

RENDERED: NOVEMBER 2, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000279-WC

CHRISTOPHER & BANKS, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-00282

KIMBERLY HANIK;
HONORABLE R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: MOORE, STUMBO AND VANMETER, JUDGES.

VANMETER, JUDGE: Christopher & Banks, Inc. petitions for the review of an opinion of the Workers' Compensation Board ("Board") reversing and remanding an opinion of an Administrative Law Judge ("ALJ"), which dismissed Kimberly

Hanik's workers' compensation claim against Christopher & Banks. For the following reasons, we reverse the Board's opinion and remand this matter to the Board with directions to reinstate the order of the ALJ.

Hanik was employed as an assistant manager by Christopher & Banks, working at a retail store located within the Summit, a large shopping center in Jefferson County, Kentucky. On January 9, 2011, Hanik closed and locked the front door of the store at the end of business hours, and walked around the side of the building into a parking lot located behind the building where her car was parked. Once there, Hanik slipped and fell on what she described as "black ice." She was later diagnosed with a torn rotator cuff and underwent surgery on February 8, 2011.

Hanik filed the underlying claim for workers' compensation benefits against Christopher & Banks. The ALJ granted Christopher & Banks' motion to bifurcate the proceedings to determine whether Hanik's slip and fall occurred in the course of her employment. Hanik, as well as other employees of Christopher & Banks, were deposed regarding whether the back parking lot in which Hanik fell was controlled by Christopher & Banks.

Hanik testified that the parking lot in question is referred to as the employee parking lot, and that she was told to park there by the Summit Shopping Centre and the manager of Christopher & Banks when she was hired. Hanik stated that no signs or markings indicate that the back parking lot is for employees, but certain parking spaces in the front lot are designated for employees.

Several employees of Christopher & Banks were deposed regarding the parking situation; Carolyn Steiner, Jerry Poschinger, Krista Redel, and Judy Noland all testified that they were not told by management of Christopher & Banks where to park, though each mostly park in the back lot, with the exception of Noland. Noland testified that certain spaces in the front parking lot are designated by yellow lines to indicate parking for any employees who work in stores leased by the Summit. The employees agreed that the only time they were asked to park in the back lot is the Christmas holiday season when the Summit requests they do so. They stated that the back lot is not marked as employee parking, and that anyone is allowed to park there. Hanik deposed Christopher & Banks' employee Mary Jo Frye, who testified that at the time of her hiring, management of Christopher & Banks told her to park in the back lot. Frye further stated that she regularly parks in the back lot, but will occasionally park in the front lot. Patricia Spence, the manager of the Christopher & Banks store located in the Summit testified that she commonly refers to the back lot as the employee lot, but has never told any employee where to park. She further stated that Christopher & Banks does not maintain the back lot or have it striped, paved or cleared of snow; all of which is maintained by the Summit. Spence parks in the front lot.

Basing its determination on *K-Mart Discount Stores v. Schroeder*, 623 S.W.2d 900 (Ky. 1981), the ALJ determined that the evidence indicated that Christopher & Banks had no control over the back lot where Hanik slipped and fell. The ALJ found the evidence showed that Christopher & Banks did not

instruct Hanik or its other employees to park in a specific parking lot, and that any such directive was initiated by the Summit. As a result, the ALJ concluded that the back lot was not a part Christopher & Banks' "operating premises," and therefore Hanik's injury was not work-related.

Hanik did not file a petition for reconsideration; instead, Hanik appealed to the Board, which reversed the ALJ's determination and found that the back lot constituted the "operating premises" of Christopher & Banks. In deciding so, the Board determined that the evidence supported a finding that Christopher & Banks directed its employees to park in the back lot. The Board held Hanik's injury to be work-related. This appeal followed.

Christopher & Banks argues that the Board erred by impermissibly usurping the ALJ's discretion to make factual findings and weigh the credibility of the evidence. We agree.

As the finder of fact, the ALJ has the sole authority "to judge the 'weight, credibility, and inferences' to be drawn from the evidence, and is therefore permitted to believe some evidence and to disbelieve other evidence." *Carnes v. Parton Bros. Contracting, Inc.*, 171 S.W.3d 60, 66 (Ky.App. 2005) (citations omitted). The ALJ has discretion to accept and reject any testimony and believe or disbelieve any portion of the evidence presented. *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009) (citation omitted).

