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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: August 26, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 9-16-04 [illegible], D.C.

2003-SC-0648-WC

MERRICK PRINTING COMPANY APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-0472-WC
WORKERS' COMPENSATION BOARD NO. 98-72170

MICHAEL W. VERTREES; SHEILA C. LOWTHER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Denying an employer's motion to reopen, an Administrative Law Judge (ALJ) determined that KRS 342.125(1) did not permit the reopening of a settled workers' compensation claim as a means of apportioning the injured worker's proceeds from a civil action in which the employer failed to intervene. The Workers' Compensation Board (Board) and the Court of Appeals have affirmed. Likewise, we affirm.

The claimant sustained a work-related shoulder injury on July 9, 1998. He underwent surgery by Dr. Catalano several weeks later. Sometime thereafter, he developed osteomyelitis, a bone infection. Dr. Malkani then performed a second surgery, debrided the infected area, and administered antibiotics. On November 10, 1999, the claimant brought a civil action against Dr. Catalano.

On February 9, 2000, while the civil action was pending, the claimant and his employer agreed to settle the workers' compensation claim. They agreed to a lump

sum of $47,491.55, which was based on an 18% impairment and a return to work earning a lower average weekly wage than at the time of injury. They also agreed that the employer had previously paid $38,624.88 in temporary total disability benefits and $53,821.72 in medical expenses, which included both of the surgeries and treatment. The agreement was approved on February 15, 2000.

On July 5, 2002, the claimant and Dr. Catalano agreed to settle the allegations in the civil suit for a total of $292,854.06. The agreement did not allocate the settlement proceeds among items of damages. On July 8, 2002, the employer filed a motion to intervene in the civil suit which the trial court later denied.[1]

Also on July 8, 2002, the employer filed a motion to reopen the workers' compensation claim. Although no action had yet been taken on the motion to intervene in the civil action, the employer's motion to reopen alleged that it had intervened. It also alleged that the parties to the civil action had settled the matter and that the claimant and employer had been unable to agree how to divide the proceeds. Noting that KRS 342.125(1) specifies the grounds for reopening and that the employer had failed to allege one of the listed grounds, the ALJ denied the motion. In a petition for reconsideration, the employer noted that the claimant settled the civil action after settling the workers' compensation claim. It asserted, therefore, that the settlement in the civil action amounted to newly discovered evidence with respect to the workers' compensation claim, evidence that could not have been discovered with due diligence before the workers' compensation claim was settled. The petition was denied.

Following unsuccessful appeals to the Board and the Court of Appeals, the employer asserts that KRS 342.700(1) prohibits the claimant from receiving a double

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[1] The claimant has maintained from the outset that the civil action was settled on July 5, 2000; that the employer moved to intervene on July 8, 2000; and that the motion was denied. Although there is nothing in the record to document the assertions, the employer has not disputed them or offered evidence to the contrary.

recovery for his injury and that an ALJ has the authority to apportion settlement proceeds under Whittaker v. Hardin, Ky., 32 S.W.3d 497 (2000). The employer argues that the Court has, on occasion, permitted reopening for reasons that are not specified in KRS 342.125(1). For example, although the "mistake" provision had previously been interpreted as permitting a reopening only to correct mistakes of fact, in Wheatley v. Bryant Auto Services, Ky., 860 S.W.2d 767 (1993), the court determined that an ALJ was permitted to reopen a final award, sua sponte, in order to correct a mistake of law. Likewise, in Westvaco Corp. v. Fondaw, Ky., 698 S.W.2d 837 (1985), the court indicated that although KRS 342.125(1) did not include post-award medical fee disputes as a ground for reopening, reopening was the proper method for resolving such disputes. Finally, the employer asserts that to construe KRS 411.188(2) as prohibiting apportionment on these facts would produce an absurd and inequitable result. It concludes, therefore, that it should be permitted to reopen the workers' compensation award and obtain an apportionment of the claimant's proceeds from the civil settlement.

On the date of injury, KRS 342.700(1) provided as follows:

> (1) Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil action against the other person to recover damages, or proceed both against the employer for compensation and the other person to recover damages, but he shall not collect from both. If the injured employee elects to proceed at law by civil action against the other person to recover damages, he shall give due and timely notice to the employer and the special fund of the filing of the action. If compensation is awarded under this chapter, the employer, his insurance carrier, the special fund, and the uninsured employer's fund, or any of them, having paid the compensation or having become liable therefor, may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employee, less the

> employee's legal fees and expense. The notice of civil action shall conform in all respects to the requirements of KRS 411.188(2).

