IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Braithwaite, Petitioner	:	
v.	:	No. 1301 C.D. 2011
	:	Submitted: October 28, 2011
Workers' Compensation Appeal Board (D. Powell, Inc.), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: December 9, 2011**

In this workers' compensation appeal, Robert Braithwaite (Claimant) asks whether a Workers' Compensation Judge (WCJ) erred in granting D. Powell, Inc.'s (Employer) petition to review and terminate benefits pursuant to Section 413(a) of the Workers' Compensation Act (Act).[1] Specifically, Claimant asserts the WCJ erred in allowing Employer to contest liability for Claimant's injuries after Employer allowed an issued temporary notice of compensation payable (TNCP) to convert to a notice of compensation payable (NCP) by operation of law, thereby admitting liability. Furthermore, Claimant contends even if permitted to set aside the NCP, Employer did not meet its burden to establish intoxication as an affirmative defense. Lastly, Claimant argues the WCJ's order does not moot his disfigurement claim petition. Upon review, we affirm.

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 771.

I. Background

Claimant worked for Employer as a steamfitter for several years. In April 2003, Claimant was injured in a single-vehicle automobile accident while driving a company van. As a result of the accident, Claimant suffered fractures to his right arm, ribs, and left ankle and foot. Thereafter, Employer timely issued a TNCP.

After issuing the TNCP, Employer investigated Claimant's injuries. Specifically, a workers' compensation insurance adjuster, Nancy J. Bauer (Bauer), met with Claimant to discuss his accident and injuries. Claimant's wife and a nurse were also present. At the meeting, held in May 2003, Claimant explained the accident occurred on his way home from a job in north Pittsburgh. Claimant also explained the accident occurred because he dropped his cell phone, and then he lost control of his van attempting to pick it up. Claimant did not inform Bauer that he was intoxicated at the time of the accident or that he had been at a bar for several hours prior to the accident.

As a result of Claimant's explanation, Bauer believed the accident occurred within the scope of Claimant's employment. Additionally, Bauer saw no reason to investigate whether alcohol played a part in the accident. As a follow-up, later that month, Bauer called Claimant to ask if he could remember the address of his last job before the accident. Claimant again stated he knew he was driving home from the north side of Pittsburgh, but did not remember the location's address. At that time, Employer allowed the TNCP to convert to an NCP by operation of law.

A month later, Bauer received information from Dave Goldberg (Goldberg) an insurance adjuster for Employer working on the vehicle liability claim resulting from Claimant's accident. Goldberg told Bauer he discovered the police issued Claimant a citation for driving under the influence (DUI) as a result of the accident. Bauer then obtained the police report detailing this information for her own records. At that time, Bauer scheduled another meeting with Claimant.

The following week, in September, Bauer met with Claimant and his wife for a second time. At the meeting, Bauer again asked Claimant where he was driving from at the time of his accident. Claimant then told Bauer he was driving from the west end of Pittsburgh. Next, she asked whether Claimant stopped at a bar on the way home. At that point, Claimant's wife interrupted Bauer and asked her where she was going with her line of questioning. Bauer informed Claimant and his wife it appeared Claimant's intoxication caused the accident. Claimant's wife then told Bauer to leave and instructed Claimant not to answer any more questions. Bauer left as requested.

After the meeting, Bauer believed alcohol played a major role in causing Claimant's accident and injuries. Shortly thereafter, and because the time for revoking the TNCP expired, Employer stopped payment of Claimant's medical bills. Additionally, Employer filed a review and termination petition based on its discovery that Claimant's intoxication caused the accident.

