RENDERED: JUNE 19, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001752-WC

TOYOTA MOTOR MANUFACTURING
KENTUCKY, INC. APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-12-85293

JASON TUDOR; HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT, THOMPSON AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: Toyota Motor Manufacturing Kentucky, Inc. ("Toyota") appeals from a decision of the Workers' Compensation Board ("the Board"). The Board affirmed the March 28, 2014 opinion, award and order and the May 20, 2014 order of Hon. Steven G. Bolton, Administrative Law Judge ("the ALJ"),

awarding Jason Tudor ("Tudor") temporary total disability ("TDD") and permanent partial disability ("PPD") benefits. After review, we affirm.

In the workers' compensation claim filed on May 18, 2012, Tudor alleged that he sustained a lower back injury while working on the Trim II process in Toyota's manufacturing facility. The accident occurred on March 23, 2010. Tudor reported this accident to his supervisor. His supervisor then completed an injury report and sent him to Toyota's Industrial Health Services ("IHS"), Toyota's in-house medical clinic.

According to IHS records, Toyota's physician, Dr. Gwendolyn Reyes, initially diagnosed Tudor's injury as a back sprain/strain. Tudor also had an MRI taken of his spine. Drs. Travis Lutz and Steven Kiefer reviewed the MRI. Dr. Lutz characterized Tudor's condition as disc herniations, while Dr. Kiefer labeled them bulging discs. Dr. John Guarnaschelli conducted an independent medical evaluation two years later and diagnosed a "lumbar disc entity and mechanical low back pain, with both clinical and radiographical evidence of multilevel spondylosis and degenerative changes." Tudor maintained that Toyota's medical personnel never disclosed that he had two herniated discs.

Tudor did not miss a day of work due to this injury. Instead, from May-September 2010 and again from December-March 2011, Drs. Reyes, Kiefer and Guarnaschelli restricted Tudor from performing job activities that involved repetitive bending and twisting, overhead work or excessive lifting. Tudor testified he did not perform any actual work while on restricted duty. He stated he had to

report for work but mainly just "stood around." However, Tudor also admitted that his supervisor, Mickey Payne ("Payne"), would place him at the end of the Trim II process for inspection purposes. Payne averred that Toyota does not permit its employees to simply stand around.

Toyota presented Tudor's claim to the third-party administrator ("TPA") of its self-funded workers' compensation insurance plan. The TPA denied the claim. The claim representative responsible for denying the claim, Jennifer Lyons ("Lyons"), explained that she denied the claim because the statute of limitations had run. Furthermore, Lyons testified that she did not believe she was under any obligation to notify an employee who has never missed work and collects full pay, even though he has not achieved maximum medical improvement ("MMI") and is unable to perform the type of work done at the time of injury, of the limitations period.

Tudor challenged the denial of his claim, and the ALJ found in his favor. The ALJ attributed Tudor's injury to cumulative trauma and further awarded him TTD and PPD benefits. Toyota then appealed the benefit awards to the Board. The Board affirmed the ALJ.

For its first argument on appeal, Toyota reiterates its position that the statute of limitations barred Tudor's claim. In support, Toyota first argues that the ALJ improperly applied *Toyota Motor Mfg. v. Czarnecki*, 41 S.W.3d 868 (Ky. App. 2001), to toll the statute of limitations. Toyota then argues the Board erred by alternatively determining that the statute of limitations was tolled because

Toyota failed to notify the Department of Worker's Claims (the "DWC") under Kentucky Revised Statutes ("KRS") 342.040(1).

In reviewing the Board's decision, the role of this Court is "to correct the Board only when [it] has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky. App. 2004). When the Board finds in favor of the claimant, the issue becomes whether that decision was supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). Substantial evidence is evidence that is sufficient to induce conviction in the mind of a reasonable person. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

Under Kentucky workers' compensation law, a party typically has two years to file a claim after a work-related accident or the claim is forever barred. *See Lawson v. Wal-Mart Stores, Inc.*, 56 S.W.3d 417, 420 (Ky. App. 2001); KRS 342.185. However, when a claimant fails to file a timely claim and the circumstances indicate that claimant was lulled into thinking he did not need to file a claim within two years of the accident, Kentucky courts may apply equitable principles to toll this limitations period. *See J & V Coal Co. v. Hall*, 62 S.W.3d 392, 395 (Ky. 2001).

