

OPINION ENTERED: MAY 8, 2012

CLAIM NO. 200800061

KEVIN MOORE

PETITIONER

VS.

**APPEAL FROM HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE**

HIGHLAND HOME IMPROVEMENTS,
MITER CONSTRUCTION COMPANY,
UNINSURED EMPLOYERS' FUND,
and HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AFFIRMING

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

SMITH, Member. Kevin Moore ("Moore") appeals from the November 28, 2011 Opinion and Order of Hon. Richard M. Joiner, Administrative Law Judge ("ALJ"), dismissing his claim against Highland Home Improvements ("Highland"). The ALJ determined Moore's claim was not brought within the statute of limitations and was, therefore, time-barred by the provisions of KRS 342.185. Moore did not file a petition for reconsideration.

Moore filed a Form 101 on January 14, 2008, alleging he was injured on September 15, 2007, within the scope and course of his employment, when he fell from a ladder injuring his elbow, left wrist, left femur and liver. The Department of Workers' Claims assigned the claim to an ALJ and scheduled a benefit review conference for June 13, 2008, at the Louisville, Kentucky hearing site. However, on March 10, 2008, Moore filed a motion to dismiss the claim without prejudice. As grounds for his motion, Moore indicated he had been arrested on a parole violation and was incarcerated in Bowling Green. He expected to be incarcerated for no less than three years. As a consequence, Moore explained he could not attend conferences, depositions or hearings.

On March 17, 2008, Moore filed a motion to hold the claim in abeyance, indicating his possible release from prison in approximately five weeks. The ALJ granted that motion on April 3, 2008, stating in part:

The claim will be held in abeyance until May 1, 2008. If the plaintiff is not out of prison by then and is not able to dedicate the claim, the Administrative Law Judge would then rule on the motion to dismiss the claim without prejudice.

On May 8, 2008, the ALJ reviewed the file and required the parties to file a status report within 10 days. On May

23, 2008, the ALJ granted Moore's original motion and dismissed the claim without prejudice.

Moore filed a second Form 101 on April 25, 2011 asserting the same injury. Highland filed a special answer asserting the affirmative defense of statute of limitations. The ALJ bifurcated the claim for decision on whether Moore's claim was barred by the limitation provisions of KRS 342.185.

Moore testified by deposition on August 9, 2011. He stated he was transported by ambulance to the University of Louisville Hospital following his injury where he received medical treatment and surgery to his left wrist and left hip. He was hospitalized for four days.

Moore filed his first workers' compensation claim on January 14, 2008. However, shortly thereafter he was incarcerated for a parole violation. Moore acknowledged in May of 2008 he was aware his claim was being dismissed at the request of his attorney. Over the next several years, he remained incarcerated in Kentucky penal institutions until his release on February 9, 2011. During that time, he saw no physicians for his work injury.

In his brief to the ALJ, Moore argued his incarceration was a legal disability requiring the tolling of the statute of limitations. In support of his argument, he cited Young

vs. Belcher, 474 S.W.2d 78 (Ky., 1971). In that case, the Court of Appeals, then the highest court in Kentucky, found the claimant's confinement in the penitentiary was a legal disability tolling the statute of limitations for a workers' compensation claim. Moore recognized that Young was based in part on KRS 413.310, which provided time spent in confinement did not count toward the period of limitation for commencement of an action. Moore also acknowledged the statute had been repealed.

In his November 28, 2011 Opinion and Order, the ALJ reviewed the statutory requirements of KRS 342.185 and KRS 342.270 and then dismissed the claim stating:

The claim has been filed more than two years after the date on which the injury was alleged. The plaintiff argues that because Mr. Moore was incarcerated in the Commonwealth of Kentucky prison system he was under a disability and that that period of incarceration should not apply in calculating the period of time applicable to a statute of limitations defense. I cannot buy that. Mr. Moore's incarceration certainly would make prosecution of his workers compensation claim more difficult, but not impossible. This claim was not timely filed.

On appeal, Moore maintains the ALJ erred in not recognizing he was under a legal or physical disability which restricted his ability to commence a workers'

compensation action and, thus, essentially tolling the statute of limitations requirements in KRS 342.185. Moore argues incarceration in a penitentiary is clearly a legal disability which should toll the statute. As a prisoner, it would be difficult to file the necessary forms required in a workers' compensation case. In addition, he contends his deposition could not be taken while he was incarcerated and it would have been difficult to acquire medical reports necessary to address causation and impairment. Finally, Moore contends it would have been impossible for him to attend a benefit review conference or formal hearing. For these reasons, Moore argues the ALJ's decision should be reversed and the matter remanded to the ALJ for further adjudication.

We find no error in the ALJ's conclusion that incarceration did not toll the statute of limitations and therefore Moore's claim was not timely filed. The ALJ's analysis is correct and the ALJ correctly applied the law in this claim. We therefore affirm.

KRS 342.185(1) provides:

. . . no 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. . .

The statute further provides for tolling the period of limitations during any period the employer voluntarily pays income benefits. KRS 342.210 also provides for tolling of the statute of limitations for a mentally incompetent person or minor for so long as the individual has no committee, guardian or next friend, or other person authorized to claim compensation for the individual under KRS 342.160. None of these provisions operate to toll the period in Moore's case. Moore identifies no statutory provision or regulation supporting tolling of the period based upon incarceration, and this Board is unable to identify any provision within the Act to that effect.

Moore again relies upon Young, supra, although acknowledging the decision was based in part upon KRS 413.310 which was repealed effective July 13, 1990. Since that general provision, tolling the period during incarceration was repealed, no other general provision for tolling during incarceration has existed. Where a provision is repealed and a subsequent statute is enacted that does not contain the provision, by enacting the current statute, the legislature must be viewed as having rejected the

earlier provision. See Roberts ex rel. Roberts v. George W. Hill & Co., 23 S.W.3d 635 (Ky. 2000).

As the ALJ noted, Moore's incarceration certainly would have made pursuing of the claim more difficult. However, Moore, while represented by counsel, voluntarily chose to dismiss his claim rather than placing it in abeyance or pursuing it during his confinement. Moore testified he was aware of the dismissal at the time the order was entered. Additionally, Moore had the ability to re-file his Form 101 prior to the expiration of the period of limitations and could have requested abatement at that time. Simply stated, Moore was not precluded from pursuing his claim during incarceration and has identified no legal authority for tolling the statute of limitations in his claim.

Accordingly, the November 28, 2011 Opinion and Order rendered by Hon Richard M. Joiner, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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