

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 13, 2019

CLAIM NO. 200687100

ANTHONY MCDOWELL

PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE**

CITY OF ASHLAND;
AND HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

RECHTER, Member. Anthony McDowell appeals from the June 24, 2019 Opinion and Order and the July 22, 2019 Order on Reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”), dismissing his claim as barred by the statute of limitations set forth in KRS 342.185. On appeal, McDowell argues the statute of limitations was tolled due to his employer’s failure to comply

with the notification requirements of KRS 342.040. For the reasons set forth herein, we affirm.

McDowell filed his claim on December 11, 2018, alleging an injury to his shoulder on May 11, 2006 while working for the City of Ashland (“Ashland”). He was off-work for a period of time, and received temporary total disability (“TTD”) benefits. He returned at the end of 2006 when his treatment ended. McDowell continued to work for Ashland until 2017, when he retired.

The claim was bifurcated for consideration of the statute of limitations, and whether McDowell was notified his benefits were terminated, as required by KRS 342.040. McDowell testified he never received a WC-3 letter informing him of the termination of his TTD benefits. He further testified his address is 1024 West Rose Road, Ashland, Kentucky 41102, and he has lived at this address for fifteen years.

McDowell acknowledged he received checks from KEMI during the period he was off work. He testified the checks were sent to his address on West Rose Road. The checks ceased when McDowell was released to return to work. He testified he called KEMI in 2007, 2008, and 2010 to verify his claim was still “open”. McDowell acknowledged the KEMI representative informed him in 2010 that his claim had “lapsed”, and informed him of the two year statute of limitation.

McDowell visited an attorney in 2016 to inquire about his workers’ compensation benefits, and was informed the file had been closed. His attorney showed him a copy of a letter from the Department of Workers’ Claims (“DWC”) dated June 6, 2006. The address listed on the letter was incorrectly listed as 1024

Rose Road, instead of 1024 West Rose Road. McDowell did not take any further action on the claim until December 11, 2018 because he suffered a heart attack in 2017.

Kim McKenzie, Labor Cabinet resource management analyst, testified the DWC received a request for McDowell's file from his attorney on September 28, 2016. The DWC policy is to mail records within three business days after receipt of payment. She stated the records were mailed to McDowell's attorney and there was no return of the envelope to the DWC. She testified a subsequent payment for an underpayment as to the rate of TTD does not generate an additional WC-3 letter.

Michael Adkins, risk manager for Ashland, testified McDowell's address is listed in their records as 1024 Rose Road. However, he acknowledged FMLA forms and W2 forms in 2006 and 2007 were sent to McDowell at 1024 West Rose Road, Ashland, Ky. 41102. Adkins also testified the first report of injury that was signed by McDowell listed his address as Rose Road, Ironville, Kentucky.

Amy Griffin, corporate counsel for KEMI, testified KEMI's records indicate McDowell received TTD benefits from May 11, 2006 through June 1, 2006. These checks were mailed to McDowell at 1024 Rose Road, Ashland, KY 41102. KEMI notified the DWC of the suspension of TTD benefits on June 6, 2006 and provided the address of 1024 Rose Road. KEMI made an additional payment in August 2006 to correct an underpayment as to the rate of the TTD benefits previously paid. The payment did not include any additional duration of the TTD period. KEMI also sent a Form 113 and a letter advising McDowell of KEMI's phone number and the claim number to 1024 Rose Road. Based on KEMI's records,

the checks were not returned and all the checks cleared the bank. Griffin testified KEMI sent DWC notice of the additional payment for underpayment of TTD.

Ashland submitted photographs showing the road sign and a marker identifying the road on which McDowell's house sits as Rose Road. The photographs also indicate a church and other municipal buildings close to McDowell's house use Rose Road as their address, rather than West Rose Road.

The ALJ's findings relevant to this appeal are as follows:

Pursuant to KRS 342.185 (1), an injured work[er] must file a claim for workers' compensation benefits within two years of the work related injury or within two years of the last payment of income benefits, whichever is later. The decision of whether the statute has been tolled depends upon the facts and circumstances of each case. *Newberg v. Hudson*, 838 S.W.2d 384, (KY 1992). Failure to comply with KRS 342.040 to notify the Board of failure to make compensation payments will preclude reliance on the Statute of Limitations defense. *City of Frankfort v Rogers*, 765 S.W.2d579 (KY APP 1989). KRS 342.040 states that if the Employer's insurance carrier 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 of the right to prosecute a claim under this chapter.

Pursuant to *H.E. Neumann Company v. Lee*, 975 S.W.2d 917 (KY 1998), the purpose of the notification requirements in the workers' compensation statutes is to advise an injured worker, in writing, of his right to prosecute his claim and the period in which to do so. The failure to comply with the notification requirements of the statutes tolls the statute of limitations. *Kentucky Container Service, Inc., v. Ashbrook*, 265 S.W.3d 793 (KY 2008). It is sufficient that the "statute letter" containing information about an employee's right to prosecute claim was sent to the employee by regular mail. An employee's statement that he did not receive the "statute letter" advising him of his right to prosecute a workers' compensation claim after the employer terminated TTD

benefits is insufficient to estop the employer from raising the statute of limitations defense. *Akers v. Pike County Board of Education*, 171 S.W.3d 740 (Ky. 2005).

After careful review of the evidence, the ALJ finds McDowell's claim is barred by the statute of limitations. The ALJ finds Ashland [met] its burden of proving it and the DWC complied with their statutory obligations under KRS 342.040.

McDowell sustained a work injury on May 11, 2006. He sought medical treatment and was off work for a period. The records of KEMI indicate McDowell received TTD benefits from May 11, 2006 through June 1, 2006. Griffin testified KEMI notified DWC when they terminated McDowell's TTD benefits. On June 6, 2006, DWC mailed the required letter advising McDowell of his rights to prosecute a claim. McDowell filed his application for resolution of claim on December 11, 2018, 12 years after the termination of TTD benefits. Further, McDowell did not even file his claim within two years of when his attorney obtained the claim file and he learned there was a two-year limitation issue.

McDowell's argument that the DWC letter was mailed to the wrong address, does not negate Ashland and the DWC's compliance with KRS 342.040. McDowell's address being 1024 W. Rose Road does not mean Ashland/KEMI failed to comply with KRS 342.040. Ashland's carrier KEMI used the address that it had used throughout the handling of McDowell's claim, which was 1024 Rose Road. That is the address KEMI had on record for McDowell. KEMI used that address to mail McDowell's TTD checks, which were received and cashed. Further, KEMI used that address to send McDowell his initial claim letter, which included KEMI's address, phone number, McDowell's 113 and medical card. McDowell acknowledged he received that letter and information. Moreover, the TTD termination letter, the initial letter from KEMI, nor any of the TTD checks were ever returned as undeliverable. McDowell never reported to Ashland or KEMI that those correspondences reflected an incorrect address or any problem with that address. Ashland nor the DWC had any reason to believe they were mailing correspondence

to anything but a valid address for McDowell in compliance with KRS 342.040.

Based on the foregoing, Ashland and the DWC complied with KRS 342.040 and McDowell's claim is barred by the statute of limitations. The facts and circumstances of this case do not justify tolling the statute of limitations.

McDowell filed a petition for reconsideration including the arguments it raises on appeal. The ALJ provided the following additional analysis in her order on reconsideration:

IT IS HEREBY ORDERED the Petition for Reconsideration is **OVERRULED**. The ALJ will provide some clarification. Although the ALJ states on page 8 of the Opinion that KRS 384.185 provides that an injured worker has two years from the date of the last payment of benefits to file his claim, the statute's specific words are "within 2 years following the *suspension* of payment." The wording of the statute is consistent with the DWC's policy of not sending out notifications of additional payments made that do not alter the last date for the period of TTD, as testified by Kim McKenzie. Further, KRS 342.040 requires the insurance carrier to notify the commissioner of the termination of benefits, which the carrier did. The undersigned should have chosen more concise words when paraphrasing KRS 384.185, but there are no errors on the face of the opinion. The ALJ explained thoroughly her rationale for the decision that the DWC satisfied its obligations under KRS 342.040 and the statute of limitations bars the claim.

Further, the ALJ notes McDowell has consistently made reference in his brief, petition for reconsideration, and amended petition for reconsideration to a payment in August 2016. This is clearly a typographical error, as there is no evidence of any payment in 2016 only August 2006. The August 2006 payment was for an underpayment of TTD. It was not a reinstatement of TTD and did not change the date of termination of

benefits, thus there was no additional obligation on the insurance carrier or DWC to send any further notice.

On appeal, McDowell first argues there is no proof he received the June 6, 2006 termination letter. He argues the Rose Road address, instead of West Rose Road, is incorrect and insufficient to constitute notice of his time to file a claim. McDowell asserts there is no presumption that incorrectly addressed mail is delivered to the actual correct address. McDowell further argues the last TTD payment in August 2006 was never the subject of a termination letter, to a correct address or not, which means the statute of limitations never began. The principles of equity would find the use of an incorrect address for the termination letter on June 6, 2006, his testimony that he did not receive the letter; and the complete failure to send a termination letter after the last TTD payment was made should not prejudice his claim. KRS 342.185 requires an application for adjustment of a claim must be filed within two years following the suspension of the payment of income benefits. KRS 342.040(1) places certain obligations on the employer and on the DWC to advise the worker of the right to file a claim, and the applicable period of statute of limitations. When KRS 342.040(1) and KRS 342.185(1) are read together, it is clear the two-year statute of limitations period does not begin to run until: 1) the employer ceases payment of voluntary income benefits; 2) the employer provides notice of the cessation of benefits to the DWC; and 3) the DWC sends the employee the required notice. Newberg v. Hudson, 638 S.W.2d 384 (Ky. 1992).

