IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Miller Wagman, Inc., Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Hostler), Respondent	:	No. 2556 C.D. 2010
	:	Submitted: June 3, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: October 19, 2011

Miller Wagman, Inc. (Employer), petitions for review of the decision of the Workers' Compensation Appeal Board (Board), which affirmed the decision of the Workers' Compensation Judge (WCJ) who determined that an employment relationship was not maintained between Employer and Robert Hostler (Claimant) during the period of layoff at issue, such that this period may not be included in the calculation of Claimant's average weekly wage (AWW). The WCJ also found Employer's contest to be unreasonable and awarded counsel fees.

Claimant was 58 years old and had worked as a stone mason for Employer since 1999. Notes of Testimony, January 5, 2009 (N.T. 1/5/09) at 4 and 13; Reproduced Record (R.R.) at 6a and 15a. Given the nature of the construction business, Claimant was laid off for periods of time. N.T., 1/5/09 at 4; R.R. at 6a. Claimant was laid off from September 2007, until June 28, 2008. N.T., 1/5/09 at 14; R.R. at 16a. Claimant testified that he did not experience any shoulder pain

before returning to work. On or about August 29, 2008, he experienced "throbbing pain" in his shoulder after picking up a bucket. N.T., 1/5/09, at 7; R.R. at 9a. Claimant went to Orthopedic Spine Specialists on September 2, 2008, and was treated by Dr. Gracia Etienne, M.D. (Dr. Etienne). N.T., 1/5/09, at 6; R.R. at 10a. Dr. Etienne placed Claimant on light duty with no use of his right arm or hand. N.T., 1/5/09, at 9; R.R. at 11a. Dr. William H. Ulmer, M.D. (Dr. Ulmer), performed arthroscopic surgery on Claimant on November 18, 2008.

On October 18, 2008, Claimant filed a Claim Petition and alleged that he sustained a right shoulder torn rotator cuff injury on or about August 29, 2008, during the course and scope of his employment. The Employer issued a Notice of Compensation Payable (NCP), which set forth an AWW of $585.96, with a weekly compensation rate of $403.50. Although Employer accepted the injury, the parties contested Claimant's AWW.

The WCJ ordered Employer to pay any past due and owing wage loss benefits based upon an AWW of $1,451.42[1], and a weekly compensation rate of

[1] The calculation of Claimant's AWW was based on the following:

Week ending:	Amount earned
7/05/08	$1,229.44
7/12/08	$1,536.80
7/19/08	$1,498.38
7/26/08	$1,536.80
8/02/08	$1,536.80
8/09/08	$1,536.80
8/16/08	$1,325.49
8/23/08	$1,459.96
8/30/08	$1,402.33
TOTAL:	$13,062.80 divided by 9 weeks = $1,451.42

$807.00 plus interest. The WCJ also ordered Employer to pay unreasonable contest attorney fees to Claimant's counsel in the amount of $1,470.00.

The WCJ credited Claimant's testimony and concluded that Claimant's AWW was $1,451.42 based on his actual earnings from his date of hire on June 30, 2008. The WCJ determined that Claimant's employment ended in 2007 with his layoff and he did not maintain an employment relationship thereafter. WCJ's Decision, Finding of Fact No. 18 at 3. The WCJ found the decisions in Reifsnyder v. Workers' Compensation Appeal Board (Dana Corporation), 584 Pa. 341, 883 A.2d 537 (2005), and Elliot Turbomachinery v. Workers' Compensation Appeal Board (Sandy), 898 A.2d 640 (Pa. Cmwlth. 2006), to be distinguishable.

On appeal, the Board affirmed and concluded:

> The Judge [WCJ] in the instant case noted that Employer had acknowledged that after Claimant was laid off in September 2007, he was not offered any type of ongoing benefits such as health insurance or retirement contributions, had no type of regular communication with Claimant, and there was no requirement that Claimant check in periodically (Finding of Fact No. 11). He noted that unlike in Elliot Turbomachinery, Claimant here had no choice in deciding whether or not he would accept the layoff. Furthermore, the Judge noted that unlike in Reifsnyder, Claimant here had not retained significant rights/accoutrements of employment such as plant seniority, healthcare, and sick leave benefits, and employer contributions to his retirement account. Based on this reasoning, the Judge concluded that Claimant's

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WCJ's Decision (Decision), November 23, 2009, Finding of Fact No. 10, at 2.

