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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: February 22, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 5-24-07 E.A.Brown P.C.

2006-SC-0396-WC

OLIVIA ANNE STEWART — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-2094-WC
AND
2005-CA-002279
WORKERS' COMPENSATION NO. 03-83231

UNIFIRST CORPORATION, ET AL. — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Convinced that it was unclear the Administrative Law Judge (ALJ) correctly understood the evidence regarding the notice requirement, the Workers' Compensation Board vacated the claimant's award and remanded for further consideration of the matter. The Court of Appeals determined, however, that the parties stipulated to the date of the alleged work-related injury, that they were bound by the stipulation, and that the claimant could not have given notice under KRS 342.185 to an individual that the employer no longer employed on that date. Therefore, the court reversed and directed the ALJ to dismiss the claim. We affirm.

The claimant's application for benefits alleged that her neck and shoulders, back, and both hands began to hurt on January 10, 2002, when using a three-prong hook to dislodge a bundle that was jammed in a chute. It alleged that she reported the incident to Dan Smith, her employer's general manager, and to Cheryl Younger, the human

relations manager, that same day and that she underwent surgery for the neck injury in February, 2002, and March, 2003. It also alleged that she reported carpal tunnel syndrome after the diagnosis in June, 2003.

It is undisputed that the claimant first sought medical treatment for her alleged injury on January 29, 2002, when medical records indicate that she saw Dr. Buchanan, her primary care physician, for a "recheck." After noting her responses to various questions concerning her physical condition, his treatment notes state:

> She has had a problem recently. She has had pain in her left anterior shoulder sometimes in her chest radiating down her left arm. She says it is very severe. It aches all day and interferes with her sleep at night. . . . She has noticed some numbness and tingling in her left hand and fingers.

About two weeks after seeing Dr. Buchanan, the claimant requested non-work-related personal medical leave/short term disability leave to undergo surgery. An employment form signed by the claimant and by Dr. Eggers, her neurosurgeon, indicated that a C5/6 disc herniation commenced on January 18, 2002, and that surgery was prescribed. Another form requested leave from February 20, 2002, until about April 1, 2002, and was approved by Dan Smith. Dr. Eggers released the claimant to return to work without restrictions on March 25, 2002. She was terminated as of April 26, 2002, for failure to comply with/enforce the tardy policy and for changing records without authorization. There was no evidence that she missed any time between her return to work and her termination.

Nowhere did Dr. Buchanan's or Dr. Eggers' treatment notes mention the work-related incidents that were described in the claim or indicate that the complaints were work-related. Dr. Shah diagnosed severe bilateral carpal tunnel syndrome on June 12, 2003, noting a history of numbness in the hands and the prior neck surgeries. The

claimant filed an application for benefits on September 29, 2003. On October 23, 2003, Dr. Bilkey performed an independent medical evaluation. Based on a history given by the claimant, he determined that the surgeries were performed to treat the effects of a January 10, 2002, injury to her neck at work. He also determined that the carpal tunnel syndrome was due to repetitive motions performed her work.

The employer denied the claim, asserting that the alleged injury did not arise out of and in the course of the employment and that the claimant failed to give due and timely notice. The employer explained that the claimant took short-term disability when she underwent surgery in February, 2002. She later returned to work without restrictions and did not report a work-related injury to her supervisor or human resources until March 14, 2003, which was nearly a year after her termination. Shortly thereafter, she filed a wrongful termination suit against the employer. At no time before filing her claim did she report work-related carpal tunnel syndrome.

As noted by the ALJ, the parties stipulated to various matters at the Benefit Review Conference (BRC). Among other things, they stipulated, "The plaintiff allegedly suffered a work related injury on January 10, 2002." As pertinent to this appeal, they also agreed to limit the contested issues to whether the claimant proved an injury as defined by the Act, whether any injury was caused by her work, and whether she gave adequate notice. The contested issues did not include the date of injury.

At the hearing, the claimant testified that she was uncertain of the date but that the neck and shoulder injury occurred early in January, 2002. She testified several times over the course of the civil suit and workers' compensation proceedings. Her testimonies contain several different dates for the incident and several different versions of how soon after the incident she saw Dr. Buchanan; however, she was

steadfast in asserting that the incident occurred on a day when she was filling in as supervisor for Brenda Leslie, who was off work. She explained at the hearing that she went to Brenda's area to pull down garments from a chute. When using a pole to do so, she heard her neck pop and told a co-worker who was standing next to her. As she was walking towards her own area "to get something to take," she picked up a case from the floor to put it on the top shelf and her neck popped again. She stated that she told Karen Bowling, who worked in her area, and then went to inform Cheryl Younger, the human resources manager. She found Cheryl outside, smoking with Dan Smith and Steve Sutton. Cheryl advised her to see Margie Matthis, a human resources assistant, to "fill out a Workers' Comp paper." She stated that Margie had her "fill out—sign a piece of paper." She stated that she called Dr. Buchanan, but sometime later Margie told her that she'd be fired if she took compensation, so she cancelled the appointment. She also made and cancelled another appointment. When her pain became worse, she kept an appointment for January 29, 2002. She stated that she did not tell Dr. Buchanan that her symptoms began with the work-related incidents because she was afraid of being fired. For the same reason, she requested short-term disability leave rather than temporary total disability when she underwent surgery.

