

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000522-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
CIVIL ACTION NO. 01-CI-00291

ANGELA WICKER (NOW VAUGHN)
AND KENTUCKY BOARD OF CLAIMS

APPELLEES

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; HENRY, JUDGE; PAISLEY,¹ SENIOR
JUDGE.

PAISLEY, SENIOR JUDGE: The Commonwealth of Kentucky,
Transportation Cabinet, Department of Highways (Cabinet) appeals
from a judgment of the Knott Circuit Court entered on July 1,
2005, which affirmed a judgment of the Kentucky Board of Claims
(Board). The Board concluded that the Cabinet negligently
failed to place a stop sign at the intersection of Ky. 3209 and

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

Ky. 1087 which led to an accident in which Angela Wicker was injured. The Board awarded Wicker \$45,219.90 in damages. On appeal, the Cabinet argues it was not negligent since it had no notice that a stop sign was missing at the intersection of Ky. 3209 and Ky. 1087; argues that even if it were negligent, Wicker was also negligent since she failed to yield the right of way to oncoming traffic; and argues that the Board miscalculated Wicker's damages. Finding that Wicker was negligent as a matter of law, we affirm in part, reverse in part and remand.

At approximately 3:00 pm on August 11, 1996, Angela Wicker and Kenneth D. Hayes were involved in an automobile accident at the intersection of Ky. 3209 and Ky. 1087 in Knott County, Kentucky. According to the record, Wicker was traveling northbound on Ky. 3209, a small secondary road. As she drove, Wicker was unaware that she was approaching an intersection with Ky. 1087 since she was unfamiliar with Ky. 3209, the approach to the intersection was uphill, and all she could see was Ky. 3209 as the road widened and bore to the left. As the Cabinet admits, there was neither a stop sign on Ky. 3209 nor any other sign to warn drivers approaching Ky. 1087 that an intersection was imminent. As Wicker slowly crested the hill, she proceeded into the intersection. At this time, Kenneth D. Hayes was traveling in a truck eastbound on Ky. 1087. Hayes's vehicle struck Wicker's car on the driver's side with tremendous force

totaling Wicker's vehicle and breaking the right side of Wicker's C1 vertebra, which is the vertebra at the very top of the neck.

Immediately after the accident, Wicker exited her vehicle and told Hayes that she would pay for his vehicle. Apparently, she considered the accident to be her fault. Kentucky State Trooper Wendell Scott was dispatched to the accident scene to investigate. He noted in his accident report that the stop sign was missing on Ky. 3209 and noted that Ky. 3209 proceeded uphill toward the intersection and that Ky. 1087 was not visible until one reached it.

Although Wicker had a broken neck, she was able to move and was, at the time, numb. One of Wicker's friends stumbled onto the accident and transported Wicker to a local hospital. The emergency room physician eventually found that Wicker had a broken neck and had her transported to University of Kentucky Medical Center. While at UK, Wicker was placed in a hard collar to immobilize her broken neck, and the treating physician advised her to wear the collar for four to five months.

At the time of the accident, Wicker was twenty years old and worked as a pharmacy technician. According to Wicker, after the accident she was fired because she was unable to work. However, the record reflects that, on October 30, 1996, eighty

days after the accident, Wicker began working as a receptionist at Uni-Sign. She worked at Uni-Sign for approximately four months. In April 1997, Wicker worked for approximately one month as a waitress at Shiloh's Restaurant. Then, from October 1997 to February 1998, Wicker worked sporadically as a waitress at Reno's Roadhouse. Eventually, Wicker tried to attend college as well. However, according to Wicker, she was unable to work and was unable to attend class due to the pain she felt in her neck.

On April 2, 1997, Wicker filed a claim with the Kentucky Board of Claims in which she alleged that the Transportation Cabinet had acted negligently for failing to place a stop sign at the intersection of Ky. 3209 and Ky. 1087. Wicker sought damages for the loss of her vehicle, for medical expenses and for loss of future earnings. After nearly three years of legal wrangling, Wicker's claim proceeded to a final hearing on January 19, 2000 before a hearing officer. However, it was not until September 20, 2001 that the Board issued a judgment regarding Wicker's claim.

