

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2003-CA-001769-WC

MCKNIGHT AND SONS SAWMILL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-02-01202

RICHARD BROWN, UNINSURED EMPLOYERS' FUND,  
AMERICAN INTERSTATE INSURANCE COMPANY,  
WORKERS' COMPENSATION BOARD, AND  
HON. DONALD G. SMITH, ALJ

APPELLEES

OPINION

AFFIRMING

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BEFORE: BARBER, SCHRODER AND TAYLOR, JUDGES.

TAYLOR, JUDGE. McKnight & Sons Sawmill ("McKnight") asks us to review an opinion of the Workers' Compensation Board entered July 23, 2003. We affirm.

On February 22, 1997, McKnight acquired workers' compensation insurance from American Interstate Insurance Company ("American"). One year later, on February 22, 1998, McKnight voluntarily allowed its workers compensation insurance coverage with American to lapse as it had become too expensive.

Thereupon, McKnight purchased an accident policy which included major medical coverage for work place injuries as well as payment for lost wages. It appears that McKnight's employees were not told that they were no longer covered by workers' compensation insurance.

In July of 1998, Richard Brown suffered a broken left leg while in the course of employment with McKnight. Brown was off work for approximately three months, and, thereafter, was released to return to work without restrictions. Later, he was treated on two separate occasions for an infection in his leg and was off work. In May of 2002, Brown's leg was once again infected; he was finally released to return to work on September 4, 2002.

When Brown was injured, he received benefits from the accident insurance policy. When Brown's leg flared up in May of 2002, the accident insurance carrier refused to pay additional benefits. The accident insurance policy only extended benefits to two years from the date of injury.

On August 12, 2002, Brown filed a Form 101 for adjustment of injury with the Department of Workers' Claims. The Administrative Law Judge "ALJ" concluded that American was responsible for payment of workers' compensation benefits to Brown because it failed to terminate coverage according to the

mandate of 803 Ky. Admin. Regs. (KAR) 25:175(2), which reads as follows:

Section 2. Reporting Requirements.

(1) Beginning on January 1, 1998, each insurance carrier shall file the information required on the Form POC-1 with NCCI pursuant to the time requirements established in KRS 342.340(2).

(2) NCCI shall electronically file the information filed pursuant to subsection (1) with the Department of Workers' Claims.

(3) The time requirements established in KRS 342.340(2) shall be satisfied once the insurance carrier makes the appropriate filing with the NCCI.

(4) Until December 31, 1998, an insurance carrier shall file the information required on the POC-1 for each new policy, renewal policy, and a change or termination of a policy.

The ALJ also concluded that Brown's claim was timely filed as the statute of limitations was tolled.

The facts surrounding American's attempted termination of the workers' compensation insurance policy are largely undisputed. On February 27, 1998, American notified the National Counsel and Compensation Insurance, Inc. ("NCCI") by mail of the termination in coverage. American submitted to NCCI a Form WC-890609-B, that had been issued by NCCI. For whatever reason, NCCI failed to notify the Department of Workers' Claims ("Department") of McKnight's termination of workers compensation insurance. It appears that NCCI's failure to notify the Department was representative of a greater problem which spurred

the enactment of emergency regulation 803 KAR 25:175(E). On October 15, 2002, NCCI finally notified the Department that McKnight's workers' compensation insurance policy had been terminated.

The ALJ ultimately concluded that American was liable for payment of workers' compensation benefits to Brown. The ALJ determined that American had not strictly complied with the notification requirements of 803 KAR 25:175(2). The ALJ specifically concluded:

American Interstate Insurance Company asserts that they fulfilled all necessary requirements for terminating coverage to the Defendant when filing a Form WC-890609-B with NCCI in March 1998. American Interstate Insurance Company further argues that they have substantially complied since the Form WC-890609-B contained all the necessary information required to terminate coverage. However, 803 K.A.R. 25:175 Section 2 required the carrier to file a Form POC-1. Admittedly, this was not done. . . . Therefore it does not appear that American Interstate Insurance Company has properly satisfied the requirements to terminate coverage and shall be held responsible for payment of benefits in this matter.

Upon the issue of the statute of limitations, the ALJ determined that the statute was tolled and that Brown's claim was timely filed:

The next issue to be addressed by the Administrative Law Judge is whether Plaintiff's claim is barred by the statute of limitations. KRS 342.185 requires the

