COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2007-SC-000533

KENTUCKY CONTAINER SERVICE, INC. APPELLANT

VS APPEAL FROM THE COURT OF APPEALS OF KENTUCKY
CA NO. 2006-CA-002299
WCB NO. WC-98-84520

KENNETH ASHBROOK,
HON. RICHARD JOINER, ALJ and
WORKERS' COMPENSATION BOARD APPELLEES

BRIEF FOR APPELLEE

Submitted by:

James D. Howes, Esq.
Attorney for Appellants
HOWES and PAIGE, PLLC
1501 Durrett Lane, Suite 200
Louisville, KY 40213
502-454-4850

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing document was this the 31 day of December, 2007, served by registered and regular US mail upon:

Susan Stokley Clary, Clerk of the Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; George Geoghegan, III, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229; Hon. William P. Emrick, Executive Director, Office of Workers' Claims, 657 Chamberlin Avenue, Frankfort, KY 40601, Hon. Richard Joiner, ALJ, 145 E. Center St., Madisonville, KY 42431, and; Hon Derek P. O'Bryan, Sheffer Law Firm, PLLC, 101 S. Fifth Street, Ste. 1600, Louisville, KY 40202.

James D. Howes

STATEMENT CONCERNING ORAL ARGUMENT

There is no need for an Oral Argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

By Opinion and Award dated April 21, 2006, the Hon. Richard Joiner, ALJ found that the Employer did not properly notify the Department of Workers' Claims (now Office of Workers' Claims) that it had terminated the temporary total income benefits to Mr. Ashbrook. As a consequence, the ALJ ruled that the defense of statute of limitation is not available to the Employer. This decision was upheld by a Workers' Compensation Board Opinion dated September 29, 2006. On July 27, 2007 the Court of Appeals affirmed. The Employer now presents the same argument once again in which it contends, in spite of the ALJ's finding, that it strictly complied with Kentucky law and even if it did not, Mr. Ashbrook's claim should be barred based on equitable principles.

ARGUMENT

I. The Defendant/Employer Did Not Strictly Comply With the Notification Requirements of the Act and the Appellee's Claim for Workers' Compensation Benefits is Not Barred by the Statute of Limitation.

In its Brief the Defendant/Employer argues that the ALJ erred in determining that the statute of limitations was tolled for the injury occurring on April 15, 1998. The Defendant/Employer argues that it properly notified the OWC as required by KRS 342.040(1) upon the suspension/termination

of benefits to Mr. Ashbrook. However, such is not the case. Instead, the ALJ determined, based on the testimony of Ms. Deborah Wingate, that the Employer failed to comply with the OWC's filing requirements.

By deposition dated August 31, 2005, Ms. Wingate, the Division Director for Information and Research with the OWC, repeatedly testified that all trading partners (carriers) were properly and adequately advised of the OWC's procedures. In particular, they were advised that S1 was the proper code for reporting the suspension of TTD and that an FN code would not trigger a statute letter (WC-3) to the Claimant. Concerning the inference that the OWC did not sufficiently inform the carrier in this claim, Ms. Wingate testified at page 15.6:

> The IABC standards were adopted by the agency and named in our statutes. The process of becoming a trading partner requires that certain documents be filed with the Office of Workers' Claims a trading partner profile; and in the process of doing that, there was a test that was involved. So, there was a lot of communication that went on between our staff and any carrier, vendor, third-party administrator that wanted to do electronic data interchange. This information would have been, then, communicated at that time and they would have been referred to the agency's website.

Attempting to further explain how she knew that Cathy New of Midwestern Insurance Alliance (the carrier herein) received proper information, at page 38.18 Ms. Wingate stated:

> In order to become a trading partner, you have to send files to the agency and you send test files and they go through a series of scenarios that you have to send in.

> So, you have to demonstrate that you can both send and receive files based on Kentucky requirements. Once you have completed that test, which at that time was coordinated by Bruce Curry, then he would put you into production but not until then. During that period of time, a lot of communications went back and forth between Cathy New and Bruce Curry regarding file structure, file issues.
>
> You could have only accomplished that if you had Kentucky-specific requirements. That's why I answered your questions the way I did. I cannot say that they would not have known. You know, based on just the fact that my letter didn't contain the requirements and Paul Riddell's letter did not contain the requirements, I believe that Kentucky's requirements were communicated well during the test process.

Based on Ms. Wingate's testimony the ALJ concluded that "the notice that was given [by the Employer] was not coded in such a way that a letter notifying the Claimant of the statute of limitations was automatically generated". As this Honorable Court knows, the ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc., vs. Burkhardt, 695 SW2d 418 (Ky. 06/13/1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt vs. Bugg Brothers, 547 SW2d 123 (Ky. 02/18/1977). The ALJ is free as the trier of facts to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness. Caudill vs. Maloney's Discount Stores, 560 SW2d 15 (Ky. 12/09/1977).

Furthermore, a reviewing panel may not substitute its judgment for that of the ALJ on matters involving the weight to be accorded the evidence in questions of fact. KRS 342.285. In this case the ALJ chose to believe the testimony of Ms. Wingate and her testimony provided substantial evidence in support of the ALJ's decision on this point.

The ALJ properly compared this case to Billy Baker Painting v. Barry, 179 S.W.3d 860 (Ky. 09/22/2005) wherein this Honorable Court upheld the tolling of the statute of limitation due to the Employer's failure to properly notify the OWC. The ALJ in Barry found that even though the Employer provided certain information the Employer failed to provide a "payment adjustment end date" which was required at that time to generate a WC-3 to the Claimant. As a consequence, the Claimant was never notified of his right to file a claim or the time frame for doing so.

In the claim *sub judice* the ALJ also found that the Employer filed certain information but did not file the correct information with the OWC. The ALJ concluded that as a result of the Employer's failure the Claimant was not notified of his right to file a claim and accordingly, the statute is tolled. The ALJ did not err in doing so.

The Employer would have this Court believe that Billy Baker Painting v. Barry stands for the principle that if a carrier notifies the OWC of the "payment adjustment end date", then the carrier has given proper notice. The Claimant submits that such an interpretation of Barry is a perversion

of the plain and clear meaning of the case. In Barry, this Honorable Court simply isolated the reason for the breakdown in the notification process, and the reason for the break-down was the Employer's failure to furnish the "payment adjustment end date". If the Employer therein had failed to use the proper code, then the Court would not have been discussing the Employer's failure to submit the "payment adjustment end date": the Court would have isolated the Employer's failure to use the proper code as the reason for the Employer's failure to give proper notice. The fact that the Employer in the case *sub judice* furnished the "payment adjustment end date" does not automatically qualify the notice as a proper notice if the Employer otherwise failed to furnish the requisite information sufficient to trigger a statute letter to the Claimant. According to the OWC it is the carrier's failure to furnish an S1 code, a very simple request, that resulted in the failure to trigger a Form WC-3 (2-year letter) to the Claimant.

In the final analysis, any reasonable presumption would require the carrier herein to file the proper code at the point it first realized that the incorrect code was filed. Yet, to this day there is no evidence whatsoever that Midwestern has ever filed the correct suspension code in this claim. The carrier has chosen the most expedient course of blaming the OWC for its mistake without making any attempt to comply. The Employer having asserted that this claim is barred by the statute of limitations, the burden is on the Employer to prove the elements of the defense. Lizdo v. Gentec

Equipment, 74 S.W.3d 703 (Ky. 05/16/2002). In this, the Employer has failed.

II. Appellee's Claim for Workers Compensation Benefits is Not Barred as a Matter of Equity by the Statute of Limitation.

The Defendant/Employer lays all blame for the breakdown in the notification process at the feet of the OWC. While the Employer is quick to pass the buck it cannot be disputed that the ALJ determined that the Employer failed to give notice in the form required by the OWC. That is, the ALJ found that the Employer through its carrier knew or should have known how to file the correct information with the OWC; that the carrier did not file the correct information with the OWC, and; that it was this failure that resulted in a lack of notification to the Claimant. As previously stated, it is within the province of the ALJ to determine the facts and he did so. As a result of the ALJ's findings it is beyond dispute that the Employer violated Kentucky law. Since workers' compensation is a creature of statute and the remedies and procedures described therein are exclusive, Williams v. Eastern Coal Corp., 952 S.W.2d 696, 698 (Ky. 10/02/1997), it is difficult to understand how the Employer can argue that equity requires that the within claim be barred.