In the judgment, the Board found that Wicker had failed to yield the right of way to Hayes. It also found that on the day of the accident no stop sign was in place on Ky. 3209 where it intersects with Ky. 1087. The Board imputed to the Cabinet the knowledge that a stop sign had been missing at the

intersection on the day of the accident. At the hearing, the Cabinet presented testimony that it had placed a stop sign at the intersection on April 5, 1996, but the Board did not find the testimony credible. Thus, the Board found that the Cabinet had acted negligently and was liable for Wicker's injury and for her damages. The Board found that, as a result of the accident, Wicker had suffered a broken neck, which caused her to lose wages and which somewhat impaired her ability to earn future income. As a result, the Board awarded Wicker \$12,717.90 for her medical expenses; \$2,400.00 for loss of wages; \$6,000.00 for the loss of her vehicle and \$24,102.00 for loss of future earning capacity.

The Cabinet appealed the judgment to the Knott Circuit Court, but, as previously mentioned, the circuit court affirmed the Board's judgment. Now, the Cabinet appeals to this Court.

WICKER'S FAILURE TO YIELD THE RIGHT OF WAY

The Cabinet argues first that the Board erred when it failed to find that Wicker acted negligently since it found that she failed to yield the right of way to Hayes. Citing Kentucky Revised Statutes (KRS) 189.330, the Cabinet points out that, when a vehicle approaches an intersection with a stop sign, the vehicle must stop and yield the right of way to any vehicle in the intersection. Also, according to KRS 189.330, after stopping the vehicle must yield to any other vehicle approaching

the intersection from another roadway if the other vehicle is so close that it would constitute an immediate hazard. According to the Cabinet, Wicker violated KRS 189.330 since the Board found that she failed to yield the right of way to Hayes. Furthermore, the Cabinet argues that it is irrelevant that the stop sign on Ky. 3209 was missing on the day of the accident. Citing Walton v. Chevron, USA, Inc., 655 S.W.2d 11 (Ky. 1992), the Cabinet points out that the Kentucky Supreme Court has held that, even if a stop sign on an inferior road, such as Ky. 3209, is missing at an intersection with a superior road, such as Ky. 1087, the superior road does not lose its superior status. Thus, pursuant to KRS 189.330, even if a stop sign is missing on an inferior road, a motorist on the inferior road must still yield the right of way to vehicles traveling on the superior road. Based on this reasoning, the Cabinet reckons that Wicker acted negligently and argues that Board should have apportioned some, if not all, the liability to her.

KRS 44.140 controls appeals taken from the Board of Claims to the circuit court and provides that, upon appeal, the circuit court is limited to determining: (1) whether the Board acted in excess of its powers; (2) whether the award was acquired by fraud; (3) whether the award conformed with the provisions of KRS 44.070 to 44.160; and (4) whether the Board's findings of fact support the award. KRS 44.140(5). In addition,

the circuit court's judgment will have the same effect as any other judgment of the circuit court regarding a civil matter, which means the circuit court's judgment can be appealed to this Court. Id. Ultimately, when we review a decision rendered by the Board of Claims, we will not reverse if the Board's findings of fact are supported by substantial evidence. Furthermore, if the Board's findings of fact and conclusions of law are not clearly erroneous, then we are prohibited from substituting our judgment for that of the Board's. Department For Human Resources v. Redmon, 599 S.W.2d 474, 476 (Ky. App. 1980). However, we review questions of law *de novo*. Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet, 983 S.W.2d 488, 490 (Ky. 1998).

