COMMONWEALTH OF KENTUCKY
SUPREME COURT
CA #2006-CA-002299
WCB #WC-98-84520
SUPREME COURT NO. 2007-SC-000533

KENTUCKY CONTAINER SERVICE, INC. APPELLANT

VS.

BRIEF FOR APPELLANT
KENTUCKY CONTAINER SERVICE, INC.

KENNETH ASHBROOK
and HON. RICHARD JOINER, ALJ APPELLEES

Comes now the Appellant, Kentucky Container Service, Inc., by counsel, and submits to this Honorable Court the following for its Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed this 30 day of October 2007, by mailing copies of same to the following: James D. Howes, Esq., Howes & Paige, PLLC, 1501 Durrett Lane, Suite 200, Louisville, Kentucky 40213; Hon. Richard M. Joiner, ALJ, 145 East Center Street, Madisonville, Kentucky 42431, and the original and ten copies to the Clerk, Supreme Court, 235 Capitol Bldg, 700 Capital Avenue, Frankfort, Kentucky 40601-3488.

Derek P. O'Bryan
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INTRODUCTION

This is a workers' compensation case in which the Appellant, Kentucky Container Services, Inc., appeals from Administrative Law Judge Richard M. Joiner's finding that the Appellee's claim in regard to a right shoulder injury of April 15, 1998, was not barred by the limitations provisions of the Workers' Compensation Act because the employer failed to strictly comply with the notification requirements of KRS 342.040(1), and as such, the limitations period was tolled.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant submits that this matter does not need to be heard orally before the Court.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Appellee, Kenneth Ashbrook, was employed by Kentucky Container Services, Inc.(hereinafter "Kentucky Container"), as a truck driver when he suffered a work-related right shoulder injury on April 15, 1998, after falling and landing on his right shoulder. (Ashbrook Depo. p. 10). After undergoing a right rotator cuff repair surgery on May 13, 1998, Mr. Ashbrook completed a course of physical therapy which was followed by a work hardening program. (Ashbrook Depo. p. 14). Mr. Ashbrook was voluntarily paid temporary total disability (hereinafter "TTD") benefits until September 17, 1998. He returned to work without restrictions on September 18, 1998 performing the exact same job duties as before the injury .

After TTD benefits were discontinued, the workers' compensation carrier, Midwestern Insurance Alliance (hereinafter "MIA")[1], filed electronic notice with the then Department of Workers' Claims (hereinafter referred to by its current name, the Office of Workers' Claims and abbreviated as "OWC"), advising that the income benefits were terminated. However, the OWC never sent out the statutorily required limitations letter to Mr. Ashbrook.

The Appellee filed a *pro se* medical fee dispute on November 3, 1998 requesting that MIA be held liable for certain cardiology tests that were conducted prior to the right shoulder repair. On January 20, 1999, an Order was entered overruling the Appellee's medical fee dispute. An Application for Resolution of Injury Claim (Form 101) was not filed by Mr. Ashbrook in conjunction with the

[1] Midwestern Insurance Alliance is the managing general agent for Clarendon National Insurance Company, the carrier on the risk in this case.

medical fee dispute. The Appellee did not file anything else with the OWC until June 14, 2004, when he filed a Form 101 against Kentucky Container for injuries to his left shoulder and left knee that occurred in 2002 but with a different carrier on the risk. At this time, the Appellee still neglected to file a Form 101 in regard to the right shoulder injury.

Almost seven years after the initial incident, the Appellee finally filed an Application for Resolution of Injury Claim for the right shoulder injury with same being received by the OWC on March 9, 2005. After the Appellant asserted its limitations defense, the Appellee contended the statute of limitations had been tolled in regard to the November 1998 injury because he never received a statute of limitations (WC-3) letter from the Commissioner.

It is important to note at this point by way of preliminary explanation that for work place injuries on or after January 1, 1996, the OWC implemented an electronic filing format that replaced the paper filings of first reports and subsequent reports of injuries. This electronic data interchange (hereinafter "EDI") system requires electronic filing of an IA-1 for the First Report of Injury. All Subsequent Reports of Injury, including termination of benefits are reported on a Form IA-2. (Ashbrook v. Kentucky Container, Board Opinion pp. 3-4).

