IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel DiFrancesco,	:	
Petitioner	:	
	:	
v.	:	No. 1243 C.D. 2010
	:	Submitted: November 12, 2010
Workers' Compensation Appeal	:	
Board (Sears),	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: January 4, 2011

Daniel DiFrancesco (Claimant) appeals from an order of the Workers' Compensation Appeal Board (Board) reversing in part the decision of the Workers' Compensation Judge (WCJ) which granted a 25% penalty on benefits paid from April 29, 2007, until the date of her order but affirming all other aspects of the WCJ's decision. For the reasons that follow, we reverse in part the Board's decision.

This case involves whether a claimant is entitled to penalties when an employer believes it filed a Notice Stopping Temporary Compensation Payable and Notice of Workers' Compensation Denial but the Board found it was not received by the Bureau of Workers' Compensation (Bureau) causing the Temporary

Compensation Notice to be converted to a Notice of Compensation. While the issue of the filing of the Notices or the propriety of the Notice of Compensation is no longer before us because Employer did not appeal it to this Court, we must address the underlying facts in order to arrive at the issue of penalties which Claimant has raised on appeal.

Claimant suffered a work-related back injury on January 1, 2007, while working for Sears (Employer). He continued working regular duty from January 1, 2007, through January 23, 2007. On February 16, 2007, Employer filed a Notice of Temporary Compensation Payable (NTCP) indicating the same and stating that his disability began on January 24, 2007, which the Bureau received. Claimant began receiving benefits at a weekly rate of $324. The NTCP also indicated that Claimant was released to modified-duty but Employer could not provide such work to Claimant.

Employer's insurance carrier, Sedgwick CMS, allegedly filed with the Bureau a Notice Stopping Temporary Compensation Payable (Notice Stopping) and a Notice of Workers' Compensation Denial (Notice of Denial) on April 17, 2007. However, because the Bureau purportedly did not receive those Notices within 90 days as required by Section 406.1(d)(6) of the Pennsylvania Workers' Compensation Act (Act),[1] the Bureau issued a Notice of Conversion to Compensation Payable

[1] Act of June 2, 1915, P.L. 736, *added by* Act of February 8, 1972, P.L. 25, *as amended*, 77 P.S. §717.1. Section 406.1(d)(6) of the Act dictates that if an employer does not file a Notice Stopping within the 90-day period allocated for a NTCP, that Notice automatically converts to a Notice of Compensation Payable and the employer is deemed to have admitted liability for the work injury recognized in the NTCP. *Galizia v. Workers' Compensation Appeal Board (Woodlock Pines, Inc.)*, 933 A.2d 146 (Pa. Cmwlth. 2007).

(Notice of Conversion) on May 1, 2007. Employer's insurance carrier received the Notice of Conversion, but believing it was issued in error, did not contact the Bureau.

Claimant filed a penalty petition alleging that Employer violated the Act by failing to pay and then suspending his benefits from February 28, 2007, to the present; by failing to properly file an NTCP; and by failing to timely file a Notice Stopping and a Notice of Denial with the Bureau. Claimant sought a 50% penalty for each violation.

In support of his petition, Claimant, by deposition, testified that he was injured on January 1, 2007, and only started receiving benefits on January 24, 2007. He stated that he lost time from work during those dates due to pain in his back because of the injury, and that he missed several days of work and some hours during a workday but was not compensated for that time missed. However, he could not specify the days or hours he missed. After January 24, 2007, he stated that he worked at Best Buy, Classic Temps and Labor Ready, but had not worked since June 2007. Again, he could not specify the dates on which he worked. He also stated that he received unemployment compensation beginning in July or August 2007 in the amount of $89 per week. In support of his claim, counsel for Claimant submitted into evidence the Notice of Conversion dated May 1, 2007, to indicate that the Bureau had not filed a Notice Stopping and, therefore, had accepted liability for his claim. Counsel for Claimant also submitted into evidence a letter from Suesie Hartman (Claims Examiner Hartman), Claims Examiner III for Sedgwick CMS, to Claimant dated February 28, 2007, in which she stated that a stop payment had been placed on the check issued to Claimant for the pay period from February 28, 2007, through

March 6, 2007, because Claimant was not owed the money as he had returned to work.

