RENDERED: April 7, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003115-WC

RICKY DALE CONNER — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-96-08883

RANDY THORNTON HEATING & AIR-CONDITIONING, OHIO CASUALTY INS.; RANDY THORNTON HEATING & AIR-CONDITIONING, AIK SELF-INSURANCE; SPECIAL FUND; HON. THOMAS A. NANNEY, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART;
VACATING AND REMANDING IN PART
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Ricky Dale Conner has filed a petition for review of an opinion of the Workers' Compensation Board rendered on November 20, 1998, that affirmed the Administrative Law Judge's dismissal of his workers' compensation claim against Randy Thornton Heating and Air Conditioning for a 1986 injury on the

grounds that it was time-barred pursuant to KRS[1] 342.185; and the denial of benefits for a 1995 injury. Since we agree that there was substantial evidence to support the ALJ's findings that no disability resulted from the 1995 injury, we affirm in part. However, since we have concluded that the ALJ and the Board erred in failing to address the employer's alleged failure to comply with KRS 342.040 concerning notice of termination of benefits, we must vacate this part of the Board's opinion and remand to the ALJ for further consideration.

Conner, who was born in 1959, has a high school education and vocational training in appliance repair. In 1982, he began working for Thornton as a service man, where his work included installing and servicing heating and air conditioning units. This case involves two separate work incidents that occurred at times when Thornton was insured by two separate insurance companies — one occurred on January 20, 1986, with insurance by the Ohio Casualty Company, and the other on November 4, 1995, with insurance by AIK Selective Self-Insurance Fund.

At the time of the first incident on January 20, 1986, Conner was moving a compressor weighing about 300 pounds when he felt something pop in his lower back. He was treated by Dr. Robert Meriwether, a neurosurgeon, and was diagnosed as having a bulging or protruding disc. Conner continued to experience pain in his lower back and right leg, but did not have surgery and

[1]Kentucky Revised Statutes.

continued to work. He testified that the only way that he was able to tolerate the pain and to continue his work was by taking large amounts of pain medication. He testified that since he was taking so much pain medication, Thornton would occasionally provide him a driver. Over the next ten years, Conner continued to work for Thornton and occasionally missed work for which he was paid temporary total disability benefits. During this period, he also underwent physical therapy and two series of epidural blocks. Before the November 1995 injury, Conner was last paid TTD benefits in December 1992.

On November 5, 1995, Conner was servicing a stove at the customer's house when he experienced severe pain in his lower back and leg. Conner claimed that the pain he suffered was significantly more severe than what he had previously experienced. On November 9, 1995, Conner underwent back surgery by Dr. Joseph Rowland for a herniated disc. Conner went back to work in February 1996, and was promoted to service manager. He stated that while working as a service manager he was still required to perform heavy lifting, but the heavy lifting was not as frequent as before his promotion. On April 11, 1997, Conner underwent a second back surgery at the same level. He has not worked since April 1997.

Conner filed his workers' compensation claim on December 9, 1996, wherein he alleged an injury on January 20, 1986, and a "reinjury on November 4, 1995." After the claim was held in abeyance due to the April 1997 surgery, an order was

entered on March 2, 1998, setting proof time. Conner and both insurance companies submitted various medical evidence to the ALJ for his consideration.

In his findings of fact and conclusions of law, the ALJ first determined that the claim for the 1986 injury was barred by the statute of limitations as follows:

> The first issue which must be resolved is whether the claim against the Defendant-Employer as insured by Ohio Casualty is barred by the statute of limitations. The last temporary total disability benefits paid by Ohio Casualty following the injury in 1986 occurred on December 31, 1992. Ohio Casualty again paid benefits after the November 4, 1995 incident, beginning January 21, 1997. Therefore, on its face, the statute of limitations on the 1986 injury had already expired when Ohio Casualty made payments in January 1997. The question arises whether Ohio Casualty has waived its right to the defense of statute of limitations as a result of the subsequent payments after the statute has run. This issue has been addressed in the case of **Harris Bros. vs. Crider**, Ky. 497 SW2d 731 (1973) in which the court indicated that when the first carrier made payment of temporary total disability on the mistaken belief that they were responsible for benefits, no waiver of the statute of limitations had occurred. A claim which has expired under the provisions of KRS 342.185 cannot be revived by subsequent payment [emphasis original].

The ALJ then addressed the issue of whether Conner's disability was the result of the time-barred 1986 injury or the 1995 injury. After noting that "there is a clear difference of opinion in the medical testimony," the ALJ determined that Conner's disability claim had to be dismissed.

On July 31, 1998, Conner filed a petition for

reconsideration with the ALJ wherein he re-argued the issues of the statute of limitations and the ALJ's refusal to allocate any of the disability to the 1995 injury. Additionally, for the first time, Conner claimed that the "numerous injuries sustained by [Conner] while employed by [Thornton] from 1986 through 1997 constitute mini-traumas which commenced the statute of limitations on November 4, 1995, the last reported accident." Thornton, as insured by AIK, objected to Conner's petition and noted that the mini-trauma theory of the case had not been previously argued. Following the ALJ's denial of his petition, Conner appealed to the Board and raised the issues of the statute of limitations and the mini-trauma theory.

In affirming the ALJ's dismissal of Conner's claim, the Board stated:

> KRS 342.185 requires that an Application for Adjustment of Claim be made within two years of the accident giving rise to an injury. See Coslow v. General Elec. Co., Ky., 877 S.W.2d 611 (1994). It is true that in cases where the injury is a result of mini-traumas, the date for giving notice and the date for the clocking of limitations begins when the disabling reality of the injury becomes manifest. See, Randall Co. v. Pendland, Ky.App., 770 S.W.2d 687 (1989), where the Court adopted a rule of discovery in such circumstances.
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> Conner suffered his first work-related injury on January 20, 1986. He continued to work for Thornton by taking large amounts of pain medication. He missed work intermittently and was last paid TTD benefits in December 1992. The ALJ, relying on Harris Brothers Construction Co. v. Crider, supra, found that where the two year statute of limitations had already expired and TTD

recommenced, the 1986 claim could not be revived. Conner distinguishes Harris on the grounds that the claimant therein, Crider, concealed his earlier injury and the insurance company mistakenly paid benefits, believing they were for subsequent injury.

While the Board agrees that Harris, supra, has distinguishing facts, nonetheless, the concept that TTD cannot revive a time-barred claim holds true. While Conner, in the alternative, now argues that although his claim was not practiced as a cumulative trauma claim, there is medical evidence to suggest the possibility of a cumulative trauma injury. Conner points out that when Dr. Roland examined him in 1991, he did not believe Conner had a ruptured disc at that time but rather a bulging disc. It was not until November 1995 when Dr. Roland examined him again after the November 4, 1995 injury that the disc had ruptured. It is undisputed that Conner continued to work at heavy manual labor in awkward positions following the 1986 injury.

Pursuant to Randall Co. v. Pendland, Ky.App., 770 S.W.2d 687 (1989), the determination of the date of a work-related injury where there are many mini-traumas is the date upon which the actual disability becomes manifest. However, in Conner's case, he experienced a specific and reported incident when he injured his back on January 20, 1986. Dr. Meriwether diagnosed Conner with a protruding disc condition at that time. Conner experienced radicular pain into his right leg. Surgery was proposed but decided against. Thereafter, Conner worked with pain and took prescribed pain medication. Conner was paid TTD at various periods. He underwent physical therapy. He received two series of epidural blocks for back pain resulting from the injury. Thornton even made accommodations for Conner by providing him with a driver. The last payment of TTD paid to Conner was in December 1992. He did not file a claim for this injury until January 6, 1997.

Though medical opinion was not in

> agreement, the ALJ, in our judgment, relied on evidence of substance from Dr. Robert Weiss and Dr. Leon Ensalada in determining that the 1995 injury was merely an aggravation of the 1986 injury and not a new injury. Accordingly, the ALJ concluded that the statute of limitations in KRS 342.185 required dismissal of Conner's 1986 injury claim. Reluctantly, we agree the ALJ reached a correct legal conclusion.