Even if the OWC were responsible, in whole or in part, for the lack of notification to the Claimant, there is no authority for strapping the

Claimant, with the loss. Claimant humbly submits that the Board's position taken in Lizdo v. Gentec Equipment, supra., and affirmed by this Honorable Court, is the more reasoned approach. Therein the Board stated that in light of the high percentage of injured workers with a limited education and in light of the purpose of protecting injured workers we must ensure that they are informed of their legal rights.

Nevertheless, the Defendant/Employer argues that the Claimant should be forced to bear the loss of any mistake made in the notification process without any proof that the Claimant contributed to the mistake. While the Employer as well as the dissenting Board member argue in favor of certain equitable assumptions, none of which have been proven, the fact is that the ALJ's findings prove that the Employer violated state law. H.E. Neumann v. Lee, 975 S.W.2d 917 (Ky. 09/03/1998) declares:

> .....the failure of the employer herein, to satisfy the statutory notification requirements, acted to toll the statute of limitations by estopping the employer from prevailing on a statute of limitations defense as claimant was never notified by the board regarding his rights and the time frame in which he must act. This is true regardless of whether the employer was acting in good faith in conducting its investigation, or whether it was shown that there was actual prejudice to claimant

Claimant submits that "notice" means proper notice, and improper notice is no notice. The ALJ herein determined that the Employer did not

give proper notice and under H.E. Neumann v. Lee, supra, the statute is tolled.

Contrary to the Employer's assertion, equity should not be used to cure a violation of the Employer's statutory obligation. The Employer suggests that the Claimant knew of his time limitation, that he only asserted the April 15, 1998 injury claim because he was asserting other claims, and that he only included the April 15, 1998 injury as an afterthought in an attempt to profit from this "stale claim". There is no proof in the record however, that any of the Employer's arguments have any factual basis. Neither is there any proof that Mr. Ashbrook knew or understood his rights at any time or that he purposefully withheld the filing of a claim on his April 15, 1998, injury. Similarly, there is no proof of Mr. Ashbrook's level of sophistication. Therefore, it cannot be said that Mr. Ashbrook contributed in any manner to his failure to receive notice. The reason for the failure to notify must lie with the Employer. If, perhaps the Employer had fully complied with the notice requirements such that blame could justifiably be placed on the OWC for failing to notify the Claimant, then the Employer's claim to equitable relief could be seriously considered (see Lizdo v. Gentec Equipment), but such is not the case.

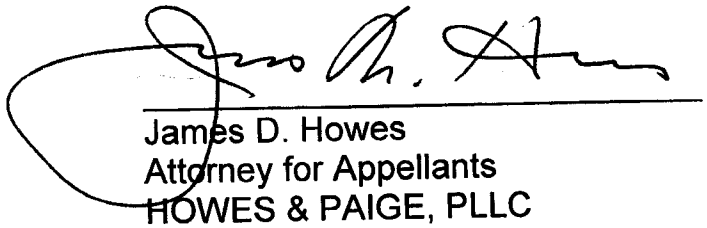
The so-called "stale" claim, about which the Employer complains, is the direct result of the Employer's failure to follow the notice procedures. While the Employer may have been prejudiced somewhat by the delay,

even more so has the Claimant. Claimant has had to forego for years the receipt of medical care and income benefits that were rightfully his, all because he was not provided the information required by Kentucky law. He is clearly within the category of workers whom the legislature sought to protect by requiring that he be notified of his rights by letter and absent proof that the Claimant somehow contributed to the notification error, the Employer must bear the brunt of its own failure.

CONCLUSION

The ALJ determined, based on substantial evidence, that the Employer failed to provide a proper notice to the OWC that resulted in Plaintiff's failure to receive the statutory notification. Based on applicable case law, equity is not available to provide a time limitation defense to the Employer unless the Employer has proven it fulfilled its obligation to provide a proper notice. Consequently, the ALJ properly held the statute of limitation tolled and the claim timely filed.

Respectfully submitted,



James D. Howes
Attorney for Appellants
HOWES & PAIGE, PLLC
1501 Durrett Lane, Suite 200
Louisville, KY 40213
(502) 454-4850