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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: May 19, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 6-9-05 Ella Grouch D.C.

2004-SC-0483-WC

AUBURN HOSIERY MILLS, INC., AS INSURED BY KENTUCKY INSURANCE GUARANTY ASSOCIATION — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-2587-WC
WORKERS' COMPENSATION BOARD NO. 02-92911

ELVIS BIKIC; AUBURN HOSIERY MILLS, INC., AS INSURED BY KEMPER INSURANCE COMPANY; AUBURN HOSIERY MILLS, INC., AS INSURED BY GREAT AMERICAN INSURANCE COMPANY; HON. LLOYD R. EDENS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Although the claimant's application for benefits was filed more than two years after his work-related back injury, an Administrative Law Judge (ALJ) determined that the period of limitations was tolled by the employer's failure to notify the Department of Workers' Claims (Department) of its refusal to pay temporary total disability (TTD) benefits when he underwent surgery for the effects of the injury. H. E. Neumann Co. v. Lee, 975 S.W.2d 917 (Ky. 1998). The Workers' Compensation Board (Board) reversed, stating that the surgery occurred long after the injury and that there was no evidence the claimant informed his employer that it was due to the injury. Reversing and reinstating the award, the Court of Appeals pointed to the claimant's unrebutted testimony that he

had inquired about disability benefits when he missed work and also about payment of his medical bills. We affirm.

The claimant, a Bosnian national, was born in 1980. He completed high school and one year of college in Germany before coming to the United States in November, 1999. In January, 2000, he began working for the defendant-employer, supplying yarn to knitting machines. At the time, he did not speak English.

On April 23, 2000, the claimant felt severe pain in his low back while helping a co-worker lift a large box of yarn that weighed 50-60 pounds. The co-worker accompanied him to their supervisor and informed the supervisor of the incident. The claimant testified that he was still unable to speak English and didn't ask about a doctor. His supervisor gave him a belt, and he completed the shift. He spoke with a case worker at the refugee office who made an appointment with Dr. Fee and then accompanied him to the appointment to translate.

Dr. Fee examined the claimant at Western Kentucky Orthopaedic Associates on May 23, 2000. The claimant gave a history of back pain, sometimes into the right leg, that began while bending over to pick up something at work. He stated that the initial pain was severe and that for a moment his eyes went black and he felt lightheaded. Dr. Fee diagnosed a lumbar strain injury. He imposed no specific restrictions but prescribed back exercises, anti-inflammatory medication, and muscle relaxers and scheduled a follow-up appointment.

On November 6, 2000, the claimant slipped in oil and fell, after which he experienced severe back pain and was unable to move. He was taken by ambulance to Logan Memorial Hospital, where his complaints included pain in the back and down the

right leg. He was diagnosed with an acute lumbar strain and returned to work the following day.

On August 17, 2001, the claimant experienced back pain while working. He testified that he informed his supervisor immediately. Logan Memorial Hospital records dated August 18, 2001, indicate that the claimant sought treatment primarily for pain in the left flank but also for chest and back pain. He was diagnosed with acute renal colic.

On September 18, 2001, the claimant returned to Dr. Fee, complaining of increased back and leg pain since an injury about a month earlier. He also complained of numbness and tingling down the back of the leg to his heel, but x-rays revealed a normal lumbar spine. Dr. Fee diagnosed a possible herniated disc and ordered an MRI. The September 26, 2001, MRI report noted a small to moderate right paracentral L5-S1 disc protrusion, likely impinging on the adjacent S1 nerve rootlet. On October 1, 2001, Dr. Fee noted that the claimant was able to continue working. He had begun physical therapy and was taking medication but wanted to avoid injections or surgery for the time being.

The claimant's condition continued to deteriorate. On November 15, 2001, he saw Dr. Villarreal of the Medical Center at Bowling Green pain clinic. Dr. Villarreal noted that the claimant had experienced chronic back and leg pain since an incident while lifting boxes at work in March or April, 2000. Dr. Villarreal characterized the momentary loss of vision and lightheadedness that the claimant described following the incident as probably being a vagal response to the onset of severe pain. He diagnosed a work-related injury involving the L5-S1 disc and recommended epidural injections.

Beginning on November 19, 2001, the claimant's pain caused him to quit working. Shortly thereafter, Dr. Fee referred him to Dr. Olson, who performed back

surgeries in January and April, 2002. The claimant was able to return to work on May 13, 2002. He was later restricted from lifting more than 35 pounds and from working more than eight-hour shifts. Eventually, he was released to twelve-hour shifts.

Dr. Chou, a specialist in physical medicine and rehabilitation, saw the claimant on July 29, 2002. Dr. Chou conducted a physical examination and a review of the medical records. He assigned a 13% impairment based on DRE lumbar Category III and restricted the claimant from lifting more than 15 pounds and from bending or twisting at the waist.

Filed on July 19, 2002, the claimant's application for benefits alleged work-related lower back injuries of April 23, 2000; November 6, 2000; and August 17, 2001. When deposed, the claimant was asked whether medical bills from the second and third incidents were sent to his health insurance carrier. He testified that he took all of his medical bills to Sharon, the individual who handled insurance matters for the company, because he did not understand them. After he began missing work, he asked her about disability benefits but was informed that the absence was not work-related. The testimony indicates that the employer took the same position regarding Dr. Fee's bills.

At the hearing, the claimant testified that he had undergone two surgeries to his lower back as well as surgery for kidney stones. He stated that he informed his supervisor of each work-related incident. He also testified that he experienced almost continuous pain in his back and leg from the initial incident, that it became more severe after each of the subsequent incidents, and that the surgeries relieved it. He stated that the employer terminated him in November, 2002, after which he worked briefly in another factory. Presently, he was looking for non-factory employment due to personal preference rather than his back condition.

After summarizing the voluminous medical evidence, the ALJ determined that the claimant sustained a work-related back injury on April 23, 2000, and gave timely notice. The ALJ noted that although the initial medical reports indicated that the incident caused only a lumbar strain, the claimant's complaints from the outset had included leg pain. Furthermore, he testified that his pain was continuous after the initial injury, and the medical records supported the testimony. Relying on the records of Drs. Fee and Olson and their associates as well as Dr. Chou's report, the ALJ concluded that the disc herniation resulted from the April, 2000, injury; that it caused the impairment; and that the subsequent incidents were exacerbations of the initial injury. See Calloway County Fiscal Court v. Winchester, 557 S.W.2d 216 (Ky. App. 1977). Therefore, the carrier that provided coverage on April 23, 2000, was liable for income and medical benefits.

Turning to the question of limitations, the ALJ noted that although the claimant's application was filed more than two years after the date of injury, the parties had stipulated to his absence from work from November 19, 2001, until May 13, 2002. During that time, the claimant had undergone two back surgeries, both within the period of limitations, but the employer refused to pay any TTD benefits and failed to notify the Department of Workers' Claims of its refusal. The ALJ determined that the injury caused the claimant to be temporarily totally disabled during the period that he missed work and that he did not receive the benefits to which he was entitled or the required letter, notifying him of the need to file a claim and of the applicable period of limitations. KRS 342.040(1). On that basis, the ALJ concluded that the employer's failure to comply with KRS 342.040(1) tolled the period of limitations until May 13, 2004. H. E. Neumann Co. v. Lee, supra.

KRS 342.040(1) provides, in pertinent part, 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. . . . 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.

KRS 342.040(1) places an affirmative duty on an employer to notify the Department of its refusal to pay TTD benefits after a worker misses more than seven days of work due to a work-related injury. Absent extraordinary circumstances such as were present in Newberg v. Hudson, 838 S.W.2d 384, 389 (Ky. 1992), an employer's failure to comply with KRS 342.040(1) tolls the period of limitations without regard to whether the failure is attributable to bad faith or misconduct because it prevents the Department from advising the worker of the right to file a claim and the applicable period of limitations. See H. E. Neumann Co. v. Lee, supra at 921; Colt Management Co. v. Carter, 907 S.W.2d 169 (Ky. App. 1995); and Ingersoll-Rand Co. v. Whittaker, 883 S.W.2d 514 (Ky. App. 1994). Hence, the burden of proving the existence of such circumstances is on the employer.

In Newberg v. Hudson, supra, the worker's first absence from work for more than one day occurred more than a month after the work-related accident. Given a form to apply for weekly sickness payments under a company policy, the worker failed to complete a question asking whether the absence was due to an accident and, if so, when it occurred, whether it occurred at work, and how it occurred. Unaware that the absence was due to the work-related accident, the employer did not notify the Department that it failed to pay TTD benefits. Concluding that the application of an equitable remedy was unwarranted under such circumstances, the court noted that not

only was there was no hint of employer bad faith or misconduct, the employer had attempted to determine the reason for the worker's absence to no avail.

Although the claimant's period of TTD began nearly 19 months after his injury, this case is not akin to Newberg v. Hudson, supra. The claimant's unrebutted testimony established that he brought his medical bills to the individual who handled insurance matters and that he inquired about disability benefits, but the employer refused to pay them. Under the circumstances, it was reasonable for the ALJ to infer that the employer knew the reason for the claimant's absence from work and to conclude that its refusal to pay TTD coupled with its failure to comply with KRS 342.040(1) tolled the period of limitations and rendered the claimant's application timely.

Contrary to the employer's assertion, Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184, 186-87 (Ky. App. 1981), does not require that the finding of causation be reversed. In Mengel, the finding was reversed because it was based upon the fact-finder's own observations and contrary to all of the medical evidence. Nothing in Mengel prohibits a fact-finder from making reasonable inferences that are consistent with the medical evidence. When considered in chronological order, the records from Drs. Fee, Olson, and Chou provide substantial evidence from which the ALJ could reasonably conclude that the claimant sustained an injury on April 23, 2000; that the injury caused a herniated disc, necessitated the two surgeries, and left the claimant with a 13% impairment; and that the subsequent events exacerbated the injury, causing symptoms but no new injury.

The decision of the Court of Appeals is affirmed.

All concur.

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