Karen Bowling continued to work for the employer when she was deposed in the claimant's wrongful termination suit. She also testified at the workers' compensation hearing, recalling that the claimant had informed her of the injury and that she had advised the claimant to fill out a report. She did not witness the incident or have personal knowledge that the claimant reported it.

Cheryl Younger testified that she knew for certain that the claimant reported a work-related injury, when Younger was human resources director. She was "not

absolutely certain whether it was December or January," but it was shortly before she left the company. She also stated that the company discouraged workers' compensation claims and that those individuals with work-related absences and restrictions lost their jobs when they returned to work. She stated that she knew of 15-20 such instances. Ms. Younger acknowledged that she was discharged involuntarily and had testified against the employer in other litigation.

Dan Smith worked elsewhere when deposed but had been the defendant-employer's general manager of distribution in January, 2002. The company later terminated his employment. He testified that company policy required all work-related injuries to be reported immediately to the worker's supervisor. An injured supervisor would report to him. He would fill out an accident report, and then Ms. Matthis would complete the accident investigation and inform the workers' compensation carrier. Mr. Smith stated that the claimant never reported a work-related injury to him or to anyone else in his presence. He approved her short-term disability application but would not have done so had he known that she was injured at work. He was aware of a longstanding injury to her neck, shoulder, and maybe her back. It dated to before he was a general manager, and he did not know when or how it occurred.

Mr. Smith acknowledged that he terminated the claimant's employment based on information that she had falsified company records. He also acknowledged that he had written a letter after the termination, offering his highest recommendation regarding her performance, work ethic, and personal ethics. Asked whether he presently agreed with the letter, he responded, "Honestly, no." He explained that to his knowledge the company had handled her case properly with regard to short-term disability and that she had evidently stated something to the contrary. He considered that to be

dishonest.

Roy Steven Sutton, a general manager, disagreed with Ms. Younger's statement that the company discourages the reporting of workplace injuries. He explained that company policy requires them to be reported immediately. He stated that the claimant never reported an injury to him.

Margaret Matthis, a human resources assistant since 1999, corroborated Mr. Sutton's testimony regarding company policy. She stated that she did not prepare accident reports. An injured worker's immediate supervisor would complete a report and give it to her, after which she would process the workers' compensation claim. She also completed paperwork for short-term disability requests. She stated that in February, 2002, the claimant informed her that she needed surgery but did not indicate that it was for a work-related injury.

Bethany Johnson, presently the employer's human resources manager, testified that the claimant contacted her on March 14, 2003, and informed her that she had sustained a work-related injury while working for the company. She stated that she had undergone surgery while employed, that she needed further surgery, and that she wished to file a workers' compensation claim. Ms. Johnson stated that she completed an accident report at that time and submitted it to the workers' compensation carrier. She also stated that the claimant received her full salary for the entire time that she was on short-term disability.

The employer submitted employment records concerning Cheryl Younger and Brenda Leslie. They indicated that Ms. Younger was terminated as being unsuited for her job and last worked on January 8, 2002. A time sheet that was signed by Ms. Leslie indicated that she missed work January 1, 2002, (holiday) and January 11, 2002,

(sick).

Among the arguments raised in its brief to the ALJ, the employer asserted that the parties were bound by the stipulation that the date of the alleged injury was January 10, 2002. After pointing to numerous inconsistencies in the claimant's testimonies in the civil suit and her claim, the employer asserted that it was impossible for the accident and notice to have occurred as she alleged. Brenda Leslie's payroll records indicated that she was absent only on January 11, 2002, which was after the stipulated date, and Cheryl Younger no longer worked for the company after January 8, 2002.

After summarizing the evidence, the ALJ noted that the parties had aggressively but professionally litigated the issues and produced "an abundance of conflicting evidence." Acknowledging that all of the witnesses appeared to be credible, the ALJ found the testimonies of the claimant and Ms. Younger to be most persuasive. The ALJ noted that there were discrepancies regarding the date of the neck and shoulder injury but determined that the claimant sustained a work-related injury and notified her supervisors as soon as practicable. The ALJ found the injury to be totally disabling and dismissed the carpal tunnel claim for lack of notice.

