

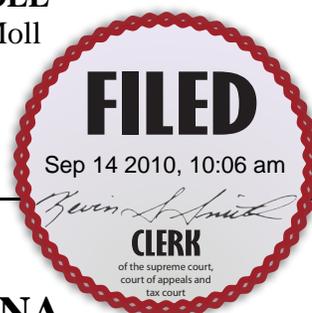
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**IN THE
COURT OF APPEALS OF INDIANA**

RONALD BROOKS,

Appellant,

vs.

ZORES, INC.,

Appellee.

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No. 93A02-1002-EX-336

APPEAL FROM THE FULL WORKER'S COMPENSATION BOARD
The Honorable Linda Hamilton, Chairman
Cause No. C-191962

September 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Ronald Brooks appeals the decision of the Full Worker's Compensation Board of Indiana (the "Board") affirming the decision of a single hearing member dismissing Brooks's bad faith claim against Zores, Inc. ("Employer"). Brooks raises three issues, which we revise and restate as whether the Board erred in affirming the order of dismissal. We affirm the Board's decision.¹

The relevant facts follow. Brooks was employed by Employer as an auto body painter between the years 1998 and 2000. Brooks filed an application for adjustment of claim in January 2002 and an amended application for adjustment of claim in April 2002 under cause number O-160125 ("Cause No. 125"). On March 26, 2008, a hearing was held by a single hearing member, and the parties were represented by counsel and presented evidence of medical records and evaluations.

On April 1, 2008, Brooks sent notice to Employer that he intended to serve requests for production of documentary evidence upon non-parties Monroe Guaranty and Finish Master. On April 9, 2008, Employer filed a motion to quash post-hearing requests for production by Brooks arguing that Brooks filed his application for adjustment of claim on April 1, 2002, that a hearing on the merits of the case was held on March 26, 2008, that Brooks did not ask for leave to serve post-hearing discovery at the hearing, and that Brooks had ample time to complete discovery prior to the hearing. On April 14,

¹ We observe that Brooks's brief does not contain a copy of the decision of the Full Worker's Compensation Board. Although the Full Board's decision is included in the appellant's appendix, we remind counsel also to include a copy of the judgment or order from which the appeal is taken in the back of the appellant's brief in compliance with Indiana Appellate Rule 46(A)(10).

2008, the single hearing member ordered that Brooks's requests for production of documents be quashed.

On April 15, 2008, the single hearing member issued a decision finding that Brooks had been evaluated by five doctors between the years 2001 and 2007, concluding that the greater weight of the evidence established that Brooks's symptoms were most likely related to a psychological disorder and that he did not suffer an occupational injury or exposure to paint fumes arising out of and in the course of his employment with Employer. The decision ordered that Brooks take nothing by way of his application for adjustment of claim.

On April 21, 2008, Brooks filed an application for adjustment of claim under application number C-191962 ("Cause No. 962") alleging that Employer acted with bad faith and committed fraud by perjury when Employer's manager, at the hearing in Cause No. 125, testified falsely that she ordered painting suits and hoods which Brooks wore while painting and that Brooks never complained about chemical exposure. Brooks requested review of the single hearing member's decision under Cause No. 125 on April 23, 2008, and after a hearing the Board affirmed the decision on February 26, 2009.

On March 11, 2009, Cause No. 962 was "Set for Pre-Trial on April 22, 2009." Appellant's Appendix at 1. On April 22, 2009, Brooks filed a motion for change of single hearing member in that cause. On the same date and in the same cause, the single hearing member entered an order of dismissal² and the chairman of the Board entered a

² A brief filed with the Board by Employer and included in the record on appeal indicates that a "status conference" with the single hearing member under Cause No. 962 was held on April 22, 2009. In

“cause status order” denying Brooks’s motion for change of single hearing member and dismissing Brooks’s application. Id. at 8.

Brooks filed an application for review by the Board, and Brooks and Employer filed briefs with the Board. In his brief, Brooks argued that his non-party discovery under Cause No. 125 should have been allowed and that his bad faith claim should be allowed to proceed to hearing on the merits. He requested the Board to remand the matter for a hearing on the merits or alternatively to reinstate Cause No. 125 and order Cause No. 125 and Cause No. 962 consolidated and remanded.

On January 21, 2010 the Board issued an order affirming the dismissal of Brooks’s application for adjustment, stating in part:

It is found by the entirety of the Members that disregarding the fact [Brooks] slept on his rights and did not appeal the underlined [sic] decision [Cause No. 125], the [Board] has considered [Brooks’s] new claim and rules as follows.

It is [] found that even assuming [Brooks’s] allegations are true and Employer’s witness committed perjury by lying about safety equipment and protective gear, this would not change the underline [sic] decision. Single Hearing Member[’s] decision is based on the medical evidence from the various physicians who opined that [Brooks’s] symptoms were related solely to his personal mental and emotional condition. [Brooks’s] contention of perjury was not material to the decision of the Single Hearing Member and is not material to this decision of the [Board].

Id. at 69-70.

his brief, Brooks states that his application under Cause No. 962 was “the subject of a ‘hearing’ noticed for 22 April 2009” and that Brooks had requested a transcript of that hearing, but that the “Court Reporter responded that the ‘discussions concerning this case, were held off the record and thus, there is no transcript to prepare.’” Appellant’s Brief at 3.

The issue is whether the Board erred in affirming the order of dismissal under Cause No. 962 entered by the single hearing member. In reviewing a worker's compensation decision, an appellate court is bound by the factual determinations of the Board and may not disturb them unless the evidence is undisputed and leads inescapably to a contrary conclusion. Christopher R. Brown, D.D.S., Inc. v. Decatur County Mem'l Hosp., 892 N.E.2d 642, 646 (Ind. 2008). We examine the record only to determine whether there is any substantial evidence, along with the reasonable inferences that can be drawn therefrom, to support the Board's findings and conclusion. Id. As to the Board's interpretation of the law, an appellate court employs a deferential standard of review to the interpretation of a statute by an administrative agency charged with its enforcement in light of its expertise in the given area. Id. The Board will be reversed only if it incorrectly interpreted the Worker's Compensation Act. Id.

Brooks argues that the Board erred in affirming the single hearing member's decision that Employer did not act in bad faith by failing to provide worker's compensation benefits to Brooks.³ Specifically, Brooks argues that "[t]he Board misses

³ Brooks also argues that he "should have been allowed the requested third party discovery, and [the Board's] denial was an abuse of discretion." Appellant's Brief at 10. Employer argues that Brooks "waived the issue with regard to his post-hearing discovery when he failed to appeal the [Board's decision] including the Order quashing the post-hearing discovery with regard to [Cause No. 125]." Appellee's Brief at 9. We agree with Employer. The record shows that on April 14, 2008, a single hearing member ordered that Brooks's requests for production of documents be quashed under Cause No. 125, that a single hearing member issued a decision on April 15, 2008 ordering that Brooks take nothing by way of his application for adjustment of claim, and that the Board affirmed the decision of the single hearing member on February 26, 2009. Brooks concedes that he did not appeal or seek timely review of the Board's February 26, 2009 order or the single hearing member's April 14, 2008 ruling on the motion to quash under Cause No. 125. See Ind. Code § 22-3-4-8(b) ("An award by the full board shall be conclusive and binding as to all questions of the fact, but either party to the dispute may, *within thirty (30) days from the date of such award*, appeal to the court of appeals for errors of law under the same terms

the point of the statute in its insistence that only a fraud or act of bad faith which would change the Award should be allowed to be addressed” and that “[i]t is immaterial whether or not the misconduct was ‘game changing,’ it is the nature of the act that warrants punishment.” Appellant’s Brief at 11. Brooks also appears to argue that the legislature has imposed upon the Board the responsibility to judge and punish employers who act in bad faith and that the Board’s “duty is to do that regardless of its distaste for such work.” Id. at 12.

Employer argues that Brooks did not appeal the Board’s decision under Cause No. 125 and, by alleging that a witness at the hearing under Cause No. 125 committed perjury during her testimony, “seeks to reopen the issues with regard to that testimony.” Appellee’s Brief at 12. Employer appears to argue that the decision of the single hearing member and the Board under Cause No. 125 was based upon the medical evidence presented at the hearing and that “whether or not [Brooks] wore a paint suit and/or hood during his employment with [Employer] would seem to be immaterial to the doctors . . . with regard to their examination, evaluation and diagnoses [of Brooks].” Id. at 14-15. Employer also cites to Ag One Co-Op v. Scott, 914 N.E.2d 860 (Ind. Ct. App. 2009), for the proposition that “there could be no bad faith in denying benefits to a worker’s compensation claimant if, in fact, the employer did not act improperly in denying benefits” and argues that here “the disputed testimony is immaterial to the ultimate

and conditions as govern appeals in ordinary civil actions”) (emphasis added); Ind. Appellate Rule 9(A)(3) (“A judicial review proceeding taken directly to the Court of Appeals from an order, ruling, or decision of an Administrative Agency is commenced by filing a Notice of Appeal with the Administrative Agency within thirty (30) days after the date of the order, ruling or decision, notwithstanding any statute to the contrary).

decision and thus, cannot serve as the basis for an award of bad faith.” Appellee’s Brief at 18.

In his reply brief, Brooks argues that Employer misstated the holding of Ag One Co-Op, that the issue in that case was “whether the Employer had ‘wrongfully denied benefits,’” and that “[t]he issue here is whether the Employer perverted the administrative and quasi-judicial system to [Brooks’s] detriment, by tendering false and perjured evidence.” Appellant’s Reply Brief at 5-6. Brooks also argues that “[w]hether or not [he] would have prevailed in his injury claim had only honest testimony been submitted, the fact that dishonest testimony was allegedly submitted, provides a separate and independent wrong and cause of action” Id. at 6.

Ind. Code § 22-3-4-12.1 governs “bad faith” allegations brought in worker’s compensation claims and provides in part:

The worker’s compensation board, upon hearing a claim for benefits, has the exclusive jurisdiction to determine whether the employer, the employer’s worker’s compensation administrator, or the worker’s compensation insurance carrier has acted with a lack of diligence, bad faith, or has committed an independent tort in adjusting or settling the claim for compensation.

I.C. § 22-3-4-12.1(a).

Initially, we observe that Brooks does not cite to authority to support his argument that “[i]t is immaterial whether or not the misconduct was ‘game changing,’ it is the nature of the act that warrants punishment,” see Appellant’s Brief at 11, or his argument that “the fact that dishonest testimony was allegedly submitted, provides a separate and independent wrong and cause of action.” See Appellant’s Reply Brief at 6.

In Borgman v. Sugar Creek Animal Hosp., 782 N.E.2d 993 (Ind. Ct. App. 2002), trans. denied, an employee argued that the Board erred in determining that the employer's worker's compensation insurance carrier did not act in bad faith in denying the employee's claim for worker's compensation benefits. The court in Borgman stated:

We initially observe that the single hearing member determined that there was an absence of evidence favorable to [the employee's] claim [for worker's compensation benefits]. Thus, her allegation that [the worker's compensation insurance carrier]'s actions constituted bad faith *necessarily* fails because [the employee] did not meet her burden of proof of the underlying claim that she was improperly denied worker's compensation benefits.

782 N.E.2d at 998 (emphasis added).

Similarly, in Ag One Co-Op, an employer argued that the Board erred in affirming the single hearing member's decision that it acted in bad faith by failing to provide worker's compensation benefits to an employee due to a dispute over which the employer was responsible. 914 N.E.2d at 861-862. The court, citing to Borgman and noting that "the essence of the holding in Borgman is that there can be no bad faith in denying benefits if, in fact, the employer did not act improperly in denying benefits," stated that it "fail[ed] to see how [the employer] can be said to have acted in bad faith in denying [the employee's] claim for benefits when [the employer] was ultimately found not to be liable for such benefits." Id. at 864.

We acknowledge that the facts set forth and the arguments presented in Borgman and Ag One Co-Op are not identical to the facts and arguments presented in this case in that the Board in each of those cases determined whether the employer had acted in bad

faith and at some point during the proceedings determined whether the employee was entitled to benefits from the employer or employers. Here, Brooks did not appeal the Board's determination under Cause No. 125 that he was not entitled to worker's compensation benefits. Nevertheless, the holdings of Borgman and Ag One Co-Op are instructive in that they essentially hold that there can be no bad faith in denying benefits where the employer is not responsible for the underlying claim. See Ag One Co-Op, 914 N.E.2d at 863-864; Borgman, 782 N.E.2d at 998.

Based upon the facts set forth in the record and our previous opinions regarding allegations that an employer acted in bad faith in adjusting or settling a claim for compensation under the Worker's Compensation Act, we cannot conclude that the Board erred in affirming the single hearing member's order of dismissal. See Alliance Ins. Group v. Howell, 929 N.E.2d 922, 926 (Ind. Ct. App. 2010) (noting that "[t]his court has held that Section 12.1(a) penalties for 'bad faith' may not be assessed if the employer, or its worker's compensation insurance carrier, is ultimately found not to be responsible for the underlying claim") (citing Ag One Co-op, 914 N.E.2d at 863-864; Borgman, 782 N.E.2d at 998).⁴

For the foregoing reasons, the decision of the Board is affirmed.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.

⁴ This case has not yet been certified.