

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001697-WC

KENDALL BURRESS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-05-66203

DON'S LUMBER; HON. DOUGLAS GOTT,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, CHIEF JUDGE; CLAYTON AND STUMBO, JUDGES.

CLAYTON, JUDGE: Kendall Burress petitions for review of the August 18, 2009, opinion by the Workers' Compensation Board (Board) affirming the February 16, 2009, decision by an administrative law judge (ALJ), which dismissed Burress's claim for occupational disability benefits filed against Don's

Lumber. The claim was dismissed on the ground it was not filed within two years of the date of the injury and, thus, was not timely. Burress also appeals from an order dated March 23, 2009, which denied his petition for reconsideration. After careful review, we affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

For a little over twelve years, Burress was employed by Don's Lumber as a contractor sales representative and still works in this capacity. As a sales representative, he analyzed blueprints and determined the materials needed for the construction of residential homes. Burress, at times, would travel to construction sites and measure them to prepare estimates for the cost of materials. On one such job, Burress was injured. His injury occurred on October 15, 2005, when he traveled to the site of a home under construction. While measuring for floor joists, he lost his balance and fell approximately 7 ½ feet into a basement space. Burress landed on his feet but then fell down on his knees. He said that he immediately knew he had suffered a serious injury and drove back to the store to report the accident. On his return trip, he experienced discomfort in his lower back, and testified that by the time he arrived at the store, his back had completely "locked up." Burress reported the accident to his supervisor, Chris Coyle, and went home for the remainder of the day.

The next day, Burress began receiving medical care and has been under constant medical care since then. At the time of the hearing with the ALJ, he was scheduled to undergo surgery on his lower back. Besides the lower back

injury, Bures also had surgery to repair an inguinal hernia in March 2006. The record shows that in 2002 Bures had surgery for a similar hernia problem.

The issue here concerns the statute of limitations and whether the application for income benefits was timely made. Since the injury occurred on October 15, 2005, and Form 101 was not filed with the Office of Workers' Compensation until May, 27, 2008, it is undisputed that more than two years passed between the injury and the application. The issue, however, is not whether Bures's claim is barred by this section of the statute of limitations but whether the two-year statute of limitation was tolled by Don's Lumber payment to Bures of his regular salary. In sum, the issue presented is whether the salary payment constitutes voluntary "income benefits," which toll the limitation period.

On February 16, 2009, the ALJ ruled that Bures's claim was barred by the applicable statute of limitations. Thereafter the ALJ denied his motion for reconsideration. Bures then appealed to the Board, which, on August 18, 2009, affirmed the ALJ's dismissal of the claim for benefits. Both the ALJ and the Board concluded that the application for workers' compensation benefits was not timely made. This appeal follows.

#### STANDARD OF REVIEW

On appeal, our standard of review of a decision of the Workers' Compensation Board "is to correct the Board only where the the [sic] 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.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The burden of persuasion is on the claimant to prove every element of a workers' compensation claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). In other words, “[w]here the party with the burden of proof is not successful before the ALJ, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it.” *Carnes v. Tremco Mfg. Co.*, 30 S.W.3d 172, 176 (Ky. 2000). With this standard in mind, we now turn to the issues in the case before us.

### ANALYSIS

Burress identifies two issues in his petition for review. First, he contends that the ALJ misapplied statutory and caselaw; and second, he argues that the ALJ erred when it did not consider Burress’s testimony at the final hearing. With regard to the latter argument, that is whether the ALJ took into account Burress’s testimony at the final hearing since the introduction to the ALJ’s opinion states that the parties waived a hearing, we believe that the Board was correct in not reversing the ALJ’s opinion on this point. We note, as did the Board’s opinion, that this specific matter was not alleged in Burress’s petition for reconsideration. Therefore, this issue was not properly preserved. In addition, it appears that the ALJ inadvertently drafted a statement in his introduction that the parties submitted briefs and waived a final hearing. Clearly, in the opinion the ALJ considered Burress’s testimony at the December 22, 2008 hearing because he discusses it. Moreover, Burress refers to the ALJ’s questioning of him at the hearing in his

brief. Therefore, the issue was not preserved, and even if it had been, it was merely a clerical error and harmless.

Next, we will focus our attention on the issue of whether the statute of limitations was tolled since, as has been conceded, Burress filed his application for workers' compensation benefits more than two years after the injury. The issue is whether the continuation of Plaintiff's salary for days missed after his work injury constitutes "payments of income benefits," which are "voluntary payments" that toll the period of limitation. Burress maintains that salary payments by Don's Lumber after the injury, when he missed work, constitute voluntary "income benefits" and, pursuant to the Kentucky Revised Statutes (KRS) 342.185(1), extend the applicable statute of limitations.

