RENDERED: August 6, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000157-WC

SAFETY KLEEN — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-02-01894

ERIC LEE MARAMAN; DONALD LEE SMITH, Administrative Law Judge; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, Chief Judge; BUCKINGHAM and TACKETT, Judges.

COMBS, CHIEF JUDGE. Safety Kleen petitions for review of an opinion of the Workers' Compensation Board of December 24, 2003, affirming an award of benefits to the appellee, Eric Maraman. Safety Kleen argues that the Board erred in concluding that the Administrative Law Judge (the ALJ) did not abuse his discretion in denying its motion to re-open proof after the final hearing. Finding no error, we affirm.

Maraman sustained an injury to his back on July 15, 2001. Upon reporting the injury to his supervisor that same day, he was warned that he should not attempt to collect workers' compensation benefits. Maraman underwent surgery on August 6, 2001, to excise a herniated disc at L4-5. Although he missed several months of work, he was not paid any temporary total disability (TTD) benefits. When he was released to work in November 2001, he was informed that Safety Kleen no longer had work for him. Although Maraman ultimately found other employment, he now earns less money than he had received while working for Safety Kleen.

Maraman filed a claim for workers' compensation benefits on November 13, 2002. On December 16, the Commissioner of the Labor Cabinet mailed a notice of the filing to Safety Kleen and its insurer, AIGS/INS.Co. The notice advised as to the "specific time requirements for defensive responses" and of the need to provide to the Department of Workers' Claims notice of the name and address of counsel.

On December 23, 2002, a scheduling order was issued and was mailed to Safety Kleen and its insurer, notifying them that they had forty-five (45) days to file a Notice of Claim Denial or Acceptance (Form lll) and that a Benefit Review Conference would be conducted on April 9, 2003. The order warned Safety Kleen that if it failed to file a Form 111, the

allegations in Maraman's application for benefits would be deemed admitted.

Safety Kleen neither filed a Form 111 nor tendered any proof prior to the expiration of time for filing proof on February 22, 2003. Maraman filed the report of Dr. S. Pearson Auerbach, an independent medical examiner. On the day before the Benefit Review Conference, the ALJ telephoned the third-party administrator responsible for administering workers' compensation benefits on behalf of Safety Kleen, advising that counsel had never entered an appearance on behalf of Safety Kleen.

Counsel for both Maraman and Safety Clean appeared at the Benefit Review Conference on April 9, 2003. Safety Kleen did not offer any explanation for its failure to file a Form 111; it did not request additional time to file the form or to submit proof. A final hearing was scheduled for April 22, 2003.

On May 8, 2003, after the final hearing, Safety Kleen moved to re-open the case and sought permission to submit additional proof on the issue of the work-relatedness of Maraman's injury. It alleged that it had recently learned that Maraman had been treated by a chiropractor, Dr. William Eriksen, in the days immediately preceding his alleged back injury. As additional grounds for the motion, Safety Kleen's counsel stated that he had only become aware of the case on April 8, 2003, and

that he had not had time to investigate and to take proof within the time provided by the scheduling order.

The motion to re-open proof times and to reschedule briefing was denied on May 20, 2003. On June 18, 2003, the ALJ rendered his opinion and award. Because Safety Kleen had not filed a Form 111, the ALJ applied the provisions of 803 KAR 25:010, Section 5(2)(b), which (as the employer had been warned) allow the factual allegations of the complaint to be deemed admitted. Thus, the ALJ resolved the issue of causation in Maraman's favor.

With respect to the issues of extent and duration of Maraman's disability, the ALJ relied on the testimony of Maraman himself and the report of Dr. Auerbach. The ALJ found that Maraman could not return to his former work. Based on the doctor's 13% impairment rating, the ALJ awarded Maraman PPD benefits of $155.04 per week for 425 weeks. Because no TTD had been paid, the ALJ also awarded TTD benefits in the amount of $510.55 per week for the period running from July 27, 2001, to November 12, 2001.

On July 10, 2003, Safety Kleen moved to file the medical reports of Dr. Robert Sexton, Maraman's surgeon, in support of its allegation that the on-set of Maraman's back problems preceded his alleged work-related injury. Although counsel for Safety Kleen had the report of Dr. Sexton when he

deposed Maraman prior to the final hearing, he made no attempt to offer it as an exhibit at that time. The motion was denied, and the pleading was ordered stricken from the record on July 25, 2003.