As the Cabinet points out, KRS 189.330 requires a driver traveling along an inferior highway to obey a stop sign placed at an intersection where the inferior highway meets with a superior highway, and the driver must yield to the traffic traveling along the superior highway. By law, Wicker had a duty to yield to traffic traveling along Ky. 1087, and the Board specifically found that Wicker had failed to yield the right of way to Hayes, who was traveling along Ky. 1087, the superior roadway. The Supreme Court held:

[T]he general rule is that a superior street or thoroughfare does not lose its superior status by reason of a stop or yield sign

being misplaced or obscured on an inferior, intersecting street. The policy underlying such a rule is that a motorist proceeding along a through street or highway protected by stop signs is entitled to assume that the driver of the vehicle on an intersecting street will obey the law and stop or yield the right-of-way.

Although there are holdings in other jurisdictions to the effect that absence of a stop or yield sign relieves the driver of a vehicle on a secondary road of the duty to yield the right-of-way, Kentucky does not appear to be adopting such position. (citations omitted.)

Walton v. Chevron, U.S.A., Inc., supra at 14. Pursuant to the holding in Walton, the absence of a stop sign on Ky. 3209 did not abrogate Wicker's duty to yield to oncoming traffic traveling along Ky. 1087. Once the Board found that she failed to yield the right of way, it was bound, as a matter of law, to conclude that Wicker had acted negligently. However, since Kentucky has abandoned the concept of contributory negligence, Wicker's negligence does not absolve the Cabinet of liability. Thus, we find that the circuit court erred when it failed to reverse the Board's judgment regarding Wicker's negligence. We reverse the circuit court's judgment in part and, in turn, reverse the Board's judgment in part and remand this action to the Board of Claims for it to apportion fault between Wicker and the Cabinet.

THE CABINET'S DUTY TO PLACE A STOP SIGN ON KY. 3209

Prior to the hearing, the Cabinet stipulated that a stop sign was missing on August 11, 1996, the day of the accident. Furthermore, it acknowledged that it had a duty to keep the roadways of the Commonwealth safe and that it would have breached that duty if it had notice that a stop sign was missing or needed on Ky. 3209, and it failed to replace the sign.

To understand the Cabinet's position, we must review the evidence and testimony presented at the hearing. In response to Wicker's discovery request, the Cabinet revealed that on, September 5, 1995, Keith Damron, a traffic engineer for the Cabinet, prepared a handwritten sign inventory regarding Ky. 3209, in which he stated that the Cabinet needed to place a stop sign, a "stop ahead" sign and a junction sign on Ky. 3209 where it intersects with Ky. 1087. Damron testified that, regarding sign inventories, he would normally draft an initial handwritten inventory. Then, he would give the handwritten copy to a secretary to draft a typed copy. The secretary would then return the typed inventory to Damron for proofing, and, after proofing, the typed inventory would be forwarded to a traffic crew to implement Damron's recommendations. Damron testified that no typewritten copy of his September 5, 1995 inventory existed. Based partially on this evidence, the Board concluded

that the Cabinet had knowledge that a stop sign was missing on Ky. 3209 on the day of the accident.

In its brief, the Cabinet argues that the fact that no typewritten inventory was ever produced does not mean that the Cabinet did not follow Damron's September 5th recommendations. The Cabinet relies upon Damron's testimony at the hearing. Damron testified that it was his procedure, once he made an inventory, to call the district traffic foreman regarding the inventory since the Cabinet policy was and is that once it knows a sign is missing, it immediately replaces it. Damron testified that he did not remember calling the traffic foreman regarding the missing stop sign on Ky. 3209 and that he did not document such calls. But he testified that he was sure he made such a call regarding his inventory since it was his procedure and he always followed his procedure. Based on this, the Cabinet argues that the Board was required to presume that the Cabinet followed Damron's inventory recommendation and placed a stop sign on Ky. 3209 no later than September 6, 1995 since the Cabinet always replaces missing signs within twenty-four hours of receiving notice. The Cabinet continues this convoluted argument and explains that it does not send out employees onto the roadways to look for missing signs since there are hundreds of thousands of miles of roads in the Commonwealth. Instead, the Cabinet relies upon local citizens and local law enforcement

agents to notify it when a sign is missing. Based on its presumption that it placed a stop sign on Ky. 3209 on September 6, 1995, the Cabinet argues that, between September 5, 1995 and August 11, 1996, it did not receive any notice from anyone that the stop sign on Ky. 3209 was missing. Therefore, the Cabinet insists that the Board erred when it imputed to the Cabinet the knowledge that a sign was missing.

