

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christopher Ochal, :
Petitioner :
v. :
Workers' Compensation Appeal :
Board (NRG Roofing), : No. 1781 C.D. 2009
Respondent : Submitted: December 31, 2009

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: February 22, 2010

Christopher Ochal (Claimant) petitions for review from the order of the Workers' Compensation Appeal Board (Board) which affirmed the Workers' Compensation Judge's denial of Claimant's review petition.

Claimant worked as a roofer for NRG Roofing (Employer). He sustained a work-related torn meniscus of the right knee on March 24, 2004. Employer issued a notice of compensation payable (NCP) on April 4, 2004. Pursuant to the NCP, Claimant earned weekly compensation of \$566.48 based on an average weekly wage of \$849.73. Claimant returned to work on August 2, 2004. He executed a final receipt on August 5, 2004. Employer suspended benefits as of August 6, 2004. Claimant returned an amount equal to four days of benefits which represented the amount of benefits that he believed he was overpaid.

In April 2007, Claimant became aware that his average weekly wage on the NCP might have been lower than it actually was. He contacted Ed Lovenwirth (Lovenwirth), adjustor for Employer's insurance company, and submitted tax returns which he maintained established a higher average weekly wage. Employer did not change the average weekly wage or the weekly benefit rate. On January 8, 2008, Claimant petitioned to review the NCP and alleged that his average weekly wage was \$944.00 not \$849.73. If Claimant was correct, he was entitled to \$629.36 in weekly compensation benefits rather than \$566.48.

Claimant testified by deposition that his W-2 form for 2003 from Employer indicated that he earned \$14,499, rather than the \$14,290 figure used to calculate his average weekly wage. Deposition of Christopher Ochal, March 31, 2008, (Ochal Deposition) at 6; Reproduced Record (R.R.) at 10a. He also believed that he earned \$13,475 in 2004 based on his W-2. Ochal Deposition at 9; R.R. at 13a. Claimant communicated with Lovenwirth concerning a higher weekly wage but "he wasn't very helpful at all." Ochal Deposition at 11; R.R. at 15a. Claimant introduced his tax returns into evidence.

Employer presented the deposition testimony of Lovenwirth, investigator for the State Workmen's Insurance Fund, regarding the calculation of Claimant's average weekly wage.

The WCJ denied and dismissed the review petition. The WCJ concluded that the review petition was barred by the statute of limitations based on the following finding of fact:

12. The testimony of Claimant does nothing to alter the fact that Claimant was last paid compensation in August 2004, and the fact that the Review Petition was not filed until January 8, 2008.

WCJ's Decision, November 17, 2008, Finding of Fact No. 12 at 3; R.R. at 79a.

On appeal, the Board affirmed.

Claimant contends that the Board erred when it affirmed the WCJ's denial of his review petition.¹ Claimant argues that because his benefits were suspended he had five hundred weeks to seek reinstatement or file a review petition to challenge the compensation rate. Because benefits were suspended on August 6, 2004, Claimant asserts that his review petition filed January 8, 2008, was timely filed.

Section 413(a) of the Workers' Compensation Act (Act)², which is contained in more than one paragraph, provides in pertinent part:

A workers' compensation judge may, at any time, review and modify or set aside a notice of compensation payable and an original or supplemental agreement or upon petition filed by either party with the department, or in the courses of the proceedings under any petition pending before such workers' compensation judge, if it be proved that such notice of compensation payable was in any material respect incorrect.

77 P.S. §771.

....

¹ This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

² Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§771-772.

