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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: April 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 5-13-04 Ella Grow:H, D.C.

2003-SC-0347-WC

PATRICIA ANN STEWART APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-2016-WC
WORKERS' COMPENSATION BOARD NO. 98-58852

PIKE COUNTY BOARD OF EDUCATION;
HON. DONALD G. SMITH, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The claimant received a permanent total disability at the reopening of her settled claim. In a decision that was affirmed by the Court of Appeals, the Workers' Compensation Board (Board) vacated the award and remanded the matter for further proceedings. Concluding that both notice and service of process to the employer were deficient until after the hearing on the matter, the Board determined that it was an abuse of discretion for the ALJ to deny the employer's motion to reopen proof and enable it to submit evidence. We affirm.

In April, 1998, the claimant slipped and fell while working, injuring her left arm and back. On June 1, 1999, before a formal claim was filed, the parties agreed to settle the matter for a lump sum that represented a 15% occupational disability. The agreement indicates that the employer had paid nearly $15,000 in medical expenses,

that no medical expenses were contested, and that the employer had paid more than 42 weeks of temporary total disability benefits. The agreement was signed on the claimant's behalf by the same attorney who represents her presently. It listed the employer as: "Pike County School Board, P. O. Box 3097, Pikeville, KY 41502." The agreement indicated that the employer's insurance carrier was "Legion Ins. c/o Cunningham Lindsey" and listed the address for Cunningham Lindsey Claims Management, Legion's third-party administrator. Janet L. Quiggins, an adjuster for Cunningham Lindsey, signed the agreement on the line designated for the employer's attorney or representative. The order approving the agreement indicates that copies were forwarded to the claimant, to her counsel, and to "INSURANCE CARRIER: The Cunningham Lindsey Claims Management Group, Incorporated, 9502 Williamsburg Plaza, Suite #201, Louisville, Kentucky 40201, Attn: Janet Quiggins."

In 2000, Legion changed third-party administrators. It did not inform the Department of Workers' Claims of the change and apparently had no legal obligation to do so. The Board later took judicial notice of the Department's records, which reflected that the First Report of Injury listed the employer's address as: "P.O. Box 3097, Pikeville, KY 41502." It also took judicial notice that the Department's records listed the address for Legion Insurance Co. as: "One Logan Square, Suite 1400, Philadelphia, Pennsylvania 19103."

On September 6, 2001, the claimant filed a motion to reopen, acting through the same attorney who represented her in the settlement. She served the motion on Ms. Quiggins at Cunningham Lindsey, the former third-party administrator. Yet, she failed to serve the motion on the employer or on Legion.

The Arbitrator who granted the motion and ordered further proof forwarded a copy of the order to the claimant's attorney and to Cunningham Lindsey. Nothing in the record indicates that the arbitrator forwarded a copy to the employer or to Legion. The Commissioner of the Department of Workers' Claims then sent a copy of the scheduling order to the claimant, her attorney, Cunningham Lindsey, and "Pike County Schools, S Mayo Trail, Pikeville, KY 41501."

The claimant proceeded to file into evidence two groups of medical records, serving notice on Ms. Quiggins and on the employer, using the S Mayo Trail address that the Commissioner had used when sending the scheduling order to Pike County Schools. She later filed notice that Dr. Warsy would be deposed on December 18, 2001, and served Ms. Quiggins but not the employer or Legion. No representative of the employer attended Dr. Warsy's deposition. The transcript was filed with the Department on January 4, 2002, and served on Ms. Quiggins, but nothing in the record indicates that a copy was sent to the employer or to Legion. Acknowledging that her proof time was scheduled to end on December 22, 2001, the claimant also moved for leave to depose Dr. Ahmed on January 8, 2002, the earliest date available. Again, she served Ms. Quiggins but not the employer or Legion. The ALJ forwarded to the employer at the S Mayo Trail address a copy of the order extending the claimant's proof time through January 8, 2002. The order granted no corresponding extension of time to the employer. On January 10, 2002, the claimant took Dr. Ahmed's deposition. Again, neither the employer nor its representative attended and, again, the record does not indicate that a copy was sent to the employer or to Legion. It also fails to indicate that a copy was sent to Ms. Quiggins.

