IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JUNE 20, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000396-WC

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-001396-WC
WORKERS' COMPENSATION NO. 08-01399

KERMIT RAY BENSON;
HONORABLE OTTO DANIEL WOLFE,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Commonwealth of Kentucky, Uninsured Employers' Fund ("UEF"), appeals from a decision of the Court of Appeals which affirmed a workers' compensation award in favor of Appellee, Kermit Ray Benson. The UEF makes the following arguments on appeal: 1) did the UEF need to appeal from an opinion of the Workers' Compensation Board which remanded this matter to the ALJ to preserve their right to appeal the ALJ's final decision; 2) did the ALJ err by accepting Benson's testimony as persuasive evidence of his average weekly wage instead of documents presented by his employer, Wayne Sturgeon; and 3) did Benson's attorney's excuse for failing to file evidence rise

to the level of "sufficient good cause" to allow the late admission of the evidence. For the reasons set forth below, we affirm the Court of Appeals.

Benson, while working for Sturgeon on a roofing project, fell off of a ladder. As a result of the fall, Benson suffered a fracture of his right wrist and a back injury. Benson filed a workers' compensation claim. Since Sturgeon did not maintain workers' compensation insurance, the UEF was added as a party.

At the hearing on his claim, Benson testified that his average weekly wage ("AWW") was $500. He based this estimate on his belief that roofers make approximately $100 a day. Sturgeon however filed a Form AWW-1 which indicated that Benson only earned $228.08 per week during the quarter most favorable to him.

It was also discovered during the hearing that Benson's counsel failed to mail a medical report to opposing counsel and to the Department of Workers' Claims. Because of this oversight, Benson provided no proof of his impairment rating. Benson's counsel apologized for the failure to produce the medical report and requested leave to introduce it. Benson also moved for a continuance or for an expansion of time for proof if the medical report was admitted into evidence. The ALJ denied the motions believing that he was not allowed to accept additional evidence once the hearing began.

After the hearing, the ALJ entered an order finding that Benson was an employee of Sturgeon at the time of the accident. However, the ALJ dismissed Benson's claim for indemnity benefits because he believed there was

insufficient evidence of Benson's AWW and that there was no evidence regarding his impairment rating.

Benson appealed the ALJ's ruling to the Workers' Compensation Board. The Board reversed and remanded the matter to the ALJ, finding that there was sufficient evidence for him to rule that Benson's AWW was either $500 or $228.08. The Board further held that the ALJ was incorrect in believing he could not accept a belated filing of the medical report. No appeal was taken from the Board's opinion.

Accordingly, the ALJ on remand found that there was good cause to justify the admission of the medical report into evidence and that the most persuasive evidence indicated that Benson's AWW was $500. The ALJ also reopened the time for proof to allow for rebuttal evidence to be submitted by the UEF and Sturgeon. An additional hearing was held in which Benson testified. After that hearing, the ALJ entered an opinion and award assigning Benson a 13% impairment rating and an AWW of $500. This impairment rating was not based on the belatedly filed medical report, but on the UEF's medical expert. The ALJ also found Benson was entitled to the triple multiplier under KRS 342.730(1)(c)1 because he was unable to return to his previous occupation as a roofer.

The UEF filed a petition for reconsideration challenging the ALJ's findings with respect to Benson's AWW and the belated filing of the medical report. The ALJ denied the petition. The Board and Court of Appeals affirmed. In affirming, the Court of Appeals refused to review the merits of the UEF's

argument regarding the calculation of Benson's AWW because the UEF did not appeal from the original Board order which remanded the case back to the ALJ. This appeal followed.

