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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000139-WC

CHESTER R. CRAIG, JR. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-86068

HITACHI AUTOMOTIVE PRODUCTS USA, INC;
JAMES L. KERR, ADMINISTRATIVE LAW JUDGE;
AND THE WORKERS' COMPENSATION BOARD APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON, ACREE, AND WINE, JUDGES.

ABRAMSON, JUDGE: Under KRS 342.185 and KRS 342.270, if the parties cannot agree regarding compensation, an injured worker who seeks workers' compensation benefits must file a written application for resolution of his or her claim "within two (2) years after the accident, or . . . within two (2) years after the cessation of voluntary payments, if any have been made." KRS 342.270(1). Chester Craig seeks compensation benefits from his employer, Hitachi Automotive Products USA, Inc., of Harrodsburg.

Craig alleges that in the course of his employment on April 8, 2003, he injured his lower back. He underwent back surgery in September 2003, and from then until his return to work in January 2004 he received temporary total disability benefits (TTD) from Hitachi's workers' compensation insurer, Liberty Mutual. Liberty terminated Craig's TTD benefits as of January 12, 2004, and Craig acknowledges that soon thereafter he received the statutorily-required notice from the Office of Workers' Claims informing him that his TTD benefits had been terminated and advising him that if he wished to seek additional benefits he had two years from the January 12 termination date to file a claim. Two years later, in February 2006, Liberty's adjuster wrote to Craig advising him that the limitations period had expired and that Liberty was therefore terminating Craig's benefits and closing his claim. Craig thereupon hired counsel and filed his Form 101 seeking adjustment of his disability claim. Hitachi then moved to have Craig's claim dismissed as untimely. By orders entered May 31, 2006 and December 22, 2006, respectively, the Administrative Law Judge (ALJ) and the Workers' Compensation Board agreed with Hitachi. They rejected Craig's argument that Hitachi should be estopped from asserting a limitations defense and dismissed his claim as outside the two-year limitations period. Petitioning for review of the Board's order, Craig contends that estoppel is appropriate because Hitachi's insurer, Liberty, violated regulations intended to promote the fair settlement of workers' compensation claims and because the violations led him to believe that his claim would be settled without litigation. Agreeing with Craig that Liberty engaged in conduct proscribed as unfair claims settlement practices under Kentucky

statutes and regulations, we reverse and remand so that Craig's claim may proceed.

As Craig notes, KRS 342.267 incorporates within the Workers' Compensation Act the provisions of KRS 304.12-230, which outlaws certain acts and omissions by insurers or their adjusters as "unfair claims settlement practice[s]," including the insurer's "fail[ure] to affirm or deny coverage of claims within a reasonable time." KRS 304.12-230(5). Pursuant to those statutes and to KRS 342.260(1), the Department of Workers' Claims promulgated 803 KAR 25:240, which imposes duties on workers' compensation carriers with respect to the fair settlement of compensation claims. Carriers are obliged to "diligently investigate a claim for facts warranting the extension or denial of benefits." Section 4. They must "attempt in good faith to promptly pay a claim in which liability is clear." Section 6. And, under Section 5 of 803 KAR 25:240:

> (1) After receipt of notice of a work-related injury necessitating medical care or causing lost work days, a carrier shall as soon as practicable advise an injured employee of acceptance or denial of the claim.
> (2) A carrier shall provide to the employee in writing the specific reasons for denial of a claim.
> (3) A carrier shall inform an employee of additional information needed for the claim to be accepted.
> (4) A carrier shall meet the time constraints for accepting and paying workers' compensation claims established in KRS Chapter 342 and applicable administrative regulations.

In this case, apparently, after Craig returned to work in January 2004 and received notice that his TTD benefits had been terminated, he discussed permanent disability benefits with Liberty's adjuster. At the adjuster's behest, Craig submitted to

her his surgeon's statement to the effect that Craig's work-related injury and surgery had left him with an impairment rating of 13%, none of which, according to the surgeon, was attributable to prior injuries. Upon receipt of this statement, the Liberty adjuster contacted Craig and indicated that she thought the 13% impairment rating excessive. During the conversation, Craig confirmed that he had injured his back on two prior occasions. He strained it once during his employment as a volunteer firefighter. Although he filed a workers' compensation claim over that injury, apparently the injury resolved fairly quickly with minimal treatment. Not long thereafter, however, in early 2002, Craig reinjured his back, in a non-work-related setting. That injury required surgery, which was performed in October 2002, about six months before the work-related injury underlying Craig's current claim.

In light of this history, the Liberty adjuster indicated to Craig her belief that some of his disability should be attributed to the prior injuries and surgery. According to Craig, however, he explained to her that after the first surgery the surgeon told him he was "as good as new" and released him to return to work without restrictions. The adjuster said, "Okay," and their conversation ended. The adjuster did not inform Craig that she needed additional information, nor did she thereafter provide him with written notice specifying reasons for denying his claim.

The adjuster did, however, correspond again with Craig's surgeon. In a letter dated May 23, 2005, she explained her concerns regarding the prior surgery and requested that the surgeon "specify what percentage of impairment Mr. Craig had

sustained as a result of his first injury." According to the adjuster, the surgeon did not respond to this request. The matter then remained dormant until February 2006, when the Liberty adjuster informed Craig that the limitations period had expired.

Clearly, the adjuster violated her statutory and regulatory duties (1) to inform Craig that additional information was needed to process his claim; (2) to affirm or deny his claim as soon as reasonably practicable; and (3) to provide written reasons for a denial if that was Liberty's position. Arguably she also failed to investigate the claim diligently, when she failed to follow-up her unanswered May 2005 letter to the surgeon, and perhaps, as Craig insists, she improperly denied Craig's entire claim where at least some liability was reasonably clear. We need not determine these less certain breaches, however, because the certain ones are enough to entitle Craig to relief.

