

RENDERED: May 5, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001216-WC

GWENDOLYN SMITH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NOS. WC-98-94968, WC-00-98724, and WC-03-72961

TRANSIT AUTHORITY OF RIVER  
CITY; HON. GRANT ROARK,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING IN PART, VACATING IN PART AND REMANDING

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BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: Gwendolyn Smith petitions for review of a Worker's Compensation Board opinion, which affirmed an opinion, order and award of the Administrative Law Judge (ALJ). Smith had been injured in the course of her employment as a bus driver several times. The ALJ denied claims from 1998 and 2000 on statute of limitations grounds and limited the award for an August 2003 injury to permanent partial disability benefits. Smith disputes the application of the statute of limitations.

She further argues that she is due additional temporary total disability (TTD) benefits for time she was taken off work from February 18, 2003, through July 28, 2003, and again for time she was off work from September 2003, until February 7, 2004, due to pain from her most recent injury.

The function of further review of the Workers' Compensation Board in this Court is to correct the Board only where we perceive that the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). We affirm the Board in part, but we remand to the ALJ for additional consideration of entitlement to TTD benefits for Smith's August 2003 injury.

Smith believes the statute of limitations was tolled by the payment of benefits on her 2000 injury because it was merely a continuation or recurrence of her 1998 injury and not a separate injury as such. Smith also believes that tolling of the statute of limitations occurred when appellee Transit Authority of River City (TARC), reported the incorrect date in its notification to her that it had ceased paying voluntary income benefits.

Tolling of the statute of limitations may occur where the employer fails to meet its statutory obligation to report

the cessation of payments under KRS 342.040. City of Frankfort v. Rogers, 765 S.W.2d 579 (Ky. App. 1988). We agree with the Board that the exception does not apply in this case, however, because TARC's defective report did not deprive Smith of notice concerning the need to file a claim before the statute of limitations period ended. (Opinion p. 12). We entirely agree with the Board's assessment that "any misunderstanding created by the notice would have suggested the need to file the claim earlier rather than later." Id. Smith's attempt to avail herself of the policy in Rogers is not warranted under the letter or spirit of its holding.

The Board concluded that its result regarding the statute of limitations rendered the remainder of Smith's assertions moot. The Board stated:

Given that the single Form 101 alleging the two injuries was filed more than two years after May 26, 2000, it is of no consequence whether TARC's voluntary payment of income benefits during that time period related to the 1998 or the 2000 work-related incidents. In either case, Smith's claim is barred by the statute of limitations. She did not file her application for benefits regarding the 1998 injury until March 28, 2003, more than two years after TTD benefits were terminated on May 26, 2000.

Appellant has failed to demonstrate why the Board's analysis is not correct. We affirm as to the statute of limitations.

Next, Smith argues that the Board erred in determining that TARC substantially complied with the requirement to timely file a Form 111 notice of claim denial or acceptance, pursuant to 803 KAR 25:010 § 5.(2)(a), and a "special answer," pursuant to 803 KAR 25:010 § 5.(2)(d). Smith argues that the language of the regulations cited above is mandatory according to KRS 446.010(29), and is clear and unambiguous. She asserts that where language is mandatory, substantial compliance is not an option. Thus, she believes that TARC's failure to comply results in all the allegations of the application for relief being deemed admitted pursuant to 803 KAR 25:010 § 5.(2)(b).

TARC did not file a Form 111, notice of claim denial or acceptance, as required by 803 KAR 25:010, § 5(2)(a), until ten days after expiration of the 45 day period set forth in the scheduling order. The real issue in this case is TARC's failure to file a "special answer" under 803 KAR 25:010, § 5(2)(d), since that is where the special defense of the running of the statute of limitations is to be asserted. See 803 KAR 25:010, § 5(2)(d)2.g. TARC did plead the special defense of the running of the statute of limitations within the 45 days set forth in the regulation, except that it was by a motion to dismiss rather than in a pleading denominated a "special answer."

The Board reasoned, nevertheless, that TARC's filing of a "Motion to Dismiss Claim" asserting the defense of the

statute of limitations within 45 days of the scheduling order was the equivalent of a special answer. The Board cited the fact that the regulation does not prescribe a particular form for the special answer. Thus, it concluded the substantial compliance by motion was sufficient to give notice of claim denial.

We affirm the Board's reasoning on this issue, as it conforms to common sense and upholds the purposes of the regulation in question. It is correct to say that the provisions of 803 KAR 25:010, § 5(2)(a) are mandatory. The Kentucky Supreme Court said just that in an opinion issued after the Board's decision in this case, Gray v. Trimmer, 173 S.W.3d 236, 240 (Ky. 2005). The Court therein observed that the purpose of requiring compliance with the regulation is "to facilitate the prompt and orderly resolution of workers' compensation claims." Id.

We agree with the Board that since there is no requirement that such a pleading be prepared on a particular form, TARC's filing of its "Motion to Dismiss Claim" may be considered a special answer. It served the purpose, stated in Gray, that claims be resolved in a prompt and orderly fashion. There is no reason to hold otherwise. On the other hand, the Board rightly states that a contrary holding would elevate form over substance.

Gray is distinguishable because the employer in that case failed to respond in any way to the claim within the 45 days. In the case at bar, Smith had early notice of TARC's intention to raise the statute of limitations defense and notice within that same motion that TARC denied the other allegations of the application for benefits. Thus, we affirm the Board's determination that TARC was in substantial compliance with the requirement of 803 KAR 25:010, § 5(2)(d), and that TARC's failure to timely comply with the Form 111 requirement of 803 KAR 25:010, § 5(2)(a) was of no consequence.

Smith's request for additional TTD benefits for February 18, 2003, through July 28, 2003, was barred by the statute of limitations, as stated above. Smith also sought TTD benefits for the period from October 2003, through February 7, 2004, following her most recent injury. They were denied by the ALJ on the basis that Smith returned to work and was able to perform her job despite Dr. Villanueva's opinion that she could not do so without first undergoing surgery on her back. The Board affirmed this result.

The opinion does not make clear why Smith's return to work in February 2004, precludes her receiving TTD benefits from September 2003, through February 7, 2004. Indeed, the ALJ failed to make findings in accordance with the statutory standard for TTD benefits. TTD is defined in KRS

342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment."

The Board states that Smith "was taken off work from September 2003 through February 7, 2004." The ALJ denied TTD benefits for this period because Smith went back to work despite her doctor's recommendation that she could not do so without having surgery. Smith stated in her deposition that payment for her surgery was denied and she was running out of sick leave time, so she returned to work for fear of losing her job.

The ALJ did not analyze the appropriateness of TTD benefits for the period from September 2003, through February 7, 2004, based on the statute. The ALJ made no findings as to maximum medical improvement or the time when Smith reached a level of improvement that would permit her to return to employment. While Smith was able to return to work on February 7, 2004, we observe no findings as to whether she could have worked earlier than that following her August 2003 injury. The Board's opinion and the recommendation of Dr. Villanueva indicate that she was taken off work during that time. Because the ALJ overlooked the statute's dictates, we remand for a determination by the ALJ as to TTD using the definition in KRS 342.011(11).

For the foregoing reasons, we affirm the Board in part, and vacate in part and remand for a determination of the availability of TTD benefits following Smith's August 2003 injury.

ALL CONCUR.

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