OPINION ENTERED: February 13, 2012

CLAIM NO. 200686043

WILLIAM DECKER PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

CONTROL SYSTEM
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

* * * * * *

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

ALVEY, Chairman. William Decker ("Decker") seeks review of the opinion, order and award rendered October 26, 2011, by Hon. Chris Davis, Administrative Law Judge ("ALJ"), dismissing his claim against Control Systems, Inc., ("Control Systems") due to the expiration of the applicable two year statute of limitations pursuant to KRS 342.185(1)

prior to its filing. Decker also appeals the order denying his petition for reconsideration entered November 21, 2011.

Control Systems timely raised the statute of limitations issue by special answer and motion. The ALJ then bifurcated Decker's claim on the issue of whether the claim was timely filed. Ladegast & Heffner Claims Services ("Ladegast & Heffner") adjusted the claim on behalf of Control Systems. It is undisputed Decker received temporary total disability ("TTD") benefits from May 1, 2008 through May 25, 2008, paid by one check issued May 28, 2008. It is likewise undisputed he filed the Form 101 on June 4, 2010. At issue was the date Decker received the check for TTD benefits.

In his appeal, Decker argues the ALJ erred in finding he received the check for TTD benefits on June 2, 2008, thereby rendering his claim untimely pursuant to KRS 342.185(1). Decker also argues the ALJ erred in finding a misrepresentation by a claims adjuster did not toll the statute of limitations because it occurred after the statute of limitations had expired. Finally, Decker argues the two year statute of limitations should begin to run from the date the employer notifies the Department of Workers' Claims ("DWC") it has terminated TTD benefits pursuant to KRS 342.040. We affirm.

Control Systems submitted the WC-3 ("statute letter") sent to Decker from the Executive Director of the DWC. In the statute letter dated June 6, 2008, the Executive Director advised Decker his TTD benefits had been terminated by his employer on May 25, 2008. The Executive Director advised Decker he could request additional benefits by filing an Application for Resolution of Injury Claim with the DWC "within two years after the date your injury occurred, or, within two years after the last voluntary payment of income benefits to you, whichever event last occurs." There is no allegation the statute letter is deficient or untimely.

Decker testified at the hearing held on September 14, 2011. Decker was born June 4, 1952 and is a resident of Leitchfield, Kentucky. Decker completed the 9th grade and does not have any vocational or specialized training. Decker testified he worked as a carpenter for Control Systems from 1978 to 1990 and then again from 2002 to the present. During his first period of employment, Decker sustained a work-related ankle injury resulting in a workers' compensation claim. Decker testified Larry Fitzhugh ("Fitzhugh"), the president of Control Systems, served as the point person and helped him deal with the insurance company in resolving his claim.

On May 16, 2006, Decker testified he was lifting a window at work when he felt an immediate burning sensation in his back. Decker testified he ultimately had back surgery sometime in 2008. Decker testified as follows regarding the receipt of the TTD check:

> Q: The check paying you, which was placed into evidence, shows that it was for $1,860 and some odd cents - - I can't read that part - - and it was sent to William R. Decker, in care of Control Systems, Inc., P.O. Box 20051. Is that the employer's address.
>
> A: Yes.
>
> Q: Do you have any independent memory of when you would have received the check or cashed the check?
>
> A: Probably within just a few days.
>
> Q: I guess you could assume that you were waiting for that check and when he got it you would have liked to have had it?
>
> A: He give [sic] it to me when he got it.

Decker testified he called the insurance carrier all the time to discuss his claim and had trouble scheduling with its representatives. Decker testified when he had a problem with his claim, he would discuss it with Fitzhugh who would help remedy the problem. Decker also testified his address in June 2008 was the same as the address found

in the statute letter dated June 6, 2008. Decker testified as follows regarding whether he actually received the letter:

> Q: I think we've asked you about this, or I know I may have asked you about this before. Do you recall ever getting that letter?
>
> A: I don't recall it, but I'm not going to say they didn't send it, because I don't remember.
>
> Q: That's a fair answer. But you don't remember particularly ever seeing it?
>
> A: No.

Christina Sharp ("Sharp"), a claims adjustor for Ladegast and Heffner, testified by deposition on February 11, 2011. A copy of the TTD benefit check and the activity log for Decker's claim were introduced as exhibits to her deposition. Sharp testified she had handled a portion of Decker's claim. Sharp testified the activity log documented all medical activity, any requests for treatment and conversations held with medical providers or the claimant. Sharp testified Decker's claim was initially handled by Carrie Berry, the medical only adjustor, since Decker did not miss work until his back surgery in May 2008. During this time period, Berry noted in the activity log the

statute of limitations was initially set to expire on May 16, 2008.