A workers' compensation judge designated by the department may at any time, modify, reinstate, suspend, or terminate a notice of compensation payable . . . upon petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased, or that the status of any dependent has changed *Provided, That, except in the case of eye injuries, no notice of compensation payable, agreement or award shall be reviewed, or modified, or reinstated, unless a petition is filed with the department within three years after the date of the most recent payment of compensation made prior to the filing of such petition. . . . And provided further, That where compensation has been suspended because the employe's earnings are equal to or in excess of his wages prior to the injury that payments under the agreement or award may be resumed at any time during the period for which compensation for partial disability is payable, unless it be shown that the loss in earnings does not result from the disability due to injury.* (Emphasis added)

77 P.S. §772.

Claimant asserts that pursuant to the latter part of Section 413(a), because his benefits were suspended, the NCP may be amended during the five hundred week period that limits partial disability payments under Section 306(b)(1) of the Act, 77 P.S. §512.

This Court addressed a similar issue in Kelly v. Workers' Compensation Appeal Board (Standard Steel), 919 A.2d 321 (Pa. Cmwlth. 2007). In Kelly, Brian Kelly (Kelly) had sustained a work related right elbow strain on June 18, 1991. Standard Steel (Standard), Kelly's employer, issued a notice of compensation payable. Standard and Kelly executed a third supplemental agreement which suspended benefits as of June 16, 1997, because Kelly worked at a job where he consistently earned more than his average weekly wage. On March 19, 2004, Kelly filed a review petition and

alleged that he sustained a serious, permanent, noticeable, and disfiguring scar as the direct result of neck surgery on February 5, 1993, which was related to the work-related injury. In addition Kelly filed a claim petition and sought to expand the description of his injury to include a neck injury and two penalty petitions in which he alleged that Standard failed to properly accept the disfigurement and neck injury claims. Kelly, 919 A.2d at 322.

Before the Workers' Compensation Judge, the parties stipulated that the notice of compensation payable was amended to include the neck injury and that the disfigurement was the result of surgery related to the neck injury. The parties further agreed that the scar became permanent as of August 5, 1993, and had not changed. The Workers' Compensation Judge determined that the claim petition and the two penalty petitions were resolved by the stipulation. The Workers' Compensation Judge denied the review petition because it was not filed within three years from the date upon which the scar became permanent, August 5, 1993. The Workers' Compensation Appeal Board affirmed because the injuries which resulted from the original injury represented an increased disability such that a review petition had to be filed within three years of the date of the most recent compensation as provided in Section 413(a) of the Act. The Board reasoned that because benefits were suspended on June 16, 1997, the review petition of March 19, 2004, was time-barred. Kelly, 919 A.2d at 324.

Kelly petitioned for review with this Court which affirmed:

Claimant [Kelly] agreed in the Stipulation that his scar became permanent as of August 5, 1993 and that it has remained unchanged since that time. The attempt here is to add Claimant's [Kelly] scar arising as a direct result of a work injury for which Employer's [Standard] liability has been

established. . . . Claimant's [Kelly] claim under Section 306(c)(22) of the Act must be decided pursuant to Section 413(a), which provides for a three-year period within which to file a review petition. Claimant's [Kelly] review petition was not filed until March 19, 2004, over ten years after the scar became permanent and almost seven years after the last payment of compensation made June 16, 1997.

Kelly, 919 A.2d at 326.

Here, as in Kelly, Claimant sought the amendment of the NCP to increase his benefits. As in Kelly, Claimant filed the review petition more than three years from the date that he last received benefits. Claimant argues that because he could seek a reinstatement of benefits for up to five hundred weeks after benefits were suspended under Section 306(b) of the Act, 77 P.S. §512, he also has five hundred weeks to amend the NCP. It is worth noting that Kelly filed his review petition within the five hundred week period during which Claimant argues he may timely file a review petition. Whether this issue was raised in Kelly is unclear. However, this Court affirmed the Board's determination that Kelly had three years to file the review petition. Further, Claimant cites no case law to support his position that the time limitation for a reinstatement of benefits applies to the review of the NCP.

This Court agrees with the Board that the statute of limitations period to review the NCP to correct an allegedly incorrect average weekly wage is three years under the Act. The Board committed no error of law. It is undisputed that Claimant did not file his review petition until January 8, 2008, more than three years after the suspension.

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

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ORDER

AND NOW, this 22nd day of February, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge