

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000729-WC

CUMBERLAND STEEL, INC.

APPELLANT

V. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-96-06592

MORRIS ESTES; ROBERT L. WHITTAKER, Director of
SPECIAL FUND; THOMAS A. NANNEY, Administrative
Law Judge; and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: COMBS, EMBERTON, and GUIDUGLI, Judges.

COMBS, JUDGE: Cumberland Steel, Inc. ("Cumberland Steel"), petitions for review of a decision of the Workers' Compensation Board that affirmed the opinion and award rendered by Hon. Thomas A. Nanney, Administrative Law Judge ("ALJ"), and a subsequent order denying petitioner's motion to reopen. We affirm the denial of relief.

On November 29, 1995, the claimant, Morris Estes, suffered a severe injury to his pelvis while working at a

construction site in Bowling Green, Kentucky. Estes was apparently struck by a steel beam being hoisted by a crane. He lost consciousness at the scene, was hospitalized for six days, and convalesced for approximately two months. On August 27, 1996, he filed a workers' compensation claim against his employer, Cumberland Steel.¹ When the matter was heard by the ALJ, the only medical evidence presented came from Dr. Philip Singer, an orthopedic surgeon. After considering Estes's testimony and the medical evidence, the ALJ concluded that Estes suffered from a 100 percent occupational disability.

Cumberland Steel appealed from the opinion and award. At the request of Cumberland Steel, the appeal was abated. Cumberland Steel indicated that it was prepared to file a motion to reopen the claim based upon an alleged mistake.

In its motion to reopen, Cumberland Steel argued that it had mistakenly been listed as Estes's employer. An affidavit signed by the President of Cumberland Steel indicated that Estes was last employed by the corporation on November 10, 1995 -- a number of days before Estes suffered his injury. Also attached to the motion was a Tennessee Employer's First Report of Work Injury form. This form identified Cumberland Construction Co. as Estes's employer as of the date of the injury.² Cumberland

¹The Special Fund was also joined as a party but was ultimately dismissed from these proceedings, as there was no evidence of its liability.

²The report was prepared by Larry Summers, a site supervisor, on December 5, 1995. A close inspection of the form

Construction Co. had an address in Maryville, Tennessee;
Cumberland Steel has an address in Hendersonville, Tennessee.

The ALJ denied Cumberland Steel's motion to reopen the claim. In his order, the ALJ noted that while Cumberland Steel had been duly served with pleadings throughout the proceedings, it had elected not to defend against the claim in any manner. Moreover, the ALJ explained, from the inception of the proceedings, Cumberland Steel had been aware of each of the facts it alleged as a basis for reopening the claim.

Cumberland Steel appealed to the Board, contending that the matter should be remanded with directions to enter an award against the appropriate defendant. The Board disagreed and affirmed the ALJ's decision, stating as follows:

803 KAR 25:010 establishes the procedure for adjustment of workers' compensation claims. The regulations in effect on the date this claim was filed provided that a defendant shall file a notice of claim denial or acceptance within 20 days after the date of the issuance of the notice that an application has been filed and that if no notice of claim denial is filed, all allegations of the application shall be deemed denied. Section 2 of that regulation provides that persons against whom the ultimate right to any relief under Chapter 342 may exist are to be joined as defendants.

Neither Cumberland Steel nor Fidelity nor CNA contend, either in their motion to reopen or in this appeal, that they were not served with the appropriate pleadings required under both the regulations and the Act, nor do they contest the ALJ's findings made below that Estes is now 100 percent occupationally disabled. What they wish to argue now is that Estes was actually injured while working for a completely different

indicates that it was received at Cumberland Steel the following day.

company and that he was not even employed by Cumberland Steel on the date of the injury, information that was readily available to them prior to the time the ALJ entered his original opinion and award. That opinion and award decided all issues in controversy at that time, and therefore the doctrine of res judicata applies to it. Parsons v. Union Underwear, Ky.App., 758 S.W.2d 43 (1988); Beale v. Faultless Hardware, Ky., 837 S.W.2d 893 (1992).

Under the appropriate circumstances, the doctrine of res judicata may be avoided in workers' compensation proceedings through a motion to reopen. However, in this claim, that motion to reopen must be grounded upon ignorance before relief can be granted on account of it. [citations omitted]. The "mistake" upon which the petitioner's [sic] moved below to have this claim reopened was based upon knowledge that was readily available to them during the course of the proceedings below and prior to the entry of the opinion and award.

