RENDERED: April 13, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002372-WC

RAYMOND HALL — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-00690

J & V COAL COMPANY; J. LANDON OVERFIELD,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BARBER, COMBS, and McANULTY, Judges.

COMBS, JUDGE: Raymond Hall petitions for review of a decision by the Workers' Compensation Board affirming a decision of the Administrative Law Judge (ALJ). The issue presented is whether Hall's claim for benefits is barred by the pertinent statute of limitations.

Hall was employed by J & V Coal Company ("J & V") from October 1996 until December 12, 1997, when he was laid off. He testified that he injured his neck and back while working in the mine on April 19, 1997. While operating a scoop that day, Hall struck a large rock and was thrown against the roof of the mine.

Hall notified his supervisor within the hour, and the two men repaired Hall's damaged hard hat.

According to Hall, he worked in pain and without medical attention for about three weeks. He advised his shift boss and then saw a doctor at a local hospital. When his pain continued, a supervisor insisted that he report to Mud Creek Clinic. He was seen by Dr. Abu Salahuddin on May 19, 1997, who referred him to Dr. Scott C. Mirani of the University of Kentucky Medical Center. Additionally, J & V prepared a statement on its letterhead, dated July 7, 1997, that provided as follows: "Raymond Hall was injuied [sic] in a [sic] accident on our property. Please send his bills to our address." The statement was signed by "Donna Rice, Secretary."

Hall testified that he had missed at least one week of work sometime in November following his April accident. Hospital records confirm treatment and an extended work absence during November 1997. While medical benefits had been partially paid, Hall's employer never filed a First Report of Injury (form SF-1A) as specifically mandated by KRS 342.038(1) (requiring such a filing within one week upon an employee's absence from work for more than one day). No TTD benefits were paid and no disability status report (form SF-3A) was filed with the Board indicating nonpayment or termination of benefits. KRS 342.040[1]

Hall filed his claim on May 27, 1999, and J & V contended that it was barred by the two-year period of

[1]KRS 342.040 also places a duty upon the Board to notify an employee of his or her right to prosecute a claim.

limitations set forth at KRS 342.185. While finding that Hall had given due and timely notice of his work-related injury, the ALJ nonetheless concluded that the employer was not estopped from asserting the statute-of-limitations defense even though it had failed to comply with KRS 342.038. Acknowledging that the employer appeared before him with "unclean hands," the ALJ concluded that dismissal was nevertheless required since Hall had not been prejudiced by the employer's failure to comply with its statutory duty. Instead of taking KRS 342.038 into account, the ALJ relied on KRS 342.040 and noted that its provisions are not called into play unless an employee's disability continues for a period of more than two weeks. Thus, he reasoned that the employer's duty to notify the Board and the Board's concomitant duty to notify the employee of his right to prosecute a claim had never come into being.

In accepting the ALJ's analysis, the Board acknowledged a line of cases holding that evidence of bad faith or employer misconduct with respect to the requirements of KRS 342.038 and KRS 342.040 may be sufficient to invoke the equitable principle of estoppel to preclude an employer from asserting the statute-of-limitations defense. However, it then concluded:

> It does not matter whether J & V's motives for not filing the SF-1 were utterly evil and corrupt. As we noted above, even if J & V had filed the SF-1, Hall would have been entitled to no more notice of the statute of limitations than he received. Failure to follow the provision of KRS 342.040 results in tolling of the statute of limitations because that statute provides for notice to the employee of his right to prosecute a claim. KRS 342.038 contains no employee notice requirement, therefore failure to

> follow its provisions only subjects the employer to the penalty provisions of KRS 342.990(7)(a), and does not otherwise estop it from relying upon other provisions of the act.

Board opinion at 8.

In Newberg v. Hudson, Ky, 838 S.W.2d 384 (1992), the employer never gave notice to the Board that there had been an injury as required under KRS 342.038. The employee filed a claim more than two years after the date of the injury. The court held that whether the statute of limitations should be tolled due to an employer's failure to give notice to the Board depends upon the facts and circumstances of each case. Id. at 388. The Newberg court concluded that even though the employee gave notice of his injury, the employer had no obligation to notify the Board at that time since the employee had missed only one day of work. The obligation imposed by KRS 342.038 did not arise until approximately one month later when the employee had missed more than one day of work. At that time, the employer sent a form to the employee requesting a brief description of the accident, but the employee failed to explain how the injury was work-related. Consequently, the employer was unable to send notice of a work-related injury to the Board as required, and the court concluded that there was no evidence that the employer's noncompliance with the notice provision in the statute was the result of bad faith. On the contrary, the evidence indicated that there was a good faith attempt to ascertain the reason for the employee's absence. Newberg, supra, at 389; see also, Colt Management Co. v. Carter, Ky. App., 907 S.W.2d 169 (1995).

The facts and circumstances in Newberg differ markedly from those involved in this case. Hall properly notified his employer of the accident and his injury. As the ALJ determined, the employer was well aware of the work-related nature of the injury. Consequently, after Hall had missed work for more than one day, J & V was obligated by KRS 342.038 to report the injury to the Board. Instead, the employer failed to prepare and to file the required report and initially refused to notify its carrier of the injury. The failure to file the notice of injury (KRS 342.138(1) deprived the Board of any awareness of Hall's predicament, frustrating later Board action to notify him of his right to pursue a claim (KRS 342.020).

> We agree that fairness should be a component of any statutorily based decision when bad faith in the blatant manufacture of a defense is involved. Fortunately, fairness is not a stranger in this area of the law, and we have repeatedly held that a false representation or fraudulent concealment will toll the statute of limitations.

Newburg, supra, at 390.

Hall never received income benefits pursuant to KRS 342.040. Essentially, then, he is being penalized doubly: he has been stripped of the right to notice that would have arisen upon payments of such benefits — in addition to never receiving any remuneration whatsoever. Under these circumstances, we conclude that the ALJ erred in permitting J & V to raise the statute-of-limitations defense in reliance upon KRS 342.040 alone. We hold that KRS 342.038(1) (the more than one-day absence requiring employer notice of injury to the Board) and KRS 342.040 (employee notice of suspension of income benefits, triggering the Board's

duty of notice to the employee) are correlative and interdependent, intended by the legislature to operate together to prevent an employee caught in such a time-warp from slipping through the cracks in the system. Both notice requirements are mandatory, and failure to comply with one cannot equitably permit an employer to invoke the other in order to raise the statute-of-limitations defense.

We are not persuaded that a different analysis of this issue is required since temporary total disability benefits were not paid on the claim. The same situation was present in Newberg. Nevertheless, the Newberg court undertook an extensive evaluation of the employer's failure to comply with the notice provision of KRS 342.038. We are aided by that precedent.

The opinion of the Workers' Compensation Board is reversed and remanded.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE J & V COAL COMPANY:

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