Although the claimant's request for additional proof time referred only to Dr. Ahmed's deposition, she proceeded to submit records from Dr. Nadar on January 2, 2002, serving only Ms. Quiggins. Likewise, although the ALJ's order extended proof time only until January 8, 2002, the claimant continued to submit evidence thereafter. She submitted records from Phil Pack, a psychologist, on January 14, 2002, serving only Ms. Quiggins. Although the record does not indicate that anyone was served with notice, she deposed Mr. Pack on January 21, 2002, and filed the transcript into evidence. As with Dr. Ahmed's deposition, the record does not indicate that a copy of Mr. Pack's deposition was sent to the employer, Legion, or even Ms. Quiggins.

On January 28, 2002, the claimant filed her witness list, a list of proposed stipulations, list of contested issues, and a designation of evidence that included evidence submitted after January 8, 2002. The filing was served on Ms. Quiggins but not on the employer or Legion.

The memorandum of the February 6, 2002, benefit review conference acknowledged that the employer had made no appearance in the reopening of this settled claim. Nonetheless, it listed a number of stipulations. It also indicated that the following items would be considered as evidence: the claimant's deposition, Dr. Warsy's deposition and records, Dr. Ahmed's deposition and records, and Phil Pack's deposition and report. Nothing in the record indicates that a copy of the memorandum was sent to Ms. Quiggins, to the employer, or to Legion.

After serving only Ms. Quiggins with notice, the claimant's deposition was taken on February 11, 2002. Although the transcript was filed into evidence, it does not indicate that a copy was sent to the employer, its carrier, or even Ms. Quiggins. On

February 15, 2002, the claimant submitted records from Dr. Warsy, serving only Ms. Quiggins. They were filed into evidence on February 21, 2002.

The ALJ conducted a formal hearing on February 19, 2002, with only the claimant and her counsel present. At the hearing, the ALJ commented for the record concerning the employer's failure to enter an appearance. Under the mistaken impression that Cunningham Lindsey was the employer's carrier, the ALJ noted that both the employer and its carrier were served with the scheduling order, including a copy of the reopened claim. Although the ALJ stated that a copy of the benefit review conference memorandum was sent by certified mail to the employer and carrier, the statement is not supported by the record. After noting that the employer had still not entered an appearance, the ALJ stated, "I understand that Plaintiff's counsel has also served the defendant-employer with all the pleadings in this matter, is that correct?" Counsel responded that although everything may not have gone to the employer, itself, it did go to the carrier, Cunningham Lindsey. Concluding that the carrier had been served with "all the pleadings, orders, and anything necessary for them to make an entry of appearance," the ALJ decided to go ahead with the hearing. With respect to the merits of the reopening, the ALJ noted that the settlement occurred before a claim was filed and that the claimant's testimony in the reopening proceeding was the only evidence of her condition at the settlement.

Attached to the hearing order were receipts for certified mail to: "Pike County Schools, S Mayo Trail, Pikeville, KY 41501" and to Ms. Quiggins, at Cunningham Lindsey Claims Management. The return receipt for the document sent to Ms. Quiggins was signed "Jane Hadden." The return receipt from the mailing to Pike County Schools

indicated that the delivery address, "P. O. Box 3097, Pikeville, KY 41502," was different from the address to which the mail was sent.

On February 25, 2002, counsel for the employer filed a notice of representation; requested copies of all medical and vocational evidence in the claimant's possession; and filed motions to certify coverage, to file a late notice of claim denial, and to reopen proof time or, in the alternative, to be given 45 days to present proof. As grounds for the motions, the employer explained that Legion had changed third-party administrators and that neither Legion nor the new third-party administrator was served with the motion to reopen or the Commissioner's scheduling order. Noting that the claimant's initial proof time had been extended, the employer asserted that neither extending its proof time nor enabling the case to be decided on the merits would prejudice the claimant.

On April 11, 2002, the employer also filed a notice of stay, documenting the fact that on March 28, 2002, in the Commonwealth Court of Pennsylvania, Docket No. 183-MD-202, Koken, Insurance Commissioner v. Legion Insurance, an order was entered placing Legion Insurance Company into fiscal rehabilitation.

