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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: November 21, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000079-WC

KEVIN W. GARLAND — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2006-CA-000382-WC
WORKERS' COMPENSATION BOARD NO. 00-62474

H.T. HACKNEY COMPANY, INC.;
HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) found the claimant's application for benefits to be untimely under KRS 342.185(1), rejecting an argument that the insurance carrier's failure to provide a correct address or its delay in complying with 803 KAR 25:170, § 2 caused him to fail to receive the letter sent to inform him of the statute of limitations. The ALJ also rejected an argument that the voluntary payment of medical expenses tolled the period of limitations. The Workers' Compensation Board and the Court of Appeals affirmed, and we affirm.

The claimant worked for the defendant-employer as a truck driver. He injured his left leg, left wrist, neck, and back in a work-related motor vehicle accident that occurred on November 9, 2000. After multiple surgeries, he returned to work in the employer's

office at a reduced wage. The employer paid voluntary temporary total disability (TTD) benefits through his return to work on July 12, 2001, and continued to pay his subsequent medical expenses. He filed an application for benefits on December 17, 2003, which was more than two years after the termination of TTD benefits. Thus, the employer raised a limitations defense under KRS 342.185(1).

Records from the Office of Workers' Claims (previously named the Department of Workers' Claims) and testimony from Joe Peters, one of its analysts, indicate that the employer's insurance carrier notified the Department when TTD was terminated and that the Department sent a letter regarding the applicable statute of limitations (WC-3 letter) to the claimant at 2638 Fairmount Street in Paducah on October 3, 2001. The records did not indicate that the letter was returned as undeliverable. Peters testified that if the letter had been returned, the Department would have investigated the current address and sent the letter to the new address.

The claimant submitted testimony from his wife, Sandra Garland, who stated that she checks the mail and attends to their paperwork and financial affairs. She testified that they lived at 2638 Fairmont Street in Paducah at the time of the accident and that sometime in July 2001 they moved to 6920 Shawn Lane in Paducah. Shown a copy of the Department's WC-3 letter, dated October 3, 2001, she testified that they did not receive it. She noted that it was addressed to Fairmount Street rather than Fairmont Street and also that their correct address in October 2001 was 6920 Shawn Lane.

When cross-examined, Ms. Garland testified that the claimant received TTD checks initially at the Fairmont Street address and that she submitted a change of address card to the post office when they moved to Shawn Lane. She acknowledged

that they had experienced no difficulty in receiving forwarded mail and that the claimant received two TTD checks at the Shawn Lane address, after which she called the insurance adjuster to inform him of the address change.

The employer submitted the deposition of Mr. John Sampson, who handled the claim for its insurance carrier. He testified that the carrier mailed TTD checks to the claimant at 2638 Fairmount in Paducah. He stated that when Ms. Garland called on July 12, 2001, to advise him of the claimant's return to work on July 9, 2001, he explained that he had already generated a check for the period through July 12, 2001, which would result in four days' overpayment. He testified that he requested her to void the check and return it, but she indicated that they had moved recently and would cash the check when they received it, then return a check for the difference. He stated that neither she nor the claimant ever gave him the new mailing address. Sampson testified that the final TTD check was mailed to the claimant at 2638 Fairmount in Paducah and was not returned. Nor was a mileage reimbursement check that was mailed to the Fairmount address in December 2001. He testified that on or about September 28, 2001, the carrier completed and filed with the Department of Workers' Claims a form IA-2, which reported that the claimant returned to work and that TTD was terminated on July 12, 2001.

The claimant relied on Lizdo v. Gentec Equipment, 74 S.W.3d 703 (Ky. 2002), and argued that the employer failed to comply with KRS 342.040(1), which tolled the statute of limitations. But the ALJ found that not only did the employer comply with KRS 342.040(1), neither the misspelling of Fairmont Street nor the fact that mail was forwarded after the move to Shawn Lane prevented the claimant from receiving the

WC-3 letter. The ALJ reasoned that although Mr. Sampson failed to request the new mailing address for the purpose of filing an accurate IA-2, Ms. Garland acknowledged filing a change of address card that informed the post office of the claimant's move from the Fairmont Street address to the Shawn Lane address. She also acknowledged that they received two forwarded TTD checks at the Shawn Lane address. Moreover, attached to the employer's brief was a copy of the December 2001 check, which was mailed to Fairmount Street and endorsed by the claimant. Noting that the WC-3 letter was not returned to the Department, the ALJ found Ms. Garland's testimony that the claimant did not receive it to be insufficient to toll the statute of limitations. Finally, the ALJ rejected the claimant's argument that the voluntary payment of medical expenses tolled the period of limitations, noting that KRS 342.185 refers only to income benefits.