In his petition for review, Conner asks that we address four issues:

> Issue 1: The Board erroneously applied the Harris Bros. Constr. Co. v. Crider, KY., 497 S.W.2D 731 (1973) decision to impose the statute of limitations when in fact voluntary payments of temporary total disability were paid by the insurance carrier, Ohio Casualty for and on behalf of the Respondent, Randy Thornton Heating & Air Conditioning which tolled the statute of limitations.
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> Issue 2: The Board erroneously adopted the ALJ opinion which ignored the required notification of termination of benefits pursuant to KRS 342.040.
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> Issue 3: The numerous injuries sustained by the Petitioner, Conner while employed by Randy Thornton Heating & Air Conditioning from 1986 through 1995 constitute mini-traumas which tolled the statute of limitations to November 4, 1995, the last reported accident.
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> Issue 4: The Board committed an error in assessing the medical evidence to determine that the injury of November 4, 1995 had no disabling effect and was not a separate work-related injury. This error was so flagrant as to cause a gross injustice to Petitioner, Conner.

We will first address issues one and two concerning the 1986 injury and the statute of limitations defense, and then we will consider under issue four whether the evidence compelled a

finding of disability for the 1995 injury. Issue three concerning the mini-trauma theory was not presented to the ALJ, and cannot be the subject of appellate review by the Board or this Court.[2]

In concluding that Conner's disability claim based on his 1986 injury was time-barred, the ALJ relied upon Harris Brothers Construction Co. v. Crider, supra. The Board noted that while Harris "has distinguishing facts, nonetheless, the concept that TTD cannot revive a time-barred claim holds true." In Harris, the claimant was first injured on November 7, 1969. After being off work for a week and drawing workers' compensation benefits, he returned to his same job. The claimant "testified that from the date of injury he continued to have pain in his back which radiated down his leg, but that in spite of the pain he continued working until December 30, 1970. At that time he had a 'new bout of back pain' which was so severe that he had to come down off the pole where he was working, and because of the severity of the pain he was unable to return to work."[3] In January 1971, the claimant contacted an attorney, who was successful in getting the insurance carrier to pay temporary total disability benefits based on the understanding that the injury occurred on December 30, 1970. However, when the claimant filed his application for adjustment of claim on February 22,

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[2]Roberts v. Estep, Ky, 845 S.W.2d 544, 547 (1993).

[3]Harris at 732.

1971, he alleged disability from the injury of November 7, 1969, and no mention was made of the episode of December 30, 1970. The employer, Harris Brothers, contended that the claim was time-barred based on the one-year statute of limitations. The claimant "maintained that the payments made during January and February of 1971 constituted a waiver of the right to plead limitations as to the injury of November 7, 1969."[4] The Board found that the insurance company "paid the claimant compensation for six weeks from January, 1971 and therefore waived the plea of limitations."[5] In reversing the Board, the former Court of Appeals stated:

> On the question of waiver we find the general authority to be that a waiver exists only where one with full knowledge of a material fact does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon that right. Knowledge of the existence of the right on the part of the party claimed to have made the waiver is an essential prerequisite to its relinquishment. No one can be said to have waived that which he does not know, or where he has acted under a misapprehension of the facts [citations omitted].
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> . . .
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> [T]he payments made were upon a mistake of fact or, as has been put otherwise, under a misapprehension of the facts. These payments did not constitute a waiver of the right to plead limitations, and Harris is not subject to liability for those injuries sustained on

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[4] Id.

[5] Id.

November 7, 1969.[6]

In the case sub judice, we do not disagree with the Board's application of the general rule concerning waiver of a statute of limitations as set forth in Harris, but we believe the Board erred in failing to address Conner's KRS 342.040 argument. In its brief, Ohio Casualty incorrectly claims that "for the first time in these proceedings, Conner is heard to complain that Thornton/Ohio is estopped from using the statute of limitations as a defense to this action because there was a failure to give appropriate notice under KRS 342.040(1)." We will summarize the procedural history of this case to demonstrate why we believe Ohio Casualty is mistaken and the Board erred in not addressing this issue.

The prehearing order and memorandum dated May 5, 1998, which was signed by the ALJ and counsel for all the parties, clearly lists "statute of limitations" as one of the "contested issues." In his brief dated June 12, 1998, and filed of record on June 15, 1998, Conner addressed this issue by pointing out that the employee's disability status report (Form SF-3A) was not filed by Ohio Casualty until March 8, 1996. In the report, Ohio Casualty indicated that as of February 25, 1996, it had terminated disability payments for the accident of January 20, 1986. Conner attached a copy of that report along with a copy of a letter dated May 8, 1996, from the commissioner for the

[6]Id. at 733.

