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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-002641-WC

ERSULINE WEATHERS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 00-WC-00514

TOWN & COUNTRY FORD; W. BRUCE COWDEN, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

TACKETT, JUDGE: Ersuline Weathers (Weathers) petitions for review from an opinion of the Workers' Compensation Board (Board) which affirmed an opinion and order of the Administrative Law Judge (ALJ) dismissing Weathers' application for workers' compensation benefits on the basis that the application failed to comply with the two-year statute of limitations period as prescribed by Kentucky Revised Statutes (KRS) 342.185. Because the application was filed outside of the

two-year limitations period and there were no circumstances which would have tolled the running of the statute of limitations, we affirm.

Weathers began working as a salesman for Town & Country Ford (Town & Country) in 1990. On Sunday, April 26, 1998, Weathers attended church with his brother, Sidney Weathers (Sidney). Weathers drove a Ford Taurus demo car supplied by Town & Country. Sidney had previously purchased vehicles from Town & Country and was interested in buying a car for his wife. As a result, it was decided that Sidney, who lived directly across the street from Weathers, would drive the Taurus home from the church services for the purpose of test-driving the vehicle.

With Sidney at the wheel, as the Taurus was stopped at an intersection, it was struck from behind by a third party. Weathers did not experience any pain at the time of the accident, and went to work the following day at which time he informed Town & Country of the accident. Weathers acknowledges that he did not inform Town and Country that he was injured in the accident at this time. Weathers testified that he began to feel stiff but continued to work throughout the week. It was not until the following Saturday that he felt pain and weakness in his back legs. Weathers stated that the next Monday his legs collapsed and that it was at that time he first sought medical

treatment. Weathers alleges that when he first began to experience pain he informed Town & Country that the pain was related to the accident and that he was going to seek medical attention.

Weathers eventually underwent a number of surgical procedures. Weathers' private insurance carrier paid all of his medical expenses. Weathers signed up for and was awarded Social Security disability benefits, and also received short-term and long-term disability benefits through Town & Country from a private disability insurance policy.

On April 28, 2000, Weathers filed an application for workers' compensation benefits. A hearing on the claim was held on October 23, 2001. With regard to the hearing, of particular significance is a hearing exhibit of Weathers' application to a private insurance carrier for short-term disability benefits which was completed shortly after the accident. Two sections of the application indicate that the cause of the disability is "illness," and in another section the application indicates that Weathers is not receiving or eligible for workers' compensation benefits.

On May 17, 2002, the ALJ issued an opinion and order dismissing the application on the basis that the application for benefits was not filed within the two-year statute of limitations period as provided by Kentucky Revised Statute (KRS)

342.185. Weathers then appealed to the Board. On November 27, 2002, the Board entered an order affirming the ALJ's dismissal of the application. This petition for review followed.

The limitations period statute, KRS 342.185(1), provides, in relevant part, as follows:

> [N]o proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident, or in case of death, within two (2) years after the death, whether or not a claim has been made by the employee himself for compensation. The notice and the claim may be given or made by any person claiming to be entitled to compensation or by someone in his behalf. If 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. (Emphasis added).

On appeal, Weathers acknowledges that he did not file his application for benefits within the two-year limitations period. However, citing to Galownia v. Starlink Satellites, Case No. 2001-CA-002686-WC, an Opinion rendered by this Court on August 2, 2002, and designated to be published, Weathers contends that the limitations period was tolled on the basis

that Town & Country did not comply with KRS 342.038(1) and/or KRS 342.040(1). We note that while the Galownia Opinion was designated to be published, the case is currently pending before the Supreme Court, and, as the August 2, 2002, Opinion is not final, it was improper for Weathers to cite Galownia as controlling authority. Kohler v. Transportation Cabinet, Ky. App., 944 S.W.2d 146, 147 (1997). In light of this we will construe Weathers' argument as limited to the contention that the statute of limitations was tolled because Town & Country failed to comply with KRS 342.038(1) and KRS 342.040(1).

The first statute relied upon by Weathers, KRS 342.038(1) provides, in relevant part, as follows:

> (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,[1] 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.... (Emphasis added.)

[1] KRS 342.185 to KRS 342.200, among other things, requires an employee to give notice of an accident as soon as practicable after the happening thereof (KRS 342.185); requires an employee to give notice of an accident and workers' compensation claim in writing (KRS 342.190); and provides that failure to give notice or delay in giving notice shall not be a bar to a claim if it is shown that the employer had knowledge of the injury or that the delay or failure to give notice was occasioned by mistake or other reasonable cause (KRS 342.200).

The second statute relied upon by Weathers, KRS 342.040(1), provides in relevant part, as follows:

> (1) . . . 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.)

Several cases have considered the issue of whether the statue of limitations is tolled if the employer fails to comply with the reporting requirements contained in KRS 342.038(1) and KRS 342.040(1). As a preliminary matter we will briefly review those.

