IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steven Nord, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Adelphia/Comcast), Respondent	:	No. 1371 C.D. 2009
	:	Submitted: December 24, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: February 9, 2010

Steven Nord (Claimant) petitions for review of the June 22, 2009 decision and order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) denying benefits pursuant to Section 311 of the Workers' Compensation Act (Act).[1] The issue before this Court is whether the Board erred in affirming the WCJ's decision that Claimant did not provide timely notice of his work-related injury to Adelphia/Comcast (Employer). For the reasons that follow, we affirm the decision of the Board.

Claimant worked as a maintenance technician for Employer until February 19, 2007.[2] On February 19, 2007, Claimant requested time off from

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 631.

[2] Claimant worked for Adelphia since March of 1995. In 2006, Comcast bought Adelphia, and Claimant continued his employment with Comcast until February of 2007.

February 20 through February 23, 2007, to attend several doctors' appointments related to heart problems. Claimant completed and signed an absence request form indicating that he was requesting time off for "medical/health issues from heart problem." Claimant did not return to work after his leave expired, but he filed for family medical leave, and received short-term and long-term disability benefits. On August 31, 2007, Claimant called Robert E. Padasak (Padasak), Comcast's human resources director for Claimant's region, in order to file for workers' compensation benefits.

On December 17, 2007, Claimant filed a claim petition alleging he sustained a cumulative trauma injury involving his hands, back, neck, and spine as a result of repetitively using his upper extremities while working for Employer. Employer denied that Claimant sustained a work-related injury. Hearings were held before the WCJ at which Claimant testified on his own behalf, and Employer presented the testimony of Padasak and Joel Ritenour, Claimant's supervisor. The WCJ issued a decision and order on October 17, 2008 denying the claim petition on the basis that Claimant failed to provide timely notice of a work-related injury. Claimant appealed to the Board. On June 22, 2009, the Board issued an order affirming the decision of the WCJ. Claimant appealed to this Court.[3]

Section 311 of the Act states:

> Unless the employer shall have knowledge of the occurrence of the injury, or unless the employe . . . shall give notice thereof to the employer within twenty-one days after the injury, no compensation shall be due until such

[3] The Court's review of the Board's order is limited to determining whether Claimant's constitutional rights have been violated, whether an error of law has been committed or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; *Visteon Sys. v. Workers' Comp. Appeal Bd. (Steglik)*, 938 A.2d 547 (Pa. Cmwlth. 2007).

> notice be given, and, unless such notice be given within one hundred and twenty days after the occurrence of the injury, no compensation shall be allowed. However, in cases of injury resulting from . . . any other cause in which the nature of the injury or its relationship to the employment is not known to the employe, the time for giving notice shall not begin to run until the employe knows, or by the exercise of reasonable diligence should know, of the existence of the injury and its possible relationship to his employment.

It is crucial to note that, "[w]hether an employee has complied with these notice requirements is a question of fact to be determined by the WCJ." *Scher v. Workers' Comp. Appeal Bd. (City of Phila.)*, 740 A.2d 741, 749 (Pa. Cmwlth. 1999). Moreover, the prevailing party below, is entitled to the benefit of all reasonable inferences from the record and to have the record read in the light most favorable to it. *Kerr v. Pennsylvania State Bd. of Dentistry*, 599 Pa. 107, 121, 960 A.2d 427, 435 (2008) (citing *Sell v. Workers' Compensation Appeal Bd. (LNP Eng'g)*, 565 Pa. 114, 122-23, 771 A.2d 1246, 1250-51 (2001)).

The WCJ, in the instant case, found that Claimant's testimony concerning what he told his supervisor about the cause of his claimed injuries was not persuasive. Reproduced Record (R.R.) at 27a. The WCJ made the factual finding, affirmed by the Board, that Claimant did not tell his supervisor that his medical problems were work-related until August of 2007. R.R. at 31a. Specifically, the WCJ focused on Claimant's testimony: (1) that he told his supervisor about the problems he was having, *i.e.*, losing his grip, dropping his coffee cup, heart palpitations, tightness in his chest; (2) that Claimant requested time off in February of 2007 for testing related to a heart condition; and (3) that Claimant believed his supervisor should have known that these problems were work-related because of his work schedule. R.R. at 27a-30a.

Claimant relies on *Sell v. Workers' Compensation Appeal Board* to support his contention that, since he had a repetitive trauma injury, the WCJ should have used the "discovery rule"[4] to determine whether he provided timely notice. Utilizing the discovery rule, however, the Board affirmed the determination that Claimant did not provide timely notice, because Claimant did not provide notice within 120 days of the date that Claimant knew or should have known of his injury and believed it to be work-related. The Board noted that Claimant believed in February of 2007 that his problems were related to his work duties, and did not notify Employer until August of 2007 because he assumed that Employer should have known. R.R. at 48a-49a. We disagree with Claimant's argument that *Sell* compels a different result.

