

RENDERED: DECEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-000382-WC

KEVIN W. GARLAND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-62474

H.T. HACKNEY COMPANY, INC.;
HON. BRUCE W. COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Kevin W. Garland has petitioned for review of an opinion of the Workers' Compensation Board entered on January 27, 2006, which affirmed the Administrative Law Judge's dismissal of his claim for workers' compensation benefits.¹

Having concluded that the Board did not err in assessing the

¹ The ALJ's opinion and order states that "[a]t a Benefit Review Conference that was held in this matter on June 8, 2004, on [Hackney's] motion this case was bifurcated on the issue of statute of limitations."

evidence nor did it overlook or misconstrue controlling precedent,² we affirm.

Garland, whose date of birth is August 10, 1970, became employed with H.T. Hackney Co., Inc. in July 1989 as a tractor-trailer truck driver.³ On November 9, 2000, during the course of his employment with Hackney, Garland sustained multiple injuries⁴ as the result of a motor vehicle accident, including a broken leg, neck, wrist, and back.⁵ Garland underwent numerous surgeries, procedures, and therapies from November 9, 2000, until December 1, 2000, but returned to work for Hackney in July 2001 in the office⁶ as a sales coordinator,⁷ with a reduction in his wages.⁸ His temporary total disability income benefits were terminated on July 12, 2001.

² Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

³ Garland's responsibilities as a truck driver included delivering wholesale groceries to convenience stores and loading and unloading trucks.

⁴ Additional orthopedic surgery is anticipated eventually in the form of a total hip replacement.

⁵ The truck Garland was driving was hit head-on by another tractor-trailer truck that was attempting to avoid a collision with a vehicle that had pulled into its lane of traffic.

⁶ He was released by his doctors to return to work.

⁷ His job duties consisted of taking care of log books and sales representatives, checking pricing, running reports from a computer, and purchasing some products.

⁸ Garland testified that at the time of the accident, he earned \$13.75 to \$14.75 per hour and normally worked overtime. He now earns \$10.00 an hour and works a 40-hour week.

On December 17, 2003, Garland filed a Form 101 Application for Adjustment of Injury Claim with the Department of Workers' Claims.⁹ On September 13, 2005, the ALJ entered an opinion and order denying Garland's workers' compensation claim as barred by the statute of limitations at KRS 342.185(1). The ALJ found that Hackney had met its burden of proof and complied with KRS 342.040(1) in the transmission of the required information contained in the 1A-2 reporting form. Further, the ALJ ruled that the fact that Garland did not receive the WC-3 form by mail standing alone could not toll the statute of limitations.¹⁰ Garland then appealed the ALJ's decision to the Board, making the same claims. The Board held that the ALJ's decision was based upon substantial evidence and the Board further concluded that the voluntary payment of medical expenses did not toll the statute of limitations set forth in KRS 342.185. The Board entered its opinion on January 27, 2006, affirming the ALJ's opinion.

Because the facts of this case are not in dispute, we will quote the relevant portions of the ALJ's opinion as follows:

⁹ While this claim was pending, the name was changed to Office of Workers' Claims.

¹⁰ See Miller v. Stearns Technical Textiles Co., 145 S.W.3d 414 (Ky.App. 2004).

3. [Garland] has introduced the testimony of [his] wife, Sandra Garland. Ms. Garland testified that she has been married to [Garland] for 15 years. She further testified that her current address is 1809 Old Calvert City Road, Calvert City, Kentucky. She testified that she is the one who takes care of the paperwork and financial matters at home and she is the one who checks the mail. She testified that at the time of the November 9, 2000[,] accident she and her husband lived at 2638 Fairmont Street in Paducah. She testified that they then moved to 6920 Shawn Lane in Paducah in July 2001. She further testified that they moved once again to the Calvert City address in April 2003. She further testified that on October 3, 2001[,] they did not live at the Fairmont address but lived at the Shawn Lane address and that they had lived at that address for approximately three months as of October 2001. She was handed Exhibit 1 to Joe Peters deposition which was the WC-3 letter dated October 3, 2001. She further noted that the address on the letter marked Fairmount Street was wrong inasmuch as she lived on Fairmont Street. She testified that they never received the WC-3 letter from the Department of Workers' Claims. She testified that she checked with the local post office prior to her deposition. The post office did not have any record of the Shawn Lane address but did have a change of address card from where they moved from Shawn Lane to Calvert City. On cross-examination, Ms. Garland testified that the temporary total disability benefits were received at the Fairmount [sic] address in Paducah and that those benefits were paid through July 12, 2001. She testified that two checks however were received at the Shawn Lane

