State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 16, 2024 CV-23-0355

In the Matter of the Claim of
FRANKI M. EVANS,
Claimant,
v

NORTHEAST LOGISTICS, INC.,
et al.,
Appellants, MEMORANDUM AND ORDER
and

ANY PART AUTO PARTS OF
MEDFORD et al.,
Respondents.

WORKERS' COMPENSATION
BOARD,
Respondent.

Calendar Date: April 24, 2024

Before: Egan Jr., J.P., Aarons, Lynch, Reynolds Fitzgerald and Powers, JJ.

Goldberg Segalla, Rochester (*Lauren E. Palermo* of counsel), for appellants.

Vecchione, Vecchione, Connors & Cano, LLP, Garden City Park (*Michael F. Vecchione* of counsel), for Any Part Auto Parts of Medford and another, respondents.

Reynolds Fitzgerald, J.

Appeal from a decision of the Workers' Compensation Board, filed January 23, 2023, which ruled, among other things, that the application for review filed by Northeast Logistics, Inc. and its workers' compensation carrier failed to comply with the service requirements of 12 NYCRR 300.13 (b) and denied review of a decision by the Workers' Compensation Law Judge.

Claimant, an automotive parts delivery driver, sustained various injuries in May 2019 when the motor vehicle she was operating was struck by a motorcycle. The incident occurred on claimant's first day of work, and claimant identified her employer as Any Part Auto Parts of Medford (hereinafter APA). APA and its workers' compensation carrier (Charter Oak Fire Insurance Company) controverted the claim, and a subsequent investigation by the Workers' Compensation Board's compliance unit concluded that claimant's actual employer was Northeast Logistics, Inc., doing business as Diligent Delivery Systems. Northeast and its workers' compensation carrier (hereinafter collectively referred to as the carrier) also controverted the claim – contending, among other things, that claimant was an independent contractor and raising the issue of other potential employers and responsible carriers. In March 2020, a Workers' Compensation Law Judge (hereinafter WCLJ) found prima facie medical evidence for various injuries to claimant and placed additional parties on notice.

Hearings were held on multiple dates between March 2020 and April 2022. By decision filed May 3, 2022, the WCLJ found, among other things, that a general-special employment relationship existed at the time of the accident – with Northeast acting as claimant's general employer and APA acting as claimant's special employer. The WCLJ found each entity to be 50% liable for claimant's claim and further noted that Chrono Realm, LLC had acted as an agent for Northeast.[1] Both the WCLJ's written decision and the April 2022 hearing transcript reflected that no parties would be discharged until "after the expected appeals [had] expired." Despite those statements, and for reasons not apparent from the record, the Uninsured Employer's Fund (hereinafter UEF), which, beginning in September 2020, had been placed on notice and appeared at each of the scheduled hearings, was not listed as an interested party on the WCLJ's decision.

[1] It appears that Chrono Realm did not have workers' compensation coverage at the time of claimant's accident.

The carrier and APA/Charter Oak separately filed applications for Board review, and claimant filed a timely rebuttal thereto. Chrono Realm and UEF also filed rebuttals – albeit beyond the time frame provided in 12 NYCRR 300.13 (c) – with UEF requesting that the applications for review be denied because it was a necessary party and had not been served with such applications. The Board, among other things, denied the respective requests for review of the WCLJ's decision based upon the failure to serve UEF with the application for review. This appeal by the carrier ensued.[2]

"Under the Board's rules, an application for Board review of a decision by a WCLJ shall be filed with the Board within 30 days after notice of filing of the decision of the WCLJ together with proof of service upon all other parties in interest" (*Matter of Martinez v Eastchester Fire Dist.*, 222 AD3d 1139, 1140 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; *see Matter of Barry v Verizon N.Y. Inc.*, 197 AD3d 1421, 1422 [3d Dept 2021]; 12 NYCRR 300.13 [b] [2] [iv]; [3] [i]). Necessary parties of interest include, as relevant here, UEF (*see Matter of Barry v Verizon N.Y. Inc.*, 197 AD3d at 1422; *Matter of Morgan v DR2 & Co. LLC*, 189 AD3d 1828, 1830 [3d Dept 2020]; 12 NYCRR 300.13 [a] [4]). Consistent with the provisions of 12 NYCRR 300.13 (b) (2) (iv), the "[f]ailure to properly serve a necessary party shall be deemed defective service and the application [for Board review] *may* be rejected by the Board" (emphasis added) (*see Matter of Barry v Verizon N.Y. Inc.*, 197 AD3d at 1422; *Matter of Morgan v DR2 & Co. LLC*, 189 AD3d at 1830).

Preliminarily, we agree with the Board that Workers' Compensation Law § 23-a is of no aid to the carrier here, as the cited statute addresses technical defects in the contents of applications for Board review rather than the associated service requirements. That said, we also agree with the carrier that the decision in *Matter of Vukel v New York Water & Sewer Mains* (94 NY2d 494 [2000]) is not dispositive. To our analysis, *Vukel* is distinguishable in two respects. First, the employer and carrier in *Vukel* did not receive notice of the underlying application for Board review, thereby prejudicing their interests (*see id.* at 497-498). Here, although UEF asserted that it had not been *served* with the carrier's application for Board review, the fact that UEF filed a rebuttal thereto, wherein it asserted the service defect, necessarily indicates that UEF was *on notice* of the carrier's request for administrative review (*compare Matter of Dow v Silver Constr. Corp.*, 110 AD3d 1154, 1155 [3d Dept 2013], *with Matter of Szewczuk v ETS Contr., Inc.*, 199 AD3d 1209, 1210 [3d Dept 2021]). As UEF was on notice of the carrier's application, filed a

[2] Although APA and Charter Oak filed a responding brief in support of the carrier's arguments, they did not appeal from the Board's decision.

rebuttal (albeit untimely) and had consistently attended the underlying hearings, we are hard pressed to discern how UEF would be prejudiced by the Board's consideration of the carrier's application on the merits (*see generally Matter of Greenough v Niagara Mohawk Power Corp.*, 45 AD3d 1116, 1117 [3d Dept 2007]). More to the point, although *Vukel* considered – but did not resolve – the issue of whether the Board had the authority to suspend its own rules and regulations regarding notice requirements (*see Matter of Vukel v New York Water & Sewer Mains*, 94 NY2d at 498), no such conundrum is presented here. UEF did receive notice of the carrier's application (*compare Matter of Harrell v Blue Diamond Sheet Metal*, 146 AD3d 1189, 1190 [3d Dept 2017], *lv denied* 29 NY3d 911 [2017]), and the Board's regulations *permit* but do not *require* the Board to reject an application for Board review based upon defective service (*see Matter of Sanchez v US Concrete*, 194 AD3d 1287, 1290 [3d Dept 2021]; 12 NYCRR 300.13 [b] [2] [iv]; [4] [iv]).

As a final manner, it bears repeating that the carrier's failure to serve UEF with the application for Board review seems to have been occasioned by the inexplicable omission of UEF from the list of necessary parties contained on the WCLJ's decision (*compare Matter of Bowersox v Prime Time Express, Inc.*, 62 AD3d 1099, 1100 [3d Dept 2009]). Considering these circumstances, we are persuaded that penalizing the carrier for failing to serve an entity that did not appear on the face of the WCLJ's decision constitutes an abuse of discretion. Accordingly, the Board's decision is reversed, and this matter is remitted to the Board for consideration of the carrier's application for review.

Egan Jr., J.P., Aarons, Lynch and Powers, JJ., concur.

ORDERED that the decision is reversed, without costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision.

ENTER:

Robert D. Mayberger
Clerk of the Court