RENDERED: DECEMBER 27, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2002-CA-000827-WC

MARY PAWLEY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-01-00421

BAPTIST HOSPITAL EAST and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING WITH DIRECTIONS
** ** ** ** **

BEFORE: COMBS and DYCHE, Judges; JOHN POTTER[1], Special Judge.

COMBS, JUDGE: Mary Pawley has petitioned for review of an opinion of the Workers' Compensation Board entered on March 27, 2002. The Board reversed the decision of the Administrative Law Judge (ALJ) that awarded Pawley permanent partial disability benefits and remanded the matter to the ALJ for the dismissal of her claim. We conclude that the Board overlooked or misconstrued controlling statutes or case precedent when it held that Pawley's claim was barred by the two-year statute of limitations contained

[1]Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

in KRS[2] 342.185. See, Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992). Thus, we reverse and remand.

The pertinent facts bearing on this appeal are not in dispute. Pawley, a nurse employed by Baptist Hospital East ("BHE" or the "hospital"), sustained an injury to her neck on November 11, 1998, while lifting a patient. She immediately reported the incident to her supervisor and sought medical attention. The hospital neglected to submit a First Report of Injury (Form SF-1) to the Board as required by KRS 342.038(1).

Pawley's condition was treated conservatively for many months with physical therapy, epidural blocks, and anti-inflammatory medication. Her medical bills were paid by the hospital's compensation carrier. She worked three twelve-hour shifts each week and missed very few days of work by visiting the doctor, undergoing tests, and obtaining medical treatments on the days that she was not scheduled to work. Because she did not miss enough days to qualify for temporary total disability benefits (TTD), the provisions of KRS 342.040(1) were not triggered. This statute requires an employer to notify the Department of Workers' Claims when it either terminates payments of TTD or fails to make such payments when due. It also sets forth the Board's concomitant duty to notify the injured employee of the limitations period. Consequently, although BHE and its insurer were fully aware that the clock was ticking on Pawley's claim, there is no dispute that Pawley did not receive notice of

[2]Kentucky Revised Statutes.

the two-year limitations provisions in KRS 342.185 either from her employer or from the Board.

Pawley's injury did not respond to the conservative treatment, and her condition worsened. By the fall of 2000, it became apparent that she needed surgery. Prior to the two-year anniversary of her injury, Pawley discussed the need for surgery with Joyce Minturn, a Benefits Coordinator in BHE's Human Resources Department. Minturn acknowledged that she advised Pawley that her surgery would be covered by workers' compensation, that she would receive TTD in the amount of 66 2/3% of her salary during her time off from work, and that she would be able to return to light duty work following her surgery. A similar discussion occurred between Pawley and Minturn in December of 2000, at which time Pawley informed Minturn that her surgery was scheduled for the following January. The surgery was pre-certified by the hospital's insurer.

After she underwent surgery in January 2001, Pawley was notified by the hospital's insurer that it was no longer liable to her for workers' compensation benefits because the statute of limitations had run on her claim. As it had previously certified her surgery, the insurer paid those costs. However, it informed Pawley that "nothing else" (including any future medical bills arising from her work injury and/or temporary total disability) would be paid. Pawley obtained legal counsel, and in March of 2001, four months after the statute of limitations had run, she filed a claim for benefits.

The hospital stipulated: coverage, the existence of an employment relationship, that Pawley sustained a work-related injury in November 1998, and that it had received due and timely notice of her injury. Nevertheless, BHE asserted that Pawley's claim was barred by the statute of limitations. Pawley relied on an estoppel theory, which the ALJ utilized as follows in making his award:

> . . . [Pawley] asserts that the statute of limitations should not apply based upon equitable estoppel. If the statements made by an employer constitutes false or fraudulent misrepresentations which would reasonably lure an injured employee into believing that claim would be paid, then the employer is estopped from relying upon a statute of limitations under Logan Manufacturing Company v. Bradley, Ky., 476 S.W.2d 819 (1972). In this instance, it is undisputed that [Pawley] did report her injury to the [hospital] and a First Report of Injury was completed. That report was never filed with the Board in this matter. Joyce Minturn had at least two conversations with [Pawley] (one in September 2000 and one in December 2000) regarding payment of workers[']' compensation benefits. [Pawley] was told that her injury was covered by workers[']' compensation. All of her medical treatment was pre-certified and approved by the workers[']' compensation carrier. This Administrative Law Judge found [Pawley's] testimony to be very credible regarding her conversations with Joyce Minturn. Joyce Minturn told [Pawley] that the surgery and temporary total disability benefits would be paid. When specifically asked by [Pawley] about time missed for the work injury following a myelogram, Joyce Minturn indicated that such time could have been covered by workers[']' compensation but to leave things as they were since [Pawley] had already been paid. [Pawley] has indicated that she did rely on these representations by Joyce Minturn to her detriment. See Cowden Manufacturing Company v. Fultz, Ky., 472 S.W.2d 679 (1971). The Administrative Law Judge does believe that the statements made

> by Joyce Minturn to [Pawley] would reasonably lure her into believing that her claim would be paid. Joyce Minturn never advised [Pawley] at any time that her workers[']compensation benefits could be terminated under the statute of limitations. Based upon these findings, the Administrative Law Judge does believe that equitable estoppel must prevent the [hospital] from relying upon the defense of statute of limitations in this matter.

The ALJ awarded Pawley TTD benefits for the period she spent recovering following surgery and permanent partial disability benefits of $65.44 for 425 weeks based on a 15% impairment rating.

The hospital filed a petition for reconsideration and cited the case of Emmert v. Jefferson County Board of Education, Ky., 479 S.W.2d 621 (1972). The ALJ denied the petition and concluded as following with respect to the statute of limitations issue:

> The Administrative Law Judge has reviewed the case of Emmert v. Jefferson County Board of Education, Ky., 479 S.W.2d 621 (1972). Contrary to the [hospital's] assertion, that case does not indicate that the parties must have discussed the statute of limitations in order for the Plaintiff to be lured into believing that her claim would in fact be paid. The present case is also different on the facts. In this instance, Joyce Minturn is in charge of human resources and workers[']compensation for the [hospital]. She is assumed to have knowledge of workers' compensation and gave [Pawley] assurances that her claim would be covered by workers' compensation. She further indicated that [Pawley] should be paid two-thirds of her salary, excluding taxes, and temporary total disability benefits while she recuperated from surgery. The surgery would also be compensable under workers' compensation, as would all medical bills related to the injury. She told [Pawley] that short-term disability could not be applied for because

> this was a workers' compensation claim. The Administrative Law Judge continues to believe that [Pawley] relied on these statements to her detriment and that such statements reasonably lured [Pawley] into believing that her claim would be paid. Therefore equitable estoppel does in fact apply to this fact situation.

In its review, the Board concluded that the ALJ erred in applying the doctrine of equitable estoppel to prevent the hospital from benefitting from the limitations defense.

> To be successful in asserting that an employer be equitably estopped from maintaining the statute of limitations defense, a claimant must show that the employer or the insurance carrier made false representations to the claimant about his claim and these false representations lulled the claimant into not filing her claim within the prescribed time limit. Cowden Manufacturing Company v. Fultz, Ky., 472 S.W.2d 679 (1971). As argued by Baptist [Hospital] East, the false representation must be made by the employer and it does not matter what the claimant believes. Inasmuch as the statements made by Minturn do not reach the level of constituting a false representation or fraudulent concealment as to the statute of limitations pursuant to Emmert, supra, the ALJ must be reversed and Pawley's claim dismissed as barred by the statute of limitations.