In response, Claimant denied the allegations, and filed a review petition alleging he sustained a disfigurement from the accident. Claimant also

filed a penalty petition citing Employer's refusal to pay benefits under the NCP. Employer denied Claimant's averments, and amended its pending petition to additionally allege Claimant was not within the course and scope of his employment at the time of the accident. A hearing ensued.[2]

At the hearing, Claimant testified that on the day of the accident, he ended his shift by dropping off equipment at the west end overlook in Pittsburgh. After dropping off the equipment, he drove to a nearby bar. Claimant further testified he drank at the bar for approximately three hours, but did not remember how many alcoholic beverages he consumed. Claimant then explained he lost control of his vehicle and crashed after he dropped his cell phone and reached to retrieve it from the floor.

In opposition, Employer presented the testimony of Bauer, related to the processing of this claim, of Lori Ann Reed (Reed), an eyewitness to the accident, and of Trooper Raymond Quiroz Jr. (Trooper Quiroz), the responding officer. Specifically, Trooper Quiroz testified Claimant was in transit to the hospital when he arrived at the scene; therefore, he did not speak to Claimant until they met at the hospital. However, at the hospital, Trooper Quiroz noted Claimant's eyes were bloodshot and glassy, and Claimant had the scent of alcoholic drinks on his breath. Upon request, Claimant consented to blood alcohol testing, which established Claimant's blood alcohol content (BAC) was 0.24.

[2] By interlocutory order prior to the hearing, a WCJ granted Employer a supersedeas. The litigation then stalled, as Claimant asserted his right against self-incrimination while this DUI charge was pending. Eventually, in October 2005, Claimant testified at a hearing and the WCJ's record was completed.

Trooper Quiroz ultimately charged Claimant with DUI. Claimant did not inform Trooper Quiroz about the role his cell phone played in the accident.

Employer also offered the testimony of Dr. Charles L. Winek, Ph.D. (Employer's Expert), a toxicologist, to describe the likely effects of Claimant's BAC on his driving. Employer's Expert testified that based on the accident reports, the medical reports, and his calculations, Claimant's BAC at the time of the accident was 0.238. Furthermore, he testified a 0.238 BAC signifies Claimant was incapable of safely operating a motor vehicle. In addition, Employer's Expert testified if Claimant reached for his cell phone on the van's floor while driving on the highway it would be exactly the kind of risk-taking behavior expected from an intoxicated driver. Thus, Employer's Expert concluded the accident was causally related to Claimant's loss of his sensory, motor, and judgment functions resulting from intoxication.

Claimant's Expert, Dr. Michael A. Zemaitis, Ph.D. (Claimant's Expert), agreed with Employer's Expert that Claimant's BAC was approximately 0.24 at the time of the accident, and that he was incapable of safely operating a motor vehicle. However, Claimant's Expert could not say with scientific certainty whether alcohol alone caused the accident because, in his opinion, Claimant's behavior with his cell phone may have been the cause.

Ultimately, the WCJ granted Employer's petition and set aside the NCP. Specifically, the WCJ accepted the testimony of Claimant, Bauer, Reed, and Trooper Quiroz as credible. Additionally, the WCJ found Employer's Expert more

credible than Claimant's Expert. Furthermore, the WCJ was persuaded by Employer's Expert's explanation that to the extent Claimant's reaching for the cell phone contributed to causing his accident, it was the sort of risk-taking behavior caused and made worse by intoxication. Therefore, the WCJ reasoned Claimant's intoxication caused the accident and the resulting injuries; thus, Claimant was ineligible for benefits.

The WCJ then reasoned that setting aside the NCP mooted Claimant's disfigurement claim; therefore, it was denied. Additionally, the WCJ granted Claimant's penalty petition based on Employer's unilateral cessation of payments for Claimant's medical bills.[3] Both parties appealed their respective issues to the Workers' Compensation Appeal Board (Board).

On appeal, Board affirmed the WCJ's decision. Claimant now appeals to this Court.[4]

II. Issues

Claimant argues the WCJ and Board erred in granting Employer's petition, and setting aside the NCP. Claimant argues Employer cannot challenge

[3] The WCJ granted a penalty in the amount of 50% of Claimant's unpaid medical bills, which Employer had not paid in violation of the Act. Additionally, the WCJ imposed counsel fees against Employer for unreasonably contesting Claimant's penalty petition.

