RENDERED: NOVEMBER 30, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001066-WC

WILLIE COUCH — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-00-00706

H. GRAU & SONS, INC.;
HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

BARBER, JUDGE: This is an appeal from an opinion of the Workers' Compensation Board, affirming the dismissal of this claim by the ALJ on the ground that it is barred by the statute of limitations. Finding no error, we affirm.

The Appellant is Willie Couch ("Couch"). On June 9, 2000, Couch filed a Form 101 with the Department of Workers' Claims, alleging a September 13, 1996 injury to his right shoulder while working for the Appellee, H. Grau & Sons ("the employer"). KRS 342.185 provides that a claim must be filed

within two years after the date of the accident. The statute further provides that "[i]f payment of income benefits have been made, the filing of an application for adjustment of claim . . . shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the accident whichever is later."

Couch did not miss any time from work immediately following the injury. He was subsequently off work for his shoulder a total of three days — two days in July 1997 and one in August 1998. Couch testified that he took the time off as personal days. No temporary total disability benefits were paid. In July 1998, before the statute ran, Couch called the insurance company because his shoulder was not getting any better. Couch claims that the adjuster led him to believe that his case would be "reopened" and approved his seeing a physician. The adjuster also approved an MRI and physical therapy. Following therapy, Couch returned to the physician. Upon receipt of the bill, Couch contacted the adjuster and was informed that the statute of limitations had run on his claim. Couch emphasizes that he has less than a sixth-grade education and is a long-term employee.

The employer explains that Couch missed no time from work immediately following the injury. He was seen at St. Luke Hospital the morning after the injury, a Saturday, and returned to work the following Monday, with a helper and his arm in a sling. Couch wore the sling for eight to ten days. The employer notes that Couch sought no further medical treatment for approximately a year and nine months after the injury. The three

days Couch was off work was not at a doctor's direction; further, Couch did not advise the adjuster or his employer that he was off work due to a work-related injury. According to the employer, Couch testified that no promises were made to him by the adjuster about his claim. The employer maintains that despite his limited educational background, Couch was not a stranger to the workers' compensation process having settled two prior claims.

The ALJ dismissed the claim as time barred. The Board affirmed. On appeal to this Court, Couch raises four issues. He contends that: (1) the claim is not barred because the insurance carrier did not file a "first report of accident" or an SF3A to trigger the "statute of limitations letter" to be sent by the Department of Workers' Claims advising that he had two years to file his claim; (2) the insurance carrier is estopped from relying on the statute of limitations because "it took advantage" of Couch; (3) the filing of a petition for reconsideration to bring the estoppel issue to the ALJ's attention is not mandatory; and (4) the payment of medical bills tolled the statute of limitations.

The unanimous opinion of the Workers' Compensation Board contains a thorough discussion of the applicable law, as set forth below:

> On appeal, Couch first argues his claim is not barred by the statute of limitations because Grau did not file a first report of the accident but thereafter paid voluntary benefits by way of salary in lieu of TTD. Couch argues that after he was injured he was required to wear a sling and even though he reported to work, he could not perform his regular duties without the assistance of a helper that was voluntarily provided by Grau.

Couch contends Grau acted in contradiction of KRS 342.038 and 342.040 and as such, the statute of limitations in this claim was tolled.

KRS 342.038(1) provides in pertinent part,

> [w]ithin one week after the occurrence and and knowledge, as provided in KRS 432.185 to 342.200, of an injury to an employee causing his absence from work for more than one (1) day, a report thereof shall be made to the department in the manner directed by the commissioner through administrative regulations.

KRS 342.040(1) provides in part:

> no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability . . . . If the employer's insurance carrier or other party responsible for the payment of workers' compensation benefits should terminate or fail to make payments when due, that party shall notify the commissioner of the termination or failure to make payments and the commissioner shall, in writing, advise the employee . . . of right to prosecute a claim under this chapter.

Couch relies on H.E. Neumann Co. v. Lee, Ky., 975 S.W.2d 917 (1998), wherein the court stated:

> The purpose of the above referenced statues is to advise an injured worker, in writing, of his right to prosecute his claim, and the time frame in which to do so, and to provide prompt resolution of asserted work-related injury claims. Thus, contrary to the employer's assertion, the intended purpose of the statute would not imply a different standard based on whether the employer initially paid voluntary benefits and then terminated them, or never paid voluntary benefits, as either way the worker would be entitled to the intended benefit of the statutorily mandated written notice.

