Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 17, 2015

CLAIM NO. 200974167

SODEXO[1] PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

EDDIE BROWN
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
AND ORDER DENYING ORAL ARGUMENT
* * * * * *

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

STIVERS, Member. Sodexo appeals from the November 13, 2014, Order of Hon. J. Landon Overfield, former Chief Administrative Law Judge ("CALJ") overruling Sodexo's Renewed Motion to Reopen and Motion to Vacate the Opinion,

[1] The pleadings and order provide two different spellings of the Petitioner's name. We will rely on the Petitioner's spelling of its name as Sodexo.

Award, and Order on reopening of Hon. Robert L. Swisher, Administrative Law Judge ("ALJ Swisher") finding Eddie Brown ("Brown") totally occupationally disabled and awarding permanent total disability ("PTD") benefits. No petition for reconsideration was filed.[2]

On appeal, Sodexo argues it was unfairly prejudiced due to the failure of Brown and the Department of Workers' Claims ("DWC") to take reasonable steps to notify it of the reopening of Brown's claim. Sodexo charges KRS 342.125 is the equivalent of Civil Rule 60.02 and provides the litigant up to a year to seek to set aside an unjust judgment or order. Sodexo seeks reversal of the CALJ's November 13, 2014, Order overruling its motion and requests the opinion entered by ALJ Swisher be vacated.

The Form 110 approved on August 10, 2010, reveals Brown injured his low back while working for Sodexo on October 5, 2009. The Form 110 listed the 5% impairment rating assessed by Dr. Rodney V. Chou on April 14, 2010. Brown settled his claim for a lump sum of $10,923.10. Brown did not waive his past medical benefits, future medical benefits, vocational rehabilitation, and right to

[2] Hon. J. Landon Overfield retired at the end of 2014. However, we will refer to him as the Chief Administrative Law Judge for purposes of this opinion.

reopen. The Form 110 was signed by Brown, Hon. Sean P. Lohman, his attorney, and Andrea Norris ("Norris"), a representative of Gallagher Bassett Services, Inc. ("Gallagher"). On the Form 110, Gallagher's address is listed as P.O. Box 4104, Schaumburg, Illinois 60168. The Form 110 was not signed by Sodexo; however, its address was listed as 2908 Brownsboro Road, Louisville, Kentucky 40206.

On September 3, 2013, Brown filed a motion to reopen alleging he had been laid off from Sodexo contemporaneous with the approval of the Form 110 due to Sodexo's belief his restrictions could no longer be accommodated. Brown attached the July 22, 2013, report of Dr. Mark Barrett in which he expressed the opinion Brown's original 5% impairment rating had increased to 8%. He also attached the report of Dr. Chou in which he assessed a 5% impairment rating and restrictions. Brown contended he was now totally occupationally disabled. That motion was served upon the Commissioner and Sodexo at the address of 2908 Brownsboro Road, Louisville, Kentucky 40206 ("Brownsboro address") and Gallagher, at P.O. Box 4104, Schaumburg, Illinois 60168 ("Schaumburg address").

On October 10, 2013, the CALJ entered an order concluding Brown had made a *prima facie* case for reopening and sustaining his motion to reopen to the extent the claim

would be assigned to an Administrative Law Judge for further adjudication. That order was served on Sodexo and Gallagher at the same address shown on Brown's motion to reopen. The record reveals the copy of the October 10, 2013, order and the envelope containing the order sent to Gallagher and Sodexo were returned to the DWC marked "Return to Sender, Not Deliverable as Addressed, Unable to forward," by the United States Postal Service on October 16, 2013, and October 21, 2013, respectively.

On November 18, 2013, a scheduling order was sent by the Commissioner directing Sodexo had forty-five days to file a Form 111, and if no Form 111 was filed the allegations would be deemed admitted. It also contained a proof schedule and set a Benefit Review Conference ("BRC") for May 12, 2014, at 11:00 a.m. The parties were to file a witness list and copies of all known exhibits, proposed stipulations, and notice of contested issues within ten days of the BRC. That notice was sent to Sodexo at 9801 Washington Blvd, Gaithersburg, MD 20878 and to Gallagher at the Schaumburg address.