The claim was then transferred to Sharp when Decker was approved for back surgery. In an entry dated May 28, 2008, Sharp noted TTD benefits were paid for a period of May 1, 2008 through May 25, 2008. In entries dated June 2 and 4, 2008, the adjuster noted the statute of limitations is now two years from the last TTD payment of May 25, 2008. In an entry dated January 27, 2010, Sharp noted the statute of limitations is running and the EDI was completed on June 5, 2008. In an entry dated June 7, 2010, Dena Green, Sharp's supervisor, noted:

> I spoke to Ee on clm/sol- he is upset that we are not paying for this longer. I explained SOL- the ltr c was sent, etc. We will pay for outstanding bills prior to SOL and what we recently approved.

Sharp testified all of her telephone conversations where with Fitzhugh and she did not recall ever talking to Decker. Sharp testified she did not recall any conversations with Fitzhugh between May 28, 2010 and June 7, 2010, but acknowledged "insignificant" conversations would sometimes not be noted. Sharp further testified she probably had conversations about the statute of limitations

during this period concerning the authorization of treatment.

Sharp testified the TTD check was issued in the amount of $1860.89 for the period of May 1, 2008 through May 25, 2008. The TTD check was issued by Ladegast & Heffner, Louisville, Kentucky and sent to William Decker, in care of Control Systems, Louisville, Kentucky. The check was issued May 28, 2008, received by the bank on June 7, 2008, and posted on June 9, 2008. When asked when the TTD check was actually mailed out, Sharp testified as follows:

> Q: It was paid from 5/1/08 through 5/25/08, and the check itself, and we've got it in evidence, was dated 5/28/08?
>
> A: Correct.
>
> Q: Let me ask you to assume that 5/28/08 was a Wednesday.
>
> A: Okay.
>
> Q: What would be the process as far as mailing out that check in terms of when it would have been mailed out of your office?
>
> A: Well, if a check goes out, it is done from our office that week, they all go out on Friday. No checks go out until Friday unless a check needs to be pulled for some particular reason. If it's late, if we owe for backpay or something like that, or if someone needs to get it, then we have it pulled.
>
> Q: Do you know if this check would have been pulled?

> A: I do not know if it was pulled. I assume that it was.
>
> Q: Why?
>
> A: Because it was done on 5/28/08, and it starts - - the indemnity starts on 5/1, so that's - - technically, we're paying him for benefits late because - -
>
> Q: It had been more than two weeks?
>
> A: It had been more than two weeks, yeah.

Sharp testified, assuming the check had not been pulled, the latest the TTD check would have been mailed would have been Friday, May 30, 2008.

Fitzhugh testified by deposition on February 11, 2011, Control Systems is a general contractor doing mostly remodeling work. Fitzhugh testified he served as the point person throughout Decker's injury claim and made telephone calls on behalf of Decker concerning his claim. Fitzhugh testified he talked to Carrie Berry, Christina Sharp and Dena Green, insurance adjusters for Ladegast & Heffner, about the statute of limitations back in 2008 and then again in 2010. Specifically, Fitzhugh testified he talked to Sharp on June 3, 2010, who informed him the statute of limitations was going to expire on June 6, 2010. Although he did not know how she came up with the June 6, 2010 date,

Fitzhugh hand-delivered the Form 101 to the DWC the next day on June 4, 2010. Fitzhugh testified he received Decker's TTD benefit check in 2008, but could not recall the exact date. Fitzhugh testified when he would have given the TTD benefit check to Decker as follows:

> Q: Do you have any independent recollection as to how soon after you received it you would have given it to Randall?
>
> A: If they mailed it on Friday, I got it on Monday. I would probably give it to him the date I got it. Now, I don't go to my post office box every day.
>
> Q: Is it safe to assume that whenever you got it, you would have given it to him almost immediately?
>
> A: Yes sir.
>
> Q: Especially if he had been waiting for it?
>
> A: Yes, sir.
>
> Q: Would you have hand-delivered it to him or vice versa, he would have come and picked it up as opposed to putting it in the mail to him?
>
> A: Yes.
>
> Q: You wouldn't have put it in the mail?
>
> A: No, not in the mail.

In the opinion, order and award rendered October 26, 2011, the ALJ found as follows:

6. The issue to be decided is statute of limitations. As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky.App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. Paramount Foods Inc., v. Burkhardt, 695 S.W. 2d 418 (Ky., 1985).

In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments. The Administrative Law Judge will note that no attorney herein is accusing any other attorney or party of "nefarious" conduct. This claim and issue is a case of very little factual dispute with some legal dispute and completely polar opposite possible results.

