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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2006-CA-000567-WC

LIBERTY MUTUAL GROUP — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-96-00240

ANTHONY THOMPSON; HON. W. BRUCE COWDEN, JR., ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Liberty Mutual Group petitions for review from a February 17, 2006, opinion and order by the Workers' Compensation Board (Board) affirming an award to Anthony Thompson by the administrative law judge (ALJ). Liberty argues

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

that the ALJ improperly enhanced Thompson's benefits based on the general contractor's violation of safety regulations and that the ALJ improperly calculated its subrogation rights to the proceeds from Thompson's settlement of a third-party civil action. We conclude the award was subject to the enhancement provisions of KRS 342.165(1), and that the ALJ properly calculated Liberty Mutual's subrogation interest. Hence, we affirm.

The underlying facts of this action are not in dispute. Liberty Mutual is the workers' compensation carrier for Thompson's employer, Merrick Construction. Merrick had a contract to perform construction and maintenance at a plant owned by the Budd Company in Shelbyville, Kentucky. On November 29, 1995, Merrick assigned Thompson to help another Merrick employee, Chuck Cummings, perform routine maintenance on the plant's heating, ventilation and air conditioning (HVAC) system. The maintenance included replacing air filters in the HVAC system and much of the work was done on the roof of the building. The filters and filter frames were stored on a mezzanine floor of the building which housed an electrical substation.

The mezzanine level was a restricted area and was normally kept locked. Cummings, the site supervisor, had a key to the area and he also had a desk on the mezzanine. Cummings

took Thompson to the mezzanine, and showed Thompson the doors to the mechanical pump room, where the filters were stored and how to open them. However, Cummings did not show Thompson another set of double doors on the mezzanine. These doors opened into a space sixteen feet above the factory floor and were used by Budd employees to load equipment and supplies onto the mezzanine level. The double doors were not marked or locked.

Thompson estimated Cummings had given him ten to fifteen minutes of training for the HVAC maintenance job. They then left to perform the maintenance work. Shortly thereafter, Thompson returned to the mezzanine to get more filters. However, he mistakenly went through the double doors instead of the door to the pump room. The doors opened outward and Thompson fell sixteen feet to the factory floor below. As a result, Thompson fractured his cervical spine and is now confined to a wheelchair.

Thompson settled civil suits against the builder and architect of the Budd plant, for a total of $2,550,000.00. Budd was dismissed from the civil action because it is immune from liability as an up-the-ladder contractor.[2] Thompson's attorney from the civil case testified that he received a total of $909,578.48 in fees and costs from the settlement proceeds.

[2] KRS 342.610.

There were two primary issues in Thompson's workers' compensation claim against Merrick. First, Thompson argued that his award was subject to a 15% enhancement because his injury was caused by Merrick's intentional failure to comply with a safety regulation or statute. The ALJ found that Merrick did not create the hazardous condition involving the double doors. Nevertheless, the ALJ concluded that Merrick, through its agent Cummings, controlled the area, knew of the safety violation, and failed to adequately protect Thompson against it. Consequently, the ALJ enhanced Thompson's award by 15%.

Second, Liberty Mutual sought a subrogation credit for the settlement proceeds that Thompson received in the civil action. After allocating the percentages of fault and determining the total damages which Thompson would have received had his case gone to trial, the ALJ found that Liberty Mutual was entitled to a subrogation interest of $1,200,000.00. However, the ALJ further held that Thompson was only entitled to a subrogation credit to the extent that Thompson's workers' compensation benefits exceeded $909,578.46, representing the amount which he paid to his attorney in fees and costs. Liberty Mutual appealed these two determinations to the Board, which affirmed the ALJ. This appeal followed.

As a preliminary matter, Thompson asserts that Liberty Mutual's appeal should be dismissed for two reasons. First,

Thompson argues that Liberty Mutual's appeal is fatally flawed because it failed to name the Board as a party to the appeal. Recently, however, in Hutchins v. General Electric Co.,[3] the Kentucky Supreme Court held that the Board is not an indispensable party to invoke this Court's jurisdiction over the matter.[4] Consequently, dismissal of the appeal is not appropriate.

We also disagree with Thompson's argument that Liberty Mutual's appeal to the Board was untimely. The ALJ issued his initial order opinion and award on April 14, 2005, but specifically reserved a ruling on the issue of Liberty Mutual's subrogation credit. Both Thompson and Liberty Mutual filed petitions for reconsideration, which the ALJ sustained in part and denied in part on July 29, 2005. After entry of that order, Liberty Mutual filed a second petition for reconsideration, which the ALJ denied on September 28, 2005.

Thompson contends that Liberty Mutual's notice of appeal should have been filed within thirty days of the ALJ's denial of the first petition for reconsideration. But as the Board correctly noted, the ALJ's initial opinion and award was interlocutory. The ALJ did not finally adjudicate all issues until the July 29, 2005 supplemental opinion and award. Liberty

[3] 190 S.W.3d 333 (Ky. 2006).

[4] Id. at 336-37.

Mutual filed a timely petition for reconsideration of that order and thereafter filed a timely notice of appeal from the denial of that motion. Consequently, the matter was timely appealed to the Board.

Thus, we return to two central issues in this appeal. Liberty again argues that the ALJ erred by imposing the 15% safety penalty allowed by KRS 342.165(1). The version of KRS 342.165(1) that was in effect on the date of the injury contained the following language:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased fifteen percent (15%) in the amount of each payment.[5]

KRS 342.165(1) promotes workplace safety by encouraging workers and employers to follow safety rules and regulations.[6] Strictly speaking, the additional compensation allowed under the statute is not a "penalty", but serves to compensate the party that benefits from it for the effects of

[5] The current version of the statute provides for enhanced benefits of 30%.

