Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 30, 2021

CLAIM NO. 201581294

LEWIS DOOR SERVICES CO. INC. PETITIONER

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

JOHN J. REKER and
HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Lewis Door Service Co. Inc. ("Lewis Door") appeals from the December 21, 2020 Opinion, Award, and Order rendered by Hon. Monica Rice-Smith, Administrative Law Judge ("ALJ"). The ALJ found Lewis Door is estopped from asserting a defense regarding the statute of limitations. She noted its failure to provide proper notification pursuant to KRS 342.040(1) tolled the statute of limitations. The ALJ found John Reker ("Reker") is permanently totally disabled

due to his June 1, 2015 right shoulder injury, and awarded permanent total disability ("PTD") benefits and medical benefits. Lewis Door also appeals from the January 21, 2021 Order denying its Petition for Reconsideration.

On appeal, Lewis Door argues it complied with the notice requirements of KRS 342.040. Lewis Door also argues the "fails to make payments when due" language contained in KRS 342.040 only applies in instances where no temporary total disability ("TTD") benefits are paid. Finally, Lewis Door argues Reker's remedy lies with the Board of Claims or in Circuit Court. Because the ALJ's determination Lewis Door failed to provide proper notification required by KRS 342.040(1) thereby tolling the statute of limitations was not erroneous, and a contrary result is not compelled, we affirm.

The sole issue on appeal concerns KRS 342.040(1) and the statute of limitations. Therefore, we will not discuss the medical evidence of record.

Reker filed a Form 101 on February 26, 2020 alleging he injured his right shoulder in the course of his job duties as a garage door installer for Lewis Door on June 1, 2015 while pushing on a spring. Reker was 64 years old when he was injured, and he has not worked since that date.

Lewis Door, as insured by KAGC/Ladegast & Heffner ("Ladegast"), filed a Form 111 denying the claim. It alleged Reker's claim was barred by the statute of limitations stating, "Claimant was 64 years old on date of injury and exhausted his income benefits. Subsequently, more than 2 years had passed by the time he filed his claim on 2/26/20."

Lewis Door filed electronic documents obtained through an open records request with the Department of Workers' Compensation ("DWC") reflecting Lewis Door submitted a first report for the work injury on June 15, 2015. Lewis Door submitted an "IP- initial payment" document on June 23, 2015, notifying the DWC that it initiated payment of TTD benefits on June 2, 2015. The records reflect Lewis Door filed multiple "BM-Bi-Monthly" documents notifying the DWC that it continued to pay Reker weekly TTD benefits. The last record is a "S7-Suspension, Benefits Exhausted" document notifying the DWC that it paid Reker weekly TTD benefits in the amount of $488.09 from June 2, 2015 through May 29, 2017 for a total of $50,761.36.

Lewis Door submitted a Pay Log Report for indemnity payments reflecting Reker's weekly TTD benefits were paid from June 2, 2015 to May 29, 2017 for a total of $50,761.36. Lewis Door also filed a Pay Log Report for $118,985.95 in medical expenses it paid on Reker's behalf from June 2015 through October 2018.

Reker testified by deposition on June 18, 2020 and at the final hearing held October 19, 2020. Reker was born on April 2, 1951. He began working as a service technician for Lewis Door in July 1995. Reker injured his right shoulder on June 1, 2015 as he was replacing a broken spring. Dr. Scott Kuiper performed a right rotator cuff repair on June 23, 2015, a revision rotator cuff repair on November 15, 2015, and a reverse total right shoulder replacement on August 25, 2016. Reker testified his right shoulder condition deteriorated after the total replacement, and he was eventually referred to Dr. Mark Smith for a second opinion. Dr. Smith

performed a revision of the total right shoulder replacement on March 6, 2018. Reker continued to treat with Dr. Smith through November 2018.