Ignoring the notice of stay, the ALJ noted that the order extending the claimant's proof time until January 8, 2002, automatically extended the employer's proof time through February 7, 2002. Yet, the employer failed to make an entry of appearance during proof time and failed to appear at the benefit review conference or hearing. On that basis, the ALJ determined that the motions to certify coverage and to reopen proof time were untimely and denied them. Noting the employer's lack of a reasonable explanation for why it failed to appear or defend the case despite the fact that it was served, the ALJ determined that the notice of denial and request for medical evidence also were untimely. The ALJ noted that the initial claim was settled, noted that certain

"stipulations were entered into by the [claimant], with no appearance by the Defendant-Employer," and listed them. After reviewing the evidence that the claimant submitted, the ALJ awarded lifetime benefits for permanent total disability.

The employer's petition for reconsideration pointed out that the claimant failed to serve her motion to reopen on either the employer or Legion. Furthermore, the Commissioner failed to mail the scheduling order to Legion or its authorized agent. The employer maintained that even if one were to assume that it or its carrier had been neglectful, the penalty that the ALJ imposed was abusive under the circumstances. Finally, noting that the burden was on the claimant to prove every element of her claim for increased benefits and pointing out that a stipulation was an agreement of the parties, the employer asserted that reliance on "stipulations" made solely by the claimant amounted to a patent error in the opinion and award.

The claimant responded that an insurance carrier is not a party to a claim and that the employer was served with a copy of the scheduling order. She asserted that the employer's motions concerned matters within the sound discretion of the ALJ and that the rulings were not unreasonable under the circumstances. Finally, she maintained that each of the stipulations favored the employer, was supported by evidence of record, or concerned a matter that was rendered res judicata by the terms of the settlement agreement.

Overruling the petition, the ALJ noted that an insurance carrier is not a party under Chapter 342. Furthermore, although the employer's carrier was not served, its agent, Ms. Quigley, was served. Rejecting the employer's assertion that the award amounted to a default judgment, the ALJ pointed out that it was based on the evidence that was timely filed by the parties. Although acknowledging that the employer was

correct in its assertion that stipulations are not unilateral, the ALJ stated that the facts contained in the stipulations were supported by the unrebutted testimony of the claimant. The claimant continues to maintain that the decision was correct and should not have been vacated.

We begin our analysis with a brief review of procedures relevant to the reopening of a claim. As authorized by KRS 342.125(1), a party may move to reopen an otherwise final award. As with any other pleading, the motion must "be served on all other parties by mailing a copy to the other parties or, if represented, to that representative, at the parties' or representatives' last known address." 803 KAR 25:010E, § 3(3). The Commissioner then issues notice that the claim has been assigned to an ALJ, a document that is commonly referred to as the scheduling order. KRS 342.270(2). Within 45 days of the scheduling order, the employer must file notice of claim denial or acceptance, setting forth specifically those material matters that are admitted and those that are denied. KRS 342.270(2); 803 KAR 25:010E, § 5(2). KRS 342.470 prescribes the manner for giving notice to a carrier whenever Chapter 342 requires such notice.

In addition to requiring notice of any pleadings, 803 KAR 25:010E, § 3(3) requires parties to be served with notice of depositions. Also upon notice, a party may file evidence, which will be admitted without further order unless a proper objection is filed within 10 days. 803 KAR 25:010E, § 9(6). All parties take proof for 45 days from the date of the scheduling order, with the defendant receiving an additional 30 days to complete its proof, and the claimant receiving 15 days thereafter for rebuttal. 803 KAR 25:010E, § 5(3). Proof time may be extended upon a showing of circumstances that prevent its timely introduction, but motions for extension of time must be filed no later than 5 days before the deadline sought to be extended and require a supporting

affidavit. 803 KAR 25:010E, § 13(1). Absent compelling circumstances, only one 30-day extension is permitted. 803 KAR 25:010E, §13 (2). Furthermore, granting an extension of time automatically enlarges the opponent's time unless the extension is for rebuttal proof. 803 KAR 25:010E, § 13(3).

