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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-002299-WC

KENTUCKY CONTAINER SERVICES, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-84520

KENNETH ASHBROOK;
HON. RICHARD JOINER,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

KELLER, JUDGE: Kentucky Container Services, Inc. (Kentucky Container) appeals from the Administrative Law Judge's (ALJ) opinion finding that the statute of limitations was tolled by Kentucky Container's failure to comply with the reporting requirements of

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 11-(5)(b) of the Kentucky Constitution and KRS 21.580.

KRS 342.040(1). Kentucky Container also alleges error in the ALJ's application of and analysis of the theory of equitable estoppel. A divided Workers' Compensation Board affirmed the ALJ and we, likewise, affirm.

FACTS

This claim was before the ALJ for determination of Kenneth Ashbrook's entitlement to benefits for injuries that occurred on April 15, 1998, September 23, 2002, November 15, 2002, and March 25, 2004. Only the 1998 injury is at issue on appeal; therefore, we will only summarize the facts as they apply to that injury and the issues raised by Kentucky Container.

Ashbrook suffered a work-related injury to his right shoulder on April 15, 1998, and Kentucky Container paid temporary total disability (TTD) benefits to Ashbrook from April 16, 1998, through September 17, 1998. On November 3, 1998, Ashbrook filed a *pro se* medical fee dispute seeking payment for medical expenses associated with a cardiac evaluation that he underwent prior to his shoulder surgery. An Arbitrator found that Ashbrook had failed to meet his burden of proof that the contested treatment was related to the work injury and therefore dismissed the medical fee dispute. Ashbrook did not file anything else with the Office of Workers' Claims until June 14, 2004, when he filed an Application for Resolution of Injury Claim (Form 101) for injuries to his left shoulder and left knee that occurred in 2002. Pursuant to a joint motion of the parties, the ALJ placed that claim in abeyance, where it remained until February 7, 2005. On March 9, 2005, Ashbrook filed a Form 101 alleging an injury to

his right shoulder that occurred at work on April 15, 1998, and for a subsequent injury to his right shoulder that occurred during physical therapy on March 25, 2004. Ashbrook's claims were consolidated on March 21, 2005.

After it stopped making voluntary income benefit payments for the 1998 injury, the carrier for Kentucky Container electronically filed a document with the then Department of Workers' Claims (hereinafter referred to by its current name, the Office of Workers' Claims and abbreviated as the OWC) indicating that income benefits had been terminated. However, the OWC did not send the statutorily mandated notice (the limitations letter) to Ashbrook advising him of the period within which he was required to file his claim. It is this failure by the OWC to send the limitations letter that gives rise to this appeal. We set forth below a summary of the evidence relevant to that issue.

Ashbrook testified that he injured his right shoulder on April 15, 1998, when he fell. Sometime following the injury, Ashbrook underwent surgery and, following post-surgery physical therapy, he returned to work without restrictions. Ashbrook could not recall filing a medical fee dispute; however, he did not dispute having done so. In March of 2004, Ashbrook underwent physical therapy to lose weight prior to undergoing knee surgery. While lifting weights in therapy, Ashbrook re-injured his right shoulder.

After the 1998 injury, Ashbrook received TTD benefits while he was off work. He did not recall receiving a letter from the OWC notifying him of his statute of limitations, and he did not become aware that he had only two years to file a formal claim

for benefits for the 1998 injury until he spoke with the attorney representing him for his 2002 injuries.

Debra Wingate, the Division Director for Information and Research at the OWC, testified that workers' compensation carriers or other vendors (trading partners) are required by statute to submit various reports to the OWC. One such report is a Subsequent Report of Injury, which must be submitted when a carrier stops making voluntary income benefit payments to an injured employee. If such a Subsequent Report of Injury is correctly submitted, the OWC generates and mails to the injured employee the limitations letter notifying the employee of his statute of limitations. *See* KRS 342.040(1).

Prior to January 1, 1996, trading partners filed paper reports; however, on January 1, 1996, the OWC switched to electronic filing. When that change occurred, trading partners were required to complete a trading partner profile and to participate in a testing process to verify that they could successfully submit information to and receive information from the OWC electronically. The testing process involved the submission of "test files" reflecting a number of different scenarios based on Kentucky filing requirements, and the OWC would not permit a trading partner to submit data electronically until the testing process had been successfully completed.

