IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: NOVEMBER 22, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 12-13-06 ELA

2006-SC-0139-WC

SANDRA HARTLAGE — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-1445-WC
WORKERS' COMPENSATION NO. 04-01282

KROGER #394; HON. JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Vacating an order that dismissed the claimant's application for benefits without prejudice, the Workers' Compensation Board (Board) stated that the motion and the order granting it provided no basis for review and remanded the claim to the Administrative Law Judge (ALJ) for further proceedings. The Court of Appeals determined that an ALJ has discretion to grant a voluntary dismissal without prejudice but affirmed because neither the regulations nor CR 41.01 permitted one under the present circumstances. It is unnecessary in this case to determine whether CR 41.01 applies to workers' compensation proceedings. Otherwise, we affirm.

On July 21, 2004, the claimant filed an application for benefits. It alleged that she injured her left arm, shoulder, and neck in April, 2003, in the course and scope of her work for the defendant-employer. Submitted with the claim were medical records

from Louisville Bone & Joint Specialists, PSC, that addressed her ability to work.

On August 20, 2004, the employer filed a Form 111 in which it accepted the claim as being compensable but asserted that there was no injury of appreciable proportion. It also filed medical records from Dr. DeGruccio regarding visits on May 13, 2003; May 27, 2003; and June 16, 2003; and an MRI performed on May 23, 2003.

The claimant submitted a September 17, 2004, report from Dr. Browne, who had examined her in July, 2003, and February, 2004. He diagnosed rotator cuff tendonitis and assigned restrictions but stated that he was "not able to grant any permanent physical impairment and loss of function at this time." He indicated that an arthroscopic procedure might be necessary.

Finally, the employer filed a September 27, 2004, report from Dr. Gladstein, who diagnosed a left shoulder contusion or strain. Noting that none of the other physicians' examinations had been remarkable, he stated that he would not impose any permanent restrictions because he did not think that there had been a significant injury. In his opinion, any degenerative changes were unrelated to the alleged work injury.

Proof time expired shortly thereafter. The employer filed its witness list, proposed stipulations, and notice of contested issues, and the Benefits Review Conference was held on December 2, 2004. At that time, the claimant had submitted no evidence that the injury resulted in a permanent impairment rating. Nor had she filed a motion under 803 KAR 25:010, § 15 requesting an extension of proof time or a motion under 803 KAR 25:010, § 13(12) requesting that the BRC be postponed for good cause. On December 6, 2004, she filed a motion to dismiss the matter without prejudice and requested the ALJ to enter a proposed order. Objecting, the employer asserted that to dismiss the claim without prejudice at that point would be unfair and

prejudicial. It requested that the final hearing be scheduled. On December 9, 2004, the ALJ entered a summary order dismissing the claim without prejudice.

The employer's petition for reconsideration argued that the regulations did not permit a dismissal without prejudice under the circumstances. They required a final hearing and a decision on the merits. Furthermore, it argued, to permit the claimant to dismiss without prejudice at that point unfairly prejudiced the employer. After the petition was summarily denied, the employer appealed. The record indicates that the claimant filed a new application for benefits that was identical to the dismissed application and accompanied by identical medical evidence. The employer both objected to the filing and responded. No scheduling order had been issued as of June 10, 2005, when the Board entered its opinion.

The claimant asserts that Board and the Court of Appeals erred in determining that neither a voluntary nor discretionary dismissal without prejudice was permitted in this case. She maintains that the Court of Appeals erred in considering CR 41.01 as a possible basis for dismissal because it is not among the civil rules that have been adopted by the regulations; therefore, it is inapplicable to workers' compensation proceedings. Relying on authority for the principle that dismissals with prejudice should be avoided, she argues that a workers' compensation claimant may dismiss the claim as a matter of right at any time before the merits are adjudicated. In the alternative, she argues that an ALJ has the authority to grant a voluntary dismissal without prejudice. She maintains that the Board substituted its judgment when vacating the order of dismissal because it was not present at the BRC when the matter was discussed.

