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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002288-WC

UNINSURED EMPLOYERS' FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-01005

MATTHEW STANFORD; HON. CHRIS
DAVIS, ADMINISTRATIVE LAW JUDGE;
U.S. ARMY CADET CORPS, INC.; BLUEGRASS
AREA DEVELOPMENT DISTRICT; AND
WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2011-CA-000075-WC

U.S. ARMY CADET CORPS, INC.

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-01005

MATTHEW STANFORD; HON. CHRIS
DAVIS, ADMINISTRATIVE LAW JUDGE;
UNINSURED EMPLOYERS' FUND;
BLUEGRASS AREA DEVELOPMENT
DISTRICT; AND WORKERS'
COMPENSATION BOARD

CROSS-APPELLEES

OPINION AND ORDER
AFFIRMING AND DENYING

** ** * * * **

BEFORE: DIXON AND NICKELL, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: The Uninsured Employers' Fund ("UEF") appeals from, and the U.S. Army Cadet Corps., Inc. ("USACC") cross-appeals from the December 1, 2010, opinion of the Workers' Compensation Board ("Board") which affirmed in part, reversed in part, and remanded the Administrative Law Judge's (ALJ's) July 12, 2010, opinion, award, and order adjudicating the benefits claim of Matthew Stanford. Because we find no error with the Board's order, we affirm.

The facts of this workers' compensation claim are somewhat unique. Bluegrass Area Development District ("Bluegrass") established a program, By Learning U Earn ("BLUE"), with the use of federal funding, to help place youth into summer work programs. Individuals placed through BLUE were considered to be Bluegrass employees, were covered by its insurance, and worked 30 hours per week at \$7.25 per hour. An agreement between Bluegrass and the USACC

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

was entered into in which BLUE employees were used at the USACC's Millersburg facility. The agreement indicated that employees would perform, among other duties, community relation activities.

Stanford was volunteering for the USACC, as a cadet counselor, approximately four weeks before he began working for Bluegrass under the BLUE program. The USACC did not carry workers' compensation insurance. After becoming an employee of Bluegrass by means of the BLUE program, Stanford continued to perform his cadet counselor duties, which were of a "24/7" nature. However, BLUE provided that he would be paid for 30 of his weekly hours by Bluegrass. Stanford routinely completed his Bluegrass timecard so that it indicated work hours of 8:00 a.m. to 3:00 p.m., five days a week. The USACC provided Stanford with housing and meals.

After becoming an employee of Bluegrass, Stanford continued to perform the same duties he had when he was only volunteering: training, watching, and interacting with cadets on a 24/7 basis. Stanford testified that an agent of Bluegrass informed him that his duties as a cadet counselor were within the definition of community relation activities. While the majority of Stanford's duties were located at the Millersburg job site, he was sometimes required to perform duties at other facilities.

On July 23, 2009, while performing cadet counselor duties at the Harold Disney Training Facility, located in Armetus, Kentucky, Stanford fell from a zip line and suffered permanent injury which rendered him a quadriplegic. As a

result of the July 23 injury, Stanford sought workers' compensation benefits. The claim was heard by ALJ Chris Davis. All parties stipulated that, since his injury, Stanford has been permanently and totally disabled. A dispute arose, however, whether Stanford was working for the USACC or Bluegrass at the time of his injury.

ALJ Davis adjudicated the claim in an opinion, order, and award entered on June 8, 2010. ALJ Davis opined that Stanford's injury took place while he was acting in the scope and course of his employment. It was also found that Stanford was primarily an employee of the USACC, acting as subcontractor for Bluegrass. Therefore, it was held, that Bluegrass is an up-the-ladder contractor and thus liable for the workers' compensation benefits to Stanford should USACC default. ALJ Davis concluded that the USACC is initially responsible for all benefits owed to Stanford, but that Bluegrass shall become liable for any benefits, in the event that the USACC does not or cannot pay the benefits.