To summarize, the Cabinet insists that it always replaces missing signs within twenty-four hours of receiving notice that said sign is absent. Thus, it concludes that the Board was required to presume that the Cabinet followed Damron's inventory recommendation and erected a stop sign on Ky. 3209 on September 6, 1995. We disagree. As the finder of fact, the Board had the sole responsibility to weigh the evidence and judge the credibility of all witnesses, and it was not bound to accept the testimony of any witness as true. Dunn v. Commonwealth, 151 S.W.2d 763, 764-765 (Ky. 1941). Furthermore, the Board had the duty to weigh the probative value of all the evidence presented to it and had the duty to decide which testimony it found most convincing. Commonwealth, Department of Highways v. Dehart, 465 S.W.2d 720, 722 (Ky. 1971). While the Board was bound to consider Damron's testimony, and its judgment shows that it clearly did, it was not required to draw the same

inferences from it as the Cabinet obviously did, *i.e.*, that the Cabinet erected a stop sign on Ky. 3209 on September 6, 1995.

As we stated previously, when reviewing a decision made by the Board of Claims, we will not reverse if the Board's findings of fact are supported by substantial evidence.

Department for Human Resources v. Redmon, supra. The Supreme Court has defined substantial evidence as, "some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people." Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). In other words, substantial evidence is, "evidence which would permit a fact-finder to reasonably find as it did." Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Wicker presented evidence, in the form of Damron's testimony and in the form of his handwritten sign inventory, that, on September 5, 1995, Damron had recommended that a stop sign, a junction sign and a "stop ahead" sign be placed on Ky. 3209 where it intersects with Ky. 1087. This constitutes substantial evidence to support the Board's finding that the Cabinet had knowledge of the missing stop sign. Therefore, the circuit court did not err when it affirmed the Board's finding that the Cabinet had knowledge that a stop sign was missing at the intersection of Ky. 3209 and Ky. 1087 on the day of the accident.

The Cabinet also insists that it erected a stop sign on Ky. 3209 on April 5, 1996, only a few months prior to the accident. In order to understand this argument, we must consider more of the evidence presented to the Board. A mere eight days prior to the hearing, the Cabinet produced a Form 396, which is a timesheet used by the Cabinet, that was dated April 5, 1996. This Form 396 reflects that, on that day, two Cabinet employees, Timothy Carter and Robert Thompson, worked overtime when they erected a stop sign in Knott County. The Form 396 also reflects that this stop sign was budgeted to Ky. 1087. The Cabinet also produced the handwritten notes of Roger Tackett, a district traffic foreman for the Cabinet. One of Tackett's notes states in pertinent part, "4-5-96 put up stop sign on old road at talcum off of 80". The other note states in pertinent part, "T. Carter- - stop sign on old road at talcum . . . R. Thompson- 7611 - stop sign on old road, talcum". According to the Cabinet, these documents established that it placed a stop sign on Ky. 3209 on April 5, 1996.

At the hearing, the Cabinet called Roger Tackett to testify. He testified that, on April 5, 1996, he received a phone call that a stop sign was missing on Ky. 3209. Tackett testified that he dispatched Carter and Thompson specifically to Ky. 3209 to replace this missing sign. Tackett testified that the Form 396 reflects that Carter and Thompson performed work on

Ky. 3209. Tackett also testified that on April 5, 1996, Carter and Thompson replaced only one stop sign, and Tackett explained that his notations "put up stop sign on old road at talcum off of 80"; "stop sign on old road at talcum" and "stop sign on old road, talcum" meant that the work was performed on Ky. 3209.

About one week after the hearing, the parties deposed both Carter and Thompson. Carter testified that he and Thompson were dispatched to replace a stop sign on "an old coal road" off of Ky. 1087. Carter testified that while in route to the old coal road, he and Thompson drove along Ky. 3209 and noticed that the stop sign was missing. Noticing this, they stopped, and, on their own initiative, they placed a new stop sign on Ky. 3209.