> 2007 earnings with Employer should not be included in the calculation of his AWW. We must agree.
>
> Although Claimant had a history with Employer, as the Judge [WCJ] noted, and returned to employment with Employer consistently following the layoffs, he did not retain any of the rights of a continuous employee as had the claimants in Reifsnyder. Nor did he have a choice regarding a layoff as did the claimant in Elliot Turbomachinery. Thus, we do not believe the facts in this case support a conclusion that an employment relationship was maintained after Claimant was laid off in 2007. Therefore, to include wages earned in 2007 prior to Claimant's layoff in calculating his pre-injury average weekly wage would have been error and we need not disturb the Judge's [WCJ] decision finding that Claimant's average weekly wage was $1,451.42.

Board's Opinion, November 5, 2010, at 6-7.

Before this Court, Employer contends[2] that the Board improperly considered factors outlined by our Pennsylvania Courts to determine whether an employment relationship was maintained during a period of layoff for purposes of calculating the AWW[3]; the Board's calculation of Claimant's AWW was inconsistent with the Pennsylvania Supreme Court's mandate that the AWW calculation should be a realistic measure of the Claimant's pre-injury earnings;[4]

[2] 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).

[3] Employer asserts that because Claimant was hired in 1999, and generally laid off each year for a period of 6-8 months, there was a continuing employment relationship and therefore the AWW should be $586.96 based on the inclusion of prior lay off periods, when Claimant was laid off from Employer in 2007.

[4] This Court has combined Employer's first two issues.

and that the Board erred when it affirmed the WCJ's determination that Employer engaged in an unreasonable contest.

In Reifsnyder, our Pennsylvania Supreme Court had the opportunity to address the computation of the AWW during periods of layoffs. Three injured employees[5] of Dana Corporation (Dana) who had worked for Dana for at least fifteen years maintained a continuing employment with Dana but were subject to periodic layoffs. All three experienced layoffs in each of the four quarters immediately preceding their work injuries. The WCJ determined that the periods of time when the employees earned no wages due to layoffs should have been included in the calculation of their AWW's pursuant to Section 309(d) of the Workers' Compensation Act (Act), 77 P.S. §582.[6] The Board affirmed. This

[5] Their appeals were consolidated.

[6] Act of June 2, 1915, P.L. 736, as amended, Subsections d.1 and d.2 were added by the Act of June 24, 1996, P.L. 350:

> (d) If at the time of the injury the wages are fixed by any manner not enumerated in clause (a), (b) or (c), the average weekly wage shall be calculated by dividing by thirteen the total wages earned in the employ of the employer in each of the highest three of the last four consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury and by averaging the total amounts earned during these three periods.
>
> (d.1) If the employe has not been employed by the employer for at least three consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury, the average weekly wage shall be calculated by dividing by thirteen the total wages earned in the employ of the employer for any completed period of thirteen calendar weeks immediately preceding the injury and by averaging the total amounts earned during such periods.

Court reversed and concluded that the layoffs resulted in the employees working less than a single completed period of thirteen weeks in the previous year and that the AWW must be calculated pursuant to Section 309(d.2), which allows a prospective calculation of AWW by multiplying the worker's hourly rate by his expected weekly work hours. Reifsnyder, 584 Pa. at 344-345, 883 A.2d at 539.

> Our Pennsylvania Supreme Court reversed:
>
> [T]he statute does not specifically address the work scenario presented; *i.e.*, there is no explicit mention in the statute of whether and how, in the calculation of AWW, to account for periods when a worker was laid off in the previous year, much less how to account for such layoffs if they are a common occurrence in a long-term employment relationship. Nevertheless, we believe that the structure and plain language of the statute clearly indicate that Section 309(d), not subsection 309(d.2), controls the calculation and also provides an accurate measure of such a type of worker's economic reality and earning capacity. As previously stated, Section 309(d) and subsections (d.1) and (d.2) address work/employment relationships of differing lengths. Section 309(d) governs employees with the longest work/employment histories- *i.e.*, employees who have been employed for at least four consecutive periods of thirteen calendar weeks. Subsections (d.1) and (d.2) address progressively shorter employment relationships: (d.1) governs employees employed for at least one, but less than three consecutive periods of thirteen calendar weeks; while (d.2) addresses cases of recent hires, *i.e.*

> (d.2) If the employe has worked less than a complete period of thirteen calendar weeks and does not have fixed weekly wages, the average weekly wage shall be the hourly wage rate multiplied by the number of hours the employe was expected to work per week under the terms of employment.