On January 16, 2014, Brown filed the report of Dr. Barrett. The notice of filing of the report was only sent to Gallagher at the address of The Gallagher Center, 2 Pierce Place, Itasca, IL 60413.

On March 25, 2014, ALJ Swisher entered the BRC Order scheduling the hearing for March 25, 2014, and identifying the contested issues. The BRC was signed by Brown's counsel and on the line for Sodexo's counsel was handwritten "did not appear." The BRC Order does not contain a certificate of service.

On March 25, 2014, ALJ Swisher conducted a hearing at which neither Sodexo nor its counsel appeared. The formal hearing order executed on that same date identifies the items filed by Brown and indicates Sodexo did not file any items to be considered as evidence. Brown's counsel signed the order and on the line for Sodexo's attorney to sign is handwritten "no appearance." The hearing order contains no certificate of service.

On April 7, 2014, Brown's counsel filed a notice of change of address. That pleading reflects the original was sent to the DWC but was not sent to either Sodexo or Gallagher.

On April 25, 2014, Brown filed his memorandum pursuant to the ALJ's order which was served on Sodexo at the Brownsboro address and Gallagher at the Schaumburg address.

On May 12, 2014, ALJ Swisher entered an opinion, award, and order sustaining Brown's motion to reopen based

on increase in impairment and/or disability and finding Brown is totally occupationally disabled. The record reflects the opinion, award, and order mailed to both Sodexo at the Brownsboro address and Gallagher at the Schaumburg address were returned to the DWC with a yellow adhesive note from the United States Postal Service on both which read “Return to Sender” and “Unable to Forward.” The date appearing on the yellow adhesive note on the envelope addressed to Sodexo is May 16, 2014, and the yellow adhesive note attached to the envelope sent to Gallagher is dated May 17, 2014. Nothing on either envelope reflects when the DWC received the returned decisions.

On June 18, 2014, Brown’s attorney filed a motion and affidavit for approval of attorney fee certifying he sent a copy of the motion for approval of attorney fee to Sodexo at the Brownsboro address and Gallagher at the Schaumburg address.

On June 19, 2014, the ALJ entered an order approving the attorney fee requested which contained no certificate of service.

On July 11, 2014, Sodexo filed a motion to reopen and motion to vacate ALJ Swisher’s opinion, award, and order. It asserted the carrier had not become aware of the reopening until it was contacted by Brown’s counsel on June

24, 2014, regarding the status of the settlement check. Sodexo asserted this communication was the first indication the carrier received regarding the litigation upon reopening. It asserted its attorney was then contacted to look into the claim, and during the investigation the attorney determined different addresses were used for both Gallagher and Sodexo on multiple pleadings. It notes the motion to reopen and order sustaining the motion to reopen were sent to Sodexo at the Brownsboro address and Gallagher at the Schaumburg address. However, when the scheduling order was issued on November 18, 2013; Sodexo's address was shown as 9801 Washington Blvd, Gaithersburg, MD 20878. The order sent to Gallagher was sent to the Schaumburg address. Sodexo noted when the report of Dr. Barrett was filed it was not sent a copy, but the notice of filing was sent to Gallagher at The Gallagher Center, 2 Pierce Place, Itasca, IL 60413. When Brown's brief was filed it was mailed to Sodexo at the Brownsboro address and to Gallagher at the Schaumburg address. Likewise, the Opinion, Award, and Order and the motion for attorney fees were sent to Sodexo at the Brownsboro address and to Gallagher at the Schaumburg address. Sodexo asserted the Brownsboro address is incorrect as it relocated approximately four years ago, and Gallagher had not been located at the Schaumburg

address for approximately three years. Sodexo contended the fact the insurance carrier received Dr. Barrett's medical report is not sufficient notice a claim has been filed and litigation had been initiated.