As our Supreme Court has observed, estoppel is an equitable remedy often invoked to prevent a party from benefiting from its own misconduct. *Akers v. Pike County Board of Education,* 171 S.W.3d 740 (Ky. 2005). It is permitted

> when the estopped party is aware of material facts that are unknown to the other party and then engages in conduct, such as acts, language, or silence, amounting to a [mis]representation or concealment of the material facts. The conduct is performed with the intention or expectation that the other party will rely upon it, and the other party does so to his detriment.

Id. at 743. Although these are the general elements, because estoppel is an equitable remedy its propriety ultimately depends upon the totality of circumstances in the particular case. *Patrick v. Christopher East Health Care,* 142 S.W.3d 149 (Ky. 2004);

Miller v. Thacker, 481 S.W.2d 19 (Ky. 1972). In the workers' compensation context, employers have been estopped from asserting a statute of limitations defense where their failure to comply with KRS 342.040 has prevented notice to the employee of his right to prosecute a claim and of the limitations period, *H.E. Neumann Company v. Lee,* 975 S.W.2d 917 (Ky. 1998), and where their insurers have made representations amounting to a waiver of the limitations defense. *Carroll County Memorial Hospital v. Yocum,* 489 S.W.2d 246 (Ky. 1972). More generally, insurers (and their principals) have been estopped from asserting the limitations defense where, by their actions or communications, they have led the claimant to believe that a settlement would be reached and thereby induced a late filing, or where they have intentionally prolonged settlement negotiations and thereby caused the claimant to let the filing deadline pass. *Robinson v. Pan American World Airways, Inc.,* 650 F. Supp. 125 (S.D.N.Y. 1986); *Cassidy v. Luburich,* 364 N.E.2d 315 (Ill.App. 1977). *See McAdam v. Grzelczyk,* 911 A.2d 255 (R.I. 2006) (discussing the general rule). *And see* Allan E. Korpela, "Settlement Negotiations as Estopping Reliance on Statute of Limitations," 39 ALR 3rd 127 (1971).

In this case, the insurer intentionally left negotiations unresolved for over eight months without informing Craig either that his claim could not be further processed or accepted until additional information was received from his surgeon, or that his claim had been denied and the reasons for that denial. Because the fair claims settlement statute, KRS 342.267, and the regulations promulgated pursuant to it, imposed a duty on the insurer to advise Craig that additional information was needed or that his claim had

been denied, its silence was wrongful. To permit Hitachi now to rely on a limitations defense would thus permit it to benefit from its carrier's own proscribed practices at the expense of an innocent injured worker, a result this Court has rightfully deemed repugnant. *City of Frankfort v. Rogers,* 765 S.W.2d 579 (Ky. 1988). The Board and the ALJ misconstrued controlling law by ruling otherwise, and so we must reverse the Board's order and remand for a full consideration of Craig's claim. *Western Baptist Hospital v. Kelly,* 827 S.W.2d 685 (Ky. 1992).

Seeking to avoid this result, Hitachi relies on several older cases which hold that, absent a false promise to settle a claim or other misleading behavior, insurance settlement negotiations do not, by themselves, toll the limitations period or estop the insurer from asserting a limitations defense. *Logan Manufacturing Company v. Bradley,* 476 S.W.2d 819 (Ky. 1972); *Cuppy v. General Accident Fire & Life Assurance Corporation Ltd.,* 378 S.W.2d 629 (Ky. 1964); *Pospisil v. Miller,* 343 S.W.2d 392 (Ky. 1961). These cases, however, were decided before the enactment of KRS 342.267 and 803 KAR 25:240. The current statute and regulations were clearly intended to afford injured workers, most of whom are not versed in the law or in the technicalities of insurance, additional protection during the settlement process. The new rules require the insurer to make timely disclosures to the employee regarding the status of that process, disclosures that were not required under earlier law. These new disclosure requirements provide new grounds for deeming an insurer's silence "misleading," and thus add to the

circumstances in which estoppel may be appropriate. The cases upon which Hitachi relies do not, therefore, require a different result.

Hitachi also argues that even if its insurer violated provisions of the fair claims settlement regulations, estoppel is not an appropriate remedy because KRS 342.267 provides only that noncompliant insurers may be fined or, in extreme cases, excluded from the market. In *Patrick v. Christopher East Health Care, supra,* however, our Supreme Court noted that KRS 342.990 similarly provides for civil penalties for violations of KRS 342.038 and KRS 342.040, statutes, as noted above, requiring that employers give notice when they deny or terminate voluntary income benefits. There is no statutory provision for an equitable remedy. Nevertheless, the Court acknowledged cases applying estoppel to violations of those very statutes, recognizing that the equitable remedy is sometimes necessary to prevent unfairness to the injured worker. Here, too, we are not persuaded that the General Assembly meant to preclude an equitable remedy against insurers and their principals who disregard the fair claims settlement laws. On the contrary, those laws clearly reflect an intent to promote non-adversarial settlement of disability claims without resort to litigation, and to protect injured workers against the unintentional forfeiture of viable claims. That intent would be frustrated if an employer could not be estopped from invoking a limitations defense where its insurer's conduct violated the fair claims settlement laws regarding prompt and decisive handling of claims.

In sum, although Craig did not file his compensation claim until after the two-year limitations period had expired, his delay was reasonably induced by Hitachi's insurer's violations of KRS 342.267 and 803 KAR 25:240. Hitachi should therefore have been estopped from raising a limitations defense. The Board erred by ruling otherwise. Accordingly, we reverse the Board's December 22, 2006 Order and remand so that Craig's claim may be reinstated.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas G. Polites
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BRIEF FOR APPELLEE:

Timothy J. Walker
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