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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002936-WC

WAL-MART STORES, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-71003

JUDY MCCLURE; HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BARBER, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Wal-Mart Stores, Inc. has appealed from an opinion of the Workers' Compensation Board entered on November 22, 2000. The Board reversed the findings of the Administrative Law Judge and set aside the 15% reduction in benefits penalty the ALJ had assessed against the appellee, Judy McClure. Having concluded that the Board improperly usurped the authority of the ALJ in setting aside the 15% penalty, and that the ALJ made inadequate findings of fact, we reverse and remand.

Judy McClure was injured while performing her work duties at Wal-Mart on March 19, 1997. While stocking pillows, she failed to follow her employer's policy which required an employee to use a ladder when placing an item on a high shelf. Instead, McClure stepped on a "metal platform" to help her reach the shelf. When this platform slipped, she fell and injured her back.

On April 20, 1999, after McClure had been seen by eight different physicians, a final benefit review determination was made by the arbitrator. In addition to finding McClure to be totally disabled, the arbitrator found that her injuries were caused, in part, by her failure to follow Wal-Mart's safety policy. The ALJ agreed with the arbitrator's findings, and on June 15, 2000, granted McClure disability benefits, but reduced her benefits by 15% pursuant to KRS[1] 342.165, as a result of her failure to follow her employer's safety policy.

McClure filed a petition for reconsideration with the ALJ contesting the 15% penalty. Specifically, McClure argued that the penalty should not be assessed against her, even though she was aware of the safety policy, because on the night of her injury no ladder was available for her use. On July 18, 2000, the ALJ upheld the 15% penalty, without addressing McClure's argument that it was impossible for her to use a "non-existent ladder." On appeal, the Board, relying exclusively on McClure's uncontradicted testimony that no ladder was available for her

[1]Kentucky Revised Statutes.

use, set aside the 15% penalty the ALJ had assessed. This petition for review followed.

There are two issues for our review (1) whether the Board improperly usurped the authority of the ALJ in setting aside the 15% penalty; and (2) whether the ALJ made sufficient findings of fact in support of his decision to assess the 15% penalty against McClure's benefits.

We hold that the Board exceeded its authority when it improperly usurped the authority of the ALJ by setting aside the 15% penalty assessed against McClure's benefits. In its opinion reversing the penalty assessed by the ALJ, the Board stated:

> As previously noted, the only evidence relating to this issue comes from McClure herself. At no time did she attempt to imply that there was not an appropriate policy in effect or that she was in any way unaware of this policy. Clearly, as found by the ALJ, McClure knew there was a safety procedure in place by the employer which would be violated if she did not use a ladder. That portion of the ALJ's finding is certainly supportable by the evidence. However, thereafter a difficulty arises. As found in Barmet of Kentucky, Inc. v. Sallee, Ky.App., 605 SW2d 29 (1980), knowing and complying are not necessarily the same thing. The employer in no way disputes any aspect of McClure's testimony concerning her efforts at locating a ladder nor that she was unable to find one.
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> In Barmet, the court took note of the fact that simply because fuse pullers were required by regulation to be used, if none were available clearly the employee could not comply. That something may have been furnished by the employer on the date preceding an incident but for whatever reason was unavailable on the date of the injury does not establish, in our opinion, that the "safety appliance [was] furnished by the employer." We believe the availability of ladders does not go solely to the issue of whether it was furnished by the employer but

> it also raises a question concerning the intent of the employee to violate the safety rule. Even a voluntary violation of a safety rule, as found by the ALJ here, does not in and of itself establish intent to violate the rule. While on the surface this may appear to be splitting hairs, in reality employees, and for that matter employers, are, on occasion, placed in the proverbial Hobson's choice situation. Do you not perform your job responsibilities or do you undertake those responsibilities in violation of a safety regulation after making an effort to comply with the rule?

While the Board's reasoning in its opinion is sound, it has erred by accepting McClure's testimony as an established fact. The ALJ as the trier of fact is charged with deciding the credibility of a witness. In Bullock v. Gay,[2] the former Court of Appeals stated:

> "Generally, testimony given by a disinterested witness, who is no way discredited by any other evidence, to a fact within his own knowledge, which is not in itself improbable or in conflict with other evidence, is to be believed; and in many cases it is said that the facts so given are to be taken as legally established. . . . It does not necessarily, follow, however, that a verdict or finding must be made in favor of the party introducing uncontradicted testimony, especially if such testimony discloses a variety of circumstances from which different minds may reasonably arrive at different conclusions as to the ultimate facts or if the uncontradicted evidence is that of interested witnesses. There are many cases illustrating the principle that the testimony of a witness, though uncontradicted, is for the triers of fact, whether court or jury, who are not bound thereby" [emphases added].

[2]296 Ky. 489, 491-92, 177 S.W.2d 883, 885 (1944)(quoting 20 Am.Jur. §1180).

In the case at bar, since McClure's testimony clearly came from an interested party, the evidence she provided was not necessarily to be taken as establishing a fact. Whether her testimony is to be believed is within the purview of the ALJ as the fact-finder. Therefore, the Board improperly usurped the authority of the ALJ by accepting McClure's testimony as true. Accordingly, the decision of the Board which set aside the 15% penalty is reversed.

Additionally, we hold that the ALJ's opinion contained inadequate findings of fact to support his decision to assess the statutory penalty. It was error for the ALJ not to adequately address McClure's testimony. She testified in part:

> I don't know what had been done that night, but all the departments around -- the shoe department, the clothing department, even grocery department -- didn't have ladders. They were gone. . . I went in the back and looked for one and asked some of the men in the back, you know, where the ladders were. They said they didn't know. I went in other departments looking for ladders...[b]ut they weren't there.

