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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000480-WC

BRENDA LOUISE MILES — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-98035

MARION COUNTY BOARD OF EDUCATION;
HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

BARBER, JUDGE: Both the Administrative Law Judge (ALJ) and the Workers' Compensation Board (WCB) found that Brenda Louise Miles' (Miles) claim for workers' compensation benefits was time-barred despite undisputed evidence that the statutory letter (also known as a WC-3) meant to advise potential claimants of the applicable statute of limitations for making a workers' compensation claim from the Commissioner of the Department of Workers' Claims (DWC) never reached Miles. The

reason it did not was because the employer did not provide the Commissioner with Miles' correct address. We reverse and hold in the circumstances of this case the two-year statute of limitations in KRS 342.185(1) is tolled.

The facts of this case are largely undisputed. Miles is employed by the Marion County Board of Education (the Board) as a school bus driver. On February 22, 2001 Miles slipped on a piece of ice on the bottom step of the school bus she was operating, fell, and injured her back. She was off work from February 23, 2001 to May 15, 2001 during which time the Board paid Miles temporary total disability benefits (TTD). The Board also paid Miles' medical bills.

The Board admits that Miles was covered under the Workers' Compensation Act; that she received a work-related injury, and that it received due and timely notice of the injury.

After Miles' injury the Board had her sign a form entitled, "Kentucky School Boards Insurance Trust Workers' Compensation Injury Notice." That form contained a variety of information concerning Miles' employment, the injury, and her contact information. It is undisputed that Miles did not fill out the form, she only signed it. When questioned regarding whether she had signed the form when blank she stated she did not believe so and acknowledged that she would most likely have

reviewed the document for the purpose of determining whether it was blank.

Also undisputed is that the address contained on the form filled out by the Board and signed by Miles, 1665 L. Mattingly Road, Lebanon, KY 40062, is not Miles' correct address.

When Miles' TTD benefits were terminated the Board, through its' insurance carrier, Kentucky School Boards Insurance Trust (KSBIT), electronically filed a form IA-2 with the Department of Workers' Claims as is required by KRS 342.040(1). It is undisputed that the IA-2 filed contains an incorrect address for Miles and also has information relating to the injury not appearing on the form previously signed by Miles. The IA-2 lists Miles' address as "1665 Lewis Mattingly Rd., Lebanon, KY 40062."

At all relevant times in this action Miles' correct address was "1330 Lewis Mattingly Road, St. Francis, Kentucky 40062."

Finally, it is undisputed that on June 4, 2001 the Commissioner sent a WC-3 letter to Miles at the incorrect address provided on the IA-2; the letter was returned as undeliverable on June 11, 2001. Miles never received the notice called for by KRS 342.040(1) of her need to file any claim for workers' compensation benefits within two years from the date of

injury or the cessation of temporary income benefits, whichever is later.

The ALJ found that the Board "provided the Department of Workers' Claims with the correct address for plaintiff and complied with all requirements of KRS 342.040." The ALJ also found Miles to be responsible for the incorrect address information given on the form that the Board had Miles sign. For these reasons he concluded Miles was not entitled to have the two-year statute of limitations tolled. The WCB affirmed on the basis that tolling of the statute of limitations in KRS 342.185(1) is only appropriate where the claimant can show reasons such as misconduct on the part of the employer for the application of the doctrine of estoppel.

Our standard of review of an appeal of a workers' compensation case is set forth in Western Baptist Hosp. v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992). Because we believe the WCB has misconstrued controlling precedent and committed an error in assessing the evidence that is "so flagrant as to cause gross injustice," we reverse.

The WCB's acceptance of the ALJ's finding that the Board provided the Department of Workers' Claims with Miles' correct address and that Miles herself was responsible for supplying an incorrect address is simply not supportable by any evidence in the record. The undisputed evidence is that the

employer, through KSBIT, filed an IA-2 with an incorrect address. There is no evidence in the record that KSBIT's information came from the form that Miles signed and the Board filled out, thus, there is no evidence that Miles is in any way responsible for the information given to the Department of Workers' Claims. This finding by the ALJ and implicitly upheld by the WCB is clearly erroneous and unreasonable under the evidence in the case. Lizdo v. Gentec Equip., 74 S.W.3d 703, 705 (Ky. 2002)(unreasonable finding is subject to reversal on appeal).