> employees who worked less than a single complete period of thirteen calendar weeks at the time they suffered a work injury.
>
> The structure of the statute strongly indicates that subsection (d.2) was not intended to apply to employees, such as Claimants here, with long-term employment relationships with their employer, who happen to have been subject to layoffs. Both (d) and (d.1) include look-back periods encompassing the preceding fifty-two weeks, in search of 'completed' thirteen-week periods; in contrast, subsection (d.2) has no such long term focus, and indeed, it provides for a **prospective** calculation of potential earnings. By its terms, (d.2) contemplates persons for whom there is little work history with the employer upon which to calculate the AWW. Viewing the interrelationship of these subsections, we deem it unlikely in the extreme that the General Assembly intended (d.2) to supplant (d) or (d.1) anytime a long-term employment relationship happens to involve periods with a 'work' cessation. Instead, we conclude that subsection (d.2) was intended for instances that it plainly covers; *i.e.* those instances of work injuries to recently hired employees for whom there was, by definition, no accurate measure of AWW other than taking the existing hourly wage and projecting forward on the basis of the hours of work expected under the employment agreement.

Reifsnyder, 584 Pa. at 356-357, 883 A.2d at 546-547. (emphasis in original)

Our Pennsylvania Supreme Court further reasoned that the claimants all returned to work after their layoffs which evidenced an ongoing employment relationship despite a period of inactivity. The Supreme Court stated:

> Notably, the general rule set forth in Section 309(d) does not speak in terms of the continuity of 'work' but rather, the continuity of the employment relationship. The fact that Claimants were not 'working' during the periods

> when they were laid off does not mean that their long-term employment relationship was severed.[7]

Reifsnyder, 584 Pa. at 357, 883 A.2d at 547.

More recently, in Elliot, this Court applied Reifsnyder. Delbert Sandy (Sandy) had suffered a work-related hearing loss from his employment with Elliot Turbomachinery Company (Elliot). One of the issues centered on the calculation of Sandy's AWW. Sandy had worked for Elliot for approximately thirty-five years with some layoffs during that time. The WCJ awarded benefits pursuant to Section 309(d.1) because Sandy's employment was not continuous over the fifty-two weeks prior to the injury due to three layoffs for periods of approximately one week, two weeks, and two months, and because Sandy was not required to contact Elliot during any layoff. The Board affirmed. Elliot appealed to this Court.

This Court reversed and determined that Sandy's AWW must be calculated under Section 309(d). This Court based its decision in part on Reifsnyder:

> The term 'employ' or 'employed' is not limited to actual days an employee performs work, but encompasses the period of time that an employment relationship is maintained between the parties…. In each case, the critical fact that determines whether there is an employment relationship is whether there is the communication between employer and the claimant. Accord, Reifsnyder.

[7] In Reifsnyder, our Supreme Court concluded that the claimants' long-term employment relationship had not been severed during the periods when they were laid off and not working. In so holding, the Court pointed out that the claimants had returned to work with the same employer following their layoffs. Further, the claimants did not lose seniority, healthcare benefits or retirement pension accounts during their layoffs. Because the employment relationship was not severed, the claimant's average weekly wage had to be calculated under Section 309(d).

> Here, the evidence is that for the first quarter, February 26, 2001 through May 26, 2001, claimant [Sandy] worked ten of the thirteen weeks as he was voluntarily laid off for three weeks. In the second quarter, May 26, 2001 through August 26, 2001, claimant [Sandy] worked five of the thirteen weeks, as he was voluntarily laid off for eight consecutive weeks. Claimant [Sandy] worked the entire third and fourth quarters prior to his injury. Claimant [Sandy] testified that he accepted the lay off in part because it meant that younger employees were not laid off…. Claimant's [Sandy] testimony is that he is offered the choice of whether to accept a layoff, and the choice is offered based on seniority…. That testimony evidences a continuing employer/employee relationship, and based on that relationship, i.e., seniority, claimant [Sandy] decides whether or not to work. That testimony, standing alone, supports a finding that an employment relationship is maintained. (Citations omitted).

Elliot, 898 A.2d at 648.

Because there was a continuing employer/employee relationship in the four quarters preceding the injury, this Court approved the application of Reifsnyder and determined that Section 309(d) applied. Elliot, 898 A.2d at 649.