Reker has never been released to return to his pre-injury job with Lewis Door, nor has he worked anywhere since June 1, 2015. Ladegast paid for all of his medical treatment. However, he stopped receiving TTD benefits on May 29, 2017. Reker called Terry Whiting ("Whiting"), an adjuster with Ladegast, to determine why his TTD benefits had ceased. Whiting informed him he stopped receiving TTD benefits "due to whatever law it was, that they didn't have to pay me anymore and I had to go on Social Security." He then applied for and began receiving Social Security retirement benefits.

Reker had a subsequent conversation with Whiting, who told him TTD benefits could be available to him. She advised the law had been reversed and he could start receiving TTD benefits again. He did not understand how this could affect his regular Social Security benefits. Reker informed Whiting he would call her back after he discussed this with his wife, but he has not spoken to her since then.

Reker had several previous work injuries while employed by Lewis Doors for which he received TTD benefits, but never filed a formal claim. Reker did not receive a statute of limitations letter upon termination of TTD benefits for his previous injuries. Reker testified no one from Ladegast ever advised him what statute of limitations meant, and he did not understand its meaning or implication before meeting with counsel in 2020.

Whiting testified by deposition on May 28, 2020. She has been employed by Ladegast since August 2001 and was assigned to Reker's claim.

Whiting became aware of the holding in Parker v. Webster County Coal, 529 S.W.3d 759 (Ky. 2017), "when the decision was made." Her supervisor notified the claims adjusters of the Parker decision. Whiting testified she was provided a copy of the Parker decision at the meeting, and was told to be conscious of people's age and the duration of TTD benefits. Whiting testified her supervisor closely followed Reker's claim.

Whiting confirmed Ladegast paid Reker's medical expenses through at least October 2018. She confirmed Reker was paid TTD benefits through May 29, 2017, when he reached age sixty-six. Whiting testified as follows regarding the termination of Reker's TTD benefits:

> Q: Why were Mr. Reker's TTD benefits stopped on May 29, 2017?
>
> A: Because he exceeded the weeks. And I offered to continue paying him but he told me he was on Social Security and he did not want that to interrupt or affect those benefits.
>
> Q: You offered to continue to pay Mr. Reker TTD after May 29, 2017?
>
> A: I can't remember the exact date.
>
> Q: ... So you told Mr. Reker, "I'll continue to pay you after May 29, 2017." And he said, "No." That's your testimony?
>
> A: I can't remember the exact date, Scott, but we offered and he said he didn't want it to affect his Social Security.

Whiting clarified her statement "exceeded his weeks" meant, "the a hundred and four weeks, due to his age." Whiting could not recall if she believed Reker was statutorily prohibited from receiving additional TTD benefits as of May

29, 2017 pursuant to the Parker decision. Whiting also testified she is familiar with House Bill 2 effective July 14, 2018, terminating benefits at age 70. Whiting testified she believed Reker's statute of limitations expired on May 30, 2019, two years after the last payment of TTD benefits.

On September 28, 2018, Dr. Smith noted Reker underwent a revision of a right reverse total shoulder on March 8, 2018. He recommended additional physical therapy and restricted Reker from work. As of September 28, 2018, Whiting acknowledged the statute of limitations had not expired; Reker had undergone surgery for which his treating physician restricted him from work; Reker was not at maximum medical improvement; the old age Social Security retirement limitation contained in KRS 342.730(4) no longer applied; and the recent version of KRS 342.730(4) was effective and terminated benefits at age 70. Whiting stated TTD benefits were possibly payable as of September 28, 2018.

Stephen Mason ("Mason") testified by deposition on July 10, 2020. Mason has worked for the Department of Labor for over twenty years, with nearly all of his work focused on the electronic data interchange ("EDI"). Mason is the information systems manager for data management, and oversees the EDI section and microfilm conversion process. One purpose of EDI is to notify employees of the statute of limitations. In general, an employer notifies the DWC when it terminates TTD or fails to make payments when due by filing an appropriate EDI code, which triggers the DWC to generate a statute of limitations letter, also known as a WCR3D or WCR3S notification, to be sent to the employee.

