

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 20, 2014

CLAIM NO. 201176092

RHONDA FOX

PETITIONER

VS.

APPEAL FROM HON. DOUGLAS GOTT,
ADMINISTRATIVE LAW JUDGE

SAM'S CLUB
and HON. DOUGLAS GOTT,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING
* * * * *

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

STIVERS, Member. Rhonda Fox ("Fox") appeals from the February 25, 2014, Opinion and Order of Hon. Douglas Gott, Administrative Law Judge ("ALJ") in which the ALJ sustained Sam's Club's October 21, 2013, Motion to Dismiss Fox's claims for income and medical benefits because both were barred by the statute of limitations, KRS 342.185. No petition for reconsideration was filed.

The Form 101, filed September 3, 2013, alleges on January 21, 2011, and August 30, 2011, Fox injured her neck and back respectively, in the following manner: "1. Plaintiff was walking into work and was hit by a truck. 2. Plaintiff was lifting some grills when she felt pain."

On October 3, 2013, Sam's Club filed a Special Answer in which it asserted, in part, as follows: "G. Running of periods of limitation or repose under KRS 342.195, 342.270, 342.316, or other applicable statute." On October 3, 2013, Sam's Club filed a Notice of Claim Denial in which it denied the claims for several reasons, one being the claim is barred by the statute of limitations. After "Explain," Sam's Club wrote as follows: "Under investigation, to be supplemented upon completion."

On October 21, 2013, Sam's Club filed a Motion to Dismiss asserting Fox's Form 101 is barred by the statute of limitations and requesting the claims be dismissed with prejudice.

On December 11, 2013, Sam's Club filed an "Amended Special Answer" in which it withdrew all of its previous special defenses except for the running of the periods of limitation and repose. Additionally, on December 11, 2013, Sam's Club filed an "Amended Notice of Claim Denial" in which it maintained the claims were denied

because of the statute of limitations. After "Explain," Sam's Club wrote as follows: "The claims were not filed within two (2) years of either injury, pursuant to the applicable statutes. No TTD benefits were paid."

The December 9, 2013, "Telephonic Conference Order and Memorandum" indicates, in part, as follows: "Parties agreed to cancel 1-15-13 BRC, & have Hearing scheduled on bifurcated issue of limitations."

The January 23, 2014, order states, in relevant part, as follows: "The parties have advised the ALJ of their agreement to submit the bifurcated issue of whether Plaintiff's claim is barred by limitations. It is so ordered." The February 25, 2014, Opinion and Order reads as follows:

Statement of the case

This claim has been bifurcated for a decision on whether the claims of Plaintiff Rhonda Fox are barred by limitations. Fox's Form 101 alleges injuries while working for the Defendant on January 21, 2011, and on August 30, 2011. Her claim was filed on September 3, 2013. Because that filing was more than two years after the two dates of injury, the Defendant seeks dismissal. Fox argues that the Defendant's failure to make voluntary payments, or the lack of reporting its denial of such payments, has tolled the limitations period.

KRS 342.185(1) and KRS 342.270(1) require a claim to be brought within two years of the date of injury, or, if voluntary payments have been made, within two years of the cessation of those payments. In this case, it is undisputed that no voluntary income payments were made; and that Fox did not file her claim within two years of either date of injury. Therefore, there must be a circumstance serving to toll the limitations period and estop the Defendant from relying on the limitations defense.

Fox relies on KRS 342.040(1), which states in pertinent part:

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 fifteenth day after the employer has knowledge of the disability...If the employer's insurance carrier or other party responsible for the payment of workers' compensation benefits should terminate or fail to make payments when due, that party shall notify the executive director of the termination or failure to make payments and the executive director shall, in writing, advise the employee or known dependent of right to prosecute a claim under this chapter.

(emphasis added to provisions relied upon by Fox)

Findings and Conclusions.

