

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2004-CA-000414-WC

BILLY BAKER PAINTING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-76344

DANIEL BERRY;
HON. BONNIE C. KITTINGER,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

BARBER, JUDGE: Appellant, Billy Baker Painting (Billy Baker), petitions for review from a decision of the Workers' Compensation Board (WCB) that affirmed a decision of the Administrative Law Judge (ALJ) finding that the two-year Statute of Limitations applicable to filing an application for adjustment of claim was tolled on Appellee, Daniel Berry's (Berry), claim for benefits due to a knee injury. Having

thoroughly reviewed the facts and circumstances of the case and the applicable case law, we affirm.

The facts are more than adequately set forth in the ALJ's Opinion and we adopt that statement as follows:

Plaintiff, Daniel Berry, filed for workers' compensation benefits on December 17, 2002, against Defendant, Billy Baker Painting. Plaintiff alleges that on or about July 19, 1997, he injured his right knee while stepping onto a ladder, which shifted, and that subsequently, he developed back pain from limping on his right leg. Defendant filed a Notice of Claim Denial, on Form 111, stating that the claim is barred by the Statute of Limitations, inasmuch as the employer last paid temporary total disability benefits in November 1997. Defendant also filed a Special Answer, specifically raising the affirmative defense of Statute of Limitations contained in KRS 342.185. . . .

1. Plaintiff is 52 years old and his work history is that of a painter and a musician. He sustained an injury to his right knee on July 19, 1997, as he was painting an interior wall and attempted to step onto a ladder. He received payment of temporary total disability benefits through November 16, 1997, and returned to work for the same employer for another 3½ years. Plaintiff states that he has not worked since November 21, 2002, when he was laid off from work with a different employer.

Following his injury, Plaintiff underwent arthroscopic surgery on his right knee in September, 1997, and was released to return to work by Dr. Bonarens, his treating doctor, in November, 1997. Plaintiff received TTD benefits from the date of injury through November 16, 1997.

He testified that he continued to have problems with his knee and that in April, 2001, his employer terminated the employment relationship without providing a reason. His knee subsequently worsened; however he stated that he did not seek medical treatment until sometime in 2002.

Defendant-Employer took the depositions of two Department of Workers' Claims employees, Joe Peters and Deborah Wingate. Mr. Peters is the Supervisor in the Agreements Section at the Kentucky Department of Workers' Claims (DWC). His department is responsible for processing Statute of Limitations letters generated by electronic data input from employers. Mr. Peters was able to testify that DWC received an electronic filing report advising of the initiation of TTD payments. DWC received [another] electronic filing report advising of a suspension or termination because of Plaintiff's return to work.

Ordinarily, a notice from the employer, such as the third notice electronically submitted by the Defendant-Employer, would trigger a Termination of Benefits letter (WC3) to the Plaintiff notifying him of the two-year Statute of Limitations following the last payment of TTD, in which to file a workers' compensation claim. According to Mr. Peters, Plaintiff was not sent a WC3 termination letter because the electronically filed report by the Defendant-Employer did not include a "payment adjustment end date" which indicates the date of last payment of TTD. Mr. Peters characterized the payment adjustment end date as a mandatory field on the computer screen used in the electronic filing process. He characterized the electronic filing by Defendant as "deficient" in the sense that it did not include an adjustment end date.

Deborah Wingate testified as Director of the information and research division for the Kentucky DWC. She confirmed that the WC3 termination letter was generated, but was not mailed to the claimant because of the missing information in the payment adjustment field. Such letters, which were generated without a termination date, were allowed to accumulate for a period of time and were then simply thrown away. She testified that, to her knowledge, DWC did not reject the employer's filing or generate any kind of error message to the carrier's third party adjuster indicating that a termination letter would not be sent. According to Ms. Wingate the WC3 termination letter was not generated because the adjustment end date was not included in the Defendant's electronic filing.

As an Exhibit to Mr. Peter's deposition, Plaintiff filed a copy of a November 14, 2000, letter from former DWC Commissioner Walter W. Turner, addressing the issue of the failure of the Department to issue a WC3 termination letter in circumstances similar to the one at hand. According to Mr. Turner, in a similar case, the employer filed a notice indicating that the report was a suspension transaction; however, the payment adjustment end date was left blank. Mr. Turner characterized the adjustment end date as a mandatory field when the payment of benefits is suspended or terminated. He acknowledged that no edit or reject system was in place to notify the employer when the data was missing or that a termination of benefits letter would not be mailed to the employee. According to Mr. Turner one or more employees of DWC made a policy judgment to discard the letters generated without a payment adjustment end date instead of mailing them to the employee, a decision which he felt was erroneous.

