IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Waste Recovery Solution, Inc., and State Workers' Insurance Fund, Petitioners	:	
	:	No. 2686 C.D. 2010
v.	:	Submitted: May 6, 2011
Workers' Compensation Appeal Board (Swiger), Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: July 15, 2011**

In this appeal, we are asked whether a Workers' Compensation Judge (WCJ) erred in granting a claimant's untimely challenge to a notification of suspension issued under Section 413(c) of the Workers' Compensation Act (Act)[1] where the claimant asserts his employer laid him off when he reported back to work. Waste Recovery Solution, Inc. and its workers' compensation carrier, State Workers' Insurance Fund (collectively, Employer) petition for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed a WCJ's order granting Shelby Swiger's (Claimant) challenge petition and continuing his

[1] Act of June 2, 1915, P.L. 736, as amended, added by the Act of July 1, 1978, P.L. 692, 77 P.S. §774.2. Section 413(c) authorizes an employer to unilaterally suspend compensation upon written notification to the claimant and the Department of Labor and Industry, Bureau of Workers' Compensation (Bureau). "The notification of suspension shall include an affidavit by the insurer that compensation has been suspended because the employe has returned to work at prior or increased earnings." Id.

compensation. Employer contends the WCJ erred in granting Claimant's untimely challenge under Section 413(c), which is a statute of repose. Employer also contends the WCJ erred in ruling on the merits of Claimant's challenge without taking any record evidence. For the reasons that follow, we affirm.

I. Background

In November 2008, Claimant sustained a work injury to his lower left leg, which Employer acknowledged in a notice of compensation payable. On February 27, 2009, Employer issued a notification of suspension under Section 413(c) of the Act. The notification suspended Claimant's compensation, effective that date, on the basis he returned to work at earnings equal to or greater than his time-of-injury earnings. See Reproduced Record (R.R.) at 41a. It included a signed insurer's affidavit attesting that the statements contained therein were true and correct to the best of the affiant's knowledge, information and belief. Id.

Claimant signed a certified mail receipt for the notification on March 3, 2009. Id. at 42a. The notification form provides for an employee challenge to the suspension. See id. at 43a. The challenge provisions state in part:

> If you do not agree with this action, you should challenge it by checking the box below, signing this form and mailing it to the [Bureau of Workers' Compensation]. This material must be filed with the Bureau within twenty (20) days from the date you received it.
>
> If you do not challenge this action within twenty (20) days of the date you receive this Notice, you will be deemed to have admitted that you agree with the action taken on this form. In that case, this Notice will have the same binding effect as a fully executed Supplemental

> Agreement for the suspension or modification of benefits.

Id.

On March 30, 2009, Claimant mailed his challenge to the Bureau. Id. at 44a. He challenged the notification on the basis that he did not return to work. Id. at 43a.

At hearing, Claimant told the WCJ he reported to work right after his doctor cleared him, but Employer laid him off. See Notes of Testimony (N.T.), 05/06/09, at 3; R.R. at 35a. Thereafter, Claimant called Employer back a couple times. Id. They told him nothing was available and they would call him when worked picked up. Id. However, Employer indicated online that it had a position available. N.T. at 3-4; R.R. at 35a-36a.

Employer then moved to dismiss Claimant's challenge as untimely. It submitted into evidence the notification of suspension, proof of mailing, the certified mail receipt signed by Claimant, and Claimant's envelope addressed to the Bureau. See N.T. at 4-5; R.R. at 36a-37a.

The WCJ then asked Employer's counsel whether Claimant's statement that he did not return to work was accurate. N.T. at 5; R.R. at 37a. Employer declined to address this issue on the ground that Claimant did not challenge the notification within 20 days as required by Section 413(c)(2) of the Act, 77 P.S. §774.2(2).

However, the WCJ decided to grant Claimant's challenge. N.T. at 6; R.R. at 38a. The WCJ remarked that Employer should either prove that work was available or that it laid off Claimant after he fully recovered from his injury. Id.

In his decision, the WCJ made the following findings of fact:

> 1. A Notification of Suspension under Section 413 by defendant was filed. The employee challenged.
>
> 2. At the hearing it was established that claimant had reported to work but was laid off.
>
> 3. The objection to timeliness was overruled.

WCJ Op., 05/13/09, at 1 (emphasis added). Based on these findings, the WCJ determined Claimant's challenge petition should be granted. Id. He therefore ordered Claimant's compensation to continue. Id.

On appeal, the Board affirmed. It acknowledged Employer's argument that Claimant's challenge was time-barred by the express language in Section 413(c)(2) requiring that a challenge be filed within 20 days of receipt of notification. Bd. Op., 11/22/10, at 3. However, the Board reasoned that Section 413(c) must be viewed as a whole. Id.

