

RENDERED: May 27, 2005; 10:00 a.m.
TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2004-CA-002447-WC

REALTY IMPROVEMENT COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-68191

RICKY RALEY, DECEASED; HAROLD W.
RALEY, ADMINISTRATOR; HON. RICHARD M.
JOINER, ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR
JUDGE.¹

COMBS, CHIEF JUDGE: Realty Improvement Co., Inc. (Realty
Improvement) petitions for review of an opinion of the Workers'
Compensation Board which affirmed a decision of the
Administrative Law Judge (ALJ). Because of Realty Improvement's
intentional violation of two safety regulations which resulted
in the death of its employee, Ricky Raley (Raley), the ALJ

¹ Senior Judge John D. Miller, sitting as Special Judge by Assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

increased the death benefit owed to his estate by the 30% penalty provided in KRS² 342.165(1). On appeal, Realty Improvement argues that only income benefits -- as distinguished from death benefits -- are subject to enhancement by the safety penalty.

In addition to the issue of the proper application of KRS 342.165(1), Realty Improvement also challenges the ALJ's award on procedural grounds. It contends that it was denied due process of law by the failure of the claimant to provide its correct address on the "Application for Resolution of Injury Claim" (Form 101). As a result, Realty Improvement argues that it was not made aware of the claim for the 30% penalty in timely fashion in order to provide an adequate defense. It also claims that the ALJ abused his discretion in failing to grant its motion to re-open proof time after it actually learned of the pending claim. Finding no error, we affirm.

The facts are not in dispute. On October 22, 2002, while working for Realty Improvement, Raley died from a closed head injury that he suffered when he fell thirty feet off a roof. As a result of this accident, Realty Improvement was penalized by the Kentucky Labor Cabinet for violating 29 CFR³ 1926.501(b)(11) (failure to provide Raley with fall protection

² Kentucky Revised Statutes.

³ Code of Federal Regulations.

equipment) and 29 CFR 1926.503(a) (failure to provide him with fall protection training).

Raley died without dependents. Realty Improvement paid his estate a lump sum death benefit of \$54,089.28 pursuant to KRS 342.750(6), which provides as follows:

In addition to other benefits as provided by this chapter, if death occurs within four (4) years of the date of injury as a direct result of a work-related injury, a lump-sum payment of fifty thousand dollars (\$50,000) shall be made to the deceased's estate, from which the cost of burial and cost of transportation of the body to the employee's place of residence shall be paid. Annually, the commissioner shall compute, in accordance with KRS 342.740, the increase or decrease in the state average weekly wage, and consistent therewith, shall adjust the amount of the lump-sum payment due under this subsection for injuries occurring in the succeeding year.

On October 29, 2003, Raley's administrator filed a claim seeking an additional sum equal to 30% of the death benefit pursuant to KRS 342.165(1). The Form 101 submitted by the administrator incorrectly identified Realty Improvement's address as the address where the accident occurred. However, the "Citation and Notification of Penalty" forms issued by the Kentucky Labor Cabinet, which were submitted with the Form 101, contained Realty Improvement's correct address. Raley's administrator also provided the correct address for Realty Improvement's insurer, Ladegast & Heffner Claims Service.

On January 20, 2004, Realty Improvement, by counsel, filed a Notice of Claim Denial (Form 111), contesting any liability for the safety penalty provided by KRS 342.165(1). On April 6, 2004, counsel submitted a "Statement of Proposed Stipulations, Notice of Contested Issues, and Witness List," in which he identified the sole issue for resolution by the ALJ as the propriety of the application of the 30% safety penalty to death benefits. On April 16, 2004, after attending a benefit review conference, counsel entered an agreement that the fatal accident "was caused in some degree by the intentional failure of the employer to comply with a safety statute or regulation."

By agreement, the matter was submitted to the ALJ for resolution on the record without the presentation of any evidence. Realty Improvement filed its brief on May 3, 2004. A week later, after the briefing period had ended, Realty Improvement filed a motion seeking to remove the matter from submission and sought to re-open the proof time. Counsel contended that after he was asked by Realty Improvement's insurance carrier to provide representation, he made several unsuccessful efforts to contact Realty Improvement at the address provided on the notices generated by the Office of Workers' Claims (OWC) -- the incorrect address contained on the Form 101. When he received no response from Realty Improvement,

counsel stated that he assumed that the company did not want to contest the underlying facts of the claim.