Mason testified workers' compensation insurers must submit information to the DWC. The DWC sets forth rules on how to submit the information, and requires the use of EDI codes provided in an event table. According to the event table, insurance companies are obligated to file periodic reports every sixty days while a claim is ongoing so long as TTD benefits are paid. There is no applicable code or ongoing obligation to file periodic reports once TTD benefits have been terminated, other than a subsequent notice if such benefits have been subsequently resumed.

Mason confirmed Ladegast filed a first report of injury, an initial payment document indicating it commenced TTD benefits, and several bi-monthly notices indicating it continued to pay Reker TTD benefits. Mason confirmed the DWC received and accepted a "S7-suspension, benefits exhausted" notification on June 19, 2017 indicating Ladegast ceased TTD benefits on May 29, 2017. Ladegast did not pay additional TTD benefits after May 29, 2017. According to the EDI table, the S7 code is triggered when "all payments of indemnity benefits have been stopped because limits of benefits or entitlement have been reached." The event table also states the S7 code does not generate a statute letter. Mason testified as follows, regarding whether the use of the S7 code generated a statute letter:

> Q: The DWC also has the ability to have the S7 code generate a statute letter, doesn't it?
>
> A: Currently, yes.
>
> Q: Does the S7 generate a statute letter currently?
>
> A: Currently, yes.

> Q: How long has the DWC had the S7 code generate a statute letter?
>
> A: For four months.
>
> Q: Do you know why it did not generate a statute of limitations letter prior to four months ago?
>
> A: No, I do not. That was due to the leadership at that time up until four months ago.
>
> Q: Well, let me ask you this. Prior to four months ago, how were employees whose benefits had been exhausted because of their age notified of the statute of limitation?
>
> A: I could not tell you.

Mason testified he has never been asked how to notify an employee of the statute of limitations when benefits are terminated due to their age. He confirmed Ladegast filed a TTD termination notice on June 16, 2017, notifying the DWC it had terminated those benefits on May 29, 2017. The Commissioner of the DWC did not subsequently send Reker a letter regarding his statute of limitations. On cross-examination, Mason testified as follows:

> Q: ... If the insurance adjuster in this claim determined after June 19th, 2017 that Mr. Reker was actually owed benefits and that insurance adjuster failed to initiate those payments, is there an EDI notification that [Ladegast] should have sent to the [DWC] to notify the DWC that they had failed to initiate payments when due?
>
> Mr. Harrison: Object to form.
>
> A: Forgive me. In the 20 years I've worked in this, I have never seen an MTC notice saying failed to report, but if there were reportable payments to be paid, they should have filed a reinstatement of benefits or an RB.
> . . . .

A: In my experience, I haven't run across that scenario where I have known that someone failed to report and didn't report anything to us.
. . . .

Q: On page nine of the event table, there is a trigger event that says reinstatement of benefits subsequent to previous suspension. When is the insurance company supposed to make that report that's listed as SROI in the report type?
. . . .

A: When benefits resume.

Q: Are insurance companies required to file this SROI when benefits are resumed?

A: So the SROI just for information purposes, is just a subsequent report of injury, so that's just a type of filing . . . .The thing that actually makes a difference is the RB portion, which is reinstatement of benefits. They are required if benefits resume to file reinstatement of benefits with the state.

Q: So there is an insurance company to notify the DWC that benefits have been reinstated?

A: Yes.
. . . .

Q: Let me rephrase the question. If the insurance company fails to make payments when due, in other words, they don't make a payment of TTD when they know they are supposed to, how are they supposed to notify you in the EDI of that failure?

A: No way unless they're actually going to make the payments.