Department of Workers' Claims that advised Conner that pursuant to KRS 342.185 a claim for compensation "must be filed within two years after the date your injury occurred, or, within two years after the date your employer or its insurance carrier last made a voluntary payment of income benefits to you" [emphasis original]. In its brief, dated June 15, 1998, and filed of record on June 17, 1998, Ohio Casualty set forth its statute of limitations defense under KRS 342.185(1), but did not cite any case law or acknowledge Conner's claim of lack of notice under KRS 342.040(1).[7]

As indicated earlier in this Opinion, the ALJ very briefly addressed the statute of limitations defense. In doing so, the ALJ failed to consider Conner's position that Ohio Casualty's failure to give notice pursuant to KRS 342.040(1) prior to March 8, 1996, prevented it from using the statute of limitations defense to bar his claim. In his petition for reconsideration, Conner once again tried to get the ALJ to address this issue when he noted that "Ohio Casualty never presented evidence to rebut their own document, the Employee Disability Status Report, Form 3A which was filed on March [8], 1996." He attached another copy of the Form SF-3A to his petition. Ohio Casualty did not file a response to Conner's

[7]We recognize that Ohio Casualty's counsel may not have received Conner's brief when its brief was mailed on June 15, 1998. Regardless, Ohio Casualty took no action to respond to the allegation of lack of notice and did not move the ALJ to strike the attachments from Conner's brief.

petition, and the ALJ without addressing the issue summarily "overruled" the petition.

In his brief before the Board, Conner once again stated that "Ohio Casualty never presented evidence to rebut their own document, the Employee Disability Status Report, Form 3A which was filed on March [8], 1996." Conner pointed out that Ohio Casualty had voluntarily paid medical bills related to his 1986 injury during 1993, 1994 and 1995. He closed his argument on the statute of limitations by stating: "Harris does not apply, the statute of limitations was tolled by the acts of Bonnie Riley as the claims representative for Ohio Casualty. . . ." In its brief, Ohio Casualty responded to this argument by stating: "In addition to the above, the claimant herein recites information in his brief that is not of record in the evidence before this tribunal, i.e., a Form allegedly filed by Bonnie Riley. Accordingly, petitioner's argument in this regard is not only improper but is unsupported by the evidence of record and is a nullity." As we have noted, the Board's opinion failed to address the Form SF-3A issue.

The case law is clear that "failure to satisfy the notification requirement [of KRS 342.040] must fall upon [the employer]."[8] "KRS 342.040 places an affirmative duty upon the employer to notify the Board when TTD payments have stopped. Only when this duty has been accomplished can the Board fulfill

[8]Colt Management Co. v. Carter, Ky.App., 907 S.W.2d 169, 171 (1995).

its duty to the employee — to inform him of the time in which he may file a claim."[9] If the employer "did not comply with the statutory mandate . . . the employee, who was in no way to blame for the techincal error, is entitled to have the statute of limitations tolled."[10]

In the case sub judice, Conner was paid TTD on December 31, 1992, and then there was the time period of no payment of TTD until the payments were made for 16 weeks of disability from November 6, 1995, to February 25, 1996. Ohio Casualty filed the Form SF-3A termination of benefits notice on March 8, 1996, in reference to the termination of TTD on February 25, 1996. Thus, the issue is whether Ohio Casualty complied with KRS 342.040 by filing the Form SF-3A termination of benefits notice after TTD benefits were terminated on December 31, 1992, other than the notice filed on March 8, 1996. If not, then under Colt and Ingersoll-Rand, Conner is entitled to have the statute of limitations tolled. Accordingly, we vacate the opinion of the Board and remand this matter to the ALJ for a proper consideration of the KRS 342.040 notice issue.

We will now address the ALJ's determination that all of Conner's disability is attributable to the 1986 injury and not the 1995 injury. The claimant bears the burden of proof and risk

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[9] Ingersoll-Rand Co. v. Whittker, Ky.App., 883 S.W.2d 514, 515 (1994).