Deborah Wingate, the Division Director for Information and Research at the OWC testified in regard to the carrier's electronic filing of notification of termination of voluntary TTD benefits. Ms. Wingate testified that carriers or other vendors

(trading partners[2]) are required by statute to electronically submit various reports to the OWC. One such report is the Subsequent Report of Injury. Ms. Wingate also explained that when filing electronically, trading partners must use specific maintenance type codes ("MTC") which all originate from the International Association of Industrial Accidents Boards and Commissions (hereinafter "IAIABC") Implementation Guide. The IAIABC codes were specifically adopted by statute by the OWC for electronic filing, becoming effective for injuries reported on or after January 1, 1996. (Wingate Depo. pp. 10,13-15, 26-27); 803 KAR 25:170.

Ms. Wingate testified that in this case, the OWC received an electronic First Report of Injury (Form IA-1) on April 27, 1998 and thereafter, received two separate subsequent reports of injury (Form IA-2s) with a Final Subsequent Report ("FN" maintenance type code) that clearly provided a return to work date of September 18, 1998 and a termination of TTD benefits date of September 17, 1998.

Ms. Wingate testified that upon termination or suspension of benefits, a statute of limitations letter is triggered and sent by the OWC only if an S1 maintenance code is received. (Wingate Depo. pp. 9-10). However, both the FN and S1 maintenance type codes originate from the IAIABC Implementation Guide. The IAIABC definition of S1 is "Suspension, returned to work, or medically determined/qualified to return to work", and the definition of FN is "Final: Closed claim, no further payments of any kind anticipated." (Wingate Depo. p. 10; Exhibit 3).

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[2] A trading partner is a company responsible for submitting electronic data interchange information to the agency. (Winagate Depo. pp. 20-21).

Interestingly, while the OWC accepts both S1 and FN codes, only an S1 code will generate the statute letter. According to Ms. Wingate, this information was supposedly available to insurance carriers in 1999 but when pressed on questioning, she could not produce any evidence of the validity of this statement. Specifically when asked to explain how carriers or trading partners were notified that an FN code would not generate a statute of limitations letter, she replied that verbal notice was given to access the event table on the agency website. (Wingate Depo. pp. 14-15). However, she admitted that she was not privy to any conversations in which same was verbally conveyed by herself or anyone else and further admitted that the Kentucky event table was never mailed to any carriers. (Wingate Depo. p. 21). Rather, the only manual available in written form was the IAIABC Guide which did not contain the Kentucky event table. (Wingate Depo. pp. 15-17). In fact, the OWC readily accepts the FN code despite the fact that it generates no action on the part of the Department. (Wingate Depo. pp. 25-26). Ms. Wingate testified that due to the definitions of FN and S1 codes as contained the IAIABC manual, there was a great deal of confusion when the OWC mandated electronic filing in 1996 and for several years thereafter in regard to carriers and trading partners reporting the cessation of voluntary TTD benefits. (Wingate Depo. pp. 18-19).

Because many carriers were continuing to submit FN codes to show termination of TTD benefits, a letter was sent out by Director, Paul Riddell, dated July 20, 1998, which was addressed to "all trading partners". This letter, in essence, instructed the recipients to use the S1 code instead of the FN code to report a suspension of benefits. Attached to the letter was a list of trading partners who

were sending "Finals Without Sending Any Suspensions". (Wingate Depo. pp. 19-22; Exhibit 5 with attachment). Neither MIA nor Clarendon National Insurance Company (hereinafter "Clarendon") were included on this list. Therefore, Ms. Wingate testified that if the spreadsheet attachment indicated which individuals received it, then neither MIA nor Clarendon would have received this communication from Director Riddell. (Wingate Depo. p. 22). However, the attachment does show over 5,251 alleged "violations" from over fifty other carriers.

On December 2, 1999, Ms. Wingate sent a letter to Clarendon stating that the department determined that a number of claims had been identified which did not have a return to work date or subsequent report filed and attached a list of same. (Wingate Depo. pp. 27-28; Exhibit 6 with attachment). There was nothing in the letter containing a direct or indirect reference that MTC S1 rather than FN was required if TTD benefits had been terminated. Additionally, Kenneth Ashbrook was not listed on the attached audit. (Wingate Depo. p. 30).

