

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-002016-WC

PATRICIA ANN STEWART

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-85852

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

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HUDDLESTON, PAISLEY AND TACKETT, JUDGES.

TACKETT, JUDGE. Patricia Ann Stewart petitions for review of an opinion of the Workers' Compensation Board that vacated and remanded a decision by the Administrative Law Judge awarding Stewart permanent total disability benefits because the Pike County Board of Education was not given adequate notice and an opportunity to present evidence to the Administrative Law Judge. We affirm.

In April 1998, Stewart injured her left arm and back when she slipped on a wet floor while working as an Instructional Aide for the Pike County Board of Education. She developed reflex sympathetic dystrophy in her left arm but returned to work with restrictions in January 1999. On June 1, 1999, she settled her initial workers' compensation claim for a lump sum amount of \$5,265.62 representing a 15% permanent partial disability.

On September 6, 2001, Stewart filed a motion to reopen her claim alleging that she had continued to experience pain and physical limitations since her injury, and that her condition had deteriorated due to physical and psychological problems. She indicated that she had been unable to work since February 2001. Accompanying her motion, Stewart submitted records that contained medical opinions indicating she suffered degenerative disc disease of the lumbar spine, lumbosacral radiolopathy, and early left carpal tunnel syndrome. During discovery, Stewart's attorney took the dispositions of two of her testing physicians and a clinical psychologist without the presence of opposing counsel when no one for the employer made an appearance. Stewart's attorney had sent notice of the depositions to Janet Quiggins at Cunningham Lindsey Claims Management, Inc., who had handled the settlement of the initial claim on behalf of the Pike County Board of Education.

On February 6, 2002, the ALJ held a benefit review conference attended only by Stewart's attorney. On February 19, 2002, the ALJ conducted a hearing attended only by Stewart and her counsel. On February 20, 2002, Pike County Board of Education filed a notice of representation and motions to file a late claim denial and request to reopen the time for proof alleging a lack of notice. On March 14, 2002, the ALJ issued an opinion and order denying Pike County Board of Education's motions and awarding Stewart permanent total occupational disability benefits under Kentucky Revised Statute (KRS) 342.125 based on a worsening of her condition. On March 25, 2002, Pike County Board of Education filed a motion for reconsideration, which was denied.

On August 28, 2002, the Workers' Compensation Board entered an opinion vacating the ALJ's opinion and remanding this action in order to allow Pike County Board of Education a reasonable period to submit evidence. After an extensive review of the facts, the Board held that the ALJ abused his discretion in denying Pike County Board of Education an opportunity to present evidence because of a lack of adequate notice of the reopening claim. The Board's opinion provided a comprehensive rendition of the factual situation and a well-reasoned analysis of the legal issues raised in this case. Consequently, we adopt the following portion of the Board's opinion:

Although Stewart filed her motion to reopen in September 2001, counsel for Pike County did not enter an appearance in this action until after the final hearing in February 2002, at which time Pike County filed a concurrent motion to reopen proof time. That request was denied and the ALJ's decision granting Stewart lifetime benefits was subsequently rendered.

On appeal, Pike County raises multiple issues involving the procedural methods employed by the ALJ and the respondent on reopening, however, only the petitioner's primary argument need be addressed. Pike County charges that from the onset of Stewart's reopening through February 2002, neither it nor its insurance carrier were [sic] properly notified of these proceedings or correctly served with any pleadings or evidence. Pike County further declares the ALJ's refusal to reset proof time once it had received proper notice constitutes an abuse of discretion and, for that reason, the ALJ's decision increasing Stewart's benefits was arbitrary and capricious. After thoroughly reviewing the record and the applicable law, we agree. Accordingly, all other issues raised by Pike County are either premature or moot.

The facts of this appeal are straightforward. Stewart allegedly suffered a work-related injury while in Pike County's employ on April 8, 1998. On that date, she slipped on a wet floor and fell, injuring her left wrist and lumbar spine.