An employer bears primary liability for a workers' compensation claim, regardless of whether its liability is indemnified with insurance coverage. Therefore, it is the employer, not its insurance carrier, who is the real party in interest. See, Browns, Bell & Cowgill v. Soper, 287 Ky. 17, 152 S.W.2d 278 (1941); Wilcox v. Board of Education of Warren County, Ky.App., 779 S.W.2d 221 (1989). As the real party in interest, an employer is entitled to procedural due process, including notice and an opportunity to be heard. American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Comission, Ky., 379 S.W.2d 450 (1964). 803 KAR 25:010E, § 3(3) requires that every party or its representative be served with every pleading. We find nothing in Chapter 342 to indicate that service of a claim or motion to reopen on an employer may be made through service on its insurance carrier. Although KRS 342.470 prescribes the manner for giving notice to an insurance carrier whenever Chapter 342 requires such notice, nothing designates an insurance carrier as a party to a workers' compensation claim unless it is specifically named as a party. Likewise, nothing requires an injured worker to serve the employer's carrier with notice of a claim or motion to reopen unless the carrier is named as a party.

As the real party in interest, the employer was entitled to notice of the claimant's motion to reopen and was entitled to receive all pleadings and notices required under Chapter 342 until it designated a representative for the service of process in the matter. Notwithstanding Ms. Quigley's role with respect to the settlement agreement, nothing in

the record indicates that the employer designated Ms. Quigley or Cunningham Lindsey as its representative for the service of process with respect to future matters. Furthermore, we are not persuaded that serving a motion to reopen and related pleadings on a claims adjuster who had worked for the employer's insurance carrier's third-party administrator at the time of the initial claim could reasonably be viewed as serving the employer as required by 803 KAR 25:010E, § 3(3). It was not until a notice of representation was filed on February 25, 2002, that the employer designated a representative for the service of process in the reopening.

Although the name and address of the claimant's employer were listed on the First Report of Injury and appeared on the face of the settlement agreement, she failed to serve the employer with a copy of her motion to reopen. Contrary to her assertion, the Commissioner's scheduling order was not properly served on the employer. It was neither addressed to the employer nor sent to the address that was listed on the First Report of Injury and settlement agreement, the address to which the return receipt indicates that the letter containing the hearing order was later delivered. Instead, the Commissioner's office addressed the scheduling order to "Pike County Schools" at an incomplete street address. Although the record indicates that the claimant attempted to send some of the pleadings and evidence to the employer, using the correct name, it also indicates that she failed to send even them to the employer's last known address.

Although the ALJ noted at the hearing that a copy of the benefit review conference memorandum was sent to the employer by certified mail and that it had failed to enter an appearance, no evidence supports the statement. The earliest evidence in the record to establish the delivery of a pleading is the return receipt for the certified mail in which the ALJ sent a copy of the hearing order. Even then, although the

pleadings clearly indicated that the employer was the Pike County Board of Education, the receipt indicates that the letter was addressed to "Pike County Schools" at the same incomplete street address that the Commissioner and the claimant had used previously. The receipt indicates that the letter was ultimately delivered to the address shown for the employer on the First Report of Injury and the settlement agreement, and it was in response to that letter that the employer moved to enter an appearance, designated a representative for the service of process in the matter, and requested time for taking proof.

Although the employer was entitled under the regulations to notice of depositions and of evidence that was filed, the record does not indicate that the claimant attempted to provide such notice except with respect to the initial medical reports. Nonetheless, the evidence was admitted and considered. Although the regulations require a supporting affidavit showing compelling circumstances in order to extend a party's proof time by more than 30 days, nothing in the record explains why the claimant was permitted to continue to introduce proof up until February 21, 2002, long after her proof time expired. Although some of the evidence was submitted in what would appear to be the claimant's rebuttal time, the employer's failure to enter an appearance and introduce evidence obviated a rebuttal. Nonetheless, the claimant submitted proof out of time, and the ALJ considered it.

As the claimant has pointed out in an attempt to defend her failure to give proper notice and service of process, the employer did not assert to the ALJ that it was unaware of the reopening until it received the certified letter on February 20, 2002. Its argument was premised on a lack of notice to its carrier, Legion. Nonetheless, because the conduct of these proceedings was so arbitrary and capricious, we are persuaded

that the decision to vacate the award was warranted. Under the circumstances, the employer must be given a reasonable period in which to present evidence, and the claimant must then be given time for rebuttal.

The decision of the Court of Appeals is affirmed.

All concur.

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