Plaintiff to file his claim within two years of the date of injury or the last payment of income benefits. The parties have stipulated that no temporary total disability benefits have been paid in this matter. However, the Plaintiff did receive income benefits from a sickness and accident policy. Although the Plaintiff and his mother initially thought he was receiving workers compensation benefits, they did learn in August 1998 that those benefits were being paid under a sickness and accident policy and was not a workers['] compensation. Yet it also appears that the Defendant only filed that Form SF-1 with the Department of Workers Claims on August 22, 2002. Therefore the Plaintiff never received a notice letter from the Department of Workers Claims informing him of the two-year statute limitation. The Defendant asserts that only the insurance carrier is responsible for notifying the Department of Workers Claims. Since the Defendant had voluntarily terminated coverage, there was no reporting requirement. The Administrative Law Judge does not agree. KRS 342.038 and KRS 342.040 indicate an 'employer's insurance carrier or other party responsible for payment of workers' compensation benefits' shall be responsible for making the report to the Department of Workers' Claims within one week of receiving notification that a work injury has occurred. If the employer has no insurance carrier, then the 'other party responsible for the payment of workers' compensation benefits' must notify the Department of Workers' Claims. That was not done in this matter until August 22, 2002. Therefore the statute of limitation in KRS 342.185 would be tolled in Plaintiff's claim pursuant to Holbrook vs. Lexmark International Group, Inc., Ky., 65 S.W.3d 908 (2001).

The Workers Compensation Board agreed with the ALJ as to the tolling of the statute of limitations; however, it

disagreed with the ALJ as to American's responsibility for workers' compensation benefits. The Board concluded that American had substantially complied with 803 KAR 25:175 and, thus, was not responsible for payment of workers' compensation benefits to Brown. This review follows.

McKnight contends the Board committed error by concluding that American had substantially complied with 803 KAR 25:175. Specifically, McKnight argues that substantial compliance of said regulation is insufficient; rather, McKnight believes that strict compliance with the regulation is required. American urges this Court to reverse the Board's decision and to affirm the ALJ's decision on this issue.

We, however, must agree with the Board that substantial compliance is sufficient under 803 KAR 25:175. Indeed, any other interpretation would lead to a manifest injustice. The evidence supports the Board's conclusion that NCCI's failure to properly notify the Board was a consequence of its own internal disorder and was not a consequence of American's utilization of the Form WC-890609-B. Indeed, as specifically concluded by the Board:

American attempted to comply with the reporting regulations by utilizing the form NCCI supplied. NCCI, the vendor selected by the Department, failed with its requirement to return the incorrect form to American so that it could then re-file the notice of termination. It is apparent from

the evidence in the record that NCCI did nothing to inform American of any short comings of its reporting of policy termination. It only confirmed to American that the termination notice had been received by it on March 6, 1998.

Accordingly, we are of the opinion that American acted in good faith and substantially complied with 803 KAR 25:175 and thus, is not responsible for payment of workers' compensation benefits to Brown.

McKnight additionally argues the ALJ and the Board erred by concluding that the statute of limitations had been tolled and Brown's claims had been timely filed. We, however, also believe that the statute was tolled and adopt herein the Board's erudite opinion thereupon:

"The statute of limitations issue is complicated as well. KRS 342.038 and KRS 342.040 act to toll the two-year limitations period set forth in KRS 342.185 when the employer fails to make required reporting under those statutes. KRS 342.038(1) and (3) require employers to keep a record of all injuries that occur in the course of the employment, and also to notify their insurance carrier or other party responsible for the payment of workers' compensation benefits of any work-related injury within three working days of being notified of the underlying accident. KRS 342.038(1) requires the employer to notify the Department within one week of an injury that causes a worker to be absent from work for more than one day. The Form SF1 is used to provide such notice. KRS 342.040(1) provides in pertinent part as follows:

[N]o 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 of 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. . . . In no event shall income benefits be instituted later than the fifteenth day after the employer or death. Income benefits shall be due and payable not less often 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 dependant of right to prosecute a claim under this chapter.

As indicated above, the insurance carrier is not liable for the payment of benefits in the herein claim. McKnight, the employer, however, was responsible for the timely filing of an SF1. Though Brown was paid disability benefits, it is uncontroverted that he sustained a work injury and should have been entitled to at least temporary total disability ("TTD") benefits. These were not paid. Because McKnight



neither initiated payment of TTD nor filed the SF1 with the Department, promptly notifying the commissioner of its failure to make TTD payments, the statute of limitations is tolled. The legislative mandate of employer notice followed by written notice from the commissioner is to ensure that an injured worker is advised in writing of his right to prosecute his claim and the time frame of his right to prosecute his claim and the time frame in which to do, and to provide prompt resolution of asserted work-related injury claims. See H.E. Neuman Co. v. Lee, Ky., 975 S.W.2d 917 (1998); City of Frankfort v. Rodgers, Ky. App., 765 S.W.2d 579 (1988).

We believe the onus was on McKnight to properly notify the commissioner of Brown's injury and pay the compensation due, or notify the commissioner of its failure to make payment when due. Since McKnight failed in all regards, the ALJ correctly determined that Brown's claim was timely filed."

As such, we are of the opinion the statute of limitations (Kentucky Revised Statutes 342.185) was tolled by McKnight's failure to properly notify the commissioner of Brown's injury, and by its failure to pay temporary total disability benefits. We, thus, believe that Brown's claim was timely filed.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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