

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

02/21/2007

JOSEPH R. RUBIO, Claimant

Opinion by DUDLEY
Commissioner

v. VWC File No. 227-31-18

KALKREUTH ROOFING AND SHEET METAL, INC., Employer
AMERICAN HOME ASSURANCE COMPANY, Insurer

W. David Falcon, Jr., Esquire
Chasen and Boscolo
103 West Broad Street
Suite 100
Falls Church, VA 22046
for the Claimant.

Terry D. Adams, Esquire
Jordan, Coyne and Savits, L.L.P.
10509 Judicial Drive
Suite 200
Fairfax, VA 22030
for the Defendants.

REVIEW on the record by Commissioner Tarr, Commissioner Diamond, and Commissioner Dudley at Richmond, Virginia.

This case is before the Commission on the employer's request for Review of the Deputy Commissioner's June 5, 2006, Opinion. It requests that the record be reopened for submission of the certified death certificate of Joseph R. Rubio from Arizona. Moreover, the employer assigns error to the award of benefits as procured by fraud, to the award of any benefits, and to the finding that the claimant's testimony was credible. Additionally, the claimant moved for sanctions pursuant to Virginia Code § 65.2-713 of the Virginia Workers' Compensation Act on the

grounds that the employer's request for Review is without merit. We affirm in part, set aside the award, deny the motion for sanctions, and remand for evidence on the claimant's identity.

On February 28, 2006, the claimant, identified as Joseph R. Rubio, filed a Claim for Benefits alleging that he fell 24 feet from a ladder and sustained multiple injuries on February 16, 2006, while working for the employer. He listed his social security number (which we will omit in this Opinion) and his date of birth as April 8, 1966. The form was signed by his attorney. The claimant sought temporary total disability benefits beginning February 23, 2006, and lifetime medical benefits. On May 16, 2006, the employer filed a notice of intent to rely on the affirmative defense of willful misconduct.

At the Hearing on June 1, 2006, the parties stipulated to the claimant's pre-injury average weekly wage, to the periods of disability, and that he sustained an injury by accident arising out of and in the course of his employment on February 16, 2006. The employer defended on the basis that the claim was barred, pursuant to Code § 65.2-306, by his willful misconduct in failing to follow a safety rule, namely that he placed a ladder on an uneven surface in violation of a safety rule.

The evidence is summarized to the extent necessary to explain our conclusions upon Review. The claimant testified that on February 16, 2006, he was replacing a roof at Loudoun County High School for the employer. He had to climb two ladders to get to the second roof on which he had been working for two weeks. The claimant stated that, two days before the accident, one of the ladders was moved by his foreman, "Alvaro," and remained in that location on the date of the accident (Tr. at 4). He testified that, on the morning of the accident, there

was ice on the roof. The claimant inquired of Alvaro if they were prone to injury climbing the ladder, to which he responded negatively. Five individuals went up the ladder that morning. At some point later that day, another worker on the first roof, which was one ladder below where the claimant was working, needed screws. Since Alvaro had assigned him the task of getting the screws, he climbed down the ladder to take them to the other employee. At that time, the “ladder just flew away,” and the claimant fell down to the first roof (Tr. at 6). He stated that his fall was witnessed by the general superintendent, who then asked Alvaro why the ladder was not “tied off” (Tr. at 9).

On cross-examination, the claimant testified that, during his four months of employment with the employer, he received one safety briefing in December 2005, around Christmas. He denied receiving information about how to climb and place ladders. The claimant stated that he probably signed a safety meeting document indicating that he attended. He denied moving the ladder on the morning of the accident. The claimant said that he did not take a urinalysis as a result of his accident. He testified that he was not born in Guatemala. There were no other witnesses at the Hearing.

The Deputy Commissioner held that the claimant sustained a compensable injury by accident on February 16, 2006, and awarded temporary total disability benefits beginning February 23, 2006, and continuing. The employer requested reconsideration and Review, and asked that the record be reopened for the admission of an Arizona death certificate for Joseph R. Rubio.

Upon reconsideration, the Deputy Commissioner found that the proffered death certificate did not constitute after-discovered evidence as provided under Rule 3.3 of the Rules of the Virginia Workers Compensation Commission. We agree.

Commission Rule 3.3 provides as follows:

No new evidence may be introduced by a party at the time of review except upon agreement of the parties. A petition to reopen or receive after-discovered evidence may be considered only upon request for review.

A petition to reopen the record for additional evidence will be favorably acted upon by the full Commission *only when* it appears to the Commission that such course is absolutely necessary and advisable *and* also when the party requesting the same is able to conform to the rules prevailing in the courts of this State for the introduction of after-discovered evidence. [emphasis added]

Thus, the party seeking to reopen the record for submission of after-discovered evidence must prove that:

(1) the evidence was obtained after the hearing; (2) it could not have been obtained prior to the hearing through the exercise of reasonable diligence; (3) it is not merely cumulative, corroborative or collateral; and (4) it is material and should produce an opposite result before the commission.

Williams v. Peoples Life Ins. Co., 19 Va. App. 530, 532, 452 S.E.2d 881, 883 (1995).

We find that the employer did not prove these elements, specifically, that the evidence could not have been discovered before the Hearing and would have produced a different result on re-Hearing. The Claim for Benefits was filed on February 28, 2006. There is no evidence that attempts to obtain the death certificate were promptly initiated or unduly delayed. Moreover, at no

point during the Hearing did the employer request that the record be left open or indicate difficulty with any efforts to prepare for the Hearing and/or obtain such information.

Employer's counsel failed to show that this information was unknown to the employer before the evidentiary Hearing, or that the information could not have been obtained by the exercise of reasonable diligence. In fact, counsel inquired of the claimant regarding his place of birth on cross-examination, but did not address any further identity issues. Also, the fact that the injured party may be an illegal immigrant using a fake identity may not be material to the issue of whether he is entitled to temporary total disability benefits, and thus, probably would not have produced an opposite result at Hearing. Pursuant to § 65.2-101, amended in April 2000, the definition of "employee" includes aliens unlawfully employed. Therefore, if the claimant is an alien, his status would not necessarily bar him from receiving benefits. Accordingly, the evidence proffered by the employer does not meet the requirements of after-discovered evidence.

However, the evidence proffered by the employer raises questions not answered by the available evidence. The production of a death certificate in the claimant's name, with the same social security number and date of birth, does not address the reasons he is using that information. There is no evidence that he is, or is not, an illegal alien, and there is no evidence as to the reason he is using the decedent's information. We do not have sufficient evidence to determine this injured worker's true identity. To permit an award and payment of benefits under the name and social security number of an individual who has been dead since May 2, 1994, raises the issue of the Commission being asked to knowingly enter an award which has the force of a judgment in favor of someone who may have provided false information as to his true identity. The claimant is

attempting to obtain workers' compensation benefits using this information and has obtained medical care using this information. If he is an illegal alien, and therefore, entitled to benefits, issuing an award and causing benefits to be paid to a named person who is deceased results in the Commission entering an award in favor of an incorrectly identified individual. This puts the employer and insurer in a position of being ordered to pay benefits to a person who is not the named party. It results in the misuse of an official record that has the force of a judgment. The Commission, like a court, cannot and should not condone generating a legal order and record that misidentifies the party in whose favor the award is entered.

It is well-settled that the Commission may reopen the record when circumstances indicate that an award is the result of fraud. The employer argues that the proffered evidence implicates potential fraud on the Commission. The proof of alleged fraud must be clear and convincing, such as to satisfy the conscience of the trier of fact, "who should be cautious not to lend too ready an ear to the charge." City of Norfolk v. Bennett, 205 Va. 877, 140 S.E.2d 655 (1995), *quoting* Redwood v. Rogers, 105 Va. 155, 53 S.E. 6 (1906). We find that the documents filed with the employer's written statement are sufficient to set out the *prima facie* case of fraud as alleged. The proffered evidence indicates that the named claimant may be deceased, and as this is not a claim for a living person and not for death benefits, the Commission cannot enter a claim and award in favor of a deceased individual.

We find that the Deputy Commissioner correctly determined that the individual who filed the claim as Joseph R. Rubio proved that he suffered a compensable injury by accident. The record

supports this finding. We further agree that the employer did not prove that the claim was barred by willful misconduct.

Finally, we address the claimant's request that sanctions be imposed against the employer for presenting a frivolous and groundless appeal. Virginia Code § 65.2-713 provides that we may assess against an employer or insurer, who has brought or defended proceedings, or alternatively, delayed payment under an existing award without reasonable grounds, the whole cost of the proceedings, including a reasonable attorney's fee. See Va. Polytechnic Inst. v. Posada, 47 Va. App. 150, 622 S.E.2d 762 (2005) and Lowe's of Short Pump Virginia v. Campbell, 38 Va. App. 55, 62, 561 S.E.2d 757, 760 (2002). The determination of whether a case was prosecuted without reasonable grounds must be judged from the perspective of the employer, not the employee. Lynchburg Foundry Co. v. Goad, 15 Va. App. 710, 427 S.E.2d 215 (1993). Looking at the facts from the perspective of the insurer, we find that this appeal was brought with reasonable grounds. See Slusher v. Shelor Chevrolet Corp., 70 OWC 272 (1991). The employer obtained evidence after the Hearing that appeared relevant to the claim and argued that such evidence should be considered on Review. While we disagree with the employer's arguments, we decline to assess sanctions, since we agree with the employer that the award as entered should be vacated pending the receipt of additional evidence.

Accordingly, the Opinion of the Deputy Commissioner that on February 16, 2006, the individual identifying himself as Joseph R. Rubio sustained a compensable injury by accident and is entitled to temporary total disability benefits beginning February 23, 2006, and continuing, is AFFIRMED. However, the award is VACATED, and the claim is REMANDED for the taking of

evidence of the claimant's actual identity and immigration status,¹ so that an award may be issued for the benefit of the correct party. The claimant's motion for sanctions is DENIED. The style of the case and any award that may enter should reflect the true identity of the claimant.

APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within 30 days of receipt.

cc: Mr. Joseph R. Rubio
7667 Maple Avenue
Apartment 410
Silver Spring, MD 20912

Kalkreuth Roofing and Sheet Metal, Inc.
P.O. Box 6399
Wheeling, WV 26003

American Home Assurance Company
AIG Domestic Claims, Inc.
P.O. Box 70069
Louisville, KY 40270

¹ While the claimant's immigration status does not prevent him from receiving benefits, it may impact the nature of the benefits to which he may be entitled. *See* Code § 65.2-502(A).