Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 31, 2018
OPINION WITHDRAWN: September 11, 2018
OPINION RE-ENTERED: September 11, 2018

CLAIM NO. 201481777

JOY HELTON PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

NEWGISTICS,
KENTUCKY INSURANCE GUARANTY ASSOCIATION,
CORPORATE RESOURCE SERVICES,
UNINSURED EMPLOYERS FUND, AND
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
DISMISSING
AND REMANDING

* * * * * *

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

ALVEY, Chairman. Joy Helton ("Helton") appeals from the January 2, 2018 Interlocutory Opinion and Order, and the May 16, 2018 Order rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). In the January 2, 2018

opinion, the ALJ determined neither Newgistics, Inc./CT Corporation System ("Newgistics") nor the Kentucky Insurance Guaranty Association ("KIGA") are responsible for Helton's claim, and dismissed both as party defendants. In the May 16, 2018 order, the ALJ stated the findings in the January 2, 2018 opinion are final and appealable, and dismissed Helton's claim. Helton did not appeal from the June 8, 2018 Order on petition for reconsideration in her notice of appeal.

On appeal, Helton argues the ALJ misinterpreted KRS 342.610(2) and should have found Newgistics liable. Helton argues the ALJ erred in failing to hold KIGA liable pursuant to Chapter 342 since KRS 304.36-050(6)(a)(1) conflicts with the purpose of the Workers' Compensation Act. Helton argues KRS 304.36 violates the Privileges and Immunities clause of the United States Constitution. Despite the statement by the ALJ regarding finality, issues remain for determination. Therefore, the opinions and orders rendered January 2, 2018, May 16, 2018 and the June 8, 2018 are not final and appealable, and this appeal is dismissed.

Helton filed a Form 101 alleging she injured her right foot and back on May 2, 2014 while employed by Corporate Resource Services ("CRS"), a temporary employment agency. Helton identified CRS as the Defendant/Employer and Lumbermen's Underwriting Alliance ("LUA") as its workers' compensation insurer. In several subsequent orders, the ALJ joined the KIGA and Newgistics as parties to the claim. The claim was bifurcated to determine coverage and who is potentially responsible for Helton's alleged work injuries on August 29, 2017.

Helton testified by deposition on June 20, 2016, and at the hearing held November 1, 2017. At the hearing, the parties stipulated Helton sustained work

injuries while working at Newgistics located in Hebron, Kentucky. The parties also stipulated Newgistics had workers' compensation coverage through Chubb Insurance at the time of the injury. The parties additionally agreed both CRS and LUA became insolvent subsequent to the work injury.

At all relevant times, Helton resided in Hamilton, Ohio. Helton testified she called CRS after seeing an employment advertisement on Craig's List. Helton attended an interview at the CRS office located in Florence, Kentucky, and began working for them in March 2014. Helton was placed at Newgistics where she worked as a shipper/laborer from March 2014 through May 6, 2014. Helton testified that on May 2, 2014, she was working at Newgistics when she tripped over a rubber mat with her right foot. Helton treated with Dr. Matthew Connolly from September 2014 through January 2016 and Dr. Kelly (first name not provided) from November 2014 through April or May 2016. She began treating with Dr. Zeeshan Tayeb in May 2016. Helton confirmed CRS' insurer, LUA, paid her temporary total disability ("TTD") benefits from May 2014 through February 2016. Helton believes LUA paid for her medical expenses through and including the time treatment was rendered by Dr. Kelly. Medical expenses associated with treatment by Dr. Tayeb were submitted under her husband's health insurance policy. Helton confirmed she has not received any benefits from KIGA.

The May 23, 2016 Judgement, Decree and final Order of Liquidation was filed into evidence. The Cole County Missouri Circuit Court declared LUA insolvent and placed the insurer into liquidation. A liquidator was also appointed.

KIGA submitted documents filed by CRS with the Kentucky Secretary of State, including the May 2011 Certificate of Authority and its Annual reports from 2011, 2012 and 2013. Those documents reflect CRS was organized in Delaware on December 15, 2009, maintained its principal office in New York, and listed its registered agent in Kentucky.

CRS filed the July 26, 2016 letter it received from the executive director of KIGA. He explained Helton's claim was sent to KIGA for coverage consideration due to LUA's liquidation on May 23, 2016. The director stated the claim fell outside the KIGA's responsibility since its purpose is to assist Kentuckian's who have a claim against certain insolvent insurers. In this case, neither the injured worker or the employer/policyholder were residents of Kentucky, at the time of the insured event, as required by KRS 304.36 – 050(6)(a)(1). Therefore, the KIGA denied all responsibility relating to Helton's claim.