In *Czarnecki*, *supra*, a Toyota employee filed a workers' compensation claim more than two years after a work-related accident. However, prior to the expiration of the limitations period, IHS had advised the employee that

her cumulative injuries had actually healed. This Court held that these circumstances tolled the statute of limitations because the employee was entitled to rely on the judgment of IHS physicians when electing not to file a claim.

Here, the ALJ found that Tudor's injury was the result of cumulative trauma and neither party challenged this finding. It is equally undisputed that Tudor's accident occurred on March 10, 2010, and he filed his claim on May 23, 2012. As such, Tudor sustained a cumulative injury and filed his claim more than two years after the date of injury. The ALJ also found that IHS informed Tudor that his symptoms were not work-related, a finding Toyota did not refute. Moreover, there is no question IHS possessed a copy of Dr. Lutz's MRI report and never informed Tudor that he suffered from two herniated discs rather than disc bulging; Toyota only countered that the herniated-versus-bulging disc distinction is largely a question of semantics in the medical field.

Based on these facts, the ALJ applied the holding of *Czarnicki* and concluded the failure to disclose Dr. Lutz's diagnosis was tantamount to notifying Tudor that his back had healed. Toyota argued this extension was both factually and legally deficient. We disagree.

First, because a physician's MRI report is sufficient evidence for an ALJ to find an individual suffered from a certain medical condition as a matter of fact, we conclude that Tudor had two herniated discs. Second, because possession of a physician's MRI report is sufficient for an ALJ to find a physician knew of its contents, we conclude IHS knew that Tudor had two herniated discs. Finally, the

Czarnecki holding is applicable to more than the narrow facts of that case. An employer's in-house physician must inform its employee of relevant diagnoses of which the physician knows or should know. Otherwise the physician's silence may lull the employee into a false sense of security as it relates to his personal and financial health, deterring him from filing a timely claim just as if the physician had affirmatively represented his condition had healed. This is especially so when the in-house physician tells the employee his injury is not work-related. Because the employee is entitled to rely on such a representation (*see Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 620 (Ky. 2004)), the physician may have additionally cast doubt on the employee's likelihood of bringing a successful claim. Accordingly, because IHS knew about Dr. Lutz's diagnosis and never informed Tudor that he had two herniated discs, Toyota cannot raise the limitations defense of KRS 342.185.

We will address whether Toyota had a duty to report under KRS 342.040(1). However, to facilitate this analysis, we will first evaluate Toyota's second argument on appeal regarding the ALJ's decision to award TTD benefits. Toyota asserts that the award was improper because Tudor continued working and received full pay in excess of his TTD rate. Toyota further claims this is antithetical to the policy underlying TTD benefits. For the following reasons, we agree with the ALJ's decision.

In Kentucky, an employer pays its employee "wages" for performing labor and pays "income benefits" for work-related disabilities. *Millersburg*

Military Inst. v. Puckett, 260 S.W.3d 339, 342 (Ky. 2008). KRS 342.040(1) prohibits an employer from paying income benefits "for the first 7 days of disability unless the disability continues for more than 2 weeks (14 days)." *Pierson v. Lexington Public Library*, 987 S.W.2d 316, 319 (Ky. 1999). Employers also may not apply private benefits, including post-injury wages, to offset the amount of income benefits they owe under the workers' compensation act absent some statutory authority. *See Williams v. E. Coal Corp.*, 952 S.W.2d 696, 701 (Ky. 1997). Furthermore, "an employer seeking credit against its workers' compensation liability has the burden to show a proper legal basis for the request." *Puckett*, 260 S.W.3d at 342.

KRS 342.0011(11)(a) defines TTD as "the condition of an employee who has not reached [MMI] from an injury and has not reached a level of improvement that would permit a return to employment." The second prong of this conjunctive definition denies TTD benefit eligibility to "individuals who, though not at [MMI], have improved enough following an injury that they can return to work despite not yet being fully recovered." *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579, 581 (Ky. App. 2004). The Kentucky Supreme Court has interpreted the phrase "return to employment" to mean a return to the type of employment that is either customary for the injured employee or the type the injured employee was performing at the time of his injury—not just any type of work. *Cent. Kentucky Steel v. Wise*, 19 S.W.3d 657, 659 (Ky. 2000).