The Administrative Law Judge finds that the undisputed facts are that the last date on which the Plaintiff was paid TTD was May 25, 2008. That he was mailed the appropriate letter, dated June 6, 2008, by the DWC, stating his statute of limitations expired on May 25, 2008. That he was told, by the insurance adjuster, on June 3, 2010, that the statute of limitations expired on June 6, 2010. And, finally, that his claim was filed on June 4, 2010.[1]

The Administrative Law Judge makes the following findings of fact

[1] The 06/04/10 filing of the Form 101 was defective but that is the date deemed for filing.

regarding factually disputed issues. First, although the Plaintiff's testimony is that he does not remember receiving a letter from the DWC regarding the expiration of the statute of limitations, and I believe him, there is no reason to believe he did not get the letter and I find he did receive said letter. The Plaintiff's memory is not the best. He seems an honest man but clearly his level of sophistication and attention to these details is lacking and he has de facto [sic] ceded almost all responsibility for his claim to others. However, this is not the fault of the DWC or the carrier.

Second, I find that despite the fact that the check was not cashed until June 7, 2008 the Plaintiff nonetheless received his check on June 2, 2008. As the Defendant points out there is no evidence that the delay is proof that he did not get his check until June 6 or 7, 2008. As the statute of limitations has clearly expired and the carrier complied with the reporting requirements the burden of proof shifts to the Plaintiff to show why the statute should be tolled. In fact, it is the testimony of the employer, Mr. Fitzhugh, who is clearly an advocate for the Plaintiff that he probably received the check on June 2, 2008 and gave it to the Plaintiff.

The above factual finding is relevant due to the Plaintiff's reliance on *Sturgill Lumber Company v. Maynard*, 447 S.W.2d 638 ([sic]1969). That decision is still applicable law in the Commonwealth, despite its age. However, it does not apply herein because the claim was filed after the check, herein, [sic] was received by the Plaintiff.

I do not believe, and do not find, that the action of Christina Sharp telling Mr. Fitzhugh that the statute of limitations expired on June 6, 2010 tolled the statute of limitations to that date. For this to be the case Ms. Sharp would have needed to tell the Plaintiff, or his de facto representative, Mr. Fitzhugh, this prior to the statute actually expiring. Whether the date of the statute expiring is May 25, 2010 or June 2, 2010 she did not make this error until after the statute expired. Thus her mistake did not lull the Plaintiff nor toll the statute of limitations.

Finally, the Plaintiff's attorney, a highly respected, intelligent, ethical and experienced attorney does not accuse Ms. Sharp of fraud. The undersigned, as knowledgeable about the parties who come before him and the workings of the ground level of workers' compensation as the next person, does not believe fraud was committed. That Ms. Sharp and her co-workers knew "a firestorm" was coming when the statute of limitations expired is no more proof that they contrived to lull the Plaintiff or Mr. Fitzhugh than my knowing to take shelter when the tornado siren sounds is proof I caused the tornado.

Whether the statute of limitations expired on May 25, 2010 or June 2, 2010 the claim was not filed until June 4, 2010. The carrier complied with all of their reporting duties and the Department of Workers' Claims issued the appropriate notice letter. The carrier did nothing prior to June 2, 2010 to toll the statute of limitations. The claim is dismissed as being filed outside the statute of

> limitations. The undersigned knows this is a matter of days, less than forty-eight hours, but it is the fact and law.

In his petition for reconsideration, Decker argued the ALJ erred in determining he received the TTD check on June 2, 2008, instead of June 7, 2008. Had the ALJ correctly determined Decker received the TTD check on June 7, 2008, the claim would have been timely filed and the misrepresentation by Sharp, made on June 3, 2010, would be within the statute of limitations. In the order denying his petition for reconsideration, the ALJ ruled as follows:

> 2. Any error, if any, regarding the summary of when Mr. Fitzhugh received any check is immaterial. Said fact was relied upon in the dismissal of this matter. Rather the primary reason that this claim was dismissed, as shown by the Opinion, was the factual finding that the Plaintiff did receive the notification letter from the Department of Workers' Claims and that although it may seem harsh the Defendant is not liable for the Plaintiff's inability to understand its importance or to remember he even received it. The Plaintiff's Petition is DENIED.

As the claimant in a workers' compensation proceeding, Decker had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App.

1979). If the party with the burden of proof before the ALJ was unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). As long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

KRS 342.285 designates the ALJ as the fact-finder. In that role, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky.

