

RENDERED: MAY 13, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001481-WC

SOMERSET BOARD OF EDUCATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-75501

ALICE F. PERKINS; HON. BONNIE
KITTINGER, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

McANULTY, JUDGE: Appellant Somerset Board of Education (Board of Education) petitions the Court for review of the opinion of the Workers' Compensation Board (Board) affirming the opinion of the Administrative Law Judge (ALJ) which awarded benefits to

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Alice Perkins for an injury to her low back and right hip during the course of her employment as a custodian. The Board of Education argued that the ALJ's decision arbitrarily selected an injury date not supported by the medical or testimonial evidence. The Workers' Compensation Board affirmed the ALJ's order as supported by inferences from the evidence and therefore "not clearly unreasonable." On appeal, the Board of Education argues that the Board did not perform a correct review and the claim should be reversed.

The function of review of the Workers' Compensation Board in the Court of Appeals is to correct the Board only where we perceive 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 Hosp. v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992). We do not believe that the Board flagrantly erred in assessing the evidence so as to commit a gross injustice. Thus, we affirm the Board.

The Board of Education points out that the injury date is possibly or even probably wrong. The date is July 25, 2001, taken from Dr. Lester's medical evaluation of August 1, 2001, which began by stating: "Ms. Perkins stated she was injured four weeks ago and her last day of work was 7/25/01." He reported her injury in that evaluation as an incident of her pushing a

desk with her hip. Certainly, four weeks prior to the date of her examination with Dr. Lester would put the injury date closer to the beginning of July rather than the 25th. In addition, the Board of Education points out the lack of confirmation from Ms. Perkins' testimony, since at one time she stated that she thought the desk incident occurred near the end of the school year in May, and another time said she did not remember anything happening in July. The Board of Education argues these inconsistencies make the use of the July 25, 2001 date arbitrary, only designated by the ALJ to conform to the pleadings in this case.

We agree that obtaining a correct injury date was a problem in this case. Nevertheless, we do not agree that "an error in assessing the evidence so flagrant as to cause gross injustice" has been shown. The Board appropriately noted that there were two injuries found by the ALJ in this case. The date given of July 25, 2001, was ostensibly the last day of work after the incident in which Ms. Perkins injured her right hip and leg while pushing a desk with her hip. That choice of date could be considered reasonable in that it apparently was the date that her injury became so disabling as to require her to take off work.

Moreover, the Board of Education has not shown any "gross injustice" in the uncertainty over the date of injury.

As Ms. Perkins points out in her brief, the Board of Education does not dispute that Ms. Perkins suffered a low back injury. There is no evidence to show that her injury was attributable to any event that occurred outside her work. Although Ms. Perkins admitted to leg pain in 1999, there was no medical evidence that she was treated for any pain then, or that it kept her from performing her duties at work.

Whether the incident occurred in May, the beginning of July, or the end of July, 2001, Ms. Perkins suffered an injury to her right hip when she was at work and pushed a desk. The medical evidence is consistent with a finding of an injury that occurred prior to the incident on August 7, 2001. Moreover, the Board of Education has not argued that it was harmed by the confusion about the injury date. Neither notice nor statute of limitations is claimed as an issue in this case. Furthermore, Ms. Perkins was awarded benefits from the date of the second injury she incurred in this case. Thus, we cannot perceive any clear error or injustice in the ALJ's settling upon the July 25th date.

It is not the function of this Court to resolve factual disputes but only to review for flagrant error. We do not find it in this case. Therefore, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

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