I. THE UEF WAIVED ITS RIGHT TO APPEAL THE AWW CALCULATION

The UEF's first argument is that it did not waive its right to appeal the calculation of Benson's AWW by not appealing from the original Board opinion. That opinion ordered the ALJ to assign Benson an AWW of either $500 or $228.08. Because the UEF did not directly appeal that decision, the Court of Appeals believed that the UEF was now precluded by the "waiver extension" of the "law of the case doctrine" from raising any arguments concerning whether substantial evidence existed to support an AWW of $500. *See Whittaker v. Morgan*, 52 S.W.3d 567, 569 (Ky. 2001).

We agree that the UEF should have appealed from the original Board opinion. *Whittaker* states that "where a decision of the Board sets aside an ALJ's decision and either directs or authorizes the ALJ to enter a different award upon remand, it divests the party who prevailed before the ALJ of a vested right and, therefore, the decision is final and appealable to the Court of Appeals." *Id.* at 569; *Davis v. Island Creek Coal Co.*, 969 S.W.2d 712 (Ky. 1998). Here, the Board's opinion set aside a decision in favor of the UEF and ordered the ALJ to assign Benson an AWW of either $500 or $228.08. If the UEF objected to the potential assignment of an AWW of $500 it could have appealed to the Court of Appeals because the Board's opinion was final and appealable. Since the UEF did not appeal from a final and appealable order

finding that substantial evidence existed for an AWW of $500, we find that it is now precluded from appealing that decision. *Whittaker*, 52 S.W.3d at 569.

Because we agree with the Court of Appeals that the UEF cannot appeal the ALJ's determination that Benson earned an AWW of $500, we will not review the substantive merits of their argument.

II. THE ALJ WAS WITHIN HIS DISCRETION IN FINDING GOOD CAUSE FOR THE BELATED ADMISSION OF THE MEDICAL RECORD INTO EVIDENCE

The UEF argues that the ALJ abused his discretion by allowing Benson to belatedly file a medical record into evidence after his counsel admitted he forgot to send the record to opposing counsel and to the Department of Workers' Claims. After weighing the circumstances presented to him, the ALJ made the following findings to support the conclusion that the medical report should be admitted into evidence:

> [A] good cause determination is gleaned from the colloquy of the parties prior to and during the Final Hearing of May 28, 2009. Therein . . . attorney for [Benson], explained he genuinely believed [the medical] report had been filed and served by his office. At page 10 of the Hearing transcript, Attorney Harrison indicated that according to his file the report was filed and served. Attorney Harrison was willing to give the other parties additional time to file rebuttal proof if he was allowed to file [the medical] report. Attorney Harrison stated, page 15, 'I certainly assumed that it had been sent. It was supposed to have been sent the day after we received it. . . I actually remember signing it. But, if my staff did not get it out, that's my fault.'
>
> This ALJ, based upon the representation of Attorney Harrison, finds or found that good cause existed to allow the late filing . . .

We agree that there was good cause to allow the medical record to be belatedly filed. The goal of KRS Chapter 342 "is to facilitate the prompt and informal resolution of workers' compensation claims," and an ALJ has the

authority to make exceptions to the rules where warranted. *New Directions Housing Authority v. Walker*, 149 S.W.3d 354, 358 (Ky. 2004). As such, an ALJ is not "required to dismiss the claim of every worker who fail[s] to present [a] prima facie [case] within the initial proof time, regardless of the circumstances." *Id.* at 357. Here the medical record was essential to Benson's claim, and after it was allowed to be belatedly filed the time for proof was reopened so that the UEF could present rebuttal evidence. The UEF took advantage of this by filing the report of their expert, Dr. Baker. Importantly, the ALJ in making his final ruling relied almost entirely on Dr. Baker's report and not the medical report filed by Benson. The ALJ did not abuse his discretion by allowing the medical report to be filed.

Thus, for the reasons set forth above, we affirm the Court of Appeals.

All sitting. All concur.

COUNSEL FOR APPELLANT,
COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND:

Charles Davis Batson
Assistant Attorney General

COUNSEL FOR APPELLEE,
KERMIT RAY BENSON:

Robert E. Harrison