Even if it were assumed KSBIT's information on the IA-2 came from the form signed by Miles, there is no evidence in the record to support a finding that Miles was responsible for the information contained therein. The evidence is that an employee of the Board filled out the form and Miles simply signed it. Her deposition testimony does not establish that she reviewed the form for accuracy of the information – only that it was not blank when she signed it.

Furthermore, the legal conclusion that Miles is not entitled to have the statute of limitations tolled in this case misconstrues controlling precedent.

The burden of proof for asserting an affirmative defense such as the statute of limitations is on the employer. Lizdo, supra 74 S.W.3d at 705. It has long been recognized that

the two-year statute of limitations provision for bringing a claim contained in KRS 342.185(1) and the requirement for the employer to advise the Commissioner of the DWC when income benefits have been terminated or will not be paid contained in KRS 342.040(1) work in tandem. Patrick v. Christopher East Health Care, 142 S.W.3d 149, 151 (Ky. 2004); J & V Coal Co. v. Hall, 62 S.W.3d 392, 395 (Ky. 2001).

The purpose of KRS 342.040(1)'s requirement for the employer to notify the Commissioner of this occurrence is so that the potential claimant-employee will receive notice of his or her right to prosecute a claim and the time limits within which this must be pursued. Lizdo, supra 74 S.W.3d at 705; J & V Coal Co., supra 62 S.W.3d at 395; H.E. Neumann Co. v. Lee, 975 S.W.2d 917, 920 (Ky. 1998); Newberg v. Hudson, 838 S.W.2d 384, 388 (1992).

There is no doubt that KRS 342.040(1) places an affirmative duty on the employer to properly notify the Commissioner of the DWC of the termination or refusal to pay income benefits. Colt Management Co. v. Carter, 907 S.W.2d 169, 171 (Ky.App. 1995); Ingersoll-Rand Co. v. Whittaker, 883 S.W.2d 514, 515 (Ky.App. 1994). Proper notification to the Commissioner of the DWC includes, we think, proper information regarding the location to send the statutory notice letter to a potential claimant. But the Board argues that there is no

evidence of bad faith or misconduct on its part so that its failure to comply with KRS 342.040(1) by not providing the Commissioner of the DWC with Miles' correct address should not deprive it of the defense of the statute of limitations in this case citing to Patrick, supra 142 S.W.3d at 152.

It is true Patrick notes that estoppel "is generally reserved for situations where there is evidence of misconduct on the employer's part. . . ." Patrick, supra 142 S.W.3d at 152. However, as was also noted in Patrick, application of principles of estoppel depend on the facts and circumstances of each case. Id. And, in certain circumstances estoppel is appropriate even where there is no evidence of bad faith or misconduct. See H.E. Neumann Co., supra 975 S.W.2d at 921-922.

The essential question in this case is who should bear the burden or consequences when the employer fails to properly notify the Commissioner of the DWC of a potential claimant's correct address. We answer this question as did the Court in Ingersoll-Rand Co., supra. KRS 342.040(1) places the burden on the employer for proper notification. If this is not given, the Commissioner of the DWC is prevented from fulfilling his duty. Id. at 516. Where there is further evidence, such as here, that the employee is not at fault for the information transmitted, principles of equity mandate the consequences be borne by the

employer. Id. at 515 & 516. See also, Colt Management Co., supra 907 S.W.2d at 171.

The ruling of the WCB (and the ALJ) effectively placed the burden on Miles to show bad faith or misconduct before principles of estoppel would be applied to toll the statute of limitations in KRS 342.185(1). As our review of the case law above demonstrates, this misconstrues controlling precedent.

For the reasons stated above, the decision of the WCB is reversed.

SCHRODER, JUDGE, CONCURS.

KNOPF, JUDGE, DISSENTS WITH SEPARATE OPINION.

KNOPF, JUDGE, DISSENTING: Respectfully, I dissent from the majority opinion because it overreaches the proper scope of this Court's review. As the fact finder, the ALJ has the sole discretion to determine the quality, character, and substance of evidence.[1] The function of further review of the Board in the Court of Appeals is to correct the Board only where this Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.[2] I am unpersuaded by the majority that the view of the evidence taken

[1] Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 929 (Ky. 2002).

[2] Western Baptist Hosp. v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

by the ALJ and the Board was patently unreasonable or flagrantly implausible. Hence, I would affirm the Board's decision to uphold the ALJ's determination.