I. January 21, 2011 injury claim.

This claim is clearly time barred. Fox testified that she never sought medical treatment and never missed any work following this injury. Therefore, there was never an obligation under KRS 342.040 for the Defendant to have paid temporary total disability benefits, and, consequently, no requirement for the Defendant to have provided any notice of denial of such benefits. An employer has no duty to notify DWC that it was not paying benefits if the claimant was never entitled to such benefits. *J & V Coal Company v. Hall*, 62 S.W.3d 392 (Ky. 2001). Fox's argument that undisputed permanent impairment separately triggers a requirement for payment and notification (as discussed within the second claim below) is not applicable to this claim because there is no evidence of any permanency; Fox's own evaluator did not assign impairment for this injury.

II. August 30, 2011 injury claim.

Fox argues that (1) she was owed "income benefits" (2) because of the Defendant's "knowledge of her disability" within the limitations period, and (3) that its failure to have notified DWC of its refusal to "make payments when due" tolls the statute. The ALJ disagrees.

"Income benefits." For this section, the ALJ addresses Fox's argument that the "disability" for which she was owed "income benefits" was temporary total disability. (Her claimed entitlement to income benefits for being permanently partially disabled is addressed in the next section.) "Temporary total disability" is defined at KRS 342.0011(11)(a) as the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement

which would permit a return to employment.

The ALJ makes two findings in conjunction with Fox's argument that she was owed TTD, and that the Defendant's failure to have paid it tolls the limitations period. First, if Fox believed that she had been wrongfully denied TTD, she had to assert that claim with a timely filed Form 101, which she did not do. She cannot present a stale claim to assert that she should have been paid TTD, and that if she had been paid TTD then the carrier would have been required to send the notice to the DWC when it was terminated, which would have prompted the "WC-3" letter from the DWC advising her that she had two years from the date of termination to file her claim.

Alternatively, Fox has not proven that she was entitled to TTD benefits. She continued to work for the Defendant after the injury, but she argues that she missed more than seven days of work and therefore became entitled to TTD. Specifically, she interprets attendance records from the Defendant as showing that she missed nine days on account of her work injury over a period of three years. (Brief, p. 6). The ALJ believes it was Fox's burden to demonstrate that she missed eight or more days work because of disability from her work injury, and she did not do so. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). In her Brief, Fox identified 35 missed days over the three years, and conceded that the "vast majority" of them were for vacation or "comp time." (Brief, p. 5). The notation on the attendance records for the other dates is simply "off," and Fox asks the ALJ to accept that such "means she was of work due to reasons related to her back

injury." (Id.) The ALJ is unwilling to accept such a proposition. First, Fox's own testimony contradicts the argument that she missed more than eight work days because of her injury. She plainly testified that she was aware of only two missed work days. (depo, p. 63). Second, she failed to present any doctor's appointment statements or other off-work medical statements to support her claim that the work injury caused her to miss work on those days.

"Knowledge of disability" requires **"payment."** The "knowledge of disability" to which Fox refers here is alleged permanent partial disability. The references to "income benefits" and "disability" within KRS 342.040(1) are commonly viewed by practitioners and adjudicators in the context of temporary total disability income benefits; in fact, all of the reported (and unreported) cases involving a carrier's alleged failure to comply with the notification requirement of the statute deal exclusively with TTD. But Plaintiff accurately points out in her Brief that the statute makes no distinction between temporary and permanent disability in analyzing entitlement to "income benefits" under KRS 342.040(1). In a case involving PPD payments, the Court in *Pierson v. Lexington Public Library*, 987 S.W.2d 316 (Ky. 1999), said that "KRS 342.040(1) refers only to 'disability' and does not distinguish between temporary and permanent disability." *Id.* at 319.

Fox argues that when the Defendant's own evaluator assigned permanent impairment she became entitled to permanent income benefits for the corresponding disability. Dr. Banerjee's report was issued on March 22, 2013. Thus, according to Fox, the Defendant had

"knowledge of (her) disability" prior to the expiration of the limitations period, failed to "make payments when due," and failed to notify the DWC that it was not making such payments.

Fox advances a novel theory under this long-standing statute for maintaining the viability of her Form 101. The ALJ does not believe the legislature intended the interpretation urged by Fox; and does believe that the practice of workers compensation cases would be turned on end if it was adopted. The Workers Compensation Act establishes an adversary proceeding, and the claimant has the burden of proof. The Act does not impose a duty to pay permanent income benefits absent ALJ approval of a Form 110 settlement agreement pursuant to KRS 342.265(1), or after the filing of a Form 101 when liability is dictated by an award. There is no provision for an "advance" on PPD benefits, or something akin to payment of "temporary permanent partial disability benefits" pending more formal proceedings.