KRS 342.285(2) limits review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers"; whether the decision "was

procured by fraud”; or whether the decision was erroneous as a matter of law. KRS 342.285(2)(c), (d), and (e). Such errors of law would include whether the ALJ made a clearly erroneous finding of fact, rendered an arbitrary or capricious decision or committed an abuse of discretion. *Kroger v. Ligon*, 338 S.W.3d 269, 273 (Ky. 2011).

The party appealing “a finding that favored the party with the burden of proof must show that no substantial evidence supported the finding, *i.e.*, that it was unreasonable under the evidence.” *Id.* (citations omitted). Evidence is substantial if, when taken alone or in light of all the evidence, has probative value to induce conviction in the mind of a reasonable person. *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky.App. 2004) (citation omitted). The Board must determine if the evidence is sufficient to support the ALJ, or if the evidence compels a different result. *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992).

Generally, employees who are injured on the way to or from the worksite are not entitled to compensation from the employer. *Pierson v. Lexington Pub. Library*, 987 S.W.2d 316, 318 (Ky. 1999). An exception to this rule is that an employer may be liable for injuries which occur on the operating premises, not just the worksite. *Id.* (citation omitted). Whether a particular area is considered the operating premises depends on the unique circumstances of each case; of particular importance “is the extent to which the employer could control the risks associated with the area where the injury occurred.” *Id.*

In *K-Mart Discount Stores*, 623 S.W.2d 900, an employee of K-Mart fell and injured herself in a parking lot owned by the Madisonville Square Shopping Center (“Center”), which leased retail space to K-Mart. The leasing agreement provided for the Center to have total maintenance responsibility for sidewalks, parking lot, parking lot lights, sweeping, snow removal, restriping, and landscaping. *Id.* at 901. The court held that despite the parking lot providing a convenience for K-Mart’s employees, the leasing agreement proves that K-Mart did not control the parking lot, and therefore, the parking lot did not constitute K-Mart’s operating premises for purposes of workers’ compensation liability. *Id.* at 902.

The Board found this case to be governed by *Pierson*, 987 S.W.2d 316, in which an employee for the Lexington Public Library (“Library”) was injured in a public parking lot where the Library had leased parking spaces for its employees. Although the Library did not maintain the parking lot, the Library leased spaces to provide its employees with free parking. *Id.* at 318. The court held that by leasing spaces the Library held influence over the owner of the parking structure and influenced its employee where to park by providing free parking as a part of its employee benefit package. *Id.* Under these circumstances, the court determined the Library maintained sufficient control over the parking lot, and the employee’s injury was compensable. *Id.*

In the case at bar, the ALJ reviewed the pertinent testimony and physical evidence regarding the location and geography of the back parking lot and

concluded that Christopher & Banks did not sufficiently control the back parking lot so as to consider it the operating premises. Summarizing the evidence presented, the ALJ concluded that Christopher & Banks

had no control whatsoever over the parking lot where the Plaintiff fell. The evidence is clear and the [ALJ] believes that the Plaintiff was not instructed by the Defendant Employer to park in a specific parking lot and that any directives of where the workers in the mall were to park was made by the Summit Mall itself and not Christopher and Banks.

Our review of the ALJ's opinion reveals no unreasonable factual findings or inferences made from those factual findings to ultimately determine that Christopher & Banks did not have control over the back parking lot. In reversing the ALJ, the Board impermissibly reweighed the evidence. The Board did not point to any factual finding made by the ALJ which it considered unreasonable, but merely reached a different conclusion after its review of the evidence. Though the Board has presented an alternative conclusion or inference to be drawn from the evidence presented, it may not superimpose its own appraisals as to the weight and credibility of the evidence in doing so. Accordingly, the Board has erred by reversing the ALJ's opinion.

The Workers' Compensation Board opinion is reversed, and this case is remanded to the Board with directions to reinstate the order of the ALJ.

ALL CONCUR.

BRIEF FOR APPELLANT:

Denis S. Kline
Louisville, Kentucky

BRIEF FOR APPELLEE:

Ched Jennings
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