Based on the above testimony of Deborah Wingate in conjunction with the attached exhibits to her deposition, it is clear that neither MIA nor Clarendon was ever initially informed that the FN code was inadequate to generate a statute letter. Moreover, it is equally clear that this problem was shared by many other trading partners. In fact, Ms. Wingate acknowledged that this issue continues to arise in current litigation today, a decade later. (Wingate Depo. p. 40).

Cathy New, manager of the workers' compensation claims department at MIA and an officer of the corporation testified before the ALJ at the Final Hearing. (FH p. 53). Ms. New explained that MIA is a managing general agent for Clarendon

and that she was employed in her present managerial position with MIA during the initiation of the electronic filing program that came into effect with the OWC in 1996. (FH pp. 53-55). Ms. New also testified that the OWC sent out instructions to the carriers and administrators that in providing the electronic transmit, the instructions in the IAIABC manual were to be used. (FH p. 56). According to the IAIABC manual, FN is a proper code to use to report the termination of payments. (FH p. 58). Significantly, Ms. New testified that she never received the July 20, 1998 letter that was sent out by the Director which was addressed to "all trading partners" instructing to use the S1 code instead of the FN code to report a suspension of benefits. (FH p. 68). Despite the fact that Ms. New would have been the person to have received communications from the OWC regarding electronic filing, she never was advised that the OWC required an S1 maintenance code to generate a termination of benefits letter, was never sent a 1998 or 1999 event table from the OWC, and was never advised either verbally or in written form to access the Department's website to obtain an event table. (FH pp. 69-70, 73). Additionally, Ms. New was never advised that the final electronic subsequent report of injury, which clearly set out the dates of the return to work and cessation of TTD benefits, would not generate a statute of limitations letter. (FH p. 73).

When the electronic filing system was first initiated, the EDI director sent a letter with attachment to insurers advising that the OWC would require electronic reporting of impairment percentages included on the electronic transmittals. (FH exhibit 1). This document set forth the mandatory and optional data fields required by the electronic filing system. At no point on that document is there any indication

of a requirement that insurers report the date of final TTD benefits by any code other than that as set forth in the IAIABC manual. Ms. New testified that other than being told to acquire an IAIABC manual to utilize for reporting, this document contained the only instructions she ever received from the OWC when the EDI was first initiated. (FH p. 67).

Ms. New noted at the Final Hearing that the administrative regulations mandate that carriers cannot electronically file information with the OWC directly, but must use a vendor designated by the OWC. (FH p. 59). Additionally, Ms. New reviewed the July 20, 1998 letter that was sent out by the Director, Paul Riddell, which was addressed to "all trading partners", instructing them to use the S1 code instead of the FN code to report a suspension of benefits. (FH p. 68). Ms. New testified that she never received that letter and that neither MIA, Clarendon, nor MIA's vendor were on the list of recipients of that communication.

Ms. New testified that MIA received some notification from the OWC in 2001 that all reporting of termination of TTD benefits were to start retroactively only to 2001 by submitting an S1 as the termination of TTD benefits. (FH p. 73 & 76). MIA complied with this request. As such, not until Mr. Ashbrook filed this claim in 2005 was Ms. New ever made aware that the Appellee was not sent a statute of limitations letter. In fact, not until the filing of this instant claim, and one other that is also being litigated currently, was Ms. New ever made aware that an FN code never would have generated a statute letter. (FH p. 72). Regardless, it is beyond dispute that MIA was specifically informed by the OWC on December 30, 1999, by way of electronic confirmation that all of the information needed to generate a

statute letter had been accepted. (FH pp. 74-75; Wingate Depo. pp. 6-7, Exhibits 1 & 2).

In the litigation before the Administrative Law Judge below, the Appellant relied upon the statute of limitations as an affirmative defense to this claim. Despite the fact that the Appellant strictly complied with the notification requirements as set out in the Kentucky Workers' Compensation Act, the Administrative Law Judge rejected the Appellant's statute of limitations defense by applying the doctrine of equitable estoppel. However, rather than performing an analysis of the equities involved with regard to all parties, the Administrative Law Judge below focused solely on the Defendant/Employer's alleged misuse of a maintenance type code in finding that its notification to the OWC was deficient.

