Missouri Court of Appeals

Southern District

Division Two

DORIS DEMORE,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	Nos. SD32350 and SD32362
	)	Consolidated
DEMORE ENTERPRISES, INC.,	)	
	)	FILED: July 15, 2013
Respondent,	)	
	)	
AMERICA FIRST INSURANCE CO.,	)	
	)	
Respondent-Cross Appellant.	)	

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

AFFIRMED AS MODIFIED

Hershel and Doris Demore and their daughter Delores worked for the family business, Demore Enterprises ("DE").[1] Delores got a call, at DE's office during business hours, reporting vandalism of nearby DE property. It was the fourth recent burglary, theft, or vandalism of DE property in that vicinity.

[1] For convenience and clarity, we will refer to the Demores by their first names and to respondent-cross appellant America First as "Insurer."

The three Demores left DE's office and headed to the scene, all in Hershel's personal vehicle. En route, all were injured in a crash so severe that it took 25 minutes to extract them from the wreckage. They each filed for workers compensation after Insurer refused benefits or medical treatment, and each obtained an award.

Three appeals and two cross-appeals were filed, which we consolidated for argument. This opinion addresses the appeal and cross-appeal as to Doris's award.

Doris's Appeal

An ALJ awarded Doris benefits for temporary and permanent total disability, past medical expense, future medical treatment, plus legal expenses per § 287.560 on a finding that Insurer had unreasonably denied compensability.[2] The Commission affirmed the award with two modifications:

1. Reversing the ALJ's finding "that employer/insurer waived its right to select employee's medical providers for employee's future medical care," the Commission found instead "that the general rule still applies and employer/insurer maintains its control over the selection of employee's future medical providers."

2. The Commission also disagreed with, and reversed, the ALJ's § 287.560 award of attorney fees and costs against Insurer.

Except as first noted below, we reject all of Doris's challenges to these changes.

Selection of Future Medical Providers

Doris rightly objects to the Commission ordering "employer/insurer" to direct her future medical treatment, since employers alone (not insurers) have that right.[3]

[2] Statutory citations are RSMo as amended through 2005. Rule references are to Missouri Court Rules.

[3] *See* § 287.140.10; ***Teale v. Am. Mfrs. Mut. Ins. Co.,*** 687 S.W.2d 218, 220 (Mo.App. 1984).

Insurer candidly agrees. We grant this point and will substitute DE, as employer, for "employer/insurer."

However, we reject Doris's complaint about the Commission overruling the ALJ as to waiver. We review and defer to the Commission's decision in this instance, not that of the ALJ. ***Johnson v. Land Air Express***, 391 S.W.3d 31, 36 (Mo.App. 2012). Whether waiver occurred is a factual determination on which we defer to the Commission. *See* ***Pruett v. Federal Mogul Corp.***, 365 S.W.3d 296, 307-08 (Mo.App. 2012). Ours is not to second guess, even if evidence would support a contrary finding. ***Id***. at 308. If Doris seriously questions the medical care offered by her family-owned business, § 287.140.2 allows her to seek relief from the Commission. Point denied.[4]

Section 287.560 Costs

Doris's challenge to Commission reversal of the ALJ's § 287.560 award fares no better.[5] As we noted in ***Nolan v. Degussa Admixtures, Inc.***:

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[4] We also reject Doris's theory that, by refusing to seek its own review, DE robbed the Commission of lawful authority to consider this issue. For one thing (among many), the Commission must "rule upon every issue presented which pertains to a determination of liability in a workers' compensation claim; *liability is not fixed until it is determined who is entitled to what from whom.*" ***Stonecipher v. Treasurer***, 250 S.W.3d 450, 452 (Mo.App. 2008) (quoting ***Highley v. Martin,*** 784 S.W.2d 612, 617 (Mo.App. 1989)).

[5] In assessing costs, the ALJ found that:

> The insurer was afforded two and half years to acknowledge existing case law and have [sic] submitted no defense, based upon either factual or legal grounds that reflect a good faith defense to compensability. At a minimum, the insurer should have provided Doris Demore with medical care and temporary disability compensation. The insurer, however, denied liability and forced Doris Demore to secure legal counsel in order to obtain her benefits. As a consequence, Doris incurred an effective loss of 25 percent of her claim ….

In reversing the ALJ on this issue, the Commission found:

> The state treasury generally bears the costs of workers' compensation proceedings. Only a party who brings, prosecutes, or defends a case without reasonable grounds may have costs assessed against it. Even then, the Commission "may" assess such costs, but neither the statutory language nor case law compels such an award. Indeed, our appellate courts have cautioned the Commission to exercise this discretionary statutory power with great caution and only when the case for costs is clear and the offense egregious.
>
> Given the Commission's discretion, our proper review is for abuse of discretion, which generally means a decision so clearly against the logic of the circumstances, and so unreasonable and arbitrary, that it shocks one's sense of justice and indicates a lack of careful deliberate consideration.

276 S.W.3d 332, 335 (Mo.App. 2009) (internal citations and some quotation marks omitted). Given this high bar, our review of the record does not persuade us that the Commission abused its discretion on this issue. Points denied.[6]

Insurer's Cross-Appeal

Insurer seeks affirmative relief in four points, all of which are seriously flawed.[7] We first address, collectively, assertions that no competent substantial

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> The primary issue in this case concerns whether employee's June 29, 2009, injury arose out of and in the course of her employment. Following the 2005 amendments to Missouri Workers' Compensation Law and the introduction of strict construction to Chapter 287 of the Revised Statutes of Missouri, this issue of whether an injury "arises out of" and "in the course of" employment has been highly contested. Based on the facts of this case and the arguments proffered by insurer, we do not find that its defense of this claim was egregious or without reasonable grounds.

[6] Cases cited by Doris do not support reversal. They are examples of appellate courts *affirming* cost awards, not situations where a *denial* of costs was reversed. Even less convincing is Doris's claim that the Commission violated § 286.090 by "failing to prepare and file a written statement setting forth its findings of fact and conclusions of law with respect to [this ruling] …." The Commission did issue such a statement, which was for our benefit on review (s*ee* ***Stegman v. Grand River Reg'l Ambul. Dist.***, 274 S.W.3d 529, 534 (Mo.App. 2008)) and was more than adequate for that purpose.

[7] Other cross-appeal points are merely arguments as respondent against Doris's claims on appeal.

evidence supports Doris's awards for past medical expense (Point II), future medical treatment (Point III), and cash disability benefits (Point IV).

Ignoring the Whole Record

Whether these awards are "supported by competent and substantial evidence is judged by examining the evidence *in the context of the whole record*." ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d 220, 223 (Mo. banc 2003) (our emphasis).[8] "*A court must examine the whole record* to determine if it contains sufficient competent and substantial evidence to support the award, *i.e.*, whether the award is contrary to the overwhelming weight of the evidence." ***Id***. at 222-23 (our emphasis). This is because an award "contrary to the overwhelming weight of the evidence is, *in context*, not supported by competent and substantial evidence." ***Id***. at 223 (our emphasis). It is a "rare case" when this standard is met. ***Id***.

Thus, to merely cite selected evidence contrary to an award and ignore the rest of the record makes no case for reversal per ***Hampton***. Insurer does little or no more than this, offering arguments that range from two paragraphs (Point III) to 2½ pages (Point IV) when the appellate record exceeds 2500 pages.

To make an effective ***Hampton*** argument, using Point II (past medical expense) as an example, Insurer needed to:

1. Marshal all record evidence favorable to the award;
2. Marshal all unfavorable evidence, subject to the Commission's explicit or implicit credibility determinations; and

[8] Some cases we cite are among many overruled by ***Hampton*** on an unrelated issue. *See* 121 S.W.3d at 224-32. We cite these for principles unaffected by ***Hampton***.

3. Show "in the context of the whole record" how the unfavorable evidence so overwhelms the favorable evidence and its reasonable inferences that the award "is, in context, not supported by competent and substantial evidence." ***Id.*** at 223.

See ***Jordan v. USF Holland Motor Freight***, 383 S.W.3d 93, 95 (Mo.App. 2012) (citing ***Stewart v. Sidio***, 358 S.W.3d 524, 527-28 (Mo.App. 2012); ***Houston v. Crider***, 317 S.W.3d 178, 187 (Mo.App. 2010)). ***Hampton***'s emphasis on context and the whole record demands this or some similar process and analysis. Insurer's failure to recognize this strips its arguments of persuasive value. *See* ***Stewart***, 358 S.W.3d at 528; ***Houston***, 317 S.W.3d at 189.

Rule Violation Hampers Appellate Review

Compounding the problem is Insurer's omission of required references to the record.[9]

> Rule 84.04(i) requires all factual assertions in the argument be supported by references to the record on appeal. *See Pattie v. French Quarter Resorts,* 213 S.W.3d 237, 240 (Mo.App.2007). "'References to the record on appeal in the argument portion of the brief provides [sic] us the tool with which to verify the accuracy of the factual assertions in the argument upon which a party relies to support its argument.'" *Id.* (quoting *Shaw v. Raymond,* 196 S.W.3d 655, 659 n. 2 (Mo.App.2006)). In the absence of the required references to the record on appeal, the verification process "would require us to search the record to find what we deem supports [an appellant's] factual assertions." *Shaw,* 196 S.W.3d at 659 n. 2. "This would effectively thrust us into the role of an advocate for [the appellant], a role we cannot take." *Id.* An appellant's failure to comply with Rule 84.04(i) denies us the ability to provide verifiable appellate review, and, therefore justifies our decision to decline to review the point of error for that argument. *Id.*

[9] Prior to this year, Rule 84.04(i), titled "Page References in Briefs," required a brief's argument to "have specific page references to the legal file or the transcript." This requirement now is slightly reworded and moved to Rule 84.04(e), which reads in pertinent part: "All factual assertions in the argument shall have specific page references to the relevant portion of the record on appeal, *i.e.*, legal file, transcript, or exhibits."

Clean Uniform Co. v. Magic Touch Cleaning, 300 S.W.3d 602, 607 (Mo.App. 2009). This mandate is essential to the effective functioning of appellate courts. ***Lombardo v. Lombardo,*** 120 S.W.3d 232, 246-47 (Mo.App. 2003).

> A party's mandated compliance with this Rule allows this court to verify the evidence upon which a party relies in support of its argument; without such compliance, this court would effectively act as an advocate of the non-complying party, which we cannot do. This court cannot ... spend time perus[ing] the record to determine if the statements are factually supportable.

Id. at 247 (quoting ***McCormack v. Carmen Schell Constr. Co.***, 97 S.W.3d 497, 509 (Mo.App. 2002)). An argument that violates this rule "wholly fails to preserve any error for review." ***Bailey v. Phelps County Reg'l Med. Ctr.***, 328 S.W.3d 770, 772 (Mo.App. 2010).

"Here, unless we were to do the work for [Insurer], we have no way of knowing whether the facts [it] cites in [its] argument are supported by the record." ***Lombardo,*** 120 S.W.3d at 247. We cannot seine this record for that purpose or to remedy this rule violation without becoming a *de facto* advocate for Insurer. *Ex gratia* review satisfies us, in any event, that this is not "the rare case" to which ***Hampton*** alludes. Points II, III, and IV thus fail.

Point I

Finally, this point contests the finding that Doris was injured in the scope and course of her employment. We cannot tell from the point itself whether Insurer's challenge is factual or legal, although the supporting argument suggests to us the former. Either way, Insurer does not convince us.

To the extent Insurer is claiming that no competent substantial evidence supports this liability finding, its arguments suffer from the same flaws as Points II-IV and thus fail for the same reasons.

To the extent Insurer is claiming that the Commission misapplied the law, we quote from Insurer's own brief (our emphasis):

> To receive benefits for injuries sustained while a claimant is away from the employer's place of business in a traveling capacity, the claimant must show that at the time of the accident, he was not *exercising a personal privilege for his own benefit, wholly apart from his employment or his employer's interests*. *Anderson v. Veracity Research Co.,* 299 S.W.3d 720 (Mo. App. 2009).

Insurer does not argue that Doris was injured this way – while exercising a personal privilege for her own benefit, wholly apart from her employment or DE's interests – and certainly cites no such evidence.

Point I thus fails, and with it, Insurer's cross-claim for affirmative relief.

Conclusion

Because Point I of Doris's appeal is well-taken and conceded by Insurer, we modify the Commission's award to specify that Demore Enterprises, Inc., as employer, shall control selection of Doris's future treatment providers. Finding no merit in any other claim on appeal or cross-appeal, we affirm the Commission's award as modified. *See* ***Thompson v. ICI Am. Holding***, 347 S.W.3d 624, 636 (Mo.App. 2011) (award affirmed as modified by the court).

DANIEL E. SCOTT, P.J. — OPINION AUTHOR

DON E. BURRELL, C.J. — CONCURS

MARY W. SHEFFIELD, J. — CONCURS