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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: DECEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0163-WC

DATE 1-12-06 ELIA Grow, DC

JERRY R. PACE — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-1507-WC
WORKERS' COMPENSATION BOARD NO. 98-59480

H&N TRUCKING, SPECIAL FUND;
HON. LAWRENCE F. SMITH, ADMINSTRATIVE
LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's application for benefits on the ground that it was barred by KRS 342.185(1) and that the circumstances did not warrant tolling the period of limitations. Although the claimant continued to assert that he missed two weeks of work following the injury and that KRS 342.040(1) entitled him to a "right to prosecute" letter, the Workers' Compensation Board (Board) and the Court of Appeals affirmed. We affirm.

On November 23, 1996, the claimant was involved in an accident with another motor vehicle while hauling coal for the defendant-employer. He was taken to the local hospital and testified that although he was not hospitalized, he missed two weeks of work immediately thereafter. He missed work periodically after the accident due to his injuries or medical appointments regarding his injuries. He stated that his only other absence from work was for a trip to California in 1997. The claimant testified that his

employer might have paid for two medical bills of about $50.00 each at the Cloverfork Clinic and paid for a test at the University of Kentucky but that it paid no cash benefits. He stated that he mentioned workers' compensation benefits to his employer occasionally and was told that the employer was taking care of it. The claimant testified that he quit working in March, 1998, but later testified that after taking the rest of 1998 off, he returned and worked through September, 1999. He stated that he began to receive social security disability benefits in 1999. He filed a workers' compensation claim on April 21, 1999, alleging injuries to his back and head, and later amended the claim to allege a psychological overlay as well.

The employer deposed Herman Caldwell, its corporate secretary and the claimant's supervisor. Caldwell testified that the claimant began working for the company early in 1996 and worked off and on until September, 1999. He explained that the claimant sometimes took off for vacation and that at times there was not much coal to be hauled. He stated that he arrived at the accident site on November 23, 1996, before the claimant was taken to the hospital. He informed his insurance agent of the accident two days after it occurred but did not file a First Report of Injury (SF-1) until October 30, 1998. He explained that he had told his agent he would pay the claim rather than turn it in to the insurer, thinking that the accident would not be costly because "it wasn't that bad." After paying a number of medical bills, he decided to let the insurer pay. He stated that the claimant missed two or three days of work after the accident but did not mention any subsequent physical problems that were due to it. To the best of his memory, the claimant had been involved in one prior accident and two subsequent accidents. Caldwell stated that the claimant did not miss any more work

after the November, 1996, accident than he had missed previously, and he filed copies of the claimant's work sheets to support the testimony.

Among the contested issues were the extent and duration of disability, statute of limitations, work-relatedness of an alleged psychiatric disability, unpaid temporary total disability (TTD) and medical benefits, and subrogation credit for proceeds of the claimant's civil action against the third-party tortfeasor. After conducting an exhaustive review of the lay and medical evidence, the ALJ noted that the claimant had settled his civil action and that his testimony in the present action was "a model of inconsistency." Furthermore, the claimant was injured in a subsequent motor vehicle accident on September 26, 1997, and most of the medical evidence arose after the subsequent accident. The ALJ noted that the record contained no evidence from either of the claimant's treating physicians and that the only physicians who attributed the cause of his present difficulties to the 1996 accident were not informed of the accident in 1997. Of those who were informed of the 1997 accident, Dr. Cooley was not convinced that the claimant sustained a traumatic brain injury and Dr. Muffly attributed any impairment of the spine to the 1997 accident. Noting the claimant's longstanding history of back and joint problems before November 23, 1996, the ALJ concluded that the accident caused only a temporary arousal of pre-existing active back and joint problems and resulted in a period of TTD of less than 14 days.

In its initial review of the matter, the Board noted the conflicting evidence regarding the number of days that the claimant missed work following the November, 1996, accident and remanded the claim for an essential finding of fact in that regard. See Pierson v. Lexington Public Library, 987 S.W.2d 316 (Ky. 1999). A different ALJ reviewed the record on remand and, much like the first, noted that the claimant's

testimony was "highly inconsistent and in many instances lacks credibility." Finding Mr. Caldwell's testimony to be "straightforward and persuasive," the ALJ concluded that the duration of TTD was no more than three days and dismissed the claim again.

The Board determined subsequently that the evidence did not compel a finding that the claimant missed more than seven days of work due to disability from the November 23, 1996, accident. Therefore, KRS 342.040(1) did not entitle him to receive TTD benefits. Nor did it require the employer to notify the Board of its failure to pay TTD or entitle the claimant to receive a "notice to prosecute" letter. See J & V Coal Co. v. Hall, 62 S.W.3d 392 (Ky. 2001); H. E. Neumann Co. v. Lee, 975 S.W.2d 917 (Ky. 1998). The Board concluded that the ALJ properly dismissed the claim on the ground that it was barred by limitations.

Although the Court of Appeals affirmed, the claimant continues to maintain that the evidence compelled a favorable finding regarding the duration of TTD. Focusing on Mr. Caldwell's failure to file a timely Form SF-1, the claimant asserts that he clearly knew that compensation benefits were due and that "the most substantial and compelling evidence of record" required the ALJ to determine that he missed two weeks of work after the injury, that he should have been paid TTD, and that the employer's failure to do so or to notify the commissioner tolled the statute of limitations.

The claimant bore the burden of proof and risk of non-persuasion regarding every element of his claim. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). KRS 342.285 designates the ALJ as the finder of fact with the sole authority to weigh conflicting evidence and assess the credibility of witnesses. Id. Compelling evidence has been characterized as being evidence so overwhelming that no reasonable person could fail to be persuaded by it. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App.

1985). Where an ALJ finds that the party with the burden of proof has failed to meet that burden, the evidence on appeal must be so overwhelming that it compels a finding in that party's favor. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). A finding that is supported by substantial evidence is not unreasonable and may not be disturbed on appeal. Id.

Like the ALJ who considered the claim initially, the ALJ who determined the duration of TTD stated that the claimant's testimony was inconsistent and found Mr. Caldwell to be the more credible witness. Contrary to the claimant's assertion, the ALJ was not required to view Caldwell's explanation regarding his delay in filing a Form SF-1 as compelling a conclusion that he knew the claimant was entitled to TTD or that he was attempting to manufacture a limitations defense. The employer paid no voluntary income benefits, and the claimant has pointed to nothing that would have compelled a reasonable person to conclude that the November 23, 1996, accident caused more than seven days of TTD. Under the circumstances, he has failed to show that the ALJ erred in dismissing his claim or that the Board and the Court of Appeals erred by affirming the decision.

The decision of the Court of Appeals is affirmed.

All concur.

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