Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 2, 2014

CLAIM NO. 201090780

DAVIS HAMMOND PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

KD BUCKLES
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Davis Hammond ("Hammond") appeals from the March 24, 2014 Opinion and Order, and the April 24, 2014 Order on Petition for Reconsideration of Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"). The ALJ dismissed Hammond's injury claim as barred by the statute of limitations. On appeal, Hammond argues his employer

should be estopped from asserting a limitations defense, and the ALJ improperly rejected unrebutted testimony. We disagree and affirm.

On April 6, 2010, Hammond injured his back while lifting and moving tubing at a site owned by his employer, K.D. Buckles, Inc. At the time of his injury, he was also employed by Alderson Enterprises as an industrial mechanic. Hammond's father-in-law, Kenneth Buckles, was the owner and supervisor of K.D. Buckles, Inc. Since Hammond's injury, Mr. Buckles passed away and ownership of the company passed to his three daughters, one of whom is Hammond's wife.

A subsequent MRI revealed Hammond had a ruptured disc. Surgery was performed in May, 2010. He was off work until January, 2011. He did not receive workers' compensation benefits while he was off work, although he did receive salary continuation from K.D. Buckles. Hammond currently continues to work for K.D. Buckles, although he now only performs telephonic scheduling. He attempted to return to work for Alderson Enterprises in January, 2011, but was unable to continue working after only two days. He filed the present injury claim on September 23, 2013.

Hammond testified he received a letter from the Department of Workers' Claims indicating he had two years from the date his salary continuation payments terminated

in which to file a claim. He acknowledged Kentucky Mutual Employers Insurance ("KEMI") initially paid for his surgery and medical treatment. Although K.D. Buckles paid his salary continuation, he was not compensated for his lost wages from Alderson Enterprises until "much later". At some point in January, 2011, Hammond testified he called Christy Pack, a KEMI representative, about his lost wages from Alderson Enterprises. According to Hammond, she indicated she would "look into it and take care of it." Evidently, the fact he eventually received the lost wages from Alderson Enterprises, gave Hammond the impression KEMI was acting in his best interest.

Hammond testified he spoke with Ms. Pack again in 2013, when he was considering a second surgery for implantation of a spinal cord stimulator. He was told this procedure would be denied although, according to Hammond, it had been previously approved. At the end of July, 2013, he was notified that KEMI was not going to cover any additional medical treatment.

Hammond testified he believed KEMI was "looking out for" his interests during the "process." However, he likewise acknowledged he hesitated in seeking the advice of an attorney regarding his claim because, in essence, he is

suing his wife and her sisters. In fact, he conceded this has caused friction at home.

The ALJ dismissed Hammond's injury claim as barred by the statute of limitations. The ALJ correctly noted Hammond's claim was filed on September 23, 2013, more than two years after his salary continuation payments terminated on January 5, 2011, in violation of the statute of limitations set forth in KRS 342.185(1). Further, it was undisputed K.D. Buckles' workers' compensation carrier notified the Department of Workers' Claim that Hammond's salary continuation, paid in lieu of temporary total disability benefits, was terminated effective January 5, 2011. Hammond himself acknowledged receiving a notification letter regarding the statute of limitations, as required by KRS 342.020.

Under these circumstances, the ALJ accurately noted, the sole question was whether the employer is estopped from asserting a limitations defense. Holbrook v. Lexmark Intern. Group, Inc., 65 S.W.3d 908 (Ky. 2001). The ALJ concluded Hammond had not been lulled into a false sense of security causing him to untimely file his claim. In a thorough analysis of the various factual circumstances relevant to this issue, the ALJ explained:

The undersigned's review of the record in this matter establishes that following plaintiff's lumbar surgery in 2010, the defendant/employer obtained a medical opinion that plaintiff had reached maximum medical improvement and that a settlement offer was made in November of 2011. An issue had arisen prior to that offer, however, with respect to plaintiff's concurrent employment at Alderson Enterprises and the impact that concurrent employment, and therefore concurrent wage, would have on plaintiff's entitlement to income benefits of both temporary and permanent. Plaintiff testified that he spoke with the KEMI adjuster on more than one occasion inquiring as to payment for the work that he missed at Alderson and was told on those occasions that the carrier was looking into the matter. Ultimately, plaintiff was paid additional temporary total disability benefits in July of 2013 apparently based on additional wage records obtained by KEMI from Alderson. It is unknown to the ALJ, and not disclosed in the record, why it took over a year and a half to obtain those records, and it is not disclosed what effort, if any, plaintiff made to expedite that process to obtain the records and submit them to the carrier. Plaintiff further testified that during this time frame the owner of the employer, Mr. Buckles, his father-in-law, passed away and ownership of the company became vested in his wife and sister-in-law, and that had he filed a workers' compensation claim he would have been suing his wife, an occurrence which has now caused friction in his home. Plaintiff also testified that he received approval from KEMI shortly before the expiration of the statute of limitations for medical treatment which was to occur after the expiration of

the statute. Plaintiff concluded that he was relying upon KEMI and the adjuster to look out for his interest in this matter while the claim was being adjusted.