There are adverse practice consequences to tolling the limitations period when evidence of permanency develops during the two-year limitations period. For example, employers and carriers will stop having claimants evaluated. These evaluations are for settlement evaluation purposes and without them fewer claims will be settled; and that is contrary to a strong public policy that encourages prompt settlement of workers compensation claims with minimal litigation expense. *Whittaker v. Pollard*, 25 S.W.3d 466 (Ky. 2000).

The policy encouraging prompt resolution of claims is further thwarted if an injured worker obtains evidence of undisputed permanency in an [sic]

compensable claim and then has no time constraints on filing her claim. Without litigation initiated within the limitations period, an employer could be deprived of the opportunity for meaningful discovery that might lead to impactful information not previously known; or prevented the opportunity for timely medical evaluations that it did not appreciate the need to schedule. Related to that would be an employer's concern of how frequently to have the claimant evaluated while waiting to see if she files a claim; or whether it should have the claimant periodically put through intrusive surveillance to monitor activity while waiting to see if a claim will be filed. (Fox's inaction in this case prevented a prompt settlement of her claim. She was sent a settlement offer on June 3, 2013, based on Dr. Banerjee's impairment rating, and had about 90 days to accept one of two options offered by the Defendant or file a Form 101 before the limitations period expired.)

Another complicating circumstance associated with potential, indefinite tolling of limitations in a case like Fox's is the impact on medical benefits, the employer's liability for which terminates with the expiration of the limitations period. A finding for Fox would create employer liability for medical expenses for more than two years after an injury as long as the claimant possessed a medical report documenting that she had undisputed work related impairment.

Yet another complication would be the case where there is undisputed work related impairment, but a difference of medical opinion on the extent of disability, i.e., divergent impairment ratings, possible total disability, or

application of multipliers. Theoretically, adopting Fox's theory could allow a claimant to accept voluntary PPD payments for 400-plus weeks, and then, prior to the expiration of the 425-week period of PPD, file a Form 101 to claim extended income benefits for total disability. Fox posits that if the employer does not initiate voluntary payments at least at the low end of what the evidence suggests, it has violated KRS 342.040(1). (Brief, p. 8). The ALJ does not believe that appellate bodies will agree.

"Notify" DWC of **"failure to make payments when due."** An employer's failure to satisfy the notification requirement of KRS 342.040(1), thereby negating the letter from the DWC advising an injured worker of her right to make a claim, acts to toll the limitations period and estops the employer from relying on that defense. *H.E. Neumann Co. v. Lee*, 975 S.W.2d 917 (Ky. 1998). It is undisputed in this case that the Defendant provided no notice to DWC that it was not making payments to Fox. However, as found in the preceding sections, there were no "payments" that were "due" Fox by the Defendant, and therefore it had no reporting requirements. *J & V Coal Company, supra*.

In deciding this case, the ALJ was mindful that the Workers Compensation Act is remedial in nature and requires liberal construction to affect its "humane and beneficent purposes." *Wilson v. SKW Alloys, Inc.* 893 S.W.2d 800, 802 (Ky. App. 1995). And the ALJ was further mindful that the history of the Act demonstrates that the legislature has sought to broaden rather than restrict the coverage it

affords. *Princess Mfg. Co. v. Jarrell*, 465 S.W.2d 45, 48 (Ky. 1971). However, the *Wilson* court also said that while liberal construction is proper to effect beneficent purposes, a statute should not be construed so as to give a meaning that the language of the statute does not fairly and reasonably support. The ALJ finds that the Defendant's actions, or inactions, considered in the context of KRS 342.040(1), do not toll the limitations provisions of KRS 342.185(1) and KRS 342.270(1) so as to create a timely filed Form 101 in this case.

The Defendant's motion to dismiss is sustained.

On appeal, Fox asserts that pursuant to KRS 342.040(1), she was entitled to voluntary permanent partial disability ("PPD") benefits during the two years following the date of her injury.¹ Fox asserts Sam's Club's failure to pay voluntary PPD benefits tolled the statute of limitations.

