

OPINION ENTERED: January 27, 2012

CLAIM NO. 200985977

CARETENDERS HOME HEALTH

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

SHARON GRIGSBY  
and HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

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BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

**STIVERS, Member.** Caretenders Home Health ("Caretenders") seeks review of the September 7, 2011, opinion, order, and award rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ") finding Sharon Grigsby ("Grigsby") sustained work-related injuries to both knees on December 8, 2007, and awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical

benefits. Because the issue on appeal relates to Grigsby's employee status on the date of her injuries, we will not discuss the medical evidence.

Grigsby, who has a Bachelor of Science degree in nursing and is a registered nurse ("RN"), was employed as the director of Caretenders' Shepherdsville office. Caretenders is a home health agency. Grigsby fell while dancing at Caretenders' Christmas party which she had volunteered to organize. The Christmas party occurred at the Holiday Inn at Fern Creek. As a result of her injuries, Dr. Sanjiv Mehta ultimately performed ACL repair surgery on both knees. On June 15, 2009, Grigsby fell at work and again was seen by Dr. Mehta who referred her to Dr. Greg Rennirt, who performed a second surgery on her left knee. Because infection developed, another surgery was performed by Dr. Rennirt.

During her March 3, 2010, deposition, Grigsby testified she was required to attend the company Christmas party. Grigsby's relevant testimony is as follows:

Q: And you said you were required to be at this, this party?

A: Yes sir. Actually I was the--each Director has different duties, that they do, and that was one of my duties is to, to organize the Christmas party and--

At the July 21, 2011, hearing, Grigsby testified this was the first year Caretenders "did the Christmas party." Grigsby testified although she had help, it was her responsibility to organize the party. In that regard, Grigsby testified as follows:

Q: And this was part of your job description there at Caretenders?

A: I think it's that number thirteen that says other duties as assigned.

Q: That's your interpretation of thirteen?

A: Well...

Q: Were you instructed by anyone in management or your immediate supervisor that you were required to be at that Christmas party that evening?

A: Actually that year, yes, I was. I actually got a phone call from Missy at five after six, as I was unloading gifts out of the back of my van, wanting to know where the hell I was.<sup>1</sup>

Grigsby testified she has e-mails which reflect she had to be present at the party.

Grigsby explained the directors decided Caretenders would have its first off-site Christmas party, and someone was needed to organize the party. Grigsby believed she volunteered to organize the party. Grigsby

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<sup>1</sup>Missy is Mary Joyce Bonsutti, Caretenders' area executive director who was Grigsby's immediate supervisor.

testified as the organizer, she had to be present. Further, all of the directors were expected to be there. Grigsby explained "we all had so much money to spend and had to bring the door prizes to the hotel." Because Missy thought it would be a good idea for them to have another Christmas tree and the tree at the Holiday Inn was not to "our liking," prior to the party, Grigsby and her husband brought a Christmas tree to the party site and decorated it. They returned home, got ready, and attended the Christmas party. There is no dispute the party was for the employees of Caretenders, and Caretenders paid for the party. Grigsby explained Caretenders had directors for eight different offices. She testified to the phone conversation she had with Missy inquiring as to her location on the night of the party, stating as follows:

Q: Was she already there, wanting to know where you were?

A: Yes, she was already there, and actually her fiancé - her husband now - was the one that came out to help me.

Mary Joyce Bonsutti ("Missy") testified at the July 21, 2011, hearing. Missy testified she was the area executive director and Grigsby's immediate supervisor. She introduced as "Exhibit 1" a copy of Grigsby's job description. Missy explained, at holiday time, Caretenders

tries to do something to thank its employees and each office gets to choose what it would like to do. There is "a pot of money to spend" on the party. She stated the decision to have an office party was probably made at the director's meeting. The directors decided they wanted to pool their money and have one party. Caretenders asked for volunteers to organize the party and Grigsby volunteered and got Tracy Nelson ("Tracy") to help. Caretenders provided a "buffet meal" and a "DJ" at the party. Concerning the door prizes, Missy explained as follows:

A: ... And we took - well, what we call employee recognition money -- had door prizes. If you came and your name was drawn while you were there you got a door prize, and that kind of thing.

