# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: November 20, 2018**

CLAIM NO. 201701380

TYLER WHITE PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

EXTREME UNDERGROUND DRILLING;
UNINSURED EMPLOYERS' FUND;
AT&T; CT CORPORATION SYSTEM; and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**VACATING & REMANDING**

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

**ALVEY, Chairman.** Tyler White ("White") appeals from the August 23, 2018 Opinion and Order, and the September 10, 2018 Order denying his petition for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"), dismissing his claim in its entirety due to lack of territorial jurisdiction. On appeal,

White challenges this determination. For reasons not raised by White, we vacate and remand.

White filed a Form 101 on August 4, 2017, alleging he sustained multiple head injuries on August 2, 2016, while working for Extreme Underground Drilling, LLC ("Extreme"). At the time of the injury, White was working on a job for Extreme in Murfreesboro, Tennessee. In the Form 101, White indicated Extreme's business address is located in Albany, Kentucky. White also identified AM Trust North American ("AM Trust") as Extreme's workers' compensation insurer. The Commissioner of the Kentucky Department of Workers' Claims certified a workers' compensation policy was not in effect for Extreme in Kentucky on the date of injury. Subsequently, the Uninsured Employers' Fund ("UEF") and AT&T[1] were joined as party defendants. The claim was bifurcated for a determination regarding jurisdiction pursuant to KRS 342.670, and therefore, we will not summarize the medical evidence of record.

Counsel for AM Trust, the UEF, and Bellsouth entered notices of appearance and actively participated throughout the course of this claim. Extreme, *pro se*, did not participate in this claim other than its owner testifying by deposition in April 2018. Documents filed into the record establish Extreme submitted a "Petition for Benefit Determination" with the Tennessee Bureau of Workers' Compensation on August 18, 2017, for the same August 2, 2016 injury alleged in White's Kentucky claim. Those documents establish AM Trust paid medical expenses and temporary

[1] Throughout this claim, AT&T and Bellsouth Telecommunications, Inc. ("Bellsouth") have been used interchangeably. For sake of clarity, we will refer to the entity as Bellsouth.

total disability benefits pursuant to Tennessee workers' compensation law. Extreme is represented by counsel in the Tennessee claim, but not in the Kentucky claim.

White testified by deposition on October 17, 2017. White and Gary Wallace ("Wallace") are brothers-in-law and their families have lived on the same street in Albany, Kentucky, for over ten years. White worked for J3 Natural Resources, an oil company owned by Wallace, for approximately a year prior to May 2016. There, he drilled and performed service checks on oil wells in Kentucky. White testified he and Wallace began discussing the fiber optics business while drilling oil wells in Cumberland County, Kentucky in early 2016. Subsequently, Wallace formed Extreme, a land fiber optics business, and hired White in either April or May 2016 as a utility locator. White stated he completed an application for employment, took a drug test and was hired in Kentucky. White acknowledged none of the jobs Extreme performed were located in Kentucky. The majority of tools and equipment were provided by Extreme. White received paychecks and a W-2 from Extreme. White explained Extreme's address was the same as Wallace's residential address in Albany, Kentucky. He also testified Wallace's wife was the company secretary. White stated Albany, Kentucky is approximately seventeen miles from the Tennessee border.

White testified that the first project he worked on with Extreme was located in Atlanta, Georgia, and lasted approximately four to five months. The next project was located in Murfreesboro, Tennessee, and involved installing conduit. White believed Bellsouth hired Extreme as a subcontractor. White testified he and Wallace drove a vehicle leased by Extreme to a gas station in Kentucky to meet other

employees. From there, they drove to job sites in either Georgia or Tennessee and stayed at motels during the week while they worked. Equipment was kept either at the job site or at Wallace's residence in Kentucky. White insisted he occasionally performed repair work on Extreme's equipment or machinery in Kentucky. White estimated 90% of the work he performed for Extreme occurred outside the Commonwealth of Kentucky, while 10% occurred within. On August 2, 2016, while working in Murfreesboro, Tennessee for Extreme, White sustained facial injuries when a drill malfunctioned. White initially treated at an emergency room and subsequently underwent facial reconstruction surgery on August 12, 2016.

Wallace testified by deposition on April 17, 2018. He acknowledged litigation for workers' compensation is pending in both Kentucky and Tennessee, and that Extreme is represented by counsel only in the Tennessee litigation. Wallace testified he and two other partners organized Extreme in March 2016. The business involves the installation of underground fiber optic cable. Wallace acknowledged Extreme is registered as a limited liability corporation in Kentucky, and his residential address in Albany, Kentucky is listed as Extreme's principal office and registered agent. However, Wallace insisted Extreme's business address was later changed to a Clarksville, Tennessee address. Extreme did not rent or lease real property, nor perform any work in Kentucky. Extreme owned or leased several pieces of equipment, which were kept in Tennessee. Extreme also leased or owned several vehicles. Extreme had employees located in both Kentucky and Tennessee. Wallace indicated White had completed an employment application and returned it to Extreme in Kentucky. White was notified by phone that he had been hired.

Extreme first contracted with Google Fiber in April 2016, to perform work in Georgia. Extreme then contracted with Westek, Incorporated on May 17, 2016, to perform work solely in Murfreesboro, Tennessee. Extreme, including White, was working on the Murfreesboro job at the time of the August 2, 2016 work injury. Wallace testified that for this particular job, he and other Kentucky employees typically met at a gas station in Kentucky, approximately seven miles from the Tennessee border. From there, they drove ninety to one hundred miles to the hotel in Murfreesboro, where they stayed for the workweek. Extreme's employees from Tennessee met them at the hotel every morning for a "toolbox meeting" before heading to the worksite. Wallace testified he worked from the hotel after leaving the job site, and used the hotel's address for business mail. Wallace denied that White performed any repair work on Extreme's equipment in Kentucky. On the date of injury, Extreme had workers' compensation insurance coverage in Tennessee. Wallace acknowledged his wife performed secretarial work for Extreme from their residential home in Albany, Kentucky.

Subsequent to White's work injury, Extreme contracted with another company in September 2016 to perform work solely in Alabama. Wallace stated White quit working for Extreme in March 2017 for reasons unrelated to his work injury. Wallace no longer owns or operates Extreme.

The ALJ rendered an Opinion and Order on August 23, 2018 addressing the bifurcated issue of jurisdiction. The ALJ determined Kentucky does not have jurisdiction and dismissed White's claim in its entirety due to lack of territorial jurisdiction. The ALJ served copies of the Opinion to Hon. James Howes,

counsel for White, Hon. Mark Howard, counsel for AM Trust, Hon. Steven Armstrong, counsel for Bellsouth, and Hon. William Jones, counsel for the UEF. The ALJ did not indicate he served a copy of the Opinion to Extreme. White filed a petition for reconsideration requesting the ALJ provide additional findings of fact supporting his determination, and served copies to counsel for the UEF, AM Trust and Bellsouth. Both Bellsouth and AM Trust filed responses to White's petition, and served copies to all counsel, as well as to Extreme. The ALJ denied White's petition on September 10, 2018. He again served copies of the Order to counsel for White, the UEF, AM Trust and Bellsouth, but did not serve a copy to Extreme. White filed a Notice of Appeal, and served a copy on the ALJ, and counsel for AM Trust, Bellsouth, and the UEF. Although named as a party defendant, a copy of the Notice of Appeal was not sent to Extreme.

On appeal, White argues the ALJ erred in determining Kentucky does not have jurisdiction. That said, this Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Here, although it is a party to this claim, there is no record that Extreme was ever served a copy of either the August 23, 2018 Opinion and Order or the September 10, 2018 Order on petition for reconsideration. Extreme was identified as the Employer/ Defendant in White's Form 101. Although Extreme was not represented by counsel in the Kentucky claim, its owner testified by deposition in April 2018. KRS 342.275(2) requires an ALJ to render an award, order or decision within sixty days following the final hearing. The statute also requires the award, order or decision to

be filed with the records of proceedings, "and a copy of the award, order or decision shall immediately be sent to the parties in dispute." Similarly, 803 KAR 25.010 §3(9) provides, "Immediately upon entry of an order or opinion, a notice shall be served electronically on all parties. A paper form of the order or opinion shall be served upon those parties not utilizing LMS." It does not appear Extreme was served a copy of the Opinion or Order on petition for reconsideration. Extreme did not appeal from the Opinion and Order on petition for reconsideration, and did not file a respondent's brief before the Board.