Here, the ALJ examined Tudor's post-injury job responsibilities and awarded TTD benefits only for the months Tudor performed menial tasks while on restricted duty. The ALJ also considered Payne's testimony. Payne stated that he had to create a job function for Tudor on a daily basis from May-September 2010. Payne also explained that during this same time Tudor performed quality checks (which Payne did not consider a regular job) and occasionally cleaned the line area. Based on this evidence, the ALJ found that Tudor had not reached MMI and did not return to either customary or pre-injury work while on medical restrictions for a period longer than two weeks. Toyota's position that it did not owe TTD benefits because it paid Tudor full wages while on restrictive duty has no statutory authorization and thus no legal support. Furthermore, Toyota waived any potential credit against its workers' compensation liability for these wages because it failed to claim that these wages were paid in lieu of compensation as required by *Triangle Insulation & Sheet Metal Co. v. Stratemeyer*, 782 S.W.2d 628 (Ky. 1990). Accordingly, under the language of KRS 342.0011(11)(a), 342.040(1) and the standard set forth in *Wise*, the ALJ properly awarded TTD benefits.

Having determined TTD benefits were properly awarded, we now return to an analysis of the statute of limitations issue previously discussed. The first question with respect to this issue is whether another provision of KRS 342.040(1) also required Toyota to report to the DWC its refusal to pay Tudor TTD benefits. If so, the second question becomes whether its failure to report serves as an alternative ground to toll the statute of limitations. The Board held

that Toyota had an obligation to report under KRS 342.040(1), even though Tudor continued to work without missing a day and received full wages. We agree.

An employer must strictly comply with the requirements of KRS 342.040(1) and notify the DWC when it fails to pay income benefits when due. *Kentucky Container Serv., Inc. v. Ashbrook*, 265 S.W.3d 793, 795 (Ky. 2008). Moreover, "[a]n employer who fails to comply with KRS 342.040(1) is not permitted to raise a limitations defense because its action effectively prevents the DWC from complying with its duty under KRS 342.040(1) to notify the worker of his right to prosecute a claim and of the applicable period of limitations." *J & V Coal Co.*, 62 S.W.3d at 395.

Here, the ALJ awarded Tudor TTD benefits based on the language of KRS 342.0011(11)(a), another provision of KRS 342.040(1), and the standard set forth in *Wise*, and we have upheld that decision. These income benefits were due. Toyota never paid them and never notified the DWC. Accordingly, Toyota's violation of the reporting requirements provided in KRS 342.040(1) operated as an independent ground to toll the statute of limitations.

The final issue on appeal derives from the ALJ's decision to award PPD benefits. Toyota contends that the ALJ erroneously granted the triple multiplier provided in KRS 342.730(1)(c)(1) and incorrectly applied *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). Toyota also argues the Board improperly substituted its findings of fact for those of the ALJ when it upheld the ALJ's decision.

KRS 342.730(1)(c) provides, in pertinent part, as follows:

> 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; ***or***
>
> 2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments [emphasis added].

In *Fawbush*, the ALJ found a workers' compensation claimant returned to work at a greater weekly wage than what he earned at the time of his injury. The ALJ also found the claimant did not retain the physical capacity to return to the type of work he was performing at the time of his injury. The ALJ then opined KRS 342.730(1)(c)(1) and (2) were mutually exclusive. The Kentucky Supreme Court agreed and after determining neither provision trumps the other, held, "an ALJ is authorized to determine which provision is more appropriate on the facts. If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the

indefinite future, the application of paragraph (c)(1) is appropriate." *Fawbush*, 103 S.W.3d at 12.

Here, the record indicates Tudor was incapable of performing the type of work he performed at the time of his injury. Tudor did not return to the Trim II process, and the ALJ emphasized the restrictions placed on Tudor's job responsibilities. As such, there was sufficient evidence for the ALJ to award the triple multiplier provided in KRS 342.730(1)(c)(1).

On the other hand, the evidence is insufficient to find KRS 342.730(1)(c)(2) applicable. Although the ALJ noted Tudor's wages were "a little higher" after returning to work and that "he actually worked a lot of overtime" in 2013, this is not enough to indicate Tudor would continue to earn a weekly wage equal to or greater than his average weekly wage at the time of injury. The ALJ attributed Tudor's wage increase on return to six-month reviews and did not specify whether he would to be able to continue to work overtime. Accordingly, because we agree with the Board that *Fawbush* requires both KRS 342.730(1)(c)(1) and (2) to apply, we will not set aside the ALJ's award of the triple multiplier. The decisions of the Board are hereby AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Kenneth J. Dietz Florence, Kentucky	Bennett Clark Lexington, Kentucky