As an initial matter, it is important to note that on appeal, Fox is not asserting Sam's Club should have voluntarily paid temporary total disability ("TTD") benefits; thus, this opinion will not discuss Fox's entitlement to TTD benefits. Fox makes this clear when she states as follows:

¹ Fox does not specify to which injury she is referring. However, it appears her argument is directed to August 30, 2011, injury as her argument revolves around the fact Dr. Banerjee assessed a 7% impairment for the August 2011 back injury.

While the Claimant presented a two-pronged argument to the ALJ concerning the Employer's failure to pay either TTD or PPD income benefits, this appeal concerns only the issue of whether the statute of limitation is tolled as a result of the Employer's failure/refusal to pay PPD income benefits and/or provide notification to the Commissioner.

Based on the record and Fox's argument on appeal, we summarily affirm the ALJ's decision to dismiss Fox's claim for the January 21, 2011, injury. The record reveals Fox did not miss any work after this injury and Sam's Club was not required to pay TTD benefits after this injury.² Further, it is apparent the impairment rating assessed by Dr. Banerjee did not relate to the January 21, 2011, injury.³ Thus, based on Fox's own analogy, as Sam's Club did not have an obligation to pay TTD benefits, it would not have an obligation to pay PPD benefits within the two year period following the January 21, 2011, injury. Therefore, Fox is unable to arrive at any reason why the statute was tolled as to the January 21, 2011, injury.

Concerning the August 30, 2011, injury, as articulated by the ALJ, while Fox's argument that the

² In her deposition, Fox was unable to identify any days missed because of back problems between the first injury and the second.

³ Dr. Banerjee's March 22, 2013, report speaks only to a diagnosis and impairment rating for the August 30, 2011, injury.

failure of Sam's Club to pay voluntary PPD benefits tolled the statute of limitations on her claim is "novel," there is no support for such an argument. The ALJ stated:

The Act does not impose a duty to pay permanent income benefits absent ALJ approval of a Form 110 settlement agreement pursuant to KRS 342.265(1), or until after the filing of a Form 101 when liability is dictated by the award in an ALJ Opinion.

Indeed, the unambiguous wording of KRS 342.040(1) is only relevant to when voluntary *TTD benefits* are payable. It reads, in relevant part, as follows:

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.

Being unambiguous on its face, a rule of statutory construction long accepted by Kentucky courts is that unambiguous statutes must be applied as written. "[A]bsent an ambiguity, 'there is no need to resort to the rules of statutory construction in interpreting it.'" Hall v. Hospitality Resources, Inc., 276 S.W.3d 775, 784 (Ky. 2008). The legislature's intent must be inferred "from words used in enacting statutes rather than surmising what may have been intended but was not expressed." Hall v.

Hospitality Resources, Inc., supra. As the statutory language of KRS 342.040(1) regarding the number of days of disability only has relevance to the payment of voluntary TTD benefits, it cannot be interpreted as pertaining to voluntary PPD benefits. Bolstering our interpretation of KRS 342.040(4) as it pertains solely to TTD benefits is the fact that KRS 342.040(2) speaks to overdue TTD benefits.

In addition, as pointed out by the ALJ, permitting the statute of limitations "to be tolled in a case like Fox's would have a detrimental impact on the practice and resolution of workers compensation claims." The ALJ cited to several reasons which have been cited verbatim in this opinion. Acceptance of Fox's argument would mean that once an employer receives an impairment rating from a physician of its choice, it is obligated to pay voluntary PPD benefits or to advise the executive director of its failure to pay PPD benefits before having had a chance to investigate the claim, obtain opinions from other physicians, and/or determine whether the impairment rating was due to a non-work-related injury or pre-existing active condition. We decline to interpret KRS 342.040(1) in this manner.

Assuming, *arguendo*, that Fox's argument regarding KRS 342.040(1) is correct and that it is equally as

applicable to PPD benefits as it is TTD benefits, Fox has failed to prove that she missed at least two continuous weeks of work following the August 30, 2011, injury which is mandated by the wording of KRS 342.040(1). On this issue, Fox testified as follows in her deposition:

Q: The question was, can you identify any days that you missed for your back, specific days, following your injury on August 30, 2011?