* * * *

The petitioner refers to the alleged mistake by claimant as to the appropriate defendant as being the mistake under which this claim may be reopened. The claimant, however, has not moved to reopen on the grounds of a mistake. The ALJ therefore, in our opinion, did not err in overruling the petitioner's motion to reopen.³

In its petition for review, Cumberland Steel continues to argue that the circumstances before us now are governed by the "mistake" provision of the reopening statute and that the claim should be remanded to the ALJ for judgment against the correct defendant-employer. We disagree.

KRS 342.125(1) provides that a party seeking to reopen a workers' compensation award must establish a change of occupational disability, mistake, fraud or newly discovered

³The Board refused to consider the argument that the ALJ's award illegally created insurance by estoppel as the issue had not been properly raised before the ALJ.

evidence in order to prevail. Petitioner, however, has failed to demonstrate that a misconception of any sort existed at the time of the original award.

In Uninsured Employers' Fund v. Fox, Ky., 862 S.W.2d 902, 904 (1993), the court specifically stated that a "mistake, regardless of whether it is of law or fact, must be founded upon ignorance before relief may be granted on account of it." Here, there is no evidence indicating that any of the litigants labored under a misapprehension as to the identification of the proper party-defendant at the time the ALJ's award was entered. While Cumberland Steel maintains that it was not Estes's employer as of the date of the injury, Estes presented persuasive evidence that Cumberland Steel was indeed his employer at that time. Julie Pruitt, a legal assistant to Estes's attorney, attested, in part, to the following facts:

1. When asked to obtain the precise name and address of his employer, Estes reported that he was working on a job site in Bowling Green, Kentucky for Cumberland Steel. Cumberland Steel's address was 114 Canfield Place, B-8, Hendersonville, Tennessee.
2. A letter received by counsel's office from CHUBB Services Corporation indicated that the incident had been reported by Estes's employer, Cumberland Steel.
3. Documents filed prior to the initiation of the claim, including the Notice of First Payment, indicated that "Fidelity & Casualty Company c/o CNA" was the insurer.
4. Every pleading following the Form 101 had been served upon Fidelity & Casualty Company pursuant to information provided by the Department of Workers' Claims.

5. Despite correspondence and several telephone conversations with representatives of CNA, there was never any mention that the manner in which the employer had been identified was erroneous.

6. Only in February 1997, did a representative of CNA challenge (in a telephone conversation) claimant's listing of Cumberland Steel as his employer as of the date of the injury.

7. Fidelity & Casualty Company never entered an appearance in the proceedings.

8. Cumberland Steel never challenged its designation as the claimant's employer.

This information demonstrates that Estes was not acting under a misconception when he indicated that Cumberland Steel was his employer at the time of the injury. To the contrary, it demonstrates that Estes had a good-faith belief that he was employed by Cumberland Steel at the time of his injury and that he had reasonable grounds to support this belief.

While Cumberland Steel was aware of Estes's position, neither it nor its insurer chose to challenge his contention during the course of the proceedings. In light of the circumstances of this case, we conclude that Cumberland Steel was in a position to respond to the pleadings and that, as a result, it was compelled to present its arguments in the original proceedings. Clearly, it acted at its peril in failing to do so.

As was noted in Fox, reopening proceedings are designed to prevent injustice resulting from the erroneous fact-finding of an ALJ -- not to save litigants from the consequences of their own mistakes. Cumberland Steel was at all times aware of the proceedings instituted against it. Therefore, it was obligated

to respond at the appropriate time, and its failure to do so and the resulting consequences are not a proper basis for reopening.

Again, while the parties disagreed as to the identity of Estes's employer as of the date of the injury, neither party has asserted that it labored under any misapprehension or that it operated on the basis of any "mistake" during the course of the proceedings. As a result, we cannot conclude that Cumberland Steel can avail itself of the mistake provision of the reopening statute.

Finally, we agree that Cumberland Steel's argument with respect to its insurer's rights cannot be considered for the first time on appeal. It has not been shown that the Board overlooked or misconstrued controlling statutes or legal precedent -- or that the view of the evidence taken below was either patently unreasonable or flagrantly implausible. See Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685 (1992).

Accordingly, the decision of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Walter E. Harding
Louisville, KY

BRIEF FOR APPELLEE MORRIS
ESTES:

Robert M. Alexander
Glasgow, KY

BRIEF FOR APPELLEE SPECIAL
FUND:

Benjamin C. Johnson
Louisville, KY