

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: August 21, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0728-WC

FINAL

DATE 9-11-03 ELLAG:Gou.H.D.C.

STARLINK SATELLITE SERVICES

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2001-CA-2686-WC
WORKERS' COMPENSATION BOARD NO. 98-65232

PETE GALOWNIA; HON. RONALD W. MAY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Reversing a decision of the Workers' Compensation Board (Board), the Court of Appeals determined that the Administrative Law Judge (ALJ) erred by dismissing this claim on the basis of limitations. The Court's rationale was that Starlink Satellite Services' (Starlink's) failure to comply with KRS 342.038(1) and KRS 342.040(1) estopped it from raising a limitations defense. We affirm insofar as the ALJ's application of KRS 342.040(1) was erroneous, but because it has not been determined whether the claimant was an employee or an independent contractor, the conclusion that Starlink violated KRS 342.040(1) was premature. To that extent, we reverse.

The claimant had an arrangement with Starlink by which he installed satellite dishes. On September 13, 1998, he was injured while working and notified his supervisor. He sought medical treatment on the following day. When he contacted

Starlink about receiving workers' compensation benefits, it maintained that he was an independent contractor and refused to pay. Although he obtained counsel who corresponded with Starlink's counsel concerning the matter in February, 2000, he did not file a claim until March 30, 2001, more than two years after the accident. Starlink moved to dismiss on the grounds that it had paid no benefits; that the claimant was not an employee under the Act; and that he had been so informed. The ALJ then ordered the claimant to show cause, in writing and under oath, why the motion should not be granted.

In an unsworn pleading, the claimant asserted that he had missed several weeks' work following his injury and that Starlink paid no TTD benefits although they were due. He argued that by failing to notify the Department of Workers' Claims (Department) of its refusal to do so, Starlink violated KRS 342.040(1) and also prevented the Department from performing its obligation to give notice under KRS 342.040(1). Therefore, the period of limitations was tolled. Ingersoll-Rand Co. v. Whittaker, Ky.App., 883 S.W.2d 514 (1994). He also filed a motion for summary judgment with regard to the issue of Starlink's liability and introduced a February, 2000, letter to Starlink's counsel that explained his rationale for asserting that the parties had an employer/employee relationship under Purchase Transportation v. Wilson, Ky., 39 S.W.3d 816 (2001).

The ALJ rejected the motion for summary judgment on the ground that it was an unauthorized pleading. Furthermore, the ALJ determined that Starlink's failure to comply with KRS 342.038(1) by filing a first report of injury did not cause the period of limitations to be tolled. Stating that it was "notice when compensation is terminated" that triggered the Department's obligation to notify the claimant of his right to prosecute

and the applicable period of limitations under KRS 342.040(1), the ALJ concluded that the claim must be dismissed. Although the claimant petitioned for reconsideration, complaining that the ALJ had misapplied the law, the motion was overruled.

Affirming, the Board relied upon Newberg v. Hudson, Ky., 838 S.W.2d 384 (1992), for the principle that where a valid dispute concerning the applicability of the Act exists from the outset, a failure to comply with KRS 342.038(1) and KRS 342.040(1) will not estop the employer from raising a limitations defense. The Board determined that Starlink's failure to pay TTD benefits together with the allegations in its motion to dismiss constituted a prima facie basis to dismiss the claim and that, when given an opportunity to show cause why the motion should not be granted, the claimant had failed to do so. The Court of Appeals noted, however, that the Board had failed to address the decision in H. E. Neumann Co. v. Lee, Ky., 975 S.W.2d 917, 920 (1998), and reversed. Applying Neumann v. Lee to the present facts, the Court determined that the period of limitations was tolled because although it was undisputed that Starlink was notified of the injury and was aware that the claimant missed more than seven days of work due to the injury, it failed to pay TTD benefits and to comply with KRS 342.040(1), thereby preventing the claimant from receiving the notice to which he was entitled. See also, J & V Coal Co. v. Hall, Ky., 62 S.W.3d 392, 395 (2001).