UEF filed a petition for reconsideration, requesting clarification of the ALJ's findings and/or additional findings of fact in anticipation of Bluegrass' probable appeal. Bluegrass filed a motion for reconsideration, contesting the finding of up-the-ladder liability. Stanford also filed a motion for reconsideration and argued, among other things, that the ALJ erred in noting that there are no unpaid medical bills. The ALJ denied all of the parties' motions for reconsideration in an order dated July 12, 2010. Stanford then filed a second motion for reconsideration, and again argued that the notation of unpaid medical

bills was error. That motion was denied in an order entered on August 2, 2010. Bluegrass then sought review, with the Board, of the June 8, 2010, order of the ALJ, as well as the July 12, 2010, order denying Bluegrass' motion for reconsideration. The USACC also appealed from the June 8, 2010, order of the ALJ, as well as the August 2, 2010, order denying Stanford's second motion to reconsider.

In the interim, Bluegrass filed a motion for continuation of benefits pending appeal with the Board. In that motion, Bluegrass sought an order of continuation of benefit payments to Stanford, pending the appeal, as well as an order that the party assessed with liability, as a result of the appeal, be required to reimburse the prevailing party and assume all future payments. In an order entered on August 16, 2010, the Board sustained the motion to the extent that benefits shall be paid, in accordance with the ALJ's order, pending the appeal. The Board noted, however, that:

[p]ursuant to 803 KAR 25:010 Section 21 (14), the Board only has authority to 'order payment of benefits pending appeal in conformity with the award, decision, or order appealed from.' To the extent the petitioner's motion asked the Board to order reimbursement from the UEF should petitioner prevail on appeal, an issue not addressed in the ALJ's opinion, the petitioner's motion is **DENIED**.

(Emphasis in original).

An opinion of the Board was entered on December 1, 2010, which held that up-the-ladder liability was not a contested issue preserved by the parties

for determination by the ALJ. The claim was remanded to the ALJ with instructions to hold the USACC primarily liable for all benefits and require reimbursement to Bluegrass for any benefits paid. The Board also instructed that, should the USACC default on its payments to Stanford, the UEF shall provide payment of benefits, pursuant to 803 KAR 25:010 Sec. 25. The Board dismissed, as untimely, the issues presented by the USACC in its appeal. This appeal and cross-appeal followed.

An ALJ's decision is "conclusive and binding as to all questions of fact" and the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact[.]" KRS 342.285. This Court's review is limited to that of the Board and also to errors of law arising before the Board. *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999); KRS 342.290. Hence, our review "is to correct the Board only where the . . . Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

On appeal, the UEF and the USACC both argue that the issue of reimbursement was not preserved for determination by the ALJ and therefore the Board cannot order it. The USACC adopted the arguments given by the UEF on this issue. UEF supports its argument with an analysis of the alleged duplicitous manner in which Bluegrass filed its motion for continuation of benefits pending appeal. UEF also maintains that the Board executed an "about face" by ordering

reimbursement inconsistent with the legal analysis contained in its prior order which denied Bluegrass' motion for reimbursement should it succeed on appeal. Lastly, UEF argues that Bluegrass has never been required to provide proof of benefits paid and/or whether or not those payments were congruent with Kentucky's medical fee schedule, and therefore requiring reimbursement of a "blanket" amount creates a due process issue. For the following reasons, we do not agree.

Both logically, and equitably, the issue of reimbursement is a sub-issue of any liability issue presented to either the ALJ or the Board. It is disingenuous for the USACC to suggest that it will be held liable for Stanford's expenses but not be liable for those expenses that have already been paid by another exonerated party. Because USACC was determined to be liable for Stanford's bills, which Bluegrass had previously been paying, reimbursement for past expenses goes part and parcel with the determination. The Board did not perform an "about-face" but rather performed its duties properly at the appropriate times. Because, pending completion of the appeal, it was not authorized to order payment of benefits that were in conflict with the ALJ's order, it properly declined to do so. However, once the Board held that liability had been reallocated to a party other than that designated by the ALJ, reimbursement was inevitable and proper. The Board's order does not speak to the amount that should be reimbursed, because such specifics are better left to the fact finder. Furthermore, that amount has not yet been ordered by the ALJ and is therefore unpreserved

conjecture. Should the USACC have an objection to the amount that the ALJ orders as reimbursement, then such a challenge must first be presented to the ALJ.