In the December 21, 2020 Opinion, the ALJ determined the June 1, 2015 work injury warrants a 22% impairment rating, and Reker is permanently totally disabled. The ALJ awarded PTD benefits subject to the limitations contained

in the version of KRS 342.730(4) effective July 14, 2018, and medical expenses. The ALJ found Reker's claim was not barred by the statute of limitations because Lewis Door failed to satisfy the notice requirements contained in KRS 342.040. The ALJ found as follows, *verbatim*:

> KRS 342.185 (1) requires an application for benefits to be filed within two years after a work related accident or within two years after the employer terminates income benefits, whichever occurs last. KRS 342.040 (1) requires the employer to notify the Department of Workers' Claims when it terminates TTD or fails to make payments when due. It further requires the commissioner to advise the employee or known dependent of the right to prosecute a claim. The goal of KRS 342.040(1) is to prevent individual who receive voluntary income benefits from developing a false sense of security and failing to file a timely claim. If an employer fails to give proper notification as required by KRS 342.040 (1), the employer is not permitted to raise a statute of limitations defense because its action effectively prevents the Commissioner from complying with his duty to notify the worker of his right to prosecute his claim and the applicable period of limitations. *Patrick v. Christopher East Health Care*, 142 S.W.3d 149 (KY 2004). KRS 342.040 (1) places the burden on the employer for proper notification. *Ingersoll-Rand Company v. Whittaker*, 883 S.W.2d 514 (KY APP 1994).
>
> The ALJ finds the statute of limitations tolled in Reker's claim due to Lewis Doors' failure to provide proper notification required by KRS 342.040 (1). Although Lewis Doors notified the Commissioner when it terminated Reker's TTD because it was exhausted under the then version of KRS 342.730(4), the law subsequently changed resulting in Lewis Doors' notification no longer being sufficient. Lewis Doors' carrier also had a duty to pay Reker's claim because liability was clear. Thereafter, Lewis Doors failed to provide the appropriate notification to the Commissioner resulting in no issuance of a statute of limitation letter from the Commissioner.

Lewis Doors terminated Reker's TTD benefits on May 29, 2017. At that time, the applicable version of KRS 342.730(4) terminated all income benefits upon the date the employee qualified for normal old-age Social Security benefits or two years after the employee's injury or last exposure, whichever last occurs. Since Reker was 64 at the time of his injury, the time limit for his benefit had expired and his TTD was appropriately terminated. Lewis Doors sent an S7 code through EDI notifying DWC of the termination of TTD benefits. DWC received the S7 on June 19, 2017. Under the law at that time, Reker qualified for no further income benefits. (Although there was no reason given as to why a statute letter was not generated, the ALJ wonders if it was because under the law at that time, Reker could not even file a claim and gain any more income benefits.) However, on April 27, 2017, the Kentucky Supreme Court issued *Parker v. Webster County Coal, LLC*, 529 S.W.3d 759 (KY 2017), finding the version of KRS 342.730(4) terminating income benefits upon an employee qualifying for old-age Social Security unconstitutional. *Parker* became final on November 2, 2017. At that point, the basis for terminating Reker's income benefits was no longer valid and TTD benefits were due. Lewis Doors acknowledged TTD benefit were due. Whiting even contacted Reker about reinstating his TTD benefits. TTD benefits were due Reker. Lewis Doors failed to pay the TTD due and failed to notify DWC it was not paying benefits due under the then final *Parker* case.

Lewis Doors argues KRS 342.040 (1)'s "fails to make payments when due" language only applies when no TTD benefits have been paid citing an unpublished Court of Appeals case, *Gerald–Singleton v. U of L Healthcare University Hospital*, 2005 WL737522. The *Gerald-Singleton* case is an unpublished case and not binding. Further, Reker's situation is distinguishable from *Gerald-Singleton*. In *Gerald-Singleton*, the claimant's TTD benefits terminated because she returned to work. U of L notified DWC of the termination of TTD and the claimant received a WC-3 letter informing her she had two years to file a claim. She failed to file her claim with in the statute and argued the statute was tolled because she missed 22 hours of work due to her injury after her TTD was terminated and U of L failed to notify

DWC. The Court ruled Gerald-Singleton's claim barred by the statute of limitations. The Court's reasoning revolved around the concern that a claimant could circumvent the two-year state of limitation, after receiving a WC-3 letter, by claiming entitlement to additional TTD benefits by alleging additional missed time from work due to the work injury after the expiration of the statute of limitations.