KRS 342.040(1) places certain obligations on the employer and on the Department of Workers' Claims (now the Office of Workers' Claims). The employer has an affirmative duty to notify the Department of its refusal to pay TTD benefits after a worker misses more than seven days of work due to a work-related injury. The statute requires the Department to advise the worker of the right to file a claim and the applicable period of limitations. Furthermore, KRS 342.185(1) tolls the period of limitations until voluntary income benefits are suspended. When KRS 342.040(1) and 342.185(1) are read together, it is clear that the two-year 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 Office of Workers' Claims; and (3) the Office of Workers' Claims sends the employee the required notice.

KRS 342.990 provides both civil and criminal penalties for a failure to comply with KRS 342.040, but neither it nor any other statute provides a remedy for workers whose rights are affected by the failure to comply. Thus, the courts have turned

to equitable principles in order to protect them.[3] Under the doctrine of equitable estoppel, certain conduct by a party is viewed as being so offensive that it precludes the party from later asserting a claim or defense that would otherwise be meritorious.[4] In other words, it serves to offset the benefit that the offending party would otherwise derive from the conduct.[5] An equitable estoppel is permitted when the estopped party is aware of material facts that are unknown to the other party and then engages in conduct, such as acts, language, or silence, amounting to a representation or concealment of the material facts. The conduct is performed with the intention or expectation that the other party will rely upon it, and the other party does so to his detriment.[6]

In Newberg v. Hudson,[7] the Kentucky Supreme Court held that an employer's failure to strictly comply with KRS 342.040(1) estops it from raising a limitations defense. The rationale is

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[3] *See* Newberg v. Hudson, 838 S.W.2d 384, 389 (Ky. 1992).

[4] *See* McDonald v. Burke, 288 S.W.2d 363 (Ky. 1956); P.V.& K. Coal Co. v. Kelly, 191 S.W.2d 231 (Ky. 1945).

[5] *See* Edmondson v. Pennsylvania National Mutual Casualty Insurance Co., 781 S.W.2d 753, 755 (Ky. 1989).

[6] *See* Howard v. Motorists Mutual Insurance Co., 955 S.W.2d 525 (Ky. 1997); Gray v. Jackson Purchase Production Credit Association, 691 S .W.2d 904 (Ky.App. 1985).

[7] *Supra*.

that if the Department does not receive an employer's notice of termination or refusal, it cannot perform its obligation to the affected worker. Furthermore, it is not necessary to establish that the employer acted in bad faith for the employer to be precluded from raising a statute of limitations defense. Rather, it must merely be shown that such failure could not be attributed to the worker.[8]

This is not a case where the employer failed to comply with KRS 342.040(1) in an attempt to manufacture a limitations defense or a case in which the Department failed to comply with KRS 342.040(1). Instead, the employer provided incorrect information to the Department regarding Miles's current address and, as a result, the statutory notice sent by the Department never reached her. The majority states that there is no evidence that the incorrect address came from the form that Miles signed. But if the address did not come from that form, from where else would it have come? The ALJ made a reasonable inference from the evidence that incorrect information provided to the Department came from the injury form that Miles signed.

Moreover, the majority opinion entirely disregards Miles's conduct which contributed to the error. The majority

[8] *See* H. E. Neumann Co. v. Lee, 975 S .W .2d 917, 921 (Ky. 1998); Colt Management Co. v. Carter, 907 S.W.2d 169 (Ky.App. 1995); and Ingersoll-Rand Co. v. Whittaker, 883 S .W.2d 514 (Ky.App. 1994).

focuses on the fact that the employer filled out the injury form containing the incorrect address. Thus, the majority concludes that Miles could not be responsible for the incorrect information on the form that she signed.

The problem with this approach is that none of the possible interpretations of the evidence are particularly favorable to Miles. She either: (1) signed a blank form and left it to the school board to fill out the necessary information; (2) signed a form filled out by the school board without reviewing the information contained therein; or (3) reviewed and signed the form filled out by the school board but overlooked the outdated address. If Miles signed a blank form (something, Miles testified, that she did not believe she would do), then the school board might bear some responsibility for the error. But conversely, Miles also would have been negligent in signing a blank form. Likewise, Miles would have been negligent if she had failed to thoroughly review a completed form prior to signing it.

In any case, Miles would bear at least some fault for the incorrect information transmitted to the Board. Consequently, the ALJ reasonably concluded that Miles was not entitled to claim estoppel against the school board. While this result is certainly unfortunate for Miles, I cannot conclude that the ALJ's interpretation of the evidence is clearly erroneous.

Therefore, the Board properly affirmed the ALJ's order dismissing Miles's claim as untimely.

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