

RENDERED: March 20, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-1124-WC

HAROLD RONALD BALL;
and JOHNNIE L. TURNER

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 93-20409

DIXIE FUEL COMPANY;
HON. RON CHRISTOPHER,
Director of Special Fund;
HON. IRENE STEEN,
Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

* * * * *

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM and KNOPF, JUDGES.

KNOPF, JUDGE: This is an appeal from an opinion and order by the Workers' Compensation Board (Board), affirming an opinion and award on reopening by the Administrative Law Judge (ALJ). We affirm in part, reverse in part, and remand for further proceedings.

On October 15, 1993, the appellant, Harold Ronald Ball, filed a claim for adjustment of benefits based upon two (2) occupational injuries. The first claim involved a low back injury which occurred on February 8, 1992. The second claim involved an injury to Ball's arm and chest occurring on May 12, 1993. Ball was employed by the appellee, Dixie Fuel Company (Dixie Fuel) at the time of both injuries. Dixie Fuel was insured by Old Republic Insurance Company (Old Republic) for the 1992 injury and by Wausau Insurance Company (Wausau) for the 1993 injury. The two (2) injuries were consolidated and settled for a twenty percent (20%) occupational disability. Ball subsequently returned to work for Dixie Fuel.

On January 3, 1996, Ball filed a motion to re-open his previously settled claim, seeking an order directing Dixie Fuel to provide certain medical treatment. The motion was served on counsel for each of Dixie Fuel's carriers. Old Republic provided counsel to Dixie Fuel with respect to the 1992 low back injury, and Wausau provided counsel to Dixie Fuel with respect to the 1993 injury. Ball asserted that he had suffered an increase in occupational disability relative to his 1992 low back injury, and that he developed carpal tunnel syndrome as a result of his 1993 arm injury. During the course of the proceedings on reopening, Ball filed an amended Form 101, alleging that he was struck by a rockfall on June 21, 1995, which caused additional injury to his back, neck, and shoulder.

Following submission of evidence, the ALJ entered an opinion and award on December 20, 1996. The ALJ found that Ball failed to prove any increase in occupational disability resulting from his 1992 low back injury. She found Ball's current shoulder symptoms to be related to his initial injury in May of 1993, and authorized whatever surgical procedure an orthopedic surgeon recommended. She further determined that Ball's carpal tunnel problems were not related to his May 1993 injury, referring to Dr. Zerga's testimony that on nerve conduction studies the symptoms were worse on the left than on the right, while the injury in 1993 was only to Ball's right side. She also determined that Ball had failed to prove any increase in occupational disability since his original settlement, referring to the fact that he was currently capable of performing his job as a shuttle operator and that whatever surgery he undertakes to correct his shoulder problem would hopefully decrease his occupational disability. The ALJ also denied Ball's motion to award attorney's fees and costs of the motion to reopen.

The service list on the ALJ's opinion and award indicates that it was sent to Ball, counsel for the Special Fund, and counsel for Old Republic. On January 10, 1997, Ball filed a notice of appeal to the Board, naming Dixie Fuel, the ALJ, and the Special Fund as respondents. The notice of appeal to the Board contains a certificate indicating that it was mailed to counsel for Dixie Fuel as insured by Old Republic, to counsel for

the Special Fund and to the ALJ. However, no such service is certified upon counsel for Dixie Fuel as insured by Wausau.

On February 11, 1997, Ball moved the Board to amend to add Johnnie L. Turner as petitioner, and raising the issue of the denial of Ball's motion to award attorney's fees and costs. Turner was Ball's counsel during the proceedings before the ALJ. The Board granted the motion to add Turner as petitioner on February 28, 1997. However, on March 12, Wausau's counsel for Dixie Fuel appeared to object to the motion, asserting, "[t]he petitioner seeks to accomplish the joinder of a new respondent under the guise of amending a prior petition."

The Board affirmed the ALJ's award in an opinion and order dated April 11, 1997. The Board concluded that Ball failed to properly perfect his appeal against Dixie Fuel as insured by Wausau. Therefore, the Board concluded that the issues relating to attorney's fees and costs were not properly presented. The Board further found that substantial evidence existed supporting the ALJ's finding that Ball failed to prove a change in his occupational disability. The Board also affirmed the ALJ's finding that Ball failed to prove that his carpal tunnel syndrome was work-related. Ball now appeals to this court.

Ball first argues that his notice of appeal served upon Dixie Fuel was sufficient to bring all issues relating to Dixie Fuel before the Board. We agree. Essentially, the Board held that Dixie Fuel as insured by Old Republic and Dixie Fuel as

insured by Wausau are separate parties for purposes of the notice of appeal. As correctly noted by the Board, the purpose of CR 73.03 is to give the opposing party fair notice of the pendency of the appeal. Blackburn v. Blackburn, Ky., 810 S.W.2d 55 (1991).

Yet generally, workers' compensation insurance carriers are not parties to a workers' compensation claim. Rather, they provide representation on behalf of their insured for injuries alleged to have occurred during the period for which coverage was in effect. The carrier's liability to the employee is contractual based upon the contract of insurance with the employer. Thus, the only necessary parties to the appeal from the ALJ to the Board were Ball, Dixie Fuel, and the ALJ. These parties were all named on the notice of appeal.

We believe that the Board confused the issue of who is a necessary party to an appeal with the issue of to whom must a copy of the notice of appeal be sent. Dixie Fuel is one (1) party represented by two (2) separate counsel, each for separate portions of the claim. CR 73.03(1) requires that the notice of appeal "shall contain a certificate that a copy of the notice has been served upon all opposing counsel, or parties, if unrepresented, at their last known address." Ball failed to send a copy of the notice of appeal to one (1) of Dixie Fuel's two (2) counsel of record.

