

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 3, 2014

CLAIM NO. 201301923

DARYL LAFERTY

PETITIONER

VS. APPEAL FROM HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

UNITED PARCEL SERVICE
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Daryl Laferty ("Laferty") appeals from the February 24, 2014, Order and the April 14, 2014, Order overruling his petition for reconsideration of Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"). In the February 24, 2014, Order, the ALJ sustained United Parcel Service, Inc.'s ("UPS") Motion to Dismiss, ordering the claim dismissed due to a failure to file the Form 101

within the statutory period as mandated by KRS 342.185(1). On appeal, Laferty asserts the ALJ erred by dismissing the claim.

The Form 101, filed December 10, 2013, alleges on July 21, 2011, Laferty sustained injuries to his heart and kidneys and suffers migraines due to the following incident: "Mr. Laferty experience [sic] heat exhaustion, dehydration and heat stroke while delivering packages in 100 degree temps." The Form 101 asserts "[n]otice was given to supervisor on date of injury."

Medical records attached to the Form 101 indicate Laferty was examined by Dr. Brian M. Plato, D.O., on September 11, 2012. In this medical record, Dr. Plato diagnosed the following:

1. Migraine without aura, with intractable migraine, so stated, without mention of status migrainosus.
2. Tension type headache, unspecified.

In Dr. Plato's "Progress Notes," he wrote as follows:

Mr. Laferty began having headaches last December, this all began following an episode of severe dehydration and 'heat stroke' he had in the summertime requiring 3 days at Jewish Hospital.

Also attached to the Form 101 is a medical record of Norton Healthcare dated August 20, 2013, containing the following diagnoses:

1. Migraine without aura, with intractable migraine, so stated, without mention of status migrainosus.
2. Tension type headache, unspecified.
3. Chronic migraine without aura, with intractable migraine, so stated, without mention of status migrainosus.

Finally, attached to the Form 101 is a medical record dated June 5, 2012, of Dr. Michael Payne who set forth the following diagnoses: Headache; Insomnia; Memory Loss; and Hypertension.

UPS filed the medical records of Dr. Janet Chipman and Dr. Wayne Gibson.

The medical record of Dr. Chipman dated August 1, 2011, contains the following history:

Very nice 49-year-old well known to me after caring for his wife and him both, he being status post laparoscopic cholecystectomy with x-ray 6/2008. He comes in now with what he describes as pain in his lower left abdomen. He relates that it is subsequent to his heat stroke but I think actually the abdominal symptoms were the initiating factor.

He describes that the Wednesday morning about 10 days ago he had emesis x2. He went to work and did fairly well. That

night he came home and began to have a lot of abdominal cramping. He had sweating during the night. He had pains all over his abdomen.

The next day he went to work and became 'overheated.' He tried to drink fluids but to no avail and finally had to go to the Emergency Room at Jewish East. He says they gave him multiple bags of IV fluids and sent him downtown. During that evaluation at Jewish East he had a CT scan of the chest, abdomen and pelvis 7/21 where there were no acute findings. IV contrast was not administered secondary to a GFR of only 29. He was seen to have calcifications in the left anterior descending coronary vessel, worrisome for coronary artery disease. He had a non-obstructing right kidney stone. The GI tract appeared normal. He had an MRI of the thoracic aorta which was normal. He also had a renal ultrasound that essentially was normal.

He says while in the hospital he continued to have some mild abdominal pain. He was discharged two days after [sic] admitted with some mild pain and was told to follow up with his primary care physician. His stools were soft while in the hospital, changed to diarrhea once he got home and then became also frank water. He has been started on Cipro and Flagyl by Dr. Payne and the diarrhea had continued. He had 3 this morning that were all runny. He has had no blood in this whatsoever.

He doesn't know of any exposure to any GI viruses or intake or [sic] spoiled food.

Under "Diagnosis" is the following:

Gastroenteritis. I think his heat exhaustion is actually secondary to being in a depleted state from his gastroenteritis. It seems that it started the day prior to the heat exhaustion, continued to a mild level and has progressed on to the diarrhea phase. I am not sure if this is related to an ischemic event or infectious.

Under a separate heading of "Diagnosis" is the following: "Apparent renal insufficiency, continued on Lisinopril."