It is well established in order for the requirements of due process of law to be satisfied, a litigant must be afforded procedural due process as well as substantial due process. Kentucky Alcoholic Beverage Control Board v. Jacobs, 269 S.W.2d 189 (Ky. 1954); Utility Regulatory Commission v. Kentucky Water Service Co., Inc., 642 S.W.2d 591 (Ky. 1982). We determine the ALJ's failure to serve copies of his decision and the order on reconsideration deprive Extreme of due process.

In Jones v. Davis, 246 Ky. 293, 54 S.W.2d 681 (1932), the Claimant was granted an award of benefits by the "old" Workmen's Compensation Board. A copy of the board's decision was not sent to either the claimant or his attorney. An affidavit from the claimant's attorney verified he had learned of the decision from a third party after the expiration of the seven-day time period allotted for requesting review by the entire board. The request for review was made within seven days of the date the Claimant learned his case had been decided. Because the Claimant's request for review was filed more than twenty days after the board's initial decision,

the employer argued that the decision was final and the appeal should be dismissed.

The Kentucky Court of Appeals disagreed and stated as follows:

> The original application of Jones was heard before a referee of the Workmen's Compensation Board, and after hearing the evidence offered by the parties, he undertook for the board to determine the dispute in a summary manner and otherwise comply with the requirements of section 4933, Ky. Statutes. The duties imposed upon the board by this section are aptly and concisely stated in its own language. It reads: 'The board, or any of its members, shall hear the parties at issue and their representatives and witnesses and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law and any other matters pertinent to the question at issue, shall be filed with the record of proceedings, and a copy of the award shall *immediately* be sent to the parties in dispute.' (Our italics).
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> It will be observed that this language requires of the board the performance of certain, definite, specific duties, i. e., (a) To determine the dispute in a summary manner; (b) make order or award, together with the finding of fact and rulings pertinent to the issue; (c) file same with the record of the proceedings; and (d) send immediately a copy of the award or order to the parties to the dispute. The clause of this section requiring the board to make, with its order or award, a finding of facts, has often been construed as mandatory. South Mountain Coal Co. v. Haddix, 213 Ky. 568, 281 S.W. 493; Stokes v. Black Hawk Coal Co.'s Receiver, 242 Ky. 849, 47 S.W.2d 740; Standard Elkhorn Coal Co. v. Royark, 243 Ky. 828, 50 S.W.2d 33. The requirements of section 4933, are, by the language of section 4934, carried into section 4934.
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> The clause requiring the board to send immediately a copy of the award or order to the parties to the dispute has not been heretofore presented and construed by this court; nor has the term 'rendition,' as it is used in section 4935. It is presumed in every case, unless the contrary affirmatively appears, that the board in the discharge of the duties prescribed by section 4933, Ky. Statutes, discharged them in the manner and form prescribed and

as directed by the provisions of this section. The word 'rendition,' as it is used in section 4935, is the performance by the board of the duties set forth in section 4933. A discharge thereof by the board, collectively or together, is a 'rendition' within the meaning of the term as it is used in section 4935, and not the mere act of preparing, dating, and signing of the award or order of the board. 'Rendition' is the act of rendering; to 'render' is to deliver; transmit; as to render a message; to state; deliver; as to render an account of money or actions; to render judgment; to render a bill; to furnish; as to render assistance, or as 'to render unto Caesar the things that are Caesar's.' Webster's New International Dictionary; Aetna Life Insurance Co. v. Hesser, 77 Iowa, 381, 42 N.W. 325, 4 L.R.A. 122, 14 Am. St. Rep. 297. If, as in this case, it is shown without dispute that no copy of the award was in fact sent by the board to the applicant or to his counsel, it should be deemed that one of the essential elements of 'rendition,' as this word is used in section 4935, was omitted by it. The right to a review by the full board as authorized by section 4934 is a valuable one, and the party entitled thereto cannot be deprived thereof by a failure of the board, through inadvertence, or otherwise, to observe and discharge its statutory duty to send a copy of the award or order to the party or his counsel as required by section 4933. No one of its statutory duties, as prescribed by this section, may be omitted or dispensed with by the board so as to deprive either party to the proceeding of his statutory right. The board is not required by the Statutes to hold a term, or to set apart a day, for the determination of the issues in the proceeding at or on which to make the award or order. Its discharge of the duties prescribed by section 4933 is without notice to, and in the absence of, the interested parties, and therefore the requirement that a copy of the award shall be sent immediately to the parties to the dispute is indispensable and wisely mandatory. It is the method provided by the act to afford due process to the parties to the dispute. It is essential to the validity of the award or order, and is one of the acts of the board necessary to constitute the rendition of the order or award as this term is used in section 4935.

Any other construction of sections 4933, 4934, and 4935 would place it within the power of the board, if it

> desired, or if it neglects so to discharge its statutory duty in this respect, to deprive the parties of their statutory right of making application for a hearing before the full board, or the filing of a petition for review by the circuit court, by merely refusing or failing to send copy of the award or order until it was too late for them to assert their statutory right, or too late to avail themselves thereof.
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> The affidavit of counsel was filed in the present case, showing the copy of the award was sent to a disinterested third party, and not to the applicant nor his counsel of record. It was delivered to the appellant's counsel by the third party, which, for the purpose of section 4933, served the purpose of its requirement. It and the application for review before the full board were filed within seven days after the copy of the award was sent by the third party to counsel of Jones and as was his imperative duty in order to entitle him to avail himself of the requirement of the Statutes in respect to immediately sending a copy of the award, and his so doing was both a waiver of the informality of the sending of the copy by the board and a compliance by him under the circumstances with section 4934, requiring the application for review before the full board to be made within seven days after the date of the award. The petition to the circuit court for review by it was filed within twenty days after the full board made its final award, made on an application for review of the referee's award.
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> Id. at 684, 685.

The language contained in the Act as it existed in 1932 required, "[t]he award, together with a statement of the findings of fact, rulings of law and any other matters pertinent to the question at issue, shall be filed with the record of proceedings, and a copy of the award shall *immediately* be sent to the parties in dispute," and is identical to current language contained in KRS 342.275(2). The only difference now is that ALJs are charged with this duty rather than the Board.

Based upon the foregoing, we vacate the ALJ's Opinion and Order on petition for reconsideration. We remand the claim to the ALJ with instructions to send copies of the decision and order on reconsideration to all parties, including Extreme, in accordance with KRS 342.275(2) and 803 KAR 25.010 §3(9). Until all parties have been afforded the opportunity to appeal the Opinion, Award and Order of the ALJ, we are unable to address the merits of this appeal. Any party aggrieved by the ALJ's decision or order on reconsideration may file a timely appeal within thirty (30) days after the finality of the ALJ's order certifying copies of the decision and order have been served on all parties.

Accordingly, the August 23, 2018 Opinion and Order, and the September 10, 2018 Order by Hon. Chris Davis, Administrative Law Judge, are hereby **VACATED** and **REMANDED** to the Administrative Law Judge for entry of an amended opinion in conformity with the views expressed herein.

ALL CONCUR.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:** **LMS**

HON JAMES D HOWES
5438 NEW CUT RD, STE 201
LOUISVILLE, KY 40214

**RESPONDENT:** **USPS**

EXTREME UNDERGROUND DRILLING
69 DALE HOLLOW MANOR
ALBANY, KY 42602

**COUNSEL:** **USPS**

HON KATHERINE BANKS
PO BOX 1350
PRESTONSBURG, KY 41653

**COUNSEL FOR RESPONDENT AM TRUST NORTH AMERICA:** **LMS**

HON MARK W HOWARD
51 CAVALIER BLVD, STE 260
FLORENCE, KY 41042

**COUNSEL FOR RESPONDENT AT&T/BELLSOUTH:** **LMS**

HON STEVEN R ARMSTRONG
138 SOUTH THIRD STREET
LOUISVILLE, KY 40202

**COUNSEL FOR RESPONDENT UEF:** **LMS**

HON WILLIAM H JONES
UNINSURED EMPLOYERS FUND
1024 CAPITAL CENTER DR, STE 200
FRANKFORT, KY 40601

**ADMINISTRATIVE LAW JUDGE:** **LMS**

HON CHRIS DAVIS
657 CHAMBERLIN AVE
FRANKFORT, KY 40601