Among other things, the employer's petition for reconsideration noted that the ALJ erred in stating that "there is some discrepancy as to the date of this injury" because the parties were bound by their stipulation regarding the date. It asserted again that the claimant's version of the events could not have occurred on January 10, 2002, because the evidence of record indicated that Brenda Leslie was not absent on that day and that Cheryl Younger had already been terminated. Therefore, the finding in the claimant's favor was not supported by substantial evidence and was so unreasonable as to be erroneous as a matter of law.

The ALJ denied that portion of the petition, stating as follows:

> First, defendant points out that the parties entered into an agreed stipulation that the "plaintiff alleges a work related injury on January 10, 2002." According to defendant's payroll records, plaintiff's last day of work was January 8, 2002.
>
> Plaintiff correctly points out that although the BRC stipulations included the plaintiff alleged a work-related injury on January 10, 2002, the evidence submitted by the parties indicated confusion on the issue. Even defendant's witnesses testified that they believed plaintiff reported an injury after January 8, 2002, which was reportedly her last day of work. This ALJ, noting the discrepancy between the evidence and the stipulation, arrived at a decision consistent with the evidence.

803 KAR 25:010, provides, in pertinent part, as follows:

> Section 13. Benefit Review Conferences.
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> . . . .
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> (13) If at the conclusion of the benefit review conference the parties have not reached agreement on all the issues, the administrative law judge shall:
> (a) Prepare a summary stipulation of all contested and uncontested issues which shall be signed by representatives of the parties and by the administrative law judge; and
> (b) Schedule a final hearing.
> (14) Only contested issues shall be the subject of further proceedings.
>
> . . . .
>
> Section 16. Stipulation of Facts.
> (1) Refusal to stipulate facts which are not genuinely in issue shall warrant imposition of sanctions as established in Section 24 of this administrative regulation. An assertion that a party has not had sufficient opportunity to ascertain relevant facts shall not be considered "good cause" in the absence of due diligence.
> (2) Upon cause shown, a party may be relieved of a stipulation if the motion for relief is filed at least ten (10) days prior to the date of the hearing, or as soon as practicable after discovery that the stipulation was erroneous.
> (3) Upon granting relief from a stipulation, the administrative

> law judge may grant a continuance of the hearing and additional proof time.

Under the regulations, agreements contained in a signed BRC memorandum are the equivalent of a contract from which a party may not be released without a showing of cause.

The claimant had the burden of proving every element of her claim, including the date of her work-related injury. KRS 342.185 and KRS 342.190 required her to prove that she notified the employer of her work-related accident and resulting injury "as soon as practicable." The parties stipulated that, "The plaintiff allegedly suffered a work related injury on January 10, 2002." They listed her allegations that she sustained an injury and that the injury was work-related as being contested, but they did not include the alleged date of injury among the contested issues. Therefore, the legal effect of the stipulation was to establish the date of the alleged work-related injury. Because neither party moved to be released from the stipulation, they were bound by it. It relieved the claimant of the burden to prove the actual date of her injury and enabled the employer to base its defense on the agreed-upon date. Although the ALJ was free to judge the credibility of witnesses and to weigh conflicting evidence, the ALJ was not free to disregard the date to which they agreed. Had the claimant made the required showing of cause and been relieved from the stipulation, she would have been required to prove the date of her injury.

This is not a case such as Osborne v. Pepsi-Cola, 816 S.W.2d 643 (Ky. 1991), in which a party submitted evidence regarding a stipulated issue, listed the issue as being contested in his brief, and failed to mention the stipulation in his petition for reconsideration yet complained on appeal that the ALJ failed to enforce the stipulation.

The claimant's testimonies regarding the date were inconsistent, but the employer did not submit evidence that the alleged injury occurred on a date other than stipulated. Its position was that no work-related injury occurred. Moreover, it sought to enforce the stipulation in both its post-hearing brief to the ALJ and its petition for reconsideration.

For the claimant's version of events to be possible, the accident had to have occurred on a day when Cheryl Younger was present and Brenda Leslie was absent. Although the ALJ was free to conclude that testimony regarding Ms. Leslie's absence on a given date was more persuasive than the documentary evidence, it is undisputed that Cheryl Younger no longer worked for the employer on January 10, 2002. Under the circumstances, testimony by the claimant and Ms. Younger cannot constitute substantial evidence that she gave timely notice of a January 10, 2002, injury.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., Cunningham, McAnulty, Minton, Noble and Scott, JJ., concur. Schroder, J., not sitting.

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