In City of Frankfort v. Rogers, Ky. App., 765 S.W.2d 579 (1988), the employer failed to comply with the provision of KRS 342.040(1) which requires the employer to notify the Board if it stops making voluntary payments to an injured worker, thereby preventing the Board from fulfilling its obligation of notifying the worker of his right to prosecute a workers' compensation claim against the employer. The decision held that an employer cannot blatantly disregard its statutory obligation under KRS 342.040 and thereby manufacture the defense of limitations under KRS 342.185.

In Newberg v. Hudson, Ky., 838 S.W.2d 384 (1992), the case primarily relied upon by the ALJ, the employee suffered a work-related injury on October 28, 1985, but did not miss his first day of work as a result of the injury until November 19, 1985, and did not miss more than one day of work until December 1985. After the claimant began missing work, the employer's personnel coordinator gave the claimant a form to complete for weekly sickness payments under company policy. The form requested that the employee indicate whether a work-related accident caused the work absence and, if so, requested a description of the accident. The employee left the applicable spaces blank. The claimant did not file his claim for benefits until November 23, 1987. The Supreme Court held that where there is no evidence that the employer's noncompliance with the notice provisions was in bad faith, and there is evidence of a good-faith attempt by the employer to ascertain the reason behind an employee's absence from work, then the statute of limitations is not tolled.

In Ingersoll-Rand Co. v. Whittaker, Ky. App., 883 S.W.2d 514 (1994), there was a copy of a form in the employer's file which, arguably, indicated that the employer had intended to notify the Board of its termination of voluntary payments; however, the notification was, inexplicably, never sent to the Board as required by KRS 342.040(1). The employer argued that

because it did not manufacture the limitations defense and did not blatantly disregard its statutory obligation to notify the Board, it should not be denied the defense. The Court disagreed and held that, regardless of proof of employer misconduct, an employer's unexplained failure to file a notification with the Board precludes the employer from asserting a limitations defense. The court reasoned that notification is an affirmative duty on the part of the employer, and that it would be unreasonable to expect the injured worker to bear the consequences of such error since it was in no way his fault that the notification requirement was not met.

In Colt Management Co. v. Carter, Ky. App., 907 S.W.2d 169 (1995), the employer was not allowed to plead a statute of limitations defense after having failed to notify the Board pursuant to KRS 342.040(1) that it had stopped paying voluntary income benefits, and the Board did not know to advise the worker of his rights. In addition, the decision distinguished Newberg v. Hudson, supra, and expressly rejected the employer's argument that it was not barred from asserting a limitations defense since there was no proof that it acted in bad faith. The decision held that it 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 H. E. Neumann Company v. Lee, Ky., 975 S.W.2d 917 (1998), the claimant alleged that he suffered a work-related heart attack as a result of becoming overcome by fumes while using a cleaning solution. After being released from the hospital having undergone quadruple bypass surgery, the employee testified that he called the employer's office to see why his medical bills were not being paid and was informed that he had to fill out a workers' compensation form. The employee filled out a form stating that the basis of his claim was work-related and that he had missed fifty days of work at the time the form was sent to his employer. The employer then sent the form to its insurance carrier. The claimant received no response from the employer and the employer failed to submit the first report of injury with the Board as required by KRS 342.038(1) and also failed to notify the Board as required by KRS 342.040(1) that it would not pay benefits in response to the claimant's notification of a work-related disability. The Supreme Court held that unlike the situation in Newberg v. Hudson, supra, the record reflected that the claimant missed more than seven (7) days work immediately after the occurrence of the alleged injury and that the claimant notified the employer of his injury and his belief that it was work-related. The Supreme Court noted

that at that point the employer was under a duty to notify the Board pursuant to KRS 342.038(1) and KRS 342.040(1). The Supreme Court noted that the failure of the employer to satisfy the statutory notification requirement acted to toll the statute of limitations by estopping the employer from prevailing on the statute of limitations defense inasmuch as the claimant was never notified by the Board regarding his rights and the time frame in which he must act.

Finally, in J & V Coal Co. v. Hall, 62 S.W.3d 392 (2001), the employee was injured in April 1997 and filed his claim in May 1999. Following the accident the employee informed his shift supervisor about the accident but continued working in pain for approximately three weeks before advising his employer that he would require medical treatment. The employee did miss work as result of injuries sustained in the accident thereby triggering the notification provisions of KRS 342.038(1); however, he did not miss a sufficient number of days to trigger entitlement to temporary benefits under KRS 342.040(1). Therefore, the "terminat[ion] or fail[ure] to make payments when due" provision of KRS 342.040(1) was never triggered and, consequently, the notification provisions of KRS 342.040(1) were never triggered either. The Supreme Court noted that even though the employer did not comply with the notification provisions of KRS 342.038(1), since the employee never qualified

for temporary income benefit payments under KRS 342.040(1), even if the employer had complied with the reporting requirements of KRS 342.038(1), the employee would not have qualified for notification under KRS 342.040(1). The Supreme Court noted that under these circumstances the statute of limitations was not tolled.