At the time of Stewart's injury, Pike County was insured by Legion Insurance Company ("Legion"), a Pennsylvania domiciled carrier. In turn, Legion was then under contract with Cunningham Lindsay Claims Management ("Cunningham"), a third party administrator ("TPA") responsible for the adjustment of its Kentucky workers' compensation claims.

Prior to filing a formal Application for Resolution of Injury Claim, Stewart and Legion entered into a negotiated settlement brokered by Cunningham. On May 26, 1999, a written agreement was executed by Stewart, her attorney, and Janet L. Quiggins, an adjuster employed by Cunningham. Pursuant to this agreement, Stewart received a lump sum payment of \$5,265.62, representing a 15% occupational disability. The settlement agreement was approved by Chief Arbitrator, J. Kevin King, on June 1, 1999. As a result, copies of the Arbitrator's order were then subsequently certified as being forwarded to Stewart's attorney and Quiggins, in care of Cunningham as the third party administrator for Legion.

Of primary importance to this appeal is the fact that in 2000, Legion changed third party administrators for purposes of its Kentucky claims, entering into a contract with In Service Corporation ("In Service"), a Charlotte, North Carolina, company. For purposes of the case *sub judice*, this information was apparently indirectly communicated to Stewart via correspondence regarding payment of ongoing medical treatment. On the other hand, Legion as the carrier of record, did not communicate these changes to the Department of Workers' Claims, nor was it legally obligated to do so.

On September 6, 2001, Stewart filed a motion to reopen her 1999 settlement agreement, alleging a worsening of her condition, both medically and occupationally. Stewart's motion was served only on Quiggins at Cunningham's address in Louisville, Kentucky although Cunningham was no longer acting as the third party administrator for Legion. Cunningham apparently took no action with regard to providing notice to its former employer on this occasion, nor at any other juncture

during the period this matter has been pending. Correspondingly, Stewart did not serve a copy of the motion to reopen on either Pike County or Legion. Consequently, neither Pike County nor Legion filed a responsive pleading.

On October 8, 2001, Stewart's motion to reopen was approved by Chief ALJ Sheila C. Lowther to the extent that her cause of action on reopening was assigned to an Administrative Law Judge for further adjudication. This order likewise was served only on Stewart's counsel and Cunningham and nothing in the record indicates that neither [sic] Pike County nor [sic] Legion ever received a copy.

On October 23, 2001, the Commissioner of the Department of Workers' Claims issued a scheduling order assigning Stewart's reopening to ALJ Smith. That order, however, was not mailed to either Legion or Pike County at their correct addresses, but was sent to Stewart at her home address; Stewart's attorney at his law office; Pike County Schools at an incomplete address on S. Mayo Trail, Pikeville, Kentucky; and, Cunningham in Louisville. For what we believe to be obvious reasons, the scheduling order failed to generate any response on behalf of Pike County or its carrier. This reopening then proceeded with the presentation of evidence by Stewart unilaterally.

On November 20, 2001, Stewart filed a notice of submission of records of Dr. Naveed Ahmed served on Quiggins and Pike County at the nonspecific S. Mayo Trail location. On November 29, 2001, Stewart filed a notice to take the deposition of Dr. Adil K. Warsy, this time only serving Quiggins. Then on November 30, 2001, Stewart filed a notice of submission of records of Dr. Warsy. This pleading was

served on Quiggins and Pike County at the unspecified S. Mayo Trail address.

On December 11, 2001, Stewart next filed a motion for leave to take proof out of time. This pleading was also served only on Quiggins. The deposition of Dr. Warsy was subsequently taken on December 18, 2001 and filed with the Department of Workers' Claims on January 4, 2002. No one from Pike County attended and it appears from the record as if no attempt was made to deliver a copy of this evidence to the petitioner.