[4] This Court's review is limited to determining whether there was a violation of constitutional rights, an error of law committed, or a violation of Board procedures, and whether necessary findings of fact were supported by substantial evidence. Lehigh Cnty. Vo. Tech Sch. v. Workers' Comp. Appeal Bd. (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

whether Claimant's injuries are work-related in a review or termination petition, because it admitted the injuries are work-related by allowing the TNCP to convert to an NCP. Additionally, Claimant contends Employer did not carry its burden to establish intoxication caused Claimant's accident. Lastly, Claimant argues the WCJ's order did not moot his disfigurement claim petition.

III. Analysis

A. Employer's Ability to Challenge the NCP

Section 413 of the Act states, "[a] [WCJ] may, at any time, review and modify or set aside [an NCP] … if … such [NCP] … was in any material respect incorrect." 77 P.S. §771. In conjunction, Section 406.1 of the Act[5] permits an employer to issue a TNCP where the employer is uncertain about a claimant's injuries and seeks to investigate before assuming liability by issuing an NCP. 77 P.S. §717.1(d)(1). In enacting Section 406.1 of the Act, the legislature did not eliminate or modify Section 413; therefore, it remains applicable for remedying an employer's material mistake. Mahon v. Workers' Comp. Appeal Bd. (Expert Window Cleaning), 835 A.2d 420 (Pa. Cmwlth. 2003) (en banc).

In seeking to modify an NCP, the burden is on a petitioner to prove it made a material mistake of law or fact in issuing the NCP. Waugh v. Workmen's Comp. Appeal Bd. (Blue Grass Steel), 558 Pa. 400, 737 A.2d 733 (1999). Taken together, in Beissel v. Workmen's Compensation Appeal Board (John Wanamaker, Inc.), 502 Pa. 178, 465 A.2d 969 (1983), and Barna v. Workmen's Compensation Appeal Board (Jones and Laughlin Steel Corporation), 513 Pa. 518, 522 A.2d 22

[5] Act of July 2, 1993, P.L. 190 as amended, 77 P.S. §717.1.

(1987), our Supreme Court explained an employer may set aside an NCP on the basis of material mistake in limited circumstances. Specifically, an employer may set aside an NCP if it did not have the opportunity to fully investigate a claim, but nevertheless issued an NCP, and quickly acted to remedy the discovered error. Waugh.

Since Beissel and Barna, our Supreme Court expanded the circumstances in which an NCP may be set aside. Specifically, under Section 413 of the Act, an employer may challenge a material mistake, which is related to an employee's eligibility for benefits, if the employee's concealment of evidence caused the mistake. Id.; Phillips v. Workmen's Comp. Appeal Bd. (Edgar Const. Co.), 519 Pa. 31, 545 A.2d 869 (1988) (plurality opinion). More recently, this Court in Mahon, applied Barna and its progeny, and permitted an employer to challenge an NCP based on a material mistake where the claimant was not forthcoming with the information rendering him ineligible for benefits.

In Mahon, the employer's mistake related to whether an employee's injury was work-related or whether it resulted from his intoxication. Specifically, the purported work-related injury occurred when the employee fell off a ladder after coming to work intoxicated. After the fall, the employer conducted an investigation, and found no indication the employee was intoxicated at the time of the fall. To that point, the employer took and relied on the employee's description of the accident, in which the employee did not mention he was intoxicated when he fell. Therefore, believing the injury occurred in the scope and course of employment, and concluding it did not need to further investigate, the employer

issued an NCP. However, the employer later discovered the employee was intoxicated when he fell; therefore, it petitioned to set aside the NCP.