Q: So all this was paid for by Caretenders?

A: That portion was all paid out of the employee recognition pot, yes. All the directors did not attend. We had to...

Missy denied telling the directors they were required to attend the party. She stated no one was required to attend. Concerning the phone call about which Grigsby testified, Missy testified as follows:

Q: All right;, [sic] now, did you speak to Ms. Grigsby that evening by -- by cell phone and ask her wherever the hell she was?

A: I -- I'm not going to say I did. If -- if she wasn't there -- we were trying to order everything. I very possibly may have called and said we're trying to get all the door prizes, where are you, trying to get everything together, so I...

Q: So you don't deny?

A: I may very well have called because I was expecting her.

Missy later testified as follows:

Q: Okay, now you -- you made a statement that, quote, I was expecting her to be at the party?

A: That's right, because she had told me that she was already coming and that she was bringing her gifts. Everyone had a pot of -- I believe it was three hundred dollars that they had to spend to make -- to bring out to -- to thank employees, and we divided it sort of up. So then if you weren't going to be there, then I was like, well how's everybody's gifts getting there?

Q: So this wasn't just a Christmas party, it was an employee recognition party as well?

A: It was a holiday party.

Regarding the issue on appeal, the ALJ found as follows:

9. The issues to be decided are extent and duration; application of the multipliers; whether or not the Plaintiff was in the course and scope of her employment on December 8, 2007; and pre-existing, active condition for the June 15, 2009 date of injury.

As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky.App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. Paramount Foods Inc., v. Burkhardt, 695 S.W. 2d 418 (Ky., 1985).

In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments.

Regarding whether or not the Plaintiff's attendance at the Christmas party was within the course and scope of her employment the undersigned notes it clearly did not occur on the employer's premise or during lunch or a recreational period. The Christmas party also did not provide any tangible benefit to the employer beyond that of employee morale. In order for the Christmas party to satisfy the test of *Jackson v. Cowden Manufacturing Co.*, 578 S.W.2d 259 (Ky.App. 1978) attendance must either have been expressly or impliedly required and/or the employer must have asserted sufficient control over the activity to bring it within the orbit of employment.

As to the facts of the case the undersigned notes that the two main witnesses, the Plaintiff and Ms. Bonsutti, either have testified substantially in agreement, or, at the

least, have not contradicted each other.

With that in mind the Administrative Law Judge determines that the Plaintiff volunteered to organize the Christmas party, with volunteer being taken literally and the truest sense of the word. Once having volunteered the Plaintiff had a responsibility to bring door prizes and other incidents of the party to the party. Therefore, although she truly freely volunteered to organize the party thereafter her attendance became effectively mandatory. This conclusion is reinforced by the testimony from both witnesses that the Plaintiff was expected to bring the door prizes, among other things, and that Ms. Bonsutti called the Plaintiff, and spoke to her in a manner more resembling a boss-worker relationship, than co-equal fellow party goers, to ensure the Plaintiff's prompt attendance. That the Plaintiff could have, as is Ms. Bonsutti's testimony, arrived at the party, dropped off the prizes and other items and then left is not persuasive.

Because, even though she initially volunteered, the Plaintiff's attendance at the company Christmas party was required her injury at the party is within the course and scope of her employment.

Inasmuch as both dates of injury are within the course and scope of employment the defense of pre-existing, active condition, which was predicated on a portion of the Plaintiff's impairment/disability being allocated to the December 8, 2007 date of injury and that date of injury being found non-work related, is moot. The

undersigned also notes that the findings, below, make the issue moot. The remaining issue is extent and duration and application of the multipliers.

Based on the opinions of Dr. Warren Bilkey, the ALJ determined the December 8, 2007, fall was the cause of the knee injuries and Grigsby had a 9% combined impairment.

Caretenders filed a petition for reconsideration asserting the ALJ has not "provided sufficient findings of basic fact regarding the arguments raised by the Defendant" concerning whether the injury on December 8, 2007, occurred while Grigsby was in the course and scope of her employment. It requested additional findings of fact specifically as to Missy's testimony. On October 3, 2011, the ALJ entered the following order regarding Caretenders' petition for reconsideration:

. . .