address. She testified that they moved from the Fairmount [sic] address to the Shawn Lane address sometime in July 2001 but she could not recall the exact date of when the Fairmount [sic] address ceased to be her mailing address. She testified that when she moved from Fairmount [sic] to Shawn Lane she completed a change of address card. She testified that she received the two disability checks at the Shawn Lane address because she called the case worker for the insurance company and informed him that their address had changed. Ms. Garland further noted that she had no difficulty receiving forwarded mail at her new address at 6920 Shawn Lane.

4. [Hackney] has filed the deposition of Mr. Joe Peters. Mr. Peters holds the position of Resource Management Analyst III for the Office of Workers' Claims. His responsibilities include checking electronic filings and editing and checking those filings for errors. His job also includes developing training courses for in-house and out-of-house insurance carriers. He testified that a WC-3 letter was sent to Kevin Garland at 2638 Fairmount, Paducah, Kentucky 42001 after the insurance carrier filed an IA-2 report indicating that temporary total disability benefits had ceased. Mr. Peters testified that there was no record of a return of the letter in the electronic file. He testified that if the letter had been returned a current address would have been investigated and the letter would have been sent to the new address. However, because there is a copy of the WC-3 letter in the department's imaging system he would assume that the letter was mailed and the original was received by [Garland].

5. [Hackney] has also filed the deposition of Mr. John Sampson, Jr. as evidence in this claim. Mr. Sampson is employed by AIG, the insurance carrier in this case as a claims manager. He has been employed by AIG for nine years but has worked in his current position for nine months. Around the time period of 2000 and 2001 he held the title of senior claims specialist. He handled [Garland's] claim from the beginning which was the day of the November 9, 2000[,] accident. He testified that AIG on behalf of [Hackney] paid [Garland] temporary total disability benefits beginning November 10, 2000[,] and continued those payments through July 12, 2001. The temporary total disability benefits were mailed to [Garland] at 2638 Fairmount, Paducah, 42001. He testified that he spoke with Ms. Garland on July 12, 2001. He testified that Ms. Garland called on July 12, 2001[,] to advise him that [Garland] returned to work on July 9, 2001. He testified that he explained to her that on July 6, 2001[,] he had generated a temporary total disability check that paid him through [] July 12, 2001. He further explained to her that there was a four day overpayment. He requested that she write void across the check when she received it and send it back to AIG. She explained that they had recently moved and that she would wait until she received the check.¹¹ At that time she would cash the check and send AIG the difference. He denied that at any time during his conversation with Ms. Garland did she give him a new mailing address and he further denied that at no time did Kevin Garland or his wife Sandra Garland inform him of their move to the Shawn Lane address. He testified that

¹¹ The Board misstates this finding by the ALJ. See infra n. 13.

the July 6, 2001[,] check was mailed to the 2638 Fairmount address and was never returned back to AIG. He stated that an IA-2 subsequent report noting the return to work was completed and filed [with] the Department of Workers' Claims on or about September 28, 2001. He further stated that since that time a mileage reimbursement check in the amount of \$1,056.64 was sent to [Garland] at the same address of 2638 Fairmount, Paducah, Kentucky 42001 on December 11, 2001. He testified that the reimbursement check was never returned to AIG. He explained that if a check has not been cashed within 180 days of its issuance, the check is automatically voided in the insurance carrier's system and the reimbursement check and the July 6, 2001[,] temporary total disability check [have] not been voided. Therefore[,] he opined that both checks have been cashed. On cross-examination, Mr. Simpson testified that he transacted the July 6th check but the checks are actually mailed out from a different office in New Jersey. He stated that he puts the information into a computer system which automatically goes to a check printing office, which is located in New Jersey and that the New Jersey office mails the check from there. He testified that if there is a change of address he would put that information into the computer system and the check would then be mailed to the new address.