We observe that KRS 342.185(1) requires an application for adjustment of claim to be filed within two years of the date of injury, or within two years of the suspension of "payments of income benefits." KRS 342.270(1) further provides that the application must be filed within two years of the date of injury, or within two years of the "cessation of voluntary payments, if any have been made."

Based on these statutes, Burress argues that the limitation period was tolled. Burress maintains that the limitation period was extended because Don's Lumber paid him his regular base salary when he was absent from work on account of a hernia, hernia surgery, and back pain. He alleges that all these symptoms were a result of the October 15, 2005 accident. As stated above,

Burress

has the burden of proving every element of his claim, including that it was timely filed in compliance with KRS 342.185. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). Hence, Burress must prove that the salary payments by Don's Lumber were voluntary "income benefits" made in order to toll the statute of limitations.

"Voluntary payments" that toll the period of limitation are those that either the employer intended or the worker had reasonable ground to believe were in lieu of workers' compensation payment. *Kentucky West Virginia Gas Co. v. Spurlock*, 415 S.W.2d 849, 851 (Ky. 1967):

Voluntary payments which will toll the limitation statute (KRS 342.270(1)) are those which either the employer intended or the employee had grounds to reasonably believe were in lieu of workmen's compensation benefits. *Larson, 2 Workmen's Compensation Law*, Section 78.43(c).

Now, we will address the issue of whether Don's Lumber intended the payments to be in lieu of workers' compensation benefits or whether Burress had a reasonable belief that the payments were in lieu of workers' compensation benefits. In order to ascertain if Don's Lumber or Burress considered the salary payments to be voluntary income benefits, it is necessary to define "income benefits." The Act defines "income benefits" as "payments made under the provisions of this chapter to the disabled worker or his dependents in case of death, excluding medical and related benefits[.]" KRS 342.0011(12). This characterization of the payments as voluntary "income benefits" is a question of

fact to be proven by Burress. He must show that Don's Lumber intended the payments as "income benefits" based on his disability.

The evidence shows that Burress never stopped working at Don's Lumber. Indeed, as found in the case record, he was still working there at the time of the administrative proceedings. Moreover, Burress acknowledges that no insurance carrier paid him workers' compensation benefits and that his medical bills were paid by his regular insurance carrier and not the workers' compensation carrier. In fact, the workers' compensation insurance carrier was unaware that Burress was absent from work because Don's Lumber paid his regular salary when he was off work for medical treatment or recuperation. Hence, Burress presented no evidence that the payments were formally labeled as "income benefits" for the purposes of workers' compensation. And both Burress and Don's Lumber referred to them throughout the proceedings as salary payments not "income benefits." The fact that the payments were viewed by both parties as "salary" and not "income benefits" puts in doubt whether the payments were "voluntary income benefits" as defined under KRS 342.270(1).

We find it persuasive in the case at hand that salary payments voluntarily made to Burress, without reference to the applicable workers' compensation act or liability under such provisions, are not voluntary "income benefits" that toll the running of limitations. Furthermore, the intent of the employer alone is not controlling, but must be considered in connection with the question of whether such payments caused the employee to believe that his or her

claim was being recognized. Here, Burress referred to the payments as salary. Accordingly, we find the ALJ's and the Board's analysis, that the salary payments were not voluntary "income benefits" for the purpose of tolling the statute of limitations, was a reasonable inference.

The rationale behind tolling the limitation period while an employer makes voluntary "income benefits" is to prevent the injured worker from being lulled into a false sense of security by the payments and, therefore, fail to timely file a claim. *City of Frankfort v. Rogers*, 765 S.W.2d 579 (Ky. App. 1988).

Neither the ALJ nor the Board found any evidence that supported a finding that Don's Lumber was motivated to pay Burress a salary on the days he missed work in order to lull him into missing his limitations deadline. Given the evidence presented, we find this also is a reasonable inference by the ALJ and the Board.

Burress and Don's Lumber acted as if his absences from work were merely temporary. Coyle explained in his testimony that the decision to pay Burress for his time off work was because "[w]e try to take care of our employees." The circumstances in this case are similar to those in *Browning v. Ford Motor Co.*, 287 Ky. 261, 152 S.W.2d 976 (Ky. App. 1941). In that case, the Court held that the continued payment of the claimant's salary after an injury "was prompted by purely humane and sympathetic considerations and that such help was in no wise intended to be or considered as payment to him of compensation." *Id.* at 980. We are aware of the fact that *Browning* was decided prior to the standard enunciated in *Spurlock*, but we still find it instructive as to the motivation of the



employer. Plus, Burress never established that Don's Lumber acted in bad faith and blatantly manufactured a limitations defense in this claim. *See Newberg v. Hudson*, 838 S.W.2d 384 (Ky. 1992). Given our standard of review here, which is to correct the Board only if we perceive that it committed an error in assessing the evidence so flagrant as to cause gross injustice, we cannot find that the ALJ or the Board did so when they determined that neither Burress or Don's Lumber intended the salary to be in lieu of "income benefits."

