

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania/ :
DPW and CompServices, Inc., :
Petitioners :
 :
v. : No. 1147 C.D. 2009
 : Submitted: December 18, 2009
Workers' Compensation Appeal :
Board (Zacherl, Deceased), :
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: January 29, 2010

The Commonwealth of Pennsylvania/DPW and CompServices, Inc. (Employer) petition for review of an order of the Workers' Compensation Appeal Board (Board) which reversed in part and affirmed in part the order of the Workers' Compensation Judge (WCJ). The Board reversed the WCJ's award of unreasonable contest attorney's fee and affirmed the WCJ's grant of the fatal claim petition filed by Lynn Zacherl (Claimant) seeking compensation for the death of her husband, Dennis Zacherl (Decedent). We affirm.

Decedent worked as a residential service aide for twenty-seven years at the Polk Center (Center), which provides care for the mentally and physically handicapped. On September 18, 2003, Decedent filed a claim petition alleging that he was disabled as of March 28, 2003 due to hepatitis C contracted as a result of

his exposure to such disease during his employment. The WCJ denied Decedent's claim petition and the Board affirmed. However, on appeal to this Court, we held that Employer failed to rebut the statutory presumption that Decedent's hepatitis C arose out of and in the course of his employment.¹ Accordingly, we reversed the Board's decision. See Zacherl v. Workers' Compensation Appeal Board (Department of Public Welfare) (Pa. Cmwlth., No. 397 C.D. 2006, filed October 30, 2006).

Decedent died on March 15, 2005. Claimant filed the fatal claim petition at issue here on January 17, 2007. Therein, Claimant alleged that Decedent's cause of death was due to "Hepatitis C contraction; liver failure; liver failure induced by Hepatitis C; renal failure due to Hepatitis C." Employer filed a timely answer and hearings before the WCJ ensued.

In support of the fatal claim petition, Claimant testified on her own behalf and presented the deposition testimony of William E. Prenatt, M.D., a board certified family practitioner, and Pradeep Kumar, M.D., a board certified internist and gastroenterologist. In opposition to the fatal claim petition, Employer presented the deposition testimony of Donald J. McGraw, M.D., who is board certified in occupational medicine.

¹ Section 301(e) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §413, added by the Act of October 17, 1972, P.L. 930, provides that a claimant is entitled to a rebuttable presumption that his or her occupational disease arose out of and in the course of his or her employment if it be shown that the claimant, at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard. Section 108(m) of the Act, added by, Section 1 of the Act of October 17, 1972, P.L. 903, as amended, 77 P.S. §27.1(m), lists hepatitis C as an occupational disease in the occupations of blood processors, fractionators, nursing, or auxiliary services involving exposure to hepatitis C.

Dr. Prenatt testified that the immediate cause of Decedent's death was liver failure and that the liver failure was due to hepatitis C. Dr. Prenatt opined that Decedent's hepatitis C was a substantial contributing factor in his death and that Decedent's alcohol use was also a contributing factor in his death.

Dr. Kumar testified that Decedent's death was due to a complication of liver disease and transplantation, which included liver failure as well as intracranial hemorrhages. Dr. Kumar opined that the primary reason for Decedent's liver failure was his hepatitis C. Dr. Kumar did not believe that Decedent's liver failure and death were substantially contributed to by his consumption of alcohol. Dr. Kumar testified that biopsy studies confirmed that Decedent's liver failure was due to hepatitis C as well as rejection of the transplanted liver. Dr. Kumar stated further that there were no alcohol related changes on the biopsy. On cross-examination, Dr. Kumar agreed that Decedent resumed drinking alcohol after his second liver transplant and the doctor agreed further that Decedent was not re-listed for another liver transplant because of his alcohol consumption.

Dr. McGraw testified that Decedent underwent two liver transplants within days of each other in December of 2003, secondary to alcohol and chronic hepatitis C. Dr. McGraw testified that Decedent was identified as having end-stage liver disease secondary to hepatitis C and alcohol on March 2, 2005. Dr. McGraw explained that Decedent's original liver disease was caused by a combination of alcoholic cirrhosis and hepatitis C. Dr. McGraw agreed that hepatitis C was a contributing factor to Decedent's death on March 15, 2005. Dr. McGraw believed that there was a high probability that Decedent would still be alive if he had not resumed alcohol consumption following liver transplantation. On cross-examination, Dr. McGraw agreed that hepatitis C was a substantial

contributing factor in the necessity for the liver transplants that Decedent received and the doctor further agreed that hepatitis C was a substantial contributing factor to Decedent's death.

Based on the foregoing medical opinions, the WCJ found that Claimant had sustained her burden of proof that Decedent's death was due in substantial part to his work-related hepatitis C. The WCJ found that Dr. Prenatt, Dr. Kumar and Dr. McGraw all agreed that Decedent's initial need for liver transplantation and his ultimate demise were due in substantial part to his work-related hepatitis C. The WCJ found further that Claimant credibly testified that she was married to and dependent upon Decedent and that the funeral expenses were in excess of \$3,000.00.

Accordingly, the WCJ granted Claimant's fatal claim petition. The WCJ also assessed an attorney fee of \$6,000.00 against Employer based on the finding that Employer failed to establish a reasonable basis to contest the fatal claim petition.

Employer appealed the WCJ's decision to the Board. The Board reversed the WCJ's determination that Employer failed to establish a reasonable contest and affirmed the grant of the fatal claim petition. Employer now appeals the portion of the Board's order affirming the WCJ's grant of the fatal claim petition to this Court.

