

RENDERED: SEPTEMBER 16, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000139-WC

MICHAEL HON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-94101

UNITED PARCEL SERVICE;
HON. J. LANDON OVERFIELD;
AND KENTUCKY WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

BUCKINGHAM, JUDGE: Michael Hon petitions for review of an opinion by the Workers' Compensation Board affirming an opinion and order by an administrative law judge (ALJ) dismissing Hon's low back injury claim on the ground that it was barred by the applicable statute of limitations. We affirm.

Hon was employed as a delivery driver by United Parcel Service (UPS) from 1984 to 2002. He sustained a back injury on

December 21, 1998, and was off work for surgery from that time through June 1999. Temporary total disability (TTD) benefits were paid by UPS from February 24, 1999, through June 16, 1999. UPS notified Workers' Claims of the termination of those benefits, and Workers' Claims notified Hon of the applicable statute of limitations period in a letter dated June 16, 1999.

Hon continued working with UPS as of June 7, 1999. On December 28, 2000, he injured his shoulder lifting a package. Hon received TTD benefits from February 22, 2001, through June 20, 2001. In August 2002, UPS terminated Hon's employment because the prescription medications he was taking for pain disqualified him from driving a UPS truck. A settlement of his shoulder injury claim was approved on September 29, 2002.

On September 12, 2002, Hon filed an application for resolution of his injury claim, in which he lists the injury as his December 21, 1998 low back injury. UPS asserted the statute of limitations as a defense, and the ALJ agreed. The Board affirmed the ALJ's decision in an opinion entered on December 30, 2004. Hon's petition for review followed.

The applicable statute of limitations states as follows:

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.

KRS¹ 342.185(1). Therefore, since Hon's low back injury occurred on December 21, 1998, he was required to assert his claim within two years of that date or within two years following the suspension of TTD benefits.

Two years from the date of the injury would be December 21, 2000. Two years from the date of the suspension of TTD benefits would be June 16, 2001. Therefore, since Hon did not assert his claim until September 12, 2002, his claim was barred by the statute of limitations unless he can convince us otherwise by further argument.

Hon's first argument is that the TTD benefits he received from February 22, 2001, through June 20, 2001, for the shoulder injury were actually TTD benefits paid for his back injury. This argument is refuted by the settlement agreement signed by Hon that reflected the benefits were paid for the shoulder injury. The argument is also refuted by the testimony of the insurance claim adjustor, Tina McDonald, who testified that the TTD benefits paid to Hon during February 2001 through June 2001 were for his shoulder injury. Furthermore, Hon testified that he was told that the TTD benefits in 2001 were being made for his shoulder injury.

¹ Kentucky Revised Statutes.

Nevertheless, Hon contends that the TTD benefits paid in 2001 were actually for his low back injury and that he asserted his claim within two years of the suspension of those payments. In support of that argument, he introduced into evidence an affidavit from his treating physician, Dr. Gary Melton. Dr. Melton stated that Hon was taken off work in February 2001 due to his back injury and not his shoulder injury. Hon contends that the affidavit constitutes uncontradicted medical evidence of that fact.

The Board stated that "the pertinent question before the ALJ in ruling on the limitations issue was not, as Hon insists on appeal, the medical cause of Hon's disability in 2001, but rather was whether UPS paid TTD benefits in 2001 for Hon's 1998 low back injury or for Hon's 2000 shoulder injury." We agree with the Board's analysis. Furthermore, as noted by the Board, there was substantial evidence to support the ALJ's finding that UPS paid Hon TTD benefits in 2001 for his shoulder injury and not his back injury. That evidence included the terms of the settlement agreement, the testimony of the claims adjustor, and Hon's own testimony. In short, the evidence was not so overwhelming as to have compelled a finding in Hon's favor. See Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App. 1994).

Hon's second argument is that UPS is estopped from asserting the statute of limitations defense. KRS 342.040(1) provides in pertinent part as follows:

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.

Id. The failure to give the statutory notice acts "to toll the statute of limitations by estopping the employer from prevailing on a statute of limitations defense[.]" H.E. Neumann Co. v. Lee, 975 S.W.2d 917, 921 (Ky. 1998). Hon argues that even if the TTD benefits paid in 2001 were for his shoulder injury and not his back injury, UPS was nevertheless required to give the statutory notice that it was denying his claim for low back TTD benefits because he was, in fact, entitled to such benefits.

Hon never established that UPS had a duty to give the notice required by KRS 342.040(1). There was no evidence in the record that Hon ever advised UPS that he was being taken off work in 2001 due to his back injury. In fact, the evidence indicates otherwise. In short, we conclude that UPS was not estopped to raise the defense of statute of limitations.

The Board's opinion is affirmed.²

COMBS, CHIEF JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

Robert B. Cetrulo
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BRIEF FOR APPELLEE, UPS:

Marcus A. Roland
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² Because we have rejected Hon's arguments on the merits, we decline to address UPS's argument that Hon failed to preserve the issues in his petition by filing a petition for reconsideration pursuant to KRS 342.281.