[10] Id. at 515-16.

of persuasion before the ALJ.[11] If the claimant is unsuccessful before the ALJ and appeals, the question before the reviewing tribunal is whether the evidence was so overwhelming upon consideration of the entire record, as to have compelled a finding in his or her favor.[12] The ALJ as fact-finder is entitled to believe part of the evidence or disbelieve other parts, even where the evidence came from a single witness.[13] The ALJ has the authority to determine the quality, character and substance of the evidence presented.[14] If there is evidence of substantial quality to support the ALJ's decision, the reviewing tribunal is bound by the record.[15] A reviewing court is precluded from substituting its judgment in place of the ALJ's.[16]

The ALJ summarized the medical evidence and found as follows:

> The next issue which must be resolved is whether plaintiff's current condition is the

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[11]REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224, 225-25 (1985); Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984); Snawder v. Stice, Ky.App., 576 S.W.2d 276, 380 (1979).

[12]Id.; See also Evansville Printing Corp. v. Sugg, Ky.App., 817 S.W.2d 455, 458 (1991).

[13]Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977); Codell Construction Co. v. Dixon, Ky., 478 S.W.2d 703 (1972); W.L. Harper Construction Co. v. Baker, Ky.App., 858 S.W.2d 202, 205 (1993).

[14]Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

[15]Id.

[16]W.L. Harper Construction, supra at 205.

result of a new injury occurring in 1995 or is all attributable to the original injury of 1986. On this issue, there is a clear difference of opinion in the medical testimony. The plaintiff would rely on the medical testimony of Dr. Rowland, who indicated that he would not have imposed any restrictions on the plaintiff prior to 1995. He also stated that the incident in 1995 was consistent with plaintiff's injury and resulting surgeries. In contrast, the record contains the reports of Dr. Meriwether as they relate to plaintiff's treatment prior to the injury of 1995. It is very obvious that plaintiff had extensive and continuing treatment for his back condition by Dr. Meriwether. It is further apparent that based upon the reports of Dr. Meriwether as early as January 1988, there was significant evidence of the existence of a herniated disc and Dr. Meriwether was of the opinion that surgery would be needed in the future. In 1990, plaintiff was continuing to take significant amounts of pain medication. A myelogram and post-myelogram CT Scan in January 1991 also indicated the existence of a broad-based disc herniation at L4-5. Nevertheless, plaintiff was reticent to proceed with surgery. Finally, as late as October 1992, plaintiff continued to demonstrate evidence of an L4-5 disc herniation but was able to tolerate the discomfort provided he could take pain medication on a regular basis.

Futher, Dr. Leon Ensalad was of the opinion that plaintiff's current condition is all related to the injury in 1986 and his continuing deterioration since that time. In his report of February 1997, Dr. Berkman indicated that plaintiff's condition suggested that it was related to a previous injury.

This is an extremely close question which will in effect determine whether plaintiff is entitled to any benefits as a result of his long history of back problems while working for the Defendant-Employer. While I might be inclined to accept the opinion of Dr. Rowland, I cannot ignore the

> weight of the evidence which supports the contrary view. I am especially persuaded by the continuing treatment by Dr. Meriwether after the injury in 1986.
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> It is my belief that plaintiff had a herniated disc at L4-5 as a result of the 1986 injury and that his condition simply continued to deteriorate. In 1995, it became so bad that he could no longer put off surgery. I further note that the report of Dr. Robert Weiss, in April of 1997 specifically states that plaintiff's problems are the result of the original injury of 1986.
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> Therefore, I feel compelled to conclude that the evidence establishes that plaintiff's current condition stems directly from the injury of 1986 and that the incident in November 1995 does not constitute a new and distinct injury. While I do not believe that the result reached herein is necessarily just, I nevertheless, must conclude that it is consistent with the case law and the totality of the evidence presented.

We agree with the Board that the ALJ "relied on evidence of substance from Dr. Weiss and Dr. Ensalada in determining that the 1995 injury was merely an aggravation of the 1986 injury and not a new injury." Accordingly, we affirm on this issue.

In summary, the Board's opinion is affirmed as to there being no disability attributable to Conner's 1995 injury, but vacated and remanded as to the issue of the statute of limitations in KRS 342.185 and lack of notice in KRS 342.040.

ALL CONCUR.

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