Having carefully reviewed the record and the applicable case law, we conclude that the Board's determination that Pawley's claim is timed barred is clearly erroneous as a matter of law. The hospital contends that the advice given to the claimant by the clerk in Emmert is similar to that given to Pawley by Minturn. We agree. Nevertheless, we believe there is a significant difference between the two cases — a distinction which the ALJ correctly grasped. He properly concluded that Minturn's advice to Pawley constituted the very kind of deceptive

conduct to justify applying the doctrine of equitable estoppel. Unlike the circumstances in this case, the claimant in Emmert was not unaware of the limitations period governing her claim. Pawley had absolutely no idea of such a problem nor had any notice been provided to her.

Emmert, decided some thirty years ago, considered the doctrine of equitable estoppel under a statutory scheme that differed from the applicable law in this instant case. In 1972, the employer had a duty to notify its employees of the one-year statute of limitations then in effect. See, KRS 342.186 (repealed in 1980). The employer had initially complied with its statutory duty to give its employee notice of the limitations period; in its later assurances of coverage, the employer failed to reiterate the limitations period. These later statements were held not rise to such a degree of fraudulent misrepresentation that the employer would be prevented from asserting a statute-of-limitations defense to a claim. Contrary to the Board's determination, Emmert does not remotely approach the kind of egregious situation that we see before us now where the employee had never been made aware of the statute of limitations governing her claim.

The current statutory scheme requires the Board to give an employee notice of the limitations period once its receives notification from an employer that it has terminated or stopped making TTD payments. Because Pawley was conscientious in obtaining medical treatment on days she was not scheduled to go to work, the hospital's duty to pay TTD and its duty to notify

the Board when it ceased paying TTD were not triggered. Thus, the issue is whether the hospital, which was aware that Pawley would not receive any notification from the Board with respect to the statute of limitations, is entitled to raise that statute as a defense after assuring Pawley that she was entitled to medical benefits for her surgery and income benefits while she convalesced.

In its appeal to the Board, BHE did not challenge the ALJ's finding that Pawley had been lulled into inaction by her discussion with Minturn or that she relied on Minturn's assurances of coverage to her detriment. Instead, it argued that it had no legal duty to inform Pawley of the statute of limitations. Absent bad faith or fraudulent behavior on its part, BHE contended that could not be estopped from raising the defense of limitations.

We hold that the Board clearly erred in reversing the properly crafted opinion of the ALJ. As set forth in Ingersoll-Rand Co. v. Whittaker, Ky.App., 883 S.W.2d 514 (1994), situations in which an employer can be estopped from pleading a limitations defense are not limited to those in which it has perpetrated a fraud on its employee or engaged in a deliberate deception. Further, as noted in H. E. Neumann Company v. Lee, Ky., 975 S.W.2d 917, 921 (1998) (emphasis added):

> [I]t is not necessary that it be established that the employer acted in bad faith for the employer to be precluded from raising a statute of limitations defense, as it must merely be shown that such failure could not be attributed to the worker.

In this case, it is undisputed that the untimely filing of Pawley's claim was not attributable to any failing on her part. We can find no finer textbook example for invoking the doctrine of equitable estoppel than in the disgraceful — indeed truly scurrilous — conduct that has occurred here. J & V Coal Company v. Hall, Ky., 62 S.W.3d 392 (2001) recognizes that "estoppel is an equitable remedy" and "the appropriateness of its application depends on the fact and circumstances of each case." Id. at 395. We hold that the circumstances in this case not only compel but virtually cry out for application of the doctrine. We have before us an employer who was given notice of an employee's work-related injury, who both accepted responsibility for payment of the medical consequences of that injury, and who then remained silent about the limitations period -- all the while undertaking to advise that employee that she was entitled to medical and income benefits. In keeping with the purposes of the workers' compensation act and basic principles of due process and fairness, BHE cannot be permitted to benefit from its deceptive behavior by raising a limitations defense, and the Board erred in ruling otherwise.

The opinion of the Workers' Compensation Board is reversed, and this matter is remanded with directions that the opinion and award of the ALJ be reinstated.

POTTER, SPECIAL JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

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