In the present controversy, Reifsnyder controls. Claimant worked for Employer as a stone mason from 1999 until he was injured in August 2008. Mark Miller (Miller), President and owner of Employer, testified on behalf of Employer. Layoffs occurred about once a year and lasted between six and eight months. Notes of Testimony May 14, 2009, (N.T. 5/14/09) at 4; R.R. at 33a. When Claimant was laid off, he "would hope that he [Claimant] would return when I needed him, yes. And he typically did." N.T., 5/14/09 at 8; R.R. at 37a. Miller testified that during the layoffs, Claimant and Miller would occasionally contact one another about the availability of work.

Claimant and Employer had a "long-term employment relationship" where layoffs were a "common occurrence." Reifsnyder, 384 Pa. at 356, 883 A.2d at 546. Beginning with his first year with Employer in 1999, Claimant experienced a layoff each year of several months duration, after which he always returned. For nine years, Claimant chose to work for Employer knowing that he would have wages for four to six months a year and with a layoff the rest of the time. After a layoff in September 2007, Employer informed Claimant that he would be contacted when more work became available. The employment relationship was maintained and accordingly Section 309(d) must govern the calculation of his AWW.

Last, Employer contends that the Board erred when it affirmed the WCJ's finding that the Employer presented an unreasonable contest.

> Section 440(a) of the Act, 77 P.S. §996(a)[8], provides:
>
> > In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, agreements or other payment arrangements or to set aside final receipts, the employe... in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, that cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

[8] This Section was added by the Act of February 8, 1972, P.L. 25.

An employer's contest is reasonable if the contest was brought to resolve a genuinely disputed issue, not merely to harass the claimant. Dworek v. Workmen's Compensation Appeal Board (Ragnar Benson, Inc.), 646 A.2d 713 (Pa. Cmwlth. 1994). The imposition of attorney fees is a question of law reviewable by the Board and this Court. McGoldrick v. Workmen's Compensation Appeal Board (Acme Markets, Inc.), 597 A.2d 1254 (Pa. Cmwlth. 1991).

Here, Claimant offered the initial report of Dr. Ulmer, Claimant's treating physician, which indicated that Claimant worked as a stone mason and over the course of a week, he began to notice some discomfort in the shoulder. Claimant's Exhibit No. 8. Employer had Claimant examined by Dr. Naidu on January 28, 2009. Dr. Naidu determined that Claimant's pre-existing condition was aggravated by his work injury on September 8, 2008.

Employer submitted a statement from Miller wherein Miller acknowledged Claimant informed him on September 2, 2008, that Claimant could not raise his right arm, Claimant could not tell him when exactly this happened, and that there was no accident. Employer's Exhibit No. 4. Employer also submitted the Claim Petition and a statement from Dr. Etienne dated September 2, 2008, which did not specifically reference a work injury.

The WCJ concluded:

> The Employer did not have a reasonable basis to contest this claim. The initial denial asserted that additional information was required, including a statement from the Claimant and medical records. The medical records from the Claimant's surgeon, Dr. Ulmer confirmed causation,

> as did the IME report from Dr. Naidu. While it is true that the initial report from Dr. Etienne in September 2, 2008 did not reference the work injury, this was subsequently clarified by Dr. Ulmer's report. The statement written by Mr. Miller in September merely references the fact that the Claimant had played at one point in an old- timer's baseball league. There was no information ever produced to suggest that this prior activity in any way led to the injury in question. The Employer must pay $1,470 in counsel fees.

WCJ's Decision, Finding of Fact No. 19, at 4.

This Court finds no error in the determination that Employer's contest was unreasonable.

Accordingly, this Court reverses in part and remands for a calculation of Claimant's AWW pursuant to Section 309(d) of the Act which must include the time period when Claimant was laid off in the fifty-two week period prior to the date of his work-related injury. This Court affirms the Board's determination that Employer's contest was unreasonable.

BERNARD L. McGINLEY, Judge

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Workers' Compensation Appeal Board (Hostler), Respondent	:	No. 2556 C.D. 2010

O R D E R

AND NOW, this 19th day of October, 2011, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is reversed in part and remanded for a calculation of Claimant's average weekly wage and affirmed in part as to the unreasonable contest challenge.

Jurisdiction relinquished.

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BERNARD L. McGINLEY, Judge