985). This said, we turn to the substance Carhartt's appeal.

As the Board observed, KRS 342.277 has, since 1994, provided for alternative dispute resolution within the workers' compensation system:²

- (1) In accordance with administrative regulations promulgated by the commissioner, a collective bargaining agreement between an employer and a recognized or certified exclusive bargaining representative that contains the following provisions may be recognized as valid and binding:
 - (a) An alternative dispute resolution system to supplement, modify, or replace the provisions of this chapter that relate to the resolution of disputes, and which may include but is not limited to mediation and arbitration, the results of which may be binding on the parties;
 - . . .
 - (2) A system of arbitration may provide that the decision of the arbiter is subject to review by an administrative law judge.

²There is an irony to this, of course, for, as Larson notes, "the workers' compensation system is already an alternative dispute resolution system." Larson, Arthur, *Larson's Workers' Compensation Law*, § 125.06(1) (2000).

Pursuant to this statute, the Commission has established a mechanism whereby employers and employees may have ADR plans certified and recognized as binding. 803 KAR 25:150. This regulation establishes minimum plan requirements including the following provision with respect to appeals:

Section 5. Appeals. (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. . . .

(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;

(b) The final order is incomplete, ambiguous or so contradictory as to make implementation impracticable;

(c) The mediator or arbitrator was patently biased or partial;

(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 proceeding; or

(e) The final order of the mediator or arbitrator was procured by fraud.

We have not been referred to the ADR plan governing Audus's arbitration, but the parties do not dispute that it was duly certified and made binding pursuant to the above statute and regulation. Nor is there any suggestion that the plan's appeal provisions differ from those just quoted.

In construing these provisions, the Board relied heavily on judicial decisions discussing the standard of review applied to commercial arbitration awards. As indicated above, the modern practice has been for courts to grant relief from such awards only in cases of gross error, such as the arbitrator's

disregard of well-established law. Carrs Fork Corporation v. Kodak Mining Company, Ky., 809 S.W.2d 699 (1991). The principal reason for this judicial deference to arbitrators' decisions applies in the workers' compensation context as well: the parties have agreed to an expedited procedure for settling their disputes; the arbitrator's decision is an extension of that agreement; and the Board will not remake it. Cf. Taylor v. Fitz Coal Co., Inc., *supra*. We are satisfied, therefore, that the Board did not err in determining its standard of review. Carhartt is not entitled to relief unless the arbitrator committed an error of law or fact so gross as to satisfy at least one of the conditions listed in 803 KAR 25:150 § 5, and, conversely, those conditions are appropriately understood as intending the same deference that has been accorded arbitration awards in other contexts.

Conceding that this is the proper standard of review, Carhartt asserts that the Board misapplied it. It maintains that the arbitrator's alleged misreading of KRS 342.0011(1) amounts to his "exceeding the authority vested by applicable law." Rejecting this argument, the Board reasoned that ordinary questions of statutory interpretation are not outside the arbitrator's authority and that such interpretations, arrived at in good faith (of which there is no doubt in this case), are not subject to review under 803 KAR 25:150 § 5 for mere error. We agree.

Although the arbitrator is not authorized to ignore applicable, well-established law (*i.e.* rules no longer requiring

interpretation), or to disregard the plain meaning of statutory words and phrases, Carrs Fork Corporation v. Kodak Mining Company, *supra*, that is not what happened here. The amended statute upon which Carhartt relies presented an unsettled issue concerning causation in workers' compensation cases. As Carhartt acknowledges, "causation" is a difficult concept throughout the law, and not surprisingly even this amended statute does not render the meaning of that term in this context plain. Interpretation was required, and the arbitrator's interpretation was plausible. Where this is the case in an arbitration, where interpretation is necessary and where, as here, the arbitrator's interpretation is unbiased and plausible, it is precisely the arbitrator's interpretation, right or wrong, for which the parties have bargained. In giving effect to that bargain, the Board properly deemed the statutory misconstruction alleged by Carhartt to be outside the scope of its review.

For these reasons, we affirm the August 30, 1999, order of the Workers' Compensation Board.

ALL CONCUR.

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