[6] Apex Mining v. Blankenship, 918 S .W.2d 225, 228 (Ky. 1996).

the opponent's intentional misconduct.[7] By its terms, the statute requires two conditions to be operative before the penalty can be applied. The injury to the employee must have been caused by: 1) the employer of the injured party; and 2) the employer must be the employer who would otherwise have been liable for the payment of worker's compensation benefits.[8]

The parties agree that the design of the doors and Budd's failure to properly mark and lock the doors were violations of applicable building codes and OSHA regulations. Furthermore, it is undisputed that Budd had been given notice that the doors constituted a violation. However, Liberty Mutual emphasizes that the ALJ must find the injury was caused by Merrick's intentional violation of a safety statute or regulation. In this case, Merrick did not create the dangerous condition. Furthermore, there was no evidence that Cummings had directed Thompson to use the doors to fulfill the job requirements. Consequently, Liberty Mutual argues that there was no evidence to support the conclusion that the accident was caused by Merrick's intentional violation of any safety regulations.

[7] *See* AIG/AIU Ins. Co. v. South Akers Mining Co., 192 S.W.3d 687, 689 (Ky. 2006).

[8] Ernest Simpson Construction Co. v. Conn, 625 S.W.2d 850, 851 (Ky. 1981).

In determining that the accident was caused by Merrick rather than Budd, the ALJ and the Board focused on the control exercised by Merrick, through its agent Cummings, over Thompson. Cummings had control over the area – he had a key to the restricted area on the mezzanine and he had a desk there. Cummings also knew of the dangerous condition involving the double doors and he had previously informed managers at Budd that it constituted a safety violation. Finally, Cummings was responsible for training and supervising Thompson in the performance of his job duties. Thus, the ALJ and the Board concluded that Cumming's failure to warn Thompson about the hazardous condition of the doors caused the injury.

We agree with the ALJ's conclusion, but on somewhat different grounds. KRS 342.165(1) applies only when the employer who is responsible for payment of benefits intentionally violated a specific safety statute or regulation.[9] In this case, the design of the double doors on the mezzanine and Budd's failure to keep the doors locked and to post signs warning of the hazard were intentional violations of applicable safety regulations. But these intentional violations cannot be imputed to Merrick.

[9] Id.

Nevertheless, Merrick had an independent duty under KRS 338.031(1)(a) to furnish "to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees." In interpreting this duty in the context of KRS 342.165, this Court has adopted a four-part test to assess whether Kentucky's safe workplace statute has been violated.

> (1) [a] condition or activity in the workplace presented a hazard to employees; (2) [t]he cited employer or employer's industry recognized the hazard; (3) [t]he hazard was likely to cause death or serious physical harm; and (4) [a] feasible means existed to eliminate or materially reduce the hazard.[10]

The first three elements of this test are satisfied in this case. The condition involving the double doors clearly presented a hazard to employees. Merrick's employee, Cummings, recognized the danger and reported it to Budd. Furthermore, the likelihood of death or serious injury posed by such condition is established by both commonsense and the catastrophic injuries which Thompson actually suffered.

The fourth part of this test is the closest call. Merrick was conducting its operations on Budd's premises and was

[10] Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598, 599-600 (2000); citing Nelson Tree Services, Inc. v. Occupational Safety and Health Review Commission, 60 F.3d 1207, 1209 (6th Cir. 1995).

not in a position to alter or correct the dangerous condition involving the double doors. However, there were two feasible means available to Merrick for eliminating or materially reducing the hazard: (1) a large caution sign on the door (hand-lettered if necessary) and (2) adequate training which would apprise anyone working on the mezzanine of the serious danger lurking behind those particular doors. Budd's ownership of the premises in no way prevented Merrick from taking these simple steps to avoid certain serious physical injury or death.

We emphasize that a subcontractor would not be liable for enhanced benefits for an injury caused by a condition entirely within the general contractor's knowledge and control. But under the specific facts presented in this case, Merrick's failure to take any action or to properly warn and train Thompson constitutes a violation of its duties under KRS 338.031(1)(a). Consequently, the ALJ properly found that Merrick was liable for payment of enhanced benefits under KRS 342.165(1).

Liberty Mutual next argues that the ALJ erred by holding that all of Thompson's legal fees and expenses from the civil action must be deducted from its subrogation claim. In reaching this conclusion, the ALJ relied a discussion in AIK

Selective Self Insurance Fund v. Bush,[11] stating that that the employee's entire legal expense, not just a pro rata share, must be deducted from the employer's or insurer's portion of any recovery.[12] Liberty Mutual urges that this language should be disregarded because it was not necessary to the outcome of the decision in Bush. Furthermore, Liberty Mutual argues that this interpretation of KRS 342.700(1) is unfair because it subjects its subrogation interest to a credit for all of Thompson's legal fees rather than merely a pro rata share.

Although Liberty Mutual's argument is not unreasonable, the Kentucky Supreme Court recently rejected this position in AIK Selective Self Insurance Fund v. Minton.[13] In Minton, the Supreme Court adopted the Bush dicta applying the "made whole" doctrine to an insurer's subrogation interest. The Court specifically held that the plain language of KRS 342.700(1) requires insurers to share in the employee's cost of pursuing recovery from a third party.[14] The Court further held that all of the employee's attorney fees and legal expenses must be deducted from the insurer's subrogation credit, not merely a

[11] 74 S.W.3d 251 (Ky. 2002).

[12] Id. at 257.

[13] 192 S.W.3d 415 (Ky. 2006).

[14] Id. at 418.

proportionate share.[15] In light of the Supreme Court's holding in Minton, the ALJ properly calculated Liberty Mutual's subrogation credit.

Accordingly, the Board's opinion and order is affirmed.

ALL CONCUR.

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[15] Id. at 419-20.