

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001439-WC

VIOLA MOORE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-98-01769

TRI-COUNTY ASSEMBLIES,  
AS INSURED BY KEMI;  
TRI-COUNTY ASSEMBLIES,  
AS INSURED BY OLD REPUBLIC;  
SPECIAL FUND; DENIS KLINE,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

CROSS-APPEAL NO. 2000-CA-001596-WC

TRI COUNTY ASSEMBLIES, AS INSURED BY  
OLD REPUBLIC INSURANCE COMPANY

CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-98-01769

VIOLA MOORE; TRI COUNTY ASSEMBLIES,  
AS INSURED BY KENTUCKY EMPLOYERS'  
MUTUAL INSURANCE COMPANY;  
HON. DENIS KLINE,  
ADMINISTRATIVE LAW JUDGE;  
SPECIAL FUND; AND  
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

CROSS-APPEAL NO. 2000-CA-001602-WC

TRI-COUNTY ASSEMBLIES, AS AN  
INSURED OF KENTUCKY EMPLOYERS'  
MUTUAL INSURANCE COMPANY

CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-98-26810

VIOLA MOORE; TRI-COUNTY  
ASSEMBLIES, AS INSURED BY  
OLD REPUBLIC INSURANCE COMPANY;  
ROBERT L. WHITTAKER,  
DIRECTOR OF SPECIAL FUND;  
HON. DENIS S. KLINE,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: These petitions spring from an opinion of the  
Workers' Compensation Board rendered May 12, 2000. We affirm.

On November 12, 1998, Moore filed the instant claim for  
workers' compensation benefits. Therein, she alleged to have  
developed carpal tunnel syndrome as a result of cumulative work  
injury which manifested itself on April 2, 1997. Moore's  
employer was Tri-County Assemblies (Tri-County). At the time,  
Tri-County's compensation insurance carrier was Kentucky  
Employers Mutual Insurance (KEMI). KEMI immediately raised the  
defense of statute of limitations and also moved to join Tri-

County's previous insurance carrier, Old Republic Insurance Company (ORIC) as a party defendant to the claim. KEMI asserted that Moore sustained two injuries to her upper extremities in accidents on May 17, 1996, and May 20, 1996, while ORIC was Tri-County's insurance carrier. KEMI maintained that any alleged disability was the direct result of the 1996 injuries and not the result of any cumulative injury that manifested in April of 1997. ORIC was joined as a party on February 16, 1999.

On March 30, 1999, an arbitrator issued a "Benefit Review Determination" denying Moore benefits. The arbitrator found that Moore suffered no permanent disability. Moore appealed the decision and requested a formal hearing before an administrative law judge (ALJ). On November 27, 1999, the ALJ likewise dismissed Moore's claims on the grounds that there was no cumulative injury which manifested itself on April 2, 1997, and furthermore, that Moore's claim was barred by the statute of limitations as found in Kentucky Revised Statutes (KRS) 342.185. The matter then came before the Workers' Compensation Board (the board) for its consideration. On May 12, 2000, the board affirmed the dismissal of Moore's claim. The board held that the ALJ correctly found that there was no evidence of cumulative injury which manifested itself in April of 1997. The board, however, concluded that the statute of limitations (KRS 342.185) was tolled on Moore's May 1996 injuries. Moore files a petition for review, and KEMI and ORIC file cross-petitions for review from the board's decision.

In her petition for review, Moore contends the ALJ committed reversible error by concluding that her claim was untimely filed and that she suffered no occupational disability as a result of a cumulative injury which manifested in April 1997. Moore, however, cites this Court to no legal precedent to support her argument. Moore's argument for reversing the ALJ is as follows:

Based upon the evidence of a finding of permanent partial occupational disability due to cumulative trauma which manifested itself in April of 1997, the Court of Appeals should reverse and remand this claim back to the Administrative Law Judge for an entry of an Opinion and Award to mandate such findings.

As Moore has failed to cite to this Court any legal precedent or substantial legal argument to support her claim, we are constrained to summarily affirm.

In its cross-petitions for review, KEMI and ORIC both challenge the board's conclusion that the statute of limitations concerning the May 1996 injuries was tolled. Upon this issue, we perceive the board's reasoning as sound and adopt same herein:

We agree with Moore that the statute of limitations regarding the May 1996 injuries would be tolled in this case. As pointed out by Tri-County/KEMI, the statute of limitations is not tolled by failure to file an SF-1 but by failure to file an SF-3A. However, we believe that an obligation to file an SF-3A did arise when Moore missed work in April 1997. KRS 342.040(1) provides in pertinent part:

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 or known dependent of the right to prosecute a claim under this chapter. (Emphasis added.)

It is well-settled that if the Department is not informed of the termination or failure to make payments, the statute of limitations is tolled. Colt Management Co. v. Carter, Ky. App., 907 S.W.2d 169 (1995); H. E. Neumann Co. v. Lee, . . . [Ky., 975 S.W.2d 917 (1988)]; and City of Frankfort v. Rogers, Ky. App., 765 S.W.2d 579 (1988). The cause of the employer's failure to notify the Department is immaterial. Ingersoll-Rand v. Whitaker, Ky. App., 883 S.W.2d 514 (1994). It is clear from the record that Tri-County was informed that Moore's absence from work in April 1997 was due to her carpal tunnel syndrome. Since Moore missed more than seven days of work in 1997, TTD benefits would have been payable. KRS 342.040(1). The statute does not require notice to the Department only upon termination of benefits that are paid, but also upon a failure to make paid benefits when due. TTD benefits would have been due to Moore when she missed more than seven days of work as a result of her work-related condition. An SF-3A should, therefore, have been filed in April 1997 upon failure to pay Moore's TTD benefits. Since no SF-3A was filed, the statute of limitations regarding the May 1996 injuries would have been tolled.

We are inclined to agree with the board that the statute of limitations found in KRS 342.185 is tolled as to the May 1996 injuries. As such, we reject both KEMI and ORIC's contention to the contrary.

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

GUIDUGLI, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I agree with the separate opinion of Board Member Lovan. Because Moore had not made a claim for the 1996 injury, it was inappropriate to determine whether the statute of limitations was tolled or not. Furthermore, under the evidence as it appears to be, there was no indication to Tri-County/Old Republic that Moore's cessation of work in April 1997 had anything to do with the May 1996 incidents. Therefore, the failure to file an SF-1 or an SF-3A should not toll the statute of limitations for any 1996 injury.

BRIEF FOR APPELLANT/CROSS-  
APPELLEE, VIOLA MOORE:

John E. Anderson  
Barbourville, Kentucky

BRIEFS FOR APPELLEE/CROSS-  
APPELLANT, TRI-COUNTY  
ASSEMBLIES, AS INSURED BY OLD  
REPUBLIC INSURANCE COMPANY:

J. Gregory Allen  
Prestonsburg, Kentucky

BRIEFS FOR APPELLEE/CROSS-  
APPELLANT, TRI-COUNTY  
MANUFACTURING AND ASSEMBLY,  
INC., AS INSURED BY KENTUCKY  
EMPLOYERS' MUTUAL INSURANCE:

W. Barry Lewis  
Hazard, Kentucky

BRIEF FOR APPELLEE, SPECIAL  
FUND:

John Burrell  
Frankfort, Kentucky