When filing electronically, a trading partner must use specific maintenance type codes (maintenance codes) and follow standards set by the International Association of Industrial Accident Boards and Commissions (IAIABC) in its electronic filing manual

(IAIABC manual). Trading partners could obtain the maintenance codes from an Event Table on the OWC website; however, trading partners were required to obtain the IAIABC manual from that association. Wingate believes that trading partners were verbally advised of the information on the OWC's website during the testing process; however, she could not state whether that information was mailed or otherwise distributed to the trading partners.

The OWC and trading partners experienced several problems when making the transition from paper to electronic filing. The problem relevant to this case involves two maintenance codes, FN and S1. The S1 maintenance code indicates that the carrier has suspended voluntary payment of income benefits. The FN maintenance code indicates that the carrier does not anticipate that it will be required to pay any additional benefits to or on behalf of the injured employee. Because of the ability of an injured employee to reopen his claim and the ongoing obligation to pay medical expenses, the FN maintenance code is essentially meaningless in Kentucky and does not trigger any response by the OWC.[2] The S1 maintenance code, however, acts as a trigger for the OWC to issue the limitations letter. The Event Table on the OWC website clearly states that the S1 maintenance code will trigger the OWC to generate and send the limitations letter and that the FN maintenance code will not do so. When the carrier terminated Ashbrook's temporary income benefits, its trading partner (Midwestern Insurance

[2] Wingate testified that the FN maintenance code, while meaningless to the OWC, is not an "improper" code that would raise any questions at the OWC. Wingate believes that the FN maintenance code is used by some trading partners in order to satisfy their own internal procedures.

Alliance (Midwestern)) electronically filed a Subsequent Report of Injury notifying the OWC of that fact. Unfortunately, Midwestern used the FN maintenance code, not the S1 maintenance code. Therefore, the OWC did not generate and send the limitations letter to Ashbrook.

Wingate testified that a number of trading partners were using the FN maintenance code rather than the S1 maintenance code to advise the OWC that income benefits had been terminated. When personnel at the OWC became aware of this problem, the OWC sent a letter to the trading partners advising them to use the S1 maintenance code rather than the FN maintenance code. However, Wingate testified that documentation at the OWC indicated that the letter had not been sent to Midwestern. Wingate did send a letter to Midwestern identifying a number of files with data problems; however, Ashbrook's file was not among those identified.

Finally, Wingate testified that she did not have any documentation indicating that Midwestern had been specifically notified that the FN maintenance code would not result in the generation of the statute of limitations letter, that the S1 maintenance code should be used for that purpose, or that the Event Table could be found on the OWC website. However, Wingate believes that Midwestern should have been aware of the significance of the S1 maintenance code because of the testing it completed.

Kathy New, manager of the claims department at Midwestern, testified that Midwestern is a managing general agent for Clarendon National Insurance Company

(Clarendon). As claims manager, one of New's responsibilities is to verify that information is properly submitted to the OWC on behalf of Clarendon.

When the OWC changed to electronic filing, the OWC notified Midwestern that it was to use the instructions in the IAIABC manual. The IAIABC manual contains various maintenance codes, one of which is FN. New stated that the definition she had for FN was "notice of final TTD payment."

New noted that the regulations provide that carriers cannot electronically file information with the OWC directly. Carriers must file the information with a data collection agent or a value added network designated by the OWC. The data collection agent or value added network will then transmit the information to the OWC.

During the hearing, New reviewed a letter from the OWC advising trading partners to use the S1 code rather than the FN code in order to trigger the OWC's obligation to generate and send the limitations letter to injured workers. However, New testified that she had not previously received the letter, and she noted that neither Midwestern, Clarendon, nor Midwestern's data collection agent/value added network were on the list of recipients of that letter. Furthermore, New testified that, between 1996 and 2000, the OWC did not advise New that she could obtain an Event Table from the OWC website or that the code system on the OWC's website differed from the IAIABC manual code system. The first notice New received from the OWC that the maintenance code S1 was required to trigger the statute of limitations letter was in 2000 or 2001. New

was not aware that an FN maintenance code would not cause the OWC to generate and send the limitations letter until sometime in 2000 or 2001.

New testified that Midwestern forwarded a Subsequent Report of Injury which was submitted to the OWC on December 29, 1999. That Subsequent Report of Injury shows the date of termination of voluntary income benefits and the date Ashbrook returned to work but contains an FN maintenance code. Although she was advised of the problem with the FN maintenance code in 2000 or 2001, New and Midwestern did not re-submit a Subsequent Report of Injury for Ashbrook with the correct S1 maintenance code.

Based on the above evidence, the ALJ found that, although Midwestern did send some notice of cancellation of TTD benefits to the OWC, it sent defective notice. Because of that defective notice, the OWC did not send the limitations letter to Ashbrook, thus tolling the statute of limitations. In doing so, the ALJ relied on *Billy Baker Painting v. Barry*, 179 S.W.3d 860 (Ky. 2005).

The majority of the Board found that, even if there were no fault on the part of the employer, it "must bear the brunt of the consequences" of the OWC's failure to send the limitations letter. In doing so, the Board noted its previous opinion in *West Kentucky Specialties v. Kent Price*, Claim No. 97-74984 (rendered September 4, 2002), wherein it found that the statute of limitations was properly tolled when the failure to send the limitations letter was entirely the fault of the OWC. In his dissent, Board Member Stanley stated that it appeared that the ALJ had not taken into consideration any

of the equities favoring the employer, specifically mentioning the time that had passed between Ashbrook's injury and when he filed his claim. Therefore, Board Member Stanley stated that this claim should be remanded to the ALJ so that the ALJ could examine and weigh the equities between the parties before deciding if the statute of limitations had been tolled.

STANDARD OF REVIEW

Kentucky Container has raised two issues on appeal, whether the ALJ correctly applied KRS 342.040(1) to the facts and whether the ALJ correctly weighed the equities in finding for Ashbrook. The construction and application of a statute is a question of law and is subject to *de novo* review. *Bob Hook Chevrolet Isuzu, Inc. v. Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998). *See also Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991); *Brown v. YWCA*, 729 S.W.2d 190, 192 (Ky.App. 1987). Whether the ALJ correctly weighed the equities is a mixed question of law (i.e., whether an equitable remedy applies) and fact (i.e., whether the ALJ properly considered the equities.) When there are mixed questions of fact and law, we have greater latitude in determining if the underlying decision is supported by probative evidence. *Purchase Transportation Services v. Estate of Wilson*, 39 S.W.3d 816, 817-18 (Ky. 2001); *Garland,* 805 S.W.2d at 117. However, we are constrained to defer to the ALJ on all findings of fact that are supported by evidence of substance. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). With this

background, we will first review Kentucky Container's argument that the ALJ incorrectly applied KRS 342.040(1).

APPLICATION OF KRS 342.040(1)

Kentucky Container argues that it strictly complied with the requirements of KRS 342.040(1) and that Ashbrook's claim should have been dismissed as having been filed outside the statutory period. KRS 342.185 provides that a claim for benefits must be filed within two years of the date of injury or the date of the last temporary total disability payment. The parties do not dispute that Ashbrook's claim was filed well after the expiration of the time period set forth in KRS 342.185. Therefore, we begin our analysis by determining if the statutory period was tolled by any failure on the part of Kentucky Container to comply with its statutory obligations.

To insure that injured workers are advised of their rights, KRS 342.040(1) provides that an employer or its carrier shall notify the executive director of the OWC when it terminates temporary total disability. When so notified, the executive director of the OWC "shall, in writing, advise the employee or known dependent of [the] right to prosecute a claim under [KRS Chapter 342]."

To effectuate the mandate in KRS 342.040(1), the OWC adopted 803 KAR 25:170 Section 2(2),[3] which states that:

> Beginning with work-related injuries and occupational diseases reported to employers on or after January 1, 1996, each insurance company . . . shall file the information required on the Form 1A-2 with a data collection agent or a value added network designated by the Office of Workers'

[3] This is the version of the regulation in effect at the time of Ashbrook's 1998 injury.

> Claims, in electronic format, every sixty (60) days for as long as the disability of an employee continues and whenever payments to an employee are commenced, terminated, changed or resumed.

When a carrier fails to notify the executive director of the OWC of the termination of temporary total disability benefits, the statute of limitations in KRS 342.185 is tolled. *City of Frankfort v. Rogers*, 765 S.W.2d 579 (Ky.App. 1988). Unlike the City of Frankfort, Kentucky Container noted in its brief that it did notify the OWC that it had terminated temporary total disability benefits. While we agree that Kentucky Container did notify the OWC of the termination of Ashbrook's temporary total disability benefits, we do not agree that Kentucky Container "strictly complied" with the mandates set forth in KRS 342.040(1).

First, we note that, pursuant to KRS 342.040(1) and 803 KAR 25:170 Section 2(2)(a), Midwestern was required to give notice to a data collection agent or value added network that it had terminated Ashbrook's temporary total disability benefits. There is no proof when Midwestern transmitted that information to its data collection agent or value added network; however, that information was not transmitted to the Office of Workers' Claims until December 29, 1999, more than one year after the termination of benefits. A delay of more than one year in filing is not strict compliance.

