Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 11, 2014

CLAIM NO. 201076296

TAMMY HATTON PETITIONER

VS. **APPEAL FROM HON. JONATHAN WEATHERBY, ADMINISTRATIVE LAW JUDGE**

CENTRAL BANK
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING

* * * * * *

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

RECHTER, Member. Tammy Hatton appeals from the November 25, 2013 Opinion and Order and the December 27, 2013 Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). Her claim was dismissed as time barred. On appeal, she argues the statute of limitations was tolled by

her employer's failure to comply with KRS 342.040(1). We agree and remand this matter to the ALJ for further proceedings.

Hatton is employed as a vault teller at Central Bank. She was injured on September 27, 2010 when she fell down a staircase, injuring her knees. She was able to continue working, but visited the emergency room three days later. Hospital records indicate Hatton was diagnosed with bilateral contusions following normal x-rays. She was released to return to work the next day. Central Bank was aware of this injury, and its worker's compensation insurer paid for her medical treatment in 2010. She did not miss any work in 2010 related to the knee injury.

Nearly two years later, on August 14, 2012, Hatton underwent a right knee arthroscopy and debridement. She was off work for six weeks following the surgery. According to Hatton, the surgeon spoke with her mother after the surgery and asked whether Hatton had ever experienced a traumatic fall. When Hatton returned for a follow-up visit, the surgeon again asked if she had ever fallen because "there's a hole in the kneecap." According to Hatton, it was at this moment she first learned her knee condition was related to the 2010 fall.

After this discussion with her surgeon, Hatton called her employer's human resources department and stated her belief the surgery resulted from the 2010 fall. It is unclear from the record exactly when this conversation took place, although counsel for Central Bank indicated it occurred on September 5, 2012. Later, Hatton was interviewed by Central Bank's worker's compensation insurance carrier. Again, no conclusive proof was submitted of when this interview took place, although defense counsel indicated October, 2012. By letter dated November 21, 2012, the insurance carrier denied the claim, determining the surgery was precipitated by a fall Hatton sustained while exercising in March of 2011. No income benefits were paid to Hatton during her six-week recovery period.

Hatton filed a Form 101 on April 1, 2013. Central Bank asserted a statute of limitations defense, arguing Hatton's claim was filed nearly six months after the two-year statute of limitations set forth in KRS 342. 185. The claim was bifurcated, and a final hearing on the issue of the statute of limitations was conducted. In the November 25, 2013 Opinion and Order, the ALJ noted Hatton was informed of the causal relationship between the fall and the surgery before the two-year statute of limitations

expired. He relied on this fact to conclude Hatton's claim is time barred, reasoning: "[W]hile a delay in notifying the employer would be excusable, the delay for six months in filing a claim is not."

Hatton petitioned for reconsideration. Among other arguments, she claimed Central Bank is precluded from asserting a statute of limitations defense by KRS 342.040(1). The ALJ denied the petition, stating:

> The ALJ find that this case is distinguishable from H.E. Neumann Co. v. Lee, 975 S.W.2d 917 (1998), wherein the claimant missed more than seven days of work immediately after the occurrence of the alleged injury, and notified the employer of his injury and the belief that it was work-related. This case is different from the Plaintiff's herein who notified the employer of the incident but never missed any work or made any allegation of a work-related injury stemming from the incident in a timely manner.
>
> The ALJ therefore finds that the Plaintiff was not lulled into any false sense of security and that this matter is more analogous to Newburg v. Hudson, 838 S.W.2d 384 (1992), which stands for the proposition that an employer's obligation to notify the Department of a work-related injury and of the employer's failure to make benefit payments when due is triggered by receiving notice of an accident from an employee coupled with an absence from work for more than one day. An employer's obligation is not triggered merely by notice of an accident. The ALJ finds that mere notice is what was

> provided in this matter and it was properly dismissed per KRS 342.185.

KRS 342.185(1) requires a claimant to file an application of benefits within two years after a work-related accident, or within two years after the termination of income benefits, whichever occurs later. Hatton did not receive income benefits, and therefore her April 1, 2013 application was on its face untimely. However, an employer will be barred from asserting a statute of limitations defense when it fails to strictly comply with KRS 342.040(1).

KRS 342.040(1) requires an employer to notify the Department of Worker's Claims when it terminates or fails to pay income benefits "when due." Once this notice is given, the Department is then required to inform the employee in writing of the right to file a claim and the applicable period of limitations. Kentucky courts require strict compliance with KRS 342.040(1), and employers who fail to comply with its requirements are estopped from asserting a limitations defense. *See* Kentucky Container Service, Inc. v. Ashbrook, 265 S.W.3d 793, 795-6 (Ky. 2008). This is so even in "the absence of bad faith or misconduct." Id. The only exception to the principle of strict compliance is when the worker engages in conduct

that causes the employer to fail to comply with KRS 342.040(1). *See* Newberg v. Hudson, 838 S.W.2d 384 (Ky. 1992)(where employee failed to inform his employer that his absence from work was due to a work-related injury, employer will not be estopped from asserting a statute of limitations defense).

Based on his analysis in the Order denying Hatton's petition for reconsideration, it appears the ALJ overlooked the uncontroverted fact Hatton missed at least five weeks of work *before* the two-year statute of limitations for her September 27, 2010 injury expired. It is also uncontroverted she informed Central Bank her surgery was related to the work injury before the statute of limitations expired. Thus, there is no dispute that prior to the two year anniversary of the injury Hatton missed sufficient number of days from work to trigger the payment of TTD benefits pursuant to KRS 342.040(1) for a work-related injury, *and* Central Bank was aware her absence may be work-related. The problem is that there has been no conclusive determination as to whether the treatment for which Hatton seeks compensation – the August 14, 2012 surgery – is related to her known work-injury on September 27, 2010. As such, we do not know if Central Bank failed to make income benefit payments that were "due", or notify

the Department of this failure, as required by KRS 342.040(1). For this reason, we must remand the case for a determination as to whether Hatton's surgery is causally related to her work injury. If so, then it necessarily follows that Central Bank failed to make TTD payment "when due" and may not assert a statute of limitations defense.

Accordingly, this matter is **REMANDED** to Hon. Jonathan R. Weatherby for further proceedings as expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON JAMES D HOWES
5438 NEW CUT RD STE 201
LOUISVILLE, KY 40214

COUNSEL FOR RESPONDENT:

HON TIMOTHY FELD
333 W VINE ST #300
LEXINGTON, KY 40507

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN WEATHERBY
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601