

OPINION ENTERED: August 20, 2012

CLAIM NO. 201000096 & 200783466

EVA DOREEN STEVENS

PETITIONER

VS. APPEAL FROM HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

AMS TEMPORARIES, INC.
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

STIVERS, Member. Eva Doreen Stevens ("Stevens") appeals from the January 18, 2011, order dismissing her Form 103, the February 9, 2011, order denying her petition for reconsideration, and the March 7, 2012, "Opinion and Interlocutory Order," rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"). Stevens also appeals from the April 16, 2012, order severing her claims against

AMS Temporaries, Inc. ("AMS") (Claim Nos. 2007-83466 and 2010-00096)) from her claim against Seven Counties Services, Inc. ("Seven Counties") (Claim No. 2009-977063) and ordering the previous order dismissing the two claims against AMS is final and appealable.¹ On appeal, Stevens argues her Form 101 was timely filed. She also asserts her amended claim asserting a hearing loss was also timely filed, as it related back to the date her Form 101 was filed.

A recitation of the relevant procedural history is necessary.

The record reveals a Form 101 asserting a claim against AMS (Claim No. 2007-83466) was filed on August 14, 2009, alleging on June 27, 2007, Stevens was injured while working for Central State Hospital. Stevens described the injury as follows:

While I was escorting a patient to the seclusion room, the patient grabbed my hair, pulled my head down, and proceeded to punch me repeatedly on the left side of my head, including the left hear [sic] and face areas.

Stevens alleged injuries to her head, left ear, face, neck, and low back. AMS filed a Form 111 asserting the statute

¹Stevens' claim against AMS, as alleged in the Form 101 (Claim No. 2007-83466) was ultimately dismissed on the merits in the March 5, 2012, Opinion and Interlocutory Order.

of limitations as one of the grounds for denial of the claim. AMS also filed a motion to dismiss on September 1, 2009, for failure to file the claim within the applicable statute of limitations. On September 3, 2009, Stevens filed a response to AMS' motion to dismiss stating, in part, as follows:

Plaintiff was restricted from working from the date she was assaulted until returning to regular duty on July 20, 2007. But while the Defendant would have the Court believe that the last TTD income benefits were both paid and received the very same day Plaintiff was released back to work (July 19, 2007), their own records show that *indemnity payments were actually issued on July 19 (\$1,408.07), August 1 (\$67.05), and August 15, 2007 (\$121.45).* (**Exhibit A**) Although it is not clear when the Plaintiff actually received the check for TTD payment that was issued on August 15th, this claim was filed less than two years after that, as Defendant noted, on August 14, 2009.

On October 28, 2009, the ALJ denied AMS' motion to dismiss.

Attached to Stevens' Form 101 against AMS (Claim No. 2007-83466) are medical records, dated July 19, 2007, of Dr. John R. Morris noting the following history:

'Eva' is a 37 year old female who is an adult. She is seen at the request of Sherrell Nunnelley MD for the evaluation of a history of pain and tinnitus in the left ear. The pain began 3 weeks ago and is described as pulsating in character. It is

constant, moderate in severity and gradually improving. She reports a 3 weeks [sic] history of constant pulsatile noise. The noise is moderately intrusive and symptomatic 24 hours a day. There is no history of prior ear surgery. The onset of this condition has been sudden. The symptoms may be associated with ear trauma. No alleviating factors have been identified. The patient also reports tinnitus, headache, balance problems, decreased hearing, and fullness in the left ear. The headache is moderately severe and involves the left side of the head. She denies drainage from the ear.

Dr. Morris provided the following assessment: ear pain otalgia, acute left sudden hearing loss, tinnitus, left deviated nasal septum. Stevens underwent audiogram testing, and Dr. Morris noted as follows: "Left Ear: Abnormal: Testing revealed a mild mid-to-high frequency sensorineural hearing loss."

Medical records of Dr. Morris dated August 7, 2007, also attached to the Form 101 reveal Stevens was still experiencing problems with her left ear. Dr. Morris' assessment was as follows: ear pain otalgia, acute left sudden hearing loss, tinnitus, left deviated nasal septum.

