

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-002587-WC

ELVIS BIKIC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-92911

AUBURN HOSIERY MILLS, INC. as insured by
KENTUCKY INSURANCE GUARANTY ASSOC.;
AUBURN HOSIERY MILLS as insured by
KEMPER INSURANCE CO.; AUBURN HOSIERY MILLS
as insured by GREAT AMERICAN INSURANCE CO.;
LLOYD R. EDENS, Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: EMBERTON, Chief Judge; COMBS and TACKETT, Judges.
COMBS, JUDGE. Elvis Bikic petitions for review of an opinion of
November 5, 2003, of the Workers' Compensation Board, which
reversed and remanded the Opinion, Award, and Order of the
Administrative Law Judge (ALJ). The ALJ awarded Bikic permanent
partial disability benefits for a work-related injury based on a
13% impairment rating. The Board reversed the award after

concluding that Bikic's claim was barred by the statute of limitations as set forth in KRS¹ 342.185(1). Our review of the record reveals that the ALJ's award was amply supported by substantial evidence. We also agree with Bikic's argument that the Board erred in holding that legal precedent required the dismissal of his claim as time-barred. See, Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992). Therefore, we reverse and remand.

Bikic was hired by the appellee, Auburn Hosiery Mills, Inc. (Auburn), in January 2000. A native of Bosnia, Bikic had been in the United States for only a few weeks at the time of his hiring. He injured his back on three occasions at Auburn. The first incident occurred on April 23, 2000; the other injuries occurred on November 6, 2000, and August 17, 2001. On the latter two occasions, he was transported from Auburn to the hospital by ambulance. He underwent surgery for a herniated disc on January 3, 2003; additional back surgery was performed on April 9, 2002. Bikic filed his claim for workers' compensation benefits on July 19, 2002.

Auburn challenged Bikic's claim on two grounds. First, Auburn argued that it was barred by the applicable statute of limitations and that there was no causal connection

¹ Kentucky Revised Statutes.

between his disabling back condition and the occurrences at work. The ALJ resolved both issues in Bikic's favor as follows:

The initial question in this proceeding is whether [Bikic] has an injury as defined by KRS 342.0011(1). I am persuaded by [Bikic's] testimony concerning the onset of pain on April 23, 2000, and the subsequent incidents, as well as the medical records, which initially indicate lumbar strain but confirm disc herniation as shown by the December 27, 2001 report of Dr. Olson. In reviewing the record of Dr. Fee concerning the May 23, 2000 examination, I note that, while a lumbar strain injury was diagnosed, [Bikic] also gave a history of right leg pain. I also note that [Bikic] testified, at page 12 of the hearing transcript, that after the first injury he continually had pain in his back until his surgery. [Bikic] testified concerning the injury of April 23, 2000, and the date corresponds with the date of the statement by Mr. Austin that [Bikic] experienced an injury at that time. I am, therefore, persuaded by [Bikic's] testimony, the aforementioned statement, the May 23, 2000 report by Dr. Fee, as well as the subsequent medical records of Drs. Fee and Olson, that [Bikic] sustained an injury as defined by the aforementioned statute as a result of [the] lifting incident on April 23, 2000. Additionally, I would note that Dr. Chou, in his report, accepted [Bikic's] history that the injury occurred on that date, and his report further indicates that he has reviewed medical records from Dr. Olson and his associates.

In light of the opinion of Dr. Chou, as well as the foregoing, I am further persuaded that [Bikic's] subsequent incidents were exacerbations of the initial injury in accordance with Calloway County Fiscal Court v. Winchester, Ky., 557 S.W.2d 216 (1977). Having made that determination, the Defendant/Employer, as insured by KIGA,

shall be responsible for medical benefits associated with [Bikic's] treatment and for income benefits payable to [Bikic] as a result of the injury.

In addressing the limitations issue, the ALJ found as follows:

The statute [KRS 342.185(1)] further requires that an application for adjustment of claim must be filed within two years following the date of accident or the suspension of income benefit payments, whichever is later. In this instance, [Bikic's] injury occurred on April 23, 2000 and the application for adjustment of claim was filed on July 19, 2002, in excess of two years following the injury. The matter is, however, complicated by the fact that [Bikic] has been paid no temporary total disability benefits. Within the period of limitations, [Bikic] underwent two low back surgeries, which were performed by Dr. Olson. Additionally, the parties stipulated [Bikic] was off work beginning November 19, 2001 and continued until May 13, 2002. In H.E. Neumann Co. v. Lee, Ky., 975 S.W.2d 917 (1998), the Court held that ". . . the employer failed to make voluntary payments after a 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 the claimant regarding the applicable statute of limitations. . .".

In this instance, [Bikic] was absent from work beginning November 19, 2001 for a period in excess of seven days. The record does not indicate that the Department of Workers Claims was notified in order that the required letter of notification to [Bikic] might be sent. Furthermore, I am persuaded by the evidence in the claim, including the testimony of [Bikic], and particularly the records of Dr. Olson, that

[Bikic] was temporarily totally disabled beginning November 19, 2001 and continuing until May 13, 2002. The period of temporary total disability, during which [Bikic] was entitled to income benefits but did not receive them, began within the two year limitation period. As in pointed out in Lawson v. Wal-Mart Stores, Ky., 56 S.W.3d 417 (2001), the beginning of the income benefit period outside of the period of limitations does not extend it. In this instance, the period began within the period of limitations and, therefore, extended it to May 13, 2004. Accordingly, [Bikic's] claim was timely filed.

