

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary Sperow, :  
Petitioner :  
 :  
v. : No. 286 C.D. 2011  
 : Submitted: June 10, 2011  
Workers' Compensation Appeal :  
Board (Redner's Warehouse :  
Markets), :  
Respondent :

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

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: July 1, 2011

Mary Sperow (Claimant) appeals from an order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) denying and dismissing her petitions to review compensation benefits, to review medical treatment and to reinstate compensation benefits as untimely filed. For the reasons that follow, we affirm the Board's decision.

Claimant was employed by Redner's Markets, Inc. (Employer) and worked in its floral, produce and salad bar areas. Pursuant to a Notice of Compensation Payable (NCP) dated October 26, 2001, she was injured on June 26,

2001, and received workers' compensation benefits for bilateral carpal tunnel syndrome. The parties entered into a series of supplemental agreements that modified and suspended Claimant's benefits for various periods of time based upon her actual earnings. Claimant's last payment of workers' compensation benefits for her injury was on October 17, 2002. On February 16, 2003, Claimant wrote a check for \$108.25 to Inservco, Employer's insurance carrier, to repay it for overpayments of compensation she had been receiving. The last supplemental agreement, dated December 11, 2003, suspended Claimant's benefits effective November 9, 2003, based upon her return to work without a loss of earnings.<sup>1</sup> Claimant was also diagnosed with rheumatoid arthritis and osteoarthritis in 2002 by her treating physician, Barbara Ostrov, M.D. (Dr. Ostrov).<sup>2</sup>

In August 2005, Claimant spoke with Robert McDonough in Employer's Corporate Department because she was having trouble getting some medical bills paid for her rheumatoid arthritis and osteoarthritis by workers' compensation under her original work injury claim. They agreed that Claimant would send Employer all of her relevant medical bills and workers' compensation documentation. Subsequently, she received a letter dated September 8, 2005, from Perry Hoffmaster (Hoffmaster), Employer's Risk Manager, informing her

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<sup>1</sup> Claimant also suffered a right shoulder rotator cuff injury on April 6, 2003, while working for Employer, and she began receiving payments for that injury in June 2003. That injury is not at issue in this appeal.

<sup>2</sup> It is unclear whether Claimant's osteoarthritis was work-related. The WCJ found that it was work-related but the Board states in its opinion that Dr. Ostrov found that it was not work-related citing her May 12, 2006 deposition at p. 23.

specifically which physicians and medications were to be submitted to workers' compensation for payment and which medical treatments and medications were to be submitted to her health insurance plan. Included in those medications to be submitted to workers' compensation were medications prescribed by Dr. Ostrov for controlling carpal tunnel syndrome, rheumatoid arthritis and osteoarthritis.

On October 24, 2005, Claimant filed a petition to review compensation benefits, petition to review medical treatment and a petition to reinstate compensation benefits alleging that the description of her June 26, 2001 work injury was incorrect and should be amended to include a material aggravation of rheumatoid arthritis of her upper extremities and osteoarthritis.<sup>3</sup> A hearing was held before a WCJ who, finding that Claimant met her burden with the required medical evidence, granted Claimant's petitions and denied Employer's petition. The WCJ amended Claimant's work injury to include rheumatoid arthritis and osteoarthritis.<sup>4</sup> Employer appealed to the Board arguing that the appeals were not timely filed in that they were filed more than three years after the last payment of

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<sup>3</sup> In her petition to review medical treatment, Claimant also alleged that there were unpaid medical bills related to her 2001 work injury that had to be paid, and in her petition to reinstate compensation benefits, she requested payment of total disability benefits for the closed period between June 14, 2005, and June 24, 2005, and partial disability benefits beginning November 2004 when Claimant stopped working because of her 2001 work injury. Employer filed a termination petition alleging that Claimant had fully recovered from her 2001 work injury.

<sup>4</sup> The WCJ also directed Employer to pay Claimant's causally-related medical expenses, increased her compensation rate to reflect earnings from her concurrent employment, reinstated her benefits and ordered Employer to pay past and future wage loss benefits based upon her actual loss of earnings.

compensation, but the Board affirmed the WCJ's decision.<sup>5</sup> Employer then filed a petition for review with this Court and it also filed a petition for rehearing pending appeal with the Board. The Board granted Employer's petition for rehearing, and this Court relinquished jurisdiction.