Burress spends a great deal of time discussing the holding of *Holbrook v. Lexmark International Group, Inc.*, 65 S.W.3d 908 (Ky. 2001), and its purported clarification of *Spurlock*. *Holbrook*, however, is inapposite because the claimant in that case began to receive salary continuation payments already after the two-year limitation had expired in regard to the original injury. Further, the court held the payment did not toll the statute of limitations. We find no merit in Burress's suggestion that this case changes the necessary elements for ascertaining whether "income benefits" are voluntary and extend the period of limitation. During his testimony, Burress never suggested that his receipt of salary from Don's Lumber lulled him into a false sense of security. And the ALJ and the Board did not ignore the *Spurlock* elements when determining whether Burress's salary was a "voluntary" payment that constituted "income benefits" and tolled the statute of limitation.

Notwithstanding the requirements imposed by *Spurlock* to assess whether the limitation period was tolled by voluntary "income benefits," a

secondary issue is whether Burress even proved that the salary payments were “income benefits.” Regarding this issue, we focus on KRS 342.040 which states in pertinent part:

(1) 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, with interest at the rate of twelve percent (12%) per annum on each installment from the time it is due until paid[.]

Thus, under KRS 342.040(1), an employer does not become obligated to pay income benefits until such time as an injured worker has missed at least seven consecutive days of work.

The evidence provided by Burress about the timing and purpose of the salary payments is confusing. And, as such, Burress does not provide any specific and particular evidence showing that he missed seven consecutive days of work because of the back injury. To begin with, in their respective testimony, Burress and his former supervisor, Coyle, specified that Burress’s employee benefits entitled him to three weeks vacation pay and six sick days. Both parties said that, when Burress was unable to work because of back pain, he first used these allocated days. In particular, with regard to the back injury itself, Coyle confirmed that Burress initially missed five days from work due to the back injury. Five days does not trigger the payment of income benefits pursuant to KRS 342.040(1). In

fact, Burress never provides evidence that the 25 to 30 days he alleges missing because of the back injury were consecutive days.

Finally, Burress's testimony that he was off work for several weeks recuperating from the March 2006 hernia repair surgery does not place Burress's back injury under KRS 342.040(1). It is unclear whether Don's Lumber would have had any knowledge that this work absence was related to the October 15, 2005 work injury. Don's Lumber had reason to believe that the 2006 hernia repair was treatment for a recurrent inguinal hernia, which had previously been repaired in 2002. According to Burress's deposition, his hernia surgery was not paid for by his workers' compensation carrier but by him and his private insurance. And the absence from his employment for the surgery occurred some time after the back injury. As our Supreme Court has noted before, when an employee is absent from work sometime after an accident, the employer may be legitimately unaware that the absence was due to the previous occupational injury. *See Newberg*, 838 S.W.2d 384.

Therefore, we cannot say that the ALJ or the Board was in error when it found that Burress failed to prove that he received voluntary "income benefits," which tolled the statute of limitations. Burress has not established that he was entitled to "income benefits." *See J & V Coal Co. v. Hall*, 62 S.W.3d 392 (Ky. 2001).

## CONCLUSION

Burress argues that the ALJ and the Board misapplied the standards in *Spurlock* and erred in its reliance on *Browning*. We conclude in our analysis that the characterization of the payments made in this type of case is a question of fact based on the circumstances. Voluntary payments toll the limitation statute when the employer intended the payments in lieu of workers' compensation benefits or the employee had grounds to reasonably believe the payments were in lieu of workmen's compensation benefits. Here, the ALJ and the Board found that the salary payments made to Burress did not meet this standard.

Moreover, our standard of review requires that when a party with the burden of proof is unsuccessful in persuading the ALJ and the Board of their version of the facts, in order for us to reverse the Board, the evidence must be so overwhelming as to compel a finding in the appellant's favor. For evidence to be so compelling, it must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. *Western Baptist Hosp.*, 827 S.W.2d at 685. In the case at bar, we find that the evidence is not compelling and, hence, does not permit us to reverse the decision of the Board. Therefore, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ben T. Haydon, Jr.  
Bardstown, Kentucky

BRIEF FOR APPELLEE:

Sherri P. Brown  
Lexington, Kentucky