The claimant is correct that the regulations have adopted certain civil rules of procedure and that CR 41.01 is not among those that have been adopted. In any

event, it is unnecessary in the present circumstances for us to determine whether CR 41.01 applies to workers' compensation claims. The claimant did not file her motion to dismiss until after the employer filed a Form 111 in response to his claim, at which point CR 41.01(1) would no longer have permitted a voluntary dismissal as a matter of right. Even if we were to assume for the purposes of discussion that CR 41.01(2) applied, Sublett v. Hall, 589 S.W.2d 888, 893 (Ky. 1979), and Louisville Label, Inc. v. Hildesheim, 843 S.W.2d 321, 324-26 (Ky. 1992), make clear that a dismissal under CR 41.01(2) is a form of equitable relief and that the discretion to grant it is not unlimited. The fact-finder must analyze a number of factors, including prejudice to the parties. In the present case, the claimant's motion failed to show any cause. Therefore, a decision to grant it would have been an abuse of the ALJ's discretion under CR 41.01(2).

The Board noted in its opinion that on at least one occasion it has found an order granting a voluntary dismissal without prejudice not to be an abuse of the ALJ's discretion. In the present case, however, the lack of any grounds to support the motion for a voluntary dismissal without prejudice and the absence of any stated rationale for granting it prevented the Board from determining whether the order conformed to Chapter 342. Convinced that a remand for additional findings would be a waste of judicial resources in view of the re-filed claim, the Board vacated the order to dismiss without prejudice and remanded the claim "for further proceedings consistent with [the ALJ's] sound discretion and the mandates of the Workers' Compensation Act and regulations." The Board was divided, however, regarding what the Act and the regulations permit.

KRS 342.275(2) gives an ALJ the authority to grant continuances or grant or deny any benefits afforded by Chapter 342, including interlocutory relief, "according to

criteria established in administrative regulations." The claimant knew that for whatever reason she had not received a permanent impairment rating. If she thought the reason was that she was not at maximum medical improvement, 803 KAR 25:010, § 15 permitted her to receive an extension of proof time under specified conditions; 803 KAR 25:010, § 13(12) permitted the BRC to be postponed for good cause; and 803 KAR 25:010, § 13(15) permitted additional proof to be taken between the benefit review conference and the hearing for good cause.

The regulations do not provide for summary judgments or for involuntary dismissals with prejudice before an adjudication of the merits. Nor do they provide for voluntary dismissals without prejudice. An ALJ has the explicit authority to grant continuances under KRS 342.275(2) and explicit authority under the regulations to extend proof time and grant various forms of interlocutory relief. Absent anything in Chapter 342 or the regulations to imply that an ALJ may dismiss a claim without prejudice, we are not convinced that an ALJ must do so at any time the claimant requests.

Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991), does not support the proposition that a claimant has the right to dismiss the claim without prejudice at any time before the hearing. The dismissal at issue in Cornett was involuntary, based on the worker's failure to introduce any evidence within the initial 60-day period for proof-taking. The worker offered no excuse and asserted that nothing prevented a party from submitting the entire case at the hearing. At issue was whether the Board and the Court of Appeals erred in concluding that the dismissal was not an abuse of the ALJ's discretion. The court affirmed. It did not consider whether the dismissal should have been with or without prejudice because the statute of limitations would have barred a

re-filing. The court explained subsequently in New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2003), that the regulations and Cornett did not require an ALJ to grant an employer's motion to dismiss a claim if extraordinary circumstances prevented the claimant from making a prima facie case within the initial 60-day period for taking proof.

The Board determined in the present case that even if Chapter 342 and the regulations give an ALJ authority broad enough to grant a motion to dismiss without prejudice, the motion and the order granting it must state grounds sufficient to establish on appeal that the order is not an abuse of discretion. Considering whether an ALJ's decision conforms to Chapter 342 or whether it was an abuse of discretion is within the Board's scope of review under KRS 342.285(2). Therefore, the Board did not err by concluding that the motion and order in the present case were inadequate to permit review.

The decision of the Court of Appeals is affirmed.

Lambert, CJ., and Graves, Minton, Roach, Scott, and Wintersheimer, JJ., concur. McAnulty, J., not sitting

COUNSEL FOR APPELLANT:

Ched Jennings
239 South Fifth Street, Suite 412
Louisville, KY 40202

COUNSEL FOR APPELLEE, KROGER # 394:

Brian T. Gannon
Fulton & Devlin
2000 Warrington Way, Suite 165
Louisville, KY 40222