A: The only specific days after August-well, like when I went to see- well, I had doctors' appointments.

Q: Yeah, I'm talking about off-work days where you took the day. Did you take any days- can you identify any days that you took off work due to any back- or issues associated with your injury?

A: Well, I didn't take a day off, I don't think, until June when I threw my back out even worse.

Q: Of 2012? What year?

A: Yeah.

Q: Okay.

A: I don't miss work. You can look at my schedules. I don't miss work for anything.

Q: What day or days did you take off in June-

A: I don't recall.

Q: -for your back?

A: It's on my schedule. It's on there. I don't recall what it was. It was like two or three days, I believe. I think it had CIP on it, call in personal. I think it was the first of June, maybe. I don't really remember.

Q: I'm looking at the week of June 9 and it looks like you were just off your regular scheduled two days, on the 10th and the 14th?

A: Somewhere it says on there CIP. On that schedule.

Q: About June- the week of June 16, you took vacation; do you recall that?

A: Not really.

Q: Okay. Up through- you took vacation from Saturday, June 16, through Sunday, June 24; do you recall that?

A: No.

Q: And- okay. And the week of June 2, which would have been the first week of June, these records reveal that you had your regular scheduled off days on Wednesday and Thursday of that week beginning June 2. So your records do not appear to reflect that- are you sure you were off because your work schedule-

A: Well, I saw it on the schedule when I was looking at those.

Q: Okay.

A: Maybe it wasn't until 2013. I mean, I've been dealing with this for two years. I can't recall all of it.

Q: Okay.

A: So maybe it was 2013 instead of 2000 [sic]-

Q: Okay.

A: Can I look at that, or one of them, see if I can find it? Because it's when I was getting my chiropractic treatment that I had threw [sic] my back out and I had to miss like two or three days of work. Well, I missed two days. I think I may have been off the third day.

Q: Okay. This is 2013 records beginning June 1, and it shows you took two vacation days, on June 1 and June 2, and had a comp day on Friday the 7th. And then the next week of June 8, you had your regular off days on the 11th and 12th. And this is the week of June 14. You had off days scheduled on the- I'm sorry, that's May. Strike that. I went the wrong way.

A: The schedule specifically has a CIP on it, because I saw it when I was looking at the schedules.

Q: Okay.

A: I just don't remember what month it was. I know it was in the summer.

Q: Yeah, here's your regular off days the week of June 15. You had your two regular off days, correct?

A: Right.

Q: And then the week of the 23rd of June, you had your regular two off days on the 25th and 27th, correct?

A: Right.

Q: And then the last two days in June, 29th and 30, you have requested?

A: I'm pretty sure it had to be 2012, though, because that's when I was doing my chiropractic was in 2012, I believe, not 2013.

Q: Okay.

A: 2013 was more physical therapy instead of chiropractic.

Q: Okay. This is the week of- beginning Saturday, May 26, 2012, and you had your regular off days on Sunday, May 27, and Monday, May 28. And is this what you're referring to, CIP?

A: Yes.

Q: On Tuesday, May 29, and Wednesday, May 30?

A: Yes.

Q: Okay. And what does CIP mean?

A: Call in personal.

Q: Okay. And it's your testimony today that you remember that you were off for your back on those two specific days?

A: Yes.

Q: Okay. Any other specific days off for your back that you can identify?

A: I mean, as far as my back just hurting and not being able to come to work, no. As far as doctors' appointment and physical therapies and all that, I mean, that's in the record. There were- you know, I tried to do most of them off the clock or most of them on lunch and things like that, so- which took maybe a half an hour away from work, not like a whole day. When I went to see Dr. Banerjee, that took a whole day.

Q: Yeah, I'm sorry, my question was off for back problems, not treatment or something like that.

A: Okay.

Q: So you identified those two days in May?

A: Yes.

Therefore, using Fox's own argument and analogy, she did not meet the threshold number of missed days in order to trigger the provisions of KRS 342.040(1) requiring the employer to pay income benefits or notify the executive director of its failure to make payments. Thus, KRS 342.040(1) is inapplicable.

Accordingly, the February 25, 2014, Opinion and Order is **AFFIRMED**.

ALL CONCUR.

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