Subsequently, counsel discovered that Raley's personal representative had provided to the OWC an incorrect address for Realty Improvement and that the employer had not received notice of the claim. Without specifying what evidence it might assert in order to defeat the claim for enhanced benefits, Realty Improvement asked for an opportunity to present evidence in its defense. The motion was denied.

On June 17, 2004, the ALJ issued his opinion and award. He determined that the death benefit paid pursuant to KRS 342.750(6) constituted proper compensation within the meaning of KRS 342.165(1) and awarded \$16,226.94 (30% of \$54,089.28 per the judgment) in additional benefits to Raley's estate.

Realty Improvement filed a motion for reconsideration and outlined the evidence upon which it relied to preclude the imposition of the safety penalty. Because of the presence of frost on the roof on the morning of Raley's death, it alleged that a message had been relayed to its employees at the construction site to delay the start of the work day. There was no fall-protection equipment at the site because it was not anticipated that any employees would be on the roof until the frost had dissipated.

The motion for reconsideration was overruled. Realty Improvement appealed to the Board, which affirmed the ALJ's decision with respect to the proper application of KRS 342.165(1) (income benefits *versus* death benefits) as well as the ALJ's denial of the motion to re-open the proof time.

In seeking a reversal of an ALJ's award before this Court, Realty Improvement argues that the death benefits provided by KRS 342.750(6) are not subject to enhancement by the penalty imposed for safety violations. KRS 342.165(1) provides:

If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the **compensation for which the employer would otherwise have been liable under this chapter** shall be increased thirty percent (30%) in the amount of each payment.
(Emphasis added.)

Realty Improvement does not dispute that it was liable to Raley's estate for \$54,089.28 pursuant to KRS 342.750(6). However, it argues that it should not be required to pay the additional 30% penalty as it construes the term *compensation* in the penalty statute as meaning only income benefits.

Without reference to precedent, Realty Improvement contends that the penalty historically has never been applied to death benefits:

As far as this Appellant can determine from its research, whenever such a penalty has been awarded in the past, it has routinely been awarded in relation to income benefits only. Through its research, this Appellant has been unable to discover a single example of a safety penalty having been imposed as against death benefits under KRS 342.750(6) or, for that matter, as against medical expenses, vocational rehabilitation expenses, or any other benefits except income benefits. (Appellant's brief at p. 5.)

Realty Improvement also argues that it is not responsible for a safety penalty because the death benefits owed to Raley's estate were neither "income benefits" nor "medical and related benefits." It claims that *compensation* as defined in KRS 342.0011(14) consists of the sum of income benefits and medical and related benefits.

The Board observed that the death benefits provided by KRS 342.750(6) possess "characteristics of both 'income benefits' as well as 'medical and related benefits'." (Board's opinion of October 29, 2004, at p. 11.) However, in lieu of referring to the various definitions contained in KRS 342.0011, the Board focused on the purpose of the safety penalty statute in order to determine the meaning of the term *compensation* as contemplated by the Legislature in enacting KRS 342.165(1). It concluded:

We are convinced that even though KRS 342.750(6) does not fit neatly with the definition of compensation, it nonetheless

constitutes a form of compensation, just as death benefits payable to a surviving spouse or children under eighteen who are not wholly or partially dependent upon the deceased worker constitute compensation. (Board's opinion at p. 14.)

We agree that the Board correctly perceived the intent of the Legislature and that it did not err in interpreting the penalty statute. In reaching this conclusion, we are mindful of the directive of KRS 446.080(1) that all statutes are to be "liberally construed with a view to promote their objects and carry out the intent of the legislature" In the particular context of workers' compensation, we are conscious of the principle that the statutes be interpreted "in a manner consistent with their munificent and beneficent purpose." Jewish Hospital v. Ray, 131 S.W.3d 760, 764 (Ky.App. 2004).