On rehearing, the Board vacated and remanded the WCJ's May 9, 2007 decision concluding that the WJC's decision needed to address when the last payment of compensation was made to Claimant for her acknowledged 2001 injury so as to trigger the three-year limitations period set forth in Section 413 of the Workers' Compensation Act (Act),<sup>6</sup> 77 P.S. §772. If they were not timely filed, the WCJ was directed to deny and dismiss the petitions.

On remand, based on the payment history form of Inservco, the WCJ found that the last indemnity payment Claimant received was on October 17, 2002, and the supplemental agreement dated December 11, 2003, showing a return to work on November 9, 2003, did not establish that Claimant received her last payment on either of those dates. Because Claimant's testimony and the evidence established that the petitions were filed more than three years after her last receipt

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<sup>5</sup> The Board relied on the WCJ's finding of fact no. 37 in which the WCJ found that there had been an indemnity benefit paid to Claimant on March 5, 2003, and there was a supplemental agreement dated December 11, 2003, showing a return to work on November 9, 2003. The Board stated: [T]he WCJ analyzed this issue and found that Defendant made its last payment of compensation prior to the filing of the Review Petition on March 5, 2003, and that Claimant's Petition filed on October 24, 2005, which was less than three years after the date of the last payment." (Board's February 6, 2008 decision at 5.)

<sup>6</sup> Act of June 2, 1915, P.L., *as amended*.

of workers' compensation payments, the petitions were not timely filed and the WCJ denied and dismissed them. Claimant filed an appeal with the Board, which affirmed the WCJ's decision. This appeal by Claimant followed.<sup>7</sup>

Claimant first contends that the WCJ erred by denying her petitions because Employer lulled her into believing that it had acknowledged all of her injuries in the September 8, 2005 letter that she received from Hoffmaster. She explains that the letter she received stated that the medications prescribed by Dr. Ostrov for her rheumatoid arthritis, osteoarthritis and carpal tunnel syndrome would be paid for by Employer. Based upon that letter, Claimant said she believed that Employer would pay for her medications and acknowledge liability for all three injuries. Because she relied upon Employer's misrepresentations, Claimant argues that she took no action, i.e., filing the petitions, until such time that she began having difficulty obtaining her medications. Because it was Employer's own misrepresentations that caused her not to act, Employer cannot now argue that her petitions were not timely filed.

Claimant is making a classic estoppel argument. "Equitable estoppel arises in the workers' compensation arena when an employer, 'by [its] acts, representations, or admissions, or by [its] silence when [it] ought to speak out, intentionally or through culpable negligence induces another to believe certain

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<sup>7</sup> Our scope of review of the Board's decision is limited to determining whether necessary findings of fact are supported by substantial evidence, whether constitutional rights were violated or whether an error of law was committed. *Repash v. Workers' Compensation Appeal Board (City of Philadelphia)*, 961 A.2d 227 (Pa. Cmwlth. 2008).

facts to exist and such other right-fully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.”” *Westinghouse Electric Corporation/CBS v. Workers’ Compensation Appeal Board (Korach)*, 584 Pa. 411, 883 A.2d 579 (2005). In *Budd Baer, Inc. v. Workers’ Compensation Appeal Board (Butcher)*, 892 A.2d 64 (Pa. Cmwlth. 2006), this Court held that the doctrine of equitable estoppel cannot toll the statute of limitations unless the claimant can establish fraud, concealment *or misrepresentation* on the part of the employer.

In *Westinghouse*, the employer issued an NCP acknowledging that the claimant suffered a work-related back injury. Claimant's benefits were later reduced to partial disability. By Order dated February 28, 1990, the claimant’s wage loss benefits were commuted and a lump sum payment was made to satisfy employer’s remaining weeks of partial disability payments. The employer stipulated that it would remain responsible for payment of reasonable and necessary medical expenses related to the claimant's work injuries. In 1989, the claimant began seeing a psychiatrist for depression. Although the psychiatric injury was not an accepted injury, the employer paid the claimant's psychiatric bills through August 1998, when it refused to continue these payments on the basis that they were not work-related. On September 25, 1998, the claimant then filed a claim petition alleging that he suffered a psychiatric injury in the nature of depression that was precipitated by his 1984 back injury. The employer opposed the petitions because they were time barred as the last payment of compensation was made in 1990 when the commutation payment was made. The claimant argued that he was not time barred because the employer lulled him into a false

sense of security after the commutation by tendering payment of the claimant's psychiatric bills. Our Supreme Court found that there was no concealment, misrepresentation or inequitable conduct by the employer because there was no evidence adduced to indicate that employer paid these psychiatric bills in an attempt to induce the claimant to omit filing a petition to add his psychiatric infirmity to its NCP.