Medical records of Dr. Morris dated February 22, 2008, and also attached to the Form 101 reveal Stevens was still experiencing hearing loss. Dr. Morris made the

following assessment: left ear pain otalgia, acute left sudden hearing loss, bilateral tinnitus, left deviated nasal septum. The February 22, 2008, records state as follows:

22 February 2008: 32 year rule [sic] LPN struck on the head in a workplace [sic] incurring what appeared to be a [sic] sudden hearing loss in the left ear with a 2000 Hz. It [sic] little under a year ago. Follows [sic] up to date with the impression that she has more left hearing loss but surprisingly this is not the case in their [sic] has now developed a significant right 2000 Hz dip with some loss of discrimination. another [sic] issue: as noted, vertigo episodes with humbling [sic] of vision, not orthostatic since the trauma in the workplace though less now than before. Hearing change appears to be beyond the limits of machine error. No immunologic problems noted. Plan: will obtain immunologic screen and reevaluate with above. mri, eng. Next step may be in a volume which in [sic] by Dr. McMurry.

On January 8, 2010, Stevens filed a motion styled "Plaintiff's Motion to Amend Form 101 Filed August 14, 2009 to Include the Application for Resolution of Hearing Loss Claim." Stevens stated as follows:

Comes the Plaintiff, Eva Stevens, by Counsel, and hereby moves the ALJ for an Order allowing her to file the attached Form 103, thereby amending her claim, which was initiated with the filing of Plaintiff's Form 101 on August 14, 2009 to include her claim

for Hearing Loss. Plaintiff would note that medical records to support her claim for hearing loss were attached to her Form 101 when the claim was first filed.

The Form 103, Application for Resolution of Hearing Loss Claim against AMS, was filed January 8, 2010, (Claim No. 2010-00096). The Form 103 alleges on June 27, 2007, Stevens sustained hearing loss in the following manner: "While escorting a patient to the seclusion room, I was Attached [sic] by the patient and hit repeatedly on the left side on my head, including my left ear and face."

On January 12, 2010, Stevens filed a Form 101 against Seven Counties Services, Inc. ("Seven Counties") (Claim No. 2009-977063), alleging Stevens was involved in an incident on September 18, 2009. The incident is described as follows: "During peer to peer aggression, claimant was kicked in her abdomen and kneed in her back. She was pulled and pushed on during attack." Stevens alleges injuries to her abdominal wall and low back.

On January 22, 2010, Stevens filed a "Motion to Consolidate Claims" asking the ALJ to consolidate Claim No. 2009-77063, Stevens' claim against Seven Counties, with Claim No. 2007-83466. By order dated February 2, 2010, the ALJ sustained Stevens' motion. On his own motion, by order

dated March 1, 2010, the ALJ consolidated Claim Nos. 2010-00096, 2009-77063, and 2007-83466.

On February 11, 2010, the ALJ entered an order granting Stevens' motion to amend her Form 101 to include the Form 103 Application for Resolution of Hearing Loss.

A Form 108 medical report, dated March 25, 2010, by Dr. Barbara A. Eisenmenger set forth the following diagnoses:

Ms. Stevens has a mild hearing loss in the mid- to high-frequencies which has developed since her assault at work. The right ear thresholds are poorer than her previous test, suggesting a progressive hearing loss. Based on the reported history of hearing loss developing after the assault, the apparent absence of other factors associated with hearing loss, and the results of the hearing evaluation, the primary cause of this hearing loss at least in the left ear is the traumatic event documented on 5/27/2007 [sic]. The progressive hearing loss in the right ear seems to be still under treatment by Dr. Morris, according to her records.

Dr. Eisenmenger assessed a 2% impairment rating pursuant to Chapter 11, Table 11-1 through 11-3 of the American Medical Association Physician Guides to Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

On January 6, 2011, AMS filed a motion to dismiss Plaintiff's Form 103 asserting it was untimely and barred

by the statute of limitations. In a response dated January 20, 2011, Stevens stated as follows:

This is the second motion filed by the Defendant, AMS Temporaries, Inc., to dismiss Plaintiff's claim for injuries she sustained when she was assaulted by a psychiatric patient in the course of her employment with Central State Hospital on or about June 27, 2007. After Plaintiff filed her claim on August 14, 2009, AMS filed their first motion to dismiss alleging that the claim had not been filed within the statutory period proscribed by KRS 342.185(1). Specifically, AMS alleged that Plaintiff had not filed her claim within two (2) years of suspension of temporary income benefits. Just as in the present motion, Defendant asserted the first time that last paid TTD income benefits on July 19, 2007 and produced records from the Department of Workers Claims which appeared to provide corroboration.

Plaintiff incorporates by reference her Response to Motion to Dismiss filed on September 2, 2009. While Defendant previously sought to prove the date of the last TTD payment by only filing the records from DWC, Plaintiff produced **the Defendant's own** records which showed that *indemnity payments were also issues on August 1 (\$67.05) and August 15, 2007 (\$121.45)*. Although it was not clear when the Plaintiff actually received the check for the August 15th, 2009 TTD payment, it was obvious that this claim was filed within two years of the last income benefit payment. Therefore, after reviewing the evidence and the same arguments that Defendant has once again asserted in the present motion, this

Honorable Court denied the motion on October 28, 2009.