Garland argued before the ALJ that the statute of limitations for his workers' compensation claim should have been tolled because the WC-3 letter was mailed to an incorrect address and he never received it. Further, Garland argued that

Hackney's agent did not notify the Office of Workers' Claims of his new address in July 2001, and that the statute should have been tolled because the letter generated at the Office of Workers' Claims may not have ever been delivered to central processing, stamped, or deposited with the postal service. In the alternative, Garland argued that KRS 342.185 should be interpreted to allow a filing of a claim for benefits within two years from the last payment of voluntary benefits, including medical benefits. In contrast, Hackney argued that the temporary total disability benefits terminated on July 12, 2001, and Garland's application for an adjustment of injury claim was not filed until December 17, 2003, more than two years after the termination of his temporary total disability benefits, and the fact that Garland moved to a new address in July 2001 does not provide an excuse for Garland's failure to timely file an application for benefits.

The ALJ ruled that Hackney had sustained its burden of proving that it had provided notice to Garland pursuant to KRS 342.040(1). The ALJ applied the applicable law to the facts and determined Garland's claim was barred by the statute of limitations. The ALJ stated as follows:

7. KRS 342.185(1) provides as follows as is applicable to this issue:

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 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. . . . 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.

The facts of this case demonstrate that the last temporary total disability payment was made on July 12, 2001. The application of an adjustment of claim however was not filed until December 17, 2003, clearly beyond the 2 year statute of limitations. The facts of the case further demonstrate that upon terminating the temporary total disability benefits, the claims administrator for [Hackney] filed a Form IA-2 notifying the Office of Workers Claims that the termination date for temporary total disability benefits was July 12, 2001. This fact is confirmed through the testimony of Joe Peters. As a result of receipt of this form, the Office of Worker's Claims sent a WC-3 letter to [Garland] at 2638 Fairmount (sic), Paducah, Kentucky 42001 on or about October 3, 2001. The testimony of Joe Peters again confirms this fact and the testimony of Joe Peters further confirms that from the electronic files that the WC-3 letter was sent and there was no record of a return of the letter in the electronic file. Although the record further reflects that [Garland's] wife called the claims adjustor on July 12, 2001[,] to inform him that [Garland] had in fact returned to work on July 9, 2001[,] which precipitated the termination of temporary total disability benefits and also explained to him during the same telephone call that they had

recently moved, there is no indication that [Garland] informed the adjustor at that time of the new address. In fact the adjustor testified specifically in his deposition that at no time did [Garland] or his wife inform him of a new mailing address. He further confirmed that at no time did [Garland] or his wife inform him of the move to the Shawn Lane address.

8. The [ALJ] rejects [Garland's] argument that the statute of limitations should be tolled under the circumstances of this particular case inasmuch as [Hackney] and/or its insurance carrier failed to ask for a new address during this telephone call. The [ALJ] points out and the record so reflects that [Garland's] wife testified on cross examination that when she moved from the Fairmont address to the Shawn Lane address that she completed a change of address card at the downtown branch of the Paducah Post Office. She further testified on cross examination that she received two disability checks at the Shawn Lane address presumably based on this change of address form. In further support that [Garland] received mail at the Shawn Lane address which was sent to the old address the [ALJ] cites to the deposition testimony of John Sampson, the claims manager for AIG, who testified that a mileage check in the amount of \$1,056.64 was sent to [Garland] at [his] former address, 2638 Fairmount (sic), Paducah, Kentucky 42001 on December 11, 2001[,] and this reimbursement check was never returned to AIG as undeliverable. Moreover, Mr. Sampson explained that if the check was not cashed within 180 days of its issuance, the check was automatically voided in the insurance carrier system and that this reimbursement check had not been voided. Moreover, attached to [Hackney's] brief is a copy of this check #079822365 dated December 19, 2001[,] and addressed to [Garland] at 2638 Fairmount, Paducah, Kentucky 42001 which has

been endorsed on the back indicating receipt.