In consideration of the foregoing case authorities, we are persuaded that the ALJ's analysis of the present case is correct:

> From the facts of the case at bar, the Administrative Law Judge must find that the situation is more akin to the situation described in Newburg v. Hudson, supra. From the facts it can be ascertained that the Plaintiff returned to work immediately after the accident and worked for another one (1) week before he testified that his legs collapsed. The Plaintiff testified in fact at the formal hearing that at no time did he ever fill out any type of accident report or incident report with the Defendant/Employer. Medical reports reviewed by Dr. Goldman reflect that the Plaintiff had been treated in the past for polyarthritis in the hands, back and hip, rheumatoid arthritis, and diabetic polyneuropathy. Although the record reflects that the Plaintiff testified at the formal hearing that he did inform the people at the dealership including Mr. Butler, Mr. Meredith, as well as Ray Buchanan, that his brother was test driving the car at the time of the accident, section 2 of a short term disability application marked as "Exhibit 2" to the formal hearing testimony which was to be filled out by the Plaintiff and was in fact signed by the Plaintiff and dated May 20, 1998, approximately twenty-four (24) days after

> the alleged injury date indicated that the Plaintiff's accident or illness was not work-related nor was he receiving or eligible to receive workers' compensation benefits. Moreover, although it appears from the record that the application was filed two days after the applicable statute of limitations would have run, there is no allegation that the anniversary date was such that would have extended the statute of limitations by two days. The Administrative Law Judge must, therefore, dismiss the Plaintiff's claim for occupational disability benefits on statute of limitations grounds based on Newberg v. Hudson, supra, inasmuch as the Administrative Law Judge finds that at all times there has been no indication that the Defendant/Employer has acted in any other way than in good faith. Based on this fact, all other issues are hereby deemed moot.

The fact-finder, the ALJ, rather than the reviewing court, has the sole discretion to determine the weight, credibility, quality, character, and substance of evidence and the inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). The ALJ has the discretion to choose whom and what to believe. Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 422 (1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). Although a party may note evidence which would have supported a conclusion contrary to the ALJ's

decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

Where the decision of the fact-finder is in opposition to the party with the burden of proof, that party bears the additional burden on appeal of showing that the evidence was so overwhelming it compelled a finding in his favor and that no reasonable person could have failed to be persuaded by it. Mosely v. Ford Motor Co., Ky. App., 968 S.W.2d 675, 678 (1998). In such cases, the issue on appeal is whether the evidence compels a finding in his favor. Paramount Foods at 419; Daniel v. Armco Steel Co., L.P., Ky. App., 913 S.W.2d 797, 800 (1995). To be compelling, evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985).

The factual findings of the ALJ are supported by substantial evidence, and we agree with the ALJ that the facts in this case are most consistent with Newberg v. Hudson, supra. Under the facts and controlling authorities, the evidence is not so overwhelming as to compel a finding in favor of Weathers. It is evident that the reporting requirements of KRS 342.038(1) and KRS 342.040(1) were never triggered. We agree with the conclusion of the Board:

Here, the ALJ was not convinced Weathers had ever indicated to Town & Country that he considered this to be a work-related injury until after he filed his application two years and two days following the alleged injury. The record contained substantial evidence to support such a finding. Weathers acknowledged in his deposition that when he returned to work and informed Town & County there had been an accident, he did not state he was injured. It is apparent from the record that Weathers never attempted to have the workers' compensation carrier pay any of his medical bills for the multiple surgeries and injections and made no effort prior [sic] to file the claim, seek temporary total disability or other income benefits. From these actions as well as the statements on the short term disability application that his complaints were the result of an illness rather than an injury, the ALJ could reasonably conclude any assertion after filing the claim that Weathers had reported a work-related condition lacks credibility and were compatible with a scenario of Weathers not having reported the work injury. At no point has Weathers indicated a belief that the payment of short term and long term disability was in lieu of workers' compensation benefits. Weathers has simply failed to offer credible evidence that he reported his condition to Town & Country as a condition related to a work injury. Since the ALJ concluded Town & Country was not aware that Weathers was asserting a work-related injury until more than two years after the date of the injury, the ALJ correctly found the claim barred by the statute of limitations. Each case cited by Weathers in his appeal deals with an instance in which the employer knew of an alleged injury and failed to comply with KRS 342.038 and/or 342.040. Thus, none of those decisions are applicable to the facts as determined by the ALJ.

When reviewing decisions of the Board, our function is to correct the Board only where we perceive that the Board "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992). In this case, the Board has not overlooked or misconstrued controlling statutes or precedent or committed an error in assessing the evidence so flagrant as to cause gross injustice."

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

ALL CONCUR.

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