In reversing the award, the Board concluded that Bikic's failure to satisfy the statute of imitations was "fatal" to his claim. (Board's Opinion, p. 6) It was critical of the ALJ for failing "to give appropriate deference" to Newberg v. Hudson, Ky., 838 S.W.3d 384 (1992), the precedent that it applied as controlling in light of the overall facts of the case. Id. The Board, however, dismissed Auburn's failure to give the required notice to the Department of Workers' Claims that it was not paying temporary total disability benefits (TTD), reasoning as follows:

According to the ALJ's analysis and in reliance upon H.E. Neumann Co. vs. Lee, Ky., 975 S.W.2d 917 (1998), since Bikic missed more than seven days of work [in November 2001] thereafter the employer should have sent notice to the Department that it was not paying temporary total disability benefits so Bikic could be notified by the Department of the expiration of the statute of limitations. All of that is well and good but for the significantly different

circumstances in the instant action and that in Neumann.

Here, the compensable work injury in accordance with Calloway County Fiscal Court vs. Winchester, Ky., 557 S.W.2d (1977) occurred in April 2000. Bikic missed no work as a result of any condition associated with this injury until some 19 months later in November 2001. There is no evidence before the ALJ that at that time he notified Auburn of his condition being related to the original event.

This claim, in our opinion, is more akin to Newberg vs. Hudson, in which the injury in question occurred in late October and it was not until approximately six weeks later that the injured worker missed as much as six days from work. **There it was concluded the employer was legitimately unaware of a causal relationship.**

Based upon the evidence in the instant action, there was no effort on the part of the employer to mislead to deliberately manufacture a limitations defense. See H.E. Neumann, supra. Quite clearly, under the circumstances, and recognizing that it took a presentation of evidence before an ALJ and the involvement of multiple parties before it was ascertained as to what, if any, relationship there was between the time off from work and surgeries with the April 2000 event. [sic] No temporary total disability benefits were ever paid and the claim was not filed until July 19, 2002. Under the circumstances, we do not believe the employer failed to comply with the provisions of KRS 342.038 and 342.040 and, therefore, the statute of limitations was in no way tolled. Therefore, as a matter of law, the claim was untimely filed.

(Board's opinion, pp. 8-9, emphasis added.)

In his appeal to this Court, Bikic argues that the Board erred in reversing the ALJ's determination that Auburn's failure to comply with KRS 342.040(1) extended the limitations period. We agree. The law is clear that the employer bears the risk of loss when the notification required by KRS 342.040(1) is not received by the Department so that the Department can provide notice to an employee of his rights before the limitations period expires. See, Colt Management Co. v. Carter, Ky.App., 907 S.W.2d 169 (1995) and Ingersoll-Rand Co. v. Whittaker, Ky.App., 883 S.W.2d 514 (1994). In both of those cases, while there was no evidence of employer misconduct, the omission nonetheless could not be attributed to the employee. The same reasoning applies in this case.

While some of the facts in Newberg v. Hudson, supra, are similar to those in the case before us, we believe the Board has overlooked a significant fact that distinguishes the underlying circumstances. In Newberg, the employer actively undertook an affirmative effort to obtain information from its employee in order to fulfill its notice obligations; the employee refused to cooperate. However, it was the inaction of Auburn that caused the ALJ to determine that the statute of limitations had been tolled. Unlike the precedent relied upon by the Board, there was no evidence that Bikic failed to

cooperate or that he neglected to keep Auburn informed of the nature or cause of his medical condition.

Having failed to comply with the notification provisions of KRS 342.040(1), Auburn -- not Bikic -- bore the burden of establishing that it was "legitimately unaware of a causal relationship" in order to invoke and to benefit from the holding in Newberg v. Hudson. Rather than introducing evidence on the issue, Auburn left wholly un rebutted Bikic's testimony that he had inquired as to his entitlement to TTD as well as to all matters relating to health insurance. He stated that he was instructed by Auburn to send his medical bills to his health insurer and not to Auburn's workers' compensation carrier. Auburn cannot excuse its failure to comply with its statutory duties by attempting to shift its burden of inquiry and notification to Bikic.

The ALJ was satisfied from the evidence that Bikic gave Auburn proper notice of all three injury-causing events. He provided his employer with statements from Dr. Olson, his orthopedic surgeon, that he was off work long enough (due to surgery for a herniated disc) to be entitled to TTD. Under these circumstances, and hearkening to the remedial purposes of the workers' compensation scheme, we hold that the Board erred as a matter of law in construing Newberg v. Hudson so as to bar

Bikic's claim. The ALJ was correct in rejecting Auburn's defense based upon its statute of limitations argument.

The opinion of the Board is reversed, and this matter is remanded with directions to re-instate the opinion and award of the ALJ.

ALL CONCUR.

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