This Court, relying on Barna, held the employer was not estopped from challenging whether the injury was work related as employer previously admitted by issuing the NCP. Mahon. Specifically, because the employer relied in good faith on the employee's misleading statements, had no reason to investigate whether the employee was intoxicated at the time of the accident, despite being able to do so, and acted promptly upon discovering its mistake, the employer was permitted to challenge whether the injury was work related. Id.; Barna. But cf. Cnty. of Schuylkill v. Workmen's Comp. Appeal Bd. (Lawlor), 617 A.2d 46 (Pa. Cmwlth. 1992) (barring a challenge to an NCP where employer could have further investigated the claim and was not misled by the claimant).

Here, Claimant contends, under our Supreme Court's holdings in Barna and Beissel, Employer cannot set aside the NCP because Employer had access to all the information necessary to make an informed decision, yet admitted liability by permitting the TNCP to convert to an NCP. However, Barna and Beissel are factually distinguishable, as neither involved a claimant's attempt to mislead his employer in order to receive benefits. Rather, Claimant's appeal presents facts and issues more similar to those considered in Waugh and Mahon.

Much like the employee in Mahon, Claimant was injured, and Employer initially suspected the injury was work-related. Additionally, during its investigation, Employer obtained two separate statements from Claimant in which

Claimant did not indicate he was intoxicated at the time of the injury. See id. To the contrary, Claimant told Employer he was driving home from a job on the north side of Pittsburgh when he lost control of his vehicle in an attempt to retrieve his cell phone. As a result of Claimant's conduct, Employer had no indication Claimant was possibly intoxicated at the time of the accident, and thus, did not request documentation on the issue. See id. at 425 ("[W]here an injury reasonably appears to be the direct result of a work accident, and no apparent exclusions apply … an employer … acts reasonably in assuming that there is no uncertainty as to the cause and effect.").

It is well understood, "a court must be mindful that the [Act] imposes a duty upon an employer … to promptly commence payment of benefits..." Waugh, 558 Pa. at 405, 737 A.2d at 736. Here, Employer, after an investigation, which included two conversations with Claimant, concluded the accident and injuries were work-related. Therefore, seeing no apparent applicable exclusion, such as intoxication, Employer allowed the TNCP to convert to an NCP by operation of law. However, Claimant misled Employer to believe he was eligible for benefits; therefore, Employer is permitted to remedy its mistake by a collateral challenge to the NCP. See Mahon; Waugh. Furthermore, despite the need for finality, it is an absurd reading of the Act to preclude such a remedy under Section 413 where fraud and the like are involved. Mahon; Waugh. Therefore, because Claimant made material misrepresentations to Employer, which Employer relied on by limiting its investigation, Employer is permitted to set aside the NCP. See id. Accordingly, Claimant's argument is meritless.

B. Intoxication

Section 301(a) of the Act provides, "no compensation shall be paid when the injury … would not have occurred but for the employe's intoxication. [6] The issue of intoxication must be raised by an employer as an affirmative defense; therefore, the employer has the burden of proof. Mahon. In order to establish the defense, an employer must prove the employee was intoxicated, and the intoxication caused the injury. Id. Because this Court interprets the term "but for" in the Act to have the same meaning it does in negligence actions, an employer's duty is to show by competent and substantial evidence that a claimant would not have been injured had he not been intoxicated. Lindstrom Co., Inc. v. Workers' Comp. Appeal Bd. (Braun), 992 A.2d 961 (Pa. Cmwlth. 2010); Mahon (comparing "but-for" causation to proximate cause).

Here, Employer's Expert and Claimant's Expert agreed Claimant's BAC was 0.238 at the time of the accident, and Claimant was incapable of safely operating a motor vehicle. WCJ Op., 6/30/08, at Findings of Fact (F.F.) Nos. 14(i), 15(e)-(g). The two experts differed as to whether causation existed between Claimant's intoxication and the accident. However, the WCJ credited Employer's Expert's testimony over the testimony of Claimant's Expert where they differed. See Canavan v. Workers' Comp. Appeal Bd. (B &D Mining Co.), 769 A.2d 1250 (Pa. Cmwlth. 2001) (credibility determinations are within the province of the WCJ). To that point, the WCJ found persuasive Employer's Expert's explanation that Claimant's cell phone episode was the type of risk-taking behavior expected

[6] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §431.

from someone who is intoxicated, and thus, part of the causation stemming from his intoxication. F.F. No. 21.

