

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003046-WC

SANDRA TODD

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-88260

KENTUCKY RIVER FOOTHILLS DEVELOPMENT
COUNCIL, INC.; DONNA H. TERRY,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, EMBERTON AND GUIDUGLI, JUDGES.

EMBERTON, JUDGE: Sandra Todd appeals from an opinion of the Workers' Compensation Board upholding the Administrative Law Judge's conclusion that she had failed to establish a work-related injury. Appellant argues in this appeal that the Board erred: (1) in refusing to declare the ALJ's decision "null and void" due to misconduct on the part of her first attorney; (2) in failing to find that the evidence before the ALJ compelled a decision in her favor; (3) in upholding the ALJ's decision that a second work-related injury produced no occupational disability;

and (4) in affirming the ALJ's calculation of her average weekly wage. We affirm.

In the prosecution of her claim for workers' compensation benefits, appellant alleged a work-related injury on July 27, 1997, while performing her duties as a home health care aide for appellee, Kentucky River Foothills Development Council. She testified that on her last assignment of the day she began to experience low back pain while lifting a five-gallon bucket of water to water some flowers for a one hundred two-year-old patient. Appellant stated that after resting for a few minutes she was able to finish the job before going home. Appellant also testified that the following day she notified her supervisor, Diane Worthington, that she was feeling bad and would be unable to work.

Appellant indicated that on the next day, June 29, 1997, she again contacted Worthington to inform her that she had injured her back. Although she initially testified that she immediately saw her family physician, there is some discrepancy in her testimony as to the date of the injury and the date she sought medical attention, including August 1, 1997, more than one month after the alleged incident. Appellant also testified that Worthington informed her that she was not eligible for workers' compensation benefits because she did not report the incident within twenty-four hours of its occurrence. Subsequently, appellant sought and received short term disability benefits. Upon her return to work, appellant sustained a second injury on February 17, 1998, while emptying a large garbage can. She

promptly reported this incident to Worthington. Appellant testified that she had been seeing Dr. John Gilbert because of the previous injury and although she continued that treatment, she was also seen by other physicians. Finally, appellant stated that she was unable to return to work and suffers constant pain in her low back.

Worthington's testimony painted a different picture. Although she recalled appellant contacting her in June 1997, indicating that she may have hurt her back at work, Worthington denied telling appellant that she could not file a workers' compensation claim. To the contrary, Worthington testified when she asked appellant about filing a claim she stated that she did not want to do so because she didn't want to see a doctor. Worthington also testified that appellant told her that she did not want to see a doctor because she believed her problems were related to an old injury. Worthington admitted telling appellant that she should have reported the injury within twenty-four hours, but denied ever telling her that she could not file a workers' compensation claim. Through the testimony of Carla Chapman the employer's payroll/benefits coordinator, notes taken by Worthington after the February 27, 1998, injury were introduced into evidence. These notes which were signed by Worthington indicate that appellant's husband called her on March 2, 1998, stating that appellant had injured her back lifting a garbage can and that she would need to go back on disability. Appellant had been on short-term disability from August 11 through mid-September 1997. Worthington's notes also indicated

that both appellant and her husband told her that she did not want to file for worker's compensation benefits because she felt this injury was related to her previous back problems and that she did not want to see any doctor other than Dr. Gilbert.

After reviewing medical testimony from several physicians and noting a number of inconsistencies in appellant's testimony, the ALJ concluded that appellant had failed to meet her burden of proving a work-related injury in June 1997. The ALJ also concluded that while appellant had sustained an injury in February 1998, it was merely a temporary aggravation of an already existing condition. Therefore, benefits relating to that injury were limited to the period of temporary total disability she had experienced from that incident. Although an arbitrator who had considered the matter reached a different conclusion, that decision lost all legal import upon appellant's request for a de novo hearing before the ALJ.

As she did before the Board, appellant now seeks relief from the decision of the ALJ arguing that she was not informed by her counsel of a request for a de novo hearing and that, had she been so informed, she would not have agreed to filing such an appeal. Although appellant asks for reinstatement of the decision of the arbitrator, the relief is no longer available to her. First, as the Board correctly determined, any disagreement between appellant and her attorneys cannot be redressed in the context of her compensation proceeding as the Board lacks jurisdiction over such matters. There are other avenues available to appellant for resolution of her dispute with the

conduct of her counsel. Second, once her request for a de novo hearing pursuant to Kentucky Revised Statutes (KRS) 342.275 had been lodged, the benefit review determination by the arbitrator lost all legal effect. As provided in the analysis of de novo review set out in Louisville & Jefferson County Planning & Zoning Com'n v. Grady,¹ a de novo hearing means “trying the dispute anew as if no decision had been previously rendered.” Thus, the effect of an appeal from a benefit review determination is that the claim in its entirety is before the ALJ as though there had been no previous determination. Therefore, once a de novo hearing has been conducted, there is no prior determination to reinstate. In our opinion, once an appeal is taken from the benefit review determination, the claim may be resolved only by the claimant voluntarily dismissing her claim by agreement of the parties with the approval of the ALJ, or by ALJ decision.²

Next, appellant asserts that the evidence before the ALJ compelled a finding of a work-related injury in June 1997. We disagree. In Western Baptist Hospital v. Kelly,³ the Supreme Court directed that review of opinions of the Board be limited to ascertaining whether it “overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” Here, because a review of the record convinces us that the ALJ’s assessment of the evidence is “neither patently unreasonable nor flagrantly

¹ Ky., 273 S.W.2d 563, 565 (1954).

² See, KRS 342.325.

³ Ky., 827 S.W.2d 685, 687-88 (1992).

implausible," we must affirm the Board's decision.⁴ It was well within the prerogative of the ALJ to determine the weight and credibility to be accorded the evidence received. As the Board points out, we are dealing with an unwitnessed accident which was disputed by various other elements of evidence and thus the ALJ, drawing reasonable inferences from that evidence, could legitimately conclude there was no work-related injury.

The same reasoning dispels appellant's contentions with respect to the medical evidence which was at best conflicting. There was ample evidence to support the ALJ's finding that the February 1998, injury was merely an aggravation of a pre-existing condition which did not necessitate an assessment of permanent occupational disability benefits.⁵

Finally, we are in complete agreement with the Board that appellant did not show an error in the computation of her average weekly wage based upon the failure to include the \$100 per week she received for work performed by "Todds' Cleaning." Although she correctly states that the average weekly wage may be increased by proof of concurrent employment, appellant failed to prove entitlement to any increase. The testimony clearly indicates that checks were issued in the name of appellant's son and while there is evidence that she may have been present while the work was being performed, it falls short of mandating a finding that she received pay for this work.

⁴ 827 S.W.2d at 688.

⁵ Calloway County Fiscal Court v. Winchester, Ky., 557 S.W.2d 216 (1977).

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kaye L. Leighton
Mt. Sterling, Kentucky

BRIEF FOR APPELLEE KENTUCKY
RIVER FOOTHILLS DEVELOPMENT
COUNCIL, INC.:

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