Second, Midwestern used the incorrect maintenance code when filing the Subsequent Report of Injury. New's testimony that she was unaware of the problem with the FN maintenance code is credible. However, as between Midwestern and Ashbrook, Midwestern was the only party in a position to discover and correct the error.

Third, New testified that when Midwestern did receive specific notification from the OWC regarding the proper maintenance code, Midwestern did not re-submit a Subsequent Report of Injury with the correct maintenance code for Ashbrook's claim. Based on these facts, we hold that Kentucky Container did not strictly comply with the dictates of KRS 342.040(1) and the ALJ correctly determined that Ashbrook's statute of limitations was tolled.

Kentucky Container relies heavily on *Billy Baker Painting v. Barry*, 179 S.W.3d 860 (Ky. 2005), to support its position. However, that reliance is misplaced. In *Billy Baker Painting*, as herein, the carrier notified the OWC that it had terminated temporary total disability benefits. However, the notice of termination from the carrier did not contain a "payment adjustment end date." Despite this deficiency, the OWC accepted the notice of termination for filing; however, because of this deficiency, the OWC did not send the limitations letter to Barry. Furthermore, the OWC did not notify the carrier of the deficiency or that the limitations letter had not been sent. The Supreme Court of Kentucky held that the payment adjustment end date was a necessary part of the termination notification and, because that was missing, the carrier had not complied with its statutory obligations under KRS 342.040(1), thus tolling the period of limitations.

Kentucky Container argues that *Billy Baker Painting* stands for the proposition that a notice of termination need only contain the return to work date and the date of termination of TTD benefits to comply with the statutory requirements of KRS 342.040(1). However, we believe that this oversimplifies the Court's holding in *Billy*

*Baker Painting*. The Court was not setting forth the minimum standards for complying with KRS 342.040(1), since establishing those standards is the responsibility of the executive director of the OWC. *See* KRS 342.260(1). The Court was merely noting that the provision of certain information is mandatory as set forth by the OWC. The mandatory information includes the return to work date and the date of termination of TTD benefits, but that is not the only information required. When a carrier neglects to include mandatory information, "without regard to whether the failure is attributable to bad faith or misconduct," *Billy Baker Painting,* 179 S.W.3d at 864, one of the mandatory standards is not met. Therefore, OWC does not generate and send the limitations letter, and the statute of limitations is tolled.

As noted by Kentucky Container, this case does differ from *Billy Baker Painting* because Midwestern did provide all of the dates necessary for the OWC to generate and send the limitations letter. However, Midwestern did not provide the appropriate maintenance code so that the OWC would generate and send that letter. Whether the carrier failed to provide necessary information or it provided the information in an incorrect format, the net effect is the same; the OWC did not generate and send the limitations letter. As the Court noted in *Billy Baker Painting,* "it is unfortunate that the carrier was not informed of the omission." 179 S.W.3d at 865. However, that did not change the result in *Billy Baker Painting* and it does not change the result herein.

EQUITABLE ESTOPPEL

Kentucky Container next argues that the ALJ did not take into consideration the equities on Kentucky Container's side of the ledger. In doing so, it relies on the dissent of Board Member Stanley, *J & V Coal Company v. Hall,* 62 S.W.3d 392 (Ky. 2001), and *Newberg v. Hudson*, 838 S.W.2d 384 (Ky. 1992). However, we believe that *J & V Coal Company* and *Newberg* can be distinguished from the case at bar and that the Supreme Court of Kentucky, absent extraordinary circumstances, removed equitable considerations from the table in *Billy Baker Painting*.

In *J & V Coal Company,* Hall testified that he suffered a neck injury on April 19, 1997, but that he did not seek medical treatment until three weeks later. In November of 1997, Hall missed five days of work due to his injury but he did not miss any other work due to the injury. Hall filed his Form 101 more than two years after the injury and testified that he did not receive the limitations letter from the OWC. The ALJ noted that J & V Coal Company (J & V) had failed to file a first report of injury and had failed to notify the OWC that it was not paying TTD benefits under KRS 342.040. However, the ALJ found that the filing of a first report of injury does not trigger the OWC to generate and send the limitations letter. Therefore, the failure to file a first report of injury would not toll the statute of limitations. Furthermore, the ALJ found that Hall had not missed enough work to qualify for TTD benefits; therefore, J & V had no obligation to file the notice required by KRS 342.040. Based on these facts, the ALJ found that the statute of limitations was not tolled. The Supreme Court of Kentucky

affirmed the ALJ, holding that Hall was never entitled to TTD benefits, and J & V had no duty to notify the OWC that it was not paying or that it had terminated the payment of TTD benefits. Therefore, Hall would not have been entitled to receive a limitations letter from the OWC.

