

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pilgrim's Pride Corporation, :
 Petitioner :
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 : : No. 1413 C.D. 2010
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 : :
 : : Submitted: November 24, 2010
v. : :
Workers' Compensation : :
Appeal Board (Santos), : :
 Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE PATRICIA A. McCULLOUGH, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: March 1, 2011

Pilgrim’s Pride Corporation (Employer) petitions for review of an order of the Workers’ Compensation Appeal Board (Board), which affirmed the decision of a workers’ compensation judge (WCJ) denying Employer’s Termination Petition and granting the Reinstatement and Penalty Petitions filed by Aurea Santos (Claimant). We affirm.

The facts of this case are as follows. On October 17, 2007, Claimant sustained a work-related injury, which was described as a right gluteal contusion. Employer accepted liability for Claimant’s injury for medical treatment only by way of a Notice of Compensation Payable (NCP) issued on January 4, 2008.

On April 10, 2008, Employer filed a Termination Petition alleging that as of February 25, 2008, Claimant was fully recovered from her injury. On July 2,

2008, Claimant filed a Reinstatement Petition alleging that her injury worsened causing a decrease in earning power. On October 6, 2008, Claimant filed a Penalty Petition seeking a 20% penalty of past due compensation on the basis that Employer failed to investigate and accept Claimant's work injury in a timely fashion.

Following a hearing, the WCJ found that Claimant had not fully recovered, but that her condition worsened in May 2008. The WCJ further found that Employer violated the Workers' Compensation Act (Act)¹ by its failure to issue a Notice of Denial or accept the work-related injury with twenty-one days of the injury. By decision dated June 8, 2010, the WCJ denied Employer's Termination Petition and granted Claimant's Reinstatement and Penalty Petitions. Employer appealed the WCJ's order to the Board, which affirmed.²

Employer now petitions this Court for review of the Board's order.³ Employer contends that the WCJ abused his discretion in awarding Claimant a 20% penalty given the circumstances of the case. We disagree.

Pursuant to Section 435 of the Act, 77 P.S. §991,⁴ a WCJ shall have the power to impose a penalty where there is a violation of the Act or the rules and regulations issued pursuant to the Act. "Employers and insurers may be penalized a

¹ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 - 1041.4, 2501-2708.

² The Board's decision was not unanimous. Commissioner Frioni filed a dissenting opinion wherein he stated that he was unable to conclude that Employer's violation of the Act in this particular matter justified a 20% penalty on all past due benefits.

³ This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, whether errors of law have been committed, whether there has been 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, 642 A.2d 797 (1995).

⁴ Added by the Act of February 8, 1972, P.L. 25.

sum not exceeding ten per centum of the amount awarded and interest accrued and payable: Provided, however, That such penalty may be increased to fifty per centum in cases of unreasonable or excessive delays.” Section 435(d)(i) of the Act, 77 P.S. §991(d)(i). “Such penalty shall be payable to the same persons to whom the compensation is payable.” Id.

In seeking a penalty, Claimant bears the initial burden of proving a violation of the Act. Sanders v. Workers' Compensation Appeal Board (Marriott Corporation), 756 A.2d 129 (Pa. Cmwlth. 2000); Shuster v. Workers' Compensation Appeal Board (Pennsylvania Human Relations Commission), 745 A.2d 1282 (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 566 Pa. 654, 781 A.2d 151 (2001). Thereafter, the burden shifts to the employer to prove that a violation of the Act had not occurred. Shuster, 745 A.2d at 1288.

The imposition of a penalty and the amount of the penalty to be imposed are left to the sound discretion of the WCJ. Brutico v. Workers' Compensation Appeal Board (US Airways, Inc.), 866 A.2d 1152 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 584 Pa. 679, 880 A.2d 1240 (2005); McLaughlin v. Workers' Compensation Appeal Board (St. Francis Country House), 808 A.2d 285, 288 (Pa. Cmwlth. 2002). The WCJ's decision to impose a penalty will not be overturned on appeal absent an abuse of discretion. McLaughlin; Department of Public Welfare v. Workers' Compensation Appeal Board (Overton), 783 A.2d 358 (Pa. Cmwlth. 2001), petition for allowance of appeal denied, 573 Pa. 717, 828 A.2d 351 (2003). "An abuse of discretion is not merely an error of judgment but occurs ... when the law is misapplied in reaching a conclusion." Westinghouse Electric

Corporation v. Workers' Compensation Appeal Board (Weaver), 823 A.2d 209, 213-214 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 581 Pa. 694, 864 A.2d 531 (2004).

An employer violates Section 406.1 of the Act⁵ if it fails to issue an NCP, a notice of compensation denial (NCD), or a notice of temporary compensation payable (NTCP) within twenty-one days of receiving notice of a work-related injury. Coyne v. Workers' Compensation Appeal Board (Villanova University), 942 A.2d 939 (Pa. Cmwlth.), petition for allowance of appeal denied, 599 Pa. 683, 960 A.2d 457 (2008); Johnstown Housing Authority v. Workers' Compensation Appeal Board (Lewis), 865 A.2d 999 (Pa. Cmwlth. 2005). The 21 days an employer has to file one of these documents is calculated from the date it is notified of the claimant's injury,

⁵ Section 406.1 was added by the act of February 8, 1972, P.L. 25, 77 P.S. §717.1, and provides, in relevant part:

(a) The employer and insurer shall promptly investigate each injury reported or known to the employer and shall proceed promptly to commence the payment of compensation due either pursuant to an agreement upon the compensation payable or a notice of compensation payable as provided in section 407 or pursuant to a notice of temporary compensation payable as set forth in subsection (d), on forms prescribed by the department and furnished by the insurer. The first installment of compensation shall be paid not later than the twenty-first day after the employer has notice or knowledge of the employe's disability. Interest shall accrue on all due and unpaid compensation at the rate of ten per centum per annum. Any payment of compensation prior or subsequent to an agreement or notice of compensation payable or a notice of temporary compensation payable or greater in amount than provided therein shall, to the extent of the amount of such payment or payments, discharge the liability of the employer with respect to such case.

77 P.S. §717.1(a).

not the date the claimant actually begins experiencing an earnings loss. Brutico, 866 A.2d at 1155.

Here, Employer concedes that it violated Section 406.1 of the Act by not issuing an NCP, NCD or NTCP within 21 days of being notified of the injury. Claimant was injured on October 17, 2007 and notified the Employer the next day (Reproduced Record at 19a), but Employer did not file an NCP until January 4, 2008. Employer asserts that its delay was merely a technical violation in this case because the NCP was in place for more than five months before Claimant was rendered disabled by the work injury and more than five months before she ever lost a day of work as a result of the injury; Claimant suffered no pecuniary harm or prejudice from the delay. Employer offered no explanation for its delay. Although Claimant may not have suffered any economic harm or prejudice as a result of the delay, the purpose of the penalty is to ensure adherence to the rules and discourage, through financial means, violations of the rules. Palmer v. Workers' Compensation Appeal Board (City of Philadelphia), 850 A.2d 72 (Pa. Cmwlth. 2004). As discussed above, the imposition of a penalty is within the sole discretion of the WCJ. McLaughlin. Absent an abuse of that discretion, it will not be overturned on appeal. See id. We see no abuse of discretion to warrant a reversal of the penalty award in this case.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

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ORDER

AND NOW, this 1st day of March, 2011, the order of the Workers' Compensation Appeal Board, at A09-0618, dated June 17, 2010, is AFFIRMED.

JAMES R. KELLEY, Senior Judge