First and foremost, Section 413(c) only allows an employer to unilaterally suspend compensation "during the time the employe has returned to work at his prior or increased earnings …." 77 P.S. §774.2. Because Employer chose not to contest Claimant's statement that he was laid off when he reported

back to work, Employer's unilateral suspension "was essentially invalid as it was never permitted by Section 413(c)." Bd. Op. at 4.

The Board also recognized the Act is remedial in nature, intended to benefit the worker, and must be liberally construed to effectuate its humanitarian objectives. Tarapacki v. Workmen's Comp. Appeal Bd. (Diversified Contracting, Inc.), 641 A.2d 639 (Pa. Cmwlth. 1994). It therefore reasoned "it makes little sense to require the WCJ to turn a blind eye to evidence that [Employer] took an impermissible unilateral suspension in this matter." Bd. Op. at 4. "To strictly apply the deadline in Section 413(c) … would result in the ongoing suspension of Claimant's benefits … despite the fact that Claimant was effectively not permitted to return to work for [Employer]." Id. at 4-5. The Board determined that such a result would be contrary to the purpose of Section 413(c) and the Act's objectives. Id. at 5. Employer petitions for review.[2]

II. Issues

Employer presents two issues for our review. First, Employer contends the Board and the WCJ failed to recognize that Section 413(c), by its clear and express language, is a statute of repose. Thus, the WCJ erred in addressing the merits of Claimant's challenge. Second, Employer contends the WCJ's decision is not supported by substantial, competent evidence; rather, the

[2] This Court's review is limited to determining whether the WCJ's findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Shannopin Mining Co. v. Workers' Comp. Appeal Bd. (Sereg), 11 A.3d 623 (Pa. Cmwlth. 2011).

WCJ took no sworn testimony and provided no opportunity for cross-examination or objection.[3]

III. Discussion

A. Timeliness

Employer first contends the WCJ erred when he disregarded the fact that Claimant filed his challenge to notification of suspension approximately seven days beyond the 20-day deadline in Section 413(c)(2) of the Act. Employer's argument is as follows.

> Section 413(c) is a statute of repose. Claimant received the notification of suspension on March 3, 2009. Therefore, by operation of law, Claimant's benefits were suspended on March 24 as if he had signed a supplemental agreement. Section 413(c)(2) of the Act; U.S. Airways v. Workers' Comp. Appeal Bd. (Rumbaugh), 578 Pa. 456, 854 A.2d 420 (2004). By disregarding the untimeliness of Claimant's challenge and by not requiring him to establish non-negligent circumstances warranting extension of the 20-day filing deadline, the WCJ improperly placed the burden on Employer to address the merits. See Dowhower v. Workers' Comp. Appeal Bd. (Capco Contracting), 591 Pa. 476, 919 A.2d 913 (2007) (where statutory provisions are mandatory, as a general rule, they cannot be waived; substantial compliance will not suffice).

[3] Claimant represents himself in this matter. By order dated April 25, 2011, this Court struck Claimant's brief for noncompliance with the Rules of Appellate Procedure.

Further, a challenge allowed by law is an appeal. An untimely appeal deprives the tribunal of jurisdiction to rule on its merits. Day v. Civil Serv. Comm'n, 593 Pa. 448, 931 A.2d 646 (2007). Workers' compensation appeals are governed by the same timeliness principles. Sellers v. Workers' Comp. Appeal Bd. (HMT Constr. Servs., Inc.), 552 Pa. 22, 713 A.2d 87 (1998).

Employer asserts Claimant did not timely file his challenge to the notification of suspension. Therefore, Claimant's benefits were properly suspended by operation of law. U.S. Airways.

We disagree. Section 413(c) of the Act, in its entirety, provides (with emphasis added):

> Notwithstanding any provision of this act, an insurer may suspend the compensation during the time the employe has returned to work at his prior or increased earnings upon written notification of suspension by the insurer to the employe and the department, on a form prescribed by the department for this purpose. The notification of suspension shall include an affidavit by the insurer that compensation has been suspended because the employe has returned to work at prior or increased earnings. The insurer must mail the notification of suspension to the employe and the department within seven days of the insurer suspending compensation.
>
> (1) If the employe contests the averments of the insurer's affidavit, a special supersedeas hearing before a workers' compensation judge may be requested by the employe indicating by a checkoff on the notification form that the suspension of benefits is being challenged and filing the notification of challenge with the department within twenty days of receipt of the notification of suspension from the insurer. The special supersedeas hearing shall be

> held within twenty-one days of the employe's filing of the notification of challenge.
>
> (2) If the employe does not challenge the insurer's notification of suspension within twenty days under paragraph (1), the employe shall be deemed to have admitted to the return to work and receipt of wages at prior or increased earnings. The insurer's notification of suspension shall be deemed to have the same binding effect as a fully executed supplemental agreement for the suspension of benefits.