Reker's situation is different from that in *Gerald Singleton*. Reker's TTD ended because he exhausted the time limit pre-*Parker*, there was no issue as to whether medically he still qualified for TTD benefits. Subsequently, his termination of TTD was invalidated by a change in the law. Reker is not trying to circumvent the 2-year statute by alleging additional missed time. Reker never returned to work and Lewis Doors acknowledged TTD benefits were due him after *Parker*. Finally, the Court in Gerald-Singleton noted that once a single WC-3 letter is received by the injured worker, the protection requirements to the employee underlying KRS 342.040 have been satisfied and the notice obligation of the employer is ended unless and until voluntary payments to the employee are in fact "resumed." In Reker's case, there was no WC-3 letter received to satisfy the notice obligation of the employer.

The purpose of KRS 342.040(1)'s requirement for the employer to notify the DWC is so the potential claimant/employee will receive notice of his right to prosecute a claim and the time limits within which this claim must be pursued. *Lizdo v. Gentec Equipment*, 745 S.W.3d 703 (KY 2002). 803 KAR 25:240 imposes various duties on the insurance carriers and agents. Section 4 requires carriers diligently to investigate a claim for facts warranting extension or denial of benefits. Section 6 requires carriers in good faith to pay promptly a claim in which liability is clear. Lewis Door's carrier was aware of the change in the law and its effect on Reker's claim. Not only was Whiting aware that *Parker* entitled Reker to additional income benefits, but Whiting testified her supervisor was also closely monitoring Reker's claim. The EDI Event Table specifically states that the S7 does not generate a Statute Letter. The insurance carrier and its agents have access to the table. They are under a duty to investigate claims

for facts warranting extensions or denials of benefits. The Carrier should have known S7 did not generate a statute letter. After *Parker*, the Carrier knew Reker was still entitled to benefits and that S7 was no longer appropriate notification for the claim. The Carrier did not reinstate benefits and did not notify DWC of failure to pay the benefits due nor did it attempt to correct the now inappropriate notice. Under *Ingersoll-Rand Company*, the burden is on the employer to provide proper notification, which Lewis Doors did not provide.

Based on the foregoing, the ALJ finds Reker's claim is not barred by the statute of limitations because Lewis Doors failed to satisfy it notice requirements under KRS 342.040.

Lewis Door filed a Petition for Reconsideration alleging the following:

1) The ALJ erred in failing to provide what would have constituted proper notice to the DWC; 2) The ALJ failed to determine that the DWC was negligent when it failed to send a statute letter to Reker after it received the S7 code on June 19, 2017; 3) The ALJ erroneously held Lewis Door had to provide additional notice to the DWC since the S7 was no longer valid; 4) The ALJ erroneously determined Lewis should have known the S7 would not generate a statute letter; 5) The meaning of "fails to make payments when due" contained in KRS 342.040 does not change depending on whether the DWC complies with its own statutory duties; and the ALJ usurped the role of the legislature by relieving the DWC of its statutory duties, while at the same time placing additional duties on Lewis Door.

