

RENDERED: NOVEMBER 2, 2012; 10:00 A.M.  
TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2012-CA-000468-WC

WILLIAM DECKER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-06-86043

CONTROL SYSTEMS, INC.;  
HONORABLE CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION  
BOARD

APPELLEES

### OPINION AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: KELLER, TAYLOR AND VANMETER, JUDGES.

VANMETER, JUDGE: William Decker petitions for review of the opinion and order of the Workers' Compensation Board ("Board") which affirmed the Administrative Law Judge's ("ALJ") opinion and order dismissing his claim for benefits following a work-related injury. For the following reasons, we affirm.

On May 16, 2006, Decker sustained a work-related injury while employed with Control Systems, Inc. He received temporary total disability (“TTD”) benefits from May 1, 2008 through May 25, 2008, paid by one check issued May 28, 2008. On June 4, 2010, he filed a Form 101 claim for benefits. Control Systems argued that Decker did not file his claim within two years after receipt of the last voluntary payment of benefits and thus his claim was barred by the statute of limitations.

The ALJ bifurcated the statute of limitations issue and, following a hearing, found that Decker received the check on June 2, 2008 and that his claim for benefits was barred by the statute of limitations since he did not file it within two years of receipt of the last voluntary payment of benefits. The ALJ further found that Control Systems had complied with its duty to notify the Department of Workers’ Claims (“Department”) of termination of Decker’s benefits and that the Department timely notified Decker, by letter dated June 6, 2008, of the May 25, 2010, expiration date for filing a claim. Decker petitioned the Board for review of the ALJ’s decision and the Board affirmed. This petition for review followed.

The standard for appellate review of a Board decision “is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009) (citing *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)). We review an award by the ALJ to determine whether its findings were

reasonable under the evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). The ALJ is the finder of fact and “has the sole authority to determine the quality, character, and substance of the evidence.” *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citation omitted).

Decker argues that the ALJ erred by finding that his claim was untimely filed. We disagree.

KRS<sup>1</sup> 342.185(1) requires an application for benefits to be filed within two years from the date of a work-related injury or within two years from the date the employer terminates income benefits, whichever occurs later. To encourage injured workers to file a timely claim and to ensure that workers who receive voluntary income benefits do not get lulled into a false sense of security, KRS 342.040(1) requires the employer to notify the Department if voluntary benefits are terminated and requires the Department to notify the worker of the right to file a claim and of the applicable period of limitations. KRS 342.040(1) does not specify the time in which an employer must notify the Department; however, to ensure prompt compliance, 803 KAR<sup>2</sup> 25:170 Section 2 requires that notification be made as soon as practicable and not later than one week from the date voluntary payments to an employee are terminated. An employer’s failure to comply with KRS 342.040(1) can result in civil and criminal penalties, *see* KRS 342.990, but Chapter 342 does not provide a remedy for the affected worker. As a result, courts

---

<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> Kentucky Administrative Regulations.

have turned to equitable principles when circumstances demand to prevent employers who fail to comply with KRS 342.040(1) from asserting a statute of limitations defense when an employee does not file a timely claim.

In this case, Control Systems made one voluntary payment of TTD benefits by check issued on Wednesday, May 28, 2008, which the ALJ found Decker received on Monday, June 2, 2008. Control Systems properly notified the Department of termination of TTD benefits and on June 6, 2008, the Department mailed a letter to Decker informing him that the statute of limitations for filing a claim for benefits expired on May 25, 2010, two years from the date TTD benefits ceased. The record does not indicate that the letter was deficient or untimely; rather, Decker simply testified that he did not remember receiving it. On June 3, 2010, Christina Sharp, an insurance adjuster, informed Decker's boss, Larry Fitzhugh (president of Control Systems), that the statute of limitations expired on June 6, 2010. Decker filed his claim on June 4, 2010.

Decker maintains that he did not receive the check until June 7, 2008 and thus his June 4, 2010, claim was timely filed. He asserts that the earliest the check would have been placed in Fitzhugh's post office box would have been June 2, 2008 and that Fitzhugh testified that he did not visit his post office box every day. Fitzhugh stated that he would have hand-delivered the check to Decker the day he received it, and Decker testified that he would have immediately deposited it. Consequently, Decker argues that the date of deposit, June 7, 2008, should be deemed the date of "receipt" for purposes of the statute of limitations and

accordingly his claim was timely filed. In the alternative, Decker asserts that the two-year statute of limitations should begin to run, for equitable purposes, from the date Control Systems notified the Department of termination of benefits and thus his claim was timely filed.

However, contrary to Decker's assertion, substantial evidence supports the ALJ's finding that Decker received the TTD check on June 2, 2008. Neither Fitzhugh nor Decker recalled the exact date the check was received. Sharp testified that the latest the check would have been mailed would have been Friday, May 30, 2008 and the record shows that the check was mailed from one Louisville address to another. Fitzhugh stated that he probably received the check on June 2, 2008 and gave it to Decker the same day. Evidence that Decker deposited the check on June 7, 2008 does not compel a finding that the check was not received until that day.

Furthermore, the ALJ correctly found that Sharp's June 3, 2010, statement advising Fitzhugh that the statute of limitations expired on June 6, 2010 did not toll the statute of limitations. In order for the statute of limitations to be tolled, the evidence must establish that the employer or the insurance carrier made a false misrepresentation to the claimant which lulled the claimant into not filing his claim within the prescribed time. *Cowden Mfg. Co. v. Fultz*, 472 S.W.2d 679, 681 (Ky. 1971) (citation omitted). Since no proof established that Sharp's statement was made to Decker and lulled him into filing outside the prescribed time period, the ALJ properly determined that the statute of limitations was not tolled.

Lastly, we conclude that application of an equitable remedy was unwarranted in these circumstances. Control Systems properly notified the Department of termination of TTD benefits and the Department timely notified Decker of the statute of limitations for filing a claim. Decker was not lulled into a false sense of security by the payment of voluntary benefits, or deprived of notice from the Department without a reasonable time remaining in which to file a claim. *See Patrick v. Christopher E. Health Care*, 142 S.W.3d 149 (Ky. 2004) (employer not equitably estopped from raising two-year statute of limitations defense to claim for benefits where two-month delay in notice to the Department did not deprive claimant of notice while a reasonable time remained in which to file a claim); *Miller v. Stearns Tech. Textiles Co.*, 145 S.W.3d 414 (Ky.App. 2004) (workers' compensation claim filed within two years of letter from Department, but more than two years after the time of claimant's injury and termination of TTD benefits, was untimely since tardiness of Department's letter did not adversely affect claimant's ability to act within the two-year period of limitations). *Cf. Ingersoll-Rand Co. v. Whittaker*, 883 S.W.2d 514 (Ky.App. 1994) (employer that did not notify Board when it terminated voluntary payments to worker could not assert statute of limitations defense when worker failed to file claim within two-year statutory time frame); *City of Frankfort v. Rogers*, 765 S.W.2d 579 (Ky.App. 1988) (employer that did not inform Board when it terminated voluntary payments to worker could not assert statute of limitations defense when worker failed to file claim within two-year statutory time frame). Here, Decker does not allege, and the

record does not reflect, that Control Systems failed to notify the Department of termination of benefits or that Decker suffered any prejudice. Thus, application of an equitable remedy to bar Control Systems' statute of limitation defense was not warranted.

The opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Wayne C. Daub  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Douglas A. U'Sellis  
Louisville, Kentucky