Sodexo noted the first report of injury on file with the DWC reporting the November 5, 2009, injury lists Sodexo's address as 9801 Washington Blvd, Gaithersburg, MD 20878 and 1850 Bluegrass Avenue, Louisville, Kentucky. It maintained both of these addresses are current with active accounts. It also noted the first report of injury initially listed the Schaumburg address for Gallagher. However, on page eight of the first report of injury there was a change showing the address to be 2 Pierce Place, 60168. Sodexo stated this address is Gallagher's current address. Since the first report of injury on file with the DWC included the correct addresses for both it and Gallagher, Sodexo asserted the addresses were available to Brown when filing all pleadings during litigation. Despite this fact, Brown consistently served the pleadings on old, inactive locations.

Sodexo cited to 803 KAR 25:010 Section 3(3) which states all pleadings shall be served upon all other parties by mailing a copy to the other parties or, if represented, to that representative, at the party's or representative's

last known address. It stated the addresses listed on the initial motion to reopen were the addresses reflected on the Form 110 settlement agreement. However, these addresses were not the addresses on file with the DWC. Sodexo posited Brown's motion to reopen may have been returned to him. Thus, if Brown received notice an incorrect address was used, there was an obligation to notify the DWC so future pleadings would be provided to the proper parties at their current address as required by the regulations. Failure to do so results in an injustice as the proper parties would not be notified of the litigation.

Based on the fact multiple addresses were used and proper addresses were not included on all pleadings, Sodexo argued it appeared proper notice was not provided pursuant to the regulations. It argued it should have been provided the opportunity to rebut Brown's allegation of a worsening condition as contemplated by the statute. Further, claimants should not be encouraged to file pleadings with incorrect notice so that their allegations go unchallenged. As a result, Sodexo requested the ALJ reopen the claim and vacate the May 12, 2014, Opinion, Award, and Order.

Brown filed a response asserting the motion to reopen was served on the parties at the addresses listed on

the Form 110. With one exception, copies of his pleadings were sent to these addresses. Brown's counsel represented he had a vague recollection of one mailing sent to Sodexo at the Brownsboro address being returned. If that happened at all, he stated it occurred once. Further, no other items were returned, most notably, the items mailed to the Schaumburg address.

Brown maintained while it may be true that Gallagher's headquarters have moved from Schaumburg to Itasca, Illinois, a distance of about seven miles, it appeared Gallagher continued to maintain a P.O. Box in Schaumburg, where various pleadings were sent. Brown represented Gallagher's website, under the tab "Multi-State Claims," continues to list P.O. Box 4104 Schaumburg, Illinois 60168 as a proper address.

Brown contended that regardless of the address utilized, the Commissioner conducts an independent review of the DWC database and mails a copy of the scheduling order to the most current address on file. This would explain why the scheduling order was mailed to Sodexo at the Gaithersburg, MD address. Brown notes the DWC also mailed the scheduling order and copies of all subsequent orders to Gallagher at the Schaumburg address. He contended this address remains a valid mailing address for

Gallagher and explains why no items mailed to this address were ever returned as undeliverable.

Brown's counsel stated he was unable to explain how he obtained the Itasca, Illinois address utilized in serving Dr. Barrett's report on Gallagher. Brown's counsel states his paralegal prepared the motion and he is unaware of where she obtained the address.

Brown argued KRS 342.125 provides four grounds for reopening none of which were established in the motion. Further, it appeared if a mistake was made, it was by someone at Gallagher failing to route the various pleadings to the appropriate person which is an internal problem and not the responsibility of Brown or the ALJ. Accordingly, he requested the motion be overruled.

On August 19, 2014, the CALJ entered an order noting the motion was supported by photocopies of pleadings, orders, scheduling order, and the opinion, award, and order as well as photocopies of printouts from the DWC. The CALJ concluded the gist of Sodexo's motion is not all documents relating to the reopening were served on it and its carrier at the same addresses. However, the CALJ observed there was no verification of Sodexo's statement its insurance carrier did not become aware of this reopening until it was contacted by Brown's counsel

regarding the status of the settlement check. The CALJ noted the documents filed with Sodexo's motion establish Brown's motion was served on Sodexo and its insurance carrier at the addresses listed in the Form 110 settlement agreement approved by Hon. R. Scott Borders, acting Chief Administrative Law Judge. The CALJ observed the claim was originally settled without the filing of a Form 101 and formal litigation. Further, the CALJ's order sustaining Brown's motion to reopen was served on Sodexo and its insurance carrier at the address listed on the Form 110. The CALJ also noted the November 18, 2013, scheduling order was served on Sodexo at an address then on record with the DWC and upon the insurance carrier at the address listed on the Form 110. The CALJ concluded there was no evidence filed either with Sodexo's motion or in the DWC's record that any of these documents were returned to the DWC as undelivered. Therefore, it is presumed the documents were received by Sodexo and its insurance carrier.

