# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: April 2, 2014**

CLAIM NO. 201301169

TONY GRAY PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

JAMES RIVER COAL CO.
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**

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

**RECHTER, Member.** Tony Gray ("Gray") appeals from an October 17, 2013 order rendered by Hon. Steven J. Bolton, Administrative Law Judge ("ALJ") sustaining James River Coal Company's ("James River") motion to dismiss. The ALJ determined Gray's claim was barred by the statute of

limitations. Gray also appeals from the November 14, 2013 order denying his petition for reconsideration. We affirm.

Gray filed his Form 101 on August 2, 2013, alleging a knee injury on August 11, 2011 when he stood up and his knee locked. Gray filed no medical evidence with his Form 101, indicating he would later supplement with records of ER visit, an MRI, X-ray, medication, and surgery.

On August 23, 2013, James River filed a special answer, Form 111 Notice of Claim Denial or Acceptance, and a motion to dismiss, asserting statute of limitations had expired. After correction of a minor procedural defect, James River filed a renewed motion to dismiss on September 12, 2013. It supported the motion with medical records establishing the injury actually occurred on August 1, 2011. Additionally, James River submitted an IA-1 report prepared on August 3, 2011 for an injury to Gray's knee on August 1, 2011. The form indicates no work loss, presumably the reason the form was not submitted to the Department of Workers' Claims at that time.

Gray filed a response to the motion to dismiss arguing the statute of limitations was tolled due to the employer's failure to report his absence from work following surgery which was performed on June 28, 2013.

Gray submitted no evidence with his response to the motion. In a reply, James River submitted timekeeping records indicating Gray received vacation pay on June 28, July 1, 2, 3, and 5, 2013. It also submitted the affidavit of Georgia Miniard, human resources manager, who indicated Gray requested vacation days on the above listed dates. He returned to work at his regular job on July 7, 2013 and was never off work until the mine was idled on September 16, 2013. James River argued it was under no obligation to pay temporary total disability ("TTD") benefits, and KRS 342.038 and KRS 342.040 do not apply.

On October 17, 2013, the ALJ issued an order sustaining the renewed motion to dismiss. At the outset, the ALJ amended the Form 101 to indicate August 1, 2011 as the correct date of injury, which Gray does not dispute. As a result, the ALJ concluded Gray's August 2, 2013 Form 101 was filed one day too late. Further, he rejected Gray's assertion the statute of limitations had been tolled, finding he did not miss a sufficient number of work days to require payment of TTD benefits or to invoke the mandatory reporting requirement of KRS 342.038.

Gray filed a petition for reconsideration, arguing the fact he used vacation time to recover from surgery was irrelevant to the question of whether the

injury needed to be reported to the Department of Workers' Claims. Gray asserted his doctor kept him off work for ten days following surgery and he was on light duty for seventeen days, a fact that remains whether the mine was closed or open. He attached a one page July 11, 2013 medical report from Kimberly Cesario, APRN of Premier Orthopedic and Sports Medicine ("Premier"), noting Gray was seen for follow up after knee surgery performed on June 28, 2013. Gray was released for full duty work as of July 11, 2013. He also attached the first page of an August 12, 2013 report from Premier as an exhibit. The note indicates Dr. Beliveau had instructed him not to return to work for six weeks following surgery, but Gray had insisted on returning two weeks after surgery. The ALJ denied Gray's petition for reconsideration by order dated November 14, 2013.

On appeal, Gray accepts August 1, 2011 as the correct date of injury, but continues to argue the two-year statute of limitations was tolled by KRS 342.038 and by KRS 342.040. KRS 342.038(1) states:

> 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 department in the manner directed by

> the commissioner through administrative regulations.

It is undisputed Gray did not initially miss any work as a result of the August 1, 2011 injury, thus the duty to report the injury to the Department could not have arisen in 2011.

Instead, Gray argues the duty to report arose when he used vacation days on June 28, July 1, 2, 3, and 5, 2013. However, by the plain language of KRS 342.038(1), the duty to report only arises if the employer has knowledge of the reason for the absence from work. Here, the evidence only established the employer knew Gray was taking vacation days. Because the record does not establish James River had knowledge of an absence from work for more than one day *related to the injury*, Gray did not prove his statutory period was tolled pursuant to a violation of KRS 342.038.

The tolling provision of KRS 342.040(1) is also inapplicable, which provides in pertinent part:

> [N]o 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 or death. Income benefits shall be due and payable not less often than semimonthly. 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 commissioner of the termination or failure to make payments and the commissioner shall, in writing, advise the employee or known dependent of right to prosecute a claim under this chapter. (Emphasis added)

Hence, an employer does not become obligated to pay TTD benefits until such time as an injured worker has missed at least seven consecutive days of work. *See* Roark vs. United Parcel Service, 2006-SC-000945-WC, 2007 WL 4139636 (Ky. 2007). Gray failed to show he missed more than seven consecutive days of work due to the work injury to become entitled to receive income benefits. Rather, records reflect Gray missed five days from work, for which he used vacation time. This period is not sufficient to trigger the notice requirement. Further, there is no evidence James River paid Gray for vacation days in lieu of TTD benefits. Thus, no obligation existed for James River to report a refusal to pay TTD benefits to the department.

We address a final point. Throughout his appeal, Gray vigorously emphasizes he should not be penalized for using his vacation time to recover from the June 28, 2013 surgery. Admittedly, the ALJ’s opinion might be read as

discounting the days Gray missed from work because he used vacation time instead of sick leave. However, what is determinative in this matter is the complete lack of evidence from which to impute James Rivers' *knowledge* as to the reason for his absence. KRS 342.038(1) requires an employer have knowledge as to the reason for missed work days, and there is no indication whatsoever James River was put on notice that Gray's time off from work in 2013 was related to the 2011 work injury. *See* Newberg v. Hudson, 838 S.W.2d 384, 389 (Ky. 1992)("When the employee is not absent from work until sometime after the accident, the employer may be legitimately unaware that the absence is due to the previous occupational injury.").

As the ALJ noted in his order denying reconsideration, we recognize the seemingly harsh result reached in this case, given Gray missed the filing deadline by a single day. However, although Gray argued certain facts in his pleadings before the ALJ, he failed to file any evidence in support of his position. Similarly, much of his argument to the Board turns upon facts not in evidence. Prior to the ALJ's dismissal, Gray did not introduce medical evidence establishing entitlement to TTD benefits during the period in question. He attempted to introduce medical records from Premier in his petition for

reconsideration. However, a petition for reconsideration is not a proper vehicle for introduction of additional evidence and that evidence may not be considered by the ALJ on reconsideration, nor may it be considered by the Board on appeal. Simply put, James River established Gray's injury occurred on August 1, 2011 and the claim was filed two years and one day following the injury. James River made a *prima facie* showing of entitlement to the statute of limitations defense and Gray failed to rebut that showing.

Accordingly, the October 17, 2013 and November 14, 2013 orders rendered by Hon. Steven G. Bolton, Administrative Law Judge, are hereby **AFFIRMED**.

Finally, Gray requested oral argument. Having reviewed the record, we conclude oral argument is unnecessary. **IT IS HEREBY ORDERED AND ADJUDGED** the request for oral argument is **DENIED**.

ALL CONCUR.

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REBEKKAH B. RECHTER, MEMBER
WORKERS' COMPENSATION BOARD

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