

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002686-WC

PETE GALOWNIA

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-65232

STARLINK SATELLITES;
HON. RONALD W. MAY, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: GUDGEL, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Pete Galownia has petitioned for review of an opinion of the Workers' Compensation Board entered on November 14, 2001, which affirmed an order by the Administrative Law Judge which had dismissed his claim for benefits as barred by the two-year statute of limitations contained in KRS¹ 342.185. Having concluded that the Board overlooked and misconstrued controlling statutes or case precedent, we reverse and remand.

¹Kentucky Revised Statutes.

In September 1998, Galownia worked installing satellite dishes for Starlink Satellites. On September 13, 1998, Galownia injured his knees when he tripped and fell while running cable wire in an attic; that same day he orally notified his supervisor of the accident and injury; and the next day he went to the hospital where he received pain medication and was referred to an orthopedist. A subsequent examination resulted in a diagnosis of left knee strain, chondromalacia patellae and intra-articular derangement of the knee. Dr. Julie Ann Martin assigned him a 5% functional impairment. Galownia did not resume working for Starlink after the accident. However, he did return to work in January 1999, assisting in the installation of satellite dishes for another company. This new job involved less lifting and carrying.

Starlink denied Galownia's claim for workers' compensation benefits on the grounds that he was an independent contractor, rather than an employee. Accordingly, it did not pay Galownia's medical expenses nor did it pay him any temporary total disability benefits. After Galownia hired an attorney in 1999, the parties attempted to resolve the issue of his employment status and his entitlement to benefits. Unable to reach a settlement, Galownia filed an application for resolution of injury claim with the Department of Workers' Claims on March 30, 2001.

In May 2001, Starlink filed a motion to dismiss the claim as barred by the two-year statute of limitations.² The ALJ issued a show cause order giving Galownia 15 days to show good cause why his claim should not be dismissed as untimely. In his response, Galownia argued that the limitations period was tolled because Starlink had failed to follow the required procedure under KRS 342.040(1) by either paying temporary total disability benefits or filing a notice advising the Department of Workers' Claims of its refusal to make payments. On June 25, 2001, the ALJ entered an order granting Starlink's motion and dismissing Galownia's claim based on the statute of limitations. Galownia filed a petition to reconsider challenging the ALJ's rejection of his tolling argument, requesting specific findings of fact, and seeking a hearing on the reconsideration petition. On July 16, 2001, the ALJ denied the petition to reconsider. On November 14, 2001, the Board entered an opinion affirming the ALJ's order. This petition for review followed.

Under KRS 342.185(1), an application for adjustment of claim for workers' compensation benefits must be made within two years after the date of the accident giving rise to the claim; however, "[i]f payments of income benefits have been made, the filing of an application for adjustment of claim with the department within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later." The Board ruled that since it was

²KRS 342.185.

undisputed that Starlink made no temporary total disability payments and hence no cessation of payments occurred, the tolling provision of KRS 342.185(1) was never triggered.

Galownina acknowledges that his situation does not precisely fit within the parameters of KRS 342.185(1), but he argues that the limitations period was tolled nonetheless because Starlink failed to comply with the reporting requirements contained in KRS 342.038(1) and KRS 342.040(1).

KRS 342.038(1) provides in relevant part:

(1) Every employer subject to this chapter shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within one (1) week after the occurrence and knowledge, as provided in KRS 342.185 to 342.200, of an injury to an employee causing his absence from work for more than one (1) day, a report thereof shall be made to the department in the manner directed by the commissioner through administrative regulations

KRS 342.040(1) provides in relevant part:

(1) Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury or disability resulting from an occupational disease, with interest at the rate of twelve percent (12%) per annum on each installment from the time it is due until paid, except that if the arbitrator³ or administrative law judge determines that a denial, delay, or termination in the payment of income benefits was without reasonable foundation, the rate

³The arbitrator was eliminated by amendments enacted in 2000.

of interest shall be eighteen percent (18%) per annum. In no event shall income benefits be instituted later than the fifteenth day after the employer has knowledge of the disability or death. Income benefits shall be due and payable not less than semimonthly. 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 right to prosecute a claim under this chapter [emphasis added].