The purpose underlying KRS 342.165(1) was examined in Apex Mining v. Blankenship, 918 S.W.2d 225, 228 (Ky. 1996), in which the Supreme Court observed that the goal of KRS 342.165 "is to promote workplace safety by encouraging workers and employers to follow safety rules and regulations." The Court concluded that:

Consistent with its purpose of preventing workplace injuries, KRS 342.165 imposes a monetary penalty for certain safety violations. KRS 342.165 penalizes employer misconduct with a 15%⁴ increase in each payment of "compensation" for which the

⁴ This percentage was increased to 30% in 2000.

employer would otherwise have been liable and penalizes worker misconduct with a 15% decrease in compensation. **Regardless of whether the penalty is computed as a function of an income benefit or other compensation,** the penalty clearly is not an income benefit

Id. (Emphasis added.)

Raley's administrator points out that Realty Improvement's interpretation of the penalty statute would produce the incongruous result of imposing a smaller penalty for causing an employee's death rather than his injury. Needless to note, such an outcome could not advance the purpose of the statute. The employer's intentional violation of a safety statute or regulation triggers the penalty. The compensation to be awarded under the Act flows (regardless of its nature as income or death benefit) from such conduct and results in the penalty. In the context of promoting safety, the overriding statutory objective is the protection of all employees -- regardless of marital status or number of dependents. We hold that the Board did not err in affirming the ALJ's award.

Realty Improvement next argues that it was denied the opportunity to defend the claim for increased benefits. As the employer and the real party in interest, Realty Improvement was entitled to procedural due process, including notice of the claim and the opportunity to be heard. See, American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning

Commission, 379 S.W.2d 450 (Ky. 1964). In addition, 803 KAR⁵ 25:010 § 3(2) requires all claims to be served "on all parties." Section 3(3) of that same regulation requires all pleadings to be served upon "all other parties . . . or, if represented, to that representative, at the party's or representative's last known address." It is apparent from the record that Realty Improvement was not served with the Form 101.

In its review, the Board concluded that Realty Improvement was not entitled to be relieved of the ALJ's award by its failure to receive notice of the claim filed by Raley's estate:

Our review of the record indicates that the notice sent to Realty Improvement was returned to the Department of Workers' Claims as undeliverable and that a memo was directed to the ALJ on January 8, 2004, noting the same. However, less than four days later counsel for Realty Improvement entered its [sic] appearance of record. More than five and one-half months later, without ever having been in direct contact with his client, counsel entered into the stipulation addressing the safety regulation. We wonder out loud why correspondence from the Office of Workers' Claims directed to Realty Improvement was returned yet counsel's correspondence was not. Nonetheless, the correct address for Realty Improvement was contained on the "Citation and Notification of Penalty" appended to the Form 101 and was in the possession of counsel. Furthermore, the correct address of Realty Improvement was available from Ladegast & Heffner and a

⁵ Kentucky Administrative Regulations.

minimal inquiry early on could surely have put counsel and client in contact.

It has long been accepted that the fact finder has the authority to control the taking and presentation of proof and it is not unreasonable for an ALJ to either direct additional proof to be presented or prohibit evidence in order to maintain a reasonable element of due process [citations omitted]. Here, the ALJ refused to allow additional proof after the claim had already been submitted and briefed. There was no abuse of discretion. (Board's opinion at pp. 15-16.)

We find no error in the Board's resolution of the issue. Although the address given for Realty Improvement on the Form 101 was incorrect, it evidently sufficed to provide notice of the claim. Realty Improvement suffered no jeopardy and was represented by legal counsel throughout the entire proceeding. Its counsel filed a response, entered into stipulations, appeared at a benefit review conference, and filed a brief on Realty Improvement's behalf. At no time prior to the submission of the case did counsel notify the ALJ or opposing counsel of his difficulty -- belatedly asserted -- in contacting or communicating with his client. Under these circumstances, we hold that counsel's knowledge of the claim is properly imputable to Realty Improvement and that it is duly bound by the vigorous representation provided by its counsel in its defense.

The opinion of the Workers' Compensation Board is affirmed.

All CONCUR.

BRIEF FOR APPELLANT:

Douglas A. U'Sellis
Louisville, Kentucky

BRIEF FOR APPELLEE HAROLD W.
RALEY, ADMINISTRATOR, ESTATE
OF RICKEY RALEY, DECEASED:

John M. Lally
Louisville, Kentucky