1. The Administrative Law Judge has already set forth sufficient findings of fact and analysis to support the decision in this claim and to apprise the parties of the facts and rationale used in reaching this decision.

2. The Administrative Law Judge concedes that the analysis of an activity being transformed from voluntary to compulsory is unusual but the analysis is correct. A remarkably similar fact situation can be Found [sic] in *Clark County Board of*

*Education v. Jacobs*, 278 S.W.3d 140  
(Ky. 2009).

3. The Petition for Reconsideration  
is DENIED.

On appeal, Caretenders asserts the ALJ erred in determining Grigsby was acting in the course and scope of her employment while dancing at the company Christmas party. Caretenders cites American Greetings Corp. v. Bunch, 331 S.W.3d 600 (Ky. 2010) and references the four prong test to be utilized in determining whether a recreational activity may be viewed as being work-related. Regarding the second prong of the test, Caretenders takes issue with the ALJ's finding Grigsby's participation was transformed from voluntary to compulsory. It asserts the ALJ's finding creates a "slippery slope" regarding where the line is to be drawn as to when Grigsby's activities cease being compulsory.

Alternatively, Caretenders asserts even though none of Grigsby's activities as a volunteer organizer fell within the course and scope of her employment, her attendance at the event was compulsory only to the extent of delivering "door prizes and incidents to the party." After accomplishing that chore, Grigsby's attendance "crossed the line from compulsory to voluntary the moment she had completed that delivery."

It also argues Missy's phone call inquiring as to Grigsby's whereabouts "reflects no more control than a similar call between two friends expecting to see one another at a party." Caretenders posits should the phone call reflect an exercise of control by the employer, it terminated upon delivery of the door prizes. Caretenders argues there is no evidence Grigsby had any additional duties as the volunteer organizer after dropping off the door prizes. It posits Missy called for the exclusive purpose of making sure the door prizes would be delivered to the party. Caretenders asserts the testimony regarding the phone call "does not constitute substantial evidence of control by Missy of Grigsby's activities for the duration of the evening."

Caretenders submits Smart v. Georgetown Community Hospital, 170 S.W.3d 370 (Ky. 2005) and Jackson v. Cowden Mfg. Co., 578 S.W.2d 259 (Ky. App. 1978) are dispositive since the party did not occur on the employer's premises during normal working hours, Missy testified no one was required to attend the party, and it did not derive substantial benefit from the party "other than the intangible benefit of employee good-will or morale." Further, Caretenders exerted no control over the party because it was voluntarily organized by Grigsby.

Caretenders asserts the ALJ's application of Clark County Bd. of Educ. V. Jacobs, 278 S.W.3d 140 (Ky. 2009) is error.

Grigsby, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including work-relatedness. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Grigsby was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984). Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979);

Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

In American Greetings Corp. v. Bunch, supra, the Supreme Court instructed as follows:

*Smart* established four independent tests to determine whether an injury that occurs during a recreational activity comes within the course and scope of the employment (*i.e.*, is work-

related). *Smart* indicates that an injury occurring during a recreational activity may be viewed as being work-related if:

1. It occurs on the premises, during a lunch or recreational period, as a regular incident of the employment; or

2. The employer brings the activity within the orbit of the employment by expressly or impliedly requiring participation or by making the activity part of the service of the employee; or

3. The employer derives substantial direct benefit from the activity beyond the intangible benefit of an improvement in employee health and morale that is common to all kinds of recreation and social life; or

4. The employer exerts sufficient control over the activity to bring it within the orbit of the employment.

No single factor should receive conclusive weight when deciding whether an injury is work-related. [footnote omitted]