In this case, as in *Westinghouse*, even though Claimant testified that she believed the September 5, 2005 letter led her to believe that her bills were going to be paid, there was no evidence adduced to indicate that Employer would pay these bills in an attempt to get Claimant not to file a petition seeking to add rheumatoid arthritis and osteoarthritis as accepted injuries to the NCP. The letter simply states that certain medications and medical treatments would be covered under workers' compensation and they included rheumatoid arthritis and osteoarthritis as well as the carpal tunnel.

In the alternative, Claimant contends that the date of suspension contained in the December 2003 supplemental agreement begins the running of the statute so that regardless of when the last payment was actually made, she timely filed her petitions. Claimant alleges that Section 413(a) of the Act only applies when the parties have previously agreed upon the compensation payable but disputed the nature of the injury accepted. In this case, the supplemental agreement suspended her benefits on November 9, 2003, for the June 26, 2001 work injury. Accordingly, pursuant to Section 413(a), the supplemental agreement

itself does not suspend benefits until November 9, 2003, regardless of the date Employer issued the last payment.

Section 413(a) of the Act provides, in relevant part:

A workers' compensation judge designated by the department may, at any time, modify, reinstate, suspend, or terminate a notice of compensation payable, an original or supplemental agreement or an award of the department or its workers' compensation judge, 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. Such modification, reinstatement, suspension, or termination shall be made as of the date upon which it is decreased, recurred, or has temporarily or it finally ceased, or upon which it is shown 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.* (Emphasis added.)

At the hearing before the WCJ, Claimant acknowledged that the last payment she received from Employer was on October 17, 2002. (November 25, 2008 Hearing Transcript at 13.) She also acknowledged that the payment history that was submitted into evidence by Employer indicated the same. (Original Record – D-Remand 1.) Because the last date of payment is controlling, the WCJ properly determined that Claimant's petitions were not filed within three years



after October 17, 2002, the date of the last payment she received when she filed her petitions on October 24, 2005.

Finally, Claimant argues that the statute was triggered when she paid a reimbursement of an overpayment to Employer in 2003.<sup>8</sup> Claimant explains that after she received her last payment on October 17, 2002, she was informed that there was an overpayment in her case. She issued a check in the amount of \$108.25 to Employer on February 16, 2003, but for some reason, this payment was credited to her account on March 5, 2003. Because Section 413(a) of the Act provides that an NCP cannot “be reviewed...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 the Act does not specify who makes the payment, Claimant argues that the payment can be made by the claimant as well as the employer, and Claimant’s petitions were timely filed because they were filed within three years after March 5, 2003. Notwithstanding this imaginative argument, Section 415(a) of the Act demands that within three years after the date of the most recent payment of compensation by the employer/insurance carrier, the claimant may file his or her petition. *Fitzgibbons*

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<sup>8</sup> Claimant also argues that the WCJ’s March 24, 2009 decision ordered that she be paid a wage loss benefit “payment” for the period of June 14, 2005, through June 25, 2005. Because that was technically the last payment made to her for the June 26, 2001 work injury, the petitions she filed on October 24, 2005 were timely. While the WCJ found that Claimant had a work-related loss of earnings during this period of time because Employer did not make suitable work available to her and ordered a reinstatement of benefits, that order did not exist until four years after the period to timely file the petition had expired. Therefore, her time for filing the petitions was not revived.

*v. Workers' Compensation Appeal Board (City of Philadelphia)*, 999 A.2d 659 (Pa. Cmwlth. 2010).

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

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 Markets), :  
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**ORDER**

AND NOW, this 1<sup>st</sup> day of July, 2011, the order of the Workers' Compensation Appeal Board, dated January 28, 2011, at No. A09-0627, is affirmed.

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DAN PELLEGRINI, JUDGE