The claimant raises two rationales for tolling the statute of limitations. First, he argues that the employer failed to comply strictly with KRS 342.040(1) and with 803 KAR 25:170, § 2, which required it to notify the Department that it terminated TTD by filing a Form IA-2 as soon as practicable and not later than one week after terminating benefits. He argues that Billy Baker Painting v. Barry, 179 S.W.3d 860 (Ky. 2005), requires strict compliance with the employer's obligation under KRS 342.040(1). Thus, he reasons that the carrier's failure to file an IA-2 within a week of terminating TTD and its failure to inform the Department of his current address precluded it from asserting a limitations defense, regardless of whether there was bad faith or misconduct on its part or prejudice to him. Second, he argues that because KRS 342.185(1) and KRS 342.270(1) are inconsistent and because KRS 342.0011(14) considers both income and medical benefits to be compensation, voluntary payments of either income or other

compensation, including medical benefits, should toll the statute of limitations.

KRS 342.185(1) requires an application for benefits to be filed within two years after a work-related accident or within two years after the employer terminates income benefits, whichever occurs last. To encourage injured workers to file a timely claim and ensure that those who receive voluntary income benefits do not develop a false sense of security about the need to do so, KRS 342.040(1) and the regulations place certain obligations on employers and on the Office of Workers' Claims. The obligations now placed on the Office were placed previously on the Department.

KRS 342.040(1) requires an employer to notify the Office if TTD is terminated or not paid to a worker who has missed more than seven days of work due to a work-related injury. It requires the Office to inform the worker of the right to file a claim and of the applicable period of limitations. KRS 342.990 provides civil and criminal penalties for an employer's failure to comply with KRS 342.040(1), but Chapter 342 provides no remedy for the affected worker. Thus, courts have turned to equitable principles when the circumstances warranted and estopped employers who failed to comply with KRS 342.040(1) from asserting a limitations defense, even in the absence of bad faith or misconduct.[1] An exception was Newberg v. Hudson, 838 S.W.2d 384 (Ky. 1992), in which the court found the circumstances not to warrant an equitable

---

1 Billy Baker Painting v. Barry, 179 S.W.3d 860 (Ky. 2005) (employer failed to include TTD termination date on its IA-2, so the Department failed to send a WC-3 letter); Lizdo v. Gentec Equipment, supra, (employer failed to prove that it notified the Department or that the Department notified the injured worker); H.E. Neumann Co. v. Lee, 975 S.W.2d 917 (Ky. 1998) (employer's failure to pay TTD or notify the Department tolled the statute of limitations without regard to bad faith); Colt Management Co. v. Carter, 907 S.W.2d 169 (Ky. App. 1995) (lack of misconduct immaterial where employer failed to notify Department that TTD terminated); and Ingersoll-Rand Co. v. Whittaker, 883 S.W.2d 514 (Ky. App. 1994) (failure to notify Department precluded limitations defense regardless of who was responsible).

remedy.

This is not a case such as Billy Baker Painting v. Barry, supra, in which the employer failed to specify on its IA-2 the date on which it terminated benefits, conduct that defeated the purpose of KRS 342.040(1) by preventing the Department from sending a WC-3 letter. Although this employer's IA-2 did not contain the Shawn Lane address and misspelled Fairmont Street, the ALJ was not persuaded by Ms. Garland's testimony that she informed the carrier of the Shawn Lane address and that her husband did not receive the letter. Nothing requires an ALJ to rely on the testimony of an interested witness, and the record contained substantial evidence that neither the claimant nor his wife informed the carrier of the Shawn Lane address, that the Department mailed a WC-3 letter to the claimant at 2638 Fairmount Street in Paducah, and that the claimant continued to receive forwarded mail bearing that address more than two months after the Department mailed the WC-3 letter. Such circumstances did not require an equitable remedy.