KRS 411.188(2) provided:

> At the commencement of an action seeking to recover damages, it shall be the duty of the plaintiff or his attorney to notify, by certified mail, those parties believed by him to hold subrogation rights to any award received by the plaintiff as a result of the action. The notification shall state that a failure to assert subrogation rights by intervention, pursuant to Kentucky Civil Rule 24, will result in a loss of those rights with respect to any final award received by the plaintiff as a result of the action.

KRS 342.700(1) gives subrogation rights to employers who have paid workers' compensation benefits and prevents the worker from receiving a double recovery. It entitles employers to timely notice of a civil action that the injured worker files against a third-party tortfeasor and permits them to intervene to protect their subrogation rights. Although KRS 411.188 has been found to be an unconstitutional encroachment on this Court's power to prescribe rules of practice and procedure, the decision concerned only KRS 411.188(3)'s requirement that evidence of collateral source payments be admitted at trial. See O'Bryan v. Hedgespeth, Ky., 892 S.W.2d 571 (1995), in which this Court held that the requirement violated the constitutional separation of powers. Under KRS 411.188(2), an employer who has paid workers' compensation benefits and who has been notified of the worker's civil action must intervene in the action to preserve its claim for reimbursement from the recovery, but it need not actively pursue the subrogation claim. Zurich American Insurance Co. v. Haile, Ky., 882 S.W.2d 681 (1994). In summary, just as KRS 342.700(1) requires an injured worker to give timely notice of a civil action against a third-party tortfeasor, KRS 411.188(2) requires the employer to file a timely motion to intervene in the civil action in order to preserve its subrogation rights.

Although the record does not establish affirmatively that the employer was served with timely notice of the claimant's civil action, the employer has never asserted that he failed to comply with KRS 342.700(1) by providing notice that conformed to KRS 411.188(2). In fact, the employer asserts that it was "engaged in the settlement process with the parties during the civil claim." Nonetheless, after settling the workers' compensation claim, it failed to move to intervene in the civil action until approximately two and one-half years after it was filed, at which point the parties to the action had settled. Consistent with the employer's failure to assert its right to a portion of the claimant's recovery by filing a motion to intervene during the pendency of the action, the trial court denied its post-settlement motion to do so. Under KRS 411.188(2), the employer's failure to intervene before the settlement resulted in a loss of its subrogation rights and entitled the claimant to receive all of the settlement proceeds.

Attempting to reopen the workers' compensation award, the employer asserted that the settlement in the civil action constituted newly discovered evidence that warranted reopening. The argument was unsuccessful because although KRS 342.125(1) permits reopening upon prima facie evidence of newly discovered evidence, such evidence must have existed at the time the claim was resolved but not have been discoverable through the exercise of due diligence. See Walker v. Farmer, Ky., 428 S.W.2d 26, 29 (1968). Therefore, the claimant's settlement of the civil action could not properly be viewed as being "newly discovered" evidence with regard to the workers' compensation claim because the action was pending when the workers' compensation settlement occurred, and it was not settled until roughly two and one-half years later.

Workers' compensation is a statutory creation, and the employer has failed to convince us that the present facts warrant a judicial exception to the grounds for reopening

that are set forth in KRS 342.125(1). This case does not involve circumstances that are akin to those addressed in Wheatley v. Bryant, supra, or Westvaco v. Fondaw, supra. KRS 342.700(1) gives an employer who has paid workers' compensation benefits a right to intervene in the worker's civil action to protect its subrogation rights and entitles the employer to notice of the action that conforms to KRS 411.188(2). The latter provision is explicit concerning the penalty for failing to intervene in a proceeding of which proper notice is given. Furthermore, the employer has failed to show that applying KRS 411.188(2) to the present facts would produce an absurd result that warrants the creation of a judicial ground for reopening. Contrary to what the employer would have us believe, the claimant may or may not have received a double recovery. The agreement in the civil action did not allocate the proceeds among items of damages. It was reached before trial and before the employer moved to intervene. Under the circumstances, the employer's failure to intervene might well have been a factor in the sum for which the parties agreed to settle.

The decision of the Court of Appeals is affirmed.

All concur.

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