A divided Workers' Compensation Board affirmed the ALJ. The Court of Appeals also affirmed, holding that Kentucky Container did not strictly comply with the requirements of KRS 342.040(1) and the regulations, and that because there was no evidence that the Appellee did anything to impede the Appellant's ability to comply with the reporting requirements, the ALJ was not required to undertake an analysis of the equities involved. This instant appeal to the Highest Court follows.

ARGUMENT

I.

THE NOTIFICATION REQUIREMENTS OF THE WORKERS' COMPENSATION ACT WERE STRICTLY COMPLIED WITH BY THE APPELLANT AND THE APPELLEE'S CLAIM FOR WORKERS' COMPENSATION BENEFITS IS BARRED BY THE STATUTE OF LIMITATIONS

In this matter *sub judice*, it is undisputed that the Appellee's injury occurred on April 15, 1998 and that he received TTD benefits only through September 17, 1998. Therefore, pursuant to KRS 342.185(1), which provides in relevant part that a claim must be brought within "two years following the suspension of payments", it is patently clear that the Appellee filed his application for resolution of injury claim (on March 9, 2005) too late to recover for this injury. Moreover, the Administrative Law Judge's finding that the statute was tolled because the Appellee did not receive a letter from the OWC advising him of the limitation is erroneous as a matter of law, as is the finding of the Court of Appeals that the Appellant did not strictly comply with the reporting requirements of the Kentucky Workers' Compensation Act. The evidence has shown that all reporting requirements were met by this Appellant.

The evidence is clear that when the OWC instituted the new electronic filing system, there were many thousands of reports of benefit terminations made to the OWC by various insurers which the OWC believed to be incorrectly reported. In June of 1998, the OWC compiled a listing of "trading partners" who had not "properly" reported TTD termination dates for final payments of benefits and then wrote a letter under the signature of the Director stating that the MTC to be used

was different from that listed in the IAIABC manual that had already been specifically adopted by statute by the OWC. However, it is patently clear that neither MIA, Clarendon nor their vendor was listed on the attachment as a recipient of this correspondence, and none of the three ever received this communication directing that an S1 code should be used in lieu of the FN code for use in reporting final TTD payments. There is not one shred of evidence to the contrary.

Moreover, upon review of the final Subsequent Report of Injury, it is obvious that the insurer sent all of the information required by KRS 342.040(1) and 803 KAR 25:170 § 2 to properly notify the OWC of the cessation of TTD benefits. In fact, the final Subsequent Report of Injury verifies that the OWC received this information on December 30, 1999. The fact that the Department failed to send a termination of benefits letter cannot and should not now be imputed to the carrier.

The Appellant relies on this Court's holding in the case of Billy Baker Painting v. Barry, 179 S.W.3d 860 (Ky. 2005), which is directly on point and further affirms that the Appellant complied with all dictates of the Act to ensure that the Appellee received his termination of benefits letter from the OWC. In Billy Baker Painting, the Appellee did not receive a statute of limitations letter because the insurance carrier provided incomplete information in an electronic filing by not including a "payment adjustment end date" when notifying the OWC that it was terminating voluntary TTD benefits due to the claimant's return to work. Id. at 861. In ruling that the statute of limitation had been tolled in the Billy Baker Painting case, the Supreme Court noted that while the insurance carrier informed the OWC that it had terminated benefits and that the claimant had returned to work on November 16, 1997, it had

failed to include the actual date that TTD benefits were terminated. Id. at 864. For this reason, being that the carrier had not included a mandatory date in its subsequent injury report (IA-2), the Supreme Court held that the OWC did not mail a termination of benefits letter, and therefore, the statute was tolled. Id.

In the present case, however, it is clear that MIA included in its subsequent injury report of December 29, 1999 (with same being received by the OWC on December 30, 1999) both the return to work date and the date TTD benefits were terminated. Thus, MIA has complied in every sense with what the Kentucky Supreme Court has held to be necessary for the OWC to have filed a notice to the injured worker of his rights to prosecute the claim. Again, as noted by the Supreme Court and as stated in relevant part in KRS 342.040(1):

> 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 added.)

Thus, it is clear that the OWC did not fulfill its duty to notify the Appellee of his right to prosecute the claim. Nevertheless, the Appellant did satisfy its duty by providing all the information required by both the controlling statutes and regulations. As such, the law mandates that it must not now be required to accept Mr. Ashbrook's stale claim almost seven years late.