Citing to 803 KAR 25:010§4(6)(A)7, the CALJ stated the motion to reopen must have attached a certificate of service certifying the motion was served on all parties as well as counsel for the parties. The CALJ concluded that requirement was met, and there is no evidence Sodexo did not receive a copy of the motion to

reopen. Further, the order sustaining the motion to reopen was served on Sodexo and its insurance carrier and there is no evidence either failed to receive the order reopening the claim. The CALJ concluded there was no evidence Sodexo or its insurance carrier failed to receive any documents filed in the reopening. Finding no grounds to support Sodexo's motion, the CALJ overruled Sodexo's motion.

Sodexo did not appeal this order. Instead, on October 10, 2014, it filed a renewed motion to reopen and motion to vacate the Opinion, Award, and Order. It asserted neither it nor its third party administrator received notice of the motion to reopen. Sodexo cited to the affidavit of Susanna Jean and Andrea Norris which it attached as Exhibits 1 and 2.[3] Sodexo noted Brown stated

[3] As noted by Sodexo in its motion, the affidavit of Andrea Norris, Senior Claims Adjuster, reflects Gallagher moved its headquarters to The Gallagher Center, 2 Pierce Place, Itasca, Illinois, in February 2010 where it is currently located. Mail sent to the Schaumburg address was forwarded by the United States Postal Service to the correct address for one year. At the expiration of that year, mail sent to the Schaumburg address would be returned undeliverable. As a result, pleadings sent to Schaumburg address in this case were never received by Gallagher. This included the motion to reopen, the order reopening the claim, the scheduling order, and the opinion, award, and order. Norris states Gallagher was not made aware of the reopening until June 24, 2014, when she was contacted by Brown's counsel via telephone regarding the status of the settlement check. Norris states Brown's counsel could have reached her at that number at any point during the litigation of the claim but failed to do so until inquiring about the settlement check. Norris maintained Brown's failure to appropriately serve Gallagher prevented it from being able to obtain counsel and properly defend the claim. Similarly, the affidavit of Susanna Jean, risk management of Sodexo, reflects Sodexo's headquarters had not been located at 2908 Brownsboro Road, Louisville, Kentucky, for approximately four years. Sodexo's headquarters are currently located

when the motion to reopen was filed he relied upon the settlement agreement in obtaining the addresses for Sodexo and Gallagher. Observing that companies may relocate, Sodexo asserted the reliance by Brown's counsel with no effort to determine whether Sodexo or Gallagher still received mail at those addresses was irrational and not reasonably calculated to assure the responding parties would receive service of the motion to reopen.

Sodexo also noted Brown's counsel had determined the address to which he sent Gallagher's copy of his motion to reopen was still listed on its website under the tab "Multi-State Claims." It represented the website relied upon by Brown's counsel is not Gallagher's website. It is a website called www.multistateclaims.com. That website does not readily reveal the identity of the person or organization that created and maintains it. However, it contended selecting "Claim Reporting" and "Kentucky" leads to a page that identifies Advantage Workers' Compensation Insurance Company which apparently used Gallagher as its third party administrator. Sodexo surmised that what appears to have happened is that when Brown's choice of

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at 9801 Washington Blvd, Gaithersburg, MD. As a result, pleadings sent to the Brownsboro Road address regarding Brown's claim were never received by Sodexo. Therefore, Sodexo was not made aware of the reopening of the claim to assert a worsening of condition until the litigation had ended.

address for Gallagher was challenged, Brown's counsel "googled" Gallagher, and rather than discuss the information that appears on Gallagher's website, Brown's counsel brought up some out-of-date information on a website created by unknown persons to support his failure to find out where Gallagher could be contacted and notified in August 2013.

Sodexo notes nearly all subsequent filings and orders were sent to outdated and incorrect addresses. However, the scheduling order was not sent to Gallagher but was sent to Sodexo at its current address. Sodexo asserts when it saw Gallagher's name on the distribution and scheduling order, it reasonably believed its third party administrator had the situation in hand. However, Gallagher was still unaware the claim was being reopened. Sodexo argued sending Dr. Barrett's report to Gallagher's correct address was not sufficient to apprise Gallagher of the pending litigation in a previously settled claim.

It asserts Sodexo and Gallagher first received notice of the reopening by telephone call from Brown's counsel to Andrea Norris after the deadlines for filing a petition for reconsideration and an appeal had passed.

Sodexo notes KRS 342.125(4) states "reopening and review under this section shall be had upon notice to the

parties and in the same manner as provided for an initial proceeding under this chapter." It asserts that provision of the statute was not followed. It maintained that in the initial proceeding, the DWC determines the correct address of the employer and its insurer or third party administrator using current information maintained by the DWC, and serves official notification of the filing upon all concerned. In this case, Brown's counsel relied upon information contained in a settlement agreement prepared three years earlier and made no attempt to determine whether the information was current. In addition, the DWC failed to use its own resources to determine Gallagher's correct address and the ALJ simply used Brown's filings as the source of addresses for the other parties.

Sodexo attached letters in two different cases written by Brown's counsel before the motion to reopen was filed, correctly addressed to Gallagher's headquarters. Therefore, it argued when Brown filed his motion to reopen, his counsel knew Gallagher's address which was not the same as shown on the settlement agreement.

Sodexo noted notice mailed to an incorrect address and not received by the addressee is inadequate and judgment cannot be rendered against the party.

Sodexo argued sending copies of the pleadings, orders, and opinion to the wrong address constitutes mistake within the within the meaning of KRS 342.125. Therefore, the appropriate remedy is to reopen the case, vacate the award, and allow it to present evidence.

In response, Brown asserted the current motion and renewed motion is virtually identical to its previous motion which was overruled by the CALJ. Brown also observed no petition for reconsideration was filed or appeal taken from the August 19, 2014, Order. Brown asserted Sodexo's current motion is impermissible. He surmised Sodexo's motion appears to originate from a mistaken belief the previous motion was overruled only because it failed to submit proof in support of its allegations. Brown contended Sodexo is now attempting to remedy this by submitting affidavits from Gallagher's representatives. Brown noted Sodexo's failure to present this proof in its original motion only formed a portion of the basis for the CALJ's August 19, 2014, Order, as the CALJ stated there was no evidence filed with Sodexo's motion that any of the documents were returned to the DWC as undelivered.

Brown contended the fact none of the alleged improperly addressed pleadings were ever returned to the

DWC is probably the strongest evidence Sodexo actually received all the pleadings. Further, even if Sodexo's failure to submit proof of its allegations was the sole basis of the CALJ's ruling in the August 19, 2014, Order, the proper remedy was for Sodexo to file a petition for reconsideration and either submit its proof or request proof time in which to do so. Sodexo's failure to file a petition for reconsideration prohibits it from challenging the CALJ's finding of fact on this issue.

Brown contended there was no error in the CALJ's Order and Sodexo waived its right to argue error since it failed to file a petition for reconsideration or appeal from the August 19, 2014, Order. Therefore, the subsequent motion is an impermissible attempt to reargue an issue which has previously been adjudicated.

In the November 13, 2014, Order, after setting forth a brief procedural history of the claim, the CALJ noted he overruled Sodexo's motion and no petition for reconsideration or appeal was filed thereafter. The CALJ indicated the current motion pending before him requested the same relief on the same grounds as stated in the previously overruled motion. Since the issue raised by Sodexo in its renewed motion is now *res judicata*, the CALJ overruled Sodexo's motion.

In its argument on appeal, Sodexo again notes Brown's counsel relied upon information contained in the settlement agreement in serving Sodexo and Gallagher. It also notes the letters of Brown's counsel show he had written to Gallagher in other cases at the correct address prior to filing the motion to reopen. Sodexo cites to McAtee v. Wigland of Louisville, Inc., 457 S.W.2d 265 (Ky. 1970) in support of its assertion notice mailed to an incorrect address and not received by the addressee is inadequate and judgment cannot be rendered against the party who did not receive notice of the motion. It goes on to note the procedural problems which arise within the DWC in cases where the parties have settled prior to the filing of the Form 101. Sodexo posits when the non-moving party fails to respond or appear even under circumstances where the failure seems peculiar, the moving party and the ALJ may have no inclination to determine whether the other party actually received notice of the proceedings or whether notice actually was reasonably calculated to reach those parties. It contends this case starkly illustrates the unfairness that results as it was not given the opportunity to defend.

Sodexo notes it was shocked to learn a claim it had settled based on a 3.25% permanent partial disability

has been converted to an award of permanent total disability. It argues there should be a regulation or policy requiring the a party filing a motion to reopen to attest to his or her efforts to locate and notify opposing parties, or the DWC should put internal measures in place for keeping track of the claimants, employers, insurers, and third party administrators. Even though it is too late for such a regulation to help Sodexo, it argues it has a remedy pursuant to KRS 342.125 and the CALJ erred in denying its renewed motion.

Citing to Gussler v. Williams, 2006-CA-001722-WC, rendered February 23, 2007, Designated Not To Be Published, and Com. v. Gussler, 2007-CA-000389-WC, rendered August 3, 2007, Designated Not To Be Published, Sodexo asserts as follows:

> In *Gussler*, the employer had not been notified of an order on reconsideration until after the deadline to appeal had passed, so the ALJ was able to remedy the situation by vacating the original order and issuing a new one, restarting the time to appeal. That would not work here, because the employer and TPA did not receive any proper notice of the motion to reopen or proceedings thereafter, and had no opportunity to present evidence so as to have grounds for a reversal. With the deck thus stacked in the [sic] Brown's favor, there would be no point in an appeal going to the merits of the award. The

> only remedy here is to start the proceedings on reopening again.

Sodexo argues that sending Brown's copies of the motion to reopen, orders, and the opinion, award, and order to the wrong addresses constitutes mistake within the meaning of KRS 342.125. Therefore, pursuant to Fluor Const. Intern., Inc. v. Kirtley, 103 S.W.3d 88 (Ky. 2003), the appropriate remedy is to reopen the case, vacate the award, and allow Brown to present evidence. Sodexo contends the fact it did not receive notice of the motion or the award on reopening is not disputed. It notes Brown's response was merely an attempt to justify his reliance on outdated information in obtaining the addresses for Sodexo and Gallagher.

Sodexo argues its remedy is to file another reopening pursuant to KRS 342.125 which is similar to vacating a judgment pursuant to CR 60.02. It posits as follows:

> If Sodexo had not filed its first motion, but had filed a motion to reopen and vacate the award, supported by affidavits, on October 10, that would have been within a reasonable time. (CR 60.02 gives the aggrieved party up to a year!) At least, under that circumstance, if the CALJ had denied the motion because he thought it was too late, and/or that he did not think Sodexo's lack of notice of Brown's reopening of the settlement was

> grounds for vacating the award and relitigating Brown's motion, then, again, those decisions would have been erroneous and subject to reversal. The result should not be any different just because Sodexo's counsel filed an inadequately-supported motion, which was denied, before refilling it with proper support. Judge Overfield's saying that his denial of the first motion, on procedural grounds, made the second motion *res judicata* does no more or less than sweep Sodexo's meritorious argument under the rug, even if such was not the CALJ's intention. That ruling was erroneous, and the Board should reverse it. Clear Fork Coal Co. v. Gaylor, 286 S.W.2d 519 (Ky. 1956) (held that the dismissal of the employee's first motion to reopen because it was not accompanied by a physician's affidavit was not *res judicata* of a second motion because it did not decide the case on the merits).

We vacate the CALJ's November 13, 2014, Order and remand.

In McAtee v. Wigland of Louisville, Inc., supra, the record disclosed Wigland mailed the motion for summary judgment to McAtee's attorney at the incorrect address of 424 West Liberty, Louisville, Kentucky. The correct address was 422 West Liberty. In support of McAtee's motion to set aside the summary judgment, an affidavit was filed by one of her attorneys in which it was stated the appellee's motion for summary judgment was sent to the wrong address and was not received. The former Court of

Appeals, now Supreme Court, reversed since a notice mailed to an incorrect address and not received by the addressee did not comply with CR 5.02.

In its initial motion to vacate, Sodexo attached the first report of injury in this claim which is listed on file at the DWC, listed 9801 Washington Blvd, Gaithersburg, MD 20878 as the address for Sodexo, Inc. and 1850 Bluegrass Avenue, Louisville, Kentucky as the address for Sodexho, Inc. Both addresses are different than the addresses utilized by Brown in his motion to reopen as Brown mailed his motion to 2850 Bluegrass Avenue, Louisville, Kentucky. Although pages two through five of the first report of injury list Gallagher's address as P.O. Box 4104, Schaumburg, Illinois 60168, on pages six and seven there is noted a (change) showing Gallagher's address to be 2 Pierce Place, 8th Floor. There is no city and state listed. The addresses listed on the first report of injury reveal the addresses used by Brown were not correct. Further, the letters attached to Sodexo's renewed motion indicate Brown's counsel had corresponded with Gallagher at its correct address prior to filing his motion to reopen in this case. Thus, we believe there is a legitimate issue as to whether Brown used the last known address and the correct address of both Sodexo and Gallagher in serving his

motion to reopen. Consequently, Sodexo is entitled to a ruling on its motion and renewed motion.

The cases of Gussler v. Williams, supra, Com. v. Gussler, supra, and Fluor Const. Intern., Inc. v. Kirtley, supra, hold when a party does not receive notice its petition for reconsideration was denied until after the time for filing an appeal has expired, upon the aggrieved party's motion to set aside the order, the ALJ should set aside the order and re-enter a new order in order to allow a timely appeal. In Fluor, the Supreme Court stated as follows:

> Here, although the ALJ did not cite KRS 342.125 in granting the motion by Fluor, we believe that statute offers the same relief in this situation as would CR 60.02. *Cf. Campbell v. Universal Mines, Ky., 963 S.W.2d 623 (1998)*; *Wheatley v. Bryant Auto Service*, Ky., 860 S.W.2d 767 (1993). Pursuant to the same rationale in *Kurtsinger*, *supra*, we hold that the ALJ did not abuse his discretion in granting the motion by Fluor.

Id. at 90.

Relying upon Fluor, supra, the Court of Appeals reached the same conclusion in Com. v. Gussler, supra. There, Gussler and his attorney were not listed on the certificate of service on the order denying his petition for reconsideration. The Board rendered a decision

dismissing the appeal but also advised Gussler to seek a factual determination as to whether the order on reconsideration was properly noticed. The Board stated if the service was improper, pursuant to KRS 342.125(1)(c) the ALJ could set aside his previous order on reconsideration and then re-enter it to allow Gussler to timely appeal. Gussler filed a petition for review with the Court of Appeals. Shortly thereafter, the ALJ denied both of Gussler's pending motions and he appealed to the Board. The Board ultimately rendered a decision reversing the ALJ's order and remanding the claim for entry of an order setting aside the order denying Gussler's petition for reconsideration and for re-entry of that order. The Court of Appeals affirmed the Board stating Gussler "has not yet received an appeal on the merits of his claim." Slip Op. at 2, Com. v. Gussler, supra. The Court Appeals stated:

> 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.

Slip Op. at 3.

We cite these cases for the proposition that when the ALJ determines a party has not received notice of a pleading and/or order he or she has the authority pursuant to KRS 342.125 to set aside the order to allow the party the opportunity to file the appropriate pleading. Thus, these cases have some bearing here.

However, our ruling is controlled by Clear Fork Coal Co. v. Gaylor, 286 S.W.2d 519 (Ky. 1956). In the initial proceedings Gaylor received an award of temporary total disability benefits for a period of 40.47 weeks. On June 8, 1953, Gaylor filed a notice of intent to reopen the award pursuant to KRS 342.125 claiming a change of

condition. A motion was filed for additional compensation but the Board overruled the motion because it was not accompanied by an affidavit of a physician. On September 1, 1953, a second motion of the same tenor was filed supported by an affidavit of an orthopedic surgeon. The Board sustained the motion over the appellant's objection and set the matter for a hearing. As a result, Gaylor received an additional award. Clear Fork appealed arguing that overruling of the first motion to reopen the award was *res judicata* and a bar to later reopening the case. The Court of Appeals disagreed holding as follows:

> However, in *Byrne & Speed Coal Corp. v. Dodson*, 263 Ky. 848, 94 S.W.2d 24, it was held that the doctrine of res judicata has no application where there was not an examination of the merits of the claim upon the first motion but only an adjudication of a technical insufficiency. See also *Hysteam Coal Corp. v. Ingram*, 283 Ky. 411, 141 S.W.2d 570.
>
> The record here clearly shows that appellee's first motion to reopen was overruled solely because he failed to file a supporting affidavit. The merits of his claim of permanent disability were not even considered by the Board at that time; therefore, under the authority of the Dodson and Ingram cases, the dismissal of the first motion is not a bar to the second. Such action by the Board could not be res judicata on an issue which was never even considered, much less passed upon. We conclude appellee was entitled to

> his day in court on the merits of his motion to reopen.

Id. at 522.

The above holding is applicable here. The sole ground for overruling the renewed motion to reopen and motion to vacate was the CALJ's belief the August 19, 2014, Order was *res judicata* as to the renewed motion filed by Sodexo. Since the August 19, 2014, Order was not *res judicata*, the November 13, 2014, and August 19, 2014, Orders of the CALJ must be vacated.

In vacating, we are compelled to note the record is replete with evidence Brown and the DWC used the wrong address for both Sodexo and Gallagher. In the August 19, 2014, Order overruling Sodexo's first motion to reopen and motion to vacate the award, the CALJ incorrectly stated there was nothing in the record indicating any of the documents had been returned. This statement completely ignored the fact the CALJ's October 10, 2013, Order sustaining Brown's motion to reopen sent to Gallagher and Sodexo was returned by the United States Postal Service to the DWC on October 16, 2013, and October 21, 2013, respectively, with the designation "return to sender, not deliverable as addressed, unable to forward." In addition, the record reflects the Opinion, Award, and Order of ALJ

Swisher sent to both Sodexo and Gallagher were returned by the United States Postal Service with the designation "return to sender, unable to forward." Those facts along with the addresses of Sodexo and Gallagher contained within the first report of injury, and the letters of Brown's counsel pre-dating Brown's motion to reopen establishing Brown's counsel knew Gallagher's current address prior to filing his motion to reopen, raise legitimate issues which must be resolved on remand.[4]

Further, as Sodexo filed a renewed motion to reopen and did not file a new motion, KRS 342.125(3) which prohibits a party "from filing a motion to reopen within one year of any previous motion to reopen by the same party" is not applicable. The renewed motion was merely an extension or amendment of its previous motion to reopen in which Sodexo corrected what the ALJ perceived to be deficiencies in the initial motion to reopen and motion to vacate the opinion, award, and order.

Finally, we conclude oral argument is unnecessary and deny Sodexo's request for oral argument.

[4] We also note Brown does not deny Norris' statement that Brown's counsel contacted Norris after ALJ Swisher's decision was rendered inquiring about the settlement check.

Accordingly, the August 19, 2014, Order and the November 13, 2014, Order of the CALJ are **VACATED**. This claim is **REMANDED** to the ALJ for a ruling on the merits of Sodexo's renewed motion to reopen and motion to vacate the opinion, award, and order which encompasses its initial motion to reopen and motion to vacate the opinion, award, and order.

ALL CONCUR.

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