77 P.S. §774.2.

An insurer may only suspend a claimant's benefits under Section 413(c) where there is no dispute the claimant returned to work without a wage loss. U.S. Airways; Hinkle v. Workers' Comp. Appeal Bd. (Gen. Elec. Co.), 808 A.2d 1036 (Pa. Cmwlth. 2002). In essence, a unilateral suspension under Section 413(c) is an automatic supersedeas predicated solely on the fact that the claimant returned to work at his time-of-injury earnings. Id. Here, Employer's notification stated Claimant returned to work at earnings equal to or greater than his time of injury wage. R.R. at 3a, 41a. It also included an insurer's affidavit affirming that the statements contained therein were correct and truthful. Id.

Although not sworn as a witness, Claimant, representing himself, stated at hearing that when he reported back to work on his doctor's advice, Employer laid him off. He called back a couple of times and Employer informed

him nothing was available. Employer advised Claimant it would call him back when work picked up.[4]

When asked if Claimant's statement of facts was accurate, Employer's counsel responded:

> Your Honor, I hate to get into that, because he's got an obligation to file a challenge within 20 days of receipt, and I think if – unless he files that, that it's dead in the water.

N.T. at 5; R.R. at 37a. By declining to contest Claimant's statement that he never returned to work, Employer put the initial validity of its notification of suspension at issue. U.S. Airways; Hinkle.

Nonetheless, Employer asserts that by operation of law Claimant's suspension, effective February 24, 2009, became valid after 20 days even if he did not return to work. Such an interpretation of Section 413(c) is contrary to its plain language. See U.S. Airways (language of Section 413(c) is clear and unambiguous; it grants insurers the right to immediately suspend a claimant's benefits *where the claimant returned to work without a wage loss*). The purpose of a special supersedeas hearing under Section 413(c) is to determine whether the claimant returned to work without a wage loss as the insurer averred, whether the

[4] If an employer or insurer fraudulently or deceptively lulls a workers' compensation claimant into a false sense of security regarding the filing of a claim, the defendant will be equitably estopped from using the claimant's inaction as a basis to deny the claim. Gadonas v. Workers' Comp. Appeal Bd. (Boeing Defense and Space Group), 931 A.2d 95 (Pa. Cmwlth. 2007). Here, Employer did not contest Claimant's statement that Employer laid him off and told him it would call him when work becomes available.

date of the suspension is the date the claimant returned to work, and whether the claimant is still working without a wage loss. Id. Because Employer failed to contest Claimant's statement that it laid him off when he reported to work, we discern no error in the Board's determination that Employer's unilateral suspension was not permitted under Section 413(c) and was therefore invalid. Section 413(c); U.S. Airways; Hinkle.

In addition to the statutory language and Employer's conduct at the hearing, Employer's inconsistent return-to-work conduct supports the WCJ's determination. In particular, Employer's conduct was inconsistent when it formally asserted Claimant returned to work at the same earnings, but it later delayed in allowing Claimant's actual return to work and receipt of wages. Insofar as this uncontested conduct explains a delay by Claimant, it supports the WCJ's determination.

B. Substantial Evidence

Employer also contends the WCJ's decision is not supported by substantial, competent evidence. Section 422(a) of the Act requires a WCJ to issue a "reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached." 77 P.S. §834 (emphasis added).

Here, Employer asserts, the record consisted only of opening statements. Claimant did not testify and there was no opportunity for cross

examination. Employer further asserts it had no opportunity to present its defense on the merits.

We disagree. The record adequately supports the WCJ's decision. When the WCJ asked Employer at hearing if Claimant's statement of the facts was accurate, Employer declined to address Claimant's averment that he did not return to work. As a result, Employer waived its opportunity to present a defense on the merits of Claimant's challenge petition. See Dobransky v. Workers' Comp. Appeal Bd. (Cont'l Baking Co.), 701 A.2d 597 (Pa. Cmwlth. 1997) (failure to raise a specific defense before the WCJ results in a waiver of that issue).

Even now, on appeal, Employer makes no offer of proof on the merits. It does not indicate which witnesses, if any, it intends to call, it does not indicate what documents (such as pay stubs) it intends to offer, and it affords no factual theory to support its automatic suspension. In short, Employer's conduct continues to act as a waiver of the merits of Claimant's challenge petition.

Employer, however, is not without a remedy. It may petition for suspension without an automatic supersedeas, and it may prove the facts which entitle it to that relief. Because an alternate procedure is available to Employer, prejudice is not clear.

For all these reasons, we discern no error in the Board's holding that Employer's notification of suspension was invalid under Section 413(c) of the Act and U.S. Airways. Therefore, we affirm.

ROBERT SIMPSON, Judge

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O R D E R

AND NOW, this 15th day of July, 2011, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge