

Commonwealth Of Kentucky

Court Of Appeals

No. 1998-CA-000518-WC

GARY RAY COBB

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-08793

McCOMB SUPPLY COMPANY;
SPECIAL FUND;
HON. SHEILA LOWTHER,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GARDNER, MILLER, and SCHRODER, Judges.

MILLER, JUDGE. Gary Ray Cobb (Cobb) asks us to review a January 30, 1998 opinion of the Workers' Compensation Board (board). Ky. Rev. Stat. (KRS) 342.290. We affirm.

On December 7, 1994, Cobb suffered a work-related injury while in the employ of McComb Supply Company (McComb). He completed work that day but was absent the following day. On December 22, 1994, Cobb sought treatment for his injury with Dr. Fazal Ahmad. Pursuant to an excuse from Dr. Ahmad, he did not work on December 22nd or 23rd. McComb voluntarily paid Cobb his

usual salary for the days he missed work. After continuing with lighter duties for several weeks, he eventually returned to his regular tasks. Cobb continued to work for McComb until July 1996. On December 10, 1996, he filed a claim for workers' compensation benefits.

In an Opinion and Order entered August 22, 1997, the administrative law judge (ALJ) dismissed Cobb's claim as barred by the statute of limitations. Cobb appealed to the board, which, in turn, affirmed the ALJ's decision. This appeal followed.

Cobb maintains that the ALJ erred in holding that the statute of limitations had run on his claim for benefits. Specifically, he argues that the wages he received for the three days he was absent from work in December 1994 constituted income benefits as found in KRS 342.185(1). As such, he claims the two-year limitation prescribed by KRS 342.185(1) and KRS 342.270(1) was tolled until at least December 22, 1996. We disagree.

A claimant in a workers' compensation case has the burden of proof. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). When the claimant fails, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984).

To prevail, it was incumbent upon Cobb to prove that both he and McComb understood that the payments in question were made in lieu of workers' compensation income benefits. See Moore v. Seagraves Coal Company, 441 S.W.2d 771 (1969). We find no evidence to support same. Charles Smith, president of McComb,

testified that the company has a policy of paying employees their regular salary if they require short periods of time off work due to illness, injury, or family problems. He stated that Cobb was paid pursuant to this policy for the days he missed in December, 1994. Mr. Smith denied that it was intended or inferred that the payments were to be made in lieu of income benefits. Cobb testified that he did not receive benefits from McComb for the days missed but "just got paid." He did not indicate that he believed these payments were in lieu of income benefits. In sum, the evidence does not compel a different result than that reached by the ALJ.

We reject Cobb's argument regarding McComb's failure to file an SF-3A form with the Workers' Compensation Board as the issue was not raised before the ALJ. See Port v. Commonwealth, Ky., 906 S.W.2d 327 (1995); Commonwealth v. Duke, Ky., 750 S.W.2d 432 (1988); Daugherty v. Commonwealth, Ky., 572 S.W.2d 861 (1978).

Having reviewed the record and opinions of the ALJ and the board, we are of the opinion that the board committed no error in construing the law or assessing the evidence. See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth A. Buckle
Hyden, KY

BRIEF FOR APPELLEE/McCOMB:

Thomas L. Ferreri
Cynthia B. Pectol

Lexington, KY

BRIEF FOR APPELLEE/FUND:

Benjamin C. Johnson
Louisville, KY