9. Although [Garland's] wife's testimony indicates that the street name for [Garland] contained with the Department of Workers Claims notification letter and with the reimbursement check has been incorrectly recorded as Fairmount when in actuality the correct spelling is Fairmont, as it applies to the reimbursement check [Garland] did in fact receive said check upon the change of notification form notwithstanding [sic] this incorrect spelling. To this extent, the [ALJ] finds that the misspelling played no consequence in the failure of the notice letter from being forwarded. For these reasons, the [ALJ] will find that contrary to the holding in Lizdo v. GenTech Equipment, 74 S.W.3d 703 (Ky. 2002) the [ALJ] finds that the employer did in fact comply with the provisions of KRS 342.040(1) in the transmission of the required information contained in the IA-2 reporting form. Under the circumstances, the [ALJ] finds that [Garland's] testimony that she did not receive the WC-3 form as mailed by the Department of Workers Clams is insufficient in and of itself to toll the statute. Under the circumstances of this case and as previously pointed out the [ALJ] finds significant the following to substantiate this finding:

1. [Garland's] wife did testify on cross examination that she filled out a change of address form at the downtown post office branch located on 4th Street across from City Hall in Paducah, Kentucky.
2. [Garland's] wife acknowledged that she in fact did receive 2 temporary total disability checks at the Shawn Lane address notwithstanding the fact that they were mailed by the insurance carrier to the old address of 2638

Fairmount in July 2001 and the evidence further demonstrates that a reimbursement check dated December 2001 which was mailed to the former address, incorrectly spelled, was endorsed by [Garland] and therefore received.

3. Joe Peters, with the Department of Workers Claims, stated that there was no return on the WC-3 form.

For these reasons the [ALJ] must find that this claim must be dismissed as barred because the Form 101 application was filed outside the 2 year period put forth in KRS 342.185(1). . . .

Garland subsequently appealed to the Board and asserted the same arguments. The Board held that there was substantial evidence to support the ALJ's decision that Garland's claim was time-barred, and that Garland's policy argument regarding KRS 342.185 was a decision for the Legislature and not the Board. This petition for review followed.

As the fact-finder, the ALJ has the sole discretion to determine "the quality, character, and substance of evidence."¹² The function of further review of the Board in the Court of Appeals is "to correct the Board only where [this] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the

¹² Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 929 (Ky. 2002).

evidence so flagrant as to cause gross injustice".¹³ In the case before us, we are unpersuaded that the view of the evidence taken by the ALJ and the Board was unreasonable. Because we agree with the Board's rationale on this issue, we quote from Chairman Gardner's opinion and adopt the following as our own:

KRS 342.040(1) places certain obligations on the employer and on the Office of Workers' Claims. The employer has the affirmative duty to notify the Office of Workers' Claims of its refusal to pay temporary total disability ("TTD") benefits after a worker misses more than seven days of work due to a work-related injury. The statute also requires the Office of Workers' Claims to advise the worker of the right to file a claim and [the] applicable period of statute of limitations. KRS 342.185 tolls the period of limitations until voluntary income benefits are suspended. When KRS 342.040(1) and KRS 342.185(1) are read together, it is clear the two-year statute of limitations period does not begin to run until: 1) the employer ceases payment of voluntary income benefits; 2) the employer provides notice of the cessation of benefits to the Office of Workers' Claims, and (3) the Office of Workers' Claims sends the employee the required notice.