KRS 342.040(1) specifies no time within which the employer must comply. Thus, an employer could comply with the plain language of the statute but defeat its purpose by waiting to file a Form IA-2 until much or most of the period of limitations has expired. To ensure prompt compliance, 803 KAR 25:170, § 2 requires an IA-2 to be filed as soon as practicable but no later than one week after TTD is terminated or not paid when due. The regulation specifies no penalty for a tardy filing, and this case demonstrates that in at least some instances a WC-3 letter is mailed upon receipt of a tardy IA-2. As in Patrick v. Christopher East Health Care, 142 S.W.3d 149 (Ky. 2004), we conclude that equity does not necessarily require a tardy Form IA-2 to be viewed as

being equivalent to a failure to comply with KRS 342.040(1), particularly when a WC-3 letter is mailed while a reasonable amount of time in which to file a claim remains. Because from early October 2001 to July 12, 2003, constituted a reasonable amount of time, the present circumstances do not warrant an equitable remedy.

The claimant bases his second argument on an inconsistency that has existed between KRS 342.185(1) and KRS 342.270(1) since July 15, 1982. KRS 342.185(1) provides, in pertinent part:

> [N]o proceeding under this chapter for compensation for an injury or death shall be maintained . . . unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the office within two (2) years after the date of the accident. . . . If payments of income benefits have been made, the filing of an application for adjustment of claim with the office within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later. (emphasis added).

KRS 342.270(1) provides:

> If the parties fail to reach an agreement in regard to compensation under this chapter, either party may make written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee. (emphasis added).

Thus, KRS 342.185(1) tolls the period of limitations for so long as an employer pays income benefits. But KRS 342.270(1) appears to toll the period of limitations for so

long as the employer pays compensation, the statutory definition of which includes both income and medical benefits.

Until January 1, 1973, Chapter 342 did not define the term "compensation." KRS 342.185(1) tolled the period of limitations for so long as an employer made voluntary "payments of compensation," and KRS 342.270(1) was substantially the same as today. Although KRS 342.270(5) required a claim to be held in abeyance during any period that "voluntary payments of compensation are being made under any benefit sections of this chapter," the courts determined repeatedly that voluntary medical benefits did not come within the meaning of the term "compensation" as used in KRS 342.185(1) or KRS 342.270 and did not toll the period of limitations.[2] In 1972 the legislature enacted KRS 342.620(14) (now KRS 342.0011(14)) to define "compensation" as including both income and medical benefits, which had the effect of overruling the previous decisions. Thus, the court determined in Hetteberg v. City of Newport, 616 S.W.2d 35 (Ky. 1981), that voluntary medical payments tolled the statute of limitations. The next year the legislature amended KRS 342.185(1).

As amended effective July 15, 1982, KRS 342.185(1) tolls the period of limitations for so long as an employer makes voluntary payments of "income benefits." In Purdy v. Palmore, 789 S.W.2d 12 (Ky. 1990), the court determined that the

---

2 Franklin v. Blue Grass Cooperage Co., 447 S.W.2d 621 (Ky. 1969) (medical expenses are not compensation); Parrish v. Briel Industries, Inc., 445 S.W.2d 119 (Ky. 1969) (reimbursement of medical expenses does not toll the statute of limitations); Louisville Safety Council, Inc. v. Hack, 414 S.W.2d 877 (Ky. 1966) ("voluntary payments" refers to payments of compensation, not medical bills); Kentucky West Virginia Gas Co. v. Spurlock, 415 S.W.2d 849 (Ky. 1967) (payments of medical bills are not "voluntary payments' within the meaning of KRS 342.270(1)); Pipes Chevrolet Co. v. Bryant, 274 S.W.2d 663 (Ky. 1954) (payment of hospital expenses does not toll limitations); Miles v. General Electric Co., 280 S.W.2d 529 (Ky. 1955) ("payments" means payments of compensation, not medical bills).

amendment to KRS 342.185(1) did not apply for a claim that arose before its effective date. Its rationale for concluding that voluntary payments of medical expenses tolled the statute of limitations for such a claim rested on KRS 342.270(5), a provision later deleted from the statute. Mindful that the legislature amended KRS 342.185(1) after our decision in Hetteberg v. City of Newport, supra, and that it deleted KRS 342.270(5) after our decision in Purdy v. Palmore, supra, we conclude that it intended for the period of limitations to be tolled for voluntary payments of income benefits but not for voluntary payments of medical benefits.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT,
KEVIN W. GARLAND:

MARK D. PIERCE
535 BROADWAY
P.O. BOX 472
PADUCAH, KY 42002-0472

COUNSEL FOR APPELLEE,
H.T. HACKNEY COMPANY, INC.:

RICHARD CHRISTION HUTSON
WHITLOW, ROBERTS, HOUSTON & STRAUB, PLLC
300 BROADWAY ST.
P.O. BOX 995
PADUCAH, KY 42002-0995