As an initial matter, the ALJ notes that there is no evidence that the adjuster made any misrepresentation or fraudulent representation. It appears to the ALJ that, at most, the adjuster told plaintiff that it was either looking into or trying to obtain wage records regarding his concurrent employment with Alderson, presumably in order to determine the appropriate benefit rate. Continual promises to look into that matter, however, do not as a matter of law constitute actions "of a character to prevent inquiry or elude an investigation or otherwise mislead the party having the cause of action." Moreover, plaintiff was clearly under a duty to exercise reasonable care and diligence on his own behalf and his reliance upon the insurance adjuster to look out for his interest, in the absence of any misrepresentation or fraudulent representation, was misplaced. Nothing that the adjuster did or did not do relieved plaintiff from his obligation to protect his own rights once he was advised in January of 2011 that he had two years within which to file a claim for benefits, otherwise he would lose that claim. No action taken by the adjuster or the insurance carrier could reasonably be construed by plaintiff as an inducement not to file his claim on a timely basis. In fact, since it apparently took the carrier an extended period of time to obtain information regarding plaintiff's concurrent wages, plaintiff should have, in the exercise of appropriate diligence, acted on his own behalf to preserve his claim by

> timely filing an application for adjustment. While plaintiff points to the fact that medical treatment was approved by the carrier shortly before the expiration of the statute of limitations, that circumstance is not dispositive of the ultimate issue in that when the treatment was approved, plaintiff's claim was still "alive" and the carrier remained under the obligation at that time to provide medical benefits. Moreover, payment of "catch up" temporary total disability benefits in July of 2013, after the claim expired, does not revive the claim and nothing that occurred subsequent to January 5, 2013, is relevant with respect to the consideration of estoppel by virtue of conduct prior to that date. Considering the totality of the evidence, the ALJ concludes that plaintiff did not pursue his claim for workers' compensation benefits on a timely basis for a combination of "family" reasons (i.e., the ownership of the business he was making a claim against) and the mistaken assumption that the carrier was either looking out for or obligated to look out for his best interests. The ALJ finds, under the facts and circumstances presented, that plaintiff was not lulled into a false belief that he was not required to file his claim prior to January 5, 2013, and there is no evidence to support the argument that the defendant/employer and/or its workers' compensation carrier are estopped from asserting the limitations defense herein.

Hammond's subsequent petition for reconsideration was denied as a re-argument of the merits of the claim. On appeal, he claims the ALJ erred in finding he was not

lulled into a false sense of security. He also argues the ALJ improperly disregarded unrebutted testimony.

Hammond bore the burden of proof in his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was not successful in carrying that burden, the question on appeal is whether the evidence compelled a contrary result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Here, it does not. As evidenced by the ALJ's discussion above, he clearly grasped the factual circumstances of the case, including Hammond's assertion he "relied on KEMI" to look out for his "best interests". It is within the ALJ's discretion to accept or reject this testimony. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Instead, the ALJ relied on other facts in evidence to conclude Hammond failed to file a timely claim for a combination of personal reasons and the "mistaken assumption" that KEMI was obligated to look out for his best interests. This conclusion is well supported by the record. While Hammond has identified other evidence supporting a different conclusion, namely his own testimony, such proof certainly does not compel a contrary result. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Hammond next argues the ALJ rejected his unrebutted testimony without sufficient explanation. The ALJ determines the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). That discretion is not lost simply because the claimant is the only person to testify, as here.

Furthermore, we cannot agree the ALJ even rejected Hammond's testimony. To the contrary, the ALJ impliedly accepted as true Hammond's belief KEMI would "look out for his best interests" and his concerns over suing a company owned by his father-in-law, and his own wife. While not rejecting this testimony, the ALJ instead concluded these circumstances did not amount to being lulled into a false sense of security by KEMI. Again, the ALJ provided a thorough analysis of this conclusion.

For the reasons set forth herein, the March 24, 2014 Opinion and Order, and the April 24, 2014 Order on Petition for Reconsideration of Administrative Law Judge, Hon. Robert L. Swisher are hereby **AFFIRMED.**

ALL CONCUR.

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