In the case before us, Ashbrook was entitled to and received TTD benefits. Therefore, Kentucky Container had an obligation to notify the OWC that it had terminated those benefits. Kentucky Container failed to adequately do that and, as held by the Supreme Court of Kentucky, "[a]bsent extraordinary circumstances such as were present in *Newberg v. Hudson*, 838 S.W.2d 384, 389 (Ky. 1992), an employer's failure to comply strictly with KRS 342.040(1) and the applicable regulations has tolled the period of limitations, without regard to whether the failure is attributable to bad faith or misconduct." *Billy Baker Painting,* 179 S.W.3d at 864, *citing H.E. Neumann v. Lee*, 975 S.W.2d 917 (Ky. 1998); *Colt Management Co. v. Carter*, 907 S.W.2d 169 (Ky.App. 1995); *Ingersoll-Rand Co. v. Whittaker*, 883 S.W.2d 514 (Ky.App. 1994). As noted below, the extraordinary circumstances referred to by the Court revolve around issues of notice and include some implications of fault on the part of the employee with regard to giving notice. There are no extraordinary circumstances herein. Ashbrook gave due and timely notice and there is no indication that Ashbrook did anything that would have caused Kentucky Container to fail to give notice to the OWC or to give inaccurate information to the OWC. Therefore, we hold that *J & V Coal Company* is not dispositive.

In *Newberg v. Hudson*, Hudson was injured in 1985. He missed one day of work immediately following the injury and missed approximately six weeks of work one month after the injury. The employer contested notice, offering evidence that when Hudson completed the paperwork when he missed the six weeks of work, he did not state that he had suffered a work injury. Hudson testified that he gave notice the day following the injury and offered the testimony of a co-worker in support of his contention. Hudson did not file his Form 101 until more than two years from the date of injury and argued that his claim was not time barred because his employer did not file a first report of injury or notify the OWC that it was not paying TTD benefits when due. The employer argued that it had no obligation to file a first report of injury because it had no notice of Hudson's injury. Furthermore, since it had no notice of Hudson's injury, it could have no obligation to notify the OWC that it was not paying TTD benefits when due.

The ALJ found that Hudson had given due and timely notice, and found that the statute of limitations was tolled because of the employer's failure to notify the OWC that it was not paying TTD benefits when due. The Supreme Court reversed the ALJ, holding that there was no evidence that "the employer's noncompliance with the notice provisions was in bad faith and there [was] evidence of a good-faith attempt to ascertain the reason behind [Hudson's] absence from work." *Newberg v. Hudson,* 838 S.W.2d at 389. The Court then stated that an absence of evidence of bad faith should foreclose the equitable remedy of tolling the statute of limitations. *Id.* at 389-90.

In the case before us, unlike in *Newberg v. Hudson,* there is no question that an injury occurred and that Ashbrook gave due and timely notice of that injury. Furthermore, there is no question that Kentucky Container attempted to comply with its reporting obligations. However, as noted above, Kentucky Container did not appropriately comply with its reporting obligations. That failure "tolled the period of limitations, without regard to whether the failure is attributable to bad faith or misconduct[,]" *Billy Baker Painting,* 179 S.W.3d at 864, because there are no extraordinary circumstances and strict compliance is mandated.

Finally, we note Kentucky Container's argument that, when he filed the *pro se* medical fee dispute, Ashbrook demonstrated a level of sophistication that should have enabled him to determine when his statute of limitations would run. As implied by the Court in *Billy Baker Painting*, an employer is only relieved of strictly complying with its reporting duties when some action by the claimant interferes with that strict compliance. Kentucky Container has pointed to no case law or statutory or regulatory provision that relieves an employer of its reporting requirements based on a claimant's sophistication; therefore, this argument has no merit.

For the above reasons, we hold that the ALJ was not required to address the equities with regard to Kentucky Container's conduct and we affirm the Board.

CONCLUSION

The ALJ correctly found that Kentucky Container did not strictly comply with the requirements of KRS 342.040(1) and the regulations. Furthermore, because

there was no evidence that Ashbrook did anything that impeded Kentucky Container's ability to comply with the requirements of KRS 342.040(1) and the regulations, we hold that the ALJ was not required to undertake an analysis of or to balance the equities between the parties. For these reasons, we affirm the Board.

ALL CONCUR.

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