The medical record of Dr. Gibson dated August 10, 2011, indicates the following medical history: "[H]ypertension. Syncope due to hypovolemia. Acute renal failure due to hypovolemia. Cholecystectomy. Renal stones." Under "Impression" is the following: "1. Coronary calcification with risk factors for CAD 2. Hypertension 3. Renal Stones."

On January 27, 2014, UPS filed a Notice of Claim Denial denying the claim for the following reasons:

- Plaintiff was not employed by defendant on the date of alleged injury;
- The alleged injury did not arise out of and in the course of employment.
- The plaintiff did not give due and timely notice to employer of the injury.
- The claim is barred by limitations.

Under "other reasons for denial" is: "Any affirmative defenses are specifically pled."

On January 27, 2014, UPS filed a Special Answer asserting the statute of limitations, KRS 342.270, is a complete or partial bar to Laferty's claim. All other allegations were denied.

On February 7, 2014, UPS filed a Motion to Dismiss Claim with Prejudice in which it set forth several grounds. First, UPS asserted Laferty's alleged injuries were sustained on July 21, 2011, and he filed his Form 101 on December 2, 2013. Second, UPS asserted it did not receive notice of Laferty's alleged injuries until the Form 101 was filed and no benefits were paid regarding the alleged injuries. Third, UPS asserted the medical records of Dr. Chipman, filed in the record on February 7, 2014, indicate Laferty was seen on August 1, 2011, eleven days after the alleged date of injury, for gastroenteritis, and on that date Laferty asserted his gastroenteritis was related to heat exposure. Finally, UPS argued that pursuant to KRS 342.185(1), no claim for compensation shall be maintained unless notice was given to the employer as soon as practicable after the happening thereof and a Form 101 is filed within two (2) years after the date of the accident.

On February 24, 2014, Laferty filed a "Response to Defendant's Motion to Dismiss and Plaintiff's Motion to Place Claim in Abeyance." Due to its immense significance, Laferty's response will be set forth verbatim herein:

The Defendant/Employer's motion is not appropriate. United Parcel Service, Inc. has requested that this claim be dismissed with prejudice based on the statute of limitations as prescribed in KRS 342.185(1), but they [sic] should be barred from asserting this defense as the injury was timely reported to the Plaintiff's supervisor immediately and the Plaintiff missed work due to the injury thereafter. UPS did not report the injury to the DWC and/or its workers' compensation carrier. As such, the motion to dismiss is groundless.

The fact that the 'workers' compensation carrier never received notification of an alleged injury' is irrelevant as it is the fault of its own insured, UPS, for not properly reporting the injury to them and the DWC. The Plaintiff will testify that he worked a 10 1/2 hour shift as a driver for UPS during a 100 degree [sic] and suffered from heat exhaustion, dehydration and heat stroke. His supervisor came to where Mr. Laferty was incapacitated and took him to the hospital. The Plaintiff was off work for 6-7 weeks thereafter due to this injury, but did not receive any benefits. Based upon these facts, the statute of limitations is tolled and the Defendant cannot rely upon it as a defense.

Motion

The Plaintiff moves to have this claim placed in abeyance while the

appeals process of his union dispute is completed. He does not want to jeopardize his prospect of being allowed to return to his job through the union and employer negotiations or the union appeals process. It was his desire in filing the claim to preserve his workers' compensation rights.

WHEREFORE, the Plaintiff respectfully requests that the attached Order be entered overruling the Employer's motion to dismiss this claim and placing the claim in abeyance until the Plaintiff's capable of proceeding in the workers' compensation claim without impacting his union rights.

On February 24, 2014, the ALJ sustained UPS's Motion to Dismiss, holding as follows:

This claim is hereby dismissed ["with prejudice" has been crossed out with "ODW" handwritten above] due to Plaintiff's failure to file the Form 101 Application for Resolution of Injury Claim within the statutory period as prescribed in KRS 342.185(1).

In his March 7, 2014, petition for reconsideration, Laferty made several arguments. First, Laferty asserted the ALJ failed to review his response to UPS's Motion to Dismiss. Next, Laferty asserted UPS is estopped from relying upon a statute of limitations defense because its failure to give the statutory notice tolled the statute of limitations. Laferty argued "UPS was required to report his work injury to its workers' compensation carrier

and the carrier was required [sic] give the statutory notice that it was denying his claim because he was, in fact, entitled to such benefits." Last, Laferty asserted the fact that UPS's workers' compensation carrier never received notification of an alleged injury is not his fault. Instead, it is UPS's fault for not reporting the injury to the carrier and the Department of Workers' Claims.