KRS 342.040(1) provides as follows:

(1) Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury or disability resulting from an occupational disease, with interest at the rate of twelve percent (12%) per annum on each installment from the time it is due until paid, except that if the administrative law judge determines that a denial, delay, or termination in the payment of income benefits was without

reasonable foundation, the rate of interest shall be eighteen percent (18%) per annum. In no event shall income benefits be instituted later than the fifteenth day after the employer has knowledge of the disability or death. Income benefits shall be due and payable not less often than semimonthly. 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. (Emphasis added.)

Newberg v. Hudson, *supra*, involved a claim in which the injured worker did not miss more than one day of work due to his work-related injury until nearly two months after the accident that caused it and did not state a reason for the absence when completing a form requesting sick pay. The Court determined, therefore, that because the worker did not inform his employer that the absence of more than one day was due to the injury and because the employer was not aware of that fact, there was no hint of employer misconduct in failing to comply with KRS 342.038(1) and KRS 342.040(1) such as would warrant the application of an equitable remedy. Contrary to Starlink's interpretation, the decision did not express the broader principle that estoppel is an inappropriate remedy where an employer asserts that the Act does not apply and, therefore, fails to comply with KRS 342.040(1).

In Neumann v. Lee, *supra*, the worker missed more than seven days of work immediately after the accident and notified the employer of the injury and his belief that it was work-related. Nonetheless, the employer failed to pay benefits or to comply with KRS 342.040(1) by notifying the Department of its failure to do so; therefore, the Department did not inform the worker of the need to file a claim within the period of limitations. Although an attorney who was hired with regard to another matter made some inquiries about the workers' compensation claim on his behalf, the worker did not

hire counsel with respect to the claim until after the period of limitations would have run. Shortly thereafter, the employer notified him that it was denying the claim on the basis that it was not work-related, and he filed an application for benefits.

Concluding that the period of limitations was tolled with respect to Lee's claim, the Court distinguished Newberg v. Hudson, *supra*, and also rejected an argument that estoppel was an inappropriate remedy unless there was evidence that the worker was lulled into inaction by the employer's conduct. The Court pointed out that the employer had a duty to comply with KRS 342.040(1) when the worker missed more than seven days of work due to a work-related injury and that its failure to do so had prevented the worker from receiving the notice to which he was entitled. Furthermore, the worker was entitled to notice, regardless of whether the employer conducted a good-faith investigation and regardless of whether the employer's failure to comply with KRS 32.040(1) caused him actual prejudice. The Court concluded, therefore, that the employer's failure to comply with KRS 342.040(1) tolled the period of limitations.

KRS 342.040(1) clearly requires an "employer" to notify the Department not only when income benefits are terminated but also if they are due and not paid. Thus, the obligation is predicated on the existence of an employment relationship and a work-related injury that causes a disability of more than seven days' duration. Absent either element, there is no obligation to pay TTD or to notify the Department of a failure to do so. For that reason, an allegation that an injured worker is an independent contractor might well be a rationale for disregarding KRS 342.040(1) despite knowledge that a worker has missed more than seven days due to a work-related injury. The fact remains, however, that a failure to comply with the statute would prevent the worker from receiving notice from the Department and, therefore, would foreclose a limitations

defense if an employment relationship were later found to exist, even in the absence of actual prejudice to the worker. See Neumann v. Lee, supra at 922.

It is undisputed that Starlink was aware that the claimant missed more than seven days of work due to the injury. Starlink's motion to dismiss maintained that no benefits were paid and that the claimant was not an employee under the Act, clearly implying an assertion that no benefits were due. Nonetheless, the ALJ dismissed the claim based upon an erroneous interpretation of KRS 342.040(1) and, for that reason, failed to determine whether Starlink was the claimant's employer, whether benefits were due but not paid, and whether Starlink had an obligation to notify the Department under KRS 342.040(1). Absent such findings, it was premature for the Court of Appeals to conclude that Starlink's failure to notify the Department tolled the period of limitations. To that extent, we reverse.

The decision of the Court of Appeals is hereby affirmed in part and reversed in part, and the claim is remanded to the ALJ for further consideration.

All concur.

COUNSEL FOR APPELLANT:

H. Brett Stonecipher
Ferreri & Fogle
300 E. Main Street, Ste. 500
Lexington, KY 40507

COUNSEL FOR APPELLEE:

James D. Howes
Howes & Paige, PLLC
Watterson City West, Ste. 1020
1941 Bishop Lane
Louisville, KY 40218