The requirement in KRS 342.038(1) that an employer file a first report of injury form (Form SF-1) if a worker misses one day of work due to a work-related injury serves to prevent an employer from manufacturing a limitations defense by denying knowledge of an injury.⁴ The purpose of KRS 342.040(1) is to establish a procedure for notification from a third-party, the commissioner, to an injured employee, in writing, of his right to prosecute a claim, the time-frame in which to do so, and to facilitate prompt resolution of work-related injury claims.⁵

Several cases have dealt with an employee's attempt to estop an employer from asserting a statute of limitations defense based on its failure to comply with the requirement in KRS 342.040(1) of notifying the commissioner of the termination of payments or the failure to make payments when due.⁶ These cases

⁴See J & V Coal Co. v. Hall, Ky., 62 S.W.3d 392, 395 (2001).

⁵H.E. Neumann Co. v. Lee, Ky., 975 S.W.2d 917, 920 (1998).

⁶See, e.g., City of Frankfort v. Rogers, Ky.App., 765 S.W.2d 579 (1988); Ingersoll-Rand Co. v. Whittaker, Ky.App., 883 S.W.2d 514 (1994); and Colt Management Co. v. Carter, Ky.App., 907

(continued...)

held that the notification procedures should be strictly applied so that any failure in complying precluded an employer from asserting a limitations defense regardless of fault or bad faith.

In Newberg v. Hudson,⁷ the Supreme Court dealt with a claim of estoppel based on an employer's failure to comply with the notice statutes where no temporary total disability benefits had been paid. The Court indicated that although neither KRS 342.038, nor KRS 342.040 specifically addresses tolling, application of the equitable principle of estoppel should be applied on a case-by-case basis and the tribunal could take into account the bad faith or fault of the employer for failing to comply with the statutes. In Hudson, the Court held that the employer was not estopped from asserting a statute of limitations defense because it had not been given sufficient information to put it on notice that it was required to comply with the notice provisions.⁸

In H.E. Neumann Co., the Supreme Court revisited the issue of estoppel with respect to an employer's failure to comply with

⁶(...continued)
S.W.2d 169 (1995).

⁷Ky., 838 S.W.2d 384 (1992).

⁸See also J & V Coal Co., supra, where the Supreme Court held estoppel would not apply despite an employer's failure to comply with KRS 342.038(1), where the employer's duty to file notice under KRS 342.040(1) was not triggered. We note the confusing reference by the Court on page 395 to the fact "the claimant did not miss work due to his injury for more than two weeks at any time before the period of limitations expired" [emphasis added]. We do not understand the relevance to "two weeks." Pursuant to KRS 342.040(1), TTD benefits are payable for the eighth day of disability. If the disability continues for a period of two weeks, then TTD benefits are also payable for the first seven days.

the notice requirements. The Court indicated that an employer's duty to file the notice documents under KRS 342.038(1) and KRS 342.040(1) existed whether voluntary temporary total disability benefits were initially paid and then terminated or no voluntary payments were made at all. It rejected the argument that an employer's good faith could excuse its failure to comply with the notice requirements where no payments were made:

Therefore, once the employer herein had notice that claimant had missed more than one day of work as the result of an alleged work-related injury, it had the duty of filing a first report of injury with the board within one week. Moreover, when the employer failed to make voluntary payments after claimant was absent from work for seven days, it had the duty of notifying the board that no benefits would be paid so that the board could notify claimant regarding the applicable statute of limitations. The purpose of the above-referenced statutes is to advise an injured worker, in writing, of his right to prosecute his claim, and the time frame in which to do so, and to provide prompt resolution of asserted work-related injury claims. Thus, contrary to the employer's assertion, the intended purpose of the statute would not imply a different standard based on whether the employer initially paid voluntary benefits and then terminated them, or never paid voluntary benefits, as either way the worker would be entitled to the intended benefit of the statutorily mandated written notice.⁹

It also rejected the argument that application of estoppel depended on whether the employee was lulled into inaction by the employer's conduct:

Specifically, in the case at bar, unlike the situation in Newberg v. Hudson, supra, the record reflects that claimant missed more than seven days of work immediately after the

⁹H.E. Neumann, Co., supra at 920.