Thompson also testified that he and Carter were dispatched to replace a stop sign on an old coal road off of Ky. 1087. He testified consistently with Carter that, while in route to the coal road, they drove along Ky. 3209, noticed the missing stop sign, and replaced it. He testified that he wrote on a piece of paper that he and Carter replaced two stop signs: one on the old coal road and another on Ky. 3209. Thompson insisted that he gave this document to Tackett. Thompson testified that the Cabinet maintains files regarding such work and that his document should have been placed in the appropriate file. However, he testified that he searched the Cabinet's files and was unable to find his document.

The Cabinet acknowledges that inconsistencies exist between the testimony of the witnesses and the information contained in the Form 396 and Tackett's notes; however, the Cabinet insists that the testimony of the witnesses is more credible than the documents. In addition, the Cabinet acknowledges that inconsistencies exist between Tackett's testimony and the testimony of Carter and Thompson, but the Cabinet claims these inconsistencies are irrelevant, and it concludes that the testimony of Tackett, Carter and Thompson proves that the Cabinet placed a stop sign on Ky. 3209 on April 5, 1996. Furthermore, the Cabinet claims that, from April 5, 1996 to August 11, it received no notice from either the local citizenry or local law enforcement that the stop sign on Ky. 3209 was missing. So it reasons that the Board erred when it imputed to it the knowledge that a stop sign was missing on Ky. 3209 on the day of Wicker's accident.

At the risk of being redundant, we reiterate that the Board, as the fact-finder, had the sole responsibility to judge the credibility of all witnesses who testified before it; additionally, it was not required to accept the testimony of any witness as true. Dunn v. Commonwealth, supra. In fact, the Board had the discretion to believe all of a witness's testimony, part of a witness's testimony or none of a witness's testimony. Gillispie v. Commonwealth, 279 S.W. 671, 672 (Ky.

1926). Despite the Cabinet's insistence to the contrary, the inconsistencies between Tackett's testimony and his notes from April 5, 1996; between Tackett's testimony and the Form 396 and between Tackett's testimony and the testimony of Carter and Thompson are glaringly obvious and very relevant. The Board was not required to accept any of Tackett's, Carter's or Thompson's testimony as true, and, given the inconsistencies among their testimonies, the Board's skepticism was well justified. Thus, we must accept the Board's finding that no stop sign was placed on Ky. 3209 between September 5, 1995 and the date of the accident, August 11, 1996. So we conclude that the circuit court did not err when it affirmed this finding of the Board.

WICKER'S MEDICAL EXPENSES

According to the record, Wicker did not have automobile liability insurance at the time of the accident. According to the Cabinet, KRS 403.39-110 requires all automobile owners in the Commonwealth to have automobile liability insurance that contains reparation benefits of at least \$10,000.00 for personal injury. So, relying on Commonwealth of Kentucky, Transportation Cabinet, Bureau of Highways v. Roof, 913 S.W.2d 322 (Ky. 1996), the Cabinet argues that because, by statute, Wicker was required to have automobile insurance, then she had a "right to receive" benefits in the amount of at least \$10,000.00 to cover her medical expenses. So the Cabinet

reasons that Wicker's award for medical expenses should have been reduced by \$10,000.00 and argues the Board erred when it failed to reduce Wicker's award for medical expenses.

According to KRS 44.070(1), "any damage claim awarded [by the Board] shall be reduced by the amount of payments received or right to receive[.]" According to the record, Wicker had no automobile insurance; thus, she received no insurance benefits nor did she have the right to receive such a payment. While we agree with the Cabinet that Wicker was statutorily obligated to purchase automobile insurance, this statutory obligation did not mean that she had a right to receive insurance benefits. Since she did not receive nor did she have the right to receive insurance benefits, the Board was simply not required to offset Wicker's award by \$10,000.00. Thus, the circuit court did not err when it affirmed the Board's decision regarding Wicker's medical expenses.