As we mentioned above, this testimony by McClure was uncontradicted by Wal-Mart. However, the ALJ made inadequate reference to the testimony in his opinion. In his decision to assess the penalty, the ALJ made the following findings:

> The plaintiff described an injury on March 19, 1997 when she fell from a platform and landed on the floor and the platform striking her back. She acknowledged she was told to use a ladder to get items from the shelves but a ladder was not available.
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> . . . .
>
> The defendant-employer has requested a reduction in plaintiff's award of 15% for a

> violation of KRS 342.165 and it is apparent to the undersigned that the plaintiff knew she was violating safety procedures at the time the injury occurred. Accordingly, her award shall be reduced by 15% for her intentional failure to use a safety appliance furnished by the employer pursuant to KRS 342.165.

Nothing else was stated in the ALJ's opinion regarding the unavailability of a ladder. We believe more was required.

In Shields v. Pittsburg & Midway Coal Mining Co.,[3] this Court explained the necessity of having specific findings of fact:

> It is not the intention of the Court to place an impossible burden on the Workers' Compensation Board [the ALJ has replaced the Board as fact-finder] but only to point out that the statute [KRS 342.275] and the case law require the Board to support its conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the basis for the decision. As the circuit court said, "Concededly, it takes more time in writing an Opinion to tailor it to the specific facts in an individual case, however, this Court feels that the litigants are entitled to at least a modicum of attention and consideration to their individual case" [emphasis added].[4]
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> . . . .
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> [T]he Board must state its findings with enough specificity for the Court to conduct a meaningful appellate review [emphasis added].[5]

In the case sub judice, the ALJ has failed to support his conclusions of law with facts drawn from the evidence. He

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[3]Ky.App., 634 S.W.2d 440 (1982).

[4]Id. at 444.

[5]Id. at 441.

merely assessed the penalty because McClure did not use a ladder; he failed to explain how McClure's uncontradicted testimony had affected his decision. This omission is of particular concern, because the weight given to McClure's testimony would have a significant impact on the applicability of the statutory penalty.

A similar problem occurred in Shields. The Board, the body previously charged with fact-finding, had failed to mention the amount of weight it had given particular testimony in rendering its decision. This Court remanded the case and ordered the Board to make more specific factual findings, because if weight were indeed given to the testimony in question, it would have been error to do so. To be able to correct an error on appeal, if in fact one has occurred, the reasoning behind the Board's decision had to be known.[6]

In the instant case, like Shields, whether the ALJ believed McClure's testimony must be known in order for a meaningful appellate review to be conducted. If McClure had a plausible reason for not using a ladder, then the penalty was not appropriate.

In Barmet, supra, a foreman was electrocuted while changing a fuse, and the employer argued that any benefits should be reduced by 15% because the company's safety policy provided that employees of Sallee's job classification were not permitted to change fuses, and also that a "fuse-puller"[7] should have been

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[6]Shields, supra at 442.

[7]A "fuse-puller" is simply a device used by a worker to remove a fuse.

used. However, even though it was against company policy for the decedent to change a fuse, "there was [also] substantial evidence that fuse-pullers were not available." Accordingly, this Court stated that the penalty was not applicable since compliance with the safety standard was not practical.

This rule from Barmet is consistent with case law outside this jurisdiction. In Van Waters & Rogers v. Workman,[8] the Supreme Court of Utah stated:

> A workable formula in distinguishing willful failure from less culpable conduct is set out in 1A A. Larson, Workmen's Compensation, § 32.30 (1982) and § 33.40, respectively:
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> . . . .
>
> But the general rule can be stated with confidence that the deliberate defiance of a reasonable rule laid down to prevent serious bodily harm to the employee will usually be held to constitute wilful misconduct, in the absence of a showing of . . . specific excuses. . . .
>
> If the employee had some plausible purpose to explain his violation of a rule, the defenses of violation of safety rules or wilful misconduct are inapplicable, even though the judgment of the employee might have been faulty or his conduct rash. . . .

Therefore, if McClure's testimony is accepted by the ALJ as true, then it would be error for him to assess the penalty. The absence of a ladder would have made McClure's

[8]700 P.2d 1096, 1099 (Utah, 1985). See also General American Tank Car Corp., v. Borchardt, 69 Ind.App. 580, 122 N.E. 433 (1919).

compliance with the safety standards impracticable, and she would have had a plausible reason for stepping on the platform.

However, whether the ALJ made this error in assessing the penalty cannot be determined on appeal until the ALJ adequately explains the reasoning behind his decision. If the ALJ did not believe McClure's testimony, that should be reflected in his opinion; and the reviewing body can then determine whether the penalty was properly assessed. The ALJ's opinion, in its current form, prevents meaningful appellate review. It is impossible to determine whether the ALJ believed McClure's testimony. Accordingly, this matter is remanded to the ALJ with instructions to make specific findings of fact regarding McClure's testimony.

In summary, the Board improperly usurped the authority of the ALJ when it accepted McClure's testimony as establishing a fact that there was no ladder available. The credibility of her testimony must be decided by the ALJ. Additionally, the ALJ did not support his decision to assess the penalty with sufficient findings of fact, as he did not adequately address McClure's testimony. Meaningful appellate review is thus impossible due to the inadequate factual findings. Therefore, the opinion of the Board is reversed and this matter is remanded to the ALJ for further findings consistent with this Opinion.

ALL CONCUR.

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