The provision of a statute of limitation in KRS 342.185(1) serves the same purpose as all statutes of limitation, which is to protect a defendant from being

required to litigate a stale claim. However, the current case is the very definition of a stale claim. Despite the dilatory filing by the Appellee in this case, the Court of Appeals affirmed the Board and the ALJ below when it found that the Appellant did not strictly comply with KRS 342.040(1) and 803 KAR 25:170 § 2(2). However, what the Appellate Court fails to realize is that Kentucky Container complied with the statutory notice requirements when it included in its final subsequent injury report of December 29, 1999 both the return to work date and the date TTD benefits were terminated. Therefore, MIA has met the requirements this Highest Court has held to be necessary for the OWC to have sent a limitations letter to the injured worker advising him of his rights bring a claim pursuant to the holding in Billy Baker Painting, *supra*. Although the Court of Appeals specifically found that MIA provided all necessary dates for the OWC to generate and send the limitations letter, the Appellate Court seeks to expand this Court's holding in Billy Baker Painting by adding additional requirements and responsibilities above those already set out by this Court.

Thus, rather than base its ultimate holding on the fact that the Appellant provided all of the information required for the OWC to fulfill its duty to issue the limitations letter, the Court of Appeals listed three specific reasons that it found noncompliance on the part of the Appellant.

First, the Appellate Court found that MIA was not in compliance with KRS 342.040(1) and 803 KAR 25:170 § 2(2), because notice of the termination of TTD benefits was not transmitted to the OWC until December 29, 1999, more than one year after the termination of benefits. (Ashbrook v. Kentucky Container, July 27,

2007 Ky. App. Decision p. 11). However, this case is not now and has never been about the timing of the Appellant's transmission of the termination of TTD date. This specific point has never been an issue in this case and should not be an issue now. In fact, the Court of Appeals supplies the precedent invalidating this very finding. In Miller v. Stearns Technical Textiles Co., 145 S.W.3d 414, 415-416 (Ky. App. 2004), the Court of Appeals held that a workers' compensation claim which was filed within two years of the letter generated by the OWC, but more than two years after the time of the claimant's injury and termination of TTD benefits was untimely since there was nothing to indicate that the tardiness of the OWC letter so adversely affected the claimant's rights so as to make it impossible for her to act in accordance with the two-year statute of limitations. The carrier in that case did not provide the OWC with the TTD termination date until some eleven months following cessation of those benefits. As such, the statute letter was also delayed by an eleven month period. Id. at 415. However, the Court of Appeals held that the claimant still had sufficient time to file a claim had she desired to do so. Id.

The Appellate Court now attempts to ignore its own precedent and find that the December 29, 1999 transmittal of the TTD termination date was somehow defective because of the time of the filing. This finding is simply not enough to carry the day for the Appellee. This case is about the information that was provided to the OWC (the date of cessation of TTD benefits), not when that information was transmitted and received.

Secondly, the court of Appeals also found that MIA used an incorrect maintenance code when filing the Subsequent Report of Injury. (Ashbrook v.

Kentucky Container, July 27, 2007 Ky. App. Decision p. 11). Again, the Court of Appeals misses the point. The FN code was not an incorrect code. The FN code is a proper MTC to use to report the termination of payments according to the IAIABC Manual which the OWC has specifically adopted by statute. The fact that the OWC had an internal problem in which their system did not recognize the very codes they adopted by law is error on behalf of the OWC and should not be imputed to the Appellant. Ms. Wingate's self serving testimony that the carriers were advised not to use the FN code to generate a limitation letter is simply not credible in light of the over five thousand documented cases by over fifty trading partners who used the FN code to report the termination of TTD benefits. Of course, the Appellant was not even named on the list of the trading partners who were using the FN code to report the cessation of income benefits so the true number of trading partners who reported to the OWC by using the FN code will never be known.

In light of the evidence in this case, it simply cannot be said that the myriad trading partners were all incorrect in reporting the termination of TTD benefits by using the FN code. All of these trading partners used the coding mandated to be used by the Workers' Compensation Act, the IAIABC codes. Any error in not sending the limitations letter was at the hands of the OWC rather than MIA.