Counsel for Employer submitted the Notice Stopping and the Notice of Denial, both dated April 17, 2007, and submitted Claims Examiner Hartman's deposition testimony which was summed up in the Referee's finding of facts as follows:

> 8a. She works for Sedgwick as a Claims Examiner III, adjusting a workers' compensation file from beginning to end. She was the adjuster who handled Mr. DiFrancesco's claim from the beginning. She issued a Notice of Temporary Compensation Payable on February 16, 2007, pursuant to which payment began on January 24, 2007. On April 17, 2007, she issued a Notice Stopping and a Denial, and then mailed the forms from the mailroom to the Bureau with a copy to Claimant and the employer. Whenever a Bureau form is issued, it is documented in the computer log notes. She received no communication from the Bureau regarding these forms. Claimant was paid through April 28, 2007 for total payments from January 24, 2007 through April 28, 2007. She received a Notice of Conversion from the Bureau, but assumed it was issued in error.
>
> b. She did not follow up with the Bureau about the error, nor did she try to refile the Bureau documents. She can issue Bureau forms from her computer. The forms are printed out and all sent in one envelope en masse to the Bureau daily. The forms are not sent certified or return receipt requested. She put the forms into the envelope. She does not have proof that the Bureau actually received the forms. There was a stop payment made on a check for the time period 2/28 to 3/6/07 in the amount of $324.00 because she was under the impression he had returned to work, but she was later informed he had returned for a few hours so she started the checks again. Checks were issued in error on April 20 and April 27 for pay periods 4/15

through 4/28, which was after she issued the Notice Stopping.

The WCJ found Claimant's testimony credible that he suffered a work-related injury on January 1, 2007, and that he missed some days from work before January 24, 2007, but because Claimant could not specify which days he missed, the WCJ did not award compensation for any period prior to January 24, 2007. The WCJ also found Claimant credible that he received the NTCP, the Notice Stopping, the Notice of Denial and the Notice of Conversion, and that he worked at various places between January 24, 2007, and June 2007, and received unemployment compensation benefits.

Although the WCJ found Claims Examiner Hartman's testimony credible that she printed the Notice Stopping and the Notice of Denial, as well as her testimony that she put the documents into an envelope for the Bureau, the WCJ found that her testimony did not prove that the Bureau received the forms or that the forms were filed as required by Section 406.1(d)(5)(i) of the Act, 77 P.S. §717.1(d)(5)(i). "She was not able to produce evidence, such as a certificate of mailing, to show the forms were actually received by the Bureau, nor did she investigate the matter when she received the Notice of Conversion indicating the Temporary Notice converted to a Notice of Compensation Payable." (WCJ's December 26, 2008 decision at 3.)

Because she found that Employer violated the Act by failing to pay Claimant benefits after receiving the Notice of Conversion, the WCJ ordered a penalty in the amount of 25% on benefits owed to Claimant from April 29, 2007, up to the date of the order. The WCJ further ordered Employer to pay Claimant the

benefits he was owed for the check on which the stop payment was made and assessed a 50% penalty on the amount of that check because the check should have been reissued to Claimant once Employer realized Claimant had not returned to work.[2] Both parties appealed to the Board.

Employer argued that Claimant failed to meet his burden of proving that Employer violated the Act when it failed to pay benefits after receiving the Notice of Conversion or when it stopped payment on a check for Claimant's benefits because it could reasonably rely that the Notice had been filed. While the Board agreed with the WCJ's award of a 50% penalty for Employer's failure to pay benefits due for the period of February 28, 2007, through March 6, 2007, pursuant to the NTCP (when it stopped payment on Claimant's check), it did not agree with the 25% penalty from April 29, 2007, because it believed that it was not unreasonable for Claims Examiner Hartman to rely on the documents she had issued in believing that the Bureau had made an error in issuing that Notice of Conversion. Therefore, the Board determined that the WCJ's assessment of a 25% penalty on benefits due from April 29, 2007, to the date of her order was not warranted based on what she termed a unilateral suspension of Claimant's benefits.[3]

In his appeal, Claimant argued that the WCJ erred by finding that he failed to establish wage loss prior to January 24, 2007. However, the Board

[2] The WCJ ordered that Employer was entitled to a credit for wages and unemployment compensation received by Claimant since January 24, 2007.

[3] Claimant also argued that the WCJ erred by failing to award a 50% penalty for Employer's failure to pay him benefits due pursuant to the Notice of Conversion. However, based on its decision on that issue, the Board determined that Claimant was not entitled to such a penalty.

disagreed, pointing out that Claimant could not remember the dates he missed work from January 1, 2007, through January 24, 2007, and the WCJ did not err by awarding zero compensation between those dates. Claimant also argued that the WCJ erred by finding that Employer was entitled to a credit for wages and unemployment compensation received since January 24, 2007. The Board noted that Section 306(a) of the Act, 77 P.S. §511, provides that a claimant could not receive payment of total disability compensation benefits for any period during which the employe was employed or receiving wages. Further, Section 204 of the Act, 77 P.S. §71, provides that an employer was entitled to a credit against workers' compensation benefits for unemployment compensation benefits paid where it timely asserted and met its burden to prove such an entitlement. *Toy v. Workmen's Compensation Appeal Board (Alltel Pa.)*, 651 A.2d 701 (Pa. Cmwlth. 1994). This appeal by Claimant followed.[4]