Defendant obtained and filed the deposition testimony of Mary Margaret Sutherland, Claims Manager at Ladegast & Heffner Claims Service. Ms. Sutherland testified that Plaintiff was paid TTD benefits from July 29, 1997, through November 16, 1997. At the end of his period of TTD, her company electronically filed a report advising DWC of the termination of his benefits. Ladegast & Heffner received an acknowledgment from DWC that the filing was accepted on November 21, 1997. According to Ms. Sutherland, the filing contained a return to work date of November 16, 1997; however, no information was shown in the payment adjustment end date field.

According to Ms. Sutherland, the initial stages of electronic filing included numerous changes in the program and methodology and a change in the computer software program. The early filing system did not include a method by which the carriers were notified of missing information. It is also her understanding from documents received in September, 1999, and March, 2000, that DWC might have changed their policy regarding whether a WC3 termination letter would be generated as a result of any notice of suspension, as opposed to being generated only when specific payment adjustment end date information was supplied. Ms. Sutherland said Ladegast & Heffner was not advised by DWC that its suspension notice was deficient or would result in a decision not to mail a WC3 termination letter.

Ms. Sutherland testified that she received a letter in December 1999 from Deborah Wingate with a list of claims showing lost time injuries, which did not reflect a return to work date or a subsequent report from the carrier. The list did not include the name of the Plaintiff in this case.

As an Exhibit to Ms. Sutherland's deposition, Plaintiff filed an affidavit by Commissioner Larry Greathouse certifying the electronic data interchange records filed regarding the injury to this Plaintiff. These records include a First Report of Injury and two subsequent reports of injury, including the November 21, 1997, suspension notice at issue herein. Commissioner Greathouse's affidavit also included the following statement: "I also certify as of this date, January 5, 2003, the Kentucky Department of Workers' Claims' data base does not reveal the filing of a suspension IAT reflecting the Adjustment End Date and as a result, the WC3 termination of benefits letter has not been generated."

On appeal Billy Baker continues to argue that it fulfilled all of its statutory duties and the only party who failed to fulfill its obligation was the Department of Workers' Claims (DWC). Therefore, it contends that the defense of the Statute of Limitations should be available to it in this case.

KRS 342.185(1) requires a worker to file a claim for injury within two years of the date of the accident or two years from the last payment of income benefits. KRS 342.040(1) requires the employer to notify the DWC of any termination or failure to make payments. This notification then triggers the duty of the DWC to send the WC3 termination letter to the employee advising him of his right to prosecute a claim.

It has long been recognized that the provisions of KRS 342.185(1) and 342.040(1) work in tandem. J & V Coal Co. v.

Hall, Ky., 62 S.W.3d 392, 395 (2001). An employer that does not comply with KRS 342.040(1) is estopped from relying on the statute of limitations. Id.; Patrick v. Christopher East Health Care, Ky., 142 S.W.3d 149, 151-152 (2004). This is so even if the failure to comply is not in bad faith. Rogers v. Palm Beach Co., Inc., Ky., 114 S.W.3d 848, 850 (2003).

It is undisputed in this case that Berry did not file his claim within two years of the last payment of TTD. It is also undisputed that he was never sent the WC3 termination letter advising him of the applicable Statute of Limitations. What was disputed in this case was whether Billy Baker complied with its duty to notify the DWC under KRS 342.040(1) so that the letter would be sent. The ALJ found that the reason the DWC did not send the letter was because of Billy Baker's failure, through its carrier, to communicate to the DWC the payment adjustment end date. This finding is supported by substantial evidence. Pruitt v. Bugg Bros., Ky., 547 S.W.2d 123, 124 (1977).

Where the employer fails to comply with KRS 342.040(1), even if that failure is unintentional, the consequences of that failure fall on the employer. Lizdo v. Genetic Equip., Ky., 74 S.W.3d 703, 705-706 (2002); Colt Management Co. v. Carter, Ky. App., 907 S.W.2d 169, 171 (1995);

Ingersoll-Rand Co. v. Whittaker, Ky. App., 883 S.W.2d 514, 515
(1994).

Accordingly, the decision of the WCB is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Douglas A. U'Sellis
Louisville, Kentucky

BRIEF FOR APPELLEE, DANIEL
BERRY:

Christopher P. Evensen
Louisville, Kentucky