Next, on January 2, 2002, ALJ Smith extended Stewart's proof time through January 8, 2002. No extension was granted to either Pike County or Legion. This order was served on Quiggins, Stewart's attorney, and Pike County Schools, again at the nonspecific S. Mayo Trail address. On the same date, Stewart filed a notice of submission of records of Dr. Anbu Nadar, again serving only Quiggins. Then on January 10, 2002, Stewart took the deposition of Dr. Ahmed. Again, Pike County is shown as not having been present and apparently no attempt was made to provide them with a copy of that testimony.

On January 14, 2002, Stewart filed a notice of submission of records of Phil Pack, M.S. This evidence was only served on Quiggins. Afterward, on January 21, 2002, Stewart took the deposition of Phil Pack, once more with no appearance by any representative of Pike County and no copy delivered to either the petitioner or its carrier.

On January 28, 2002, Stewart filed her witness list with the ALJ. Only Quiggins is listed as being served. Subsequently, on February 6, 2002, the ALJ conducted the benefit review conference ("BRC") in this matter. Following that conference, a BRC order executed by Stewart's counsel was

issued by the ALJ, once more listing no appearance on behalf of Pike County. Although only Stewart and her lawyer were present, the BRC order reflects that the ALJ unilaterally entered stipulations regarding a wide variety of facts.

A final hearing in this matter was conducted five days later by the ALJ on February 11, 2002. Again, only Stewart and her counsel were present. At the hearing the ALJ made the following comments on the record:

JUDGE SMITH:

Okay. I do need to note for the record that the defendant-employer has failed to make an entry of appearance in this case. The scheduling order that came from Frankfort on October 23, 2001 specifically listed the Pike County Schools and their insurance carrier as being served with a copy of the claim.

Also we held a benefit review conference in this case back on February 6, 2002 at that time or thereafter I sent a copy of the benefit review conference order by certified mail both to the defendant-employer and to their insurance carrier and I still did not receive any reply. I did check with Frankfort yesterday prior to driving down to Pikeville and was told that as of yesterday, which would have been February 18, 2002, that there still was no appearance for the defendant-employer or their carrier in this matter.

I understand that Plaintiff's counsel has also served the defendant-employer with all the

pleadings in this matter, is that correct?

MR. LUCAS:

To their carrier. I'm not sure that we put them to the Board itself. Everything has gone to the carrier.

JUDGE SMITH:

And that would be the carrier that was listed on the scheduling order from Frankfort, Cunningham [sic], Lindsey Claims Management, Inc?

MR. LUCAS:

Yes, 9502 Williamsburg Plaza, Suite 201, Louisville, Kentucky 40222. Every pleading has gone to them.

JUDGE SMITH:

So, therefore, it does appear that they have been served with all the pleadings, the orders and anything necessary for them to make an entry of appearance if they intended to do so and have failed to do so at least to this point. So we are going to go on forward with the hearing at this time.

It looks like we held a benefit review conference as I said on February 6, 2002. At that time I went through the stipulations and the contested issues at least as recognized by the Plaintiff at that time and I am going to run through those again.

Although the ALJ makes reference to having sent a copy of the BRC order to Cunningham and Pike County by certified letter, there are no return receipts from

the U.S. Post Office contained in the record for this mailing. Hence, we can only assume that neither party received the BRC order. We are also confused by the entry of stipulations without the petitioner's participation or consent.

After the conclusion of Stewart's final hearing, a transcript was prepared. That evidence is certified as being sent only to the Commissioner of the Department of Workers' Claims and Stewart's attorney. No delivery was attempted on either Pike County or Legion according to the transcript's certificate of service.

On February 19, 2002, the ALJ mailed copies of the order documenting that a final hearing had been conducted by certified letter to Quiggins at Cunningham's address in Louisville and to Pike County at the nonspecific S. Mayo Trail address. A return receipt regarding this document is contained in the record from Cunningham, signed for by Jane Hadden, rather than Quiggins. Hadden's identity or relationship with Cunningham is not further identified.

The record also contains a return receipt regarding the certified letter sent to Pike County at S. Mayo Trail, Pikeville, Kentucky. The receipt, however, indicates that this letter was redirected by the U.S. Post Office to P.O. Box 3097, Pikeville, Kentucky 41502. Moreover, the return card is checked "yes" for "delivery address different" than that listed on the article.

It is at this point in the litigation that Pike County is apparently made aware for the first time of Stewart's reopening. On February 25, 2002, counsel for Pike County entered a notice of representation, a request for medical records/reports and vocational reports, a Form 111- Notice of Denial of Claim, and a motion to reopen proof time, citing to the fact that between

the date of the original settlement agreement and Stewart's 2001 motion to reopen, Legion had changed its third party administrator with regard to the administration of its Kentucky workers' compensation claims.

For reasons that are unclear, the ALJ summarily denied Pike County's request for additional time in which to present a defense and, as previously noted, on March 14, 2002, entered a decision granting Stewart a 100% lifetime award.

In response, Pike County filed a petition for reconsideration, citing to the fact that neither it nor its carrier were ever properly served with any pleading throughout the litigation of Stewart's reopening until the ALJ's certified letter containing a copy of the hearing order was redirected by the U.S. Post Office to Pike County's correct post office box address. On April 11, 2002, Pike County additionally filed a notice of stay, documenting 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. This notice was ignored by the ALJ and by order issued April 12, 2002, Pike County's petition for reconsideration was denied. This appeal subsequently ensued.

It has long been established that a party's right to present evidence must not fall victim to rules of order unless it is clearly necessary in order to prevent chaos. Messer v. Drees, Ky., 382 S.W.2d 209 (1964). In this instance, we find no such necessity that would validate the ALJ's actions.

The standard of review for granting relief from a judgment based on

extraordinary circumstances such as in the case *sub judice*, is abuse of discretion. See, CR 60.02(f). Relief from such a judgment is available where a clear showing of extraordinary and compelling equities is made. Dull v. George, Ky. App., 982 S.W.2d 227 (1998). Abuse of discretion has been defined in relation to the exercise of judicial power as that "which implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Comm'n ex rel v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945). In exercising our discretion whether to grant relief from the ALJ's refusal to permit Pike County to present a defense, we must consider whether Pike County had a fair opportunity to present its case before the ALJ on the merits and whether the granting of relief would be inequitable to the other parties. S.R. Blanton Development, Inc. v. Investors Realty and Management Co., Inc., Ky. App., 819 S.W.2d 727 (1991).

Without question, given the procedural history of this claim, we are unsettled at the manner in which Pike County's post hearing request for time to investigate this claim and submit evidence was disposed of by the ALJ. Clearly, the ALJ all along suspected that neither Pike County, nor its carrier, had ever properly been placed on notice of Stewart's reopening. Otherwise he would not have forwarded copies of the BRC and final hearing orders to the petitioner by certified letter, a courtesy not required by statute or regulation.

We must presume that the ALJ's first certified mailing to Pike County was sent to the same partial S. Mayo Trail address as his second letter. In that nothing in the record documents its delivery to either the petitioner or, for that matter Cunningham, this should have comprised an admonition that all past notices to those same

addresses were wanting. The probable existence of defects in notice and service of process should have been further emphasized in the mind of the ALJ by the fact that Pike County entered its first appearance in this matter only when his second certified letter was successfully delivered after being redirected by the U.S. Post Office to a corrected address.

We believe there is no doubt but that at every step of the procedural process, until the receipt by Pike County of the ALJ's certified letter in February 2002, all pleadings, including those forwarded by the Department of Workers' Claims, were either sent to an uncooperative and disinterested third party no longer under any contractual obligation to the petitioner or its insurance carrier, or to the defective street address for "Pike County Schools" listed in the Department's original scheduling order of October 23, 2001. In this regard, we take judicial notice of the fact that Stewart's First Report of Injury lists Pike County's correct address as P.O. Box 3097, Pikeville, Kentucky 41502. This is the same address to which the ALJ's second certified letter was redirected by the U.S. Post Office in February 2002. We equally take judicial notice of the fact that, in regard to this claim, records from the Department of Workers' Claims list the right address for Legion Insurance Company as One Logan Square, Suite 1400, Philadelphia, Pennsylvania, 19103.