Claimant first contends that the Board erred in determining that the 25% penalty imposed by the WCJ was improper and should be reversed because Employer clearly did not meet its burden under Section 406.1(d)(6) of the Act. That section provides that:

> If the employer does not file a notice under paragraph (5) within the ninety-day period during which temporary compensation is paid or payable, the employer shall be deemed to have admitted liability and the notice of

[4] Our scope of review of the Board's decision is limited to determining whether constitutional rights have been violated, whether an error of law was committed, or whether findings of fact are supported by substantial evidence. *Morella v. Workers' Compensation Appeal Board (Mayfield Foundry, Inc.)*, 935 A.2d 598 (Pa. Cmwlth. 2007).

> temporary compensation payable shall be converted to a notice of compensation payable.

Claimant argues that there is no question that Claims Examiner Hartman failed to "file" the Notice Stopping and the Notice of Denial as evidenced by the Bureau's issuance of the Notice of Conversion. We agree.

Claims Examiner Hartman admitted that she received the Notice of Conversion but believed it was in error, yet never contacted the Bureau to check if it was a mistake. She did not resubmit the Notice Stopping and the Notice of Denial. Although Employer argues that Claims Examiner Hartman reasonably believed that the Notice Stopping and the Notice of Denial were timely mailed and received by the Bureau and that the Notice of Conversion was erroneously filed by the Bureau, the WCJ found that the Notice Stopping and the Notice of Denial were never filed. Because the statute requires that the employer "file" the documents within 90 days – not that it "reasonably believes it filed the documents within 90 days," once Claims Examiner Hartman received the Notice of Conversion, it was her responsibility to contact the Bureau to determine if there had been an error. Consequently, we agree with Claimant that the Board erred by reversing the WCJ's order imposing the 25% penalty.

Claimant argues next that the Board erred by affirming the WCJ's finding and conclusion that he failed to prove his partial wage loss between January 1, 2007, through January 24, 2007, because the only issue before the WCJ was whether Employer violated the Act for its unilateral termination of benefits after it disregarded the Notice of Conversion. Claimant explains that the WCJ found that she

could not grant him compensation before January 24, 2007, because he was not specific as to what days he missed work due to his injury. However, he was only seeking relief in the form of enforcing the Notice of Conversion which required Employer to continue indemnity benefits under a converted NTCP from April 29, 2007, to the present. The issue was never raised by either party, and the WCJ exceeded her authority in making this finding (Finding of Fact No. 10) as did the Board in affirming.[5] Taking this one step further, Claimant then alleges that because he did not present precise amounts of earnings that he made from various places of employment after January 24, 2007, the WCJ either erred in not granting him the same disposition for wage loss benefits before January 24, 2007, or she erred in granting the offsets to Employer.

Although Claimant only filed a penalty petition and was not requesting that benefits be awarded from January 1, 2007, through January 24, 2007, Claimant was on notice of the issue of wage loss for those dates because his attorney raised that issue at his deposition. Claimant was also aware that Employer was seeking credit for other wages and unemployment compensation benefits because Employer's counsel questioned him about that issue on cross-examination. Section 306(a) of the Act prevents a claimant from receiving payment of total disability compensation benefits for any period during which he is employed or receiving wages, and Section 204 of the Act, 77 P.S. §71, provides that Employer is entitled to a credit against workers' compensation benefits for unemployment compensation benefits paid where it proves entitlement. Here, the WCJ found that Claimant was receiving both wages

[5] Claimant argues that this is relevant because he does not want to be collaterally estopped from pursing unpaid wage loss benefits once it is established that Employer must comply with the Notice of Conversion because the NTCP did not cover the period prior to January 24, 2007.

and unemployment compensation. Because the amount of unemployment compensation is specified and known, that amount may be credited. Because the amount of wages was never specified and is unknown, that amount cannot be credited. Consequently, that portion of the Board's order is reversed as well.

Accordingly the Board's order is affirmed in part and reversed in part in accordance with this decision.

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DAN PELLEGRINI, JUDGE

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	:	
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O R D E R

AND NOW, this 4th day of January, 2011, the order of the Workers' Compensation Appeal Board, dated May 27, 2010, at No. A09-0101, is affirmed in part and reversed in part in accordance with this decision.

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DAN PELLEGRINI, JUDGE