In their present Motion to Dismiss, the Defendant makes no mention of their prior attempt to obtain a dismissal of Plaintiff's injury claim. What is even more incredible is the fact that, notwithstanding that they were previously confronted with their own records which proved that the last TTD benefits were paid on August 15, 2007, Defendant has again only produced the DWC's records in an attempt to establish July 19, 2007 as the date of the last income benefit payment. While AMS would be entitled to the benefit of the doubt the first time this occurred, it is difficult to dismiss such a material omission as a mere oversight the second time around.

Contrary to Defendant's representation of the facts, the record in this case shows that Plaintiff filed her Application for Resolution of Injury Claim in a timely manner. Subsequently, Plaintiff filed a motion to amend her application to include a claim for traumatic hearing loss arising out of the June 27, 2007 work-injury at Central State Hospital. Furthermore, Plaintiff filed another Application for Resolution of Injury Claim based on a subsequent injury that she sustained on September 18, 2009 in the course and scope of her employment with Seven County Services, Inc. While there was no objection to Plaintiff's request to amend her claim, AMS filed a Special Answer on January 12, 2010 alleging that Plaintiff's claim for hearing loss was barred by limitations.

CR 15.01 allows a party to amend their pleadings with leave of court, which 'leave shall be freely given when

justice so requires.' Furthermore, CR 15.03(1) provides that, 'Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.' Since this is certainly the case here, it is clear that the amended claim against AMS would relate back to the date the original claim was filed, or August 14, 2009, which this Honorable Court has already observed to have been timely filed within two years of the Defendant's last disability income payment.

By order dated January 18, 2011, the ALJ sustained AMS' motion and dismissed Stevens' Form 103 "as barred by limitations." On January 26, 2011, Stevens filed a "Petition for Reconsideration or, in the Alternative, for Findings of Fact." By order dated February 9, 2011, the ALJ denied Stevens' petition for reconsideration and set forth additional findings of fact as follows:

The ALJ specifically finds that Plaintiff alleged a hearing loss injury of June 27, 2007 by way of Form 103 filed with the DWC on January 8, 2010. Plaintiff was referred for a UME, which was completed on March 23, 2010 by Dr. Barbara Eisenmenger. Dr. Eisenmenger found that Plaintiff's alleged hearing loss was attributable to a single traumatic event of June 27, 2007. The record demonstrates that Plaintiff received TTD benefits after the June 27, 2007 accident from June 28, 2007 through July 19, 2007. Although there

is a dispute as to when Plaintiff last received TTD, Plaintiff has asserted in prior pleadings and the record demonstrates that certainly no TTD was paid to Plaintiff by the Defendant-Employer, AMS Temporaries, after August 15, 2007. As such, Plaintiff had through no later than August 15, 2009 in which to file her Form 103. Having not filed her Form 103 within the applicable two-year time limitation, this ALJ finds that Plaintiff's form 103 is untimely and is barred by the two-year limitations period set forth by KRS 342.185.

On September 22, 2011, AMS filed a "Motion to Dismiss Form 101" again requesting the ALJ dismiss Stevens' Form 101 since it was barred by the statute of limitations.

A benefit review conference ("BRC") order dated January 5, 2012, lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, average weekly wage, unpaid or contested medical expenses, injury as defined by the ACT, TTD (rate and duration). Under the heading of "other" is the following handwritten notation: "TTD was thereafter paid at \$478.42/week 9/19/09-9/20/09 & 9/30/09-4/16/11, for a total of \$39,640.52."² Other matters include the following: "1) preservation of hearing loss issue re: dismissed & merit of claim to be briefed; 2) MFD on Dr. Williams' req. for trigger pt

² This second period of TTD pertains to Stevens' claim against Seven Counties.

injections." Among the listed stipulations is the following regarding TTD: "TTD benefits were paid at the rate of \$508.00 per week from 6/28/07-7/19/07 for a total of \$1,596.57." Handwritten above the total TTD benefits paid is "2007" in parentheses, clearly indicating this period of TTD benefits pertains to the 2007 injury and Stevens' claim against AMS.

In the "Opinion and Interlocutory Order" dated March 5, 2012, the ALJ made the following determination regarding the timeliness of Stevens' Form 101:

Defendant AMS contends Plaintiff's Form 101 setting forth her injury of June 27, 2007 was not timely filed and thus her claim against AMS should be dismissed. This exact contention was previously argued and addressed for determination. On October 28, 2009 it was determined that defendant AMS' motion to dismiss due to Plaintiff's claim being filed outside of the time provided by the applicable statute of limitations was without merit. On that day an order was rendered overruling Defendant's motion. This argument will not be again considered, but is preserved for an appeal should Plaintiff desire to pursue such course.

Regarding the hearing loss claim, the ALJ stated as follows:

Plaintiff seeks to have the issue of the ALJ's dismissal of her hearing loss claim reargued but such has already been addressed and decided. On January 18, 2010 an order was rendered

dismissing Plaintiff's Form 103, because it was filed after the applicable statute of limitations had expired. This argument will not be again considered.

In the March 5, 2012, Opinion and Interlocutory Order, the ALJ placed Stevens' claim against Seven Counties (Claim No. 2009-77063) in abeyance until such time she attains maximum medical improvement ("MMI").

On March 22, 2012, Stevens filed a motion to sever requesting the ALJ to sever Claim No. 2007-83466 from Claim Nos. 2009-77063 and 2010-00096. Stevens also requested "that the decision rendered in Claim No. 2007-83466 be deemed to be final and appealable." By order dated April 16, 2012, the ALJ severed Claim No. 2009-77063 against Seven Counties from Stevens' two claims against AMS- Claim Nos. 2007-83466 and 2010-00096. The ALJ also determined as follows: "As of the date of this Order, Plaintiff's two dismissed claims against AMS Temporaries, Inc., shall be deemed final and appealable."

We begin by stating Stevens' first argument regarding her Form 101 in Claim No. 2007-83466 is not a viable issue as the orders dated October 28, 2009, and January 18, 2011, determined Stevens' Form 101 was timely filed.

Stevens' second argument on appeal is her Form 103 relates back to the date of the initial filing of the Form 101 and, consequently, was timely filed. Stevens argues as follows:

CR 15.01 allows a party to amend their pleadings with leave of court, which 'leave shall be freely given when justice so requires.' Pursuant to CR 15.03(1), amended claims would relate back to the date of the original pleading where 'the claim...asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading...' Both CR 15.01 and CR 15.03(1) are applicable in workers compensation claims. A court's liberal discretion under CR 15.01 was reiterated in the case of *Caldwell v. Bethlehem Mines Corp.*, 455 S.W.2d 67, 68-69 (Ky. 1970) where it was also determined that there should be no less liberality in the rules of procedure for workers' compensation cases. In *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136 (Ky. 1991), the Kentucky Supreme Court determined that CR 15 is a tool for deciding cases on their merits rather than on the basis of gamesmanship. See also *Kroger Co. v. Jones*, 125 S.W.3d 241 (Ky. 2004).

Petitioner alleged an injury to her left ear and attached medical evidence from her ENT of a work-related hearing impairment with her original Application for Resolution of Injury Claim. She then had the right to amend her Application to specifically assert a claim for hearing impairment from being struck in the head and around the ears during the assault on June 27, 2007 while working as an LPN at Central

State Hospital through the Respondent's agency, as she alleged in the original claim. Her Motion to Amend was filed soon after the original claim, during a time when she was drawing TTD benefits for a second injury, and right before the case was placed in abeyance. There was clearly no prejudice to AMS Temporaries for the Court to allow amendment of the pleadings to allow the hearing impairment claim to be specifically pled.

In fact, Respondent never objected to the Motion to Amend. However, because Department regulations required that particular forms be used for filing particular claims, Petitioner had to file a Form 103 (Application for Resolution of Hearing Loss Claim) to supplement her Form 101 (Application for Resolution of Injury Claim). Nevertheless, the amended claim would relate back to the date Petitioner's original Form 101 was timely filed since it arose out of the same occurrence and with the same employer that was alleged in the original claim, pursuant to CR 15.03(1).

We vacate the ALJ's dismissal of Stevens' hearing loss claim and remand.

This is a highly unusual hearing loss claim stemming from acute trauma instead of cumulative trauma. It is clear Stevens' Form 103 was filed beyond two years from the date of the June 27, 2007, injury and beyond two years from the date voluntary TTD payments ceased. The ALJ determined, as set forth in his additional findings in the

February 9, 2011, order on Stevens' petition for reconsideration, that "[t]he record demonstrates that Plaintiff received TTD benefits after the June 27, 2007 accident from June 28, 2007 through July 19, 2007." The ALJ further determined as follows:

Although there is a dispute as to when Plaintiff last received TTD, Plaintiff has asserted in prior pleadings and the record demonstrates that certainly no TTD was paid to Plaintiff by the Defendant-Employer, AMS Temporaries, after August 15, 2007. As such, Plaintiff had through no later than August 15, 2009 in which to file her Form 103.

The ALJ's determination to dismiss Stevens' Form 103 is based on form rather than substance and is contrary to the liberal tenor of CR 15.01 which states leave to amend pleadings "shall be freely given when justice so requires."

A review of Stevens' Form 101 against AMS and attached medical records reveal Stevens copiously pled a hearing loss claim. In the Form 101, Stevens listed the "left ear" as one of the injured body parts. Additionally, attached to her Form 101 are numerous medical records of Dr. Morris addressing Stevens' acute hearing loss following the June 27, 2007, injury. We point out the Form 101 is comprised not only of the allegations contained within it

but also all attachments. 803 KAR 25:010 Sec. 5(1) states as follows:

To apply for resolution of an injury claim, the applicant shall file Form 101 with the following completed documents"

The documents include a work history (Form 104), a medical history (Form 105), a medical release (Form 106), and one medical report which includes a description of the injury which is the basis of the claim and a medical opinion establishing a causal relationship between the work-related events and the medical condition which is the subject of the claim. The Form 101 consists of all of the above. This is consistent with the holding in Gray v. Trimmer, 173 S.W.3d 236 (Ky. 2005). In that claim, Gray submitted his Form 101 supported by a one-page medical opinion from Dr. Brooks stating Gray's underlying inflammatory process was most likely caused by work and then further aggravated by continual work within the repetitive work environment. The Form 101 itself made no reference to an inflammatory process. The employer failed to timely file a Form 111 or to introduce any proof or appear at the BRC. The Supreme Court held as follows:

In failing to deny the allegations of the claimant's application, the employer admitted that she sustained 'repetitive motion injuries to both

upper extremities', that the injuries caused an 'inflammatory process', and that they occurred 'within the course and scope of her employment.'

Id. at 241.

Clearly, this language indicates the Supreme Court viewed Dr. Brooks' report, attached to the Form 101, as part of the application.

In the case *sub judice*, Stevens adequately set forth a claim for hearing loss in her Form 101 both by alleging an injury to her ear in the Form 101 and attaching medical records relating to treatment of her ear. The ALJ, in orders dated October 28, 2009, and March 5, 2012, found Stevens' Form 101 to be timely filed. While it is wholly unclear why Stevens delayed filing her motion to amend and Form 103 until January 8, 2010, AMS was certainly on notice hearing loss was an issue based on the language in Stevens' Form 101 and the attached medical reports. Significantly, AMS failed to file a motion to dismiss until one full year after Stevens filed her Form 103 on January 8, 2010, and more than nine months after Dr. Eisenmenger's Form 108 was filed in the record which conclusively links Stevens' hearing loss in her left ear to the incident taking place on June 27, 2007. In the interim, AMS failed to file any motions objecting to the Form 103 and Dr. Eisenmenger's

Form 108. AMS suffered no prejudice by virtue of the delay, as it was clearly aware by virtue of the Form 101 that Stevens was alleging a hearing loss claim. See Lawrence v. Marks, 355 S.W.2d 162 (Ky. 1961).

Finally, we note that Stevens' filed her Form 103 over two month *before* Dr. Eisenmenger's March 23, 2010, examination during which she conclusively determined Stevens' hearing loss, "at least in the left ear," relates to the June 27, 2007, work incident.

Accordingly, the ALJ's dismissal of Stevens' hearing loss claim as set forth in the January 18, 2011, order dismissing her hearing loss claim, the February 9, 2011, order denying her petition for reconsideration, the March 7, 2012, "Opinion and Interlocutory Order," and the April 16, 2012, order severing her claim against AMS from her claim against Seven Counties and ordering the previous order dismissing the two claims against AMS final and appealable is **VACATED**. This claim is **REMANDED** to the ALJ for reopening the time for taking proof on Stevens' hearing loss claim, a hearing, and a decision on the merits.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON UDELL B LEVY
455 S FOURTH ST
1450 STARKS BUILDING
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON LYN DOUGLAS POWERS
1315 HERR LN STE 210
LOUISVILLE KY 40222

COUNSEL FOR RESPONDENT:

HON JOSEPH C KLAUSING
455 S FOURTH ST
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON JAMES G FOGLE
333 GUTHRIE GREEN #203
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON OTTO D WOLFF IV
8120 DREAM ST
FLORENCE KY 41042