Finally, the Court of Appeals took issue with the fact that MIA did not resubmit a Subsequent Report of Injury with an S1 MTC in regard to the Appellee's claim when it did receive notification of the alleged "proper" code to use in 2001. (Ashbrook v. Kentucky Container, July 27, 2007 Ky. App. Decision p. 12). However,

the Appellate Court overlooks the fact, that this specific notification was to be retroactive only to 2001. MIA had no reason to know that all of the FN MTCs used prior to 2001 would not have generated a limitations letter. In fact, the Appellate Court even noted that Cathy New provided credible testimony that she was unaware of the issues with the FN code. Recall Ms. New's testimony that not until the filing of this instant claim and one other that is also being litigated currently, was she ever made aware that an FN code never would have generated a statute letter. The fact that the OWC communicated to report termination of benefits by use of a S1 MTC in 2001 to be retroactive only through 2001 is not notice that all earlier filings prior to 2001 would be defective if the intent was to generate a limitations letter. The Court of Appeals takes a giant leap in making this conclusion, a conclusion that is not based on the facts of this case.

Clearly, the Court of Appeals decision below that the Appellant did not comply with the statutes and regulations that make up the Act is incorrect. Rather, the Appellant complied with the statutory notice requirements when it included in its subsequent injury report of December 29, 1999 both the return to work date and the date TTD benefits were terminated.

The Court of Appeals seeks to extend the holding in Billy Baker Painting, by finding that more is required than this Highest Court specifically held in that case. In short, the Appellant provided the exact date of the termination of TTD benefits which is the exact information this Court has held to be required for the OWC to generate the limitations letter. Billy Baker Painting, 179 S.W.3d at 864.

For all of the reasoning set out above, the Court of Appeals is simply incorrect in its holding that the statute of limitation was tolled in the matter *sub judice*. Additionally, the analysis applied at the Workers' Compensation Board level is also incorrect as a matter of law and the cases it relied upon to support its position that the statute of limitation should be tolled are easily distinguished from the facts of the case at bar.

In Lizdo v. Gentec Equipment, 74 S.W.3d 703 (Ky. 2002), no electronic notification whatsoever was ever sent to the OWC. As such, "the employer concedes that it did not comply with its obligation to notify the Commissioner that TTD benefits were terminated." Id. at 705.

The case of Newberg v. Hudson, 838 S.W.2d 384 (Ky. 2002), actually supports the position of the Appellant. In Newberg, the employer neither provided notice of the initial injury nor the nonpayment of TTD benefits. The employer argued that it had never been put on notice of the injury. TTD benefits were never initiated. The ALJ, however, found that notice had been given to the employer by the injured worker. Id. at 385-386. The Supreme Court noted that, "whether the statute of limitations will be tolled by the employer's failure to trigger this notification scheme will depend upon the facts and circumstances of each case." Id. at 388. Ultimately, the Supreme Court held that the statute of limitations defense survived despite the lack of any notification to the OWC. "In this case, because there is no evidence of bad faith on the part of Highland [the employer], we agree with the Board that Highland was not precluded from raising the statute of limitations defense." Id. at 390 (bracketts added).

In Ingersoll-Rand Co. v. Whittaker, 883 S.W.2d 514, 515 (Ky. 1994), once again, absolutely no notification of the termination of TTD benefits was ever received by the OWC which is contrary to the facts of the matter *sub judice*.

In City of Frankfort v. Rogers, 765 S.W.2d 579, 580 (Ky. App. 1988), the facts were undisputed in that notification was never given to the OWC of the termination of TTD benefits. As such, because no notification was given, the Court did not allow the employer to rely upon the limitations defense. Again, this fact pattern is contrary to the facts of the matter at bar.

Although the Appellee relies on the case of H.E. Neumann Company v. Lee, such reliance is misplaced. 975 S.W.2d 917 (Ky. 1998). In the Lee case, the employer never even submitted a First Report of Injury to the OWC despite the fact that the Appellee had missed more than seven days of work immediately after the occurrence of the injury and despite the fact that the Appellee had provided notice to his employer. At this point, the employer had a duty to notify the OWC of the alleged injury but failed to do so. Id. at 921. However, the employer did not provide the required notification to the OWC and also failed to advise the claimant that it would deny the claim until 2 ½ years after the date of the injury, well after the statute of limitations had run, which deprived the claimant of his right to written notice to prosecute the claim. Id. Therefore, the Supreme Court held that the failure to provide the statutory notice tolled the limitations period. Id.