In the April 14, 2014, Order overruling Laferty's petition for reconsideration, the ALJ stated as follows:

This dismissal is correct. A simple review of the claim file reveals Plaintiff alleged a July 21, 2011 work injury, but filed his Form 101 on December 10, 2013, more than two (2) years after the alleged work injury. Per KRS 342.040(1) an injured worker's claim must be filed within two (2) years of his work incident. There are exceptions to this time limitation, but no valid exception is shown herein.

On appeal, Laferty argues UPS was required to report his injury to its workers' compensation insurance carrier, and the carrier was required to give the statutory notice it was denying his claim. Laferty asserts he has been denied protection under the Workers' Compensation Act. Additionally, Laferty asserts the medical records attached to his Form 101 indicate he missed work after the July 21,

2011, incident. Laferty also argues he was entitled to temporary total disability ("TTD") benefits during the time he was off work and protection under the Act.

We vacate the February 24, 2014, Order and the April 14, 2014, Order overruling Laferty's petition for reconsideration and remand for a reopening of proof time and entry of a decision resolving the issues of notice, the statute of limitations, and, if appropriate, the merits of Laferty's injury claim. Laferty is entitled to introduce evidence relevant to the issues of notice, the statute of limitations, and the merits of his injury claim.

Several statutes are implicated by this appeal.

KRS 342.185(1) states as follows:

(1) Except as provided in subsection (2) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and 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, or in case of death, within two (2) years after the death, whether or not the claim had been made by the employee himself for compensation. The notice and claim may be given or made by any person claiming to be entitled to compensation or by someone in his behalf. 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.

KRS 342.190 mandates that notice and claim shall be in writing.

KRS 342.200 states as follows:

The notice shall not be invalid or insufficient because of any inaccuracy in complying with KRS 342.190 unless it is shown that the employer was in fact misled to his injury thereby. ***Want of notice or delay in giving notice shall not be a bar to proceedings under this chapter if it is shown that the employer, his agent or representative had knowledge of the injury or that the delay or failure to give notice was occasioned by mistake or other reasonable cause.*** (emphasis added).

KRS 342.038(1) and (3) state as follows:

(1) Every employer subject to this chapter shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. ***Within one (1) week after the occurrence and knowledge, as provided in KRS 342.185 to 342.200, of an injury to an employee causing his absence from work for more than one (1) day, a report thereof shall be made to the office in the manner directed by the executive director through administrative regulations.*** An employer's insurance carrier or other party responsible for the payment of

workers' compensation benefits shall be responsible for making the report to the Office of Workers' Claims within one week of receiving the notification referred to in subsection (3) of this section. (emphasis added).

...

(3) Every employer subject to this chapter shall report to his workers' compensation insurance carrier or the party responsible for the payment of workers' compensation benefits any work-related injury or disease or alleged work-related injury or disease within three (3) working days of receiving notification of the incident or alleged incident. (emphasis added).

KRS 342.040(1) states, in relevant 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.... In no event shall income benefits be instituted later than the 15th 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 should terminate, or fail to make payments when due, the employer shall notify the board of such termination or failure to make payments and the board shall, in writing, advise the employee or known dependent of right to prosecute a claim under this chapter.**

In his Form 101, Laferty represented notice was given to his supervisor on the date of the injury. Additionally, in his February 24, 2014, "Response to Defendant's Motion to Dismiss and Plaintiff's Motion to Place Claim in Abeyance," Laferty, through counsel, represented he will testify that on July 21, 2011, the date upon which he suffered a heat stroke, his supervisor found him incapacitated and took him to the hospital. Assuming, *arguendo*, Laferty is able to introduce evidence, either in the form of testimony and/or documentation, indicating his supervisor found him incapacitated on July 21, 2011, and took him to the hospital, this is sufficient to trigger the notice exception put forth in KRS 342.200, as Laferty's "employer, his agent or representative had knowledge of the injury."

