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HARRIETTE JANE UNGER, APPELLEE AND CROSS-APPELLANT, v. OLSEN'S AGRICULTURAL LABORATORY, INC., APPELLANT AND CROSS-APPELLEE.

809 N.W.2d 813

Filed January 10, 2012. No. A-11-205.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.
6. **Workers' Compensation: Notice.** If the employee fails to give notice as soon as practicable, the employee may be barred from asserting his or her claim.
7. ____: ____. When the parties do not dispute the facts concerning reporting and notice, whether such facts constitute sufficient notice to the employer under Neb. Rev. Stat. § 48-133 (Reissue 2010) presents a question of law.
8. **Workers' Compensation: Notice: Appeal and Error.** Where the underlying facts are undisputed, or if disputed, the factual finding of the trial court was not clearly erroneous, the question of whether Neb. Rev. Stat. § 48-133 (Reissue 2010) bars the claim is a question of law upon which the appellate court must make a determination independent of that of the trial court.

Appeal from the Workers' Compensation Court. Affirmed.

Patrick R. Guinan, Tiernan T. Siems, and Sara A. Lamme, of Erickson & Sederstrom, P.C., for appellant.

P. Stephen Potter for appellee.

IRWIN, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

This appeal involves Harriette Jane Unger's claim in the Workers' Compensation Court for benefits from her employer, Olsen's Agricultural Laboratory, Inc. (Olsen's). A single judge of the compensation court entered an award in Unger's favor for permanent total disability benefits, medical expenses, and future medical care. The judge also found that Olsen's failed to affirmatively plead that Unger did not give adequate notice of her injury under the Nebraska Workers' Compensation Act and declined to consider the lack-of-notice defense alleged by Olsen's. Olsen's appealed to a review panel of the compensation court, and the review panel remanded the matter to the trial judge for a determination of the viability of the lack-of-notice defense. Olsen's then appealed to this court. We find that the review panel's order was a final, appealable order, and we affirm the review panel's remand of the matter for a determination of the viability of the lack-of-notice defense. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

BACKGROUND

Unger filed the initial petition in this case on May 12, 2003, and the operative fourth amended petition on December 9. In the operative petition, Unger alleged that she was employed by Olsen's from October 4, 1999, through May 23, 2001, where she worked as a laborer testing soil samples. Unger claimed that she contracted a lung condition known as aspergillosis from exposure to substances in her work that resulted in substantial disability, medical treatment, and ultimately surgery, including the removal of a portion of her lung. Unger alleged that the matters in dispute included past and future medical expenses, temporary and permanent disability, loss of earning capacity, and vocational rehabilitation.

In its answer, Olsen's alleged, among other things, that there were additional matters in dispute, including whether the statute of limitations barred Unger's claim, whether any injury Unger might have sustained was due to a work-related injury

or exposure, and whether Unger provided sufficient notice of injury to Olsen's.

Trial was held before a single judge of the compensation court on January 28, 2010. For purposes of this appeal, we need not detail the evidence presented. During trial, there was some discussion between the judge and counsel for Olsen's about the alleged delay by Unger in giving notice of her injury. The judge asked counsel for Olsen's whether it was standing on its lack-of-notice defense, which counsel answered in the affirmative.

The single judge entered an award on August 31, 2010, finding that Unger was injured as a result of an occupational disease, finding that she was permanently and totally disabled, and awarding benefits. Of particular relevance to this appeal is the trial judge's finding that Olsen's failed to affirmatively plead that Unger did not give adequate notice of her injury under the Nebraska Workers' Compensation Act and that the court would not consider this argument.