The ALJ overruled Lewis Door's petition, stating as follows, *verbatim*:

The ALJ found Lewis Doors did not provide the appropriate notification to the Commissioner after failing to make payments when due. Gerald-Singleton v. U of L Healthcare University Hospital, 2005 WL 737522 is an unpublished case and further, the ALJ found Reker's situation distinguishable from those in *Gerald-Singleton*. The ALJ specifically laid out the facts relied on to determine Lewis Doors failed to make

> payments when due. In short, after *Parker v. Webster County Coal, LLC,* 528 S.W.3d 759 (KY 2017), Lewis Doors knew Reker's TTD should have been reinstated and acknowledged Reker was entitled to payments. Rekers' desire not to receive the payments does not negate Lewis Doors' obligation to pay those benefits or notify the Commissioner of failure to make those payments. Lewis Doors' petition is a rearguing of the claim. The ALJ finds no errors on the face of the opinion.

On appeal, Lewis Door argues it fully complied with the notice requirements contained in KRS 342.040. It asserts TTD benefits were paid and terminated pursuant to the previous version of KRS 342.730(4), and it terminated payments on May 29, 2017. Pursuant to KRS 342.185, Reker was required to file a claim within two years from the last voluntary payment of income benefits. However, Reker filed his claim more than two years after the last voluntary payment of TTD benefits, on February 26, 2020. Lewis Door asserts it has no duty to ensure the Commissioner of the DWC complies with his or her own duties in KRS 342.040. Lewis Door asserts the DWC was negligent in its failure to send out a statute of limitations notification upon receiving the S7 by Ladegast. Lewis Door asserts the DWC's negligence is conclusively established by the fact the Commissioner recently amended the EDI system so that the S7 code now generates a statute letter.

Lewis Door argues the ALJ erred in determining the statute of limitations was tolled due to its failure to provide proper notification required by KRS 342.040(1). It asserts the "fails to make payments when due" language in KRS 342.040(1) only applies if no TTD benefits have been paid. It points to the Board's opinion in Brenda Gerald-Singleton v. University of Louisville, No. 97-60184 (2004).

Lewis Door also argues Reker's remedy lies with the Board of Claims against the Commonwealth of Kentucky or by filing a claim against the Commissioner in Circuit Court.

As an affirmative defense, the burden to prove the application of the statute of limitations falls on the employer. Lizdo v. Gentec Equipment, 74 S.W.3d 703, 705 (Ky. 2002). Since Lewis Door was unsuccessful in its burden, the question on appeal is whether the evidence compels a different result. 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

KRS 342.185(1) provides as follows:

> Except as provided in subsections (2) and (3) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident. . . . **If payments of income benefits have been made, the filing of an application for adjustment of claim with the department within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later.** (emphasis added)

KRS 342.040(1) provides 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. All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury or disability resulting from an occupational disease . . . .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 ours)

KRS 342.185(1) and KRS 342.040(1) operate together to toll periods of limitations until after the payment of voluntary income benefits ceases in order to protect injured workers from being lulled into a false sense of security by receiving income benefits and failing to pursue a claim. KRS 342.040(1) places an affirmative duty upon an employer who terminates or fails to make payments when due to notify the Commissioner of such failure. An employer who fails to comply with KRS 342.040(1) is estopped from raising the limitations defense because it effectively prevents the Commissioner from complying with its duty to advise the employee of his or her right to prosecute the claim. Billy Baker Painting v. Barry, 179 S.W.3d 860, 865 (Ky. 2005). *See also* H.E. Neumann v. Lee, 975 S.W.2d 917 (Ky. 1998). It is unnecessary to establish an employer acted in bad faith for it to be estopped from

raising the statute of limitations defense. Id. Whether the statute of limitations is tolled due to an employer's failure to comply with KRS 342.040(1) depends on the facts and circumstances of each case. Colt Management Company v. Carter, 907 S.W.2d 169, 170 (1995).