In *Sell*, the claimant was a smoker who suffered from sore throats, coughing, tightness in her chest, a runny nose, yearly bouts of bronchitis and, eventually in 1992, double pneumonia. Sell was regularly exposed to fumes and dust from the processing of chemicals, including formaldehyde, at work. She noticed that during the work week, her energy level decreased and her respiratory problems increased. She, thus, mentioned to her co-workers that she thought her health problems may be related to her job, but, lacking proof, she never mentioned anything to her supervisor. After experiencing difficulty breathing and being admitted to the hospital in November of 1992, the claimant was told that she had emphysema, but the

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[4] The "discovery rule" is the term given to the portion of Section 311 of the Act which provides that:

> the 120-day notice period . . . does not begin to run in cases in which the nature of the injury or its causal connection to work is not known, until an employee knows or by the exercise of reasonable diligence, has reason to know of the injury and its possible relationship to her employment.

Sell, 565 Pa. at 123, 771 A.2d at 1251.

cause of her problems was never discussed. The claimant did not return to work after her hospitalization, but went in search of a doctor who had knowledge of the effects of the chemicals and dust she was exposed to at work. In August of 1993, a physician determined that her exposure to formaldehyde exacerbated her illness, and agreed that she could return to work as long as she had limited exposure to formaldehyde.

In that case, the WCJ found, and the Board affirmed, that the claimant's notice was timely under the discovery rule because prior to receiving a medical diagnosis on the issue, she did not know or have reason to know that her condition was connected to her job. Reviewing the matter, the Supreme Court of Pennsylvania affirmed, explaining that: "the discovery rule . . . calls for more than an employee's suspicion, intuition or belief . . . the statute's notice period is triggered only by an employee's knowledge that she is injured and that her injury is possibly related to her job." *Sell*, 565 Pa. at 126, 771 A.2d at 1253.

Relying on *Sell*, Claimant argues that his belief alone that his injury was work-related was not enough to find that he did not give timely notice. Instead, he contends that he needed a doctor's determination that his injury was work-related, and hence, under his interpretation of the discovery rule, his August of 2007 notice to Employer was timely.

Claimant's reliance on *Sell* is misplaced. We note that *Sell* does not hold that a doctor's notice is an absolute pre-requisite to the duty to notify an employer of a known injury in all repetitive trauma injury cases under the discovery rule. On the contrary, the Supreme Court in *Sell* was careful to note that the notice period is triggered when the employee knows "that her injury is *possibly* related to her job." *Id*. (emphasis added). Given the WCJ's finding that the claimant had no reason to

know that her injury was possibly related to her job, the Supreme Court noted that the nature *and* context of the claimant's injury were central to its decision to affirm the WCJ.

We conclude that *Sell* is quite distinguishable from the present case. Obviously, each case involves the determination of whether substantial evidence supports a factual finding as to whether each respective employer was given timely notice under the applicable discovery rule. However, in *Sell*, the fact finder made the factual determination that the employer *was* given timely notice in light of the factual scenario presented; and in the instant case, the fact finder made the factual determination that Employer *was not* given timely notice in light of a completely different set of facts. Thus, between the two cases, the same legal standard and the same standard of review are applied to opposite results based on differing sets of facts. Here, Claimant's testimony indicates that, in February of 2007, when he requested time off for testing, he believed his injury was work-related; therefore, he knew that his injury was "possibly work related." *Id*. Tellingly, Claimant testified that he believed that his supervisor should have known his problems were work-related at that point, based on his symptoms and work schedule. R.R. 123a-126a. Claimant cannot state that Employer should have known of the work-relatedness, and then claim that he did not know of the same work-relatedness, or at least the possibility thereof. Furthermore, the discovery rule is not based on what *Employer* should have known, but whether Claimant gave timely notice based on what Claimant knew, or should have known. Claimant believed his problems were work-related, sought treatment for his problems, and failed to inform Employer at that time assuming his supervisor knew or should have known. R.R. 27a-31a. Clearly, there is substantial evidence to support the WCJ's determination in this case.

The Board committed no error in upholding the WCJ's determination. Thus, we affirm the decision of the Board.

JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 9th day of February, 2010, the June 22, 2009 order of the Workers' Compensation Appeal Board is affirmed.

JOHNNY J. BUTLER, Judge