Olsen's appealed to a review panel of the compensation court, assigning 18 errors in its application for review. The review panel entered an order of remand on review on February 23, 2011. The panel, without deciding whether lack of notice is an affirmative defense, found that such defense was in fact alleged by Olsen's in paragraph 17 of its answer to Unger's fourth amended petition. It also found that the trial judge was aware of the lack-of-notice defense and the unwillingness of Olsen's to waive that argument because of the affirmative response of Olsen's to the trial judge's inquiry during trial as to whether Olsen's was standing on the lack-of-notice defense. The review panel ordered that the award be remanded to the trial court for "a proper determination of the viability of the lack of notice defense" asserted by Olsen's. The review panel did not consider the other assigned errors of Olsen's.

Olsen's subsequently perfected its appeal to this court.

ASSIGNMENTS OF ERROR

Olsen's asserts, consolidated and restated, that the review panel erred in (1) failing to find that Unger did not give notice of her injury as soon as practicable as required by statute and

remanding the matter back to the trial court, (2) not considering the other assigned errors of Olsen's concerning not vacating the part of the award finding that Unger suffered a compensable injury and not vacating the single judge's finding that aspergillosis is an occupational disease, (3) failing to find that Unger's claim was barred by the statute of limitations, (4) failing to vacate the award of a 100-percent loss of earning capacity and permanent disability, and (5) failing to vacate the award finding past and future medical expenses are compensable for any work-related accident Unger suffered or for any disease she allegedly contracted while employed.

On cross-appeal, Unger asserts that the review panel erred in holding that Olsen's properly asserted lack of notice in its answer.

STANDARD OF REVIEW

[1-3] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Pearson v. Archer-Daniels-Midland Milling Co.*, 282 Neb. 400, 803 N.W.2d 489 (2011). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong. *Id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id.*

ANALYSIS

Jurisdiction.

[4] We first consider whether the review panel's February 23, 2011, order is a final, appealable order. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter

before it. *Darnall Ranch v. Banner Cty. Bd. of Equal.*, 280 Neb. 655, 789 N.W.2d 26 (2010).

The only assignment of error considered by the review panel was the assertion of Olsen's that the single judge erred in finding that Olsen's failed to affirmatively plead as a defense that Unger failed to give sufficient notice of her injury under the Nebraska Workers' Compensation Act. The panel concluded that the lack-of-notice defense was properly before the trial court and should have been addressed and ordered that the award be remanded to the trial court for a determination of the viability of the lack-of-notice defense. The question that we must answer is whether this order of remand qualified as a final, appealable order.

We find some guidance in the case of *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 787 (1995). In that workers' compensation case, a dispute existed between Aetna Insurance Company and Continental Western Insurance Company over which had coverage. The trial judge applied the last injurious exposure rule and found Aetna Insurance Company to be the sole liable defendant. The three-judge review panel disagreed with the trial judge's use of the last injurious exposure rule, held that the date of injury determines liability when there is one employer and several insurers, vacated the award, and remanded the matter for a determination of the date of the worker's injury. On appeal to this court, the majority concluded that there was no final, appealable order and, in the process, distinguished *Hull* from our opinion in *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994) (holding that review panel order vacating trial judge's dismissal of petition for failure to prove work-related injury and remanding matter for trial was final, appealable order, finding that substantial right had been affected because review panel's order destroyed dismissal obtained by employer from trial court).

[5] On further review, the Nebraska Supreme Court in *Hull* reversed, finding that the review panel order was a final, appealable order. The court in *Hull* cited to the well-known holding of *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993), that "a substantial right is affected if the order affects the subject

matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing." 247 Neb. at 718, 529 N.W.2d at 788. The court in *Hull* found that the order of the review panel affected substantial rights of the worker and Continental Western Insurance Company because the worker "was deprived of an award in his favor and Continental [Western Insurance Company] was deprived of a finding of no liability on its part." 247 Neb. at 719, 529 N.W.2d at 788.

[6] In the case before us, Unger received a very substantial award of benefits, and the single judge found that Olsen's was precluded from asserting its lack-of-notice defense. Neb. Rev. Stat. § 48-133 (Reissue 2010) requires that an employee give notice of an injury to the employer "as soon as practicable" after the injury. If the employee fails to give notice as soon as practicable, the employee may be barred from asserting his or her claim. See *Williamson v. Werner Enters.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004). As a result of the order of remand in this case, Unger is now facing a defense which was earlier resolved in her favor—not on the merits, but on an obviously erroneous procedural basis by the trial judge. Thus, should the remand in this matter result in a finding that Unger failed to give the required notice, she could be deprived of a substantial award. Because there now exists the potential deprivation of Unger's award, we conclude that the review panel order of remand affects a substantial right and therefore constitutes a final, appealable order.

Notice.

We next consider the first assignment of error asserted by Olsen's, which is dispositive of this appeal. As mentioned above, § 48-133 requires that an employee give the employer notice of an injury as soon as practicable after the happening thereof. Olsen's clearly raised the issue of Unger's alleged lack of notice in its operative answer, whether it was necessary to do so or not. And, the trial judge was aware of the lack-of-notice issue and the unwillingness of Olsen's to waive that argument based on the discussion during trial between the judge and counsel for Olsen's on that issue. We conclude, as

did the review panel, that the trial judge was clearly wrong in failing to address the notice issue.

In its brief on appeal, Olsen's argues that it was error for the review panel to fail to find that Unger did not give notice of her injury as soon as practicable as required by statute. Olsen's asserts that it was error to remand the matter back to the trial court for this determination because there was no factual dispute and that therefore, it is a question of law.

[7,8] Olsen's relies upon the proposition that when the parties do not dispute the facts concerning reporting and notice, whether such facts constitute sufficient notice to the employer under § 48-133 presents a question of law. See *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009), citing *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995). This court has also recognized that where the underlying facts are undisputed, or if disputed, the factual finding of the trial court was not clearly erroneous, the question of whether § 48-133 bars the claim is a question of law upon which the appellate court must make a determination independent of that of the trial court. See, *Snowden v. Helget Gas Products*, 15 Neb. App. 33, 721 N.W.2d 362 (2006); *Williamson v. Werner Enters., supra*. In all of these cases, unlike the case at hand, the appellate court was called upon to review a determination previously made by the trial court, and reviewed by the three-judge panel, regarding the notice issue. In this case, no such determination has been made for either the review panel or us to review.

We also note that the argument of Olsen's that the facts are undisputed focuses on Unger's delay in giving notice as soon as practicable. In *Williamson v. Werner Enters.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004), we found that the meaning of the phrase "as soon as practicable" depended on the particular facts and circumstances. Clearly, in the present case, this is a question that should be determined by the trial court based upon the particular facts and circumstances.

Furthermore, there is another, perhaps more important, question in this case, relating to an exception to the notice requirement in § 48-133. The statute goes on to state that "[w]ant of such written notice shall not be a bar to proceedings under the

Nebraska Workers' Compensation Act, if it be shown that the employer had notice or knowledge of the injury." Unger argues that Olsen's had notice or knowledge of her injury prior to her giving written notice. Again, this question should be addressed by the trial court as it involves analysis of what information Olsen's had concerning Unger's lung condition and her exposure to substances in connection with her job requirements. See, *Risor v. Nebraska Boiler, supra*; *Snowden v. Helget Gas Products, supra*.

In conclusion, we affirm the order of the review panel remanding the matter to the single judge for a determination of the viability of the lack-of-notice defense. We note that the review panel did not expressly vacate the award of the trial judge, and we accordingly conclude that the remand is solely for a determination, on the existing evidentiary record, of whether the defense of lack of timely notice of injury is viable.

CONCLUSION

We affirm the order of the Workers' Compensation Court review panel remanding this matter for a determination of the viability of the lack-of-notice defense asserted by Olsen's.

AFFIRMED.

[By order of the court, *State v. Nadeem*, 19 Neb. App. 466, 808 N.W.2d 95 (2012), withdrawn. See *State v. Nadeem*, 19 Neb. App. 565, 809 N.W.2d 825 (2012). (Pages 467-73 omitted.)]