occurrence of the alleged injury, and that claimant notified the employer of his injury and his belief that it was work-related. At that point, the employer was under a duty to notify the board under KRS 342.038(1) and KRS 342.040(1). However, the employer failed to advise claimant that it would deny the claim until 2 ½ years after the date of injury, well after the statute of limitations had elapsed, depriving claimant of his statutorily mandated right to written notice. Hence, the failure of the employer herein, to satisfy the statutory notification requirements, acted to toll the statute of limitations by estopping the employer from prevailing on a statute of limitations defense as claimant was never notified by the board regarding his rights and the time frame in which he must act. This is true regardless of whether the employer was acting in good faith in conducting its investigation, or whether it was shown that there was actual prejudice to claimant [emphasis added].¹⁰

In the case sub judice, the Board relied upon Hudson, but did not even discuss H.E. Neumann Co. The Board concluded that Galownia was not lulled into inaction by Starlink's conduct, and cited Hudson as recognition by the Supreme Court that an employer should not be estopped from raising a limitations defense for failing to satisfy the notice filing requirements where there is a valid dispute as to applicability of the Workers' Compensation Act from the beginning of a claim. The Board noted that Galownia was aware of the dispute over his entitlement to benefits because of uncertainty over his employee status prior to the two-year anniversary date of his injury. The Board ruled that Galownia's knowledge of the dispute was sufficient to put him on notice that he needed to proceed in a

¹⁰Id. at 921-22.

timely manner. The Board concluded, “[i]f there is a known dispute from the beginning as to the applicability of the Kentucky Workers’ Compensation Act, whether it be work-relatedness, notice, employer/employee relationship, it is incumbent upon the injured ‘employee’ to file his claim within the two-year statute of limitations.”

The case sub judice is distinguishable from Hudson, and the Board’s reliance on Hudson is misplaced. The employer in that case was not subject to estoppel because it did not have sufficient information that its employee’s absence from work for the requisite period was due to a work-related injury thus triggering its duty to file the notices under KRS 342.038 and 342.040. The employer in Hudson did not dispute the applicability of the Act until after the claim was filed and its unawareness of the existence of its duty to file the first report of injury was reasonable because the employee did not miss more than one day of work until six weeks after the injury, and the employee failed to complete a form given to him by his employer concerning whether he was alleging a work-related accident.¹¹

Similarly, the Board’s focus on whether Galownia was lulled into inaction is misplaced. The Court in H.E. Neumann Co. indicated that the focus should be on strict compliance with the notice filing requirements, regardless of the employer’s good faith or actual prejudice to the claimant. Once an employer is notified of a work-related injury and becomes aware of the fact that an employee has missed more than one day of work because of

¹¹H.E. Neumann, Co., supra at 921.

the injury, the employer's duty to file a first report of injury arises under KRS 342.038(1). Under KRS 342.040(1), the employer must notify the commissioner of its failure to make temporary total disability payments within 15 days after the employer has knowledge that an employee has missed work for more than eight days because of a work-related injury so that the commissioner can advise the employee in writing of his right to prosecute a claim. If an employer fails to comply with its duty under both of these statutes, the statutory limitations period is tolled and the employer is estopped from utilizing a limitations defense to bar an employee's claim, regardless of whether the employee was actually prejudiced such as being lulled into inaction or misled by the employer's noncompliance.¹²

Our standard of review is whether the Board overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.¹³ There is no dispute that Galownia notified Starlink of his injury the day it occurred; he was absent from work for several months; Starlink was aware that his failure to return to work was due to the injury; Starlink made no temporary total disability payments; and it did not file a first report of injury or notify the commissioner of its failure to make payments.

¹²See J & V Coal Co., supra at 395 ("An employer who fails to comply with KRS 342.040(1) is not permitted to raise a limitations defense because its action effectively prevents the commissioner from complying with its duty under KRS 342.040(1) to notify the worker of his right to prosecute a claim and of the applicable period of limitations.").

¹³See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

Thus, Starlink failed to comply with the notice requirements of KRS 342.038(1) and KRS 342.040(1) even though it was aware of Galownia's work-related injury and his absence from work for more than eight days because of the injury. Regardless of Starlink's good faith and any lack of prejudice to Galownia by Starlink's failure to comply with the statutes, the equitable principle of estoppel applies to this case. We hold that the Board erred in ruling that Galownia's claim was barred by the two-year statute of limitations and that Starlink was not estopped from raising the limitations defense.

For the forgoing reasons, the opinion of the Workers' Compensation Board is reversed and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

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