

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000205-WC

JEFFERSON COUNTY ATTORNEY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-01149

MARY ANN TAYLOR;
A.B. CHANDLER, III, ATTORNEY GENERAL;
DONALD G. SMITH, ADMINISTRATIVE LAW JUDGE
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: The Jefferson County Attorney petitions for review of a decision of the Workers' Compensation Board which remanded in part an award of the Administrative Law Judge for findings on temporary total disability (TTD). The employer contends the Board erred in deciding that the statute of limitations was tolled and in remanding for the amount of TTD. We agree with the Board. The employer's failure to file a First Report of Injury tolled the statute. Also we believe the issue of TTD was before the ALJ when the parties stated that an issue

for the ALJ was "the extent and duration of disability". Thus, we affirm.

Mary Ann Taylor was an employee of the Jefferson County Attorney's office when she began experiencing pain in December of 1999 which was diagnosed as carpal tunnel syndrome. The employer admits on page four of its brief, and the ALJ found, that Mary Ann did report the injury to her supervisor and she believed her condition to be caused by her work activity. Mary Ann never filed for interim benefits, although she lost work and underwent surgery. Attempts to return to work failed because she experienced too much pain. Ultimately, she filed the claim in question.

At the hearing before the ALJ, the parties entered into eleven stipulations, including timely notice to the employer. However, the ALJ found that the employer never filed a First Report of Injury to the Department of Workers' Claims until March 17, 2000, and that this error tolled the statute of limitations. The ALJ found that disability started on April 7, 1997, when Dr. Fox first operated on Mary Ann. Although the ALJ believed the employee was totally disabled, he found that there was no assessment of medical impairment based on the AMA Guides and that failure of proof precluded an award of permanent disability under the current statute.

On appeal to the Board, the Board upheld the denial of an award of permanent total disability because the employee failed to introduce the AMA Guides, as required under KRS 342.0011(11)(c). However, the Board recognized that the ALJ had

the extent and duration of disability before it and that included temporary total disability benefits. Also, the ALJ made detailed findings as to time off due to the injury, but failed to determine the period of maximum medical improvement - the time when TTD ended and total permanent disability (TPD) started. The Board remanded the matter back to the ALJ for further findings on TTD.

On appeal to this Court, the employer contends the Board erred in deciding the statute of limitations was tolled and in remanding to determine the TTD benefits. Although the employer contends the case of Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999) is dispositive of the first argument, we disagree. Although Alcan involved the statute of limitations in the case of cumulative trauma cases, the issue revolved around notice to the employer. In the case sub judice, we have a stipulation and finding of notice with a filing over two years later. Both sides agree it would take a tolling to save the employee's case. The ALJ and the Board both concluded the employer's failure to file a First Report of Injury with the Department tolled the statute. We agree. KRS 342.185 requires the employee to give the employer prompt notice of an injury. After the employer receives notice, the employer is required to notify the Department of Workers' Claims by filing a First Report of Injury. KRS 342.038; KRS 342.040; 803 KAR 25:170. The Department must then notify the injured worker that she has so much time from the date of injury to file a claim. KRS 342.040. Until the claimant received notice, the employer is estopped from

asserting the statute of limitations. Colt Management Co. v. Carter, Ky. App., 907 S.W.2d 169 (1995). Failure to give statutory notifications results in tolling the statute of limitations. H.E. Neumann Co. v. Lee, Ky., 975 S.W.2d 917 (1998).

The employer's second alleged error is also without merit. The employer contends the remand to the ALJ is giving the employee a second bite at the apple. We disagree. The ALJ found specific periods Mary Ann missed work due to the injury. The ALJ also found the injury progressed to TPD but did not award benefits because the employee failed to include statutory evidence for TPD. There is no requirement for use of the AMA Guides in finding TTD. The ALJ just has to determine maximum medical improvement to see when TTD ends and TPD begins. That is an issue of fact and part of the "extent and duration" of disability. Under Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), the ALJ finds the facts and both the Board and this Court review those findings, not decide the facts de novo. Our review reveals no errors.

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

ALL CONCUR.

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