On cross-appeal, USACC makes the following arguments: 1) the ALJ erred in finding that the claimant was an employee of the USACC or in not finding dual employment at the time of the injury; 2) the ALJ erred in finding that the claimant was acting within the course and scope of employment at the time of his injury; and 3) the Board erred in dismissing the appeal of USACC.

In support of its decision to dismiss USACC's appeal, the Board stated:

Stanford admitted in the second petition for reconsideration he was seeking the same relief he sought in his first petition for reconsideration. Successive petitions for reconsideration seeking the same relief are not permitted. Had the petition been filed within 14 days of the original opinion or had the second petition dealt with a patent error in the order ruling on the first petition for reconsideration, such a petition would be proper. Here, the second petition was filed more than 14 days after the date of the original decision and the second petition did not address a new error contained in the order ruling on the first petition for reconsideration. Thus, the second petition for reconsideration was not a timely petition addressing the original decision by the ALJ. Since the second petition was not a timely petition and did not address an error first occurring in the order ruling on the first petition for reconsideration, it did not destroy the finality of the order ruling on the first petition for reconsideration. Tube Turns Division of Chemetron v. Quiggins, 574 S.W.2d 901 (Ky.App. 1978). Because the petition for reconsideration was improper, the ALJ's order ruling on the second petition for reconsideration was a nullity. Stewart v. Kentucky Lottery Corp., 986 S.W.2d 918 (Ky.App. 1998). Based upon the foregoing, USACC's appeal to the Board was not timely. USACC's

appeal had to be filed by August 16, 2010 and it was not filed until August 27, 2010. Thus, the issues raised by USACC are not properly before the Board and its appeal must be dismissed.

We note, even if we were to consider the merits with regard to USACC's appeal, the record contained ample substantial evidence to conclude Stanford was an employee of USACC at the time of his accident and was acting within the course and scope of his employment at the time of his injury.

Having reviewed the record, we hold that the Board's analysis, and resulting dismissal, are sound. The USACC argues that the Board's analysis requires that it "determine whether or not a petition for reconsideration filed by another party addresses a new error or an old error and make a determination as to whether a second petition for reconsideration should be ruled on." If we are to read the USACC's argument correctly, it essentially argues that the Board require all parties to an action be aware of the pleadings set forth by the other parties. If such is the conclusion of the Board's analysis, whether intentional or not, it is appropriate. It is the responsibility of all parties to be cognizant, absent failure of service, of the pleadings and resulting rulings, of all other parties. Furthermore, Stanford's second motion for reconsideration clearly stated that it sought the same relief that was sought in the original motion for reconsideration. All pleadings were straightforward and required no deciphering. The Board's dismissal of the USACC's issues on appeal was appropriate. Therefore, we need not address the merits of the USACC's unpreserved arguments of ALJ error.

For the foregoing reasons, the December 1, 2010, opinion of the Workers' Compensation Board is affirmed.

Also before this Court is Stanford's motion for sanctions against the USACC for filing a frivolous appeal. An appellate court may award damages if the court finds that an appeal "is so totally lacking in merit that it appears to have been taken in bad faith." CR 73.02(4). The USACC sought review of the Board and the ALJ's determination of Stanford's employer and whether Stanford was acting within the scope of his employment at the time of his injury. Both of these issues are clearly essential elements of a workers' compensation claim and thus subject to review. Further, given the unique facts of this case, the resolution of these issues could not have been an effortless task. Thus, it would be insincere of this Court to hold that the USACC's claims were so lacking in merit that they were brought in bad faith. Once an appeal is initiated, it is prudent for a party to pursue all arguments upon which it hopes to succeed. Therefore, despite the USACC's failure to procure a desired reversal of the Board's adjudication, its additional claims are an anticipated element of a thorough appeal. Furthermore, the Board's decision to disregard Stanford's second motion for reconsideration when determining the timeliness of the USACC's appeal is an issue of first impression and one which had a direct effect on the USACC. Therefore, we hold that Stanford has failed to show that the USACC's claims were so lacking in merit that they were brought in bad faith and warrant sanctions. Accordingly, the motion for sanctions is hereby ORDERED DENIED.

ALL CONCUR.

ENTERED: September 30, 2011

/s/ Ann O'Malley Shake
SENIOR JUDGE, COURT OF APPEALS

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