In the January 2, 2018 Interlocutory Opinion and Order, the ALJ stated as follows in determining neither Newgistics nor KIGA are responsible for Helton's s claim and dismissed both entities as party defendants:

> As indicated above, this claim has been bifurcated to first determine which, if any, party is responsible for payment of plaintiff's workers' compensation claim. Again, there is no issue as to whether plaintiff suffered an injury at work. There is also no question that plaintiff's employer, CRS, had secured workers[sic] compensation coverage through Lumbermen's. There is also no dispute that at the time of the injury and all times during her employment and her work at Newgistics, plaintiff was a resident of Ohio. All parties agree that the Kentucky Insurance Guaranty Association (KIGA), is a Kentucky statutory creation and the applicable statute defining its liability limits

coverage for insolvent carriers to claimants who are residents of Kentucky.

With these facts in mind, plaintiff presents an impassioned and novel theory of recovery, arguing her situation should be treated either as a contractor/ subcontractor situation such that Newgistics should have liability as an up the ladder employer under KRS 342.610; or that plaintiff was a leased employee and that the leasing entitity[sic], Newgistics, should be responsible because CRS did not maintain a policy of insurance that provided coverage throughout plaintiff's potential entitlement to him, and medical benefits under KRS 342.

However, there are simply insurmountable facts that prevent the defendant, Newgistics, or any other defendant other than CRS/Lumberman's from bearing any liability. First, despite plaintiff's arguments to the contrary, this is not a contractor/subcontractor or a leased employee situation. CRS is a provider of temporary workers to employers who need them. As a provider of temporary workers, CRS was required to secure workers[sic] compensation coverage for its temporary workers, including plaintiff. There is no dispute CRS fulfilled this obligation. The fact that that insurance company ultimately became insolvent, after plaintiff's date of injury and after paying some income and medical benefits does not change the fact that CRS met its obligation in procuring workers' compensation coverage with an entity licensed to do business in Kentucky. Therefore, even if this were considered a contractor/subcontractor situation, Newgistics would not have liability as an up the ladder employer because the primary "contractor," CRS, had valid workers' compensation insurance in effect at the time of injury.

Similarly, this is not a situation of a leased employee. As set forth in Kentucky Uninsured Employers Fund v. Hoskins, Ky., 449 S.W.3d 753 (2014), a leasing company provides administrative services, including workers' compensation coverage, payroll, benefits, etc. to other companies' existing workforces. In this case, CRS did not come in and take over all of Newgistics' administrative/personnel obligations for all of Newgistics' employees. Rather, it is[sic] simply

provided some temporary laborers, as did other temporary agencies. Therefore, this theory of recovery also cannot prevail.

Moreover, even if CRS were considered an employee leasing company, the result would not change because, again, it fulfilled its obligation of procuring valid workers[sic] compensation coverage which was in effect at the time of plaintiff's injury.

For these reasons, it is determined Newgistics is not responsible for payment of plaintiff's workers' compensation claim.

Alternatively, plaintiff argues KIGA should not be allowed to avoid liability simply because plaintiff lived a few miles north of the Ohio River at the time of her injury. She argues to do so would clearly thwart the purpose of KRS 342 and of KIGA. Plaintiff's arguments in this regard, as her other arguments addressed above, certainly strike a chord in that it does not make sense that a claimant with an otherwise compensable injury may have no source of recovery simply because the guarantee fund created to meet the obligations of insolvent insurance companies excludes non-Kentucky residents from coverage. However, as KIGA noted in its brief, KIGA is a statutory entity limited in the claims it is liable for and authorized to pay. It is only authorized to pay statutorily covered claims. One Beacon Insurance Co. v. KIGA, Ky. App., 336 S.W.3d 914 (2011). In this case, KRS 304.36-050(6)(a)1 states explicitly that a claimant seeking payment from KIGA must be a resident of Kentucky at the time of the insured event. Therefore, the statute specifically and absolutely precludes KIGA from being responsible for plaintiff's claim because she was an Ohio resident at the time of her work injury.

For these reasons, it is determined neither Newgistics nor KIGA are responsible for plaintiff's claim and they are hereby dismissed as party defendants.

Plaintiff may proceed with this litigation to seek an award of benefits which she can try to enforce against CRS and/or Lumberman's, which are the remaining responsible parties.

In a May 16, 2018 order, the ALJ stated the findings in the January 2, 2018 Opinion on Bifurcated Issues are final and appealable, and dismissed Helton's claim.

Helton filed a petition for reconsideration requesting a specific finding of fact as to whether a compensable work injury occurred and whether payment of compensation by an employer is proper. In an order rendered June 8, 2018, the ALJ sustained Helton's petition. Notwithstanding the fact CRS had declared bankruptcy and may be insolvent, the ALJ found Helton suffered a compensable injury for which CRS is liable for payment of medical and income benefits. However, the ALJ made no specific award of TTD benefits, PPD benefits, or medical benefits.

Because we conclude the ALJ's opinions and orders issued January 2, 2018, May 16, 2018 and the June 8, 2018 are not final and appealable, we dismiss this appeal.

803 KAR 25:010 Sec. 22 (2)(a) provides as follows:

> [w]ithin thirty (30) days of the date a final award, order, or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order, or decision may file a notice of appeal to the Workers' Compensation Board.

803 KAR 25:010 Sec. 22 (2)(b) defines a final award, order or decision as follows:

> "[a]s used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2)."

Civil Rule 54.02(1) and (2) states as follows:

> (1) When more than one claim for relief is presented in an action . . . the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.
>
> (2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

Hence, an order of an ALJ is appealable only if: 1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and, 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. Tube Turns Division vs. Logsdon, 677 S.W.2d 897 (Ky. App. 1984); *cf.* Searcy v. Three Point Coal Co., 280 Ky. 683, 134 S.W.2d 228 (1939); *and* Transit Authority of River City vs. Sailing, 774 S.W.2d 468 (Ky. App. 1980); *see also* Ramada Inn vs. Thomas, 892 S.W.2d 593 (Ky. 1995).

We first note throughout the course of this litigation, several entities were joined as party Defendants, including CRS, LUA, KIGA and Newgistics. The Uninsured Employers' Fund, the Florida Workers' Compensation Insurance Guaranty Association, the Ohio Bureau of Workers' Compensation, and the New

York Liquidation Bureau were also joined, but subsequently dismissed as party defendants prior to the January 2018 opinion.

A benefit review conference ("BRC") was held on August 29, 2017. The BRC order and memorandum stated, "Claim bifurcated to first decide coverage/ responsible party. Proof open up to 10-15-17." The ALJ scheduled a formal hearing, which was held on November 1, 2017. At the hearing, the ALJ noted the only issues to be decided were the bifurcated issues of coverage and responsible party. Thereafter, the ALJ rendered the "Interlocutory Opinion and Order" on January 2, 2018, finding neither Newgistics nor KIGA responsible for Helton's claim, and dismissing them as party defendants. The ALJ noted Helton "may proceed with this litigation to seek an award of benefits which she can try to enforce against CRS and/or [LUA], which are the remaining responsible parties." In the May 16, 2018 order, the ALJ rendered the findings contained in the January 2018 opinion final and appealable without making additional findings of fact and dismissed Helton's claim. In the June 8, 2018 Order on petition for reconsideration, the ALJ found Helton suffered a compensable injury for which her employer is liable for payment of medical and income benefits.

The ALJ only determined who he deemed was the responsible employer. No determination was made regarding Helton's entitlement to income or medical benefits, or any other remaining undecided issues. After reviewing the ALJ's January 2, 2018, May 16, 2018 and the June 8, 2018 opinions and orders, it is readily apparent they do not operate to terminate the action or finally decide all

outstanding issues thereby divesting the ALJ once and for all of the authority to decide the merits of the claim.

That said, Helton's appeal is hereby dismissed, and the claim is remanded to the ALJ to conduct all proceedings necessary for a final decision on all issues. Once the ALJ has issued a final determination regarding all issues, any aggrieved party may file an appeal.

Accordingly, the appeal seeking review of the decisions rendered January 2, 2018 and May 16, 2018 by Hon. Grant S. Roark, Administrative Law Judge is hereby **DISMISSED.** This claim is **REMANDED** for an additional determination as set forth above.

This opinion was reissued due to a typographical error on page 7 of the original opinion. 803 KAR 25:101 Section 21 has been changed to Section 22.

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN
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