Id. at 920.

We believe Couch's reliance on the holding in Neumann and the mandates contained in the above referenced statutes is misplaced. In the instant case, Couch missed absolutely no work subsequent to his September 1996 injury. The evidence is uncontroverted that he missed two days of work in July 1997 and one day in August 1998, however, he never informed his employer that this was the result of a work-related injury. In fact, Couch testified that he either took vacation or sick time to attend to his medical needs. During this entire period, he received his regular salary.

Generally, when wages are continued after a work-related injury such payments may be considered "in lieu of" compensation benefits if intended by the parties. As such, those payments of course would extend the statute of limitations for an additional two-year period after the last voluntary payment. See KRS 342.185; Kentucky West Virginia Gas Co. v. Spurlock, Ky., 415 S.W.2d 849 (1967); Kentucky Safety Council v. Hack, Ky., 414 S.W.2d 877 (1967). Both of the above cited cases involve salary continuation of claimant's who were "off work." We have been directed to no authority, nor can we find any, which stands for proposition that a worker who after an injury misses no work but continues to receive his regular salary, even though he may be working with restrictions, could be deemed as receiving that pay in lieu of "statutory benefits."

In H.E. Neumann Co. v. Lee, supra, the claimant was absent from work for a sufficient period of time to entitle him to TTD benefits and the employer was required to report the injury even though it had not made TTD payments. Couch was simply not absent from work for more than one day after his injury, nor did he notify Grau that his three days of nonsequential absenteeism which occurred more than a year later were in any way connected to his shoulder injury. The requirement of employer notice was never triggered and the commissioner was therefore not under the resultant duty to advise Couch of his right to prosecute a claim. Newburg v. Hudson, Ky., 838 S.W.2d 384 (1982). As

Couch's injury occurred on September 13, 1996, his claim should have been filed no later than two years subsequent to that date, and as such we can find no error on the part of the ALJ.

Couch secondly argues that the insurance company should be estopped from relying on the statute of limitations because it took advantage of him. This issue was presented to the ALJ; however, he did not address it in his decision. Unfortunately, Couch did not request additional findings via a petition for reconsideration. This issue is not preserved for purposes of appellate review. See Easton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985); Hall's Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000). We would note however, that even if we were to rely on the uncontradicted testimony of Couch, he is not entitled to the relief sought as a matter of law. Couch testified that in July 1998 he phoned a claims adjuster to apparently seek authorization for an MRI. He stated the claims adjuster told him that his case had been closed but that she would reopen it. The diagnostic testing and attendant physicians' fees were paid. Couch again sought advanced authorization for physical therapy, and the fees associated with that treatment were again paid. In October 1998, while inquiring as to the nonpayment of a doctor's bill, he was informed by the adjuster that the statute of limitations had run. Those facts, standing alone, as a matter of law will not support an assertion that the insurance carrier engaged in false representation or fraudulent concealment which would extend the statute of limitations. See Emmert v. Jefferson County Board of Education, Ky., 479 S.W.2d 621 (1972); Logan Manufacturing Co. v. Bradley, Ky., 476 S.W.2d 819 (1972); Moore v. Seagraves Coal Co., Ky., 441 S.W.2d 771 (1969). In the instant case, there is no substantive evidence that any assurances were made to Couch by either the employer or the insurance carrier that his claims would be paid. Further, there is no authority that an insurance carrier must notify a potentially adverse party that his right to file a claim is about to expire.

Finally, Couch argues that payment of his medical expenses in July and August 1998 for his 1996 injury tolled the statute of limitations. The ALJ did not address this argument, and as previously noted no petition for reconsideration was filed. Again, we find no merit as a matter of law in Couch's assertion. As set out above, KRS 342.185 refers to payment of "income benefits." KRS 342.0011(12) defines income benefits as "payments made under the provisions of this chapter to the disabled worker or his dependents in case of death, excluding medical and related benefits." (Emphasis added.) Further, the courts have specifically held that payment of medical expenses does not constitute voluntary payment of compensation. Emmert v. Jefferson County Board of Education, supra.

For the foregoing reasons, the decision of the ALJ is **AFFIRMED.**

We concur in the Board's reasoning and affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Bernard J. Blau
Jolly, Blau, Kriege & Turner
Cold Springs, Kentucky

BRIEF FOR APPELLEE:

George T. Kitchen, III
Boehl, Stopher & Graves
Louisville, Kentucky