The obvious difference between the above-referenced cases and the case at bar is that in the instant matter, the Appellant complied with the statutory notice requirements when it included in its subsequent injury report both the return to work

date and the date TTD benefits were terminated. Thus, MIA has complied in every sense with what the Kentucky Supreme Court has held to be necessary for the OWC to have filed a notice to the injured worker of his rights to prosecute the claim pursuant to the holding in Billy Baker Painting, *supra*. Thus, while it is clear that the OWC did not fulfill its statutory duty to notify the Claimant of his right to prosecute the claim, the Appellant did satisfy its duty by providing all the information required by both the controlling statutes and regulations. As such, the law mandates that it must not now be required to accept Mr. Ashbrook's stale claim.

II.

EVEN IF THE NOTIFICATION OF TERMINATION OF BENEFITS WAS TECHNICALLY DEFICIENT, THE APPELLEE'S CLAIM FOR WORKERS COMPENSATION BENEFITS IS STILL BARRED BY THE STATUTE OF LIMITATIONS AS A MATTER OF EQUITY

As stated above, the Appellant steadfastly maintains that it properly complied with its statutory notification requirements in regard to this case. However, even if this Honorable Court deems the notification to have been deficient, the statute of limitations defense should still have survived as a matter of equity. Clearly, the Administrative Law Judge felt compelled by the decision in Billy Baker Painting v. Barry, 179 S.W.3d 860 (Ky. 2005), to toll the statute of limitations based on the doctrine of equitable estoppel. However as pointed out by Board Member Stanley below in his Dissent and as noted by the Supreme Court in J & V Coal Co. v. Hall, 62 S.W.3d 392 (Ky. 2001), estoppel is an equitable remedy and the justness of its application depends on the facts and circumstances of each case. *Cf.* Patrick v.

Christopher East Health Care, 142 S.W.3d 149, 152 (Ky. 2004). Nevertheless, in the case at bar, the ALJ did not consider any of the equities whatsoever that favor the Appellant.

While the Appellant recognizes that findings of fact made by the Administrative Law Judge are not to be disturbed by reviewing bodies (Cal-Glo v. Mahan, 729 S.W.2d 256 (Ky. App. 1987)), the issue before this Honorable Court is one of law rather than fact. As such this Court owes no deference to the decision of the Administrative Law Judge. Rather, a finding that is unreasonable under the evidence is subject to reversal on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

In his Opinion below, the Administrative Law Judge made no finding of misconduct on the part of the Appellant but recognized a break down in the communication process:

> Here the employer gave some notice to the Department of Workers' Claims. The notice that was given was not coded in such a way that a letter notifying the claimant of the statute of limitations was automatically generated. The department did not send such a letter.... it is unfortunate that the carrier was not informed of the omission of the proper code on its submission and given an opportunity to rectify the matter. (ALJ Opinion pp. 38-39).

Despite the lack of a showing of bad faith on the part of the Appellant, the Administrative Law Judge still tolled the statute of limitations. This decision on the part of the ALJ is incorrect as a matter of law. Estoppel is only appropriate for and should be reserved for situations where there is evidence of misconduct on the part of the employer, such as attempting to manufacture a limitations defense. *See*

Newberg v. Hudson, 838 S.W.2d 384 (Ky. 1992). In Newberg, the Court dismissed the plaintiff's claim despite the fact that no notification was provided of the termination of TTD benefits because there was no hint of employer misconduct or bad faith in the findings by the ALJ sufficient to compel a decision in equity. Id. at 389-90. The Newberg case law now demands a similar result in this matter as the Administrative Law Judge did not consider any of the equities favoring the Appellant and its reliance upon the limitations defense.