Contrary to Caretenders' assertion, we conclude Smart v. Georgetown Community Hospital, supra, and Jackson v. Cowden Mfg. Co., supra, are not applicable to the case *sub judice*. In Jackson v. Cowden Mfg. Co., supra, Jackson,

an employee of Cowden, was injured off the work premises while playing basketball on a company sponsored team in an industrial league sponsored by the Lexington-Fayette County Parks Recreation Department. Membership on a team sponsored by a local company was limited to the employees of the particular company. Although Cowden paid the team's annual entry fee and provided uniforms in a previous year, there was no dispute Cowden's name did not appear on any of the uniforms at the time of Jackson's injuries. Likewise, there was no evidence in the record Cowden ever used any form of direct or indirect compulsion to insure employee participation in the league. In Jackson's case, the Supreme Court determined he was injured while engaging in personal recreation which was totally remote from his employment and was not performing any service for Cowden or on business for Cowden at the time of his injury; rather, Jackson was furthering his own interests. There was no evidence Cowden directly or indirectly led Jackson to believe playing in the industrial league was required as part of his employment.

In Smart v. Georgetown Community Hospital, supra, Smart was injured at Spindletop Hall in Lexington attending an annual picnic for the employees. The employees were encouraged to attend but were not required to do so. Smart

testified her understanding was that the purpose of the picnic was to boost employee morale and help employees meet other employees not encountered on a daily basis. There were door prizes and recreational activities for those who chose to participate. Smart tore the anterior cruciate ligament in her left knee while playing volleyball. The injury occurred off the hospital premises and outside Smart's normal working hours. Although Smart was strongly encouraged to attend, she acknowledged she did not feel she was required to attend. Any benefit to the employer consisted of improving employee morale which was intangible not substantial. Further, the pick-up volleyball game in which Smart was injured was not organized or controlled by her employer and her participation was purely voluntary. In both cases, the dismissal of their claims was affirmed.

In the case *sub judice*, Grigsby's testimony constitutes substantial evidence which clearly supports the ALJ's findings. Grigsby testified she volunteered to organize the party and was also required to attend. We note Caretenders did not rebut Grigsby's testimony recited herein regarding the second Christmas tree Grigsby and her husband brought to the party site and decorated. Further, Grigsby's testimony she was required to bring the door prizes to the party is substantiated by Missy. Missy also

did not dispute Grigsby's testimony that Grigsby received a call shortly before the party from Missy inquiring about her location. Missy specifically testified she was expecting her. The fact Grigsby received a call from Missy inquiring where she was and Missy's acknowledgement she was expecting Grigsby supports the ALJ's finding Grigsby was compelled by her employer to be at the Christmas party.

We find the ALJ's rejection of Caretenders' argument Grigsby's attendance was not compelled after she dropped off the gifts and door prizes to be more than reasonable, given the testimony of Grigsby and Missy. We do not believe it was unreasonable for the ALJ to conclude that as a part of Grigsby's organizational duties, she was required to bring the door prizes to the Christmas party and remain at the party. The ALJ properly exercised the discretion granted him by law in determining the testimony of Missy and Grigsby establish Caretenders' actions brought Grigsby's position as the volunteer organizer of the party "within the orbit of the employment by expressly or impliedly requiring participation or by making the activity part of the service of the employee." Smart v. Georgetown Community Hospital, supra, at 372.

Likewise, we believe the testimony of Grigsby and Missy support a finding Caretenders exerted "sufficient

control over the activity to bring it within the orbit of the employment." Id. Missy did not deny she called Grigsby inquiring about her whereabouts and admitted Grigsby was expected at the party. In addition, Caretenders did not dispute Missy was, in part, a guiding force in causing Grigsby to bring and decorate a second Christmas tree.

Further, we believe the ALJ correctly determined this case fell within the purview of Clark County Bd. of Educ. v. Jacobs, supra. Specifically, we believe the following language in Clark County Bd. of Educ. v. Jacobs, supra, to be applicable:

Although the injury occurred off school premises, the record permitted reasonable inferences that the school board encouraged her to perform the activity that resulted in her injury...

The testimony of Grigsby and Missy establish once Grigsby volunteered to organize the party, she was required to be at the party and, therefore, constitutes substantial evidence supporting the ALJ's determination the injuries Grigsby sustained at the party on December 8, 2007, were within the course and scope of her employment.

Accordingly, the September 7, 2011, opinion, order, and award and the October 3, 2011, order overruling Caretenders' petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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