1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility, or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). Rather, it must be shown there was no evidence of substantial probative value to support the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Contrary to Decker's assertion, the evidence supports the ALJ's factual finding the TTD check was received on June 2, 2008 and the statute letter from the Executive Director regarding the expiration of the statute of limitations was also timely. As noted by the ALJ, Fitzhugh testified he "probably" received the check June 2, 2008 and gave it to Decker the same day. The ALJ also noted there was no evidence the delay between June 2, 2008 and the eventual bank deposit on June 7, 2008 is proof Decker did not receive the check until June 7, 2008. Although Decker points to other evidence supporting his position the TTD benefit check was not received until June 7, 2008, such does not compel a reversal on appeal.

That said, the ALJ did not err in dismissing Decker's claim as untimely. KRS 342.185(1) states, in part:

> If payments of income benefits have been made, the filing of an application for adjustment of claim with the office within the period shall not be required, but shall be requisite within two (2) years following the suspension of payments or within two (2) years of the accident whichever is later.

KRS 342.270 requires the application for resolution of claim to be filed "within two (2) years after the accident . . . or within two (2) years after the cessation of voluntary payments, if any have been made". In Sturgill Lumbar Co. v. Maynard, 447 S.W.2d 638, 639 (Ky. 1969), the court analyzed 342.270, as it then existed, required an application for benefits to be filed within one year after the cessation of voluntary payments. In Sturgill, the insurance company issued a TTD check on September 10, 1965 to Maynard for the period from July 30, 1965 to August 31, 1965. Maynard filed his application for compensation on September 9, 1966. *Id.* Sturgill rejected the argument the statute of limitations began as of the last day of the period for which the last TTD payment was made and held "payment" to mean the following:

> the receipt by the workman of an instrument of payment, and payment will be deemed to have ceased as of the day the last instrument of payment was received. The voluntary payments to Maynard thus must be held to have ceased when he received the September

> 10 check, which was less than one year before he filed his application for compensation. *Id.*

In Perdue Environmental Contracting v. Ortiz, Claim No. 04-92818 (rendered April 27, 2007), the claimant was paid voluntary TTD benefits from August 20, 2003 through September 14, 2003. The last TTD check was issued by the employer on September 22, 2003 and was received by the claimant sometime after that date. The claimant filed the Form 101 on September 15, 2005. In concluding the claim timely, the Board found "Ortiz's claim was filed on September 15, 2005, within two years of either the issue or receipt of the check, compelling a legal conclusion that it was filed within two years of the last payment of voluntary TTD benefits."

In this instance, Decker was paid TTD benefits from May 1, 2008 through May 25, 2008. The last and only TTD check was issued by the insurance company on May 28, 2008, which the ALJ found Decker received on June 2, 2008. Decker filed the form 101 on June 4, 2010. Therefore, Decker's claim was not filed within two years of either the issue (May 28, 2008) or receipt (June 2, 2008) of the check, and was properly dismissed by the ALJ as untimely.

Likewise, the ALJ did not err in concluding Sharp's June 3, 2010 misrepresentation, if any, advising Fitzhugh the statute of limitations would expire on June 6, 2010, did not toll the statute of limitations. In order for the statute of limitations to be tolled, the evidence must establish the employer or the insurance carrier made false representations to the claimant that lulled the claimant into not filing his claim within the prescribed time. Cowden v. Manufacturing Co. v. Fultz, 472 S.W.2d 679 (Ky. 1971). The alleged misrepresentation from Sharp would necessarily have required communication to Decker prior to the expiration of the statute of limitations in order to lull him into not filing a claim. Wright v. Washington Penn Plastic Co., Inc., Claim No. 03-73784 (rendered August 29, 2007). Sharp allegedly made a misrepresentation on June 3, 2010 regarding the statute of limitations. Whether the statute expired on May 25, 2010 the last date of payment; May 28, 2010 the date the check was issued; or June 2, 2010 the date Decker received the check, Sharp did not allegedly make the statement until after the statute expired. It is also noted no evidence was introduced, nor was there an allegation of violation by the Executive Director, Control Systems, or Ladegast & Heffner of KRS 342.040.

We find Decker's argument the two year statute of limitations should begin to run from the date the employer notifies the DWC of termination of payments as mandated by KRS 342.040 is without merit. In support of his argument, Decker submits the scenario where the notification by employer was not made until three days prior to the statute of limitations expiration, admitting such was not the case here. KRS 342.185 and KRS 342.270 are completely void of this language. Also, this scenario has been addressed under the estoppel theory. Frankfort v. Rodgers, 765 S.W.2d 579 (Ky. App. 1988), Ingersoll-Rand Co. v. Whittaker, 883 S.W.514 (Ky. App. 1994).

Accordingly, the decision rendered October 26, 2011 and the November 21, 2011 order denying the petition for reconsideration by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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