

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2004-CA-001507-WC

JERRY PACE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-59480

H & N TRUCKING; WORKERS'
COMPENSATION FUND, SPECIAL FUND;
HONORABLE LAWRENCE SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

DYCHE, JUDGE: Jerry Pace was involved in a work-related traffic accident on November 23, 1996. He filed an application for workers' compensation benefits on April 21, 1999. An arbitrator dismissed his claim as being barred by the two-year statute of limitations. KRS 342.185. On *de novo* review by an Administrative Law Judge, his claim was again dismissed on two grounds: limitations, and that the work-related November 23,

1996, accident "caused a temporary arousal of Pace's pre-existing active back and joint problems, producing a period of temporary total disability of less than 14 days."

On appeal, the Workers' Compensation Board remanded the case to the ALJ

for a specific determination as to the exact period of temporary total disability following the 1996 accident. If the ALJ determines Pace's temporary total disability was seven days or less, dismissal of the claim is appropriate. If, on the other hand, Pace's disability was for more than seven days, payment of TTD benefits beginning on the eighth day were payable and if not paid, as the evidence here indicates, H & N Trucking had the affirmative obligation to notify the commissioner. Under this second set of circumstances, H & N Trucking's disregard of the statutory mandate would result in a tolling of the statute of limitations.

On remand, a new ALJ conducted an exhaustive review of the file, and adopted the original ALJ's findings of fact. He found Pace's testimony to be lacking in credibility, and the testimony of the H & N Trucking witness to be "straightforward and persuasive." The ALJ found that Pace had missed no more than "2 to 3 days of work, and a temporary total disability did not extend beyond 3 days." The claim was dismissed.

Pace argued to the Workers' Compensation Board on his second appeal, as he does here, that the evidence compels a finding that he missed two weeks of work following the work

injury, and that the statute of limitations thus should have been tolled. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. 1984). We have reviewed the record and find no such evidence. Although Pace's testimony could have supported a finding in his favor, it is not so overwhelming as to compel a finding in his favor.

We have undertaken the review mandated by Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (Ky. 1992), and find no error in assessing the evidence, flagrant or otherwise. The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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