Herein, Employer raises the following issue for our review: whether the Board erred in failing to remand this matter to the WCJ in order for the WCJ to address the defense presented by Employer; specifically, that Decedent's consumption of alcohol following his liver transplants constituted an independent or intervening cause of his demise on March 15, 2005.

Initially, we note that this Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988).

In a fatal claim petition, the claimant must establish first that he or she is a widow or widower of the decedent in order to qualify for benefits under the Act. Cyga v. Workmen's Compensation Appeal Board (Shade Mining Company), 524 A.2d 1078 (Pa. Cmwlth. 1987). Next, the claimant must show by unequivocal medical evidence, that the deceased suffered from an occupational disease and that such disease was a substantial, contributing factor in bringing about death. Martin v. Workers' Compensation Appeal Board (Red Rose Transit Authority), 783 A.2d 384, 389 (Pa. Cmwlth. 2001), petition for allowance of appeal denied, 568 Pa. 710, 796 A.2d 988 (2002).

Herein, it is undisputed that Claimant is the widow of Decedent and that Decedent suffered from work-related hepatitis C. However, Employer argues that Decedent's resumption of alcohol consumption following his December 2003 liver transplants, in direct violation of his doctors' instructions, constituted an intervening or independent cause of Decedent's death on March 15, 2005. Employer argues that Decedent's voluntary alcohol consumption is what led to the failure of his liver and to his ultimate demise and that this intervening event extinguished its liability to pay fatal claim benefits to Claimant. In support of this

argument, Employer cites to this Court's decision in DePrimo v. Workmen's Compensation Appeal Board (Affiliated Food Distributors), 661 A.2d 37 (Pa. Cmwlth. 1995).

In DePrimo, the WCJ found that the claimant had suffered two work-related heart attacks but that a third heart attack suffered by claimant was the result of his failure to follow reasonable medical advice and take prescribed medication. As such, the WCJ denied benefits because claimant's disability after his third heart attack was not work-related. The Board affirmed.

On appeal, we held that the evidence supported the WCJ's finding that the third attack was precipitated by an independent cause. Accordingly, we held that the claimant's failure to take the prescribed medication resulted in a forfeiture of his benefits pursuant to Section 306(e)(4) of the Act, 77 P.S. §531. Section 306(e)(4) provides that an employee's "refusal of reasonable services of health care providers, surgical, medical and hospital services, treatment, medicines and supplies shall forfeit all right to benefits for any injury or increase in incapacity shown to have resulted from such refusal." 77 P.S. §531.

Employer argues that the facts of this matter are similar to the facts in DePrimo and that its defense in this matter is similar as in that case; specifically, that Decedent's voluntary consumption of alcohol, which was directly contrary to the instructions he was given by his doctors, constituted an independent and intervening cause of death. Employer contends that this issue was clearly addressed in the reports and depositions of the medical witnesses but that the WCJ simply did not address this critical issue. Therefore, Employer requests that we remand this case to the WCJ for consideration of this issue.

As pointed out by the Board, the WCJ did consider Employer's defense. In finding of fact 6, the WCJ summarizes Dr. McGraw's testimony

including the doctor's belief that there was a high probability that Decedent would still be alive if he had not resumed alcohol consumption following the liver transplantations. In the summarization of the testimony of Claimant's two medical experts, the WCJ also included those experts' opinions regarding Decedent's alcohol consumption and his death. In finding of fact 4, the WCJ summarizes Dr. Penatt's testimony including the doctor's opinion that Decedent's alcohol use was also a contributing factor in Decedent's death. In finding of fact 5, the WCJ summarizes Dr. Kumar's testimony including the doctor's opinion that Decedent's liver failure and death were not substantially contributed to by his consumption of alcohol. The WCJ also included Dr. Kumar's testimony that biopsy studies confirmed that Decedent's liver failure was due to hepatitis C as well as rejection of the transplant liver and that there were no alcohol related changes on the biopsy.

While the WCJ did not specifically make a finding that Decedent's alcohol consumption was or was not an independent and intervening cause of his death, it is clear that the WCJ did consider the role that Decedent's alcohol consumption had in Decedent's ultimate demise. Moreover, we believe our decision in DePrimo is inapplicable to this matter. As stated previously herein, Claimant's burden in this matter was to prove that Decedent's death was due in substantial part to his work-related hepatitis C. The WCJ found that Claimant sustained her burden based on the opinions of Dr. Prenatt, Dr. Kumar and Dr. McGraw, all of whom agreed that Decedent's initial need for liver transplantation and his ultimate demise were due in substantial part to his work-related hepatitis C. In other words, Decedent's death was related to hepatitis C. In DePrimo, the claimant suffered two separate work-related heart attacks but benefits were denied for his third heart attack because it was caused by the claimant's failure to take

prescribed heart medication and, therefore, unrelated to the two work-related heart attacks.

We note further that Employer does not challenge the WCJ's finding that Decedent's death was due in substantial part to his work-related hepatitis C. It is well settled that the WCJ, as fact finder, has exclusive province over questions of credibility and evidentiary weight, and the WCJ's findings will not be disturbed when they are supported by substantial competent evidence. Northeastern Hospital v. Workmen's Compensation Appeal Board (Turiano), 578 A.2d 83 (Pa. Cmwlth. 1990).

As the WCJ's decision is based upon substantial evidence, the Board's order is affirmed.

JAMES R. KELLEY, Senior Judge