A thorough search reveals no case law directly on point to the unique factual circumstances of this claim. However, the holdings in Billy Baker Painting v. Barry, 179 S.W.3d 860 (Ky. 2005) and Kentucky Container Services, Inc. v. Ashbrook, 265 S.W.3d 793 (Ky. 2008) are illustrative. Barry injured his knee on July 19, 1997 and was eventually released to return to work in November 1997. The Employer paid TTD benefits until November 16, 1997. The Claimant filed an application for benefits in December 2002. The evidence demonstrated the DWC received and accepted an electronic document indicating Barry returned to work on November 16, 1997 and the Employer terminated TTD benefits. However, the Employer did not include a mandatory payment end date, the date of last TTD payment. Therefore, the DWC did not mail a statute of limitations notification letter to the Claimant since the date of the last TTD payment could not be verified. The employer was not notified of the insufficient document or that a notification letter was not sent. Id. at 861-863. The ALJ determined the employer's failure to include the payment adjustment end date caused Barry not to receive the statute notification letter, and the statute of limitations was tolled. Id. at 863. The Kentucky Supreme Court affirmed noting the missing field was mandatory. The Court also stated that although it was unfortunate the insurer was not informed of the omission by the

DWC or given an opportunity to rectify the matter, it was not convinced the ALJ erred by concluding the equities favored the claimant. Id. at 864-865.

In Kentucky Container Services, Inc. v. Ashbrook, supra, Ashbrook sustained a work injury on April 15, 1998. He underwent surgery and received TTD benefits until September 17, 1998. Ashbrook filed an application for benefits in 2005. The Claimant did not recall receiving a statute notification letter. In notifying the DWC of the termination of TTD benefits, the adjuster used the code "FN=Final" rather than "S1=suspension, returned to work, or medically determined/qualified to return to work." The evidence demonstrated the S1 code triggered the DWC to generate and send a statute notification letter, while the FN code did not. The insurer was notified in 2000 or 2001 that only an S1 code would result in a statute notification letter, but there was no evidence indicating it resubmitted the form to contain the correct S1 code. Id. at 794-795. The ALJ determined the insurer submitted a defective form causing the DWC to fail to send a notification letter. The failure to strictly comply tolled the statute of limitations. Id. at 795. The Court affirmed, noting the evidence supported the finding the Employer failed to strictly comply with KRS 342.040(1) and 803 KAR 25:170, section 2(2) when it failed to file a Form 1A-2 more than a year after it terminated benefits, the report contained the incorrect code, and the insurer subsequently failed to submit a corrected form after it was notified that only the S1 code signified the termination of TTD. Id. at 795-797.

It is undisputed Reker sustained a work-related injury on June 1, 2015, for which he provided timely notice. It is also undisputed Lewis Door paid voluntary TTD benefits until May 27, 2017, and submitted an electronic form

utilizing code "S7-Suspension, Benefits Exhausted" to notify the DWC that it paid Reker TTD benefits through May 29, 2017. The EDI event table sets forth many codes an insurer could use to notify the DWC of ceasing indemnity benefits which generates a statute letter. ("MTC Codes: 04, CD, S1, S2, S3, S4, S5, S6, S8, S9, SD will generate a statute letter.") However, the EDI event table specifically notes, "S7 will NOT generate letter." (original emphasis). A statute letter was not generated or triggered since Ladegast utilized the S7 code, presumably because Reker had reached the age limitation contained in the previous version of KRS 342.730(4).

When Reker's TTD benefits were stopped, the Kentucky Supreme Court had already issued Parker v. Webster County Coal, supra, holding the age limitation contained in the 1996 version of KRS 342.730(4) is unconstitutional. The Parker decision became final in November 2017, prior to Reker undergoing his fourth surgery. The current version of KRS 342.730(4) became effective July 14, 2018, terminating benefits at age seventy or four years after the date of injury, whichever occurs later. In Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), the Kentucky Supreme Court determined the amendments to KRS 342.730(4) were retroactive to all claims still pending on the effective date of the statutory changes.