Additionally, should the evidence, after a reopening of proof time, reveal Laferty missed more than one day of work as a direct result of the July 21, 2011, incident, UPS was mandated by statute to report to its workers' compensation insurance carrier "any work-related injury or disease or alleged work-related injury or disease" within three working days of receiving notification of the incident or alleged incident. KRS 342.038(1) and (3). Assuming the evidence, after a

reopening of proof time, reveals Laferty's supervisor took Laferty to the hospital on July 21, 2011, the date UPS received notification of the incident would be July 21, 2011. Thus, UPS' workers' compensation insurance carrier was required to file a report with the Office of Workers' Claims within one week of receiving notification from UPS of the incident. KRS 342.038(1).

In addition, pursuant to KRS 342.040(1), should the evidence, after a reopening of proof time, reveal Laferty missed work due to the work injury for at least seven days following the July 21, 2011, incident, UPS was mandated by statute to notify the Office of Workers' Claims of its failure to make voluntary payments. This would have resulted in the Office of Workers' Claims advising Laferty, in writing, of his right to file a claim. KRS 342.040(1).

In his February 24, 2014, "Response to Defendant's Motion to Dismiss and Plaintiff's Motion to Place Claim in Abeyance," Laferty represented he was off work for six to seven weeks following the July 21, 2011, incident. Additionally, the medical records of Dr. Chipman, dated August 1, 2011, filed in the record by UPS, indicate Laferty was discharged *two days* after being admitted to the hospital following the July 21, 2011, incident, thus indicating he indeed missed more than one day of work.

In the event, the ALJ finds UPS failed to fulfill the requirements of KRS 342.038 and KRS 342.040(1), the ALJ shall determine whether the two-year statute of limitations as set forth in KRS 342.185(1) was tolled as permitted by the applicable case law. See City of Frankfort v. Rogers, 765 S.W.2d 579 (Ky. App. 1988); Newberg v. Hudson, 838 S.W. 2d 384 (Ky. 1992); H.E. Neumann Co. v. Lee, 975 S.W.2d 917 (Ky. 1998).

In H.E. Neumann Co., supra, the Supreme Court of Kentucky stated as follows:

Therefore, once the employer herein had notice that claimant had missed more than one day of work as the result of an alleged work-related injury, it had the duty of filing a first report of injury with the board within one week. Moreover, when the employer failed to make voluntary payments after claimant was absent from work for seven days, it had the duty of notifying the board that no benefits would be paid so that the board could notify claimant regarding the applicable statute of limitations. The purpose of the above-referenced statutes is to advise an injured worker, in writing, of his right to prosecute his claim, and the time frame in which to do so, and to provide prompt resolution of asserted work-related injury claims.

Id. at 920.

In H.E. Neumann Co., supra, the Supreme Court ultimately determined the two-year statute of limitations in KRS 342.185 had been tolled due to the employer's

failure to follow the notice requirements as set forth in KRS 342.038 and KRS 342.040(1). While this Board is aware that the facts in H.E. Neumann Co., supra, differ slightly from the facts in the case *sub judice*, it is clearly relevant and potentially applicable.

As stated by the Court in Newberg v. Hudson, supra, "KRS 342.040 guarantees that an employee will be notified of his or her right to prosecute a claim upon the employer's termination of compensation payments or upon the employer's failure to make those payments when due." Id. at 388. As also stated by the Court, whether the statute of limitations was tolled by the "employer's failure to trigger this notification scheme [under KRS 342.040(1)] when it has failed to make payments when due will depend upon the facts and circumstances of each case." Id.

Accordingly, the February 24, 2014, Order and the April 14, 2014, Order overruling Laferty's petition for reconsideration are **VACATED**. This claim is **REMANDED** to the ALJ for a reopening of proof time and entry of a decision resolving the issues of notice, the applicability of the statute of limitations, and, if appropriate, the merits of Laferty's injury claim in conformity with the views expressed herein.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS AND FILES A SEPARATE
OPINION.

CHAIRMAN, ALVEY. I agree with the majority to the extent the decision of the Administrative Law Judge should be vacated and the claim remanded for a decision on the merits. However, I disagree with the majority to the extent it is premature to advise the Administrative Law Judge as to which statutes are applicable and any result which may be directed. This is particularly true of the advisory opinion expressed by the majority regarding the application of several statutes if established by the evidence which is inappropriate.

In essence, the Administrative Law Judge merely issued a summary judgment which he is not entitled to do. Our review of this appeal is therefore limited to vacating the Administrative Law Judge's order and remanding for him to make a determination based upon the merits and I respectfully disagree with any additional determinations made or recommended by the majority.

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