Nevertheless, Claimant contends the WCJ mischaracterized Employer's Expert's testimony. Claimant argues Employer's Expert did not unequivocally testify Claimant's intoxication caused or compounded his misjudgments related to picking up his cell phone. Specifically, Claimant points to the following portion of Employer's Expert's testimony during cross-examination:

> Q. Could [dropping a cell phone and reaching to pick it up while driving] in and of itself cause the accident that happened in this case?
>
> A. If I ignored the alcohol, I would say yes. Because accidents happen when people are on cell phones …. It is a distraction. So he had two distractions. One, his normal sober judgment was removed, and two, he was using a cell phone that he said he dropped and went to pick it up.

Reproduced Record (R.R.) at 426a-27a.

Claimant asserts this testimony undermines Employer's Expert conclusion regarding causation. However, Employer's Expert clearly and decisively testified that deciding to reach for a cell phone on the van's floor was a matter of judgment, and Claimant's judgment was severely impacted by his intoxication. Specifically, Employer's Expert testified:

> Q. ….but isn't that action regarding the cell phone in and of itself a reason which would cause someone to lose control of their vehicle such as what happened here?

…

A. It is a detraction [sic]. And I would think in this situation, particularly on an interstate, that it is more related to the alcohol that the accident occurs because you reach for it, you reach for a cell phone, that's a risk-taking action caused by alcohol, and certainly an accident can occur with somebody even talking on a telephone and paying more attention to that than why are to driving. … But that does not negate that this guy is significantly intoxicated. That's my point.

R.R. at 423a-24a (emphasis added).

Therefore, constrained to the facts of this case, Employer's Expert unequivocally testified Claimant's intoxication caused the accident. Moreover, to the extent Claimant's behavior with his cell phone contributed to the accident, Employer's Expert credibly testified Claimant's ill-advised behavior was caused and amplified by his intoxication. Additionally, Employer does not have the burden to prove no other condition contributed to the injuries, only to prove but for Claimant's intoxication the injuries would not have occurred. See Mahon. Thus, because Employer offered substantial competent evidence intoxication caused Claimant's injuries, Employer satisfied its burden of proof to set aside the NCP and render it a nullity. Accordingly, Claimant's argument is meritless.

C. Claimant's Disfigurement Petition

As a final point, Claimant asserts he is entitled to a disfigurement award regardless of whether the underlying NCP is set aside. Claimant contends Employer is obligated to pay compensation under an NCP until a WCJ's final order terminates that obligation. Therefore, according to Claimant, the

compensation owed to him includes a disfigurement award stemming from the NCP, even if the award is requested after the NCP is set aside as improperly issued.

It is well established, an employer may not unilaterally refuse to pay benefits after issuing an NCP. Loose v. Workmen's Comp. Appeal Bd. (John H. Smith Arco Station), 601 A.2d 491 (Pa. Cmwlth. 1991). However, contrary to Claimant's contention, no such principle allows a claimant to modify or augment his recovery under a vacated NCP. Here, prior to the consideration of Claimant's disfigurement claim petition, the WCJ set aside the underlying NCP rendering it a nullity and placing the parties back to their initial positions before the NCP existed. See Phillips. Therefore, Claimant's argument is meritless as his petition is moot.

Accordingly, we affirm.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Braithwaite, Petitioner	:	
v.	:	No. 1301 C.D. 2011
Workers' Compensation Appeal Board (D. Powell, Inc.), Respondent	:	

O R D E R

AND NOW, this 9th day of December, 2011, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge