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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-002015-WC

SUPER AMERICA, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
THE WORKERS COMPENSATION BOARD
CLAIM NO. WC-96-06852

CHARLOTTE PENNINGTON,
SPECIAL FUND, ALJ ROGER RIGGS,
AND WORKERS' COMPENSATION BOARD

APPELLEES

AND: CROSS-PETITION NO. 2002-CA-002048-WC

ROBERT L. WHITTAKER, DIRECTOR
OF WORKERS' COMPENSATION FUNDS,
SUCCESSOR TO SPECIAL FUND

CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS COMPENSATION BOARD
CLAIM NO. WC-96-06852

SUPER AMERICA, INC.,
CHARLOTTE PENNINGTON,
HON. ROGER D. RIGGS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: HUDDLESTON, PAISLEY AND TACKETT, JUDGES.

TACKETT, JUDGE: Super America, Inc. ("Super America") and Robert L. Whittaker, Director of Workers' Compensation Funds, appeal from an opinion of the Workers' Compensation Board (the "Board") which vacated and remanded an opinion and order issued by Administrative Law Judge (ALJ) Roger D. Riggs. In his opinion and order, ALJ Riggs dismissed Charlotte Pennington's (now Sluss) original workers' compensation claim against Super America with prejudice and immediately terminated all benefits. Finding no error by the Board, we affirm.

On February 10, 1995, while working for Super America as a floral arranger, Pennington sustained injuries to her back and right leg. Pennington timely reported this injury to her supervisor, but continued working due to seasonal demands¹. In October 1995, Pennington developed neck pain with tingling in both hands after loading flowers into a cooler during the course and scope of her employment with Super America. Pennington notified her supervisor of this injury and obtained medical treatment. Super America responded by reducing Pennington's hours to three days per week and placed her on light duty. Eventually, various physicians confirmed the presence of disc herniation in Pennington's neck, leading to Pennington being

¹ Pennington's injury occurred during the Valentine's Day sales period, an extremely lucrative sales period for florists.

taken completely off work in February 1996. During the diagnosis and treatment of this injury, Pennington developed a psychological condition. Although her physicians recommended surgery, Pennington declined that option. Instead, Pennington was given permanent physical restrictions.

Pennington filed her workers' compensation claim on August 26, 1996. The ALJ on her original claim found Pennington to be totally and permanently disabled and awarded benefits. Super America appealed to the Board, which unanimously affirmed that ALJ's decision. A panel of this Court affirmed the Board's decision on August 13, 1999 in an unpublished opinion.

This matter remained dormant until September 2000. At that time, Super America retained a private investigator to conduct visual surveillance of Pennington. The investigator conducted surveillance on the 21st and 22nd of September, 2000, videotaping Pennington repeatedly engaging in prohibited physical activities, such as bending, crawling and stooping. This videotape, as well as a written report, were provided to Super America on October 20, 2000.

Apparently in anticipation of renewed legal activity, Super America then scheduled Pennington for an independent medical evaluation with Dr. Kenneth Graulich on February 1, 2001. Pennington failed to appear for this evaluation, causing Dr. Graulich to charge Super America with a "no show" fee in the

amount of \$150.00. Thereafter, Super America filed a motion to reopen this matter on grounds that Pennington fraudulently obtained workers' compensation benefits. In its motion, Super America requested that Pennington's benefits be reduced or terminated and demanded reimbursement of the "no show" fee, as well as any travel expenses tendered to Pennington in connection with Dr. Graulich's evaluation. Super America's motion to reopen was sustained and assigned to ALJ Ronald W. May for further adjudication.

In July 2001, Pennington was evaluated by Dr. Graulich. During his evaluation, Dr. Graulich found Pennington to be suffering from cervical spondylosis and mechanical low back pain, both of which are caused by degenerative arthritis from ageing. Further, Dr. Graulich diagnosed Pennington as suffering from upper extremity tendonitis with possible minimal right carpal tunnel syndrome. Dr. Graulich did not believe Pennington's medical condition was worsening.

Pursuant to Super America's request, Pennington appeared and gave testimony at a discovery deposition on July 23, 2001. During her deposition, Pennington indicated that she was married to J.B. Sluss. Pennington described Sluss as an employee for "the railroad," but she was unable to identify which particular railway system employed Sluss. Pennington further testified that she continues to experience neck, back

and psychological problems related to her work-related injuries. Pennington confirmed that she has not been employed since February 1996.

When confronted with the information gathered by Super America's surveillance of her in September 2000, Pennington testified that the private investigator actually followed her twin sister, Shirley Davis. According to Pennington, Davis was caring for her and conducting maintenance on Pennington's rental properties while she was bedridden with a heart condition. Pennington stated that her heart condition was first diagnosed on September 19, 2000, after she underwent a stress test that indicated she "had a heart attack and clogged arteries." Pennington was not hospitalized during the time Super America conducted its surveillance. Since the discovery of her heart disease, Pennington stated that an "angioplastic [sic]" had been recommended, but that she had declined the surgical procedure. Instead, she has successfully treated her disease with an "herb" described as "Doctors' Healthy Heart Formula." Pennington concluded that Davis was videotaped by Super America's private investigator while performing maintenance on the rental property.

When asked to provide her sister's address, Pennington testified that she did not know Davis' physical address. Pennington was also unable to adequately provide directions to

Davis' residence in Lawrence County. Further, Pennington refused to provide Davis' telephone number to Super America's counsel because the number was not published. While Pennington provided no contact information for her sister, she did produce a photograph of herself sitting next to Davis². This photograph was attached to the transcript of Pennington's deposition as an exhibit.

In light of these revelations, Super America filed a motion for an extension of time to verify Pennington's defense. After this motion was sustained, Super America attempted to take the depositions of Davis and Pennington's husband. At no time did Super America obtain subpoenas for these individuals. Rather, Super America chose to place the responsibility for production of these witnesses on Pennington's counsel. These depositions, scheduled for September 21, 2001, were cancelled by Super America after it learned that neither witness would appear. Pennington's counsel, MaLenda Haynes ("Haynes"), informed Super America that these depositions could be rescheduled at her cost. Super America did not take advantage of Haynes' offer, but instead requested copies of birth certificates from both Pennington and Davis, as well as contact

² The two women appearing in the photograph appear to be identical twins.

information for Davis and the name of J.B. Sluss' employer. Neither Pennington nor Haynes responded to these requests.

In the meantime, ALJ May retired, necessitating the transfer of the case to ALJ Riggs. ALJ Riggs issued an order rescheduling the benefit review conference for January 17, 2002. This order was correctly addressed to Haynes' North Court Street office address in Grayson, Kentucky.

On January 9, 2002, Super America filed a motion to compel discovery with regard to the requested information pertaining to Davis. Super America also requested additional proof time to determine if further witnesses or evidence was necessary. Initially ALJ Riggs took no action on this motion.

Pennington and Haynes both failed to appear at the January 17, 2002 hearing. Nevertheless, the record reveals that ALJ Riggs conducted the conference in Pennington's absence. The record is silent as to whether the ALJ attempted to contact Haynes by telephone during the conference. After noting Pennington's absence, the ALJ scheduled a final hearing for March 21, 2002. ALJ Riggs officially endorsed his order as having been mailed to Haynes on January 18, 2002. However, according to the certificate contained within the order, this order was mailed to Haynes' former mailing address at 150 West Main Street in Grayson, Kentucky. Haynes and her secretary both claim that the order was not received in their office. Neither

does the record, however, indicate that the order was returned to the ALJ or the Department of Workers' Claims as undeliverable by the United States Postal Service.

Meanwhile, ALJ Riggs sustained Super America's motion to compel discovery and ordered Pennington to provide all requested information no later than fifteen days prior to the hearing date. While Haynes received this order as it was forwarded to her correct office address, the order failed to designate a hearing date. Despite receiving this order, Pennington failed to provide any information to Super America concerning her sister.

The final hearing convened on March 21, 2002, as scheduled. Pennington and Haynes were again absent. As a result of Pennington's absence, ALJ Riggs dismissed Pennington's claim with prejudice and ordered all benefits terminated immediately. ALJ Riggs further ordered Pennington to reimburse Super America the \$150.00 "no show" fee incurred for her failure to appear for Dr. Graulich's independent medical evaluation. Pennington filed a motion for reconsideration, arguing that she did not receive notice of either scheduled benefit review conference. The ALJ denied this motion for reconsideration. On appeal, the Board vacated and remanded, holding that ALJ Riggs' actions amounted to a default judgment. According to the Board, the ALJ was required to consider the matter on its merits,

especially after terminating Pennington's benefits. This petition followed.

Super America argues that ALJ Riggs did not abuse his discretion when he terminated Pennington's benefits and dismissed her claim. In support of its argument, Super America submits that the Board incorrectly utilized the wrong standard in its decision to vacate and remand the matter for an adjudication on its merits. While we certainly understand and sympathize with the frustration of the ALJ and Super America with regard to Pennington's conduct during these proceedings, we are compelled to agree with the Board.

Our standard of review in a workers' compensation matter is set forth in Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992):

The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the the [sic] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

Workers' compensation claims are meant to be practiced in a somewhat flexible manner and the ALJ is not required to follow strict technical rules of procedure so long as the parties are afforded administrative due process. Estill County Farm and Home Supply v. Palmer, Ky., 416 S.W.2d 752 (1967).

Furthermore, since Kentucky's workers' compensation scheme is fundamentally for the benefit of the injured worker, a just claim must not fall victim to rules of order unless it is clearly necessary to prevent chaos. Messer v. Drees, Ky., 382 S.W.2d 209 (1964).

In the case *sub judice*, the ALJ issued an order dismissing and terminating Pennington's benefits. Apparently, this order was entered because of Pennington's failure to cooperate during discovery. While we understand the ALJ's frustration, his action is analogous to the rendering of a default judgment. It is clear Kentucky law does not favor default judgments because every case should be decided upon its merits. Howard v. Fountain, Ky. App., 749 S.W.2d 690 (1988). As the Board mentioned there is considerable doubt whether Pennington acted in good faith at every step of the discovery process. Her refusal to produce her twin sister and husband for depositions, to provide her twin sister's address, birth date or contact information, despite numerous requests and an order compelling the production of such evidence, rightly exposes her to sanctions pursuant to CR 26.02³. However, another ALJ, the Board and this Court have previously held that she is entitled to a lifetime award of benefits at the time of her original

proceeding. This entitlement to workers' compensation benefits cannot lightly be put aside in a default judgment in the name of judicial economy or as a sanction for noncompliance with discovery. The record is clear that ALJ Riggs's January 17, 2002 order scheduling a final hearing in this matter was mailed to Pennington's counsel at an incorrect address, making notice defective. Without proper notice of the March 21, 2002 hearing, Pennington was not able to explain her failure to adequately respond to Super America's discovery requests or have this matter decided on its merits. Consequently, the ALJ's dismissal and termination of Pennington's benefits constituted an abuse of discretion by the ALJ. Due process requires some consideration by the ALJ on the merits of this reopening. Therefore, we find that the Board neither misconstrued the law nor erred in assessing the evidence presented.

Accordingly, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

³ CR 26.02 applies to workers' compensation proceedings pursuant to 803 KAR 25:010E Section 17(1).

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