Although shooting fish in a barrel may be considered by some to be extremely efficient, productive and enjoyable, it is not by any stretch of the imagination an even-handed exercise. By analogy, neither has been the administrative process in this case. It seems clear to us that both notice and service of process to the employer in this action remained deficient until after the close of Stewart's final hearing. Under

the circumstances, the sanctioning of the unilateral presentation of evidence should not have been legally or equitably abided by the ALJ, and cannot now be accepted by this Board, especially in light of the extent and duration of the award granted. To do so would deny Pike County due process of law.

In a nutshell, we believe the evidence compels a finding that Pike County was not legally notified that it was a party in Stewart's reopening until six months following the institution of those proceedings. After that fact was discovered, the petitioner was denied any opportunity by the ALJ to present evidence. Consequently, we find more than sufficient grounds signifying that the ALJ's exercise of judicial power in these matters has been both arbitrary and capricious. In reaching this disposition, we find nothing prejudicial to Stewart other than the potential for a minor delay in the final resolution of her claim. In that she is claiming total disability, in spite of any such postponement, we must assume that occupationally her allegations will remain unchanged and, as such, so will the timeliness of her medical evidence. In addition, if appropriate, any future award granted by the ALJ will relate back to the date of her motion to reopen.

Moreover, we remind not only the parties, but also the ALJ, that our administrative judicial process is fundamentally designed to be adversarial in order to aid fact-finders in garnering the truth in each cause of action. The fact that this process shall now be completed should come as no surprise to anyone, and will result, in our opinion, in no irreparable harm to the claimant.

For these reasons, we vacate the ALJ's March 14, 2002 opinion and award and remand this action with instructions that proof

time be reopened and Pike County be permitted a reasonable period in which to submit evidence. At the conclusion of this proof time, as a matter of law, Stewart shall be granted an ample period of rebuttal proof time to address any defenses presented by Pike County, unless voluntarily waived.

Stewart argues the Board erred in finding the ALJ abused his discretion because Pike County Board of Education received notice of the claim through the ALJ's initial Scheduling Order dated October 23, 2001, and it has not denied having received that order. This is incorrect. As the Board noted, the Scheduling Order was mailed to Pike County Board of Education at the unspecific S. Mayo Trail address and to Cunningham Lindsey Claims Management, which no longer serviced claims for Pike County. Pike County Board of Education has consistently claimed it had no knowledge of the proceedings until February 2002, when the February 19, 2002, hearing order was forwarded to it at its correct address. This case exposes a troubling inadequacy in the record keeping and notice practices in dealing with insurance carrier third-party administrators. Nevertheless, Stewart's counsel consistently served only Cunningham Lindsey Claims Management despite the fact that Stewart had received a letter in April 2000, prior to filing her motion to reopen, indicating that In Serve Corporation was handling the benefits for her initial workers' compensation claim, rather than Cunningham Lindsey. Moreover, KRS 342.270(2)

requires the Workers' Compensation Commissioner to notify all parties of a compensation claim. The duty of this Court is to correct the Board only where it has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause injustice.

Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). Under the circumstances of this case, we believe the Board did not err in holding that the ALJ abused his discretion and acted arbitrarily in denying Pike County Board of Education an opportunity to present evidence.¹

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Lucas
Pikeville, Kentucky

BRIEF FOR APPELLEE, Pike County
Board of Education:

Walter W. Turner
Lexington, Kentucky

¹ We note that this Court's decision is not intended to express an opinion on the substantive merits of Stewart's claim.