FAIR MARKET VALUE OF WICKER'S AUTOMOBILE

According to the record, Wicker's automobile was totaled by the accident. She testified that she paid \$5,500.00 for the car and that she received a very good deal. She also produced evidence by avowal that the NADA blue book value of her car was \$7,200.00 at the time. The Board awarded Wicker \$6,000.00 for the value of her destroyed vehicle.

Wicker only paid \$5,500.00, the Cabinet points out, for the vehicle; thus, the fair market value could not be greater than \$5,500.00. And, since Wicker had driven the car between 20,000 and 30,000 miles, the Cabinet argues that the fair market value had to be less than \$5,500.00. Thus, the Cabinet concludes that the Board erred when it awarded Wicker \$6,000.00 for the car.

"Fair market value" has been defined as "the price that a willing seller will take and a willing buyer will pay for property[.]" Central Kentucky Drying Company, Inc. v. Commonwealth, Department of Housing, Buildings, and Construction, 858 S.W.2d 165, 167 (Ky. 1993). And, while purchase price may be excellent evidence of the "fair market value", it is not necessarily dispositive. Id. In the present case, Wicker testified that she paid \$5,500.00 for her car and that the price was a very good deal. This suggests that Wicker paid below market value for the car. In addition, Wicker introduced evidence by avowal that the NADA blue book value of her vehicle was \$7,200.00. This constitutes substantial evidence to support the Board's award of \$6,000.00 for Wicker's vehicle. Thus, the circuit court did not err when it affirmed the Board's decision regarding this issue.

FUTURE EARNINGS

Dr. Gleis, who treated Wicker for her injuries, testified on her behalf. He assigned to Wicker a permanent impairment rating of 5 percent based on the AMA Guidelines. On appeal, the Cabinet argues that, while Dr. Gleis opined that Wicker was 5 percent permanently impaired, neither he nor any other doctor assigned a functional impairment rating to Wicker. Thus, since no doctor found that Wicker was functionally impaired, she is not limited from performing any type of work that might exist.

In addition, the Cabinet avers that KRS 44.070 does not allow a claimant to receive damages for pain and suffering in an action before the Board of Claims. Because Wicker's ability to work is impaired by pain, the Cabinet reckons that the award for impairment of future earnings must be reversed.

To resolve this allegation of error, we must once more return to the record. According to the record, Dr. Alan Hyden began treating Wicker soon after the accident and continued to treat her for several years afterwards. Dr. Hyden testified on Wicker's behalf and reported that she has complained of continual neck pain since the accident. Dr. Hyden testified that while there was no objective explanation for Wicker's pain, he opined that he found her credible and that he believed that she was actually experiencing pain. He testified that Wicker

might not have a normal work life expectancy and that she may not be able to perform some types of work due to the pain she experiences.

As previously mentioned, Dr. Gregory Gleis also treated Wicker and he testified as well. Like Dr. Hyden, Dr. Gleis testified that he found no objective explanation for Wicker's neck pain but felt that she was credible and that she was actually experiencing pain and her pain was caused by the broken neck she had suffered as a result of the accident. He testified that, due to this pain, Wicker would have difficulty in making certain head and neck movements. Also, the doctor testified that, due to her neck pain, Wicker would be limited in the types of work she could perform. Dr. Gleis also opined that Wicker suffered from a 5 percent permanent impairment.

Sharon Lane, a vocational rehabilitation specialist, evaluated Wicker and testified that her ability to earn future income had been impaired. Lane also opined that she found Wicker credible and believed that Wicker was actually in pain.

As can be seen, the testimony from these experts constituted substantial evidence which supported the Board's finding that Wicker's ability to earn future income was impaired. Since the Board's decision was supported by substantial evidence, the circuit court did not err when it affirmed the Board's decision.

CONCLUSION

We reverse that part of the Knott Circuit Court's judgment regarding Wicker's negligence and remand for the Board to apportion liability between Wicker and the Cabinet. The remainder of the judgment is affirmed.

ALL CONCUR.

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