There is ample evidence to support the ALJ's conclusion the DWC and KEMI complied with its statutory obligation. McDowell's DWC file contains a

copy of the June, 2006 WC-3 letter. There is no evidence to indicate a complete failure to comply with KRS 342.040.

Furthermore, there is evidence that the address used by KEMI and the DWC was sufficient. McDowell received TTD checks, a Form 113, a medical card and correspondence at the Rose Road address. There is no evidence McDowell ever sought to correct the mailing address KEMI had been using. The facts here are similar to those in Kevin W. Garland v. H.T.Hackney Company, Inc., 2007-SC-000079-WC, 2007 WL 4139634, rendered November 21, 2007, (Designated Not To Be Published). At the time of a November 9, 2000 accident, Garland lived at 2638 Fairmont Street in Paducah. He moved to 6920 Shawn Lane in Paducah in July 2001, and later moved to Calvert City. After he had moved, the DWC mailed a WC-3 letter dated October 3, 2001 to 2638 “Fairmount” Street instead of Fairmont Street. After his move, Garland’s mail was forwarded to the new address. The WC-3 letter was not returned to the DWC, and Garland had received TTD and mileage reimbursement checks forwarded from the “Fairmount” address. It was determined that mailing to the “Fairmount” address was sufficient because the misspelling was of no consequence in the alleged failure of the notice letter being forwarded. There was no evidence Garland provided the employer or carrier with a new address. The ALJ determined the employer complied with the provisions of KRS 342.040(1) in the transmission of the required information contained in the IA-2 reporting form.

As in Garland, there is no evidence McDowell informed KEMI that Rose Road was an incorrect address. McDowell signed a first report of injury with an address of Rose Road in Ironville. Correspondence and checks sent to him at

Rose Road prior to the termination of TTD benefits were not returned. The WC-3 letter was not returned to the DWC. In the face of this evidence, McDowell's own testimony that he did not receive the notice letter does not compel the result he seeks.

McDowell's situation is easily distinguished from that in Kentucky Container Service Inc. v. Ashbrook, 265 S.W.3d 793 (Ky. 2008). That case involved a carrier's failure to use a correct code when it reported the termination of TTD benefits. The code used by the carrier would not trigger a WC-3 letter. After the carrier was informed of the defect, it did not submit a corrected report, an omission which resulted in the failure to generate a WC-3 letter. The ALJ concluded Kentucky Container did not sufficiently comply with the statute because it failed to provide information necessary to allow the DWC to comply with the statute.

We find no merit in McDowell's assertion that a subsequent payment of underpaid TTD benefits would require the issuance of a second WC-3 letter. KRS 342.040 requires the claimant be informed of the applicable statute of limitations when voluntary income benefits are suspended. All parties acknowledge that the additional payment in August 2006 was not a reinstatement or extension of the period of TTD benefits. This circumstance does not equate to a "suspension" of voluntary income benefits, but simply a correction of the existing period which had already ended. McDowell cites no authority that a payment representing an adjustment of the rate of TTD benefits requires issuance of a new WC-3 letter, and we find no support in the statute for such an interpretation.

Finally, assuming *arguendo* that notice was not given properly in 2006, McDowell certainly received notice when his file, including the 2006 WC-3 letter

and information concerning the August 2006 payment to adjust the rate of TTD, was provided to his attorney in October 2016. It was incumbent upon him to file his claim within two years of October 2016 at the latest. From the date his attorney received notice, the alleged action or failure to act by KEMI or the DWC cannot be viewed as the cause of McDowell's delay in filing his claim. McDowell testified that any delay after his attorney received the notice in 2016 was occasioned by a heart attack in 2017. McDowell testified he did not feel well enough to pursue the matter until 2018. McDowell's claim was not filed until December 11, 2018, more than two years after his attorney received notice.

We are convinced the ALJ properly understood and analyzed the evidence and applicable law, and acted within her discretion to determine which evidence to rely upon. It cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Accordingly, the June 24, 2019 Opinion and Order and the July 22, 2019 Order rendered by Hon. Monica Rice-Smith, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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