KRS 342.990 provides both civil and criminal penalties for failure to comply with KRS 342.040, but neither it nor any other statute provides a remedy for workers whose rights are affected by the failure to comply. Thus, the courts have turned to equitable principles in order to protect them. See Newberg v. Hudson, 638 S.W.2d 384, 389 (Ky., 1992). In Newberg, the Kentucky Supreme Court held that an employer's failure to strictly comply with

¹³ Western Baptist Hospital, 827 S.W.2d at 687-88.

KRS 342.040 estopped it from raising the limitations defense. The rationale is that if the Office of Workers' Claims does not receive an employer's notice of termination or refusal, it cannot perform its obligation to the affected worker. Furthermore, it is not necessary to establish the employer acted in bad faith for the employer to be precluded from raising the statute of limitations defense. Rather, it merely must be shown that such failure could not be attributed to the worker. H.E. Newman Co. v. Lee, [975 S.W.2d 917, 921 (Ky. 1998)]; Colt Management Co. v. Carter, 907 S.W.2d 169 (Ky.App. 1995); Ingersoll-Rand Co. v. Whittaker, 883 S.W.2d 514 (Ky.App. 1994).

Here, H.T. Hackney did not fail to comply with KRS 342.040(1) in an attempt to manufacture a limitations defense. Further, the Office of Workers' Claims did not fail to comply with KRS 342.040(1). Rather, the employer provided incorrect information to the Office of Workers' Claims regarding Garland's current address and as a result, the statutory notice purportedly never reached Garland. However, as testified to by Sampson, the insurance adjuster, Garland never provided him with the new address or, for that matter, informed him of their move.¹⁴ The ALJ rejected Garland's argument that the statute of limitations should be tolled under those circumstances. The ALJ found it significant that Garland's wife testified on cross-examination that she received two disability checks at the former address, based on a change of address form filed with the United States Postal Service.

The ALJ found the circumstances contrary to those in Lizdo v. Gentec Equipment, [74 S.W.3d 703 (Ky. 2002)] where the [S]upreme [C]ourt held the statute of limitations was tolled based upon the failure of the employer to establish that it

¹⁴ The Board misstated the finding by the ALJ. See supra n.10.

had complied with the newly amended filing regulations by submitting an electronic IA-2 in addition to the paper Form SF-3A contained in the file. The court's focus was on whether the employer had exactly fulfilled the statutory obligations imposed upon it in order to trigger the commissioner's issuance of the notice required by KRS 342.040(1) advising the claimant of his right to prosecute a claim.

Here, H.T. Hackney provided the Office of Workers' Claims with the only address it had for Garland, and he did not provide the claims administrator, Sampson, with a new address. The Office of Workers' Claims mailed the notice letter to the address it had on file. Garland properly received all the TTD checks, which were mailed to the Fairmont [sic] address, at the Shawn Lane address through forwarding by the United States Postal Service. Further[,] the WC-3 letter was not returned to the Office of Workers' Claims as undeliverable. In the face of this evidence, Garland's own testimony that he did not receive the notice letter does not compel the result he seeks.

. . .

Garland's other argument is that the statute of limitations in KRS 342.185 should have been tolled by the payment of medical benefits. According to KRS 342.185(1), [i]f payments of income benefits have been made, the filing of an application for adjustment of claim with the office 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."

Garland's reliance on Purdy v. Palmore,¹⁵ and Hetteberg v. City of Newport,¹⁶ is misplaced because, as Member Young points out in his concurring opinion, "KRS 342.185(1) has since been amended to limit tolling to voluntary payment of income benefits[.]" KRS 342.185 is unambiguous and the plain meaning of the words chosen by the Legislature require us to reject Garland's argument.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark D. Pierce
Paducah, Kentucky

BRIEF FOR APPELLEE:

R. Christion Hutson
Paducah, Kentucky

¹⁵ 789 S.W.2d 12 (Ky. 1990).

¹⁶ 616 S.W.2d 35 (Ky. 1981).