Upon review of this instant litigation, the Court of Appeals held below that because there was no evidence that Mr. Ashbrook did anything that impeded Kentucky Container's ability to comply with the requirements of KRS 342.040(1) and the regulations, the ALJ did not have to undertake an analysis of or to balance the equities between the parties. (Ashbrook v. Kentucky Container, July 27, 2007 Ky. App. Decision p. 18). In coming to this conclusion, the Appellate Court below relied upon the Supreme Court's statement that, "[a]bsent extraordinary circumstances such as were present in Newberg v. Hudson, 838 S.W.2d 384, 389 (Ky. 1992), an employer's failure to comply strictly with KRS 342.040(1) and the applicable regulations has tolled the period of limitations, without regard to whether the failure is attributable to bad faith or misconduct." Billy Baker Painting, 179 S.W.3d at 864 *citing* H.E. Neumann v. Lee, 975 S.W.2d 917 (Ky. 1998); Colt Management Co. v. Carter, 907 S.W.2d 169 (Ky. App. 1995); Ingersoll-Rand Co. v. Whittaker, 883 S.W.2d 514 (Ky. App. 1994). Then the Court of Appeals stated that the extraordinary circumstances referred to by the Supreme Court in Billy Baker Painting, revolved around issues of notice and some implications of fault on behalf

of the employee which were absent in this instant litigation. (Ashbrook v. Kentucky Container, July 27, 2007 Ky. App. Decision p. 15).

Once again, the Court of Appeals seeks to expand the holdings of the Supreme Court. Although issues revolving notice have served as the backdrop for several of the cases discussed throughout this litigation, the Supreme Court has never held that extraordinary circumstances only encompass notice issues.

In this case there are other extraordinary circumstances to examine. Consider the fact that although the Appellee was wise enough to file a medical fee dispute in November of 1998, he waited almost a full seven years after the injury to file his Application for Resolution of an Injury Claim. Additionally, he filed a previous workers' compensation claim against the same employer on June 7, 2004 concerning injuries that occurred much later in the Fall of 2002. Moreover, this Appellant did provide the OWC with notification of the return to work date of the Appellee and the termination of TTD benefits date. Do not all of these factors require at least some musing in this case? Clearly they do. The longer a claimant sits on his rights, the greater the interest of the employer to not have to litigate stale claims. Rather, equity requires that the Appellee take some responsibility for his dilatory filing of this claim, especially in light of the fact that he had timely filed the medical fee dispute in regard to this very injury. Based on the above, it is evident that the unique circumstances of this case demonstrate that the analysis below in estopping the Appellant's limitations defense was deficient.

In sum, both the ALJ and the Kentucky Court of Appeals have obviously misinterpreted the holding in Billy Baker Painting, *supra*. In that case, this very

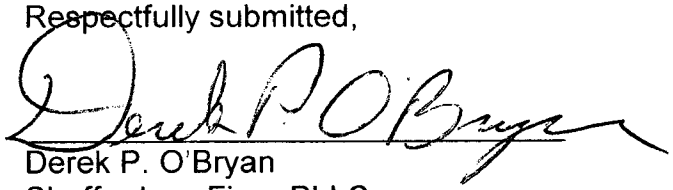
Court remarked that in rejecting the employer's argument, "we are not convinced that the ALJ erred by concluding that the equities favored the claimant." Id. at 865. However, in the instant matter, the equities clearly favor the Appellant. This fact was not lost on dissenting Board Member Stanley, and it is respectfully prayed for that this fact not be lost on this Tribunal.

CONCLUSION

For the foregoing reasons set forth herein above, it is respectfully submitted that the Appellee was barred from bringing this claim by the statute of limitations. Moreover, the Appellant properly sent electronic notice of termination of TTD benefits and notice of return to work status to the OWC. As such, the OWC received all of the information required to send the statute of limitations letter, and this case cannot survive the limitations defense. It must be dismissed as a matter of law.

In the alternative, even if this Court deems the Appellant's notification to be deficient, the Appellee's claim should still have been dismissed as untimely as the equities favor this result. For the above stated reasons, this Appellant requests that the opinions below be reversed as a matter of law and this case be Dismissed.

Respectfully submitted,



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APPENDIX

1. The Court of Appeals Opinion Affirming (7/27/07)
2. Final Decision of the Workers' Compensation Board (9/29/06)
3. The Decision of the Administrative Law Judge (4/21/06)
4. Exhibits to Deborah Wingate's deposition
5. Exhibits toWorkers' Compensation Final Hearing (3/2/06)