Safety Kleen appealed to the Board, arguing that it had not been granted sufficient time to prepare a defense and that the ALJ abused its discretion in denying its motion to re-open proof. The Board addressed those contentions as follows:

> Contrary to Safety Kleen's assessment, we do not believe the phone call from the ALJ must be construed as knowledge on his part that neither the employer nor the claims administrator were [*sic*] aware of the proceedings. There is no charge that the address at which Safety Kleen was served with Maraman's Form 101, and the notice of claim filing and scheduling order issued by the Commissioner is incorrect. Rather, every indication is to the contrary. Moreover, although service on the employer is sufficient, as a matter of law, we also note that the notice of claim filing and the scheduling order issued by the Commissioner on December 16, 2002, and the December 23, 2002, respectively, were additionally served on the workers' compensation insurance carrier for Safety Kleen at its correct address in Louisville, Kentucky, on file with the department. Safety Kleen's only allegation with respect to an alleged deficiency in service of the Form 101, the notice of filing and the scheduling order is that the documents were not mailed to the third party administrator charged with handling its claims for workers' compensation. Simply put, that is not the law. It is neither the responsibility of the employee nor the Commissioner to insure that the Form 101 and subsequent pleadings

are placed in the hands of the individual ultimately responsible for defending the interests of the employer.

. . . Safety Kleen has failed to demonstrate any good cause why it failed to file a Form 111, Notice of Claim Denial or Acceptance, in compliance with [the December 23, 2002 scheduling] order.

. . .

The granting of extensions of proof time is a matter within the discretion of the ALJ. KRS 342.230 empowers the ALJ, in receiving evidence, to make rulings upon motions presented "as will expedite the preparation of the case." The administrative regulations permit a party to move for an extension of time no later than five days before the deadline sought to be extended and provide that the extension "may" be granted upon a showing of circumstances that prevented timely introduction. 803 KAR 25:010, § 15. The regulations further provide that, upon motion with good cause shown, the ALJ "may" order that additional discovery or proof be taken between the BRC and the date of the hearing. 803 KAR 25:010, § 13. There is no similar provision respecting the submission of proof after the final hearing and, indeed, it will be noted that the regulations provide that, at the conclusion of the hearing, the claim "shall" be taken under submission immediately, or briefs may be ordered. A decision "shall" be rendered no later than 60 days after the hearing. 803 KAR 25:010, § 18. We do not believe the motion to reopen proof time filed by Safety Kleen setting forth much the same argument as it now presents for allowing the late filing of the records of Dr. Ericksen presents good cause, much less compelling circumstances, upon which the ALJ should have granted the relief requested.

In its appeal before this Court, Safety Kleen reiterates the same arguments that it had presented to the Board. It contends that the ALJ abused his discretion so as to deprive it of due process of law when he denied its motion to re-open proof after the final hearing. We find no error in the Board's resolution of this matter.

Safety Kleen correctly argues that it was entitled to due process, a principle which includes both notice and the right to be heard. American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Commission, Ky., 379 S.W.2d 450 (1964). However, the record discloses that Safety Kleen was served with Maraman's claim, a fact which wholly refutes the contention that the ALJ abused his discretion. The record in this case reveals that Safety Kleen and its insurer were provided notice of the claim since Maraman's Form 101 and subsequent orders were mailed to Safety Kleen and its insurer at their correct addresses. There is no alleged failure of process, any claim of excusable neglect, or any other reason which would justify the relief that Safety Kleen sought from the ALJ. See, e.g., S.R.Blanton Development., Inc. v. Investors Realty and Management Co., Inc., Ky.App., 819 S.W.2d 727 (1991), and Sunrise Turquoise, Inc. v. Chemical Design Co.Inc., Ky.App., 899 S.W.2d 856 (1995).

Safety Kleen has not presented any explanation for its failure to defend Maraman's claim according to the terms of the original scheduling order. It has provided no legitimate basis to warrant an extension of proof time after the final hearing. There has been no explanation for its failure to move for an extension of the proof time at the Benefit Review Conference (when counsel entered his appearance) or at any time before the final hearing. Nonetheless, Safety Kleen argues that it is entitled to be relieved of the ALJ's award on the basis that Maraman would suffer no prejudice by a re-opening of the proof and a new decision. We agree with the Board that there was no abuse of discretion by the ALJ in refusing to accommodate Safety Kleen's request for additional time to present a defense.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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