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CASE NUMBER: 117336

No. 17-117336 A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

AYAAN M. KULMIYE
Claimant/Appellant

v.

TYSON FRESH MEATS, INC.
Respondent and Self-Insured

BRIEF OF APPELLANT

Appeal from the Appeals Board for the Kansas Division
of Workers Compensation

Stanley R. Ausemus #05967
STANLEY R. AUSEMUS, CHARTERED
413 Commercial
P. O. Box 1083
Emporia, Kansas 66801
620 342-8717
620 342-0996 Fax
e-mail: stanley@sraclaw.com
Attorney for Claimant/Appellant

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NATURE OF THE CASE

This is an appeal of a Workers Compensation case. The Board of Review affirmed the findings of the Administrative Law Judge finding the claimant/appellant was terminated for cause thereby giving her a functional impairment only. The claimant/appellant believes she was wrongfully terminated and has a 100 percent work loss.

STATEMENT OF FACTS

The claimant/appellant testified at the Regular Hearing held on May 2, 2016. She stated she was formerly employed at Tyson and spoke and read only Somalian. (Record on Appeal, Vol. 4, p. 7-8)

She met with an industrial accident on August 26, 2013. She told a nurse about it stating that she developed pain and discomfort in both hips, back and legs. She testified she was sent for medical treatment. She had physical therapy for 3 days and was prescribed pills. She stated she had a surgery consultation and was advised only surgery would help her. She further testified she thought about it but did not want the surgery. She testified the doctor who told her of the surgery was in Great Bend. She testified she wants her medical left open. (*Id.*, p. 8-11)

The claimant/appellant testified she does not work at Tyson anymore because she was fired. Her testimony was that a few days before she got fired, two team members,

she believed, were talking about her. One of the team members came over to the claimant/appellant and threw a handful of ground meat in her face and called her names. The claimant/appellant told the team member she was going to the office. The claimant/appellant further testified there were other team members present when she tried to leave, one of them kicked her in the foot. The claimant/appellant stated she pushed the team member out of the way in an effort to remove herself from the situation and get to the office. Claimant/appellant was still being kicked and that's when she got slapped and struck. The claimant/appellant testified the slap left a mark on her face. She further testified that the team member tried to slap her again but a supervisor restrained her. She further testified in the eight years she worked there she never had this problem before. (*Id.*, p. 11-16)

The claimant/appellant further testified that both she and the other worker were fired. She further testified she was "pissed off" when she was hit with the meat and hit on her foot. She testified she was trying to go to the office. (*Id.*, p. 16-17)

The claimant/appellant testified she was hired at Tyson in 2006, she was provided company documentation and knew that fighting was grounds for termination. The claimant/appellant was handed her written statement regarding the incident. She testified that it was written by someone else, that she signed it although it was never read to her. She testified the worker was a Vietnamese woman and there was also a Vietnamese man present. The claimant/appellant testified she was told to go home.

She called back in a week or two and that's when they told her she had been fired. She did recognize her signature on a document confirming her termination. She further testified that she did not violate any rules of conduct and that she was "fired for wrongly." She stated:

> "This team member was fighting me -- this team member the whole time I believe was to make it seem like me and her fought and that I don't know if she wanted to get fired, but my plan was never to get fired from my job for something -- for somebody is striking me, calling me names, kicking me on the foot."

The claimant/appellant testified the company told her there were people they talked to about the incident. (*Id.* p. 17-25)

The claimant/appellant testified that she was injured in August of 2013, she was given restrictions but continued to do the job. She testified she stood at her job except her supervisor would help her out when she needed help and she would walk around when she was in pain. She further testified her job did not require her to lift or move from side to side, but did require her to push about 70 to 75 pounds. (*Id.* p. 25-28)

The claimant/appellant testified she intended to see a doctor in Great Bend. She did not remember his name, did not know if he was a surgeon. She stated she was there to get treatment and "his treatment included me to have surgery." She testified she had an MRI. When asked if the MRI showed no abnormalities, she stated her doctor told her there was a condition between her back and hip and it needed to be corrected. She

further testified she has not been employed since her job at Tyson, she has looked for work at the Work Force, she never filled out an application but a man at Work Force helped her out. (*Id.* p. 28-29)

The claimant/appellant testified that after the incident she asked more than once to be moved to another job but was told that was the only job they had for her with her restrictions. She further testified she was treated twice for pain at Great Bend. She reiterated that she only received help once at Work Force. (*Id.* p. 29-31)

STATEMENT OF ISSUES

Issue No. 1 Was Appellant wrongfully terminated?

Issue No. 2 The nature and extent of the Appellant's disability.

Issue No. 3 Did the Court err in considering statements offered by co-employees as business records when offered for the truth of the matter over the objections of the claimant/appellant?

STANDARD OF REVIEW

As this Court is well aware, its review of agency actions is limited to questions of law, K.S.A. 44-556(a). This Court has concluded that whether the Board of Appeal's findings are supported by substantial competent evidence, it is a question of law. See, *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 55, 913 P.2d 612 (1995). The Appeals Court "may not reweigh the evidence presented at the agency hearing or determine the weight or credibility of the witnesses' testimony." *Id.*, pg. 56 citing *City of Wichita v. Employment Security Bd.*, 13 Kan. App. 2d 729, 733, 779 P.2d 41 (1989). As the Kansas

Supreme Court has said, "(t)he evidence is viewed in the light most favorable to the party prevailing below, and, if substantial evidence supports the district court's factual findings, the appellate court does not reweigh the evidence or reverse the final order of the district court." *Hughes v. Inland Container, Corp.*, 407, 410, 799 P.2d 1011 (1990). "'Substantial evidence' is evidence which possesses both relevance and substance, and which furnishes a substantial basis of fact from which the issues can be reasonably resolved." *Kansas Racing Management, Inc. v. Kansas Racing Comm'n*, 244 Kan. 343, 365, 770 P.2d 423 (1989). And as the Kansas Supreme Court has affirmed, the Workers Compensation Act is to be liberally construed in favor of the worker. *Kinder v. Murray & Sons Constr. Co.*, 264 Kan. 484, 957 P.2d 488 (1989).

The Claimant/appellant further calls the Court's attention to K.S.A. 77-621, which provides the law relative to the scope of review by this Court of a finding by the Administrative Law Judge.

In the case of *Trevizo v. El Gaucho Steakhouse*, 45 Kan.App. 2d 667, 253 P.3d 785 (2011), the Court noted that the amended Kansas Judicial Act alters an appellate court's analysis in three ways: (1) it requires review of the evidence both supporting and contradicting the agency's findings; (2) it requires an examination of the presiding officer's credibility determination, if any; and (3) it requires review of the agency's explanation as to why the evidence supports its findings. It is evident that neither the Administrative Law Judge nor the Board of Appeals followed the criteria above set out

in the instant case. The Claimant/appellant further calls the Court's attention to the case of *Williams v. Petromark Drilling, LLC*, 49 Kan.App 2d, 24. This case involved the application of the"coming and going rule." However, the significance of the case involves the Supreme Court's discussion of the standard of review by the Appellate Court. The Supreme Court stated:

> "When the evidence in a workers compensation claim is not amenable to only one factual finding as a matter of law, an appellate court errs deciding it in that way. The reviewing court's responsibility is to examine the record as a whole to determine whether the worker's compensation board's factual determinations are supported by substantial evidence. This analysis requires the court to 1) review evidence both supporting and contradicting the agency's findings; 2) examine the presiding officer's credibility determination, if any; and 3) review the agency's explanation as to why the evidence supports its findings. In this case, the Court of Appeals' decision reversing the Worker's Compensation Board on the grounds that undisputed facts in the record could lead to only one legal conclusion under the 'coming and going rule' of K.S.A. 2011 Supp. 44-508(f) must be reversed and the Board's decision affirmed."

Further, the Court of Appeals in *Glenn C. Lake v. Jessee Trucking and Continental Western Group*, 49 Kan.App. 2d, 820, stated, at Syllabus 2,

> "Under K.S.A. 2012 Supp. 77-621 (c) and (d), an appellate court reviews the Workers Compensation Board's factual findings to see whether substantial evidence supports them in light of the whole record, **considering evidence both supporting and detracting from the Board's findings.**" [Emphasis added]

ARGUMENTS AND AUTHORITIES

Issue No. 1. Was Appellant wrongfully terminated

The Administrative Law Judge and the Board appear to have formed the opinion that Ms. Kulmiye was terminated for cause. In that respect the Claimant/appellant calls the Court's attention to *De Anna Merrill v. Georgia Pacific and Indemnity Insurance Co. Of North America*, Docket No. 1064126. In that case the appropriate standard for determining if an employee was discharged for cause is as follows:

> "The parties agreed *Morales-Chavarin* [No. 95,261, unpublished Kansas Court of Appeals opinion filed 08-04-2006] utilizes the appropriate standard for determining if an employee was discharged for cause. Such case stated what constituted "good cause to terminate" an employee so as to prohibit an award of work disability benefits was a question of first impression. *Morales-Chavarin* held:
>
> [T]he proper inquiry to make when examining whether good cause existed for a termination in a workers compensation case is whether the termination was reasonable, given all of the circumstances. Included within these circumstances to consider would be whether the claimant made a good faith effort to maintain his or her employment. Whether the employer exercised good faith would also be a consideration. In that regard, the primary focus should be to determine whether the employer's reason for termination is actually a subterfuge to avoid work disability payments."

We further call the Court's attention to the fact that the term "for cause" is not defined in the Workers Compensation Act. It goes without saying that the term "for cause" is subject to broad interpretation. It has been noted that the United States Supreme Court stated the term "for cause" is a broad and general standard and that a more specific definition would be impractical given the "infinite variety of factual situations that might reasonably justify dismissal for cause". *Arnett v. Kennedy*, 416

U.S. 134. As a result, it is fair to say that the term "for cause" in the Workers Compensation Act is not plain or unambiguous, but rather is broad and general and according to the United States Supreme Court not subject to precise definition.

On the other hand we must look to the *Morales-Chavarin* case which does state that there must be a standard of reasonableness based upon all of the circumstances including the good faith of both parties. *Morales-Chavarin* does not adopt a definition "for cause".

There is a 10th Circuit definition of the word "cause" which is found in *Weir v. Anaconda Co.*, 773 F.2d 1073. There it is stated as follows:

> "[Cause for discharge] is a shortcoming in performance which is detrimental to the discipline or efficiency of the employer. Incompetency or inefficiency or some other cause within the control of the employee which prohibits him from properly completing his task is also included within the definition. A discharge for cause is one which is not arbitrary or capricious, nor is it unjustified or discriminatory."

It is sufficient to say that there must be good faith on the part of all parties involved with the termination. There is no question in this case but that the claimant/appellant had worked at the plant since the year 2006. She had never had a problem in the past. It is evident that she had been "assaulted" by co-employees and from her testimony she was trying to go to the office to report this event to try and find assistance. She was not fighting, she was rather trying to extricate herself from the

situation that she was in so that she could in fact seek assistance from the proper authorities with the Respondent. The claimant/appellant further testified that she desired to continue to work at the plant. She did not want to be terminated.

Issue No. 2. The nature and extent of the Appellant's disability

Claimant/appellant would further remind the Court that there was an agreement that she suffered a 9% impairment to the body as a whole. Claimant/appellant's average weekly wage was $473.25; making her TTD rate $315.35. Based on these numbers, the compensation would calculate to $11,778.32. It was further stipulated that, from and after the date of her termination, she would be entitled to an additional $82.00 for fringe benefits. There has been testimony in this case by Doug Lindahl that given the restrictions of Dr. Murati there is no work available for her in the open market. (Record on Appeal, Vol. 2, p. 5-10) Dr. Murati testified that based upon the task list, she would have a 66.667% task loss (Record on Appeal, Vol. 3, p. 13-17).

By the same token, there has been testimony from Steve Benjamin that there is work available to her in the open labor market if one considers the report of Dr. Hunsberger. (Record on Appeal, Vol. 6, p. 12-13) Further, he has indicated if one considers Dr. Estivo's report there would be work available in the open labor market. (Record on Appeal, Vol. 6, p. 12-13)

It is the position of the claimant/appellant that she is entitled to a finding that she has a 100 percent work loss. This is based upon the opinions of Dr. Murati and Mr. Lindahl. Claimant/appellant further requests that the Court find that Dr. Murati's report is the most thorough report given. A finding of a 100 percent work loss would result in an award of $130,000,00 less any TTD which may have been paid.

Claimant/appellant would further request that her medical be left open in as much as Dr. Murati had recommended a yearly follow up for her low back pain and pain in the right hip. (Record on Appeal, Vol. 3, p. 12) Further, Claimant/appellant would remind the Court that she previously was sent to Dr. Razafindrabe for pain management. Further, Dr. Hunsberger has indicated the claimant/appellant needs pain management. Record on Appeal, Vol. 5, p. 16) She testified that she continues to have problems with pain.

Issue No. 3. Did the Court err in considering statements offered by co-employees as business records when offered for the truth of the matter over the objections of the claimant/appellant.

It is very evident that no persons were called to testify that actually viewed the matter rather, the Human Relations Department took it upon themselves to summarily dismiss the Claimant/appellant, not considering all of the facts and circumstances surrounding the events involving the assault that was made upon the Claimant/appellant. All of these matters must be taken into account when considering good faith on the part

of the Respondent. In the case before us, there is no question but what Ms. Kulmiye has testified unequivocally that she was merely trying to extract herself from the position that she was in to find the assistance from the proper authorities at the plant.

It should be further noted that the person that did testify did not view the events and could not testify as to what actually happened. Further, this is not a fight or altercation that would raise itself to the degree that the Claimant/appellant should have been terminated. There is no question that the other person who initiated the confrontation should be terminated but to terminate the Claimant/appellant is taking the matter just one step too far.

It is the position of the Claimant/appellant that if all matters are considered then the employer was not acting in good faith, failed to properly evaluate the situation and that Ms. Kulmiye should have been allowed to retain her job. Therefore the termination should never have been considered a termination for cause.

During the course of the taking of depositions, and more specifically that deposition of Barbara Larsen, counsel endeavored to offer as an exhibit written statements made by other employees at Tyson who had reportedly viewed and witnessed the events involving the claimant/appellant.

Those witness' statements were elicited from documents maintained by Ms. Larsen

and being offered as business records.

Claimant/appellant's counsel objected as follows:

> "I object to exhibit 2 on the basis that it is nothing but hearsay and if it is being offered for the truth of the matter and as far as these documents is concerned, it is hearsay and should be -- well, it is not to be allowed by the Court -- or disregarded by the Court."

(Record on Appeal, Vol 8, p. 7-8)

Still, counsel went ahead and offered the purported written statements even though they had not been subject to cross examination.

It is the position of the claimant/appellant that these written statements are in fact hearsay and should not be considered by the Court and should not have been considered either by the Administrative Law Judge or by the Board of Review.

In that respect, the claimant/appellant does call the Court's attention to the case of *State of Kansas v. Donald E. Davis*, 2 Kan.App. 2 at 698 at Syl. 1. Therein, the Court has stated as follows:

> "1. CIVIL PROCEDURE - *Hearsay -- Business Records Exception.* The business records exception to the hearsay rule renders admissible hearsay statements of hospital personnel but does not render admissible included hearsay statements absent admissibility of the included statements under some other exception to the rule."

The point is that the respondent offered the statements as a business record even though the persons making the statements were not present and subject to cross examination and for this reason it was nothing but double hearsay.

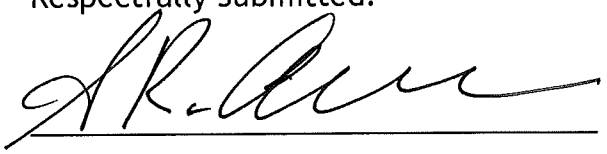
CONCLUSION

In conclusion, the claimant/appellant does request a finding by this Court that she is in fact entitled to a work loss. Claimant/appellant states that the respondent did not act in good faith in terminating her, placed reliance upon hearsay statements in the determination of her termination which should not have been considered either by the Administrative Law Judge and the Board of Review, and that there was no basis for a finding that she was terminated for cause.

Therefore, the claimant/appellant requests an Order of this Court that she is entitled to a work loss of at least $130,000.00 based upon the opinions of Dr. Murati and Mr. Lindhal. Claimant/appellant further requests that her medical be left open and the

right to review and modify.

Respectfully Submitted:



Stanley R. Ausemus #05967
STANLEY R. AUSEMUS, CHARTERED
413 Commercial
P.O. Box 1083
Emporia, Kansas 66801
620 342-8717
620 342-0996 Fax
E-mail: stanley@sraclaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original of the above and foregoing **BRIEF OF APPELLANT** was e-filed with:

Clerk of the Appellate Courts
Kansas Judicial Center
301 SW 10th Avenue
Topeka, KS 66612-1507

with two (2) copies being served upon counsel addressed as follows:

Gregory D. Worth
McANANY, VAN CLEAVE & PHILLIPS, P.A.
10 E. Cambridge Circle Drive, Ste 300
Kansas City, KS 66103

and one (1) copy being served upon each of the following:

Office of the Board of Appeals
Workers Compensation Division
401 SW Topeka Blvd. Ste 2
Topeka, KS 66612-1227

Honorable Pamela J. Fuller
Administrative Law Judge
301 N. Main #201
PO Box 1138
Garden City, KS 67846-1138

Ayaan Kulmiye
606 Long Blvd., Apt. A3
Garden City, KS 67846

on the 7th day of April, 2017.

Stanley R. Ausemus #05967
Attorney for Claimant/Appellant