Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 29, 2015

CLAIM NO. 201300273

UNINSURED EMPLOYERS FUND PETITIONER

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

JOSE ACAHUA,
LUIS LOPEZ,
ISAIAS SILVA-LAMAS, and
HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. The Uninsured Employers Fund ("UEF") seeks review of the Opinion and Award rendered February 9, 2015 by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ") awarding Isaias Silva-Lamas ("Silva-Lamas") permanent total disability ("PTD") benefits and medical

benefits for work-related injuries sustained on April 11, 2012 when he fell from a ladder resulting in quadriplegia while working for Luis Lopez ("Lopez"), who had no workers' compensation insurance policy in effect on the date of the accident. No petition for reconsideration was filed.

On appeal, the UEF argues service of process is required even in workers' compensation claims. It asserts a timely registered letter would have saved the claim. Finally, it argues KRS 342.135 is controlling over 803 KAR 25:010 Section 3(2). Because we determine service on Lopez at his last known address via first class mail both by Silva-Lamas and by the Commissioner of the Kentucky Department of Workers' Claims is sufficient pursuant to KRS 342.270 and 803 KAR 25:010 section 3(2), we affirm.

Silva-Lamas filed a Form 101 on February 25, 2013, alleging he fell from scaffolding in Pikeville, Kentucky while working for a brick mason, sustaining injuries to multiple parts of his body. He alleged his employer at the time of the accident was Jose Acahua ("Acahua"). Silva-Lamas completed the sixth grade in Mexico. He does not have a GED, nor does he have any specialized or vocational training. His work history consists of working as a construction laborer and dry wall installer.

On September 17, 2013, Silva-Lamas filed a motion for leave to amend the claim to name Lopez as his employer. This motion was granted on October 7, 2013. The ALJ mailed a copy of the order to Lopez via first class U.S. Mail. Silva-Lamas also filed an additional Form 101, along with the required attachments, listing Lopez as his employer, with an address of 2897 Mount McKinley Way, Lexington, Kentucky. The claim filings were mailed to Lopez by the Kentucky Department of Workers' Claims. Neither Lopez nor anyone on his behalf entered an appearance in the claim.

In support of the Form 101, Silva-Lamas filed records from the Pikeville Medical Center, for treatment he received from April 11, 2012 through May 10, 2012. This constitutes all of the medical evidence filed in the claim. The May 10, 2012 record notes his diagnosis consisted of quadriplegia, status post fall; healthcare associated with pneumonia; and retinopathy. The ALJ awarded PTD benefits pursuant to KRS 342.0011(11)(c)5. The UEF does not dispute the extent of the award.

Silva-Lamas testified by deposition on September 4, 2013. He is a resident of Lexington, Kentucky, but was born in Zacatecas, Mexico. At the time of the accident, he was working with Lopez, a Lexington resident, installing bricks on a porch in Pikeville, Kentucky. Lopez had invited

Silva-Lamas to work with him, and paid him ten dollars per hour. He had worked for Lopez remotely in the past. Lopez drove him to the worksite in Pikeville. He stated Stonie Newsome ("Newsome") had nothing to do with the job, but they used some of his tools. He stated Acahua was just an interpreter for Lopez. Acahua performed no work on the job, and he was unaware of whether Lopez paid him for the service he rendered in interpreting to the home owner. On the day of the accident, Silva-Lamas was working as a helper on the jobsite. They had installed too much brick and were cutting out the excess. He started to fall and remembered nothing else until he woke up in the hospital. Since the accident, he has been unable to use his legs, is confined to a wheelchair, and can only minimally raise his arms. The bills for his medical treatment remain unpaid.

Acahua testified by deposition on May 20, 2013. He stated Lopez was the boss on the job where Silva-Lamas was injured. Newsome gave Lopez the job because he had so much work he was unable to get to it. Acahua did no work on that job, and earned no money from it. He stated Lopez paid his own people. He loaned Lopez money to defray upfront costs. He contacted Barry Chaney ("Chaney"), the home owner, to secure Lopez's payment, because he was the only one who spoke English. He stated he had never worked with

Silva-Lamas, and had never seen him before Lopez brought him to Pikeville. Acahua has worked for Newsome for five to seven years.

Daniel Olvera ("Olvera") testified by deposition on October 1, 2014. He worked with Silva-Lamas, Lopez and another individual named Lalo on the Pikeville job. Olvera stated Lopez was the brick layer, and the rest were helpers. He stated they were all partners on the job, although Lopez paid everyone from money he obtained from Acahua. He stated Acahua did none of the actual work on the job. He did not consider Lopez as the boss. He has not seen Lopez in over a year.

Newsome testified by deposition on May 20, 2013. He is a self-employed brick mason who lays brick and block. He has three employees, one of which is Acahua who has worked for him for several years. He stated he has no workers' compensation coverage. His brother-in-law, Chaney, lives next door to him. He had promised to brick a porch Chaney was going to have installed, after someone else framed it. After it was framed, Newsome was too busy to lay the brick. He advised Acahua to contact Lopez to see if he wanted to do the job. Lopez has worked as a brick mason in Lexington for a number of years. Acahua contacted Lopez who agreed to do the job. Acahua was involved only as an

interpreter on the jobsite. Newsome was not involved with the job at Chaney's. He had never seen Silva-Lamas prior to the accident. He stated he provided no equipment, and made no money from the job at Chaney's house.

Chaney testified by deposition on May 20, 2013. He is an engineer for CSX railroad. He had a porch installed on the back of his house. Another contractor framed the porch, and Newsome was supposed to install the brick. When the porch framing was completed, Newsome was too busy to lay the brick. Chaney was referred to Lopez, who he was assured was covered by a workers' compensation insurance policy. He has known Acahua for a number of years because he works for Newsome. He stated Acahua served as an interpreter for Lopez. He stated Lopez "priced" the job, but Acahua collected the money. He stated he was at home at the time of the accident. Lopez and his crew were there to remove excess brick which should not have been installed. The ladder on which Silva-Lamas was working shifted and fell. Silva-Lamas was taken to the hospital by ambulance.

A benefit review conference ("BRC") was held on December 9, 2014. The issues preserved were benefits per KRS 342.730; notice; average weekly wage; unpaid medical expenses; and, TTD. The parties agreed to waive the hearing, and the claim was submitted on the record as of

December 9, 2014. Subsequent to the BRC, the UEF filed a motion to amend the order to include the issue of whether the Department of Workers' Claims has jurisdiction over Lopez. This motion was granted by order entered January 16, 2015.

The ALJ rendered his decision on February 9, 2015. Regarding the jurisdiction issue, the ALJ found as follows:

> The UEF contends that Luis was never properly served with notice of the instant claim and as such, the DWC does not have jurisdiction over Luis and hence no award can be assessed against him. The UEF argues that KRS 342.135 requires that notice of a claim be sent by registered mail or served similar to notice in a civil action which was not done in this claim and service by regular mail is not a legally sufficient method of service. The Plaintiff argues that neither Chapter 342 nor the attendant regulations require anything greater than service by regular mail, that there is no process by which a warning order attorney can be appointed pursuant to CR 4.07, and that the only obligation of the Plaintiff is to file an appropriate Form 101 and the DWC is charged with the duty of serving the claim on the alleged employer. Plaintiff contends that he has done all he is required to do by statute and regulation as far as serving notice of the claim on the Defendant and that the UEF's position is without basis.
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> In resolving this issue, the ALJ notes that Plaintiff not only moved to amend his Form 101 to include Luis Lopez as the Defendant with the motion and order

sustaining the motion being sent by the ALJ's office via regular mail to Luis' last known address, Plaintiff filed a supplemental Form 101 with the DWC asserting that Luis Lopez was the employer of record on the day of his injury. The DWC then mailed copies of the new Form 101 to all parties involved, including Luis. However, the new Form 101 sent to Luis was returned to the DWC by the U.S. Postal Service as undeliverable. The ALJ concludes that given the Plaintiff complied with the requirements and regulations of the DWC in regard to the filing of the Form 101, he was under no further obligation to provide any further service of the claim to the alleged Employer, Luis Lopez, and as such, the ALJ finds that the DWC and hence the ALJ had jurisdiction over Luis Lopez sufficient to sustain an award of benefits made against him.

While the UEF has cited UEF v. Brewster, 818 S.W.2d 602 (Ky. 1991) in support of their[sic] position that the claim against Luis must be dismissed, a close reading of that case reveals it is not precedent for its' argument. In Brewster the Workers' Compensation Board, (performing the role of adjudicator now performed by the ALJ), dismissed a claim on behalf of Brewster on grounds that the notice sent to the Defendant was returned and that the statutory provision that notice be considered served when deposited in the mail did not afford the Defendant due process and therefore the absence of the Defendant prevented the Board from rendering an award against the UEF as its liability was derivative of the Defendants. However, the claim was appealed on grounds additional to the service issue, service was eventually perfected on the Defendant, the Supreme

> Court opinion concerned only issues other than the service issue, and there was no appellate consideration of the sufficiency of service issue. As such, Brewster does not provide precedent or support for the UEF's argument other than as an example of an acceptance of the position by a fact finder in a claim. As such, the UEF's argument is made without the support of any precedent.
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> In light of the above, given that the Plaintiff sufficiently performed all regulatory requirements as set forth by the DWC in regard to the filing of his claim, the ALJ concludes that jurisdiction over Luis Lopez is proper and any award made herein against him is enforceable.
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> Such a result herein is consistent with the beneficent aim of the Kentucky Workers Compensation Act and acceptance of the argument of the UEF would seem to be contrary to that statutory purpose, especially in light of the facts herein in which no involved party has any illusion in regard to the insured status or solvency of the responsible Defendant. In fact, should the Defendant ever be found and is a solvent individual, the UEF may pursue statutory subrogation against him to recoup benefits paid under this award, such that they may be made whole. Lastly, the ALJ questions whether the UEF has standing to contest sufficiency of notice to the employer which may be a defense personal to the Defendant.

On appeal, the UEF argues Lopez was never properly served, and therefore the claim must be dismissed. It

argues 803 KAR 25:020 §3(2) conflicts with KRS 342.135, and therefore it is invalid. We disagree.

Silva-Lamas initially filed a Form 101 naming Acahua as the employer. He later filed a motion to amend the Form 101 to list Lopez as a party. Silva-Lamas mailed a copy of the motion to Lopez, via first class U.S. Mail at his last known address. He subsequently filed a new Form 101 which listed Lopez as the employer. This was filed with the Kentucky Department of Workers' Claims, which in turn served a copy of the claim to Lopez's listed address through the procedure set forth in 803 KAR 25:010 §3(2). This was all Silva-Lopez was required to do. In effect, the UEF is asking for Silva-Lamas to be penalized for an alleged failure of the Kentucky Department of Workers' Claims.

We note KRS 342.135 states as follows:

> **KRS 342.135 Notice, how served -- Notice to nonresident alien.**
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> Any notice required to be given under this chapter shall be considered properly given and served when deposited in the mail in a registered letter or package properly stamped and addressed to the person to whom notice is to be given at his last known address and in time to reach him in due time to act thereon. Notice may also be given and served like notices in civil actions. Any notice given and served as provided in this section to the consular representative of the nation of which any nonresident dependent of a

> deceased employee is a citizen or subject, or to the authorized agent or representative of any such official residing in this state, shall be deemed to have been properly given and served upon such dependent.

However, KRS 342.270 provides the following procedure for the filing of a claim:

> **KRS 342.270 Application for resolution of claim -- Joinder -- Assignment to administrative law judge -- Administrative regulations for procedures for resolution of claims.**
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> (1) If the parties fail to reach an agreement in regard to compensation under this chapter, either party may make written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. When the application is filed by the employee or during the pendency of that claim, he or she shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him or her. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.
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> (**2) Except with respect to claims for benefits by reason of coal workers' pneumoconiosis, the commissioner shall issue notice of the filing to all parties and shall promptly assign the claim to an administrative law judge.** The administrative law judge shall

> facilitate the exchange of information pertinent to the claim pursuant to administrative regulations promulgated by the commissioner. Within forty-five (45) days of the date of issuance of the notice required by this section, the employer or carrier shall file notice of claim denial or acceptance, setting forth specifically those material matters which are admitted, those which are denied, and the basis of any denial of the claim.
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> (3) Within one hundred twenty (120) days of July 14, 2000, the commissioner shall promulgate administrative regulations establishing procedures for the resolution of claims. The administrative regulations promulgated pursuant to the provisions of this subsection shall be effective on an emergency basis and be applied to all pending claims.
> (Emphasis added).

803 KAR 25:010 §3(2) outlines the procedure for service upon the parties once a claim is filed, as follows:

> (2) An application for resolution of claim shall be filed with sufficient copies for service on all parties. The executive director[1] shall make service by first class mail. Incomplete applications may be rejected and returned to the applicant. If the application is refiled in proper form within twenty (20) days of the date it was returned, the filing shall relate back to the date the application was first received by the executive director. Otherwise, the date of second receipt shall be the filing date.

[1] It is noted "executive director" and "commissioner" are used interchangeably.

We note the language in KRS 342.135 which requires notice be sent by registered letter; however, it does not specifically state this is required when filing a claim. KRS 342.270 specifically notes the claim shall be filed with the Kentucky Department of Workers' Claims, which will then serve it upon the parties. We do not believe the procedure set forth in 803 KAR 25:010 §3(2) conflicts with KRS 342.270.

We also note the UEF did not object to either the motion to join Lopez as a party, or the order entered by the ALJ on September 24, 2013 actually joining him as a party. The UEF first raised the issue of proper notice to Lopez in a response it filed on July 25, 2014 to Silva-Lamas' motion to submit the claim for decision on the record which he had filed on July 22, 2014. This was over ten months after Lopez had been joined as a party. At that time, the UEF reminded all involved that a BRC order had not been completed. The UEF listed "Jurisdiction over Luis Lopez" as a contested issue. Although not listed in the December 9, 2014 BRC order and memorandum, the UEF subsequently filed a motion to include this as an issue.

In support of its position, the UEF cites to Realty Improvement Co., Inc. v. Raley, 194 S.W.3d 818 (Ky. 2006). In that case, the Kentucky Supreme Court found the

employer's due process rights were not violated when it was assessed with a thirty percent safety penalty. There, the employer's address was improperly listed in the Form 101, and the notice was returned to the Kentucky Department of Workers' Claims as undeliverable. The employer subsequently entered an appearance and defended the claim. The Court upheld the ALJ's refusal to provide the employer additional time for introducing evidence.

The UEF next cites to the Uninsured Employers' Fund v. Brewster, 818 S.W.2d 602 (Ky. 1991). This case involved the process of appeal during the transition from the old system where the Board was the trier of fact rather than a reviewing body. Brewster subsequently served the employer through the Kentucky Secretary of State through the long arm statute. This is inapplicable to the case *sub judice* since Lopez was a resident of Kentucky at the time of the accident, and there has been no demonstration the long arm statute is applicable.

The next case cited is Akers v. Pike County Board of Education, 171 S.W.3d 740 (Ky. 2005). In that case, the claimant argued the employer failed to provide adequate notice when the Kentucky Department of Worker's Claims did not notify him of the two-year statute of limitations pursuant to KRS 342.040(1) by failing to send the "notice"

letter by registered mail pursuant to KRS 342.135. The Kentucky Supreme Court determined the Department of Workers' Claims had no obligation to do so. The Court determined the employer met its obligations when it notified the Kentucky Department of Workers' Claims it had terminated payment of temporary total disability benefits. Although the claimant asserted it did not receive notice, his testimony did not compel a contrary result.

The UEF next cites to Foremost Insurance Company v. Whitaker, 892 S.W.2d 607 (Ky. App. 1995). This case involved an attempt to set aside a default judgment in a civil case due to inadequate service from the Kentucky Secretary of State. This was not a workers' compensation claim, and involved service upon an out of state insurer, none of which are applicable here.

Finally, the UEF cites to the Natural Resources & Environmental Protection Cabinet v. Pinnacle Coal Corp., 729 S.W.2d 438 (Ky. 1987). This case involved an alleged conflict between KRS 224.083(1) governing hearings and notices of hearing in environmental cases, and the regulations implemented by the Natural Resources & Environmental Protection Cabinet. There the statute specifically stated service should be made on all parties, not their attorneys as noted in the regulation. Neither

that statute nor the administrative regulation have any bearing on this case.

Here, Silva-Lamas timely filed his claim against Lopez with the Kentucky Department of Workers' Claims. By doing so, he clearly met his statutory and regulatory requirements, as did the Pike County Board of Education in Akers, supra. Once the claim was filed, KRS 342.270 required the Commissioner to serve the parties. 803 KAR 25:010 §3(2) sets forth the procedure which must be followed.

Here, the UEF essentially requests Silva-Lamas be penalized for its perceived infraction of perfecting service by the Kentucky Department of Workers' Claims by lack of attempted service by registered mail. We note a workers' compensation injury claim consists of the filing with the Commissioner of the Kentucky Department of Workers' Claims a Form 101 application for adjustment of claim, Form 104 work history, Form 105 medical history, Form 106 medical authorization, medical report supporting the claim, and wage information, with sufficient copies for the Commissioner to serve all parties. As the ALJ determined, Silva-Lamas did what he was supposed to do. We note he had no obligation or requirement to serve this documentation directly to Lopez. We further note that while KRS 342.135 indicates the method

of service for notices, it makes no mention of the actual service of a claim filing.

We find 803 KAR 25:010 §3(2) does not conflict with either KRS 342.135 or KRS 342.270. Likewise, we determine the ALJ did not err in finding Silva-Lamas appropriately filed the claim, and his determination will not be reversed.

Accordingly, the Opinion and Order rendered February 9, 2015 by Hon. Thomas G. Polites, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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