Given the unique circumstances of this claim, we find the ALJ did not err in determining the statute of limitations was tolled due to Lewis Door's failure to provide proper notification required by KRS 342.040(1). Although Lewis Door notified the Commissioner when it terminated Reker's TTD benefits in accordance with the previous version of KRS 342.730(4), the law subsequently changed with retroactive application. As noted by the ALJ, the Court rendered Parker v. Webster

County Coal, supra, on April 27, 2017, finding the previous version of KRS 342.730(4) unconstitutional. Parker v. Webster County Coal, supra, became final on November 2, 2017. We agree with the ALJ's determination that as of November 2, 2017, Lewis Door's basis for terminating Reker's TTD benefits was no longer valid.

Whiting testified she talked to Reker at some point after May 2017, and "offered to continue paying him." She also testified TTD benefits were possibly payable as of September 28, 2018 based upon Dr. Smith's treatment note and changes in the law. The ALJ also considered the duties imposed on insurers and their agents pursuant to 803 KAR 25:240, including the duty to diligently investigate a claim for facts warranting extension or denial of benefits. She again emphasized Whiting's testimony that she was aware of the Parker decision when it was rendered and her supervisor closely followed Reker's claim. The event table clearly states the S7 code does not trigger a statute letter. Based upon the above, it was reasonable to infer Ladegast, after the rendition of Parker, knew Reker was still entitled to benefits and that S7 was no longer appropriate notification for the claim. Ladegast failed to reinstate benefits and did not notify the DWC of failure to pay the benefits due, nor did it attempt to correct the now inappropriate notice. We determine the ALJ appropriately rendered a decision based upon the facts and circumstances, and a contrary result is not compelled.

We decline to limit the "fails to make payments when due" language contained in KRS 342.040(1) to only those circumstances where no TTD benefits have been paid. Lewis Door points to our opinion in Brenda Gerald-Singleton v. University of Louisville, No. 1997-60184 (2004). There, the Board stated as follows:

> While KRS 342.040(1) does reference an employers' obligation to report a "failure to make payments," that language must be read in the context of the entire provision. Much of KRS 342.040(1) addresses when and how soon an employer becomes liable for payment of indemnity benefits after a claimant experiences disability, whether temporary or permanent, due to a work-related accident. Hence, when reviewed accordingly, the phrase "failure to make payments" is plainly in reference to an employer's refusal to initiate voluntary payments of income benefits immediately following a work-related injury, once the employee has missed the requisite amount of time from work.

The opinion relied upon by Lewis Door is not binding or authoritative. The Kentucky Court of Appeals affirmed the Board's decision in the unpublished decision of Gerald–Singleton v. University of Louisville, 2005 WL737522, rendered April 1, 2005. The facts in Gerald-Singleton are distinguishable from this case. As noted by the ALJ, Reker's TTD benefits ended because he exhausted the time limit before Parker became final. Subsequently, his termination of TTD benefits was invalidated by a change in the law. In Gerald-Singleton, there was an issue regarding whether the claimant medically still qualified for TTD benefits. As noted by the ALJ, the Board in Gerald-Singleton also determined that once the claimant receives a single statute notification, the notice obligation of the employer ends unless and until voluntary payments to the employee are in fact "resumed." Here, no statute letter was sent or received.

Finally, Lewis Door argues Reker's remedy lies with the Board of Claims or Circuit Court. We disagree. The Supreme Court in Kentucky Container Services, Inc. v. Ashbrook, 265 S.W.3d at 795-796, stated as follows:

> KRS 342.990 provides civil and criminal penalties for an employer's failure to comply with KRS 342.040(1), but

> Chapter 342 provides no remedy for the affected worker. Thus, the courts have turned to equitable principles when the circumstances warranted and estopped employers who failed to comply strictly with KRS 342.040(1) from asserting a limitations defense, even in the absence of bad faith or misconduct.

Accordingly, the December 21, 2020 Opinion, Award, and Order and the January 21, 2021 Order rendered by Hon. Monica Rice-Smith, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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