

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000389-WC

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-00366

ROBERT GUSSLER; RAY and JUANITA WILLIAMS;
HON. A. THOMAS DAVIS, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

DIXON, JUDGE: The Uninsured Employers' Fund (UEF) petitions for review of a February 2, 2007, order of the Workers' Compensation Board. Following a thorough review of the record, we affirm.

On March 7, 2005, Gussler filed a claim for workers' compensation benefits, alleging he was injured while working for Ray and Juanita Williams and Robert Williams. In February 2006, the ALJ dismissed Gussler's claim pursuant to the

¹ Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

agricultural exemption in Kentucky Revised Statutes (KRS) 342.650. Gussler filed a petition for reconsideration, which was denied by the ALJ on March 9, 2006; however, the order did not designate Gussler or his attorney in the certificate of service. As a result, Gussler filed a belated notice of appeal to the Board on April 18, 2006, and UEF moved the Board to dismiss the appeal as untimely.

On July 28, 2006, the Board rendered a decision dismissing the appeal, but also advised Gussler to seek a factual determination from the ALJ as to whether the order on reconsideration was properly noticed. The Board stated that, if service was improper, the ALJ, pursuant to KRS 342.125(1)(c), could set aside his previous order on reconsideration and then re-enter it for Gussler to timely appeal. Thereafter, Gussler filed two motions with the ALJ, one sought a factual determination on the issue of notice, the other moved the ALJ to alter, amend or vacate the order on reconsideration.

On August 18, 2006, while his motions were pending before the ALJ, Gussler filed a Petition for Review in this Court of the July 28, 2006, opinion of the Board affirming the ALJ's dismissal. (*Gussler v. Williams*, 2006-CA-001722-WC (Feb. 23, 2007) (hereinafter referred to as "*Gussler I*").

The ALJ denied both of Gussler's pending motions on August 30, 2006, and Gussler appealed to the Board. UEF moved the Board to dismiss Gussler's appeal for lack of jurisdiction due to the pendency of *Gussler I* in this Court. The Board denied UEF's motion to dismiss and ordered the parties to brief the issue on appeal. The Board

acknowledged its review would only encompass the propriety of the ALJ's denial of Gussler's motions.

In December 2006, UEF sought a writ of prohibition from this Court to prevent the Board from acting on Gussler's appeal until a decision was rendered in *Gussler I*. This Court denied relief (2006-CA-002517-OA), and UEF unsuccessfully appealed to the Kentucky Supreme Court.

On February 2, 2007, the Board rendered a decision reversing the ALJ's order of August 30, 2006. The Board remanded the case to the ALJ for entry of an order setting aside the March 2006 order denying Gussler's petition for reconsideration, and then re-entry of that order. UEF filed this petition for review on February 20, 2007. Then, on February 23, a panel of this Court rendered an opinion in *Gussler I* affirming the Board's dismissal of the original appeal as untimely. The panel also agreed with the Board that Gussler could seek redress via KRS 342.125(1)(c).

In its petition before this Court, UEF argues the Board was without jurisdiction to review Gussler's appeal from the August 30, 2006, order during the pendency of *Gussler I*, and urges us to set aside the Board's order. UEF alternatively argues that, if the Board did have jurisdiction, it improperly substituted its own findings of fact for that of the ALJ. We disagree with both contentions.

UEF cites *Jerry's Drive In, Inc. v. Young*, 335 S.W.2d 323 (Ky. 1960), for the proposition that the Board loses jurisdiction to reopen a claim while an appeal is pending. However, in *Jerry's Drive In, supra*, the employer appealed an award in favor

of its employee, and before the appellate court acted, the employer moved the Board to reopen the claim and modify the award.

Here, Gussler has not yet received an appeal on the merits of his claim. His first appeal to this Court, in *Gussler I*, addressed only the procedural issue of an untimely notice of appeal to the Board. In the present case, the ALJ and the Board addressed a collateral action, in which Gussler sought a factual determination regarding certification of service in the March 9, 2006, motion. We are not persuaded, under the circumstances presented here, that the Board lacked jurisdiction to review Gussler's collateral claim on appeal during the pendency of *Gussler I*.

We now turn to UEF's alternative argument that the Board improperly substituted its own factual findings for that of the ALJ by determining Gussler had not received notice of the March 2006 order.

In a workers' compensation case, if the ALJ finds against the claimant, the claimant then faces a stringent burden of proof on appeal to the Board. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). The Board can only reverse the ALJ's findings where the evidence is “so overwhelming as to compel a finding in [the claimant's] favor.” *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985).

The Board relied on *Fluor Construction International, Inc. v. Kirtley*, 103 S.W.3d 88 (Ky. 2003), in reversing the ALJ. In *Fluor Construction*, the employer did not receive notice that its petition for reconsideration was denied until after the time for

appeal expired. *Id.* at 89. The ALJ, on the employer's motion, set aside the order on reconsideration and then re-entered it for the employer to perfect an appeal. *Id.* The case was eventually appealed to the Supreme Court, where the Court addressed the ALJ's authority to correct mistakes pursuant to KRS 342.125(1)(c). *Id.* at 90. The Court stated:

Here, although the ALJ did not cite KRS 342.125 in granting the motion [to set aside] by Fluor, we believe that statute offers the same relief in this situation as would CR 60.02. Pursuant to the same rationale in *Kurtsinger* [*v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002)], we hold that the ALJ did not abuse his discretion in granting the motion by Fluor.

Id. (internal citations omitted).

UEF argues the Board misapplied *Fluor Construction* as requiring the ALJ to set aside and then re-enter his order on the basis of mistake. We disagree. In this case, the ALJ's order denying Gussler's motion to set aside was succinct:

Came the Plaintiff [Gussler] and made several motions including a Motion for a Determination, Motions to Alter, Amend or Vacate. Then came the Defendant [UEF] and filed Responses thereto. The ALJ, having eventually secured a copy of the file, examined the various contentions and is persuaded by the Defendant's argument that the Plaintiff is not currently in compliance with KRS 372.125 and CR 59. Further the ALJ determines there is merit in the Defendant's motion to strike the Plaintiff's Memo in Support of Plaintiff's Pending Motions as the relevance is not sufficiently documented by the caselaw.

Therefore the Plaintiff's motions are OVERRULED and the memorandum in Support of Motions is stricken from the record. It is recommended to the Plaintiff that the status of pending Orders and filings can often be determined by calling the ALJ office.

Contrary to UEF's assertion, the well-reasoned decision of the Board recognized the discretion afforded the ALJ. After discussing *Fluor Construction, supra*, the Board concluded:

We find the denial [of Gussler's motions] to be an abuse of discretion in this case. While the motion is certainly not the most artfully pled request for relief, it was sufficient, together with the previous order of this Board [July 28, 2006], to apprise the ALJ as to the relief sought on Gussler's behalf. And, as the request for relief was necessitated by an apparent error by the ALJ in the first place, we can find no valid reason for denying the request.

Under the circumstances presented, we agree with the Board that the evidence compelled a finding in Gussler's favor. The ALJ's March 9, 2006, order clearly omitted both Gussler and his attorney from the distribution list. In light of *Fluor Construction, supra*, the ALJ abused his discretion by declining to correct his own mistake.

For the reasons stated herein, the decision of the Workers' Compensation Board reversing and remanding the order of the ALJ is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gregory D. Stumbo
Attorney General of Kentucky

C.D. Batson
Assistant Attorney General
Uninsured Employers' Fund
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Robert Gussler:

G.C. Perry, III
Perry & Miller
Paintsville, Kentucky

NO BRIEF FOR APPELLEES
Ray & Juanita Williams