

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2004-CA-000538-WC

DOUGLAS LESTER

APPELLANT

V. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
CLAIM NO. WC-02-01402

DAGS BRANCH COAL COMPANY, INC. ;  
HONORABLE LLOYD EDENS,  
ADMINISTRATIVE LAW JUDGE;  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; MINTON AND VANMETER, JUDGES.

MINTON, JUDGE: The two-year limitations period for filing workers' compensation claims may be tolled where the employer or its workers' compensation insurance carrier make false representations or fraudulent concealments that lull a claimant into not filing a claim within the prescribed time. Douglas Lester, who was injured while working for the Dags Branch Coal Company, filed his injury claim more than three months after the limitations period expired. Lester argues that the employer

should be precluded from using the limitations defense. He asserts that the carrier's adjuster's delay in responding to Lester's timely request for pre-approval of surgery caused him to delay filing his claim. The ALJ found, and the Board agreed, that the adjuster's inaction in responding to Lester's request did not amount to the sort of false or fraudulent representations that toll the running of the limitations period. Our review of the record supports the findings of the ALJ and the Board. Therefore, we affirm.

Lester was employed by Dags Branch as a coal mine supervisor. He was injured on the job on June 21, 2000, when he lifted a 300-pound tire from a roof bolter. Although he did not suspect that his injuries were serious at the time, he nevertheless filed an accident report with his employer. Lester did not seek immediate medical attention for his injuries; but, some time later, his pain worsened, and he was forced to see a doctor. He received lumbar facet joint injections and took significant doses of medication to alleviate the pain. Despite the pain, Lester was never absent from work for any considerable period.

In May 2002, Dr. Timothy Kriss evaluated Lester and recommended surgery. A pre-certification for a myelogram was sent to Doug Graham, the adjuster for Dags Branch's workers' compensation insurance carrier. Graham was away on vacation

when the request was made; but he eventually authorized the procedure on May 30, 2002. On June 12, 2002, Dr. Kriss faxed Graham a pre-certification request for Lester's surgical procedure. Again, Graham was out of the office on vacation. He returned on June 17, 2002. However, Graham testified that he did not review the request until June 21, 2002, which happened to be the exact date the statute of limitations ran on Lester's claim. Graham advised Lester that his claim had been rejected because it was not within the statute of limitations. Despite the fact his claim had been rejected, Lester proceeded with back surgery on July 22, 2002.

Lester ceased his employment with Dags Branch on July 19, 2002, three days before his surgery. He has been unable to return to work since that time. His Form 101, Application for Resolution of Injury Claim, was filed with the Department of Workers' Claims on September 16, 2002, but was rejected because it was filed outside the two-year statutory period.

An ALJ reviewed Lester's case and affirmed the rejection of his claim. The ALJ stated there was no evidence of false representations or misconduct that would toll the statute of limitations. Specifically, the ALJ stated, "[w]hile I can sympathize with the plight of the Plaintiff, the standard for overcoming the two year limitation requirement of KRS 342.185(1)

is stringent. In this instance, the testimony does not convince me that the actions by Mr. Graham on behalf of the insurance carrier have risen to that level." The ALJ also noted that Lester had not been given any indication from Dags Branch that the statute of limitations for his claim would be ignored or waived. Accordingly, Lester's claim was dismissed.

Lester appealed to the Board. In addition to the reasons stated by the ALJ, the Board's opinion also noted that the statute of limitations would have been tolled had Lester missed more than seven consecutive days of work for his injuries and been awarded temporary income benefits. Since he had not, the decision of the ALJ was affirmed. This appeal follows.

Lester argues that Dags Branch should be estopped from asserting the statute of limitations. He claims Graham's actions "lulled" him into believing his claim was being considered and that approval for his surgery was pending. Lester further asserts that if the insurance carrier had informed him that Graham was on vacation and would not be able to evaluate his claim before the expiration of the statute of limitations, he would have hired a lawyer and filed the appropriate paperwork in time for his claim to have been covered.

This Court's scope of review is limited. It is solely within the province of the ALJ to make findings of fact in a

workers' compensation case.<sup>1</sup> Those findings will only be reversed if "the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in [the claimant's] favor."<sup>2</sup> Likewise, we will only correct a decision of the Board when the controlling law has been disregarded or misinterpreted.<sup>3</sup>

This case presents us with a difficult set of circumstances. We agree that Lester's situation is sympathetic. However, as the ALJ noted, the standard for overcoming a statute of limitations is stringent. As the Kentucky Supreme Court stated in Barker v. Miller,<sup>4</sup> "[l]imitations . . . are creatures of statute which are intended by the Legislature to bring finality to the legal process. 'Thus, limitations act arbitrarily, sometimes extinguishing otherwise viable claims and at other times extinguishing speculative claims.'"<sup>5</sup> We believe that in this case, the statute of limitations prescribed by

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<sup>1</sup> Miller v. East Kentucky Beverage/Pepsico Inc., Ky., 951 S.W.2d 329, 331 (1997).

<sup>2</sup> Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984).

<sup>3</sup> Daniel v. Armco Steel Company, L.P., Ky.App., 913 S.W.2d 797, 798 (1995), quoting Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

<sup>4</sup> Ky.App., 918 S.W.2d 749 (1996) (citations omitted).

<sup>5</sup> *Id.* at 751.

KRS 342.185 extinguished what otherwise would have been a viable claim.

KRS 342.185(1) provides:

Except as provided in subsection (2) of this section, no 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 . . . . 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.

There are only two ways in which the KRS 342.185 limitations period can be tolled. First, if income benefits are paid to the employee as a result of his injury, the limitations period is tolled until after the payments are suspended. Second, the period may be tolled by estoppel if a claimant can prove fraudulent misrepresentation or concealment by his employer.<sup>6</sup>

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<sup>6</sup> Newberg v. Hudson, Ky., 838 S.W.2d 384, 389 (1992).

Neither of these situations is present in this case. The record indicates Lester missed very few days from work, much less the required seven consecutive days needed to receive temporary income benefits and toll the limitations period. Likewise, there is insufficient proof that Lester's employer or the insurance company acted in bad faith. The ALJ found that Graham had not made a false representation concerning the statute of limitations, nor had he fraudulently concealed it from Lester. We believe the evidence in the record supported this finding. There is not such overwhelming proof to the contrary that a finding in Lester's favor is compelled.<sup>7</sup> Graham's action or inaction is insufficient to estop Dags Branch from asserting the statute of limitations.

For these reasons, we must affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert J. Greene  
Pikeville, Kentucky

BRIEF FOR APPELLEE DAGS BRANCH  
COAL COMPANY, INC.:

H. Brent Stonecipher  
Lexington, Kentucky

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<sup>7</sup> See, Wolf Creek Collieries, *supra*, at 736.