We do not excuse the failure by Ball's counsel to mail

a copy of the notice of appeal to Wausau's counsel. Ralph D. Carter was named as counsel for Dixie Fuel as insured by Wausau. He participated throughout the proceedings before the ALJ as counsel for Dixie Fuel as insured by Wausau. We presume that Mr. Carter's name was left off the service list on the ALJ's opinion and award due to an oversight. Regardless, the party filing the notice of appeal has a duty to provide a copy of the notice to all counsel of record.

Nonetheless, this defect in service was not jurisdictional. The failure of a party to file a timely notice of appeal shall result in a dismissal of the appeal. However, failure to comply with other rules relating to appeals shall not affect the validity of the appeal, but may be grounds for such action as the appellate court deems appropriate. CR 73.02(2). When a notice of appeal contains non-jurisdictional defects, the doctrine of substantial compliance may be applied. City of Devondale v. Stallings, Ky., 795 S.W.2d 954, 957 (1990).

The Board treated Dixie Fuel as two (2) separate entities, each compartmentalized by its separate representation by different workers' compensation carriers, and each without knowledge of the other entity's action. We believe that this distinction was arbitrary and artificial. Dixie Fuel was properly before the Board on the notice of appeal. Furthermore, neither the statutes nor the administrative regulations require a petitioner to state the grounds upon which he is appealing an

ALJ's order. Therefore, Dixie Fuel cannot be said to have lacked knowledge that those issues were being appealed.

Finally, there was no evidence that Dixie Fuel's defense of the appeal was prejudiced by the failure to send a copy of the notice of appeal to Wausau's counsel. Under the circumstances, the Board could have allowed Wausau additional time to respond to the notice of appeal, or taken other steps as authorized by CR 73.02(2). Instead, the Board presumed the error was jurisdictional, and disallowed the appeal from the ALJ's denial of attorney's fees and costs. We hold that this action was an abuse of discretion.

Upon reviewing the Board's opinion and order, we note that the Board actually addressed most of the issues relating to the petition for reopening. The only issue which the Board declined to address in its opinion and order was Ball's request for attorney's fees and costs against Dixie Fuel for unreasonably refusing to provide medical treatment. We remand this issue to the Board for consideration on appeal.

The primary issue on appeal is the ALJ's decision to deny the motion to reopen. Ball contends that the ALJ erred as a matter of law in holding that he had failed to prove an increase in occupational disability relating to the 1992 injury. In reviewing the decision of the ALJ, the Board's function is to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was

before the ALJ should be viewed as uncontradicted and compelling a different result. The scope of review in this court is to correct the Board only where the court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 688 (1992).

When the decision of the fact-finder goes against the person with the burden of proof, his burden on appeal is to show that the evidence was so overwhelming that finding against him was unreasonable. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Matters involving the weight given to the evidence and credibility accorded to the witnesses are matters within the sole province of the fact-finder. Paramount Foods v. Burkhardt, Ky., 695 S.W.2d 418 (1985). The ALJ, as finder of fact, has the right to believe part of the evidence, and to disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). In short, this court may not substitute its judgment for that of the fact-finder on the weight of the evidence. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984).

While there was some evidence supporting Ball's claim on reopening, we agree with the Board that the evidence as a whole did not compel a finding of an increase in occupational

disability. The ALJ noted that Ball's testimony regarding the injuries which he has suffered between 1992 and 1996 was vague and confusing. The ALJ found no evidence of an increase in occupational disability relative to Ball's 1992 low back injury. There was widely conflicting evidence concerning the effects of Ball's 1993 injury. While the ALJ concluded that Ball's shoulder problems were the result of his 1993 injury, she concluded that they did not constitute an increase in his occupational disability. The ALJ further found that with medical treatment for his shoulder problems, Ball would not experience any additional impairment in the type of work he is currently able to perform. Given the evidence of record, the ALJ's finding was not clearly erroneous.

As to the carpal tunnel syndrome, the ALJ found that Ball had failed to prove that it was work-related. We agree with the Board that there was medical testimony which would support either a finding that his carpal tunnel was work-related or that it was not work-related. Moreover, the ALJ noted that Ball "has not even filed a claim per se for carpal tunnel syndrome, acute or repetitive, but merely attempts to assert this through this proceeding, together with the rest of his reopening." There was no medical testimony that Ball's carpal tunnel symptoms were related to the injuries involved in this reopening, although Dr. Zerga testified that it might be related to his occupation. We conclude that the ALJ's finding was supported by substantial

evidence and should not be disturbed.

Accordingly, the decision of the Workers' Compensation Board is affirmed in part, reversed in part, and remanded for a consideration of the issue of Ball's attorney's fees and costs on reopening.

ALL CONCUR:

BRIEF FOR APPELLANT
HAROLD RONALD BALL:

Ronald C. Cox
Buttermore, Turner &
Boggs PSC
Harlan, Ky.

BRIEF FOR APPELLEE DIXIE FUEL
COMPANY (BY OLD REPUBLIC):

Antony Saragas
Huff Law Office
Harlan, Ky.

BRIEF FOR APPELLEE DIXIE FUEL
COMPANY (BY WAUSAU):

Ralph D. Carter
Barret, Haynes, May, Carter
& Roark, PSC
Hazard, Ky.

BRIEF FOR APPELLEE
SPECIAL FUND OF KENTUCKY:

David W. Barr
Louisville, Ky.