RENDERED: November 21, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001478-WC

AXMANN CONVEYING SYSTEMS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-98-00858

RICKY VANCE;
HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEE

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

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND HUDDLESTON, JUDGES.

GUIDUGLI, JUDGE. Axmann Conveying Systems (ACS) appeals from an opinion of the Workers' Compensation Board (the Board) which affirmed an opinion and award entered by Administrative Law Judge Lloyd Edens (the ALJ)awarding benefits to Ricky Vance (Vance). We affirm.

On March 6, 1998, Vance, who was employed by ACS, sustained injuries to his neck and back as a result of a work-related accident. Despite being injured, Vance continued to work until March 12, 1998. The circumstances surrounding Vance's cessation of employment with ACS were hotly disputed.

Vance testified that on March 12, 1998, he went to lunch off-site with two other employees, one of whom was his son. When the three return to work, Vance's supervisor, Bernd Huber (Huber) called him into his office. According to Vance, Huber told him that someone told him that the two employees Vance went to lunch with had smoked marijuana during lunch. Vance testified that Huber told him to tell him that his co-workers smoked marijuana during lunch, quit, or be fired. Vance stated that when he told Huber that he did not see his co-workers smoke marijuana, Huber left the office, fired the two employees, and returned. According to Vance, Huber then told him to go home, think about the situation, and call him later about coming back to work. Vance decided not to return to work. Vance believes that this whole incident occurred because he and the other two employees were trying to unionize ACS's employees.

ACS's version of these events is quite different. Huber testified at his deposition that Vance and the two employees smelled like marijuana and beer when they returned from lunch. Acting on information that the other two employees had smoked marijuana during lunch, Huber fired them immediately. Huber testified that Vance asked for permission to leave with the two employees because he rode to work with them. According to Huber, Vance later called and stated that he would not be returning to work because, among other reasons, he no longer had a ride to work. Huber denied Vance's allegation that he was fired for attempting to organize a union at ACS, and testified

that to the best of his knowledge Vance was never involved in union organization efforts.

Vance and the two other employees filed a complaint with the National Labor Relations Board (NLRB) in which they alleged that they had been fired as a result of their attempts to organize a union at ACS. All of the parties agree that the NLRB action was settled. Vance testified that he received $10,000 as a result of the settlement, and that he was told that this amount represented lost wages. Vance also testified that he paid taxes on the amount he received from the settlement. Vance admitted that the did not know what period of time the payment covered as far as wage loss.

ACS provided affidavits from Huber and Rene' Heck (Heck). In his affidavit, Huber stated that Vance "received back wages in the amount of $10,500.00 as a compromise settlement of a disputed claim with regard to the NLRB action." Heck's affidavit stated that "[i]n a compromise settlement of [the NLRB claim], we agreed to pay lost wages in the amount of $10,500.00, to run from March 12, 1998.

Counsel for ACS asked Vance to provide a copy of the settlement agreement and he agreed to look for it and provide a copy if he could find it. Counsel for Vance also asked ACS to provide a copy of the settlement. Finally, Huber agreed to provide a copy of the settlement agreement. Despite all of these agreements to provide copies of the settlement agreement, neither party placed a copy of the settlement agreement in the record.

In an opinion and award entered December 22, 2000, the ALJ awarded benefits to Vance based on a 9% permanent disability rating. The ALJ noted that ACS had paid a total of $7,314.65 in TTD benefits to Vance from March 3, 1998 to August 30, 1998, and again from April 7, 1999, to May 18, 1999. In response to ACS's argument that it was entitled to a credit equal to the amount paid to settle the NLRB claim, the ALJ held:

> The Petitioner received a settlement from the Employer as a result of a proceeding brought before the [NLRB]. The documents concerning that proceeding have not been filed, and KRS 342.730 provides only for set off for payments for employer funded disability or sickness and accident plan [sic] pursuant to KRS 342.730(6) or unemployment insurance benefits pursuant to KRS 342.730(5). Accordingly, the Employer shall not receive credit for amounts paid pursuant to the settlement of the claim brought before the [NLRB].

The Board affirmed the ALJ's opinion and award on June 13, 2001, and this appeal followed.

ACS maintains that both the ALJ and the Board erred in refusing to allow it a credit equal to the amount paid to Vance in settlement of his NLRB claim. ACS points to the fact that everyone agrees the settlement was for lost wages, and maintains that simple math shows that the settlement covers 26.38 weeks of lost wages ($10,500.00 / $398.02 average weekly wage = 26.38 weeks). ACS further contends that at a minimum it is entitled to a credit equal to the amount of TTD paid after March 12, 1998, and argues that to the extent a credit is not given, Vance has received a double recovery. It maintains that its position is

supported by Hardaway Management Company v. Southerland, Ky., 977 S.W.2d 910 (1998). We disagree.

Under KRS 342.730, employers are only entitled to a credit against their workers' compensation liability for:

> payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter[.]

KRS 342.730 (6). The payments made by ACS to settle Vance's NLRB claim clearly do not fall under any of the provisions of KRS 342.730(6).

We also agree with the Board that Hardaway is not controlling. In that case, an employee who was fired after sustaining a work-related back injury received both an award of workers' compensation benefits and a judgment in her favor against Hardaway covering lost wages in a civil action she filed for wrongful termination. Having paid TTD benefits, Hardaway argued that it was entitled "to a credit against the judgment for the amount of workers' compensation benefits paid[.]" Hardaway, 977 S.W.2d at 918. Noting the strong public policy against double recovery for the same elements of loss, the Kentucky Supreme Court held:

> Hardaway was entitled to credit against Southerland's judgment for the temporary total disability benefits paid to her while she was unable to work. Those benefits represented compensation for wages lost during an identical period for which the jury awarded her damages for "back pay and income lost."

Id. at 919.

Vance's case is the reverse of the situation presented in Hardaway in that it is seeking a credit against the workers' compensation award as opposed to a judgment. As we have noted, the question of whether payments made by an employer to an employee are subject to a credit in the employer's favor against an award of compensation benefits is answered by KRS 342.730(6), and, as we have noted, the payment made by ACS is not covered by that statute. Had ACS refused to settle the NLRB claim it had the opportunity to claim a credit for workers' compensation benefits paid to Vance against any judgment awarded in his favor under Hardaway. ACS chose to settle its claim, however, thus foreclosing any change to receive the credit it now seeks.

Even if we were to find that ACS was entitled to a credit under KRS 342.730 or Hardaway, we do not believe that the evidence contained in the record is sufficient to support the credit ACS seeks. "Where an employer seeks a credit against future workers' compensation benefits, it has the burden of proving by substantial evidence that the benefits for which the credit is sought actually are duplicative of workers' compensation benefits." GAF Corp. v. Barnes, 906 S.W.2d 353, 355 (1995). The only evidence ACS presented in regard to the settlement were the affidavits and testimony of Huber and Heck that it paid Vance $10,500 in settlement of the NLRB claim and that this payment represented lost wages from March 12, 1998 forward. This was contrary to Vance's testimony that the settlement was $10,000. We agree with the following portion of the Board's opinion and adopt it as our own:

> The settlement agreement . . . was not contained in the record and therefore, whether or not the last wages were for the same period as Vance received TTD benefits was not proven. While there may have been some evidence in the record which would have supported a contrary conclusion to that reached by the ALJ, the fact-finder was not compelled to rely on such evidence. See, McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

Having considered the parties' arguments on appeal, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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